New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."
VOL. XXVIII. TUESDAY, JANUARY 22, 1952. No. 1.

RECENT LEGISLATION OF INTEREST TO PRACTITIONERS.

IN the legislation passed last year, there are not many statutes which are of direct interest to the practitioner in his everyday work. There are, however, some which are of practical importance, and which require some detailed explanation. The first of these is the Property Law Amendment Act, 1951, which the Hon. H. G. R. Mason, K.C., as a private Member, drafted; and he had the great satisfaction of receiving the congratulations of the House when he brought it through all its stages, and so to the Statute Book. This Act, however, will not come into force until January 1, 1953. An explanation of its purpose and some detailed commentary on its provisions, written by Mr. Mason, will appear in the next issue of the JOURNAL.

DISCLAIMER OF INTEREST UNDER INTESTACY.

The Administration Amendment Act, 1951, removes some difficulties in relation to the disclaimer of a benefit under an intestacy by a person who becomes entitled by virtue of the Administration Amendment Act, 1944, to an interest in the property of an intestate. It appears that any such interest could not be disclaimed under any right given either at common law or under statute. It is true that there was some opinion to the contrary; but the effect of such opinion was to create some further problems.

A beneficiary can disclaim a gift given him by some other person, either *inter vivos* or by will; but there appeared to be no authority for the suggestion that he could disclaim any interest passing to him, as next-of-kin, by the operation of the Administration Amendment Act, 1944. The question could arise where an estate of an intestate would pass to his statutory next-of-kin, who were well provided for, and who desired to disclaim their statutory rights with a view to the vesting of the interest available to them from the intestate estate in the person or persons next entitled in succession under the statute. This could be a means of saving death duties, but it did not appear to be available. Furthermore, it would seem that a disclaimer of an interest in an intestate estate by the person or persons statutorily entitled to it made the personalty *bona vacantia*; and, accordingly, it became the property of the Crown.

Thus, in England, in circumstances covered by the Administration of Estates Act, 1925, from part of which our Administration Amendment Act, 1944, is taken, the disclaimer of an intestate's residuary estate, or a share thereof, renders that estate or share *bona vacantia*: see *Green on Death Duties*, 2nd Ed. 371, 372. This view seems to be supported in New Zealand by the wording of s. 6 of the Administration Amendment Act, 1944: see, in particular, s. 6 (1) (*f*).

In order to clear up this situation, the Administration Amendment Act, 1951, was passed. Section 2 of the Administration Amendment Act, 1951, makes provision for the right of a person who becomes entitled to property on the intestacy of another to disclaim property. It provides that property that is so disclaimed is to devolve as if the person disclaiming had died immediately before the intestate person leaving such issue as he would have left if he had actually died then. To make such a disclaimer effective, the successor must, by deed of disclaimer delivered to the intestate person's administrator, disclaim the interest to which he has become entitled as a beneficiary, provided he has attained the age of twenty-one years, is of sound mind, and is not a convict within the meaning of s. 52 of the Prisons Act, 1908. If the successor is under any such disability, the Supreme Court may, on motion, order the disclaimer of the interest on behalf of the successor.

Furthermore, no disclaimer is valid unless the successor is living when the disclaimer is made, and the disclaimer must relate to the whole of the successor's interest as a beneficiary in the real and personal property as to which the intestate person has died intestate, including property which any other person has disclaimed.

The definition of the term "intestate" in s. 2 of the Administration Amendment Act, 1944, makes the provisions of the more recent Amendment Act apply to partial intestacy as well as to total intestacy. Section 22 (*b*) of last year's Amendment Act requires that the disclaimer must relate to the whole of the benefit which the successor disclaiming takes under New Zealand law in the estate of the intestate person. In so doing, it follows the analogy of the existing law regarding disclaimer by a residuary beneficiary under a will, and it prevents a successor from disclaiming the responsibilities for onerous property in the estate without having the estate administered under Part IV of the Administration Amendment Act, 1908. It is clear that there would be considerable scope for evasion of death and gift duties if a successor could disclaim part of the benefit which he took of an intestate.

Further, such disclaimer must be made without consideration, and before the successor enters into the

enjoyment of the interest to which he has become entitled, or in any way disposes of it.

Disclaimers of property taken on intestacy must be made within one year within the first grant of administration in New Zealand in respect of the estate of the intestate person (whether that grant was made before or after December 1, 1951), or within such longer period as the Supreme Court may allow; and such a disclaimer must be made during the lifetime of the successor who is disclaiming. The Supreme Court is empowered to authorize disclaimers on behalf of infants, convicts, and persons of unsound mind who are disqualified from making a valid disclaimer.

Disclaimers of property taken on intestacy are irrevocable; but the successor who disclaims is not barred from claiming under the Family Protection Act, 1908, for provision out of the estate of the intestate person. Further, a disclaimer is deemed to be made at the first point of time when everything has been done in respect of the disclaimer which is necessary to comply with the requirements of s. 2 of the statute and of any order of the Supreme Court which relates to the disclaimer and is made under that section.

No disclaimer made when the successor is bankrupt is valid. In addition, a disclaimer is invalid if it provides for any assignment of the disclaimed interest, or in any manner provides who is to be entitled to that interest; in other words, a deed of disclaimer must not be worded as an assignment.

The Act further provides that, for the purposes of the Bankruptcy Act, 1908, and of any other Act or rule of law relating to the protection of creditors, a disclaimer of an interest taken either under a will or on intestacy is deemed to be a transfer of the property disclaimed. The effect of this provision is to enable creditors to treat the disclaimer as an act of bankruptcy and to make it void in certain circumstances—for instance, under s. 75 of the Bankruptcy Act, 1908, and under the Fraudulent Conveyances Act, 1571 (13 Eliz., c. 5). The latter statute, it may be noted, is repealed as from January 1, 1953, by s. 43 (3) of the Property Law Amendment Act, 1951, and is replaced by ss. 123 and 123A of the Property Law Act, 1908, as inserted by s. 43 (1) of the Amendment Act, 1951.

If the successor is not bankrupt at the date of his disclaimer and the administrator has no reason to believe that the successor is about to become bankrupt or that the disclaimer is void or is about to become void, the administrator may distribute disclaimed property as if there were no possibility of the disclaimer's becoming void by reason of its being deemed to be a transfer of the property, and he is indemnified against any action by reason of his distributing the interest in such circumstances.

Juries.

The Juries Amendment Act, 1951, increases the number of persons available to serve on juries, and provides a new list of persons exempt from serving on juries, so that, with certain exceptions, persons in the Government service will not be exempted unless they belong to a group specifically exempted by Order in Council or are excused from attendance. Moreover, s. 12 of the Juries Act, 1908, is amended to extend the areas of the jury districts of Auckland, Wellington, Christchurch, and Dunedin so as to include places within fifteen miles of the Courthouse of each of those cities, instead of ten miles, as previously.

Where an order is made for a special jury in an action where there are more than two parties, s. 6 of the new statute confers new powers as to the striking and reducing of a special jury upon the Court or a Judge to enable the making of an order requiring the names of not less than sixty jurors to be placed on the list in the case of a special jury of twelve and not less than thirty-two in the case of a special jury of four, and fixing the number of names that may be struck out by each party.

The Juries Act, 1908, it will be remembered, provided, in the case of a special jury of twelve, for the drawing up of a list of forty-eight jurors and its reduction to twenty-four by the plaintiff and the defendant each striking out twelve names; the remaining twenty-four were summoned and the special jury was drawn from them. A like provision was made for a special jury of four when that was ordered. No provision, however, was made as to the number of names a party could strike out of the list when there were three or more parties to the action.

Infants.

Owing to the number of marriages in New Zealand following the war years of persons, particularly wives, who were under age, some difficulty was found in advancing money for housing and other purposes to husband and wife on account of the wife's incapacity to contract. This position has been remedied by s. 14 of the Statutes Amendment Act, 1951, which inserts in the Infants Act, 1908, a new section, s. 12A, which provides that, notwithstanding anything in that Act or in any other Act or in any rule of law, no contract is to be void or voidable by reason of any party to it being an infant if, before the contract is entered into by the infant, it has been approved on behalf of the infant by a Magistrates' Court.

The new section provides further that the Court may, in its discretion, refer any such application to a parent or guardian of the infant, or, where the Court deems it necessary, to a solicitor nominated by the Court, or to the Public Trustee, or to the Maori Trustee, or to any other person; and the Court may order the applicant to pay the reasonable costs and expenses of any person to whom the application is so referred. No such person is to be under any obligation to consider or examine an application until his reasonable costs and expenses have been paid or secured to his satisfaction.

Destitute Persons.

In *Walker* v. *Walker*, [1949] N.Z.L.R. 273, the learned Chief Justice held that a Magistrate could not deal with a complaint for maintenance under s. 17 of the Destitute Persons Act, 1910, while a petition for divorce brought by the husband was pending in the Supreme Court, as the jurisdiction of the Magistrate was ousted during those proceedings. His Honour had before him an application for a writ of mandamus to issue to a Magistrate where the Magistrate declined jurisdiction while divorce proceedings were pending in the Supreme Court; and he refused the application. The effect of this judgment, the correctness of which was not disputed, was to oust the jurisdiction of a Magistrate while a petition for divorce lay unheard in the Supreme Court. There were found instances of petitions having been filed and left dormant for many years, presumably in order to evade maintenance proceedings under the Destitute Persons Act, 1910. Section 2 of the Destitute Persons Act, 1910, clears up the position, so that the Magistrate's jurisdiction remains effective except when it is suspended

by an interim order of the Supreme Court; and any order made by him is deemed to be cancelled only when a final order for maintenance is made by a Judge.

The Destitute Persons Amendment Act, 1951, makes a number of amendments to the principal Act.

Now, under s. 2 of the new Act, the jurisdiction conferred on a Magistrate by s. 17 or s. 76 of the Destitute Persons Act, 1910, or by s. 6 of the Domestic Proceedings Act, 1939, to make an order for the maintenance by any person of that person's wife or husband or any child or adopted child of either of them is to be exercisable notwithstanding that a petition is or has been presented to the Supreme Court before or after December 5, 1951 (the date of the passing of the new statute), by that person, or by that person's wife or husband, for divorce, nullity of marriage, judicial separation, or restitution of conjugal rights. In the same circumstances, a Magistrate is empowered to exercise his jurisdiction under the principal Act to vary or enforce any such maintenance order. The Supreme Court's power to make an interim order for alimony or a final order for maintenance or alimony is not affected. Any order made by the Magistrate is deemed to be suspended when, and only when, an interim order is made in the Supreme Court, and it is deemed to be cancelled only when a final order is made by that Court.

A new provision is contained in s. 3, which authorizes a Magistrate, in his discretion, where a separation order or an order of guardianship is or has been made, to vest in the husband or wife the tenancy of any dwellinghouse that is held by the other spouse and in which either of the parties resides. Except for the change of tenant, the landlord's rights are not to be affected. Provision is made for a revesting of the tenancy in the original tenant on a change of circumstances or on the death of the party in whom the tenancy has been so vested. The clause binds the Crown (where the Crown is the landlord). The "dwellinghouse" must be within the definition of that term in the Tenancy Act, 1948.

The landlord of a dwellinghouse which is the subject-matter of a vesting order under s. 3 may apply to a Magistrate, within fourteen days after service of the order upon him, for the cancellation or variation of the order. The landlord is given a right of appeal against a vesting order made under s. 3 if he has first applied for the cancellation or variation of the order and his application has been refused. He may also appeal against the refusal of his application. The time allowed for appeals is not to run against any party to the proceedings until the landlord's application has been disposed of, or, if the landlord does not so apply, until the expiration of twenty-one days after the making of the vesting order.

The maximum security that a Magistrate may require to be given for obedience to a maintenance order is increased, by an amendment of s. 30 (4) of the principal Act, from £200 to £500.

A Magistrate is authorized by s. 7 to extend the operation of an order, made before or after December 5, 1951, under Part II or Part IV of the principal Act, for the maintenance of any child who is or will be engaged in a course of education or training after the age of sixteen. At present, such an order expires when the child attains that age. No extension is to be for more than one year at any one time, or to operate after the child attains the age of eighteen.

The Registrar of a Magistrates' Court, on the application of either party to a maintenance order, is empowered by a new section (s. 39A) inserted in the principal Act to vary the order by changing the Court office into which moneys are payable under the order. Any party affected by the Registrar's decision may have it reviewed by a Magistrate, who may confirm, vary, or rescind it.

An extension of s. 43 of the principal Act is made by repealing subs. 15 and by substituting a new subsection, which makes seamen's wages liable to attachment by order of the Magistrate. Under s. 83 of the Shipping and Seamen Act, 1908, those wages are protected from attachment. Similarly, nothing in s. 3 (1) of the Wages Protection and Contractors' Liens Act, 1939, is to apply to any attachment under s. 43 of the Destitute Persons Act, 1910.

Section 44 of the principal Act is extended, by a new subs. 3A, to make workers' compensation moneys available as the subject of a charging order made by the Magistrate. Under s. 60 of the Workers' Compensation Act, 1922, compensation moneys cannot be charged: this is now modified by the new subsection.

A new section, s. 47A, provides that, where moneys are payable under a maintenance order, or under an agreement enforceable under any Act as a maintenance order, to the Superintendent of the Child Welfare Division of the Department of Education, the certificate of the Superintendent as to the amount of arrears under the order or agreement is to be sufficient evidence, in the absence of proof to the contrary, of that amount in proceedings taken by him or on his behalf to enforce payment.

A new s. 79 authorizes the making of Regulations for the taking of evidence in any proceedings by a Magistrate or Registrar of any Magistrates' Court other than the Court in which the proceedings are taken. It replaces s. 79 of the principal Act, which is limited to proceedings on a complaint, and under which an order for the taking of evidence elsewhere can be made only after the hearing of the complaint has actually commenced. The existing section is also limited, in that an order cannot be made for the taking of such evidence before a Registrar. Section 16 of the Domestic Proceedings Act, 1939, is consequently repealed.

CORONERS.

Practitioners whose work sometimes takes them before a Coroner will be interested in the Coroners Act, 1951. The Coroners Act, 1908, provided for the appointment of Coroners, and dealt with a number of miscellaneous matters; but it defined the powers, authorities, and jurisdiction of a Coroner as those of a Coroner in England. This meant that recourse had frequently to be made to English statutes and text-books; the former have changed considerably since the first Coroners' legislation was passed in New Zealand, and it was difficult to apply the English law as at present provided in statutes to the circumstances arising under the New Zealand statute, which had become out-of-date. The Coroners Act, 1951, is intended to be a complete code; and, with some amendments of the former statute, it is designed to state in detail the present New Zealand law, incorporating the present English law.

The main alterations made by the new statute are the elimination of a Coroner's jury; the removal of the requirement that the Coroner should view the body; and the elimination of the Coroner's jurisdiction as to inquests on fires. Provision is made for the taking of evidence at a distance, the completion of an inquest where the Coroner dies or becomes ill, and the re-opening

of an inquest. The authority of a Justice of the Peace to act for a Coroner is reduced to the opening by him of the inquest; his authorization of a post-mortem examination; and his ordering of burial, and the adjournment of the inquest for completion by a Coroner.

JOINT FAMILY HOMES.

Practitioners are interested in the amendment of the Joint Family Homes Act, 1950. The changes in the original statute made by the Amendment Act, 1951, will be dealt with in these pages at an early date.

SUMMARY OF RECENT LAW.

ADOPTION OF CHILDREN.

Changing Names upon Adoption. *115 Justice of the Peace Journal*, 727.

ARBITRATION.

Practice—Appeal from Supreme Court Judgment on Special Case Stated by Arbitrators—Application for Leave to Appeal to be made to Court of Decision on Special Case—Special Grounds for Departure from That Course—Arbitration Amendment Act, 1938, s. 11 (3). An application under s. 11 (3) of the Arbitration Amendment Act, 1938, for leave to appeal should be made to the Court which decides a special case; and there should be special grounds for a departure from that practice. *So held* by the Court of Appeal on a motion for leave to appeal from the judgment of the Supreme Court on a special case stated on behalf of arbitrators. The judgment of the Supreme Court was delivered on August 27, 1907: [1951] N.Z.L.R. 891. No formal judgment was sealed until October 18, 1951. On October 15, 1951, the respondent's solicitors advised the claimants' solicitors of intention to appeal against the judgment, and added that application was being made to the Court of Appeal for leave to appeal under s. 11 (3) of the Arbitration Amendment Act, 1938. The motion was served on the claimants' solicitors on October 31, 1951, and was filed in the Court of Appeal on November 7, 1951. On the motion for leave to appeal, *Held*, by the Court of Appeal, 1. That cases decided under s. 67 of the Judicature Act, 1908, are not applicable to such a motion, because that section deals with a decision in the Supreme Court on an appeal from an inferior Court; and in most of those cases the consideration was relatively small, and there had been two hearings before leave was applied for. (*Rutherfurd* v. *Waite*, [1923] G.L.R. 34, referred to.) 2. That, although the judgment of the Supreme Court was technically an interlocutory judgment, it dealt with a matter of great importance to the respondent, and, if not reviewed on appeal, conclusively determined it against him. 3. That, having regard to the facts that the judgment in the Supreme Court was in substance a final decision on the question of law involving a claim of £4,618 18s., and that the question of law arising, though perhaps within a narrow compass, appeared to be one of considerable difficulty, justice required that the respondent should be given leave to appeal, notwithstanding its not having been promptly sought. 4. That special reasons existed in this case for a departure from the practice of applying in the Supreme Court for leave to appeal. Leave to appeal was accordingly given, but subject to conditions. *In re An Arbitration, Hinurewa Kawe and Others* v. *Herlihy*. (C.A. Wellington. December 3, 1951. Fair, J.; Gresson, J.; Hay, J.)

COMPANY LAW.

Points in Practice. *102 Law Journal*, 3.

CONVEYANCING.

Inflation Clauses in Contracts. *25 Australian Law Journal*, 541.

Rules of Convenience. *95 Solicitors' Journal*, 703.

The Conveyancer and The Age of Inflation. *212 Law Times*, 214.

CRIMINAL LAW.

Burdens and Presumption. *212 Law Times*, 211.

Jurisdiction—Aggravated Assault on Female—No Power to impose Fine and grant Compensation to Person Assaulted—Justices of the Peace Act, 1927, s. 203. On a conviction under s. 203 of the Justices of the Peace Act, 1927, for an aggravated assault on a female, there is no power to impose a fine and at the same time to grant probation under the Offenders Probation Act, 1920, to enable compensation to be given. (*Kelly* v. *Police*, [1951] N.Z.L.R. 216, referred to.) *White* v. *Packman*. (S.C. Auckland. December 10, 1951. F. B. Adams, J.)

DAMAGES.

Measure of Damages—Service Pension—Exclusion in Assessment. The plaintiff, while serving in the Royal Navy, was seriously injured in a railway accident for which the defendants admitted liability. He was invalided from the Service and was awarded a disability pension, in assessing the amount of which the Minister of Pensions had power to take into account the amount of compensation awarded to the plaintiff *aliunde*. Later, the plaintiff sued the defendants for damages for negligence and was awarded £3,000 for the loss of future earnings and £2,500 for pain and suffering. *Held*, That, in assessing damages attributable to loss of earnings, the amount of the disability pension must be disregarded. (Judgment of *Sellers*, J. ([1951] 1 All E.R. 1034), affirmed.) *Payne* v. *Railway Executive*, [1951] 2 All E.R. 910 (C.A.).

As to Deduction from Damages for Negligence, see *23 Halsbury's Laws of England*, 2nd Ed., 698, para. 986; and for Cases, see *37 E. and E. Digest*, 139, 140, Nos. *933-943*, and Digest Supplements.

Trespass to Land—Improvements made by Trespasser—Value of Such Improvements not to be set off in Diminution of Special Damages. A lease of Maori land by the plaintiff to the defendant had not been confirmed: it was admittedly void, and the defendant was to be treated technically as having been a trespasser during his two years' occupation of the land. He was admittedly liable for general damages for trespass and remaining in possession, and for special damages as assessed by arbitration. The defendant claimed that the quantum of those damages should be reduced by the value of the improvements that he had made on the land. This was not a case of the landlord's standing by and allowing the improvements to be made with his knowledge. *Held*, That, in assessing special damages for trespass to land, the value of any improvements made by a trespasser on the land could not be allowed as a set-off against the amount of such damages. (*Lord Cawdor* v. *Lewis*, (1835) 1 Y. & C. Ex. 427; 160 E.R. 174, applied.) *Tai Te Whetu* v. *Scandlyn and Others*. (S.C. Hamilton. July 6, 1951. Fell, J.)

DIVORCE AND MATRIMONIAL CAUSES.

Points in Practice. *101 Law Journal*, 704.

Separation (as a Ground of Divorce)—Separation Agreement entered into by Infant—Such Agreement Voidable Contract but not repudiated—Infant Petitioner entitled to make Agreement Ground for Divorce—Divorce and Matrimonial Causes Act, 1928, s. 10 (i). A separation agreement entered into by an infant is a voidable contract, and not a contract void *ab initio*, and can be repudiated by the infant party either during infancy or within a reasonable time after the infant attains full age. Where, therefore, the petitioner is the infant, she may invoke an agreement for separation which she has never repudiated as the ground for a divorce. *Quaere*, 1. Whether the petitioner, who was an infant when a party to a separation agreement, must show that the contract was for her benefit and in her interests; but no question of ratification arises in such circumstances. (*Smith* v. *Lucas*, (1881) 18 Ch.D. 531, and *McFerran* v. *McFerran*, (1896) 15 N.Z.L.R. 292, referred to.) 2. Whether the other party could have rested on the separation agreement if he had been the petitioner—that is to say, whether the infant party to the agreement was obliged to take steps to repudiate the agreement within a reasonable time after attaining majority. (*Hole* v. *Hole*, [1948] N.Z.L.R. 42, distinguished.) *Nicholson* v. *Nicholson*. (S.C. Dunedin. December 6, 1951. North, J.)

INFANTS AND CHILDREN.

Nullity and The Status of Children. *95 Solicitors' Journal*, 692.

What Constitutes "Cruelty" to Children? *95 Solicitors' Journal*, 719.

JUDICIAL APPOINTMENTS.

Lord Justice Cohen has become a Lord of Appeal in Ordinary.

Mr. Justice Romer has been promoted from the Chancery Division to become a member of the Court of Appeal.

Mr. Upjohn, K.C., has been appointed a member of the Chancery Division in place of Mr. Justice Romer.

JURY.

The Jury during The Hearing: Some Recent Irish Decisions. *212 Law Times*, 199.

LAND TRANSFER.

Medium Filum Rule and The Torrens System. (J. Baalman.) *25 Australian Law Journal*, 538.

LANDLORD AND TENANT.

Fires Prevention (Metropolis) Act, 1774, and Subrogation. *95 Solicitors' Journal*, 652.

MINES, MINERALS, AND QUARRIES.

Practice—Appeal to Supreme Court from Administrative Act of Warden granting Claim—Decision on Such Appeal final—Warden in Such Capacity not "inferior Court"—Judicature Act, 1908, ss. 2, 67—Mining Act, 1926, s. 366. The determination of the Supreme Court on an appeal from an administrative act of the Warden in granting a claim is final, as, in that capacity, the Warden is not an "inferior Court" as defined in s. 2 of the Judicature Act, 1908. (*Royal Aquarium and Summer and Winter Garden Society, Ltd.* v. *Parkinson*, [1892] 1 Q.B. 431, applied.) *George* v. *Hore and Brown (No. 2)*. (S.C. Dunedin. November 29, 1951. Fell, J.)

NEGLIGENCE.

Personal Duties and The Employment of Skilled Persons. *212 Law Times*, 250.

NEW YEAR HONOURS.

Mr. V. R. S. Meredith, Crown Solicitor, Auckland, has received the honour of Knight Bachelor.

Mr. H. S. J. Goodman of Christchurch has been appointed an Officer of the Order of the British Empire (O.B.E.).

PRACTICE.

Discovery: Parties, &c. *95 Solicitors' Journal*, 629.

Documents Privileged from Production. *95 Solicitors' Journal*, 647.

Errors and Amendments. *95 Solicitors' Journal*, 678.

Particulars before Discovery. *212 Law Times*, 203.

Some Recent Cases. *95 Solicitors' Journal*, 691.

SHARE-MILKING AGREEMENT.

Maori Land—Agreement by Owner of Maori Land giving Right to Share-milker to occupy Such Land—Clause in Agreement declaring It not to be deemed "a lease or agreement to lease or to pass to the share-milker any estate or interest in the land"—Share-milking Agreement an "Instrument of alienation"—No Confirmation by Maori Land Court—Agreement a Nullity until Confirmed—"Alienation"—Maori Land Act, 1931, ss. 2, 273—Maori Land Amendment Act, 1932, s. 2 (1). No licence or other disposition, whether legal or equitable, and no contract to grant a licence or other disposition of, or affecting, Maori land by a Maori has any force or effect until it has been confirmed by the Maori Land Court, and, while it remains unconfirmed, cannot be made the basis of an action. (*Te Peehi Te Opetini* v. *Pakihi Sawmilling Co., Ltd.*, (1913) 15 G.L.R. 480, and *Wilson* v. *Herries*, (1913) 33 N.Z.L.R. 417, followed.) The plaintiff, a Maori, was the registered proprietor of certain Maori land. The parties had entered into a share-milking agreement whereby the defendant became entitled to depasture his dairy herd on the plaintiff's land and to farm it upon the terms and conditions expressed in that agreement as more particularly set out in the judgment. The agreement concluded with the following clause: "26. Notwithstanding anything hereinbefore contained, this Agreement shall not be deemed to create a partnership nor the relationship of employer and worker within the meaning of the Workers' Compensation Acts between the parties hereto, nor shall this Agreement be deemed to be a lease or agreement of lease or to pass to the Share-milker any estate or interest in the land herein referred to but this Agreement shall be construed to create the relationship of employer and independent contractor." Application had been made by the defendant to the Maori Land Court for confirmation, and this had not been contested by the plaintiff. The Court, however, dismissed the application, on the ground that it had no jurisdiction to entertain it. The minute of its decision was as follows: "Upon reading cl. 26, we find an express stipulation that no interest in the land shall pass to the share-milker and that the relationship between the parties is one of employer and independent contractor. In these circumstances, the Court has no jurisdiction. Application dismissed." In an action by the plaintiff for possession of the land occupied by the defendant pursuant to the terms of the share-milking agreement, *Held*, 1. That the word "licence" in the definition of "alienation" in s. 2 of the Maori Land Act, 1931, is used in the special sense of a species of disposition of or affecting customary land, or the legal or equitable fee simple of freehold land, or of any share therein. (*Nuku* v. *Phillips*, [1920] N.Z.L.R. 446, applied.) 2. That, on the proper construction of the share-milking agreement, the plaintiff made his land available to the defendant to enable the latter, by using it with his own adjoining land, to carry on his own business as a dairy farmer; it was implicit in the agreement that exclusive possession of the plaintiff's land was given to the defendant with no reservation to the plaintiff of any rights over the land differing from those reserved to a lessor under a lease; and there was nothing in the agreement involving possession adverse to that of the defendant. 3. That there were present in the share-milking agreement so many of the elements of a lease as to justify the conclusion that the instrument, if not a lease, was, at the lowest, a licence of the particular type specified in the definition of "alienation" in s. 2 of the Maori Land Act, 1931: and it created an interest in the land, notwithstanding the declaration of the parties in cl. 26 to the contrary. 4. That the share-milking agreement, as an instrument of alienation, was a nullity until confirmed, though that did not interfere with the rights, under s. 273 of the Maori Land Act, 1931, of those who claimed under the instrument, including an absolute right to a certificate of confirmation on proof that the requirements of s. 273 (1) had been complied with or exist; and the plaintiff was accordingly entitled to an order for possession of the land. (*Rawiri Te Peke* v. *Stockman*, [1917] G.L.R. 550, applied.) *Semble*, If the defendant has applied for confirmation of the share-milking agreement within the time prescribed by s. 271 of the Maori Land Act, 1931, he is entitled to renew his application to the Land Court for confirmation of it, even though he had failed to take the steps open to him to test the validity of that Court's decision in its regard.* (*Wilson* v. *Herries*, (1913) 33 N.Z.L.R. 417, referred to.) *Tumeke Wehipeihana* v. *Murray*. (S.C. Palmerston North. November 20, 1951. Hay, J.)

* Execution on this judgment was stayed to January 31, 1952.

WILL.

Bequests and Devises—Satisfaction of Debt by Legacy—Annuity under Deed secured on Realty—Bequest of Annuity of Similar Amount—No Direction to pay Debts. On July 24, 1944, after the presentation by his wife of a petition for the dissolution of their marriage, the testator entered into a deed, described as a settlement, by way of compromise of the wife's claims for alimony and maintenance, whereby he covenanted with the wife that he or "his executors or administrators will as from February 21, 1944, and until the death or marriage again of the wife pay to the wife the weekly sum of £3 on the Monday in every week." By a conveyance of even date (recited in the settlement) the testator conveyed to trustees certain yearly rentcharges on trust to sell the same and to hold the proceeds as security for the due performance of the testator's covenants. The wife covenanted not to claim alimony or maintenance against the testator other than was provided for by the settlement. On October 11, 1944, the marriage was dissolved, and on November 11, 1944, the testator remarried. By his holograph will, dated June 23, 1947, the testator, who died on February 16, 1950, made certain specific and pecuniary bequests, devised his house to his second wife for her life or widowhood, and further provided: "To my wife Doris [the second wife] £5 a week as long as she remains my widow and if she re-marries she then receives £2 a week for life. To Daisy Haves [his former wife] I give £3 a week so long as she remains unmarried." There was no further mention of the testator's former wife in the will, which appointed trustees but no executors, and gave no directions as to the payment of debts. The will failed to dispose of the capital of the testator's residuary estate. *Held*, That the annuity bequeathed to the testator's former wife, being charged on the corpus of the estate, was as great a benefit as the covenanted annuity, and, therefore, there being nothing in the will to rebut the presumption, the testamentary annuity must be taken to be in satisfaction of, and not in addition to, the covenanted annuity. *Re Haves (deceased), Haves and Another* v. *Haves and Others*, [1951] 2 All E.R. 928 (Ch.D.).

MR. JUSTICE NORTH.

Auckland Practitioners' Dinner in His Honour.

There was a very large attendance indeed at the Bar Dinner recently tendered to Mr. Justice North by the Law Society of the District of Auckland in honour of his elevation to the Bench. The Hon. Mr. Justice Stanton and the Hon. Mr. Justice Adams, together with the Hon. Sir Robert Kennedy, represented the Judiciary. The Stipendiary Magistrates were represented by Messrs. L. G. H. Sinclair, H. Jenner Wily, F. McCarthy, M. C. Astley, W. S. Spence, J. W. Kealy, and R. M. Grant. Mr. J. H. Luxford, lately Senior Magistrate at Auckland, was also present. Also in attendance were the Secretary for Justice (Mr. S. T. Barnett), the Registrar of the Supreme Court at Auckland (Mr. C. O. Pratt), the Dean of the Faculty of Law (Professor A. G. Davis), the Senior Lecturer in Law (Dr. J. F. Northey), the President of the Hamilton Law Society (Mr. G. G. Briggs), and Messrs. T. P. Cleary and F. C. Spratt of Wellington.

After the loyal toast, the Chairman, Mr. C. J. Garland, President of the Society, stated that apologies for absence had been received from the Hon. Sir Arthur Fair, Mr. Justice Finlay, and the Attorney-General, and also from Messrs. J. B. Johnston, H. M. Rogerson, T. C. Webster, and C. Freyberg.

The Guest of Honour.

In proposing the toast to the guest of honour, the President stated that there were some whom we regarded as sound lawyers with a breadth of legal knowledge and a firm grasp of legal principles ; there were others who revelled in the excitement of work in the Criminal Courts and who excelled in that branch of the law ; others again there were who had the mind of a debater—the happy combination of clear thought and clear expression —and whose *forte* was Banco work ; some others were expert in the difficult art of cross-examination ; and still others had the gift of tongues and the ability, through their power of eloquence, to sway the common juror. But how few there were who could excel in all these branches of the law : and of that select list, and high upon it, stood the name of A. K. North. It was impossible to compile a list of leading barristers without including his name. Fortunate indeed was the litigant who secured his services, for A. K. North brought to every case he handled not only his outstanding ability, but also all the energy and enthusiasm at his command. No litigant was ever known to complain that the handling of his case was slipshod, half-hearted, or lukewarm. Some four and a half years ago, Mr. North received a well-merited honour when he was called to the Inner Bar. He had rendered outstanding service to the profession and to the public. He had been a tower of strength on the Council of the Law Society, and his place there would be difficult to fill. " With his outstanding abilities and his brilliant mind," continued Mr. Garland, " it was inevitable that a Judgeship should be offered to him. The only questions in the minds of practitioners were, first, when this offer would be made, and, secondly, whether he would accept the offer. His acceptance involves real sacrifice—financial sacrifice for a leader of the Bar, and the sacrifice of friendships which, though they will continue, must inevitably be of a less intimate nature than they have been in the past. It is not surprising that, with his background, he has chosen to make the sacrifice, realizing that, in the ultimate, the badge of sacrifice is the badge of sovereignty."

Mr. Garland sympathized with those members of the profession who had stored up briefs against the return of Mr. North and now found themselves stranded and looking belatedly for other counsel.

" To his new appointment," stated Mr. Garland, " Mr. Justice North brings all the necessary qualities—character, ability, decisiveness, and experience. He had rendered outstanding service in his capacity as a barrister. Now the sphere of service is changed, but the capacity for service remains. Sir," he continued, addressing the new Judge, " you carry with you to your new office not only the congratulations of your brethren of the Bar, but also the best of all good wishes for your future."

The toast was then honoured with the greatest enthusiasm.

Mr. Justice North's Reply.

Mr. Justice North, on rising to reply, was loudly applauded. He said that he would be less than human if he had not been deeply moved by the welcome he had received from this large gathering of his professional brethren. It was a great comfort to him to know that so many of those with whom he had worked were pleased with his appointment. It was an added pleasure to have about him at this time so many of his friends of earlier days. First, the Chairman, Mr. Garland, with whom he had much in common, because they had gone to the same school, both their fathers had been Principals of Theological Colleges, and both had represented their respective University Colleges in the Joynt Scroll debate. He felt particularly honoured that Sir Robert Kennedy was present. He had known Sir Robert for many years, and, indeed, had retained him in important litigation, and was working with him at the very point of time when Sir Robert had been invited to become a Judge, and now he was going to Otago to take charge of Sir Robert's district. Then Mr. Barnett, the Secretary for Justice, had been best man at his wedding some twenty-seven years ago. And, finally, from Wellington there were present Mr. Spratt and Mr. Cleary. He had followed Mr. Spratt to Taranaki, and both had been his close friends for many years.

Mr. Justice North continued that he wished to pay a very special tribute to the two Judges in Auckland before whom he had practised for many years, Sir Arthur Fair and the late Mr. Justice Callan. Both had helped and encouraged him in his early days in Auckland, and he was profoundly grateful to them. It had given him particular pleasure that Mrs. Callan had been one of the first to see him on his return from England to say how pleased her husband would have been about his appointment. Then both the Judges present had personal associations with him. Mr. Justice Stanton was his old partner and friend, and the father of Mr. Justice Adams had admitted him to the Bar in Christchurch.

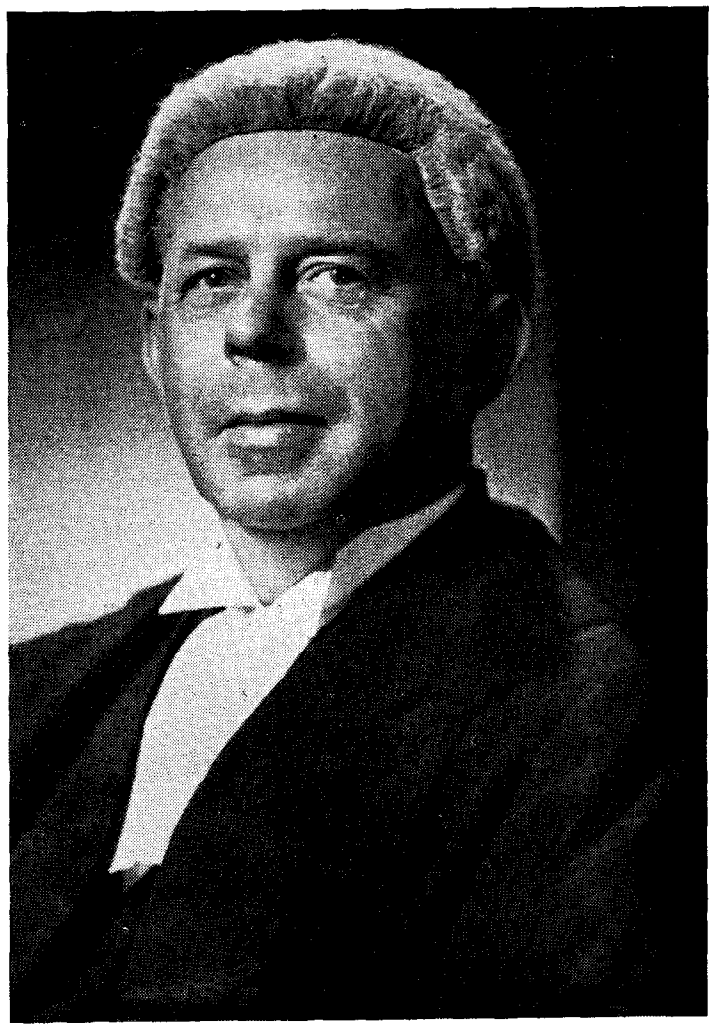
The new Judge said he could never adequately thank those members of the profession in Auckland who had believed in him from the first, nor could he ever hope to repay the help and kindness he had received from the profession in Auckland. It would be embarrassing to mention names, but those of Sir Alexander Johnstone, K.C., and Mr. H. P. Richmond could not be overlooked.

He would also like to thank those members of the Auckland Law Council who had stood aside to allow him to be Vice-President, then knowing full well that he was going overseas; and he would like to say how very grateful he was to the President, Mr. Garland, who had most nobly agreed to carry on for a year without the assistance of a Vice-President.

Now that he was to be a Judge, he proposed to make no rash promises as to his future behaviour. He realized the profession was interested in performances and not in promises. In the result, he would content himself with telling a few stories which would perhaps indicate the way his mind was moving at the moment.

While in England, he had heard of an English Judge who went for a visit to America and sat on the Bench with an American Judge, who very quickly took charge of the witnesses. The English Judge was compelled to leave before the case was over, and, on ringing his American colleague the following day to hear the result, was told: "We won."

While in Scotland, he had had the pleasure of visiting the Scottish Courts. The head of the profession was the Dean of Faculty, who had a wand of office which, when carried, entitled him to immediate audience in all Courts. He was told of a famous occasion when a young barrister was being trounced unmercifully by the Bench. The Dean stalked in, and, on the Judges enquiring his will, replied: "I am here to see that justice is done in this case."



Spencer Digby, photo.

Mr. Justice North.

Mr. Justice North continued that he had also had the pleasure of hearing a most interesting debate in the House of Lords, in the course of which Lord Samuel had said: "When I am determined, I never mind listening, because it can do no harm then."

In England, he had been very interested in the working of the Courts. In the Court of Appeal, a very large number of judgments were oral. Barristers were accustomed to put in a list of their authorities, and, as each case was cited, the relevant law report was placed before the Judges by an usher. It seemed to the speaker that such a procedure permitted a Judge to take a more intelligent interest in the argument than was often the case in New Zealand. In Courts of first instance, the evidence was taken down by shorthand writers, and it appeared to him that this speeded up the trial, and enabled cross-examination of witnesses to be carried out in a much more workmanlike manner. He had been greatly impressed by the effectiveness of the Englishman's habit of understatement. He instanced a bigamy charge where the prisoner also had a child by a third woman. The only observation the Judge had made was: "You have had an untidy matrimonial life."

The new Judge said he had been trained in the law in the office of Messrs. Wilding and Acland in Christchurch, and at a point of time when Mr. O. T. J. Alpers (as he then was) was occasionally Mr. Wilding, K.C.'s, junior; and the speaker proceeded to tell one or two stories arising out of this association.

For the benefit of young barristers, he would mention that he well remembered his friends coming to hear him address his first jury in Christchurch. They were very kind, but he was told years later that they had all agreed that, whatever else he accomplished in the law, he would never make a jury advocate.

From Christchurch he had gone to Taranaki, and most of his early experience in Supreme Court work was gained in New Plymouth. One of the advantages of practising in a circuit town was the number and variety of Judges who visited them. How well he remembered Sir John Reed, Mr. Justice MacGregor, Sir Hubert Ostler, Sir Archibald Blair, and later Sir Michael Myers, to all of whom he owed a great deal as a young man.

In conclusion, the new Judge said: "If, at the end of my period of office, people shall say of me, 'He tried to do what he thought was right, and was a kindly person,' I shall be content."

"THE GUESTS."

The toast to "The Guests" was in the hands of Mr. H. R. A. Vialoux, the immediate past President of the

Society. He referred to the very distinguished body of guests which the Auckland Society was that evening privileged to have with them. In particular, it was a very happy chance that, owing to the fact that they were engaged on work on the Auckland waterfront, the Hon. Sir Robert Kennedy and Messrs. F. C. Spratt and T. P. Cleary were able to be present. The speaker wondered whether, in the report to the New Zealand Law Society by the visitors, there would be any reference to the possibility of introducing spelling or stop-work meetings for the benefit of their overworked profession. He would, however, like to take the opportunity of asking the Wellington visitors to convey to the members of the various committees of the New Zealand Law Society, and particularly to the Standing Committee (all Wellington practitioners), the sincere thanks and appreciation of the Auckland practitioners for the very large amount of work they were doing on behalf of the members of the profession throughout the Dominion. He stated how pleased the Auckland practitioners were to be honoured by the presence of so numerous and distinguished a company of guests.

The toast to "The Guests" was then drunk with much enthusiasm.

Mr. Justice Stanton replied to the toast of "The Guests," and, on their behalf, thanked Mr. Vialoux and those present for the manner in which they had honoured it, and also the Law Society for its lavish hospitality. He pointed out that in the last eight years three practitioners from Auckland had been elevated to the Bench, and said that the latest appointee would be not only a good, but a super-excellent Judge, and the speaker was looking forward to receiving from him assistance, co-operation, and inspiration. He had only one regret, and that was that the appointment of a new Judge was due to the lamentable death of the late Mr. Justice Callan. "I do not think that any Judge has more greatly endeared himself to the members of the profession than did Mr. Justice Callan, and I should like to take this opportunity of paying a very sincere tribute to his memory. He enlivened the administration of justice with sparkling wit and kindest courtesy, and we shall all treasure our recollections of him for many years."

In the speaker's opinion, it was desirable for a Judge to have contacts with people on as varied a scale as reasonably possible. Three and a half years of judicial life had proved to him that this was quite possible without any loss of dignity as a Judge. A Judge, in his opinion, should move freely amongst his fellow-men, and it was all to the benefit of his judicial life that he should continue to do so. In other words, a Judge should be able "to walk with kings nor lose the common touch."

In conclusion, His Honour stated that he hoped the Bar would never lose its independence. He thought that perhaps there was too great a tendency on the part of counsel to say: "That is the Judge's view. I can do nothing about it." They were not doing their duty unless they pressed their views, nor were they being helpful to the Bench. "The greatest security for the maintenance of an efficient and impartial Bench is the continued existence of an able and independent Bar," said His Honour.

During the evening, musical items were rendered by Messrs. M. R. Grierson, J. B. Ramsay, and T. Sparling, and, in addition, Mr. Bryce Hart was heard in some topical humorous verse.

EASEMENTS: ARISING BY IMPLICATION FROM A GRANT OF LAND.

By E. C. Adams, LL.M.

There are now many divergences between the law of real property in England and in New Zealand. When, therefore, the decision of a Judge of first instance in England is overruled by the Court of Appeal and the case is one involving an important principle of conveyancing or real property law, the New Zealand conveyancer should ask himself to what extent, if any, the decision of the English Court of Appeal applies to New Zealand. One such case is *Re Webb, Sandom* v. *Webb*, [1951] 2 All E.R. 131, which has already been discussed in English legal periodicals, as a matter of current interest.

The case concerns the doctrine of implied reservation of easement, the leading case on which appears to be *Wheeldon* v. *Burrows*, (1879) 12 Ch.D. 31. From this case two general rules may be deduced, both of which are founded upon the maxim (now well-established) that a grantor shall not derogate from his grant. The first rule is that, on the grant by an owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (called quasi-easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been, and are at the time of the grant, used by the owners of the entirety for the benefit of the part granted. (It may be stated here that this first rule does not apply where the alleged servient tenement is under the Land Transfer Act: *Nelson* v. *Walker*, (1910) 10 C.L.R. 560, 572.) The second rule is that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it *expressly* in the grant. *Re Webb, Sandom* v. *Webb*, [1951] 2 All E.R. 131, involved this second rule and the exceptions to this rule (of which more anon), for the grantor had not expressly reserved any easement, but claimed an *implied* reservation to keep certain advertisements on the outer walls of the rooms leased. As Danckwerts, J., in the Court of first instance pointed out ([1950] 2 All E.R. 828, 830), while there is in England no great difficulty in implying a right or easement of this kind in favour of the grantee (a contention which is supported by s. 62 of the Law of Property Act, 1925), it is very difficult to imply reservations in favour of a grantor, whether a landlord or a vendor. He continued, at p. 830:

> Generally speaking, such rights have been implied in favour of the vendor . . . only in the case of easements of *necessity* when it is impossible to obtain access to the grantor's other property unless such a right is implied in his favour.

(Again, it may be pointed out that the doctrine of easement of necessity does not apply where the alleged

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ITS POLICY

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It is considered that there are approximately 5,000 crippled children in New Zealand, and each year adds a number of new cases to the thousands already being helped by the Society.

Members of the Law Society are invited to bring the work of the N.Z. Crippled Children Society before clients when drawing up wills and advising regarding bequests. Any further information will gladly be given on application.

NEW ZEALAND CRIPPLED CHILDREN SOCIETY (Inc.)

Box 6025, TE ARO, WELLINGTON.

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servient tenement is under the Land Transfer Act, 1915 : see (1934) 10 NEW ZEALAND LAW JOURNAL 234.)

The relevant facts in *Re Webb, Sandom* v. *Webb*, [1951] 2 All E.R. 131, may be shortly stated. The head lessee of business premises, of which he occupied the ground floor, where he carried on his trade of a grocer, granted to the tenant in 1949 a lease of the first and second floors for a term of twenty-one years, for use as a hairdressing saloon. As construed by the Courts, the demise included the *outer* walls of the upper floors of the premises, but there was no covenant either by the landlord or the tenant to maintain these walls, *nor was there any express reservation in the landlord's favour of advertising or other rights as regards the use of their exterior surfaces.* A most important factor in the case was that between 1939 and 1949 the tenant had been in occupation of the two floors under tenancy agreements with the same landlord—*i.e.*, head lessee—and, during that time, the landlord had maintained two advertisements on the outside of the two premises with the full knowledge of the tenant and without any complaint or claim on his part. These advertisements are thus referred to in the judgment of the Judge of first instance ([1950] 2 All E.R. 828, 830) :

> There is evidence that at the date of the lease [1949—the date of the lease in dispute], and, indeed, at the date when the tenancy began in 1939, there was on the outside wall of the first floor demised to the tenant [the lessee hairdresser] a large advertisement painted in these terms : " Webb's for Meat, Grocery and Provisions " . . . That refers to the landlord's business, which he conducted on the ground floor. There was also an advertisement contained in a frame attached to the outer wall of the first floor advertising Brymay Safety Matches.

The landlord (the grocer) claimed that he had the right or easement to retain these two existing advertisements and to effect repairs necessary from time to time. His claim was upheld by the Judge of first instance. After pointing out that the Court of Appeal had recognized that there were exceptions to the rule as laid down in *Wheeldon* v. *Burrows*, (1879) 12 Ch.D. 31, that an easement will not be implied in favour of a grantor, Danckwerts, J., said ([1950] 2 All E.R. 828, 831, 832) :

> It does seem to me that there may be exceptional circumstances in which it is only common sense to imply some reservation, and that such an implication should be made in the circumstances of the present case. When I see from the photograph which is before me that when the parties entered into their transaction there was an enormous advertisement painted on the wall advertising Webb's for meat, grocery and provisions, and a very large advertisement advertising Brymay Safety Matches, which had been there at least since 1939, and when no evidence is given that anything was said by either of the parties about the removal of those advertisements, it appears to me to be common sense to imply an intention on the part of the parties that they should remain. Therefore, I am prepared to hold that there was in favour of the landlord implied in this lease an easement until the termination of the lease to keep those two advertisements in the position in which they were, and, by necessary implication, a right to repair them, paint them, and do whatever may be necessary from time to time to preserve them as effective advertisements.

But this view was unanimously rejected by the three Judges constituting the Court of Appeal. It is the duty of a grantor to reserve expressly any right he wishes to maintain against his grantee, or, at least, to prove affirmatively that such a reservation was clearly intended by him and his grantee at the time of the grant. In the opinion of the Court of Appeal, the landlord grocer had failed to discharge this *onus probandi*. On the somewhat meagre facts before the Court, it had not been shown that it *must* have been the common intention that the landlord was to reserve a right to maintain advertisements on the wall demised. The Master of the Rolls posed and answered the problem thus ([1951] 2 All E.R. 131, 135) :

> The question then is whether, having regard to the apparent and continuous user by the landlord (or those under contract with him) with the full knowledge of the tenant, there ought to be implied the reservation which the landlord seeks. Beyond the facts of user and of the tenant's acquiescence, there is no other relevant consideration. As I have already indicated, the authorities, in my judgment, compel me to hold that the landlord has failed to establish any sufficient ground for an implied reservation in his favour.

Jenkins, J., after pointing out that the mere fact that the tenant knew, at the date of the lease of August 11, 1949, that the landlord was using the outer walls of the demised premises for the display of the advertisements in question did not suffice to absolve the landlord from his duty of expressly reserving any rights in respect of them he intended to claim, or to take the case out of the general rule as formulated in *Wheeldon* v. *Burrows*, (1879) 12 Ch.D. 31, said ([1951] 2 All E.R. 131, 144) :

> It might, I suppose, be said to have been in the contemplation of the parties that the landlord would continue to use the ground floor of the premises for the purposes of his business as a butcher and provision merchant, but it cannot, in my view, be contended that the maintenance during the term of the lease of his advertisement over the door was a necessary incident of the user so contemplated.

This passage distinguishes the case from the New Zealand case of *Lyttelton Times Co., Ltd.* v. *Warners, Ltd.*, [1907] A.C. 476 ; N.Z.P.C.C. 470. In that New Zealand case, both parties contemplated, at the time of the grant of the lease, that the grantor should carry on his printing-works on the part of the premises retained, and it was held by the Privy Council, reversing our Court of Appeal, that the grantee could not, in those circumstances, complain of a nuisance to the premises granted due to noise and vibration unavoidably occasioned by the carrying on as contemplated of printing-works on the grantor's part of the premises.

But it is important to bear in mind the exact nature of the proceedings in *Re Webb, Sandom* v. *Webb*, [1951] 2 All E.R. 131. The question raised was stated in an originating summons issued by the tenant against the landlord :

> Whether, on the true construction of the lease dated August 11, 1949, and made between the landlord of the one part and the tenant of the other part and in the events which have happened, the landlord is entitled, until the determination of the lease, to use for the purpose of advertising the outer walls and if so what portions or portion of the outer walls of the property demised by the lease without consent of the tenant.

The landlord by his counsel in the course of the argument complained of the form of the proceedings as being inappropriate to the problem which the Court was called on to determine. Particularly, he complained that in the proceedings there was no opportunity for him, as an alternative weapon of defence, to counterclaim for *rectification*. With regard to this complaint, the Master of the Rolls said, at p. 133 :

> We have, therefore, to decide the case on the material before us. Our decision must necessarily be related to those facts and cannot be regarded as extending beyond them to cover other cases in which much fuller material might be before the Court. Our decision, moreover, *must be without prejudice to any claim the landlord may have to rectify the lease* or to any point he may be able or entitled to raise on any application by the tenant for an account or an injunction or otherwise by way of enforcement of his rights.

That the remedy of rectification of the grant may be open to a grantor must be borne in mind in applying the rules laid down in *Wheeldon* v. *Burrows*, (1879) 12 Ch.D. 31.

As previously pointed out in this article, *Re Webb, Sandom* v. *Webb*, [1951] 2 All E.R. 131, dealt with the second rule laid down in *Wheeldon* v. *Burrows*, (1879) 12 Ch.D. 31. *Prima facie*, a grantor or lessor cannot assert against his grantee or lessee any right or privilege unless it has been expressly reserved to him by the grant. To this rule there are certain well-established exceptions. What are these exceptions, and to what extent are they applicable to our Land Transfer system ?

The exceptions may be thus enumerated :

(i) Implied reservation of *necessary* easements.

(ii) Implied reservation of reciprocal or mutual easements.

(iii) Implied reservation in some other exceptional cases.

Almost all the cases of implied easements of necessity have been cases of ways. As stated in *Stroud's Law of Easements*, 69 :

> It is obviously much more difficult to prove a strict necessity for light, water or support than for a way into a land-locked close.

Previously it was said, at pp. 68, 69 :

> In *Corporation of London* v. *Riggs* ((1880) 13 Ch.D. 798) it was held that " where the owner of a close surrounded by his own land grants the land and reserves the close, the implied right to a way of necessity to and from the close over the land operates by way of regrant from the grantee of the land, and is limited by the necessity which created it. This regrant, however, does not create a right to a way of necessity for all purposes for which the close may at any time be used, but only such a right-of-way as will enable the owner of the close to enjoy it as in the condition it happened to be at the time of the regrant. For instance, if at the time of the regrant the close was agricultural land, the owner of the close can only claim such a right-of-way as is suitable to the enjoyment of the land in that condition ; he cannot claim a right-of-way suitable to the user of the close as building land."

As previously stated, there can be no implied grant of an easement of necessity over land subject to the Land Transfer Act, 1915. *Quaere*, whether the grantor could claim rectification of the grant if it did not carry out the full intention of the parties.

As to cases under our second exception (implied reservation of reciprocal or mutual easements), they have usually been cases dealing with an alleged right of support, or party-wall easements. *Stroud's Law of Easements*, 70, refers to *Richards* v. *Rose*, (1853) 23 L.J. Ex. 3 :

> Where several houses belonging to the same owner are built together, so that each requires the support of the neighbouring house, and the owners part with one of the houses, the right to such mutual support is not thereby lost ; the legal presumption being, that the owner reserves to himself such right, and at the same time grants to the new owner an equal right ; and consequently if the owner parts with several of the houses at different times, the possessors still enjoy the right to mutual support, the right being wholly independent of the question of the priority of their titles.

As pointed out by counsel in *Bailey* v. *Vile*, [1930] N.Z.L.R. 829, this exception would not apply to land subject to the Land Transfer Act, 1915 : *Mackechnie* v. *Bell*, (1909) 28 N.Z.L.R. 353, and *Mackenzie* v. *Waimumu Queen Gold-dredging Co., Ltd.*, (1901) 21 N.Z.L.R. 231. But, in certain circumstances, the Supreme Court can grant relief under s. 3 of the Property Law Amendment Act, 1950 : it will be noted that under that section the Court may now create easements.

The third exception (implied reservation in some other exceptional cases) is the most difficult one. It was this exception which was dealt with, and unsuccessfully claimed by the lessor, in *Re Webb, Sandom* v. *Webb*, [1951] 2 All E.R. 131. As Jenkins, L.J., put it in the Court of Appeal in that case, the circumstances of any particular case may be such as to raise a necessary inference that the common intention of the parties must have been to reserve some easement to the grantor, or such as to preclude the grantee from denying the right consistently with good faith ; and there appears to be no doubt that, where circumstances such as these are clearly established, the Court will imply the appropriate reservation. But, again, this exception would not apply to land subject to the Land Transfer Act, 1915. To create an easement over land subject to the Land Transfer Act, 1915, a registered instrument creating the easement is necessary : s. 82 of the Land Transfer Act, 1915. But, it is submitted, there is nothing to prevent a transferor or lessor of land under the Land Transfer Act, 1915, from claiming *rectification* of the transfer or lease, provided, of course, the parties to the instrument still remain registered proprietors of their respective estates, and have not in the meantime dealt with their estates : per the Master of the Rolls in *Re Webb, Sansom* v. *Webb*, [1951] 2 All E.R. 131, per Edwards, J., in *In re Mangatainoka 1 Bc No.* 2, (1913) 33 N.Z.L.R. 23, 62, and *Taitapu Gold Estates, Ltd.* v. *Prouse*, [1916] N.Z.L.R. 825, 831.

A case cited in *Stroud's Law of Easements*, 77, as exemplifying this third exception (although recognized by the learned author as not of high authority), *Simpson* v. *Weber*, (1925) 41 T.L.R. 302, has not withstood the scrutiny of the Court of Appeal. This case arose out of a dispute between two owners of adjoining houses which had been in common ownership. The plaintiff acquired his house in 1918, the defendant his in 1923. For some years before the severance of ownership, a creeper had been growing in what was now the defendant's garden, with its foliage spreading over the walls of the plaintiff's house. It had never overhung the plaintiff's property, but merely adhered to it. Also, part of a gate leading to what was now the defendant's garden had been fastened by plugs and nails into the plaintiff's wall. The growth of the creeper had from time to time reached the plaintiff's gutter, and he had been obliged to cut it back. The Divisional Court held that in each instance there was an easement existing at the time when the original owner of the two houses conveyed the plaintiff's house to the plaintiff's predecessor in title ; and, as there was no evidence that it was not the intention of the parties to that conveyance that the creeper and the gatepost should remain, the defendant had a right to use the plaintiff's wall for the creeper and the gatepost ; but the defendant had no right to allow the creeper to grow so as to obstruct the plaintiff's gutter. The plaintiff and defendant were respectively successors in title of the grantee of a common owner and of the common owner himself. Jenkins, L.J., in *Re Webb, Sandom* v. *Webb*, [1951] 2 All E.R. 131, said that he could not agree that *Simpson* v. *Weber*, (1925) 41 T.L.R. 302, was good law so far as it proceeded on the ground that " there was no evidence that it was not the intention of the parties that the creeper and the gatepost should stay " (*ibid.*, 304) ; and this appears also to have been the view of the Master of the Rolls.

Finally, it is possible to pick up another practical point from *Re Webb, Sandom* v. *Webb*, [1951] 2 All E.R. 131, and it is this. The right to place and maintain advertisements on the land of another is a legal easement, and in New Zealand, by reason of s. 13 of the Property Law Act, 1908, such right need not be appurtenant to any land. It is also safe to assume from *Simpson* v. *Weber*, (1925) 41 T.L.R. 302, that the right to allow a plant growing on one's land to adhere to the house of one's neighbour and the right to allow one's gatepost to be attached to the wall belonging to one's neighbour are both legal easements.

CONCURRENT JURISDICTIONS.

Divertimento for Several Strings.

A Judiciary comprising ten Judges of first instance and thirty Courts of Appeal can scarcely fail sooner or later to provoke a respectful reference to the Grand Army of Haiti. There is, as it were, a certain lack of balance in the concept. In effect, however, that is the present arrangement here. With two divisions of five Judges each, sitting sometimes five, sometimes four, and sometimes three at a time, it is possible to constitute thirty different Courts of Appeal; and it seems pretty probable that, during the past year or two, all thirty of them have sat. Surely, then, the advocates of a separate Court of Appeal are now confounded: we have lots—indeed, we have dozens—of Courts of Appeal.

But it may be that the question of a separate Court of Appeal is about to become even less debatable. Something will clearly depend upon the precise manner in which a recent decision is to be applied; but it seems at least possible that the labours of the Court of Appeal will soon be materially diminished. In *Wellington District Hotel, Hospital, Restaurant, and Related Trades Employees' Industrial Union of Workers* v. *Attorney-General, Ex rel. Just*, [1951] N.Z.L.R. 1072, a Court of Appeal refused to hear the appeal, and set aside the judgment of the Supreme Court upon a question of the construction of a statute. The ground assigned was that the Court of Arbitration had jurisdiction to determine the question of construction, and was better fitted to do so than the Supreme Court, and that, therefore, the Supreme Court ought to have refused the injunctions which were sought by the plaintiffs, and which followed upon the determination in their favour of the question of construction which arose.

It is not the purpose of the present article to examine the judgment in detail. No attempt, therefore, will be made to demonstrate that injunction is a remedy of right—as it undoubtedly is—or that the injunctions granted were necessary remedies—as they plainly were—or that the Court of Arbitration could not, upon any application by the plaintiffs, have granted them any injunction or other effective relief—as the Court of Arbitration certainly could not. What is less trite, and more intriguing, is that the judgment appears to involve, as a necessary postulate, that no Court is obliged to deal with a suitor's application if it thinks that another Court having concurrent jurisdiction ought to have been applied to; and, further, that in such a case it is actually the duty of the first tribunal to throw the suitor out.

The doctrine is, it would seem, restricted to Courts of justice, as distinct from other persons performing judicial functions. The House of Lords appears to have laid it down that the latter kind of tribunal has no option but to decide questions which come before it, if it has jurisdiction to do so. In the well-known passage in *Board of Education* v. *Rice*, [1911] A.C. 179, 182, Lord Loreburn, L.C., said that there was a remedy by mandamus if the Board had not determined the question which they were required by the Act to determine. In *Whitfield's Motor Service, Ltd.* v. *Matthews*, [1932] N.Z.L.R. 1414, 1420, Ostler, J., thought it clear that a Transport Licensing Authority could not avoid deciding an incidental question of law, except by stating a case under the Commissions of Inquiry Act, 1908. Presumably, therefore, the doctrine applies only to judicial tribunals that are also Courts, unless *Whitfield's* case is now to be taken as overruled, and Lord Loreburn's dictum distinguished, by implication.

It is to be hoped that advanced tuition will shortly be forthcoming in this branch of the law. Even if one leaves aside any possible doubt as to whether it extends to judicial tribunals not Courts, the doctrine, though striking, seems difficult to apply. Among the questions which, as the present writer respectfully supposes, will fall to be decided are those now set out:

(i) Ought a Magistrate to decline jurisdiction in every civil suit, upon the ground that it would be presumptuous in him to suppose that a Judge could not try it better?

(ii) If a Magistrate tries a civil suit and an appeal is brought, ought the Supreme Court to set his judgment aside upon the said ground, and refuse to hear the appeal?

(iii) In a suit for less than £20, ought a Magistrate to decline jurisdiction in favour of:

(*a*) The Supreme Court?

(*b*) Two Justices?

(iv) What ought Justices to do about civil suits?

(v) Ought the Supreme Court to decline jurisdiction and leave the plaintiff to litigate elsewhere:

(*a*) In a civil suit for £500, upon the ground that the Magistrate's Court has jurisdiction?

(*b*) In a civil suit for a larger amount, upon the ground that the parties can give a Magistrate jurisdiction by consent?

(vi) If the Court of Appeal refuses to hear an appeal from the Supreme Court, and sets aside that Court's judgment in favour of the jurisdiction of the Court of Arbitration, and if that Court, when applied to, states a case for the Court of Appeal, what casualties may be expected?

(*vii*) If every Court having jurisdiction decides that a given suit should be tried in another such Court, has the suitor a forum, and which is it?

(viii) What should be done where a given Court is disposed to try the claim, but not the counterclaim?

(ix) To which, if any, of the foregoing questions ought an answer or answers to be declined respectively by :

(*a*) Justices ?

(*b*) Magistrates ?

(*c*) The Supreme Court ?

(*d*) The Court of Appeal ?

(x) Does any one or more, and, if so, which, of the foregoing questions depend upon the facts of the particular case ?

(xi) Ought an answer to the last question to be declined by :

(*a*) Justices ?

(*b*) Magistrates ?

(*c*) The Supreme Court ?

(*d*) The Court of Appeal ?

It is not intended for a moment to suggest that the doctrine laid down in the *Hotel Workers'* case, though novel perhaps, is anything but beneficial, or that it will render the machinery of justice less effective, except perhaps for litigants. Nevertheless, the present writer humbly conceives that, until the doctrine is more fully worked out by a series of decisions upon the part of such Court or Courts as can be induced to undertake them, the advantages accruing from the application of the doctrine will not be widely enough appreciated, or, indeed, understood.

One word, perhaps, remains to be said. It may be incorrect to characterize the doctrine as novel, and some other epithet ought possibly to be adopted. The late Sir W. S. Gilbert, while at the Bar, reported the decision of a learned Baron of the Exchequer in a somewhat similar case, *Gibbs* v. *Cobb*, (1869) B.B. 240 :

Our friend began, with easy wit,
That half concealed his terror :
" Pooh ! " said the Judge, " I only sit
In Banco or in Error.
Can you suppose, my man, that I'd
O'er Nisi Prius Courts preside,
Or condescend my time to spend
On anything but Error ?

The plaintiff, who appeared in person, rejoined with certain disrespectful and, perhaps, contemptuous observations. But the case is not here referred to upon that point, as to which, indeed, nothing was decided. It is to be hoped, however, that in comparable circumstances latter-day litigants will be less ungrateful.

—PULEX.

CONFESSIONS: A WARNING LIGHT.

Police v. Weir.

By J. C. PARCELL.

The fact that an obscure country girl of tender years appeared before a Magistrate in a way-back country Court while the Police applied for a rehearing of a conviction twelve months old or more will probably never find its way into the law reports. The proceedings themselves and the haste with which they were conducted might have led anyone to think that there was considerable anxiety on somebody's part that the case should not even find its way beyond the walls of the Court. It may be that the individual no longer matters in this country, and that the rights and privileges of the humblest citizen need trouble us no longer. If so, well and good ; but, if the principles of justice, as so frequently extolled by eminent personages in New Zealand and elsewhere throughout the Empire, are anything more than delightful opiates for the appeasement of the masses, then this humble country case is one of the most glaring warning lights ever to blaze forth from the administration of justice.

This country girl posted a letter with a £5 note in it to her mother, and her mother did not get it. She inquired from the Post Office, and was required to sign the usual form declaring she had posted the letter. The matter was then handed to the Police. The Police obtained from the girl an admission that she had not posted the letter, and immediately prosecuted her on her declaration. She was convicted. Twelve months later, the Post Office people found the letter and the £5 note in their possession.

This leaves a very unpleasant taste in the mouth. In the first place, the Police seem to have devoted an unusual amount of energy towards getting the girl to confess she was in the wrong. It looks like an application of the principle adopted in some other countries that a Government Department cannot be wrong. This girl, having accused a Government Department of the wrong of losing her letter—a thing they could not possibly do—must be made to feel the weight of authority and withdraw her wicked accusation. However that may be, the fact remains that the girl was so badgered by the Police that, for the sake of peace, she eventually said : " All right. I didn't post it."

As lawyers, we are perhaps more concerned with the machinery of law as it is put in our hands by the legislators, but there comes a time when our common heritage compels us to protest against what our legislators do, and it seems to me that the time has arrived when all lawyers should join to denounce the way in which the law relating to the receipt of *confessions* in evidence has been modified by interested parties over recent years for their own purposes.

In the bad old days, when British prestige beyond the boundaries of the Empire was something to be proud of, anything in the nature of a confession obtained by a Police officer had a very difficult task to get into a Court of law. Now, it would appear that the most acceptable piece of evidence is the statement made to the Police. And it has all been brought about by statutory modification.

Has anyone ever stopped to inquire who has been responsible for this change of law ? Has anyone ever looked up *Hansard* to see how much it was debated or questioned ? Would it be a surprise to anyone to learn that the alteration of the rule of evidence proceeded directly from those who want to use it ? And, when we read in the newspapers, with a very large question mark, that certain citizens of a central European country have been condemned of espionage or such like on their own confession, do we ever inquire whether we have not exactly the same machinery here ?

The length of abuse which can be caused by the availability of a confession in a Court of law is so great that it is distinctly arguable in the interest of justice that no confession should be used in evidence in any circumstances whatsoever. If individual rights are to be protected, it would appear from what we learn of the activities in Communist and Socialist countries that the party against which protection is most likely to be needed is the State. If the State cannot use a confession, it will not proceed with tactics designed to get a confession. A Communist or Socialist State cannot function unless the State by its officials can dominate the individual.

I believe the time has arrived when the law as to confession should be so altered as clearly to provide that no confession by a person under twenty-one years of age shall be received in evidence unless it is handed into Court by counsel acting independently for the accused, and, in all other cases, unless it is handed into Court by the accused personally or by counsel acting on his behalf.

THEIR LORDSHIPS CONSIDER.

By COLONUS.

The Danger of Metaphor.—" The advantage of correcting by familiar practice an inaccurate use of a word, although that use may be found in treatises of reputation, I remember to have seen singularly illustrated in a case that occurred some years ago in a Court of law, where the Court of law was told that in an agreement for the sale of a house the vendor was trustee for the purchaser, and the Judges were called upon to apply a rule which is quite right as between a complete trustee by declaration and the *cestui que trust*, but quite wrong where the vendor is called a trustee only by a metaphor, and by an improper use of the term ; and it required some trouble to convince them that though the vendor might be called a trustee he was a trustee only to the extent of his obligation to perform the agreement between himself and the purchaser. In like manner here, the surviving partner may be called a trustee for the dead man, but the trust is limited to the discharge of the obligation, which is liable to be barred by lapse of time ; as between the express trustee and the *cestui que trust* time will not run ; but the surviving partner is not a trustee in that full and proper sense of the word. It is most necessary to mark this again and again, for there is not a more fruitful source of error in law than the inaccurate use of language. The application to a man who is improperly, and by metaphor only, called a trustee, of all the consequences which would follow if he were a trustee by express declaration—in other words a complete trustee—holding the property exclusively for the benefit of the *cestui que trust*, well illustrates the remark made by Lord Mansfield that nothing in law is so apt to mislead as a metaphor " : Lord Westbury in *Knox* v. *Gye*, (1872) L.R. 5 H.L. 656, 675, 676.

Limits of Definition.—Some seventy-seven years later, their Lordships pointed out the opposite danger to metaphor—namely, that of over-preciseness. The humble practitioner must now steer his bark between the Scylla of analogy and the Charybdis of punctiliousness in his search for the safe route to judicial approval. For, in *Commonwealth of Australia* v. *Bank of New South Wales*, [1950] A.C. 235, 312, 313 ; [1949] 2 All E.R. 755, 773, in discussing the boundary between direct and remote restrictions on trade, their Lordships said they would not attempt to define this boundary :

> An analogous difficulty in one section of constitutional law, namely, in the determination of the question where legislative power resides, has led to the use of such phrases as " pith and substance " in relation to a particular enactment. These phrases have found their way into the discussion of the present problem also and, as so used, are the subject of just criticism by the learned Chief Justice. They, no doubt, raise in convenient form an appropriate question in cases where the real issue is one of subject-matter, as when the point is whether a particular piece of legislation is a law in respect of some subject within the permitted field. They may also serve a useful purpose in the process of deciding whether an enactment which works some interference with trade, commerce, and intercourse among the States is, nevertheless, untouched by s. 92 as being essentially regulatory in character. But where, as here, no question of regulatory legislation can fairly be said to arise, they do not help in solving the problems which s. 92 presents. Used as they have been to advance the argument of the appellants they but illustrate the way in which the human mind tries, and vainly tries, to give to a particular subject-matter a higher degree of definition than it will admit. In the field of constitutional law—and particularly in relation to a federal constitution—this is conspicuously true, and it applies equally to the use of the words " direct " and " remote " as to " pith and substance."

Procedure.—" Rules of procedure ought to be clear practical directions, not pitfalls for suitors " : Lord Selborne, L.C., in *Danford* v. *Mc Anulty*, (1883) 8 App. Cas. 456, 459.

Bidding by The Glass.—"The Chancellor [Lord Eldon] stated, that when he was Attorney-General, they had a case in the Exchequer of a female auctioneer. She continued silent during the whole time of the sale ; but, whenever anyone bid, she gave him a glass of brandy.—The sale broke up, and, in a private room, he that got the last glass of brandy was declared to be the purchaser. This was decided to be an auction " : *Walker* v. *Advocate-General*, (1813) 1 Dow 111, 114 ; 3 E.R. 640, 641.

Sealing Documents.—Corporation clients, and those dealing with them, sometimes wonder why the law insists on so old-fashioned a system as the seal. In *H. Young and Co.* v. *Mayor, &c., of Royal Leamington Spa*, (1883) 8 App. Cas. 517, Lord Bramwell supplies a handy answer. A contract by a local body was set aside for want of a seal, and he said, at p. 528 :

> I must add that I do not agree in the regret expressed at having to come to this conclusion. The Legislature has made provisions for the protection of ratepayers, shareholders, and others, who must act through the agency of a representative body, by requiring the observance of certain solemnities and formalities which involve deliberation and reflection. That is the importance of the seal. It is idle to say there is no magic in a wafer. It continually happens that carelessness and indifference on the one side, and the greed of gain on the other, cause a disregard of these safeguards, and improvident engagements are entered into. Whether that has been so in this case I have no notion ; but certainly the ratepayers of Leamington may well be astonished at the amount claimed of them. The decision may be hard

in this case on the plaintiffs, who may not have known the law. They and others must be taught it, which can only be done by its enforcement.

Note: It would probably be unwise to give the last sentence neat to a client on the wrong side of the law here.

No Fish Stories.—Mention of seals recalls another case in Dow's Reports—namely, *Hall* v. *Ross*, (1813) 1 Dow 201; 3 E.R. 672. Ross, having let certain fishing stations to Hall, erected a dry dock in an adjacent island. Apparently the pumping operations upset the fishing, and Hall claimed a deduction from the rent. Lord Eldon said he had in his possession a very learned paper on the temper and disposition of salmon, &c., which was produced in one of these causes, and which he had kept as a curiosity. But, if their Lordships, instead of confining themselves to the terms and nature of the contract, were to decide upon philosophical speculations respecting the temper and disposition of fishes, it would be long before they could come to a satisfactory conclusion. Their Lordships accordingly declined to theorize, and, instead, sent the case back with a direction to assess damages somehow. The problems of metaphysics still plague the House—and only a few years ago Viscount Simon, L.C., in *Hickman* v. *Peacey*, [1945] A.C. 304, 316; [1945] 2 All E.R. 215, 219, spoke of simultaneous deaths as:

> a problem of considerable refinement in the realm of physics and philosophy which I hardly think the two Houses [of Parliament] can be expected to have studied and inferentially pronounced upon.

Again, His Lordship refused to be drawn into providing theoretical answers, and said, at p. 318; 220:

> A Court of law, whether it takes the form of a Judge sitting alone, or sitting with the help of a jury, is not engaged in ascertaining ultimate verities: it is engaged in determining what is the proper result to be arrived at, having regard to the evidence before it.

To learn this sentence by heart should be the first duty of every law student.

"*Yes*" *and* "*No.*"—"Their Lordships think the Court in the Colony might well have taken this decision as an authoritative construction of the statute. It is the judgment of the Court of Appeal, by which all the Courts in England are bound, until a contrary determination has been arrived at by the House of Lords. Their Lordships think that in Colonies where a like enactment has been passed by the Legislature, the Colonial Courts should also govern themselves by it": *Trimble* v. *Hill*, (1879) 5 App. Cas. 342, 344, approved in *Nadarajan Chettiar* v. *Walauwa Mahatmee*, [1950] A.C. 481.

"Where an appellate Court in a Colony which is regulated by English law differs from an appellate Court in England, it is not right to assume that the Colonial Court is wrong": *Robins* v. *National Trust Co.*, [1927] A.C. 515, 519.

CORRESPONDENCE.

Elimination of Latin as A Degree Subject.

The Editor,
NEW ZEALAND LAW JOURNAL,
Wellington.

Sir,

I wish to write in support of a letter from Mr. T. P. McCarthy (1951) 27 NEW ZEALAND LAW JOURNAL, 291) protesting against the proposed elimination of Latin from the Law syllabus.

I agree with Mr. McCarthy that the elimination of Latin would tend to lower the standard of the Law degree, and I consider that it is of the utmost value to every practitioner.

I hope, therefore, that others of like views will enter their protest against the proposed elimination of Latin.

Yours, &c.,
B. A. BARRER.

The Editor,
NEW ZEALAND LAW JOURNAL,
Wellington.

Sir,

It is well to be cautious in approaching the question of dropping Latin—for it is a question of dropping it, since passes are more readily gained in other subjects. Lawyers (at their Conference) have been warned that the cultural background can be lost sight of if the control of legal education comes too much under the influence of the practising lawyer.

It is a matter for the academy rather than the Law Societies, for it pertains little to the question of whether Latin is useful to lawyers. It pertains rather to the question of whether Latin is valuable in the general scheme of a liberal education, or is an aid in receiving and imparting culture. Besides, by definition (Aristotle), "liberal" means tending to enjoyment, in which nothing accrues in consequence beyond the using.

Newman truly said (and demonstrated it fully in his cool, limpid prose) that the idea of a University is not learning or acquirement, but rather is thought or reason exercised upon knowledge. Indeed, the Victorians understood the matter clearly. Thomas Hughes (of *Tom Brown's Schooldays*) gives as the chief mark of a thoroughly bad school that it was practical and "nothing was taught (except as extras) which was not to be of real use to the boys in the world . . . not to put the boys in the way of getting real knowledge or any of the things Solomon talks about but to put them in the way of getting on."

There is, of course, no room in a note of this kind to do more than draw attention to this point of view.

Yours, &c.,
F. J. FOOT.

The Editor,
NEW ZEALAND LAW JOURNAL,
Wellington.

Sir,

Can I, an uncultured person, write you? I would like to point out how fine the line of demarcation is between a cultured and an uncultured person according to University standards.

In 1919, I hired the services of a retired clergyman and passed in Latin for Matriculation. Then I passed thirteen out of fourteen subjects for the LL.B. degree, including Roman Law, translating long passages from the *Institutes*. My Professor in Latin was a very erudite gentleman, who told me *ad nauseam* that my Latin might be excellent Baconian Latin but it was not classical Latin. I having found a Latin passage in an old judgment, in my innocence I took it to the Professor for translation, to be told it made nonsense. Later, I found the translation in a book of Latin maxims for lawyers, and took it to the Professor and told him that the maxim was attributed to Sir Francis Bacon. Hence the remarks. And thereafter I was regularly failed by small margins.

During my years, I have served the Crown in war in Egypt, Gallipoli, France, and Belgium, and in peace in a quasi-judicial capacity in this country. I have been fortunate, also, in that I have been able to serve my own profession. Some University lecturers might agree that I have acquired a modicum of a spurious cultural background. However, I will confess that I still think *Quo pro quid* should be properly translated as "How much for £1?" I think that, to understand word values in the English language, some knowledge of Latin is necessary, and that the correct standard for a lawyer would be Latin to University Entrance standard plus an examination on the use of our own Latin maxims. If the University cannot teach the bastard Latin used by lawyers, why go there?

Yours, &c.,
G. T. BAYLEE.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Sir Vincent Meredith.—The knighthood conferred upon Mr. Vincent Meredith of Auckland is a well-deserved recognition of thirty years' service as Crown Prosecutor. Now in his seventy-fifth year, Sir Vincent qualified as a barrister while he was employed in the Customs Department. His leisurely presentation of a case cloaked a worldly shrewdness, and he was well able to counteract by his quiet and incisive manner the wiles of defence counsel. Rumour has it that he proposes to publish a volume of his memoirs. If this is so, the profession may look forward to an account of many of the most interesting *causes célèbres* in New Zealand's criminal history.

Judicial Longevity.—Sir Travers Humphreys, who was eighty-four last August, has had attributed to him recently a story illustrative of the respect paid by lawyers to age and wisdom. One day, so it seems, he was passing an elderly legal group in Middle Temple Lane. As Lord Halsbury, then ninety-three, was talking to Sir Harry Poland, then ninety-one, a mutual friend of eighty-seven came up to them and joined in the conversation. "Young man," said the aged ex-Lord Chancellor, "there will be time enough to interrupt the observations of your elders when you arrive at the years of discretion."

Licensing Note.—One of the main contentions made before the Licensing Control Commission at its investigations of conditions of drinking on the West Coast was that the "spread system of drinking" there introduced the social and leisurely atmosphere of the English tavern, reduced drunkenness and crime to a minimum, and avoided the abuses of the metropolitan peak-hour swilling. This view, hallowed to some extent by coastal tradition, reminds Scriblex of the Meos, one of the most mysterious of the twelve principal races of Indo-China, whose idiosyncrasies lead them, although essentially a peaceful people, to eat the livers of their enemies when compelled to fight. What causes visitors to remember them is their continuous state of happy intoxication, due to the fact that the many rituals performed in honour of powerful tribal spirits require a generous consumption of rice liquor. "The intriguing side-issue emerges that respectability and drunkenness are allied," says Norman Lewis in *A Dragon Apparent* (Jonathan Cape, 1951). "The upright man gives evidence of his ritual adequacy by being drunk as often as possible, and he is respected by all for his piety, a pattern held up to youth."

Holiday Loss.—The public is generally philosophical about the vagaries and disappointments of holiday-making, and travel agencies are notoriously prone to take judicious notice of this fact. It is refreshing to find that last month the English Court of Appeal in *Stedman* v. *Swan Tours* placed a possible check upon this form of nuisance and annoyance. The plaintiff alleged that he had arranged with the defendants that he and five others should be taken by air to Jersey and have provided for them superior rooms with a sea view in some first-class hotel. Two of the party were convalescing after an illness. On arrival at their destination, they found that there was no sea view and that the rooms were of a grading less than minus. They were unable to obtain accommodation elsewhere, and it was contended by the plaintiff that the holiday was completely spoilt and that he was entitled to substantial damages for appreciable inconvenience and discomfort. The judgment of Barry, J., in *Bailey* v. *Bullock*, [1950] 2 All E.R. 1167, was approved by Bucknill, L.J., who thought that, although it was difficult, in circumstances such as these, to assess damages, it was no more difficult than in cases of pain and suffering for personal injuries. He awarded £50 in addition to the sum allowed by the Court below as special damages. The case should draw the attention of travel agencies to the necessity of giving their representations a spring-cleaning every year. Holidays ought to be spent without major upsets, and complainants should be spared the "send-this-guy the 'bug letter'" sort of treatment, so often meted out by group organizations.

Tecum on The March.—The *Evening Telegraph* of Alton (Illinois) announces: "Also to be subpoenaed, it is reported, is Duces Tecum who is to produce an instrument purported to be a personal ledger of Robert L. Knetzer." The *New Yorker* comments: "Last time we saw Tecum, he was over in Absentia."

End Piece.—"Advocacy Touches Bottom" is the colourful heading that the *Solicitors' Journal*, in a recent number, gives to a paragraph about a Liverpool solicitor who, feeling that the Magistrates would have ordered the birch if they had had the power to do so, administered a sound spanking to a small boy in the presence of his mother and a detective. The boy had admitted stealing sweets to the value of £5 from a warehouse, but the reddened palm which counsel showed the Court did not induce it to regard the punishment as sufficient, and the boy was sent to a remand home for twenty-eight days. It is headings such as this that show that even editors of law journals can demonstrate on occasions a dry, if somewhat low, sense of humour, to which *Punch* descended once when, in referring to the death of an artist named Longbottom, it used the caption *Ars longa vita brevis est.* Robert Graves in *Lars Porsena, or The Future of Swearing*, described a breach of the taboo against mention of the buttocks. It was perpetrated by a student of Oxford University well-known for his practical joking. He spent over a year, and a great deal of money, in scraping acquaintance under an assumed name with every person at a Cathedral town in the Midlands whose surname contained the syllables "bottom"—Ramsbottom, Sidebottom, Higginbottom, Winterbottom, and Bottomley—and insinuated himself into the friendship of every one of these families, but separately, without allowing them to meet in his presence, until finally he was able to invite them all together to a huge dinner party at his hotel. When each name in turn had been announced by a particularly loud-voiced hotel employee, he withdrew, promising to return in a few moments, and begging them to begin dinner without him. The meal consisted merely of rump steak, but by that time the host had sped away, without leaving an address.

PRACTICAL POINTS.

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1. Will.—*Solicitor appointed Executor-Trustee—Solicitor-trustee Clause in Will—Will witnessed by His Partner—Whether Firm disqualified from charging Costs against Estate—Wills Act, 1837, s. 15.*

QUESTION: X by his will appointed as his executor and trustee A, a member of the firm of A and B, practising as solicitors. The will included the following clause:

> "I direct that my trustee A shall whether or not he accepts the office of trustee under this my will be employed as solicitor to my trust estate and shall be entitled to make all usual and proper charges for both his professional and other services in the administration of the trusts of this my will and for his time and trouble that he would have been entitled to make if not a trustee and so employed."

X has died, and it is now discovered that B was one of the attesting witnesses. Does the fact that a partner witnessed the will disqualify the firm from charging costs for work done in connection with X's estate, or does it disqualify B from sharing, as partner, in those costs?

ANSWER: There does not appear to be any authority relating to the attestation of a will by a witness who is the member of a firm, which includes the solicitor-trustee appointed by the will. The question is not an easy one, but it would seem that the position may be ascertained as follows:

B is debarred from sharing the costs for the work done by him personally, or by his firm, only if s. 15 of the Wills Act, 1837, applies to him. To B or B's wife no "interest . . . is thereby given" (by X's will). Section 15 nullifies a gift of "any beneficial . . . interest" to the one who or whose wife attests the will; but this extends "so far only as concerns . . . the person attesting" and receiving "any beneficial . . . interest . . . thereby given." But B has received no "beneficial . . . interest . . . thereby given."

A can charge costs by virtue of the solicitor-trustee clause in the will. He is unaffected by s. 15: and *he* (not his firm) is the legatee. He can share those costs (as he can share any other beneficial interest which is unfettered by conditions) with whom he likes. B has received no "beneficial . . . interest . . . thereby given."—*i.e.*, by the will of X—so he is not disqualified (through having been a witness) from sharing A's beneficial interest. B's sharing of the costs arises out of the terms of the partnership agreement, and not by virtue of the beneficial interest given to A by the will. The partnership firm (*qua* firm) has no direct right of recourse against the estate: its claim is on A, who has such recourse by virtue of his trusteeship (plus the solicitor-trustee clause).

Aliter, if the solicitor-trustee clause were not in favour of A personally, but mentioned A "or any firm of which he shall be a member," as in some precedents.

B.2.

[Criticisms of the above answer are invited. The question is a difficult one, but, as it is of so practical a nature, opinions may differ.—Ed.]

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2. Power of Attorney.—*Power Irrevocable—Donor sentenced to Reformative Detention—Donee's Power to act during Period of Such Detention.*

QUESTION: By a power of attorney dated July 9, 1951, and containing a clause that it was to be irrevocable for a period of one year, A appointed B as his attorney. On August 8, 1951, A was sentenced to reformative detention for a period of 18 months. In view of such sentence, can B make a valid disposition of A's property during the period of one year from the date of the power of attorney?

ANSWER: It is submitted that B cannot make a valid disposition of A's property during the period of one year from the date of the power of attorney and after A has been sentenced: Prisons Act, 1908, s. 54, and the Crimes Amendment Act, 1910, s. 24.

Section 102 of the Property Law Act, 1908, although it keeps the power alive despite the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor, is silent as to the imprisonment of the donor. Therefore, it is submitted that Part III of the Prisons Act, 1908, prevails over s. 102 of the Property Law Act, 1908. If the prisoner is incapable of alienating his property, it appears to follow that his attorney is also incapable, for an attorney is but the agent of his principal, and cannot (in the absence of any statutory authority) do what his principal himself cannot do. "The principal must have the necessary capacity to do the acts": *Garrow's Real Property in New Zealand*, 3rd Ed. 446. X.2.

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3. Power of Attorney.—*Power given by Donor resident in New Zealand for Use in New Zealand—Requirements as to Attesting Witness.*

QUESTION: Being about to go abroad for a year or so, I intend to give a power of attorney to my son to act for me during my absence. The power will be required for use in New Zealand only. Are there any statutory requirements in New Zealand as to attestation and competency of witness?

ANSWER: If, as apprehended, the power is intended to enable dealings with land to take place, it must be attested with the requisites of a deed: see s. 26 of the Property Law Act, 1908.

There are no statutory requirements as to the class of witness required. Any witness who is *compos mentis* and who is not an interested party will do. But attention is drawn to Reg. 3 of the Land Transfer Regulations, 1948, Amendment No. 2 (Serial No. 1951/112). Unless the witness is an approved Land Transfer witness—*e.g.*, a solicitor, a Justice of the Peace, or a postmaster—the District Land Registrar may require the execution of the power of attorney to be proved in accordance with ss. 169-171 of the Land Transfer Act, 1915. X.1.

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4. Gift Duty.—*Voluntary Mortgage—Annual Increase of Same—Liability to Gift Duty and Death Duty—Death Duties Act, 1921, ss. 9, 39, 46.*

QUESTION: My client intends to give his son a mortgage of £500 over his farm and execute a voluntary memorandum of increase over the same each calendar year thereafter. Will the transactions be liable to gift duty, or to death duty on the death of my client?

ANSWER: The mortgage and each respective increase of same will not be liable to gift duty, provided:

(i) Your client makes no other gifts—*e.g.*, gift of interest—within one calendar year of each gift: *McGrath* v. *Commissioner of Stamp Duties*, [1939] N.Z.L.R. 950. The pitfall in practice is that the Stamp Duties Office may well take a different view from your client as to the exact date each respective gift became complete—*e.g.*, *Commissioner of Stamp Duties* v. *Halliday*, [1922] N.Z.L.R. 507, *Chambers* v. *Commissioner of Stamp Duties*, [1943] N.Z.L.R. 504, and *Scoones* v. *Galvin and Public Trustee*, [1934] N.Z.L.R. 1004; and see *Adams's Law of Death and Gift Duties in New Zealand*, 2nd Ed. 214.

(ii) Your client takes care not to make more than one gift as above within one and the same calendar year, always remembering that an incomplete gift is not liable to gift duty, but comes within Part IV of the Death Duties Act, 1921, when it does become complete.

The amount of the mortgage, together with the aggregate amounts secured by each respective memorandum of increase, will be liable to estate duty and succession duty on the death of your client, unless paid off and validly released more than three years before he dies. The point is that such voluntary gifts are not deductible under s. 9 of the Death Duties Act, 1921: see *Marshall* v. *Commissioner of Stamp Duties*, [1942] N.Z.L.R. 317.

X.1.