New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."
VOL. XXVII. TUESDAY, DECEMBER 4, 1951. No. 22.

THE LIMITATION ACT, 1950.

AS the sections of the Limitation Act, 1950, relating to land require special treatment, our learned friend and valued contributor, Mr. E. C. Adams, has kindly consented to deal with this phase of the new statute. For convenience of reference, we include his contribution in the present series of articles.

III.—Title to Land.

Mr. Adams says:

One of the most useful chapters in *Garrow's Real Property in New Zealand* is the one headed "Title to Land: Statutes of Limitation." (This is the chapter in which the learned author deals with the Real Property Limitation Act, 1833, s. 94 of the Trustee Act, 1908, actions for recovery of land, and the impact of our Land Transfer system on those topics.) Professor Garrow once dryly observed: "Ah! That chapter certainly did take some writing."

Fundamental Principles Unaltered.

As from January 1, 1952, this chapter in *Garrow's Real Property in New Zealand* will have to be read in the light of the Limitation Act, 1950, which follows substantially the Limitation Act, 1939, of the United Kingdom, but with certain important but very necessary differences, to deal with the special problems arising from our Land Transfer system, land of the Crown, and Maori customary land. It will be found, I think, that the general principles enunciated and carefully explained in this chapter of *Garrow's Real Property in New Zealand* remain unaltered: it is only in details that changes have been effected by the new Act, which is one of the most technical ever passed by the New Zealand Legislature.

For example, in the case of a *future* estate or interest, the right to recover any land first accrues when such estate or interest *first* becomes an estate or interest in possession: s. 9 of the Limitation Act, 1950, *Garrow's Real Property in New Zealand*, 3rd Ed. 270. Thus, if a stranger should acquire a prescriptive title to a term of years as against the lessee, the landlord's right of entry as against the trespasser accrues when the lease expires.

Garrow lays it down that, in order that time may begin to run against the person originally in possession, there must be, not merely want of actual possession on his part, but also actual possession by another. The possession necessary to defeat the claim of the original owner must be a possession inconsistent with the rights of the owner, not a possession under a title derived from the owner. If possession can be referred to a lawful title, it is not adverse possession. For example, the possession of a lessee is not adverse to his landlord's title, since he holds it by virtue of his lease until the expiration of the term: *Ormond* v. *Portas*, [1922] N.Z.L.R. 570. This basic principle is maintained, for s. 13 of the new Act provides that no right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run (thereafter in the section referred to as adverse possession), and, where, under the foregoing provisions of the Act, any such right of action is deemed to accrue on a certain date, and no person is in adverse possession on that date, the right of action shall not be deemed to accrue unless and until *adverse* possession of the land is taken.

Title by Adverse Possession.

To constitute title by adverse possession, there must be (i) *animus possidendi*, (ii) physical possession, and (iii) exclusive possession: *Maguire* v. *Browne*, (1913) 17 C.L.R. 365, and *Whatatiri* v. *The King*, [1938] N.Z.L.R. 676. In other words, there must be a trespasser before time begins to run against the rightful owner. Possession is never considered adverse if it can be referred to a legal title: *Thomas* v. *Thomas*, (1855) 2 K. and J. 79; 69 E.R. 701. And the rule pointed out in *Garrow's Real Property in New Zealand*, 3rd Ed. 277, that a father entering into possession of his infant's land (and even a stranger entering into possession of an infant's land) is deemed to enter as bailiff for the infant until after the coming of age of the infant, will still prevail, unaltered by the Limitation Act, 1950.

Another rule which will remain the same is that an adverse possessor who acquires title by possession for the statutory period has not, in the strict legal sense, acquired the title of the owner he has dispossessed. The former documentary or *de jure* title is extinguished, and the possessor has acquired a *new* title by possession, a *statutory* possessory title, which enables him to exclude all other claims, including the claim of the original owner. Section 18 of the Limitation Act, 1950, provides that, subject to the provisions of s. 10 of the Act, at the expiration of the period prescribed by the Act for any person to bring an action to recover land (including a redemption action), the title of that person to the land shall be extinguished. (Section 10 contains special provisions dealing with settled land and land held on trust.)

As under the Real Property Limitation Act, 1833, a different rule will prevail with regard to actions to recover a principal sum secured by a mortgage of, or charge on, land, or proceeds of sale of land: such an action is barred after twelve years, *but the mortgage debt or other debt is not extinguished*: s. 40 of the Real Property Limitation Act, 1833, and *Campbell* v. *Auckland District Land Registrar*, (1910) 29 N.Z.L.R. 332. Section 20 (1) of the Limitation Act, 1950, provides that no action shall be brought to recover any principal sum of money secured by a mortgage or other charge on property, whether real or personal, or to recover proceeds of the sale of land (not being the proceeds of the sale of land held upon trust for sale) after the expiration of twelve years from the date when the right to receive the money accrued. The Limitation Act, 1950, continues the distinction drawn in the Real Property Limitation Act, 1833, between the two remedies which a mortgagee has—one against the land, and the other against the mortgagor personally for the recovery of the debt. The right against the land is absolutely extinguished after the statute has run, but the mortgage debt is not extinguished; only the remedy to recover it is barred. This vital distinction is clearly shown in *Campbell* v. *Auckland District Land Registrar*, (1910) 29 N.Z.L.R. 332, where the Court of Appeal considered the effect of the Limitation Acts on a Land Transfer mortgage.

As illustrative of my main submission that the Limitation Act, 1950, does not alter the fundamental principles hitherto applied in New Zealand as to the acquisition of title to land by operation of the Statutes of Limitation, there may be cited the recent English case, *King* v. *Smith*, [1950] 1 All E.R. 553, which, of course, was decided under the Limitation Act, 1939, of the United Kingdom, on which, as previously pointed out, our Limitation Act, 1950, is mainly based. *Garrow's Real Property in New Zealand*, 3rd Ed. 273, points out that, where a lessee encroaches on land adjoining that leased, the encroachment will be considered as annexed to the land leased, unless it is clear that the tenant made the encroachment purely for his own benefit. Following the authorities cited by *Garrow's Real Property in New Zealand*, the English High Court has held in *King's* case, [1950] 1 All E.R. 553, that, where a lessee encroaches on land adjoining that leased, the encroachment is an accretion to the land leased, and the owner of the fee will acquire title thereto and have the right of possession on expiration of the current lease.

Alterations in The Law.

The fundamental principles, therefore, remain the same, but in certain details the law has been altered. Now, has the law been altered—or, to be more accurate, how will the law be altered—on and after January 1, 1952?

Perhaps the most important alteration is the abolition of the legal disability of absence beyond the seas, as regards actions to recover land—a long overdue reform of the law, which was effected in the United Kingdom by the Real Property Limitation Act, 1874. It has thus taken us almost eighty years in New Zealand to fall into line with the law of Great Britain in this respect. (Section 79 of our Judicature Act, 1908, abolished the legal disabilities of absence beyond the seas and imprisonment, but only in regard to actions for the recovery of money charged upon land, legacies, dower, and arrears of interest.) The legal disability of absence beyond the seas appears to have been first enacted in the reign of Queen Anne, when conditions of travel were certainly very different from the more expeditious and certain methods prevailing to-day. Moreover, it was different in genus from the other existing disabilities—infancy and insanity—as pointed out in the Report on Limitation of Actions (1936, Cmd. 5334) by the Law Revision Committee presided over by Lord Wright, M.R., whose recommendations gave rise to the Limitation Act, 1939, of the United Kingdom. (This report will be found in [1937] W.N. 2.) Section 2 (2) of the Limitation Act, 1950, provides that, for the purposes of the Act, a person shall be deemed to be under a disability while he is an infant or of unsound mind. Subsection 3 provides that a person shall be conclusively presumed to be of unsound mind while he is detained or kept in custody (otherwise than as a voluntary boarder) under any provision of the Mental Defectives Act, 1911.

As regards the legal disability of the owner of land, what will be the legal effect as from January 1, 1952? Reading carefully *Garrow's Real Property in New Zealand* in conjunction with s. 24 of the Limitation Act, 1950, the effect appears to be as follows:

If, at the time the right of action accrues, any person entitled is under disability by reason of infancy or insanity, such person and his representatives, notwithstanding the lapse of the statutory period (which, as hereinafter pointed out, has been reduced), are allowed *six* years from the time when such person ceased to be under the disability or died (whichever event first happened). No extension of time is allowed for disability except that of the person to whom the right of action first accrued. In no case can action be taken after thirty years (the period was previously forty) from the date of the accrual of the right of action. For example, if a right of action accrues to an infant of twelve years of age who dies at the age of nineteen, and the person next entitled is an infant of three years of age, there is no extension of time for the benefit of the second infant. The right is extinguished at the end of twelve years after the ceasing of the first disability. Once time has begun to run against the owner, the period will not be extended on account of the disability of a subsequent claimant through the owner. Thus, in *Stevens* v. *Goodall*, (1883) N.Z.L.R. 2 S.C. 5, it was held that, where a man permits another to enter into possession of a piece of land and, eighteen months after, conveys it to an infant, the latter cannot, on the ground of disability, extend the usual statutory period.

Part II of the Limitation Act, 1950, besides providing for the extension of the limitation periods in cases of legal disability as explained above, also deals with the effect of acknowledgment of title by the trespasser to the true owner, part payment by a mortgagor, or acknowledgment of his title by the mortgagee when the mortgagee is in possession of the mortgaged land, and also the effect of fraud and mistake. In these matters, I have noticed one apparent important difference. It is pointed out by the Court of Appeal in *Chambers* v. *Commissioner of Stamp Duties*, [1943] N.Z.L.R. 504, 526, that, where there is a covenant to pay rent or interest secured on land, in proceedings not against the land but upon the covenant to pay the period of limitation is twenty years, not six years, because such a case comes within s. 3 of the Civil Procedure Act, 1833, and not within s. 42 of the Real Property Limitation Act, 1833. As from January 1, 1952, this period of twenty years will apparently be reduced to six years.

The Limitation Act, 1950, repeals ss. 3-7 of the Civil Procedure Act, 1833. It is true that subs. 3 of s. 4 of the Limitation Act, 1950, provides that an action upon a deed shall not be brought after the expiration of *twelve* years from the date on which the cause of action accrued, but tagged on to this subsection is this proviso :

> *Provided that this subsection shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act.*

Subsection 4 of s. 20 of the Limitation Act, 1950, provides that no action to recover arrears of interest payable in respect of any sum of money secured by a mortgage, &c., shall be brought after the expiration of *six* years from the date on which the interest became due.

Reference to the Table (*Ante*, p. 338) will show how the relevant periods of limitation will be altered in New Zealand by the Limitation Act, 1950, and how they compare with the corresponding provisions at present in force in the United Kingdom.

Perhaps the two most important points to notice in the Table are that the present periods of twenty years for actions upon deeds and for actions to recover land will be reduced to twelve years, thus bringing New Zealand law into harmony with that of the United Kingdom.

As previously stated in this article, the Limitation Act, 1950, is one of the most technical ever passed by the New Zealand Parliament; yet, as regards acquisition to title to land, the average New Zealand practitioner will seldom, if ever, need to consider these technical rules. This is because of the impact of our Land Transfer Act, 1915, on the limitation statutes, and because of ss. 6 and 16 of the Limitation Act, 1950. (We, however, who have satisfied the examiner in real property law (perhaps as much by guile as by sound legal knowledge) may well spare a tear of sympathy for the law student who must still spend laborious nights learning these technicalities, which will be of little practical use to him in his professional life.)

Sections 6 and 16 of the Limitation Act, 1950, read as follows :

> 6. (1) Subject to the provisions of the next succeeding subsection, nothing in this Act shall apply to any Maori land which is customary land within the meaning of the Maori Land Act, 1931.
>
> (2) This Act shall be subject to the Land Transfer Act, 1915, the Land Act, 1948, sections one hundred and fifteen and five hundred and fifty-four of the Maori Land Act, 1931, and section twelve of the Public Works Amendment Act, 1935, so far as it is inconsistent with anything contained in those enactments.
>
> (3) Nothing in this Act shall affect the right of His Majesty to any minerals (including uranium, petroleum, and coal).
>
> 16. (1) Notwithstanding anything contained in section seventy of the Property Law Act, 1908, or in any other enactment when a mortgagee of land has been in possession of any of the mortgaged land for a period of twelve years, no action to redeem the land of which the mortgagee has been so in possession shall thereafter be brought by the mortgagor or any person claiming through him.
>
> (2) This section shall not apply in respect of any land that is subject to the Land Transfer Act, 1915.

Maori Customary Land.

The first thing to notice about s. 6 is that the new Act will not apply to Maori customary land—*i.e.*, land owned by Maoris in accordance with Maori custom and usage—the title to which has not been determined by the Maori Land Court. (It is understood that there is very little Maori customary land now left in New Zealand.) Now, the Limitation Act, 1950, repeals the Crown Suits Act, 1769 (commonly referred to as the Nullum Tempus Act), which is in force in New Zealand. But the present period of sixty years in respect of land of the Crown has not been altered : s. 7 of the Limitation Act, 1950. It has already been held that the Real Property Limitation Act, 1833, at present in force in New Zealand, does not apply to Maori customary land : *Hohepa Wi Neera* v. *Bishop of Wellington*, (1902) 21 N.Z.L.R. 655. But, so far as I am aware, it has never been held that the Nullum Tempus Act also does not apply to Maori customary land. Sixty years' continuous adverse possession of Maori customary land may at present confer a good title on a trespasser, but time will cease to run in favour of a trespasser as from January 1, 1952, for, as from that date, there will be no Limitation Act in force barring the rights of Maori owners to customary land, because, as explained above, the Limitation Act, 1950, repeals the Nullum Tempus Act, and declares that nothing in the Limitation Act, 1950, shall apply to Maori customary land.

Sections 115 and 554 of the Maori Land Act, 1931, read as follows :

> 115. The Maori customary title shall for all purposes be deemed to have been lawfully extinguished in respect of all land which during the period of ten years immediately preceding the thirty-first day of March, nineteen hundred and ten, has been continuously in the possession of the Crown, whether through its tenants, or otherwise howsoever, as being Crown land free from the Maori customary title.
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> 554. Notwithstanding any statutory provision to the contrary, the Statute of Limitations shall not run or be deemed to have run against a co-owner of Maori land who neglects or has at any time neglected to exercise his right of entering upon and using the common property while it remains in the occupation of another co-owner or some one claiming through or under him.

It may safely be said that the average general practitioner will not encounter these two sections very frequently in practice.

Crown Land.

The Limitation Act, 1950, is to be read subject to the Land Act, 1948. Section 172 of that Act reads as follows :

> (1) No dedication or grant of a right of way shall, by reason only of user, be presumed or allowed to be asserted or established as against the Crown, or as against any person or body holding lands for any public work or in trust for any public purpose, whether such user commenced before or after the coming into force of this Act.
>
> (2) Notwithstanding any statute of limitation, no title to any land that is a road or street, or is held for any public work, or that has in any manner been reserved for any purpose, or that is deemed to be reserved from sale or other disposition in accordance with section fifty-eight of this Act, or the corresponding provisions of any former Land Act, and no right, privilege, or easement in, upon, or over any such land shall be acquired, or be deemed at any time heretofore to have been acquired, by possession or user adversely to or in derogation of the title of His Majesty, or of any local authority, public body, or person in whom the land has been at any time vested in trust for the purposes for which it has been reserved as aforesaid.

That section is very much wider than its predecessor, s. 10 of the Land Laws Amendment Act, 1931. The exact ambit of s. 172 remains to be decided by the Courts, but it undoubtedly abrogates the decision of Blair, J., in *Barnitt* v. *Waitara Harbour Board*, [1932] N.Z.L.R. 1263, 1266, in so far as His Honour held that the section did not apply to a reserve for a road.

Land Taken for Public Work.

The effect of s. 12 of the Public Works Amendment Act, 1935, is that no prescriptive title may be obtained to a parcel of land which has been taken for a *public*

work under the Public Works Acts. Most land taken under the Public Works Acts re-vests in the Crown, but sometimes it is vested in a local authority, or, to be more correct, in the body corporate representing a local authority. Under s. 12 of the Public Works Amendment Act, 1935, a body corporate representing a local authority enjoys the same protection as the Crown. It may not be without interest to observe here that in *Ex parte McDowell*, (1897) 15 N.Z.L.R. 765, Sir James Prendergast, C.J., held that a prescriptive title could not be obtained to part of a public reserve—namely, the Wellington Town Belt.

The Effect of The Land Transfer Act, 1915.

I have left to the last the most important exception to the Limitation Act, 1950—namely, the effect thereon of the Land Transfer Act, 1915. It is obviously the most important exception, because there is now in New Zealand very little privately-owned land which is not subject to the Land Transfer Act, 1915.

Subject to the exceptions created by the Land Transfer (Compulsory Registration of Titles) Act, 1924, and by s. 43 of the Statutes Amendment Act, 1936, the effect of s. 60 of the Land Transfer Act, 1915, is that no interest can be acquired by adverse possession in derogation of the title of the *registered proprietor* of land under the Land Transfer Act, 1915. This protection is not restricted to the registered proprietor of the fee simple. It extends to the registered proprietor of *every* estate or interest registered under the Land Transfer Act, 1915 : *Campbell* v. *Auckland District Land Registrar*, (1910) 29 N.Z.L.R. 332. In that case, no principal or interest had ever been paid under the mortgage, which was more than twenty years old, and no written acknowledgment had been obtained from the mortgagor. The mortgagee put up the land for auction at a Registrar's sale and bought it in himself. The Registrar of the Supreme Court executed a transfer of the fee simple to the mortgagee, but the District Land Registrar declined to register it, on the ground that the mortgagee's rights had become barred by operation of the Real Property Limitation Act, 1833. The Court of Appeal held that the mortgagee's title was absolute and could not be extinguished by the Limitation Acts, and that, therefore, the District Land Registrar was bound to register the transfer exercising the power of sale. It would have been most inconvenient if the decision had been the other way, for then the District Land Registrar would be bound to requisition every exercise of a power of sale where the mortgage had not been dealt with for twenty years (soon to be reduced to twelve years when the Limitation Act, 1950, comes into force next year).

Section 60 of the Land Transfer Act, 1915, is modified by the Land Transfer (Compulsory Registration of Titles) Act, 1924. This Act authorizes the issue of " limited " titles, and, whilst a title remains " limited," any person in adverse possession *at the date of the bringing of the land* under the Land Transfer Act, 1915, may lodge an application under the Land Transfer Act, 1915, and, if his title has ripened under the Limitation Acts, the District Land Registrar must cancel the " limited " title and issue an ordinary certificate of title to the applicant. In short, the issue of a " limited " title does not prevent time running in favour of a trespasser under the Limitation Acts, provided the trespasser is in adverse possession at the date on which the land is first brought under the Land Transfer Act, 1915. The effect of the Limitation Act, 1950, will be to improve the position of such a trespasser by reducing the requisite period from twenty years to twelve years.

A Period of Limitation Dependent on Judicial Discretion.

Section 43 of the Statutes Amendment Act, 1936, is a most curious provision, and reads as follows :

> (1) Notwithstanding anything to the contrary in section sixty of the Land Transfer Act, 1915, on application made in a summary way to the Supreme Court by the registered proprietor of any estate or interest in land that is subject to a registered mortgage the Court, if it is satisfied that any action by the mortgagee for payment of the moneys secured by the mortgage would be barred by the provisions of any Statute of Limitation, and that but for the provisions of the said section sixty the remedies of the mortgagee in respect of the mortgaged land would be likewise barred, may, in its discretion, make an order directing the mortgage to be discharged, and upon the production of an office copy of the order the Registrar shall enter a memorandum thereof in the Register and on the outstanding instrument of title, and when the entry is made the mortgage shall be deemed to be discharged.
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> (2) Before making any order under this section the Court may direct such notice to be given by public advertisement or otherwise as it thinks fit, and may direct any person to be served with notice of the proceedings.
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> (3) By the same or another order the Court may order any person in possession of an instrument of title to the mortgaged property to deliver the title to the registered proprietor on payment of such charges as the Court may, in its discretion, fix in the order.

There are at least two things to be noted about this section. First, until an order is made under the section and is registered against the title, the title of the mortgagee is indefeasible, and he could, for instance, confer an indefeasible title on a purchaser by exercising his power of sale. But a transferee of a Land Transfer mortgage more than twenty years old (and this period will shortly be twelve years) is now put on inquiry—a result, I think, which was never intended by the Legislature. Whether intended or not, the result, in my opinion, is most unfortunate, for it strikes at the very basis of our Land Transfer system—namely, the principle that a person who contracts or deals on the strength of the Land Transfer Register, in the absence of fraud, gets an indefeasible title.

The second thing to be noticed about this section is that the matter is left to the *discretion* of the Judge. Why the operation of a Limitation Act should be left to the discretion of the Judge I could never quite understand. Finally, I think that a careful perusal of the judgment of Callan, J., in *In re A Mortgage, Pearce to Sansom*, [1951] N.Z.L.R. 331, will satisfy most conveyancers that my fears as to s. 43 of the Statutes Amendment Act, 1936, are not entirely groundless.

In re A Mortgage, Pearce to Sansom, [1951] N.Z.L.R. 331, was considered by Mr. Justice Cooke in *Thomson* v. *Commissioner of Stamp Duties* (November 16, 1951, to be reported). His Honour declined to hold that, before an order can be refused under s. 43, there must be an equity in favour of the mortgagee. He said that so to hold as a general principle might, as it seemed to him, involve a disregard of the important fact that the jurisdiction conferred by s. 43 is in terms discretionary.

We are grateful to Mr. Adams for the foregoing. We now return to our own consideration of the new statute.

IV.—Trustees.

The term " trustee," wherever it is used in the Limitation Act, 1950, is defined by reference to the definition of " trustee " in s. 2 of the Trustee Act, 1908.

The personal representatives of a deceased person, whether under a will or under an intestacy, are within s. 21, as trustees. Section 22 is expressly made subject to s. 21 (1); and the applied definition of "trustee" (in s. 2 of the Trustee Act, 1908) includes "the duties incident to the office of personal representatives of a deceased person," which is wide enough to include the payment of debts, which is one of those duties.

In *Tintin Exploration Syndicate, Ltd.* v. *Sandys*, (1947) 177 L.T. 412, the *de facto* directors of a company were held to be express trustees for the purpose of this applied definition.

Trustees are, in general, subject to the provisions of the Limitation Act, 1950; but there are two sections which have particular application to them. These are s. 10 and s. 21.

Section 10, which relates to the trustees of settled land and of land held on trust, is a new section.

Section 21 replaces s. 94 of the Trustee Act, 1908 (now repealed by s. 35 (2) and the Second Schedule to the new statute), and s. 25 of the Real Property Limitation Act, 1833, which on January 1, 1952, ceases to have effect in New Zealand (s. 35 (1) and the First Schedule).

Section 10, so far as is relevant to the considerations of the position of trustees under the section, is as follows:

> (1) Subject to the provisions of subsection one of section twenty-one of this Act, the provisions of this Act shall apply to equitable interests in land, including interests in the proceeds of the sale of land held upon trust for sale, in like manner as they apply to legal estates, and accordingly a right of action to recover the land shall, for the purposes of this Act but not otherwise, be deemed to accrue to a person entitled in possession to such an equitable interest in the like manner and circumstances and on the same date as it would accrue if his interest were a legal estate in the land.
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> (2) Where any land is held by any trustee (including a trustee who is also tenant for life, or who, by virtue of the Settled Land Act, 1908, has also the powers of a tenant for life) upon trust, including a trust for sale, and the period prescribed by this Act for the bringing of an action to recover the land by the trustee has expired, the estate of the trustee shall not be extinguished if and so long as the right of action to recover the land of any person entitled to a beneficial interest in the land or in the proceeds of sale either has not accrued or has not been barred by this Act, but if and when every such right of action has been so barred, the estate of the trustee shall be extinguished.
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> (3) Where any settled land is vested in a tenant for life or a person having the statutory powers of a tenant for life or any land is held upon trust, including a trust for sale, an action to recover the land may be brought by the tenant for life or person having the powers of a tenant for life or trustees on behalf of any person entitled to a beneficial interest in possession in the land or in the proceeds of sale whose right of action has not been barred by this Act, notwithstanding that the right of action of the tenant for life or person having the powers of a tenant for life or trustees would, apart from this provision, have been barred by this Act . . .

In considering s. 10, it must be remembered that the term "land" used therein includes (by virtue of the definition in s. 2 (1) of the Limitation Act, 1950) corporeal hereditaments, rentcharges, and any legal or equitable estate or interest therein, including an interest in the proceeds of the sale of land held upon trust for sale; but, except as stated, it does not include any incorporeal hereditament.

Moreover, by virtue of s. 10 (1), and subject to the provisions of s. 21 (1) (as to which, see *infra*), the provisions of the Limitation Act, 1950, apply to equitable interests in land, including interests in the proceeds of the sale of land held on trust for sale, in like manner as they apply to legal estates. A right of action to recover the land, for the purposes of the statute but not otherwise, is deemed to accrue to a person entitled in possession to such equitable interests in the like manner and circumstances, and on the same date, as it would accrue if his interest were a legal estate in the land.

By the application of the definition of "trustee" in s. 2 of the Trustee Act, 1908, the section applies to land vested in the personal representatives of a deceased person.

Thus, the section applies to all trustees, including those in whom a Land Transfer title to the land which they hold upon trust is vested subject to the provisions of the Limitation Act, 1950, but only in so far as such provisions are not inconsistent with anything contained in the Land Transfer Act, 1915.

Time does not run, by reason of the modification of s. 10 (1) by the provisions of s. 21 (1), against a person beneficially entitled if he is claiming against the trustee in respect of fraud "to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use" (s. 21 (1) (*b*)). This prevents time running in favour of a trustee who has retained possession of land forming part of the trust property for his own benefit in breach of his trust.

But for the provisions of s. 10 (2), when a stranger is in possession of land adversely to a trustee holding such land upon trust, time runs in the stranger's favour both against the trustee and against the beneficiaries according to their respective interests; and, at the expiration of twelve years from the date on which the stranger took possession or on which the right of action accrued to the trustee or beneficiary, or to some person through whom he claims, the title of the trustee would be extinguished (s. 18).

Section 10 (2) comes to the assistance of trustees holding land upon trust, and of the beneficiaries claiming through them, by postponing in their regard the operation of s. 18. Section 10 (2) declares that the estate of the trustee will not be extinguished so long as a beneficiary's right to recover the land or the proceeds of its sale has not accrued or been barred by the Limitation Act, 1950.

Moreover, under s. 10 (3), where any settled land is vested in a tenant for life or a person having the statutory powers of a tenant for life, or where any land is held by trustees upon trust, including a trust for sale, any of those named is capable of suing to recover the land. Under s. 10 (3), such an action for recovery may be brought by any of those persons or by trustees on behalf of any person entitled to a beneficial interest in possession in the land or in the proceeds of sale whose right of action has not been barred, notwithstanding that the right of action of any such person would, apart from s. 10 (3), have been barred by s. 7 (2) or extinguished by the operation of s. 18.

Subsections 2 and 3 change the previously existing law to this extent: where land was heretofore subject to a trust, the legal estate of a trustee might be extinguished, but, if the stranger gaining title by adverse possession had knowledge of the equities to which the land was subject—such as the rights of beneficiaries—he took subject to such equities: *Scott* v. *Scott*, (1854) 4 H.L. Cas. 1065; 10 E.R. 779. Now subss. 2 and 3 of s. 10 obviate the difficulties which might have arisen

if the legal estate in land to successive interests had been permitted to become barred so long as any equitable interest therein remained unbarred. But it would seem that those subsections do not affect the principle enunciated in *Re Nisbet and Pitt's Contract*, [1906] 1 Ch. 386, that a person who acquires a title by adverse possession is bound by restrictive covenants affecting the land.

It should be remembered that, by the operation of s. 10 (4), possession of land (including an interest in proceeds of the sale of land) by a beneficiary cannot now be adverse to the trustee or to his co-beneficiaries. This alters the position created by a proviso to s. 7 of the Real Property Limitation Act, 1833, which on January 1, 1952, ceases to operate in New Zealand (s. 35 (1) and First Schedule).

Section 21 requires some special consideration. It provides as follows:

> (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—
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> (*a*) In respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
>
> (*b*) To recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.
>
> (2) Subject as aforesaid, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued:
>
> Provided that the right of action shall not be deemed to have accrued to any beneficiary entitled to a future interest in the trust property until the interest fell into possession.

For two classes of action against trustees, there is no limitation. Under s. 21 (1), which is confined to actions by a beneficiary under a trust, no limitation applies (i) if the action is in respect of a fraud or a fraudulent breach of trust to which the trustee was a party or a privy; or (ii) if the action is one to recover from a trustee trust property or its proceeds in the trustee's possession, or previously received by the trustee and converted to his use.

As to what constitutes a breach of trust by a trustee, see *Garrow's Law of Trusts*, 209 *et seq.*, 234, 295. Some limitations on the general liability of a trustee for a breach of trust are set out in ss. 82 and 87 of the Trustee Act, 1908.

In cases which do not come within s. 21 (1), an action by a beneficiary (entitled in possession) to recover trust property or in respect of any breach of trust may not be brought after the expiration of six years from the date on which a right of action accrued, unless some other provision of the Limitation Act, 1950, is applicable (s. 21 (2)).

Thus, an action based on a pure breach of trust falls within s. 21 (2), since there is no other applicable provision in the statute. But the period of limitation prescribed by s. 22 in respect of a claim to the personal estate of a deceased person or to any share or interest therein is twelve years from the date when the right to receive the share or interest accrued; and that period, and not the six-year period prescribed by s. 21 (2), applies. On the other hand, since an action for account is an action for which a limitation period of six years is prescribed by s. 4 (2), an action for account does not come within s. 21 (2), though the period of limitation is the same.

The right of action referred to in s. 21 (2) is not to be deemed to have accrued to any beneficiary entitled to a future interest in the trust property until the interest has fallen into possession. This proviso applies where property is held on trust for persons with successive interests; and the trustee is protected from actions by remaindermen brought after six years following the falling-in of their interests, subject, of course, to the provisions of s. 21 (1).

Section 21 (3) provides that no beneficiary against whom there would be a good defence under the Limitation Act, 1950, may derive any greater or other benefit from a judgment or order obtained by any other beneficiary than he could have obtained if he had brought the action and the Limitation Act, 1950, had been pleaded as a defence. This subsection, *mutatis mutandis*, reproduces the now repealed s. 94 (2) of the Trustee Act, 1908 (s. 35 (2) and Second Schedule).

It is unnecessary to say that all the foregoing provisions of periods of limitation in relation to trustees have effect subject to the provisions of Part II of the Limitation Act, 1950, providing for the extension of the periods of limitation in the case of disability, acknowledgment, part payment, fraud, and mistake (s. 3).

V.—Claims against Deceased Persons' Estates.

By virtue of the definition of "trustee" applied by s. 2 (1) of the Limitation Act, 1950, the personal representatives of a deceased person are trustees for the purposes of the statute. Though s. 22 is expressly made subject to s. 21 (1), to which reference is made above, the respective applications of s. 21 (1) and s. 22 to actions against personal representatives will depend upon whether proceedings are brought against them as such or as trustees: *cf. Re Oliver, Theobald* v. *Oliver*, [1927] 2 Ch. 323.

Section 22 provides as follows:

> Subject to the provisions of subsection one of the last preceding section, no action in respect of any claim to the personal estate of a deceased person or to any share or interest in such estate, whether under a will or on intestacy, shall be brought after the expiration of twelve years from the date when the right to receive the share or interest accrued, and no action to recover arrears of interest in respect of any legacy, or damages in respect of such arrears, shall be brought after the expiration of six years from the date on which the interest became due.

Thus, any claim by a beneficiary against the executor or administrator (apart from one coming within s. 21 (1)) is barred on the expiration of twelve years from the date on which the right to receive a share or interest in a deceased estate accrued. That date is usually the date of the deceased's death, though it may possibly be postponed, under the common-law rule, to the end of the "executor's year"; otherwise, it is the date of vesting of such share or interest specified by the terms of the will of the deceased, or implied therein by operation of law.

After the expiration of six years from the date on which any interest on any legacy became due, any action against the personal representatives to recover arrears of interest in respect of such legacy or damages in respect of such arrears is barred.

Section 22, in respect of claims against an executor other than for interest, replaces part of s. 40 of the Real

Property Limitation Act, 1833. The section substitutes a twelve-years period for the previously-prescribed twenty-years period. Actions to recover shares on an intestacy were not dealt with by any statute of limitation until the enactment of s. 13 of the Trustee Act, 1883, Amendment Act, 1891, which was replaced by the now-repealed s. 94 of the Trustee Act, 1908.

In the repealed sections of the Real Property Limitation Act, 1833, as in s. 20 of the Limitation Act, 1950, the period was calculated from the date when the right to receive the share accrued, as in the case of money charged on land.

Actions to recover arrears of interest on a legacy fell within the general provisions of s. 42 of the Real Property Limitation Act, 1833, which contained general provisions as to arrears of periodical payments. Such actions are now within the latter part of s. 22 of the Limitation Act, 1950; and the period of six years' limitation is retained.

Section 42 of the Real Property Limitation Act, 1833, applied only to proceedings against personal representatives. Claims by one beneficiary against another were formerly treated as in the nature of actions for moneys had and received, to which the now-repealed Limitation Act, 1623, applied by analogy. Now the expression used in s. 22 ("action in respect of any claim to the personal estate of a deceased person") covers actions by a beneficiary against another beneficiary or purported beneficiary who has been overpaid or wrongly paid: see *In re Diplock, Diplock* v. *Wintle*, [1948] 1 Ch. 465, 507-514; [1948] 2 All E.R. 318, 339-343.

It is to be noted that the term "personal estate," used in s. 22, does not include chattels real (s. 2 (1)).

Claims against deceased persons' estates under the Family Protection Act, 1908, and the Law Reform (Testamentary Promises) Act, 1949, are unaffected by the Limitation Act, 1950, and thus retain their respective periods of limitation.

Under s. 3 (3) of the Law Reform Act, 1936 (as amended by the Limitation Act, 1950), no proceedings are maintainable in respect of a cause of action in tort which has survived against the estate of a deceased person, unless either (*a*) proceedings against him in respect of that cause of action were pending at the date of his death; alternatively (*b*) the cause of action arose not earlier than [two years] before his death and proceedings are taken in respect thereof not later than twelve months after his personal representative took out representation.

The previous limitation period was "twelve months before his death." Now, by virtue of s. 35 (2) and the Second Schedule of the Limitation Act, 1950, the period has been extended to two years before the death of the deceased person.

SUMMARY OF RECENT LAW.

ACTS PASSED, 1951.

16. Shorthand Reporters Amendment Act, 1951.
17. Wool Proceeds Retention Amendment Act, 1951.
18. Marriage Amendment Act, 1951.

AGENCY.

Misrepresentation by Agents. *95 Solicitors' Journal*, 588.

COMPANY LAW.

Provision of Financial Assistance. (F. P. Hennessy.) *25 Australian Law Journal*, 394.

CONTRACT.

The Court and Contracts. *212 Law Times*, 174.

Warranty: Parties to the Contract. *212 Law Times*, 149.

CONVEYANCING.

Estates of Persons dying domiciled Abroad. *101 Law Journal*, 605.

Investment Clauses. *101 Law Journal*, 633.

Transfer into Joint Names of Husband and Wife. *101 Law Journal*, 606.

CRIMINAL LAW.

Evidence—Murder—Conduct of Accused towards Deceased—Alleged Similar Act—Whether Evidence admissible—Murder by Express Malice—Intent to commit "grievous bodily harm"—What constitutes—Misdirection—When Conviction should be quashed—Substitution of Verdict of Guilty of Manslaughter—When Appeal Court should exercise Power—New Trial for Manslaughter only—Crimes Act, 1928 (No. 3664), s. 595 (2). The relations of a murdered or injured person to his assailant, so far as they may reasonably be treated as explanatory of the conduct of the accused as charged in the presentment, are properly admitted to proof as integral parts of the history of the alleged crime for which the accused is on his trial. (*R.* v. *Bond*, [1906] 2 K.B. 389, applied.) In respect of evidence tending to show that an accused person has been guilty of criminal acts other than those with which he is presently charged, it is not competent for the prosecution to tender such evidence for the purpose of leading to the conclusion that the accused is a person likely, from his criminal conduct or character, to have committed the offence for which he is being tried. Such evidence is admissible only if in some other way it tends to establish the Crown case upon some issue which has been raised in substance. (*Noor Mohamed* v. *The King*, [1949] A.C. 182, applied.) (Reasoning in *R.* v. *Yuille*, [1948] V.L.R. 41, doubted.) At the trial of a father for the murder of his infant daughter, the Crown in evidence alleged that the accused had struck her on the head, knocking her off a bed, thus causing her to strike her head on some sharp object as she fell to the floor, and that she died a few days later. Death was not directly due to the blow, nor was it likely to have occurred as the result of the child's head striking the floor. The evidence did not show that any more violence was used than was necessary to knock the child off the bed. Evidence was admitted to the effect that, nearly three years previously, the accused had struck his infant son, who had died about three days thereafter. *Held*, That there was not a sufficient degree of similarity in the acts occasioning death to justify the admission of the evidence in relation to the son's death. An intention to inflict grievous bodily harm is sufficient to constitute express malice, and, therefore, to sustain a charge of murder. The expression "grievous bodily harm" bears its ordinary and natural meaning, and it is a misdirection to tell a jury that it means "some serious interference with bodily health and comfort." (*R.* v. *Ashman*, (1858), 1 F. & F. 88, considered.) As such a misdirection involved an error in law which might have misled the jury as to the intent necessary to constitute murder, it could not be contended that there had not been a substantial miscarriage of justice, and the conviction of the accused for murder was, therefore, quashed. Consideration of whether the power of the Full Court to substitute, for the jury's verdict of guilty of murder, a verdict of guilty of manslaughter, pursuant to s. 595 (2) of the Crimes Act, 1928, should be exercised. Circumstances in which a new trial, on the ground of manslaughter only, should be ordered. *The King* v. *Miller*, [1951] V.L.R. 346 (F.C.).

Indecent Assault on Male Person—Ingredients of Offence—Boy asked to act indecently—Hostile Act by Respondent on Boy's Refusal—Offences against the Person Act, 1861 (c. 100), s. 62. To establish the offence of indecent assault under the Offences

against the Person Act, 1861, s. 62, it is not necessary to prove that the assault was of an indecent nature. It is sufficient if there was an assault accompanied by an indecent motive or other circumstances of indecency. So, where the respondent exposed his person to a boy of fourteen and asked the boy to handle him indecently, and the boy refused and tried to go away, but the respondent caught hold of him and pulled him towards himself, *Held*, That the respondent was guilty of indecent assault under s. 62, as he had performed a hostile act towards the boy accompanied with circumstances of indecency. *Beal* v. *Kelley*, [1951] 2 All E.R. 763 (K.B.D.).

For the Offences against the Person Act, 1861, s. 62, see *5 Halsbury's Statutes of England*, 2nd Ed. 812; and for Cases, see *15 E. and E. Digest*, 752, 753, Nos. *8120*, *8121*, and Digest Supp.

Police Method of Identification. *95 Solicitors' Journal*, 569.

DIVORCE AND MATRIMONIAL CAUSES.

Evidence — Adultery — Standard of Proof — "Satisfied" — Divorce and Matrimonial Causes Act, 1928, ss. 6, 17 (1) (c). Adultery is proved to have taken place between a respondent and intervener if (as in this case) there is more than opportunity alone and there is sufficient evidence to justify the inference that opportunities would be used for misconduct, and if the Court, in exercising its judgment with caution and applying its knowledge of human nature to the circumstances of the case and to the particular respondent, concludes that there is no other solution than that of guilt. (*Wright* v. *Wright*, (1948) 77 C.L.R. 191, followed.) (*Mordaunt* v. *Moncreiffe*, (1874) L.R. 2 Sc. and Div. 374, and *Allen* v. *Allen and Bell*, [1894] P. 248, applied.) (*Ross* v. *Ross*, [1930] A.C. 1, referred to.) *Semble*, The reasons for the judgment in *Ginesi* v. *Ginesi*, [1948] P. 179; [1948] 1 All E.R. 373, are in conflict with the provisions of ss. 6 and 17 (1) (*c*) of the Divorce and Matrimonial Causes Act, 1928. Observations on the question whether, in every case, adultery must be proved with the same degree of strictness as is required to establish a criminal charge. (*Ginesi* v. *Ginesi*, [1948] P. 179; [1948] 1 All E.R. 373, *Gower* v. *Gower*, [1950] 1 All E.R. 804, and *Davis* v. *Davis*, [1950] P. 125; [1950] 1 All E.R. 40, considered.) *Price* v. *Price*. (S.C. Wellington. November 12, 1951. Fell, J.)

Foreign Marriage — Validity — Proof — Necessity for Expert Evidence. In 1937, a ceremony of marriage was performed between the petitioner and respondent in Czecho-Slovakia. Evidence was tendered of this ceremony and of their subsequent cohabitation. No expert evidence was tendered to show whether this ceremony constituted a valid marriage according to the law of Czecho-Slovakia at the time. *Held*, That the degree of proof required by Victorian Courts of the validity of a foreign marriage will vary according to the nature of the proceedings. In proceedings for dissolution of marriage, stricter proof is required than in maintenance proceedings. It is the uniform practice in English Courts to require expert evidence of the validity of a marriage according to the *lex loci contractus*, and this practice should be followed in Victoria. (*Schalkan* v. *Schalkan*, (1897) 14 N.S.W. W.N. 25, and *Menzel* v. *Menzel*, [1916] St. R. Qd. 113, not followed.) (*Cristofaro* v. *Cristofaro*, [1948] V.L.R. 193, and *Spivack* v. *Spivack*, (1930) 99 L.J.P. 52, distinguished.) *Zoubek* v. *Zoubek*, [1951] V.L.R. 386.

Habitual Drunkenness and Failure to support—"Without the means of support"—Payments by Husband insufficient to maintain Wife in His Station in Life—Marriage Act, 1928 (No. 3726), s 75 (b). In para. (*b*) of s. 75 of the Marriage Act, 1928, the phrase "without the means of support" means "without sufficient means of support." The provision is concerned, not with the amount of money a wife may in fact have, but with the husband's persistent failure to perform his matrimonial obligation to maintain his wife. The respondent regularly made payments to his wife, the petitioner, for the support of herself and their two children, but the payments were insufficient to maintain her in his station of life. *Held*, That respondent had habitually left petitioner without the means of support. (*Korth* v. *Korth*, (1913) 33 N.Z.L.R. 290, and *Boundy* v. *Boundy*, [1929] S.A.S.R. 193, followed.) *Eriksen* v. *Eriksen*, [1951] V.L.R. 366.

Variations of Settlements on Dissolution of Marriage. *95 Solicitors' Journal*, 572.

HUSBAND AND WIFE.

Maintenance—Variation of Settlement—Application by Guilty Husband—Considerations to be applied. In 1936, the parties entered into a deed of separation by which the husband covenanted to pay to the wife during their joint lives and *dum casta* the sum of £275 a year tax free. At the time, he was earning £1,550 a year. The wife was not earning, and she contributed nothing towards the settlement. In 1946, the husband's income was reduced to £450 a year, his capital being some £2,500, but he continued the payments under the deed. On January 9, 1950, the wife obtained a decree *nisi* against the husband on the ground of his adultery, which was not of a flagrant character and was the result, and not the cause, of the estrangement between the parties. On May 25, 1950, the husband applied to vary the deed of separation by extinguishing his liability to pay under it. Thereupon, the wife applied to the Court to rescind the decree *nisi* and substitute for it a decree of judicial separation. *Pearce*, J., held ([1950] 2 All E.R. 449) that the wife's application was actuated primarily by considerations of financial gain, refused the application, and, on the husband's application, made the decree *nisi* absolute. In April, 1951, the Registrar recommended a variation of the terms of the deed by a reduction of the annual payments to £75 less tax. *Held*, That, bearing in mind the conduct of the parties, their respective pecuniary positions and contributions towards the settlement, and the fact that continued payment of the original allowance provided by the deed would result in the ultimate impoverishment of the husband and consequent detriment to the wife, the husband was entitled to a variation, and the Registrar's report should be confirmed. (Observations of *Vaughan Williams*, L.J., in *Constantinidi* v. *Constantinidi and Lance*, [1905] P. 271, and of *Hill*, J., in *Prinsep* v. *Prinsep*, [1929] P. 236, applied.) *Jeffrey* v. *Jeffrey*, [1951] 2 All E.R. 805 (P.D. & A.).

As to Principles on which Settlements will Be Varied, see *10 Halsbury's Laws of England*, 2nd Ed. 803-807, paras. 1280-1285; and for Cases, see *27 E. and E. Digest*, 521-528, Nos. *5632-5703*.

LAND SUBDIVISION IN COUNTIES.

Scheme Plan showing Strip of Land marked "Road widening"—Such Land not "proposed road"—Land Subdivision in Counties Act, 1946, s. 9 (3). On the scheme plan of a subdivision in the Heathcote County, the sections facing the Heathcote River were separated from a public road by a strip about 12 ft. in width, marked "road widening." On originating summons, the Court was asked to determine whether the strip of land marked "road widening" was a "proposed road" within the meaning of s. 9 (3) of the Land Subdivision in Counties Act, 1946. *Held*, That the strip of land marked "road widening" was not a "proposed road" within the meaning of that term as used in s. 9 (3) of the Land Subdivision in Counties Act, 1946, as that term was inappropriate to describe land set aside to be an addition to an existing road. *Heathcote County* v. *Sloan*. (S.C. Christchurch. October 24, 1951. Northcroft, J.)

LAW PRACTITIONERS.

Solicitors Audit Regulations, 1938, Amendment No. 3. (Serial No. 1951/260). These Regulations, which come into force on January 1, 1952, amend the Solicitors Audit Regulations, 1938, in the following respects:

(*a*) The monthly lists of trust-account balances are to be sent to the auditor not later than the tenth day on which solicitors offices are open in each month. The existing rule proscribes the first twenty-one days of January and the first fourteen days of every other month.

(*b*) It is made clear that a trust receipt must be issued by a solicitor who receives money as a trustee, although the moneys are not paid into his trust account.

(*c*) An auditor who discovers irregularities in the keeping of a solicitor's trust account is to report them to the District Law Society and the New Zealand Law Society forthwith, instead of waiting for his annual report.

MALICIOUS PROSECUTION.

Plaintiff bound over by Court of Summary Jurisdiction—Competency of Action. On the hearing of an information laid by a Police officer at the instance of a third person, the plaintiff had been ordered by the Magistrate to enter into a recognizance and to find two sureties to keep the peace and be of good behaviour for twelve months, or, in default, to serve one month's imprisonment. In an action by him against the Police officer and the third person for damages for malicious prosecution, *Held*, That, the prosecution having been successful

after the plaintiff had had an opportunity of being heard, no action for malicious prosecution lay, even though the plaintiff was only bound over, and not sentenced to imprisonment or ordered to pay a fine. (*Basébé* v. *Matthews*, (1867) L.R. 2 C.P. 684, applied.) (*Steward* v. *Gromett*, (1859) 29 L.J.C.P. 170, distinguished.) *Everett* v. *Ribbands and Another*, [1951] 2 All E.R. 818 (K.B.D.).

As to the Essentials to the Action for Malicious Prosecution, see *22 Halsbury's Laws of England*, 2nd Ed. 10-13, paras. 11-14; and for Cases, see *33 E. and E. Digest*, 481-483, Nos. *167-181*.

NUISANCE.

Statutory Nuisance: Terms of Abatement Notice and Nuisance Order. *212 Law Times*, 234.

PRACTICE.

Interrogatories—Action for Damages for Malicious Prosecution—Information charging Plaintiff with Crime laid by Police—Interrogatories seeking Nature of Steps taken by Defendants to instigate Prosecution—Such Interrogatories disallowed—Code of Civil Procedure, R. 155. The plaintiff, in an action claiming damages against the defendants for alleged malicious prosecution, alleged that, though the information was not laid by the defendants, they had in fact instigated the prosecution, and did so maliciously and without reasonable and probable cause. The interrogatories which the plaintiff sought leave to administer to the defendants included some which were directed to ascertain whether certain information was given to the Police before the Police laid the information for the crime of which the plaintiff was acquitted. To such interrogatories the defendants objected. *Held*, disallowing the interrogatories objected to, 1. That, in actions for malicious prosecution, interrogatories for the purpose of ascertaining what information a defendant had before he took proceedings should not be allowed. (*Maass* v. *Gas Light and Coke Co.*, [1911] 2 K.B. 543, followed.) 2. That, as the interrogatories objected to were, in effect, intended to establish the information given by the defendants to the Police and the other steps taken by them before the Police laid the information, they were not in so different a position from that of the informants that they could be compelled to answer interrogatories which, as informants, they could not have been required to answer. *Hansard* v. *Attwood and Another*. (S.C. Whangarei. October 30, 1951. Stanton, J.)

Service out of The Jurisdiction. *212 Law Times*, 103.

Supreme Court Amendment Rules (No. 3), 1951 (Serial No. 1951/261). These Rules, which came into force on November 22, 1951, amend the Code of Civil Procedure in respect of the matters set out below:

Rates of Interest.—Rule 305 is amended to reduce the rate of interest on judgment debts, and on debts and legacies payable under an order for accounts, to 5 per cent.; and a similar amendment is made to RR. 446, 447, and 491.

Powers of Registrars.—Rule 419 is amended to extend the existing powers of Registrars at Auckland, Wellington, Christchurch, and Dunedin so as to enable them to exercise in Chambers the jurisdiction of a Judge to consent, on application by executors or administrators under s. 13 (1) of the Public Trust Office Act, 1908, to the appointment of the Public Trustee as sole executor or sole administrator in an estate.

Probate and Administration Forms.—Forms Nos. 36, 39, and 40 (probate and letters of administration) are revoked and replaced by new Forms 36, 39, and 40, with the inclusion of references, where applicable, to the granting of probate and administration by Registrars.

Preparation of Court Documents.—A new R. 597c temporarily modifies the requirements of the Code as to the preparation of Supreme Court documents. The effect is as follows:

(i) For all documents, the margin is reduced to 1 in.; and single spacing is to be used, except between paragraphs.

(ii) For documents covering only one side of a single sheet, quarto paper is to be used where possible.

(iii) Where reasonably stout and opaque paper is used, both sides of each sheet (including, if necessary, the inside of the endorsement sheet) are to be used, with the lines registering back to back; and, where the document covers only one side of a single sheet, the endorsement is to be on the back of that sheet.

SALE OF GOODS.

Payment—Confirmed Credit—Time for Opening Credit. Sellers contracted to sell 3,000 metric tons of Brazilian groundnuts for shipment from Brazil to Genoa of the first 1,500 tons in February, March, or April, 1949, and of the second 1,500 tons in March, April, or May, at sellers' option, payment to be by the opening of a confirmed, irrevocable, divisible, transmissible, and transferable credit opened in favour of the sellers and utilizable by them against delivery of certain documents. The sellers guaranteed the necessary Brazilian export licence and the buyers the necessary Italian import licence. The export licence was obtained on February 9, 1949, and the sellers so advised the buyers on that day by cable, giving the necessary particulars and requesting them to open the credit. The import licence was obtained on March 4. The buyers only made the credit available on April 22. *Held*, That the credit must be opened and confirmed, not when the sellers were ready to tender the documents or took steps to ship the goods, but, if reasonably practicable, within such time as would enable the sellers to ship at any moment of their permissible period. In the present case, the credit should have been made available, in the case of the first shipment, at such time as it would have been available if the buyers had exercised reasonable diligence to make it available after February 9, when the particulars were supplied to them by the sellers, and, in the case of the second shipment, by March 1, or so soon thereafter as they reasonably could secure that it was opened. *Pavia and Co., S.P.A.* v. *Thurmann-Nielsen*, [1951] 2 All E.R. 866 (K.B.D.).

As to Confirmed Credits, see *29 Halsbury's Laws of England*, 2nd Ed. 213, para. 283.

TENANCY.

Dwellinghouse—Tenant's Living-quarters on Upper Floor of Business Premises—Room in Another Building used as His Bedroom—Former Premises comprising His "dwellinghouse"—Tenancy Act, 1948, ss. 2 (1) (4), 24 (1) (f). In 1939, the appellant became the tenant of an upper room in a building in the business portion of Willis Street, Wellington, used generally for commercial purposes. There were shops on the ground floor and rooms on the upper floor, let for the most part as offices. The room was 20 ft. by 20 ft., and it had been subdivided by the tenant into three small rooms, one of which he used as a kitchen. From the commencement of the tenancy up to the end of the year 1948, he used these premises for all purposes as a home. In 1948, the Wellington City Council forbade him to use the tenement for sleeping quarters. He then rented a room 7 ft. by 7 ft. a few blocks further up Willis Street, which he had since used as a bedroom. Otherwise, the appellant had continued to use the room first mentioned as the place where he cooked and had his meals, as a sitting-room where he had his piano and his books, as a place of entertainment of his guests, and generally for the housing of his effects. The landlord's claim for possession was based alternatively on s. 24 (1) (*f*) or s. 24 (1) (*h*) of the Tenancy Act, 1948. On appeal from the decision of the Magistrates' Court giving the landlord an order for possession, *Held*, allowing the appeal, That, as the place where the tenant spent most of his time during waking hours, away from his work, was the place where he lived or dwelt, that place was his "dwellinghouse" within the definition of that term in s. 2 (1) of the Tenancy Act, 1948; and, as such, it was within s. 24 (1) (*f*) of that statute. *McCarthy* v. *Preston*. (S.C. Wellington. October 29, 1951. Northcroft, J.)

WILL.

Residuary Gift—Double Gift—Charity—Gift to "St. Peter's Church Staines." By his will, dated November 14, 1946, which he wrote on a printed will form, a testator, who died on March 31, 1950, made certain bequests and continued: "The residue of my estate to be divided equally between St. Peter's Church Staines and Oxford University. My executors may postpone realization of any assets until necessary for the final distribution of the estate." There followed the printed words "I devise and bequeath all my real and personal estate not hereby otherwise disposed of unto," and the testator had himself added the words "my executors to deal with at their discretion." *Held*, (i) That the two gifts relating to the residue of the testator's estate were not irreconcilable, but the first gift carried the whole of the testator's estate not already disposed of and, therefore, provided that the first gift was fully effective, the second gift was inoperative. Statement of principle in *Theobald on Wills*, 10th Ed. 532, criticized. (ii) That, notwithstanding that no person or corporate body was named to receive it, the gift to St. Peter's Church, Staines, was a valid charitable gift to be applied for church purposes—*i.e.*, purposes connected with the services of the church in question. *Re Gare (deceased), Filmer and Another* v. *Carter and Others*, [1951] 2 All E.R. 863 (Ch.D.).

NOTICE TO MORTGAGOR OF DEFAULT.

Comments in Support of O'Brien v. Skidmore.

By A. L. TOMPKINS.

I feel it is only fair to the learned Judge concerned that some reply should be made to the strictures made by Dr. H. F. von Haast (*Ante*, p. 268) on *O'Brien* v. *Skidmore*, [1951] N.Z.L.R. 884. It is submitted that this case was rightly decided. Section 3 of the Property Law Amendment Act, 1939, was, it is submitted, passed to protect mortgagors from any exercise of a power of sale or entry into possession or any calling up of the principal sum by reason of any default unless the mortgagor had an opportunity of remedying the default upon one month's notice. The section was not intended to prevent a mortgagee from suing a mortgagor for his quarterly interest payments, for example, or to prevent a mortgagee from suing the mortgagor when the principal sum falls due. The section is, however, intended to prevent the mortgagee from going any further than that by calling up the mortgage before due date or exercising his power of sale without notice given.

In construing the section, it must be split into its component parts. It has two distinct divisions, the first dealing with the power of sale and entry into possession, and the second dealing with calling up principal moneys before the due date by reason of default. The portion of subs. 1 of the section dealing with the first part is as follows:

> no power to sell land or to enter into possession of land conferred by any mortgage shall become or be deemed to have become exercisable . . . by reason of any default . . . in the payment of any moneys so secured or in the performance or observance of any other covenant expressed or implied in the mortgage unless and until the Mortgagee serves . . . notice . . .

This part of the section clearly forbids the exercise of any power of sale, either for non-payment of interest or non-payment of principal or breach of any other covenant, until notice is given.

The second part of subs. 1 of the section is as follows:

> no moneys secured by any mortgage of land shall become or be deemed to have become payable, by reason of any default . . . in the payment of any moneys so secured or in the performance or observance of any other covenant expressed or implied in the mortgage unless and until the Mortgagee serves . . . notice . . .

This portion of the section deals only with moneys *becoming payable* by reason of a default. Examples would be principal moneys falling due by reason of default in payment of interest for so many days, or default in payment of rates or first mortgage interest or other moneys, and other similar cases. It also, of course, covers moneys falling due by reason of breach of covenant generally, such as failure to insure, failure to keep in repair, failure to farm, and so on. It cannot possibly cover the interest payments themselves, or the principal sum when it falls due on the due date, because those moneys do not fall due because of any prior default at all. They fall due because the mortgage provides that they fall due on those particular dates. The mortgagor is still protected against an exercise of the power of sale or against a premature calling up of the principal sum, and he is unprotected only in that the mortgagee may pursue his ordinary civil remedies in the Courts for recovery of interest after the due date, or of principal after the due date. Dr. von Haast states in his article, at p. 268:

> If the learned Judge's reasoning is correct, then it should also not prevent a mortgagee from exercising his power of sale when default is made in payment of principal on the date the mortgagor covenanted to pay the same.

Section 3 certainly prohibits this, because it says:

> no power to sell land . . . shall become . . . exercisable . . . by reason of any default . . . in the payment of any moneys so secured . . .

The power of sale cannot arise until there has been default in payment of the principal sum for the period specified in the mortgage. Obviously, therefore, a mortgagee cannot sell for default in payment of principal until he gives notice, &c. This does not in the least conflict with the decision in *O'Brien* v. *Skidmore*, [1951] N.Z.L.R. 884, in which the learned Judge says, at p. 886:

> It seems to me (i) that on the due date of payment (which in this case is fixed by the demand) the principal money secured by a mortgage on land becomes due, *not by reason of any default*, but because of the covenant to pay.

If the decision in *O'Brien* v. *Skidmore* is wrong, then no mortgagee can sue for interest without first giving a month's notice. Every time a small interest payment is in arrear, and notwithstanding that the mortgagee does not wish to exercise a power of sale, he must instruct his lawyer to give a month's notice under s. 3 of the Property Law Amendment Act, 1939, before he can sue a mortgagor for that payment. A wily mortgagor could put the mortgagee to endless costs and expense by making no interest payment until after he had received, in respect of each payment, a month's notice under s. 3. He would be under no risk, because, so long as he remedied the default within a month, the mortgagee could do nothing further. For the above reasons, as well as those so ably set out by the learned Judge in his judgment, it is submitted that *O'Brien* v. *Skidmore* was correctly decided, and I suggest it will stand the test of time.

Shakespeare and The Bench

Menenius: You know neither me, yourselves, nor any thing. You are ambitious for poor knaves' caps and legs: you wear out a good wholesome forenoon in hearing a cause between an orange-wife and a fossat-seller; and then rejourn the controversy of threepence to a second day of audience. When you are hearing a matter between party and party, if you chance to be pinched with the colic, you make faces like mummers; set up the bloody flag against all patience; and, in roaring for a chamber-pot, dismiss the controversy bleeding, the more entangled by your hearing: all the peace you make in their cause is, calling both parties knaves. You are a pair of strange ones. (William Shakespeare, *Coriolanus*, Act II, Scene 1.)

IMPROVEMENTS IN LEGAL EDUCATION.

And Incidentally Public Relations.

By J. C. WHITE, LL.M.

The publicity given to the suggestion of Dr. E. N. Griswold, Dean of the Law School at Harvard University, who has been on a visit to New Zealand, that a central Law School at Victoria University College would be more satisfactory than the four Law Schools raises an important question.

Also very interesting were the comments on Dr. Griswold's opinion which were published in the local press. First there was a practical view from the Victoria University College Students' Association, expressed through its Public Relations Officer; secondly, there was a forthright constructive statement by the Principal of Victoria University College, Dr. Williams; and, lastly, there was a sentence noting that the President of the New Zealand Law Society had no comment to make.

No one would criticize Mr. Cunningham for making no comment as President, but this incident emphasizes once again the need for action by the New Zealand Law Society in the matter of public relations. The Victoria University College Students' Association has a Public Relations Officer who is able to comment on a matter of vital interest to the law students, but the profession, which undoubtedly has views on the policy of legal education, has no voice ready to speak when a matter such as this becomes a live issue. This apparent failure in the machinery of our Law Society was referred to in a remit at the Legal Conference in Auckland in 1949, but the matter has been under investigation by a sub-Committee of the Council since then. Now, in 1951, the lack of a public relations system is again brought home to us.

And what of Dr. Williams's proposal that a central Law School of advanced legal studies should be set up in Wellington, while retaining the present Law Schools? It would be interesting to know whether the New Zealand Law Society and the Council of Legal Education have anything to say on this topic.

The suggestion made by Dr. Williams seems to have great merit. It would certainly be a method of lifting the teaching of law in New Zealand out of a somewhat earthy rut. It would give scope to the abler students, and it would permit our Professors to fulfil their proper function if they were freed from the present methods. For far too long our Law School at Victoria University College has employed men with the highest qualifications as mere dictaters of notes, because the system as it is leaves them no time for anything else. The basis on which we work has been to get through the syllabus and cover the ground, so that the student has a mass of writing from which to cram for his final examinations. Efforts have been made by some Professors to do more than this, but in the main it is fair to say that that is the atmosphere in which Professors and students work. It is an atmosphere on which the Professor has no real opportunity to use his talents to the best advantage.

Is such a system likely to give us more than mediocrity? If we are honest with ourselves, can we say that our system of legal education has done more than that? Can the best of our lawyers really look back and pay tribute to the lead they had from great Professors? Does the profession or the public ever look to the University for a lead on any theory or principle of law?

It may be that the idea of a central Law School of advanced studies at Victoria University College may not be practicable, because law-clerk students must be able to take their degrees in the four main centres, and other centres may well deplore the suggestion that all students for LL.M. degrees must go to Wellington. There seems to be no reason, however, why some of the improvements inherent in Dr. Williams's suggestion should not be carried out now. Others, with much greater knowledge of the subject and longer experience, can probably speak with more authority, but I feel emboldened to raise this question as one who still remembers the nightmare of our system as a student, and as one who has some slight knowledge as a one-time lecturer and examiner. From that experience I would make a plea which Dr. Williams could hardly make himself—namely, that the Professors of Law should be treated as such, and should be free to give of their talents. If notes must be dictated, let lecturers give them, or, better still, let them be cyclostyled or printed, and distributed as supplementary to a text-book. Students neither need nor want to be spoon-fed. They would no doubt much prefer to read the printed word, rather than have to translate their own handwriting, which deteriorates under this system from year to year. What students require, I suggest, is guidance and a lead in the art of understanding law, logical analysis, and the application of principles to facts. That this is so practitioners who mark students' opinions will agree.

The change, I suggest, would not overburden the students, nor, on the other hand, would it make their lot too easy; and the Professors would be able to lecture as required on selected parts of the syllabus, especially those affected by new decisions and changes in the law. They would thus be able to keep in touch with developments, and lead the thinking of the rising generation of New Zealand lawyers, at the same time making a contribution to law which we cannot expect unless they are freed from the deadening effect of our present teaching system of dictating notes and covering—or trying to cover—the ground. Such a proposal should not be considered revolutionary. On the contrary, it would no doubt bring to our system of legal education more of the attributes of a true University than we enjoy at present. But this is a matter on which someone who has experienced our own system and also attended an overseas University would be able to express an authoritative opinion.

Another change which I would venture to suggest is that for most professional examinations students should be permitted to take relevant statutes, and perhaps a text-book, into the examination-room. This would place examinations on a more sensible footing, and would help to bring the study of law at the University into touch with reality, calling for the ability to apply principle to facts without superimposing on that study

a useless memory test, which limits and frustrates what appears to be the main purpose of the course.

It would seem that we must develop our system to suit ourselves, as Dr. Conant, another great American educationist, said when addressing the Senate of the University of New Zealand. There is no reason why we should be copyists. We want to keep the system of law clerks studying and "practising" the law at the same time, but we should aim to improve their standard and to consider the interests of our abler students. In short, we need a straightforward LL.B. degree which can be obtained through hard work by the student of normal intelligence who wishes to practise law. The standard is set by the examinations, and the students would be helped, not hindered, by a freer form of lecturing by the Professors, while the horizon for abler students would be widened, and there would be every prospect of our LL.M. degree becoming one of real merit.

ESTATES OF DOMICILED NEW ZEALANDERS DYING ABROAD.

Some Unusual Problems of Administration.

By C. B. Boock, LL.B.

Recently a tragic aeroplane crash occurred in Italy. Aboard the aeroplane were, among others, three domiciled New Zealanders—a husband, his wife, and their unmarried daughter. The wife and daughter were killed instantly, but the husband survived for six days. Two children, both minors, had remained in New Zealand.

As can be imagined, there arose peculiar problems in connection with the administration of the estates, all of which were substantial. These difficulties, which could, under modern conditions, confront the average practitioner, were as follows:

1. In applying for the grants of probate or letters of administration, a preliminary matter to be determined was the correct method of establishing the fact of death. Where death itself cannot be proved, as is well known, it is possible to apply to the Court for leave to swear to death. A convenient authority on this point is *In re Harris*, [1916] N.Z.L.R. 967, in which Denniston, J., stated, at p. 968:

> The practice in such cases requires . . . that the applicant or some other person must swear to the fact of the death and not merely to his or her belief. If the applicant hesitates to swear to the fact it becomes necessary to lay the evidence before the Court, and by motion, take its direction upon the fact. If the Court be satisfied that the evidence leads up to a reasonable presumption of the death it will grant probate or administration as the case may be, and will give permission to the applicant to swear that the person died on or after the last date given of his existence.

It appears from the cases in which leave to swear to death has been granted that this procedure should be used only where there is no more than a presumption as to death. This view is confirmed in *Tristram and Coote's Probate Practice*, 19th Ed. 412, where it is said that leave to swear to death is necessary

> where the applicant for a grant cannot swear in his oath to the death of the deceased, *and* there is no direct evidence of his being dead, &c., but only evidence from which his death may be presumed to have taken place.

The paragraph proceeds to give two examples of such evidence—*viz.*, absence for a prolonged period, and non-arrival of a ship. In *Harris's* case, the only evidence of the death of the deceased (a soldier who was killed in action at Gallipoli) was contained in communications from the Minister of Defence and Base Records. Presumably a little more evidence—*e.g.*, an affidavit by a fellow-soldier—would have justified dispensing with the necessity for applying for leave to swear to death.

Where there is direct evidence of death—*e.g.*, the existence of a body—it is necessary to prove death as provided in the Code of Civil Procedure. The fact of death is in such a case provable, but it is then necessary to establish that the deceased person was the same person whose will or property is the subject of the application for probate or letters of administration. In the cases under discussion, there was ample evidence that a number of people died in the crash. There were sufficient remains for the Italian authorities to make identifications, but such identifications were, as we shall see, insufficient to comply with the provisions of the Code.

2. There was an obvious difficulty in complying with that part of R. 518 which reads as follows:

> if such person [the executor] shall be unable to prove of his own knowledge the death of the testator, the second paragraph of the said form [Form 34] shall be omitted, and the death of the testator shall be proved by some person acquainted with the fact by an affidavit in the form of the first two paragraphs of the said Form No. 34.

The first paragraph of Form 34 is a statement that the deponent knew the deceased and that the deceased resided or was domiciled in a certain place. The second paragraph recites that the deceased died on or about a certain date "as I am able to depose from . . . ," the deponent usually stating that he saw the deceased die, or that he saw the body after death, or that he attended the funeral. It was clear that in the present cases no such statement could be made by anyone in New Zealand. Moreover, although there might have been someone in Italy who could have made such a statement, there was no such person there who knew the deceased personally, thus making it impossible for him to depose as to the matter contained in para. 1 of Form 34.

The only alternative was to obtain an affidavit by someone in New Zealand who had been personally acquainted with the deceased and who had every reason to believe that their deaths had in fact occurred at the crucial time and place. The Court indicated that, in the circumstances, it would accept the best evidence available, but stressed that it was essential for the deponent to swear that to the best of his knowledge and belief the person who died in Italy on a certain date was, in the case of the husband and wife, the same person named and described in the will the subject of the motion for grant of probate, or, in the case of the daughter, the same person whose estate, effects, and

credits were the subject of the motion for grant of letters of administration. It so happened that ample evidence of such a nature was available. A brother of the deceased husband was able to depose that he knew the family well; that he knew of their intended travels; and that he had received regular correspondence from them. Copies of relevant letters were annexed to his affidavit. In particular, a statement in a letter written from Paris by the wife the evening before the family left on the ill-fated journey proved invaluable, the statement being: "Tomorrow we leave for Rome." Further exhibits were a letter from the airline company giving details of the accident, a photostat copy of the list of passengers, and death certificates issued in Italy, in which it was stated that death occurred following an air accident. All this information satisfied the Court beyond all reasonable doubt that the deceased had died in Italy, and the grants were accordingly made. This was an instance where the occasional need for flexibility of the rules relating to administration was recognized by the Court.

3. As the daughter left no will, and as both her parents were dead, there was some difficulty in determining the proper person or persons to apply for letters of administration of her estate. Although no one has any absolute right to administration of an intestate estate, the Court usually follows the practice of making a grant to the next-of-kin. The Court may, however, in certain cases pass over the person normally entitled to a grant, as was recently indicated in *In re Egen*, [1951] N.Z.L.R. 323, where the Court held that, if the Public Trustee applied for administration of the estate of the deceased, who had left a widow and three infant children, neither the widow nor the Public Trustee would have any prior right to a grant, which would be made in the Court's discretion. In the case in point, there was no reason for any application by an outsider.

At the time of the daughter's death, her *sole* next-of-kin was her father, who survived her for only six days, he being entitled to succeed to the whole of her estate. When he died, the daughter's estate became distributable as part of his estate to the two surviving children. The fact that the daughter's estate ultimately reached them was solely by virtue of the father's will. It could not matter that, had the father predeceased the daughter, her estate would still have gone to the children under the rules of intestacy. The fact remained that he did *not* predecease her, and, if he had left his estate to someone other than his children, the latter would, under the will, have had no claim to their sister's estate. Thus, the only persons who had any direct interest in the daughter's estate were the executors of her father's estate. It is true that, after their father's death, the brother and sister became the *de facto* next-of-kin of their sister, but, as they were both minors, they could not apply for administration. It is interesting to note in passing that apparently in New Zealand a grant of administration *durante minore aetate* is available only where the minor has been appointed an executor in a will, not where the next-of-kin of an intestate deceased is a minor. The only other near relatives of the daughter were a grandmother and various uncles and aunts. In view of all the circumstances, it was clear that the persons best fitted to apply for administration of her estate were the executors of her father's estate, to whom the Court duly granted administration.

It is to be observed that this was not the case of the executors of an *administrator* applying for administration, as the title of an administrator is not effective until he is appointed by the Court. If such an appointment had been made, then, of course, a grant of letters of administration *de bonis non* would have been required.

4. It was inevitable that, because of the order in which the deceased died, death duty would be payable three times on a third of the wife's estate. As both the wife and daughter died together, the latter was deemed to have survived the former by virtue of s. 6 of the Property Law Amendment Act, 1927. Under the wife's will, everything was left to her children in equal shares; as we have already seen, the whole of the daughter's estate went to her father, whose will provided for a life interest in favour of his wife, with remainder equally between his children living at his death. Thus, a third of the wife's estate fell into her daughter's estate, which in turn fell into her father's estate. Hence the triple duty.

A common form of will bequeaths the estate to the testator's spouse, with the proviso that, if the latter "predeceases me or perishes in the same disaster as myself or dies within fourteen days after my death," then the estate shall be divisible among such of the testator's children as are living at the testator's death, subject, of course, to the usual substitution clause.

In this age of air travel, it is to be regretted that accidents and fatalities are inevitably associated with such means of travel, and that, if, despite all precautions, an aeroplane does crash, the chances of survival for any passenger are not great. Members of a family often tend, not unnaturally, to keep in close contact, and are therefore likely to travel together. Practitioners might, therefore, care to give serious consideration to ensuring that the State is not presented with more than its fair share of death duty, the suggestion being that, when drafting a bequest to the child of a testator, the draftsman word the bequest in such a manner that it cannot vest unless and until the child survives the testator for a given period. Such a disposition could be expressed in a manner similar to the following:

> I give devise and bequeath the whole of my estate . . . unto my wife should she survive me for a period of fourteen days and in the event of her failing so to survive me unto such of my children as shall survive me for a period of fourteen days [and attain the age of twenty-one years.]

The Judge

These, then, are those faults which expose a man to the danger of smiting contrary to the law: a Judge must be clear from the spirit of party, independent of all favour, well inclined to the popular institutions of his country: firm in applying the rule, merciful in making the exception: patient, guarded in his speech, gentle, and courteous to all. Add his learning, his labour, his experience, his probity, his practised and acute faculties, and this man is the light of the world, who adorns human life, and gives security to that life which he adorns. (Sydney Smith, *The Judge that Smites Contrary to The Law* (1824).)

NEW ZEALAND LAW SOCIETY.

Meeting of Council.

A meeting of the Council of the New Zealand Law Society was held on September 7, 1951.

The following Societies were represented: Auckland, Messrs. C. J. Garland, M. R. Grierson (Proxy), J. B. Johnston, and H. R. A. Vialoux; Canterbury, Messrs. A. C. Perry and G. C Penlington; Gisborne, Mr. W. C. Kohn; Hamilton, Mr. G. G. Briggs; Hawke's Bay, Mr. L. W. Willis; Marlborough, Mr. A. C. Nathan; Otago, Messrs. N. W. Allan and G. N. Lloyd (Proxy); Southland, Mr. G. N. B. French; Taranaki, Mr. R. D. Jamieson; Wanganui, Mr. N. M. Izard; and Wellington, Messrs. E. D. Blundell, W. E. Leicester (Proxy), F. C. Spratt, and C. A. L. Treadwell.

Mr. A. T. Young (Treasurer) was also present.

The Vice-President (Mr. J. B. Johnston) occupied the chair.

Apologies for absence were received from Messrs. W. H. Cunningham, J. K. Patterson, and C. M. Rout.

The President.—The Council resolved that a message of sympathy be sent to the President and the hope expressed that he would make a speedy recovery.

International Bar Association.—The following is an extract from a bulletin issued by the Programme Committee concerning the Conference convened by the Inter-American Bar Association to be held at Montevideo from November 22 to December 3, 1951, to which all members of the International Bar Association were invited:

"This bulletin has been issued to show the great interest that exists for the topic of Judicial Assistance, and to stimulate submission of reports by other members of the profession. Member Organizations are urged to co-operate.

"The Programme Committee is not only interested in being informed of the existing rules and regulations in the various countries and treaties which have been entered into, but would also like to know whether the system as set up has worked satisfactorily; and if not, the character and trend of the complaints."

It was resolved that Mr. Treadwell should forward a report giving the information required by the Programme Committee.

Tenancy Act, 1948, s. 15.—It was resolved that the Auckland report be adopted and that the Standing Committee be asked to make representations accordingly. The Auckland report reads as follows:

"The New Zealand Law Society has requested the views of District Societies as to the amount of rent which should determine a general right of appeal from the Magistrates' Court to the Supreme Court in cases where the fair rent is in issue. It is mentioned that the right of appeal may be determined by the amount of rent claimed or the amount awarded by the Magistrate. It has also been pointed out that a landlord owning a block of flats where the aggregate rents exceed by a considerable sum the rental which determines the right of appeal may be debarred from exercising this right because the rents of the individual flats are not of a sufficient amount to enable him to appeal. So far as procedure is concerned, it has been suggested that the present system (where the Supreme Court relies on the Magistrates' notes of evidence) is not altogether appropriate in these cases.

"Prior to the legislation of 1950, the law regarding applications for the fixation of rents was as follows:

"(*a*) The Magistrates' Court dealt with all applications where a dwellinghouse was concerned, or (in other cases) where the basic rent did not exceed £525.

"(*b*) The Land Valuation Court had jurisdiction where licensed premises were concerned.

"(c) The Supreme Court had jurisdiction in all other cases.

"(*d*) There was no right of appeal from the Magistrates' Court to the Supreme Court.

"(*e*) There was, however, an appeal from the Supreme Court to the Court of Appeal where the basic rent or fair rent exceeded £525.

"On June 16, 1950, this Society recommended to the New Zealand Law Society that there should be a general right of appeal from an order of the Magistrates' Court fixing a fair rent in all cases where the rent exceeds, say, £100 per annum, although it was preferred that there should be a general right of appeal in all cases. It was also considered that the provisions of ss. 13 and 15A of the Act introduced by s. 57, 1949, No. 51 (s. 13 providing that no costs are to be payable to the successful party, except in special circumstances), should be repealed.

"On August 15, 1950, this Society further recommended to the New Zealand Society that the procedure on appeals from orders fixing fair rents should be the same as what it was then understood would in future be followed on ordinary appeals from the Magistrates' Court—namely, that the appeal would be decided on the notes of evidence taken by the Magistrate, subject to the power of the Supreme Court to hear additional evidence or to rehear the whole case.

"Since these recommendations were made, the law has been amended in the manner following:

"(*a*) Licensed premises are excluded from the provisions of the Tenancy Act.

"(*b*) The Magistrates' Court now has exclusive original jurisdiction in all cases, irrespective of the amount of the basic rent or the amount of the rent claimed.

"(*c*) An appeal lies to the Supreme Court where the fair rent or the basic rent exceeds £525 per annum.

"(*d*) There is no appeal from the Supreme Court to the Court of Appeal.

"The recent amendments to the law have been considered in the light of the previous recommendations made by the Society. In the view of the Council, there should be a right of appeal from the Magistrates' Court to the Supreme Court in all cases where the fair rent or the basic rent exceeds £100, and in any other case with the special leave of the Magistrates' Court. This would overcome the difficulties which have been mentioned. It is also considered that there is no good reason why the right of appeal from the Supreme Court to the Court of Appeal should be taken away in cases where the fair rent or the basic rent exceeds £525 per annum.

"With regard to the form of the appeal, it is thought that the position is adequately met by the recent amendment to the Magistrates' Courts Act. There will be cases where the Magistrates' notes of evidence are sufficient. In other cases, the Supreme Court may in its discretion rehear the whole or any part of the evidence.

"Finally, the Council is still of the opinion that there is no reason why ss. 13 and 15A of the Tenancy Act should be retained."

Dominion Legal Conference.—Of the ten replies received from Societies, the majority were in favour of holding the Conference triennially. The Council resolved that the Dominion Legal Conference be held triennially, the next Conference to be held in 1954.

Proposed Elimination of Latin from Law Syllabus.—The following letter was received from the University of New Zealand:

"Your letter asking that Latin be made an optional unit through the Law Syllabus will be submitted to the Council of Legal Education at its next annual meeting. No doubt you will realize that if a regulation were to be introduced it would not now become effective until January, 1953."

The Minister of Education wrote as follows:

"I am very grateful to you for the letter which you were good enough to send me on June 18 in which you advise that the Society has reached a conclusion with regard to Latin as a subject for Law Professional Examinations.

"I agree in every respect with the view which the Society has reached and I hope that before very long the matter will be decided on by the Council of Legal Education along lines similar to those expressed by the Society. It is good to know, also, that the University of New Zealand has quite recently reached a decision which disposes quite satisfactorily of the claims that were made by ex-service law students for special consideration with regard to Latin."

The Chairman drew attention to the fact that the regulation, if introduced, would not take effect until 1953.

It was resolved that the Standing Committee should make representations to the University with a view to bringing the change of syllabus into effect at an earlier date.

(*Concluded on p. 384.*)

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Drunken Drivers.—In the appeal at Wellington of one Daniel Reedy, a cartage contractor who, on a second offence of being intoxicated in charge of a motor-vehicle, was sentenced to fourteen days' imprisonment and his licence cancelled for three years, it was contended that, as his licence had not been cancelled at all on the first occasion, owing to special circumstances, the sentence upon the second was too severe and the statutory requirement of a longer disqualification did not apply. In dismissing the appeal upon both points, Cooke, J., made some observations with the aptness of which no one can disagree:

> It is painful to see a respectable citizen go to gaol, but, in my judgment, it is essential to bear in mind that conduct such as that to which the appellant has pleaded guilty is a direct and serious danger to the lives and safety of other people, and particularly children.

In New Zealand, up to the end of September, there has been an increase of over 30 per cent. in the fatality rate over the corresponding period last year—an increase which is statistically far beyond that of the relative increase in motor-vehicles and traffic. It is reported that for each fatality there are in addition approximately twenty people who suffer injury in the toll of the road. This situation is not confined to this country: accidents on the highway are costing the United States of America 100 persons a day, and England 100 persons a week, while Australia "is suffering from the greatest road carnage in history." In France, provision has now been made for the cancellation for life of the licences of drunken drivers. Here, the investigations of the Commissioner of Transport show that liquor is in evidence in one out of every three fatal accidents. In the humble opinion of Scriblex, Courts in this country do not make a sufficient differentiation between the drunken driver and the person who, curled up in a drunken sleep in the back of his car, is technically in charge of it. If the latter is going to lose his licence even if the evidence points to his disinclination to drive the vehicle, at least until he is fit to do so, every incentive is given him to attempt to drive to some other place rather than to remain where he is. This is, however, only one phase of the major problem which is involved in the expansion from year to year of the flow of motor transport, now so much an inherent part of our national life and economy.

The High Cost of Sin.—While not removed, like jactitation of marriage, into the limbo of forgotten actions, breach of promise of marriage has, with the emancipation of marriage, begun to assume an unfashionable, if not dodo-like, appearance. The discarded maiden no longer wilts at home, and prefers a return to employment rather than the terrors of domesticity. Nevertheless, the chivalry of a Victorian jury is by no means dead, as is instanced in *Dunhill* v. *Wallrock*, in which they awarded against a seventy-year-old defendant, and in favour of a forty-five-year-old widow, the sum of £20,000. The horror of the repudiation by the defendant of the contract to marry, after an engagement which had lasted for over five years, was intensified by the fact that she had permitted intimacy upon the strength of the promise, although the deep wound to her feelings may well have been lessened by the large sums of money which she extracted from her elderly and carnal suitor. It was claimed that the performance of the promise was fixed for a time when all the defendant's children would be settled in life, but the defendant, who did not give evidence because of the state of his health, denied the promise, and asserted through cross-examination that the lady had always had the unchanged status of a paid mistress. Although Singleton, L.J. (with whom Morris, L.J., and Harman, J., agreed), considered that the wrong to the plaintiff might have been deeper, since throughout the trial imputations had been cast upon her character, he held that the jury were not called on to fine the defendant, and that damages were intended as compensation for the breach of contract and the harm done, and must bear some relation to these two things. The sum of £20,000 did not seem to the Court of Appeal to bear any relation to the loss suffered or the wrong done; and a new trial was ordered, limited to the quantum of damages.

Hungry Solicitors.—In *Bentleys, Stokes, and Lowless* v. *Beeson* (*Inspector of Taxes*), [1951] 2 All E.R. 667, the partners in the appellant firm of solicitors had spent moneys in entertaining clients to lunch or dinner on occasions when professional advice was given. This expenditure was charged up to overhead. Roxburgh, J., has now held that it was wholly and exclusively laid out for the professional purposes of the appellants, and the fact that it involved hospitality did not make it less exclusively an expenditure for a business purpose. The fact that the partner who entertained the client himself derived a degree of gratuitous sustenance was immaterial—a necessary incident, as he would not sit eating and drinking nothing while the guest ate and drank to his heart's content. Even a lawyer must eat, but to do so virtually at the expense of the Income Tax Department makes the repast truly epicurean.

Separation Agreement.—Parties intending to separate should give heed to an aphorism attributed to Samuel Goldwyn, of film fame. "A verbal agreement," he says, "isn't worth the paper it's written on."

Slipping Note.—The recent outcrop of slipping cases (*Donohue* v. *Union Steam Ship Co. of New Zealand, Ltd.* [1951] N.Z.L.R. 862 (fish-droppings) and *Union Steam Ship Co. of New Zealand, Ltd.* v. *Boynton* (gum-copal) in the Court of Appeal, and *Hodge* v. *W. D. and H. O. Wills* (*N.Z.*), *Ltd.* (floor-moppings) before Gresson, J.), reminds Scriblex of several (before de-registration days) involving watersiders who attributed their slipping in refrigerated trucks to pieces of fat, mud, slush, and other icy products carelessly strewn about by the freezing-workers who had loaded the trucks. In one of these cases, the plaintiff was asked where two of his mates were when his accident occurred. "They were spelling," he said. "Oh," replied counsel, caustically, "no one would expect *them* to slip." "Not if they were well educated," observed Cornish, J., brightly, "and had a good ear for sound."

NEW ZEALAND LAW SOCIETY.

(*Concluded from p. 382.*)

Joint Family Homes.—Two letters, one from the Wellington Society and the other from the Nelson Society, were referred to the Conveyancing Committee, which reported as follows:

"1. *Personal Liability of Joint Owners under Mortgage executed by One of them before Issue of Certificate.*—From inquiries made by the Committee it appears that, although the form of memorandum of mortgage used by most solicitors contains a covenant by the mortgagor to obtain a deed of covenant with the mortgagee from a transferee of the mortgaged property, few of these covenants are drawn widely enough to entitle the mortgagee to demand a deed of covenant from a person who becomes a joint owner of the mortgaged land by means of an application under the Act.

"The Committee ventures no opinion on whether the applicant for a joint family home certificate in respect of land subject to a mortgage is entitled to an indemnity under s. 88 or any other provision of the Land Transfer Act from the person becoming a joint owner pursuant to the application.

"If the mortgagor of land subsequently registered as a joint family home should die, it would appear that the estate of the mortgagor against which the mortgagee would have recourse under the personal covenant of the mortgagor would be reduced by the value of the joint family home which would not form part of the estate of the mortgagor, and that therefore the value of the personal covenant might be decreased by the granting of a family home certificate.

"The Committee considers that, if the Act remains in its present form, all mortgage forms are likely to be amended to provide for the execution of a deed of covenant from the joint owners on an application for a joint family home. This will make future applications more expensive for the applicant in respect of a property subject to a mortgage, whereas it is intended that the procedure should be as inexpensive as possible.

"The Committee recommends that representations be made that the Act be amended to provide that, where a certificate is granted in respect of land subject to a mortgage, the person acquiring an interest in the land by virtue of the certificate shall become directly liable to the mortgagee for the payment of all principal money and interest secured by the mortgage, and shall also become directly liable for the performance, observance, and fulfilment of the covenants and agreements contained and implied in the mortgage as if such person had originally executed the mortgage and contracted with the mortgagee for such payment, performance, observance, and fulfilment, and whether or not such person signs the said application.

"2. The Committee could not think of any method of overcoming the difficulties raised in a letter from Nelson in the case of:

"(i) The man who wishes to buy a house as a joint family home;

"(ii) The man who wishes to build a house as a joint family home on land owned by his wife.

"In the first case, the purchase of the house in the joint names might attract gift duty, but, if the husband bought the house first and then filed the application for a joint home, no gift duty would be involved, and the only additional expense incurred is that of the application for the family home.

"In the second case, the transaction could be carried out in two steps without involving gift duty.

"The Committee considered that it would be impracticable to remit gift duty on such transactions on the applicant declaring his intention of applying for a joint family home certificate within a limited time, because this would facilitate evasion of gift duty. It might be possible to provide for a refund of gift duty if an application for a family home was filed after the gift duty was paid, but such a procedure might well cost more than the cost of an application for a family home.

"3. The Committee further considered the difficulties which arose when a joint family home application is made in respect of land subject to a current account mortgage. It seems clear from the date the family home certificate is granted any further advances under the mortgage are unsecured and any credits to the account might be applied under the rule in *Clayton's* case to repay the earlier advances made before the certificate. A current account mortgagee might thus be deprived entirely of his security without knowing anything about it. If the current account mortgagee is first mortgagee, he gets some notice from the application to produce title, and can close the account. If he is a second mortgagee, he may get no notice at all.

"It is not uncommon for businessmen to give a mortgage over their homes to secure their accounts with their merchants or bankers, and this mortgage is often a second mortgage.

"This seems to the Committee to be against the spirit of the Act, because it amounts to using the family home for business purposes, although no doubt it is not within the letter of the declaration made by an applicant that the land and dwelling are not used by any person for business purposes.

"The Committee therefore recommends that the Act be amended to provide that, when a certificate is granted in respect of land subject to a mortgage securing an account current, all advances made under the mortgage after the granting of the certificate shall be secured by the mortgage and charged on the land until express notice in writing of the issue of the certificate has been given to the mortgagee."

It was resolved that the recommendation in the report of the Conveyancing Committee concerning the personal liability of joint owners under mortgage executed by one of them before issue of certificate be adopted, and that appropriate representations be made to the Minister.

It was resolved that, with regard to the recommendation with respect to current account mortgages, no action be taken meanwhile. If it was later found that any real difficulty occurred, the matter could be further considered.

It was further resolved that the Conveyancing Committee be thanked for its report on these matters.

Sir Leonard Holmes's Visit.—The meeting then concluded for the purpose of meeting Sir Leonard Holmes, immediate past President of the Law Society of England.

Wellington members of the Committees of the Society and of the Council of the Wellington Society had been invited to attend.

CHRISTCHURCH GOLF DAY.

Competition for the Hunter Cup.

Forty-three members of the Canterbury District Law Society entered for the handicap bogey golf match played at the Shirley course on October 16 for the Hunter Cup. The winner of the trophy was Mr. K. J. McMenamin, who was square. The cup was given for competition by Mr. W. J. Hunter, formerly of Christchurch and now of Wellington, in 1925, and the first winner of the competition was E. J. Corcoran, who was second equal in a good field of players. A pleasing feature of the competition was the entry of three players from Timaru and of some from Rangiora and Kaiapoi.

At the invitation of the President of the Canterbury District Law Society (Mr. C. G. Penlington) and Mrs. Penlington, a very large gathering of members and their wives attended an At Home at the Club-house in the afternoon, when tea was served in the common room and the dining-room, both decorated for the occasion.

After the match, Mrs. Penlington presented the cup to Mr. McMenamin and the prize for putting to Mrs. G. A. G. Connal. Later, a very enjoyable sherry party was held in the Mayfair, where some members who had been unable to attend the gathering at Shirley were warmly welcomed.

The best scores in the golf match were as follows: K. J. McMenamin, all square; C. G. Penlington, E. J. Corcoran, M. W. Simes and R. C. Saunders, 2 down; A. T. Donnelly, 3 down; A. C. Fraser, G. S. Branthwaite, J. Dolph, A. T. Bell, and G. C. Weston, all 4 down; E. A. Cleland, G. A. G. Connal, and P. H. Wood, all 5 down.