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INVITEE AND INVITOR: THE RULE IN INDERMAUR v. DAMES.

II.

IN our last issue, we set out the duty of occupiers of land and houses and other premises to persons going there by invitation, generally known as the rule in *Indermaur* v. *Dames*, (1866) L.R. 1 C.P. 274, and we then set out in some detail the speech of Lord Porter in *London Graving Dock Co., Ltd.* v. *Horton*, [1951] 2 All E.R. 1, in which His Lordship explained the rule and applied it to the facts of the case before him. The rule was further explained and applied by Lord Normand. Lord Normand, who agreed with Lord Porter that the appeal succeeded, said that it was argued mainly on the duty owed in the particular circumstances of the case by an invitor to an invitee, and, in His Lordship's opinion, the case properly fell within that category. He added, at p. 8 :

> For though the usual, and perhaps the original, example of an invitee is a person who comes on land or enters premises such as a shop or dwellinghouse in pursuance of some business common to him and the occupier, there is no doubt that the respondent's counsel was right in saying that ships at a wharf or in dock have frequently been treated as "premises" and that there can be no real difference between the rights of persons entering a ship for the purpose of repairing it and those of persons entering a shop as customers.

After setting out the well-known and frequently-cited passage in *Indermaur* v. *Dames*, (1866) L.R. 1 C.P. 274, 288, in which Willes, J., stated the principle of the invitor's liability in tort, His Lordship went on to say ([1951] 2 All E.R. 1, 8) :

> There are murmurs increasing with the passage of time against a clean-cut division between invitees and licensees with a hard-and-fast delimitation of the duties owed to each category, but the exposition by *Willes*, J., of the duty owed to invitees has been adopted in many subsequent cases, and it has even been treated almost as if it were a section in a statute, and as if all questions could be solved by construing and applying it. It is remarkable that, in spite of the great variety of circumstances to which it has been applied, criticism seems to have been confined to pointing out an ambiguity or uncertainty in application, the inevitable accompaniment of any condensed statement of a complex legal conception. Nevertheless, later decisions and judicial dicta have in some respects clarified the duties of the invitor, as I hope to show.

One problem, however, remained very much where Willes, J., left it, Lord Normand continued. The occupier has no duty to the invitee unless there is an unusual danger which he knows or ought to have known. But what is an unusual danger ? It may not be unreasonable to suppose that Willes, J., was aware that "unusual" is a word which might take colour from the circumstances of the case, and that a definition of unusualness might hinder, instead of help, a just solution of a specific problem and the rational development of the law. Their Lordships had been referred to the observation of Phillimore, L.J., in *Norman* v. *Great Western Railway Co.*, [1915] 1 K.B. 584. In that case, a railway station yard was bounded by an unfenced bank. The plaintiff was in the habit of going himself, or sending a driver, with a horse and van, to receive or deliver goods. On the occasion in question, the driver left the horse unattended while he was in the defendant's office signing for goods. The horse in his absence backed the van over the bank, and damage resulted. It was held that the railway company's duty to the plaintiff was no higher than that of an occupier to an invitee, and that there was no evidence of any breach of the duty to take reasonable care that the premises were safe for persons using them in the ordinary manner and with reasonable care. Phillimore, L.J., said, at p. 596 :

> I am not certain that a way to avoid misapprehension which might arise from the use of the words "unusual danger"—which means, in my opinion, danger unusual for the particular person—might not be found by substituting the word "unexpected" for "unusual." It is not a question whether the danger is unusual with regard to all the world, but whether it is unusual with regard to the individual complainant. In other words, in analyzing the expression "reasonably safe" one must take into account what is called in modern parlance the personal equation; what may not be safe for one person may be safe enough for the persons who frequent particular business premises. For instance, in loading a ship in a dock a gangway consisting of a plank without a handrail may safely be provided, though its narrowness or slope may be such that ordinary persons, not accustomed to ships, might not find it easy to use, because the stevedore and seamen who are to use it can use it safely. The gangway has to be safe for the class of persons who use it on business, and so far as any complainant is concerned it has to be reasonably safe for him. If it is safe for him, it does not matter whether or not it is safe for anybody else. It is for that reason that the element of knowledge comes in.

Pickford, L.J., expressed his agreement with these observations (at p. 598). Lord Normand commented ([1951] 2 All E.R. 1, 9) :

> I humbly confess that I find them more ambiguous and uncertain than the words they seek to explain. I do not find that the substitution of "unexpected" for "unusual" helps me much. The real difficulty, however, is that Phillimore, L.J., speaks with two voices, sometimes saying that the premises have to be safe for the class of persons who come on to them on business and sometimes that the danger is unusual if it is unusual for the particular individual. I think that there is a confusion between the condition which gives rise to the duty, the existence of an unusual danger, and the notice, or its equivalent—*i.e.*, the knowledge of the individual invitee—which may be a discharge of the duty.

I am of opinion that, if the persons invited to the premises are a particular class of tradesman, then the test is whether it is unusual danger for that class. Therefore, if the occupier supplies the sort of gangway which stevedores usually use, he has performed his duty so far as stevedores are concerned, and, if a particular stevedore suffers from a defective sense of balance and falls off the gangway, he cannot complain of the occupier's failure of duty. The sufferer knew the danger for him and he must accept the responsibility of using a gangway which might be dangerous for him because of his idiosyncrasy. A gangway, however, which is reasonably safe for stevedores and which is no unusual danger for them, may well be an unusual danger for another class of workman or for members of the public generally. So much for "unusual" in relation to persons. A danger, however, may also be "usual" or "unusual" in relation to the place. For example, a quay is dangerous though it is not in daylight an unusual danger for normal adults, but an uneven joint between two stones near the edge of the quay may be an unusual danger to anyone, and is none the less an unusual danger though it is not a concealed danger. I would not agree that a danger, which is unusual in either of the ways I have suggested, ceases to be an unusual danger because, through frequent visits to the place, it becomes familiar. In such a case another question will arise, whether in fact the invitee had sufficient notice, but the danger, in my opinion, remains an unusual danger. Though I think it is possible to discriminate in a concrete case between a danger which is unusual and one which is not unusual, no attempt to formulate a definition of unusualness appears to me to be likely to succeed.

In *Horton's* case in the Court of first instance ([1949] 2 All E.R. 169), Lynskey, J., held that an unusual danger means a danger unusual from the point of view of the particular invitee, and that, if the invitee appreciates the existence on the premises of a danger and its nature and extent, it cannot be for him an unusual danger. He also held that the respondent had full knowledge of the nature and extent of the danger. In the Court of Appeal, Singleton, L.J., held that the danger created by the staging was unusual because it was of a kind not usually encountered by welders engaged in the repair of a ship, and that it did not become a usual danger merely because the person suing knew of it before his accident. Lord Normand said that, for the reasons which he had given, he agreed with the Court of Appeal on this point.

The question then arose whether the appellants had discharged the duty which they owed to the invitee in relation to this unusual danger. Lord Normand said ([1951] 2 All E.R. 1, 10):

It is a duty of reasonable care for the safety of the invitee. For some time it appears to have been in doubt whether the duty of care could be discharged by warning or notice of the danger. It seems to me, however, that the point is settled by a series of decisions, of which *Workington Harbour and Dock Board* v. *Towerfield (Owners)* ([1950] 2 All E.R. 414; [1951] A.C. 112) is the latest, in which it has been held that harbour authorities or wharfingers, inviting ships of a certain size to enter the harbour or tie up at the wharf, owe to their owners the duty of an invitor to an invitee and that this duty is discharged by giving warning of dangers of which they knew or ought to have known. The cases are numerous and, in addition to *Workington Harbour and Dock Board* v. *Towerfield (Owners)* ([1950] 2 All E.R. 414; [1951] A.C. 112), I will mention only *R.* v. *Williams* ((1884) 9 App. Cas. 418) and *Anchor Line* v. *Dundee Harbour Trustees*, *The Circassia*, *Ellerman Lines* v. *Dundee Harbour Trustees*, *The City of Naples* ([1922] S.C. (H.L.) 79). In the last-mentioned case *Viscount Haldane* said of ships entering the harbour of Dundee: "Their legal position would thus be like that of the plaintiff in the well-known case of *Indermaur* v. *Dames* ((1866) L.R. 1 C.P. 274), and they would be entitled to look for the discharge of a duty resting on the respondents to exercise reasonable care to avert peril to them from any unusual danger of which the respondents knew or ought to have known . . . On the other hand, those approaching with their vessels must, notwithstanding their right to rely on such care having been exercised, use care on their own part not to incur peril rashly" (*ibid.*, 83).

In the *Dundee Harbour Trustees* case, [1922] S.C. (H.L. 79), the defenders were held liable, because, *inter alia*, they failed to give warning of the position of a sunken wreck in the approaches to the harbour by means of properly disposed buoys. In the harbour and wharf cases, the duty of warning has arisen both in circumstances when the harbour authority or wharfinger had been guilty of negligence in allowing an obstruction to grow up on the bed of the harbour or at the wharf, or in failing to remove such an obstruction, and in cases where there had been no such prior negligence and the only breach of duty was the failure to warn. Lord Normand said that there is, however, no principle by which warning may be an appropriate discharge of the duty owed to invitees by a harbour authority, but inappropriate in other cases. Judicial dicta in support of the view that warning is a discharge of the invitor's duty generally are not lacking, and they are of high authority. Thus, in *Cavalier* v. *Pope*, [1906] A.C. 428, 432, Lord Atkinson said of *Indermaur* v. *Dames*, (1866) L.R. 1 C.P. 274:

one of the essential facts necessary to bring a case within that principle is that the injured person must not have had knowledge or notice of the existence of the danger through which he has suffered. If he knows the danger and runs the risk he has no cause of action.

In *Brackley* v. *Midland Railway*, (1916) 85 L.J.K.B. 1596, 1606, 1608, Swinfen Eady, L.J., and Bankes, L.J., expressed the same opinion. So also did Viscount Maugham in *Griffiths* v. *Smith*, [1941] A.C. 170, 181, 182; [1941] 1 All E.R. 66, 74.

On this point, Lord Normand said ([1951] 2 All E.R. 1, 10, 11):

When there is already knowledge, notice or warning will have no effect and the omission of it can do no harm. So, the defendant who has failed to give warning may yet succeed if he proves that the injured person had knowledge of the unusual danger. But whether it be knowledge gained without a warning or knowledge conveyed by a warning, it must be sufficient to avert the peril arising from the unusual danger. The knowledge must, therefore, be full knowledge of the nature and the extent of the danger. In the present case, the learned Judge has found that the respondent had full knowledge of the nature and the extent of the peril, and the finding is beyond doubt warranted by the evidence which shows that the respondent had before his accident complained of the same defects in the staging as were proved at the trial. The real difficulty of the case is in the argument that, though a warning may sometimes be a discharge of the invitor's duty, for example, if it excludes a part of the premises from the area of the invitation, or if it is given to a person who has nothing to consider but his own safety and pleasure, it is not sufficient if the invitee is under a duty to his employer to work in the area of the danger. In such a case, it is said, the invitor must prove, not merely that the invitee knew of the danger, but that, knowing it, either he was himself negligent or he freely and voluntarily agreed to accept the risk. In the present case this argument is of vital importance, for the respondent was, under his contract of service, engaged on the repair of the ship and for that work the use of the defective staging was necessary. Contributory negligence was pleaded but not proved. The defence of *volenti non fit injuria* was not pleaded, and the appellants relied on the respondent's knowledge of the danger, not towards establishing the plea *volenti non fit injuria*, but as an equivalent to the discharge of their duty by warning.

His Lordship went on to say that the issue between the parties might be stated in this way. The appellants say that, if the respondent incurred the risk *sciens*, he must fail, whereas the respondent says that he succeeds unless it is shown that he incurred the risk *sciens et volens*. On this issue His Lordship was not aware of any direct authority. In *Letang* v. *Ottawa Electric Railway Co.*, [1926] A.C. 725, the invitors argued that the defence *volenti non fit injuria* was

established, and it was held that it was not. If the appellants' argument in *Horton's* case, [1951] 2 All E.R. 1, is sound, the defendants in *Letang's* case assumed a greater onus than was necessary for their success. It is impossible to say what the result would have been if *Letang's* case had been argued on the lines of the appellants' argument in this case. Lord Normand said that the solution must, therefore, be attempted on principle, unaided by authority. The strength of the respondent's case was that the appellants knew that the welders were coming daily to their work and using the staging as their invitees, and that they were under a contract of service to do so. Yet the invitee's contract of service with his employer cannot be pleaded either by or against the invitor, who is a stranger to it. Otherwise, the invitor would owe to the invitee the same duty as an employer owes to his employees, and the invitee could sue with an equal prospect of success either his employer or an occupier of the premises who had erected staging thereon under a contract with his employer. Such a result would be just if the employer found liable in damages to his workman could in all circumstances recover the damages from the occupier, but counsel for the respondent recognized that the right of recovery might not be always available. The principle of avoiding circuity of action cannot be invoked, and to say that the invitor had agreed to perform the employer's duty to his employees is to resort to a fiction, and fiction is no longer an acceptable solution for the problems of industrial relationships. The sufferer must make up his mind whether to sue as an invitee or as an employee under his contract of service. He cannot, in Lord Normand's opinion, sue as an invitee and at the same time found on his contract of service as restricting his freedom to act on a warning of unusual danger given to him by the invitor.

Lord Normand then considered the argument that had been based on *Donoghue* v. *Stevenson*, [1932] A.C. 562. He referred to the fact that Singleton, L.J., and Jenkins, L.J., held that there was liability, on the principles established in that decision. But, he added, in *Donoghue* v. *Stevenson* the question was whether a ginger-beer manufacturer who had sold a bottle of ginger-beer to a retailer was under any duty of care in manufacture to a consumer who was in no contractual relation with him. The argument for the defender was that there were certain relationships, such as physical proximity or contract, which alone give rise to duties in the law of quasi-delict or tort, and that the relationship between the pursuer and the defender was not one of them. The decision was that the categories of negligence are not closed and that duties of care are owed, not only to physical neighbours, but to anyone who is " my neighbour " in the wider sense (as stated by Lord Atkin, at p. 580) of a person :

> so closely and directly affected by my act that I ought reasonably to have [him] in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

This general proposition, however, left over the question whether, in the circumstances of the case, the consumer was so closely and directly affected by the manufacturer's act that the manufacturer owed him a duty of care. The answer, as Lord Atkin said, at p. 582, was that the manufacturer :

> puts up an article of food in a container which he knows will be opened by the actual consumer. There can be no inspection by any purchaser and no reasonable preliminary inspection by the consumer.

He was, therefore, liable, though there was no contract between him and the consumer, and though he had parted with the bottle, so that there was no " physical proximity " through it between him and the consumer. The importance of the absence of any real opportunity for examination of the contents is emphasized in the speeches of Lord Thankerton, at p. 603, and Lord Macmillan, at pp. 615, 622. In *Horton's* case, Lord Normand said, there was no need to seek out in *Donoghue* v. *Stevenson*, [1932] A.C. 562, a reason for finding that the appellants owed a duty of care to the respondent. Admittedly, they owed that duty which an invitor owes to his invitee in respect of premises in the possession and control of the invitor. In any event, there was in *Horton's* case an opportunity for inspection both by the respondent's employers and by the respondent himself, so that the respondent actually knew, as the result of his inspection, the very defects of which he complained. *Donoghue* v. *Stevenson*, [1932] A.C. 562, could not, in the opinion of Lord Normand, have any application to this case.

Lord Oaksey agreed with the opinions of Lord Porter and Lord Normand. He said that the respondent, though a workman, was not employed by the appellants, and it was common ground that their relation was that of invitor and invitee, and not that of master and servant. The duty of an invitor to an invitee was, in Lord Oaksey's opinion, to give him a fair warning of any danger on the premises which he could not be expected to foresee. Premises inevitably contain a great variety of dangers, some great, some slight, some usual, some unusual, and, in His Lordship's opinion, it is a question of fact whether the danger is so slight or so usual that no warning is needed, or so great or so unusual that the invitee, with the actual knowledge of the premises which he is known by the invitor to possess, ought, in the opinion of an ordinarily careful invitor, to be warned of it. He continued ([1951] 2 All E.R. 1, 12) :

> The words of *Atkin*, J., in *Lucy* v. *Bawden* ([1914] 2 K.B. 318) approved by your Lordships' House in *Fairman* v. *Perpetual Investment Building Society* ([1923] A.C. 74) appear to me directly applicable *mutatis mutandis* to the facts of the present case : " The danger, if any, was patent to everyone, and the plaintiff gave evidence that she herself had complained to the defendant's agent about it " (*ibid.*, 81). The maxim *volenti non fit injuria* is a maxim which affords a defence to a person who has committed a breach of duty, but an invitor who invites someone on to his premises which are reasonably safe has committed no breach of duty, nor has he if the invitee knows the danger or has been adequately warned about it : see *Salmond on Torts*, 10th Ed. 38. With the greatest respect to *Singleton*, L.J., I cannot agree with his statement ([1950] 1 All E.R. 180) : " A danger which is unusual does not become other than unusual merely because the person suing knew of it before his accident. If it were otherwise, notice of an unusual danger might of itself render the rule in *Indermaur* v. *Dames* ((1866) L.R. 1 C.P. 274) wholly inapplicable, whereas notice is only an element to be considered " (*ibid.*, 184). As I read the words of *Willes*, J., in *Indermaur* v. *Dames* ((1866) L.R. 1 C.P. 274, 288), an occupier owes no duty to an invitee in respect of " usual " dangers, since the invitee is only entitled to expect that the invitor will take care to prevent damage from unusual danger, but " where there is evidence of neglect "—*i.e.*, where there is danger which may be found by the tribunal of fact to be unusual—it is a question of fact whether reasonable care has been taken by notice, lighting, guarding, or otherwise, and, therefore, there has been no neglect.

As we explained earlier, Lord MacDermott and Lord Reid, in very lengthy speeches, dissented from the majority.

The general effect of the speeches of Lord Porter, Lord Normand, and Lord Oaksey, after explaining and applying the rule in *Indermaur* v. *Dames*, was that it

was the defendants' duty to provide reasonably safe premises or else to show that the plaintiff workman (the employee of the subcontractors) had accepted the risk with full knowledge of the dangers involved. Their Lordships held that it was not necessary to show that he was *volens* as well as *sciens*, as the duty owed by an invitor to an invitee was not so high as that owed by an employer to an employee. The question whether a person in the position of the plaintiff in *Horton's* case undertook the risk of performing his task with full appreciation of the danger is a question of fact, to be decided by the tribunal which tries the case. On the facts of *Horton's* case, [1951] 2 All E.R. 1, their Lordships considered that the learned trial Judge had ample evidence for his finding that the plaintiff had full knowledge of the nature and extent of the risk which he ran, and, therefore, the defendants were freed from liability for damage occasioned by the insecurity of their premises.

SUMMARY OF RECENT LAW.

BANKRUPTCY.

Assets—Acts of Bankruptcy—Fraudulent Preference—Agreement by Debtor for Creditor to receive Moneys payable to Him—Later Assignment to implement Such Agreement—Assignment given bona fide *in Fulfilment of Contract previously made—Assignment not proved to be Fraudulent or Fraudulent Preference—Creditor taking back Goods previously sold to Debtor—Such Transaction Assignment of substantially Whole of Debtor's Property—No Proof of Creditor's acting in Good Faith—Transaction Invalid—Bankruptcy Act, 1908, ss. 26* (b), *82—Fraudulent Conveyances Act, 1571 (13 Eliz., c. 5), s. 1.* A bankrupt, who was adjudicated on March 6, 1950, derived substantially the whole of his income from building contracts with the Lands and Survey Department. In October, 1949, he arranged with the Farmers' Co-operative Organization Society of New Zealand, Ltd., to supply him with materials and to send him monthly accounts; and, upon the certification of the statements by him, the Department was to pay to the Society the accounts out of moneys owing, and becoming owing, to him by the Department. After the receipt of one statement and the payment thereof in November, although the debtor was continuing to purchase materials from the Society, no further statements were received by the Department until January 12, 1950. The Society's managing director, discovering on January 11 that the debtor owed the Society £855 3s. 7d., made inquiries from the Department, which informed him that the Department had paid the debtor £300 just before Christmas and was holding £400-odd on his account. On January 12, 1950, the Society's New Plymouth manager saw the debtor with reference to the debt of £855 3s. 7d. and to a further amount of £75 in the debtor's private account, and got him to sign two typewritten documents, one of which authorized the Society to take back into stock certain roofing and other materials belonging to the debtor and valued at £521 10s., and the other was an authority or assignment directing the Department to pay to the Society all moneys (then about £410) due by it to the debtor. Of assets amounting in value to about £1,116, the debtor had thus assigned assets amounting to £931 10s., and, as a result, was left with assets worth about £184 10s. for the payment of unsecured debts amounting to about £1,400. Each of the transactions of January 12, 1950, was attacked on the following grounds: (*a*) That it was a transfer of substantially the whole of the debtor's property for a past consideration, and was fraudulent within the meaning of, and therefore an act of bankruptcy under, s. 26 (*b*) of the Bankruptcy Act, 1908. (*b*) That it was a fraudulent conveyance within the meaning of s. 1 of the Fraudulent Conveyances Act, 1571 (13 Eliz., c. 5), and was, therefore, an act of bankruptcy under s. 26 (*b*) of the Bankruptcy Act, 1908. (*c*) That it was a fraudulent preference within the meaning of s. 79 of the Bankruptcy Act, 1908. On a motion by the Official Assignee for orders declaring that the debtor's transactions above-described were fraudulent and acts of bankruptcy, and were void as against the Official Assignee as constituting an assignment of substantially the whole of the debtor's property, *Held*, 1. That the assignment of January 12, 1950, of the £410 was in substance an implementing of the agreement between the debtor and the Society; and, as a security given over the whole of a debtor's property to secure a past advance is not an act of bankruptcy if given *bona fide* in fulfilment of a contract entered into before the debt was incurred, that assignment was not fraudulent. (*Harris* v. *Rickett*, (1859) 28 L.J. Ex. 197, and *Hutton* v. *Cruttwell*, (1852) 22 L.J.Q.B. 78, applied.) (*In re Hardy* (*No. 2*), [1922] N.Z.L.R. 613, and *New Zealand Serpentine Co., Ltd.* v. *Hoon Hay Quarries, Ltd.*, [1925] N.Z.L.R. 73, referred to.) 2. That the assignment of £410 on January 12, 1950, was not a fraudulent conveyance within s. 1 of the Fraudulent Conveyances Act, 1571 (13 Eliz., c. 5). (*Middleton* v. *Pollock, Ex parte Elliott*, (1876) 2 Ch.D. 104, followed.) (*Harman* v. *Richards*, (1852) 10 Hare 81; 68 E.R. 847, and *In re Johnson, Golden* v. *Gillam*, (1881) 20 Ch.D. 389, applied.) 3. That the Official Assignee had not discharged the burden that rested upon him of proving that the assignment was a fraudulent preference. 4. That, when the delivery to, and the taking back by, the Society of the roofing material took place, on January 12, 1950, the question whether that constituted an assignment of substantially the whole of the debtor's property had to be determined on the basis that the moneys that were the subject of the assignment or authority that was directed to the Department were no longer the debtor's property; and, on that that basis, the situation then was that, of assets amounting to about £706, the debtor assigned roofing materials of a value of £521 10s.; and, as that transaction was such as to leave the debtor in a position of obvious insolvency, it constituted an assignment of substantially the whole of the debtor's property. (*Official Assignee of Marr* v. *Chick*, (1891) 9 N.Z.L.R. 622, and *In re Bell*, (1913) 33 N.Z.L.R. 154, applied.) 5. That the suggested agreement under which the Society was to hold the roofing materials, &c., in stock, so that the debtor could repurchase it at the original price, did not constitute a present equivalent that saved the transaction from invalidity; and, therefore, it fell within s. 26 (*b*) of the Bankruptcy Act, 1908. (*Woodhouse* v. *Murray*, (1867) L.R. 2 Q.B. 634; aff. on app., (1868) L.R. 4 Q.B. 27, applied.) (*Ex parte Foxley, In re Nurse*, (1868) L.R. 3 Ch. 515, and *In re Hardy* (*No. 2*), [1922] N.Z.L.R. 613, referred to.) 6. That the Society had not discharged the onus that rested upon it of proving that it acted in good faith in order to obtain the protection of s. 82 of the Bankruptcy Act, 1908; and, even if *In re Seymour, Ex parte The Trustee*, [1937] Ch. 668; [1937] 3 All E.R. 499 (which was cited for the proposition that, for the purposes of s. 82, good faith is immaterial), were not satisfactorily distinguishable, the Court would not be justified in departing from the long line of authority in which it has been held that, for the purposes of s. 82, good faith on the part of the creditor is essential. (*In re Kerr*, [1927] N.Z.L.R. 177, applied.) (*In re Kinley*, (1914) 17 G.L.R. 166, *In re Hardy* (*No. 2*), [1922] N.Z.L.R. 613, *In re Kerr*, [1927] N.Z.L.R. 177, and *In re Eagles*, [1945] G.L.R. 239, referred to.) Consequently, the Court declared that the delivery to, and receipt by, the Society, on or about January 16, 1950, of the roofing materials and goods of the total value of £521 10s. belonging to the debtor was an act of bankruptcy, and void as against the Official Assignee. *Re Hooper* (*A Bankrupt*), *Ex parte Official Assignee*. (S.C. New Plymouth. June 15, 1951. Cooke, J.)

BENCH AND BAR.

The Rt. Hon. Sir Humphrey O'Leary, K.C.M.G., Chief Justice of New Zealand, was, in the presence of His Majesty the King, sworn of His Majesty's Privy Council at Buckingham Palace on July 11, 1951.

Sir Samuel Griffith. (Professor F. R. Beasley.) *25 Australian Law Journal*, 8.

CONTRACT.

Repudiation—Anticipatory Breach—Contract with Corporation for Removal of Refuse—Undertaking by Contractors to observe By-laws—Sealing of New By-laws—Substantial Additional Burden on Contractors. The City of London Corporation, as the sanitary authority, made a contract for the removal of refuse from the City of London under which the contractors undertook to use lighters and barges fitted with "temporary coamings and coverings to be secured to the permanent coamings" and to comply with the by-laws of the Port Health Authority for the Port of London as to removal of refuse. In April, 1948, when the contract still had a prospective life of some twenty years, the Corporation, in their capacity of Port Health Authority, sealed new by-laws, which were due to come into force in Novem-

continued from cover i.

LEGAL ANNOUNCEMENTS.

ANNOUNCEMENT.

MR. E. H. DE JOUX, LL.B., has commenced practice as a BARRISTER AND SOLICITOR at CENTRAL CHAMBERS, UPPER HUTT.

MANAGING CLERK WANTED.

WANTED, QUALIFIED MANAGING CLERK particularly for conveyancing and estates. Position offers wide general experience and prospects for further advancement. Liberal salary will be paid according to qualifications. Assistance given with accommodation. Reply, with full particulars, in confidence to :—

FITZHERBERT, ABRAHAM AND CROSSLEY,
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P.O. BOX 38, PALMERSTON NORTH.

I REQUIRE THE SERVICES OF A FULLY QUALIFIED PRACTITIONER capable of handling all Common Law work and with general conveyancing experience. Liberal salary with prospect of partnership.

W. H. ADAMS,
SOLICITOR,
HAMILTON.

C. H. STEVENS, LL.M., of DUNEDIN, Barrister and Solicitor, wishes to announce that he has been joined in partnership by RONALD JAMES GILBERT, LL.B., and that the practice will continue to be carried on at the office in the New Zealand Insurance Company Buildings, 5 Crawford Street, Dunedin, under the name of STEVENS & GILBERT.

THOMAS HUGH IAN FLEMING, LL.B., and MARTYN UREN, LL.B., have pleasure in announcing that they have been joined in partnership by MAURICE WYLLY HUNT, LL.B., (for some years their managing clerk) as from 1st July, 1951, and that they will practise in partnership at 410-412 New Zealand Insurance Buildings, Queen Street, AUCKLAND (and at 198 Great South Road, MANUREWA) as McVEAGH, FLEMING AND UREN, Barristers and Solicitors.

WE have pleasure in intimating that we have admitted to partnership MESSRS. REGINALD ALFRED KING and ARNOLD PURNELL CLOWES, Barristers and Solicitors, both of whom have been associated with our firm for many years.

EDMUND J. SMITH, LOUSLEY & SMITH,
Barristers and Solicitors,
New Zealand Express Coy. Buildings,
11 BOND STREET, DUNEDIN.

MR. JULIUS HOGBEN & MR. BOWEN CLENDON, Barristers and Solicitors, wish to announce that as from the 1st July, 1951, they have admitted to partnership their Managing Clerk, Mr. KEVIN ALOYSIUS FEENEY, LL.B. The practice will be carried on in future under the name of HOGBEN, CLENDON, & FEENEY at the same address: 5th Floor, Colonial Mutual Building, Queen Street, AUCKLAND.

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ber, 1950. One of these by-laws required every vessel transporting refuse to be provided with " permanent coamings and close-fitting hatches to such coamings, capable of completely covering the refuse, and . . . waterproof sheeting for covering such hatches." It was not disputed that the additional burden thrown on the contractors by this by-law was such as would entitle them, when the by-law came into force, to treat the contract as having been frustrated, but it was contended by the contractors that the making of the by-law was an anticipatory breach of contract, entitling them forthwith to treat the contract as repudiated. *Held*, That, while it was an implied term of any contract that one party would not do anything to disable the other party from performing the contract, the implication of a term that the Corporation would not make by-laws of the nature of that now in dispute would impose an unwarrantable fetter on the Corporation in the exercise of their statutory duties under the Public Health (London) Act, 1936, s. 84 (1) (*a*); such a term would be *ultra vires* the Corporation; and, therefore, the sealing of the by-laws was not a breach of a valid term of the contract, and did not entitle the contractors immediately to treat the contract as repudiated. Decision of *Lord Goddard*, L.C.J., [1950] 2 All E.R. 584, affirmed. *William Cory and Son, Ltd.* v. *City of London Corporation*, [1951] 2 All E.R. 85 (C.A.).

As to Repudiation of Contract, see *7 Halsbury's Laws of England*, 2nd Ed. 227-230, paras. 311-315; and for Cases, see *12 E. and E. Digest*, 338-345, Nos. *2830-2874*.

CONVEYANCING.

Insertion of Nominal Consideration in Deeds. *211 Law Times*, 250.

Landlord and Tenant: Covenant not to assign without Leave. *25 Australian Law Journal*, 10.

Sale or Mortgage of A Ship. (F. E. Moss.) *4 Australian Conveyancer and Solicitors Journal*, 45.

COSTS.

Appeals. *95 Solicitors' Journal*, 310.

Appeals to the Judicial Committee of the Privy Council. *95 Solicitors Journal*, 278, 292.

DESTITUTE PERSONS.

Maintenance Order—Omission from Order of Finding that Husband's Failure to provide Maintenance was " wilful and without reasonable cause "—Order invalid—Destitute Persons Act, 1910, ss. 17 (1), 18 (4)—Divorce and Matrimonial Causes—Separation (as a Ground of Divorce)—Separation Order bad on Its Face—Parties acting on It and treating It as Valid Order—Court's Power to make Decree Nisi*—Divorce and Matrimonial Causes Act, 1928, s. 10* (j). In each of two undefended divorce cases on the ground that a separation order had been in force for three years and upwards, the formal separation order made by the learned Magistrate recited a failure to provide adequate maintenance and guardianship (in the terms set out in s. 17 (1) (*a*) of the Destitute Persons Act, 1910). The operative part of the order made by the learned Magistrate then said, " I do adjudge the same to be true and order as follows "; and he then made a separation order and a guardianship order. *Held*, 1. That the omission from the Magistrate's order of a finding that the failure of the husband to provide maintenance for his wife was " wilful and without reasonable cause," in terms of s. 18 (4) of the Destitute Persons Act, 1910, made the order bad on the face of it. 2. That, notwithstanding the invalidity of the order, since the parties had acted on it and had treated it as being an effective order, the Court could make the decree of dissolution of the marriage. (*Dodd* v. *Dodd*, [1906] P. 189, followed.) *Phillips* v. *Phillips*: *Samson* v. *Samson*. (S.C. Hamilton. July 4, 1951. Fell, J.)

DIVORCE AND MATRIMONIAL CAUSES.

Custody of Children—Conduct of Respective Parents—Relevance confined to Bearing of Such Conduct on Future Welfare of Child— Obiter dicta *thereon—Infants Act, 1908, s. 6—Guardianship of Infants Act, 1926, s. 2. Semble*, 1. That the conduct of the parents is made relevant in an application for the custody of an infant by s. 6 of the Infants Act, 1908; but, in the light of s. 2 of the Guardianship of Infants Act, 1926, it is relevant only in so far as it bears on the future welfare of the infant, and not as ground for competitive claims by the respective parents. (*Meurant* v. *Meurant*, [1922] N.Z.L.R. 262, *Van der Veen* v. *Van der Veen*, [1923] N.Z.L.R. 794, and *Bolton* v. *Bolton*, [1928] N.Z.L.R. 473, distinguished.) (*Re Collins*, [1950] 1 All E.R. 1057, and *Lovell* v. *Lovell*, (1950) 24 Aust. L.J. 426, referred to.). (*Allen* v. *Allen*, [1948] 2 All E.R. 413, *Re Hylton*, [1928] N.Z.L.R. 145, *Parsons* v. *Parsons*, [1928] N.Z.L.R. 477, and *Fleming* v. *Fleming*, [1948] G.L.R. 220, mentioned.) 2. That matrimonial misconduct consisting in disobedience to a decree for restitution stands on a different footing from certain other forms of misconduct. (*W.* v. *W.*, [1926] P. 111, referred to.) 3. That, all other things being equal, children of tender years should be in their mother's care; and, in the case of girls, even if they have ceased to be of tender years, a mother's care is to be preferred to that of a father. (*In re Winter*, [1930] G.L.R. 637, and *Morton* v. *Morton*, (1911) 31 N.Z.L.R. 77, followed.) *Norton* v. *Norton*. (S.C. Hamilton. May 25, 1951. F. B. Adams, J.)

Desertion—Constructive Desertion for Six Months commencing in March, 1948—Resumption of Cohabitation for Six Months thereafter—Subsequent Constructive Desertion for Eight Months until Husband arrested and imprisoned—Petition filed in April, 1951—Resumption of Cohabitation constituting True Reconciliation—Period thereof excluded—Petitioner not continuously Deserted for Three Years—Divorce and Matrimonial Causes Act, 1928, s. 10 (b) (c)*—Divorce and Matrimonial Causes—Habitual Drunkenness and Cruelty—Husband imprisoned for Life before Four-years Period complete—Statutory Ground for Divorce not established—Divorce and Matrimonial Causes Act, 1928, s. 10* (c). The parties were married on December 24, 1945, and, almost from that date, there was continuous and excessive drinking by the husband, accompanied by cruelty. In March, 1948, the wife went to live with her parents. In September, 1948, she went back to her husband and resumed cohabitation, on his promise not to drink or to ill treat her. She said that he was " better for a while, but not for very long," and againt here was drinking and cruelty. In March, 1949, she left him. In November, 1949, he was arrested, and in February, 1950, he was convicted of murder and sentenced to imprisonment for life. On a petition by the wife for the dissolution of her marriage, upon the grounds (*a*) that the respondent had for four years or more—namely, from January 24, 1946, to the date of the petition (April 4, 1951)—been an habitual drunkard, and had habitually been guilty of cruelty towards her, or (*b*) in the alternative, that the respondent had without just cause wilfully deserted the petitioner and without just cause had left her continuously so deserted for three years or more—namely, from March 31, 1948, to the issue of the petition (April 4, 1951), *Held*, 1. That, on the facts, there was reasonable ground for the petitioner's leaving the respondent in March, 1948, and that a case of constructive desertion by the respondent of the petitioner then arose. 2. That, in order to determine whether the statutory period of desertion had run, the six-months' resumption of cohabitation had to be excluded, as it was too long a period for it to be regarded as otherwise than a true reconciliation, even if the resumption of cohabitation for that period in reliance on the husband's promise was no more than a conditional reconciliation; and, consequently, the petitioner, at the time of the filing of her petition, had not been continuously deserted for three years. (*Whitney* v. *Whitney*, [1951] 1 All E.R. 301, *Bartram* v. *Bartram*, [1949] 2 All E.R. 270, and *Mummery* v. *Mummery*, [1942] 1 All E.R. 553, referred to.) (*Taylor* v. *Taylor*, [1918] N.Z.L.R. 724, *Timms* v. *Timms*, [1925] V.L.R. 597, and *Gross* v. *Gross*, (1938) 38 N.S.W.S.R. 111, distinguished.) 3. That a complete cessation of the husband's habitual drunkenness before four years' had elapsed (on account of imprisonment) precluded a decree of dissolution of the marriage under s. 10 (*c*) of the Divorce and Matrimonial Causes Act, 1928. (*Thomas* v. *Thomas*, [1916] N.Z.L.R. 676, distinguished.) *Semble*, Any considerable break in the drunkenness, such as a period of some months, disentitles a petitioner to relief on the ground set out in s. 10 (*c*). *Brown* v. *Brown*. (S.C. Palmerston North. June 26, 1951. Gresson, J.)

Matrimonial Causes Rules 1943, Amendment No. 2 (Serial No. 1951/144). These Rules bring service on Maoris into line with the procedure of the Court in its general proceedings as recently modified by the Supreme Court Amendment Rules, 1950 (Serial No. 1950/58).

Rule 19 of the principal Rules is amended by giving a Registrar power to fix the time within which a respondent residing beyond New Zealand may file an answer to the petition by which a matrimonial cause is commenced.

Under R. 65 of the principal Rules, any of the powers conferred by R. 65 of the principal Rules upon the Court or a Judge thereof may be exercised by a Registrar of the Court, who thus may order a husband to pay into Court or give security for a wife's costs, to fix the amount to be paid or secured, and to give certain consequential directions.

Form No. 1 in the Schedule to the principal Rules is amended by renumbering as " 4," " 5," " 6," and " 7 " the paragraphs previously numbered " 3," " 4," " 5," and " 6," and by inserting after para. 2 the following paragraph :

" 3. During the said marriage no persons have become children of the marriage by legitimation, or by adoption by both the petitioner and the respondent.

[" *Or, as the case may require,—*]

" 3. During the said marriage the following persons have become children of the marriage by legitimation (*or* by adoption by both the petitioner and the respondent)—namely : [*Here state the names of all persons so legitimated or adopted, as the case may require, and the dates on which they were born*]."

Mohammedan Divorce and English Marriage. *211 Law Times*, 278.

EVIDENCE.

Discussions as to Evidence in Divorce. *211 Law Times*, 233.

EXECUTORS AND ADMINISTRATORS.

Revocation of Appointment as Executor. *95 Solicitors' Journal*, 280.

FAMILY PROTECTION.

Evidence. *95 Solicitors' Journal*, 294.

GUARANTEE.

Guarantor of Void Loan. *211 Law Times*, 216.

INCOME-TAX.

Report on Taxation of Business Profits. *101 Law Journal*, 339.

LAND TRANSFER.

Foreclosure of Land under Registered Title. (L. A. Harris.) *4 Australian Conveyancer and Solicitors Journal*, 41.

LANDLORD AND TENANT.

" Let Together " : Importance of Intention. *95 Solicitors' Journal*, 265.

Overlapping Businesses. *95 Solicitors' Journal*, 313.

LICENSING.

" Time, Gentlemen, Please ! " *115 Justice of the Peace Journal*, 243.

MOTOR-VEHICLES.

Unidentified Motor-vehicle involved in Accident—Agreement between Crown and Accident Insurance Companies—Construction—Inferences as to Cause of Injuries—Negligence—Question whether Unidentified Motor-vehicle had Registration Plates—Agreement between His Majesty the King and Insurance Companies regarding Claims in respect of Death or Bodily Injury caused by Use of Motor-vehicles that cannot be Identified (1931 New Zealand Gazette, *3023*), *Cl. 1* (c) (d)—*Arbitration—Arbitrator—Special Case Stated for Court's Decision—Court not to be asked to decide Questions of Fact—Function of Arbitrator—Arbitration Amendment Act, 1938, s. 11* (*1*) (a). On a special case stated by arbitrators under s. 11 (1) (*a*) of the Arbitration Amendment Act, 1938, for the opinion of the Court on the following questions relating to the application of the agreement between the Crown and certain accident insurance companies to the circumstances of the death of one Richards, who was found dead on the highway, having suffered injuries of such a nature that they might have been caused by his having been knocked down by a motor-vehicle : (i) Are the arbitrators entitled to infer from the evidence that deceased's injuries were caused by a motor-vehicle ? (ii) If the answer to Question (i) is " Yes," are the arbitrators entitled to infer from the evidence that the driver of such motor-vehicle was negligent ? (iii) If the answers to Questions (i) and (ii) are " Yes," are the arbitrators entitled to find on the evidence or infer therefrom that it is proved to their satisfaction that such motor-vehicle had registration plates attached thereto in manner prescribed by law ? *Held*, 1. That the Court should not answer the questions in the form in which they were put, as their wording was such as, in effect, to ask the Court to decide something which it was the function of the arbitrators to decide as a matter of fact. 2. That, as to the matter raised in the first question, there was evidence from which an inference could be drawn that the deceased's injuries were caused by a motor-vehicle ; but whether such an inference should be drawn was a question for the arbitrators to decide upon a consideration of the whole of the evidence. 3. That, in regard to the second question, on the assumption that the injuries were caused by a motor-vehicle, there was evidence from which negligence of the driver of that vehicle might be inferred ; and the sufficiency of such evidence was a matter for the arbitrators. (Principles enunciated in *Caswell* v. *Powell Duffryn Associated Collieries, Ltd.*, [1939] 3 All E.R. 722, 733, to be applied.) 4. That, there being no evidence at all on the matter raised in the third question, the arbitrators were not warranted in finding as a fact that the vehicle had registration plates attached in manner prescribed by law. *In re An Arbitration, Richards and State Fire Insurance General Manager.* (S.C. Palmerston North. June 22, 1951. Gresson, J.)

NEGLIGENCE.

Action for Damages—Trial by Jury—Disclosure of Fact that Defendant insured—Whether Trial should proceed. In the course of the hearing of a jury trial of an action for damages arising out of a road collision in which motor-vehicles were concerned, the fact that one of the defendants was insured was disclosed to the jury in the course of evidence. *Held* (the defendant consenting), That the jury should not be discharged, but the trial should proceed, a suitable direction being given to the jury not to take into account that the defendant was insured. *McCormack* v. *Brewer*, [1951] V.L.R. 197.

Bailor and Bailee—Bailee for Reward—Goods stolen while in Bailee's Custody—Negligence—Onus on Bailee of Proof of Theft's not occurring in Consequence of His Neglect to take Appropriate Care in Relation to Article Stolen. A bailee for reward does not discharge himself of his duty by showing that goods were stolen while they were in his custody. He must show that the theft was not due to any failure on his part in the exercise of the care and diligence which a careful and vigilant man would exercise in the custody of his own chattel of the like character and in the like circumstances. (*Bullen* v. *Swan Electric Engraving Co.*, (1907) 23 T.L.R. 258, and *Brook's Wharf and Bull Wharf, Ltd.* v. *Goodman Brothers*, [1937] 1 K.B. 534 ; [1936] 3 All E.R. 696, followed.) (*Coldman* v. *Hill*, [1919] 1 K.B. 443, referred to.) A fishing-rod was delivered into the custody of the Harbour Board packed in a small wooden case, consigned to the appellant. The appellant's lorry-driver obtained the case in a wharf shed, and placed it on the floor leaning against the front of a stack of goods. He was away looking for other goods for a quarter of an hour, and, when he returned, the case was missing, and was not recovered. The appellant brought a claim against the Harbour Board for the value of the missing article, and the learned Magistrate entered judgment for the Harbour Board. On appeal from that determination, *Held*, 1. That, as the appellant' driver found the case and as he himself leant it against the front of the stack before it was stolen, it was not lost on account of any failure by the Harbour Board to store it in a suitable place. 2. That the Harbour Board had discharged the onus of showing that the theft took place notwithstanding that it had taken all reasonable precautions to guard against the danger. *Barton Ginger and Co., Ltd.* v. *Wellington Harbour Board.* (S.C. Wellington. June 14, 1951. Hutchison, J.)

OBITUARY.

Sir George Branson, who was a Judge of the King's Bench Division from 1921 to 1940, died on April 23 at the age of seventy-nine.

PRACTICE.

Evidence—Jurisdiction—New Witness—Plaintiff's Case closed and Defendant's Evidence being heard—Witness, previously Unknown to Plaintiff or His Advisers, volunteering to give Evidence for Plaintiff—Court's Power to admit Such Evidence. The Court has power to admit further evidence at any time during a trial before the whole of the evidence on both sides has been closed. (*Ehrenfried* v. *Gleeson*, (1890) 9 N.Z.L.R. 97, and *Nelson* v. *Buchanan*, (1897) 16 N.Z.L.R. 60, distinguished.) (*Thexton* v. *Edmonston*, (1868) L.R. 5 Eq. 373, referred to.) Thus, after the evidence for the plaintiff had been called and part of the evidence for the defendant had been given, the Court allowed the calling of a witness for the plaintiff, who had volunteered to give evidence after the closing of the plaintiff's case and whose ability to give evidence was previously unknown to the plaintiff or his advisers ; and the Court directed that his evidence be called immediately upon the ending of the evidence of the defendant's witness who was then in the witness-box. *Kinnell* v. *Public Trustee.* (S.C. Wellington. November 28, 1950. Cooke, J.).

PRICE CONTROL.

Beer served on Licensed Premises—Construction of Order—Waiver—" Sale "—" Served "—" Beer sold "—Control of Prices Act, 1947, s. 15 (1) (4)—Price Order No. 962 (Spirits and Beer) (1949 New Zealand Gazette, *15*), *Cls. 6, 8.* The object of Price Order No. 962 was to fix the price of beer sold for consumption on licensed premises, and in Cls. 6 (1) and 8 (1) prices are joined or related to quantities. As the sale and the service (or delivery) of the beer are in fact and law one process, beer, when drawn from the bulk into a container and served—*i.e.*, delivered—to the customer and accepted without protest, is " beer sold " within the meaning of Cl. 8 (1) of the Order; and the price for the quantity which will reasonably fill a 10-oz. container is 6d., and it must be served in a 10-oz. container (or glass). Alternatively, construing the words " beer sold " in Cl. 8 (1) of the Order, not as meaning " beer which has been sold," but as meaning " beer the subject of a sale," the sale and the service become one contemporaneous act. (*Nokes* v. *Doncaster Amalgamated Collieries, Ltd.*, [1940] 3 All E.R. 549, and *Waugh* v. *Middleton*, (1853) 22 L.J. Ex. 109, applied.) Consequently, the Price Order fixes the price of 6d. for any quantity of beer up to 10 oz. sold for consumption on licensed premises; and, unless the seller receives a request for a smaller glass before he serves the drink, the customer is entitled to have his drink served in a 10-oz. glass reasonably filled. *Semble*, The provisions of a Price Order are matters of public policy, and cannot be waived by the customer. *Horrax* v. *Waldron.* (S.C. Dunedin. June 18, 1951. Fell, J.)

TENANCY.

Dwellinghouse—Notice to Quit—Landlord requiring Possession on Age and Ownership Ground—Express Notice of Intention to apply to Court necessary—" Application "—Tenancy Act, 1948, s. 24 (5) (b)*—Tenancy Amendment Act, 1950, s. 10.* A notice to quit, in order to comply with the requirements of s. 24 (5) (*b*) of the Tenancy Act, 1948 (added by s. 10 of the Tenancy Amendment Act, 1950), must expressly give notice of an application to the Court, and leave no room for doubt in the recipient's mind that such an application is intended, and that it will be made on the grounds set out in s. 24 (5). *Hitch* v. *Ayers.* (Palmerston North. May 15, 1951. Herd, S.M.)

TERMINATION OF WAR.

The state of war with Austria was terminated from July 9, 1951, and the state of war with Germany was terminated as from the same date, both at 12 a.m. midnight, by Proclamations of the Governor-General, pursuant to s. 41 of the Finance Act, 1950 (*1951 New Zealand Gazette*, 969, 970).

NOTE: The New Zealand Government reserve the right to retain any money or property subject to control by virtue of the Enemy Property Emergency Regulations, 1939, and to obtain satisfaction of their claims and of the claims of New Zealand nationals arising out of the state of war.

The New Zealand Government desire to recall that by virtue of the Enemy Trading (Austria) Notice, 1947, supplemented by the Enemy Property (Austria) Notice, 1947, certain categories of trade between New Zealand and Austria were authorized, and that further restrictions on trade between the two countries were removed by the revocation on December 31, 1948, of the Enemy Trading Emergency Regulations, 1939.

The New Zealand Government desire to recall that by virtue of the Enemy Trading (Germany) Notice (No. 2), 1947, supplemented by the Enemy Property (Germany) Notice, 1947, certain categories of trade between New Zealand and Germany were authorized, and that further restrictions on trade between the two countries were removed by the revocation on December 31, 1948, of the Enemy Trading Emergency Regulations, 1939.

TRANSPORT.

Omnibus-driver's Licence—Application to Local Authority—Adverse Police Report as to Applicant's Suitability as Omnibus-driver—Refusal of Such Licence—Council not delegating Its Power under Regulations to Police Department—Further Consideration by Council's Transit Committee of Reports by Police and by Corporation's Transit Controller—Committee recommending Adherence to Council's Refusal of Licence—Consideration of Applicant's Suitability not required to be Quasi-judicial—Sufficiency of Inquiry not Reviewable by Court—Transport Act, 1949, s. 30—Motor-drivers Regulations, 1940 (*Serial Nos. 1940/73, 1943/101*), *Reg. 6 (1).* The plaintiff applied to the Council of the defendant Corporation in May, 1950, for an omnibus-driver's licence to enable him to accept a position which was available to him. When he made his application, the officer of the City Council directed him, in accordance with the Council's practice, to take his application to the Police Station, so that a report might be obtained from the Police as to his suitability as an omnibus-driver. The Police reported that he was not a suitable person to hold an omnibus-driver's licence. He was advised that a licence would not be granted to him, because of this adverse report. On requests for a further inquiry, the Corporation's Transit Controller reported that a firm which had previously employed the plaintiff considered him to be a dangerous driver and a menace on the road. The matter came before the Council's Transit Committee, which, after consideration of the Police report and the written report of the Transit Controller and his further verbal report, recommended to the Council that the previous decision to decline an omnibus-driver's licence to the plaintiff should stand. On application for a writ of mandamus directing the defendant Corporation to hear and determine the application of the plaintiff for an omnibus-driver's licence under the Motor-drivers Regulations, 1940, *Held*, 1. That the action of the Council, when it first refused the application, was not a mere delegation to the Police Department of its power under the Regulations. 2. That the effect of s. 30 of the Transport Act, 1949, together with Reg. 6 (1) of the Motor-drivers Regulations, 1940, as amended, is that the local authority must consider an application for a licence; and, as it may cause to be made " such other inquiries as it thinks fit with reference to the suitability of the applicant," its consideration of the question of suitability is not required to be quasi-judicial consideration: and the Court may not inquire into the sufficiency of the Council's inquiries. (*Randall* v. *Northcote Corporation*, (1910) 11 C.L.R. 100, followed.) 3. That, accordingly, the City Council had not failed to consider the plaintiff's application according to law. *Sadler* v. *Palmerston North City Corporation.* (S.C. Palmerston North. April 12, 1951. Hutchison, J.)

VALUATION OF LAND.

Residences owned by Mining Company in Remote Mining Township and let to Its Employees—Company Only Possible Purchaser of Other Residences and Market Prices accordingly Low—Objections by Company to Valuations of Residences—Prices paid on Monopoly Market—Uncertainty of Company's Future Prospects—Valuations on Existing Basis alone Possible—Onus of showing Valuations Wrong not discharged—Valuation of Land Act, 1925, s. 27. The township of Waiuta was situated at the end of a twenty-four-miles road from Reefton, and the whole township depended entirely on the life and working of the Blackwater mines, which dealt with the recovery of gold by means of quartz-crushing methods. There were no other industries or farms anywhere near Waiuta, and no inducement for anyone other than the mine employees to live there. Some fourteen houses were erected on land comprised in the company's mineral licence, and some forty-one houses on residence sites owned by the company. In addition, there were some seventy-eight houses on residence sites privately owned. Apart from several sales of the privately-owned houses by one employee to another, the only possible purchaser was the company, and, when it bought, the price it paid was very much lower than the valuations made by the Valuation Department. The houses for sale to the company comprised those of employees who wished to leave to go elsewhere and those forming part of deceased persons' estates which had to be sold in order to wind up the estates. One house, for example, valued at £630, was bought in November, 1950, for £320, and another, valued at £165, was bought for £80. On objection by the company to the increased valuations of the residences (apart from the sites), *Held*, 1. That the residences could not be regarded as a wasting asset, tied to the mine, and their life could not be calculated accordingly, but, as it was necessary for the company to have the houses to attract workmen, and as they were being used as homes by the workmen, the residences must be considered on that basis. 2. That it was impossible to anticipate the company's future prospects, and consideration of the position on the existing basis was the only possible course for the Valuation Department to pursue; and, in any event, as new valuations must be made every five years, any alteration in the company's position could be dealt with as it arose. 3 That, with reference to the influence on market prices of the locality and the purpose of the township, the company held a monopoly of the buying market, and was, in effect, able to dictate the price to desperate sellers who had to take a low price to quit; and, accordingly, the prices paid on a monopoly market were no answer to the valuations. 4. That the company had not discharged the onus imposed on it by s. 27 of the Valuation of Land Act, 1925, as it had failed to show that any mistake had been made by the Valuation Department or that the values were incorrect; and, accordingly, the valuations of the company's houses were upheld. *Blackwater Mines, Ltd.* v. *Valuer-General.* (Reefton, May 30, 1951. Thompson, S.M.)

Constitutional Law.

THE PREROGATIVE POWER OF DISSOLUTION.

By J. F. NORTHEY, B.A., LL.M. (N.Z.), Dr. Jur.
(Toronto).

Clause X of the Letters Patent, dated May 11, 1917, constituting the office of Governor-General of New Zealand, provides:

> The Governor-General may exercise all powers lawfully belonging to Us in respect of the summoning, proroguing, or dissolving any legislative body, which now is or hereafter may be established within the Dominion (*a*).

It is this prerogative power of dissolution, conferred by His Majesty on the Governor-General of New Zealand under the above Clause, that the Prime Minister, Mr. S. G. Holland, has advised Lord Freyberg to exercise, in order that a General Election may take place. It will be observed that Clause X provides that the Governor-General *may* grant a dissolution, and theoretically the Governor-General has a complete discretion. However, the exercise of the prerogative of dissolution is controlled by constitutional conventions which determine the circumstances in which the power will be exercised (*b*). In New Zealand, it has been exceptional for Parliaments to be dissolved before their statutory term has expired, but, in the United Kingdom, dissolution under the Royal Prerogative before the expiration of the full term of Parliament is much more common (*c*).

In a discussion of the prerogative powers exercisable by the King or his representatives, it is necessary to note the important place that constitutional conventions occupy in the constitutional law of the British Commonwealth. In constitutional law, the term "convention"[1] has a different meaning from that assigned to it in international law; constitutional conventions are those rules the breach of which will not involve civil or criminal proceedings against those not complying with them.[2] To a very large extent, these conventions govern the relations between the Crown and the Ministry for the time being. The Report of the Conference on the Operation of Dominion Legislation has pointed out that constitutional conventions also play a considerable part in Commonwealth relations. This Report observes:

> The association of constitutional conventions with law has long been familiar in the history of the British Commonwealth; it has been characteristic of political development both in the domestic government of these communities and in their relation with each other; it has permeated both executive and legislative power. It has provided a means of harmonizing relations where a purely legal solution of practical problems was impossible, would have impaired free development, or would have failed to catch the spirit which gives life to institutions. Such conventions take their place among the constitutional principles and doctrines which are in practice regarded as binding and sacred whatever the powers of Parliaments may in theory be.[3]

Because the constitutions of Commonwealth countries are to a greater or less extent unwritten,[4] they lend themselves to alteration to meet changing conditions, and modifications can be brought about by convention without the need for legislative amendment. Unlike Eire, where the principle of Ministerial responsibility has been incorporated in a written constitution,[5] Commonwealth countries have relied on understandings, on practice which has come to be regarded as precedent, to secure that the Crown shall always act on ministerial advice,[6] and also to determine the circumstances in which Ministers shall continue to hold office.

The power of the Crown to grant or to refuse a dissolution of Parliament advised by a Ministry is governed by constitutional conventions. In order to determine what these conventions or rules are, it is necessary to examine the circumstances in which the prerogative power of dissolution has been exercised in the past.[7] It is against this background that we must examine the recent request for, and the grant of, a double dissolution to Mr. R. G. Menzies, the Prime Minister of Australia. The events leading up to the Prime Minister's advice to the Governor-General and the decision of the Governor-General to grant the dissolution sought threw fresh light on the exercise of prerogative powers. For this reason, the "crisis" of March, 1951, is of considerable interest to constitutional lawyers.

It will be recalled that Mr. Menzies invoked the provisions of s. 57 of the Commonwealth of Australia Constitution Act, 1900, when he sought the Governor-General's approval of a double dissolution. Section 57 provides, *inter alia*:

(*a*) The text of the Letters Patent issued under the Great Seal of the Realm appears in *1919 New Zealand Gazette*, 1213, 1214.

(*b*) Sir John Marriott, in his foreword to A. E. Forsey's *The Royal Power of Dissolution of Parliament in the British Commonwealth* (1943), x, points out that "under no circumstances is a Cabinet, still less a Prime Minister, entitled to 'demand' a dissolution from the Crown. . . . That as he [Mr. Forsey] well knows and emphasizes is the exclusive prerogative of the Crown."

(*c*) W. I. Jennings, *The Law and the Constitution*, 3rd Ed. (1943), 82, 83, states: "In the United Kingdom, Parliament is elected for a maximum term but may be dissolved by the King. This is law; but in practice no Parliament continues for its maximum term, and every Parliament since 1832, to go back no further, has been dissolved under the Royal Prerogative."

The remainder of this article has been written, and was in print when the Prime Minister announced that he had advised His Excellency to grant a dissolution.

[1] Dicey seems to have coined the phrase "conventions of the constitution." W. I. Jennings, *The Law and the Constitution*, 3rd Ed. (1943), 79, 80.

[2] E. C. S. Wade and G. G. Phillips, *Constitutional Law*, 4th Ed. (1950), 8, refer to conventions of the constitution as the "many rules and precepts to be mastered by men and women engaged in public life, as well as students of constitutional law, which are not, at all events directly, part of the law of England in the sense that their validity can be the subject of proceedings in a Court of law. In particular, breaches of such rules will not result in a civil action or criminal prosecution being directed against the offender." See also A. B. Keith, *The Dominions as Sovereign States* (1938), 161-167, A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 9th Ed. (1939), xxix, xxx, 417-473, and W. I. Jennings, *The Law and the Constitution*, 3rd Ed. (1943), 79-131.

[3] Report of the Conference on the Operation of Dominion Legislation (1929) (Cmd. 3479), 20.

[4] Even in countries having "written" Constitutions, such as Canada and Australia, constitutional conventions operate, although their ambit is necessarily narrower.

[5] E. C. S. Wade and G. G. Phillips, *Constitutional Law*, 4th Ed. (1950), 13.

[6] A. B. Keith, *The Dominions as Sovereign States* (1938), 162.

[7] For a discussion of the exercise of the prerogative of dissolution, see A. B. Keith, *The Dominions as Sovereign States* (1938), 162-167, 220-225, A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 9th Ed. (1939), 423-438, W. I. Jennings, *The Law and the Constitution*, 3rd Ed. (1943), 165-169, E. C. S. Wade and G. G. Phillips, *Constitutional Law*, 4th Ed. (1950), 61, 62, 88, 89, and E. A. Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth* (1943).

> If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if, after an interval of three months, the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General *may* dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time . . .

The italics are mine.

The section goes on to provide for a joint sitting of the members of the Senate and House of Representatives if, after such dissolution, difficulties continue to obtain in securing the passage of the proposed law. The double dissolution procedure provided in s. 57 had previously been used on only one occasion, in 1914, when the Governor-General, Sir Ronald Ferguson, granted a double dissolution to Mr. Joseph Cook, who was decisively defeated in the elections which followed. The circumstances surrounding the action of the Governor-General on that occasion will be discussed below.

In considering the advice submitted to the Governor-General by Mr. Menzies, it will be convenient to divide the problem into two parts :

(*a*) Compliance with the conditions precedent to the granting of a dissolution under s. 57 ; and

(*b*) These conditions having been fulfilled, as the Governor-General by inference decided, an examination of the principles that govern the exercise of the discretion to grant a dissolution.

Although it would seem that the first part of the question needs only to be stated to be answered, this was not altogether clear until the Governor-General announced his decision. It will be seen that the powers conferred by s. 57 arise only where the Senate has on two occasions, separated by an interval of three or more months, rejected or failed to pass a Bill sent to it by the House of Representatives, or has passed it with amendments unacceptable to the House of Representatives. Until the Governor-General granted the dissolution, it appeared that the Senate had not so acted ; the Senate had referred the Commonwealth Bank Bill, the subject of the dispute, to a Select Committee. The question whether the provisions of s. 57 had been satisfied was one of interpretation, on which opposing opinions could be held, but the Governor-General might well have decided that the action of the Senate did not constitute failure to pass the Bill. If the Governor-General had so decided, the request for a double dissolution could have been refused on that ground, without the need for examining the principles governing the exercise of the Governor-General's discretion. These principles will now be examined.

Having stated the special statutory provision which was invoked in Australia, it is not necessary that the principles which apply generally as to the exercise of the Governor-General's discretion should be scrutinized. It will be noted that s. 57 provides that the Governor-General *may* dissolve both Houses, and we should now discuss the principles which determine the exercise of the Governor-General's discretion. It is logical that attention should first be paid to the double dissolution of the Commonwealth Parliament in 1914.[8] The General Election for the House of Representatives held in 1913 gave the Liberals, under Mr. Cook, 38 seats and the Labour Party 37 seats. As the Liberals formed the Government and one of their members occupied the Speaker's chair and another was Chairman of Committees, the Government could function effectively only if the Speaker and the Chairman of Committees supported Government measures. In the Senate, however, Labour held 29 seats and the Liberals 7. As in the case of the Federal Parliament dissolved in March, 1951, the presence of a Labour majority in the Senate led to difficulties in the enactment of the Government's legislative programme. In 1914, the Governor-General was asked to agree to a double dissolution under s. 57, on the grounds that the Senate was preventing the passage of the Government Preference Prohibition Bill and that the provisions of s. 57 had been satisfied. The Governor-General agreed to the Prime Minister's request, and the following propositions are stated by Dr. Evatt as having been established on that occasion :[9]

(*a*) That, so long as the conditions mentioned in s. 57 are complied with, the Governor-General *will* grant a double dissolution to Ministers who possess the confidence of the House of Representatives. (The italics are mine).

(*b*) That it is not material to consider the importance or significance of the Bill which, being the subject of dispute between the two Houses, becomes the occasion of the double dissolution.

(*c*) That, in particular, it is not necessary that the Senate's rejection of the specified Bill should have created a condition of financial deadlock between the two Houses.

(*d*) That it is immaterial that the Ministers deliberately set out to create the occasion mentioned in s. 57, for that is exactly what the Cook Government did.

It will be noted that Dr. Evatt emphasizes the condition that Ministers should possess the confidence of the House of Representatives, but it is conceived that he states the constitutional convention as to the grant of dissolution in a rather dogmatic form. Had he, in proposition (*a*), used the word "should," instead of the word "will," the precise shade of meaning might have been better expressed. It cannot be doubted that there are occasions when the Governor-General might properly refuse to accept his Ministers' advice, even where they apparently possess the confidence of the Lower House ; but in such cases his right to refuse advice would be exercised only in exceptional circumstances.[10] Subject to this qualification, Dr. Evatt's propositions seem accurately to state the principles on which the Governor-General should act.

In determining the principles governing the exercise of the Governor-General's discretion to accept or refuse the advice of his Ministers, recourse may properly be had to precedents in other parts of the Commonwealth in addition to that of 1914 when the Australian

[8] See H. V. Evatt, *The King and His Dominion Governors* (1936), 37-49, for a full discussion of the circumstances in which the Governor-General accepted the advice tendered to him on that occasion.

[9] *Ibid.*, 45.

[10] A. B. Keith, *The Constitutional Law of the British Dominions* (1933), 150, 151, and W. I. Jennings, *The Law and the Constitution*, 3rd Ed. (1943), 168. The South African precedent of 1939 mentioned *infra* indicates that there are occasions when the Governor-General may properly refuse advice as to dissolution. The Hertzog Ministry did not, of course, possess the confidence of the Lower House.

Governor-General granted a double dissolution. The most important precedent to which attention should be drawn is the refusal by the Governor-General of Canada, Lord Byng, to grant to Mr. Mackenzie King a dissolution of the Canadian House of Commons in 1926. In June of that year, Mr. Mackenzie King advised the Governor-General to dissolve Parliament, which at that time was debating a motion of censure on the Government. It appears that Lord Byng regarded the request as a device for avoiding further discussion on the motion and the possibility of an adverse vote's being taken on the Government's policy. Lord Byng undoubtedly gave the question long and careful consideration and applied himself to an interpretation of the earlier precedents.

It should be noted that no request by a Canadian Prime Minister for a dissolution had been refused since Sir Edmund Head in 1858 refused a dissolution to Premier Brown, and that there had been no instance of refusal of advice as to dissolution tended by the Federal Prime Minister since the passing of the British North America Act, 1867.[11] In order fully to appreciate the background to the controversy as to the powers of a Governor-General, it should be mentioned that the General Election of 1925 gave the parties the following representation in the House of Commons:

Conservative Party (led by Mr. Meighen)	116
Liberal Party (led by Mr. Mackenzie King)	101
Progressive Party	24
Labour Party and Independents	4

The Governor-General apparently decided that, as the election of 1925 had not given Mackenzie King's administration a clear mandate, and as the continued support of the Liberals by the Progressives was in doubt, he was justified in refusing the request for a dissolution and inviting the Leader of the Opposition, Mr. Meighen, to form a government. Mr. Mackenzie King resigned on June 28, 1926, when his request for a dissolution was declined, and on June 29 Mr. Meighen, as the leader of the largest party in the House of Commons, was asked to form a government.[12] Unfortunately for Lord Byng, as otherwise his actions would not have attracted so much criticism, Mr. Meighen was unable to form a government having the support of the House of Commons; he was obliged in consequence to resort to various devices—strictly legal, but unlikely to appeal to the electorate—to maintain himself in power. He did not make any appointments to the Privy Council, except in an acting capacity, as this would have involved the vacation by those persons of the seats in the House of Commons; pending the holding of elections, he would thus have been placed in a worse position in the House.[13] To secure supplies for necessary Government expenditure, Mr. Meighen resorted to special warrants signed by the Governor-General, because appropriations had not been voted by Parliament.[14] When, on July 2, 1926, it became apparent that the Meighen administration could not maintain itself, the Prime Minister asked that Parliament be dissolved, to which request the Governor-General, rather surprisingly, agreed.[15]

The ensuing election, fought mainly on the constitutional issues involved, returned Mr. Mackenzie King to power. Mr. Mackenzie King stated in his election manifesto:

> In a word, the position I took was that in Canada the relation of the Prime Minister to the Governor-General is the same in all essential respects as that of the Prime Minister to the King in Great Britain.[16]

In effect, the electorate rejected the Governor-General's interpretation of the political situation and his powers.[17] It should be observed, however, that Dr. Evatt has warned against the acceptance of the decision of the electorate as *ex post facto* justifying or rejecting the stand taken by the Governor-General.[18] Mr. Mackenzie King pointed out in his election campaign that it was illogical for a Governor-General to refuse a dissolution to a Prime Minister who had not been defeated in the House and shortly afterwards to agree to the request of his successor, who, because of the poor support available to him, was not prepared to face the House.[19]

Professor Keith, in a letter to the *Manchester Guardian* of July 8, 1926, stated that:

> it is a matter for serious regret that Lord Byng should thus have ignored the new status of the Dominions as coequal members of the British Commonwealth of Nations . . . Whatever may be said of Lord Byng's action generally in this matter, it is clear that he has failed in the fundamental duty of securing the observance of the law and customs of the Constitution.[20]

Dr. Evatt[21] considers that Lord Byng's error lay not so much in the refusal of the dissolution to Mr. Mackenzie King as in his subsequent acceptance of Mr. Meighen's advice without first consulting Mr. Mackenzie King. It is Dr. Evatt's contention that, after Mr. Meighen's failure to form a Government, Mr. Mackenzie King would have been entitled to a dissolution if he had been consulted and had advised such a course. Professor Keith[22] took issue with Dr. Evatt on this point, because, in Keith's opinion, a dissolution should have been granted to Mr. Mackenzie King without inviting Mr. Meighen to form a government.

The Imperial Conference of 1926, having considered the problem, at the request of the Canadian representatives adopted a resolution that the Governor-General holds in all essential respects the same position in relation to the administration of public affairs in a Dominion as is held by His Majesty in Great Britain. The text of this resolution reads:

> In our opinion it is an essential consequence of the equality of status existing among the members of the British Commonwealth of Nations that the Governor-General of a Dominion is the representative of the Crown, holding in all essential

[11] See E. A. Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth* (1943), 143, 144.

[12] R. McG. Dawson, *The Government of Canada* (1949), 390.

[13] A. B. Keith, *The Dominions as Soverign States* (1938), 162, 240.

[14] A. B. Keith, *The Dominions as Sovereign States* (1938), 162.

[15] H. V. Evatt, *The King and His Dominion Governors* (1936), 55-64, and A. B. Keith, *Letters and Essays on Current Imperial and International Problems 1935-6* (1936), 84, 85.

[16] R. McG. Dawson, *Constitutional Issues in Canada* (1933), 81 *et seq.*

[17] Mr. Meighen, however, affirms that "the Governor-General was right and Mr. Mackenzie King was wrong." A. Meighen, *Unrevised and Unrepented* (1949), 169. He is supported by E. Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth* (1943), 131-250, and (1950) *6 International Journal*, 82, 83.

[18] H. V. Evatt, *The King and His Dominion Governors* (1936), 165.

[19] The text of this speech appears in A. B. Keith, *Speeches and Documents on the British Dominions* (1931), 149-160, and A. B. Keith, *The Dominions as Sovereign States* (1938), 221.

[20] A. B. Keith, *Letters on Imperial Relations, Indian Reform, Constitutional and International Law 1916-1935* (1935), 59.

[21] H. V. Evatt, *The King and His Dominion Governors* (1936), 62.

[22] A. B. Keith, *Letters and Essays on Current Constitutional and International Problems 1935-6* (1936), 84, 85, and A. B. Keith, *The Dominions as Sovereign States* (1938), 221.

respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain, and that he is not the representative or agent of His Majesty's Government in Great Britain or any Department of that Government.[23]

It will readily be seen that the adoption of this resolution does not provide a complete solution to the problem, as there are no clear-cut conventions that govern the action of His Majesty in relation to requests for dissolutions.[24] It appears from the precedents in the United Kingdom, including the grant in 1924 of a dissolution to Mr. Ramsay MacDonald, and from the precedents in other parts of the Commonwealth since 1926, that it is unusual for His Majesty or a Governor-General to refuse to grant a dissolution advised by the Prime Minister. Professor Keith has stated :

It is, of course, too much to say that the Governor[-General] must grant a dissolution inevitably on a request from his Government. It is obvious that only one dissolution can be asked for by the same Ministry within a limited period ; if it fails to secure a majority at a dissolution, it cannot imitate Continental practice and endeavour to secure a complacent Legislature by a series of dissolutions. The King in a like case would clearly be compelled to refuse dissolution, and would then find a new Government to support his action.[25]

It would seem that all that can safely be said is that it would require exceptional circumstances to justify the King or a Governor-General refusing a dissolution, but, if a request were made immediately after a general election, the Governor-General might properly refuse the request, unless some new problem of major importance had arisen in the meantime.[26] Professor Jennings states that :

it is not at the present time settled whether the King is bound to dissolve Parliament at the request and at the request only of the Prime Minister.[27]

If a dissolution is refused, however, the Governor-General must find a new Government which will *ex post facto* accept responsibility for the decision to refuse a dissolution. The refusal by Sir Patrick Duncan, Governor-General of South Africa, to accept the advice of General Hertzog that Parliament be dissolved in 1939 is a clear illustration of the principles that the Governor-General may, in a proper case, refuse the advice of his Prime Minister and that the incoming Government must accept responsibility for the decision taken by the Governor-General. It does not follow, as Wade and Phillips suggest,[28] that the refusal of the advice of the Prime Minister as to dissolutions will involve the King or his representative in a political controversy, although there is a very real danger that such might be the result. However, if, as occurred in South Africa in 1939, the King or the Governor-General should secure the appointment, on the resignation of the Prime Minister whose advice was not accepted, of a Ministry with the support of the Lower House, his action could scarcely be called in question.

The Governor-General of Australia, when advised to dissolve both Houses of Parliament, must first decide whether the case is a proper one for the exercise of the power of dissolution conferred by s. 57, and, if he decides that it is, he must then proceed to determine whether or not His Majesty would, in similar circumstances, act on the advice of his United Kingdom Ministers to grant a dissolution of the House of Commons. It cannot be over-emphasized, however, that the Governor-General has a discretion in the matter, and, if the Governor-General of Australia had refused the dissolution sought, either because he considered that the conditions stated in s. 57 had not been satisfied or because he felt that the case was not one for the grant of a dissolution, it would have been improper to attack him for having violated constitutional principles.

Perhaps the least satisfactory aspect of the foregoing discussion of the prerogative power of dissolution—and this criticism extends to the prerogative powers generally—is the fact that there are no clear rules that govern the exercise of these powers. The actions of the King or his representative tend to become the subject of criticism, as they did in the Lord Byng-Mackenzie King incident, when the decision taken by the King or his representative might have a decisive effect on the fortunes of the political parties. This unsatisfactory state of affairs has attracted the attention of at least two prominent constitutional lawyers. Professor Kennedy, formerly Dean of the Faculty of Law, University of Toronto, who is accepted as a leading authority on the Canadian constitution, has stated :

Canada cannot rely on these indefinite and indecisive precedents [for the guidance of the King], which merely provide " case-law " for argument, and it must work out its own procedure on the principle that the rules of executive authority in the United Kingdom cannot be imitated, for they do not exist as rules ; and should not be imitated if they did exist. We need definite regulations in this connection.[29]

Professor Kennedy believes that, as the offices of King and Governor-General are not comparable in many respects, the precedents that guide His Majesty are not suitable for adoption in the Dominions ; he stated that :

it is impossible to expect him [the Governor-General] to follow English precedents, for they are neither clear nor applicable.[30]

Dr. Evatt, who subjected the constitutional conventions relating to the exercise of the prerogative powers of dissolution and dismissal to a most searching analysis in *The King and His Dominion Governors*, argues that it would be better for those concerned with the exercise of these powers, and not the least for the Crown itself, if the constitutional conventions were converted into rules of positive law. Speaking of the power to grant or refuse a dissolution, he stated :

It is desirable in the interests of the Crown and of its Dominion representatives that there should be more precise rules governing the circumstances and conditions under which a dissolution should be granted and should be refused. The absence of such rules does not necessarily bring the King or the Governor-General into the realm of political discussion and criticism, but its presence would be a complete safeguard against the possibility of misunderstanding and possible condemnation.[31]

As to constitutional conventions generally, Dr. Evatt pleads for their clarification and enactment as law in these words :

If Parliamentary government is to endure, it is essential that this constitutional no-man's-land should be finally

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[23] Report of the Imperial Conference (1926) (Cmd. 2768), 16.

[24] See W. P. M. Kennedy, *The Constitution of Canada 1934-1937* (1938), 505, 506, and H. V. Evatt, *The King and His Dominion Governors* (1936), 60, 69, 120, 286.

[25] A. B. Keith, *The Dominions as Sovereign States* (1938), 222, 223.

[26] Wade and Phillips, *Constitutional Law*, 4th Ed. (1950), 61, 62, 88, 89, A. B. Keith, *Letters on Imperial Relations, Indian Reform, Constitutional and International Law 1916-1935* (1935), 68, 69, A. B. Keith, *The Dominions as Sovereign States* (1938), 223, and H. V. Evatt, *The King and His Dominion Governors* (1936), 255, 256.

[27] W. I. Jennings, *The Law and the Constitution*, 3rd Ed. (1943), 71 ; see also pp. 166-168.

[28] E. C. S. Wade and G. G. Phillips, *Constitutional Law*, 4th Ed. (1950), 61.

[29] W. P. M. Kennedy, *The Constitution of Canada 1534-1937*, 2nd Ed. (1938), 505.

[30] *Ibid.*, 505, 506.

[31] H. V. Evatt, *The King and His Dominion Governors* (1936), 69 ; see also the views of Professor K. H. Bailey, *Ibid.*, xvi.

explored. In defining the conventions and maxims great difficulty will, no doubt, be involved. There will be greater dangers involved if the questions continue to be neglected. Although the declarations of the Imperial Conferences of 1926 and 1930, and the passing of the Statute of Westminster in 1931, have gone some little way towards carrying out the task in relation to certain aspects of Dominion self-government, very much remains to be done both in Great Britain and most of the Dominions.[32]

It will be recalled that constitutional conventions have the virtue of enabling changes to be made without the need for formal amendment of the law. It is claimed that by means of conventions the elasticity of the constitution is preserved, but Professor Kennedy has remarked that :

> " Elasticity " is a blessed word, but like many blessed words is too often a shibboleth. We must realize that, if the Governor-General is to act always on the advice of his Ministers, then the Cabinet is supreme and free from all restraint ; that, if he is to have reserve power, then we may have the bandying of authorities all over again ; that it is impossible to expect him to follow English precedents for they are neither clear nor applicable.[33]

Dr. Evatt has pointed out that :

> If the situation is allowed to continue without any alteration, the Sovereign, Governor-General, and the Governor will have to determine for themselves, on their own personal responsibility, not only what the true constitutional convention or practice is, but also whether certain facts exist, and whether they call for the application of the rule which is alleged to be derived from, and consistent with, all constitutional precedents. Even if, upon the given occasion, no extraordinary exercise of the Crown's prerogative results, the possibility of its exercise has always to be reckoned with, and this inevitably creates uncertainty and distrust.[34]

In so far as the conventions relating to the exercise of the prerogative of dissolution are concerned, it is believed that the advantages of flexibility are outweighed by the disadvantages of uncertainty as to their scope.[35] They have the added disadvantage that their very vagueness is liable to involve the King or his representatives in a political controversy similar to that which occurred in 1926 in Canada and in 1931 in the United Kingdom, when Mr. Ramsay MacDonald was permitted to retain the Premiership despite the fact that the great majority of his supporters withdrew their allegiance from him. It would be preferable if these conventions were reduced to a set of rules, and, if this were done, there would be little room for controversy over the decisions of the King or his representatives. The fact that in the Constitution of Eire it was possible to incorporate into the law the conventions governing Ministerial responsibility suggests that the task of codifying these conventions would not be impossible.

[32] H. V. Evatt, *The King and His Dominion Governors* (1936), 120 ; see also *ibid.*, 286, 292.

[33] W. P. M. Kennedy, *The Constitution of Canada, 1534-1937*, 2nd. Ed. (1938), 505, 506.

[34] H. V. Evatt, *The King and His Dominion Governors* (1936), 286. Dr. Evatt's conclusion is that " there should be more precise rules . . . " : *Ibid.*, 69, 120, 289.

[35] A. E. Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth* (1943), has subjected the precedents relating to dissolution to a most careful analysis. He has also criticized the opinions of many writers as to the interpretation of these precedents. The conclusions offered by Dr. Forsey (pp. 257-271) strengthen the views put forward above that the constitutional conventions as to dissolution, &c., should be converted into definite rules, not only because of the vagueness of the existing principles, but also because of the directly opposite interpretations that can sometimes be placed on past precedents.

LIMITED CERTIFICATE OF TITLE.

Proof of Non-Extinguishment of Limited Certificate of Title by Statutes of Limitation.

By E. C. ADAMS, LL.M.

EXPLANATORY NOTE.

Every solicitor and conveyancer in New Zealand is well aware of the general rule that the estate or interest of a registered proprietor under the Land Transfer Act cannot be extinguished by adverse possession. Section 60 of the Land Transfer Act, 1915, provides that, after land has become subject to that Act, no title thereto, or to any right, privilege, or easement in, upon, or over the same, shall be acquired by possession or user adversely to, or in derogation of, the title of the registered proprietor. It was held in the leading case of *Campbell* v. *District Land Registrar of Auckland*, (1910) 29 N.Z.L.R. 332, that the term " registered proprietor " in this section includes not only the registered proprietor of the fee simple, but also the registered proprietor of every other estate or interest in the land. Although all this is very well known in legal circles in New Zealand, the exceptions to this general rule are not nearly so well known.

The first exception, which may be mentioned, is s. 43 of the Statutes Amendment Act, 1936, which somewhat undermines the principle as to mortgages. This section enables the Supreme Court *in its discretion* to make an order directing a mortgage to be discharged, if it is satisfied that any action by the mortgagee for payment of the moneys secured by the mortgage would be barred by any Statute of Limitation and that, but for the provisions of s. 60 of the Land Transfer Act, 1915, the remedies of the mortgagee in respect of the mortgaged land would be likewise barred. The mortgage, however, is not discharged until the District Land Registrar enters a memorandum of the Court order on the Register Book. It appears that, until the order vacating the mortgage is so registered, the title of the mortgagee is indefeasible, and he could confer an indefeasible title on a purchaser by exercising his power of sale : *Suttie* v. *Te Winitana Tupotahi*, (1914) 33 N.Z.L.R. 1216, *Waimiha Sawmilling Co., Ltd. (In Liquidation)* v. *Waione Timber Co., Ltd.*, (1925) N.Z.P.C.C. 267, and *B.* v. *M.*, [1934] N.Z.L.R. s. 105.

An order under this section was recently made by Mr. Justice Callan, but His Honour declined to lay down any rules governing the Court in the exercise of its discretion : *In re A Mortgage, Pearce to Sansom*, [1951] N.Z.L.R. 331.

What at first sight appears to be rather a disturbing exception to the general rule of indefeasibility enshrined in s. 60 of the Land Transfer Act, 1915, is s. 72, which makes every certificate of title void, as against the title of any person adversely in occupation of, and

rightfully entitled to, the land, or any part thereof, *at the time when such land was first brought under the Land Transfer Act.* A little reflection, however, will convince anyone with a knowledge of the history of conveyancing in New Zealand that extremely few Land Transfer titles can be invalidated by the operation of s. 72. The writer has known of only one instance in practice where this section was invoked, and even in that case it was eventually admitted that the certificate of title issued was not invalidated by s. 72. Title to land in New Zealand has its origin in grant from the Crown: s. 72 could apply, for example, where the Crown grants land to the subject when a trespasser has already acquired title by operation of a Statute of Limitation. If the land has not already been Crown-granted, the subject can acquire a valid title as against the Crown only by sixty years' continuous and adverse possession by virtue of the Nullum Tempus Act (the Crown Suits Act, 1769): *Riddiford* v. *The King*, (1905) N.Z.P.C.C. 109. The Limitation Act, 1950, which comes into force on January 1, 1951, repeals the Nullum Tempus Act, but retains the period of sixty years before the Crown's claim to land can be extinguished by the adverse possession of a trespasser. It is not likely that the Crown will grant land if it has been in the adverse possession of a trespasser for sixty years or more. Section 72 of the Land Transfer Act, 1915, might operate to invalidate a certificate of title issued on an order of the Maori Land Court, which has been allowed to lie for an unconscionable time in the Maori Land Court, but even that is very unlikely, for s. 73 of the Maori Land Court Act, 1894, provides that the person entitled to a certificate of title shall be deemed to be the registered proprietor of the land—*i.e.*, to have all the benefits of a registered proprietor before he is a registered proprietor in actual fact—and, when a certificate of title is eventually issued, such certificate is ante-vested to the date on which he first became entitled to a certificate of title.

With the passing of the Land Transfer (Compulsory Registration of Titles) Act, 1924, however, a change comes over the scene. Section 60 had to be considerably modified with regard to many titles issued under that Act. Section 3 of that Act instructed the District Land Registrars to bring under the Land Transfer Act, 1915, with all convenient speed all land theretofore alienated from the Crown for an estate in fee simple and not already subject to that Act. Now, when that Act came into force, in April, 1925, New Zealand had been a British possession for eighty-five years, and during that time the Real Property Limitation Act, 1833, had been in force in New Zealand, except as to Land Transfer titles as explained above. (The Limitation Act, 1833, will remain in force in New Zealand until January 1, 1952, when it will be replaced by the Limitation Act, 1950, which shortens the period which a trespasser requires to obtain a good title, as against the private owner *de jure*.) Therefore, as regards titles compulsorily brought under the Land Transfer Act, 1915, by the Registrar, it was not practicable in most cases to issue fully-guaranteed titles. Most certificates of title were issued limited—*i.e.*, limited as to title, or limited as to parcels, or limited as to parcels and title. The reason for the issue of certificates limited as to parcels may be best explained in the clear language of the then Registrar-General of Land (Mr. C. E. Nalder):

> To issue fully-guaranteed titles without requiring surveys would be to invite numerous claims upon the Assurance Fund in cases which abound especially in towns, where the documentary title holder has lost his title to part of the land by encroachment and adverse possession of his neighbour, and in cases where descriptions of land in deeds are erroneous.

Now, most owners and their successors in title who had titles limited as to parcels have been perfectly satisfied to have their titles remain so limited. Certificates of title limited as to parcels are not guaranteed as to the position, area, or boundaries of the land. But this is not the only incident or risk which the registered proprietor of a limited title runs. In fact, his limited title may have become absolutely extinguished by operation of the Real Property Limitation Act, 1833.

Section 16 (1) (*d*) of the Land Transfer (Compulsory Registration of Titles) Act, 1924, expressly makes a limited certificate of title subject to the title (if any) of any person adversely in actual occupation of, and rightfully entitled to, any such land, or any part thereof. But this is not all, for subs. 3 of the same section provides that, notwithstanding the provisions of s. 60 of the principal Act, the issue of a limited certificate of title for any land shall not stop the running of time under the Statutes of Limitation in favour of any person in adverse possession of such land *at the time of the issue of such certificate*, or in favour of any person claiming through or under him. The crucial date, therefore, with regard to a limited certificate of title when a trespasser has got into possession, is the date the Registrar first brought the land under the Land Transfer Act, 1915. It is not necessarily the date of the issue of the present certificate of title, for the original certificate of title may have been cancelled and a substituted one, also limited, issued therefor in accordance with s. 14. Some of the limited certificates of title have now been issued for more than twenty-five years, and a person contracting or dealing with the registered proprietor is entitled to be satisfied that the registered title has not become extinguished by operation of the Statutes of Limitation, which will depend upon whether a trespasser was in possession at the date of the first bringing of the land under the Land Transfer Act, 1915, and the duration of the trespasser's possession. If the adverse possession began after the land was first brought under the Land Transfer Act, 1915, it will not avail against the title of the registered proprietor, whose title will be protected by s. 60 of the Land Transfer Act, 1915.

Section 17 of the Land Transfer (Compulsory Registration of Titles) Act, 1924, constitutes the procedural complement to the substantive law which I have been explaining above. So long as any land continues to be comprised in a limited certificate of title, any person claiming to be seised or possessed of an estate of freehold in such land, or any part thereof, by virtue of possession adverse to the title of the proprietor in whose name such certificate of title was issued, may make an application under the provisions of the Land Transfer Act, 1915, as if the later Act had not been passed and the limited certificate of title had not been issued. The Examiner and Registrar shall deal with such application in the manner provided by the Land Transfer Act, 1915, and, if they are satisfied as to the grounds of the applicant's claim, the Registrar shall in due course issue an ordinary certificate of title to the applicant, and shall call in and cancel or correct the limited certificate of title, as the case may require, under the powers conferred upon him by the principal Act for the correction of errors.

The following precedent has been drawn to satisfy a proposed purchaser from the registered proprietor, or to satisfy the District Land Registrar upon a request to remove limitations, that the registered title has not become extinguished by operation of the Statutes of Limitation. Obviously such a declaration should set out, as far as practicable, the facts of occupation and possession from the date of first bringing the land under the Land Transfer Act, 1915. A mere bald statement that no person is in adverse possession in relation to the registered proprietor is not sufficient.

PRECEDENT.

IN THE MATTER of the Land Transfer (Compulsory Registration of Titles) Act, 1924

AND

IN THE MATTER of Certificate of Title Vol. Folio Registry.

I A. B. of Wanganui widow do solemnly and sincerely declare as follows:

1. That I am the widow of C. D. late of Wanganui accountant who died at Wanganui on or about the day of December 1936.

2. That probate of the will of the said C. D. was granted to me as the executrix out of the Supreme Court of New Zealand at Wanganui on the day of March 1938.

3. That at the time of the death of my said husband the said C. D. he was the registered proprietor of ALL THAT parcel of land situate in the city of Wanganui containing [*Set out area*] more or less being [*Set out official description of land*] and being now all the land comprised and described in Certificate of Title Volume Folio Registry.

4. That from the date of the death of my said husband down to the year 1948 the said property was let off and on to several tenants and I collected all the rents and paid all the outgoings including the instalments under the outstanding Deed of Mortgage No. which has now been repaid.

5. The dwelling which was erected on the said land fell into disrepair and when the property finally became vacant in the year 1948 I decided not to relet it. It was my intention to demolish the said dwellinghouse.

6. I was unable to get the dwelling demolished just when I wanted to with the result that the dwelling remained unoccupied till the month of December 1949 when it was occupied by squatters. Court proceedings were subsequently instituted to obtain possession and finally in the month of March 1950 an order was made for possession and the said dwelling was vacated on or about the 1st day of May 1950.

7. I thereupon arranged for the dwelling to be demolished which was done in or about the month of June 1950 and from that date down to the present time there has been no building of any description on the said land which has remained vacant.

8. The said land which is now a vacant section is not held in possession adverse to the registered proprietor.

9. That since the death of my said husband the said C. D. I have paid all rates due in respect of the said land as well as the instalments due in respect of the said outstanding Deed of Mortgage which has now been repaid.

10. As the executrix of the will of the late C. D. I am now entitled to be registered as the proprietor of the estate and interest in respect of which the said C. D. was so registered as proprietor.

AND I make this solemn declaration conscientiously believing the same to be true and by virtue of the Justices of the Peace Act 1927.

DECLARED, &c.

CORRESPONDENCE.

Salaries of the Judges.

The Editor,
NEW ZEALAND LAW JOURNAL,
Wellington.

Dear Sir,

In reading with interest the Conference issue of the JOURNAL and your excellent report of the proceedings thereat, I am tempted to address you on the remit dealing with the salaries of the Judges, which was so ably proposed by Mr. G. M. Lloyd.

The upshot of the debate was that the Conference adopted the recommendation of the President of the New Zealand Law Society that the whole matter be referred to the New Zealand Law Society for action.

One naturally wonders whether this remit is to suffer the same fate as remits on the same subject have suffered in the past. You will no doubt recall that, at the last Legal Conference in Wellington, in the course of reading a paper I commented upon the leisurely manner in which the Council of the New Zealand Law Society conducted its business, and instanced judicial salaries as a typical example. On that occasion, I said: "But looking further back, and with particular reference to my statement that the Council nowadays is too ponderous and too slow to conduct our business efficiently, I find that in 1928 at our first Legal Conference, a resolution for the immediate revision of judicial salaries was unanimously passed. It was reaffirmed in 1929. No doubt there may be a good story to be told as to the vicissitudes of those motions, but the plain fact remains that it was not until 1946 that any increments were forthcoming."

The paper also stated that the Magistrates had improved their status, not as a result of the labours of the New Zealand Law Society, but as a result of a series of petitions to Parliament presented in 1944 by Mr. A. M. Goulding, S.M., and others.

One hopes that this remit too will not be quietly interred in the archives of the New Zealand Law Society.

Reverting to the remit itself and the discussion that followed, I cannot agree with my friend Mr. C. A. L. Treadwell that it is embarrassing to suggest the precise salaries to be paid to Supreme Court Judges, or to give a definite lead as to appropriate pension arrangements. Since judicial salaries were first fixed and pension rights conferred, there have been major social changes, and the present pension provisions, judged by modern superannuation schemes, are completely out of date.

With every respect, I think that the Conference should have attempted to settle a salary figure which could be the subject of negotiation with the Government.

Mr. Lloyd's very useful review of judicial salaries in other countries suggests that it would not be inappropriate, having regard to the real value of to-day's pound, to claim that the Chief Justice's salary should be at least £4,500 and the salaries of his colleagues £4,000.

Whether or not another figure be ultimately settled, a definite claim must precede negotiations with the Government, and preferably it should be made and decided upon in open conference.

Reverting to the pensions, it seems to me that the existing arrangement applies the principle of "the survival of the fittest," and should be abandoned in favour of the well-established modern scheme which gives the Judge an option, during a fixed period preceding retirement, of taking either a single pension for his life only or a reduced pension for the joint lives of himself and his wife and thereafter during the life of the survivor. Furthermore, as the ultimate pension is really earned, the pension should be payable in any event for a period of (say) five years certain following retirement, irrespective of survivorship for that period.

Superannuation provisions along the above lines are now quite common features of modern superannuation provisions, and there is no valid reason why they should not apply to members of the Judiciary.

I make these suggestions in the hopes that we may have the views of others and thereby give the New Zealand Law Society a working basis for its approach to the Government, and that, when the next Legal Conference is held, we will receive a report that the task now entrusted to the New Zealand Law Society has been satisfactorily accomplished.

Yours, &c.,
D. W. VIRTUE.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Judicial Salaries.—Speaking recently on the debate in the House of Lords on the salaries of County Court Judges, Viscount Simon said that, if it was true—and he knew that it was—that many County Court Judges were haunted and harassed by financial worries, that unquestionably gravely threatened the completely efficient discharge of their duties. In view of the present high cost of living and the heavy burden of taxation, men whom he might be glad to select for this most important post did not come forward, because the effective remuneration was inadequate and unattractive. (County Court Judges receive £2,000 per annum, as do Metropolitan Police Magistrates.) He instanced that the Clerk to the London County Council had £3,750, the Education Officer £3,500, and the Clerk to the Central Criminal Court £3,000. There is a Ripley touch about the odd fact that the Chief Justice of New Zealand enjoys (if that term be apt) an emolument £500 less than the last-mentioned Clerk.

The Weight of Numbers.—Dean Griswold of the Harvard Law School told a charming story against himself to a small gathering of practitioners who entertained him in Wellington recently. It seems that on one occasion he was appearing for the Solicitor-General of the United States before the Supreme Court on an appeal heard by eight of the Justices, the ninth being ill. On delivery of judgment, it was found that the Court was against him by five to three. He wrote a note of congratulations to his opponent, but could not forbear mentioning that he had the best Judges on his side. The reply was cryptic. "So long as I can get the other five with us in this Court," wrote his opponent, "you can have the three best Judges every time."

Costs.—The reluctance, bordering often on horror, with which the average politician considers questions of legal costs is exemplified by the attitude of the Victorian Premier (Mr. McDonald) towards a request by the Frank Hardy Defence Committee to pay Hardy's legal costs (amounting to £2,450) arising from the "*Power without Glory*" case. Hardy is the author of a novel of that name, and was recently acquitted on a charge of criminal libel, certain of the less pleasant characters of the book being claimed to be malicious and defamatory pictures of well-known people of an earlier Australian era. The Premier, in forcible if somewhat ungrammatical language, made no bones about the matter. "The Government will not pay these costs," he said, "not even if it is the last thing I do." But this may well be no more than a mild suggestion that he does not want to be bothered at all about the matter. Even Judges can be painfully direct on this subject. For instance, Stanton, J., concludes his judgment in *In re Matthews (deceased), Matthews* v. *New Zealand Insurance Co., Ltd.*, [1951] G.L.R. 120, by saying, at p. 121: "If the amounts for the plaintiff and Barbara cannot be agreed upon, I will hear counsel and settle them." Counsel, however, are for the most part a hardy and tenacious tribe.

Plea in Mitigation.—Would there be less crime if the conditions under which we live could be improved? Scriblex has just heard of a man who pleaded guilty the other day to several charges of breaking and entering. "What puzzles me," remarked the Judge when the prisoner appeared for sentence, "is how you could dare to break into the same house three times running." "Ah, your Honour," said the prisoner, "it's this wretched housing shortage."

Conference Memo.—Members of the English Law Society are to hold their Annual Conference at Harrogate between September 24 and September 28, 1951. The programme shows that on the second day discussions on such varied topics as legal aid, professional purposes, scale of fees, and articled clerks share the honours with a mannequin parade. Here is an admirable idea, and one that must commend itself strongly to the Hawke's Bay Law Society, which is to be, according to rumour, a keen contender for the next biennial Legal Conference. It is to be hoped, however, that the judging of such a parade will not be entrusted to anyone with an actual status less than that of a Judge of the Supreme Court. It would be better still if a visiting Lord Justice of Appeal were available, or, failing him, the Chief Justice of Ceylon.

Simplification by Regulation.—The *Law Journal* has recently been informed that, in a recent contest to translate English into United States Federal prose, the first prize—a coat of arms showing a stuffed bureaucrat rampant on a bound volume of the Congressional Record, the gift package done up in red tape—went to the translator of the proverb "A rolling stone gathers no moss" into the language in which it would be described in a Government regulation and, for conciseness, gathered into one sentence:

> A detached fragment of the terrestrial lithosphere, whether of igneous, sedimentary, or metamorphic origin, and whether acquiring its approximation to sphericity through hydraulic action or other attrition, when continuously in motion by reason of the instrumentality of gravitational forces constantly acting to lower its center of gravity, thus resulting in a rotational movement around its temporary axis and with its velocity accelerated by any increase in the angle of declivity, is, because of abrasive action produced by the incessant but irregular contact between its periphery and the contiguous terrain, effectively prevented from accumulating on its external surface any appreciable modicum of cryptogamous vegetation normally propagated in umbrageous situations under optimum conditions of undeviating atmospheric humidity, solar radiation, quiescence, and comparative sequestration from erosive agencies.

Matrimonial Note.—

Mr. Raham: On another occasion I recommended a gentleman to take a stick and give his wife a few strokes with it. I don't know if he got excited or what, but he gave her a regular hiding.

Victoria: How awful!

Mr. Raham: It was indeed, for she threw her arms round his neck, and, saying she adored him, refused to have anything more to do with the divorce. She was going to marry a Colonel in the Army, and he was most offensive to me about it. I had to tell him that if he didn't leave my office I would send for the Police.

—Somerset Maugham, *Home and Beauty*.

OBITUARY.

Mr. Martin Luckie, O.B.E. (Wellington).

On July 6, the members of the profession in Wellington met at the Supreme Court to pay tribute to the memory of the late Mr. Martin Luckie, O.B.E., who had been a highly respected lawyer and citizen in Wellington for many years.

On the Bench were the Acting Chief Justice, Sir Arthur Fair, Mr. Justice Northcroft, Mr. Justice Finlay, Mr. Justice Gresson, Mr. Justice Hutchison, and Mr. Justice Cooke, as well as the Hon. Sir David Smith, the Hon. Sir Robert Kennedy, and the Hon. H. H. Cornish.

There was a large attendance of members of the profession.

The Magistracy was represented by Messrs. A. A. McLachlan, J. S. Hanna, J. Hessell, M. B. Scully, and R. M. Grant.

The Solicitor-General.

The first speaker was Mr. H. E. Evans, K.C., Solicitor-General, who said:

"I have been asked by the Attorney-General, who regrets that he is unavoidably prevented from being present this morning, to take his place in paying a tribute to the memory of the late Mr. Martin Luckie, who died three days ago after a full and useful life of eighty-three years.

"Mr. Luckie had practised in Wellington for over fifty-five years, and had gained our admiration, respect, and affection. He was a trusted and careful guardian of the interests of his clients, scrupulous in upholding and observing the highest traditions of our profession, and courteous and co-operative in all his dealings.

"It is much to be able to say of a member of our profession that he has earned his living by diligent, capable, and honourable service to his clients; but it is even more to be able to say of him that, besides all that, he has generously and freely given his time and the benefit of his experience to the service of his fellow-citizens. There is probably no profession or calling affording a better training for such service, or greater opportunities for rendering it, than our own. Mr. Luckie has left behind him an unparalleled record of service to this City and to a large number of public objects. That great service has been energetically but quietly and modestly given, and has so gained the public confidence that the call to continue it has been constantly renewed throughout his career. It was well said, when we attended his funeral service on Wednesday, that his life has been an example of things of real value,—sincerity, simplicity, and service.

"May our respectful sympathy, and the tributes paid here and elsewhere to his life and work, be consolations to his widow and daughters in their bereavement."

The Wellington District Law Society.

In addressing the Bench, the President of the Wellington District Law Society, Mr. C. A. L. Treadwell, said that he wished, on behalf of the Wellington District Law Society, to pay tribute to the memory of the late Mr. Martin Luckie. The President continued:

"Mr. Luckie had practised his profession here in Wellington since his admission as a barrister and solicitor in 1893. For many years he appeared not infrequently in this Court, where he conducted himself with courtesy and distinction. Latterly, he confined his activities to the conveyancing side of our calling, where, with his wide experience and sagacity, he served his clients well.

"His kindliness and helpfulness were always extended to his less experienced brethren, earning for himself the affection and high regard of us all.

"Although always busily engaged in his profession, he found time to serve his brethren on its Council. For eleven years in all he was a member of our Council, and from 1920 to 1922 he was successively Treasurer, Vice-President, and President. In addition to bearing office in the District Law Society, he was a member of the Council of the New Zealand Law Society in 1922 and from 1927 to 1930.

"Apart from his profession, he also served for thirty-six years in municipal office the City he loved so well, and such service was graciously recognized by His Majesty the King. The City, too, marked its high appreciation of his public service—a service as yet unparalleled here—and has perpetuated his memory by naming a great park and playing-ground the Martin Luckie Park. It is not here, however, that I should expatiate upon his public services, beyond saying that he applied in the wider sphere of public service the talents which so well fitted him for his professional calling.

"We who knew him well will ever remember him with affection and admiration.

"Now that he has gone, after a full life of service, we may reflect upon his character. One is reminded in doing so of the words of a great English philosopher, who recently said that to make a man great he must possess certain attributes, two of these attributes being ideal aims and sportsmanlike principles. Those two attributes Martin Luckie possessed in full measure. There was in him no mercenary motive. His sportsmanlike instinct was evident whether he was fighting the cause of a client or furthering the interest of the City or playing for his side on the cricket field.

"In nature he was modest and kindly, as befits great men. Now there remain only a memory and the example he has left behind for all of us to follow. A fine lawyer, a boon companion, and a great man has passed to his eternal rest.

"To his widow and his children we tender the expression of our deep sympathy."

The Bench.

The Acting Chief Justice, Sir Arthur Fair, addressing the assemblage, said that the Judges wished to associate themselves with the eloquent tributes that had been paid on behalf of the profession and by the Solicitor-General to the life and work of the late Mr. Martin Luckie, a barrister and solicitor of this Court. By his passing, his fellow-men had lost a faithful and devoted servant, whose work was well done over the whole span of his long life.

His Honour continued: "It is an inspiring record of unselfish interest in, and devotion to, forwarding the welfare of his fellow-citizens.

"From his youth, Mr. Luckie took an active interest in every form of healthy sport, particularly in cricket and football. His generous and unselfish nature led him to devote his energies, not to his own personal success in these, but to forwarding in every way the general welfare of all healthy sports. His public spirit and his interest in his fellow-men were such that his own personal interests always took second place, and those of his clients and his City came first in his thoughts and his life. He provided an inspiring example of that generous spirit of service for the common good which, fortunately, is so often found in English-speaking countries, and to which we largely owe our progress and prosperity.

"As the President of your Society has pointed out, from the age of forty-five until the ripe age of eighty-one—a period of thirty-six years—he served as a City Councillor, and took a leading part in the development and growth of our City. Every step for its improvement and for the public benefit had his active and energetic support. For all good causes he fought well, and was never discouraged by disagreement, disappointment, or defeat, but continued his unselfish work as cheerfully and actively as where his efforts were crowned by success.

"Despite his many public activities, which made so large a call on his time, he continued in active practice as a solicitor during the whole of his life, as partner in a firm that always had a very large business. His wise advice and outstanding ability were available to a very large number of clients, who doubtless will remember his energetic protection of their interests. For he guarded their rights and protected their interests with the same skill and care he would have given to his own.

"In the earlier days of his practice, he appeared frequently as counsel in the Courts, and whenever he appeared it was certain that his client's rights would be thoroughly supported and any objections to their enforcement searchingly examined. In later years, he did not appear in Court so frequently; but the deep interest that he took in his fellow-men in every activity in life, and his real and sincere interest in his profession and in the administration of law, were shown by his frequent attendance in the Court, when the opportunity offered, listening to the arguments and watching the progress of the cases, in respect of which, of course, he had no personal interest. This practice he continued right up to last year, and it seems to provide an instance of that impersonal and generous interest in all aspects of life that marked his activities throughout.

"His kindly and cheerful personality has passed from us in the ripeness of years, and a figure familiar and loved by all who knew him will be seen no longer. But it is good to know that he passed to his rest with a consciousness that he had served his fellow-men long and faithfully and that his memory would be held in affectionate regard well beyond his life by the members of his profession and by those whom he knew and served.

"To his widow and children we desire to offer our deep sympathy in the great loss that has fallen on us all, but especially on them."