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THE CROWN PROCEEDINGS ACT, 1950.

V.

In this concluding article, we deal with the changes made by the new Act in relation to the obtaining of discovery against the Crown and the right to interrogate the Crown, and the special provisions relative to counterclaim and set-off against the Crown, the application to officers of the Crown of the prerogative writ of mandamus, proceedings in the Admiralty jurisdiction, and some minor matters.

Discovery and Interrogatories.

Previously to the coming into force of the Crown Proceedings Act, 1950, a subject proceeding by way of petition of right under the Crown Suits Act, 1908, was not entitled to an order for discovery of documents against the Crown: *Rayner* v. *The King*, [1929] N.Z.L.R. 805. That right is a substantive right; and s. 34 of the Crown Suits Act, 1908, was a procedural section only. On the other hand, in *Barrett* v. *Minister for Railways*, (1902) 21 N.Z.L.R. 511, discovery was ordered; there, the proceedings were, not by way of petition of right, but by way of action under a special statutory provision.

Thus, before the Crown Proceedings Act, 1950, came into force, the Crown could not be compelled by an order of the Court either to give discovery or to answer interrogatories. The question, therefore, how far Crown documents ought to be protected from discovery in legal proceedings to which the Crown was a party never arose upon an order for discovery; but the question has on more than one occasion arisen where an officer of the Crown has been subpoenaed to produce documents in proceedings between subjects. The Crown always maintained the view that it was not bound to produce documents if the appropriate Minister was of opinion that their production would prejudice the public interest. Much controversy ranged about this question for many years.

Section 27 of the Crown Proceedings Act, 1950, lays down in statutory form that the Crown may be ordered to give discovery and to answer interrogatories, subject to an important qualification that is made in the public interest.

The section provides as follows:

> (1) Subject to and in accordance with rules of Court,—
>
> (*a*) In any civil proceedings to which the Crown is a party or third party, the Crown may be required by the Court to answer interrogatories if the Crown could be required to do so if it were a private person of full age and capacity; and
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> (*b*) In any such proceedings as aforesaid the Crown may be required by the Court to make discovery of documents and produce documents for inspection if the Crown could be required to do so if it were a private person of full age and capacity:
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> Provided that this section shall be without prejudice to any rule of law which authorizes or requires the withholding of any document or the refusal to answer any question on the ground that the disclosure of the document or the answering of the question would be injurious to the public interest.
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> (2) Any order of the Court made under the powers conferred by paragraph (*a*) of the last preceding subsection shall direct by what officer of the Crown the interrogatories are to be answered.
>
> (3) Without prejudice to the proviso to subsection one of this section, any rules made for the purposes of this section shall be such as to secure that the existence of a document will not be disclosed if, in the opinion of a Minister of the Crown, it would be injurious to the public interest to disclose the existence thereof.

The section preserves the rule of law entitling—and, indeed, requiring—witnesses to withhold documents or to refuse to answer a question if the disclosure of the document or the giving of an answer would be injurious to the public interest. This rule is part of the general law of evidence, and is not a particular right of the Crown.

The proviso to subs. 1 applies to the trial; it applies as well to interlocutory proceedings and to actions between subjects as to those in which the Crown is a party.

The proviso to subs. 1 and the contents of subs. 3 are worthy of special attention in relation to their application to the Crown. They can be considered together.

The words "any rule of law" which authorizes or requires the withholding of any document or the refusal to answer any question on the ground of public interest, at once draw attention to the effect of the judgment of the House of Lords in *Duncan* v. *Cammell, Laird, and Co., Ltd.*, [1942] A.C. 624; [1942] 1 All E.R. 587, in which their Lordships dealt with the principles on which production of documents should be refused on the ground of public interest.

We suggest that the principles enunciated in that case by Viscount Simon, L.C., in a speech in which the other Law Lords concurred, may properly be called a "rule of law" in New Zealand.

In a judgment delivered some six years before the House of Lords had considered *Duncan's* case, our Court of Appeal, in *Gisborne Fire Board* v. *Lunken*, [1936] N.Z.L.R. 894, followed the decision of the Judicial Committee of the Privy Council in *Robinson* v. *State of South Australia* (*No. 2*), [1931] A.C. 704, and held that the Court has always in reserve the power of examining documents for which protection is sought, in order to

ascertain whether the public interest would be prejudiced by its production and to require some indication of the injury which would result from such production.

In *Duncan* v. *Cammell, Laird, and Co., Ltd.*, the House of Lords took a different view from that expressed by the Privy Council in *Robinson's* case. In the former, it was held that documents otherwise relevant and liable to production must not be produced if the public interest required that they should be withheld. A Court of law should uphold an objection duly taken by a public Department called on to produce documents in a suit between private citizens if, on grounds of public policy, they ought not to be produced. Documents otherwise relevant and liable to production need not be produced if the public interest requires that they should be withheld, owing to their actual contents or to the class of documents to which they belong. An objection duly taken by the head of such a Department should be treated by the Court as conclusive ; but it is essential that the decision to object should be taken by the Minister who is the political head of the Department concerned, and that he should have seen and considered the contents of the documents and himself formed the view that, on the grounds of public interest, they ought not to be produced. If the question arises before trial, the objection may ordinarily be taken by affidavit of the Minister. If it arises on subpoena, the objection may in the first instance be conveyed to the Court by an official of the Department, who produces a certificate signed by the Minister stating what is necessary ; but, if the Court is not satisfied, it can request the Minister's personal attendance.

While an objection validly taken to production, on the ground that it would be injurious to the public interest, is conclusive, the mere fact that the Minister or the Department does not wish the documents to be produced is not an adequate justification for objecting to their production. Production should be withheld only when the public interest would otherwise be damnified, as where disclosure would be injurious to national defence or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the Public Service. In such a case, the Court should not require to see the document, for the purpose of ascertaining whether disclosure would be injurious to the public interest.

In the course of his speech, Lord Simon, L.C., said that, although an objection validly taken to production, on the ground that this would be injurious to the public interest, is conclusive, it is important to remember that the decision ruling out such documents is the decision of the Judge.

Thus, in *Duncan's* case the objection raised in the respondent's affidavit was properly expressed to be an objection to produce " except under the order of this Honourable Court." It is the Judge who is in control of the trial, not the Executive. On the other hand, while privilege in relation to discovery is for the protection of the litigant, and can be waived by him, the Judge should insist, if necessary, even though no objection be taken, on the protection of documents which it would be contrary to the public interest to reveal.

The Lord Chancellor pointed out that, when the Crown is a party to a suit, discovery of documents cannot be demanded by the other party as of right, although in practice, for reasons of fairness and in the interests of justice, all proper disclosure and production should be made. In concluding his speech, he indicated the sort of grounds that would not afford to the Minister adequate justification for objection to production. At pp. 642, 643 ; 595, he said :

> It is not a sufficient ground that the documents are " State documents " or " official " or are marked " confidential." It would not be a good ground that, if they were produced, the consequences might involve the Department or the Government in Parliamentary discussion, or in public criticism, or might necessitate the attendance as witnesses or otherwise of officials who have pressing duties elsewhere. Neither would it be a good ground that production might tend to expose a want of efficiency in the administration or tend to lay the Department open to claims for compensation. In a word, it is not enough that the Minister of the Department does not want to have the documents produced. The Minister, in deciding whether it is his duty to object, should bear these considerations in mind, for he ought not to take the responsibility of withholding production except in cases where the public interest would otherwise be damnified, for example, where disclosure would be injurious to national defence, or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the Public Service. When these conditions are satisfied and the Minister feels it is his duty to deny access to material which would otherwise be available, there is no question but that the public interest must be preferred to any private consideration.

The Lord Chancellor added, *obiter*, that the same principles seemed to him also to apply to the exclusion of oral evidence which, if given, would jeopardize the interests of the community (as set out in *Duncan's* case : [1942] A.C. 624, 643 ; [1942] 1 All E.R. 587, 595) ; and this was implied in Lord Eldon's language in *Customs Commissioners for Scotland* v. *Vass*, (1822) 1 Sh. Sc. App. 229, 230. After all, the public interest is also the interest of every subject of the realm, and, while, in these exceptional cases, the private citizen may seem to be denied what is to his immediate advantage, he, like the rest of us, would suffer if the needs of protecting the interests of the country as a whole were not ranked as a prior obligation.

The question then arose in New Zealand whether our Courts should follow *Duncan's* case when the question came up for consideration, or whether they were bound by *Gisborne Fire Board* v. *Lunken*, [1936] N.Z.L.R. 894, and the Privy Council judgment which it followed. The New Zealand Law Society suggested that, in future, Ministers in charge of State Departments should follow *Duncan's* case, and that they should also adopt the principles laid down in that case by the Lord Chancellor. The attention of the Prime Minister and the Attorney-General was drawn to the matter. In due course, the Law Society received the following reply from the learned Attorney-General, under date October 27, 1943. This letter contains an important statement of State policy, and has a distinct bearing on the proviso to s. 27 (1) and on s. 27 (3). It is as follows :

> This topic is one which has at all times engaged the anxious consideration of the Law Officers of the Crown, and I am very much obliged to you for giving me an opportunity of studying the very careful report which was prepared for your Society, and a copy of which was enclosed with your letter.
>
> I may say that the Crown's advisers have from time to time been impressed with conflicting decisions of the Courts on this topic and have welcomed the decision of the House of Lords in *Duncan* v. *Cammell, Laird and Co., Ltd.*, [1942] A.C. 624.
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> As your Society's report observes, this decision expressly dissents from that of the Privy Council in *Robinson* v. *State of South Australia* (*No.* 2), [1931] A.C. 704, followed and perhaps extended in New Zealand by the Court of Appeal in *Gisborne Fire Board* v. *Lunken*, [1936] N.Z.L.R. 894. The Privy Council does not always regard itself as bound by

its own decisions, and I am of opinion that if the point came again before it, it would be decided in accordance with *Duncan* v. *Cammell, Laird, and Co.*, and that *Robinson* v. *State of South Australia* would not be followed.

The difficulty with which I am meanwhile faced is the rule of law that, as your Society's report observes, the Courts in New Zealand are bound by decisions of the Privy Council. The legal position, however, in the particular case where a decision of the Privy Council has been explicitly dissented from by the House of Lords has, I believe, not yet been laid down in a manner finally binding on the Courts of New Zealand. Besides the case of *Will* v. *Bank of Montreal*, [1931] 3 D.L.R. 526, to which your Society's report refers, I may mention *Stevenson* v. *Basham*, [1922] N.Z.L.R. 225, and the Canadian authorities collected in 7 *Australian Law Journal*, 102. I think the correct view to take of the conflict of decisions in the matter to which your letter relates is that the persuasive authority of *Will* v. *Bank of Montreal* would be accepted by the Courts in New Zealand. Substantially this is the view that counsel for the Crown was instructed to submit in *Lovell* v. *Barry Bros., Ltd.*,[1] in which I understand that no formal decision was given. I am glad to find that the Crown's view is one which appears to be shared by your Society.

As to the second matter raised in your letter, I have to say that the principles laid down by Viscount Simon, Lord Chancellor, in *Duncan* v. *Cammell, Laird, and Co.*, are fully accepted by the Government; and that they were, indeed, used and followed as the basis of the Crown's decision as the course to be followed in *Lovell* v. *Barry Bros., Ltd.*[1] and they will no doubt again be studied whenever a similar position arises.

The operation of the rule in *Duncan's* case is not confined to official documents, but extends to all documents or evidence the disclosure of which would injuriously affect the public interest; equally, the fact that a document is official or confidential is, by itself, no ground for withholding it: *Asiatic Petroleum Co., Ltd.* v. *Anglo-Persian Oil Co., Ltd.*, [1916] 1 K.B. 822.

The judgment of the House of Lords in *Duncan* v. *Cammell, Laird, and Co., Ltd.*, [1942] A.C. 624; [1942] 1 All E.R. 587, was held by Callan, J., to be inapplicable in the circumstances of *Keenan* v. *Auckland Harbour Board*, [1946] N.Z.L.R. 97, 104. It was submitted that a certain letter could not be put in evidence without jeopardizing the interests of the State. His Honour held that that was a matter for the responsible Minister to raise, and not a point for decision by the Court. The Minister, having had an opportunity to claim privilege, did not do so, and, accordingly, *Duncan's* case did not apply.

In *Hiroa Mariu* v. *Hutt Timber and Hardware Co., Ltd.*, [1950] N.Z.L.R. 458, it was held by Smith, J., following *Duncan's* case, that it is for the Minister himself to take any objection to the admission of evidence on the ground that the exclusion of such evidence is necessary for the proper functioning of a Government Department, or that, if it were given, it would jeopardize the interests of the community. In such a case, the Minister in charge of the Department concerned should give careful consideration to the whole matter in issue, and should himself take the objection. The Permanent Head of the Department cannot be substituted for the responsible Minister except in a rare case where it can be shown that it was not possible or practicable for the Minister to act and the Court considers that, in the circumstances, it is reasonable for the objection to be taken by the Permanent Head.

It should be noted that subs. 3 of s. 27 goes even further than *Duncan's* case, and provides that rules of Court may be made to enable a Minister to withhold evidence of "the *existence* of a document" if, in the Minister's opinion, it would be injurious to the public interest to disclose its existence. Such extension of the rule in *Duncan's* case by a special rule of Court is necessary, because R. 161 of the Code of Civil Procedure requires the party against whom an order for discovery is made to set out in his affidavit the documents which he objects to produce (Form No. 12, para. 2). No new rule of Court in relation to s. 27 (3) has yet been made in New Zealand; but see R.S.C., O. 31, r. 30.

[1] This case was not reported, but it is explained in (1944) 20 NEW ZEALAND LAW JOURNAL, 2.

SET-OFF AND COUNTERCLAIM AGAINST THE CROWN.

Where the expression "proceedings against the Crown" is used in the Crown Proceedings Act, 1950, it includes a claim by way of set-off or counterclaim raised in proceedings by the Crown (s. 2 (1)).

Before the passing of the Act, no counterclaim or set-off could be raised against the Crown: *Secretary of State for War* v. *Easdale*, (1893) 27 I.L.T. 70. The point was raised earlier in *Brogden* v. *The Queen*, (1876) 1 N.Z. Jur. (N.S.) C.A. 69, whether the Crown could plead a set-off in New Zealand. The Court of Appeal (Williams, J., *dubitante*) held that it could not.

Now s. 30 (2) empowers the making of rules of Court with respect (*inter alia*) to the following matters:

(*e*) For providing that a person shall not be entitled to avail himself of any set-off or counterclaim in any proceedings by the Crown for the recovery of taxes, duties, or penalties, or to avail himself in proceedings of any other nature by the Crown of any set-off or counterclaim arising out of a right or claim to repayment in respect of any taxes, duties, or penalties;

(*f*) For providing that a person shall not be entitled, without the leave of the Court, to avail himself of any set-off or counterclaim in any proceedings by the Crown if either the subject matter of the set-off or counterclaim does not relate to the Government Department or officer of the Crown in whose name the proceedings are brought, or the proceedings are brought in the name of the Attorney-General;

(*g*) For providing that the Crown, when sued in the name of a Government Department or of an officer of the Crown, shall not, without the leave of the Court, be entitled to avail itself of any set-off or counterclaim if the subject matter thereof does not relate to that Department or officer; and

(*h*) For providing that the Crown, when sued in the name of the Attorney-General, shall not be entitled to avail itself of any set-off or counterclaim without the leave of the Court.

Thus, though the Act, in s. 2 (1), anticipates that set-offs and counterclaims will be allowed in proceedings under it, the extent to which they can be made use of is severely limited, though with reciprocity, by s. 30 (2) (*e*) - (*h*). The object of limiting the rules to be made under the authority of s. 30 (1) appears to be to keep the determinations of liability in respect of revenue matters distinct from other actions, and, also, not to permit actions relating to the activities of different Government Departments to be tried in the same proceedings without leave of the Court.

No rules have, as yet, been made in pursuance of s. 30 (1), but, in the meantime, the practical effect of the section may be summarized to the following effect:

(*a*) Where the Crown sues for taxes, duties, or penalties, the defendant cannot plead any set-off or counterclaim.

(*b*) Where the Crown sues for any other cause of action, the defendant cannot raise a set-off or counterclaim arising out of a right or claim to the repayment of taxes, duties, or penalties.

(*c*) Where the Crown sues in the name of an authorized Government Department, the defendant can, without leave, plead a set-off or counterclaim where its subject matter relates to the plaintiff Department; where its subject matter does not so relate, the leave of the Court must be obtained.

(*d*) Where the Crown sues in the name of the Attorney-General, no set-off or counterclaim can be pleaded by the defendant except by leave of the Court.

(*e*) Where a plaintiff sues the Crown in the name of a Government Department, the Crown can raise a set-off or counterclaim without leave if its subject matter relates to the defendant Department, but requires the leave of the Court to do so if its subject matter does not so relate.

(*f*) Where the Crown is sued in the name of the Attorney-General, it cannot raise any set-off or counterclaim without the leave of the Court.

(*To be concluded.*)

SUMMARY OF RECENT LAW.

ADMINISTRATIVE LAW.

Action against Domestic Tribunal. *213 Law Times*, 75.

AUCTIONEER.

Auctioneer's Duty and Authority to sign Memorandum. *96 Solicitors' Journal*, 91.

BANKRUPTCY.

Operative Point for Reputed Ownership. *213 Law Times*, 72.

The Bankrupt's Power to make Contracts. *102 Law Journal*, 171.

BILL OF EXCHANGE.

Indorsement—Promissory Note—Payable to "F. and F.N.Co." —Indorsement, by Partner of Firm, "F. and F.N."—Incomplete and Irregular on Its Face—Plaintiffs suing as Holders in Due Course—Entitled to succeed as Holders for Value—Bills of Exchange Act, 1882 (c. 61), s. 29 (1). In pursuance of an agreement between the defendant and a firm for the purchase of shares the defendant made two promissory notes payable on demand on specified dates to "Fathi and Faysal Nabulsy Co. or order," the name being that of a firm in which Fathi Nabulsy and Faysal Nabulsy were the partners. The notes were indorsed to the order of the plaintiffs by Faysal Nabulsy, who had authority to sign for the firm, with the words "Fathi and Faysal Nabulsy," the word "company" being omitted. This was the recognized signature of the partnership, and the plaintiffs discounted the notes in good faith and without notice of any defect in the title of the payees. On presentation the notes were dishonoured. On a claim against the defendant, as drawer of the notes, by the plaintiffs, as holders in due course, *Held*, (i) That, although the indorsement was valid to pass the title in the notes to the plaintiffs, the omission of the word "company" would give rise to a reasonable doubt whether the payees and the indorsers were necessarily the same, and, therefore, the notes could not be said to be complete and regular on the face of them and the plaintiffs could not succeed as holders in due course within s. 29 (1) of the Bills of Exchange Act, 1882; but (ii) That the plaintiffs, having pleaded that they were holders in due course, were entitled to rely on the more limited allegation, although not pleaded, that they were holders for value; the defendant had failed to plead any defect in their title; and, therefore, he was liable to the plaintiffs on the notes. *Arab Bank, Ltd.* v. *Ross*, [1952] 1 All E.R. 709 (C.A.).

As to Transfer of Bill by Indorsement, see *2 Halsbury's Laws of England*, 2nd Ed. 655, 656, paras. 902, 903; and for Cases, see *6 E. and E. Digest*, 210-219, Nos. *1294-1365*.

COMPANY.

Director—Authority—Ostensible Authority—Provision in Article permitting Delegation of Powers to One Director—Unauthorized Agreement made by Director—Ignorance of Other Party to Agreement of Provision in Article—Company not estopped from setting up Director's Absence of Authority. By the articles of association of the defendant company, the board of directors were empowered to delegate powers to a committee consisting of a member or members of their body. Without the authority of the other members of the board, a director of the defendant company purported to enter into an agreement on the company's behalf with an agent of the plaintiff company, who had no knowledge of the contents of the articles of association of the defendant company or of the board's right to delegate powers to a committee. On a claim by the plaintiff company arising out of the purported agreement, *Held*, That, as, at the time of the making of the purported agreement, the plaintiff company, through their agent, had no knowledge of the defendant company's articles of association and the powers of delegation contained therein, the plaintiff company could not rely on those articles as conferring ostensible or apparent authority on the director of the defendant company to make the agreement on behalf of the defendant company, and, therefore, the defendant company were not estopped from establishing that there was no authority in the director to enter into the agreement on their behalf, and so were not liable under the agreement. (*Houghton and Co.* v. *Nothard, Lowe, and Wills*, [1927] 1 K.B. 246, and *Kreditbank Cassel G.m.b.H.* v. *Schenkers*, [1927] 1 K.B. 826, followed.) (*British Thomson-Houston Co., Ltd.* v. *Federated European Bank, Ltd.*, [1932] 2 K.B. 176, not followed.) (*Mahony* v. *East Holyford Mining Co.*, (1875) L.R. 7 H.L. 869, distinguished.) *Rama Corporation, Ltd.* v. *Proved Tin and General Investments, Ltd.*, [1952] 1 All E.R. 554 (Q.B.D.).

CONFLICT OF LAWS.

Contract—Law applicable—Deed executed by Husband in United States—Husband resident in England—No Assets in United States—Payments under Deed in Dollars—American Law applied by Deed to Investment of Funds—Rights of Inspection exercisable in America. By a deed executed in the State of New Jersey in the United States of America, a husband undertook to make certain payments to his wife, from whom he was divorced. At that time, both husband and wife were in New Jersey, but the husband was ordinarily resident in the United Kingdom and the wife in the United States. After the execution of the deed, and in consequence of it, the husband had no assets in the United States, the great bulk of his assets being in the United Kingdom. The deed provided that the payments should be made in dollars and incorporated the law of the State of New York or of the State of New Jersey for the purpose of determining in what securities certain funds should be invested. It also created certain rights of inspection which in the normal course would be exercised in America. The husband fell into arrear with his payments, and was sued by his wife in the High Court in England. In his defence, he asserted that the law of the State of New Jersey was the proper law for determining the validity of the agreement. An order was made by consent for payment of £6,000 in respect of the arrears. The husband paid £2,000 in full, but, when tendering the balance, sought to deduct £2,754 for income-tax on the whole £6,000, claiming to be entitled to do so under rr. 19 and 21 of the All Schedules Rules of the Income Tax Act, 1918. *Held*, That, having regard to the provisions of the deed (payment in dollars, incorporation of New Jersey law, and the right of inspection), and the assertion as to the law applicable by the husband in his pleading, the presumption that the deed was governed by the *lex loci contractus* was not displaced by the fact that the husband was at the time ordinarily resident in the United Kingdom and was left with no assets in the United States (the institution by the wife of proceedings in the English Courts being immaterial), and the deed was governed by the law of New Jersey; and, therefore, the husband could not deduct income-tax under English law, by which they had not agreed to abide. (*Indian and General Investment Trust, Ltd.* v. *Borax Consolidated, Ltd.*, [1920] 1 K.B. 539, applied.) *Keiner* v. *Keiner*, [1952] 1 All E.R. 643 (Q.B.D.).

As to Law Governing Contracts, see *6 Halsbury's Laws of England*, 2nd Ed. 263-269, paras. 321-323; and for Cases, see *11 E. and E. Digest*, 394-399, Nos. *673-707*.

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LEGAL ANNOUNCEMENTS.

PARTNERSHIP NOTICE.

We have to announce that we have admitted into partnership as from 1st day of April, 1952, MR. ARTHUR WILLIAM MIDDLETON, LL.B., son of our MR. WILLIAM MIDDLETON.

The practice will continue to be carried on under the same firm name of "MONAGHAN & MIDDLETON," at Egmont Street, NEW PLYMOUTH.

MONAGHAN & MIDDLETON.

LEGAL PARTNERSHIP.

I have pleasure in announcing that I have admitted into partnership MR. SAMUEL LANCELOT HENRY and my son MR. IVAN HUNTER MAIN, LL.B. The practice will continue to be carried on under the Firm Name of HISLOP & CREAGH & MAIN at our offices in Thames Street, OAMARU.

JOHN H. MAIN,
OAMARU, April 1st, 1952.

POSITION.

CIVIL SERVANT, 26 (twelve units LL.B.) experience in LEGAL BRANCH OF GOVERNMENT seeks position with legal firm. Anywhere considered.

"CIVIL SERVANT,"
C/o Box 472, WELLINGTON.

MESSRS. A. M. GASCOIGNE and A. G. WICKS announce that they have as from the 1st April, 1952, admitted into partnership MR. JOHN HALFORD WALTON. The practice will in future be carried on under the name of GASCOIGNE, WICKS & WALTON, at the same offices in Lower High Street, BLENHEIM.

CONSTITUTIONAL LAW.

Accession to the Crown. *102 Law Journal*, 172.

CONTRACT.

Merger—Simple Contract to repay Bank Overdraft—Subsequent Agricultural Charge under Seal—Covenant to pay "all moneys now or hereafter due"—Agricultural Credits Act, 1928 (c. 43), s. 5 (1). In 1948 and 1949, the defendants, who were farmers, had an overdraft with the plaintiff bank which by parol agreement they were jointly and severally liable to repay with interest and charges. On November 2, 1949, the defendants executed in favour of the bank a charge under seal under the Agricultural Credits Act, 1928, s. 5 (1), to secure all moneys then or thereafter owing to the bank, and therein covenanted to pay all such moneys on demand. In 1950, on the completion of a sale of the property charged, the charge was discharged by agreement on the payment of £4,000. On a claim by the bank for payment of an amount of the overdraft in excess of the £4,000, *Held*, That the merger of a simple contract in a specialty operated only if that were the intention of the parties; on construction, the charge did not show that the intention of the parties in the present case was that the simple contract between the bank and the defendants should be merged in the charge; and, therefore the contention of the defendants that the discharge of the charge discharged their debt in full must fail, and they were liable for the balance of the overdraft. (Dictum of *Maule*, J., in *Price* v. *Moulton*, (1851) 10 C.B. 573, disapproved.) *Barclays Bank, Ltd.* v. *Beck and Another*, [1952] 1 All E.R. 549 (C.A.).

As to Discharge of Right of Action for Breach of Contract by Merger, see *7 Halsbury's Laws of England*, 2nd Ed. 254, para. 351; and for Cases, see *12 E. and E. Digest* (Replacement) 580-584, Nos. *4468-4520*.

CRIMINAL LAW.

Multiplication of Counts. *116 Justice of the Peace Journal*, 100.

DESTITUTE PERSONS.

Maintenance Order—Discharge—Petition for Divorce—Application for Alimony pendente lite. Where a wife who has in her favour a maintenance order made by a Magistrate includes in a petition for divorce a claim for alimony *pendente lite*, she may apply to the Magistrate to discharge his order, since she cannot have two concurrent maintenance orders, and the jurisdiction of the Magistrate in dealing with her application does not conflict with the jurisdiction of the Divorce Court. *Pooley* v. *Pooley*, [1952] 1 All E.R. 395 (P.D. & A.).

As to Discharge of Maintenance Order, see *10 Halsbury's Laws of England*, 2nd Ed. 843, para. 1345; and for Cases, see *27 E. and E. Digest*, 565, 566, Nos. *6237-6250*, and Digest Supplements.

EXECUTION.

Garnishee Order—Debt "owing or accruing"—Deposit Account—Money repayable only on Production of Deposit Book—R.S.C., Ord. 45, r. 1—County Court Rules, Ord. 27, r. 1. A judgment debtor had a sum of money in a deposit account with a bank, the contract between the bank and the debtor being subject to the conditions (*a*) that fourteen days' notice should be given of a withdrawal, and (*b*) that money could be withdrawn only on a personal application by the debtor at the bank and on production of the deposit book. On January 11, 1952, a notice of withdrawal given by the debtor expired, and, on the same day, the judgment creditor issued a garnishee summons against the bank. The debtor did not apply, personally or at all, for repayment of the money, and it was still with the bank. *Held*, That, as the judgment debtor had failed to comply with all the terms of the contract of deposit, he could not obtain payment from the bank of the money in his deposit account, and the judgment creditor could not be in a better position than the debtor; therefore, the sum standing to the credit of the debtor's deposit account was not a debt "owing or accruing" to him from the bank within the meaning of R.S.C., Ord. 45, r. 1, and of the County Court Rules, Ord. 27, r. 1, and it was not a proper subject of garnishee proceedings. *Bagley* v. *Winsome (National Provincial Bank, Ltd., Garnishee)*, [1952] 1 All E.R. 637 (C.A.).

As to Debts Owing or Accruing, see *14 Halsbury's Laws of England*, 2nd Ed. 107-111, paras. 171-176; and for Cases, see *21 E. and E. Digest*, 624-626, Nos. *2105-2120*.

FACTORY.

Dangerous Machinery—Duty to fence Machinery—Machinery manufactured in Factory—Factories Act, 1937, (c. 67), ss. 14 (1), 16, 20 (cf. Factories Act, 1946 (N.Z.), ss. 41 (4), 42). The respondents were the owners of a factory engaged in the manufacture of machinery. The appellant, who was under eighteen years of age, was employed by the respondents in the factory as an apprentice fitter. While cleaning a dangerous, but unfenced, part of a machine which had been manufactured in the factory, he was injured. He claimed damages for the breach by the respondents of their statutory duty under ss. 14 (1), 16, and 20 of the Factories Act, 1937. *Held*, That, on the true construction of s. 14 (1), read in conjunction with ss. 12 and 13 of that Act, the words "any machinery" did not apply to machines within the factory which were products of the manufacturing processes carried on in the factory, and, therefore, the duty securely to fence dangerous machinery laid on occupiers of factories by ss. 14 (1) and 16, and the prohibition against young persons cleaning dangerous machinery provided by s. 20, did not apply, and the respondents were not liable to the appellant under those sections. *Parvin* v. *Morton Machine Co., Ltd.*, [1952] 1 All E.R. 670 (H.L.).

Place "within the close, curtilage, or precincts forming a factory"—Part of Factory Building—Factories Act, 1937 (c. 67), s. 151 (6) (cf. Factories Act, 1946 (N.Z.), s. 2 (1))—Openings in Floors—Space for Hoist at Edge of Floor—Safe Means of Access—Factories Act, 1937 (c. 67), ss. 25 (3), 26 (1) (cf. Factories Act, 1946 (N.Z.), ss. 47, 48). A workman was employed by the second defendants on work of installing boilers in an electricity power station belonging to the first defendants. On the second floor where he worked five boilers had been installed in bays and were generating electricity. Beyond these five bays, there were four more bays into which boilers were to be put. There was a partly erected boiler in the sixth bay, and an unguarded open space in the seventh bay, in which a hoist was working, with a drop of 45 ft. through that open space to the ground floor. The workman was working in the ninth bay. Between the fifth bay, the last of the bays in which there were working boilers, and the sixth bay, the first of the bays in which installation was in progress, a tarpaulin had been put up to divide the operating part of the building from that part in which installation was in progress. When the workman was returning from his lunch to his work at the ninth bay, in some manner unexplained he fell through the open space in the seventh bay and was killed. In a claim by the workman's personal representatives, *inter alia*, against the first defendants for breach of statutory duty under the Factories Act, 1937, *Held*, That the place where the accident happened did not form part of a factory, because, by reason of the separation therefrom of the operating part of the factory, it was a place situate within the close, curtilage, or precincts forming a factory which was used solely for some purpose other than the processes carried on in the factory, within the meaning of s. 151 (6) of the Factories Act, 1937, and this was so notwithstanding that the place formed part of the factory building itself; and, therefore, the first defendants were not bound by the statutory duties imposed by the Factories Act, 1937. (Dictum of *Wynn-Parry*, J., in *Cox* v. *Cutler and Sons, Ltd., and Hampton Court Gas Co.*, [1948] 2 All E.R. 673, approved.) Observations as to the meaning of "openings in floors" in s. 25 (3) and of "safe means of access" in s. 26 (1) of the Factories Act, 1937. *Street and Another* v. *British Electricity Authority and Others*, [1952] 1 All E.R. 679 (C.A.).

HUSBAND AND WIFE.

Title to Property—Matrimonial Home held in Joint Tenancy—Court's Discretion in determining Dispute as to Right of One Spouse to occupy Matrimonial Home—Two Classes of Cases—Court's Approach to Each—Married Women's Property Act, 1908, s. 23. Section 23 of the Married Women's Property Act, 1908, is intended to extend to cases where there is a dispute as to the possession of property, even where it is manifest that the title or ownership is in one of the spouses. (*Thomson* v. *Thomson*, [1944] N.Z.L.R. 469, and *Hutchinson* v. *Hutchinson*, [1947] 2 All E.R. 792, followed.) In cases where a dispute has arisen between a husband and wife who are separated or divorced, as to the title to, or ownership of, property, the Court, in the altered matrimonial circumstances of the parties, endeavours to find the true intention of the parties at the time when the property was acquired. In no such case has the Court regarded it as a proper exercise of its discretion to deprive the true owner of his or her interest in the disputed property merely because the other spouse was the more worthy or had the higher moral claim. (*Re Rogers' Question*, [1948] 1 All E.R. 328, applied.) (*Barrow* v. *Barrow*, [1946] N.Z.L.R. 438, *Kelner* v. *Kelner*, [1939] 3 All E.R. 957, and *Hichens* v. *Hichens*, [1945] 1 All E.R. 451, referred to.) (*Thomson* v. *Thomson*, [1951] N.Z.L.R. 1047, discussed.) In

cases where a dispute has arisen as to the right to occupy the matrimonial home, the title to which is in one or both of the parties, other considerations besides ordinary legal rights arise, by reason of the special relationship of the parties; and the Court has a discretion, which must be exercised judicially, to make such order as it thinks fit, even if it means interfering with the legal rights of one of the spouses. (*Stewart* v. *Stewart*, [1948] 1 K.B. 507; [1947] 2 All E.R. 813 applied.) (*Symonds* v. *Hallett*, (1883) 24 Ch.D. 346, and *Gaynor* v. *Gaynor*, [1901] 1 I.R. 217, referred to.) In the present case, the parties were joint tenants of the property which constituted the matrimonial home. They had entered into an agreement for separation, and proceedings in divorce had been commenced, based on the husband's adultery, but had not come to hearing. The terms of the agreement for separation gave the plaintiff wife the right to occupy the house for a period, and appeared to contemplate that the parties would live in separate places. There were three children living with the plaintiff, one of whom was only ten years of age. On an application by the wife for an order under s. 23 of the Married Women's Property Act, 1908, for exclusive possession of the family home, *Held*, That the wife should be given exclusive possession for the time being, for the reasons that, in the circumstances, it was embarrassing that the husband and wife should be under the same roof; it was desirable that the normal family life should continue as far as possible; while there was no direct evidence of housing difficulties in Invercargill, the Court was entitled to take into account the current housing shortage in the country; the behaviour of the husband had been bad in the extreme, and he had forfeited any right to special consideration by the Court; and the husband was better able to fend for himself. An order was made that, until a further order of the Court, the wife was to be entitled to the exclusive possession of the matrimonial home and of the furniture and of such of the effects therein as might be fairly regarded as part of the equipment of the home. (*Oates* v. *Oates*, [1949] S.A.S.R. 37, referred to.) (*Thomson* v. *Thomson*, [1944] N.Z.L.R. 469, distinguished.) *Simpson* v. *Simpson*. (S.C. Invercargill. March 10, 1952. North, J.)

INCOME TAX.

Recovery of Tax on Tax Free Annuity. *96 Solicitors' Journal*, 98.

LAND AGENT.

Commission—Introduction of Purchaser—Purchaser unable to raise Purchase Price—Agency terminated by Agreement—Sale subsequently effected to Same Purchaser—Agent's Right to Commission. The defendant instructed the plaintiffs, a firm of estate agents, to endeavour to sell his bakery business, and he signed a document, dated March 11, 1949, appointing the plaintiffs to be his agents for that purpose. The document further provided that, in consideration of the plaintiffs' agreeing to be his agents for the said purpose: "I agree that I will not revoke this authority or determine your agency for the purpose aforesaid during the period of twelve weeks from this date. If a sale is effected of the said business and property by you at any price to which I may agree or by me or anyone else at any price whatever during the said period I will pay you a commission of 2 per cent. of the purchase price of the property and 5 per cent. of the purchase price of the valuation and effects however sold and that such commission shall be paid to you together with such expenses incurred by you relevant to this sale at your offices on the day when such sale is agreed to be completed whether the purchase is in fact completed or not." The plaintiffs introduced G., and a price was agreed on, but G. was unable to raise the necessary money, no contract was signed, and the negotiations ceased. On May 12, 1949, the defendant, through his solicitor, wrote to the plaintiffs purporting to withdraw his instructions for the sale of his property, and on May 17, 1949, the plaintiffs replied regretting that the defendant had withdrawn his property and enclosing a bill for £10 10s. for expenses. On May 18, 1949, the defendant approached G., and offered to reduce the price formerly agreed on and to allow a substantial part thereof to remain outstanding on the security of a second mortgage and a promissory note. G. accepted, on May 28, 1949, a contract for the sale was entered into, and on June 1, 1949, the purchase was completed by conveyance. On the same day, the defendant paid to the plaintiffs the £10 10s. claimed by them. In an action in which the plaintiffs claimed commission on the sale, the Court found that the defendant had not acted fraudulently. *Held*, That, although, at the time of his introduction by the plaintiffs, G. had been willing to purchase, he was not then able to do so; by the time of the final agreement between G. and the defendant, the plaintiffs' agency had been terminated by an agreement *bona fide* entered into by the defendant, and their introduction of G. had ceased to be an operating factor in the sale, the effective cause of which was the provision of financial assistance by the defendant; and, therefore, the plaintiffs were not entitled to commission. *Jack Windle, Ltd.* v. *Brierley*, [1952] 1 All E.R. 398.

As to Remuneration of Agents, see *1 Halsbury's Laws of England*, 2nd Ed. 256-263, paras. 431-436; and for Cases, see *1 E. and E. Digest*, 488-518, Nos. *1664-1801*.

LANDLORD AND TENANT.

Re-entry by Evicted Person. *96 Solicitors' Journal*, 38.

Tenancy—Tenancy at Will—Permission to occupy Premises conditional on Payments being made to Third Party. In 1936, a father bought a house for his son and daughter-in-law. He paid £250 in cash and borrowed £500 from a building society on the security of the house, the loan being repayable with interest by instalments of 15s. a week. The house was in the father's name, and he was responsible to the building society for the payment of the instalments. He told the daughter-in-law that the £250 was a present to her and her husband, handed the building society book to her, and said that, if and when she and her husband had paid all the instalments, the house would be their property. From that date onwards the daughter-in-law paid the instalments as they fell due out of money given her by her husband. In 1945, the father died, and by his will left the house to his widow. Shortly afterwards, the son left his wife. In an action by the widow against the daughter-in-law for possession, *Held*, (i) That the occupation of the house by the son and the daughter-in-law was not determinable by the widow on demand, since they were entitled to remain in possession so long as they paid the instalments to the building society, and, therefore, they were not tenants at will of the premises. (ii) That the payments of instalments could not be regarded as payments of rent made for convenience to the building society, and not to the father, since the daughter-in-law and her husband were not bound under any agreement with the father to make those payments, and, therefore, they were not weekly tenants or tenants for the period during which the instalments fell to be paid. (iii) That the daughter-in-law and her husband were licensees, having a permissive occupation short of a tenancy, but with a contractual or equitable right to remain in possession so long as they paid the instalments, which would grow into a good equitable title to the house when all the instalments were paid, and, therefore, the widow was not entitled to an order for possession. *Errington* v. *Errington and Another*, [1952] 1 All E.R. 149 (C.A.).

As to a Licence, see *20 Halsbury's Laws of England*, 2nd Ed. 8-12, paras. 5, 6.

LAW PRACTITIONERS.

Organized Continuing Training for Lawyers. *29 Canadian Bar Review*, 950.

Types of Advocacy. *212 Law Times*, 307.

Unqualified Person preparing Instrument—Estate Agent—Lease for Fourteen Years determinable by Tenant at End of Any Year. The appellant, an estate agent, prepared for reward an instrument which purported to be an agreement for a lease of certain property for a term of fourteen years, commencing on October 1, 1948. The document, which was not under seal, contained a term whereby the tenant could determine the lease at the end of any year. On being charged with an offence under the Solicitors Act, 1932, s. 47 (1), in that, not being a person qualified under that subsection, he had prepared an instrument relating to personal estate, the appellant contended that no offence had been committed, as (*a*) the instrument was an agreement under hand only, within the meaning of s. 47 (4) (*b*) of the Solicitors Act, 1932, and (*b*) assuming that it was a lease, and not a tenancy agreement, it was for a term which would not necessarily last for more than three years, and, therefore, under s. 52 (2) (*d*) and s. 54 (2) of the Law of Property Act, 1925, it was not required to be under seal. *Held*, (i) That an instrument which was void at law unless it was under seal, but, in fact, was not under seal, was not an "agreement under hand only" within s. 47 (4) (*b*) of the Solicitors Act, 1932, and, therefore, if a person who was not qualified under s. 47 (1) drew or prepared such an instrument for reward, he was guilty of an offence under s. 47 (1). (ii) That the instrument prepared by the appellant did not create a tenancy for a "term not exceeding three years" within the Law of Property Act, 1925, s. 54 (2), but purported to create a lease for a term

exceeding three years, notwithstanding the fact that the tenant could determine the term by notice within three years. (*Ex parte Voisey, Re Knight*, (1882) 21 Ch.D. 442, distinguished.) Therefore, under s. 52 (1) of the Law of Property Act, 1925, the instrument was void at law, as it was not under seal, and the appellant was guilty of an offence against s. 47 (1). *Kushner* v. *Law Society*, [1952] 1 All E.R. 404 (K.B.D.).

LICENSING.

What is a *Bona fide* Traveller? *25 Australian Law Journal*, 645.

LIEN.

Lien and the Right of Sale. *96 Solicitors' Journal*, 84.

MILK.

Milk-delivery Licence—Milk Authority attaching Condition requiring Milk Vendor "to have for sale daily sufficient pasteurized milk as is asked for" by Customers—Construction of Condition—Principles of Construction Applicable—Milk Act, 1944, s. 83 (1) (b). On November 8, 1950, the Napier Milk Authority, pursuant to a resolution passed by it on November 6, 1950, by a circular notice to all holders of milk-delivery licences in its district, purported to add to the conditions to which such licences were already subject under its by-law. The material part of such circular notice is as follows: "Circular to All Napier Milk Vendors. Amendments to Licenses. I have to give you formal notice that the Napier Milk Authority has resolved as under: 1. That commencing on November 24, 1950, the conditions attached to every Milk Delivery License heretofore issued by the Milk Authority for the Napier Milk District shall be added to — (*a*) By requiring the holder of any such license to have in his possession for sale during normal hours of delivery an adequate supply of both pasteurized milk and milk which has not been pasteurized or subjected to a similar treatment and to sell pasteurized milk to every customer who requests to be supplied with pasteurized milk and to sell milk which has not been pasteurized or subjected to a similar treatment to every customer who requests to be supplied with milk which has not been pasteurized or subjected to a similar treatment." The defendants received a copy of this notice, to which was added a postscript as under: "*P.S.* You will note that under 1 (*a*) you will be required to have for sale daily sufficient pasteurized milk as is asked for by your customers. Failure to comply with this requirement will, in view of your previous total disregard of the Authority's requests, result in legal proceedings being taken against you without further notice." The defendants, who traded in partnership were charged under s. 85 (*b*) of the Milk Act, 1944, that, on December 5, 1950, being the holder of a milk-delivery licence, they failed without lawful excuse to comply with the direction requiring the holder of a milk-delivery licence to have in his possession for sale during the normal hours of delivery an adequate supply of pasteurized milk. The learned Magistrate dismissed the information. On a general appeal from that determination, *Held*, 1. That such a condition is to be construed in the same manner as by-laws of local authorities are to be construed—*i.e.*, it is to be given a "benevolent" construction, as opposed to a "strict" construction required in respect of penal or taxation provisions, or provisions of a type that should be precise and exact in the requirements imposed upon the persons who have to observe them; and regard must be given to the assumption that such condition was intended to be reasonable in its terms, and not to require from the person on whom the duty was imposed conduct or behaviour that it would be unreasonable to ask of them. 2. That the condition attached to the milk-delivery licence required the milk vendor to carry an adequate supply of pasteurized milk; and it meant that on request, which should be made at least on the preceding day, the milk vendor was bound on the next day of delivery to bring the milk that he was asked to bring. 3. That there was no evidence that, on the day named in the information, any of the defendant's customers had requested to be supplied with pasteurized milk, and no evidence from which it could be inferred that the defendants should have anticipated any demand which would have necessitated the carrying of even one bottle of pasteurized milk. The appeal was accordingly dismissed. *Lamason* v. *McLean and Another*. (S.C. Napier. February 13, 1952. Fair, J.)

MISREPRESENTATION.

Principal and Agent—Liability of Principal for Misrepresentation of Agent—Innocent Misrepresentation by Agent—Knowledge of True Facts by Principal—No Fraud on part of Principal. In the course of negotiations by the plaintiffs for the purchase of a bungalow belonging to the first defendant, the agents of the first defendant made certain statements as to the value of the property. Owing to the defective condition of the bungalow, the statements were untrue, but the agents were not aware of the existence of any defects, and so made the statements innocently, believing them to be true. The first defendant, who was aware of the defective structural condition, had not authorized his agents to make the statements, nor had he deliberately kept them in ignorance with the dishonest intention that they should mislead a prospective purchaser, and he did not know that the statements were being made. Relying on the agents' representation, the plaintiffs bought the property. On discovering its defective condition, they sued the first defendant and his agents for damages for fraudulent misrepresentation. *Held*, That, in the absence of actual fraud or dishonesty on the part of a principal, knowledge by him of facts which render false a statement made innocently by his agent does not render the principal guilty of fraudulent misrepresentation, and, therefore, the action failed. (*London County Freehold and Leasehold Properties, Ltd.* v. *Berkeley Property and Investment Co., Ltd.*, [1936] 2 All E.R. 1039, criticized and explained.) (*Derry* v. *Peek*, (1889) 14 App. Cas. 337, applied.) (Observations of *Atkinson*, J., in *Anglo-Scottish Beet Sugar Corporation, Ltd.* v. *Spalding Urban District Council*, [1937] 3 All E.R. 335, approved.) *Armstrong and Another* v. *Strain and Others*, [1952] 1 All E.R. 139 (C.A.).

As to Principal's Liability for Agent's Misrepresentation, see *1 Halsbury's Laws of England*, 2nd Ed. 289, para. 475; and for Cases, see *1 E. and E. Digest*, 587-594, Nos. *2245-2281*.

NEGLIGENCE.

Contributory Negligence—Action by Two Plaintiffs—Wife and Husband—Judgment for First Plaintiff against Defendant—Second Plaintiff one-third to blame—Right of Defendant to recover from Second Plaintiff one-third of Damages Payable to First Plaintiff—Law Reform (Contributory Negligence) Act, 1945 (*c. 28*), *s. 1 (1) (Contributory Negligence Act, 1947* (*N.Z.*), *s. 3*). The female plaintiff was injured in a collision between a motor-van, in which she was being driven by the male plaintiff (her husband), and a motor-car driven by the defendant. In an action for damages brought by the plaintiffs against the defendant, the Judge found the male plaintiff one-third to blame for the accident and the defendant two-thirds to blame. With regard to the female plaintiff's claim, he gave judgment in her favour for £405. On a counterclaim by the defendant against the male plaintiff for one-third of the sum awarded to the female plaintiff, *Held*, That the defendant's counterclaim, being based on the judgment against him, and not arising directly from the accident, was not a "claim" within s. 1 (1) of the Law Reform (Contributory Negligence) Act, 1945, nor was his liability to the female plaintiff, which also arose under the judgment and not directly from the accident, "damage" within the subsection; and, therefore, the defendant could not recover against the male plaintiff under the subsection. Per *Morris*, L.J., That the defendant was held liable to the wife, not because her husband was negligent towards her, but because he himself was negligent and caused her damage; the defendant and the husband were not joint tortfeasors, but were separate tortfeasors whose concurrent acts caused injury to the wife; and, therefore, the defendant had not suffered damage partly through the fault of the husband, and his counterclaim was not a "claim" within s. 1 (1). Decision of *Devlin*, J., [1951] 2 All E.R. 713, affirmed. *Drinkwater and Another* v. *Kimber*, [1952] 1 All E.R. 701 (C.A.).

Contributory Negligence—Contribution by One Tortfeasor to Another Tortfeasor—Court's Consideration of Causative Potency of Factors involved and Their Blameworthiness—Law Reform Act, 1936, s. 17. Under s. 17 of the Law Reform Act, 1936, it is the duty of the Court to fix such amount of contribution recoverable by a tortfeasor from another tortfeasor as the Court finds just and equitable, having regard to the extent of the responsibility of the person concerned for the damage. This involves the Court's consideration, not only of the causative potency of a particular factor or particular factors, but also of its or their blameworthiness. (Dictum of *Denning*, L.J., in *Davies* v. *Swan Motor Co.* (*Swansea*), *Ltd.* (*Swansea Corporation and James, Third Parties*), [1949] 1 All E.R. 620, 632, applied.) (*Helson* v. *McKenzies* (*Cuba Street*), *Ltd.*, [1950] N.Z.L.R. 878, referred to.) *McFarlane* v. *Neshausen* (*Grey, Third Party*). (S.C. Gisborne. March 6, 1952. Hutchison, J.)

Judgment—Both Parties to blame—Judgment on Claim and Counterclaim for Damages in proportion to Responsibility for Damage—Law Reform (Contributory Negligence) Act, 1945 (c. 28), s. 1 (1)—Negligence — Costs — Both Parties to blame. The plaintiff's motor-car was in collision with a motor-van driven by a servant of the defendants. Both vehicles suffered damage. The plaintiff claimed damages for negligence, and the defendants filed a counterclaim on the same ground. The County Court Judge found both parties equally to blame, and he dismissed the claim with costs and the counterclaim with costs. *Held*, (i) That, having regard to the terms of the Law Reform (Contributory Negligence) Act, 1945, s. 1 (1), the proper form of order was judgment on the claim for damages in respect of half of the damage proved by the plaintiff and judgment on the counterclaim for damages in respect of half of the damage proved by the defendants. (ii) That the order as to costs made by the County Court Judge gave an undue advantage to the defendants, and, without laying down any rule of practice to be followed in all cases in which there were cross-claims for negligence and each side was held equally to blame, justice would be done in the present case if there were no order as to costs on the claim or counterclaim. *Smith* v. *W. H. Smith and Sons, Ltd.*, [1952] 1 All E.R. 528 (C.A.).

For the Law Reform (Contributory Negligence) Act, 1945, s. 1, see *17 Halsbury's Statutes of England*, 2nd Ed. 12.

PARTITION OF LAND.

Tenants in Common—Application by Trustees of Deceased Tenant in Common to sell Properties—Tenant occupying Office Building opposing Sale of Other Property and asking for Partition (including Partition to Him of Office Building)—Insufficient Reasons given by Such Tenant in Common of Office Building against Its Sale or for Its Partition in His Favour—Property Law Act, 1908, s. 105 (1). Two brothers, E. and P., were partners in a legal practice. They held a number of properties as tenants in common in equal shares. E. died, and his trustees applied for an order directing the sale of one of those properties, so as to improve the life tenant's position. The application to the Court did not include the building in part of which P. continued to carry on his practice (herein termed "the office building"). P., in a counterclaim, asked the Court to decree a partition between E.'s trustees and himself of all the lands of which they and he were registered as tenants in common, including the office building, which, in particular, he wished to have partitioned to himself. The trustees applied for an order that such building be sold; but they did not want a sale of other city properties. The defendant P. based his claim for the partitioning to him of the office building on the facts that it was built for the legal practice of his brother and himself, that, under his partnership agreement with his brother, the survivor became entitled to the goodwill and assets of the practice on making a certain payment, which he had made, and that the practice was still being carried on in that building by the firm of which he remained the senior partner. It was common ground that in the action the Court had to decree either a partition or a sale, and that the onus lay upon the defendant entitled to the extent of one half, who opposed a sale, to establish that there was good reason for a partition in preference to a sale. *Held*, 1. That the primary question, that of the office building, had to be considered by relation to that building as a whole; and that its occupancy for business purposes by one of the co-owners was insufficient ground for refusing to decree a sale. 2. That the assets of the partnership between E. and P. did not include the office building itself; but, as between the partners, they included the occupancy of the part of the building occupied by the partnership; and the right of P. on the death of E. against E.'s personal representatives could not be put higher than as one relating to the occupancy of that part of such building. (*Wilkinson* v. *Joberns*, (1873) L.R. 16 Eq. 14, and *Roughton* v. *Gibson*, (1877) 46 L.J.Ch. 366, distinguished.) 3. That there were other matters, as stated in the judgment, which diminished the weight to be given to P.'s claim to occupancy, without any agreed-upon term, of part of the office building. 4. That no sufficient reason had been shown by P. why a sale of the office building should not be directed. *In re Moore (deceased), Moore and Others* v. *Moore.* (S.C. Nelson. February 8, 1952. Hutchison, J.)

POLICE OFFENCES.

Sunday Trading—Artist, in Full View of Public, completing Mural in Shop on a Sunday—Such Person Working at his Calling—"Trade or calling"—Police Offences Act, 1927, s. 18 (1) (3). The appellant was charged under s. 18 (1) of the Police Offences Act, 1927, that on Sunday, June 24, 1951, within view of a public place, Ponsonby Road, he worked at his trade or calling. Defendant was an artist. It was admitted that on the day and date alleged, in full view of the public, he completed the painting of a mural depicting transport through the ages on the wall of a motor-cycle shop in Karangahape Road. He was in full view of the public through the plate glass window of the shop. He was convicted. On appeal under s. 303 of the Justices of the Peace Act, 1927, *Held*, 1. That the word "calling" in the expression "trade or calling" in s. 18 (1) of the Police Offences Act, 1927, in its natural meaning includes many occupations that would not be included under the word "trade." 2. That the appellant was decorating the interior of a shop, and a person who makes his living by carrying out such decorating is working at his "calling"; and, while doing so, he commits an offence under s. 18 (1) of the Police Offences Act, 1927, if he does such work in the public view on a Sunday. 3. That the appellant could not claim exemption under the provisions of s. 18 (3), as the work done by him on a Sunday was not a work of necessity. *Turner* v. *Baigent.* (S.C. Auckland. February 4, 1952. Stanton, J.)

SALE OF GOODS.

Payment—Confirmed Credit—Time for opening Credit. Sellers contracted to sell 3,000 tons of Brazilian groundnuts for shipment from Brazil to Genoa of the first 1,500 tons in February, March, or April, 1949, and of the second 1,500 tons in March, April, or May, at sellers' option, payment to be by the opening of a confirmed, irrevocable, divisible, transmissible, and transferable credit in favour of the sellers and utilizable by them against delivery of shipping documents. The sellers guaranteed the necessary Brazilian export licence and the buyers the necessary Italian import licence. The export licence was obtained on February 9, 1949, and the sellers so advised the buyers on that day by cable, giving them certain particulars which the buyers required for opening the credit and requesting them to open the credit forthwith. The buyers did not make the credit available until April 22. *Held*, That, in the absence of an express stipulation in the contract, the credit should have been opened, not when the sellers were ready to ship the goods, but at the beginning of the shipment period; on the facts of the present case, the credit should have been made available, in the case of the first shipment, on February 9, when the particulars were supplied to the buyers, and, in the case of the second shipment, on March 1, or as soon after those dates as it could have been opened by the exercise of reasonable diligence by the buyers; and, therefore, the buyers were liable in damages to the sellers for the delay. Decision of *McNair*, J., [1951] 2 All E.R. 866, affirmed. *Pavia and Co., S.P.A.* v. *Thurmann-Nielsen*, [1952] 1 All E.R. 492 (C.A.).

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

Quality—Clause regulating Buyer's Claim for Inferior Quality—Application to Deterioration owing to Defective Packing. Under a contract in writing for the sale of goods, the buyer agreed to purchase rubber known as "R.M.A.2 ribbed smoked sheet Hevea Braziliensis." A clause in the contract read as follows: "Quality: To be as described above. If found inferior . . . buyer shall accept the rubber with a fair allowance . . . Notice in writing of any objection on the grounds of quality must be given . . . not later than sixty days after discharge of goods at destination . . ." The sellers delivered the rubber to the buyer's warehouse, where later the buyer discovered that it had suffered damage through the adhesion of defective coverings in which the sellers had wrapped it. The buyer gave notice of objection outside the time limit laid down by the quality clause in the contract, and the sellers refused to admit the claim on the ground that the notice of objection was out of time. *Held*, That the complaint of the buyer was, not that the sellers had supplied goods which were not of the quality contracted for, but that the goods supplied had suffered damage; the words of the quality clause were not expressed with sufficient clarity to include such damage to the goods as had been suffered in this case; and, accordingly, the buyer's claim was not out of time and he was entitled to an allowance. (Dicta of *Bankes* and *Scrutton*, L.JJ., in *Szymonowski and Co.* v. *Beck and Co.*, [1923] 1 K.B. 464, 466, applied.) *Minister of Materials* v. *Steel Brothers and Co., Ltd.*, [1952] 1 All E.R. 522 (C.A.).

As to Breach of Conditions and Warranties, see *29 Halsbury's Laws of England*, 2nd Ed. 53-56, paras. 65-68; and for Cases, see *39 E. and E. Digest*, 466-470, Nos. *917-945*.

CURIAL REVIEW OF THE DETERMINATIONS OF ADMINISTRATIVE TRIBUNALS.

By J. F. NORTHEY, B.A., LL.M., Dr. Jur. (Toronto).

V. QUESTIONS OF LAW AND FACT.

More difficulty is met in reference to this recommendation than in respect of the earlier recommendations. It is by no means easy to decide what are questions of fact as distinct from questions of law,[27] and the conception as to "jurisdictional fact" does not make the position any clearer. Gordon has hardly helped to clear up the confusion in his article in the *Law Quarterly Review*.[28] The Committee's recommendation must be examined against the background that the distinction between questions of fact (on which the Committee think there should be no appeal) and questions of law (on which appeal is to be permitted) is not an easy one to make.

Reference should be made to Sir Maurice Gwyer's written statement to the Committee on Ministers' Powers.[29] He did not believe, however, that there should be an unrestricted right to go to the Courts, because, if such right existed, it would frustrate the purpose of Parliament in conferring jurisdiction on administrative tribunals. Gwyer suggested that perhaps it would be possible to allow appeals if a certain amount of money was involved, or in respect of defined categories of cases, and concluded that perhaps appeal by leave would be the best solution. He emphasized, however, that appeal should be within limits, as otherwise the purpose of creating special tribunals would be liable to be defeated. The difficulty in distinguishing errors in law from questions of jurisdiction was also canvassed.[30]

When questioned on the extent to which he would recommend that appeals be allowed from tribunals exercising quasi-judicial powers, Gwyer answered that to allow appeals as freely as from tribunals exercising judicial functions would be to appeal from the rock to the sand.[31] Because of the infusion into the deliberations of quasi-judicial tribunals of questions of policy, he considered that appeals from their decisions should be restricted. The Committee, however, in making their recommendation, made no distinction between tribunals exercising judicial or quasi-judicial functions. Gwyer was nearer to an appreciation of the vital difference between curial review of judicial decisions and curial review of decisions made without reference to an objective standard. Gwyer was probably aware that curial review was most satisfactory when it extended to bodies performing their functions substantially as do the ordinary Courts of law, and he no doubt appreciated that, the greater the element of discretion or subjectivity in the decision of the tribunal, the less satisfactory would be review by the Courts. The Courts are eminently fitted for scrutinizing the manner in which bodies possessing judicial functions exercise those functions, but they have no special advantage when quasi-judicial, administrative, legislative, or executive functions are being reviewed. In fact, they are quite unfitted to review either administrative, legislative, or executive functions, and, in respect of quasi-judicial functions, it is only the truly judicial element in respect of which they have special competence. This is what Gwyer had in mind when he spoke of appealing from the rock to the sand, because the Courts are less fitted, by reason of the training of the Judges, to review functions other than the purely judicial than are administrative tribunals possessed of expert knowledge in the particular field.

The authorities show that, unless review is expressly excluded under statutory enactment,[32] the Courts will review the decisions of administrative tribunals when there has been:

(*a*) Failure to comply with the procedure prescribed by statute or by common law.

(*b*) An excess of jurisdiction or a failure to exercise jurisdiction.

(*c*) A lack of evidence on which the decision is based.[33]

But, apart from express statutory provisions, there is no appeal on a question of law *as such*.[34] This seems to have been recognized by the Committee, as they said that parties *should* have an appeal on questions of law. It is not clear just what the Committee had in mind by way of procedure to enable appeals on questions of law to be brought before the High Court, but it might either be a streamlining of the writ system or the establishment of a statutory right of review similar to that given in the United States Administrative Procedure Act, 1946. If it is to be the latter, it is important to note the observations of Gordon, who has drawn attention to the effect which the Committee's recommendation might have on functions presently exercised by the Courts.[35] It might now be appropriate to examine the prerogative writ system and to determine the adequacy of the writs as a means of review.

VI. THE PREROGATIVE WRITS.

Unless recourse to the writs is expressly excluded under statutory authority, the writs are available to

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[27] See John Dickinson, *Administrative Justice and the Supremacy of Law* (1927), 50-55, 151-153, 167-170, 313-319; as to jurisdictional fact, see pp. 51, 52, 309-312.

[28] D. M. Gordon, "Observance of Law as A Condition of Jurisdiction," (1931) *47 Law Quarterly Review*, 386, 557. See also M. Hancock's "Discharge of Deportees on Habeas Corpus," (1936) *14 Canadian Bar Review*, 116, and *Banks* v. *O'Brien* (*No. 2*), (1951) F. B. Adams, J., Unreported.

[29] See also *2 Minutes of Evidence taken before the Committee on Ministers' Powers*, H.M.S.O., p. 22, Q. 245.

[30] *Ibid.*, Qs. 290, 299, 302, 303, and 354.

[31] *Ibid.*, Q. 400.

[32] Even in these cases there is doubt. See footnote 21, *Ante*.

[33] J. Finkelman, *1 U.T.L.J.*, 313, 327.

[34] Lord Loreburn in *Board of Education* v. *Rice*, [1911] A.C. 179, 182: "The Board is in the nature of the arbitral tribunal, and a Court of law has no jurisdiction to hear appeals from the determination either upon law or upon fact." *New Zealand Waterside Workers' Federation Industrial Association of Workers* v. *Frazer*, [1924] N.Z.L.R. 689, 698, 703 (per Salmond, J.) is also relevant. Compare, however, as to error of law apparent on the face of the order, *The King* v. *Northumberland Compensation Appeal Tribunal, Ex parte Shaw*, [1951] 1 K.B. 711; [1951] 1 All E.R. 268, and the notes on this case in (1951) *14 Modern Law Review*, 207, and (1951) *67 Law Quarterly Review*, 452. Consider s. 35 of the Land and Income Tax Act, 1923.

[35] D. M. Gordon, (1933) *49 Law Quarterly Review*, 94, 419, 440, 441.

review the decisions of administrative tribunals where no administrative appeal procedure is provided, and the decisions of administrative appeal tribunals where there is a hierarchy of administrative bodies. We are concerned to determine whether the writs are adequate for the purposes of review, and, if it should be found that they are not, to inquire in what direction lies the remedy. Should the writs be abolished in so far as review of administrative agencies is concerned, as appears to be the recommendation of the Committee on Ministers' Powers, and a simple procedure substituted for them, or is it possible to persevere with the writs if they are made more efficient ? Although the prerogative writs include certiorari, habeas corpus, injunction, mandamus, prohibition, and *quo warranto*, it is proposed to examine only the writs of certiorari, mandamus, and prohibition. Not only are these writs those which are most frequently called into use to examine the actions of administrative tribunals, but they are also the most troublesome. Habeas corpus is of limited application, and is adequate for its purposes. Injunction and *quo warranto* are infrequently used.

Mandamus is available, in the words of High, to compel the performance of duties purely ministerial in their nature, and so clear and specific that no element of discretion is left in their performance, but, as to all acts or duties necessarily calling for the exercise of judgment and discretion on the part of the officer or body at whose hands their performance is required, mandamus will not lie.[36] Certiorari and prohibition will lie respectively to quash and restrain the exercise of judicial functions by administrative tribunals where there has been non-observance by the tribunal of :

(*a*) Statutory limitations upon jurisdiction, including failure to exercise jurisdiction.

(*b*) Procedural formalities, whether prescribed by statute or common law.

(*c*) Lack of evidence upon which to base the decision.[37]

Having stated in general terms the nature of these prerogative remedies, it is necessary to deal with them in more detail. It would appear to be relatively easy to determine whether or not a function is " ministerial " —*i.e.*, containing no element of discretion—but the authorities demonstrate that this is not the case. In *The Queen* v. *Adamson*, (1875) 1 Q.B.D. 201, certain Justices of the Peace had refused to issue a summons against persons who had broken up a meeting and assaulted the persons attending it. The issue of the summons necessarily involved an exercise of discretion, but the Court, to whom the Magna Carta Association applied for mandamus, decided that the writ would issue to compel the Justices to perform their functions. No doubt the Court was influenced by the fact that certiorari to quash the decision of the Justices would be quite inadequate, as the injured persons would not thereby be benefited. Sir Alexander Cockburn, C.J., delivering the judgment of the Court, stated, at p. 205 :

> Nothing can be clearer than that this Court has, in the absence of express statutory provision, no appellate jurisdiction to review the decision of Magistrates who have once heard a case and decided it, in a matter within their jurisdiction . . . I cannot resist the conclusion that the Magistrates must have acted upon a consideration of something extraneous and extra-judicial which ought not to have affected their decision, and which, it seems to me, was the same as declining jurisdiction.

The Court here took it unto itself to decide that a judicial body had acted upon extraneous considerations, and therefore issued mandamus to compel it to perform its functions. By so doing, the Court was clearly interfering with the discretion of the Justices. Gordon[38] has criticized this abuse of the writ of mandamus. He stated :

> The orthodox view has always been that mandamus is a remedy, not for reviewing in any degree the exercise of judicial power, but only for coercing those who have the power and decline to use it. The usual pretext given, for what is obviously reviewing the exercise of power, is that when a tribunal misuses its power, it does not make use of that power, but of another ; that is, it declines the jurisdiction given to it. This pretext seems to be a mere quibble. When a tribunal has used its power properly, its decision must be impeccable ; it is only when it fails in that that it errs. If a tribunal misusing its power (within its proper province) declines jurisdiction, then every tribunal that errs declines jurisdiction. If its erroneous decision can be ignored in mandamus proceedings, it has no binding force at all. The result must be legal anarchy . . . Two other forms of the same pretext for making mandamus a remedy for error may be noticed. First, it is said that if a tribunal in making its decision has taken into account " extraneous and extra-judicial considerations," it has not exercised its jurisdiction, but has in effect declined it.

In *The King Ex rel. Lee* v. *Workmen's Compensation Board*, [1942] 2 D.L.R. 665, O'Halloran, J., makes a conscious effort to make the writ of mandamus more effective, but, in so doing, he tends to depart from the earlier authorities. O'Halloran, J., was anxious to provide a remedy for the relator, and was not disposed merely to quash the decision of the Board, which he felt might on reconsideration reach the same conclusion. O'Halloran, J., ignored the trrditional distinction between " ministerial " and other functions, and placed emphasis on the existence of a statutory duty on the Board to perform an affirmative act. Other cases[39] could be cited of instances where the Courts, in an endeavour to provide a remedy where they considered it justified, have been obliged to twist the writ to make it suit their purposes.

It has been mentioned that certiorari and prohibition will be available at the discretion of the Courts if the tribunal has either :

(*a*) Failed to observe its jurisdiction (including refusal to exercise that jurisdiction).[40]

(*b*) Failed to observe the procedural formalities prescribed by statute or common law.[41]

(*c*) Acted on lack of evidence.[42]

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[36] J. L. High, *A Treatise on Extraordinary Legal Remedies*, 3rd Ed. (1896), 31, 32. See also J. Hart, *Introduction to Administrative Law* (1940), 439 *et seq.*

[37] J. Finkelman, *1 U.T.L.J.*, 313, 327. Compare, however, *Fenton* v. *Auckland City Corporation*, [1945] N.Z.L.R. 768, 775 (per Callan, J.).

[38] (1931) *47 Law Quarterly Review*, 386, 557, 585.

[39] *The Queen* v. *Local Government Board*, (1885) 15 Q.B.D. 70, *The Queen* v. *Income Tax Special Purposes Commissioners*, (1888) 21 Q.B.D. 313, *Income Tax Special Purposes Commissioners* v. *Pemsel*, [1891] A.C. 531, and *O'Connor* v. *Jackson*, [1943] 4 D.L.R. 682.

[40] *The Queen* v. *Local Government Board*, (1882), 10 Q.B.D. 309, 321, *New Zealand Waterside Workers' Federation Industrial Association of Workers* v. *Frazer*, [1924] N.Z.L.R. 689, 706, 707 (per Salmond, J.), *Hyland* v. *Phelan*, [1941] N.Z.L.R. 1096, 1101, 1102, and *King* v. *Frazer*, [1945] N.Z.L.R. 175.

[41] *Board of Education* v. *Rice*, [1911] A.C. 179, *Local Government Board* v. *Arlidge*, [1915] A.C. 120, *Hyland* v. *Phelan*, [1941] N.Z.L.R. 1096, 1101, and *R.* v. *Bellak*, [1947] 1 W.W.R. 477.

[42] *Wilson* v. *Esquimalt and Nanaimo Railway Co.*, [1922] 1 A.C. 202, 212. It is not altogether clear whether insufficiency of evidence or the complete absence of evidence upon which the decision could be based will entitle the Courts to issue the writs. Compare *The King* v. *Nat Bell Liquors, Ltd.*, [1922] 2 A.C. 128, 149 *et seq.*, *Penney* v. *Wairau Licensing Committee*, (1902) 22 N.Z.L.R. 602, and *Outred* v. *Keddell*, (1906) 26 N.Z.L.R. 201.

These writs lie only if the administrative tribunal is exercising "judicial" or "quasi-judicial" functions, but it has been found difficult to define these terms. Many cases could be cited but two only will be mentioned. In *Errington* v. *Minister of Health*, [1935] 1 K.B. 249, Maugham, L.J., considered that the nature of the function might be different at various stages of the procedure. He observed, at p. 273:

> although the act of affirming a clearance order is an administrative act, the consideration which must precede the doing of that act is of the nature of a quasi-judicial consideration.

In *The King* v. *Electricity Commissioners, Ex parte London Electricity Joint Committee Co. (1920), Ltd.*, [1924] 1 K.B. 171, there was a similar difficulty in distinguishing "legislative" from "judicial" functions.[43]

[43] See also *New Zealand Waterside Workers' Federation Industrial Association of Workers* v. *Frazer*, [1924] N.Z.L.R. 689, 709, 710 (per Salmond, J.), and *F. E. Jackson and Co., Ltd.* v. *Price Tribunal (No. 2)*, [1950] N.Z.L.R. 433, where there was also a problem of distinguishing "judicial" from "legislative" functions. In *Royal Aquarium and Summer and Winter Garden Society, Ltd.* v. *Parkinson*, [1892] 1 Q.B. 431, the distinction between judicial and administrative functions was brought out by the Court. Section 6 (5) of the Crown Proceedings Act, 1950, emphasizes the distinction between judicial and other functions.

(To be concluded)

CONTRACTS BY INFANTS.

By E. C. Adams, LL.M.

(Concluded from p. 93.)

Infants' Transactions in respect of Land and Mortgages.

As *Anson's Law of Contract*, 18th Ed. 122, 123, stated of its Imperial prototype (the Infants' Relief Act, 1874), this provision appears to have been designed to guard not merely against the results of youthful inexperience, but against the consequences of honourable scruples as to the disclaimer of contracts upon the attainment of majority.

To the conveyancer, the most important effect of this section is that a mortgage by an infant is absolutely void. Apparently no Court had any power to authorize a mortgage by an infant until the passing of s. 10 of the Statutes Amendment Act, 1951. In New Zealand, s. 12 of the Infants Act, 1908, probably has to be read subject to the provisions of the Land Transfer Act, 1915, conferring indefeasibility of title on a person who manages to get on to the Register Book without fraud. The Legislature had to make special provision for mortgages executed by infant mortgagees under the Rehabilitation Act, 1941. Section 17 of the Rehabilitation Amendment Act, 1944, makes such mortgages valid. Later, the Legislature went further, and made liable *infant* wives of servicemen who went as sureties for their husbands in respect of loans under the Rehabilitation Act, 1941, provided the document was executed with the *prior* approval of the Public Trustee: s. 59 of the Finance Act (No. 2), 1948. The requirement as to the prior approval of the Public Trustee was based on s. 75 of the Life Insurance Act, 1948, which authorizes minors of or over the age of fifteen years to deal with life insurance policies, subject to the approval of the Public Trustee.

Other statutory provisions which may be mentioned are s. 70 of the Land Act, 1948, s. 46 of the Fencing Act, 1908, s. 266 of the Maori Land Act, 1931, and s. 99 of the Property Law Act, 1908.

As a general rule, any person of the age of seventeen years and upwards may hold a lease or licence under the Land Act, 1948, and any such person, for the purpose of that Act, shall be deemed to be of the age of twenty-one years. Section 46 of the Fencing Act, 1908, provides that any minor holding land under any lease, licence, certificate of occupancy, or other form of tenure under the Land Act, 1908, or any former Land Act shall be deemed to be of the full age of twenty-one years. (N.B.—The Land Act, 1908, was repealed and consolidated by the Land Act, 1924, which, in its turn, was repealed and consolidated by the Land Act, 1948, of which s. 70 is the relevant provision.)

Dealing with the liability of minors holding land under the Land Acts, the late Mr. W. R. Jourdain, in his useful digest of the *Land Laws of New Zealand*, cites a most interesting case heard by the late Dr. McArthur, S.M., in Wellington in May, 1902. Grass-seed was obtained by infants holding land under the Land Act, 1892, and promissory notes given by them in payment therefor to the Crown. When the promissory notes fell due, infancy was pleaded. The Crown admitted infancy, but based its claim as being one for the sale of necessaries for the proper carrying out of the conditions of the licence under which defendants held the land. The question of infancy had been raised only after the issue of summons for payment of the promissory notes. The Magistrate held that the question was whether grass-seed supplied to defendants was a necessity. He found that it was, and gave judgment accordingly.

This grass-seed case may with advantage be compared with the English Court of Appeal decision in *Mercantile Union Guarantee Corporation, Ltd.* v. *Ball*, (1937) 53 T.L.R. 734, which illustrates the general rule that it is for the plaintiff to prove that a contract which he has made with an infant is for the benefit of the infant, and the *onus probandi* is indeed a heavy one. In that case, an infant had entered into a contract for the hire and purchase of a large and expensive lorry, which he used for the purposes of his business. The infant was sued for payment of arrears under the contract, but was held not liable. The Court held that it was not a contract for necessaries, or a contract of service or apprenticeship, or analogous to any of them.

Section 266 of the Maori Land Act, 1931, provides that any person of seventeen years of age and upwards may acquire Maori freehold land, or an interest therein, subject to the restrictions in the Act as to aggregation of land.

Section 99 of the Property Law Act, 1908, provides that minors of twenty years of age if males, or of seventeen years of age if females, upon or in contemplation of marriage, may, with the sanction of the Supreme Court, make a valid and binding settlement or contract for settlement of all or any part of their property or property over which they have a power of appointment, whether in possession, reversion, remainder, or expectancy.

As Garrow points out in his *Real Property in New Zealand*, 3rd Ed. 104, an infant may buy and sell land, but his purchase or conveyance may be set aside within a reasonable time after he comes of age, or if he dies before coming of age, by his representatives. Mortgages, or conveyances by way of mortgage, by infants of property to secure money lent are void: ss. 12 and 13 of the Infants Act, 1908. But it appears to the writer that these rules of the common law and statute law must be read subject to the rule laid down in *Sinclair* v. *Brougham*, [1914] A.C. 398, and to the provisions of the Land Transfer Act, 1915, conferring an indefeasible title on the person who gets on to the Land Transfer Register without fraud. Although a mortgage by an infant is void if it is to repay money lent, the lender may recover the money, if he can trace it: such, I take it, is the rule laid down by the House of Lords in *Sinclair* v. *Brougham*, [1914] A.C. 398. If an infant registered proprietor gives a mortgage of land under the Land Transfer Act, 1915, the Registrar will not register it, if the legal disability of infancy is noted on the Register Book. If the disability was not noted on the Register, the mortgage would be registered if it appeared to be in order, and the effect of the rule in *Boyd* v. *Mayor, &c., of Wellington*, [1924] N.Z.L.R. 1174, would be to confer an indefeasible title on the mortgagee, unless he was affected with fraud. It is true that there is a decision in Queensland to the contrary (*Coras* v. *Webb and Hoare*, [1942] St.R.Qd. 66), but the principle of *Boyd's* case, [1924] N.Z.L.R. 1174, is not binding on the Queensland Courts, as it is on the New Zealand Courts. In principle, there appears to be no essential difference between a mortgage by an infant and a lease of Maori land in contravention of the Maori Land Acts. The effect of registration of a lease of Maori land under the Land Transfer Act, 1915, was summarized by Fair, J., in *Mereana Perepe* v. *Anderson*, [1936] N.Z.L.R. 47, as follows, at p. 50:

> It was submitted on behalf of the defendant that registration of the lease under the Land Transfer Act precluded the raising of any questions as to the validity of the lessee's title. I think this contention is sound. It was held by the Court of Appeal in *Harris* v. *McGregor* ((1912) 32 N.Z.L.R. 15), approving of the decision in *Wolters* v. *Riddiford* ((1905) 25 N.Z.L.R. 532), that registration under the Land Transfer Act of a lease of a similar kind conferred on the lessee a "complete and irrefragable title" notwithstanding that upon the face of it the lease was contrary to law, and the confirmation order purporting to have been made was ineffectual.

Garrow's Real Property in New Zealand, 3rd Ed. 104, goes on to say that an infant's purchase or conveyance is voidable at his option:

> It is not void. It is good until set aside; but, if the infant elects to set it aside, it becomes absolutely void, and a *bona fide* purchaser for value is not protected. He who deals with an infant does so at his peril. The infant can recover his property from anyone into whose hands it has come. The infant is apparently not liable to repay the purchase money unless he has fraudently represented himself to be of full age.

That may be good law as regards dealings with land not subject to the Land Transfer Act, 1915, but it is submitted that a person taking title from an infant gets an indefeasible title if he gets on to the Land Transfer Register, provided, of course, he is not affected with fraud. If A, an infant, transfers land to B, and B transfers to C, and C gets on to the Land Transfer Register, there is no possible doubt that, unless C is guilty of actual dishonesty, C gets an indefeasible title: *Gibbs* v. *Messer*, [1891] A.C. 248. It is further submitted that B also, in the absence of actual fraud on his part, gets an indefeasible title. This result appears to follow from *Assets Co., Ltd.* v. *Mere Roihi*, (1905) N.Z.P.C.C. 275, as construed and applied by the judgment of the majority of the New Zealand Court of Appeal in *Boyd's* case, [1924] N.Z.L.R. 1174. Indeed, this has already been held in Victoria in *Percy* v. *Youngman*, [1941] V.L.R. 275. In that case, it was decided that an infant who has a certificate of title under a statute corresponding to our Land Transfer Act, 1915, without the fact of infancy being stated thereon, cannot, upon attaining his majority, recover the property from the person to whom he has transferred it for value, and who has become registered as proprietor thereof while unaware of the transferor's infancy.

Before concluding this short survey of the law of contract in New Zealand as it existed before the passing of s. 10 of the Statutes Amendment Act, 1951, it should be pointed out that, for the purposes of the Settled Land Act, 1908, an infant absolutely entitled in possession to land has the powers of a tenant for life under that Act: see s. 76. Thus, with the consent of the Supreme Court under the Settled Land Act, 1908, an infant by his guardian *ad litem* may sell his land: see (1944) 20 NEW ZEALAND LAW JOURNAL, 170, as to the procedure to be adopted.

Now the law has been made much more satisfactory by adding to s. 12 of the Infants Act, 1908, above cited, the following section:

> 12A. (1) Notwithstanding anything in this Act or in any other Act or any rule of law, no contract shall be void or voidable by reason of any party thereto being an infant if, before the contract is entered into by the infant, it has been approved under this section on behalf of the infant by a Magistrate's Court.
>
> (2) Any application to a Magistrate's Court under this section may be made by the infant on whose behalf the contract is to be approved or by a parent or guardian of the infant.
>
> (3) The Court may, in its discretion, refer any such application to a parent or guardian of the infant, or, where the Court deems it necessary for the purposes of the application, to a solicitor nominated by the Court, or to the Public Trustee or the Maori Trustee, or to any other person, and may order the applicant to pay the reasonable costs and expenses of any person to whom the application is so referred. Any person to whom the application is so referred may file a report in the Magistrate's Court setting out the results of his consideration and examination of the application and making in respect thereof such recommendations as he thinks proper, and may appear and be heard at the hearing of the application; but no such person shall be under any obligation to consider or examine any such application until his reasonable costs and expenses have been paid or secured to his satisfaction.

Shortly put, the effect of s. 10 of the Statutes Amendment Act, 1951, is that an infant—*i.e.*, a person who has not attained the age of twenty-one years—may enter into any contract, provided the *prior* approval of the Magistrates' Court is obtained thereto. The principal point to be observed is that the consent of the Magistrates' Court must be obtained *before* the contract is entered into. A contract entered into by an infant subject to the consent of the Magistrates' Court being obtained thereto would still be voidable or void, as the case may be. Thus, if a mortgage of

land executed by an infant were dated before the date of the consent of the Magistrates' Court, the District Land Registrar would have no option but to decline to register the mortgage: *Rhodes* v. *Waiariki District Maori Land Board*, (1914) 33 N.Z.L.R. 1370. If a merchant desires to supply on credit grass-seed or fertilizer or a motor-lorry to a minor, or if a money-lender desires to lend money to an infant for the purpose of building a home, or if an intending guarantor of a loan granted to an infant (for, as decided in *Coutts* v. *Browne-Lecky*, (1946) 62 T.L.R. 421, if a contract by an infant is void, a guarantee of that contract is also void)—all should mark time until the necessary prior consent of the Magistrates' Court has been obtained to the proposed contract.

Quite wisely, I think, the Legislature has not attempted to lay down any rules of guidance to the Magistrates' Court. Apparently, the granting or declining of its approval is solely within the discretion of the Court itself; but one may reasonably expect that the Court, following the common law as enunciated by such great authorities as Littleton, Coke, and Mansfield, will not approve unless satisfied that the proposed contract is one likely to be beneficial to the infant. If the Magistrates' Court declines its consent, the applicant probably has the right of appeal to the Supreme Court.

The great advantage of the legislation is that persons proposing to enter into contracts with infants may obtain the approval of the Court, and thus put the contracts on the same level as contracts entered into with persons not under the legal disability of infancy. Infants will benefit by being able to enter into contracts more freely than heretofore—more, it is hoped, will, for example, secure the necessary finance to build homes, or to conduct their businesses. By this simple amendment, the Legislature has provided the element of certainty to contracts entered into by infants, and certainty is a desideratum of any system of law.

As regards the sale of land by an infant, the procedure under the Settled Land Act, 1908, is still available, but I anticipate that, by reason of s. 10 of the Statutes Amendment Act, 1951, there will in future be very few applications of this nature made to the Supreme Court under the Settled Land Act, 1908.

SIR THOMAS MORE, THE LAWYER.

By RICHARD O'SULLIVAN, Q.C.

II.—AT THE COURT.

In the *Utopia*, he who runs may read the professional mind and the political convictions of Thomas More.

Though Utopia is conceived as a pre-Christian community the citizens, or "the most and wisest part of them," share a common belief in the existence of God and in the immortality of the soul. King Utopus, for all his conviction that "there was one religion alone which was true and all others superstitious and vain" and that "the truth of its own power would at last issue out and come to light," yet (we are told) gave to every man free liberty and choice to believe what he would, "saving only that he earnestly and straitly charged them that no man should conceive so vile and base an opinion of the dignity of man's nature as to think that souls die and perish with the body; or that the world runneth at all adventures governed by no divine providence."[1]

The author of *Utopia* had an abiding love of constitutional freedom. The boy who had bearded Henry VII in Parliament wrote in the spirit of freedom an *Ode of Congratulation* to Henry VIII and Catherine when they were crowned. The titles of his *Epigrammata* breathe the same spirit: "What is the difference between a king and a tyrant?" "A good king is the father not the lord of his people." "A tyrant in his sleep differs in no wise from a plebeian." "The consent of the people gives and takes away the kingdom."

For all his indebtedness to Plato, Thomas More thought of the free citizens of Utopia, not as a privileged class dependent on slave labour, but (in the fashion of the common law) as free and lawful men and women living in the fellowship of a free community. There are bondmen, to be sure; but bondage in Utopia is merely a species of penal servitude.

The king of Utopia is a monarch with limited, not absolute, power. His kingdom is, in the language of Sir John Fortescue, in the *De Monarchia* and the *De Laudibus, regimen politicum et regale*, and not *regimen regale simpliciter*. And the royal power is balanced by the power of the Church, as it was in Magna Charta and throughout the Middle Ages.

Apart from the political and social reforms that are outlined in *Utopia* and that have commended the work to so many earnest spirits in subsequent centuries, there is in *Utopia* a feature of singular interest to which attention has been specially directed by Sir Arthur MacNalty, some time chief medical officer to the Ministry of Health.[2] It is the deep and constant interest of Thomas More in matters of medicine and of hospital and public health reform. The interest of More in medicine and in hospital reform was in all likelihood due to his close friendship with Linacre, "the guide of my studies," whose lectures on Aristotle he attended in London.[3] In his home at Bucklersbury and afterwards at Chelsea, Thomas More is known to have supervised the medical and classical studies of his foster child, the great-souled Margaret Gigs, who had an intimate knowledge of Galen. He also directed the studies of John Clement, whom she afterwards chose for her husband, and who, like Linacre, became President of the Royal College of Physicians.

In the *Utopia*, a scheme for hospital reform is set forth in these words:

[1] "Him that is of a contrary opinion they count not in the number of men, but as one that hath debased the high nature of his soul to the vileness of brute beast bodies; much less in the number of their citizens whose laws and ordinances if it were not for fear he would no wise esteem. Wherefore (we are told) he that is thus minded is deprived of all honours, excluded from all offices, and removed from all administration of the Commonweal. And thus he is of all sorts despised as being necessarily of a base and vile nature."

[2] In his Chadwick Public Lecture given at the Royal Society of Tropical Medicine and Hygiene and printed in the issue of *Nature* dated 23rd November, 1946 (Vol. 158, p. 732).

[3] In due course Thomas More became one of the trustees for the lectures in medicine that were founded by Linacre at Cambridge and Oxford.

> For in the circuite of the citie, a little without the walls they have iiii hospitalles, so bigge, so wyde, so ample and so large, that they may seme iiii little townes, which were devised of that bignes partely to thintent the sycke, be they never so many in numbre, should not lye to thronge or strayte, and therefore uneasely and incommodiously: and partely that they which were taken and holen with contagious diseases, suche as be wonte by infection to crepe from one to another, myght be layde aparte farre from the company of the residue. These hospitalles be so wel appointed, and with al thinges necessary to health so furnished, and more over so diligent attendaunce through the continual presence of cunning phisitians is geven, that though no man be sent thether against his will, yet notwithstandynge there is no sick persone in al the citie, that had not rather lye there then at home in his owne house.

As Under-Sheriff of the City of London, Thomas More had occasion from time to time to advise the Corporation on matters concerning water supply, sanitation, and public health. In 1514, he was in fact appointed one of the Commissioners of Sewers of Thames Bank from East Greenwich to Lambeth. In the *Utopia*, which was composed in the following year, he devised what Sir Arthur MacNalty calls " a most complete system of health reform which was greatly in advance of his time and in some respects in advance of our own time." The capital of Utopia is :

> a well-built city with gardens and open spaces, a public water-supply, drainage and clean streets, with public abattoirs outside. Public hospitals were provided for the treatment of rich and poor, and isolation hospitals for cases of infectious disease. Other amenities included communal meals (in the manner of the Inns of Court), the safeguarding of maternity with municipal nurses for infant welfare, nursery schools (or *crèches*) for children under five, free universal education for all children, with continuation, adolescent and adult schools ; religious instruction, industrial welfare, enlightened marriage laws and eugenic mating, and obedience to the laws of health, including fresh air and sunlight, and active occupation without undue fatigue. It is a comprehensive programme of social medicine which, written in the sixteenth century, expresses many of the aspirations of to-day.

In the service of the King, which he reluctantly entered soon after the publication of the first edition of *Utopia*, at first as Master of Requests (the King " having then no better room void ") and afterwards as Under-Treasurer and a member of the Privy Council,[4] Thomas More had many opportunities of pursuing his interest in matters of medicine and of health reform. In 1518, the King being at Abingdon, both plague and sweating sickness were rife at Oxford. Henry appointed Thomas More, lately back from an embassy to France, to supervise the health measures that needed to be taken in the emergency. In due course More certified to the King from Oxford, that he had charged the Mayor and the Commissary in the King's name " that the inhabitants of those houses that be and shall be infected, shall keep in, put out wisps of hay and bear white rods." He also forbade them to keep animals in their houses ; and officers were directed to keep the streets of the towns cleansed and to burn refuse. Here (as Sir Arthur MacNalty points out) we see notification and segregation used for the prevention of epidemic disease, with an immediate measure of success, as the records show.

In 1526, More was again appointed Commissioner of Sewers for the coast of the Thames from East Greenwich to Gravesend. To him, as Lord Chancellor in 1532, in all probability we owe the important Act of Parliament (23 Hen. VIII, c. 5) which appointed Commissioners of Sewers in all parts of the kingdom.

As Lord Chancellor, too, in 1529, Sir Thomas More signed the agreement between the King and the nobility which led up to the introduction, in 1532, of the Statute of Uses.[5] Certain other statutes which were passed while he was Chancellor seem to bear the mark of his mind and influence—for example, the statute which first drew the distinction between " wilful murder " of malice aforethought and unlawful killing which is now called manslaughter, and the other statute dealing with larceny, which appears to have been the earliest Act that put young offenders in a special category.

In the actual conduct of the many judicial offices he filled from time to time over a period of some twenty years, Thomas More was, according to Erasmus, " a holy and righteous Judge." Sixty years after his death, in the last decade of Elizabeth, Sir John Harington denominated him " that worthy and uncorrupt Magistrate." Among the citizens of London of the same decade he was remembered as " the best friend that the poor e'er had."

In his recent work on Westminster Hall, the late Mr. Hilary Saunders pictured Thomas More sitting day after day " dispensing justice with a speed and lucidity which astonished, delighted, or dismayed all who came before him." The day came when, having dealt with one case, he called for the next, only to be told that there were no other cases outstanding. He ordered the fact to be inscribed in the Register of the Chancery. The occasion was celebrated in the popular rhyme :

> " *When More some time had Chancellor been*
> *No more suits did remain ;*
> *The like will never more be seen*
> *Till More be there again.*"

Again as Lord Chancellor, Sir Thomas More sought to relieve the tension that arose with the common-law Judges through the issue of injunctions out of Chancery. Having armed himself with a docket showing the number and the causes of the injunctions that had already been granted or were now being sought, he invited the common-law Judges to dine with him at Westminster, and after dinner :

> when he had broken with them what complaintes he had heard of his Injunctions, and moreover showed them both the number and causes of every one of them in order, so plainly that, upon full debating of those matters, they were all inforced to confesse that they, in like case, could have done no otherwise themselves. Then offered he this unto them : that if the Justices of everye Court (unto whom the reformation of the rigoure of the lawe, by reason of their office, most especially apperteyned) woulde, upon reasonable considerations, by their owne discretions (as they were, as he thought, in conscience bounden) mittigate and reforme the rigour of the lawe themselves, there should from henceforth by him no more Injunctions be graunted. Whereunto, when they refused to condescende, then said he unto them : " Forasmuch as your selves, my Lordes, drive me to that necessitie for awarding out Injunctions to relieve the peoples injurye, you cannot hereafter any more justly blame me." After that he saide secretly to Master William Roper : " I perceave, sonne, why they like not so to doo, for they see that they may by the verdict of the Jurie cast all quarells from themselves upon the Jurie, which they accompt their chiefe defence."

The Judges of the common law having declined the offer of the Lord Chancellor, three centuries were to pass before the power to grant injunctions was conferred by s atute on the Courts of common law, and law and equity were fused in one system of administration.

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[4] The occasion of his entering into the King's service was a case which was heard in the Star Chamber before the Chancellor and other Judges arising out of the King's claim to forfeit one of the Pope's ships which had put in at Southampton. In this case Thomas More argued so learnedly on the Pope's side that the forfeiture was restored, and More gained such renown that " for no entreaty would the King be induced any longer to forbear his service."

[5] The document is printed as an appendix in Holdsworth H.E.L., Vol. IV, Appendix III, p. 577. On his appointment as Under-Treasurer in 1521 Thomas More was knighted. His blood was never ennobled by Henry VIII.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

An Alert Press.—The Press of this Dominion is so much under critical fire that it is pleasing to record one of its many efforts to give service to the public. In his review to the annual meeting of the shareholders of the New Zealand Press Association, the Chairman relates that, after the jury in the Minginui murder trial retired at 12.8 p.m., evening newspapers were invited to remain linked, if necessary, beyond the usual time, so as to receive the verdict. At 2.50 p.m., the jury returned. Thereupon Hamilton sent a memo: "Murder verdict coming." Five minutes later, Hamilton lodged a message giving the verdict and sentence, and this was received, after transmission via Wellington, by other newspaper offices throughout New Zealand at 3.4 p.m., fourteen minutes after the jury returned and nine minutes after the message was lodged. The public dearly loves a murder, especially if a hanging appears to be its logical conclusion.

E. and O.E.—In a judgment under review in the Court of Appeal, it is stated with great candour: "On reconsidering my summing-up after reading it through yesterday afternoon, I should add this—that the summing-up was taken by an inexperienced associate, and was not presented to me for review until three weeks afterwards, and then it was not a very good record of what anybody could possibly have said in the circumstances. I had to do my best to recall what I said and put it in as a record of what had been said. It may be defective in not having something in that was said. I am not sure if that was so or not. It is probably a little defective in some forms of expression, and I should have seen that that was noted at the end of the report of the summing-up." Both the inexperienced associate and the inexperienced counsel have to learn their job, and we suppose that is is an inevitable consequence of our system of practice and procedure that the errors of both have to be charged up to the litigant's account. Sir John Latham, who is to retire this month from the Chief Justiceship of the High Court of Australia, has announced that in his leisure he proposes to learn to type again, and hopes to overcome a habit of earlier years of beginning letters: "Dead Sir." During the last year, he has been on leave from the High Court Bench, and has spent the time on a self-selected task of revising rules of procedure unchanged since 1934. His final act as Chief Justice will be to sign the printed rules, a volume of some two hundred and thirty pages.

The Mistaken Baker.—Under the Defence (General) Regulations in England, an offence which is a breach of control must be visited with a penalty which will at least secure that the offender makes no profit on the unlawful transaction, unless the Court finds "special circumstances" justifying an exception. On a charge against a Yorkshire baker with a small shop of selling coconut ice in a breach of the food rationing Regulations, it was stated for the Ministry of Food that the defendant had made an estimated profit of £5,973, and, after allowing for overhead charges, the balance was £5,150, and this was the minimum fine the Bench found it had to impose. Examination of his business accounts showed, however, that the man of dough was suffering from delusions of financial grandeur, the profit being £150 only. On appeal to Quarter Sessions, the fine was reduced to this amount. Counsel explained that it was ludicrous to suppose the takings of a small baker's shop could have amounted to £6,000 in a month; but why the successful appellant should have acquiesced in such an error is a harder nut to crack.

Local Justice.—According to the *New Zealand Herald*, Wairoa County councillors some time ago suggested that names should be drawn from a hat to decide which offenders should be prosecuted for having noxious weeds, and in particular blackberry, on their properties. Lack of public spirit seems to have defeated what would otherwise have been a "money for jam" County scheme, since a number of farmers were not disposed to go to a ballot upon the matter. It has now been decided to direct the energy of the Council to the clearing of its own weed-infested areas before it reconsiders what is to be done about the unchecked growths of other miscreants.

"Craving Knives."—An Auckland correspondent reports that in the typed version of his brief of the evidence in a domestic dispute the lady accuses her husband of chasing her around the house with a "craving knife." If, as Shaw maintains in his *Revolutionists' Handbook*, marriage is popular because it combines the maximum of temptation with the maximum of opportunity, then a "craving knife" can in the circumstances disclosed be regarded as the Freudian symbol of the woman who, while desiring her husband, would like to murder him at the same time. Scriblex is unable to see that this is so far divorced from the norm of a happy married life as to call for any special comment.

Crime and Culture.—The prisoners in Horfield Jail in Bristol have made a request to be supplied with books on the Greek Testament, organ music, commercial art, publishing, modern plays, and literary criticism. This is thought by the authorities to be their reaction to the published announcement that the Police in Halifax are to take an official course of study in the works of Shakespeare so as to render their diction more pleasing and their testimony more acceptable in the Courts. One wonders how far the prisoners would agree with Wordsworth's lines: "We must be free or die, who speak the tongue that Shakespeare spake."

Hospitalizational Note.—The orthopaedic witness has made us familiar with "hospitalization." Not for him does an injured man go back to the hospital for more treatment: he "requires a further period of hospitalization." The other day, a psychiatrist, reporting on a delinquent, wrote: "He does not impress me as a definite psychotic clinically . . . hospitalization is not indicated at present." This report provoked the *Justice of the Peace and Local Government Review* into the caustic comment: "The Court at first considered prisonization was the appropriate treatmentalism, but eventually decided that domiciliarization was more suited to the prisoner, who was duly probationalized."

THEIR LORDSHIPS CONSIDER.

By COLONUS.

Contracts.—" Nothing is more dangerous than to allow oneself liberty to construct for the parties contracts which they have not in terms made, by importing implications which would appear to make the contract more businesslike or more just " : Lord Atkin in *Bell* v. *Lever Bros.*, [1932] A.C. 161, 226.

Ousting Trustees.—The Judicial Committee remarked, in 1884, how little authority there was for the removal of trustees from office apart from cases of misconduct. Discussing the topic, in *Letterstedt* v. *Broers*, (1884) 9 App.Cas. 371, 386, 387, they said :

> As soon as all questions of character are as far settled as the nature of the case admits, if it appears clear that the continuance of the trustee would be detrimental to the execution of the trusts, even if for no other reason than that human infirmity would prevent those beneficially interested, or those who act for them, from working in harmony with the trustee, and if there is no reason to the contrary from the intentions of the framer of the trust to give this trustee a benefit or otherwise, the trustee is always advised by his own counsel to resign, and does so. If, without any reasonable ground, he refused to do so, it seems to their Lordships that the Court might think it proper to remove him ; but cases involving the necessity of deciding this, if they ever arise, do so without getting reported. It is to be lamented that the case was not considered in this light by the parties in the Court below, for, as far as their Lordships can see, the Board [of trustees] would have little or no profit from continuing to be trustees, and as such coming into continual conflict with the appellant and her legal advisers, and would probably have been glad to resign, and get out of an onerous and disagreeable position. But the case was not so treated.

In that case, there were constant bickerings between the trust Board concerned and the beneficiaries, so their Lordships concluded that it was necessary, for the welfare of the beneficiaries, that the Board should no longer be trustees. A principle of general interest is set out at p. 389 :

> It is quite true that friction or hostility between trustees and the immediate possessor of the trust estate is not of itself a reason for the removal of the trustees. But where the hostility is grounded on the mode in which the trust has been administered, where it has been caused wholly or partially by substantial overcharges against the trust estate, it is certainly not to be disregarded.

Representations.—A plot fit for a novel is found in *Jorden* v. *Money*, (1854) 5 H.L.Cas. 185 ; 10 E.R. 868. In 1841, a young Army officer named William Money was led by two older men to join them in buying up cheap Spanish bonds, whilst his father was on a mission to Spain to try and settle bondholders' claims. Charles Marnell, a family friend, advanced £1,200, and bonds were bought by the syndicate. Unfortunately, Money senior was unsuccessful, and, to try to help his son, offered Marnell £400 to clear William's share. This was declined. Marnell died in 1843, leaving all his property to his sister Louisa. Miss Marnell sympathized with the youth, but his father turned down a suggestion of settlement at the £400. In 1845, William was to be married, and his story was that Miss Marnell told him to go ahead, as she did not intend to collect the debt. He did, and later Miss Marnell did also, becoming Mrs. Jorden. Unfortunately, the debt was included in her marriage settlement, and later she sued for it. Then it came out that in 1832, Money senior had voluntarily given Miss Marnell a house and some land. The transaction was gratuitous, and, therefore, revocable. It was suggested that Money senior had agreed to waive his right of revocation if Miss Marnell waived her claims ; but the majority of the House did not accept this version of the evidence. The debt was held to be still binding, and Lord Cranworth, L.C., explained this alleged bargain (at p. 220 ; 884) :

> if this be a correct account, that in a conversation which he had, it was agreed by and between Miss Marnell and himself, that in consideration of his permitting her to continue in the possession and enjoyment of that property, she should engage wholly to abandon the debt, it is the most unfortunate thing I ever knew in my life that Mr. Money, a barrister, a man advanced in life, whose son was about to marry, who, as the father knew, had this outstanding claim against him, if he thought that this was a positive contract, and that the lady so understood it,—I say it is the most unfortunate thing I ever knew in my life, that he did not reduce it into writing, because if the lady so understood it, she would have been perfectly willing to sign the writing.

The moral of it all seems to be that barristers should pay careful attention to the financial training of their sons.

Costs.—Costs are a most useful institution, largely taken for granted in daily practice (except where a prayer for them is inadvertently omitted), and it comes as a surprise to learn that they have a history—in fact, an origin. In *Garnett* v. *Bradley*, (1878) 3 App.Cas. 944, 962, Lord Blackburn makes one of his characteristic excursions into the past :

> Costs in Courts of common law were not by common law at all, they were entirely and absolutely creatures of statute. There had been statutes passed at different times giving costs, some in one case and some in another, the earliest being the Statute of Gloucester, passed many centuries ago, which gave costs, if I recollect rightly, to demandants who recovered damages in a real action, which they had not had before. Subsequent statutes were passed at different times giving a plaintiff a right to recover costs in any action, and there were other statutes passed at different times upon the subject of costs in the common law Courts. I think the first that gave costs to the defendant was as late as James I, and there were several other statutes giving costs, but all those statutes went upon one principle throughout. The result was, that, as a general rule, in every case in Courts of common law the party who succeeded got his costs, whether he was plaintiff or defendant, whether he succeeded by a verdict or upon demurrer. I say the general rule established by all those numerous statutes (for there was no one statute which laid it down) was that the successful party got his ordinary taxed costs ; in other words, that the costs followed the event, and that the party who was successful had them as a matter of right.

Where is a Debt ? —" The task of discovering *secundum fictionis legis* a local situation for an intangible legal conception has long been a familiar one. One example is that of finding a residence for a company. A company exists in law apart from the human beings which compose it, the company itself cannot eat or sleep—common tests of residence in human beings—yet the Courts have found no difficulty in attributing residence to it and ascertaining its locality. The position is really summed up by *Lord Lindley* in the *Muller and Co.'s Margarine* case in this House ([1901] A.C. 217, 236) when he says that the legal conception of property involves the legal conception of existence somewhere. Once it is established that a debt may have a local situation, the rules of law by reference to which such situation is to be determined are settled beyond question. So far back as the reign of Elizabeth in *Byron* v. *Byron* (1 Cro. Eliz. 472) *Anderson*, J., is reported as saying : ' The debt,' (namely, that in question in that case) ' is where the bond is, being upon a specialty ; but debt upon a contract follows the person of the debtor ; and this difference hath been oftentimes agreed ' " : Lord Warrington of Clyffe in *English, Scottish and Australian Bank, Ltd.*, v. *Inland Revenue Commissioners*, [1932] A.C. 238, 248.