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THE CROWN PROCEEDINGS ACT, 1950.

THE Crown Proceedings Act, 1950, came into force on January 1, 1952. Subject to some necessary and inevitable distinctions, its broad purpose and effect is to enable a subject to take exactly the same kind of proceedings against the Crown as he could if the Crown were a fellow-citizen. Because the new statute has made a number of changes in the position of the Crown as a litigant in our Courts, practitioners may be interested in a brief consideration of the way in which these changes gradually came about.

The new statute consolidates the provisions contained in the Crown Suits Act, 1908, and its Amendments, and, as its title implies, changes and improves the procedure relating to civil proceedings by and against the Crown. It also modifies the rights and liabilities of the Crown *vis-a-vis* the subject, but, in so far as new matter is concerned, it is mainly procedural—most of the changes made being for the purpose of bringing the procedure in actions by or against the Crown into line with the procedure in actions between subjects. In that respect, the statute follows the Crown Proceedings Act, 1947, enacted at Westminster with application to England and Scotland. These alterations will be explained later. Meanwhile, it may be helpful to summarize the position of the Crown as a litigant before the Act was passed, and the reasons underlying the changes which the Act has made.

I.—The Development of Changes made in English Law.

As early as the thirteenth century, the rule had become established that the King could not be compelled to answer in his own Court; but this, as Pollock and Maitland remarked in their *History of English Law*, was equally true of every petty lord or petty manor. In the sixteenth century, however, the procedure of Petition of Right at common law was established, and it maintained its position until 1947.

In theory, therefore, there was considerable difficulty in the way of a subject's pursuing any remedy against the Crown. In practice, however, these difficulties were to a great extent removed by various means adopted by the Crown whereby claims against it could be adjudicated in the Courts. And, gradually, the common-law position became modified by legislation.

At common law, in any proceedings by the Crown against a subject no costs were recoverable from the Crown by a successful subject. This was remedied in the Crown Suits Act, 1855, which authorized the recovery of costs as though the proceedings had been between subject and subject.

In England, the first real inroad on the immunity of the Crown from action at the suit of a subject was made by the Petition of Right Act, 1860, which made statutory the former common-law practice. The subject could claim from the Crown in any of the superior Courts at Westminster by a petition addressed to Her Majesty. The petition was to be left with the Home Secretary:

> in order that the same may be submitted to Her Majesty for Her Majesty's gracious consideration, and in order that Her Majesty, if she shall think fit, may grant her fiat that right be done.

Upon the Queen's fiat being obtained, the petition was served on the Treasury Solicitor, praying for a plea or answer on behalf of the Crown within twenty-eight days.

In practice, the Crown was advised by the Junior Counsel to the Treasury, and finally by the Attorney-General, who was politically responsible for the advice to grant or withhold the refusal of the fiat. In *The Queen* v. *Inland Revenue Commissioners, In re Nathan* (1884) 12 Q.B.D. 461, 479, Bowen, L.J. (as he then was), said, at p. 479:

> Everybody knows that the fiat is granted as a matter, I will not say of right, but as a matter of invariable grace by the Crown whenever there is a shadow of claim—nay, more, it is the constitutional duty of the Attorney-General not to advise a refusal of the fiat unless the claim is frivolous. Indeed, even where the Attorney-General had grave doubt, it was not unusual for him to recommend the fiat and allow the question of whether the petition lay to be dealt with by the Court on proceedings for demurrer.

The Lord Chancellor could direct the course in which the petition should be prosecuted. So far as might be applicable, the practice and course of procedure in an action or suit between subject and subject extended the hearing to Petitions of Right, with this proviso:

> Nothing in this statute shall be construed to give the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy before the passing of this Act.

The suppliant was entitled to expenses against the Crown and other parties to the proceedings. The means of recovering an amount to which the suppliant was entitled by a judgment was by presentation of a certificate to the Treasury, signed by a Judge or one of the Judges in which the action was heard and determined.

The classes of claims which could be made the subject of a Petition of Right at common law were never satisfactorily defined, but probably the best definition is that contained in the judgment of Lord Cockburn, C.J., in *Feather* v. *The Queen*, (1865) 6 B. & S. 257, 294; 122

E.R. 1191, 1204, 1205, when, in delivering the judgment of the Court, he said :

> The only cases in which the Petition of Right is open to the subject are, where the land or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or if restitution cannot be given, compensation in money, or where a claim arises out of a contract, as for goods supplied to the Crown or to the public service. It is in such cases only that instances of Petitions of Right having been entertained are to be found in our books.

It will be observed that, whatever else might be the subject of a Petition of Right, a claim in tort could not be. This exclusion was no doubt based upon the ancient constitutional maxim that the King can do no wrong, as well as on the principle that the doctrine of *respondeat superior* did not apply to the Crown.

With regard to torts, however, the Crown always gave facilities for a claimant to pursue a personal action against the Crown's servant ; and, if the act complained of was done by that servant in the course of his official duties, the Crown invariably stood behind the defendant servant and paid any damages awarded. This practice covered the majority of cases of tort, but there were still some few cases in which either the defendant could not be identified or for some other reason a personal action did not lie. In these cases, various attempts were made from time to time to allow the claims to be adjudicated upon, but there were legal objections to some of the means adopted, as was expressed by the House of Lords in the case of *Adams* v. *Naylor*, [1946] A.C. 543 ; [1946] 2 All E.R. 241. While these devices removed to a great extent any substantial grievance, the fact remained that the subject was dependent for his remedy upon the grace of the Crown, and had no legal right enforceable against the Crown without the Crown's consent. Another cause of complaint related to the methods by which the Crown enforced its remedies against the subject. Although the Administration of Justice (Miscellaneous Provisions) Act, 1933 (Eng.), authorized the Crown to recover debts by proceedings instituted by writ of summons, the procedure normally adopted by the Crown in proceedings against the subject was by way of information or by the prerogative writs of *capias ad respondendum*, writs of *subpoena ad respondendum*, and the like. It was said with justification that these forms of proceedings were archaic and in some ways oppressive to the subject. Moreover, many practitioners were unfamiliar with the practice and rules of Court pertaining to proceedings of this nature.

These difficulties probably did not assume any great importance until the early part of the present century. During and after the First World War, however, the State became involved in a great number of trading activities, and these activities have increased during and since the Second World War. It was perhaps not surprising, therefore, that lawyers and businessmen urged that the principles, which had perhps been unobjectionable in an age when there was little distinction between the King in his personal capacity and the Crown as the Head of the State, should be abandoned and that the State should be placed in the same position as the subjects in the Courts of law. There was never any suggestion that any change should be made so far as concerned the King in his personal capacity ; and it was recognized—and, by s. 39 of the Crown Proceedings Act, 1947 (Gt. Brit.), still is recognized—that it would be inconsistent with the Royal dignity that the King himself in respect of his own acts should be impleaded in his own Courts in his private capacity. (See, also, s. 35 (1) of the Crown Proceedings Act, 1950 (N.Z.).)

The first step taken in England to remedy the matter was taken in 1921 by the then Lord Chancellor, Lord Birkenhead, who appointed a strong Committee of lawyers and others to consider the position of the Crown as litigant and to propose such amendments of the law as, with due regard to the exceptional position of the Crown, might seem advisable and feasible. The Committee moved slowly, and, in 1924, the then Lord Chancellor (Lord Haldane) directed it to assume that amendment was both desirable and feasible, and to proceed with the drafting of a Bill. The Bill was produced in 1927. It was not found possible at that time to give legislative effect to the Committee's Report ; and it was not until 1947 that a Bill, which differed in many respects from the Bill of 1927, was introduced into Parliament by the Lord Chancellor, Lord Jowitt. That Bill passed through all its stages during the summer and became the Crown Proceedings Act, 1947. It came into force on January 1, 1949.

II.—The Course of Progress in New Zealand.

In New Zealand, the position at common law prevailed until 1858, when the Crown Suits Act, 1855 (Eng.), was followed here three years after its enactment. In later years, the New Zealand Legislature anticipated, in its enactment of substantive law, many of the changes which were not brought about in Great Britain until 1947.

By s. 2 of the Crown Costs Act, 1858, if judgment were given against the Crown in any action, suit, or other proceeding, the defendant or defendants were entitled to recover costs in like manner and subject to the same rules and provisions as though such proceedings had been between subject and subject. The manner of recovery of debts, damages, &c., due and payable to the Crown was prescribed by the Crown Debts Act, 1866, but no provision was made for the recovery by a subject from the Crown of any debts, land, or goods. The means of recovery by the Crown of any debt, duty, or sum of money was a writ of *capias ad respondendum*, while suits relating to the recovery from a subject of land or goods belonging to the Crown were to be in the same form as in a similar action between subject and subject.

The influence of the Crown Suits Act, 1860 (Eng.), was reflected in New Zealand legislation in the passing of the Crown Redress Act, 1871, whereby subjects were entitled to proceed on a Petition of Right against the Crown in respect of any claim or demand against Her Majesty which arose or accrued after January 1, 1872, within New Zealand ; but the written consent of the Governor endorsed in the petition was a condition precedent to action (s. 2). The proceedings on the petition were to be analogous to those in an action at law between subject and subject. No execution against the Crown was permissible ; but the Registrar had to give a successful suppliant a certificate of judgment. The Governor was empowered to pay the amount appropriated by the General Assembly to the purpose of the judgment and costs. The proceedings allowed against the Crown by this statute were limited to a claim or demand founded on and arising out of some contract entered into by the authority of Her Majesty's local Government in New Zealand, excluding any claim in the nature of an action for specific release for the perfor-

mance of, or any action for damages for the breach of, any contract for the purchase of any lands of the Crown.

The Crown Redress Act, 1871, was in part repealed and was extended by the Crown Redress Act, 1877. Section 2 was repealed, and the replacing provision prescribed that any claim or demand against the Crown could be set forth in a petition filed in the Supreme Court; and, if the claim was within the jurisdiction of a District Court or Resident Magistrate's Court, application had to be made to the Attorney-General or Solicitor-General for his consent to the hearing. The term "claim or demand" was clarified, so that an action had to be founded on, or had to arise out of:

> some contract, act, deed, matter or thing done, executed, or entered into by or under the authority express or implied of Her Majesty's local Government in New Zealand, or for which the said local Government would be responsible if they were private subjects of Her Majesty in New Zealand.

The restriction relating to contracts for the purchase of lands of the Crown was retained. For the first time, a petition had to be filed within twelve months after the claim or demand had arisen; and no petition could be filed unless one month's previous notice of intention to file the petition had been given to the Attorney-General or Solicitor-General, explicitly stating the claim or demand and the nature of the relief sought.

The Crown Suits Act, 1881, was a consolidation of the statutes to which reference has just been made. It omitted any reference to the exception of proceedings against the Crown in respect of the purchase of Crown lands. Part II (ss. 26-40) prescribed the methods of enforcing claims against the Crown. Section 37 limited a cause of action against the Crown to the breach of a contract entered into by the Governor under the authority of the Government, and a tort done under such authority in connection with a public work. These sections were re-enacted in the consolidating statute (the Crown Suits Act, 1908) with little change (s. 37 becoming s. 35 in the new Act); and they are too well known to require any further reference to them here. It was not until 1910 that any substantial advance was made; and in that year New Zealand originated an important departure from the common law in relation to the Crown's immunity. It was a principle of English common law that no claim against the Crown could be made in respect of a tort alleged to have been committed by the Crown or its servants. This was slightly modified in New Zealand by s. 35 of the Crown Suits Act, 1908, as we have seen.

By the Crown Suits Amendment Act, 1910, a great advance was made in this country. Section 35 of the principal Act was repealed. In its place, s. 3 enacted that a claim or demand could be made against the Crown by petition in respect of the breach of any contract, express or implied, and of any cause of action in respect of which a Petition of Right would lie against the Crown at common law. In addition, it provided in general terms that a subject could claim against the Crown by petition in respect of:

> Any wrong or injury which is independent of contract and for which an action for damages would lie if the defendant was a subject of His Majesty.

The only exceptions were the following causes of action: (*a*) assault, false imprisonment, malicious prosecution, or erroneous judicial process; (*b*) libel or slander; and (*c*) any cause of action in which malicious motive is an essential element.

The doctrine of *respondeat superior* thus became applicable to claims against the Crown, subject to an exception in favour of the Governor-General and judicial officers, none of whom was deemed to be a servant of the Crown within the law relating to employers' liability; but claims in respect of death or personal injury were not to exceed £2,000.

Thus, the New Zealand Legislature anticipated by thirty-seven years the enactment in the Crown Proceedings Act, 1947 (Eng.), which makes of almost general application in Great Britain the proposition that the Crown can be sued in tort, and that it is vicariously liable for the torts committed by its servants.

The changes made by the Crown Proceedings Act, 1950, from the previously existing Crown Suits legislation will be considered in our next issue.

SUMMARY OF RECENT LAW.

CONTEMPT OF COURT.

Article in Newspaper giving Criminal Record of Convicted Person—Such Article featured prominently in Posters—Appeal from Conviction pending—Duty of Directors of Newspaper—Liability of Printer and Publisher notwithstanding Lack of Knowledge of Contents of Newspaper—Printers and Newspapers Registration Act, 1908, s. 11. After the conviction of one Horry for murder, and before the time for appeal had expired, the defendant company published in its weekly newspaper an article describing in detail Horry's criminal record and expressing its opinion as to his character and conduct in respect of the alleged murder and generally. This was published and featured on its posters in such a form as to give the utmost prominence to the facts referred to and to the opinion of the paper. It referred in detail to "his frightful record," and described him as guilty of "almost every manner of deceitful and vicious offence," "an unspeakable monster," and "a suave black-hearted fiend." On the posters advertising the issue were displayed in very prominent type the words: "Staggering Criminal Record of Murderer Cecil Horry." At the time this publication took place, the defendant company was aware that an appeal against conviction might be lodged; and, indeed, in another passage in the same issue, referred to this possibility. On a motion for an order for the imprisonment of the defendant printer and publisher of the newspaper, and for the imposition of a fine on the defendant company, *Held*, 1. That such conduct was contempt of Court, in that it tended gravely to interfere with the ordinary course of justice; and that the proprietors of the newspaper, and all responsible persons connected with the conduct of a newspaper of the type of the defendant company's, should have known that such would have been its effect. (*R.* v. *Davies, Ex parte Delbert-Evans*, [1945] K.B. 435; [1945] 2 All E.R. 167, referred to.) 2. That it is the duty of the directors of a newspaper to see that the utmost care is taken to ensure that no breach of their duty is committed; and the publication of such gravely prejudicial matter was due to insufficient care being taken to ensure that the publication did not infringe the law. 3. That, if the offence in question had been deliberate, it would probably have been punished by the imprisonment of the person responsible; but the Court accepted the explanation that it was due to a mistake as to the advice given by the defendant company's legal advisers. 4. That the printer and publisher of the offending issue of the newspaper was liable for contempt of Court, even if he did not know what the newspaper articles contained. (*In re The American Exchange in Europe, Ltd., The American Exchange in Europe, Ltd.* v. *Gillig*, (1889) 58 L.J. Ch. 706, applied.) The defendant company was fined £250 and ordered to pay costs; and the defendant printer and publisher was ordered to pay costs. *Attorney-General* v. *Crisp and "Truth" (N.Z.), Ltd.* (S.C. Full Court. Wellington. December 19, 1951. Fair, J.; Hutchison, J.; Hay, J.)

CRIMINAL LAW.

Theft—Restitution of Property—Order for Restitution—Property to be of Specific Character to which Specific Person entitled—Conglomerate Fund of Currency being Proceeds of Several Crimes—No Order for Restitution possible as Moneys not Identifiable with any Particular Crime—Crimes Act, 1908, ss. 449, 451. Any order made under s. 449 of the Crimes Act, 1908, is penal in character, and, while it is additional to the sentence, it must be made contemporaneously with the imposition of the sentence. It must be an order for disbursement out of funds which are the *bona fide* property of the person convicted, and it has no reference to restoration of possession of the property of another or others. Section 451 has relation to chattel property of a specific character to the possession of which some specific person is entitled. Assuming that the words " any property found in his possession " used in that section are sufficiently wide to cover property substituted for the original proceeds of a crime, it must be clear that the property which is to be the subject of the order (whether it is in the form in which it was taken from the person entitled to its possession or whether it is in some substituted form) is sufficiently identifiable to make it possible to say that someone is entitled to its specific possession. (*R.* v. *Mailer*, [1922] N.Z.L.R. 288, applied.) (*Reg.* v. *Central Criminal Court Justices*, (1886) 18 Q.B.D. 314, and *Reg.* v. *Doyle and Hinge*, (1891) 10 N.Z.L.R. 167, referred to.) Consequently, an order cannot be made under s. 451 where a composite sum of money in the form of currency, to the possession of which no claimant can establish a specific right of possession, is a conglomerate fund representing the proceeds of several crimes but incapable of identification with any particular crime. In such a case, the several claimants are left to enforce ther respective rights by civil process. *In re Kirkham.* (S.C. Hamilton. November 30, 1951. Finlay, J.)

CROWN PROCEEDINGS.

Shipping—Limitation of Liability—Collision between Submarine and Merchant Ship—Failure of Submarine to comply with Rules concerning Lights in the King's Regulations and Admiralty Instructions, ch. XVI, para. 660—"Actual fault or privity" of Board of Admiralty—Merchant Shipping Act, 1894 (c. 60), s. 503 (1)—Crown Proceedings Act, 1947 (c. 44), s. 5 (1). At 7 p.m. on January 12, 1950, a collision occurred in the Thames estuary between H.M.S. *Truculent* and a Swedish steamship, the *Divina*. H.M.S. *Truculent* sank with loss of life and the *Divina* was seriously injured. The navigation of both vessels was at fault, and those in charge of each vessel claimed to have been misled by the lights of the other. As the *Divina* was laden with an inflammable cargo, she exhibited, in addition to the usual lights, a red light at the masthead in accordance with art. 4 of the Petroleum Spirit in Harbours Order, 1939. The commander of H.M.S. *Truculent*, failing to recognize the red light as that of a petroleum ship, thought that the *Divina* was a mooring vessel lying stationary in the channel, and realized the risk of collision only at a late moment. H.M.S. *Truculent*, being a submarine, was not able to carry lights conforming exactly with the requirements of art. 2 (*a*) of the Regulations for Preventing Collisions at Sea, contained in Sched. I to an Order in Council dated October 13, 1910, and, from the position of her lights, she gave the impression of being an extremely small vessel, with the result (*a*) that the pilot of the *Divina* made an error of navigation which contributed to the collision, and (*b*) that there was possibly a greater loss of life among the personnel of H.M.S. *Truculent* than there would otherwise have been, as those in charge of the *Divina*, failing to appreciate the probable size of the submarine's complement, or that the vessel was a submarine, thought that all those who had been on board the sunken vessel had been rescued by a third ship. At the time of her construction, the plans in regard to H.M.S. *Truculent* were submitted by the Third Sea Lord, who was in charge of such matters on behalf of the Board of Admiralty, to the full Board, and the detailed plans, showing, *inter alia*, the position of the ship's lights, were submitted to the Third Sea Lord, who was responsible for them. On August 4, 1940, liability for the collision was settled as between H.M.S. *Truculent* and the *Divina* on the basis that both vessels were to blame, H.M.S. *Truculent* to the extent of 75 per cent. and the *Divina* to the extent of 25 per cent. A number of actions by the personal representatives of civilian personnel in H.M.S. *Truculent* who lost their lives as a result of the collision were brought against the Admiralty, and in them the Admiralty admitted liability. The Admiralty, as the authorized Government department for instituting civil proceedings on behalf of the Crown, now brought an action under the Merchant Shipping Act, 1894, s. 503 (1), and the Crown Proceedings Act, 1947, s. 5 (1), asking for a declaration of limitation of liability in respect of the claims for damages, including claims in respect of loss of life, arising out of the collision. *Held*, (i) That the failure of the commanding officer of H.M.S. *Truculent* to recognize the red light of the *Divina* as the light of a vessel carrying petroleum spirit was not a sufficient reason for holding that the submarine, when entering the Thames estuary at night, should have engaged a licensed pilot, but, assuming that there was a fault in failing to take a pilot, the fault was that of the commanding officer, who had a discretion in the matter, under the King's Regulations and Admiralty Instructions, ch. XXXIII, s. II, para. 1179, and the Admiralty could not be held privy in the matter so as to defeat His Majesty's claim for limitation of liability under s. 5 (1) of the Crown Proceedings Act, 1947. (ii) That, assuming that the local commander was guilty in failing to issue a special notice that a submarine would be navigating on the surface in the Thames estuary by night, his fault would not be the fault of the Admiralty, and could not defeat His Majesty's claim for limitation of liability. (iii) That, although, by s. 741 of the Merchant Shipping Act, 1894, His Majesty's ships were specifically exempted from the provisions of that Act, by publishing the King's Regulations and Admiralty Instructions (ch. XVI, para. 660, of which imposed on His Majesty's ships regulations in identical terms with the Regulations for Preventing Collisions at Sea, 1910), the Admiralty had accepted on behalf of His Majesty's ships the same duty to obey the collision regulations as was imposed by s. 419 (1) of the Merchant Shipping Act, 1894, on any other ship, and a breach of that duty could not be excused merely because of the practical difficulty of complying with art. 2 (*a*) of the regulations, and, therefore, in the absence of a notice warning other mariners that it was impossible, in the case of a submarine, to comply with art. 2 (*a*), the breach of that article constituted a breach of the duty which H.M.S. *Truculent* owed to other vessels, and there was a fault in relation to the lights exhibited by H.M.S. *Truculent*. (iv) That, assuming that those in charge of the *Divina* made a negligent mistake, and that they would not have been misled by the lights of H.M.S. *Truculent* but for a defective look-out on their part, nevertheless the fault of H.M.S. *Truculent* in exhibiting misleading lights was such as to cause the negligent mistake of the *Divina*, which she would not otherwise have made, and, therefore, that fault contributed to the loss and damage caused by the collision. (*Corstar (Owners)* v. *Eurymedon (Owners)*, *The Eurymedon*, [1938] 1 All E.R. 122, applied.) (v) That, as the fault in relation to the lights carried by H.M.S. *Truculent* was one of which the responsible member of the Board of Admiralty—*viz.*, the Third Sea Lord—was aware, or should be deemed to be aware, and as the Third Sea Lord was the directing mind of the Admiralty in regard to the proper equipment of His Majesty's vessels, his fault or privity was the fault or privity of someone who was not merely a servant or agent for whom the Admiralty was liable on the footing *respondeat superior*, but of someone for whom the Admiralty was liable because his action was that of the Admiralty itself, and, therefore, the loss and damage occasioned by the collision did not occur " without . . . [the] actual fault or privity " of the Admiralty within the meaning of s. 503 (1) of the Merchant Shipping Act, 1894, and, accordingly, the claim on behalf of His Majesty for limitation of liability under the Crown Proceedings Act, 1947, s. 5 (1), failed. (*Lennard's Carrying Co., Ltd.* v. *Asiatic Petroleum Co., Ltd.*, [1915] A.C. 705, applied.) *H.M.S. Truculent, The Admiralty* v. *The Divina (Owners) and Others*, [1951] 2 All E.R. 968 (P.D. & A.).

For the Crown Proceedings Act, 1947, s. 5 (1), see *6 Halsbury's Statutes of England*, 2nd Ed. 50.

For the Merchant Shipping Act, 1894, s. 503, see *23 Halsbury's Statutes of England*, 2nd Ed. 656.

For the Regulations for Preventing Collisions at Sea, see *30 Halsbury's Laws of England*, 2nd Ed. 676.

DEATHS BY ACCIDENTS COMPENSATION.

Child born out of Wedlock to Widow of Deceased before Her Marriage to Him and living with Them as Member of Their Family during Term of Their Marriage—Such Child deemed Legitimate Offspring of Her Mother and thus Dependant of Deceased—"Stepdaughter"—Infants Act, 1908, s. 2—Law Reform Act, 1936, s. 5 (1). On an application for apportionment of damages recovered under the Deaths by Accidents Compensation Act, 1908, it became necessary to determine who were the children of the deceased. The deceased was married twice. By his first marriage he had two children, J. and S. After the termination of that marriage by divorce, J. remained with the deceased and S. remained with his mother continuously, and, after her remarriage, was maintained by her and by her husband, who, through counsel, informed the Court that they did not desire any provision to be made for S. out of the deceased's estate. J. had been living with her mother since the deceased's death. The plaintiff (the deceased's widow) and the deceased had three children of their marriage, I., B., and A., and a daughter had

been born within due time after his death. When the plaintiff married the deceased, she was the mother of a child, D., then two years old and not born in wedlock. After the marriage, D. lived with plaintiff and the deceased as a member of their family, and was wholly dependent on the deceased. *Held*, 1. That it was not competent for the mother of S. and her husband to waive S.'s rights (if any), and whether S. had suffered no loss by reason of the deceased's death was a question of fact to be dealt with on the apportionment of the damages. 2. That the child D. was not a "stepdaughter" of the deceased within the definition of the word "child" in s. 2 of the Deaths by Accidents Compensation Act, 1908, taken alone; but, by reason of s. 5 (1) of the Law Reform Act, 1936 (which, by s. 4, is to be read together with and deemed part of the Deaths by Accidents Compensation Act, 1908), the words "any relationship" are absolutely general, and apply to the deducing of relationship between a deceased person and an alleged stepdaughter; and, as, for the purposes of deducing such relationship, D. was to be treated as the legitimate offspring of her mother, she was a "stepdaughter" of the deceased within the meaning of the statute; and, in the present case, it was immaterial who the reputed father might be, or whether any person had acquired reputation as the father. (*Dickinson* v. *North Eastern Railway Co.*, (1863) 2 H. & C. 735; 159 E.R. 304, and *Williamson* v. *Auckland Electric Tramways Co., Ltd.*, (1911) 31 N.Z.L.R. 161, applied.) *Semble*, In other cases, the relationship may be traceable through a reputed father, the mother's identity being irrelevant. (*Mander* v. *O'Toole*, [1948] N.Z.L.R. 909, distinguished.) 3. That, accordingly, D. was within the class of children whose claims were to be considered—namely, D. and the six children of the deceased's marriages—and the question what provision should be made for each of them remained to be dealt with as a question of fact. *Keith* v. *Hadfield*. (S.C. In Chambers. Auckland. December 19, 1951. F. B. Adams, J.)

DIVORCE AND MATRIMONIAL CAUSES.

Connivance — Termination — General Consent to Husband's Adultery—Forgiveness and Condonation—Subsequent Adultery without Consent. In October, 1949, the wife gave a general consent to the husband's adultery, but excluded from her consent adultery with Miss N. The husband began to commit adultery with Miss N. in January, 1950, when he told his wife, untruly, that he was associating with another woman. The wife begged him to give up the other woman, and in March, 1950, he told his wife, again untruly, that he had done so. Believing the husband was telling the truth, the wife forgave him his past adultery, and attempts were made between the parties to resume marital intercourse. The husband continued his adultery, and this was later discovered by the wife, who filed a petition for divorce on the ground of the adultery. *Held*, That the wife had withdrawn her consent to the husband's adultery and had forgiven his past adultery before the petition was filed; her connivance had spent itself; and so, for the purposes of the present suit, she had not connived at adultery within the meaning of s. 4 of the Matrimonial Causes Act, 1950. (Dictum of *Lord Westbury*, L.C., in *Gipps* v. *Gipps and Hume*, (1864) 11 H.L. Cas. 13, not followed.) *Gorst* v. *Gorst*, [1951] 2 All E.R. 956 (P.D. & A.).

As to Connivance, see *10 Halsbury's Laws of England*, 2nd Ed. 674-676, paras. 995-999; and for Cases, see *27 E. and E. Digest*, 327-332, Nos. *3062-3122*, and Digest Supplements.

MINING.

Special Dredging-claim Licence—Application affecting Crown Land open for Mining in Mining District—Objection by Catchment Board—No Legal Right to object because Grant may be contrary to Principles of Soil Conservation and Rivers Control Act, 1941—Land in Conservation Reserve exception—Mining Act, 1926, ss. 18, 19, 87, 126 (c), *144, 169, 176 (1)* (j)*—Soil Conservation and Rivers Control Act, 1941, ss. 16, 20 (2)—Farm Land—Special Conditions—Catchment Board asking for Imposition of Special Conditions in Licence to prevent Destruction of Surface of Land for Agricultural or Pastoral Purposes—Cost of Compliance exceeding Unimproved Value of Land—Conditions not imposed—Mining Act, 1926, ss. 87, 218 (2) (3), 176(1)* (j)*—Practice—Applicant for Mining Privilege appearing by Solicitor—Declaration of Compliance by Applicant receivable on Evidence—Mining Act, 1926, s. 169* (p) (q) (s). Where land is Crown land and open for mining in a mining district, a Catchment Board cannot make a valid objection to the power of the Warden to grant a licence for a special dredging claim, as the Soil Conservation and Rivers Control Act, 1941, does not give an absolute legal right to object to the grant of a mining privilege because such grant may offend against the principles of that statute. (*In re Paterson*, (1898) 16 N.Z.L.R. 295, applied.) (*Egerton* v. *Brownlow (Earl)*, (1853) 4 H.L. Cas. 1; 10 E.R. 359, and *Janson* v. *Driefontein Consolidated Mines, Ltd.*, [1902] A.C. 484, referred to.) While it may be in the public interest, and in accordance with the tenor of the Soil Conservation and Rivers Control Act, 1941, that good farming-land should be conserved, neither that statute nor the Land Act, 1948, takes away from the Warden the power to grant a mining privilege over farming-land, provided that such land is Crown land open for mining in a mining district, and it is not in a conservation reserve. Both the Mining Act, 1926, and the Soil Conservation and Rivers Control Act, 1941, are statutes promulgated in the public interest; but, in a mining district, the mining industry is to be regarded as the paramount industry. (*Betts* v. *Ross*, (1921) 17 M.C.R. 33, and *Aitken* v. *Callwell*, (1926) 21 M.C.R. 23, followed.) While s. 218 of the Mining Act, 1926, permits the Warden to impose special conditions to prevent the destruction of the surface of the land or to prevent the rendering of it unfit for agricultural or pastoral purposes in special circumstances, the Warden may not impose, in view of s. 218 (3), special conditions of such a nature that the cost of complying with them is likely to be greater than the unimproved value of the land affected for agricultural and pastoral purposes. The fact that an applicant for the grant of a mining privilege appeared by a solicitor at the hearing of his application does not preclude the use of the applicant's statutory declaration of compliance with the Mining Act, 1926, made in terms of s. 169 (*q*) thereof, as evidence in support of the application. On an application for a special dredging-claim licence over Crown lands open for mining in a mining district, the Otago Catchment Board objecting to the grant of the application, *Held*, 1. That, as the applicant company was engaged in mining, no valid objection existed to the grant of its application, the granting of which would not be inconsistent with the administration of the Mining Act, 1926; and there is nothing in the Soil Conservation and Rivers Control Act, 1941 (except with regard to conservation reserves), to prevent the Warden from exercising his powers under the Mining Act, 1926, to grant a claim which does not conserve the soil. 2. That, on compliance with the requirements of the Warden as set out in the judgment, the application should be granted, subject to the following special condition: That the holder works the claim in such a way that a continuous line of tailings will be left against the adjoining portion of Section 22, Block IV, Wakefield Survey District, to serve as an adequate flood protection to the remaining area of Section 22 to the satisfaction of the Warden. (*In re Paterson's Application*, (1912) 32 N.Z.L.R. 53, applied.) *In re Austral New Zealand Mining, Ltd.'s, Application*. (Cromwell. June 28, 1951. Dobbie, S.M., as Warden.)

POLICE OFFENCES.

Sunday Trading—Artist, on Sunday within View of Public Place, completing Mural in Shop—Occupation as Artist or "trade or calling"—Such Work not "work of necessity" as Its Completion could have been so timed as to be completed before Sunday—Police Offences Act, 1927, s. 18 (1) (3). The word "calling" as used in s. 18 (1) of the Police Offences Act, 1927, includes any occupation, vacation, business, or profession that has a commercial basis and that is not otherwise included in the other words used in s. 18 (1); and whether or not a profit is made is not material. (*Police* v. *Baylis*, (1946) 4 M.C.D. 459, and *Bramwell* v. *Lacy*, (1879) 10 Ch.D. 691, followed.) The term "works of necessity" in s. 18 (3) implies work which is unavoidable, necessitous, or indispensable. Consequently, the offence created by s. 18 (1) was committed by a defendant whose sole occupation was that of an artist, and who, in pursuit of that occupation, carried out the completion of a mural in a shop in full view of the public on a Sunday; and it was not "a work of necessity," as he could have so timed his work that it would have been unnecessary to continue it into the Sunday. *Police* v. *Turner*. (Auckland. August 30, 1951. Wily, S.M.)

PROBATE AND ADMINISTRATION.

Grant of Administration—Relation back—Resealing of Irish Grant—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 169 (1). On January 23, 1950, the plaintiff's husband, who was domiciled in Northern Ireland, died in England. On January 12, 1951, the plaintiff took out letters of administration in Northern Ireland. On January 19, 1951, she issued a writ in the High Court in England under the Fatal Accidents Act, 1846, claiming, as administratrix, damages for negligence from the defendant. On March 20, 1951, the grant in Northern Ireland was sealed in England under s. 169 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925. *Held*, That the sealing of the grant under s. 169 (1) did not result in the grant having effect in England from the date of the grant in Ireland, and, therefore, on January 19, 1951, the plaintiff had not obtained a grant in England, the action had not been commenced within twelve calendar months of the death of the

plaintiff's husband, as required by the Fatal Accidents Act, 1846, s. 3, and the writ must be set aside. *Burns* v. *Campbell*, [1951] 2 All E.R. 965 (C.A.).

TENANCY.

Dwellinghouse—Notice to Quit—Landlord requiring Possession on Age-and-Ownership Ground—Compliance with Statute—All Necessary Information contained in Notice—Tenancy Act, 1948, s. 24 (5) (b)—*Tenancy Amendment Act, 1950, s. 10.* The following notice to quit was given to a tenant of a dwellinghouse: "Take notice that I require you to quit and deliver up vacant possession of the premises occupied by you at the above address at the expiration of six months of receipt of this notice by you. This notice is sent to you under s. 24 (5) of the Tenancy Act, 1948 (as amended by 1950 No. 28)." On the preliminary question whether the notice complied with the statutory requirements, *Held*, That, as all the necessary information was contained in the notice, and express reference was made to the relevant section of the Tenancy Act, 1948, on reference to which the tenant could be left under no possible misapprehension as to the purport and meaning of the notice, the requirements of s. 24 (5) (*b*) of the statute (as added by s. 10 of the Tenancy Amendment Act, 1950) had been complied with. (*Hitch* v. *Ayers*, (1951) 7 M.C.D. 252, distinguished.) *Howes* v. *Salter*. (Auckland. October 25, 1951. Kealy, S.M.)

Possession—Notice to Quit—Expiry of Contractual Tenancy—Notice given by Lessor of Intention to bring Action for Possession after Expiry of Tenancy—Tenants holding over and paying Rent—Notice to Quit not required before Commencement of Action—"Deemed"—Tenancy Act, 1948, ss. 23, 43 (2). The lessees' tenancy under a lease of shop premises was due to expire on May 19, 1951. On April 26, 1951, the lessor wrote to the lessees expressing his intention to bring an action for possession after date of the expiry of the tenancy if the lessees failed to give up possession on that date. After the expiry of the tenancy, the lessees continued in possession, and rent was received by the lessor. In dismissing an action for possession, the learned Magistrate held that a notice to quit was necessary to determine the defendants' statutory tenancy, the lessor's letter being merely an intimation of the lessor's intention to take proceedings. On appeal from that determination, *Held*, 1. That, upon the termination of the lease by effluxion of time, the continued possession by the lessees and acceptance of rent by the lessor did not constitute a new tenancy; and, consequently, no notice to quit was required, as the contractual tenancy was at an end; and the letter sent to the lessees by the lessor on April 26, 1951, was sufficient notice of his intention to sue for possession within s. 23 of the Tenancy Act, 1948. (*Morrison* v. *Jacobs*, [1945] 2 All E.R. 430, followed.) (*Card* v. *Bilderbeck*, [1951] N.Z.L.R. 296, and *Loughnan* v. *Jamieson*, [1928] N.Z.L.R. 298, distinguished.) (*Cameron* v. *The King*, [1948] N.Z.L.R. 813, referred to.) 2. That s. 43 (2) of the Tenancy Act, 1948, does not create a statutory tenancy, as it deals with tenancies which have actually expired, either by effluxion of time or upon notice; it purports to do no more than attach incidents to the continued possession by assuming a tenancy which has ceased to exist. (*Muller* v. *Dalgety and Co., Ltd.*, (1909) 9 C.L.R. 693, and *The Queen* v. *Norfolk County Council*, (1891) 60 L.J.Q.B. 379, applied.) The appeal was allowed and the case was referred back to the Magistrate for a determination of those matters which s. 24 and the following sections of the Tenancy Act, 1948, make relevant to the claim for possession. *Searle* v. *Purnell and Another*. (S.C. Christchurch. December 14, 1951. Northcroft, J.)

TRANSPORT.

Offences—Disqualification of Intoxicated Motor Driver—Upon First Conviction Existing Licence to be cancelled—Disqualification extending to All Kinds of Motor-drivers' Licences—"Any licence"—Transport Act, 1949, s. 41. Upon the first conviction of a person for being in a state of intoxication while in charge of a motor-vehicle on a public road, the Court must, in terms of s. 41 of the Transport Act, 1949, unless for special reasons it thinks fit to order otherwise, cancel any existing licence held by him and disqualify him from obtaining any kind of motor-drivers' licence for a period of one year from the date of the conviction. (*Reedy* v. *Brown*, [1951] N.Z.L.R. 1040, referred to.) (*Police* v. *Macassey*, (1950) 6 M.C.D. 330, overruled.) (*Burrows* v. *Hall*, (1950) 66 T.L.R. 1102, mentioned.) *Rimmer* v. *Bellingham*. (S.C. Auckland. December 19, 1951. Finlay, J.)

Offences—Negligent Driving causing Bodily Injury—Collision occurring on Clear Road—Defendant turning into Sun—Blinding causing Swerve into Approaching Vehicle—Effect of Sun's Ray's foreseeable—No Precautionary Measures taken—Defendant Negligent—Transport Act, 1949, s. 39 (1)—Transport Amendment Act, 1950, s. 17. A motor-car, while going along a road with a bitumen surface 27 ft. wide, struck a motor-truck in which M. was a passenger. Both vehicles were being driven at a reasonable speed, and each had been travelling, for some distance before the collision, on its correct side of the centre line of the roadway. The point of impact was between 200 ft. and 250 ft. from an easy right-hand bend around which the defendant had come. For the last 50 yards before the impact, the defendant drove directly into the early morning sun. The defendant said that, when he turned directly into the sun before the impact, he was completely blinded and the sudden swerve from his course caused the collision. The defendant was charged with negligent driving causing bodily injury to the driver of the truck and to the passenger in it. *Held*, 1. That the defendant should have seen the approaching truck when he rounded the bend at a distance of 150 ft. from the point where the defendant would have turned into the sun, and the distance could have been further, owing to the bend's being a gradual one. 2. That the effect of the rays of the sun on the defendant was not an unforeseeable incident, and he took no precautionary measures, did not reduce speed, and did not prepare himself for the emergency which he knew, or should have known, was approaching. (*Billy Higgs and Sons, Ltd.* v. *Baddeley*, [1950] N.Z.L.R. 605, distinguished.) 3. That the defendant was negligent in taking no such precautionary measures, and in not having seen the approaching vehicle as he rounded the bend and before he was adversely affected by the sun, and in continuing his course when he was so affected. 4. That the accident was, accordingly, not an inevitable one, and the prosecution had presented a *prima facie* case, which the defendant had not satisfactorily answered; and, consequently, the defence of *mens rea* failed. (*Police* v. *Shannon*, (1950) 45 M.C.R. 136, applied.) *Police* v. *James*. (Auckland. September 7, 1951. Wily, S.M.)

TRUSTS AND TRUSTEES.

Resulting Trust—Money handed by Daughter to Father to assist Him in purchasing Land—Title to Land taken in Father's Name—Land sold and Proceeds retained by Father—Transaction not Gift or Loan but Resulting Trust in Daughter's Favour. In 1947, the plaintiff, J., gave his daughter M., the defendant, a wedding present of £500. J. later purchased a poultry farm. It was arranged that he should provide the purchase-money and M.'s husband should work the farm, and they entered into a partnership agreement whereby they should share the net profits equally. M. was not a party to the agreement, though she knew of it. She handed £450 of her own money to J., who accepted it. The title to the property was taken in J.'s name, as was the title to an adjoining property, for the later purchase of which J. used the £450. The poultry farm was not a success, and finally J. sold both properties and collected the whole of the sale moneys. J. refused to give the £450 back to M. She sued J. for its recovery as money lent. She obtained judgment against him in the Magistrates' Court as money handed over by M. to J. in such circumstances that J. ought to pay such moneys to M. On appeal from that determination, *Held*, 1. That the matter was not one of gift in the ordinary sense, but was a resulting trust arising by operation of law by one person providing the purchase-money, or part of the purchase-money, and the title being taken in the name of another. (*Dyer* v. *Dyer*, (1788) 2 Cox 92; 30 E.R. 42, followed.) 2. That, on the basis of a resulting trust, it was unnecessary to decide whether there was undue influence arising from the relationship of father and daughter. (*Allcard* v. *Skinner*, (1887) 36 Ch.D. 145, distinguished.) *Jones* v. *Parkinson*. (S.C. Auckland. November 7, 1951. Fell, J.)

WAGES PROTECTION AND CONTRACTORS' LIENS.

Practice — Commencement of Proceedings — Proceedings in Supreme Court by way of Writ of Summons—Irregularity in Procedure if Otherwise begun—Amendment allowed—"Action"—Wages Protection and Contractors' Liens Act, 1939, ss. 34 (1), 35 (1), 36—Judicature Act, 1908, s. 2—Code of Civil Procedure, RR. 1, 271, 599. Under s. 34 (1) of the Wages Protection and Contractors' Liens Act, 1939, the appropriate Court is left to decide how an action claiming a declaration as to a lien or charge can be most conveniently brought according to its own rules and procedure. In relation to the Supreme Court, the procedure is governed by s. 2 of the Judicature Act, 1908, which defines "action" as meaning "a civil proceeding commenced by writ or in such other manner as may be prescribed by rules of Court." The proper procedure in the Supreme Court by any person claiming in the Supreme Court a declaration that he is entitled to a lien or charge under the Wages Protection and Contractors' Liens Act, 1939, is by way of writ of summons, as no new rules have been made prescribing the procedure to be adopted

in the case of actions under that statute. Where proceedings have been commenced by a summons and statement of claim, and not by a writ of summons, there has been an irregularity in procedure, and the defendant is not prejudiced if an amendment is made by the Court under R. 599 of the Code of Civil Procedure so as to treat the proceedings as if initiated by writ of summons. (*Palmerston North City Corporation* v. *Manawatu-Oroua Electric-power Board*, [1934] N.Z.L.R. 1100, and *Kaikoura County* v. *Boyd*, [1949] N.Z.L.R. 233, applied.) (*Stepney Borough Council* v. *John Walker and Sons, Ltd.*, (1934) 103 L.J.K.B. 380, distinguished.) *Stringer and Another* v. *Ruddenklau*. (S.C. Dunedin. December 17, 1951. North, J.)

WILL.

Construction—Direction to divide Residuary Estate "in equal shares between my sister B. and between the children of my deceased sister E. living at the date of my death in equal shares"—First-named Sister taking Half-share in Residuary Estate. The testator, by his will, gave the following direction: "Upon the death or remarriage of my said wife I direct my trustees to divide my estate in equal shares between my sister Bertha Fittall of Richmond and between the children of my deceased sister Ellen Jefferies living at the date of my death in equal shares I hereby declare that in the event of the said Bertha Fittall predeceasing me leaving issue at the date of my death then such issue if only one then solely and if more than one then in equal shares shall take the share which his or their parent would have taken under this my will." The sister, Bertha Fittall, had survived the testator, but had since died. The other sister left five children. Upon originating summons asking whether, on the death or remarriage of the testator's widow, the estate of Bertha Fittall took one equal half-share or only one-sixth of the capital of the estate, *Held*, That the estate of Bertha Fittall took a half-share in the residuary estate of the testator. (*Burke* v. *Burke*, (1899) 18 N.Z.L.R. 216, *Re Daniel, Jones* v. *Michael*, [1945] 2 All E.R. 101, and *Re Jeeves, Morris-Williams* v. *Haylett*, [1948] 2 All E.R. 961, referred to.) *In re Sutton (deceased), Fittall and Another* v. *Public Trustee and Oters*. (S.C. Nelson. December 6, 1951. Hutchison, J.)

Construction—Restraint on Alienation—Bequest to Son of Half-share in Income of Residue "without power of alienation or anticipation"—Proviso that Son's Share in Capital of Residue should not during His Lifetime pass by Bankruptcy or be taken in Execution—Such Share vested without Restriction as to Voluntary Alienation—No Clear Expression of Intention as to Trustees holding Capital of Son's Share—Son entitled to Transfer thereof—Property Law Act, 1908, s. 24. A testator by his will directed his trustee to sell his estate and invest the proceeds, with power to postpone conversion and to hold the residue of his estate: "Upon Trust during the life of my said wife to pay one half of the income arising therefrom to my said wife for her sole and separate use and benefit and to pay the other half of such income equally to my son and daughter . . . without power of alienation or anticipation And from and after the death of my said wife I Direct my said trustees to divide my said residuary estate equally between my daughter . . . and my son . . . Provided Always And I Do Hereby Declare that as to the half share of my said son in my said residuary estate the same or any other property given to him by this my will shall not during his lifetime pass by bankruptcy or be liable to be seized sold attached or taken in execution by process of law." The testator's widow and his son and daughter survived him. On the death of the widow, the son asked that his share in the testator's residuary estate be transferred to him. On originating summons for the interpretation of the testator's will, the Court was asked to determine whether the bequest to the son conferred upon him, from and after the death of the testator's widow, the right to require the capital of such bequest to be paid to him during his lifetime. It was admitted that, but for s. 24 of the Property Law Act, 1908, the proviso in the will as to the son's share would have no effect. *Held*, 1. That effect must be given to the difference in the wording of the income clause ("without power of alienation and anticipation") from the wording of the proviso relating to the son's share in the residue ("shall not during his lifetime pass by bankruptcy or be liable to be seized sold attached or taken in execution by process of law"), evidently taken from the last words of s. 24 (1) of the Property Law Act, 1908. 2. That the son's share was vested, and that the omission of any restriction as to alienation or anticipation entitled him to receive his share. 3. That, even if there had been a restraint on anticipation, the words of the rest of the proviso did not show an intention that only the income should be paid to the son and the capital retained during his life, as the testator had made it clear that the son was entitled to sell or transfer the capital voluntarily, and he did not use clear words that the trustee had to hold the capital fund. 4. That, accordingly, the son was entitled to require the capital of his bequest to be paid to him by the trustee during the son's lifetime. (*In re Wilson, Wilson* v. *Wilson*, [1934] N.Z.L.R. 49, followed.) (*Kidd* v. *Davies*, [1920] N.Z.L.R. 486, and *Newberry* v. *Commissioner of Stamp Duties*, [1938] N.Z.L.R. 780, referred to.) *In re Shipherd (deceased), Guardian Trust and Executors Co. of New Zealand, Ltd.* v. *Smales and Another*. (S.C. Auckland. November 12, 1951. Fell, J.)

Extended Meaning of "Widowhood" in Testamentary Gifts. *95 Solicitors' Journal*, 738.

The Ultimate Justification of Law

From the broadest point of view I find that the relationship between law and ethics is most significantly attested in the fact that Courts of law exist for the administration of justice and that justice is one of the cardinal virtues of moral philosophy. But, you will say, the justice of the law Courts is a very different thing from the ideal virtue of Aristotle's ethics. That is true, and yet I maintain that the ultimate justification of the law is to be found, and can only be found, in moral considerations. You will have noticed that all our early writers on law seek to justify its precepts as based either on divine revelation or on the moral and rational nature of man. Let me commend you to read the first title of Stair's *Institutions of the Law of Scotland*, wherein he treats of the common principles of law, if you wish to see the lofty claims which the father of Scots law made for his science. No doubt there is a prosaic school which has sought to explain all laws as the product solely of expedience and utility, but I have always found their doctrine as unconvincing as it is uninspiring. The truth is that in the ultimate analysis the basis of the law is ethical, at first perhaps dimly perceived and concealed under much that is irrelevant, but increasingly realized as civilization advances and becomes self-conscious. I have instanced already the profession which, by the inscription over their doors, our Courts make to the world that they are temples of justice, a conception which the law shares with moral philosophy; but the coincidence of their vocabulary goes much further than this, for they share also such words of fundamental ethical significance as "right" and "wrong," which are as often on the lips of the lawyer as they are on those of the moral philosopher. The appeal of law is in the last resort to the conscience of mankind, and to commend itself to our conscience the law must be righteous and just. When Justinian, at the outset of his *Institutes*, proclaimed that the precepts of the law were these—to live honestly, to injure no one, and to give every man his due—he used the language of ethics in order to state the true aim of the great system of law which he formulated and which still provides the rules of conduct for a great portion of the human race. (Rt. Hon. Lord Macmillan, "Law and Ethics," from *Law and Other Things*.)

The Judge

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

THE PROPERTY LAW AMENDMENT ACT, 1951.

By The Hon. H. G. R. Mason, K.C., M.P.

Three leading ideas determine the scope and framework of this Act—to correlate the contents of the Property Law Act, 1908, and the Land Transfer Act, 1915, better than is done by the present sections of those Acts, to rewrite parts of the Property Law Act in closer conformity with more modern English counterparts as appearing in the English Law of Property Act, 1925, and to make some few but quite important changes in the law. The Act is therefore most easily discussed under these three headings. Interest attaches to all three, and the last naturally calls for the close attention of all conveyancers. But it was the first-mentioned element—correlation—that was the primary purpose of the Act.

Correlation between Land Transfer and Property Law Acts.

For some years now a desire has been expressed by the legal profession for better correlation between the Land Transfer Act and the Property Law Act. Does a particular section in the Property Law Act apply to land under the Land Transfer Act, or only to other land? Why is a section in the Property Law Act repeated in the Land Transfer Act if this does not mean that the sections of the Property Law Act cannot govern land under the Land Transfer Act? Why should implied covenants in a lease under the Land Transfer Act be completely different from those in a deed of lease? And so one might go on.

It is clear that the two Acts might be redrawn so as to simplify the ascertainment of the law comprised in them. Drafts were accordingly prepared by the late Mr. S. I. Goodall at the request of the Law Revision Committee as long ago as 1939. The war soon afterwards made it impossible to examine them. Some time after the close of the war, the matter was taken up again, and a committee was appointed to examine the drafts. But a committee of the necessary ability to deal with so burdensome a task was not easy to get together, and no appreciable progress was made. It became clear that hope of making progress lay in dealing merely with specific amendments, and that the disposal of these would most quickly lead to a compilation. This is the plan followed in the recent Amendment Act. Many of the sections of it, therefore, simply declare whether or not a certain section of the Property Law Act applies to land under the Land Transfer Act, and repeal a corresponding section of the Land Transfer Act where there is duplication. Section 8, part of s. 9, and ss. 13, 14, 18, 19, 21, 22, 24, 25, 31, and 33, and part of s. 38 are in this category.

In a second category are sections which have a similar operation to that of the first, but in these there is the necessity of making some adjustment of terminology to enable the section of the Property Law Act to be understood in relation to the forms or procedure of the Land Transfer Act. Sections 10, 12, 20, 23, 27, 28, 29, 30, and 35 and part of s. 38 are of this sort.

It will thus be seen that a very large proportion of the sections of the Act is devoted to this attempt to secure better correlation. The general scheme they follow is to confine principles of general law to the Property Law Act and to leave in the Land Transfer Act any provision peculiar to the forms and operations of the system which that statute establishes, as contrasted with principles of law common to property generally. This closely follows work which has been done in New South Wales. It may be questioned whether this process has been taken far enough, and whether some incompleteness has not been left. But an immense amount of discussion has attended such changes as have been made, and the attempt to take the process further would have greatly delayed, and perhaps completely defeated, the passage of the recent Bill.

Conforming to English Changes.

This purpose of correlation is not absent from the remaining sections, but new purposes now come in.

The English Law of Property Act, 1925, has sections which rewrite old law in modern form, with (at most) a slight change of substance, though sometimes with simplification. Sections of a third category in our Act now under discussion take advantage of such English sections.

Section 5 deals with the rule in *Shelley's Case*, (1581) 1 Co. Rep. 93 b; 76 E.R. 206, and with the double-possibility doctrine. These were abolished by the Conveyancing Ordinance. But a question has been raised as to the efficacy of Sir William Martin's draft, which was in the same terms as the sections now appearing in the Property Law Act, 1908. It seems rather futile to have sections giving rise to argument as to whether or not rules were effectually abolished over a century ago. The rules have since been abolished in England in words the efficacy of which is undisputed. Our present amending Act, in s. 5, repeals Sir William Martin's sections which now are embodied in the principal Act, as having fulfilled their purpose; but, before doing so, it recites the English sections and says that Sir William Martin's draft always had the same meaning as the English wording. It is to be hoped that the result is to secure, not merely that these old rules are quite dead, but also that the corpses are buried out of sight and may be forgotten.

The same section repeals sections in the principal Act asserting sundry rights or powers of married women in relation to property which seem long ago to have become unnecessary by reason of more general laws removing disability from married women.

Some other provisions of the main Act appear to have become surplusage, and they have not been repealed by the present Amendment Act. In particular, in three short sentences the Conveyancing Ordinance did away with uses in our system. The Property Law Consolidation Act, 1905, repealed the Statute of Uses in its application to New Zealand, but still carried forward Sir William Martin's words, which now appear in the 1908 Act. At least some of these thereby became surplusage. Another curious oversight to find as late as 1908 is the reference in s. 101 and s. 102 to the marriage of a woman as revoking her power of attorney. This anachronism is corrected by s. 38 of the new Amendment Act.

English legislation relating to accumulations, the benefit and burden of covenants relating to land, and the

Continued from cover i.

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41-806

Messrs. K. L. Brookfield, L. B. Schnauer and H. E. H. Smytheman who have hitherto carried on practice as Barristers and Solicitors at Auckland under the firm name of BROOKFIELD, PRENDERGAST, SCHNAUER & SMYTHEMAN wish to announce that as from the 1st January, 1952, they have been joined in partnership by MR. FREDERICK MORRIS BROOKFIELD, B.A., LL.B. The practice will be carried on as before, under the name of BROOKFIELD, PRENDERGAST, SCHNAUER & SMYTHEMAN at the same address, 33 Shortland Street, Auckland.

enforceability of a covenant made by a man with himself and another or others is adopted in ss. 7, 9, and 11, with slight verbal adjustment derived from New South Wales. At present, we have to refer to English legislation of 1800 (the Thellusson Act) for the main rules on accumulations. On compilation, we shall have the convenience of seeing all the law in our own statute. The new draft of s. 32 (inserted by s. 7 of the Amendment Act), by following a New South Wales form which, while using the same phrasing, eliminates unnecessary repetition, is more concise than the English version. The new s. 32A (a qualification of restriction on accumulation) is an English form.

The English sections which have been adopted in s. 9 are chiefly notable for the provision in subs. 2 of the new s. 47B relating to the burden of covenants relating to land :

> This section extends to a covenant to do some act relating to the land, notwithstanding that the subject-matter may not be in existence when the covenant is made.

And in this and the preceding new section relating to the benefit of such covenants the concluding subsection in each instance appears to give better remedy for the enforcement of restrictive covenants—a matter which will later be reverted to. In s. 11, the burden of all implied covenants is made joint and several, following a New South Wales precedent and superseding a provision which applied only in mortgages. The right of a purchaser of a reversion to enforce a condition for re-entry or forfeiture (s. 36) ; a restriction on the rule against perpetuities (s. 41) ; and the law as to conveyances in fraud of creditors and as to voluntary alienation with intent to defraud a subsequent purchaser (s. 43)—which last supersedes the well-known Statute of Elizabeth and the subsequent case law thereon—are all dealt with in terms taken from the English Act which has been mentioned.

In all the sections under this third category, it may be said that changes of substance are on the whole not far-reaching, and that the changes, whether of substance or of form, tend to simplify our law and to bring it into line with that of England, with the well-known convenience attendant upon that circumstance.

Changes of Substance.

In a fourth category, we come to sections whose primary purpose is a more significant change in the law. Section 6 provides that a contingent or future gift of property carries the intermediate income unless otherwise disposed of. This draft owes much to New South Wales. The corresponding English form goes no further than the first subsection, dealing with gifts under wills, and contains expressions which give emphasis to the rule in relation to real property in a manner which is a little puzzling until one remembers that the provision is less required in relation to personalty, the presumption in that case being different. But the New South Wales adaptation which is followed, dealing with all property in general terms and forgetting past differences, seems simple and sufficient, as the addition of the second subsection from the same source extending to all classes of instruments other than wills appears convenient. It was held in *In re Raine, Tyerman* v. *Stansfield*, [1929] 1 Ch. 716, that the English section did not apply to a pecuniary legacy ; and in our section the words " pecuniary or demonstrative legacy " are inserted, and differentiate it from both the English and the New South Wales prototypes. The same section of our Amendment Act enacts an English form, giving all married infants power to give valid receipts for income, and two forms from New South Wales, giving an arbitrary interpretation to such expressions occuring in instruments as " heir," " next-of-kin," " heir of the body," and other like expressions. Legislation has so altered the operation of such expressions that it is hardly likely that a person, or at least an unlearned person, using them would have an intention in any way according with their present effect. It is well, therefore, to impose on them a presumptive meaning more in accord with the probable intention—as is here done.

In s. 16, the root of title is reduced to thirty years. There are those of us who can remember the time when such a provision would have saved enormous labour ; but to-day, with the Land Transfer system universal, or on the verge of becoming so, its utility will probably be confined to sometimes disposing more readily of requisitions on limited certificates of title issued compulsorily under the Land Transfer (Compulsory Registration of Titles) Act, 1924. The provision as to rights of vendor and purchaser respecting limited certificates of title set forth in s. 17 merely expresses the existing conveyancing practice.

The legal profession has found the Public Trustee very diffident in undertaking the responsibility of acting on behalf of mortgagees who are dead, cannot be found, or are otherwise unavailable. In New South Wales, the Court undertakes this responsibility, and, following a suggestion from the representatives of the New Zealand Law Society, that arrangement is followed in the present Amendment Act : s. 26. By s. 32, different properties in single or collateral securities may be sold or leased together, in one lot ; and, following an English form, the mortgagee's receipt for money is made sufficient.

The same s. 32 includes what is perhaps the most interesting change made by the Act. It provides that purchasers of equities of redemption become personally liable to mortgagees ; and separate deeds of covenant to that effect are abolished. The habit of requiring such deeds has become inveterate, and this provision will do away with that unnecessary work and expense.

Leases are so generally drawn to meet individual cases, with the covenants all consequently expressed, that implied covenants in them do not frequently come under notice. But that is not a reason why they should be completely unsuitable. In s. 34, they are consequently rewritten in a form closer to that which a solicitor would probably employ and superseding a discrepancy between the forms implied in the Land Transfer Act and the Property Law Act.

The registration of restrictive covenants under the Land Transfer Act has long been desired by solicitors. Fencing covenants are the only ones of this class which it has been permissible to register. Following on a reference to the Supreme Court in respect of a fencing covenant and the Court's decision that such covenants were not registrable, it was felt that so useful a convenience could not be dispensed with ; and legislative provision was made for the fencing covenant. But covenants generally were still unprovided for. This long-needed change is effected in s. 37. And the same section gives power to the Court to remove easements or restrictive covenants which lapse of time and changed circumstances have made obsolete.

Several changes in law relating to powers of attorney are made in s. 38. An attorney may now sign with his own name instead of with his principal's—following a seventy-years-old English provision. The provisions of the principal Act might, at a casual reading, appear to apply to corporations, but it has been held that they do not. Consequently, a section (s. 103A) has been inserted to the effect that they shall so apply. Section 100 has been rewritten in a form which owes much to a New South Wales precedent, embodies somewhat simpler expressions, and provides for the making of the statutory declaration of non-revocation by certain officers of a corporation where the donee of the power of attorney is a corporation, and further provides that his declaration shall be sufficient proof of his authority to make the declaration on behalf of the corporation.

Section 40 makes a small adjustment. At the time when s. 108 of the principal Act was originally drawn, "public" companies was an expression probably intended to include all companies. By striking out the word "public," doubt is removed as to whether dividends from private companies are apportionable.

Estates tail are abolished by s. 42. They have never been popular in New Zealand, and are not now used. The question of what to do arose by reason of the English legislation of 1925 as to disentailing assurances being divergent from our older legislation. Should we retain our separate law, or amend to accord with England, in a field in which we had no actual subject-matter? By this section—which owes much to a New South Wales precedent—existing estates tail are converted to fees simple; and future limitations expressed in a manner which formerly denoted an estate tail will give a fee simple. All this is doubtless without practical significance to the practitioner; but it will save teachers and students from troubling with what has become in our country a form so purely hypothetical.

Changes in the implied covenants of mortgages are made by the Schedule to the Act. The mortgagor now covenants to pay rates and taxes, and, where the mortgage is subject to a prior charge, appropriate additional covenants are implied. Incidentally, it may be observed that to introduce some of these changes two subsections of s. 64 of the principal Act had to be removed and inserted as part of s. 56—which is their proper place. This is done in s. 15 of the Amendment Act, and is far from being the only instance that comes under notice in which the existing arrangement of sections of the Property Law Act, 1908, cannot be praised.

Following the usual practice where there is a change in the law relating to conveyancing, ample time is given for solicitors to make themselves acquainted with the Act, which is expressed to come into operation on January 1, 1953. The original draft provided that it should come imto operation one day earlier but affect deeds coming into operation on January 1, 1953, in order that the latter date might be given to the consolidation Act which should follow, but a last-minute change has meant that the permanent Act cannot have its most convenient date.

THE JOINT FAMILY HOMES AMENDMENT ACT, 1951.

By E. C. ADAMS, LL.M.

In (1950) 26 NEW ZEALAND LAW JOURNAL, 333, I endeavoured to outline and explain the provisions of the Joint Family Homes Act, 1950, which, as anticipated, has proved one of the most popular Acts passed in recent years by the New Zealand Parliament. Up to the year ending December 31, 1951, no less than 3,975 applications by married home-owners had been received and approved by the various District Land Registrars throughout New Zealand. In fact, so fashionable has become the settling of homes under the Joint Family Homes Act that two spinster sisters residing in a district, which I shall forbear from naming, have expressed great indignation because the Act does not permit them to settle their jointly-owned home!

NOVEL NATURE OF PRINCIPAL ACT.

The Act broke new ground, although in draftsmanship and procedure it was modelled on Part I of the Family Protection Act, 1908, which, however, had become almost obsolete. So far as I am aware, there is nothing in any other jurisdiction resembling our Joint Family Homes Act. Since it is of such a novel nature, it was only to be expected that the Act would require amending from time to time. The Joint Family Homes Amendment Act, 1951, contains several important amendments to the principal Act, and clarifies certain points which otherwise might have led to litigation.

AMBIT OF ACT EXTENDED.

The principal Act provided that a husband and wife or either of them might settle land the value of which did not exceed £4,000 as a joint family home if they resided and had their home in a dwellinghouse on the land, if the dwellinghouse and land were used *exclusively* for residential purposes and were not used by any person for business purposes or occupied by any person who paid rent to the husband or wife. The limit of £4,000 in value was found in practice to be too low. If the existing valuation (probably made when the sale of homes was controlled by the Land Sales Act) approached within £1,000 or £1,500 of £4,000, the expenses of a special valuation had usually to be met. Moreover, on present-day values, many homes were found to be worth more than £4,000. Accordingly, the limit of value has been increased by s. 3 of the Amendment Act from £4,000 to £5,000.

METHOD OF VALUING LEASEHOLD ESTATES.

The principal Act did not limit settlements to freehold land. Leasehold land, for example, could also be settled. But the Act was silent as to whether the maximum value which could be settled was the capital value of the land or the value of the lesse's interest therein. Section 4 of the Amendment Act clarifies the point by providing that, if the lessee settlor has an option

to purchase, or has agreed to purchase, the land, the leasehold estate is to be valued as if it were an estate in fee simple, but that in other cases it is to be valued as a leasehold estate only. The basis of valuation of leasehold estates is therefore put on the same basis as under the Death Duties Act, 1921, for death-duty and gift-duty purposes.

Home need not be used Exclusively for Residential Purposes.

But the main hardship in practice was found to be the requisite that the land had to be used *exclusively* (which is a very strong word) for residential purposes, and not used by any person for business purposes or occupied by any person who paid rent to the husband or wife. Thus there could be no settlement if a garage on the land was let even for only a few shillings per week, or if a child or other relative was boarded for a nominal sum. Section 3 of the Amendment Act gives much greater elasticity. Since December 1, 1951, a home may be settled if the dwellinghouse and land are used exclusively or *principally* as a home for the husband and wife and such of the members of the household as for the time being reside in the home.

An Additional Interest in Land Automatically Settled.

As previously pointed out, a leasehold estate could be settled, but the principal Act did not make any provision for impressing with the effect of the settlement any other lease which might be granted to the joint home-owners, or the fee simple if it was afterwards acquired by them. Presumably, in such cases a new application under the Act was necessary. The position hereunder is now much simpler and more satisfactory, for s. 6 of the Amendment Act comprehensively provides that, where the persons or the survivor on whom a joint family home is settled acquire an additional, new, substituted, or different registered estate or interest in the land settled, the Registrar shall thereupon, without payment of any fee, register the Joint Family Home Certificate in respect of that estate or interest. The section expressly provides that all the provisions of the principal Act shall apply to that estate or interest as if it had been settled as a joint family home by the settlor or settlors specified in the Joint Family Home Certificate.

Residences under Mining Act may be Settled.

In my article ((1950) 26 New Zealand Law Journal, 333) I pointed out that, although a leasehold as well as a freehold estate could be settled under the Act, no provision had been made for settling a family home held as a mining privilege under the Mining Act, 1926. This omission has now been rectified, for ss. 2 and 7 authorize the registration as joint family homes of residence sites held under the Mining Act, 1926. The intending settlor makes application to the Mining Registrar in the usual form.

Advertising of Applications now Optional.

As a joint family home is, to the extent of £2,000, protected from creditors, obviously it was only just that creditors of the would-be settlor should have a say as to whether or not the home should be settled under the Act. Accordingly, it was mandatory for all applications to be advertised in a newspaper circulating in the district. The creditors had three months in which to lodge a caveat against the application. As, however, the Act was intended for the benefit of home-owners who were residing in the matrimonial home, it also was desirable that expenses should be reduced to an absolute minimum. As many objected to the cost of an advertisement, the Amendment Act now makes advertising optional. If advertising is dispensed with, the Joint Family Home Certificate will issue on the same date on which the application is accepted by the Registrar. It will not be necessary to wait for three months after the date of the advertisement, which has been the position heretofore, and which will still prevail if the application is advertised in future cases at the request of the applicant. But, where the application is not advertised, it is provided by s. 9 of the Amendment Act that, if the settlor is adjudicated a bankrupt under the Bankruptcy Act, 1908, within two years after the date of the registration of the Joint Family Home Certificate, the settlement shall be void as against the assignee in bankruptcy. Thus, where the application is not advertised, protection from the claims of creditors is not achieved until two years after the settlement of the home. It may reasonably be anticipated that in future most applicants who are engaged in private business will have their applications advertised, but that the majority of other applicants will not. It is to be pointed out that, since the coming into operation of the Amendment Act, applications will not be advertised *unless the applicant so requests in writing* and pays the prescribed advertising fee.

Settlements of Mortgaged Land.

There was in the principal Act more than one *casus omissus* with respect to land which was mortgaged. These were noticed by practising practitioners and brought to the attention of the Government by the New Zealand Law Society. The effect of the Amendment Act in supplying these omissions is to make the principal Act harmonize more with general conveyancing principles, which have stood the test of time.

Both Spouses become Jointly and Severally Liable for Mortgage.

Many of the homes which are settled are owned by only one of the spouses. The effect of the settlement is to vest the land in both spouses as joint tenants, and thus to make a gift of one-half to the spouse who before had no share in the land. In such cases, the vesting on the registration of the Joint Family Home Certificate is more in the nature of a transmission than in that of a transfer. It is true that, by s. 88 of the Land Transfer Act, 1915, a covenant is implied in every *transfer* of land subject to a mortgage that the transferee will at the proper times make all payments becoming due under the mortgage and will keep the transferor indemnified in respect of all such payments and in respect of all liability on account of the future observance and performance of the covenants and conditions express or implied to be observed and performed by the transferor ; but, as a settlement under the Joint Family Homes Act is not a transfer, this section presumably would not apply to a settlement under that Act. It was held in *Ramsay* v. *Brown and Webb*, [1922] G.L.R. 71, that the transferee of a mortgaged property is not personally liable to the mortgagee for the mortgage debt unless he becomes so by *express* contract. (On the coming into operation of the Property Law Amendment Act, 1951, the rule in *Ramsay's* case, [1922] G.L.R. 71, will be abrogated.) Ever since this case, it has become almost the universal practice in New Zealand for a mortgage to contain a covenant by the mortgagor to obtain a deed of covenant with the mortgagee from a transferee of the

mortgaged property that he (the transferee) will duly and punctually pay to the mortgagee all moneys secured by the mortgage and perform and observe all covenants, conditions, and agreements express or implied in the mortgage. (On the coming into operation of the Property Law Amendment Act, 1951, these deeds of covenant will be obsolete, and an expensive and hideous excrescence on our conveyancing system will have been removed.) But these deeds of covenant did not contemplate a settlement under the Joint Family Homes Act. If the mortgagor of land subsequently registered as a joint family home should die before the other spouse, apparently under the principal Act the estate of the mortgagor against which the mortgagee would have recourse under the *personal* covenant of the mortgagor would be reduced by the value of the joint family home, which would not form part of the estate of the mortgagor, the whole of the property having become vested in the surviving spouse. It was highly probable, therefore, that, if the principal Act had not been amended, mortgages would soon be amended to provide for the execution of deeds of covenants from both spouses whenever application was made for the issue of a Joint Family Home Certificate, and the land was in the name of one spouse only. This would have added to the expense of settling a home under the Act. Accordingly, s. 8 of the Amendment Act provides that, where a settlement is made by only one of the spouses, and the land is mortgaged, the other spouse must consent to the settlement, and will thereupon, on the settlement of the home, become jointly and severally liable with the settlor for the liabilities of the settlor under the mortgage.

The Rule in Clayton's Case provided for.

Moreover, on the passing of the Joint Family Homes Act, 1950, the ghost of *Devaynes* v. *Noble, Clayton's Case*, (1816) 1 Mer. 529; 35 E.R. 767, 781, stalked the land once again to disturb the minds of mortgagees under mortgages securing *future* advances. As to the rule in *Clayton's Case*, see *23 Halsbury's Laws of England*, 2nd Ed. 398. Every practitioner knows how in practice financial institutions protect themselves against the rule in *Clayton's Case*. It was feared that, if the principal Act was not amended, any future advances under mortgages securing future advances would become unsecured from the date a Joint Family Home Certificate was issued. Accordingly, s. 8 of the Amendment Act also provides in effect that, where a mortgage has been given before the settlement and secures future advances, all advances made after the settlement in accordance with the provision for future advances will stand charged on the land as fully and effectively as they would have been if the land had not been settled as a joint family home.

Cancellation by Registrar.

The principal Act had provided for cancellation of the Joint Family Home Certificate by the District Land Registrar in the following circumstances:

(i) Where the land to which the certificate related had ceased to be used exclusively for residential purposes, and the husband and wife had both ceased to reside and have their home in a dwellinghouse or in any part of a dwellinghouse on the land, and it was unlikely they would again take up residence and make their home in a dwellinghouse or in any part of a dwellinghouse on the land, or that either of them would do so.

(ii) Where, in the opinion of the District Land Registrar or Registrar of Deeds, the certificate should not have been issued.

The conditions in para. (ii) remain the same, except that, in the case of a settled residence-site under the Mining Act, the Mining Registrar has the same powers of cancellation as the District Land Registrar. But para. (i) above has been materially modified in order to bring it into harmony with the widened definition of land which may be settled as a joint family home. The Registrar—*i.e.*, the District Land Registrar or the Mining Registrar, as the case may be—may now cancel the registration under the Act where neither the husband nor the wife resides on the land or where the land has ceased to be used exclusively *or principally* as a home for the husband and wife or either of them and for such of the members of their, his, or her household (if any) as for the time being reside in the home.

Cancellation and Variation by The Court.

Under s. 11 of the principal Act, the Court had power to cancel registration of a joint family home in the event of the divorce or separation of the spouses. Section 11 of the Amendment Act varies the class of cases in which a Court, Judge, or Magistrate may make an order in favour of the husband or wife for possession of a joint family home, for the cancellation of a Joint Family Home Certificate, or for the sale or lease of a joint family home and the disposition of the proceeds. This section allows such an order to be made where there has been an order for maintenance or guardianship as well as where there has been a decree or order for divorce, nullity of marriage, judicial separation, or separation, but not where there has been a decree for restitution of conjugal rights. The jurisdiction of Magistrates' Courts under the section is restricted to making orders for possession in cases where no order in respect of the home has been made by the Supreme Court or any Judge thereof.

Settlement of Maori Land.

The position of Maori land as regards applications for the issue of a Joint Family Home Certificate has been clarified by s. 16 of the Amendment Act. It is enacted that no Maori land within the meaning of the Maori Land Act, 1931, shall be settled as a joint family home without the consent of the Maori Land Court, which Court shall take into account the interests of the settlor or settlors when it is considering an application for its consent. Where Maori land is settled as a joint family home with the consent of the Maori Land Court, nothing in the Maori Land Act, 1931, shall require the confirmation of the settlement.

Of course, European land (as defined in the Maori Land Act, 1931) owned by a Maori is exactly on the same footing as European land owned by a European. Such land, if otherwise eligible, may be settled without the consent of, or confirmation by, the Maori Land Court.

Section 16 of the Amendment Act further provides that, where Maori land is settled as a joint family home, the provisions of the Joint Family Homes Act, 1950, relating to the sale, transfer, mortgage, lease, or disposition of the joint family home shall be subject to the provisions of the Maori Land Act, 1931.

Refund of Fees.

Section 15 of the Amendment Act is a useful machinery clause dealing with the fees payable under the principal

Act. It provides that in any case where for any reason a Joint Family Home Certificate is not issued in pursuance of an application therefor, the Registrar *may* in whole or in part refund the fees paid for lodging or advertising the application or in anticipation of the issue and registration of a Joint Family Home Certificate.

Finally, apparently *ex abundante cautela*, the Legislature has enacted in this section that the only registration fee payable on any registration under the Joint Family Homes Act is that prescribed by the Regulations made under the principal Act: see the Joint Family Homes Regulations, 1951 (Serial No. 1951/28).

THE INTERNATIONAL COURT OF JUSTICE.

By F. Elwyn Jones, M.P.*

In a world that has become frightened of its own shadow, there is something heartening about a session of the World Court at The Hague. Here are a dozen or so Judges drawn from all parts of the world. An American sits next to a Russian, a Frenchman next to a Pole, and an Englishmen next to an Egyptian. Lawyers schooled in the laws of Islam and of Christianity, of China and of Mexico, of East and of West, sit together and adjudicate together some of the world's thorniest problems. When we are sitting in that Court, the fact that we are all citizens of one world seems to be the only political fact that matters.

The first essential of such a Court as this—indeed, perhaps of any Court—is the judicial independence of its members. Everything possible has been done to make sure that the Judges are independent. They are selected by a majority of the members of the General Assembly and of the Security Council of the United Nations. In no sense are they Government nominees. They are—or should be—completely free from pressures from their own Governments. It is true that sometimes one of the Judges may come from a country whose case the Court may actually be trying. To equalize this, each country which comes before the Court can have one of its own nominees on the Bench. So that, if, for instance, Persia had agreed in June to argue its case before the Court, a Persian Judge would have been added to the Bench. The Judges can be dismissed only by the unanimous vote of the other members of the Court. And, perhaps I ought to add, they are the highest-paid Judges in the world.

I have called it a World Court. It is not quite that, because there are some States which do not belong to it. But it is as near to being universal as any institution in the world to-day. Its official name is the International Court of Justice, and it is the principal judicial organ of the United Nations, and successor to the old Permanent Court of Justice.

It is, of course, a civil Court concerned with civil disputes between Governments. It has no criminal jurisdiction whatsoever. So when, at the end of the war, the problem arose of dealing with the mass crimes of the Nazis and the Japanese, the Allied statesmen had to set up special international military tribunals to try the German and Japanese war criminals.

This is yet another illustration of the fact that the development of international institutions for giving effect to—for putting teeth into—international law has lagged behind the development of international law itself.

It is international law which the World Court applies, and it comes from four main sources. First, international treaties and conventions, like those governing the treatment of prisoners of war. Next, international customs which have obtained the force of law, like the right of passage on the high seas. Thirdly, the general principles of law recognized by civilized nations, like the principle that nobody shall be Judge in his own cause. Lastly, the decisions of Courts and the writings of jurists.

Some people complain that international law is inadequate to deal with international problems in its present form. But the more pressing problem in this atomic world is, I think, to give effect to what law we have.

The Hague Judges represent the main forms of civilization and the principal legal systems of the world, and they have shown that there are certainly no technical reasons why international disputes should not be settled judicially, so long as goodwill is shown by both sides. That is the clue. Unless that goodwill exists, we can go on codifying international law and drafting charters of human rights until the atom bombs come home.

The Court's proceedings are conducted in French and English. Interpreting takes up a lot of time, for, although the Court has microphones, it has not made use of the simultaneous translation system which was so successful at Nuremberg.

The question which struck me when I saw the Court in action was this: Have these Judges in fact succeeded in bridging the political gap which now divides the nations? Have they proved capable of neutrality in the cold war? It is perhaps too early to give an answer. So far as appearances go, the Judges, despite the fact that they all wear the same dignified Court dress of black gowns and white lace jabots at the neck, are typical products of their own countries, and look it, too. Yet this has not prevented them on important occasions from behaving like citizens of the world. On one issue in the Corfu Channel case, for instance, the British Judge joined with the rest of the Court in rejecting the British case. In that same case, too, the Polish Judge agreed with the majority that Albania gravely transgressed international law because she failed to notify the existence of a minefield near her shores and to warn

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British destroyers of the danger, so that forty-four British sailors were killed. It was just the kind of incident which in the past has led to war. Instead, it led to litigation. The Court finally awarded Britain over £800,000 damages. It is no fault of the Court that not a penny of this has yet been recovered.

Here again we get back to the problem of lack of goodwill. The Charter of the United Nations itself contains an undertaking by each of its members to comply with the decisions of the Court in any case to which it is party. It goes further, and adds that, if any party to a case fails to perform its obligations, the dissatisfied party may appeal to the Security Council. This Britain has just done. The Security Council may decide on measures to be taken to give effect to the judgment. The whole machinery of enforcement therefore depends, as I have said, on the Security Council's working effectively. Once again, that machinery is being put to a crucial test in the Persian oil dispute.

But, whatever shortcomings there may be in enforcing the judgments of the Court, this must not be allowed to obscure the vital work which the Court is doing. And it is worth remembering that it is only in the Corfu Channel and the Anglo-Persian disputes that any countries concerned in any of the Court's rulings have failed to comply with those rulings.

The truth is that even in this convulsive world there is far more obedience to world law than defiance of it. Civilized men tend on the whole to rally to the support of the law. Their opinion—public opinion—is the strongest force behind international law. After many bitter lessons, mankind is slowly realizing that war and civilization are incompatible, and that, unless certain standards and rules are accepted by all the nations, we are unlikely to survive in this atomic age.

THESE RENT RESTRICTIONS.

Can a Magistrate Overrule a Higher Court ?

By Advocatus Ruralis.

Recently, Advocatus was interviewed by a somewhat peeved landlord. He had stood by while the lease of one of his premises had been sold for about three years' rent, and the premises had not even been used for the same line of business. The landlord was the owner of property on the outskirts of the town. By a policy of low rents, he had made the area popular ; but now he could not raise his rents. The Government had been asked to pay, and were paying, in the same area as much per square foot upstairs as the landlord could obtain downstairs, both in concrete buildings. Over a period of fifty years, the landlord had suffered from fire, earthquake, slump, bad tenants, empty shops, and (from 1931 onwards) rent restriction.

We explained that a City Council, a brewery, or any other corporation was entitled to let unimproved land at 5 per cent. and do nothing for it. If, on the other hand, a private landlord bought land and took two and a half to three years obtaining permits, overcoming builders, and putting up a building on part of the land, he would be allowed 4½ per cent. on the value of the land built on, arrived at by some mysterious method called valuation, which might have no relationship to the price paid. He would not be allowed the interest on the cost of the land while building, nor would he be allowed to add the rates paid during building, interest on the cost of building during building, rates on the empty part of the section, or any other figure which even the income-tax authorities would allow. He could look forward to a period of restricted rents, to be followed, in the event of recession, by empty shops and 20 per cent. reductions in rents.

The landlord pointed out that in other towns rents had gone up, and were going up, and that recent judgments of the Supreme Court appeared to approve this course.

Advocatus pointed out that a curious position had arisen. If the Court of Appeal or the Supreme Court did not like a judgment of a previous Court of Appeal or Supreme Court, it differentiated it and imposed its own judgment. If you did not like that judgment, you could appeal. By recent legislation, a Magistrate has become the final arbiter in rental matters. Where the rentals are under £500 per annum, there is no appeal. The result could quite well be that, where a Magistrate had given a series of decisions which were overruled by a later decision of the Supreme Court, all he had to do in his next rental case was to differentiate his previous rulings, and he could in effect overrule the Supreme Court, and there would be no appeal from his judgment.

This may or may not have been the cause of different methods of rent fixation between different villages.

Some Magistrates are believed to have stated in the privacy of their bathrooms (or wherever Magistrates go when they would be private) that, if the landlord and tenant have arrived at any agreement as to rental, then this is a fair rental. If this heresy is expressed before the rental case is heard, Advocatus believes that the judgment can be upset ; but no other method is known.

The landlord had one old building, not in good repair. The Rents Officer said he would be allowed 1½ per cent. on the depreciated value of the building for repairs. This amounted to £12 per year, out of a rental of £60. He was told that, if he put the building in repair, he could charge interest on the amount of the repairs. The landlord pointed out that painting (£100) and repairs (verandah, £130 ; other, £70) would absorb the whole of the last five years' rents, and that in seven years this would probably happen again.

Advocatus was not prepared to comment on the theory that, if the highest possible insurance was obtained, a fire would be a good thing.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Divorce Commission.—Amongst the eighteen members of the Royal Commission set up in England to inquire into the law relating to marriage and divorce are to be found Lord Keith, Senator of the College of Justice in Scotland; Mr. Justice Pearce, Judge of the High Court of Justice (Probate, Divorce, and Admiralty Division); Sir Frederick Burrows, Governor of Bengal, 1946-1947; Mr. Daniel Hopkin, Metropolitan Police Magistrate; Mr. F. G. Lawrence, K.C., Recorder of Tenterden; Mr. James Walker, K.C., Sheriff of Inverness, Moray, Nairn, and Ross and Cromarty. Seven women are named as members. The Chairman is Lord Morton of Henryton, Lord of Appeal in Ordinary, Scots by birth, an excellent golfer, whose chief recreation is said to be learning Wisden by heart in bed. He also is reputed to have a phenomenal memory, and, once introduced to a stranger, to be able to remember not only his face, but also his handwriting, initials, and private address.

In and Out.—In a recent article upon the ancient office of usher of the Court, Sir William Valentine Ball recalls an incident that occurred on a Welsh circuit. A barrister named Davies was prone to make flowery speeches, which, "if they did not impress the jury, at least intrigued the Judge." On one occasion, he decided to give the jury an idea of its own importance and of its right place in English history. "Gentlemen," he said, "remember you came in with William the Conqueror. Ever since that historic event, it has been for you to say whether a prisoner is guilty or not guilty." The Judge waited his opportunity, and, at the conclusion of his summing-up, he observed: "Gentlemen, learned counsel for the prisoner has told you that you came in with the Conqueror. You will now go out with the usher."

What is (or are) A Family?—Described by the Attorney-General in England as a "stop-gap" or "stand-still" measure, the Leasehold Property (Temporary Provisions) Act, 1951, has now reached the English statute book after a chequered career through Parliament. It provides that, where a tenancy which was granted for a term of years certain of more than twenty-one years expires after June 23, 1951, and before June 24, 1953, and immediately before the date of expiry the tenant or a member of his family was residing in a dwellinghouse comprised in the property, then, unless the tenant has given notice, the tenancy automatically continues until the later date. There have been several decisions under the Rent Restriction Acts as to a "member of the tenant's family." A husband qualifies (*Salter* v. *Lask*, *Lask* v. *Cohen*, [1925] 1 K.B. 584), so do a brother and sister (*Price* v. *Gould*, (1930) 143 L.T. 333), a niece by blood (*Thurlby* v. *Robinson*, (1945) 89 Sol. Jo. 520), an adopted child (*Brock* v. *Wollams*, [1949] 1 All E.R. 715), and a niece by marriage who had been nursing the tenant and his wife for a couple of years (*Jones* v. *Whitehill*, [1950] 1 All E.R. 71). But it is pleasing to note that the term has been freed from any pollution on the distaff side. A man living with the tenant as man and wife has been held to be a member of her "family" for the purposes of the Act (*Gammans* v. *Ekins*, [1950] 2 All E.R. 140). When the legislation was going through the House, Lord Tovey conceded that it was difficult to find a suitable definition, and suggested that this seemed to be a good reason for "doing something to try to help the unfortunate landlord and tenant by giving them some guidance." Lord Buckmaster also supported the insertion of a definition, upon the ground that it was not possible, as a result of the cases, to state with confidence and precision what was meant by the term "family." They seem, however, to have been talked out of it by Viscount Simon, who contended that whether or not a person was a member of the tenant's family was a matter which might vary with the circumstances of a particular case, and that it was better to leave it to the good sense of the tribunal to decide what was reasonable.

Curb on Verbosity.—The other day, Scriblex, always anxious for shortcuts to knowledge, came upon a book on advocacy, *Eulogy of Judges*, the work of an Italian Professor, Piero Calamandrei. It has been translated into English and published in America. In it the Professor outlines an excellent method whereby the young Italian student is taught to avoid prolixity. He is given a single morning to study a complicated civil case and then asked, for a period of an hour, to report orally his views upon it. The following day he is asked to present the same material in half an hour, and on the third day to cover the whole ground in quarter of an hour. On this case, his report is made to a group of students who know nothing of the case. If he succeeds in presenting the material so well that the students grasp the essential points, it is considered that he has shown mastery of that type of oratory which makes a sound lawyer.

Snail Tale.—"Richard Roe," by the way, has caused a flutter in the legal dovecots of Scotland by asserting that there never was a snail in Mrs. Donoghue's ginger-beer bottle. He says that, under the procedure of the Court of Session, the point of law was taken to the House of Lords before the facts were tried, and, when they *were*, there just wasn't a snail at all. For our part, Stevenson *dissente*, we prefer to cling to our illusions. After all, who actually saw the dermatitis bug in Dr. Grant's underpants?

From My Note-book.—"*Ex parte* judgments are always treated differently from other judgments in the eyes of the law when it comes to consider whether they ought or ought not to be 'blowed off by a side-wind'": per Devlin, J., in *Everett* v. *Ribbands and Another*, [1951] 2 All E.R. 818, 821, 822.

"Mr. Trinder has appeared here so often that we look upon him as one of ourselves": The Chaplain of Parkhurst Prison in a speech of thanks to Tommy Trinder, the famous entertainer.

Any causing of a vehicle to move, even by one person's pushing and another steering, amounts to a driving of it: Lord Goddard, L.C.J., in *Shimmell* v. *Fisher*, [1951] 2 All E.R. 672, 673.

THEIR LORDSHIPS CONSIDER.

By COLONUS.

Secret Legatee.—The decision of Danckwerts, J., in *Re Young, Young* v. *Young*, [1950] 2 All E.R. 1245, that an attesting witness could take under a secret trust notwithstanding s. 15 of the Wills Act, 1837, calls to mind the ingenious Irish testatrix in *Cullen* v. *Attorney-General*, (1866) 14 L.T. 644, who left the residue of her estate, not direct to the Church, but to the Reverend Patrick Doyle and the Most Reverend Daniel Murray, writing to them at the same time to explain what she wanted them to do with the money. Naturally, when these trustees brought the secret trust to light in due course, they wanted exemption from duty, in view of the charitable purposes involved. However, they did not succeed. Lord Chelmsford said, at p. 645 :

> the residue in this case is not by virtue of the will given for charitable purposes, but by virtue of the trust imposed by the letters contemporaneous with the will.

Lord Westbury added, at p. 645 :

> The object of that portion of the statute is to charge testamentary gifts.

But Lord Cranworth, L.C., remarked also, at p. 645 :

> I cannot disguise from myself that the rule so laid down is one which may enable parties . . . always to evade, or rather to avoid, the payment of any legacy duty. Because, if the testator is a married man, he may leave the whole of his property to his wife, taking an undertaking from her which does not form part of his will that she at his death will dispose of the property in such and such a way.

" *During.*"—Certain rice was to be shipped during the months of March and/or April. Nine-tenths of the load was put on board the ship in February. The report of the case runs for twenty-two pages, and shows that March means March, not February : *Bowes* v. *Shand*, (1877) 2 App. Cas. 455.

Over-zealous Agents.—It is well to be reminded of the basis of common legal concepts. In *Tanham* v. *Nicholson*, (1872) L.R. 5 H.L. 561, Lord Hatherley, L.C., got down to bedrock. A notice to quit had been served on a daughter of the tenant. She put it on the dresser in the kitchen, and afterwards burnt it. Their Lordships held there had been a sufficient service on her father, and the Lord Chancellor remarked, at pp. 568, 569 :

> the real point in the case, when you come to consider it, is this ; not whether or not the person you have constituted your agent, by your line of conduct, to receive any document that may be left at your house, has performed that which is his or her duty, but whether or not you have constituted that person your agent . . . the agency being once admitted, it is beyond all legitimate inquiry to go into the question whether the person whom you constituted your agent did or did not fail in his duty towards you. The question is, whether the other person was entitled to consider that he was dealing with you in everything that he did with the agent. Therefore the fact that the agent who received the notice put it into the fire would liberate entirely the person who delivered the notice, but it would not liberate the receiver of the notice when once the agency was established, it would not avail him as a mode of escaping from the consequences of his having employed such an agent.

Crown Grants.—It would be interesting to see claims on the Assurance Fund by prior owners in cases such as *Neill* v. *Duke of Devonshire*, (1882) 8 App. Cas. 135, 181, 182 :

> The property on the west bank of the river (Blackwater, Ireland) . . . down to where the possessions of the dissolved monastery of Masallan began . . . belonged to the Earl of Desmond and others who were attainted along with him ; the lands on the east side of the river . . . belonged, at that time, to Sir John Fitzgerald, who was not attainted. It was a matter depending on the evidence what fisheries were included in the possessions of these forfeited persons, and of the monastery of Molanassa which had come to the Crown ; and of Sir John Fitzgerald, which was not forfeited at all, and whose possessions never came into the hands of the Crown at all. But what was granted to Raleigh by Queen Elizabeth, including the forfeited lands on the west bank of the river, and the possessions of the dissolved monastery of Masallan, and that which he had purchased from the Bishop, Dean, and chapter of Lismore, were on December 7, 1602, a very short time before his attainder, conveyed by him to Sir Richard Boyle. Probably the validity of this conveyance was questioned, or at least questionable on behalf of the Crown, and Sir Richard Boyle prudently obtained a series of grants from James I and Charles I, under the Commissioners for Defective Titles, confirming his title. These were dated in 1604, 1609, 1613, and 1630, all much more than sixty years ago.

A Lesson from Medicine

In order to indicate a perspective on the question quickly, I point to our brethren in the medical profession. I do so without intent to draw invidious comparisons, or to imply that there are no major differences, or to suggest that anyone is to blame because lawyers are not held in the same high esteem which the doctors enjoy. I can only mention one aspect of a large problem—namely, that medicine rests on science, and is itself, to a substantial degree, a science, whereas the practice of the law does not even pretend to rest on organized empirical knowledge. For three centuries, science has received the supreme accolade of Western culture, and medicine participates in that prestige. Nor is it merely a matter of public esteem. The reputation is deserved, because the doctors are contributing to our knowledge of health in many important ways. The conquest of disease by scientific methods is universally appreciated, as are preventive medicines and the efforts of doctors to educate the public. The clinic and the laboratory and the scientific medical publications are established and highly regarded. . . .

The doctors have developed a class of specialists who are laboratory researchers and clinicians. I propose a similar development in law. National and State laboratories of factual and legal research could investigate many problems with a view to increasing our knowledge of the legal institution in all its ramifications. The regular publication of the results in Bar and other law journals, and the occasional giving of wide publicity to certain discoveries, would give the public and the lawyers themselves a broader conception of the functions of the Bar and improve the handling of legal problems, whether they be ordinary county issues or the uncertain questions of international law. Even though many lawyers remain dubious regarding the effect of scientific research on their individual practice, they ought to encourage it, not only because of indirect advantages, such as increased public regard, but also because there is great need for scientific knowledge of law and legal institutions : Jerome Hall, " The Challenge of Jurisprudence," (1951) *37 American Bar Association Journal*, 23.