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NEGLIGENCE: THE DOCTRINE OF FORESEEABILITY.

A STUDY of Mr. Leicester's able paper, "Some Reflections upon the Development of the *Donoghue* v. *Stevenson* Principle" (*Ante*, p. 88), which was delivered at the Legal Conference at Dunedin, will have familiarized readers with the doctrine of foreseeability, which has developed from the classic words of Lord Atkin in the "Who is my neighbour?" passage in his speech in the case mentioned. Yet, as Mr. Leicester said, the problem which Lord Atkin posed involves us in a world of undefined boundaries, in which it is by no means easy to discover who is a neighbour within his criterion.

More recent than the reading of Mr. Leicester's paper is the judgment of the House of Lords in *Bolton* v. *Stone*, [1951] 1 All E.R. 1078. Although the facts are *sui generis*, as they evolve out of a cricket match, the undefined boundaries of the doctrine of foreseeability, to which Mr. Leicester referred, are brought more into focus in all the speeches of their Lordships.

Although there are indications that, upon the facts, their Lordships tended to the opinion that *Bolton* v. *Stone* was a border-line case, they were all of a like opinion as to the law to be applied to the facts. In formulating the doctrine of foreseeability, they held that it is not enough that the happening should be such as can reasonably be foreseen. There must also be a reasonable possibility of injury's being caused. Consequently, before a person can be found guilty of actionable negligence, the further result that injury is likely to follow must also be such as a reasonable man would contemplate. There must be sufficient probability to lead a reasonable man to anticipate it; in other words, the risk of injury must be a substantial one.

The undisputed facts, as found by Oliver, J. ([1949] 1 All E.R. 237), may now be summarized.

On August 9, 1947, Miss Stone was injured by a cricket ball while she was standing on the highway outside her house, 10 Beckenham Road, Cheetham Hill, Manchester. The ball was hit by a batsman playing in a match on the Cheetham Cricket Ground, which is adjacent to that highway. Miss Stone brought an action for damages against the committee and members of the club. The striker of the ball was not a defendant.

The club has been in existence, and matches have been regularly played on this ground, since about 1864. Beckenham Road was constructed and built up in 1910. For the purpose of this work, the contractors made an arrangement with the club that a small strip of the ground at the Beckenham Road end should be exchanged for a strip at the other end. The match pitches have always been, and still are, kept along a line opposite the pavilion, which was the midline of the original ground. The effect is that in the case of a stright drive—the hit in the case in question—Beckenham Road has for some years been a few yards nearer the batsman than the opposite end. The cricket field, at the point at which the ball left it, is protected by a fence 7 ft. high, but the upward slope of the ground towards the fence is such that the top of the fence is some 17 ft. above the cricket pitch. The distance from the striker to the fence is about 78 yards, and to the place where Miss Stone was hit, just under 100 yards. A witness, Mr. Brownson, who lives in the end house—one of the six at the end nearest the ground and opposite to that of Miss Stone—said that five or six times during the last few years he had known balls hit his house or come into the yard. His evidence was quite vague as to the number of occasions, and it has to be observed that his house is substantially nearer the ground than Miss Stone's. Two members of the club of over thirty years' standing agreed that the hit was altogether exceptional and greater than anything previously seen on that ground. They also said—and the learned Judge accepted their evidence—that it was only very rarely that a ball was hit over the fence during a match. On these facts, the learned Judge acquitted the appellants of negligence, and held that nuisance was not established.

Miss Stone appealed. The Court of Appeal ([1949] 2 All E.R. 851) reversed the judgment of Oliver, J. The Court comprised Somervell, Singleton, and Jenkins, L.JJ. It held by a majority (Somervell, L.J., dissenting) that, there being a foreseeable risk of a ball's being hit into the road, the occupiers of the cricket ground were under a duty to take reasonable care to avoid injury to anyone on the road; they had failed to carry out this duty; and, therefore, they were liable for damages in negligence to Miss Stone. From that judgment, the cricket club appealed to the House of Lords ([1951] 1 All E.R. 1078).

Lord Porter, after referring to the facts as found in the Court of first instance, posed the question that had to be answered by their Lordships: Is it enough to make an action negligent to say that its performance

may possibly cause injury, or must some greater probability exist of that result ensuing in order to make those responsible for its occurrence guilty of negligence ?

In the present case, Lord Porter said, the appellants had not done the act themselves, but they were trustees of a field where cricket was played ; they were in control of it ; and they invited visiting teams to play there. They were, therefore, and were admitted to be, responsible for the negligent action of those who used the field in the way intended that it should be used. He continued, at p. 1080 :

> The question then arises : What degree of care must they exercise to escape liability for anything which may occur as a result of this intended use of the field ? Undoubtedly, they knew that the hitting of a cricket ball out of the ground was a possible event, and, therefore, that there was a conceivable possibility that someone would be hit by it, but so extreme an obligation of care cannot be imposed in all cases. If it were, no one could safely fly an aeroplane or drive a motor-car since the possibility of an accident could not be overlooked, and, if it occurred, some stranger might well be injured. Cases of that kind, however, presuppose the happening of an event which the flyer or driver desires to do everything possible to avoid, whereas the hitting of a ball out of the ground is an incident in the game and, indeed, one which the batsman would wish to bring about.
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> In order that the act may be negligent there must be not only a reasonable possibility of its happening, but also of injury being caused. In the words of *Lord Thankerton* in *Bourhill* v. *Young* ([1942] 2 All E.R. 396) the duty is to exercise
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> " . . . such reasonable care as will avoid the risk of injury to such persons as he can reasonably foresee might be injured by failure to exercise such reasonable care " (*ibid.*, 399).
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> *Lord Macmillan* used words to the like effect (*ibid.*, 403). So, also, *Lord Wright* in *Glasgow Corporation* v. *Muir* ([1943] 2 All E.R. 44, 50), quoted the well-known words of *Lord Atkin* in *Donoghue* v. *Stevenson* ([1932] A.C. 562) :
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> " You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour " (*ibid.*, 580).
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> It is not enough that the event should be such as can reasonably be foreseen. The further result that injury is likely to follow must also be such as a reasonable man would contemplate before he can be convicted of actionable negligence. Nor is the remote possibility of injury occurring enough. There must be sufficient probability to lead a reasonable man to anticipate it. The existence of some risk is an ordinary incident of life, even when all due care has been, as it must be, taken.

Lord Porter went on to say that it cannot too often be repeated that there are two different standards to be applied. When one is considering whether an appeal should be allowed or not, the first is whether the facts relied on are evidence from which negligence can in law be inferred ; the second is whether, if negligence can be inferred, those facts do constitute negligence. The first is a question of law on which the Judge must actually or inferentially rule ; the second, a question of fact on which the jury, if there is one, or, if not, the Judge, as judge of fact, must pronounce. Both to some extent, but more particularly the latter, depend on all the surrounding circumstances of the case.

In the present instance, the learned trial Judge had come to the conclusion that a reasonable man would not anticipate that injury would be likely to result to any person as a result of cricket being played in the field in question ; and Lord Porter could not say that that conclusion was unwarranted. He proceeded, at p. 1081 :

> In arriving at this result I have not forgotten the view entertained by *Singleton*, L.J., that the appellants knew that balls had been hit out of the ground into the road, though on very rare occasions—six were proved in about thirty years—and it is true that a repetition might at some time be anticipated. Its happening, however, would be a very exceptional circumstance, the road was obviously not greatly frequented, and no previous accident had occurred, nor do I think that the respondent improves her case by proving that a number of balls were hit into Mr. Brownson's garden. It is danger to persons in the road, not to Mr. Brownson or his visitors, which is being considered. In these circumstances I cannot say that as a matter of law the decider of fact, whether Judge or jury, must have come to the conclusion that the possibility of injury should have been anticipated. I cannot accept the view that it would tend to exonerate the appellants if it were proved that they had considered the matter and decided that the risks were very small and that they need not do very much. In such a case I can imagine it being said that they entertained an altogether too optimistic outlook. They seem to me to be in a stronger position if the risk was so small that it never even occurred to them.

The quantum of danger must always be a question of degree, said Lord Porter. It is not enough that there is a remote possibility that injury may occur. The question is : Would a reasonable man anticipate it ? Lord Porter did not think that he would, and in any case, unless an appellate body are of opinion that he clearly ought to have done so, the tribunal on whom the duty of finding the facts rests is the proper judge of whether he would or not.

Lord Normand said that it was not questioned that the occupier of a cricket ground owes a duty of care to persons in an adjoining highway or neighbouring property who may be in the way of balls driven out of the ground. It was necessary, however, to consider the measure of the duty owed. He continued, at p. 1082 :

> It is not the law that precautions must be taken against every peril that can be foreseen by the timorous. In *Glasgow Corporation* v. *Muir* ([1943] 2 All E.R. 44) the decision turned on the standard of care, and *Lord Thankerton* held that a person is bound to foresee only the reasonable and probable consequences of his failure to take care, judged by the standard of the ordinary reasonable man. He observed that the question whether a defender had failed to take the precautions which an ordinary reasonable man would take is essentially a jury question, and that it is the duty of the Court to approach the question as if it were a jury and that a Court of Appeal should be slow to interfere with the conclusions of the trial Judge. *Lord Macmillan* agreed that the standard of duty was the reasonable man of ordinary intelligence and experience contemplating the reasonable and probable consequences of his acts (*ibid.*, 48). What ought to have been foreseen is the test accepted by *Lord Wright* (*ibid.*, 50), who quoted *Lord Atkin's* words in *Donoghue* v. *Stevenson* ([1932] A.C. 562) :
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> " You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour " (*ibid.*, 580).
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> *Lord Clauson* ([1943] 2 All E.R. 44, 54) stated as the test whether the person having the duty of care ought, as a reasonable person, to have had in contemplation that, unless some further precautions were taken, such an unfortunate occurrence as that which in fact took place might well be expected.

It was, therefore, not enough for the respondent to say that the occupiers of the cricket ground could have foreseen the possibility that a ball might be hit out of the ground by a batsman and might injure people on the road. She had to go further and say that they ought, as reasonable men, to have foreseen the probability of such an occurrence.

Among the facts found by Oliver, J., were that a house substantially nearer the ground than the place where the respondent was injured had been hit by a cricket ball driven out of the ground on certain occasions

(vaguely estimated at five or six by a witness) in the previous few years; that the hit which occasioned the respondent's injury was altogether exceptional; and that it was very rarely indeed that a ball was hit over the fence between the road and the ground. Lord Normand went on to observe, at p. 1083:

> It is, perhaps, not surprising that there should be differences of opinion about the appellants' liability even if the correct test is applied. The whole issue is indeed finely balanced. On the one side there are, as we were told, records of much longer hits by famous cricketers than the drive which caused the injury to the respondent and it is, of course, the object of every batsman to hit the ball over the boundary if he can. Again, the serious injury which a cricket ball might cause must not be left out of account. On the other side, however, the findings of fact show that the number of balls driven straight out of the ground by the players who use it in any cricket season is so small as to be almost negligible, and the probability of a ball so struck hitting anyone in Beckenham Road is very slight. The issue is thus one eminently appropriate for the decision of a jury, and *Oliver*, J., dealt with it as a jury would and gave his decision without elaborating his reasons. I think that the observations of *Lord Thankerton* in *Glasgow Corporation* v. *Muir* ([1943] 2 All E.R. 44, 47) are apposite and that it is unfortunate that the Court of Appeal should have reversed the decision.

Lord Normand, after considering issues traversed in the Court of Appeal, said, at p. 1083, that, whatever view might be taken on those matters, his conclusion was that the decision of Oliver, J., should have been respected as equivalent to a verdict of a jury on a question of fact.

Lord Oaksey said that the standard of care in the law of negligence is the standard of an ordinarily careful man, but, in his opinion, an ordinarily careful man does not take precautions against every foreseeable risk. He can, of course, foresee the possibility of many risks, but life would be almost impossible if he were to attempt to take precautions against every risk which he can foresee. He takes precautions against risks which are reasonably likely to happen. Many foreseeable risks are extremely unlikely to happen and cannot be guarded against except by almost complete isolation. The ordinarily prudent owner of a dog does not keep his dog always on a lead on a country highway for fear it may cause injury to a passing motor-cyclist, nor does the ordinarily prudent pedestrian avoid the use of the highway for fear of skidding motor-cars. It may very well be that after this accident the ordinarily prudent committee man of a similar cricket ground would take some further precaution, but that is not to say that he would have taken a similar precaution before the accident. There are many footpaths and highways adjacent to cricket grounds and golf courses on to which cricket and golf balls are occasionally driven, but such risks are habitually treated both by the owners and committees of such cricket and golf courses and by the pedestrians who use the adjacent footpaths and highways as negligible, and it was not, in Lord Oaksey's view, actionable negligence not to take precautions to avoid such risks.

It was readily foreseeable, said Lord Reid, that an accident such as befell the respondent might possibly occur during one of the appellants' cricket matches. Balls had been driven into the public road from time to time, and it was obvious that if a person happened to be where a ball fell that person would receive injuries which might or might not be serious. On the other hand, it was plain that the chance of that happening was small. The exact number of times a ball had been driven into the road was not known, but it was not proved that this had happened more than about six times in about thirty years. If he assumed that it had happened on the average once in three seasons, His Lordship said that he would be doing no injustice to the respondent's case. Then there had to be considered the chance of a person being hit by a ball falling in the road. The road appeared to be an ordinary side road giving access to a number of private houses, and there was no evidence to suggest that the traffic on this road was other than what one might expect on such a road. On the whole of that part of the road where a ball could fall there would often be nobody and seldom any great number of people. It followed that the chance of a person's ever being struck, even in a long period of years, was very small. Lord Reid continued, at p. 1084:

> This case, therefore, raises sharply the question what is the nature and extent of the duty of a person who promotes on his land operations which may cause damage to persons on an adjoining highway. Is it that he must not carry out or permit an operation which he knows or ought to know clearly can cause such damage, however improbable that result may be, or is it that he is only bound to take into account the possibility of such damage if such damage is a likely or probable consequence of what he does or permits, or if the risk of damage is such that a reasonable man, careful of the safety of his neighbour, would regard that risk as material? I do not know of any case where this question has had to be decided or even where it has been fully discussed. Of course there are many cases in which somewhat similar questions have arisen, but, generally speaking, if injury to another person from the defendants' acts is reasonably foreseeable the chance that injury will result is substantial and it does not matter in which way the duty is stated.

In such cases, Lord Reid said that he did not think that much assistance is to be got from analysing the language which a Judge has used. More assistance is to be got from cases where Judges have clearly chosen their language with care in setting out a principle, but, even so, statements of the law must be read in the light of the facts of the particular case. Nevertheless, making all allowances for this, he found at least a tendency to base duty rather on the likelihood of damage to others than on its foreseeability alone. He went on to say, at pp. 1084, 1085:

> The definition of negligence which has, perhaps, been most often quoted is that of *Alderson*, B., in *Blyth* v. *Birmingham Waterworks Co.* ((1856) 11 Exch. 781):
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> > "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do" (*ibid.*, 784).
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> I think that reasonable men do, in fact, take into account the degree of risk and do not act on a bare possibility as they would if the risk were more substantial. A more recent attempt to find a basis for a man's legal duty to his neighbour is that of *Lord Atkin* in *Donoghue* v. *Stevenson* ([1932] A.C. 562):
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> > "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour" (*ibid.*, 580).
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> Parts of *Lord Atkin's* statement have been criticized as being too wide, but I am not aware that it has been stated that any part of it is too narrow. *Lord Atkin* does not say "Which you can reasonably foresee could injure your neighbour": he introduces the limitation "would be likely to injure your neighbour." *Lord Macmillan* said in *Bourhill* v. *Young* ([1942] 2 All E.R. 396):
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> > "The duty to take care is the duty to avoid doing or omitting to do anything the doing or omitting to do which may have as its reasonable and probable consequence injury to others and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed" (*ibid.*, 403).

Lord Thankerton in *Glasgow Corporation* v. *Muir* ([1943] 2 All E.R. 44), after quoting this statement, said:

> "In my opinion, it has long been held in Scotland that all that a person can be held bound to foresee are the reasonable and probable consequences of the failure to take care, judged by the standard of the ordinary reasonable man . . . The Court must be careful to place itself in the position of the person charged with the duty and to consider what he or she should have reasonably anticipated as a natural and probable consequence of neglect, and not to give undue weight to the fact that a distressing accident has happened" (*ibid.*, 47).

The law of Scotland does not differ in this matter from the law of England.

There are other statements which may seem to differ but which I do not think are really inconsistent with this. For example, in *Fardon* v. *Harcourt-Rivington* ((1932) 146 L.T. 391), *Lord Dunedin* said:

> "This is such an extremely unlikely event that I do not think any reasonable man could be convicted of negligence if he did not take into account the possibility of such an occurrence and provide against it . . . people must guard against reasonable probabilities, but they are not bound to guard against fantastic possibilities" (*ibid.*, 392).

Lord Reid said that he doubted whether Lord Dunedin meant the division into reasonable probabilities and fantastic possibilities to be exhaustive so that anything more than a fantastic possibility must be regarded as a reasonable probability. What happened in that case was that a dog left in a car broke the window, and a splinter from the glass entered the plaintiff's eye. Before that had happened, it might well have been described as a fantastic possibility, and Lord Dunedin did not have to consider a case nearer the border-line. Lord Reid did not think it necessary to discuss other statements which might seem to be at variance with the trend of authority which he had quoted, because he had not found any which was plainly inconsistent with it, and he had left out of account cases where the defendant clearly owed a duty to the plaintiff and by his negligence caused damage to the plaintiff. In such cases questions have arisen whether damages can only be recovered in respect of consequences which were foreseeable or were natural and probable, or whether damages can be recovered in respect of all consequences, whether foreseeable or probable or not, but remoteness of damage in this sense appeared to His Lordship to be a different question from that which arose in the present case.

Lord Radcliffe said that, if the test whether there has been a breach of duty were to depend merely on the answer to the question whether this accident was a reasonably foreseeable risk, he thought that there would have been a breach of duty, for that such an accident might take place some time or other might very reasonably have been present to the minds of the appellants. It was quite foreseeable, and there would have been nothing unreasonable in allowing the imagination to dwell on the possibility of its occurring. There was, however, only a remote, perhaps he ought to say only a very remote, chance of the accident's taking place at any particular time, for, it it was to happen, not only had a ball to carry the fence round the ground, but it had also to coincide in its arrival with the presence of some person on what did not look like a crowded thoroughfare and actually to strike that person in some way that would cause sensible injury. He continued, at p. 1087:

> Those being the facts, a breach of duty has taken place if they show the appellants guilty of a failure to take reasonable care to prevent the accident. One may phrase it as "reasonable care" or "ordinary care" or "proper care"—all these phrases are to be found in decisions of authority—but the fact remains that, unless there has been something which a reasonable man would blame as falling beneath the standard of conduct that he would set for himself and require of his neighbour, there has been no breach of legal duty, and here, I think, the respondent's case breaks down. It seems to me that a reasonable man, taking account of the chances against an accident happening, would not have felt himself called on either to abandon the use of the ground for cricket or to increase the height of his surrounding fences. He would have done what the appellants did. In other words, he would have done nothing. Whether, if the unlikely event of an accident did occur and his play turn to another's hurt, he would have thought it equally proper to offer no more consolation to his victim than the reflection that a social being is not immune from social risks, I do not say, for I do not think that that is a consideration which is relevant to legal liability.

Their Lordships all distinguished *Castle* v. *St. Augustine's Links, Ltd.*, (1922) 38 T.L.R. 615, which rested on a different set of circumstances, in which a succession of players driving off alongside the road might be expected from time to time to slice a ball over or along the road; and, therefore, the possibility of danger to those using the highway there was much greater.

As to the alternative claim based on nuisance, it was admitted for Miss Stone that, in the circumstances of the case, unless negligence were proved, nuisance could not be established; and there was nothing to suggest, in *Castle's* case, that a nuisance was created by the first ball that fell in the road there in question. It was also argued that the case came within the *Rylands* v. *Fletcher* principle, but this proposition was summarily rejected. So, too, was the respondent's reliance on the doctrine of *res ipsa loquitur*, since, as Lord Porter observed, all the facts were known, and, consequently, it could not have any application.

The observations of two of their Lordships in relation to known risks emanating from sports grounds are, at first glance, seemingly contradictory; but, on closer examination, they do not appear to be so. Lord Reid said, at p. 1086:

> If this appeal is allowed, that does not, in my judgment, mean that in every case where cricket has been played on a ground for a number of years without accident or complaint those who organize matches there are safe to go on in reliance on past immunity.

Lord Normand had observed earlier, at p. 1084:

> There are many footpaths and highways adjacent to cricket grounds and golf courses on to which cricket and golf balls are occasionally driven, but such risks are habitually treated both by the owners and committees of such cricket and golf courses and by the pedestrians who use the adjacent footpaths and highways as negligible, and it is not, in my opinion, actionable negligence not to take precautions to avoid such risks.

The question of the safety of such a ground is not one of law; it is one of fact and degree; and opinions may well differ in regard to any such ground. As their Lordships, in effect, held, a reasonable man, considering each case from the viewpoint of safety, would not or should not disregard any risk unless it is extremely small.

THE AUSTRALIAN LEGAL CONVENTION.

"A Grandly-conceived Convention."

By JULIUS M. HOGBEN.

The Seventh Legal Convention of the Law Council of Australia as part of the Australian Jubilee celebrations was grandly conceived. To bring together from all parts of the British Commonwealth and from the United States of America lawyers, jurists, and Judges (terms which, as one speaker emphasized, are not mutually exclusive) was an inspiration. The names and the stature of the overseas visitors were of themselves enough to ensure success, and even the man in the street was impressed. The ceremonies, the official opening, and the several religious services were given full Press publicity, and all Sydney knew that something unique was happening. One felt that the standing of the law and of lawyers must be, and was, enhanced by the very fact of such a Convention.

Socially, the Convention was the greatest possible success; the V.I.P.'s were entertained from morning to early morning—dinners and drives, cocktail parties, lunches, a harbour excursion, and a theatre party. Hospitality was poured out with a lavish hand. The human frame could hardly hope to be fresh at the end of a week of it; at least one member of the Entertainment Committee was driven to taking sleeping-draughts to make sure of some rest from all his labours.

The V.I.P.'s became known very early as the D.O.G.'s, because they were so named by Lord Jowitt, who at the opening spoke of those whom the Committee referred to as Distinguished Overseas Guests, D.O.G.'s, and, he added, very lucky D.O.G.'s they were to be the recipients of such hospitality.

And yet, with all this glamour, and with all the generous and lavish social entertainment, the Convention as a legal convention was something of a disappointment. High judicial officers and representatives of every branch of the profession were brought to Australia from the four corners of the earth, and there was not one discussion on a topic of major interest to the whole of the British Commonwealth, and those papers which did have implications beyond the borders of Australia were discussed by Australians only. Many from within Australia as well as those from overseas felt that here was a unique opportunity for a discussion, contributed to by India, Pakistan, and Ceylon, by Canada and South Africa, by Australia and New Zealand, and by the leaders of the law in England, on the past, present, and future constitution of the British Commonwealth. Never before had there been the opportunity for such a discussion by verbal exchanges of the ideas of legal minds from the whole of the British Commonwealth. Some of the visitors from overseas had their problems which were problems common to all, and which they would have been glad to discuss with their fellows from other Dominions; but the opportunity did not come. Many of the leaders who had travelled thousands of miles to the Convention were neither invited nor given the opportunity to speak.*

* The Chief Justice of Canada, the Rt. Hon. Thibeaudeau Rinfret, is reported in the *New Zealand Herald* of September 11 to have said, while passing through Auckland: "The Convention was successful in bringing people together, but not as a legal convention."

THE CONFERENCE PAPERS.

The first paper did have implications beyond Australia, the outstanding paper prepared by Dean Erwin N. Griswold of Harvard on "Divorce Jurisdiction and Recognition of Divorce Decrees." This was a comparative study of the laws of the United States and of the Commonwealth. It dissipated a lot of misunderstanding on such American divorces as the Reno divorces. It urged the recognition by the Commonwealth countries of a separate domicil for a wife, not by statutory provisions for special cases, but through the Common Law as the general rule. This paper dealt with the extra-territorial recognition of divorce decrees, and cried out for discussion by representatives of the five legal systems operating within the British Commonwealth—namely, the British Common Law, the Roman-Dutch law of South Africa and Ceylon, the French-Canadian law, and the Hindu Law and Moslem Law of India and Pakistan. The clash of different systems is probably greater on questions of personal status than anywhere else in the realm of law, and yet no delegate outside Australia was invited to speak. Whether any such delegate intended to speak will never be known, as, after several Australians had spoken, the contribution from Joske, K.C., being the one outstanding, the chairman announced that he would like a smoke before lunch, as no doubt many others would, and the discussion was therefore closed.

The paper on "Fifty Years of the Australian Federal Constitution" was another paper to which valuable contributions could have been invited from the representatives of the two countries with federal constitutions (Canada and the United States of America), but again this was not done. This paper was prepared by Professor E. H. Bailey, Federal Solicitor-General. It was described as showing the author's detachment, "a form of occupational disease"—whether in Professors or in Solicitors-General the speaker did not say. The two most valuable contributors to the discussion were the youngest and the oldest. The former, Wild of Sydney, after a hesitant start, gave a solid and delightful criticism of the Constitution and its administration. It was he who said that "lawyers, if not laws, flourish in the dustbowl of s. 92"—the most provocative section of the Constitution, dealing as it does with the powers in the economic field of Federal and State Parliaments. The oldest contributor was Sir Robert Garran, who had been one of "Sir Edmund Barton's bright young men" and was the survivor of the team responsible for drawing up the Constitution. Sir Robert Garran said of himself, in private conversation, that he spent the first thirty years of his life in Melbourne, the second thirty in Sydney, and that he was spending the third thirty years in Canberra. In discussing Professor Bailey's paper, he told of the violent debates in the 'nineties for and against federation; free trade versus protection was, he said, the lion in its path, and he recalled Sir George Reid's comment that for New South Wales to federate was like a teetotaller setting up house with five drunkards. Sir Robert advocated the setting up of a permanent non-

SUMMARY OF RECENT LAW.

BANKRUPTCY.

Effect of Disclaimer of Leaseholds. *211 Law Times*, 330.

COMPANY.

Dividend—Computation—Payment of Dividend Tax free up to 6s. in the £. The articles of a company provided: "The 'B' cumulative preference shares confer the right to a fixed cumulative preferential dividend at such rate that after deduction of income-tax thereon at the current rate for the time being (irrespective of any allowance or rebate in the case of a particular shareholder) the amount remaining shall be the clear sum of 6 per cent. per annum on the capital paid up thereon less the amount of any income-tax for the time being payable in excess of 6s. in the pound computed on the gross sum of 6 per cent. per annum on such capital." On the construction of this provision, *Held*, That for any year in which the rate of income-tax was more than 6s. in the £ the deduction in respect of the excess ought to be calculated on the amount of £6 per centum on the capital paid up, and not on that amount grossed up at 6s. in the £, so that for a year in which the rate of income-tax was 9s. in the £ the net amount of the dividend on £100 "B" cumulative preference shares (fully paid up) would be £6 less 18s., or £5 2s. *Friends Provident and Century Life Office and Another* v. *Investment Trust Corporation, Ltd., and Others*, [1951] 2 All E.R. 632 (H.L.).

As to Payment of Dividends Free of Tax, see *17 Halsbury's Laws of England*, 2nd Ed. 250, 251, paras. 507, 508; and for Cases, see *28 E. and E. Digest*, 110, No. *680*, and Digest Supplement.

CONTRACT.

Contracts ousting The Jurisdiction of The Court. *211 Law Times*, 346.

Property Passing under Illegal Contract. *211 Law Times*, 303.

CONVEYANCING.

Modification of Investment Clauses on The Execution of Special Powers of Appointment. *211 Law Times*, 348.

Trusts for Poor Relations. *95 Solicitors' Journal*, 347.

CRIMINAL LAW.

Identification by Photograph. *115 Justice of the Peace Journal*, 434.

Legal Cruelty. *115 Justice of the Peace Journal*, 419.

Identification as A Facet of Criminal Law. (Sydney Paikin.) *29 Canadian Bar Review*, 372.

Master and Servant. *115 Justice of the Peace Journal*, 402.

Murder—Provocation—Direction to Jury—Failure to direct—Newspaper Publications—Photographs—Whether rendering Fair Trial impossible—Whether Miscarriage of Justice—Crimes Act, 1928 (No. 3664), ss. 593, 594 (1). The accused was charged with the murder of D. The accused had attacked a passenger in a motor-car with a knife, and, when D., a bystander, attempted to prevent the attack, had struck D. with the knife and killed him. It was submitted on behalf of the accused that the evidence showed that he had just seen his young child knocked down by the motor-car and killed, owing to the negligence of the driver thereof, and that the provocation he thereby received was such as to reduce the killing of D. from murder to manslaughter. *Held, per Lowe*, A.C.J., and *O'Bryan*, J., That the suggested provocation was not sufficient to lead an ordinary person to do what the accused did in respect of D., and that the question of manslaughter based on provocation was properly withdrawn from the jury. (*Holmes* v. *Director of Public Prosecutions*, [1946] A.C. 588, applied.) Per *Smith*, J., That, as the accused must have been aware that D. was restraining him from attacking the passenger in the car, the case was one of constructive murder, to which the doctrine of provocation was irrelevant. If a defence, though not taken by the accused, is open on the evidence, it is the duty of the trial Judge so to direct the jury, and, if he fails to do so, it is the duty of an appellate Court to put him right. (*Kwaku Mensah* v. *The King*, [1946] A.C. 83, followed.) A new trial will not be granted on the ground that newspaper publications of photographs and articles have prejudiced and made impossible the fair trial of an accused person unless it appears that a miscarriage of justice, within the meaning of the Crimes Act, 1928, ss. 593, 594 (1), has occurred. (*Ross* v. *The King*, [1922] V.L.R. 329, followed.) *The King* v. *Scriva* (*No. 2*), [1951] V.L.R. 298 (F.C.).

Punishment in Prisons and Borstals. *101 Law Journal*, 437.

Surety of the Peace. *115 Justice of the Peace Journal*, 337.

The Defence of Superior Orders. *101 Law Journal*, 467.

DESTITUTE PERSONS.

Blood Tests in Affiliation Cases. *115 Justice of the Peace Journal*, 353.

EASEMENT.

Easements by Implied Reservation. *212 Law Times*, 6.

ESTOPPEL.

Consideration and Estoppel. *101 Law Journal*, 466.

FRAUD.

The Law and Witchcraft. *212 Law Times*, 16.

INCOME-TAX.

Apportionment on Sale of Land of Income-tax. *212 Law Times*, 5.

Company Directors and Employment Abroad. *211 Law Times*, 318.

Profits of Trade—Deductions—Entertainment of Clients—Income Tax Act, 1918 (c. 40), Schedule D, Cases I and II, r. 3 (a). The partners in a firm of solicitors were accustomed to entertain existing clients of the firm to luncheon at a social club and at various restaurants. During luncheon, business was discussed. The legal advice given to clients at luncheon was charged to them in the normal way, but the fees charged did not include the expenses of the meals, which were paid by the firm. This practice was adopted by the partners both for their own convenience, so that they could devote the remainder of the day to other work in their offices, and for the convenience of clients. The partners claimed to deduct the cost of these entertainments (which included the cost of their own meals) in computing the profits of the firm for assessment to income-tax. The Income Tax Act, 1918, Schedule D, Cases I and II, r. 3 (*a*), forbids the deduction of "any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment, or vocation." *Held*, That it was not essential, in order that deduction of the cost of the meals and refreshment should be allowed, to prove that the expenditure was "necessary" (in the strict sense of the word) for the purposes of transacting the business, and, notwithstanding the fact that the partner concerned obtained gratuitous sustenance, the giving of the hospitality was, on the facts, in each case a single transaction embarked on solely for business or professional purposes, and, therefore, the deduction ought to be allowed. *Bentleys, Stokes, and Lowless* v. *Beeson* (*Inspector of Taxes*), [1951] 2 All E.R. 667 (Ch.D.).

LAND TRANSFER.

Lease—Implied Covenants—Express Repair Covenant—Such Covenant neither Exclusion nor Modification of Implied Covenant to repair—Land Transfer Act, 1915, s. 93. The plaintiffs were the owners of 1,461 acres 2 roods 5 perches of land, which was the subject of a lease which had expired. As lessors, they claimed damages from the lessee on the ground of his alleged failure to keep and yield up the demised premises in good and tenantable repair. There was no express covenant to repair in the lease, but the lessors claimed that such a covenant was implied by virtue of s. 97 of the Land Transfer Act, 1915. The lessee contended that the repair covenant was excluded by the operation of cl. 3 of the lease, which was as follows: "3. The Lessees shall during the first five years of the term hereby granted and in each succeeding quinquennial period up to the expiration of the twentieth year of the said term make and effect upon and to the hereby demised land improvements to a value not being less than two hundred and fifty pounds and shall at the expiration of the said term leave on the said land substantial improvements to a value not being less than one thousand pounds Provided nevertheless that the

Lessees shall not be entitled to nor shall the Lessors be liable to pay any compensation for such improvements." On special case stated for the opinion of the Court, pursuant to s. 11 of the Arbitration Amendment Act, 1938, *Held*, That the express provision in cl. 3 neither excluded nor modified the covenant implied by virtue of s. 97 of the Land Transfer Act, 1915. (*Hansford* v. *Jago*, [1921] 1 Ch. 322, and *Gregg* v. *Richards*, [1926] Ch. 521, referred to.) (*Tattley* v. *Cooper*, (1905) 25 N.Z.L.R. 18, *Puhi Maihi* v. *McLeod*, [1920] N.Z.L.R. 372, *Malzy* v. *Eichholz*, [1916] 2 K.B. 308, and *Stephens* v. *Junior Army and Navy Stores, Ltd.*, [1914] 2 Ch. 516, distinguished.) *In re An Arbitration, Hinurewa Kawe and Herlihy.* (S.C. Auckland. August 27, 1951. Stanton, J.)

LANDLORD AND TENANT.

Compensation for Goodwill: Qualifying Period. *95 Solicitors' Journal*, 363.

Owners paying Rates for Tenant. *95 Solicitors' Journal*, 358.

Res Judicata and Investigation of Rent. *95 Solicitors' Journal*, 359.

MASTER AND SERVANT.

Negligence—Liability of Master—Proper System of Working—Extent of Master's Duty—Reasonable Foreseeability of Injury to Servant—Need to give Instructions. It is the duty of an employer acting reasonably to give such directions as to the method to be employed by his employees as will avoid the possibility of danger to the men in the circumstances. (*Winter* v. *Cardiff Rural District Council*, [1950] 1 All E.R. 892, applied.) It is the duty of an employer reasonably to anticipate that the men provided for a job will consider it expected of them to carry on as best they can with the number provided, and that, if a man gets into difficulties, he will make an effort to get out of them himself before he calls on others who have other work to do. (*Nicholls* v. *F. Austin (Leyton), Ltd.*, [1946] A.C. 503; [1946] 2 All E.R. 92, referred to.) The fact that employees did not, apparently, regard the work given them to do as beyond their capabilities or as unsafe is not conclusive that there was no negligence on the part of the employer, of whom a high standard of care is required; and, if there was a danger, it is not essential for consideration of the question whether or not there was negligence that the damage that in fact occurred should be damage that should precisely have been foreseen. (*In re Polemis and Furness, Withy and Co., Ltd.*, [1921] 3 K.B. 560, *Winter* v. *Cardiff Rural District Council*, [1950] 1 All E.R. 819, and *Thorogood* v. *Van den Berghs and Jurgens, Ltd.*, [1951] 1 All E.R. 682, followed.) A new trial of this action followed the nonsuiting of the plaintiff, in pursuance of the judgment of the Court of Appeal (*Ante*, p. 23), where the facts of the plaintiff's accident sufficiently appear. At the second trial, the evidence presented a case substantially different from that presented at the first trial, in that the plaintiff tendered evidence that no system of working had been laid down. It was common ground at the trial that the only instruction that the men had been given was that the barrels were to be rolled from one end of the shed to the other and stacked there with the use of the jigger, the men being left to use their own discretion as to how it should be done. The plaintiff, a fellow-worker, and the two men who were with him when the accident happened gave evidence that no system had been laid down. There was also evidence that went to show that each one of these men had himself on different occasions rolled barrels alone; there was the evidence of the plaintiff and two others of the men to show, if it were accepted, that the foreman knew that they were rolling barrels by themselves; and there was the evidence of the plaintiff and one other of the men that the managing director of the defendant company knew that the plaintiff, at any rate, was rolling barrels by himself. The jury found for the plaintiff and awarded damages. Counsel for the defendant company moved for a nonsuit, on the ground that there was no evidence that the injury sustained by the plaintiff was due to any neglect on the part of the defendant company. This was opposed by the plaintiff's counsel, who put his case as depending on the consideration of the following questions: (*a*) whether there was evidence of the absence of a system of work that should have been arranged by the employer; (*b*) whether there was an insufficient supply of men and materials for the proper carrying out of the operation; and (*c*) whether the defendant company countenanced a practice of rolling barrels single-handed when it should not have done so. On these matters, the question was whether there was evidence to go to the jury on which it could properly find that the answers should be as submitted for the plaintiff. *Held*, 1. That there was evidence to go to the jury that the injury to the plaintiff flowed directly, and without any break of the chain of causation, from his rolling the barrel by himself, even though he gave the extra heave without thinking he was in difficulties affecting his health or safety. 2. That there was evidence on which the jury might properly hold that an accident might well occur and a man be injured in some way; and, in this regard, it was not only the plaintiff who had to be considered, as a number of men were from time to time employed, and among them it might reasonably be anticipated that there were some whose hearts were not completely sound or who were liable to accident in some other way if the jury thought it should reasonably be anticipated. 3. That there was evidence on which the jury could properly hold that, the facts being as they were, the defendant company failed to observe its duty as employer to take due and reasonable care for the safety of the plaintiff and not to subject him to unnecessary risks; and that it was open to the jury to hold that there was a reasonably apparent danger of a man being injured in some way. (*Bressington* v. *Commissioner for Railways (New South Wales)*, (1947) 75 C.L.R. 339, applied.) (*Fardon* v. *Harcourt-Rivington*, (1932) 146 L.T. 391, referred to.). The motion for a nonsuit was accordingly dismissed. *Williams* v. *B.A.L.M. (N.Z.), Ltd. (No. 3).* (S.C. Wellington. June 8, 1951. Hutchison, J.)

MORTGAGE.

Mortgagee's Powers—Power to sue for Overdue Principal Sum—Previous Notice Unnecessary—Property Law Amendment Act, 1939, s. 3 (1). Under s. 3 (1) of the Property Law Amendment Act, 1939, no power of sale conferred by a mortgage becomes exercisable by reason of any default in the payment of any moneys secured, unless and until the mortgagee serves a notice; and, if there has been a default in payment of rates or the observance of a covenant to farm entitling the mortgagee to call in before the due date, the mortgagee cannot sue for the principal unless and until he serves a notice. In the Magistrates' Court, the appellant sued the respondent for £200 and interest, being the balance owing under a memorandum of mortgage given by the respondent to the appellant and payable "on demand." The respondent, while admitting that the £200 and interest moneys were owing and had been demanded, set up the defence that as no notice in compliance with s. 3 of the Property Amendment Act, 1939, had been given the principal and interest moneys were not payable. The learned Magistrate held that respondent was entitled to a month's notice under s. 3. On appeal from that judgment, *Held*, 1. That on the due date of payment—which was fixed by the demand—the principal money secured by the mortgage became due, not by reason of any default, but because of the covenant to pay. 2. That on the day after the due date—*i.e.*, the day of the demand—the mortgagor could be sued, because or by reason of his default; but it was not the default which made the money due; it was the original covenant; and no notice under s. 3 (1) of the Property Law Amendment Act, 1939, was necessary. The case is reported on this point only. *O'Brien* v. *Skidmore.* (S.C. Hamilton. July 17, 1951. Fell, J.)

PRACTICE.

Costs—Abortive Trial—Discovery of Juryman's Association with Party of Nature likely to affect His Unbiased Consideration of Matters in Issue—Jury discharged—Plaintiff Successful in Later Trial—Incidence of Costs of Abortive Trial—Costs in Discretion of Court—Code of Civil Procedure, RR. 555, 604. In *Williams* v. *B.A.L.M. (N.Z.), Ltd. (No. 2)* ([1951] N.Z.L.R. 629), the trial Judge discharged the jury after the hearing by a jury had lasted about three-quarters of a day, because of the then-discovered association of a juryman with one of the parties. The question of costs, if any, was reserved. The second trial resulted in a verdict for the plaintiff. On the question of costs reserved in the earlier abortive trial, *Held*, 1. That the learned trial Judge had discharged the jury under R. 604 of the Code of Civil Procedure; and the position was not altered by the fact that counsel had properly agreed with His Honour's view, and had consented to the course he intended taking as being necessary for the true administration of justice. (*Take Kerekere* v. *Cameron*, [1920] N.Z.L.R. 302, applied.) 2. That the costs of the abortive trial were, therefore, in the discretion of the Court, under R. 555, and the successful party in the later trial should, *prima facie*, be allowed the costs of the abortive trial; but, in the circumstances of this case, the plaintiff, who was successful in the later trial, should be allowed a lump sum of an amount less than full costs for the abortive trial. (*Blaymires* v. *Ewing*, (1890) 9 N.Z.L.R. 567, and *Thompson* v. *Mason*, (1910) 12 G.L.R. 673, followed.) (*Tasker* v. *Algar and Algar*, [1930] N.Z.L.R. 61, distinguished.) The plaintiff

accordingly, was allowed £50, with witnesses' expenses and disbursements as fixed by the Registrar, in respect of the abortive trial. *Williams* v. *B.A.L.M. (N.Z.), Ltd. (No. 4).* (S.C. Wellington. August 1, 1951. Hutchison, J.)

Transfer of Action into Supreme Court—Removal not as of Right—Notice of Transfer of Proceedings Out of Time—Application for Enlargement refused—Delay in bringing Litigation to Conclusion considered—Magistrates' Courts Act, 1947, s. 43 (1)—Magistrates' Courts Rules, 1948, r. 179 (1). Section 43 of the Magistrates' Courts Act, 1947, does not give an absolute right to transfer proceedings from the Magistrates' Court to the Supreme Court, as it is subject to notice being given within the prescribed period. In determining the propriety of granting an application for enlargement of the time for filing such a notice, one matter to be considered is delay in bringing the litigation to a conclusion. (*Stenhouse* v. *McCurdie*, (1911) 31 N.Z.L.R. 73, applied.) The defendant applied for an enlargement of the time fixed by r. 179 (1) of the Magistrates' Courts Rules, 1948, for the filing of a notice requiring the proceedings to be transferred to the Supreme Court under s. 43 (1) of the Magistrates' Courts Act, 1947, in relation to an action claiming £301 4s. 6d. Notice of intention to defend was given on February 13, 1951, and the case was set down for hearing on February 27. The defendant's notice requiring the action to be transferred to the Supreme Court should have been filed not later than February 13, but it was not filed until February 21. The defendant in support of the application merely said that the prescribed notice was filed late owing to pressure of business, and that the defendant had a good defence to the plaintiff's claim. *Held*, That, as a transfer of the proceedings to the Supreme Court would involve a delay of about three months in reaching a final determination of the plaintiff's claim, the grounds of the application did not justify the granting of the extension of time applied for. *Stewart Sawmilling Co., Ltd.* v. *Ayres.* (Feilding. March 5, 1951. Coleman, S.M.)

PUBLIC REVENUE.

Death Duties Estate Duty—Deductible Debt—Son Lessee expending Moneys on Deceased's Land—Agreement by Father to devise Land to Son—Such Devise made by Father's Will—Son Devisee by virtue of Contract—Son's Expenditure neither "pecuniary liability" nor "charge"—Not a "debt owing by the deceased at his death"—"Debt"—Death Duties Act, 1921, ss. 2, 9 (1) (2). Where a legacy is given in consideration of an existing debt, the debt is deductible in computing the final balance of the testator's estate unless it comes within one or more of the paragraphs of s. 9 (2) of the Death Duties Act, 1921, prohibiting deduction. The deceased died on September 6, 1945. He was the owner of a farm which, up to June, 1938, he occupied, employing his son thereon. Thereafter, until the death of the deceased, the son occupied the farm as monthly tenant at a rental of £5 per month plus rates and other outgoings. In October, 1939, the dwellinghouse on the farm was destroyed by fire. Insurance moneys amounting to £350 were paid by the deceased into his son's bank account, to be used towards meeting the cost of the new dwelling. The deceased discussed with his son the provisions of his intended will, and promised to secure the farm to him by will; and the son, in proceeding with the erection of the new home, did so in reliance on that promise. The son had a new house erected, and claimed to have contributed moneys and labour to the value of £501 19s. 11d., in addition to the sum of £350 contributed by the deceased. The deceased did not agree or promise to reimburse the son for his expenditure and labour. He made his will as promised, and it remained unrevoked at his death; and under it the son was entitled to the farm. In 1945, the son erected a barn on the farm at his own expense, his expenditure and labour thereon being estimated at £421 3s. 6d. It was admitted that the deceased did not agree or promise to reimburse the son in respect of the erection of the barn. As in the case of the dwellinghouse, the barn was erected in reliance on the deceased's promise to devise the farm to his son. On an originating summons to determine whether all or any part of the son's expenditure in money and labour on the dwellinghouse and the barn constituted a "debt" within the meaning of that term as used in s. 9 (1) of the Death Duties Act, 1921, *Held*, 1. That the only rights the son had during the deceased's lifetime were his monthly tenancy and his right to insist that his father should not put it out of his power to perform his promise to devise the farm; and, at the date of the deceased's death, the son's only rights were either to receive the property by devise under the will or to obtain such relief, by way of damages or otherwise, as might be appropriate in respect of the breach of the promise. (*Ramsden* v. *Dyson*, (1866) L.R. 1 H.L. 129, and *Coffill* v. *Commissioner of Stamp Duties*, (1920) 20 N.S.W.S.R. 278, distinguished.) (*In re Whitehead, Whitehead* v. *Whitehead*, [1948] N.Z.L.R. 1066, *Plimmer* v. *Wellington City Corporation*, (1884) N.Z.P.C.C. 250, and *Parish* v. *Parish*, (1891) 9 N.Z.L.R. 705, referred to.) 2. That, accordingly, there was no separate and pre-existing right that was satisfied by the devise; there was only an agreement to make the devise for an executed consideration giving rise to no other claim; in other words, the son was a devisee only by virtue of a contract, but he was not in any sense a creditor. 3. That there was neither a "pecuniary liability" nor a "charge" at the date of the father's death, and that, accordingly, there was no "debt" in any sense of that word as used in s. 9 (1) of the Death Duties Act, 1921. *Public Trustee* v. *Commissioner of Stamp Duties.* (S.C. Auckland. July 31, 1951. F. B. Adams, J.)

STATUTE.

Interpretation—Reference to Subsequent Enactment in Aid of Interpretation—Regulation making Printing or Publishing of Any Statement likely to encourage Continuance of Declared Strike an Offence—Defendant proved only to have distributed such a Statement—Subsequent Amendment of Regulation adding Offence of "distributing or delivering" Such Statement—Court's Right to look at Amendment in interpreting Word "publishes"—Defendant not guilty of "publishing"—"Publishes"—Waterfront Strike Emergency Regulations, 1951 (Serial Nos. 1951/24, 1951/100), Reg. 4 (d). The respondent had been charged with publishing, on April 17, 1951, a pamphlet likely to encourage the continuance of a declared strike, contrary to the provisions of Reg. 4 (*d*) of the Waterfront Strike Emergency Regulations, 1951, the material parts of which were as follows: "Every person commits an offence against these regulations who . . . (*d*) Prints or publishes any statement . . . or other matter . . . likely to encourage . . . the continuance of a declared strike." The respondent admitted distributing a number of pamphlets. The learned Magistrate who heard the information held that on the material date a declared strike was in progress, and that the pamphlet was one likely to encourage the continuance of the declared strike. He held that the act of the respondent in distributing the pamphlets did not amount to "publishing" them within the meaning of the word "publishes" as used in Reg. 4 (*d*), and he dismissed the information. On May 1, 1951, after the dismissal of the information, Reg. 4 (*d*) was amended by inserting, after the word "publishes," the words "or distributes or delivers to the public or to any person or persons or causes to be printed or published or distributed or delivered as aforesaid." On an appeal by the respondent from the dismissal of the information, *Held*, 1. That the amendment of Reg. 4 (*d*) could be looked at in order to clear up any ambiguity in the use of the word "publishes," so as to determine the proper construction of Reg. 4 (*d*) as originally made. (*Attorney-General* v. *Clarkson*, [1900] 1 Q.B. 156, *Cape Brandy Syndicate* v. *Inland Revenue Commissioners*, [1921] 2 K.B. 403, and *Ormond Investment Co.* v. *Betts*, [1928] A.C. 143, followed.) (Dictum of *Callan*, J., in *Sluggish River Drainage Board* v. *Oroua Drainage Board*, [1944] N.Z.L.R. 445, 457, referred to.) 2. That, in the light of the amendment (which was an extension of the scope of Reg. 4 (*a*)), the original Reg. 4 (*a*) was limited to publication in the popular sense, which did not cover distribution. *Leveridge* v. *McCann.* (S.C. Wellington. August 1, 1951. Fell, J.)

TRANSPORT.

Offences—Trade Motor—Loading or Unloading in Course of Trade—Defence Available to Charge of Traffic Offence—Obligation not to transgress Regulations beyond Departure justified in Particular Circumstances—"Due consideration to the safety and convenience of other road users"—Traffic Regulations, 1936 (Serial Nos. 1936/86, 1949/142), Reg. 4 (7) (j) (9). The driver of a trade motor is entitled to the benefit of the defence specified in Reg. 4 (9) of the Traffic Regulations, 1949 (substituted by Reg. 4 of Amendment No. 7), while loading or unloading it, unless he did not have "due consideration to the safety and convenience of other road users," which involves the obligation not to transgress the provisions of the Regulations beyond what the exigencies of loading or unloading in the particular circumstances justify or require as a departure from the Regulations. Thus, the driver of a milk-delivery van, which was a "trade motor" for the purposes of Reg. 4 (9) of the Traffic Regulations, 1936, was not giving "due consideration to the safety and convenience of other road users" when he drove his milk-delivery van on the wrong side of the roadway and parked it there while he was unloading it by the delivery of milk bottles to residents on the right-hand side of such roadway, as the unloading operation could have been as easily and conveniently carried out by driving and parking the van on its correct side; and, therefore, he was not entitled, when charged with an offence under Reg. 4 (7) (*j*), to the benefit of the defence under Reg. 4 (9). *Stubbing* v. *Baigent.* (S.C. Auckland. August 8, 1951. Stanton, J.)

Removal of Motor-driver's Disqualification—Legislative Policy—Considerations in applying Same—Transport Act, 1949, s. 31 (7)—Transport Amendment Act, 1950, s. 14. The legislative policy that underlies s. 31 (7) of the Transport Act, 1949 (as inserted by s. 14 of the Transport Amendment Act, 1950), is in accord with the policy that underlies s. 12 of the Crimes Amendment Act, 1910—namely, that of granting reductions for good behaviour in sentences of imprisonment. Considerations to which effect must be given in the application of that general policy to cases in which removal of a disqualification is sought under s. 31 (7) of the Transport Act, 1949, may be summarized as follows: 1. The proceeding is in no sense an appeal against sentence, and the matter must be approached on the basis that the sentence imposed was in every respect a proper one. 2. The jurisdiction conferred by the subsection must be exercised having regard to the four matters expressly mentioned in it—namely, (*a*) the character of the applicant; (*b*) his conduct subsequent to the order; (*c*) the nature of the offence; and (*d*) any other circumstances of the case. 3. One essential condition which must exist before relief should be granted is that, so far as can be gathered from all the circumstances of the case, there is no reasonable likelihood of the applicant thereafter committing an offence of the nature of those referred to in ss. 39 and 40 of the Transport Act, 1949. 4. Each application must be scrutinized with care; and its fate must ultimately depend on the circumstances of the particular case, after due weight has been given to the various considerations above referred to. *In re Boyd.* (S.C. Napier. August 2, 1951. Cooke, J.)

WORKERS' COMPENSATION.

Assessment—Total Incapacity for Three Days—No Permanent Injury—Weekly Maximum Payment apportionable—Workers' Compensation Act, 1922, s. 5 (5)—Workers' Compensation Amendment Act, 1947, s. 39 (5)—Workers' Compensation Amendment Act, 1949, s. 4 (a)—Practice—Reference to Court of Appeal for Opinion on "Any point of law," meaning thereby Disputed Point of Law—Undesirability of Court of Appeal dealing with Question on Argument presented by One Side Only—Workers' Compensation Rules, 1939 (Serial No. 1939/8), Ch. VIII, R. 5. On October 24, 1949, the plaintiff suffered an accident which incapacitated him from work for three days, but there was no permanent injury. He was paid £3 5s. 5d. as compensation for the three days of his incapacity. His earnings were such that, if he had been totally incapacitated for a week, he would have been entitled to the then weekly compensation of £6. On case stated by the Judge of the Compensation Court, the question for the opinion of the Court of Appeal was the amount of compensation to which the plaintiff was entitled for the three days of total incapacity. *Held*, by the Court of Appeal, That, under s. 5 (5) of the Workers' Compensation Act, 1922, as it stood (as amended) at the date of the plaintiff's accident, the weekly payment of compensation was apportionable, the weekly compensation payment so apportionable being arrived at, not only by the calculation of 75 per cent. of the worker's weekly earnings at the time of the accident, but also by the application of the qualification "not exceeding in any case six pounds per week." *Quaere*, Whether the apportionment should be by sevenths. *Semble*, The provision made in R. 5 of Ch. VIII of the Workers' Compensation Rules, 1939, for the reference to the Court of Appeal of "any point of law" relates to "any disputed point of law." *Cunningham* v. *D. C. Turnbull and Co., Ltd.* (C.A. Wellington. July 24, 1951. Northcroft, Hutchison, Cooke, JJ.)

NOTICE TO MORTGAGOR OF DEFAULT.

Some Comments on O'Brien v. Skidmore.

By H. F. VON HAAST, M.A., LL.B., D.LITT.

The decision of the learned Judge, Fell, J., in *O'Brien* v. *Skidmore*, [1951] N.Z.L.R. 884, is hard to follow. After a very careful perusal of his judgment and of the sections of the Property Law Act, 1908, and the Property Law Amendment Acts, 1939 and 1950, involved, it seems to me, with great respect, that it is a case of a judgment *per incuriam*.

I assume that the reader of this article has the *Law Reports* containing the case in question before him. The mortgage that Fell, J., had to consder was one payable "on demand"; demand had been made, and was followed by default. His Honour held that no notice was required under s. 3 of the Property Law Amendment Act, 1939, because, although the mortgagor was in default, it was not the default that made the money *due*; it was the *original covenant* which did this.

Apparently, the judgment is not confined to a mortgage payable on demand. His Honour says:

> This interpretation still gives the mortgagor a large measure of protection, but it does not prevent the mortgagee from suing for the principal or interest owing when default is made in payment on the date the mortgagor covenanted to pay.

If the learned Judge's reasoning is correct, then it should also not prevent a mortgagee from exercising his power of sale when default is made in payment of principal on the date the mortgagor covenanted to pay the same. In each case, it is default under a covenant by the mortgagor that leads to the provision for his protection by the service of a notice, and the power "shall be deemed not to be exercisable and moneys deemed not to be payable" until the provisions of the section have been complied with.

Let us analyse the section. There are two divisions of cases:

(*a*) Power to sell land or to enter into possession, not deemed to have become exercisable;

(*b*) Moneys secured, not deemed to have become payable.

by reason of two separate things:

(i) Default in the payment of any moneys so secured under a covenant for payment—obviously, as will be seen by what follows; or

(ii) On the performance of observance of any *other* covenant expressed or implied in the mortgage, unless the mortgagee serves the notice, &c.

What is the meaning of "*other* covenant," unless it refers to a covenant other than the covenant to pay, which applies in the case of a covenant securing the payment of moneys? Then s. 4 of the Property Law Amendment Act, 1950, fits in, suggesting that both s. 3 of the Property Law Amendment Act, 1939, and s. 68 of the principal Act apply to a mortgage where the principal is overdue, by allowing the mortgagee to combine in one notice the notice of default and the notice of intention to call up the principal sum.

It is submitted that the learned Judge has given too narrow and strained an interpretation of the words "by reason of any default."

The judgment appears to conflict with the *ratio decidendi* of *H.* v. *I.*, [1940] N.Z.L.R. 235, where, at p. 236, Ostler, J., says:

> The law now is that no mortgagee can exercise his power of sale for default until he has served a notice on the mortgagor specifying the default and giving him a month's time in which to remedy it, and the mortgagor has failed during that month to do so.

As *O'Brien's* case was on appeal from a Magistrate's decision, the judgment was final, and there is no appeal therefrom.

Continued from cover i.

LEGAL ANNOUNCEMENTS.

WANTED TO PURCHASE.

BARRISTER'S WIG, size 7⅞ or 7½, and GOWN. Replies to :—
"ROBES,"
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MR. K. L. SANDFORD OF HAMILTON wishes to announce that he has been joined in partnership by Mr. Duncan Wallace McMullin, LL.B. The practice hitherto carried on under the name of Strang Taylor and Sandford will in future be continued by Mr. Sandford and Mr. McMullin in partnership under the name and style of :—
STRANG, SANDFORD & McMULLIN,
Barristers and Solicitors,
South British Insurance Buildings,
VICTORIA STREET,
HAMILTON.

THE AUSTRALIAN LEGAL CONVENTION.

"A Grandly-conceived Convention."

By JULIUS M. HOGBEN.

The Seventh Legal Convention of the Law Council of Australia as part of the Australian Jubilee celebrations was grandly conceived. To bring together from all parts of the British Commonwealth and from the United States of America lawyers, jurists, and Judges (terms which, as one speaker emphasized, are not mutually exclusive) was an inspiration. The names and the stature of the overseas visitors were of themselves enough to ensure success, and even the man in the street was impressed. The ceremonies, the official opening, and the several religious services were given full Press publicity, and all Sydney knew that something unique was happening. One felt that the standing of the law and of lawyers must be, and was, enhanced by the very fact of such a Convention.

Socially, the Convention was the greatest possible success; the V.I.P.'s were entertained from morning to early morning—dinners and drives, cocktail parties, lunches, a harbour excursion, and a theatre party. Hospitality was poured out with a lavish hand. The human frame could hardly hope to be fresh at the end of a week of it; at least one member of the Entertainment Committee was driven to taking sleeping-draughts to make sure of some rest from all his labours.

The V.I.P.'s became known very early as the D.O.G.'s, because they were so named by Lord Jowitt, who at the opening spoke of those whom the Committee referred to as Distinguished Overseas Guests, D.O.G.'s, and, he added, very lucky D.O.G.'s they were to be the recipients of such hospitality.

And yet, with all this glamour, and with all the generous and lavish social entertainment, the Convention as a legal convention was something of a disappointment. High judicial officers and representatives of every branch of the profession were brought to Australia from the four corners of the earth, and there was not one discussion on a topic of major interest to the whole of the British Commonwealth, and those papers which did have implications beyond the borders of Australia were discussed by Australians only. Many from within Australia as well as those from overseas felt that here was a unique opportunity for a discussion, contributed to by India, Pakistan, and Ceylon, by Canada and South Africa, by Australia and New Zealand, and by the leaders of the law in England, on the past, present, and future constitution of the British Commonwealth. Never before had there been the opportunity for such a discussion by verbal exchanges of the ideas of legal minds from the whole of the British Commonwealth. Some of the visitors from overseas had their problems which were problems common to all, and which they would have been glad to discuss with their fellows from other Dominions; but the opportunity did not come. Many of the leaders who had travelled thousands of miles to the Convention were neither invited nor given the opportunity to speak.*

* The Chief Justice of Canada, the Rt. Hon. Thibeaudeau Rinfret, is reported in the *New Zealand Herald* of September 11 to have said, while passing through Auckland: "The Convention was successful in bringing people together, but not as a legal convention."

THE CONFERENCE PAPERS.

The first paper did have implications beyond Australia, the outstanding paper prepared by Dean Erwin N. Griswold of Harvard on "Divorce Jurisdiction and Recognition of Divorce Decrees." This was a comparative study of the laws of the United States and of the Commonwealth. It dissipated a lot of misunderstanding on such American divorces as the Reno divorces. It urged the recognition by the Commonwealth countries of a separate domicil for a wife, not by statutory provisions for special cases, but through the Common Law as the general rule. This paper dealt with the extra-territorial recognition of divorce decrees, and cried out for discussion by representatives of the five legal systems operating within the British Commonwealth—namely, the British Common Law, the Roman-Dutch law of South Africa and Ceylon, the French-Canadian law, and the Hindu Law and Moslem Law of India and Pakistan. The clash of different systems is probably greater on questions of personal status than anywhere else in the realm of law, and yet no delegate outside Australia was invited to speak. Whether any such delegate intended to speak will never be known, as, after several Australians had spoken, the contribution from Joske, K.C., being the one outstanding, the chairman announced that he would like a smoke before lunch, as no doubt many others would, and the discussion was therefore closed.

The paper on "Fifty Years of the Australian Federal Constitution" was another paper to which valuable contributions could have been invited from the representatives of the two countries with federal constitutions (Canada and the United States of America), but again this was not done. This paper was prepared by Professor E. H. Bailey, Federal Solicitor-General. It was described as showing the author's detachment, "a form of occupational disease"—whether in Professors or in Solicitors-General the speaker did not say. The two most valuable contributors to the discussion were the youngest and the oldest. The former, Wild of Sydney, after a hesitant start, gave a solid and delightful criticism of the Constitution and its administration. It was he who said that "lawyers, if not laws, flourish in the dustbowl of s. 92"—the most provocative section of the Constitution, dealing as it does with the powers in the economic field of Federal and State Parliaments. The oldest contributor was Sir Robert Garran, who had been one of "Sir Edmund Barton's bright young men" and was the survivor of the team responsible for drawing up the Constitution. Sir Robert Garran said of himself, in private conversation, that he spent the first thirty years of his life in Melbourne, the second thirty in Sydney, and that he was spending the third thirty years in Canberra. In discussing Professor Bailey's paper, he told of the violent debates in the 'nineties for and against federation; free trade versus protection was, he said, the lion in its path, and he recalled Sir George Reid's comment that for New South Wales to federate was like a teetotaller setting up house with five drunkards. Sir Robert advocated the setting up of a permanent non-

political commission to consider and submit necessary amendments to the Constitution, for, as he pointed out, " the time has come, with the change from the age of *laisser-faire* to the age of the welfare State, for substantial revision of the Constitution." He commented on the regrettable use of layman's language in the document, and suggested that the word " absolutely " was put into s. 92 because of " the national habit of emphasizing a statement by the addition of a colourful but unnecessary adjective." Another clause, he said, was " not the clause of a layman, but that of an Equity lawyer—and I don't know which is worse."

It was in the discussion of another paper that reference was made to " primitive States like New South Wales, where they have Law and Equity " ; and it was a South Australian who quoted Wilfred Blackett writing of the gentlemen, attorneys, and bushrangers of the New South Wales profession, and added " many of whom we know to-day." The New South Wales lawyers enjoyed the quips as much as any of us. It was the same South Australian who spoke of the need to be brief as " a new-fangled invention arising from the snappy arguments in the banking case."

The papers on " The Historial Development of the Legal Profession in New South Wales," on " Fifty Years of Equity in New South Wales," and on " The Jubilee of Federal Industrial Arbitration " were no doubt papers that should have been prepared and placed on record, but the interest of the first two was limited to New South Wales, and that of the third did not extend beyond Australia. The first of these three papers contained a refence to the division of the profession into its two branches, barristers and solicitors, and this alone provoked discussion, each speaker proving his system to be the best in the best of all possible worlds—and convincing nobody but himself. But the discussion provoked some historical facts from Windeyer, K.C., including the facts that there never has been a Law Library in New South Wales worth calling a library and that from 1850 to 1930 every Chief Justice of Victoria was born in Ireland. The irrelevancies and asides provided interest in the discussions.

Some Outstanding Speakers.

It would have been more logical to have begun at the beginning, the opening ceremony at the Sydney Town Hall on August 8. The Town Hall was filled. The D.O.G.'s had assembled to be robed and wigged and photographed, and all that took time, so that the ceremony was twenty minutes late ; but nobody minded that. When a door tentatively opened at the back of the Hall, the whole audience stood and turned to watch the procession enter ; it was a false alarm, but it had varied the period of waiting. The procession, when it did come, was certainly impressive, if only because of the array of scarlet robes and full-bottomed wigs, which, more than anything save the Lord Chancellor, gave dignity to the occasion. (Ten minutes' rehearsal under a good sergeant-major could have worked wonders in the procession itself.) The scarlet robes were followed by the rich black and gold of the Master of the Rolls and the Lord Chancellor and the Royal-Arms-coated purse of the latter.

The evening was made by the Lord Chancellor's speech—the perfect speech, courteous, eloquent, full of charming, unobstrusive learning, English humour, and common sense. The speeches of the Chief Justices of India and Canada were both attractive, and helped to impress upon listeners the wideness of the net cast to draw visitors from all the world ; but it was the Lord Chancellor's evening. He seemed then and always the true Englishman, his rich robes, his knee breeches, and buckled shoes emphasized his Englishness, just as much as the flowing tweed cape and tweed hat that he wore when he joined us in the harbour excursion. He is the Englishman in his middle sixties, with all the mental youth and vigour and the physical dignity and social ease of manner that we look for in the Englishman at his best. Lady Jowitt remarked on one occasion that they had been through two wars and five elections, and had survived ; nobody who heard or met Lord Jowitt could imagine him in the role of politician ; all would concur in naming him a statesman.

Perhaps the marked feature of the Convention was the polished and cultured ease of the speeches of Lord Jowitt and Sir Raymond Evershed. Next to them was Sir John Latham, who opened the formal legal part of the proceedings and contributed to a later discussion. Sir Raymond Evershed proposed the toast of " The Profession " at the Convention Dinner. The Dinner was attended by no fewer than seven hundred and fifty. We learned that some air was circulating round the edges of the dining-hall ; in the middle of it, there was no air. The speeches compensated, and, by comparison with New Zealand legal dinner loquacity, were models of substance and brevity. Sir Raymond Evershed defined the real task of the legal profession as to protect those who enter into contracts which they do not understand to buy goods which they do not want and cannot afford. His speech was a combination of thoughtfulness, humour, and wit. He reminded us that " the fundamental distinguishing feature between our way of doing things and that of others is that our judgments are not those of an impersonal body, but the personal judgments of an individual Judge." The importance of a high professional standard is great indeed.

It was Sir Raymond who referred to the presence at the dinner of the women in the profession, both barristers and solicitors, of whom about twenty-five attended. He welcomed them ; he paid tribute to the part that women took in public affairs, and stressed the important contributions they could make to the law ; he made everybody realize how wonderful women are. " I hope," he said, " that some of the biologically inferior sex will one day be on the Bench, one of them even on the Bench of the High Court. I by then—thank God—will be dead."

Those who attended the Australian Jubilee Legal Convention will remember it. Sydney has its attractions for any visitor. They were added to by the Convention, with its papers and discussions, its social whirl, its seriousness and its humour, and its gatherings in such numbers of lawyers, jurists, and Judges. One was made to realize the vastness, not only of the British Commonwealth, but also of Australia itself, where to the Sydneysider the man from Perth is as much a stranger as is the man from Ceylon. But all were joined by the common ties of the law, and all spoke the same language, shared in the same interests, and participated in the same laughter and the same applause. It was indeed a grandly-conceived Convention.

THE DEMISE OF THE DEEDS SYSTEM.

Completion of Compulsory Title Work in Auckland.

An interesting function took place at the Land Transfer Office in Auckland on August 17, when, at the invitation of the District Land Registrar at Auckland, Mr. G. H. Seddon, a large gathering of practitioners celebrated the completion of the work required for the issue of compulsory Land Transfer titles in Auckland.

The District Land Registrar, Mr. G. H. Seddon, said that Auckland was the last Land Transfer District to complete the compulsory-title work, which meant, from a practical point of view, the demise of the Deeds System in New Zealand. He was proud that so many practitioners and their staffs had honoured the Land Transfer Office with their presence, since many of them had been long and closely associated with the Deeds Indexes and Records of the office. He particularly welcomed the President of the Auckland District Law Society, Mr. C. J. Garland, the Secretary for Justice and Permanent Head of the Land and Deeds Department, Mr. S. T. Barnett, and the Registrar-General of Land, Mr. E. C. Adams.

The History of Deeds Registration.

Mr. Seddon continued :

" From the earliest days of its colonization, offices have existed in New Zealand for the registration of documents affecting land, and the Land and Deeds Department, of which these offices were the origin, has been in operation for over one hundred years. The authority for the setting up of these Registry Offices was the Land Registration Ordinance, 1841. It provided that there was to be a Registry Office in every District to which the Governor by Proclamation made it applicable. As the Auckland District was one of the first to be settled, it was natural that soon after the passing of the Ordinance it should be made to apply here.

" On August 15, 1842, a Deeds Registry Office was opened in Auckland, with Robert A. Fitzgerald as Registrar, and the first registrations were effected before the end of September, 1842. The District was the County of Eden, the area adjoining Auckland City and extending from a little to the south of the entrance to Manukau Harbour to the entrance to Kaipara Harbour.

" Following the passing of the Constitution Act, 1852, Provinces were set up, and the Auckland Provincial Council by an Act of 1856 provided that the registration of deeds should be effected under the authority of the Provincial Act, and not under the Land Registration Ordinance, 1841. The Provincial Acts were repealed by the General Assembly of New Zealand by the Deeds Registration Amendment Act, 1863. It can readily be imagined that in the early days of settlement the volume of work was not very great, and thus Registrars of Deeds usually held other posts as well. In Auckland, the first Registrar was also Registrar of the Supreme Court and Registrar of Births, Deaths, and Marriages. Our early association with the Justice Department is thus repeating itself.

" After the re-enactment of the existing legislation in 1868, practically no amendment was made until the Deeds Registration Act, 1908, which is still in force. That is, from 1842 until the present day there have been Deeds Register Offices in New Zealand, and the registration of deeds has been effected in the same way as set out in the original legislation. This provided that the document to be registered was to be handed to the Register Office where it was indexed, copied into books kept for the purpose, and then returned to the person who presented it. Whether the deed was valid was no concern of the Registrar, and registration gave the document no greater validity than it previously had. The title to the land depended on the deeds themselves, and not upon their registration. There has always been a popular misconception amongst conveyancing clerks that a copy of the Lord's Prayer had to be accepted for registration provided a plan was attached. We have never gone so far as that, but I remember a lease I searched in Otago, where the term ran ' while wood grows and water flows.'

" The object of registration was to enable persons dealing with land to ascertain what documents were registered, the general principle being that a person acting *bona fide* on the strength of the Register and registering his document would obtain priority over a person claiming under a prior deed which had not been registered. The person dealing with the land had, however, to satisfy himself that all deeds right back to the Crown Grant were effective and valid, and all those deeds, each forming a link in the title, had to be readily produced. A missing or defective deed became a permanent blot on the title, and created difficulties when the land came to be dealt with.

" Thus the searching of titles and the investigation of all the deeds affecting them made conveyancing a laborious and costly procedure, and only experienced conveyancers were capable of performing the work involved. Less experienced persons usually searched back to a dealing by some experienced conveyancer, and relied on the fact that he had accepted the title as good.

" The unsatisfactory features of this system of registration of deeds soon became apparent, and endeavours were made to find a less complex and more dependable method of dealing with titles to land. This was found in the Torrens System, which was introduced into New Zealand in 1870 by the Land Transfer Act passed in that year. It provided that the lands deemed to be subject to its provisions were :

" (i) Lands alienated by the Crown since the passing of the Act ; and

" (ii) Those deeds lands the proprietors of which applied to have them brought under the Land Transfer Act.

" It will thus be seen that it was contemplated that an ever-increasing area of land would be subject to the provisions of the Land Transfer Act. From the passing of the Land Transfer Act, 1870, there have thus been two systems of registration in New Zealand, one being the registration of deeds, and the other that of registered titles, guaranteed and evidenced by a certificate of the Registrar.

" Although many thousands of applications had been made, it was estimated in 1923 that about one-fifth of the land in New Zealand was still held under the old Deeds System. Our Legislature then broke new

ground and passed the Land Transfer (Compulsory Registration of Titles) Act, 1924, which has no prototype in any of the Torrens Systems overseas. This Act was drafted by Mr. C. E. Nalder, Registrar-General of Land, who I am pleased to say is still living in Khandallah, Wellington, and who was invited to attend this ceremony. So well was it drafted that in the whole twenty-six years there has not been a single case on this Act. He was fortunate in obtaining the backing of Sir Francis Bell, who piloted the legislation through Parliament, and gave full credit to Mr. Nalder for his legal knowledge and initiative.

" This Act was designed to bring all land in the country under the Land Transfer system, and placed on the Registrar the obligation of searching all old deeds titles and dealing with them as he would have done had applications been lodged with him.

" My own connection with the compulsory work commenced in Marlborough in 1925, where I gave the new Act a flying start. Since then, I have acted as sexton in Gisborne, Otago, and now Auckland.

" A compulsory title differs from one under the principal Act in that it need not be guaranteed as to area or dimensions, and any defects in the old title are placed on record. These titles are stated to be ' limited,' but they are dealt with in the same way as ordinary Land Transfer ones, and their defects as to title are gradually being remedied, so that in the course of time most of them will differ from the ordinary ones only in that they will not have any guarantee as to area or dimensions.

" This measure has saved owners of property much in legal costs, and will eventually give a State-guaranteed title to every proprietor of land. All that a conveyancer has to search is the Certificate of Title and the Registrar's Minutes setting forth any defects.

" In conclusion, I should like to mention the great help that the office received during this work from solicitors. Without their co-operation we would not have been able to achieve this magnificent reform in our land system."

The Auckland Deeds Office.

Mr. W. A. Wilson, Assistant Land Registrar, supported Mr. Seddon's remarks. He said :

" In 1842, when Auckland was but a few straggling buildings, it was already described by writers as the ' Metropolis of the Colony,' and, in spite of everything, it still holds that honoured position.

" In that year, the Rev. James Buller, a Methodist parson with headquarters at Tangiteroria, in the Kaipara district, acquired the site from Governor Hobson. It was described as ' being an eligible site for the erection of the proposed place of worship,' and consisted of Allotment 27 Section IV of the Town of Auckland. He obtained a grant from the Colonial Secretary and a wooden building 40 ft. by 25 ft. was erected. This was opened for regular church services in 1843, but within a year or two was found to be too small and inadequate for the purpose. At that time, the district round about here was mostly of a residential nature, while many soldiers were stationed in the barracks about one hundred yards away. It was the first European Methodist church to be established in New Zealand.

" By 1848, a brick building 70 ft. by 50 ft. had replaced the earlier wooden one, and five or six years later a further 16 ft. was added to its length. It is in this building, and under the same roof, that we stand to-day. Those pillars, where the notices ' Silence ' and ' Please replace Books after Use ' are printed, formed part of the original outside walls, while the added 16 ft. forms two rooms at what is now the back of the office. So we are in quite an historical building ; it is one of the oldest commercial brick buildings in Auckland, or, at least, part of it is. Owing to the shifting of the population to the new residential suburbs (a process that is still going on), the Methodists found that they could not carry on, and in 1874 sold the property to the Auckland Improvement Commissioners for £3,500. A brick building with over half an acre of land in the very heart of the city !

" The entrance in those days was from High Street, up those stone steps which are still in their original position. An iron boot-scraper still stands at the old front door—a very necessary thing in those old days, when High Street was a muddy rut in wet weather. It is much worn, but still upright and serviceable. From the entrance, a long passage-way led to the back of the building. On the walls hung the County and reference plans. To the right, as you entered, was the Land Transfer Office, while the Deeds Register Office was on the left. The Police Court occupied the space where our registration counter is at present, the Court offices occupied the back portion of the building, while the upper story accommodated the Magistrate's Court and the Stamp Duties Department. The District Land Registrar occupied a dark, dismal room under the stairway, and in the next room the Magistrate examined and certified all mental cases.

" Many changes have taken place, however. Wings have been built on each side of the old place. The Courts shifted to a building of their own, and the Stamp Office eventually found its own accommodation. So that to-day we occupy the whole building, and even now are trying to get further additions built on.

" There has always been a very close relation between the staff of this office and the legal profession. Apart from the every-day personal business contacts, the Department in the earlier days of its existence drew many from the ranks of the profession. This was especially so in the cases of the senior officers, and in particular of the District Land Registrars, most of whom received their early training in legal offices. Over the last four decades, however, the reverse process has been operating (a sort of reverse pass). In this district alone, some twenty-odd members of the present Law Society began their careers, or spent part of their training years, as members of this staff.

" In conclusion, I would like to say that, even though the Deeds have gone to their long last rest, the office motto still remains : ' Deeds, and not words.' "

The Romance of Deeds Titles.

The next speaker was Mr. W. A. Dowd, the Chief Examiner of Titles at Auckland, who, as Mr. Seddon said in introducing him, has searched many thousands of titles there and in Napier.

Mr. Dowd said :

" It is perhaps not inappropriate that I should say a few words on this occasion, for ever since the inception of the compulsory registration of titles I have been closely associated with its operation, both in Hawke's Bay and here in Auckland, and thus I have had many opportunities of observing what I shall describe as the

romance of the Deeds Titles.

" There are only a few minutes available to me this afternoon, but I hope to be able to show you that in my twenty-six years' association with the Deeds System I found much that was humorous, much that was piquant, much that was naive, and, indeed, much that was tragic.

" I would quote, for example, the case of the Maori who claimed a Land Transfer title by long occupation. As was usual in these cases, he was asked to state the circumstances in which he first went into possession. His reply was most unexpected. Couching his affidavit in the full formalism of the law, he stated that he claimed through his grandfather, who ate the Maori who originally owned it. The old jurists used to write about feoffment with livery of seisin. We did not have the feoffment in this case, but apparently the liver was present, and no doubt the seasoning too !

" I recall, too, some of the magnificent land titles which I converted to the Land Transfer system in Hawke's Bay. There was the sheep-station of Thomas Lowry. Older solicitors will remember him as the owner of the famous race-horse Desert Gold. The outstanding feature of this title was that, from the time of its being granted in the early 'fifties until the date I issued the Land Transfer certificate, only two dealings appeared on it—the Crown Grant to Thomas Lowry, and, many years later, his will. This huge sheep-station, conservatively valued in the vicinity of £1,000,000, had never known a mortgage.

" Then there was the title I issued to Sir George and Paul Hunter for the Porongahau Estate. It was issued to these two as tenants in common in equal shares. Sir George had never dealt with his half-share, but Paul had mortgaged his half to the Australian Mutual Provident Society for £250,000. It must have been very satisfying to him to know that it needed the tremendous financial structure of the A.M.P. to keep him in pocket-money.

" Coming now to some Auckland reminiscences, I remember commencing to investigate a certain Deeds Title and finding registered there an agreement between two London ladies named Rees and one de Bernardy. In this agreement, the two ladies agreed, in consideration of de Bernardy's revealing to them the whereabouts of some land in New Zealand to which they were entitled, that they would share with him the proceeds of its sale. The next document registered was an order of the King's Bench Division in London declaring that the agreement I have referred to was void for champerty. Now, it was some years since my law-student days, so I thought I would revise my knowledge of this particular branch of the Law of Contract. I therefore turned up my *Anson* at the proper chapter, and there, to my astonishment, I found that the leading case regarding champerty was none other than *Rees* v. *de Bernardy*,* the two parties to the agreement on the Auckland Deeds Register. Present-day students of law will find the same case still quoted as a leading authority in the modern text-book *Cheshire on Contract*.

" Another case which stands out in my memory was that of a claim by one Kemp. He was a descendant of the original missionary of that name who came to New Zealand with Samuel Marsden. He too based his claim on long adverse occupation. The success or failure of it turned on the age of a particular picket fence. Accordingly, evidence was called for regarding its age. The reply came in the form of a startling affidavit from one Charlotte Kemp. This lady was the daughter of the original missionary who came out with Marsden, and she still lives on the shores of the Bay of Islands in the oldest house in New Zealand. In her affidavit, Miss Kemp stated that she was eighty-five years of age ; she stated further that she knew the particular picket fence well, and was in a position to give evidence regarding its age. She went on to state that, when she was a child of five, she rose from her bed one morning and, pulling up the blind of her window, which overlooked the fence, she saw there impaled on the pickets the heads of the white men who had been massacred by the Maoris during the night. I need hardly add that the evidence was deemed adequate as to the age of the fence.

" Later, I was examining a title for a parcel of land in Queen Street, Auckland, owned by one Patrick Campbell. This was the man who used to own Herne Bay and part of Ponsonby as his sheep-farm. I recall this title well, because of some unusual features in his will. In order to identify himself, he recited his relationship to numerous Irish families, the O'Donnells, the O'Tooles, the O'Haras, the Murphys, and generally revealed a pedigree which would beat Carbine's and make Mainbrace look like a hack. He then went on to dispose of his lands piece by piece, and I must say that, in my long experience as an Examiner of Titles, I cannot recall any land-owner in Auckland who owned so much land in the City and its environments. It was he who gave Point Erin Park to the City of Auckland.

" Perhaps I should mention, too, a title so beloved of conveyancers—Clendon's Grant of 10,000 acres on the fringe of the city. It fell to my lot to convert this title to the Torrens System. Clendon subdivided his land into lot after lot in tens, and scores, and hundreds. Finally, he went the way of all flesh, and the last act in the drama of that title was the registration of his will. I rather expected that his estate would have been a large one, but was surprised to find that the amount he left would hardly these days purchase one of the lots in one of the numerous towns on the land he used to call his own.

" Then there was the grant to the original North Auckland settler, Gilbert Mair, out of which came the present town of Whangarei. Mair's Grant early in its history came into the ownership of William Robert Reyburn, and it was he who subdivided the land into the present Whangarei. This was the most difficult title I ever examined, and, if my old friend Harry Reyburn is listening to me, I should like to tell him just how much his grandfather is answerable for.

" However, my reminiscences must end. To-day, we are celebrating the end of the Deeds System. It had its advantages. It was certainly cumbersome, but it was flexible, and any solicitor who was trained on its titles acquired a background that the Land Transfer system can never afford. I have often thought that a Solicitor trained on the Deeds Titles is like a mariner who was trained in a sailing-ship—both learnt the background, the whys and wherefores, and the true inwardness of their jobs. But its advantages were far outweighed by certain serious defects, so it had to go, and I have no doubt that the profession will not mourn its going, for, after all, they have now been able to pass to us of the Land Transfer Office the headaches which previously were theirs.

" This mention of the legal profession reminds me that I want to pay them a tribute. I want to tell them

*[1896] 2 Ch. 437.

that their high conveyancing standards have facilitated the work of converting the deeds titles; I want to tell them that their excellent draughtsmanship immeasurably lightened our labours. I should like to say, too, that the happy relations which always characterized our dealings also considerably lightened our labours. To say that these happy relations will always continue is to state the merest of truisms, but it is a truism which, nevertheless, carries within it the happiest of auguries for the future."

The Secretary for Justice.

The Secretary for Justice, Mr. S. T. Barnett, said that the District Land Registrar had spoken of the ceremony as one to commemorate a demise, and rightly so, as, in the first place, they were in a building very suitable to a funeral, as at one time it was a church, and, in the second place, he had just met the Coroner, Mr. Addison.

Mr. Barnett continued:

"There is one thing that has always caused me great surprise, and that is that you must steal our people and not train your own. Another thing is that in all my life I never got anything from a Registrar except a requisition, but it now appears that we shall get some sherry and a piece of cake.

"Before this occasion, I had never realized that there was any romance at all in the Deeds System. Personally, I confess to little knowledge of the subject, and it is very surprising to hear that some people manage to extract interest and humour from it.

"While in America last year, I visited the headquarters of a certain County. It was just two days before the election, and the Sheriff—who, incidentally, was in charge of the Land Registry Office—was engaged principally on work in connection with the forthcoming election. He showed me some titles which interested me greatly. One recited a parcel of land whose boundary ran from the rail fence to the foxhole and then to some other obscure point. A lease was to endure as long as water ran and grass grew. I told the sheriff that this election campaign looked a pretty expensive business, and he replied that it was going to cost him all his salary for three years, but that he expected to do pretty well, all the same.

"You know that I have had no part in this work, and am a mere figurehead, but I can appreciate the satisfaction derived from cleaning up this gigantic task, which has been going on for twenty-seven years. I think that we may fairly say to Mr. Seddon that it is a tribute to his own personal energy and enterprise that it has been completed. And it certainly is a most unusual thing that a District Land Registrar should invite the profession and other people interested to partake of his hospitality. I am glad that Mr. Adams was able to attend this function personally."

The Registrar-General of Land.

The Registrar-General of Land, Mr. E. C. Adams, said it gave him great pleasure to be present at the invitation of Mr. Seddon.

He referred to the fact that it was exactly thirty-one years since he had to give a speech in the Auckland Registry Office, and said that that was a long time. It was on such an occasion as the present that one really appreciated Charles Lamb's *The Old Familiar Faces.*

He said he would like to add a word or two to Mr. Seddon's able address in which he had dealt with the system of conveyancing in New Zealand. The speaker continued:

"It is the year 1951, and in the year 1922 there was a series of Acts passed by the Imperial Parliament which considerably simplified the system of conveyancing which then operated in England, and somebody suggested to the late Francis Dillon Bell that he should enact those Acts in New Zealand. But fortunately he knew his job, and he had other ideas. He immediately realized that it would be a far, far better thing to make the Land Transfer system compulsory in New Zealand, and in 1923 in New Zealand we had exactly the same position as exists in Melbourne, the two systems operating side by side, the Torrens System and the old Deeds System.

Sir Francis Dillon Bell called Mr. Nalder and asked him whether it was possible to bring all the land held under the Deeds System under the Land Transfer Act. Mr. Nalder said: 'Yes; it is possible.' And Sir Francis asked: 'Can it be done in five years?' Mr. Nalder replied: 'Yes; I think it can, except in Auckland.' Now, that shows what a wise man Mr. Nalder was.

"It is curious, but it was a fact in the majority of districts in New Zealand, that the land was brought under the Act within five years, and I think it was quite a good achievement. Now it has reached finality in Auckland, but I am quite sure that, if the war had not intervened, the work would have been finalized in Auckland much more quickly.

"The home of the Torrens System is in South Australia, but it was not until about 1944 that they began to realize the possibilities of our Compulsory Act and wrote for particulars of it. I replied answering those inquiries,

(*Concluded on p. 276.*)

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

The Tulips Case.—The Lord Chancellor, Viscount Jowitt, has recently created great public interest in England over utterances arising from a humbler set of circumstances than would normally be associated with the Keeper of the King's Conscience or of the Great Seal. It seems that a woman with young children was seen picking three tulips from a public garden at South Shields. The Magistrates, who were greatly disturbed at the increasing practice of damaging flowers and shrubs growing in public places, thought it necessary to remand the woman in custody for the night and then to fine her the following morning the sum of £5. The matter was of sufficient importance to cause Viscount Simon in the House of Lords to ask whether the Government had any statement to make in relation to the case. In the course of general remarks, Viscount Jowitt said that it would obviously be undesirable for him to attempt to lay down any general rule as to the occasions on which those powers should be exercised, or upon the question in what circumstances, when those powers were exercised, the remand should be in custody, and not on bail. Two propositions seemed, however, to be clear. First, a series of cases established that the power to remand in custody ought not to be used merely as an additional means of punishing the accused. Secondly, the power of remanding in custody should be used, in the case of a woman with young children, only in very special circumstances. He also said that, while not wishing to imply any censure upon the Magistrates, he felt bound to say that they made a grave error of judgment in the course which they took, though he was satisfied that they were endeavouring to do their duty. It seems, from comments on the case, that the public hold the Magistrates involved in a somewhat less tolerant light.

A Little Temper.—In the Lambeth Magistrate's Court earlier this year, a defendant, a young man who had been a boxer, lost his temper when a car did not slow down as he was crossing the road, and put his fist through a side window, cutting his thumb. The fine was 1s., with 25s. doctor's fee and £4 damages.

Local Government.—Admirers of our local-government system will derive satisfaction from the bouquet given it by J. C. D. Mackley, F.C.S. (N.Z.), F.I.A.O., County Clerk of the Masterton County Council, and Secretary of the New Zealand Institute of County Clerks in an article published in (1951) *115 Justice of the Peace and Local Government Review*, 246. Those connected with local government in New Zealand, he says, are proud of its tradition of honorary service. This is an outstanding feature of local government in comparison with other forms of government. There are no salaried offices or places of profit open to county councillors, and their work is performed solely for the benefit of their fellow-ratepayers, and out of a general desire to render disinterested service. The honorary character of the institution is jealously preserved by statute. Under pain of disqualification and penalties, no councillor may occupy any place of profit under the council, nor may he be concerned directly or indirectly in a contract with the council.

Snails and Cricket Balls.—It seems worthy of comment that the obligations of foreseeability—one of the most important doctrines enunciated in modern law—have their legal origins in comparative trivia—in a snail in *Donoghue* v. *Stevenson*, [1932] A.C. 562; in underpants in *Grant* v. *Australian Knitting Mills, Ltd.*, [1936] A.C. 85; and now in an ubiquitous cricket ball in *Bolton* v. *Stone*, [1951] 1 All E.R. 1078. According to Lord Porter in the cricket-ball case, it is not enough that the event should be such as can reasonably be foreseen; the further result that injury is likely to follow must also be such as a reasonable man would contemplate before he can be found guilty of actionable negligence. The mere possibility of injury, he considered, was not enough, since the existence of some risk is an ordinary incident of life, even when all due care has been, as it must be, taken. It was reasonable enough for the supporters of the batsman, Leadbeater—a Yorkshireman in a Lancastrian team—to expect he would hit a sixer over the fence, but quite unreasonable to anticipate that Miss Bessie Stone, one foot on the pavement and another on her garden step, would collect the ball on her head.

Prison Witness.—That there are phases of legal ethics permitting of strong differences of opinion is amply demonstrated in the case of *Tombling* v. *Universal Bulb Co., Ltd.*, heard by the English Court of Appeal in April, 1951. Here, the matter for consideration was whether counsel, who began his examination of his witness by asking him whether he lived at what was his home address, should have brought out the fact that the witness, having been convicted of being drunk in charge of a motor-vehicle, was brought from prison to give evidence. This fact was unknown to the trial Judge or to the defendants or to their counsel. Somervell, L.J., was prepared to see arguments on both sides as to whether the Court should be aware in all cases that the witness came from prison. He thought, however, having had more time than counsel had had to consider what was the right course, that it would have been better if counsel had omitted to put the question as to the witness's address. Denning, L.J., thought that there was no duty on counsel to tell the Judge that the witness came from prison to give evidence, any more than there was to tell him that the witness had had previous convictions. On the other hand, Singleton, L.J., was quite sure that, if a witness was brought from prison, both the Court and the opposing party ought to know it. It seemed to him that counsel had thought only of his duty to his client, to the exclusion of the duty which he owed to others, and, in particular, to the Court. The question is an interesting one, and, as can be seen, also an open one.

Crime Note.—That crime does not pay is a current theme of reformers, aided by the movies. Some doubt may be thrown on the proposition by the new *Russell on Crime: A Treatise on Felonies and Misdemeanours*. This edition (10th) is issued in two volumes listed at £12 12s. net.

THE DEMISE OF THE DEEDS SYSTEM.

(*Concluded from p. 274.*)

and I have since had word that they were very impressed by it. About three years ago, we had a similar inquiry from Victoria, and I do not think it will be long before they bring in a Compulsory System in Victoria.

" Sir Francis Dillon Bell had the choice in 1923 of introducing Acts that follow those now operating in England or bringing all land in New Zealand under the Land Transfer Act. You will agree his decision was a very wise one. I was the Registrar in Hokitika in 1924, and I did not think I would be Registrar-General of Land before it had its funeral."

The Auckland Law Society.

The President of the Auckland Law Society, Mr. C. J. Garland, said he had had an invitation extended to him to go to Thames to attend a twenty-first birthday party that day. He was able truthfully to reply that he had had to attend the funeral of his old friend, Mr. Deeds.

Mr. Garland proceeded :

" I suppose some of us have had a feeling of inferiority in circumstances such as these. Shakespeare put these words in the mouth of Henry V : ' And gentlemen in England now abed shall think themselves accursed they were not here And hold their manhoods cheap while any speak That fought with us upon St. Crispin's day.' All young law clerks who are here and whose experience has been limited to the Land Transfer system will count their manhood cheap when old conveyancers talk of the Deeds System.

" On behalf of the legal profession, I want to congratulate the District Land Registrar on his great achievement. We know the difficulties under which you have laboured for many years, and somehow I fear that we have sometimes added to those difficulties. I speak from experience, for we know that you have not at any time been overstaffed, and we have, with our taking ways, deprived you of that staff.

" We know that this office is staffed to take 170 documents a day, but the number registered is over 300 a day, and, in spite of shortage of staff, you have persevered, and not weakened. I want to offer the congratulations of the profession to you and to your staff. I want to take this opportunity of telling you how much the legal profession appreciates the tremendous efforts you made before June 30, D Day, when you took in over two thousand documents. I recall that when a commanding officer asked Haig to see what reinforcements he could find, he was sent one cook. Mr. Seddon's position in the office was the same. Everybody was on the counter. Do not think we were trying to beat the Government. We were only getting in ahead. On behalf of the profession, I want to thank you, sir, for the invitation to come here. We should be throwing the party for you. We have attended here as always when there is anything free."

The Wraith of a Dead Conveyancer.

The last speaker was Mr. Bryce Hart, who addressed his remarks to " all to whom these presents shall come."

He said :

" I feel that I am here as the wraith of a dead conveyancer, but I have many happy recollections of this Office some thirty years ago. In those days, we law clerks in receipt of such stultified wages were wont to augment them per medium of search fees. Some years later, some interfering District Land Registrar decided that these fees belonged to the Government, and did not constitute a fund for indigent law clerks. As a consequence, many of us turned from conveyancing to the common law, where we have since found that the only searching done was performed by the Police upon our clients, and that the only type of conveyance we dealt with was the Black Maria. However, I have always thought that there is a certain amount of dignity about the old parchment conveyance, particularly the handwritten one. There is something majestic about it. I can see nothing majestic about the modern Certificate of Title, which, when all is said and done, is merely a series of ' Seddon Memorials.'

" Before coming up here to-day, I looked up *Garrow's Real Property* and noted with some interest that he had devoted a whole page to ' Conveyances by Intoxicated Persons.' There is nothing new in this. One has only to read the daily papers to realize that a number of intoxicated people are still in charge of conveyances.

" I shall always have happy memories of those dear old gentlemen known as recorders, and of their copperplate writing as they copied the various deeds into their large books. They were scrupulously careful in their work, and paid great attention to detail. They exhibited what I would call the true spirit. I know this, because I have smelt it in their very breaths. They have long since gone to meet their Redeemer, taking with them in each case, I assume, an equity of redemption.

" Mr. Seddon, I must thank you for sending me your kind invitation to this function. The most notable feature of the invitation was your intimation that, after the formal part of the gathering, sherry would be supplied. I realize that to-day marks the demise of the Deeds System, but the wording of your invitation suggests that in your swan song you have introduced for the last time a ' Covenant to produce.' "

The Deserted Home.—A problem that crops up frequently is the position of a deserted wife and children when the male miscreant of the family decides to sell up the home on them. In *Thompson* v. *Earthy* (*The Times*, June 8, 1951), the vendor of a house property had deserted his wife, but at the hearing of maintenance proceedings he had given an undertaking to the Justices that he would allow his wife and children to remain in the house, which had been their matrimonial home. The purchaser proceeded against the wife, who was held by Roxburgh, J., to have no interest, legal or equitable, so as to be bound in the hands of the purchaser. It may be assumed that, whatever difficulties may arise in the future out of our Family Home scheme, this particular one will not be amongst them.

—Scriblex.