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THE LIMITATION ACT, 1950.

II. Common-law Actions.

THE main task of the practitioner, when dealing with the periods of limitation specified in the Limitation Act, 1950, is first to ascertain, if the cause of action (or right of action) has accrued, the date on which it accrued or is, for the purposes of the statute, deemed to have accrued, or the date which is the subject of a prescribed construction. An example of the latter is found in s. 2 (7), which says, in relation to Part II :

> references to the date of accrual of right of action shall—
>
> (*a*) In the case of an action for an account, be construed as references to the date on which the matter arose in respect of which an account is claimed :
>
> (*b*) In the case of an action upon a judgment, be construed as references to the date on which the judgment became enforceable :
>
> (*c*) In the case of an action to recover arrears of rent or interest, or damages in respect thereof, be construed as references to the date on which the rent or interest became due.

Other examples will be found in s. 8 *et seq.*, mainly relating to the recovery of land.

Under the Limitation Act, 1950, the right to bring an action to enforce a civil claim is barred by the expiration of a period, which, except in some special provisions, begins to run from the date on which the cause of action (or the right of action) accrued. The terms " cause of action " and "right of action " are both used.

Some sections use the term " the date on which the cause of action accrued " (s. 2 (1) (7)), or the words " from the accrual of the cause of action " (s. 5 (*1*)) ; but, in other sections, the term " right of action " is used : *cf.* ss. 7 and 8 ; and even the phrase " Accrual of Rights and Causes of Action " is used as a heading to a group of sections (ss. 6-19).

Date of Accrual of Cause of Action.

The expression " date on which the cause of action accrued " is not defined, though used in several places in the Limitation Act, 1950. The expression similarly appears in the corresponding English statute, from which a definition is omitted, probably because the Law Revision Committee (Eng.) stated in para. 6 of their Report :

> Any attempt to produce a comprehensive statutory definition . . . would probably create more difficulties than it would solve.

But the Committee expressed the opinion that the test for determining when a cause of action accrues is whether a complete cause of action, to which, under the old procedure, the defendant could not have demurred, has arisen. They recognized, however, that this is not wholly satisfactory, since it makes the operation of the new statute depend to some extent on technicalities of pleading with which the present generation of lawyers is not familiar.

The term " action " is defined in s. 2 (1) of the Limitation Act, 1950, to mean " any proceeding in a Court of law other than a criminal proceeding " ; so that an action, under the statute, is exclusively a civil one. Under s. 30, for the purposes of the Act, any claim by way of set-off or counterclaim is deemed to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded.

References in the statute to " a right of action to recover land " include references to a right to enter into possession of the land, or, in the case of rentcharges, to distrain for arrears of rent. References to the bringing of such an action include references to the making of such an entry or distress : s. 2 (5).

In Part II, any references to a " right of action " are amplified by s. 2 (7) to include references to a cause of action and a right to receive money secured by a mortgage or charge on any property to recover proceeds of the sale of land, and to a right to receive a share or interest in the personal estate of a deceased person.

The term " cause of action " means that which makes action possible, as Lord Dunedin said in *Board of Trade* v. *Cayzer, Irvine, and Co., Ltd.*, [1927] A.C. 610, 617 ; or, as Lord Esher, M.R., put it in a definition which has been frequently applied, a cause of action is " every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court " : *Read* v. *Brown*, (1888) 22 Q.B.D. 128, 131.

A " right of action "is not the power of bringing an action. As Lord Esher, M.R., said in *Attorney-General* v. *Lord Sudeley*, [1896] 1 Q.B. 354, 359 :

> Anybody can bring an action, though he has no right at all. The meaning of the phrase is, that the person has a right or claim before the action which is determined by the action to be a valid right or claim.

It follows, therefore, that " cause of action " means the fact or combination of facts giving rise to a right of action. And the date on which the cause of action accrues is the date on which a right of action arises.

The Limitation Act, 1950, must first be referred to for specific applications of artificial dates for the accrual, for the purposes of the statute, of specific causes or rights of action.

If, however, there is no express provision made in the statute for the construction of the term " cause of action " in regard to the matters it specifies, then ascertainment of " the date on which the cause of action accrues " is to be sought in the common law.

Thus, the cause of action for breach of a simple contract accrues on the breach itself, for that is the gist of the action ; and, if the breach occurs over six years before the commencing of the action upon it, the fact that the subsequent damage happened within six years next before the suit will not prevent the application of s. 4 1 (*a*) : *Gibbs* v. *Guild*, (1881) 8 Q.B.D. 296, 302. The question when the breach occurred is one of law, to be determined according to the common-law principles applicable to the particular case.

The cause of action for a tort accrues when it becomes effective—that is, when the resulting damage manifests itself—and each recurring act of a distinctly new damage (as distinguished from a development in an old one) is the accrual of a fresh cause of action : *Fetter* v. *Beal*, (1701) 1 Ld. Raym. 339 ; 91 E.R. 1122.

The foregoing can be illustrated by the judgment of the Court of Appeal, delivered by Cooper, J., in *Dillon* v. *Macdonald*, (1902) 27 N.Z.L.R. 375, wherein the Court discussed the meaning of the phrase " cause of action," at pp. 392, 393 :

> in an action for damages for breach of contract, the cause of action is the breach of contract . . . There is, however, one class of cases in which the fact of damage is a necessary and essential ingredient in the " cause of action "—namely, actions for torts causing damage to person or property not actionable without special damage, or until damage is sustained. *Brunsden* v. *Humphrey* (14 Q.B.D. 141) is a good illustration of the first branch of this class, and the well-known cases of *Backhouse* v. *Bonomi* (9 H.L.C. 503) and *Darley Main Colliery Co.* v. *Mitchell* (11 App. Cas. 127) are instances of the second branch. In this class of cases the damage is the gist of the action, and it is properly stated as part of the " cause of action."

It is stated in *20 Halsbury's Laws of England*, 2nd Ed. 618, para. 777, that :

> A cause of action cannot accrue unless there be a person in existence capable of suing and another person in existence who can be sued.

But, in *R.B. Policies at Lloyd's* v. *Butler*, [1949] 2 All E.R. 226, an action for the return of a motor-car alleged to be wrongfully detained by the defendant (an innocent holder who had given consideration for it without any knowledge of its having been stolen), and, alternatively, for the value of the car or for damages for wrongful detention, the preliminary question for decision was whether it was necessary that there should be an actual, known, and available defendant to such an action before it could be said that the cause of action had " accrued," to fulfil the phrase used in (our) s. 5 (2). It was held that, if every ingredient of the cause of action is present, the cause of action cannot be said not to have " accrued " (for the purposes of (our) s. 4 (1) or s. 5 (2)) merely because there was an absent and unknown defendant whose name could not be inserted in the writ. In the view of Streatfeild, J., the proper construction of the words " the cause of the action has accrued " involved the finding that the cause of action had accrued eight years previously, when the thief stole the car from the plaintiff and converted it to his own use.

This change in the law effected by s. 5 (2) of the Limitation Act, 1950, as illustrated by *Butler's* case (*supra*) is a striking one, when one considers the law as it was in relation to actions for conversion or detinue, as shown in the judgment of Fletcher Moulton, L.J., in *Clayton* v. *Roy*, [1911] 2 K.B. 1031, 1048, where His Lordship observed :

> In an action of detinue, as in other actions of tort, the Statute of Limitations runs from the time when the cause of action arose ; consequently, if nothing happened to give rise to an action of detinue, there is no period of time which can operate to extinguish the title of the real owner. He may have been deprived of control over his chattel for a hundred years, but it still remains his property, and no action will lie to recover it, unless there has been a demand and a refusal which would be sufficient to give rise to a cause of action. If there is a demand by the owner from the person in possession of the chattel and a refusal on the part of the latter to give it up, then in six years the remedy of the owner is barred . . . If something less were sufficient, the Statute of Limitations might commence to run against the owner without his knowledge.

But s. 5 (2) and the construction put on it by Streatfeild, J., in *Butler's* case has changed all that.

Claims for Contribution : Special Provision.

It would appear that, on the analogy of cases arising out of contract or tort, time should commence to run in respect of claims for contribution under s. 17 of the Law Reform Act, 1936 (N.Z.), when the liability of the person claiming contribution is ascertained or the damages are paid, whichever is the earlier. But it was held in England in *Merlihan* v. *A. C. Pope, Ltd., and Hibbert*, [1945] 2 All E.R. 449, on the interpretation of s. 21 (1) of the Limitation Act, 1939 (the first part of which corresponds with s. 23 (1) of our Limitation Act, 1950), that time began to run from the time when the cause of action relative to the claim for contribution accrued—namely, the date of the accident in respect of which the damages were held to be payable —and not from the date of the award of those damages to the successful plaintiff. The position was somewhat overcome, in a roundabout way, in a later case, *Hordern Richmond, Ltd.* v. *Duncan*, [1947] 1 All E.R. 427, where the prospective third party was the servant of a public authority, and, as such, was entitled to seek, after twelve months from the date on which the cause of action accrued, the protection of s. 21 (our s. 23), unless the claim against him was brought within that one-year period. The defendants sought and obtained, within that year, a declaration that, if the plaintiff should suceed in having damages awarded against them, they would have a right to claim contribution or indemnity from the third party even though more than twelve months had passed since the cause of action accrued.

To remedy the position disclosed by the judgment in *Merlihan's* case, [1945] 2 All E.R. 449, and to render unnecessary the proceedings instituted in *Duncan's* case, [1947] 1 All E.R. 427, s. 14 of the Limitation Act, 1950, enacts :

> For the purposes of any claim for a sum of money by way of contribution or indemnity, however the right to contribution or indemnity arises, the cause of action in respect of the claim shall be deemed to have accrued at the first point of time when everything has happened which would have to be proved to enable judgment to be obtained for a sum of money in respect of the claim.

Restrictions on Application of The Statute.

There are, however, certain limits to the application of the Limitation Act, 1950, in respect of an " action."

Notwithstanding the wide definition of that term in s. 2 (1), it has been held that s. 4 (4), which is expressed to apply to actions to enforce judgments obtained after January 1, 1952, does not apply to the issue of execution and does not affect the restrictions on execution contained in the rule of procedure corresponding with R. 346 of the Code of Civil Procedure: *W. T. Lamb and Sons* v. *Rider*, [1948] 2 K.B. 331; [1948] 2 All E.R. 402. By s. 4 (8), the limitation of actions of contract and tort, and of certain other actions as set out in s. 4, is not in general to apply to any cause of action within the Admiralty jurisdiction of the Supreme Court which is enforceable *in rem*.

Under s. 4 (9), s. 4 is not to apply to any claim for specific performance or for an injunction or for other equitable relief, except in so far as any provision of s. 4 may be applied by the Court by analogy: as to the effect of this subsection, see *Poole Corporation* v. *Moody*, [1945] K.B. 350; [1945] 1 All E.R. 536.

By s. 31, nothing in the statute is to affect any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise: as to acquiescence, see *13 Halsbury's Laws of England*, 2nd Ed. 208, 219.

Some General Rules of Interpretation.

It is impossible, in the space available to us, to traverse the whole of the Limitation Act, 1950, in relation to the various causes of action and rights of action which it controls, as this entails an examination of the law applicable to the enforcement of each cause of action or to each right of action affected by it; and it also requires some consideration of the differences appearing in the new Act from the provisions of the statutes and the individual sections of statutes it replaces. Our readers are directed, for such a detailed exposition of the new Act, to *Preston and Newsom's Limitation of Actions*, 2nd Ed., which comprehensively deals with the Limitation Act, 1939 (U.K.). By using the marginal comparisons (as given in our statute) of the sections in our Act with the sections of the United Kingdom statute, they will find a great deal of valuable commentary and exposition in that work.

There are, however, some general common-law rules which may be of guidance to our readers in relation to the Limitation Act, 1950. The rules are not new, but they are, in most cases, apposite to the construction of any statute of limitation.

The first of these rules which may conveniently be here referred to is that it is only when the cause of action has accrued—that is to say, when the right of action has vested in the plaintiff—that the bar of time begins to run—for example, if a previous request (*Birks* v. *Trippet*, (1666) 1 Wms. Saund. 28, 32; 84 E.R. 32, 34) or a previous demand (*In re Tidd, Tidd* v. *Overell*, [1893] 3 Ch. 154) is required before the complete right to sue arises, the time will run only as from the date of the request or demand. At the same time, there are certain incidentals to a right of action which are no part of the right of action itself, and these incidentals will not delay the time's commencing to run.

Thus, in the case of a solicitor's claim for costs, the cause of action is complete when the work is concluded, and time then commences to run, notwithstanding the fact that the solicitor must, in compliance with s. 28 (1) of the Law Practitioners Act, 1931, have delivered his bill of costs to the party chargeable, and have also waited one month thereafter before commencing proceedings: *Coburn* v. *Colledge*, [1897] 1 Q.B. 702; and see also, on this point, *Monckton* v. *Payne*, [1899] 2 Q.B. 603.

It is, of course, different if the incidental is made a condition precedent to the right of suing: *Corbett* v. *Badger*, [1901] 2 K.B. 278: see s. 23 (1) (*a*) of the statute, where notice of action is to be given by the prospective plaintiff to the prospective defendant as soon as practicable after the accrual of the cause of action. Such notice is a condition precedent to the bringing of an action against the Crown or a public or local authority, &c.

The second general rule is that the limits of time appointed by the Limitation Act, 1950, may be different according to the nature of the relief which is claimed in the action, and even in respect of the same cause of action against persons of differing status. For example, an action against the Crown or a public or local authority must be commenced, after notice, before the expiration of one year from the date on which the cause of action arose: s. 23 (1); but the same cause of action against a person not within that category may not be barred after six or twelve years according to its particular nature: *cf.* s. 4 (1) (2) (5) or s. 4 (3) (4).

A third rule of general and almost universal application to a statute of limitation is that time, once it has commenced to run, will not cease to run merely by reason of any subsequent event. But the time of limitation may be extended. The provisions of Part I of the Limitation Act, 1950, have effect subject to the provisions of Part II, which provide for extensions of the periods of limitation in cases of disability, acknowledgment, part payment, fraud, and mistake (s. 3). Section 24 applies to "the date when any right of action accrued for which a period of limitation is prescribed under this Act"; and see s. 2 (7) and the rules of construction given therein in respect of Part II. So, it would appear, all actions subject to the Limitation Act, 1950, and the respective periods of limitation therein specified may be extended for disability by six years in all cases, except in actions against the Crown or public or local authorities within s. 23, where the extension is limited to one year from the date when the person under the disability died or ceased to be under it (s. 24 (*a*)).

A fourth general rule is that the effect of the expiration of the periods prescribed in Part I of the Limitation Act, 1939, is to bar the remedy, not the right, and that Act must be specially pleaded by way of defence, and also pleaded as early as possible (probably because the protection of the statute may be waived by the defendant); and the Court will not of itself take notice of the defence: *cf.* Magistrates' Courts Act, 1947, s. 113 (4). But this is to be understood only of cases where the statute bars the remedy merely, without extinguishing the very right itself, and not of cases where the very right itself, and not merely the remedy, is barred. On the expiration of the period prescribed for the bringing of an action to recover "land" (as defined in s. 2 (1)), the title of the owner thereof is extinguished (s. 18); similarly, by a change in the existing law, the title of the owner of a chattel is now extinguished when his right to bring an action in respect of the conversion or detention thereof becomes barred (s. 5 (2)). In any proceedings subsequently commenced, the defendant in either case need not

plead the Act expressly: he may apply to have the statement of claim struck out: *cf. Price* v. *Phillips*, (1894) 11 T.L.R. 86.

It is a fifth general rule that an acknowledgment or part payment of a claim, or an admission of the plaintiff's right of action (or of his title), will (subject to the statutory requisites for acknowledgment being complied with) operate to revive the right of action (or the title); and thereby the time will begin to run afresh, as the right of action is deemed to have accrued on, and not before, the date of the last acknowledgment or the last payment: s. 25 (1) (4). For example, an account stated between the plaintiff and the defendant—and on which a balance is shown to be owing to the plaintiff—implies a promise by the defendant to pay that balance: and, for the purposes of s. 25 (4), it becomes an absolute acknowledgment of the balance as due and owing. And the right of action thereafter rests, in general, on this new promise to pay, the original cause of action being replaced by the acknowledgment.

A sixth rule, of general application, is that remedies, as distinguished from rights, are to be pursued according to the law of the place where the action is instituted, which law is commonly called the *lex fori*. And the reason of the rule is that, Courts of law being instituted by every nation for its own convenience, the nature of the remedies available therein and the times and modes of the proceedings therein are regulated by that nation's own views of what is just and proper or expedient; and it is not obliged, out of any comity to other countries, to depart (in a matter of procedure) from its own notions of what is just and proper or expedient. Therefore, where an action is brought in a Court outside New Zealand upon a contract made in New Zealand, a plea of the provisions of the Limitation Act, 1950, is not, in general, a good bar to the remedy; but a plea of the statute of limitation of the *lex fori* is a good bar. As all actions relative to the title to real estate are regulated by, and are to be pursued according to, the *lex loci rei sitae*, the Limitation Act, 1950, must, wherever an action is brought relating to the title of land in New Zealand, be the only law relating to limitation of action to be applied, no matter where, outside the Dominion, the action is brought.

In general, the rule of construction affecting the Limitation Act, 1950 (or any other statute of limitation), is that it is to be construed strictly. The defence of lapse of time against a just demand is not to be extended to cases which are not clearly within the enactment, while provisions which give exceptions to the operation of the enactment are to be construed liberally: see the speech of Lord Cranworth, L.C., in *Roddam* v. *Morley*, (1857) 1 De G. & J. 1, 23; 44 E.R. 622, 630, and *Maxwell on the Interpretation of Statutes*, 9th Ed. 291.

In our next issue, we propose to consider the Limitation Act, 1950, in its relation to actions in respect of land, mortgages, and the like.

CORRESPONDENCE.

Elimination of Latin as A Degree Subject.

The Editor,
NEW ZEALAND LAW JOURNAL,
Wellington.

Sir,

Mr. McCarthy seeks views on this question. I offer my experience as a recent graduate.

When I began the law course, it was a number of years since I had studied Latin at school. For the degree course we studied a book on early Italian beekeeping—written in verse, strangely enough. (The *Journal of Agriculture* might give a lasting quality to its contents if a suitable poet could be found. I offer the suggestion for what it is worth.) This is almost all the Latin verse we read, so I cannot form an opinion about Roman culture, but our Professor made a very scholarly and human treatment of this work, and, had I not been forced to concentrate on the translation into English, I am sure I would have received benefit from the study.

In addition to this work, we studied two speeches on the political situation in Rome 2,000 years ago. The situation does not seem to have improved much in that time, except that Governments are now attacked through the ballot-box. Both speeches seemed to be well phrased, but, since I did not study Latin past Stage I, I am in no position to judge.

During the rest of the year, I brushed up some (but not all) of the grammar and vocabulary I had forgotten after leaving school.

As for "understanding and valuing the foundations of Western civilization," the benefit I received was, as you can see, infinitesimal. One week spent in reading Bertrand Russell's *History of Western Philosophy* would have given me one thousand times the understanding I received in the Latin course.

As for "understanding and valuing the origins and development of our system of law," I can say that I learned nothing whatever of this from my study of Latin. I did learn something of Roman Law, but not in the Latin class, and not through knowing any Latin. What little I did learn gave me the impression that Roman Law, the enactment of a Roman Emperor, was the opposite of our system of common law, and not the foundation of it.

As for Latin as a "cultural link," the elementary knowledge of a nation's culture obtained from portion of a book on agriculture and two political speeches ill repaid me for the time I spent on the subject. Had I been able, instead of sitting Latin, to study, say, History, or History of Political Theory, or Greek History, Art, and Literature, or Comparative Political Institutions, or Economics, or even English—to name a few subjects I would have liked to take—then, I feel, the University would have given me more opportunity of preparing myself for entry to a learned profession.

I do not want to imply criticism of the teaching of Latin by the University. The Colleges do their best with the material available, but Stage I Latin is a preparation for the study of the Latin language, not an adequate entry to Roman culture.

If a classical language is deemed essential, would not Greek be far more valuable? I cannot claim a classical education, but I had always believed that the great achievements in art, in poetry, in sculpture, in architecture, and in drama and literature were to be found in Greek culture, rather than in Roman.

The majority of practitioners who hold law degrees to-day no doubt graduated before 1938, and may not be aware that the degree course to-day involves more than double the amount of general cultural preparation formerly demanded.

The five-year course of nineteen units is arduous enough to dispense with Latin as a hurdle or hazard. Since 1938, the degree course has contained five Arts units at Stage I or II, so that the prerequisite for the study of law is, with Roman Law, more than half of an Arts degree. If a student passes twenty-one instead of nineteen units, the University gives him a double degree in Arts and Law. I would suggest that, if Latin were an optional, instead of a compulsory, subject, the cultural value of the LL.B. degree would be raised, not lowered.

Yours, &c.,
R. M. DANIELL.

SUMMARY OF RECENT LAW.

BY-LAW.

Accumulation of Rubbish on Vacant Land—"Suffer to be deposited or to accumulate . . . rubbish"—Knowledge of Successive Deposits of Rubbish—Reasonable Steps open to Defendant to prevent Accumulation not taken—"Suffers." If a man knowingly permits a thing to happen, he suffers it to happen. A man who suffers a thing to happen does not necessarily permit it, as he may not have the physical power or right to stop it; but, if he has that power or right and does not stop it, he suffers it to happen. (*Rochford Rural District Council* v. *Port of London Authority*, [1914] 2 K.B. 916, and *Berton* v. *Alliance Economic Investment Co., Ltd.*, [1922] 1 K.B. 742, followed.) An Auckland City by-law was in the following terms: "419. No person shall: (1) Deposit or permit or suffer to be deposited or to accumulate any refuse or rubbish of any description . . . on any vacant land not being a place set apart for such purpose by the Council." The defendant had been charged with suffering rubbish to accumulate on vacant land, owned by him, in breach of the by-law. He was convicted. The learned Magistrate found as facts that the defendant had knowledge that successive acts of deposit of rubbish had taken place, and that the defendant's previous erection of a notice prohibiting such acts did not prove effective. On appeal from the conviction, *Held*, dismissing the appeal, 1. That the learned Magistrate's finding of fact fixed the appellant with knowledge, and the by-law obliged him to take such reasonable steps as were open to him to prevent the accumulation of rubbish, such as the erection on the street frontage of the vacant land of a suitable fence, which would have provided an effective means of preventing unauthorized deposits of rubbish. (*Bailey* v. *Pratt*, (1902) 20 N.Z.L.R. 758, and *Doyle* v. *Gilmer*, (1910) 29 N.Z.L.R. 1168, distinguished.) 2. That, as the appellant owned the vacant land, he had the legal right to stop or prevent the accumulation of rubbish, and he had, therefore, suffered it to accumulate in breach of the by-law. *Cameron* v. *Paull*. (S.C. Auckland. October 19, 1951. Fell, J.)

CRIMINAL LAW.

Appeal—Verdict Unreasonable and not supported by Evidence—Accused indicted and convicted on Four Counts charging Indecent Assault on Male on Four Different Days—Two Charges not proved—Effect of Verdicts thereon on Convictions on Other Counts—Trial and Convictions "unsatisfactory"—Convictions quashed—Verdict of Acquittal entered—Criminal Appeal Act, 1945, ss. 3, 4—Trial—Direction to Jury—Indecent Assault—Indictment containing Several Counts—Each Count charging Separate Indecent Assault on Different Days—Jury to be directed to return Verdict on Each Count—Warning to be given of Distinction between Evidence on Each Count and on Every Other Count. Where an indictment for indecent assault contains a number of counts, each count charging a separate assault, the jury should be directed carefully and fully to consider each charge independently of the others, and, as well, should be warned not to fall into the error of supposing that the partial weakness of the evidence in respect of each charge might be cured by the fact that there are a number of counts in that position, and that the evidence on any count might be supplemented by looking at the evidence as a whole. (*R.* v. *Bailey*, [1924] 2 K.B. 300, followed.) In every case of this sort—and, indeed, in every case where a number of charges have to be tried together—the method of performing it requires to be put to the jury by the Judge clearly, and, generally, in some detail, possibly the best way in a case such as the present being to suggest to the jury that it should take the charges in order of date and determine whether each of the earlier ones is proved before passing on to the next. The appellant was convicted on four charges of indecent assault on a male, alleged to have taken place, in respect of a boy aged 13 years, on December 15, 1950, and on January 10, February 7, and April 28, 1951. On appeal from those convictions, *Held*, 1. That on neither of the charges was there evidence relating to January 10 and February 7 respectively sufficient to discharge the onus of proof, and a reasonable jury, if those counts alone were being considered, could not properly consider them proved; and that the verdict on both would have to be quashed, and a verdict of acquittal entered. 2. That the fact that the jury was prepared to find the accused guilty in respect of two counts on which the evidence was quite inadequate to prove them gave sound ground for suspecting its approach to the other evidence and for considering the verdict which it had arrived at on the other counts as probably unsatisfactory. 3. That, for the reasons given in the judgment, the trial and conviction could not be regarded as other than unsatisfactory; and the verdict should be quashed and a verdict of acquittal entered on all the counts. (*R.* v. *Marco* (*No. 3*), [1946] N.Z.L.R. 660, applied.) *The King* v. *Muling*. (C.A. Wellington. October 5, 1951. Fair, A.C.J.; Gresson, J.; Stanton, J.; Hay, J.; F. B. Adams, J.)

Practice—General Appeal to Supreme Court against Conviction in Magistrates' Court—Judgment of Supreme Court thereon not appealable to Court of Appeal—Judicature Act, 1908, s. 70—Justices of the Peace Act, 1927, s. 315. There is no right of appeal from a judgment of the Supreme Court in respect of a general appeal under s. 315 of the Justices of the Peace Act, 1927, against a conviction. The judgment of the Court of Appeal in *Stagpoole* v. *Brewer*, (1894) 13 N.Z.L.R. 136, which dealt with an appeal to the Supreme Court on a case stated, extends to and covers a general appeal. *So held* by the Court of Appeal in a motion for an order dismissing the appellant's notice of motion on appeal from an order of the Supreme Court dismissing his appeal under s. 315 of the Justices of the Peace Act, 1927, from a conviction by a Magistrate. *Waldron* v. *Horrax*. (C.A. Wellington. October 12, 1951. Fair, A.C.J.; Stanton, J.; Hay, J.)

DIVORCE AND MATRIMONIAL CAUSES.

Separation—Parties entering into Agreement for Separation in July, 1929—Subsequent Occasions of Intercourse between Parties continuing until 1945 and then ceasing—Parties thereafter living Apart—In 1951, Agreement for Separation not "in full force for not less than three years"—Divorce and Matrimonial Causes Act, 1928, s. 10 (i). An agreement for separation was entered into by the parties on July 6, 1929. The parties admitted that intercourse had taken place on numerous occasions from about the month of January, 1931, but they agreed that any such cohabitation had ceased in 1945. Nothing in the nature of an agreement for separation was entered into at that time. They had since lived separate and apart. The husband's petition was based on s. 10 (*i*) of the Divorce and Matrimonial Causes Act, 1928—namely, that the agreement for separation had been in full force for not less than three years (that is to say, from July 6, 1929, down to the filing of the petition in 1951). The wife alleged that the agreement was brought about by the wrongful conduct of the petitioner. *Held*, 1. That, on account of the cohabitation between the spouses subsequent to the separation agreement, that agreement terminated before 1945; and, as it was not thereafter renewed by any deed or other writing, or verbally, the petitioner was not entitled to succeed. (*Bennett* v. *Bennett*, [1936] N.Z.L.R. 872, and *Ducker* v. *Ducker*, [1951] N.Z.L.R. 583, followed.) 2. That, on the facts, even if the agreement for separation made on July 6, 1929, had still existed, it had been brought about by the wrongful conduct of the petitioner. *Green* v. *Green*. (S.C. Palmerston North. October 3, 1951, Northcroft, J.)

EVIDENCE.

Anticipated Proceedings. *212 Law Times*, 33.

FOOD AND DRUGS.

Cream—Non-compliance with Prescribed Standard—Company selling Cream to Retail Vendor—Property in Cream passing from Company when Cream collected on Retail Vendor's Behalf—Any Person eligible to lay Information for Breach in relation to Sale of Food not complying with Prescribed Standard without giving to Company Portion of Sample taken—Term implied in Contract of Sale that Cream complied with Prescribed Standard at Time of Delivery and for Reasonable Time thereafter—"All reasonable steps"—Food and Drugs Act, 1947, ss. 6 (2), 7, 15, 16. Any person, including a Departmental officer, may lay an information for a breach of s. 6 (2) of the Food and Drugs Act, 1947; and, if the facts can be proved without the aid of ss. 15 and 16 of the statute, a conviction can be recorded. (*Cruickshank* v. *Hughey*, [1951] N.Z.L.R. 540, referred to.) The appellant purchased milk from farmers, and on April 4, in accordance with a regular procedure, it sent a large quantity to the Government Milk Treatment Station at Dunedin to be separated. The separation was duly completed, and about 41 gallons of cream were available for collection by the appellant at the Treatment Station at approximately 4.30 p.m. on April 4. In fact, it was collected at about 8.30 p.m. Twenty-six retail milk vendors, whose business it was to deliver milk and cream to the public, and who purchased their cream for this purpose from the appellant, had earlier on the same day left their respective empty cream containers at the appellant's "cool room" for the purpose of having their orders for cream fulfilled. An employee of the appellant between 8.30 p.m.

and 9.30 p.m. on April 4 placed in each container, from the supply just received from the Treatment Station, the amount of cream which each vendor had previously ordered. This was done in the cool room, where the containers were left by him to be taken away some hours later by the retailers. One W. collected his own and P.'s cream from the appellant's cool room at about 2.30 a.m. on April 5. While W. was still there, an Inspector, an " officer " under the Act, but not the informant in these proceedings, purchased from him a half-pint of P.'s cream, paying to W., as P.'s agent, the correct price of 1s. 6d. therefor. The Inspector told W. that the cream was purchased for the purpose of analysis, and, so far as P. was concerned, the Inspector duly complied with the provisions of ss. 15 and 16 of the Food and Drugs Act, 1947. A sample was sent to the Government Analyst, who commenced the reductase test about 8.30 a.m. The sample so analysed, forming part of 5 pints of cream sold by the appellant to P., did not comply with Reg. 104 of the Food and Drug Regulations, 1946, in that it completely decolorized the metaylene blue in two hours as against the permitted minimum of four hours. Section 16 of the Food and Drugs Act, 1947, was admittedly not complied with as regards the company, no sample having been supplied to the company by the Inspector. *Held*, 1. That a contract for the sale of cream must imply that the cream complied with the standard at the time of delivery and for a reasonable time thereafter; and, whenever the property passed within the rules laid down in s. 20 of the Sale of Goods Act, 1908, the appellant, in view of the definition of " sale " in s. 3 of the Food and Drugs Act, 1947, was responsible until the milk-vendor's agent took delivery at 2.30 a.m. on the morning of April 5. (*Walters* v. *Mitton*, [1926] S.A.S.R. 261, applied.) (*Ollett* v. *Jordan*, [1918] 2 K.B. 41, distinguished.) 2. That the appellant had not satisfied the onus of proof that it took all reasonable steps to ensure that the sale of the cream would not constitute an offence against the Food and Drugs Act, 1947, or against any Regulations made thereunder, in that it had not proved that, within practicable limits, no other steps could have been taken. (*Canterbury Central Co-operative Dairy Co., Ltd.* v. *McKenzie*, [1923] N.Z.L.R. 426, applied.) (*Bodley* v. *Rawlinson*, [1918] N.Z.L.R. 726, referred to.) Appeal from the judgment of *Willis*, S.M., reported (1951) 7 M.C.D. 347, dismissed. *Dairy Farmers' Co-operative Milk Supply Co., Ltd.* v. *Fischer*. (S.C. Dunedin. October 2, 1951. Fell, J.)

HUSBAND AND WIFE.

Married Women's Property—Disputes between Spouses—Judge's Discretion as to making Order—Apportionment of Assets of Partnership between Husband and Wife—Presumption as to Wife's Ownership of Moneys, &c., in Sole Name—Effect of Discharge of Onus—" As he thinks fit "—Married Women's Property Act, 1908, ss. 11, 23. Section 23 of the Married Women's Property Act, 1908, empowers the Judge hearing any application under the section to " make such order with respect to the property in dispute . . . as he thinks fit." Thus, when the learned trial Judge finds the existence of a partnership between husband and wife, or an implied trust, he may apportion the partnership assets; and, in doing that, he is also doing what he " thinks fit " in respect to the property in dispute. (*Thomson* v. *Thomson*, [1944] N.Z.L.R. 469, *The Venture*, [1908] P. 218, and *In re Humphery*, [1917] 2 K.B. 72, applied.) (*Raymond* v. *Raymond*, (1912) 31 N.Z.L.R. 69, *Barrow* v. *Barrow*, [1946] N.Z.L.R. 438, and *Miller* v. *Miller*, [1946] Q.W.N. 31, distinguished.) The onus of rebutting the presumption created by s. 11 of the Married Women's Property Act, 1908, that the moneys and property specified therein are the separate property of a married woman lies on him who alleges the contrary. When that onus has been discharged (as here, by the finding as to the partnership), the learned trial Judge, in arriving at the proportions of each party, need not treat moneys and bank deposits differently from any other of the assets. (*In re McGrath, Ex parte Official Assignee*, (1897) 17 N.Z.L.R. 646, and *Official Assignee of McWilliam* v. *McWilliam*, [1923] N.Z.L.R. 561, followed.) *Thomson* v. *Thomson*. (S.C. Invercargill. October 15, 1951. Fell, J.)

INDUSTRIAL CONCILIATION AND ARBITRATION.

Jurisdiction—Alteration of Union Rules—Application to Supreme Court involving Determination as to whether Certain Industries " related industries "—Matter in Dispute within Jurisdiction of Court of Arbitration—Industrial Conciliation and Arbitration Act, 1925, ss. 4 (2), 13, 27—Industrial Conciliation and Arbitration Amendment Act, 1947, s. 9 (1). The whole structure of the Industrial Conciliation and Arbitration Act, 1925, suggests that the administration of the industrial affairs of industrial unions is intended to be under the control and direction of the Court of Arbitration, which, subject to the qualification that it is acting in a matter within its jurisdiction, is supreme and uncontrolled. Consequently, when the Supreme Court is asked to determine whether or not certain industries are " related industries," as that term is used in s. 27 of the Industrial Conciliation and Arbitration Act, 1925, that Court should not determine the question. It is, in any event, a question of fact, and one which should generally be left in the hands of the authorities (the Governor-General or the Court of Arbitration) to whom, in that section, the Legislature has committed the responsibility of decision. *Semble*, By taking advantage of the procedure indicated in s. 9 (1) of the Industrial Conciliation and Arbitration Amendment Act, 1947, and by a fuller use by the Registrar of his powers under s. 4 (2) of the Industrial Conciliation and Arbitration Act, 1925, most (if not all) matters relating to industrial unions, their internal organization, and their external relations to each other could be effectively dealt with and determined by the Court of Arbitration without waiting for the occurrence of an industrial dispute. *So held*, by the Court of Appeal, allowing an appeal from the judgment of *Hutchison*, J. ([1950] N.Z.L.R. 680), in respect of two actions for the issue of writs of mandamus and injunction to the appellant unions (defendants in the Court below), and consequentially the Registrar of Industrial Unions, preventing them from giving effect to alterations in the unions' rules. Judgment to be entered for the defendants in both actions. *Wellington District Hotel, Hospital, Restaurant, and Related Trades Employees' Industrial Union of Workers* v. *Attorney-General, Ex rel. Just and Others: Wellington District Hotel, Hospital, Restaurant, and Related Trades Employees' Industrial Union of Workers and Other Unions* v. *New Zealand Hospital Boards' Industrial Union of Employers and Others.* (C.A. Wellington. October 12, 1951. Fair, A.C.J.; Stanton, J.; Hay, J.)

LANDLORD AND TENANT.

Agents and Illegality. *95 Solicitors' Journal*, 479.

LAW PRACTITIONERS.

Seventh Legal Convention of The Law Council of Australia. *25 Australian Law Journal*, 233.

MINING.

Special Alluvial Claim—Application for Licence over Lands held under Occupation Lease under Land Act, 1924—No Compensation payable—Land Act, 1924, ss. 310, 311—Occupation Lease Regulations, 1909 (1909 New Zealand Gazette, *553*), *Regs. 12, 17, 18—Land Act, 1948, s. 185.* Part VIII of the Land Act, 1924, forms a separate code for dealing with lands in occupation leases, and for mining thereon. Regulation 17 of the Occupation Lease Regulations, 1909, is *ultra vires*, in that it attempts to impose on the Warden conditions contrary to the express provisions of the Land Act, 1924, when the Regulation says that the Warden must be satisfied that the land contains a payable deposit of gold and the Act itself says only that the Warden has to decide that the land is required for mining purposes. Regulations 17 and 18 cannot be operated in conjunction with s. 311 of the Land Act, 1924, as that section, read by itself, provides a way whereby an occupation lease can in whole or in part be resumed, subject to compensation to the lessee for substantial improvements; when resumed, the land would become Crown land in a mining district, and would be open to mining under the Mining Act, 1926, in the ordinary way. Section 310 of the Land Act, 1924, must be read by itself. It provides a way for a miner to obtain a claim or other mining privilege without reference to s. 311 or resumption, but, if resumed, subject to compensation to the lessee in the same way as is provided in s. 311 (3). If the words in subs. 2 of s. 310 (" as hereinafter provided ") are read as meaning " in the same way as is provided in subs. 3 of the next section," the difficulty is overcome. (*Stirland* v. *McCarthy*, (1903) 6 G.L.R. 218, and *Gibson* v. *Halliday*, [1919] N.Z.L.R. 753, distinguished.) Consequently, the application by the respondent for a special alluvial claim over lands held by the appellant under an occupation lease granted under Part VIII of the Land Act, 1924, was not an application under Reg. 17 of the Occupation Lease Regulations, 1909, but was an ordinary application under s. 310 (2) of the Land Act, 1924, to which Reg. 12 applied, and no compensation was payable. The appeal from the Warden's decision to grant the application for the special claim was accordingly dismissed. (*George* v. *Hore and Brown*. (S.C. Dunedin. October 1, 1951. Fell, J.)

NEGLIGENCE.

Fire—Fire of Unknown Origin spreading to Adjoining Land—Owner of Land on which It started taking No Steps to abate It—

Onus of Proof of His Knowledge of Fire—Onus on Him to prove Impossibility of preventing it from Spreading. An occupier is not responsible for a nuisance created by a trespasser or without authority, unless, with knowledge of its existence, he suffers it to continue without taking reasonably prompt and efficient means for its abatement. (*Sedleigh-Denfield* v. *O'Callaghan*, [1940] A.C. 880; [1940] 3 All E.R. 349, followed.) (*Boatswain* v. *Crawford*, [1943] N.Z.L.R. 109, referred to.) The plaintiff (respondent in the appeal) and the defendant (appellant in the appeal) owned adjoining farms. The back portion of both farms was rough scrub country, which was separated from the grasslands of the parties by a deep ditch. The grassland was peaty, with logs and roots both on the surface and underground, and, once a fire became established in this grassland, it was difficult to put out or stop. The learned Magistrate found that the fire started from some unknown cause in the rough scrub land at the back of the defendant's property, and that the defendant's attention was drawn to it by the plaintiff's manager, who asked the defendant what he was going to do about it, and he said he was not going to do anything. The plaintiff's manager successfully prevented the fire from crossing the ditch at the back of the plaintiff's grassland, but the fire crossed the ditch at the back of the defendant's land and became established in his grassland, and spread from that into the grassland of the plaintiff, who checked it in his own land for some time by a small ditch, but it ultimately got across or around this ditch and burned a considerable area of the plaintiff's land. When the fire crossed the ditch which the plaintiff's manager had dug, the plaintiff, by means of a bulldozer, kept it under control on a line further back. There was evidence to show that the bulldozing had finally stopped the spread of the fire on the plaintiff's land. In an action claiming damages in respect of the spread of the fire from the defendant's land to the plaintiff's, it being alleged that the defendant was negligent, after he knew of the existence of the fire, in taking no steps to prevent it from spreading to the plaintiff's land, the learned Magistrate gave judgment for the plaintiff and awarded damages. On appeal from that determination, *Held*, 1. That the onus was on the plaintiff to prove that the defendant knew of the fire, and it was then for the defendant to prove that it was impossible to do anything by taking reasonably prompt and efficient means to stop the fire from spreading. 2. That the learned Magistrate was right in finding that there was evidence that the defendant should have taken steps to control the fire or to prevent it from spreading; and his assessment of the damages was proper. *Semble*, The statement of *Lord Dunedin* in *Fardon* v. *Harcourt-Rivington*, (1932) 146 L.T. 391, 392, that, "If the possibility of the danger emerging is reasonably apparent, then to take no precaution is negligence," must be read in conjunction with the particular facts of the case; and it is not authority for saying that, when a nuisance or danger which is completely impossible of abatement or control exists upon an occupier's land, and the possibility of danger is certain, the occupier must take steps which everybody realizes would be futile in order to be able to say that, at any rate, he had tried. *Landon* v. *Rutherford*. (S.C. Hamilton. September 25, 1951. Fell, J.)

Negligence and Contributory Negligence. *212 Law Times*, 119.

OBITUARY.

The Hon. Sir Harilal Kania, Chief Justice of India, aged 61.

PRACTICE.

Appeals to Supreme Court—Court's Discretion to rehear Evidence—Principles applicable to Applications for Such Rehearing—Magistrates' Courts Act, 1947, s. 76 (2)—Magistrates' Courts Amendment Act, 1950, s. 2. The Supreme Court in an appeal from the Magistrates' Court may in its discretion—under the proviso to s. 76 (2) of the Magistrates' Courts Act, 1947 (as substituted by s. 2 of the Magistrates' Courts Amendment Act, 1950)—rehear the whole or any part of the evidence given in that Court. Such an application must be dealt with on the same principles as were held applicable to similar applications under s. 155 of the Magistrates' Courts Act, 1908, and s. 166 of the Magistrates' Courts Act, 1928. (*D.C. Street Construction Co. (Auckland), Ltd.* v. *Murphy*, [1949] N.Z.L.R. 646, and *Cole* v. *Schwamm*, [1950] G.L.R. 273, referred to.) Where it is not possible for the Supreme Court to ascertain, by reading the Magistrate's notes, whether his decision was right or wrong, the Court should take the exceptional course of ordering a rehearing. (*Henry F. Moss, Ltd.* v. *Colledge*, [1918] N.Z.L.R. 72, *Carruth* v. *Kinney*, [1931] N.Z.L.R. 1195, and *Parsons* v. *Parsons Engineering Co., Ltd.*, [1933] G.L.R. 347, referred to.) *Seagar* v. *Wellington City Corporation*. (S.C. Wellington. October 30, 1951. Cooke, J.)

Of Tactical Matters. *95 Solicitors' Journal*, 537.

Original Summonses for Construction of Written Document: Parties' Costs. *95 Solicitors' Journal*, 478.

Statute Barred and Unbarred. *95 Solicitors' Journal*, 522.

Writs: Duration and Acceptance of Service. *95 Solicitors' Journal*, 508.

PUBLIC RESERVE.

Land vested by Statute in Municipal Corporation "for the use, enjoyment, or recreation" of Inhabitants of Borough—Corporation's Intention to construct Public Road or Street through Such Land—Land restricted to Designated Purpose—"Use"—Reserves and Other Lands Disposal and Public Bodies Empowering Act, 1923, s. 66. The purposes detailed in s. 66 of the Reserves and Other Lands Disposal and Public Bodies Empowering Act, 1923, which authorized the Council of the defendant Corporation to purchase certain land and stated the conditions on which it should be held, are the only purposes to which the Council can appropriate or use that land; and any discretion as to the nature of its use must be confined within the meaning of the enacting words of the section. (*The Queen* v. *Mayor, &c., of Wellington*, (1896) 15 N.Z.L.R. 72, followed.) The word "use" in the phrase "use, enjoyment, or recreation of the inhabitants of the borough," which is to be read in its context, is a use at least similar to, and perhaps connected with, the enjoyment in the sense of enjoyment for the purposes of recuperation, or more active recreation, of the inhabitants; and that meaning of the word does not include the use of ordinary traffic roads or the use of them for ordinary purposes of transport. Consequently, whether the ordinary or natural meaning of the collocation of words or their meaning in statutes *in pari materia* is considered, the use of the land authorized by the final words of s. 66 (1) is restricted, and, except under special authority, it cannot be diverted from the designated purpose of "the use, enjoyment, or recreation of the inhabitants of the borough." An injunction was accordingly issued restraining the defendant Corporation from proceeding to construct a public road or other way or thoroughfare available for public vehicular traffic through any portion of the land in question. *Attorney-General, Ex rel. Fitchett* v. *Lower Hutt City Corporation*. (S.C. Wellington. September 12, 1951. Fair, A.C.J.)

TRANSPORT.

Offences—Disqualification of Intoxicated Motor-driver—Second Conviction—"Special reasons"—Circumstances Special to Facts constituting Offence before Court—Transport Act, 1949, s. 41 (2). The appellant pleaded guilty to a charge that, while in a state of intoxication, he was in charge of a motor-vehicle. He was convicted in the Magistrates' Court and sentenced to fourteen days' imprisonment with hard labour, and it was ordered that the motor-driver's licence held by him be suspended from the date of conviction until June 30, 1952, and that he be declared disqualified from obtaining a further licence before October 1, 1954. The appellant had previously been convicted of a similar offence, but no cancellation or disqualification was ordered. On appeal from the sentence of imprisonment and against the suspension and disqualification, *Held*, 1. That, with regard to the imprisonment and to the length of the term, the sentence could not be said to have been excessive or to have been arrived at by an under-valuation or overestimation or misunderstanding of any salient feature of the case; and, in the circumstances, the sentence was a proper one. 2. That there were no "special reasons" within the meaning of those words in s. 41 (2) of the Transport Act, 1949, as a circumstance cannot be a "special reason" unless it is special to the facts which constitute the offence in respect of which the Court is adjudicating. (*Whittall* v. *Kirby*, [1946] 2 All E.R. 552, followed.) (*Jowett-Shooter* v. *Franklin*, [1949] 2 All E.R. 730, referred to.) 3. That, accordingly, the facts which constituted special reasons in connection with the appellant's first offence could not constitute special reasons in connection with his second offence; and, as a matter of law, it was not open to the Magistrate to take the view that they did. (*Duck* v. *Peacock*, [1949] 1 All E.R. 318, followed.) *Quaere*, Whether, in the absence of "special reasons," the learned Magistrate should have disqualified the appellant, not merely (as he did) for a period of three years from the date of the conviction, but also, in terms of s. 41 (2) of the Transport Act, 1949, thereafter until the Court, upon application made after the expiration of that period, orders the removal of the disqualification. *Reedy* v. *Brown*. (S.C. Wellington. October 16, 1951. Cooke, J.)

VALUATION OF LAND.

Land not being Farm Land—Valuation for Death-duty Purposes—Death of Deceased in March, 1950—Value not to exceed "basic value"—Servicemen's Settlement and Land Sales Act, 1943, s. 54 (1)—Statutes Amendment Act, 1948, s. 45—Servicemen's Settlement and Land Sales Regulations, 1949 (Serial Nos. 1949/81, 1950/15), Reg. 3 (d). Section 45 of the Statutes Amendment Act, 1948, was expressly made applicable to the valuation of any land under the Valuation of Land Act, 1925, and, consequently, its application was not limited to the valuation of land to which the Servicemen's Settlement and Land Sales Act, 1943, then applied. A valuation for the purposes of s. 70 of the Death Duties Act, 1921, of the land (not being farm land) owned by a deceased person who died before November 1, 1950, should be made by the Valuer-General in accordance with the Valuation of Land Act, 1925, as modified by s. 45 of the Statutes Amendment Act, 1948, because the Servicemen's Settlement and Land Sales Act, 1943, was then in force. A person died on March 22, 1950, and her executors applied to the Valuer-General to make a valuation of her property (which was not farm land) for death-duty purposes. The valuation was made, admittedly, on a "free-market" basis. On appeal by the Crown against the decision of a Land Valuation Committee, *Held*, That it was incumbent on the Valuer-General to fix a value of the deceased person's land not exceeding the basic value of the land within the meaning of the Servicemen's Settlement and Land Sales Act, 1943; and it was immaterial that, at or about the relevant date, there were sales on the open market by reference to which a free-market value could have been assessed. *In re Smith (deceased)*. (L.V.Ct. New Plymouth. October 1, 1951. Archer, J.)

WORKERS' COMPENSATION.

Assessment—Limitation of ss. 3 and 4 of Workers' Compensation Amendment Act, 1949, to Cases where Crown pays Compensation "as the employer"—Worker employed by Westport Coal Co., Ltd.—Liabilities of Company deemed by Statute to be Liabilities of Crown from October 1, 1948—Worker employed by Company injured in October, 1947—Crown liable not "as the employer" but because of Liability imposed by Westport Coal Company Act, 1948—Wage Increases imposed by General Orders—Part of "weekly amount which the worker is earning . . . after the accident"—Whether Annual Holiday Pay Part of "average weekly earnings"—Workers' Compensation Act, 1922, s. 5 (6)—Workers' Compensation Amendment Act, 1936, ss. 6 (1), 7 (5)—Workers' Compensation Amendment Act, 1949, ss. 3, 4—Finance Act, 1949, s. 11—Westport Coal Company Act, 1948, s. 4. Section 11 of the Finance Act, 1949, limits ss. 3 and 4 of the Workers' Compensation Amendment Act, 1949, to cases where the Crown pays workers' compensation "as the employer," and excludes cases where the Crown pays because of some other liability. Consequently, s. 11 does not apply in respect of a worker employed by the Westport Coal Co., Ltd., who was injured on October 2, 1947, by accident arising out of and in the course of that employment, since, by virtue of s. 4 of the Westport Coal Company Act, 1948, the liabilities of the company were deemed on October 1, 1948, to become liabilities of His Majesty the King. The wage increases required by the General Orders of the Court of Arbitration form part of "the weekly amount which the worker is earning . . . after the accident" within the meaning of those words in s. 5 (6) of the Workers' Compensation Act, 1922 (as substituted by s. 6 (1) of the Workers' Compensation Amendment Act, 1936). (*Syme* v. *Watt*, [1945] G.L.R. 23, distinguished.) *Quaere*, Whether holiday pay under the Annual Holidays Act, 1944, comes within the expression "average weekly earnings" in s. 7 (5) of the Workers' Compensation Amendment Act, 1936, as "earnings received by a worker while at work during the twelve months preceding the accident." *Filer* v. *The King*. (Comp. Ct. Westport. October 3, 1951. Ongley, J.)

Delay in commencing Action—Parties in Agreement as to Reasonableness of Cause of Delay for Nineteen Months after Accident—Writ not issued until Twenty-three Months after Accident—Action barred after Expiry of Six Months from Date of Accident unless Reasonable Cause for Delay exists to Date of Commencement of Action—"Failure"—Workers' Compensation Act, 1922, s. 27 (1) (4). The words "the failure" as used in s. 27 (4) of the Workers' Compensation Act, 1922—which is as follows: "A failure to commence the action within the time hereby limited [six months of the date of the accident causing the injury (s. 27 (1))] shall be no bar to the action if, in the opinion of the Court, the failure was occasioned by mistake, or by absence from New Zealand, or by any other reasonable cause"—refer to a failure to bring the action until it is actually brought. (*Lingley* v. *Thomas Firth and Sons, Ltd.*, [1921] 1 K.B. 655, applied.) (*Murray* v. *Baxter*, (1914) 18 C.L.R. 622, not followed.) Consequently, failure to commence an action claiming workers' compensation after the expiry of the period of six months from the date of the accident causing the injury bars the plaintiff's action, unless that failure was occasioned by mistake or other reasonable cause existing up to the date on which the writ was actually issued. *So held* by the Court of Appeal, in answer to a question asked in a case stated by the Judge of the Compensation Court inviting the opinion of the Court of Appeal on the interpretation of s. 27 (1) (4) of the Workers' Compensation Act, 1922. The plaintiff suffered injury by accident during and in the course of his employment in February, 1948. It was agreed between the parties that there was reasonable cause for the delay in the issue of the writ up to September 23, 1949—that is, for approximately nineteen months—but the defendant contended that no such reasonable cause existed in respect of the period from September 23, 1949, to the date when the writ was issued, a period of over four months. The delay was accounted for by a search for witnesses during October, 1949, following the receipt of a denial of liability on September 23, 1949, and by the solicitor's clerk, who had been instructed to prepare the writ during the first week of November, 1949, refraining from issuing it until February 6, 1950. *Held*, by the Court of Appeal, That, in view of its above-stated interpretation of the word "failure" as used in s. 27 (4) of the Workers' Compensation Act, 1922, the plaintiff's action was barred by s. 27 (1). *Morrison* v. *Liddle Construction, Ltd.* (C.A. Wellington. October 25, 1951. Northcroft, J.; Finlay, J.; Cooke, J.)

Bias, Sacred and Profane

There are many forms of bias—the bias against sexual vice, for example, which makes certain Judges entirely unfitted to try certain types of case. After the political, the commonest I should say was the religious. Lord Westbury could not abide a bishop, and was always looking for their heads with a stick like an Irishman at Donnybrook Fair. He it was, you remember, who "disestablished Hell, dismissed the Devil with costs, and took from the Church of England her last hope of eternal damnation." Some Judges cherish a passionate ecclesiasticism; some have a prejudice against the clergy. There was an eminent Judge in Scotland, Lord Young, who had a gift of bitter language and a great dislike of dissent. On one occasion counsel began his speech with, "My Lord, my client is a most eminent and most respected minister of the Free Church of Scotland," and then stopped to allow the words to make a proper impression on the Bench. Lord Young looked down under his grim eyebrows: "Go on, sir, go on. Your client may be a perfectly respectable man for all that."

Now there is nothing to be said against the retention of these prejudices; I believe in every man having a good stock of them, for otherwise we should be flimsy, ineffective creatures, and deadly dull at that. Since a Judge is a human being, he must be permitted to have his share in the attributes of mortality. But he must be capable of putting them aside. He must have the power of separating a question from the "turbid mixture of contemporaneousness" with which it is clogged. It is a task which requires supreme intellectual honesty, a complete absence of the "lie in the soul," and it is the first duty of a Judge. (John Buchan, "The Judicial Temperament," from *Homilies and Recreations*.)

Continued from cover i.

LAW TEACHING OVERSEAS.

By Professor R. O. McGechan,
Dean of the Faculty of Law, Victoria University College.*

I was absent from the College on refresher leave from August 31, 1950, to May 24, 1951, and during that time I visited Law Schools in Australia, Canada, and the United States.

My chief concern was with methods of law teaching; organization of Law Schools; student law reviews; Moot Courts; legal writing programmes; law libraries; student legal-aid clinics; extra-curricular activities of law students; and financing of Law Schools by alumni funds. I also took the opportunity to look at Courts in session to see methods used by advocates abroad in presenting cases to the Court, so that I might the better understand methods of instruction which were directed towards training law students to take the first steps to proficiency as advocates in those Courts. I talked with law Deans and teachers, Judges, practitioners, and students, and in most places with University administrators as well.

Teaching Methods.

The study of these was the main purpose of my visit to the United States. I am impressed with the effectiveness and variety of teaching methods which I found used in American Law Schools. The method employed goes by the generic name of the case method. There is, however, a great variety of methods, and sometimes the same variation from the normal is still thought of as case method, at others is called something else. At best, methods depend, as they should, on the teacher and on the subject taught. The important difference between our own and American methods lies in the fact that for eighty years American teachers have given up text-book and lecture for collections of materials and class discussion. The methods nearly all involve the placing of this material (principally reports of cases decided in Court) in the hands of students, preparation in advance of class hours by students, and the use of class hours for discussion of the material. American law teachers always contrast case method with lecture method, which for them does not involve preparation in advance, or class discussion during the class hour.

Originally, it has been said, though its historical accuracy is now in doubt, case method was a Socratic method of question and answer, in which anything a student said was pursued to its logical consequences, especially its logical absurdity. Though there are extant sound and effective Socratic teachers, to-day at least case method covers a great variety of methods. But all methods involve discussion, if not the Socratic method. Some teachers have sandwiched lecturing into discussion, just as law teachers at Victoria University College have sandwiched discussion into lecturing. The tendency may well be for American and our own methods to reach very nearly common ground. The values of most case methods of teaching lie in the greater interest in law engendered in the student, in development of greater capacity to think, to express himself, to be critical of what is said to him, and in continuous exercise in various legal techniques and skills. At its very best, it gives the student the satisfying experience of really discovering (or believing he is really discovering) something for himself, or with the teacher.

I intend as a result of my experience to prepare my own materials, first of all in Administrative Law, and to experiment during the next few years with some of the methods I thought most effective. I am convinced that the students will benefit materially, will learn more, will better develop their capacity to think, particularly to think on their feet and in public, and will acquire skill in a number of important legal techniques.

Law Reviews.

Another aspect of the work of American Law Schools which I think can be usefully adapted here is the law review. The law review is a student responsibility subject to a certain amount of teacher supervision, the amount varying considerably from Law School to Law School. The review consists of articles, book reviews, and notes. The articles and reviews are the work of Professors and outsiders, more or less edited by students; the notes are student work, and comprise generally notes on, or arising out of, reported cases. An editorial board is appointed from the best students of the two senior years. The seniors edit the work of junior editors; often an article is rewritten as many as five times. The educational value of writing and editing in this way is very impressive, and there is no mistaking the quality of the editors. On a small scale, I am convinced that we could do useful work along these lines here, and we are laying our plans to develop a review gradually during the next three or four years.

Moot and Practice Courts.

These are a feature of the American Law Schools. As a result of what I saw, I was able to see clearly for the first time the difficulty I have always felt about carrying on Moot Court work here. In an American Court, argument is presented primarily in written form, and the advocate is given a limited time in which he may address the Court. The American student who follows this procedure gets considerable benefit from carefully preparing a written argument, and can be reasonably kept to twenty minutes oral argument when he faces the Moot Court judges. In New Zealand, however, argument in Court is entirely oral, and the difficulty for the student is to present a difficult argument in the short space of time allowed him. Naturally, subjects chosen for Moots have been fundamental, and required a very carefully developed argument based on a wide range of material, so that it is little wonder that Moots have never been entirely successful with us. But I am convinced that we should do something to revive them, keeping these difficulties in mind.

Law School Libraries.

Law School libraries in America are, of course, mostly of staggering proportions. Harvard has over 736,000 books in its law library alone. I formed the opinion that 80,000 to 90,000 books constituted a sound working library for students and teachers in America. The number reflects the enormous output of statute and

* From a report to the College Council on his refresher leave.

reported cases in the forty-eight States, so that the number is very much higher than we would require here for the same purpose. In Australia, I found that more money was being spent on Law School libraries than we were spending, and this, I admit, causes me considerable concern. For many years we had been ahead of Australian Law School libraries other than those of Sydney and Melbourne.

I was also able to arrange for a few exchanges between American Law School libraries and our own library. The exchanges will be very valuable to us, as they will give us, for very little expense, books which we want, and for which we would normally pay dollars.

Administrative Law.

I also took the opportunity to look closely into the teaching of Administrative Law in the United States. I found that very interesting developments were taking place. It has been usual to teach Administrative Law in a somewhat formal way by dealing with the procedures which a variety of administrative agencies either had in common or reflected variants of a common legal norm. We had made no attempt to deal with the work of any one agency as a whole. It is precisely this which in some cases in America forms the basis of the course, while in other cases there is a blend of our formal approach, interspersed and supplemented with study of the background, rationale, and manner of working of one or more agencies. The American approach called "functional" gives a more rounded picture, and is more alive, than a purely formal approach. A good deal of work will be necessary here before change along these lines can be introduced, but I think it would be worth the work.

General.

I was made very welcome by all the faculties I had the good fortune to see. Frequently a luncheon was arranged in my honour, with opportunity to speak about what we were doing here and about New Zealand generally. In nearly all cases I lunched regularly with members of the Law Faculty while I was visiting the School. These contacts have given me the opportunity to make some friendships which will be not only a pleasure to me but also, I think, of very great value to the Law Faculty. This is perhaps the most important result of refresher leave spent abroad.

I am deeply indebted to the Carnegie Corporation and the United States Educational Foundation in New Zealand and to the College for the opportunity they have given me.

THE LEGAL CHARACTER OF THE KOREAN WAR.

By D. P. O'Connell, LL.M. (N.Z.), Ph.D. (Cantab.).

International controversies tend to-day more than ever to be formulated in a strictly legalistic fashion. No nation attempts to realize its political ambitions without having at least a pretext of law to support its action. This is especially true in the case of Russia, whose conduct of international affairs since the war has been based upon a hairsplitting interpretation of the international instruments to which she is a party, especially the United Nations Charter and the Potsdam Agreement. The campaign in which New Zealand troops are engaged in Korea is in essence a political affair; it is an attempt to preserve the balance of power in the East between the Soviet bloc and the Anglo-American bloc. The issues between the opposing forces are, however, contained within the ambit of the United Nations Charter, and have a juridical basis. To New Zealand lawyers, therefore, the legal character of the war in which our troops are engaged should be of special interest.

The Validity of the Security Council Resolutions on Korea.

The North Korean assault was launched on June 25, 1950. Within a few hours of the news of the attack reaching Lake Success, an emergency meeting of the Security Council was held, at which a resolution was adopted calling for the cessation of hostilities and the withdrawal of North Korean forces to the 38th parallel. Two days later, the Council resolved that members of the United Nations should furnish the Republic of Korea with such assistance as might be needed to repel the invasion. New Zealand, in company with the United States, the United Kingdom, and the Netherlands, responded immediately to this call, and by July 7 forty-five members had endorsed the Council's action.

The resolutions in question were loosely drafted, and their legal character is controversial. The Soviet has attacked their validity on three principal grounds. In the first place, they were taken in the absence of the Russian delegation, which had boycotted United Nations proceedings during the previous six months. On January 10, 1950, Dr. T. F. Tsiang, representative of the Kuomintang Chinese Government, had been selected Chairman of the Security Council. Russia had instantly objected, and had proposed that the Security Council exclude Dr. Tsiang, on the ground that he no longer represented the Chinese people and should be replaced by a representative from the Pekin Government. This resolution had been defeated by three votes to six, with two abstentions. At the conclusion of the vote, Mr. Malik had left the Chamber, declaring that his delegation would take no part in future meetings until the representative of the Kuomintang had been "removed."

The boycott was still in operation when the resolutions on Korea were adopted. The Anglo-American bloc had thus achieved a tactical advantage, and, realizing how completely outmanoeuvred she had been, Russia returned to the Security Council in some haste, declaring the resolutions unconstitutional. The decisions of the Security Council, it was alleged, were substantive in effect, and required for their validity, under Art. 27 of the Charter, the affirmative votes of seven of the eleven members of the Security Council, "including the concurring votes" of the five per-

manent members. Russia, one of the permanent members, had not signified her concurring vote.

The Russian argument on this issue was not treated with much seriousness by the other members of the Security Council. Her absence when the resolutions were taken constituted an "abstention," and during the previous two years a custom had grown up whereby an "abstention" from voting by a permanent member was deemed not to be a veto. The cease-fire resolutions in Palestine and Kashmir in 1948, and the resolutions on the Azerbaijan question, had been taken with the abstention of Russia, and the latter had not objected to their validity.

There was little more substance in the second Russian objection—namely, that the resolutions had been taken with the concurring vote of the Kuomintang representative, and in the consequent absence of the Pekin representative, who alone was entitled to vote on behalf of China, one of the permanent members. It is for the Security Council itself to decide the competence of any individual to represent one of its members, and at no time has the Security Council resolved that Dr. Tsiang is unqualified to represent China.

The third Russian objection was taken under Art. 32 of the Charter, which stipulates that a State which is not a member of the United Nations, if it is a party to a dispute under consideration by the Security Council, "shall be invited to participate in the discussions relating to the dispute." This Article would appear to have rendered it mandatory upon the Security Council to invite North Korea to state its case in the deliberations which preceded the passing of the resolutions. North Korea had not been so invited, and in fact no overtures were made to its Government until some time after action had been taken in Korea. There is nothing in the Charter, however, to suggest that failure to invite a State which is a party to a dispute to appear before the Security Council renders the latter incompetent to arrive at decisions on the matter. The validity of the resolutions would appear to be independent of the presence or otherwise of North Korean delegates.

The Obligation of New Zealand to contribute Forces to Korea.

In lodging its objections to the resolutions, the Russian delegation appears to have assumed that the Security Council intended to take international enforcement action in Korea. It is not at all certain, however, that this assumption was correct. In dealing with a threat to international peace, the Security Council may adopt one of three courses. Under Art. 39 of the Charter, it may "make recommendations" with a view to settling the dispute; under Art. 41, it may apply diplomatic and economic sanctions; and, under Art. 42, it may "take such action by air, sea, or land forces as may be necessary." It would seem that only the latter two courses of action are substantive in character, and, therefore, subject to the veto. Recommendations under Art. 39 are generally believed to be merely procedural and to require nothing more than any seven affirmative votes. The British Government would seem to be of the opinion that the resolutions of the Security Council were nothing more than "recommendations" to the members of the United Nations, intended to legalize their activities in Korea, and that the war is being conducted, *not by the Security Council*, but *by individual members under Security Council sanction.*

Several considerations support this view. In the first place, the Charter contemplates that international enforcement action is to be taken by the Security Council itself through the agency of the Military Staff Committee. Members of the United Nations undertake to enter into agreements with the Security Council affording the latter military forces, facilities, and operational bases. The conclusion of these agreements is subject to the veto, and, because of this, no such agreements had, at the time of the outbreak of the war, been contracted. There was, therefore, no legal obligation upon any member of the United Nations to contribute forces to the campaign, and the Security Council was incompetent to call upon it to do so. The Military Staff Committee has not functioned in relation to the war, although General MacArthur was designated as Supreme Commander of the combined forces of the several member States, and permission was given for operations to be conducted under the United Nations flag.

New Zealand, in responding to the recommendations of the Security Council, would seem to have taken unilateral action sanctioned by the Security Council. She was under no legal obligation to do so, since she had signed no agreement with the Security Council, and recommendations, as the International Court decided in the Corfu Channel case, are not mandatory. If this view of the legal character of the conflict is correct, the decisions of the Security Council constitute a severe derogation from the type of international Police action contemplated by the framers of the Charter. The precedent, however, affords some confidence that future action taken by the Security Council against aggression will not be strangled by the exercise of the veto. Provided that a sufficient number of members are prepared, in the interests of international solidarity, to act collectively, there is no reason why the functions of the United Nations cannot be carried out by resolutions of the General Assembly, or by "recommendations" made under Art. 39 by the Security Council.

In making this suggestion, however, consideration must be given to Art. 106, which anticipates that, in the absence of military agreements enabling the Security Council "to begin the exercise of its responsibilities," the five permanent members of the Security Council "shall consult with one another with a view to such joint action" as is necessary for the maintenance of peace. It is not clear whether this Article is intended to render the Security Council incompetent to take decisions until the conclusion of the agreements contemplated. At all events, it has been ignored in the case of Korea, and, to date, Russia has made no objection under it.

The Status of the Belligerents in Korea.

If it is true that hostilities in Korea constitute a war between individual members of the United Nations, on the one hand, and the aggressor and its Chinese "volunteers," on the other, what is the status of the respective combatants? Action of the former is legalized by the Security Council, that of the latter is stigmatized as illegal. At least since Nuremberg, it is recognized that certain categories of war are criminal in character, and the Security Council is the

only organ competent to pronounce upon their criminality. Does it follow that the laws of war apply only for the benefit of the United Nations troops and not for the benefit of the aggressors? This is the first war in history in which the legality of the operations is clearly defined, and there is, therefore, no precedent on this important point. It would seem in principle, however, that the laws of war must apply equally to both sides. They were evolved, not for the benefit of States, but for that of individual combatants. If the aggressor were not entitled to the benefit of the laws of war, many undesirable activities would be legalized. There would be no restraint upon indiscriminate atomic or strategic bombing. As a matter of fact, the slaughter and mistreatment of North Korean prisoners by South Korean troops has been severely objected to as illegal by other United Nations authorities.

Although the laws of war apply to both sides, however, it would seem that the aggressor cannot claim full belligerent rights. For example, it would appear to be denied the right of angary, and that of blockade and search. In addition, requisitions made by it in its own and occupied territory would probably be invalid. Nor is it clear if the law of neutrality applies to an illegal war. The United Nations system presupposes that all members will concur in the decisions of the organization, and it would seem to follow that those members who have acknowledged the resolutions on Korea may not be "neutral" in the traditional sense, and cannot claim the rights of neutrals. There is, in addition, a school of thought which argues that there can be no "neutrals" whatever in an illegal war.

MR. WILLCOCK AND THE IDENTITY CARD.

By Ernest Watkins.

The right of the individual to challenge the Executive is a great and fundamental principle of democracy, and, indeed, of true civilization. But, if the principle is great, the practice must be found even in small things. Can one, for instance, say "No" to a policeman when one feels this is right? And can one safely leave it to the Law to judge impartially between oneself and the policeman? Mr. C. H. Willcock—an "ordinary citizen," a manager of a dry-cleaning business—stopped by the Police recently while motoring through a London suburb, knew that the answer to these questions would be "Yes." He refused the policeman's demand to show his identity card.

Identity cards, in Britain, were first introduced as a security measure by the National Registration Act, 1939, by one of the many Emergency Acts passed by Parliament on the outbreak of war. Under the terms of that Act, the policeman concerned was entirely within his rights, for every citizen should produce his card when asked by a uniformed Police officer. Mr. Willcock politely but firmly refused. He would not, he said, produce it either on the spot or later. He was acting on principle. He felt, as he explained later, that this business of identity cards had gone on long enough. The war had ended five years before, and with it, in his view, the security need for identity cards. It was about time that the authorities ceased to use a war-time Act for other, and quite different, peace-time purposes, and his refusal was a challenge to their right to do so.

Processes of The Law.

The processes of law began. The court for minor offences of that kind—in which unpaid Magistrates try the cases, with advice from a lawyer clerk on legal matters—heard the case, and felt bound (but without imposing any penalty) to convict him of a breach of the Act. Still determined to establish the principle, Mr. Willcock appealed to the High Court, and his appeal was heard at the end of June, 1951, by seven Judges. The case for the prosecution was argued by the Attorney-General.

Put into legal argument, Mr. Willcock's case was that the Emergency Acts of 1939 had all expired when the Government (as it had a short time before) declared the "emergency" at an end for one of them. That argument the Court could not accept—to the practical relief of the Government, for, in addition to identity cards, many important matters, including, for instance, the regulation of the rents of some thousands of houses, also depended on an Emergency Act.

But Mr. Willcock could claim his moral victory. The Lord Chief Justice, giving the Court's decision, said that the literal and complete enforcement of the Registration Act by the Police on every occasion did not have their complete support. The Police were using identity cards for purposes not intended by the National Registration Act, 1939; if they were not satisfied with the powers they already had, they could ask Parliament to extend them.

So ended the case of the identity card; but not the effect of Mr. Willcock's protest, for the end of that battle is, in the nature of things, never in sight. Mr. Willcock was primarily concerned with the right of the individual to challenge the Executive.

Right of the Individual.

That right is fundamental in what the Western world considers to be civilization (which is a more accurate word to use in this connection than democracy). Social organization began with the tribe, or its equivalent, and, in that, only a few had the right to offer advice to—in effect, to criticize—the tribe's effective ruler. Civilization has always grown through the individual, and usually through the individual in protest. That protest has taken many forms, and the individuals making it have been various enough, from the religious martyr to the material revolutionary; but it has been the protest that has made the change, and that protest could be directed only at the Executive, whether that Executive was dictator, party, or Civil Service. Equally, all Executives tend to accumulate power over the individual, and not only because the men who constitute

them often desire power for its own sake. They accumulate power for the most praiseworthy motives—to defeat the law-breaker.

To return to the instance of the identity card, it will seem natural, even to the best-intentioned of Executives, that a thousand men should submit to the inconveniences of having to show identity cards in order to make it easier to catch one law-breaker, even if the law-breaking is of a kind not contemplated by the Act. It was against that notion that Mr. Willcock protested.

Independence of The Judiciary.

But to whom can the individual protest, short of starting a revolution ? In Britain, he can protest to the Judiciary, as Mr. Willcock did, because the Judiciary is independent of the Executive. Mr. Willcock had no need to doubt the independence of the Courts themselves. That battle had been fought much earlier—300 years ago.

The Stuart Kings, as heads of the State, had, like their predecessors, appointed their Judges in the confident belief that the Courts, under them, would work as an instrument of State and in conformity with State policy. When Cromwell established his dictatorship, he saw no reason to change that policy. It was the Judges themselves who came to feel that the law could, and should, be something that even the State could not override, and that it existed to protect the individual as well as the State. It was they who laid the foundations in Britain of what still remains a remarkably free State. It was they who, in effect, enabled such individuals as Charles Bradlaugh to fight to establish his right to sit and vote as an elected Member of Parliament without having first to take a Christian form of oath, just as they enabled a less notorious but equally obstinate individual to fight a railway company for the right to retain his railway ticket at the end of his journey.

But perhaps in this Mr. Willcock's most direct ancestor is John Wilkes. John Wilkes was a journalist very much a thorn in the flesh of the Executive of his day, the middle of the eighteenth century. In 1769, two Ministers of the Crown signed a warrant for the arrest of everyone connected with the printing of a publication damaging to their government. The warrant contained no names, but Wilkes was arrested because he was reported (accurately) to have been the author of the offending article. He attacked in the Courts the whole conception of the " general warrant," the idea that the Police could lawfully be given by the Executive power to arrest anyone to whom they thought the warrant related ; and he won. The " general warrant " was not used again.

Mr. Willcock's Argument.

Mr. Willcock, too, asked that most awkward of questions for an Executive to answer : " Why ? " His complaint was not that the Executive should lack the power to enforce the laws Parliament had made. His argument was that the Executive should use the powers given them by Parliament only for the purposes Parliament intended, and not for such purposes as, later, they found it convenient to pursue. But his real protest went even deeper than that. It was to reaffirm the principle that man is not only born to be free ; he is also fit to be trusted with freedom. It is not for an Executive to assume that they should have power ; it is for an Executive to prove that they must be given each one of the powers they claim over the citizen.

REGIONS GARROW NEVER KNEW.

By Advocatus Ruralis.

When Advocatus was very much younger, he was asked to advise Mr. and Mrs. Innocent. (All names are fictitious.) It was in the days when the world was younger, and when it was possible to obtain domestic help who lived in. Mrs. Innocent had employed a Miss Good to do her domestic work, but Miss Good's nocturnal habits were such that Mrs. Innocent dismissed her.

Miss Good's mother (known to her neighbours as Mrs. N. B. Good) took umbrage at her daughter's dismissal and had words on the subject, but Mrs. Innocent remained firm and Miss Good joined the ranks of the unemployed.

Mrs. N. B. Good had a number of men friends, who were accustomed to call on her at almost any hour in the twenty-four. Mrs. Good explained to one or two of her men friends that Mr. Innocent was always out on Thursday evenings, and that Mrs. Innocent would welcome callers who would help to pass the time away.

The result was that there were callers, and, in desperation, Mr. and Mrs. Innocent called on Advocatus. It was obviously not a matter which could be dealt with by a disclaiming advertisement, but fortunately at this time one of the would-be callers wrote a letter, and a meeting was arranged, which was attended by Mrs. Innocent in the open and her husband and brother behind the fence. Advocatus, ever mindful of the dignity of his profession, was regrettably absent.

The catch was a well-known grandfather.

Advocatus thereupon insisted that Mrs. N. B. Good call on him, and, in the safety of his office, he explained that this was a Police matter, and that, if it were not stopped, the Police would take charge.

Advocatus felt from the glint in her eye that Mrs. N. B. Good was enjoying the situation. At any rate, as she moved her thirteen stone to the door, she accomplished a back kick in the direction of Advocatus which Hollywood could not have beaten—a kick which appeared to Advocatus to show a certain amount of contempt for laws which were man-made and man-managed.

RETIREMENT OF MR. LUXFORD, S.M.

Farewell by Auckland Practitioners.

To show their deep respect and esteem for him, a very large number of the legal profession gathered in the Magistrates' Court, Auckland, on Tuesday, September 18, to farewell Mr. J. H. Luxford, S.M., upon his retirement from the Bench after twenty-three years.

The Law Society.

The President of the Auckland Law Society, Mr. C. J. Garland, said Mr. Luxford was appointed a Magistrate in 1928 and was for some six years Chief Judge of Western Samoa; then, for six years he was stationed at Wellington, and for the last ten years as senior Magistrate in that city.

"Before Your Worship's appointment, practice as a solicitor, both in town and country, provided varied experience," Mr. Garland said. "When to that is added the rich knowledge gained through overseas service with the First N.Z.E.F., one realizes that Your Worship came to the Bench endowed with a deep insight into human nature, its frailties and its virtues, combined with a breadth of general as well as legal knowledge. Thus equipped, it is not surprising that Your Worship's judgments soon commanded the respect of counsel, litigants, and the general public.

"Your Worship has always been quick to grasp the facts of a case, and you have always been expeditious in delivering judgment. Those judgments are a pattern of a clear expression of logical thought. Your Worship never shirked a difficult question of law. Rather might one say that you revelled in legal arguments on an abstruse point of law—the type of argument that is usually associated with the higher Courts.

"If there was one failing in regard to which Your Worship was severe, it was slovenliness in preparation of one's cases," continued Mr. Garland. "Your Worship believed that what was worth doing was worth doing well, and, being thorough in your own work, you expected thoroughness in others.

"Proceedings in Your Worship's Court were often enlightened and enlivened by your keen sense of humour. But there has always been about you, sir, an innate dignity, which has assured that the decorum of the Court has always been preserved.

"The life of a Magistrate is not an easy one, but such has been Your Worship's physical and mental vigour that you have made the time to write several books on Licensing, Police Law, Land Agency, and Commercial Law—books which have proved invaluable both to practitioners and to the business community.

"Your Worship has always taken an active interest in the welfare of the law students, and during your stay in Auckland you have missed only one of their annual gatherings, and that at a time when you were on leave in Australia. The words of advice you gave to students will bear fruit for many years to come. And one recalls the great work that you have done for the Heritage movement.

"Many of us have had the pleasure of listening to you addressing such gatherings as the Savage Club and the Orphans Club, where your addresses, while full of humour, were also full of good red meat," continued Mr. Garland. "No worthy cause has ever looked to you for help and looked in vain. It seems, sir, that you have filled the unforgiving minute with more than sixty seconds' worth of distance run.

"No man who has won success by hard work will ever enjoy leisure in idleness, but we hope that Your Worship, freed from the exacting ties of long hours in this Court, will be able to enjoy more relaxation than you have been able to do in the past. I for one, sir, will look forward to meeting you at last on equal terms on the bowling-green, where one will no longer labour under an inferiority complex and a fear of being nonsuited or having costs awarded against one.

"On behalf of practitioners, I would like to take this opportunity of expressing our thanks to you for the excellent and efficient services rendered in this Court, for your unfailing consideration, and for consistent and innumerable courtesies.

"In early manhood most of us are filled with zeal to alter and reform, but in middle age we are prone to resent change and to believe that whatever is, is best. But Your Worship has never lost the youthful zeal of the reformer, and we of the Law Society are indebted to you for many suggestions of law reform. We recall the great work you did recently in connection with the new Magistrates' Courts Act and the Rules under this Act."

Mr. Garland told Mr. Luxford that it would be difficult to imagine the Court without him. It would also be difficult to picture him relaxing from effort.

"There come to the mind these words from Tennyson's *Ulysses*," Mr. Garland said:

> "' *How dull it is to pause, to make an end,*
> *To rust unburnished, not to shine in use*
> *As though to breathe were life;*
> *Life piled on life were all too little.*'

I hope the next line is not prophetic," Mr. Garland said. "It is this:

> "' *And of one to me little remains,*
> *Yet every hour is saved from that eternal silence,*
> *Something more, a bringer of new things.*' "

Mr. Garland went on: "It is not therefore surprising, sir—in fact, it is a cause for great gratification—to know that Your Worship refuses to 'rust unburnished,' that you are going to insist on shining in usefulness, and that your outstanding talents are not to be lost to this city, but will still be available in the capacity of a consulting barrister and arbitrator or umpire. We would like you to know, sir, that you carry with you on your retirement from the Bench the deep respect and sincere esteem of the legal profession and of the public. These are your dues, and have been richly earned through long years of faithful service."

Other Speakers.

The Secretary for Justice, Mr. S. T. Barnett, who had come specially from Wellington to attend the farewell function, said the Hon. T. Clifton Webb, Minister of Justice, regretted that he was unable to be present and also that such a distinguished career as Mr. Luxford's had come to a formal end. Mr. Barnett said that the competent manner in which Mr. Luxford had always discharged his duties had been greatly admired. He thanked him on behalf of the Justice Department and Court staffs, and said that he had always earned their loyalty. "Your name, sir, will endure for many years among those of the great in the magistracy, and you will always have a warm place in the affections of the Justice Department and staffs," Mr. Barnett said.

The only other speaker, the Superintendent of Police at Auckland, Mr. John Walsh, said that his Department had always received from Mr. Luxford the utmost courtesy and help. At least two of his publications, *Luxford's Police Law* and the volume on licensing, had proved most valuable to the Police.

Mr. Luxford's Reply.

In his reply, Mr. Luxford said that he had been privileged, in his career as a Magistrate, to see and to hear a great deal about people of all ages, from the very young to the very old; people in all states of mental condition, from the sane to the very insane, and from the sober to the habitual inebriates; people who were good and people who were bad, and people who were neither the one nor the other.

"Yet," he continued, "I leave this Bench with an unbounded faith in the general goodness of human beings firmly established, and believing that the milk of human kindness flows just as strongly as it ever did, if not more strongly. I know that some do not share my faith or my belief. That is not surprising, because public opinion on matters relating to human conduct is almost wholly formed from what is published about people who have brought themselves within the criminal law or who have offended against the social code.

"Would it be too much to say that, for every recorded offence against the criminal law or the social code, there are at least ten thousand unrecorded acts performed in fulfilment of the great commandment, 'Help thy neighbour,' and in fulfilment of the duty parents owe their children? May I repeat what I have often said publicly, that there is too much loose talk about child delinquency and the lack of parental control.

"I suppose that I have dealt with at least as many cases in the Children's Court as any other Magistrate, yet the number of really bad children that I have seen is small, and the number of parents who have wantonly or deliberately failed to exercise what they honestly believe is the proper control of their children is smaller still.

"Of course there are delinquent children," Mr. Luxford said. "There always have been. But, to those who describe the present

generation of children as the worst ever, I would say: 'Read your Dickens.'

"Parental control—not the lack of control so much as the wrong form of control—undoubtedly is associated with child delinquency. The likelihood of nearly every person born into this world having to shoulder the responsibilities of parenthood is a biological fact.

"One can only hope, therefore, that those charged with the duty of looking after the spiritual and intellectual welfare of the nation will always recognize that the preparation of young people to enable them properly and efficiently to discharge the responsibilities of parenthood is a paramount task if a Christian social order is to be maintained. One needs to keep a balanced outlook on this subject. It can be kept within practical bounds much better by the application of sanctified commonsense principles than by using the somewhat hackneyed, highfalutin phrases of modern psychiatry.

"Psychiatry has its uses. Indeed, it is a beneficial science if it is applied in suitable cases by properly qualified persons. It has its limitations, however, for it does not provide, nor is it ever likely to provide, a remedy for more than a small percentage of cases involving asocial acts or behaviour. For this reason, I deplore the suggestion that specialists should preside over the Children's Court. Psychiatric specialists can give valuable advice and assistance in some criminal cases, but I am convinced that the final decision must rest with the man whose talents and training have qualified him to preside as Magistrate or Judge."

The Magistrates' Court.

Mr. Luxford then made reference to the Magistrates' Court. "I think I am correct in saying," he said, "that no other Court of summary jurisdiction in the British Commonwealth of Nations or Empire has anything like the extensive civil and criminal jurisdiction of the Magistrates' Court in New Zealand, nor have any other Magistrates the many special jurisdictions and extrajudicial functions conferred on New Zealand Magistrates by statutory enactment.

"The list of these special jurisdictions and extrajudicial functions is impressive, and would surprise not only the public but many of the legal profession as well. It is not too much to say that the Magistrates' Court has acquired a degree of public confidence which has raised it to a level not very far below that of a superior Court. All of which goes to show that any member of the legal profession should feel honoured to be asked to accept appointment to this Bench.

"It is true that the material rewards of a Magistrate are less than what most practising lawyers earn, but the difference is not so marked as it used to be, and, I hope, will be less marked in the future. I can assure you that after nearly twenty-four years on the Bench I feel that the wonderful experiences I have had, the privilege of learning so much about my fellow-creatures, and the opportunity of helping to rehabilitate so many social casualties have been a reward far greater than the material rewards I might have earned had I remained in private practice.

"As you know, the Magistrates' Court has evolved from the Courts of summary jurisdiction which originally were presided over by Justices of the Peace. The judicial functions of the Justices have in practice almost disappeared in New Zealand, but the Justices of the Peace Act still remains on the statute book. There are many estimable and worthy men and women among the Justices, including a number of my personal friends, but, in my opinion, there is no room in the judicial system for laymen to administer criminal justice unaided by skilled legal assistance. In England, the functions of Justices are somewhat different. There, Justices are appointed to exercise summary jurisdiction in a county or a borough. They sit with a practising lawyer (known as the Clerk to the Justices) to direct them on questions of law and procedure. New Zealand has not reached the stage where it would be practicable to take away the criminal jurisdiction of Justices altogether, but I think the time has arrived when its exercise should be limited to specially-appointed Justices, all of whom should be practising lawyers, or at least persons who have had an adequate legal training."

Mr. Luxford dealt next with two matters concerning the legal profession. The first was legal education. "I am not qualified," he said, "to offer any criticism of the course, so far as it goes, prescribed for the Law degree, and I refrain from doing so accordingly. I feel justified, however, in saying that a student can obtain his degree, and become eligible, on behalf of a client, for audience before any Court or tribunal in the country, without having more than a fragmentary knowledge of what I regard as the most fundamental subject of all, the subject of advocacy. This subject has three main branches—ethics and the duty of counsel, forensic science and its application, and the science of fact and its application.

"Just how far the University is the proper place to teach this subject I cannot say, but of this I am certain—that no person who, under the existing law, becomes eligible to be admitted as a barrister or a solicitor should be entitled to appear as counsel or solicitor until he has obtained from an examining body appointed by the New Zealand Law Society a certificate that he has a competent knowledge of the subject of advocacy and the skill to act as advocate.

Need for Junior Bar Proper.

"The other matter I wish to refer to is the set-up of the legal profession in New Zealand," said Mr. Luxford. "This question has been discussed from time to time, and the general consensus of opinion is that the amalgam, as it is called, is best suited for local conditions. With that I am in complete agreement. At the same time, there should be room—indeed, there is room—for a Bar proper, in addition to those who have been granted silk. I would go the length of saying that the absence of a junior Bar proper is a tragedy. There are among the members of the profession a substantial number who have a natural aptitude for advocacy, and who should, in the interests of the public and the administration of justice, devote the whole of their time to this branch of legal practice. There are a greater number who can undertake the work of an advocate passably well, but not well enough to invite sufficient briefs to make a competent living. There are also a substantial number who are temperamentally and forensically disqualified from appearing in Court at all. For obvious reasons, it is not expedient, generally speaking under the existing set-up, for a solicitor to hand over his client to another practitioner, no matter how competent the other practitioner may be as an advocate.

"This inexpediency would disappear, however, if the other practitioner were a member of the junior Bar proper. I have seen a number of practitioners who have shown promise as advocates, but who, by reason of the increasing cares and responsibilities of their office practices, have lost their usefulness at the Bar. The real reason why we have not a junior Bar proper is because the economic risk is too great compared with the safety of a junior partnership in an established firm.

"I do not know if the Auckland District Law Society is still possessed of the large capital funds it used to have. If it is, there is not a better cause to which a portion of them could be put than the establishment of barristers' bursaries to enable any approved barrister to commence practice knowing that his first year's income would not be less than, say, £500. I do not think that the funds of the Law Society would be called on to pay very much. If such a scheme were adopted, a junior Bar proper would soon be established, and would be not only a boon to the profession but also a source from which competent men for the Magistrates' Bench could be drawn."

Mr. Luxford paid a tribute to the Department of Justice and its Secretary for what they were doing and for what they had done to assist the Magistrates in all matters which sound in administration; to the commissioned and non-commissioned officers of the Police Force, for whom he had the greatest admiration and respect; to the members of the staff of his Court, and in particular to that great Registrar, Mr. Jerred, who he trusted would soon be restored to health; to the various social workers and the members of the probationary committee who for the past five years had given such valuable help, unostentatiously and unrewarded, to many adolescent offenders; and to his friends the reporters, who managed so faithfully and well to record for the public the proceedings of the Court.

"I reserve my final thanks to my brother Magistrates and to the members of the legal profession for their help and co-operation," said Mr. Luxford. "I have not been wholly successful in avoiding disagreements with the Supreme Court Bench, or even with the Department of Justice, but I have not had the slightest semblance of a contretemps with any practitioner who has appeared before me, all of which goes to show how tolerant you are and how grateful I should be to be allowed, in a limited way, to return to your fold. And so, gentlemen, I officially bid you farewell, full of gratitude to you for gathering together this morning and expressing such generous words through your President."

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Negligence in France.—According to the popular song, " Fifty million Frenchmen can't be wrong " ; and the recent case before Lynskey, J., of *Kohnke* v. *Karger*, [1951] 2 All E.R. 179, shows that they do not subscribe to our notion that damages for personal injuries should be assessed once and for all—a circumstance that, under our system of civil justice, would be most detrimental to counsel for the plaintiff's peroration in his final address. (" Gentlemen, you may be wrong ; the doctors may be wrong ; even I may be wrong." At this point, counsel's voice takes on a sacred and sepulchral tone. " Remember, what you find now, you find for ever. The suffering plaintiff can never come back here again.") Miss Kohnke was a passenger in her employer's car, which came to grips with a lorry in France, and she sustained personal injuries. The driver of the lorry was found guilty of negligence by the Correctional Court of Chalons-sur-Marne, and he and his employers were ordered to pay her the sum of 1,400,000 francs, and did so. This sum is obviously not nearly as much as it looks, since the lady, on reaching the shores of England, decided to institute proceedings there for damages against *her* employer, having been encouraged, no doubt, by the finding of the French Court of Appeal that one-third of the responsibility should be attributed to him. The points in issue before Lynskey, J., were, first, whether, where there were two separate causes of action against different defendants for the same damage, a judgment against one in a foreign Court which had been satisfied was a bar to proceedings against the other for the same damage in an English Court ; and, secondly, whether, if the Court was satisfied that the amount recovered by the plaintiff was insufficient to compensate her for the damage suffered, the Court was bound by the decision of the French Court on the assessment of the amount. Both points were decided in favour of the plaintiff. The *ratio decidendi* of the second, upon which there is no authority, appears to be that a claim can be made subsequently in France for aggravation of injuries, whereas we believe, as is stated above, in the finality of claims. This prospect of a major accident becoming part of the goodwill of a legal business may be the explanation of the well-known aphorism that there is something not altogether displeasing in the misfortunes of one's friends. But the situation must at times be wearing to the nerves of the negligent defendant and the contingencies of his insurers.

Judges' Salaries.—The recent appointment of Mr. C. H. Pearson, K.C., to the King's Bench Division, and the publicized references to his salary and ultimate pension, leads Scriblex once more to direct attention to the unsatisfactory position in New Zealand. Pearson, J., will receive £5,000 a year, but, in common with all married Judges appointed since the Administration of Justice (Pensions) Act, 1950, he will contribute (but only after he retires) towards a pension payable to his wife if she outlives him. It has now been decided that the salary of County Court Judges in England be raised from £2,000 to £2,800, the new figure to be inclusive of remuneration which was paid to a Special Divorce Commissioner (an extra £3,000) and the pension rights to be based upon the full sum of £2,800. Simultaneously, Metropolitan Magistrates are to be raised from £2,000 to £2,500, the chief Magistrate to receive £300 in excess of the salary of other Magistrates—and, in point of fact, above that of our own Chief Justice. Appropriate increases in Scotland have been made to the salaries of full-time Sheriffs and Sheriff Substitutes. In a Bill introduced into the New South Wales Legislature in October, the salaries of Judges are increased by £650 a year. The Chief Justice is to get £4,500 and Justices of the Supreme Court £3,500, putting them on a parity with members of the Industrial Commission, the President of which is to have £3,750. The Chairman of the Workers' Compensation Commission has £2,750 allotted to him, while District Court Judges have £2,500. Judges and pensioners in this country both feel, according to their position and commitments, the impact of the high cost of living, but pensioners enjoy the advantage of being able to write to the newspapers about it.

Man's Best Friend.—In the midst of the traffic on one of Glasgow's busiest streets, a woman boarded a tram-car, and, upon her reaching the platform, the motorman set off, accompanied by a terrier dog which ran alongside barking. So far, so good. When the tram had gone some three car-lengths, and had reached a speed of 10 or 12 miles per hour, the dog, seeming bored with the straight and narrow path, veered in suddenly to the tram, and ran in front of it. In order to avoid hitting the dog, the motorman applied his magnetic brake ; the car stopped suddenly, and the woman (as ever, the pursuer) fell down, sustaining injury for which she was awarded £20. The Scots, however, are a tenacious race, especially if they have to pay out, as they deem, unjustly ; and so from these humble beginnings the case, following the track of " the snail in the bottle," has now reached the House of Lords : *Sutherland* v. *Glasgow Corporation*, [1951] S.C. (H.L.) 1. In the opinion of the Law Lords, who are selected, no doubt, for their love of law rather than of dogs, humanitarianism is no answer to the contention of the ruffled passenger that the motorman knew, or ought to have known, that she had not taken her seat, and that, if in fact he did not know, then the only way he " ought to have known " was to have looked behind and found out. This involves as a logical corollary that he should not move off until everyone is seated (*quaere*, the average city tram-car during busy hours), since, if he moves off and hits someone in front while he is watching the welfare of those behind him, where is he then ? He is settled, or perhaps one should say his case will be, unless counsel can be found of sufficient temerity to suggest to an astonished jury that his client failed to keep a proper look-out as the duty laid down in *Sutherland's* case required him to gaze rearwards at the time. The motorman's lot, like the policeman's, appears to be a difficult one, and not the least of his difficulties appears to be that of anticipating what will go on in " the four-legged brain of a walk-ecstatic dog."