New Zealand
Law Journal

Incorporating "Butterworth's Fortnightly Notes."

VOL. XXVII. TUESDAY, AUGUST 7, 1951. No. 14.

THE OFFICE OF THE MASTER OF THE ROLLS.

THE coming visit to New Zealand of the Master of the Rolls, the Rt. Hon. Sir Raymond Evershed, will be all too brief. Most practitioners in New Zealand would like to meet him, not only because of his personal qualities and of their familiarity with the learned judgments he has delivered in the Court of Appeal since his appointment, at the age of forty-six, in 1945, but also because of the historic nature of his great office, which developed with the jurisdiction in equity matters from a very early period of our legal history. The necessity for an early return to his duties before the ending of the Long Vacation prevents his visit to New Zealand from being extended beyond a week-end in Auckland and Rotorua.

No one in New Zealand could possibly undertake with any prospect of accuracy any original research into the history of the office of the Master or Keeper of the Rolls. All the materials for such a study are available in England only. But those who are familiar with the great work of the late Sir William Holdsworth will find in his *History of English Law* the interesting story of the development of the jurisdiction in the Chancery, to which that office is inseparably related. We have drawn heavily upon the second volume of that work in order to give our readers some idea of the great historical office which our distinguished visitor holds.

In the earliest beginnings of the Court of Chancery' the two most important sets of officials were the Masters and the Clerks.

Writers of the seventeenth century state that the Chancellor was the sole Judge of the Court of Chancery. But, being much occupied with political duties, he often needed assistance. From the reign of Henry VII onwards, he was generally assisted by the Master of the Rolls, who was the chief of the Masters in Chancery.

Fleta, in his chapter on the Chancery, says that there were associated with the Chancellor :

> honest and prudent clerks who were sworn to be faithful to the King, and who had a full knowledge of the laws and customs of England ; whose duty it was to hear and examine the prayers and complaints of petitioners, and, by Royal writs, to give the fitting remedies for the injuries which they had brought to light.

In fact, during the Middle Ages we find them called by various titles, all implying that they are assistants to the Chancellor. Their number seems from an early date to have been fixed at twelve ; and it continues to be twelve. They were paid in early times partly by fees, but chiefly in kind. They lived together in the King's house, and later in a special dwelling set apart for them, and they had certain allowances of clothes, food, and drink. They were all in orders before Henry VIII's reign ; and the Chancellor seems to have acquired the patronage of all livings under twenty marks in order that he might be able to reward the Masters and other officials of the Chancery (Y.B. 3, 4 Ed. II (S.S.), xix).

The Masters were in early times occasionally appointed by the Crown. In the reign of Edward IV, the Chancellor acquired the right, which he exercised till 1833, of appointing eleven of them. The appointment of their chief, the Master of the Rolls, remained with the Crown. The Chancellor admitted them to office by placing a cap upon their head in Court, and they have been compared to Doctors in a University.

The duties of the Masters were in earlier times very varied, the large range making it necessary that the Masters should be acquainted not only with the common law, but also with the canon and civil law.

Their duties became specialized with the growing jurisdiction of the Court of Chancery, but their position became more definite with the development of the jurisdiction of their chief, the Master of the Rolls.

The *Dialogus de Scaccario* mentions a clerk of the Chancery whose duty it was to oversee the scribe who composed the Chancellor's Roll (Stubbs, Sel.Ch. 178). Possibly this official is the Clerk or Curator of the Rolls, and the Master of the Rolls of later law. In Edward II's reign, William Airmyn was the principal clerk in the Chancery—he was sometimes even spoken of unofficially as Vice-Chancellor ; and " he was the first Chancery clerk and Keeper of the *domus conversorum* in which these rolls ultimately found their home." This would seem to show that the office was growing in distinctness and assuming its modern shape. In 1378, Parliament confirmed a grant of this House made by Edward III to the Keeper of the Rolls, and in 1388 he was assigned a place above the Judges. The Chancellor admitted him to office by putting him into the possession of this *domus conversorum*, which thus became " the College of the Chancery men." With the development of the jurisdiction of the Chancery, the judicial duties of the Masters began to increase. From the first, a large share of these judicial duties fell to the Master of the Rolls, who was sometimes assisted by the Judges. Thus, in 1433 he was commissioned, during the absence of the Chancellor in

France, to exercise the jurisdiction belonging to the Court of Chancery. In the reign of Henry VIII, as at an earlier period, he was sometimes called Vice-Chancellor.

But, up to this reign, his jurisdiction differed from that of the other Masters in degree rather than in kind. The practice, which dates from the time of Wolsey, of delegating to him a certain jurisdiction by special commission gave him in time a jurisdiction which is quite different from that of other Masters. These commissions were at first addressed not only to the Master of the Rolls, but also to the Judges and the other Masters. They empowered the persons named to hear the kind of cases specified in the commission. Later, they were addressed to the Master of the Rolls only, and empowered him to hear cases generally. The practice had become so usual that Coke states generally that the Master of the Rolls, in the absence of the Lord Chancellor, hears causes and makes orders. From 1623, he appears to have had some share in regulating the practice of the Court, as, after that date, many of the general Orders were issued by the Chancellor and the Master of the Rolls, who comes to be, in fact, the general deputy of the Lord Chancellor.

It was not certain, however, whether the Master of the Rolls exercised these powers by virtue of his position as Master or by virtue of the special commission addressed to him. In the eighteenth century, the jealousy of the other Masters raised the question of his authority to act as general deputy of the Chancellor.

Whatever may have been the historical merits of the quarrel, the obvious result was to demonstrate the necessity for regularizing the position of the Master of the Rolls, and to afford judicial assistance to the Chancellor, says the late Dr. Edward Jenks in his *Short History of English Law*. Accordingly, in the year 1730, a statute was passed giving formal authority to the Orders and Decrees, past and future, of the Rolls, to the extent warranted by practice—the Act does not specify what this extent was, but, apparently, little difficulty was felt on the point—but with a proviso that they should not be enrolled of record before being signed by the custodian of the Great Seal, by whom they could, accordingly, be reversed or amended without formal appeal. (When once enrolled, a decree could not be altered without an appeal to the House of Lords.)

Even, however, when the new office of Vice-Chancellor was created in 1813 (53 Geo. 3, c. 24), the judicial position of the Master of the Rolls was still left in its anomalous position; and, though his jurisdiction was extended by the Chancery Reform Act, 1833 (3 and 4 Will. 4, c. 94), s. 24, to the hearing of motions, pleas, and demurrers, he still remained until the establishment of the Court of Appeal in Chancery in the year 1851 (14 and 15 Vict., c. 83). Inasmuch as that statute by s. 5 invested the new Lords Justices with all the jurisdiction of the Chancellor, it might be argued that it still left the Master of the Rolls and Vice-Chancellor in the unstable position of mere reporters. But the Judicature Acts definitely placed these officers and their successors in the ranks of Judges of first instance, though the Master of the Rolls has since become a member of the Court of Appeal exclusively. As a matter of fact, Dr. Jenks adds, his house on the east side of Chancery (or Chancellor's) Lane, the ancient foundation for converted Jews, which had been confirmed to his great predecessor John de Waltham in 1378, had become the centre of Chancery business; and, though the Rolls Court was moved, on the opening of the new Royal Courts of Justice, to that building, the stately pile of the Record Office, rising on the site of the ancient garden of the Master of the Rolls, preserves the historic continuity of the scene.

The position of the Master of the Rolls to-day is summarized by the present holder of that office, Sir Raymond Evershed, in his recently published lecture, *The Court of Appeal in England*. His Lordship says:

> In accordance with the original constitution [of the Court of Appeal] the Lord Chancellor, the Lord Chief Justice, and the President of the Probate, Divorce, and Admiralty Division are *ex officio* members and there were added in 1913 the Lords of Appeal in Ordinary. Both the Lord Chief Justice and the President do from time to time preside over Divisions of the Court in order to assist in getting through its business.
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> But in the ordinary way the Court consists of the Master of the Rolls and the Lords Justices. It is my duty as Master of the Rolls to preside in Appeal Court I and to be responsible for the organization of the business of the whole Court. This last step in the rather strange career of the Master of the Rolls was, like so many things in English history, the result of chance. My early predecessors in the Middle Ages were known as Keepers or Curators of the Rolls. They were mostly clerics, and in addition to the custody of the Court rolls they had the superintendence of the so-called *domus conversorum*, the house of the Jews converted to Christianity. For this purpose the Rolls Chapel on the site of the present Record Office was granted to the Keeper of the Rolls by Edward III. That particular duty has, so far as I have been able to ascertain, been nominal for a great many years and the Rolls Chapel became for a long period the Rolls Court. In the days of Henry VII the title of Master of the Rolls appears first to have been used, and the Master of the Rolls was the senior of the twelve Masters appointed to assist the Lord Chancellor in his judicial duties. The right of the Master of the Rolls to sit alone as a Judge of first instance depended upon commissions issued by the Lord Chancellor to act as his deputy. It was for this reason that, until the reforming zeal of the last century destroyed what appears to me a happy arrangement, the Master of the Rolls was unable to sit on Wednesday and Friday afternoons during term, since at those times it was the habit of the Chancellor to sit himself. Although the Master of the Rolls was by the Act of 1873 one of the *ex officio* members of the Court of Appeal, he continued in practice to sit for most of his time as a Judge of first instance. There then occurred an awkward situation. Lord Romilly had been succeeded by Sir George Jessel. Then Lord Justice James died and the difficult question arose—who should, who indeed could, be appointed to succeed James, able to sit in judgment on appeal from Jessel? The solution was that Jessel should give up his Court of first instance and sit permanently in the Court of Appeal. And so it is that I am now to be found there every day.

SUMMARY OF RECENT LAW.

AIR LAW.

The Growth of Air Law. *25 Australian Law Journal*, 53.

ANNUAL HOLIDAYS.

Award—Worker under Award entitled to Holiday on "full pay"—"Full pay" in Award distinguished from "ordinary pay" in Statute—Annual Holidays Act, 1944, s. 4 (1). The words "full pay," where used in an award in relation to annual holidays, do not include "penalty pay" for Sunday work and for work performed on holidays within a forty-hour week, but mean, for each week of holiday, the remuneration for a week's work at the ordinary rate of pay. (Dictum of *Smith*, J., in *Leonard* v. *Auckland Electric-power Board*, [1950] N.Z.L.R. 534, applied.) (*Booth, Macdonald, and Co., Ltd.* v. *McGregor*, [1941] N.Z.L.R. 181, *Moon* v. *Kent's Bakeries, Ltd.*, [1946] N.Z.L.R. 476, and *Blanchard* v. *New Zealand Refrigerating Co., Ltd.*, [1947] N.Z.L.R. 874, distinguished.) (*Hanson* v. *Devonport Steam Ferry Co., Ltd.*, [1950] N.Z.L.R. 573, referred to.) *Coppell* v. *Lowgarth Co-operative Dairy Co., Ltd.* (Ct. of Arb. Wellington. June 27, 1951. Tyndall, J.)

BANKRUPTCY.

Proof—Money employed in setting up Business—Creditor interested in Business and benefiting thereby, but not a Partner or receiving Share of Profits. Between June 20, 1949, and October 7, 1950, the appellant advanced to the bankrupt sums amounting to £7,218 15s. 8d., which were used by the bankrupt in setting up a residential riding academy. There was no agreement between the parties for the repayment of the moneys, the payment of any interest thereon, or the giving of any security in respect thereof. Although not married to the bankrupt, the appellant lived with him and looked after the domestic side of the academy, and in the brochure advertising the academy the bankrupt and she were referred to as Mr. and Mrs. M., she being described as one of the "principals." There was no arrangement for her to receive any defined share of the profits, and she was not a partner, but the enterprise was intended to provide her, as well as the bankrupt, with a home and a living. On October 5, 1950, a receiving order was made against the bankrupt on his own petition, and the adjudication order was made on October 11. On November 11, 1950, the appellant lodged a proof for the sum of £7,218 15s. 8d. paid by her to the bankrupt, claiming that it was a loan to him at his request and alleging that she had no control over the manner in which he used it. *Held*, That the sums paid by the appellant to the bankrupt did not constitute, and were never intended to constitute, a loan, but represented her contribution to the capital of a business enterprise, in which she had an interest and which was carried on for their joint benefit; it was immaterial that she was not a partner and received no share of the profits of the business; therefore, she was not a creditor of the bankrupt, as the person carrying on the business, in respect of those sums, and was not entitled to prove in the bankruptcy in competition with the creditors of the business. (*Re Beale, Ex parte Corbridge*, (1876) 4 Ch.D. 246; 46 L.J.Bcy. 17, explained, and dictum of *Bacon*, C.J., 46 L.J. Bcy. 18, applied.) *Re Meade (A Debtor), Ex parte Humber* v. *Palmer (The Trustee)*, [1951] 2 All E.R. 168 (Ch.D.).

As to Loans for Business Purposes, see *2 Halsbury's Laws of England*, 2nd Ed. 297, para. 392; and for Cases, see *4 E. and E. Digest*, 483, 484, Nos. *4343-4357*.

Some Everyday Points in Practice. *101 Law Journal*, 369.

CONTRACT.

Performance—Warranty—Conditional-purchase Agreement to instal Diesel Engine—Vendor bound by Expressed Warranty only, All Other Warranties and Conditions being excluded—Contract for Sale of Goods and Installation—Breach of Warranty—Purchaser not exercising Rights in respect thereof—Vendor entitled to Payment of Purchase Price—Chattels Transfer Act, 1908, s. 57 (7). The respondent (hereinafter termed "the defendant"), who wanted a new electric-power plant for his hotel, signed a conditional-purchase agreement with the appellant (hereinafter termed "the company"), who dealt in plants of this nature, for the purchase of a Coventry-Victor diesel engine built up in unit with a 3 K.V.A. alternator at £295 (less £80 allowed on a trade-in of defendant's old engine). The agreement stated that the price was the price installed. Clause (*m*) of the agreement stated that, in lieu of any warranty or condition under the Sale of Goods Act, 1908, or otherwise by law, the company should be bound only by the warranty endorsed, and that the agreement embodied the whole agreement. The warranty referred to was in the following terms: "Any machine or implement within mentioned is made of good material, and with proper management is capable of doing good work. The Conditional Purchaser within mentioned, shall, within fifteen days after the delivery of same have one day to give it a fair trial, and if it should not then work well he is to give immediate written notice, stating wherein it fails to the agent through whom it was ordered, and also to A. M. Bisley & Co., Ltd., Hamilton, and thereafter allow such Company reasonable time to get experts thence to the machine or implement to remedy the defects (if any) the Conditional Purchaser providing suitable material to operate on, and rendering necessary and friendly assistance and furnishing a suitable team, driver, etc. when if the machine or implement cannot be made to do good work, the Conditional Purchaser shall return it to the place where received, free of charge, in as good condition as when received, natural wear and tear only excepted, and a new machine or implement will be given in its place or the money then paid will be refunded and the Promissory Notes (if any) returned to the Conditional Purchaser; the option of the alternatives being with the Company. Continued possession of the machine or implement or failure to give notice as above, shall be conclusive evidence that the machine or implement fulfils this warranty." The company installed the engine and alternator, but, owing to excessive vibration, it was unsatisfactory. The company tried to remedy the vibration by installing rubber mountings, but this was not satisfactory, and it then offered to suspend the engine on a frame. The defendant refused to allow this to be done, and locked the shed containing the engine. The evidence showed that the engine as installed was useless, but that it would be satisfactory either with a new block or on a suspension frame. The company claimed from the defendant the balance of the cost of the plant (£215), but was nonsuited by the learned Magistrate ((1950) 6 M.C.D. 349). From that determination the company appealed. *Held*, 1. That the contract was for the sale of goods plus installation; and, whether it was for the sale of goods or for work and labour, the parties were bound by their written contract, one term of which said that the written contract was the whole contract. 2. That, even if the contract were one for work and labour, the only warranty operating was that set out above, and, as it must be given a fair business meaning, the phrase contained therein that the machine "is capable of doing good work" meant "good work, as installed by the company." 3. That, although the machine was not capable of doing good work, the defendant was limited to his rights under the warranty; but, as he had not availed himself of them, had refused to allow the company to remedy the defects in the installation, and had not returned the machine or paid the balance overdue under the agreement, thus entitling the company to sue, the company was entitled to judgment for the contract price. 4. That, in view of the foregoing, it was unnecessary to determine whether the contract was a contract for the sale of goods or a contract for work done and material supplied, though, *semble*, it was in substance a contract for the sale of goods, and s. 57 (7) of the Chattels Transfer Act, 1924, strengthened that view. (*Lee* v. *Griffin*, (1861) 1 B. & S. 272; 121 E.R. 716, and *Ross* v. *Sadofsky*, [1943] 1 D.L.R. 334, followed.) Appeal allowed and case remitted for entry of judgment for the company for £215 with costs. *A. M. Bisley and Co., Ltd.* v. *Hawtin*. (S.C. Wellington. July 9, 1951. Fell, J.)

CRIMINAL LAW.

Evidence—Statement by Accused—Taken down in Writing and read over to Him—Statement not signed—Accused admitting Statement as read to be True—Statement in Writing as such not adopted by Accused—Writing not Admissible. At a criminal trial, evidence was given that the accused had made an oral statement, which was taken down in writing and then read over to him. The accused, while the statement was being read over to him, had not seen what was on the document containing the alleged statement. He had acknowledged what was read over to him to be true, but had refused to sign the document. *Held*, That the document, as such, was not admissible in evidence. *R.* v. *Kerr (No. 1)*, [1951] V.L.R. 211.

Identification as A Facet of Criminal Law. *29 Canadian Bar Review*, 372.

DIVORCE AND MATRIMONIAL CAUSES.

Custody of Children—Girl aged Four Years—Mother living in Adultery with only a Possibility of Marriage—Moral Welfare of Child best served by giving Custody to Father—Divorce and Matrimonial Causes Act, 1928, s. 38. The parties were divorced on the grounds of the wife's failure to obey an order for restitution of conjugal rights. There was one child of the marriage, a girl aged a little over four years. On the making of the decree absolute, an order, made by consent, granted the mother custody of the child, reserving access to the father. Three months later, the mother, taking the child, went to live in adultery with a man, with only a possibility of her ever being able to marry him. The father, pursuant to leave reserved, applied for a variation of the order to give him custody of his daughter. *Stanton*, J., made an order that the father should have custody, with reasonable access to the mother. From this order, the mother appealed. *Held*, by the Court of Appeal, dismissing the appeal, That matters of sufficient importance to weigh the balance in favour of giving custody to the father were: (*a*) That, when the time came to explain to the child the position between the mother and the man with whom she was living, then, if the child were in the mother's custody, it would not be to the child's moral welfare if it were explained by the mother, who might reasonably be expected to justify her own action; and (*b*) That, if the child were then in the father's custody, the explanation given her would not need to go so far as it would if she were in the mother's custody, and it would not require any justification or approval of the mother's conduct, and, consequently, would not be against the moral welfare of the child. (*Howell* v. *Howell*, [1942] N.Z.L.R. 311, distinguished.) (*Cubitt* v. *Cubitt*, [1930] N.Z.L.R. 227, and *Fleming* v. *Fleming*, [1948] G.L.R. 220, referred to.) Appeal from the order of *Stanton*, J., dismissed. *Otter* v. *Otter*. (C.A. Wellington. July 13, 1951. Northcroft, Finlay, Hutchison, Cooke, JJ.)

The Standard of Persuasion in establishing Matrimonial Offences. (R. P. Roulston.) *25 Australian Law Journal*, 54.

ENEMY PROPERTY.

Enemy Property Emergency Regulations, 1939, Amendment No. 8 (Serial No. 1951/170). Regulation 2 makes it clear that the rights of the Custodian of Enemy Property in respect of copyright owned by former enemies have not been affected by the termination of the state of war with Germany and Austria, and will not be affected by a termination of the state of war with Japan. Regulation 3 authorizes the Custodian of Enemy Property to carry out agreements made between the Government of New Zealand and the Government of any State whose territory was enemy territory during the Second World War so far as the agreements relate to property received by the Custodian of Enemy Property in his capacity as Custodian and to income from any such property. The Regulation authorizes the property or income of an individual subject of any such State to be transferred, in accordance with any such agreement, to the Government of the State or to a Consular officer or agent of the Government.

FOOD AND DRUGS.

Offences—Portion of Cleaning-brush found in Bottle of Wine—Wine "unfit for human consumption"—All Reasonable Steps not taken by Vendor of Wine—Powers of "Officer"—Food and Drugs Act, 1947, ss. 6 (5), 7, 12, 15, 16. The powers conferred by s. 12 of the Food and Drugs Act, 1947, do not limit the powers of an "officer" (as defined in s. 2); they merely extend the other powers conferred on him by the statute; and the special provisions of ss. 15 and 16 become applicable only when he is proceeding under the provisions of s. 12. (*Bulger* v. *Botting*, (1950) 6 M.C.D. 308, applied.) *Semble*, Where food is purchased by the public and afterwards found to contain foreign bodies, compliance with ss. 15 and 16 would be impossible before a prosecution could be commenced; if it were otherwise, the usefulness of the statute would be impaired, and its enforcement, so far as such an offence is concerned, would be made impossible. (*Lincoln* v. *Sole*, [1939] N.Z.L.R. 176, followed.) In November, 1950, Miss K. purchased from the defendant (*inter alia*) two bottles of "invalid port." When the first bottle of wine had been consumed down to about an inch or so from the bottom, it was discovered that the bottle contained what appeared to be the detachable end of a cleaning-brush. The part in the bottle appeared to be brass, and had some hundred or two hundred bristles varying from about 1 in. to 1½in. in length. The wine was bottled in a dark, though otherwise transparent, bottle. The bottle with the object in it was corked and handed to the Department of Health. The bottles were supplied to the defendant company already washed, and were not washed again by it before the wine was bottled. The manager of the defendant company admitted that he would not drink the wine with the object in, because of a natural dislike of anything else being in the bottle. He thought Miss K.'s statement that she would not have drunk the wine had she previously noticed the portion of brush a reasonable one. He also said that he would not have sold the bottle as it was if he had first noticed the object, and that he would not have removed the object and still sold the wine. On an information charging the defendant company under s. 6 (5) of the Food and Drugs Act, 1947, that it had sold a bottle of port wine unfit for human consumption, in that it contained a portion of a cleaning-brush, *Held*, 1. That the informant was not exercising any of the powers conferred on him by s. 12 (which had no relation to the facts) when, in accordance with the general duty cast on him of enforcing the Food and Drugs Act, 1947, he laid the information after he was handed the bottle of wine the sale of which, in his view, constituted an offence. 2. That the presence of the portion of the brush in the wine rendered the wine "unfit for human consumption" within the meaning of those words in s. 6 (5) of the statute. (*Brazendale* v. *Hill*, (1944) 3 M.C.D. 405, followed.) 3. That, on the evidence, the defendant had not taken all reasonable steps to ensure that the sale of the wine would not constitute an offence under the statute, and, consequently, could not avail himself of that defence in terms of s. 7. (*Canterbury Central Co-operative Dairy Co., Ltd.* v. *McKenzie*, [1923] N.Z.L.R. 26, applied.) *Connor* (*Inspector of Health*) v. *National Mortgage and Agency Co. of New Zealand, Ltd.* (Timaru. May 24, 1951. Lee, S.M.)

JUDICIARY.

Sir Edmund Barton. (J. Reynolds.) *25 Australian Law Journal*, 59.

LAW REFORM.

A Century of Legal Reform. (Walter S. Johnson, K.C.) *29 Canadian Bar Review*, 411.

MUNICIPAL CORPORATIONS.

Roads and Streets—Reduction of Street Width—Onus on Council to prove Compliance with Statutory Requirements—Prescribed Procedure not carried out—No Jurisdiction for Magistrate to hear Objections—Municipal Corporations Act, 1933, s. 175 (4), Fifth Schedule, cls. 5, 6, 7. It is provided in cl. 6 of the Fifth Schedule to the Municipal Corporations Act, 1933, relating to the stopping of streets, that the public meeting to be held under the chairmanship of the Mayor "shall decide by a majority of the district electors present whether or not the street shall be stopped." The Stratford Borough Council on March 20, 1950, passed a resolution to take the necessary steps to diminish the width of part of P. Street. The Council called the meeting of the electors required by cls. 5 and 6 of the Fifth Schedule to the Municipal Corporations Act, 1933, and, at the meeting, a resolution in favour of the Council's resolution was declared to have been carried on the voices. Eighty electors were present. There was a conflict of evidence as to whether a majority of the electors present voted for the Council's resolution, and there was no proof of a count of those who voted for it. As required by cl. 7 of the Schedule, the Council sent to the Magistrate the plans of the proposed alterations to the street and the electors' decision thereon. The learned Magistrate sat to consider objections, when a preliminary objection was taken on behalf of the respondent to the effect that the procedure set out in the Fifth Schedule had not been complied with. The learned Magistrate refused to go into this question, but adjourned his inquiry to enable the plaintiff to raise the matter in the Supreme Court. On a motion for certiorari and prohibition to prevent the Council and the Magistrate from proceeding further with steps to diminish the width of the street, *Fell*, J., made an order for the issue of a writ of certiorari restraining the Borough from proceeding with steps to diminish the width of the street ([1951] N.Z.L.R. 530). On appeal from such order, *Held*, 1. That a decision of "a majority of the district electors present" cannot be said to have been made when the sense of the meeting was taken by a method that could not, in the circumstances, form a basis for any conclusion as to whether or not the majority of those present voted for the resolution. 2. That, as the respondent had shown that matters were conducted in such a way that the chairman of the meeting had not the material before him on which to base a declaration that the motion was carried by the majority of the electors present, and so was not justified in declaring it to have been so carried, that was sufficient to shift the burden

of proof and to throw on the appellant Borough the onus of proving that the resolution was passed by the necessary majority, an onus which it had not discharged; and the chairman's declaration, therefore, must be treated as of no effect. (*Labouchere* v. *Earl of Wharncliffe*, (1879) 13 Ch.D. 346, applied.) (*The Queen* v. *Thomas*, (1883) 11 Q.B.D. 282, *Everett* v. *Griffiths*, [1924] 1 K.B. 941, and *The King* v. *Hendon Rural District Council, Ex parte Chorley*, [1933] 2 K.B. 696, distinguished.) 3. That there was no power to make the application to a Magistrate under cl. 7 unless the antecedent statutory requirements had been complied with—and one of the requirements was that there must have been a decision of the majority of the electors present at the meeting that the street should be stopped—because those antecedent statutory requirements were the essential preliminaries to the inquiry by the Magistrate or conditions precedent to his jurisdiction; and, accordingly, it was within the competence of the Court of Appeal to determine whether or not those essential preliminaries or conditions were present. (*Colonial Bank of Australasia* v. *Willan*, (1874) L.R. 5 P.C. 417, and *Ex parte Wake*, (1883) 11 Q.B.D. 291, followed.) (*The Queen* v. *Bolton*, (1841) 1 Q.B. 66; 113 E.R. 1054, *The King* v. *Mahony*, [1910] 2 I.R. 695, and *The King* v. *Nat Bell Liquors, Ltd.*, [1922] 2 A.C. 128, distinguished.) (*In re Mulvaney*, [1928] N.Z.L.R. 129, referred to.) 4. That, although under cl. 7 the inferior tribunal may, at its peril, determine whether the facts necessary for its jurisdiction exist, the position nevertheless is that the existence or otherwise of the facts, if questioned, is ultimately a matter open to examination on certiorari by a superior Court. 5. That the requirement as to decision by a majority of the electors present contained in cl. 6 of the Fifth Schedule is a statutory requirement enacted for the general public benefit; and the respondent cannot, by any admission or by anything that might in the circumstances amount to a waiver, disable itself by alleging that the resolution was not properly passed. (*In re A Bankruptcy Notice*, [1924] 2 Ch. 76, followed.) Appeal from the order of *Fell*, J. ([1951] N.Z.L.R. 530), dismissed. *Stratford Borough Council* v. *C. A. Wilkinson, Ltd.* (C.A. Wellington. July 13, 1951. Northcroft, Finlay, Hutchison, Cooke, JJ.)

POLICE OFFENCES.

Conversion of Motor-vehicle—Person in Legal Possession of Vehicle, subject to Condition not to use it except in the Course of His Employment—Use in Breach of Condition—No Offence—"Takes"—Police Offences Amendment Act, 1935, s. 2. The material part of s. 2 of the Police Offences Amendment Act, 1935, provides as follows: "Every person commits an offence who unlawfully and without colour of right but not so as to be guilty of theft . . . takes or converts to his use . . . (*a*) Any motor-car or other vehicle or carriage of any description." In that section, the word "takes" is the decisive word; and, where a person is in full legal possession of a motor-car or other vehicle mentioned in the section, though he uses it in breach of a condition relating to its use for specific purposes, he does not take or convert it to his use within the meaning of the section. Consequently, a person employed by the Crown or by a private employer who uses a motor-vehicle in the course of his employment, and who is authorized to have possession of the vehicle, subject to the condition that the vehicle is not to be used otherwise than in the ordinary course of employment, is not liable to be convicted of conversion of such vehicle within the meaning of s. 2 of the Police Offences Amendment Act, 1935, if he commits a breach of that condition. (*Ex parte Johnstone, Re Turnbull*, (1935) 52 N.S.W. W.N. 194, applied.) (*Keogh* v. *Pratt*, [1927] V.L.R. 174, referred to.) The defendant, who was employed by the Ministry of Works, drove a truck in the course of his employment. He was required on the completion of the day's work to drive the truck to his place of residence and to retain it there until he drove it off for the next day's work. A specific instruction was given to him that he was not to use the truck except in the course of his employment. Notwithstanding such instruction, he used the truck for making an unauthorized trip, and, in the course of that trip, the truck was severely damaged in a collision with another motor-vehicle. He was charged with an offence under s. 2 of the Police Offences Amendment Act, 1935. *Held*, That, as the defendant was in full legal possession of the motor-truck at the time when he used it in breach of the terms of the bailment, the information must be dismissed. *Police* v. *Synnott*. (Putaruru. June 26, 1951. Luxford, S.M.)

Offences relating to Good Order—Disturbance of Public Meeting—Nature of Disturbance involved—Disturbance to be of Such Nature as to create or to be likely to create Breach of the Peace—"Disturbs"—Police Offences Act, 1927, s. 3 (dd). The material part of s. 3 (*dd*) of the Police Offences Act, 1927, is as follows: "3. Every person is liable to a fine not exceeding five pounds who . . . (*dd*) Disturbs . . . any public meeting . . ." A disturbance at a public meeting, in order to be an offence under s. 3 (*dd*), must be of such a nature as to create, or to be likely to create, a breach of the peace. That is a question of fact, which must be determined in the particular circumstances, and which involves a consideration of such matters as the object of the meeting, whether it is religious, educational, political, or otherwise; and which also involves a consideration of the nature of the disturbance and the reaction, or likely reaction, of the audience or persons present. (*Wooding* v. *Oxley*, (1839) 9 C. & P. 1; 173 E.R. 714, followed.) (*Police* v. *Ward*, (1935) 30 M.C.R. 76, distinguished.) *Brown* v. *Harding: Brown* v. *Hill*. (Hastings. May 1, 1951. Sinclair, S.M.)

PRACTICE.

Appeal—Question of Fact—Disagreement with Tribunal which heard Witnesses. Per *Lord Merriman*, P., That there is an essential distinction between an appellate Court's finding that the evidence ought not to have been accepted by the tribunal which saw and heard the witnesses and an appellate Court's accepting the totality of the facts found by the trial Court but holding nevertheless that in law those facts do not suffice to constitute the offence charged. It makes the task of an appellate Court very difficult if it is precluded from expressing an opinion about the conclusion, taking the evidence at its most favourable for the complainant. (*Thomas* v. *Thomas*, [1947] 1 All E.R. 582, applied.) *Simpson* v. *Simpson*, [1951] 1 All E.R. 955 (P.D. & A.).

Appeals to Privy Council—Judgment of Court of Appeal sending Case back to Supreme Court to enter Judgment for Appellant—Judgment of Court of Appeal a "Final judgment"—Court of Appeal Rules, R. 19—Privy Council Appeals Rules, 1910, R. 2. The negotiations for sale between the appellant, the owner of a timber mill (with sawmill plant and bush plant), and the respondent concluded in a letter from the respondent to the appellant with a cheque for £2,000, followed by a reply from the respondent with a formal receipt for that sum. On the evidence—as interpreted by the Court of Appeal—the respondent believed that it was purchasing both the mill plant and the chattels comprising the bush plant, while the appellant believed that it was selling the mill plant only. The respondent removed both the mill plant and the bush plant. The appellant issued a writ against the respondent for wrongful removal of the bush plant, which, it said, it did not sell to the respondent, and for its possession or for its value, together with damages for wrongful detention. *Northcroft*, J., held that there was an enforceable contract for the sale of both the mill plant and the bush plant, and gave judgment for the respondent. The appellant appealed from that determination. On the appeal to the Court of Appeal, there was no dispute as to the mill plant. As to the bush plant, the Court of Appeal held that the decision of *Northcroft*, J., was equivalent to a judgment on the ground of the estoppel of the appellant which the respondent had established, allowed the appeal, and directed that the case should be sent back to the Supreme Court to give judgment on the basis that there was no contract between the appellant and the respondent. On an application by the respondent for leave to appeal to His Majesty in Council, *Held*, That the judgment of the Court of Appeal amounted in effect to a declaration that the appellant was entitled to relief on the basis that there had been a wrongful conversion or detention of the bush plant and that there should be judgment for possession of the chattels comprising it, or for damages in lieu of possession if possession could not be had; and that judgment should be treated as a final judgment within the meaning of R. 19 of the Court of Appeal Rules and of R. 2 of the Privy Council Appeals Rules, 1910. (*Dillicar* v. *West*, [1921] N.Z.L.R. 617, applied.) Conditional leave to appeal to the Privy Council was accordingly granted to the respondent. *Bruce Bay Timbers, Ltd.* v. *W. Williamson Construction Co., Ltd.* (C.A. Wellington. July 11, 1951. Finlay, Hutchison, Cooke, JJ.)

Jurisdiction—Magistrates' Court—Disqualification from performing Judicial Duty—Magistrate's Preconceived Opinion creating Suspicion that Principles of Natural Justice will be departed from—Magistrate acting without Jurisdiction. The holding or the expression of preconceived opinions by a Magistrate or Justice does not of itself constitute a disqualification from acting on a judicial matter; but a Magistrate or Justice who has a judicial duty to perform is disqualified from performing it in a case in which his preconceived opinion is of such a nature, or is held or expressed in such circumstances, or with such strength, as to create in the mind of a reasonable man a suspicion that the principles of natural justice will be

departed from. (*The Queen* v. *London County Council, In re Empire Theatre*, (1894) 11 T.L.R. 24, *Law* v. *Chartered Institute of Patent Agents*, [1919] 2 Ch. 276, and *Sharp* v. *Carey*, (1897) 23 V.L.R. 248, applied.) (*The Queen* v. *Alcock, Ex parte Chilton*, (1878) 37 L.T. 829, *The Queen* v. *Molesworth*, (1898) 23 V.L.R. 582, and *Ex parte Wilder*, (1902) 66 J.P. 761, distinguished.) (*In re Taylor*, [1937] N.Z.L.R. 768, referred to.) In the present case, the learned Magistrate, by the four statements made by him in the circumstances set out in the judgment, disqualified himself from hearing an application for custody; the order for custody made in favour of the wife was made, therefore, without jurisdiction; and the husband was entitled to a writ of certiorari with respect to that order. *Black* v. *Black and Another*. (S.C. New Plymouth. June 18, 1951. Cooke, J.)

Statement of Claim—Amendment—Question of Law arising out of Pleadings argued before Trial—Question decided against Plaintiff—Plaintiff entitled, before Commencement of Trial, to file Amended Statement of Claim amending Allegations of Fact—Code of Civil Procedure, RR. 144, 154. There is nothing in the Code of Civil Procedure to qualify or limit, after the argument of a question of law under R. 154, the right of amendment under R. 144, or the right to amend with leave after trial has commenced. (*Edmonds* v. *T. J. Edmonds, Ltd.*, [1937] N.Z.L.R. 527, followed.) Where, by consent, a question of law is argued before trial, a party is bound, subject to the right of appeal, by the Court's answer as to the point of law so decided; but he is bound by it in no other way. After a plaintiff, by his supposedly mistaken statement of the facts, has brought about an unnecessary argument on a question of law under R. 154, argued before trial, he is not estopped from saying that his pleading was inaccurate and that the true facts are different from those stated therein; and he is within his rights under R. 144 in filing an amended statement of claim amending his allegations of fact before the commencement of any trial of his action. The English practice discussed, and held to be contrary to the view that decision of a point of law precludes a party from amending his allegations of fact. (*Richards and Co.* v. *Butcher and Robinson*, (1890) 62 L.T. 867, *Preston Corporation* v. *Fullwood Local Board (No. 2)*, (1885) 34 W.R. 200, *Griffiths* v. *London and St. Katharine Docks Co.*, (1884) 13 Q.B.D. 259, *In re Taylor's Estate, Tomlin* v. *Underhay*, (1882) 22 Ch.D. 495, and *Jones* v. *Insole*, (1891) 39 W.R. 629, referred to.) *Semble*, There may be circumstances (such as the argument before trial of a question of law under an agreement that the answer should finally dispose of the action) in which it would be inequitable to allow a party to amend, and in which an amended pleading filed as of right under R. 144 must be struck out; but the Court is not at liberty to imply any such argument from the mere fact that the order for the argument of the question of law was made with the concurrence of both parties. *Keighley* v. *Peacocke (No. 2)*. (S.C. Hamilton. June 18, 1951. F. B. Adams, J.)

Supreme Court Amendment Rules (No. 2), 1951 (Serial No. 1951/157). These Rules, which amend the Code of Civil Procedure, come into force on August 9, 1951. They may be summarized as follows: *Contract:* A new Rule, R. 47A, enables the Court to give effect to contractual provisions as to the places where writs of summons and other processes may be served. *Costs:* A new Rule, R. 566B, makes it clear that the Court may delegate to the Registrar the fixing of the amount of disbursements to be included in party-and-party costs. A new Rule, R. 576C, allows a review of the action of a Registrar in fixing the amount of any costs or disbursements which fall short of taxation. It is complementary to R. 574, which allows a review of taxation. *Probate and Administration:* Forms 34, 37, 38, and 38A in the First Schedule to the Code are amended by omitting from cl. 2 of each of those Forms the redundant words "after death." *Service out of New Zealand:* Rule 48 is amended in the detail set out in Reg. 4 of these Regulations. New RR. 51AA, 51AB, and 51AC deal with service abroad in actions under the Carriage by Air Act, 1940. Rule 51H is revoked, and a new Rule, R. 51AD, deals with the extension of the preceding Rules to other documents. Minor amendments are made to RR. 51B, 51E, and 51F. *Time for Moving for New Trial:* The time for moving for a new trial under R. 284 is extended from four days to "within seven days."

PROBATE AND ADMINISTRATION.

Points in Practice. *101 Law Journal*, 396.

PUBLIC SAFETY CONSERVATION.

Proclamation of Emergency—Emergency Regulations—Governor-General's Absolute Discretion to issue Proclamation—Waterfront Strike Emergency Regulations, 1951, within Power conferred on Governor-General in Council—Appointment of Public Trustee as Receiver of Union Funds Valid—Delegation of Powers to District Public Trustee authorized—Public Safety Conservation Act, 1932, ss. 2 (1), 3, 4—Proclamation of Emergency (1951 New Zealand Gazette, *251*)*—Waterfront Strike Emergency Regulations, 1951 (Serial No. 1951/24), Regs. 2 (1), 7—Evidence—Emergency Regulations—Appointment of Receiver of Union Funds—Offences—Failure to comply with Receiver's Requirement to answer Questions relating to Disposition of Union Moneys—Refusal of Union Official to answer Questions on ground that Answers might incriminate Him—Answers not to be on Oath—Person required to answer on Oath in Similar Circumstances obliged to answer even though Answers tend to incriminate Him—Position of Person not on Oath with respect to Such Answers considered—Waterfront Strike Emergency Regulations, 1951 (Serial No. 1951/24), Reg. 7.* Under Reg. 7 of the Waterfront Strike Emergency Regulations, 1951, made on February 22, 1951, the Public Trustee on March 1, 1951, was appointed Receiver of the funds of the New Zealand Waterside Workers' Industrial Union of Workers and its branches. He delegated all his powers thereunder to the District Public Trustee at Auckland, who required H. to furnish information in answer to a series of questions as set out in the judgment. In respect of a number of these questions, H. replied: "Refused to answer as it may incriminate me." He was charged with the offence, under Reg. 7 (6) (*b*) of the Regulations, of failing to comply with the District Public Trustee's requirement to answer these questions. He was convicted and fined. On appeal from that conviction and fine, *Held*, 1. That the situation caused by the "strike" on the Auckland waterfront was of a type in respect of which s. 2 (1) of the Public Safety Conservation Act, 1932, contemplated and authorized the issue of a Proclamation of Emergency by the Governor-General; and the use in s. 4 of the statute of the words "or otherwise howsoever" is confirmatory of the view that the words of s. 2 (1) are not intended to be limited to conditions of civil disturbance or riot. 2. That, as the words in s. 2 (1) of the statute "if at any time it appears to the Governor-General" gave to the Governor-General absolute discretion to issue a Proclamation of Emergency, the question whether it was unreasonable or unnecessary was not open; and the exercise of the discretion could not be challenged except on the ground that the subject-matter of the Proclamation was outside the ambit of the power. (*The King* v. *Controller-General of Patents, Ex parte Bayer Products, Ltd.*, [1941] 2 K.B. 306; [1941] 2 All E.R. 677, and *Liversidge* v. *Anderson*, [1942] A.C. 207; [1941] 3 All E.R. 338, followed.) 3. That the Waterfront Strike Emergency Regulations, 1951, were within the power conferred on the Governor-General in Council by s. 3 of the statute to make all such Regulations "as he thinks necessary" for the purposes specified. 4. That, at the time when the Public Trustee was appointed under Reg. 7 of the Waterfront Strike Emergency Regulations, 1951, the Receiver of the funds of the Union and its branches, the cessation of work on the Auckland waterfront had become a "declared strike" within the meaning of those words as defined in Reg. 2 (1); and, accordingly, Reg. 7 was valid and operative to confer the powers exercised under it in relation to the matters in this appeal. 5. That the use of the word "any" in Reg. 7 (5) authorized the Public Trustee to delegate the whole of the powers conferred on him by the Regulations to the District Public Trustee at Auckland. (*F. E. Jackson and Co., Ltd.* v. *Collector of Customs*, [1939] N.Z.L.R. 682, distinguished.) 6. That, although Reg. 7 did not expressly provide that a person should be required to give information even though it might incriminate him, a person required by statute to answer on oath, in circumstances similar to those in this appeal, is obliged to do so even though his answers tend to incriminate him; and, in the present case, the privilege was excluded by the purpose and subject-matter of the inquiries authorized. (*Reg.* v. *Scott*, (1856) Dears. and Bell 47; 169 E.R. 909, applied.) (*R.* v. *Kempley*, (1944) 44 N.S.W.S.R. 416, referred to.) *Semble*, Even if a person not on oath has a privilege similar to that of a witness on oath (which was not decided on this appeal), it would not extend to questions under Reg. 7. *Hewett* v. *Fielder*. (F.C. Auckland. June 22, 1951. Fair, A.C.J., Stanton and F. B. Adams, JJ.)

VENDOR AND PURCHASER.

Sales by Joint Owners: Sale by One Joint Owner to Another, and Sale by Surviving Joint Owner. *101 Law Journal*, 384, 395.

WATERFRONT STRIKE.

Revocation of Proclamation of Emergency and Waterside Strike Emergency Regulations, 1951 (Serial No. 1951/175) (as from July 26, 1951).

REGISTRATION OF BUSINESS NAMES.

A Matter for Consideration when Revising the Companies Act.

By B. J. DRAKE, B.A., LL.M.

The setting up by the Government of a Committee to advise the Law Draftsman on the revision of the Companies Act, 1933, turns our attention to the present state of company legislation in England.

By the Companies Act, 1947 (Eng.), an "Act to amend the law relating to companies and unit trusts and to dealing in securities, and in connection therewith to amend the law of bankruptcy and the law relating to the registration of business names" (to adopt the Title of the Act), amendments were made to various parts of the Companies Act, 1929, and in particular to those parts relating to management and administration, share capital and debentures, charges, and winding up. This Act is not unduly long, comprising 123 sections and nine Schedules.

The Companies Act, 1948, consolidating the Companies Act, 1929, and the Companies Act, 1947 (other than the provisions thereof relating to the registration of business names, bankruptcy, and the prevention of fraud in connection with unit trusts), is, of necessity, much more elaborate, consisting of 462 sections and eighteen Schedules. Subject to the exceptions mentioned above, the Companies Act, 1948, is a consolidation of the Companies Act, 1929, its Amendments, and the Companies Act, 1947. But it is my intention to refer, not to the consolidation, or to any of the changes in the existing law made in 1948, but to one of the provisions in the Companies Act, 1947, not repealed by the following Act—that is, the registration of business names.

To many, it will come as a surprise—and perhaps as a welcome surprise—that in England business names have been, since 1916, the subject of a system of registration. It is impossible, at this remote distance, to say how strictly the provisions of the Registration of Business Names Act, 1916, have been enforced. That it has obviously continued in full force and effect is evidenced by the references to the Act in the Companies Act, 1947, applying, extending, or modifying various sections of the original Act. The Act has occasionally received mention in the law reports, and one case alone will serve to console those members of the New Zealand Society of Accountants who from time to time are aggrieved by the free use of the description "accountant" by those somewhat distant from the profession. In *O'Connor and Ould* v. *Ralston*, [1920] 3 K.B. 451, the plaintiffs, a firm of bookmakers, were claiming a large sum on cheques which had been paid to settle betting transactions and which had been dishonoured. The defendant alleged (*inter alia*) that the sums claimed could not be recovered by the plaintiffs, upon the ground that they had not complied with the provisions of the Registration of Business Names Act, 1916. They had, in fact, furnished some particulars of the general nature of their business, as required by the Act, but had described themselves as "accountants." In the words of Darling, J., at p. 456:

> It is misleading for a bookmaker to call himself an accountant . . . it may be that the expression "turf accountants" is a synonym for "bookmakers" . . . But without the addition of the word "turf" the expression "accountants" is not sufficient.

In the result, it was not necessary for the Court to decide whether the bookmakers had made such a default within the meaning of s. 8 of the Act as would prevent their action succeeding, as judgment was given for the defendant on other and more obvious grounds.

So much for the misuse of the term "accountant."

Before considering further the provisions of the Registration of Business Names Act, 1916, it is worth digressing to consider the desirability of having some system whereby firms which carry on business under names other than their own true surnames, or under a name not being merely its corporate name, without any addition, should be required to register, as is the position in England:

(*a*) The business name.
(*b*) The general nature of the business.
(*c*) The principal place of business.
(*d*) In the case of a firm, the present Christian name and surname, any former Christian name or surname, the usual residence and other business occupations of each of the partners.
(*e*) In the case of an individual, the present and former Christian and surnames, usual residence, and other business occupation.

The above is a brief paraphrase of part of s. 3 of the Registration of Business Names Act, 1916.

A firm might, for instance, describe itself as the "Reliable Private Inquiry Agency," and give as its address a Post Office box only. What chance has anyone injured by its machinations of finding the principals, let alone of taking legal action against them? On a more mundane plane, consider the numerous instances of firms with agencies for this and that commodity using descriptive firm names and shifting addresses, or of individuals "passing off" the names of well-known firms, perhaps established outside New Zealand. In some cases, of course, registration is required by other Acts. For example, the Money-lenders Act, 1908, and the Rules made under it require, on application for registration as a money-lender, particulars somewhat akin to those set out above. But this is the exception rather than the rule.

It is small comfort to the prospective plaintiff who cannot find any trace of a firm with an attractive name and an elusive address that the partners, if it is a partnership, can be sued in the name of their firm, and, on a demand in writing, must deliver to the plaintiff and file in the Court office a statement of the names and places of residence of all the persons constituting the firm. This is the rule under the Magistrates' Courts Rules, 1948, r. 61, and is similar to the rule under the Code of Civil Procedure, R. 77. If the partners fail to comply with the demand, the Court may order the particulars to be supplied, and, on failure to comply with the order, direct that they be debarred from defending the action. This provision, helpful as it is intended to be, does little to overcome the difficulties of serving the summons on—and, at the other

end of the proceedings, of enforcing judgment against—such a firm.

It is not claimed for one moment that the introduction of a measure incorporating the Registration of Business Names Act, 1916, would obviate the difficulties alluded to, but it would go some distance, as a result of the penal clauses alone. The English Act provides a default fine of £5 a day for failure to furnish a statement of particulars or of any change after registration. A later section goes even further, by making the rights of any defaulter arising out of a contract made or entered into by him in relation to the business while he is in default unenforceable by action either in the business name or otherwise, although there are provisions for relief against the disability imposed by the section. There is also a penalty of either imprisonment or fine, or both, for furnishing returns false in any material particular. The net is wide, in so far as professions as well as trades are included in the term " business."

Mention has been made of some of the circumstances in which registration is required. A few examples may make the position, as it obtains in England, clearer. Thomas Jones can trade, without registration, as Thomas Jones, or as Thos. Jones, or as T. Jones, but not as T. Jones and Co., or as Jones and Co., or as Jones and Jones. If Thomas Jones and James Smith trade as Jones and Smith, or as T. Jones and J. Smith, registration is not required, but it is if they call their firm Jones, Smith, and Co., or Jones and Co. Or, again, if Smith died, and Jones wished to carry on as Jones and Smith, then he would have to register the name. *A fortiori*, if Jones and Smith wish to carry on as the London Oyster Co., the particulars above-mentioned must be supplied upon registration.

A certificate of registration is issued, and this (or a certified copy) must be displayed at the principal place of business. In all trade catalogues and circulars, show cards, and business letters on or in which the business name appears, there must also be shown, in the case of an individual, the present Christian name(s) or initials and present surname (together with any former Christian name(s) or surname, unless the exceptions mentioned above apply), and the nationality, if not British. In the case of a firm, the foregoing applies in respect of all the partners; if a corporation is a partner, the corporate name must appear.

The present provisions of the law, as altered by the Companies Act, 1947, and the Companies Act, 1948, can be summarized as follows: If a company has registered a name under the Registration of Business Names Act, 1916, the requirements of the Companies Act, 1948, still hold. Its name must appear in all business letters, notices, and other official publications of the company. Ordinarily, particulars of its directors must be shown in the same documents on which (as noted above) particulars of the partners of a firm must appear.

Trading by a company in the ordinary way under the name or conditions of the Companies Act, 1948, puts the company outside the Registration of Business Names Act, 1916, but a point to note is that there is a new provision in the Companies Act, 1947 (though not in the Companies Act, 1948), which provides that, if a company carries on a business under a business name not being merely its corporate name without any addition, then registration of the name is required.

A provision also included in the recent company legislation is that registration under the Registration of Business Names Act, 1916, can be refused if the Registrar considers that the name proposed is undesirable. Misleading names would not be allowed—for example, if the name suggests that a small firm is a large concern trading over a wide field.

To conclude, it is possible that objections might be raised to any further restrictions and controls. But liberty is one thing, licence another. For the great majority of stable, long-established firms, no great hardship would result from registration, just as no appreciable benefit would accrue to those dealing with such businesses. But in other cases, compulsory registration of the particulars required would safeguard the business community and private individuals, and would operate *in terrorem* in respect of those business firms for whom alone registration would be irksome and oppressive. The ends here, if ever, surely justify the means.

As a matter for consideration by the Committee set up, this is perhaps on the fringe of its terms of reference, but, as a matter for consideration by all accountants, it is a protective measure which has much to commend it.

The Professions To-day

I seem to see four sources of menace to the professional ideal in the society of to-day. One, the exigencies of the individual economic existence, has always been with us. It is simply magnified in the crowded world of the time. A sceond is the multiplication of detail in every branch of learning, and notably in the learned arts pursued by the members of a profession. Nowadays these details are multiplied beyond what the individual practitioner can hope to master completely. There is consequent need of co-operation of practioners leading to partnerships of increasing size and conceivably even to corporations in which individual responsibility may become merged. Thirdly, when this stage has been reached it is difficult to resist the pressure of business methods, which easily become the methods of competitive acquisitive activity. Fourthly, all this goes along with and is given impetus by the advent of the service State and consequent growing tendency to rely on official rather than on individual private initiative and to commit all things to bureaux of politically organized society. (Roscoe Pound, " The Professions in the Society of To-day," *The New England Journal of Medicine*, September 8, 1949.)

The Coat Tails of the State

In this day and generation our most essential preoccupation surely should be to keep right in the front of our minds every hour of every day the lesson which history has plainly taught, that of all the tyrannies of man over man the tyranny of Government is the easiest to create and the hardest to destroy; that while we must guard ourselves, and can guard ourselves, against enemies from without whom we can identify and meet, we must also guard with equal zeal against the well-meaning, misguided person living right among us who would lead us into dependence on the paternalistic State—the paternalistic State which is always ready to gather us in ever-increasing debility and stagnancy under its lordly wings. (From an address by the Rt. Hon. Arthur Meighen, " The Welfare State," to the British Columbia Bar Convention at Victoria, B.C., on June 29, 1950.)

RECENT CASES ON DEATH-DUTY LAW.

By E. C. Adams, LL.M.

A. Liability of Severable Share of Joint Tenant to Death Duty.

Following on the registration in the Land Transfer Office of a transmission by survivorship, solicitors have often been called on by the Stamp Duties Office to file death-duty accounts in respect of the share of the deceased joint proprietor.

It has not always been clear what, if any, liability to death duty has been incurred. One may reasonably infer that not only practitioners, but also the Revenue officials themselves, have groped their way in the thick mists of uncertainty. The statutory provision usually relied on by the Revenue is para. (*e*) of s. 5 (1) of the Death Duties Act, 1921, which renders liable to death duty:

> Any property which the deceased has at any time, whether before or after the commencement of this Act, caused to be transferred to or vested in himself and any other person jointly, so that the beneficial interest therein passes or accrues by survivorship to any person on the death of the deceased, if the property was situated in New Zealand at the time of such transfer or vesting as aforesaid.

The law in New Zealand was unsettled until *In re Going, Public Trustee* v. *Commissioner of Stamp Duties, In re Todd, Public Trustee* v. *Commissioner of Stamp Duties*, [1951] N.Z.L.R. 144, clarified the position. There, the Court of Appeal definitely held that the New Zealand statute does not catch for death duty the severable interest of a *non-contributing* joint tenant, although in England such an interest is liable to death duty.

It may be stated at the outset that our statute aims only at *beneficial* joint tenancies; if the joint tenants are trustees, there is no liability to death duty by reason of the joint tenancy. On the death of one of joint tenants who hold as trustees, there will be no liability to death duty unless such joint tenant has also a beneficial interest in the property. For example, two brothers may hold the legal estate as joint trustees upon trust for themselves and their three other brothers in equal shares. On the death of one of the trustees, one-fifth of the property becomes liable to death duty.

Partnership property is often held, as to the legal estate, by the partners as joint tenants. But among partners the *jus accrescendi* does not apply: the beneficial ownership or the rights to the proceeds of the property are in accordance with the terms of the partnership. Partnership property held jointly, therefore, is liable to death duty on the death of a partner according to his beneficial share. The fact that the property is in the joint names of the partners may be wholly ignored for death-duty purposes.

In New Zealand, other beneficial joint tenancies usually have their origin either in one of the spouses putting property into the joint names of the spouses, probably to obviate the necessity of taking out administration on the death of one, or in a legacy or devise to relatives (usually brothers or sisters) as joint tenants, and not as tenants in common. (It may be stated in passing that, unless there is in the will an expression of joint tenancy or a clear intention that there should be a tenancy in common, two or more legatees or devisees of the same property will hold, not as tenants in common, but as joint tenants. As stated in *Garrow on Wills*, 2nd Ed. 196, the general rule is that a devise or bequest to a number of persons, whether as a class or *nominatim*, without more, creates a joint tenancy.)

In *Going's* case, the husband provided the wherewithal for the purchase of the matrimonial home, but put the legal title in the joint names of himself and his wife. The wife died first, and the Crown claimed death duty in her estate as to the severable share which she held during her lifetime.

In *Todd's* case, a mother had left property by will to three of her children equally. On the first beneficiary's dying, the Crown claimed death duty on his estate in respect of his one-third share. This, too, was a beneficial joint tenancy. The Crown failed in both cases.

Now, what would have been the position if the husband (the contributing party) had died first in *Going's* case? The matrimonial home would have been liable to death duty on the whole value of the property, *as at the date of the creation of the joint tenancy*, and not as at the date of the death of the husband; if, in the meantime, the value of the property had increased, the Crown could not have taxed the accretion to value, unless it had more than doubled itself in value. If it had more than doubled itself, probably one-half of the property could have been taxed under para. (*g*), on the value as at date of death. Since the passing of the Joint Family Homes Act, 1950, however, a husband contributing the matrimonial home, as in *Going's* case, would get exemption as to £2,000 if he had registered the family home under that Act.

This rather liberal exemption in these days of severe death duties is contained in s. 16 of the Joint Family Homes Act, 1950, which reads as follows:

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

It is perhaps superfluous to mention that the above statutory exemption applies only to homes duly registered under the Joint Family Homes Act, 1950.

B. Liability of Life Insurance Policies to Death Duty.

During the last decade, there has been much litigation in England, Scotland, and New Zealand as to the liability of life insurance policies to death duty. With the possible exception of the New Zealand cases of *Commissioner of Stamp Duties* v. *Russell*, [1948] N.Z.L.R. 520, and *Craven* v. *Commissioner of Stamp Duties*, [1948] N.Z.L.R. 550 (discussed by the learned editor of this Journal in (1948) 24 New Zealand Law Journal, 167, 183), in which cases, it appears to the writer, the New Zealand Court of Appeal whittled down considerably previously-conceived notions of liability under para. (*g*) of s. 5 (1) of the Death Duties Act, 1921 (which deals with beneficial interests accru-

ing or arising by survivorship or otherwise on the death of the deceased), and which two cases, the writer ventures the opinion, may not be followed in their entirety by the Courts of the United Kingdom if cited to them, the law as to the liability of life insurance policies to death duty is uniform in these three jurisdictions. The New Zealand practitioner may rely on cases decided in England and Scotland, especially the important Scottish case *Lord Advocate* v. *Hamilton's Trustees*, [1942] S.C. (Ct. of Sess.) 426, which has been followed in England in *Re D'Avigdor-Goldsmid's Life Policy, D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners*, [1951] 1 All E.R. 240, and in New Zealand in *Craven's* case, [1948] N.Z.L.R. 550, and *Russell's* case, [1948] N.Z.L.R. 520, and which is mentioned later in this article.

One recent English case concerns the liability to death duty, on the death of the life assured, of policies effected under s. 16 (2) of the Married Women's Property Act, 1908, which reads as follows :

> A policy of insurance effected by any man on his own life, and expressed to be for the benefit of his wife or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband or of her children, or of her husband and children, or any of them, *shall create a trust in favour of the objects therein named ;* and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured or be subject to his or her debts.

Section 11 of the Married Women's Property Act, 1882, which is re-enacted as s. 16 of our Act, has been held to apply to *accident* policies as well as to life insurance policies : *Re Gladitz, Guaranty Executor and Trustee Co., Ltd.* v. *Gladitz*, [1937] 3 All E.R. 173.

The revenue provision usually applicable with regard to insurance policies coming under s. 16 of the Married Women's Property Act, 1908, is s. 5 (1) (*f*) of the Death Duties Act, 1921, which renders liable to death duty :

> Any money payable under a policy of assurance effected by the deceased on his life, whether before or after the commencement of this Act, where the policy is wholly kept up by him for the benefit of a beneficiary (whether nominee or assignee), or a part of that money in proportion to the premiums paid by him where the policy is partially kept up by him for such benefit, if (in either case) the money so payable is property situated in New Zealand at the death of the deceased.

It may be stated as a general rule that such policies are liable to death duty on the assured's death if the deceased paid any of the premiums *after* the other spouse or children had acquired as nominee or assignee a beneficial interest in the policy. The *quantum* of liability depends on the proportion of premiums paid by the deceased *after* the surviving spouse had acquired such a beneficial interest. Premiums paid by the deceased *before* such event are irrelevant for death-duty purposes, except as gifts, if paid within three years of deceased's death, and except as possible liability under para. (*g*) hereinafter set out. This general rule may be ascertained from such cases as *In re MacEwan, Guardian Trust and Executors Co. of New Zealand, Ltd.* v. *Commissioner of Stamp Duties*, [1945] G.L.R. 92, *Lord Advocate* v. *Fleming*, [1897] A.C. 145, and *Lord Advocate v. Inzievar Estates*, [1938] A.C. 402 ; [1938] 2 All E.R. 424.

The general rule as to liability to death duty of life insurance policies effected under s. 16 of the Married Women's Property Act, 1908, is easy to grasp and easy to apply, but, in exceptional cases, where the facts are peculiar or complicated, difficult questions may arise.

One such difficult case was *Re Oakes, Public Trustee* v. *Inland Revenue Commissioners*, [1950] 2 All E.R. 851. In that case, in 1904 the deceased took out three policies of assurance on his wife expressed to be for the benefit of his wife in the event of his wife's surviving him, but for his own benefit if his wife did not survive him. The first two premiums on the policies were paid, not by deceased, but by his wife's father. Thereafter, the deceased paid the annual premiums until 1919, when he paid a lump sum in lieu of future annual premiums, thus converting the policies into fully-paid policies. In 1920, the deceased and his wife, who were between them entitled to the whole beneficial interest in the policies, settled them by a voluntary settlement for the benefit of their issue. In 1948, the deceased died, leaving his wife him surviving, and the Crown's claim to estate duty in respect of the proportion of the policy moneys equivalent to the proportion of the premiums paid by deceased was upheld by the Court.

As to the point raised by the taxpayer that the policies were not in fact *effected* by deceased, but were effected by the wife's father, Romer, J., said, at p. 854 :

> It is said that, although it was the deceased who applied for the policy and presumably filled up the necessary form for obtaining it, nevertheless the payment of the first premium was an essential ingredient to the obtaining of the policy, and, accordingly, the policy was " effected " at least as much by the father-in-law as it was effected by the deceased, and so it is said that, *in limine*, the provision is not applicable to the facts of this case. I am unable to accept that view of the matter. It seems to me that the mere fact that the father-in-law in this case, who was a wealthy man and whose daughter was marrying a comparatively impecunious officer in the Army, promised to pay, and did pay, the first two premiums on this policy, which, after all, had been taken out for the benefit of his daughter, does not come within a long way of resulting in his " effecting " the policy. The policy was, to my mind, undoubtedly " effected " by the husband, *viz.*, the deceased, and the fact that his father-in-law was generous enough, or thought it proper, to pay the first two premiums is an irrelevant factor for consideration. In my judgment, it is clear that these policies were effected by the deceased.

The taxpayer further contended that the policies were not kept up by deceased because no premiums were paid after 1919. (The deceased, be it noted, did not die until 1948.) But His Honour said, at p. 854 :

> Counsel agrees that in 1919 the deceased made a payment to convert these policies into fully paid up policies, but he says that that did not amount to a keeping up, which involves the payment of annual or periodical premiums. I do not think that matter is of any significance, and, indeed, I do not understand the argument except on the footing that, unless you can say of a policy that the premiums are payable for the purpose of keeping it up until the policy matures and the time arrives for payment, such a policy is outside the provisions. That is putting a construction on those words which I do not think they bear. There is nothing in the words about keeping up down to the date of maturity, but the reference is to moneys which, whenever payable, are paid for the purpose of keeping the policy on foot. Therefore, I do not think that any weight can be attached to that argument.

The last and most substantial argument submitted by the taxpayer was that the policy had not been wholly or partially kept up by deceased because the wife was a contingent beneficiary only, and that deceased had kept up the policy just as much for his own benefit as for his wife's. But it was held that, although the deceased was beneficially interested in the policies as well as his wife, they were " wholly kept up " by the deceased " for the benefit of a donee " (in the New Zealand statute, the word is " beneficiary," instead of " donee," but that does not appear to make any

difference) within the meaning of the English provision corresponding to our s. 5 (1) (*f*) above-cited, the word "wholly" relating solely to the payment of the premiums, and not to the beneficial interest of the donee. To the writer, this is the most important part of this judgment.

It is also clear from the judgment that the fact that a deceased had paid a lump sum in satisfaction of future outstanding premiums payable according to the original contract between the deceased and the insurance company annually or at periodic intervals does not diminish liability for death duty on the death of the assured.

In the second case, the life policy was not under the Married Women's Property Act, 1882. The facts were more complicated, and disclosed circumstances not likely to arise in New Zealand.

In *Re D'Avigdor-Goldsmid's Life Policy, D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners*, [1951] 1 All E.R. 240, the deceased in 1904 took out a policy of assurance on his own life and for his own benefit for £30,000 with profits. On October 22, 1907, the deceased made an ante-nuptial settlement whereby he settled certain freehold estates, certain investments, and the policy, and directed that the trustees should receive the moneys payable under the policy at maturity and invest them in freehold land to be held on the same trusts as might then be subsisting in relation to the freehold estates thereby settled. Under the settlement, the deceased took a protected life interest in the freehold estates, which, after his death, were directed to be held in tail male for the first and other sons of the marriage, subject to a jointure rentcharge. The deceased covenanted in the settlement to pay the premiums on the policy. In 1930, by virtue of powers conferred by a private Act of Parliament, the existing trusts were brought to an end, and, by a deed of resettlement dated June 10, 1930, the freehold estates were settled on such trusts as the deceased and the plaintiff (the deceased's eldest son) should by deed jointly appoint (provided that this power should not be capable of being exercised so as to benefit the deceased directly or indirectly) and in default of and until and subject to any appointment (as regards part thereof) on trusts under which there was a discretionary trust of which the plaintiff was the principal object, and (as regards the remainder) on trusts under which the deceased took a determinable protected life interest in restoration of his former life interest under the settlement. The deceased covenanted in the resettlement to pay the premiums on the policy, and it was provided that the proceeds should become subject to the same trusts as that part of the realty in which deceased had a protected life interest. On November 10, 1934, the deceased and the plaintiff appointed that the policy (and also certain real property—the "Wood Street property") should be held in trust for the plaintiff absolutely, and deceased was released from his covenant to pay the premiums. The deceased paid all the premiums falling due before November 10, 1934, *but thereafter until the maturity of the policy they were paid by the plaintiff.* On April 14, 1940, the deceased died, and the Crown claimed estate duty in respect of the proceeds of the policy under the English provisions corresponding to s. 5 (1) (*g*) of our Death Duties Act, 1921, or in respect of the proceeds, or a part thereof, under the English provisions corresponding to our para. (*f*) hereinbfeore set out. Of the thirty-seven premiums which had been paid, the deceased had paid four before the date of the original settlement and a further twenty-three before the disentailment in 1930. He paid a further four before the appointment of 1934, and the plaintiff paid the last six premiums. Therefore, the plaintiff in fact paid thirty-one of the thirty-seven premiums paid in respect of the policy—a very substantial proportion, be it noted.

It was held that, although until 1934 the policy was kept up by the deceased, it was not kept up for the plaintiff, who, as the ultimate "donee," was the "donee" for the purposes of the English provisions corresponding to para. (*f*) of s. 5 (1) of our Act, it being irrelevant that he was one of the beneficiaries under the settlement and the resettlement, and, therefore, the policy moneys were not caught by those English provisions.

It was also held that the property assigned to the plaintiff in 1934 was the policy—*i.e.*, the benefit of the contract of insurance with the insurance company—that no new benefit accrued or arose in connection therewith on the deceased's death, and that, therefore, the English provisions corresponding to s. 5 (1) (*g*) of our Act were not applicable. Finally, it was held that the contemporaneous appointment of the Wood Street property did not give rise to a claim under these provisions, the plaintiff being free to pay the premiums in any manner and out of any resources as he wished. In this last connection, Vaisey, J., said, at p. 244:

> The effect of the last-mentioned deed of appointment was that the plaintiff became absolute beneficial owner of the said life policy and of the said premises, 27, Wood Street. The insurance company hold the original policy. The legal estate in the said premises, 27, Wood Street, was vested in the plaintiff after the said appointment. *The plaintiff could have at any time surrendered or sold the said policy had he so desired, but he preferred to keep it up.*

As stated above, the Crown claimed duty, not only under the English provision corresponding to s. 5 (1) (*f*) of our Act, but also under the one corresponding to our s. 5 (1) (*g*), which renders liable to death duty:

> Any annuity or other interest purchased or provided by the deceased, whether before or after the commencement of this Act, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased, if that annuity or other interest is property situated in New Zealand at the death of the deceased.

As to alleged liability under this paragraph, the Court applied the leading Scottish case, *Lord Advocate* v. *Hamilton's Trustees*, [1942] S.C. (Ct. of Sess.) 426, and rejected the Crown's claim thereunder, because before deceased's death the whole beneficial interest in the policy and the moneys to be paid thereunder had become fully vested in the plaintiff. In short, no beneficial interest accrued or arose on deceased's death in favour of the plaintiff by survivorship or otherwise. In order to establish liability under para. (*g*), the Crown must establish two things—namely, (i) that the property charged had been purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, and, second, that to some extent there has been a beneficial interest arising or accruing by survivorship or otherwise on the death of the deceased.

In dealing with liability under para. (*f*), Vaisey, J., said in *D'Avigdor-Goldsmid's* case, [1951] 1 All E.R. 240, 246:

> I have come to the conclusion that the donee [in the New Zealand statute, the beneficiary] . . . is the *ultimate* donee,

and that the reference to donee is not properly applicable to a series of donees, and that the word only properly signifies the final beneficiary and owner of the policy in question.

It is indeed difficult to reconcile this dictum with the reasoning of Romer, J., in *Re Oakes, Public Trustee* v. *Inland Revenue Commissioners*, [1950] 2 All E.R. 851, 854. It may therefore be confidently predicted that there will be still further case law on para. (*f*) of s. 5 (1) of the Death Duties Act, 1921. Not only under this paragraph, but also under some others, the effect on the revenue when an end is put to the settlement—as by an absolute assignment—and the old estates cease to exist has still to be determined by our Courts.

The only noticeable difference in principle between these two life insurance cases is that, whereas in the first the policy was fully paid up before the existing trust was determined and a new gift made, in the second, after the final gift, several premiums were paid by the final donee. In the second case, the learned Judge applied the general rule as to liability under para. (*f*) referred to above and laid down in the leading cases *Lord Advocate* v. *Fleming*, [1897] A.C. 145, and *Lord Advocate* v. *Inzievar Estates*, [1938] A.C. 402; [1938] 2 All E.R. 424. But in those two leading cases, both decisions of the House of Lords, there was only one gift transaction concerned. It may be submitted that, where, as in the two cases discussed in this article, there has been more than one gift transaction involved, it will take a decision of the House of Lords or of the Privy Council to settle the law.

CO-OPERATIVE DAIRY COMPANIES ACT, 1949.

Resumption and Valuation of Dry Shares and Adoption of Model Articles by Companies.

Attention was drawn in these pages ((1949) 25 NEW ZEALAND LAW JOURNAL, 383) to the passing of the Co-operative Dairy Companies Act, 1949.

One of the purposes of this Act is to deal with the problem of "dry" shares in co-operative dairy companies.

It is well known to the legal profession that companies registered under Part III of the Dairy Industry Act, 1908, had the power of resuming their own shares up to a limit of 20 per cent. of their issued capital—a privilege not possessed by the normal company registered under the Companies Act, 1933. If the company could not agree with the "dry" shareholder as to the price to be paid by the company for the shares, the company was bound to pay par value, together with interest at 5 per cent., calculated from the end of the previous financial year of the company to the date of the surrender.

The Co-operative Dairy Companies Act, 1949, repealed Part III of the Dairy Industry Act, 1908, but retained the powers of resumption of shares as explained in the last paragraph. That is to say, the company and the shareholder can still surrender shares in the same manner, but subject to the same restrictions, provided by Part III of the Dairy Industry Act, 1908, if they so desire. But the new Act also confers much wider powers of resumption of shares on the "dry" shareholder, as well as on the company.

For the first time, the "dry" shareholder is given the right to compel the company to accept surrender of his shares subject to the condition hereinafter mentioned. For the first time, also, subject to the same condition, the company can resume "dry" shares beyond the limit of 20 per cent. of the issued capital.

Neither the company nor the shareholder, however, can operate beyond the 20 per cent. limit without the consent of a Tribunal which has been set up as authorized by the Act. If a "dry" shareholder gives notice to the company that he desires the company to resume his shares, the company must resume, but, if resumption would have the effect of reducing the issued capital by more than 20 per cent. of the issued capital, the company must apply to the Tribunal for the necessary permission to resume beyond that limit. If the company declines or fails to make the necessary application to the Tribunal, the shareholder may apply. If it is the company which desires resumption of a non-supplying shareholder's shares or the excess shares of a supplying shareholder, and resumption would extend beyond the 20 per cent. limit, the company must make application to the Tribunal for the necessary permission.

The Tribunal has been sitting in Chambers at Wellington at monthly intervals to hear applications to resume "dry" shares beyond the 20 per cent. limit. It does not follow, of course, that every application to resume is granted by the Tribunal. Such applications are of the nature of a reduction of capital, which, in the case of the normal company registered under the Companies Act, 1933, may be granted only by the Supreme Court. For example, two important factors which the Tribunal must take into consideration are the interests of the company's creditors and the stability of the company, or, to put it another way, the interests of the remaining shareholders.

Once the shares are resumed by the company, or, to put it more correctly, surrendered by the shareholder to the company, a further application to the Tribunal will be necessary to fix the value of the shares, and, at the option of the company, to fix the terms of repayment, should the company desire time to pay for the shares, unless the shareholder and the company agree on these points. Applications of this nature are now being heard by the Tribunal, and for this purpose the Tribunal will travel to the nearest convenient town and examine witnesses *viva voce*, and consider submissions by counsel should the company or shareholder be represented by counsel.

Should any practitioner be desirous of ascertaining the procedure to be adopted in respect of applications to the Tribunal, he is advised to write to the Secretary of the Tribunal, Mr. J. E. Marshall, c/- Agriculture Department, Wellington.

Finally, it is desired to remind practitioners that, unless a co-operative dairy company registered under Part III of the Dairy Industry Act, 1908, at the time of the date of the coming into operation of the Co-operative Dairy Companies Act, 1949, re-registers under the latter statute before October 20, 1951, it

loses the privileges which that registration confers. As previously pointed out, Part III of the Dairy Industry Act, 1908, has been repealed, but a company which was registered under that Act at the date of the coming into operation of the Co-operative Dairy Companies Act, 1949, is deemed in the meantime—*i.e.*, until October 20, 1951—to be registered under the Co-operative Dairy Companies Act, 1949. That Act contains a set of model Articles for co-operative dairy companies, and, before a co-operative dairy company can be registered under the Act, it must adopt certain of these Articles. The rest are optional. Special Articles are to be adopted by companies which have " group " shareholding.

JOINT WILLS AND MUTUAL WILLS.

Difficulties for the Draftsman.

A joint will is a will made by two or more testators contained in a single document, duly executed by each testator, disposing either of their separate properties or of their joint property. (An example of the former is *In the Goods of Piazzi-Smyth*, [1898] P. 7, and an example of the latter is *In the Goods of Raine*, (1858) 1 Sw. & Tr. 144 ; 164 E.R. 667.) It is not, however, recognized in English law as a single will. It operates on the death of each testator as his will disposing of his separate property, and is in effect two or more wills.

Wills are mutual when the testators confer upon each other reciprocal benefits, and these may be absolute benefits in each other's property (as in *Stone* v. *Hoskins*, [1905] P. 194), or they may be life interests, with the same ultimate disposition of each estate on the death of the survivor (as in *Gray* v. *Perpetual Trustee Co.*, [1928] A.C. 391). In practice, a joint will is a mutual will—that is, the several wills which constitute the joint will are mutual. But the reciprocal benefits can be given by separate wills, and these are known as mutual wills : *In re Heys, Walker* v. *Gaskill*, [1914] P. 192.

When mutual wills, whether contained in a joint will or contained in separate documents, relate to joint property, the agreement to make the mutual wills and the making of the dispositions in pursuance of the agreement sever the joint tenancy and convert it into a tenancy in common.

Joint Wills.

That there cannot be a joint will was the view of no less an authority than Lord Mansfield in *Earl of Darlington* v. *Pulteney*, (1775) 1 Cowp. 260, 268 ; 98 E.R. 1075, 1079. So obstinate or so ignorant are testators, however, that, despite this unequivocal statement, they have continued to insist on their legal advisers' preparing joint wills for them against the latter's better judgment and express advice, or have executed holograph documents, drawn by themselves without benefit of professional assistance, and expressed to be joint wills. The result is that a number of documents announcing themselves to be joint wills have been presented for probate, and, possibly because the Court ever leans against intestacy, the tendency for the last century, at all events has been to admit to probate such of them as, apart from purporting to dispose of the property of, and being executed by, two persons, satisfy all the requirements of a valid will.

Where the joint will deals with property held by the testators in joint tenancy, or where it is expressly stated that it is to take effect only after the death of the survivor, it cannot be proved until both testators are dead ; in other cases, the practice is to prove the will on the occasion of each death as the separate will of the testator dying, notice of the first probate being entered in the calendar of deposited wills of living persons. Thus, in *Re Duddell, Roundway* v. *Roundway*, [1932] 1 Ch. 585, where a joint power of appointment by will (an abomination which surely could have been evolved by a slip of the pen alone) was given to a brother and sister and purported to be exercised by them by a joint will, executed for that purpose alone, the joint will was proved on the death of the brother, who was the first to die, together with his separate will disposing of his estates, but Farwell, J., held that it would not become effective until the death of the sister, and then only if it remained unaltered. The question whether the survivor could in fact make any valid alteration or revocation was posed, but not answered.

Duddell's case was a very special one ; the testator and testatrix were driven to make a joint will as the only possible means of exercising the power of appointment. The principles on which the Court will act where two persons make a joint will, not of necessity, but from choice, were last illustrated in *In the Estate of O'Connor*, [1942] 1 All E.R. 546. There, two sisters, Mary and Margaret, who had long lived together and had no other living relatives, made a joint will reciting that each intended to make a separate will in favour of the other, and intended the joint will to operate only if the survivor should fail to make yet another will after the death of the first to die. Shortly afterwards, each sister fulfilled her intention of making a separate will in favour of the other absolutely, and, in the fulness of time, they died, first Mary, and, a fortnight later, Margaret, who made no new separate will during that fortnight. The executor appointed by the joint will having renounced, the question arose whether administration of Margaret's estate should issue with the joint will annexed or with both the joint will and her separate will annexed. In choosing the first of these two alternatives, which involved holding that Margaret's separate will was a conditional will which would have taken effect only if she had been the first to die, Hodson, J., declared that he was influenced by the fact that the only result of admitting Margaret's separate will would have been to produce an intestacy, as well as by the fact that so to hold would have been to destroy the whole scheme which the sisters had thought out.

Though modern decisions show that Lord Mansfield's dictum no longer holds good, the practitioner should never accept instructions to prepare a joint will, except in the unlikely event of its being necessary to exercise another joint power to appoint by will. Except in a case on all fours with *Duddell's* case, a joint will appears to be totally without merit, since it is certain to lead to litigation, while, even if it is upheld by the Courts, it will achieve nothing which could not have been achieved by the execution of separate wills.

MUTUAL WILLS.

By mutual wills are usually understood wills whereby two testators confer reciprocal benefits upon each other, either by giving each other absolute interests or by giving life interests to each other followed by identical gifts over, to the intent that, whichever testator dies first, their combined estates shall devolve together.

Wills may be joint as well as mutual when the two mutual wills are contained in a single document, which will be open to the same objections as any other joint will.

The only reported New Zealand case of such a will is *In re Neal*, (1914) 33 N.Z.L.R. 1421. The fact was that the deceased and his wife, Elizabeth Neal, made a joint and mutual will on December 22, 1898. The material part was as follows:

> We both together and each severally give devise and bequeath all our real and personal estate of every description and wheresoever situated to the longest liver of us absolutely but subject to payment of all our just debts and funeral and testamentary expenses. And we jointly and severally appoint the survivor of us to be executor of this our will.

Elizabeth Neal, the survivor, applied for probate. Mr. Justice Cooper said, at p. 1421:

> This document is in effect a will of each person in favour of the other, and that portion of it containing the will of William Neal has by his death become effective as a testamentary instrument by him: *In the Goods of Stracey* ((1855) Deane 6; 164 E.R. 484), *In the Goods of Lovegrove* ((1862) 2 Sw. & Tr. 453; 164 E.R. 1072), *In the Goods of Piazzi-Smyth* ([1898] P. 7).

His Honour ordered that the whole document should be set out in the probate, but that the probate itself should be limited to so much of the instrument as became operative on the death of William Neal.

More often, however, the mutual wills, though (*mutatis mutandis*) identical in form, are contained in separate documents, and are peculiar only in that, even if revoked, they may take effect as trusts. The *locus classicus* where this was explained is *Dufour* v. *Pereira*, (1769) 1 Dick. 419; 21 E.R. 332. Lord Camden, L.C., said (as cited from 2 Harg. Jurid. Arg. 304, 309, in *Re Oldham, Hadwen* v. *Miles*, [1925] Ch. 75, 84):

> the parties of the mutual will do each of them devise, upon the engagement of the other, that he will likewise devise in manner therein mentioned . . . and he that dies first does by his death carry the agreement on his part into execution. If the other then refuses, he is guilty of a fraud, can never unbind himself, and becomes a trustee of course.

The mutual wills themselves may afford evidence, by recital or otherwise, of an agreement that they shall not be revoked, as Lord Camden held to be the case in *Dufour* v. *Pereira*, and as was so in the recent case of *Re Green, Lindner* v. *Green*, [1950] 2 All E.R. 913, or such agreement may be proved by extrinsic evidence: *In the Estate of Heys, Walker* v. *Gaskill*, [1914] P. 192; but it will not be inferred merely from the fact that two testators make wills at the same time giving reciprocal benefits. As Astbury, J., said in *Re Oldham, Hadwen* v. *Myles*, [1925] Ch. 75, "it is a strong thing that these two parties came together, agreed to make their wills in identical terms" (*ibid.*, 87), but it was not strong enough to lead him to imply the existence of an agreement not to revoke.

Again, in *Gray* v. *Perpetual Trustee Co., Ltd.*, [1928] A.C. 391, the Judicial Committee stated categorically that "the mere fact of making wills mutually is not, at least by the law of England, evidence of such an agreement" (*ibid.*, 400). Where no such agreement is established, both wills remain freely revocable, and the death of one testator without revoking will not prevent the other from revoking, even though he has taken benefits under the will of the first to die, there being "no more . . . a trust in equity than a right to damages at law" (*ibid.*, 400). See further hereon *Garrow's Law of Wills and Administration*, 2nd Ed. 20, 21, and *Dobbie's Probate and Administration Practice*, 60-62.

If, however, there is proved to have been an agreement not to revoke, both wills remain revocable during the joint lives, and, if the first testator to die in fact revokes, the other has no cause of action, since it is competent for him also to disregard the agreement and revoke or alter his own will. It is only where the first testator dies without revoking or altering the reciprocal will that a trust affecting the estate of the survivor can arise. In such case, the testator who has died has performed his part of the agreement, and the other thereupon becomes bound to perform his part. If, thereafter, the survivor revokes his mutual will, and makes a fresh will, then, although the latter will be admitted to probate, his personal representatives will take his estate impressed with a trust in favour of the beneficiaries under the mutual will. The application of this rule has recently been exemplified in striking fashion in *Re Green, Lindner* v. *Green*, [1950] 2 All E.R. 913. In that case, a husband and wife made mutual wills, under which each gave an absolute interest to the other if surviving, but provided that, if himself or herself should be the survivor, a moiety of his or her residuary estate should be considered as equivalent to the benefits derived by him or her by virtue of being the survivor of the spouses, and should be held on specified trusts. The wife died first, and the husband married again (which, of course, operated as a revocation of his mutual will) and later made a fresh will. This later will was admitted to probate, but Vaisey, J., held that the executors held a moiety of the residuary estate upon the trusts declared by the revoked will concerning the moiety deemed to represent benefits derived from surviving the first wife. Certain pecuniary legatees interested under these trusts were also pecuniary legatees under the later will, and it was held that they were entitled to the legacies given them by the later will as well as to their interests in the trust fund, though Vaisey, J., indicated that his decision might have been otherwise if the legacies given by the later will had been identical in amount with the sums to which the legatees were entitled under the trust which he had held to exist.

The lesson for the draftsman with regard to mutual wills is very simple. Whenever he is instructed to draft wills which are in identical terms (*mutatis mutandis*), or which have other elements indicating mutuality, he should inquire whether they are intended to be irrevocable without the consent of both parties. If they are, then the agreement not to revoke should be recited in unequivocal terms in each will; if they are not, then it is almost equally desirable to negative the imposition of any trust on the estate of the survivor.

There is another lesson for the person supervising the execution of mutual wills, as he will learn from *Guardian, Trust, and Executors Co. of New Zealand, Ltd.* v. *Inwood*, [1946] N.Z.L.R. 614, in which reference is made, at pp. 623, 624, to other decisions of importance on the point of execution by the wrong testators of mutual wills, in particular, *In re the Goods of F. S.*, (1850) 14 Jur. 402, *In re Hunt*, (1875) L.R. 3 P. & D. 250, and *In re Meyer*, [1908] P. 353.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Defender's Triumph.—Reference has been made earlier in this column to *Verdict in Dispute,* aptly described as a little gem of the criminologist's art, in which Edgar Lustgarten, an English barrister, makes a psychological examination of a number of trials. The author has now published a further book, *Defender's Triumph* (Wingate, 1951), in which he gives a brilliant and searching consideration to four *causes célèbres,* the cases of Adelaide Bartlett, Robert Wood, Elvira Barney, and Tony Mancini, in which the accused were all acquitted. "I do not suggest that any of them should have been convicted. But I do suggest," says Mr. Lustgarten, "that *all* of them *would* have been convicted had they not been shielded by remarkable defenders." These were Edward Clarke, Marshall Hall, Patrick Hastings, and Norman Birkett, and an interesting and instructive picture is drawn of each :

> Clarke's endowment was persuasiveness, and his weapon was the speech—not the smooth persuasiveness of wheedling or blandishment, but the powerful persuasiveness that springs from deep sincerity; not the speech of conventional Court rhetoric, but the speech informed with the passionate eloquence of genius. In complex, abstruse, or tricky litigation Edward Clarke might not invariably shine. But when he was concerned as a principal participant with the terrible simplicities that govern life and death, he had it in him to exert an appeal that sometimes bordered on the irresistible. The Bartlett case presented him with such an opportunity.

Of Marshall Hall, desite his habit of quarrelling with the Bench and his indiscreet loquacity, in the Wood case :

> Place him in a trial where the outcome must depend upon probing and interpreting the springs of human conduct, put into his care the interests of a prisoner struggling in the net of State or circumstance, make the prospects dark and the stake his client's life—and then Marshall Hall could be a champion beyond praise. In such an atmosphere and such a setting his faults appeared trivial, his virtues magnified; errors of tact or judgment were offset and wiped out by his magnetic intensity and dynamic force. Marshall Hall was at his best where some are at their worst—fighting back to the wall in a dramatic murder case.

Of Patrick Hastings (who, after his retirement, wrote that he always hated murder trials) in the Barney case :

> The personality, cool, self-contained, rather off-hand, slightly cynical, the voice, no organ throb moving listeners to tears, but smooth and even purring with an undertone of sarcasm; the manner, informed with that assurance and that ease which, in a public performer, masks the highest art—they enthralled and fascinated London Special Juries, particularly in the years between the two world wars. Here was an advocate whose individual style accorded with the current cultivated taste. Hastings was a portent and an influence at the Bar analogous with and parallel to du Maurier on the stage.

Of Birkett in the "Brighton trunk" sensation of the Mancini case :

> Norman Birkett was the spiritual heir of Erskine . . . He mostly defended cases of a different type from Erskine's, due to the different nature of their times, but the underlying impulse was the same—a passionate desire for justice and fair play. If the one man has his Horne Tooke and Thomas Hardy, his Admiral Keppel and his Lord George Gordon, so had the other his William Frederick Oakley and his Willows Crescent sisters, his Mrs. Beatrice Pace and his Mrs. Sarah Hearn. All were human beings who stood in direst peril and were saved only by a great defender's art.

This book is no mere rehash of well-known trials. It should be read by all who relish skill and industry in the exercise of the work of a barrister.

R. E. Megarry.—The late R. E. Megarry of the *Law Quarterly Review,* to whom Apteryx pays a graceful tribute (*Ante,* p. 44), once wrote, in a discussion on strange and unexpected things that turn up in practice :

> it was with some satisfaction that he had once commenced an opinion with the words: "It can rarely fall to the lot of English counsel to have to advise upon a contract for the sale of land in Eire made between a vendor with no title and a purchaser who is insane."

But, as one of our Professors mentioned to Scriblex the other day, Megarry was himself caught up in the strange and unexpected on one occasion, and became one of the few members of the Bar to be "unmortalized" in the pages of a murder mystery. This is *Smallbone Deceased,* a good specimen of the "whodunnit" school of fiction, set in the office of a large firm of London solicitors. On p. 49, one of the characters, discussing a fellow-employee, is describing an incident in early 1948 when, as he says, the Town and Country Planning Act "was rather the fashion." The subject of his conversation had read a couple of simple articles about it, and "of course took the next opportunity of cornering an inoffensive stranger at lunch and giving him a dissertation on some of the finer points of the Act. Sheer bad luck that he should have happened to have picked on Megarry!"

From My Notebook.—"Although I think this is a borderline case, I am not prepared to differ from the conclusion that he entered into a course of conduct which was calculated to break the wife's spirit and, if possible, to induce her to leave the matrimonial home. In so acting, the husband's conduct caused injury to his wife's health, coupled with the threat of graver injury if she remained living with him. I cannot, therefore, regard the husband's conduct in this case as being part of the ordinary wear and tear of married life": Mr. Justice Karminski in *Simpson* v. *Simpson,* [1951] 1 All E.R. 955, 967.

"It is curious that New Zealand, which adopted State Socialism on a large scale in the 'nineties, is now governed by individualistic business men and land-owning farmers": E. S. P. Haynes, *Lycurgus, or The Future of Law.*

"I would remind those who prosecute, as well as those who try long criminal cases, that complication is a weapon for the defence. The fewer and simpler issues left to the jury, the less chance there is of a miscarriage of justice": Mr. Justice Byrne in *R.* v. *Patel,* [1951] 2 All E.R. 29.

"Lawyers, of course, are conservative people and they are also generally very busy, or try to be. All their time is taken up now in keeping pace with the mass of legislation and orders produced inevitably in their own countries under modern conditions of government, so that it is not physically possible for them to make themselves aware of what is going on in other countries. Another of the occupational diseases of their profession is complacency. They all know that their own system is best and that they have nothing whatever to learn from others": Lord Jowitt, L.C., in a speech to the Third International Congress of Comparative Law, Lincoln's Inn, July 31, 1950.

PRACTICAL POINTS.

1. Trusts and Trustees.—*Trustee Investments—Power to invest in Other than Authorized Investments—Special Authority to purchase Home for Life Tenant and Children.*

QUESTION: A client of mine is contemplating making a settlement, but is very much concerned at the low rate of interest now earned by investments authorized by the Trustee Act, 1908. He desires to give his trustees a wider discretion in the choice of investments, so that the trust may earn a larger income. He also desires his trustees to have power to purchase with the trust moneys a home for the life tenant and her children. Can you suggest a suitable clause

ANSWER: It is not within the province of "Practical Points" to draft clauses of a novel nature. The following clause, however, has been suggested for use in Australia, and it ought not to be difficult for the New Zealand draftsman to adapt it for use in this Dominion: "Trust moneys hereafter calling for investments may from time to time be invested in any manner for the time being authorized by law for the investment of trust funds or in the purchase of landed property in the State of including leaseholds held for a term not less than years of which years are unexpired at the time of purchase or in the purchase of freehold ground rents or in or upon the debentures, debenture stock, or bonds or shares or stock of any company incorporated by Royal Charter or pursuant to the provisions of the Commonwealth or any State of the Commonwealth (not being a private or proprietary company) having a share capital of not less than £100,000, but so that no investment shall be made upon such debentures, debenture stock, or bonds or shares or stock unless the same is first recommended by a practising broker, who is a member of the Stock Exchange of not less than fifteen years' standing, with power for the trustees to vary or transpose such investments for or into others of a like nature and so that the power to invest in land shall extend to authorize the purchase of a dwellinghouse as a home for occupation by any person entitled to a life interest in possession in the settled property." X.1.

2. Joint Family Homes.—*Proposed Settlement—Title in Name of Wife—Land subject to Mortgage to Husband—Effect of Settlement on Mortgage—Liability to Gift Duty—Liability of Subsequent Voluntary Discharge of Mortgage.*

QUESTION: Mrs. A is sole owner of a freehold house, which she desires to settle as a joint family home under the Joint Family Homes Act, 1950. The conditions prescribed by s. 3 are all fulfilled. The property is subject to a mortgage of £2,500 in favour of her husband, Mr. A. The mortgage was given to provide evidence of money advanced by Mr. A to his wife to enable her to erect the dwelling. Mr. A was writing off the mortgage by annual gifts of £500, evidenced by registered memoranda of reduction.

If Mrs. A now settles the property as a joint family home: (*a*) What effect will this have on the mortgage to Mr. A (see s. 7 (1) (*b*))? (*b*) If the mortgage becomes automatically void and unenforceable (since there cannot be a valid mortgage from two joint tenants to one of them), what steps should be taken to discharge it from the title? (*c*) If Mr. A executed a discharge without consideration after the home had been settled, would this escape gift duty (see s. 15 (1) (c))?

ANSWER: (*a*) The vesting of the home in the two spouses under the Joint Family Homes Act, 1950, will not affect the mortgage.

(*b*) The mortgage will not become automatically void and unenforceable. No District Land Registrar would think of removing it from the title without the execution of a formal discharge by the husband. It will still remain a State-guaranteed charge on the land, and the wife will still remain liable under her personal covenant. The debt and the charge will still subsist.

(*c*) If Mr. A executes a discharge without consideration, gift duty will be payable: *Commissioner of Stamp Duties* v. *Card*, [1940] N.Z.L.R. 637. The section cited does not apply, because a voluntary discharge would not be a repayment. X.2.

CORRESPONDENCE.

Judges' Salaries.

The Editor,
NEW ZEALAND LAW JOURNAL,
Wellington.

Dear Sir,

The attention of the Standing Committee has been drawn to a letter in your last issue of July 24 (*Ante*, p. 210) under the signature of Mr. D. W. Virtue.

As some of the facts related therein and relied on by your correspondent are gravely inaccurate as well as being unjust to members of our Society, it is desired I correct them.

Mr. Virtue may believe that the New Zealand Law Society conducts its business too slowly to be efficient, but he overlooked the fact that the Council of the New Zealand Law Society is working continuously and expeditiously with the aid of its Standing Committee, which is called together very frequently to deal with matters requiring urgent attention.

One infers from Mr. Virtue's letter that the problem of Judges' salaries received no active attention from the New Zealand Law Society. Nothing could be further from the truth.

The remit of 1928 resulted in immediate representations being made to the Minister of Justice, and, following the last Conference, representations were again made, which elicited a reply from the Minister of Justice in which he said:

> "I can assure you that your representations will receive consideration when the Judges' salaries are under review. In the normal course of events a decision might have been expected by now, but with recent developments a postponement of the matter until some little time after the election is inevitable."

I think it is to be regretted that Mr. Virtue should have found it necessary to express the hope that the remit would not be quietly interred.

With reference to the matter of the Magistrates' salaries, Mr. Virtue, again apparently without making any further inquiry, assumes the correctness of Mr. Lloyd's statement that the achieved increases were not in any respect due to the Law Society's efforts. This assumption too is quite without justification, and is unfair not only to the New Zealand Law Society but also to many District Societies which took active steps in the matter.

Mr. Goulding's petition, which he was good enough to send to the Society, received its support. An appropriate resolution was passed supporting the petition, and that was duly sent to the Minister. In addition, a Special Committee set up for the purpose waited on the Prime Minister. A promise to consider our representations was given, and the next year the Minister of Justice wrote the New Zealand Law Society stating, *inter alia*:

> "With reference to the matter of Magistrates' emoluments, I have to advise that it is proposed shortly to introduce the necessary legislative authority to provide for an increase in the salaries of Magistrates."

As is known, the necessary legislation was duly passed and the salaries increased.

I think it is to be regretted that Mr. Virtue did not take the trouble to ascertain the facts on the matters of which he wrote. Had he done so, he would not have misled, not only his own brethren of the law, but also the wider public who subscribe to your JOURNAL.

Yours, &c.,
C. A. L. TREADWELL,
Acting Chairman, Standing Committee.

August 6, 1951.
New Zealand Law Society,
Wellington.