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THE CROWN PROCEEDINGS ACT, 1950.

V.

PROCEEDINGS IN REM AGAINST THE CROWN.

Section 28 of the Crown Proceedings Act, 1950, is as follows :

(1) Nothing in this Act shall authorize proceedings *in rem* in respect of any claim against the Crown, or the arrest, detention, or sale of any ships or aircraft, or any cargo or other property belonging to His Majesty, whether in right of His Government in New Zealand or otherwise, or give to any person any lien on any such ship, aircraft, cargo, or other property.

(2) Where proceedings *in rem* have been instituted in the Supreme Court against any such ship, aircraft, cargo, or other property, the Court may, if satisfied, either on an application by the plaintiff for an order under this subsection or on application by the Crown to set aside the proceedings, that the proceedings were so instituted by the plaintiff in the reasonable belief that the ship, aircraft, cargo, or other property did not belong to the Crown, order that the proceedings shall be treated as if they were *in personam* duly instituted against the Crown in accordance with the provisions of this Act, or duly instituted against any other person whom the Court regards as the proper person to be sued in the circumstances, and that the proceedings shall continue accordingly. Any such order may be made upon such terms, if any, as the Court thinks just; and, where the Court makes any such order, it may make such consequential orders as the Court thinks expedient.

This section preserves the immunity of the Crown from liability to Admiralty proceedings *in rem*. An action *in rem* is one brought in the Supreme Court in its Admiralty jurisdiction in which the plaintiff seeks to make good a claim to or against certain property—*e.g.*, a ship or cargo—in respect of damage done by which he alleges that he has an actionable demand. Thus, in collision actions and other cases where a plaintiff claims a maritime lien, he can, if the *res* be within the Court's jurisdiction, by process served upon its corpus, procure its arrest and detention by the Court either until the owners bail it out by giving security for the amount claimed by him, or until the Court gives judgment upon his claim, when, if he be successful, effect may be given to such judgment by sale of the property in order to satisfy it. The effect of such a judgment or sale is that the order of the Court operates directly upon the status of the property, and transfers an absolute title to a purchaser : *Castrique* v. *Imrie and Tomlinson*, (1870) L.R. 4 H.L. 414, *Minna Craig Steamship Co.* v. *Chartered Mercantile Bank of India London and China*, [1897] 1 Q.B. 55 ; aff. on app., [1897] 1 Q.B. 460.

In the case, however, of an ordinary action *in personam*, the judgment of the Court is a personal one (in the nature of a command or prohibition) against the unsuccessful party : *Sinclair* v. *Brougham*, [1914] A.C. 398, 414. It may, it is true, be enforced against his goods by subsequent proceedings ; but, even if the sheriff sells them in execution under the judgment, he does not thereby transfer to a purchaser an absolute title : he transfers only such title as the owner may in fact have had : *Castrique* v. *Imrie and Tomlinson*, (1870) L.R. 4 H.L. 414.

In New Zealand, Admiralty jurisdiction is exercised by the Supreme Court under the Colonial Courts of Admiralty Act, 1890 (*1 Halsbury's Statutes of England*, 13). Before the enactment of the Crown Proceedings Act, 1950, proceedings *in personam* could not succeed against the Crown. In practice, they were taken against the officer in charge of the ship, and the Crown would " stand behind them." Shortly before the passing of the corresponding United Kingdom statute, the Courts frowned upon this practice : see *Adams* v. *Naylor*, [1946] A.C. 543 ; [1946] 2 All E.R. 241 ; and the practice received its death-blow in *Royster* v. *Savey*, [1947] K.B. 204 ; [1946] 2 All E.R. 642. Now, by virtue of subs. 2 of s. 28 of our statute, proceedings *in personam* may be instituted against the Crown in accordance with s. 14.

Subsection 1 of s. 28 brings the Crown in its widest sense within the Crown Proceedings Act, 1950, since it relates to any ships or aircraft, or any cargo or other property, belonging to His Majesty, " whether in right of His Government in New Zealand or otherwise." Ships belonging to Her Majesty in the right of the United Kingdom or other Dominion or Colonial Governments come within the immunity, though, where used elsewhere in the statute, the terms " Her Majesty " or " the Crown " mean Her Majesty in right of Her Government in New Zealand. But, though the immunity given by s. 28 (1) is general, it is not touched by s. 35 (2) (c), which declares that nothing in the Crown Proceedings Act, 1950, is to affect *any proceedings* in New Zealand by the Crown otherwise than in right of Her Majesty's Government in New Zealand ; because s. 28 (1) bars *all* such proceedings, whether in right of Her Majesty's Government in New Zealand or otherwise.

Since the immunity given by subs. 1 of s. 28 necessarily covers any ships or aircraft or other property of Her Majesty, the interest of the Crown therein may not at once be apparent ; consequently, subs. 2 enables the conversion of proceedings, commenced *in rem* against Crown property in the reasonable belief that it did not belong to the Crown, into valid proceedings *in personam* against the Crown or any person proper to be sued. There is no break in the continuity of the proceedings, unless the Court is not satisfied that the plaintiff had reasonable grounds for believing that the ship, aircraft, cargo, or property concerned did not belong to the

Crown ; and rules of Court will probably provide for the proper order to be made in such a case.

Mandamus.

As we have seen, the definition of " civil proceedings " in s. 2 (1) excludes proceedings in relation to habeas corpus, mandamus, prohibition, or certiorari.

Section 35 (5) is as follows :

> This Act shall not operate to limit the discretion of the Court to grant relief by way of mandamus in cases in which such relief might have been granted before the commencement of this Act, notwithstanding that by reason of the provisions of this Act some other and further remedy is available.

So far, this subsection has not received judicial interpretation, but it would seem that it has exclusive application to a prerogative writ of mandamus, and not to an action for mandamus, which may be claimed as relief in an action under R. 473 of the Code of Civil Procedure : that form of action would be within s. 12 (1).

The writ of mandamus under R. 473 is similar in nature to a decree for specific performance, and is available where a person wishes to enforce the performance of a duty in which he is personally interested, and in respect of which he has a right of action : *Davies* v. *Gas Light and Coke Co.*, [1909] 1 Ch. 708. It is not available where a prerogative writ of mandamus is the appropriate remedy : *Baxter* v. *London County Council*, (1890) 63 L.T. 767.

The prerogative writ of mandamus cannot be claimed under R. 473. It must be applied for by motion under R. 466 : *Armstrong* v. *Wairarapa South County*, (1897) 16 N.Z.L.R. 144.

The Court has, in general, refused a prerogative writ of mandamus where there is another sufficient remedy ; hence the concluding words of s. 35 (5).

The nature of a prerogative writ of mandamus is thus explained in *9 Halsbury's Laws of England*, 2nd Ed. 744-746 :

> The writ of mandamus is a high prerogative writ of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation, or inferior Court, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to supply defects of justice ; and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy, for enforcing such right (*3 Bl. Com.*, 110 ; *Com. Dig.* tit. *Mandamus* ; *R.* v. *Archbishop of Canterbury and Bishop of London*, (1812) 15 East, 117, 136) ; and it may issue in cases where, although there is an alternative legal remedy, yet such mode of redress is less convenient, beneficial and effectual (*3 Bl. Com.*, 110 ; *R.* v. *Bank of England*, (1819) 2 B. & Ald. 620, 622 ; *Re Barlow*, (1861) 30 L.J. Q.B. 271 ; *R.* v. *Thomas*, [1892] 1 Q.B. 426).
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> The grant of a writ of mandamus is, as a general rule, a matter for the discretion of the Court (*R.* v. *Bishop of Chester*, (1786) 1 Term Rep. 396 ; *R.* v. *Bishop of Sarum*, [1916] 1 K.B. 466). It is not a writ of right (*R.* v. *All Saints, Wigan (Churchwardens)*, (1876) 1 App. Cas. 611) and it is not issued as a matter of course (*Julius* v. *Lord Bishop of Oxford*, (1880) 5 App. Cas. 214, 246). Accordingly, the Court may grant the writ even though the right in respect of which it is applied for appears to be doubtful (*R.* v. *All Saints, Wigan (Churchwardens)*, (1876) 1 App. Cas. 611, 620) ; *R.* v. *London Corporation*, (1773) 2 Term Rep. 182, n. ; *R.* v. *Wilts and Berks Canal Co.*, [1912] 3 K.B. 623 ; *R.* v. *Registrar of Companies*, [1912] 3 K.B. 23, 32, 33), and, on the other hand, the writ may be refused, not only upon the merits, but also by reason of the special circumstances of the case (*R.* v. *All Saints, Wigan (Churchwardens)*, (1876) 1 App. Cas. 611, 622 ; *R.* v. *Garland*, (1870) L.R. 5 Q.B. 269, 272 ; *Croydon Corporation* v. *Croydon Rural Council*, [1908] 2 Ch. 321 ; *Wolstanton United Urban Council* v. *Tunstall Urban Council*, [1910] 2 Ch. 347 ; *R.* v. *Epsom Urban District Council, Ex parte Course*, (1912) 76 J.P. 389 ; *R.* v. *West Norfolk Assessment Committee, Ex parte Ward*, (1930) 94 J.P. 201). The Court will take a liberal view in determining whether or not the writ shall issue, not scrupulously weighing the degree of public importance attained by the matter which may be in question, but applying this remedy in all cases where, upon a reasonable construction, it can be shown to be relevant (*Rochester Corporation* v. *The King*, (1858) E.B. & E. 1024, 1033 ; *R.* v. *Barker*, (1762) 3 Burr. 1265, 1267 ; *R.* v. *Morton Brown, Ex parte Ainsworth*, (1909) 74 J.P. 53, 54). Thus, the writ has been held to lie for the surrender of the regalia of a corporation (*3 Bl. Com.*, 110 ; *R.* v. *Todd*, (1838) 2 Jur. 565) ; to oblige corporate bodies to affix their common seal (*3 Bl. Com.*, 110 ; *R.* v. *Windham*, (1776) 1 Cowp. 377 ; *R.* v. *Beeston*, (1789) 3 Term Rep. 592, 594) ; to compel a corporation to pay a sum of money pursuant to an agreement which could not be enforced by action (*R.* v. *Bristol and Exeter Railway Co.*, (1845) 3 Ry. & Can. Cas. 777) ; and to command a mayor and corporation to exercise the ancient privilege of holding a Court for determining suits notwithstanding long disuse (*R.* v. *Hastings Corporation*, (1822) 5 B. & Ald. 692, n. ; *R.* v. *Wells Corporation*, (1836) 4 Dowl. 562 ; *R.* v. *Havering Atte Bower (Steward)*, (1822) 5 B. & Ald. 691).
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> In particular, a writ of mandamus will lie to restore, admit, or elect to an office of a public nature ; for the delivery up, production and inspection of public documents ; to enforce statutory rights and duties ; to require public officials and public bodies to carry out their duties ; and to command inferior tribunals to exercise jurisdiction.
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> A writ of mandamus will not lie to compel a person to institute legal proceedings (*R.* v. *Southampton Port Commissioners*, (1870) L.R. 4 H.L. 449, 485 ; *Elwood* v. *Belfast Corporation*, (1923) 57 I.L.T. 138).

Mandamus under the prerogative writ procedure is of importance here, in that, in certain circumstances, it provides a means of compelling officers of the Crown and other Government officials to perform their duties, and it has been expressly preserved as a remedy for this purpose by s. 35 (5). It is applicable only to enforce a duty created by law in favour of the person applying for the writ. Mandamus cannot issue against the Crown, or, presumably, against a Government Department within s. 14 (2) (*a*), or against an officer of the Crown to enforce a duty owed by him to the Crown alone ; and it cannot issue to enforce the payment of money by the Crown.

It follows that the prerogative writ of mandamus has a limited scope against a Government Department, or an officer of the Crown ; but it may avail a subject who is deprived of money due to him by the Crown, and which is withheld owing to the default of some servant of the Crown, as when he has a duty to the public in certain circumstances to certify that an individual is entitled to a repayment of money or to issue an order for its payment. In such a case, a mandamus will issue to him to perform this duty. It is not, however, suggested that the application of the section is limited to such circumstances.

Application of Statutory Provisions.

Section 29 of the Crown Proceedings Act, 1950, which closely follows the corresponding subs. 1, and is in effect the same as subs. 2, of s. 31 of the United Kingdom statute, is as follows :

> (1) This Act shall not prejudice the right of the Crown to take advantage of the provisions of an Act although not named therein ; and it is hereby declared that in any civil proceedings against the Crown the provisions of any Act which could, if the proceedings were between subjects, be relied upon by the defendant as a defence to the proceedings, whether in whole or in part, or otherwise, may, subject to any express provision to the contrary, be so relied upon by the Crown.
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> (2) Section fifty-five of the Judicature Act, 1908, and section one hundred and nine of the Magistrates' Courts Act, 1947 (which empower the Supreme Court or a Magistrate in certain circumstances to order the arrest of a defendant about to leave New Zealand), shall, with the necessary modifications, apply to civil proceedings by the Crown in the Supreme Court or in a Magistrate's Court, as the case may be.

Subsection 1 is declaratory of a well-known principle of construction by which grants and statutes are interpreted in favour of the Crown. The origins of this rule were, in the first place, the idea that a particular King should not be deemed to have derogated from the royal inheritance of property and power which he was to pass to his successor except by express words, and, second, the fact that statutes were often concessions wrung from the King, who could not be supposed to have conceded more than the specific words of the statute showed, nor, in particular, anything which might divest the Crown of some privilege or prerogative. In relation to statutes, this rule has the effect that the Crown can always take advantage of a statute without being named therein, but is not bound by a statute unless referred to directly or by necessary implication (for a questioning of this rule, see per Scrutton, L.J., in *Cayzer, Irvine, and Co., Ltd.* v. *Board of Trade*, [1927] 1 K.B. 269). It was said in the older cases that statutes for the general good and public benefit included the King (by necessary implication) notwithstanding that he was not named: *Willion* v. *Berkley*, (1561) 1 Plowd. 227; 75 E.R. 345. In more recent times, however, it has been difficult to reconcile these two propositions, as most statutes are passed for the public good in some sense. The modern tendency is to hold that the Crown is in no case bound unless specifically named: see *Attorney-General* v. *Hancock*, [1940] 1 K.B. 427; [1940] 1 All E.R. 32, where the cases are reviewed. It is, of course, usual nowadays to mention the Crown in statutes and indicate the extent to which the Crown is bound. This rule of construction is preserved by s. 5 (*k*) of the Acts Interpretation Act, 1924, and is of particular importance in view of the grant by the Crown Proceedings Act, 1950, of the right to sue the Crown for a breach of a statutory duty imposed by any Act binding upon the Crown: s. 6 (2).

Section 55 of the Judicature Act, 1908, corresponds to s. 6 of the Debtors Act, 1869 (Gt. Brit.) (*1 Halsbury's Statutes of England*, 2nd Ed. 573). Section 55 provides that a defendant may be arrested and required to give security to remain in New Zealand if the Court is satisfied that there is a good cause of action against him to the amount of £50 and upwards, that he is about to quit New Zealand, and that his absence would prejudice the plaintiff: see, generally, hereon *Stout and Sim's Supreme Court Practice*, 8th Ed. 26 *et seq.* Section 109 of the Magistrates' Courts Act, 1947, is to the like effect, the amount being a sum within the jurisdiction of a Magistrate's Court for which an action has been commenced: see, generally as to s. 109, *Wily's Magistrates' Courts Practice*, 3rd Ed. 185.

Rules of Court.

Section 30, which empowers the making, altering, or revoking of rules of Court for the purpose of giving effect to the provisions of the new statute, was enacted on November 23, 1950. It was made clear that the enactment as a whole was not to come into force until January 1, 1952. Now, seventeen months have gone by since Parliament provided the rule-making power so that effect could be given to the particular legislation. But no rules, as yet, have appeared.

In Great Britain, the corresponding Act became law on July 31, 1947. The necessary rules were made and published on November 26, 1947, so that they were ready to operate on the coming into force of the statute on January 1, 1948. And, it must be remembered, those rules broke entirely new ground.

The lack of the necessary rules in this country (notwithstanding the fact that we have the advantage of having the rules made in Great Britain as a guide) is causing considerable trouble and embarrassment to those whose duty it is to advise litigants in proceedings by or against the Crown; and it is hoped that these rules will be made and published without any extension of the present seemingly inexplicable delay.

Cook Islands and Samoa.

Sections 32 and 33 apply the Crown Proceedings Act, 1950, with necessary modifications, to the Cook Islands and to Western Samoa respectively.

Nature of Relief: Addendum.

Our attention has been drawn to our explanation of s. 17 of the Crown Proceedings Act, 1950, ended at the top of the first column of p. 82, *Ante*, which, we agree, should have been amplified in relation to s. 17 (2), which is as follows:

> The Court shall not in any civil proceedings grant any injunction or make any order against an officer of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown.

While the precise scope of the subsection is not entirely clear, it would appear to do no more than enact the pre-existing common law, which was to the effect that, where an officer of the Crown (such as the Attorney-General) was sued in his official capacity as a representative of the Crown, the Court should not, by personal process against the individual officer indirectly grant a remedy which it could not grant directly against the true party—namely, the Crown: see *Bombay and Persia Steam Navigation Co., Ltd.* v. *MacLay*, [1920] 3 K.B. 402, and *Raleigh* v. *Goschen*, [1898] 1 Ch. 73.

Furthermore, the tort in respect of which an injunction could be granted against an officer of the Crown is his individual wrongdoing, independently of his official capacity: *Raleigh* v. *Goschen*, [1898] 1 Ch. 73; that is why we suggested that the granting of an injunction against the individual tortfeasor, in such circumstances, could not be regarded as giving relief against the Crown.

SUMMARY OF RECENT LAW.

BILLS OF EXCHANGE.

Negotiable Cheques. (G. A. Dickinson.) *5 Australian Conveyancer and Solicitors Journal*, 34.

CHARITY.

Benefit to Community—Promotion of Surgery—Incidental Benefits to Individuals—Gift to Royal College of Surgeons—Perpetuities—Rule against Perpetuities—Gift over from One Charity to Another—Second Charity incorporated by Royal Charter. By her will, dated January 13, 1943, testatrix, who died on February 10, 1943, gave her residuary real and personal estate on the usual trusts for conversion and directed that the resulting "endowment fund" should be held on "the following charitable trusts" which were, *inter alia*, "to pay the residue of the income of the endowment fund in each year to the treasurer . . . of the Middlesex Hospital for the maintenance and benefit of the Bland-Sutton Institute of Pathology now carried on in connection with the said hospital . . . Provided always that should the . . . Middlesex Hospital become nationalised or by any means pass into public ownership

or should the [trustees] at any time become unable lawfully to apply the income of the endowment fund for the purposes aforesaid then and in any of the said events the [trustees] shall thereupon pay and transfer the endowment fund . . . to the Royal College of Surgeons." The Middlesex Hospital was founded in 1835, but the school did not form part of the hospital until 1896. The Bland-Sutton Institute was a department of the medical school. On July 5, 1948, under the National Health Service Act, 1946, s. 11 (8), the hospital was designated a teaching hospital, and, by virtue of s. 6 (1) of the Act, the property and liabilities of the hospital were transferred to and vested in the Minister of Health, but the medical school became a separate legal entity with a governing body constituted under s. 15 (1) of the Act. The Royal College of Surgeons claimed that, by reason of the changes brought about by the Act, the gift over took effect. *Held*, (i) That, notwithstanding that the medical school of the Middlesex Hospital had not been nationalized, the institution known and referred to in the will as "the Middlesex Hospital" had become nationalized within the meaning of the will, and, therefore, the defeasance clause took effect. (ii) (*Lord Cohen* dissentiente) That, on the true construction of the Royal charter, granted in 1800, by which the Royal College of Surgeons was incorporated, the objects of the College were "the due promotion and encouragement of the study and practice of the art and science of surgery" and were directed to the relief of human suffering or to the advancement of education or science, and not to the promotion of the interests of individuals, although incidentally individuals carrying on their profession as surgeons did derive certain benefits from the College. (iii) That, for the present purpose, there was no distinction between a charity incorporated by Royal charter and one incorporated by any other means; and, therefore, the College was a charity, and the gift over to it was not bad for perpetuity. (*Re Royal College of Surgeons of England*, [1899] 1 Q.B. 871, explained and criticized.) (*Christ's Hospital* v. *Grainger*, (1849) 1 Mac. & G. 460, applied.) Decision of the Court of Appeal, *sub nom. Re Bland-Sutton's Will Trusts*, [1951] 1 All E.R. 494, reversed. *Royal College of Surgeons of England* v. *National Provincial Bank, Ltd., and Others*, [1952] 1 All E.R. 984 (H.L.).

As to Gifts for Educational Purposes, see *4 Halsbury's Laws of England*, 2nd Ed. 116-118, paras. 153, 154; and for Cases, see *8 E. and E. Digest*, 245-248, Nos. *51-73*.

COMPANY.

Director—Managing Director—Removal—Notice required—Companies Act, 1929 (c. 23), Table A, art. 68. A private company, incorporated in 1932, adopted as its articles Table A of the Companies Act, 1929, art. 68 of which provides: "The directors may from time to time appoint one or more of their body to the office of managing director . . . for such term and at such remuneration . . . as they may think fit, and a director so appointed shall not, while holding that office, be subject to retirement by rotation, or taken into account in determining the rotation or retirement of directors; but his appointment shall be subject to determination *ipso facto* if he ceases from any cause to be a director, or if the company in general meeting resolve that his tenure of the office of managing director . . . be determined." In January, 1932, at the first meeting of the directors of the company, it was resolved that the plaintiff "be and he is hereby appointed managing director of the company at a salary of £7 per week as from Monday, February 1, 1932." On March 15, 1949, the directors decided "to relieve Mr. Read [the plaintiff] of his position as managing director of the company and to give him two months' leave on full pay." On the expiration of the plaintiff's leave, the directors passed a further resolution that the plaintiff's "employment be terminated as and from May 13, 1949," and the secretary was instructed to send him one month's notice so determining his employment. In fact, however, the company paid the plaintiff his salary until, on September 28, 1949, an extraordinary general meeting of the company was held, at which a resolution approving the action of the directors in removing the plaintiff was passed. The plaintiff claimed damages for wrongful dismissal and breach of contract, on the footing that he had not been given reasonable notice. *Held*, That, on the true construction of art. 68, the plaintiff's appointment was immediately and automatically terminated on the passing of the resolution at the extraordinary general meeting of September 28, 1949, and, while it might well be that it would have been a breach of contract for the company so to alter its articles as to give the directors the power to determine the plaintiff's appointment, it was not a breach of contract for the company to dismiss the plaintiff without notice, the company having, by art. 68, expressly retained such power in its own hands. (Dictum of *Swinfen Eady*, L.J., in *Nelson* v. *James Nelson and Sons, Ltd.*, [1914] 2 K.B. 779, applied.) *Read* v. *Astoria Garage (Streatham), Ltd.*, [1952] 1 All E.R. 922 (Ch.D.).

As to Managing Directors, see *5 Halsbury's Laws of England*, 2nd Ed. 317, note (*q*); and for Cases, see *9 E. and E. Digest*, 528, 529, Nos. *3490-3492*.

CONTRACT.

Non-performance—Excuse—"Force majeure"*—Delivery of Goods "subject to export licence"—Minimum Export Prices fixed in Excess of Contract Prices.* A contract for the shipping of goods from Brazil during February to July, 1951, provided that the contract should be void for any quantity which was not shipped one month after the expiration of the contract period where shipment was prevented by *force majeure*, and that "this contract is subject to a Brazilian export licence." In June, 1951, the sellers gave the buyers notice that they could not ship the goods on the basis of the contract prices because the Bank of Brazil had stated that the goods could only be shipped at minimum f.o.b. prices, which were £28 and £40 a ton respectively higher for the two classes of goods involved than the contract prices. If they had themselves paid the minimum higher prices, the sellers could have obtained a licence to export the contract goods and shipped, declared, and tendered them within the contractual period. *Held*, That the sellers were relieved from liability under the contract, not (in the absence of any prohibition or embargo or physical or legal prevention of export) by the "*force majeure*" clause, but by the clause making it conditional on the grant of an export licence, which meant a licence for the shipping of goods in fulfilment of the contract at the prices specified therein, and not at other prices, which would have involved another contract. *Brauer and Co. (Great Britain), Ltd.* v. *James Clark (Brush Materials), Ltd.*, [1952] 1 All E.R. 981 (Q.B.D.).

As to Excuses for Non-performance of Contract, see *7 Halsbury's Laws of England*, 2nd Ed. 197-227, paras. 276-310; and for Cases, see *12 E. and E. Digest* (Replacement), 356-495, Nos. *2761-3716*.

CONVEYANCING.

Shifting Clauses. *102 Law Journal*, 188.

DAMAGES.

Measure of Damages—Foreseeable Consequences of Breach of Contract—Sale of Goods—Loss of Profit—Payment by Confirmed Letter of Credit—Failure to procure Confirmation—Knowledge of Parties that Subject-matter of Sale unobtainable by Sellers without Confirmation. On September 10, 1950, a Belgian company offered to A. Co. 1,000 tons of rolled steel, f.o.b. Antwerp, delivery in December, payment to be against an irrevocable and confirmed letter of credit. A. Co., who were unable to produce the letter of credit themselves, offered the steel to the sellers, who in turn offered it to the buyers. On September 20, 1950, the buyers, subject to the requirements as to the provision of a letter of credit, offered the steel to an American company. Both the sellers and the buyers knew that neither of them was in a position to fulfil their contractual obligations unless the American company made the money available through a letter of credit. On September 25, the American company accepted the buyers' offer, and, on the same day, the buyers agreed with the sellers that they would purchase the steel, stating: "A credit will be opened forthwith." Thereupon the sellers gave a written order to A. Co. The American company failed to open the credit, and, the buyers being unable to do so, the sellers claimed against the buyers for breach of contract and a declaration that the sellers were entitled to be indemnified against any damages payable by them to A. Co. At all material times the market value of the steel was higher than the contract price. On the question of damages, *Held*, That, the buyers being aware that the sellers could not obtain the goods unless the letter of credit was provided, the sellers were entitled to damages representing the loss of the profit which they would have made on a sale to the buyers, that being a loss which, at the time of the contract, was foreseeable by the buyers as the probable consequences of their breach, but the buyers were not aware that A. Co. also depended on the credit to obtain the goods, and, therefore, a loss by that company and possible right of recovery against the sellers was not within the contemplation of the parties, but was too remote, and the sellers were not entitled to the declaration sought. Decision of *McNair*, J., [1952] 1 All E.R. 89, reversed in part. *Trans Trust S.P.R.L.* v. *Danubian Trading Co., Ltd.*, [1952] 1 All E.R. 970 (C.A.).

As to Remoteness of Damage, see *10 Halsbury's Laws of England*, 2nd Ed. 103-109, paras. 130-136; and for Cases, see *17 E. and E. Digest*, 95-99, Nos. *108-141*.

DEFAMATION.

Libel—Qualified Privilege—Statement in Trade Union Publication made at Time of Strike during Industrial Upheaval—Interest of All Unions not to be implicated in Strike—Duty of Labour Leaders to Their Members to endeavour to keep Them out of Strike and to prevent Its Spreading—Occasion of Qualified Privilege. An occasion of qualified privilege arises where there is a duty or an interest on the part of a person who is concerned to speak out, tell the truth, or say what he knows. Such an occasion arises when, in the course of a strike of workers at a time of grave industrial upheaval, a statement is made by a union secretary or organization of unions, in a publication circulating among the members of a union or unions, in the performance of a duty to the members to ensure that they did not become involved in the strike, and in protecting a legitimate interest by explaining to such union members the issues underlying that strike; and those union members had a corresponding interest with their union secretary or organization of unions. In February, 1951, there occurred a general strike of waterside workers throughout New Zealand. This strike resulted in the issue of several Proclamations of Emergency under the Public Safety Conservation Act, 1932; in strikes of, or cessation of work by, large numbers of workers engaged in various other industries and grave industrial unrest; and in a dislocation and interruption of supplies and services to the public of New Zealand and serious financial loss to many sections of them. The plaintiff in each of two actions claiming damages for alleged libel was a waterside worker and a member of the New Zealand Waterside Workers' Industrial Union of Workers, which was deregistered on February 28, 1951, and was Vice-president of that Union and President of its Wellington branch. In one action, the first defendant was an Industrial Union comprising upwards of 3,500 workers enaged as local body or other labourers in the Wellington and other industrial districts. Its secretary, the second defendant, was the publisher of a newspaper, the *New Zealand Clarion*, circulated to members of the Union. In the May-June issue of that newspaper, there appeared an article entitled "The Present Industrial Crisis: Role of the Communist Party," in which, *inter alia*, it was said: "The Vice-president of the old Waterside Workers' Union, some of the executive members, as well as some of the officials at various ports were, and are, active members of the Communist party." It was alleged by the plaintiff that those words referred to, and were understood to refer to, him, and were defamatory. The material in the article was reprinted and was published early in July, 1951, by the National Executive of the New Zealand Federation of Labour, and was distributed through its affiliated unions to office bearers in, and other members of, those unions. In the second action, the plaintiff claimed damages in respect of that publication against the members of the National Executive of the New Zealand Federation of Labour, to which were affiliated some 193 unions and other organizations of workers throughout New Zealand, comprising in their membership a total of approximately 189,000 workers. The defendant Union secretary and the defendant members of the National Executive of the Federation of Labour had taken prominent parts in endeavouring to avert the strike, and, after its commencement, in endeavouring to confine it, by preventing it from spreading to other organizations of workers, and to bring it to an end. The printers of the *Clarion* newspaper and of the reprint from it were also named as defendants in each action. Both actions were heard together. On a motion that the actions should be withdrawn from the jury, *Held*, 1. That the defendants the Union secretary and the members of the National Executive of the Federation of Labour had, at the time of each publication, a common interest with the members of the Union and the Federation's affiliated unions, and a duty, not merely to conserve the interests of their members, but also to ensure, so far as they could attain it, that their particular adherents, whether of the individual Labourers' Union or of the wider body (the unions affiliated with the Federation of Labour), should not extend the strike by their action; and, further, a duty and an interest were created by the fact that the Labourers' Union represented a large section of workers who might become involved in the strike, and the Federation of Labour represented organized labour generally, and the defendants (other than the printers) were all actively engaged in trying to bring about a settlement. 2. That, accordingly, the publications were made on occasions of qualified privilege; and there was no evidence that any of the defendants was actuated by malice towards the plaintiff. (*James* v. *Baird*, [1916] S.C. (H.L.) 158, followed.) 3. That there was no case to go to the jury, and judgment must be for the defendants in each action. *Semble*, That, if it were necessary, it could be held that there was a duty on the part of Labour leaders, who knew the position regarding the strike, to tell the whole of the community what happens when a strike has commenced and how the Communists take charge. (*Showler* v. *MacInnes*, [1937] W.W.R. 358, applied.) *Wells* v. *Wellington, &c., Local Bodies and Other Labourers and Related Trades Industrial Union of Workers and Others*: *Wells* v. *Croskery and Others*. (S.C. Wellington. February 22, 1952. Sir Humphrey O'Leary, C.J.)

DIVORCE AND MATRIMONIAL CAUSES.

Insanity in Matrimonial Causes. *102 Law Journal*, 185.

FACTORIES.

Dangerous Machinery—Safety Guard not kept in Position by Workman—"Provision" of Guard—Workman not instructed to use Guard—Factories Act, 1937 (c. 67), ss. 16, 119 (1). The plaintiff, a tool setter employed by the defendants in their factory, having, while making adjustments, removed from a power press the guard which had been fitted by the defendants, failed to replace the guard when testing the press in motion, and suffered injury. When first instructed on how to test the press by the defendants, the plaintiff had not been told to keep the guard in position, and the defendants were aware that he carried out tests with the guard not in position. *Held*, That in having had a guard fitted to the press the defendants had "provided" a safety appliance within the meaning of s. 119 (1) of the Factories Act, 1937, although they might not have intended the plaintiff to use it; under s. 119 (1), the plaintiff was under a duty to use the guard, and, under s. 16 of the Act, he was under a duty to keep it in position while the parts required to be safeguarded were in motion; and, therefore, he was in breach of his statutory duties under those sections. *Norris* v. *Syndi Manufacturing Co., Ltd.*, [1952] 1 All E.R. 935 (C.A.).

Safe Means of Access: A Review of the Authorities. *102 Law Journal*, 213.

FENCING.

Repair—Notice to Repair served on Adjoining Owner without Response—Fence re-erected with Material retrieved from Old Fence—Six Wires used in Completed Fence—Such Work a "repair"—Adjoining Owner liable for Half Cost—Alternatively liable "in equity and good conscience"—Fencing Act, 1908, ss. 31, 32, 33, 34—Magistrates' Courts Act, 1947, s. 59. The plaintiff served on the defendant a notice under s. 32 of the Fencing Act, 1908, to repair a part of the boundary fence between their respective properties. The defendant's reply to the notice was that she did not consider herself liable to contribute towards the expense to be incurred. In the course of repairing the fence, the plaintiff pulled down the remains of the old fence, retrieved as much of the material as he could, and used it in the re-erection. He was able to reclaim only six lengths of wire from the old fence, and, as a result, he formed the opinion that, if there had ever been a seventh strand, either it was buried or it had rusted away. A sufficient "post-and wire fence" requires to be of seven wires. In an action to recover from the defendant half the cost of the repair, the defendant contended that the alleged "repair" was a re-erection, and that, in consequence, she should not be held liable on a notice to repair. *Held*, 1. That the term "repair" in s. 31 of the Fencing Act, 1908, is used in its popular sense; and, so construed, it embraces all that the plaintiff did; and he was entitled to the sum claimed. (*Tibbits* v. *Gerrand*, (1896) 14 N.Z.L.R. 678, and *McSaveny* v. *Smith*, (1904) 24 N.Z.L.R. 245, distinguished.) 2. That, alternatively, in equity and good conscience the plaintiff was entitled, under s. 59 of the Magistrates' Courts Act, 1947, to recover half the cost of the work he was inferentially adjured to put in hand, such work being done in the interests of both parties, who shared equally in the resulting asset. *Newling* v. *Le Fevre*. (Dannevirke. February 14, 1952. Harlow, S.M.)

HUSBAND AND WIFE.

Actions by Spouses against Each Other in Tort. *96 Solicitors' Journal*, 36.

INCOME TAX.

Capital Gains and Losses in Canada. *29 Canadian Bar Review*, 907.

INFANTS AND CHILDREN.

Adopter's Residence. *213 Law Times*, 32.

Custody—Rival Claims of Parents—Separate Subject subordinated to Welfare of Infant—Legal Presumption in favour of Innocent Party, but Effect not given to That Party's Claim if Adverse to Infant's Welfare—Guardianship of Infants Act, 1908, s. 2. The Court, in deciding the question of the custody of a child, must regard the welfare of the child as the first and paramount consideration, but it is only one among several other considerations. (*In re Thain, Thain* v. *Taylor*, [1926] Ch. 676, and *Otter* v. *Otter*, [1951] N.Z.L.R. 739, referred to.) The rival claims of parents to the custody of a child are relevant as a subject separate from that of the welfare of the child, but subordinated always to the paramount consideration of such welfare. (*Lovell* v. *Lovell*, (1950) 81 C.L.R. 513, and *Hume* v. *Hume*, [1926] S.C. (Ct. of Sess.) 1008, followed.) (*In re Thain, Thain* v. *Taylor*, [1926] Ch. 676, *Otter* v. *Otter*, [1951] N.Z.L.R. 739, and *Norton* v. *Norton*, [1951] N.Z.L.R. 678, distinguished.) (*Low* v. *Low*, [1951] N.Z.L.R. 206, referred to.) There is a legal presumption in favour of the innocent parent, but effect will not be given to that parent's claim if it be adverse to the welfare of the child. There is not to be a nice judicial balancing of speculative advantages to the child, but the circumstances must raise a substantial question as to its welfare. (*Hume* v. *Hume*, [1926] S.C. (Ct. of Sess.) 1008, followed.) (*M.* v. *M.*, [1926] S.C. (Ct. of Sess.) 778, referred to.) *Semble*, 1. Section 2 of the Guardianship of Infants Act, 1908, is confined to questions as between the rights of father and mother. (*In re Carroll*, [1931] 1 K.B. 317, and *Re Collins*, [1950] 1 All E.R. 1057, referred to.) 2. There may be cases where the child's welfare is neutral, and the only matter the Court can go upon is the conduct of the parties. *Connett* v. *Connett*. (S.C. Auckland. November 30, 1951. F. B. Adams, J.)

JAPAN.

Treaty of Peace (Japan) Regulations, 1952 (Serial No. 1952/80). These Regulations contain provisions for regulating the question of Contracts, Periods of Prescription and Negotiable Instruments, and the question of Contracts of Insurance, upon the restoration of peace with Japan. The period to be allowed within which presentation of negotiable instruments for acceptance or payment or notice of non-acceptance or non-payment or protest may be made is from the commencement of these Regulations on April 29, 1952, up to and including April 30, 1953.

MILITARY TRAINING.

Refusal to comply with Notice to submit to X-ray Examination at Named Hospital and to Visual Examination Elsewhere—No Notice previously given to submit to Medical Examination before Medical Board—Notice as given Invalid—"Purporting to act"—Military Training Act, 1949, ss. 10, 14 (2), 47(3), 56 (1) (a). The most that can be required of the addressee of a notice under s. 10 of the Military Training Act, 1949, is that he shall submit himself to medical examination before a Medical Board, which, by virtue of s. 13 (2), consists of at least two registered medical practitioners. A notice requiring a submission to an X-ray examination at a public hospital and to visual examination by an oculist may properly be given under s. 14 (2), but only after the examination by a Medical Board, and, even then, only at the direction of the Regional Medical Officer. If it is given before the examination by a Medical Board, it is invalid. (*Shanahan* v. *Coulson*, (1913) 32 N.Z.L.R. 905, mentioned.) Where, by virtue of s. 47 (2), the District Officer, being the person to whom any powers of the Director of Employment have been delegated, is qualified to act in his own name without reference to the delegation, the fact that he was so acting raised the presumption under s. 47 (3) that he was acting in accordance with the terms of the delegation. *Wyatt* v. *Severinsen*. (Dannevirke. January 30, 1952. Harlow, S.M.)

PRACTICE.

Affidavit—Evidence by Affidavit—Cross-examination of Deponent—Service of Notice—Deponent out of Jurisdiction—R.S.C., Ord. 38, r. 28 (Code of Civil Procedure, R. 182). Under R.S.C., Ord. 38, r. 28, when evidence is taken by affidavit any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party may serve on the party by whom such affidavit has been filed a notice in writing requiring the production of the deponent for cross-examination at the trial. That notice may be served notwithstanding that the deponent is out of the jurisdiction, and, if the deponent is produced, his affidavit shall not be used as evidence save by special leave of the Court or a Judge. *Re Lucas (deceased), Bennett and Another* v. *Lucas and Others*, [1952] 1 All E.R. 102 (Ch.D.).

As to Trial on Affidavits and Cross-examination of Deponents, see *13 Halsbury's Laws of England*, 2nd Ed. 782-785, paras. 859-862; and for Cases, see *22 E. and E. Digest*, 523-526, Nos. *5583-5614*.

PROBATE AND ADMINISTRATION.

Points in Practice. *102 Law Journal*, 186.

PUBLIC REVENUE.

Social Security Charge—Sale of Copyright by Author—Payment to be made by Royalty on Each Book sold—Writing of Books not Business of Author—Consideration not converted from Capital into Income by Mode of Payment—Land and Income Tax Act, 1923, s. 79 (1) (a)—Social Security Act, 1938, s. 127 (1). By virtue of an agreement made between the author of a book already written and the publishers, the former assigned his copyright therein to the latter, in consideration of the publishers' bearing the whole cost of printing the book and paying the author a royalty of 2s. on every copy of the book sold. The Commissioner of Taxes assessed the author, for the purposes of the Social Security Act, 1938, upon the sum received as royalties during the income year ended March 31, 1947, as being income other than salary or wages. On a case stated by the Commissioner of Taxes pursuant to s. 23 of the Land and Income Tax Act, 1923, it was held by the learned Magistrate that the Commissioner was not entitled so to assess the author, as the payment made him by the publishers was not income. On appeal by the Commissioner from that determination, *Held*, dismissing the appeal, That the transaction between the author and the publishers was a sale of property; and, despite the use of the term "royalty" in the agreement, the consideration was not converted from capital into income in the hands of the author by the agreed mode of payment by instalments. (*Earl Haig's Trustees* v. *Inland Revenue Commissioners*, (1939) 22 Tax Cas. 725, and *British Salmson Aero Engines, Ltd.* v. *Inland Revenue Commissioners*, (1938) 22 Tax Cas. 29, referred to.) *Commissioner of Taxes* v. *Dalglish*. (S.C. Wellington. December 19, 1949. Cornish, J.)

RAILWAYS.

Negligence—Right of Way for Rail Traffic—Assumption in Favour of Engine-drivers that Vehicles and Persons will keep clear of Railway-line—Extent of Immunity of Engine-driver from Charge of Negligence—"Has reason to believe that a collision is about to occur"—Government Railways Act, 1949, s. 65. Section 65 of the Government Railways Act, 1949, is as follows: "Every employee responsible for the driving or control of any locomotive, rail-car, carriage, wagon, or other traffic on the railway-line shall be entitled to assume that all vehicles which do not use the railway-line and all persons will keep clear, and all animals will be kept clear, of traffic using the railway-line; and all such locomotives, rail-cars, carriages, wagons, and other traffic may proceed past any station, level crossing, or elsewhere on the railway-line at a speed which would be reasonable if there was no possibility of that part of the railway-line being obstructed by any such vehicle, person, or animal; and neither His Majesty the King, nor the Minister, nor any employee shall be deemed negligent merely because any employee acts on that assumption, or any such locomotive, rail-car, carriage, wagon, or other traffic proceeds at such a speed: Provided that every employee who has reason to believe that a collision is about to occur between any such locomotive, rail-car, carriage, wagon, or other traffic, and any such vehicle, person, or animal shall take all steps reasonably possible to prevent the collision, and the provisions of this section relating to negligence shall not apply to any such employee in so far as he fails to do so or to His Majesty the King or the Minister in so far as any employee fails to do so." An employee of the Railways Department "has reason to believe that a collision is about to occur" within the meaning of those words in the proviso to s. 65 when (*a*) he actually sees an obstruction (of the type indicated in that section) on the line, and so placed that a reasonable person in his position would reach the conclusion that his locomotive, &c., would collide with it if the course and speed of his locomotive, &c., were maintained, or (*b*) such an obstruction is clearly visible on the line and would have been actually seen by the employee but for the fact that the employee failed to keep a normal and proper look-out. *Turner* v. *The Queen*. (Otahuhu. March 20, 1952. Kealy, S.M.)

SALE OF LAND.

Sale of Land by Auction. *102 Law Journal*, 157.

SERVICEMEN'S SETTLEMENT.

Land Valuation Committee—Consent to Sale of Land not Suitable or Adaptable for Settlement of Discharged Serviceman—Duty of Committee in dealing with Application for Such Consent—Servicemen's Settlement Act, 1950, s. 30 (1). A Land Valuation Committee, in considering, for the purposes of s. 30 (1) of the Servicemen's Settlement Act, 1950, whether or not land is "suitable or adaptable for settlement of a discharged serviceman," is concerned only with the physical suitability or adaptability of the land for that purpose. *In re A Proposed Sale, Wallace and Others to Morton and Another.* (L.V. Ct. Auckland. April 1, 1952. Archer, J.)

TENANCY.

Option given by Tenant to Landlord to purchase Goodwill of Tenant's Business in Leased Premises—Option given in Consideration of Grant of Lease of Those Premises—Completion of Sale of Goodwill and giving of Possession on Expiry of Lease—Option "Consideration other than Rent"—Acceptance of Such Option Prohibited Act for which Penalty imposed—Contract created by Exercise of Option Unenforceable—Tenancy Act, 1948, s. 19 (2) (a). As part of an arrangement by which the plaintiff, owner of shop premises, agreed to lease them to the defendant, the plaintiff was given an option to purchase the goodwill of the millinery business of the defendant together with the right to occupy the premises, but possession thereof and completion of the sale of the goodwill were not to take place before the expiry of the lease. The option, which was dated July 22, 1949, was stated as being given "in consideration of [the plaintiff] granting to it [the defendant] an agreement to lease the said premises . . . for a term of two years less one day to commence on the 13th day of October 1948 at a rental of five pounds per week." On September 26, 1950, the plaintiff exercised the option, and, on the expiry of the lease, called upon the defendant to assign to it the goodwill of the business and to vacate the premises, which the defendant declined to do. In an action for the specific performance of the contract, possession of the premises, and damages, *Held*, 1. That, on the facts, it was not established that the parties had purported to bind themselves to one another before the passing of the Tenancy Act, 1948, and the matter had to be determined under that statute as it stood at the time when the option was given. (*Jaques* v. *Withy and Reid*, (1788) 1 H.Bl. 65; 126 E.R. 40, followed.) (*Clark et Ux.* v. *Nicholson et Ux.*, [1949] N.Z.L.R. 1076, referred to.) 2. That, at the relevant time, the Legislature, by the use of the words "any consideration other than rent" in s. 19 (2) of the Tenancy Act, 1948, expressly prohibited a landlord from seeking or accepting, not merely a sum of money, but any valuable thing or right additional to the rent in consideration of, or even on the occasion of, the grant, renewal, termination, or continuance of a tenancy to which the statute applied; and the option was such a valuable right, which was capable of being turned into money. (*Fleming* v. *Bank of New Zealand*, (1900) N.Z.P.C.C. 525, followed.) 3. That the plaintiff stipulated for and accepted from the defendant, which was either a tenant or an incoming tenant, a "consideration other than rent." as those words were then used in s. 19 (2) (*a*). 4. That, as the acceptance of the option was an act prohibited by s. 19 of the Tenancy Act, 1948, for which a penalty had been imposed with the object of protecting the public, no action could be maintained upon the contract which came into being upon the exercise of the option. (*Brightman and Co., Ltd.* v. *Tate*, [1919] 1 K.B. 463, followed.) (*Holman* v. *Johnson*, (1775) 1 Cowp. 341; 98 E.R. 1120, referred to.) The plaintiff was nonsuited. *Hutt Valley Properties, Ltd.* v. *Gamages (N.Z.), Ltd.* (S.C. Wellington. March 5, 1952. North, J.)

TORT.

Assault—Liability of Person of Unsound Mind—Knowledge of Nature and Quality of Act—No Knowledge that Act wrongful. The defendant, while suffering from mental disease, attacked and injured the plaintiff. At the material time, owing to disease of the mind, while he knew the nature and quality of his act, he did not know that what he was doing was wrong. In an action for damages for assault and battery, *Held*, That, as the defendant knew the nature and quality of his tortious act, he was liable for damages for it, even though he did not know that what he was doing was wrong. (Rules in *M'Naghten's Case*, (1843) 10 Cl. & Fin. 200, held not applicable.) (*National Coal Board* v. *J. E. Evans and Co. (Cardiff), Ltd.*, [1951] 2 All E.R. 310, applied.) *Morriss* v. *Marsden and Another*, [1952] 1 All E.R. 925 (Q.B.D.).

As to Insanity as a Defence in an Action of Tort, see *21 Halsbury's Laws of England*, 2nd Ed. 288, para. 498; and for Cases, see *33 E. and E. Digest*, 141, Nos. *186, 187.*

TRANSPORT.

Offences—Parking Vehicle within Twenty Feet before Authorized Pedestrian Crossing—"Parking"—Traffic Regulations, 1936 (Serial No. 1936/86), Reg. 4 (7) (c)—Traffic Regulations, 1936, Amendment No. 8 (Serial No. 1950/189), Reg. 2 (2)—Traffic Sign Regulations, 1937 (Serial No. 1937/159), Reg. 1 (3). When a person is charged under Reg. 4 (7) (*c*) of the Traffic Regulations, 1936, with parking his taxi-cab within 20 ft. before the nearer side of an authorized pedestrian crossing, the word "parking" bears the defined meaning given to it by Reg. 1 (3) of the Traffic Sign Regulations, 1937 (which must be read with the first-named Regulations); and the proved facts must comply with that definition before such person can be convicted of the offence in relation to parking. (*O'Brien* v. *Walker*, (1946) 4 M.C.D. 594, applied.) *Police* v. *Valentine.* (Auckland. February 6, 1952. Wily, S.M.)

WILL.

Joint Tenancy or Tenancy in Common—Gift of Specified Property to Testator's Two Sons "on condition that they agree to pay in equal shares" to Testator's Widow "for the remainder of her life . . . 10s. per week." By a home-made will, made on March 31, 1936, the testator gave to his two sons, W. L. N. and J. H. N., certain specified property "(or if sold during my lifetime such balance of the proceeds of such sale as is in my possession at the date of my death) . . . on condition that they agree to pay in equal shares to my wife . . . for the remainder of her life after my decease the sum of 10s. per week." The testator died on May 21, 1937, being survived by his wife and two sons. On January 1, 1951, J. H. N. died, and the question arose whether the gift to the sons created a joint tenancy or a tenancy in common. *Held*, That, as the effect of the condition attached to the gift was to create a personal obligation on each of the sons, the language of the condition was sufficient to indicate that the interest of the two sons in the property was a tenancy in common, and not a joint tenancy. (*Kew* v. *Rouse*, (1685) 1 Vern. 353, applied.) *Re North (deceased), North* v. *Cusden*, [1952] 1 All E.R. 609 (Ch.D.).

As to Tenancy in Common, see *27 Halsbury's Laws of England*, 2nd Ed. 752-757, paras. 1282-1285, and *34 Halsbury's Laws of England*, 2nd Ed. 354-356, paras. 398-401; and for Cases, see *44 E. and E. Digest*, 977-991, Nos. *8327-8489.*

WORKERS' COMPENSATION.

Accident arising out of and in the Course of the Employment—Hernia—Law applicable to Claims for Compensation in respect of Hernia—Workers' Compensation Amendment Act, 1943, s. 6. Section 6 of the Workers' Compensation Amendment Act, 1943, exhaustively states the law applicable to claims made for compensation under the Workers' Compensation Act, 1922, in respect of hernia. (*Bishop* v. *Fletcher Construction Co., Ltd.*, [1945] N.Z.L.R. 128, *Ludwig* v. *State Fire Insurance General Manager*, [1947] N.Z.L.R. 284, and *Campbell* v. *Oates*, [1951] G.L.R. 353, referred to.) *So held*, by the Court of Appeal on case stated by the Judge of the Compensation Court for its opinion. *Crosby* v. *Empire Rubber Mills, Ltd.* (C.A. April 9, 1952. Northcroft, Finlay, Hutchison, Cooke, JJ.)

Payment of Compensation Moneys on Death—Share of Infant—No Direction as to Investment of Such Moneys—Order to hold Moneys not necessarily to be made in favour of Public Trustee—Interest of Infant to be considered—Workers' Compensation Act, 1922, s. 33. Where no direction as to investment of compensation moneys apportioned or payable to an infant is given by the Workers' Compensation Act, 1922, or otherwise, an order made in pursuance of s. 33 of that statute to hold any moneys for an infant and apply them for his benefit does not necessitate payment to the Public Trustee; and the Court is free to consider, and bound to consider, whether the interests of the infant will be better served by payment to the Public Trustee or by payment to another trustee. (*Walters* v. *Ryan*, [1933] N.Z.L.R. 821, applied.) Thus, where, on the facts, the interests of an infant would best be served by keeping him and his interests as much as possible in the family circle, giving him the benefit of a family association with a trustee other than the Public Trustee, an order may be made for payment of the infant's apportioned share of compensation moneys to that trustee, with protection of the infant's share to the extent that commission charges against it may not be greater than those chargeable by the Public Trustee. *Re Clift (deceased), Ex parte New Zealand Insurance Co., Ltd.* (Comp. Ct. Auckland. December 31, 1951. Ongley, J.)

THE LATE SIR ARCHIBALD BLAIR.

Tributes by Bench and Bar.

On April 10, the Hon. Sir Archibald Blair died at Christchurch after a long illness, aged seventy-eight. He had served as a member of the Supreme Court Bench from February 1, 1928, to February 2, 1948.

On April 24, there was a large gathering of members of the profession in the Supreme Court, Wellington, to honour Sir Archibald's memory as a fellow-practitioner and as a Judge. On the Bench were His Honour the Chief Justice, Sir Humphrey O'Leary, Mr. Justice Gresson, Mr. Justice Hutchison, Mr. Justice Hay, Mr. Justice Cooke, and Mr. Justice North. Former members of the Supreme Court Bench, who also occupied seats with the Judges, were the Hon. Sir Robert Kennedy, the Hon. Sir David Smith, and the Hon. H. H. Cornish.

The Bench's Tribute.

His Honour the Chief Justice said :

" We have gathered to-day in this Court-room which was so familiar to him as counsel and Judge to pay a tribute to the memory of Sir Archibald Blair, who retired from this Bench as recently as 1947, after a legal career first as Judge's Associate and law student in Christchurch, then as law clerk in Wellington and Auckland, and as practitioner in Auckland and Wellington, and finally as Judge, from 1928 until his retirement.

" He was thus at various times associated with the profession in Christchurch, in Auckland, and particularly in Wellington, so it is fitting that a tribute from the whole of New Zealand should be paid in this Court.

" Of some of his qualities and qualifications as Judge I shall speak later. I say that personally he was a most likeable—indeed, lovable—man, held in affectionate regard by all, in many ways an unusual—indeed, a unique—character, and his passing is an event of great sorrow and regret to us all, and in particular we regret the sad illness, the great affliction, which darkened and clouded the closing years of his life.

" We on the Bench—present and retired members (and I should mention that Mr. Justice Northcroft, who is coming to Wellington to-day, greatly regrets his inability to be present in time for this ceremony), some of whom were associated with him in his active work over the whole of his judicial career—mourn his death and express our deep and sincere sympathy to Lady Blair, whose devotion to him in difficult times was the admiration of all, to his daughters, and to his relatives.

" His work as a Judge is well known.

" He brought to the Bench a knowledge of practical affairs, in particular of commercial dealings and practice gained in early life in a merchant's office and business, and a knowledge of practical engineering, mechanics, architecture, and construction, which his forebears bequeathed to him, which made him particularly suited for the determination of cases in which such questions were involved, and the determination of which he enthusiastically undertook, and to which his colleagues on the Bench almost equally enthusiastically assigned him.

" For the administration of criminal law, the dispensing of justice in the criminal Courts, he was particularly suited, because of his knowledge of the world, his deep human sympathy for all, his toleration and understanding of human defects and deficiencies, and his inherent sense of justice and his wise application of mercy in suitable cases.

" His knowledge of law in general was wide and efficient.

" As a colleague, he was helpful and considerate, and one with whom one could work on the most pleasant and intimate terms. For myself, I pay a tribute to his help and guidance and advice when I was elevated to the Bench, and he was the senior puisne of close on twenty years' experience.

" In expressing our appreciation of him, I shall not trespass on the ground which can be more appropriately covered by the Solicitor-General for the Crown, by the President of the New Zealand Law Society, and by the President of the Wellington District Law Society ; but I must at least make passing reference to the great deal of work for the public he did in many capacities.

" He was twice President of his local Society, and it should be known that the passing of the legislation establishing the Solicitors' Fidelity Guarantee Fund occurred just after he went on the Bench, but he was greatly responsible for the preparatory work to give effect to the commendable desire of the profession in New Zealand to provide that fund which has done so much to benefit our profession.

" He was a genial and happy man, who attracted the affection of all who knew him, and we pay this tribute to him, and we who were his friends will with deep affection cherish the memory of his having been so long with us."

The Solicitor-General.

The Solicitor-General, Mr. H. E. Evans, Q.C., was the next speaker. He said :

" I have been asked by the Attorney-General, who regrets that his absence from Wellington prevents him from being present this morning, to say a few words by way of tribute, not only to the character of the late Mr. Justice Blair, but also to his great services. Those services have been both to his clients as a member of our profession and to our country in his office as a Judge of this Court—an office in which he served for twenty years with honour and distinction.

" I am one of those fortunate enough to have known His Honour from the time when he came to Wellington forty-seven years ago to enter the offices of the late Sir Charles Skerrett's firm. Throughout that long period, there have been for me frequent contacts with him, which I shall always recall with that pleasure which comes of association with a friendly man—a man the warmth of whose impulses was more than matched by the breadth of the generosity of his nature.

" During his twenty-nine years at the Bar, he earned in the practice of his profession a New Zealand-wide reputation which marked him out for appointment to the Bench. He had in his youth been Associate to Mr. Justice Denniston, and thus he was an immediate inheritor of the traditions of the great Judges of that time.

To use words spoken on the eve of his retirement, he was ever mindful of the fact that a Judge, in dealing with human rights, human passions, human emotions, human liberty itself, is administering one of the most sacred duties that fall to the lot of man, and is rendering one of the highest services that man can render to his fellows. What humanity he displayed in that service was particularly shown when he was called upon to sentence prisoners—work which, distasteful as it was to his sensibilities, he approached with a full measure of human sympathy and a readiness to risk his belief in the better side of men. The same approach marked his work as President of the Prisons Board.

" To all that he did he applied himself with that keen interest which makes for happiness in both work and recreation. His one hobby—to use both his hands and his brain to make or to repair—gave him relief from the strain and responsibility of his official duties. He rejoiced when he was able to combine work and recreation by hearing cases involving a scientific or mechanical element. The climax of that combination occurred when, near the end of his judicial career, he presided over the simultaneous hearing by himself and six assessors of the three very large compensation claims known as the Onakaka cases. He evidently enjoyed delving into the mysteries of the making of pig-iron as well as into the legal questions involved. The reason why I mention those cases is because of my happy recollection of the kindness and consideration which he showed during the thirty-three days of those long hearings.

" The Attorney-General and I desire respectfully to join with your Honours in to-day's tribute to the man and to the great service which he has given, and in sincere and respectful sympathy with his widow and family."

The New Zealand Law Society.

The President of the New Zealand Law Society, Mr. W. H. Cunningham, said :

" I am grateful to your Honours for the opportunity of saying a few words on behalf of the members of the profession throughout New Zealand at this gathering to pay a tribute of respect to the memory of the late Sir Archibald Blair. At the same time, I should like to say that the members of the profession in Auckland desire especially to be associated in this tribute, because the late Sir Archibald practised in that city for several years soon after his admission to the Bar, and after his elevation to the Bench on many occasions presided for lengthy periods in the Supreme Court in that city.

" Many details of his early life have been referred to by His Honour the Chief Justice, and further details will be mentioned by the President of the Wellington District Law Society. His Honour the Chief Justice mentions his services to the profession as a member of the Council of the Society, particularly in the establishment of the Solicitors' Fidelity Guarantee Fund.

" The late Sir Archibald Blair had a very distinguished career, both at the Bar and as a Judge of the Supreme Court. His outstanding qualities of heart and mind, his wide knowledge and experience in commercial matters, and his special interest in things mechanical enabled him to deal efficiently and well with the great variety of cases which came before him for trial and decision.

" In criminal and civil cases arising out of motor collisions which came before him, he insisted on speeds of motor-vehicles being calculated in feet per second instead of miles per hour, and thus introduced a practice which has greatly assisted juries in these cases.

" He was always interested in the work on the criminal side of the Court, in which he had gained early experience under Mr. Tole, and later he took a keen interest in his work as Chairman of the Prisons Board.

" When he was presiding in the Criminal Court, he would sometimes give full play to his abiding sense of humour, which kept his Court in merry mood, and enabled him at times to make his summing-up to the jury both interesting and amusing, but deadly for the accused if he thought he ought to be convicted. The sentencing of prisoners gave him grave concern, and he was always willing to give a chance to any prisoner who might be likely to profit by it.

" The profession was delighted when on January 1, 1947, he received a well-earned knighthood in the New Year Honours.

" He was one of the kindest-hearted men that I have ever met. He was always willing to help any deserving cause or organization, and devoted much of his precious spare time to the rendering of personal service to such organizations. He felt deeply and was much moved when the time came to bid a formal farewell to members of the profession in his retirement in February, 1948.

" The late Sir Archibald Blair was a noble character and a great, humane, and kindly Judge, whose memory will long be revered by the profession throughout New Zealand. The profession joins with your Honours in this tribute, and in tendering respectful sympathy to his widow, who gave him such devoted service in his last sad and lengthy illness, and to the members of his family."

The Wellington District Law Society.

The last speaker was the President of the Wellington District Law Society, Mr. E. D. Blundell, who said that the members of his Society and their staffs respectfully associated themselves in every way with the tributes that had already been paid to the memory of the late Sir Archibald Blair. He had been asked by the Palmerston North branch of the Society to associate its members with the Society's tributes.

Mr. Blundell continued :

" A little over four years ago, members of this Society, together with the presiding Magistrates in Wellington, the Under-Secretary for Justice, and officers of this Court assembled in this Court to pay tribute to Sir Archibald in his retirement from the Bench. None of those present will forget the moving scene when His Honour, with that innate modesty and deep sincerity which were so essentially part of his nature, expressed his thanks for what had been said of him and his sorrow in saying good-bye. Nor shall we forget the last and final privilege granted to each of us of shaking hands with one whom we had respected as a fellow-practitioner, honoured as a Judge, and throughout liked as a man. It is sad that in so brief a time we assemble again, this time to pay tribute to his memory.

" Sir Archibald had a long, and, as was inevitable with his personality, a colourful, association with the practice of the legal profession in Wellington. In 1899, as a youth just admitted to the Bar, he worked for nearly a year as a clerk in the office of Mr. T. F. Martin. He then moved to

(*Concluded on p. 128.*)

CURIAL REVIEW OF THE DETERMINATIONS OF ADMINISTRATIVE TRIBUNALS.

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

VII. DEFECTS IN THE WRIT SYSTEM.

The writs are subject to many defects, of which the following deserve mention :

(i) The writ of mandamus is available only in respect of " ministerial " functions, while certiorari and prohibition lie only in respect of " judicial " functions. The Courts in their attempt to define these terms have not been particularly successful, and the law is in a chaotic state.[44] To add to the confusion, there is the curious circumstance that certiorari and mandamus have both been successfully sought in the same action.[45]

(ii) The writs are available only if there is no other equally convenient remedy available to the applicant. This rule has not operated too harshly on applicants, because the Courts have apparently heeded the advice of Brett, L.J.,[46] to use the writs freely. Even where an appeal procedure is provided, the writs have been granted ; but this is regarded as exceptional.[47] The Courts have further assisted applicants by insisting on a strict interpretation of statutory provisions which purport to exclude the use of the writs.[48]

(iii) Closely related to the first point mentioned above is the problem of characterization—*i.e.*, the determination by the Court of the nature of the function being performed by the administrative tribunal. The determination of the nature of the function is necessary before the Courts can proceed to the next question—namely, whether the circumstances justify the issue of a writ. It has been mentioned that the Courts have not been particularly successful in formulating a definition of " ministerial " and " judicial " ; they seem on occasion to have coloured their determination by their sympathy or lack of sympathy for the applicant's case, and have, in the words of Gordon,[49] formed a definition " which would harmonize with the conclusion they wished to reach." In other cases, they seem to have ignored the initial question of characterization, and have proceeded to issue the writ notwithstanding the fact that the availability of the writ is conditioned by the nature of the function being performed by the administrative tribunal.[50]

That the problem of characterization of the functions of administrative tribunals is not easily soluble is demonstrated by the examination of Robson by the Committee on Ministers' Powers. A full session of the Committee was devoted to an attempt to find some basis for distinction between " judicial," " quasi-judicial," and " administrative " functions, but an examination of the minutes leaves one convinced only of the extreme difficulties to be encountered in reaching definitions which can be used to differentiate between the different functions.[51] Other authors have drawn attention to the complexity of the problem.[52]

If the nature of the functions exercisable by administrative bodies were arranged on a scale according to the degree of objectivity or subjectivity which enters into the decision rendered, it might be found that the functions ranged according to the degree of subjectivity (with that possessing the highest degree of subjectivity mentioned first) would take this form :

Executive (where freedom of choice is virtually absolute).

Ministerial—*i.e.*, function exercisable by a Minister of the Crown.

Legislative.

Administrative.

Judicial.

Ministerial (where there is little or no discretion permitted to the body exercising the functions).

According to the interpretations which the Courts have applied for centuries, mandamus will lie in respect of ministerial functions where the element of discretion is small, and certiorari and prohibition will be granted to review judicial functions. The Courts have accepted these limitations in principle, and have recognized that those functions which contain a large element of discretion cannot be controlled by the Courts, as by so doing, the Courts would be usurping functions for which they are unsuited and which they were not intended to exercise. Some of the cases which follow illustrate the tendency of the Courts to enter into the field of review of other than judicial or ministerial functions because of their sympathy for the case of the applicant. They have characterized the function as " judicial " or " ministerial," and so have paid lip service to the principles that determine the availability of the writs. In *Errington* v. *Minister of Health*, [1935] 1 K.B. 249, we find Maugham, L.J., finding that, while the final act was administrative (and, therefore, not reviewable by certiorari), the preceding process was quasi-judicial, and, therefore, subject to review. In *The King* v. *Electricity Commissioners, Ex parte London Electricity Joint Committee Co. (1920), Ltd.*, [1924] 1 K.B. 171, the actions of the Commissioners resulted in legislation,

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[44] For an acute examination of the authorities, see J. Finkelman, *1 U.T.L.J.*, 322-332.

[45] *Board of Education* v. *Rice*, [1911] A.C. 179.

[46] *The Queen* v. *Local Government Board*, (1882) 10 Q.B.D. 309, 321.

[47] *Gazley* v. *Campbell and Campbell*, [1946] 3 D.L.R. 649, and *Teh* v. *Ricciuti*, [1946] 1 W.W.R. 687.

[48] *New Zealand Waterside Workers' Federation Industrial Association of Workers* v. *Frazer*, [1924] N.Z.L.R. 689, *Bruton* v. *Regina City Policemen's Association, Local No. 155*, [1945] 3 D.L.R. 437, *Re Brown and Brock and Rentals Administrator*, [1945] 3 D.L.R. 324, *R.* v. *Gelber*, [1943] 4 D.L.R. 410, and *Short* v. *Auckland Transport Board*, [1951] N.Z.L.R. 808, 813.

[49] D. M. Gordon, *10 Canadian Bar Review*, 199.

[50] In *The King* v. *Minister of Health, Ex parte Davis*, [1929] 1 K.B. 619, and *The King* v. *Minister of Health, Ex parte Yaffe*, [1930] 2 K.B. 98, there was little or no consideration of the nature of the function. It seems to have been assumed that it was " judicial " as prohibition and certiorari respectively were issued. In the former case, it would appear that the Court was impressed by the fact that, if it did not intervene at that point, the applicant would be deprived of all redress by the Courts.

[51] *2 Minutes of Evidence taken before the Committee on Ministers' Powers*, H.M.S.O., Qs. 1107-1293.

[52] C. K. Allen, *Law and Orders* (1945), 85-87, D. M. Gordon, (1933) *49 Law Quarterly Review*, 94, 98 *et seq.*, J. Finkelman, *1 U.T.L.J.*, 321 *et seq.*, and J. Willis, *53 Harvard Law Review*, 251, 279-281.

but their preliminary proceedings were labelled judicial. The same situation obtained in *New Zealand Waterside Workers' Federation Industrial Association of Workers* v. *Frazer*, [1924] N.Z.L.R. 689. In this latter case, and in others that might be cited,[53] there was a tendency to look to the procedure prescribed for the tribunal and determine the nature of the function in the light of these procedural requirements. If the Courts look to procedure *alone* in order to determine the nature of the function, they find themselves in the position of characterizing the function by reference to the procedure prescribed. Then, having determined the nature of the function in this way, they lay down rules as to the procedure which must be observed by these tribunals. It would seem, however, that, whether the function is characterized as judicial or administrative (if property rights are involved), compliance with the principles of natural justice will be demanded.[54] The judgment in *The King* v. *London County Council, Ex parte Entertainments Protection Association, Ltd.*, [1931] 2 K.B. 215, has been criticized because of the complete disregard of the nature of the function exercisable by the defendant Council, who were empowered to issue licences according to policy and their practical good sense. Their function was clearly administrative; the Council was not obliged to issue licences according to an objective standard. Because it received evidence, it was not, by reason of that fact alone, exercising judicial functions. The Court, wishing to afford a remedy, characterized the function as "judicial," as this "harmonized with the conclusion they wished to reach."[55] Many other cases could be cited to demonstrate that the problem of characterization of the functions exercised by administrative tribunals has bedevilled the writ system. It is not intended to examine the authorities further, however, and some of the other defects to which the writs are subject will be stated.

(iv) Even if the person injured by the decision of an administrative tribunal is successful in securing access to the Courts by means of the writs, and has the decision set aside, he will have failed to improve his position to any marked extent, as he must still persuade the administrative tribunal to give him the relief he is seeking. The Courts are unable to do more than quash the decision and by mandamus order the tribunal to reconsider the case. It is, therefore, possible for the tribunal to reach the same conclusion as before, having complied with the admonitions of the Court. From this point of view, the writs can hardly be regarded as satisfactory.

(v) Of necessity, curial review does not touch the substance of the decision of the administrative tribunal, because the Courts have recognized that they must not substitute their discretion for that of the tribunal to whom it was entrusted. Robson expresses the point in these words:

> the control exercised by the Courts is at bottom of a very superficial character, since it touches the form of the proceedings rather than the substance of the decision. The rules of natural justice are unquestionably valuable, both subjectively and objectively. If they are violated, injustice may be done and the parties may have a psychological sense of grievance. But even if they are observed with the utmost zeal, injustice may still be done. In short, natural justice is not nearly enough. The rules it dictates do little to ensure satisfactory decisions in the complex world of public administration in which we live.[56]

VIII. Review on Questions of Substance.

In conclusion, the writ system is scarcely adequate as a means for reviewing the actions of administrative tribunals. The writs do not give the subject the protection he needs; they are subject to many defects, perhaps the most unsatisfactory being the confusion surrounding characterization. The Courts appear to be reluctant to face the issues clearly, and admit that they have been obliged to force the writs into a Procrustean bed. What is the solution? Would it improve matters if certiorari and prohibition were made available whenever an administrative tribunal is exercising a discretion? In this way, the problem of characterization would be evaded, and the Courts could then, having found that the tribunal was exercising discretionary powers, look to:

(*a*) Matters of jurisdiction.

(*b*) Compliance with the principles of natural justice.

(*c*) Compliance with statutory provisions as to procedure.

(*d*) The adequacy of the evidence upon which the tribunal had acted.

This would leave unanswered the question of review of the substance of the decision. It might be desirable to provide a simple statutory remedy in lieu of the writs, on the lines suggested by the Report of the Committee on Ministers' Powers.[57] This solution would free the Courts from the interpretations they have applied to the writs, but would, if the Courts were to remain the reviewing body, be subject to the fatal defect that questions of substance, which in any case they are incompetent to review, would remain outside the purview of the Courts. In the United States, review of the decisions of administrative tribunals has been regulated by statute (the Administrative Procedure Act, 1946); but it is inappropriate that this experiment be examined in this article.[58]

(*To be concluded.*)

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[53] See J. Finkelman, *1 U.T.L.J.*, 331 *et seq.*

[54] *Re Imperial Tobacco Co., Ltd., and McGregor*, [1939] O.R. 213; aff. on app., [1939] O.R. 627. In *Local Government Board* v. *Arlidge*, [1915] A.C. 120, Lord Parmoor stated, at p. 142: "Whether the order of the Local Government Board is to be regarded as of an administrative or of a quasi-judicial character appears to me not to be of much importance, since, if the order is one which affects the rights and property of the respondent, the respondent is entitled to have the matter determined in a judicial spirit, in accordance with the principles of substantial justice."

[55] D. M. Gordon, *10 Canadian Bar Review*, 198 *et seq.* Gordon criticizes the judgment on the ground (*inter alia*) that the Court relied on *The King* v. *Woodhouse*, [1906] 2 K.B. 501, apparently unaware that it was reversed on appeal *sub nom. Leeds Corporation* v. *Ryder*, [1907] A.C. 420. See also *The King* v. *Minister of Health, Ex parte Davis*, [1929] 1 K.B. 619, 627, 628 (per Lord Hewart, L.C.J.: "this matter had reached its last stage but one . . . If check there is to be, it must be imposed now").

[56] W. A. Robson, *Justice and Administrative Law*, 2nd Ed. (1947) 409. See also pp. 496, 497. In his third edition, Robson refers (pp. 528, 529) to the opinions of Denning, L.J., which emphasize the limitations of review by the Courts. See also C. M. Schmitthoff, "The Growing Ambit of the Common Law," (1951) *29 Canadian Bar Review*, 469, 478-482, for a consideration of the scope of the prerogative writs.

[57] Cmd. 4060, 1932, pp. 97, 98.

[58] Reference might be made to *Warren's Federal Administrative Procedure Act and the Administrative Agencies* (1947) for details of the United States' experiment.

SIR THOMAS MORE THE LAWYER.

By Richard O'Sullivan, Q.C.

III.—In The Tower.

On May 16, 1532, Sir Thomas More resigned the office of Lord Chancellor. It was the morrow of the day on which the Catholic Bishops and Archbishops, yielding before the constant pressure of the King, had given way, or given ground.

During the years that he had been in office (1529-32) Sir Thomas More had naturally been aware of the growing tension between the King and his Secretary of State Thomas Cromwell, on the one hand, and, on the other hand, the Archbishops and Bishops of the two provinces of the Church in England, who sought against heavy odds to maintain their constitutional rights under Magna Charta: "That the Church in England shall be free and shall have all its laws in their integrity and its liberties unimpaired."

While Lord Chancellor, Sir Thomas More had been able in his own case, to some extent, to avoid or mitigate the tension. Long ago on his reluctant entry into "the King's most noble service" the King had read him "the most virtuous lesson that ever Prince taught his servant, willing him first to look unto God and after God to him." And so, when, not for the first time, the King again moved him to weigh and consider his great matter, the Lord Chancellor, falling down upon his knees:

> humbly besought His Highness to stand his gracious Sovereign, as he ever since his entry into His Grace's service had found him; saying there was nothing in the world had been so grievous unto his heart as to remember that he was not able as he willingly would, with the loss of one of his limbs, for that matter any thing to find whereby he could, with his conscience safely serve His Grace's contention.

To which the King answered that:

> if he could not therein with his conscience serve him, he was content to accept his service otherwise; and using the advice of other of his learned counsel, whose consciences could well enough agree therewith, would nevertheless continue his gracious favour towards him and never with that matter molest his conscience after.

Afterwards, having so far failed to induce or compel the Pope to grant an annulment of his marriage with Catherine of Aragon (the cause was still pending in the court at Rome), Henry VIII, acting under the inspiration of his Secretary of State Thomas Cromwell, decided, in the language of Bishop Stubbs, that he would be in England "the Pope, the whole Pope, and something more than the Pope." Hence the compulsion he now sought to exercise upon the English Bishops and Archbishops; hence the resignation, on May 16, 1532, of the Lord Chancellor.

On January 25, 1533, Henry went through a secret ceremony of marriage with Anne Boleyn, who was now with child. In March, 1533, the Bull for the appointment of Thomas Cranmer as Archbishop of Canterbury arrived from Rome. Immediately afterwards the famous Statute of Appeals, which abolished appeals from the Courts Christian to Rome and gave to the King (now claiming to be emperor) sole jurisdiction in spiritual as well as temporal causes, was passed rapidly through all its stages. On April 11, 1533 (it was Good Friday), the new Archbishop of Canterbury wrote to the King humbly requesting to be allowed to determine his matrimonial cause in his own court. Having received a commission to do so, he cited Queen Catherine to appear before him at Dunstable. On May 10 he pronounced her contumacious for not appearing. On May 23 he gave sentence that the King's marriage with Catherine was invalid and void from the beginning.[1]

On June 1, 1533, Anne Boleyn was crowned Queen in Westminster Abbey. Thomas More was invited by three Bishops, Durham, Bath, and Winchester—all of them at this time King's men—to bear them company at the ceremony. They sent him money to buy a gown for the occasion. More accepted the money but stayed at home, and explained at their next meeting that as he had granted one request he thought he might be bolder to deny the other. Recalling the story of a certain Roman Emperor, he added:

> Though your Lordships have in the matter of the matrimony hitherto kept yourselves pure virgins, yet take good heed that you keep your virginity still; for some be there that by procuring your Lordships first at the Coronation to be present, and next to preach for the setting forth of it, and finally to write books unto all the world in defence thereof, are desirous to deflower you, and they will not fail soon afterwards to devour you. It lieth not in my power but that they may devour me; but God being my good Lord, I will provide they shall never deflower me.

On March 23, 1534, the Pope at last gave a decision affirming the validity of the marriage between Henry and Catherine of Aragon. On March 30, 1534, an Act was passed for the succession of the Crown, entailing it on the children of the King by his marriage with Anne Boleyn. In the Preamble to this Act, the marriage between Henry and Catherine was declared to be against the laws of God and invalid, which involved a denial of the papal authority. It was also enacted that all subjects of full age should be obliged to take a corporal oath, in the presence of the King or his Commissioners, to observe and maintain the whole effect and contents of the Act. The penalties of refusal were those of misprision of treason. Parliament omitted to prescribe a formula for the oath. The formula used by the Commissioners was wider than the scope of the Act, and included an affirmation of the truth of the Preamble.

On April 13, 1534, Sir Thomas More as the first layman was summoned to Lambeth, to take the oath before the Lords Commissioners, Cranmer, Archbishop, Audley, Lord Chancellor, and Cromwell, Secretary of State. After a sight of the statute, he was prepared to swear to the succession, but declined to accept the Preamble, which invalidated the marriage with Catherine and denied the authority of the Pope. The King refused to accept the oath to the succession without the Preamble, as such a course "might be taken as a confirmation of the Bishop of Rome's authority and a reprobation of the King's second marriage."

[1] Then "by a like mockery of law and justice," says Dr. Gairdner, "he held a secret inquiry at Lambeth on May 28 as to the King's marriage with Anne Boleyn which was found to be lawful": *History of the English Church in the Sixteenth Century*, 141.

After detaining him four days in the custody of the Abbot of Westminster, the King, on the importunity of Anne Boleyn,[2] committed Thomas More to perpetual imprisonment in the Tower. From the Tower More wrote to his daughter :[3]

> I may tell thee, Meg. they that have committed me hither for refusing of this oath, not agreeable with their statute, are not by their own law able to justify mine imprisonment.

In the winter session of 1534, an Act was passed declaring that the King should be taken, accepted, and reputed the only supreme head in earth of the Church of England, and that he should have annexed and united to his imperial Crown the title and style and all honours and dignities thereto belonging and appertaining. It was also made high treason for any person after February 1, 1535, maliciously to wish, will, or desire by words or writing to deprive the King of any dignity, title, or name of his royal estate.

A new Act touching the succession set forth the (new) form of oath which was to be binding on every subject of the realm. An Act of Attainder (that is, of condemnation without trial) of Misprision of Treason was also passed against Thomas More for having *unlawfully* refused the oath tendered to him some months before.

In the spring of 1535, Cranmer, Audley, and Cromwell and others of the King's Council visited the Tower more than once and demanded that Thomas More should make a " plain and terminate answer whether he thought the Act of Supremacy was lawful or not." He must " either acknowledge and confess it lawful that the King should be supreme head of the Church of England, or else utter plainly his malignity." The prisoner in the Tower refused to break silence. The execution in turn of several Carthusian monks (whom he saw going to their death " as bridegrooms to their marriage "), and of Bishop Fisher, failed to shake his resolution.

On July 1, 1535, at Westminster Hall, Thomas More was indicted for treason before the King's Commissioners, Audley and Cromwell and the rest. There were four counts in the indictment. The first count charged him with having maliciously kept silence (*malitiose poenitus silebat*) on May 7, 1535, when, being asked in the Tower of London by the King's command whether he accepted and reputed the King as head of the Church, he declined to answer, and said only :

> I will not meddle with any such matters. For I am fully determined to serve God and to think upon His Passion and my passage out of this world.

The second count charged him with having written in the Tower to Bishop Fisher maliciously upholding his attitude of opposition to the King's supremacy and informing him of his own silence under examination. The third count alleged that in correspondence within the Tower he maliciously advised and encouraged Fisher to refuse an opinion on the supremacy and compared the Act to a two-edged sword. The fourth count alleged that on June 12, 1535, in the Tower, in conversation with Rich, the Solicitor-General (prosecuting counsel at the trial), he maliciously spoke his mind that it was beyond the power of Parliament to make the King head of the Church, and thus deprived him of his new statutory title.

The trial has been described by Lord Campbell as " judicial murder, the blackest crime that ever has been perpetrated in England under the form of law."[4]

For all his knowledge that the issue was predetermined, Sir Thomas More sought as a lawyer to conduct his defence. On the issues of fact arising under the second and the third counts, the alleged correspondence having been destroyed, there was no evidence before the Court save More's own innocent explanation. On the issue of fact in the fourth count he indignantly denied the evidence of the Solicitor-General :

> If I were a man, my Lords, that did not regard an oath, I need not stand in this place at this time as an accused person. And if this oath of yours, Mr. Rich, be true, then I pray that I may never see the face of God, which I would not say were it otherwise to win the whole world. In good faith, Mr. Rich, I am sorrier for your perjury than for my own peril.

To the allegation in all the counts that he spoke or acted maliciously, he objected there was no evidence of malice. To the first charge of silence he answered :

> For this my taciturnity and silence neither your law nor any law in the world is able justly and rightly to punish me unless you may besides lay to my charge either some word or some fact in deed.

In making this answer he will have had in mind the doctrine of Christopher St. German in the *Doctor and Student* in relation to divine and human law :[5]

> Man may only make a law of such things as he may judge upon, and the judgment of man may not be of inward things, but only of outward things ; and nevertheless it belongeth to perfection that a man be well ordered in both, that is to say, as well inward as outward. Therefore it was necessary to have the law of God, the which should order a man as well of inward things as of outward thing.

The trial and condemnation of Thomas More introduced a confusion between human and divine law which darkened the old distinctions of Christian jurisprudence, between the law of God, the law of reason (or of nature), and the law of the land.

After verdict and before sentence, Thomas More spoke his mind upon the matter : " Seeing that I see ye are determined to condemn me (God knoweth how), I will now in discharge of my conscience speak my mind plainly and freely touching my indictment and your statute withal." He protested that an indictment grounded on an Act of Parliament directly repugnant to the laws of God and of Holy Church was, in law among Christian men, insufficient to charge any Christian man. It was, moreover, against reason that one small realm should make a particular law disagreeable with the general law of the Universal Church, just as it would be against reason for the City of London to make a law against a statute binding the whole realm. Finally, the new legislation was contrary to the laws and statutes of England yet unrepealed, contrary to the rule of Magna Charta : that the Church in England

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[2] According to Rastell, Anne Boleyn made the King a great banquet at Hanworth twelve miles from London, and allured him with her dalliance and pastime to grant unto her this request, to put Thomas More and John Fisher to death : *Harpsfield, Early English Text Society*, 225.

[3] In the opinion of Lord Campbell, the Commissioners had no right to foist the question of the Pope's supremacy or the King's supremacy into an oath which should have been limited to the succession.

[4] Lord Macaulay has denominated the State Trials of those days as " murder preceded by mummery." On June 25, 1535, the King had ordered the preachers to set forth to the people the treasons of the Bishop of Rochester (who had already been executed) and of Thomas More, who was awaiting trial. The record of the trial in Harpsfield, which is based upon Roper and the Paris Newsletter (said to have been written by Erasmus), must now be read in the light of the *Acta Thomae Mori* of Professor de Vocht (1947).

[5] *Doctor and Student*, 16th Ed., 10 ; and see Aquinas's *Summa Theologica*, Ia, IIae, Q. 91, A. 4 : " Whether there was any need for a divine law ? "

shall be free and shall have all its laws in their integrity and its liberties unimpaired.

The confusion of the provinces of divine and human law and of the old order of Church and State worked a moral and constitutional revolution. "The revolution effected by Henry VIII," says Dr. Gairdner, "was a thing without a parallel in history, and it is hard to realize it all at the present day. Professing to the last a zeal for religion, which in early days was not altogether insincere, he had destroyed the old economy of the Church, suppressed the monasteries, confiscated an enormous mass of property, and hanged, beheaded or intimidated all who looked for the restoration of the system he had broken down." "The legislation which had deposed the Pope and made the Church an integral part of the State had made it clear that the morality of the provisions of the law or the reasons which induced the Legislature to pass it, could not be regarded by the Courts . . . . There was no need therefore for the Courts of common law to be anything but useful servants of the Crown."[6]

It is usual among constitutional lawyers to pretend that the turning-point in the Constitution was at Bosworth Field in 1485. "We have imagined the Middle Ages as rolling away when the Crown rolled off the head of Richard III on Bosworth Field . . . More would perhaps have been differently judged if our text-books, instead of beginning the modern period of English history with 1485, had begun it with the Reformation Parliament of 1529-36. With these years a new world begins."[7]

"Thomas More," we may say with Professor Chambers, "died for the right of individual conscience as against the State; for the belief that there is an ultimate standard of right and wrong beyond what the State may at any moment command." The figure that stood quiet and unafraid on the scaffold at Tower Hill on a July morning in 1535 illustrated the full measure of human worth and dignity: the ability to weigh two duties and to balance them one against the other. The last words he spoke on the scaffold contained a message to the people whom he loved and a special message to the King. He asked "that they should pray for him in this world and he would pray for them elsewhere," protesting that he died "the King's good servant but God's first."

It is a satisfaction in these days to recall that the Bar of England has always cherished the memory of Sir Thomas More. Throughout the centuries individual members of the Inns of Court, and in particular of Lincoln's Inn, have sought to do him honour. Long before the Early English Text Society gave us the trilogy of Tudor Lives of More, and before Professor Chambers wrote his classical *Thomas More*, Mackintosh and Campbell and Foss had made him a hero in three most excellent and tolerant biographies. To-day, all over the world, as we have seen, learned men and lawyers are uniting to do him homage. There are societies and institutions in his name in Australia and New Zealand and in many of the States of the American Union, in San Francisco and Detroit and Chicago and St. Paul, Minneapolis, and Washington, and, nearer home, in Brussels.

While the lawyers of the French tradition have as their patron St. Yves, who was in fact a canonist and an ordained priest, and while the lawyers of the Spanish tradition have as their patron St. Raymond of Pennafort, a priest also and a canonist, it is good to know that men of the common-law tradition may choose to have for their patron a layman who wore a stuff gown in the City of London and in Westminster Hall, and who, in the light of contemporary history, must surely be recognized as the most illustrious representative of the common law.

[6] *4 Holdworth's History of English Law*, 185, 186, 188. At p. 185 he cites *Coke's Fourth Institute*, which shows that the Judges under pressure from Thomas Cromwell, acting by express commandment of the King, finally agreed that a man that was forthcoming might be attainted of high treason by Parliament without being called to make answer. James I reports a saying of Burleigh that he knew not what an Act of Parliament could not do in England (*ibid.*, 186.) It is a theory of might, not of right.

[7] R. W. Chambers's *Thomas More*, 368. For the character of the legislation of the Reformation Parliament, and in particular of the Statute of Appeals, see *1 Holdsworth's History of English Law*, (1922), 588-592. For the genesis of the Statute of Appeals, see (1949) *English Historical Review*, "The Evolution of a Statute."

As We see Ourselves

And now let me in conclusion refer briefly to a topic rather psychological than ethical, of which we have heard a good deal in public lately. I mean the effect of the profession of advocacy upon the mental attitude of those who practise it. I am not concerned to deny that the continuous practice of advocacy has a certain effect upon the habit of mind of the advocate. His nature is inevitably subdued to what it works in, like the dyer's hand. As practice and experience render him more and more useful and skilful in his own sphere, the very specialization of his abilities tends to disqualify him for other spheres of intellectual or practical activity. His mind is constantly preoccupied with the presentation of facts and arguments relating to things which other people have done or are doing. A recent acute critic who in no unfriendly fashion describes lawyers as an order of men admirable in their private and professional capacities, trusty friends, delightful companions, stricter perhaps than any other civil profession in all rules of honour, nevertheless strenuously deprecates their predominance in public life. "Lawyers," he says, "see too much of life in one way, too little in another to make them safe guides in practical matters. Their experience of human affairs is made up of an indefinite number of scraps out of other people's lives. They learn and do hardly anything except through intermediaries." He admits the value of their contribution to the conduct of public affairs, but he would not allow them a position of control. This is shrewd criticism. It is true that the legal mind is apt to overestimate the efficacy of words. When a problem presents itself to the advocate he is apt to approach it from the point of view of seeking not necessarily the best practical solution, but the solution which will best lend itself to verbal justification. When facts are put before him he instinctively proceeds to interest himself in arranging them in an attractive pattern for oral presentation. He is apt to ask himself with regard to a proposed course of action—How will this state ? rather than—How will this work ? and, as Bacon puts it, to "desire rather commendation of wit, in being able to hold all arguments, than of judgment in discerning what is true: as if it were a praise to know what might be said and not what should be thought." (Rt. Hon. Lord Macmillan, "The Ethics of Advocacy," from *Law and Other Things*.)

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Mr. Wig et Uxor.—We have news from the House of Lords that, in a Scottish Revenue appeal case heard there recently, two barristers who were husband and wife appeared for the respondents. This is indeed a feather, or perhaps two feathers, in the Scots headgear. Nevertheless, we confess we are not altogether happy about this situation. If the husband appears as senior counsel, it would be a strain upon the wife's conscience to refer to her spouse as " my learned leader " ; on the other hand, if she takes the lead, it would be most humiliating to have to speak publicly of " her learned junior." The male barrister, whether or not he occupies the front rank of political, humanitarian, or university thought, remains at heart a mid-Victorian. To his mind, his wife looks best against a simpler and less spectacular background, and he has no wish to see her in the role of Mrs. Vincent Crummles, who, readers of *Nicholas Nickleby* will remember, first dazzled her future husband by standing on her head on the butt end of a spear, surrounded by blazing fireworks.

The Lemon Tree.—A bitterly contested action in Victoria recently arose from the claim by a nurseryman for £10,000 for the loss of a lemon tree which he described as the only seedless and thornless lemon tree in existence. " It has taken me thirty years to develop," he said in evidence, " and I doubt whether you will see the same thing again for many a long day." It seems that he sold his property in February, 1951, but claimed that it was an implied term of the agreement for sale and purchase that the purchaser would not do or permit any action that would destroy the lemon tree on the land. He alleged that he could have transferred the tree to his new property and grown from it stock that he would have tried to sell in the United States. On his return from a holiday a month later, and after the contract had been completed, he found that the tree had been ripped out in home-building operations, and was as dead as mutton. On argument, Lowe, J., held that the evidence showed that the tree could have been removed in the time allowed under the contract for sale ; and he directed the jury to find for the defendant.

The Obscene Touch.—In this era of frank fiction and franker biography, it is not always easy to determine when life in the raw lapses into indecency, but few will disagree with the opinion of Stanton, J., in confirming the conviction in the *Laughs* case, that the four stories that occasioned the prosecution were of a very poor sexual quality indeed. Amongst the several modern publications which counsel for the appellant invited the Judge to read was *Boswell's London Journal, 1762-1763*, prepared for the press by Frederick A. Pottle, Sterling Professor of English at Yale University. This was one of the sensations of the 1950 publishing season. In the preface, Christopher Morley, the famous American critic, says that he doubts whether it would be a book for Doctor Johnson, who would perhaps have said of it : " Sir, he has scandalized himself into immorality."

" It does seem, if I may say so, Doctor, a trifle immoral."

" Alas, my dear sir, I fear that in the long course literature has no morals whatever."

This point of view seems impliedly recognized by the British Home Secretary when he was asked earlier this year in the House of Commons whether, in view of the fact that the Police were issued with a list of books the possession of which was likely to infringe the law, and which they were authorized to seize, the booksellers' trade could be supplied with a list for their guidance. He replied that the only list of obscene publications circulated to the Police was not of the kind described, nor did it authorize the seizure of books : he had no power to decide whether any particular publication was obscene or to authorize its seizure. The list merely set out the titles of books which had already been condemned by the Courts over a given period. In New Zealand, *Gangster Stories* and *Laughs* have fallen under this ban, although *Health and Sunshine* and Boccaccio's *Decameron* have emerged from the test naked and pale, but unshaken.

The Frustrated Greyhound.—The overcrowding of bars and the 5 p.m. to 6 p.m. problem which has taxed both the patience and the ingenuity of the Licensing Control Commission remind Scriblex of a recent story which he passes on to the canine fanciers of the profession to add to their " shaggy dog " collection. It concerns a greyhound who was on his way to the races, with his running shorts packed in a small suitcase. He had to travel by underground in order to reach his destination, but, after he had been in the train a short while, he realized that he was travelling in the wrong direction. When the train stopped, he started to get out, only to be pushed back by hundreds of pekinese who swarmed into the carriages. He had exactly the same experience at the next station, but he managed to alight at the third, and immediately complained to the stationmaster in heated tones. This official retorted : " Well, it's entirely your own fault if you choose to travel during ' peak ' hours."

Brief Note.—Practitioners having any actions pending against the State of Bahawalpur should note that Mr. Justice McNair has found that the certificate of the Commonwealth Relations Office is conclusive as to the fact that this State is not within Her Majesty's Dominions : *Sayce* v. *Ameer Ruler Sadiq Mohammad Abbasi Bahawalpur State*, [1952] 1 All E.R. 326. Difficulties of counsel for the plaintiff in respectfully giving to the defendant its full title recall to Scriblex that some years ago a well-known Gisborne counsel whose firm had issued a writ against the Guardian Trust and Executors Co. of New Zealand, Ltd., told the Court of Appeal in opening that, for the sake of brevity, and to assist the Court, he would refer to the respondent as the " Trust Company." He then proceeded to read otherwise every word of the writ—sixty-four pages long.

Reason and Law.—" Reason is the life of the law ; nay, the common law itself is nothing else but reason . . . The law is the perfection of reason " : *1 Coke's Institutes*, 976.

" Let us consider the reason of the case. For nothing is law that is not reason " : per Sir John Powell in *Coggs* v. *Bernard*, (1703) 2 Ld. Raym. 909, 911 ; 92 E.R. 107, 109.

" If the animals had reason, they would act just as ridiculous as we menfolk do " : Josh Billings, 1818-1885.

THE LATE SIR ARCHIBALD BLAIR.

(Concluded from p. 121.)

Auckland, returning to Wellington again in 1905, this time in response to an anonymous advertisement for a managing clerk, which proved to emanate from the then firm of Messrs. Skerrett and Wylie. He held the position of managing clerk in that firm until 1910, when the firm amalgamated with Messrs. Chapman and Tripp. Shortly after the amalgamation, and in the same year, he was admitted to partnership in the new firm. He remained a partner in that firm until his elevation to the Bench in 1928. In 1926, when his then senior partner, Mr. Skerrett, was appointed to the office of Chief Justice, Sir Archibald became head of the firm, the name of which was then altered to Messrs. Chapman, Tripp, Blair, Cooke, and Watson.

" In the practice of the profession in Wellington, Sir Archibald soon achieved distinction. Certainly he had the great advantage of working under and with that great lawyer the late Sir Charles Skerrett, but that of itself would not have sufficed. He attained the forefront of the profession because of his natural talent for the law, his sheer ability, and his wide and sympathetic understanding of human problems and affairs. His practice ranged over almost every branch of the law, and his services and advice were always in demand.

" When one considers he was so preoccupied with his professional work, it becomes all the more surprising to note that Sir Archibald somehow found the time for a very lengthy period to devote his services in the interests of his fellow-practitioners in the Wellington District. Continuously from 1912 until his appointment to the Bench in 1928, he was a member of the Council of this Society. That fact alone tells cogently of the confidence reposed in him by members of the profession. On two occasions, in 1917 and again in 1926, he was President of this Society, an honour attained by only five other practitioners during the long history of the Society. Those familiar with the many and varied demands made upon members of the Council will be able to appreciate how great were the services Sir Archibald gave to his fellow-practitioners in the Wellington district.

" Our memory of Sir Archibald would long remain if he had left us nothing but the record of his eminence in the profession and his great services as a Judge. These we acknowledge with respect and gratitude. But above all do we wish to pay our humble tribute to the man we knew, to the man who was our friend. There was that in Sir Archibald which drew to him without reserve the deep and abiding affection of all those who were associated with him. His was a simple, sincere, and kindly nature. He had a genuine concern for the troubles and misfortunes of others, and, so far as was consistent with his duty, he would do all within his power to remedy them. There are many of a later generation who have benefited through his shrewd advice on matters found nowhere but from the book of experience. With his passing he has left us not only a memory but also the reminder that mundane matters will always pale before the respect and affection of one's friends.

" To his widow and members of his family we also offer our deep and sincere sympathy."

PRACTICAL POINTS.

1. Joint Family Homes.—*Subsequent Separation of Spouses—Revesting of Family Home in Settlor—Procedure—Joint Family Homes Act, 1950, s. 8—Married Women's Property Act, 1908, s. 23.*

QUESTION: Shortly after the Joint Family Homes Act, 1950, came into effect, my client (the husband) settled the matrimonial home, which was in his name solely, under that Act, and the home thereupon became vested in the husband and wife as joint tenants. The spouses have now separated under a deed of separation, and the home is let to tenants. The husband is now concerned at the fact that one half share is vested in his wife, and that, in the event of the wife's surviving him, the home will become solely vested in his wife, and will not devolve according to his will. Is it possible for the home to be revested in him solely? If so, what is the procedure? If so, could the wife claim under s. 23 of the Married Women's Property Act, 1908?

ANSWER: The answer to your question will be found in s. 8 (1) (e) of the Joint Family Homes Act, 1950, as amended by s. 10 of the Joint Family Homes Amendment Act, 1951.

The procedure is by way of application to the District Land Registrar. The District Land Registrar may cancel the registration under the Joint Family Homes Act, 1950, where neither the husband nor wife resides on the land, or where the land has ceased to be used exclusively or principally as a home for the husband and wife or either of them and for such of the members of their or his or her household (if any) as for the time being reside in the home.

Before cancelling, the District Land Registrar must give twenty-eight days' notice of his intention to cancel to the wife, who within the twenty-eight days may appeal to the Magistrates' Court against the proposed cancellation. On cancellation, the husband would become the sole registered proprietor of the land again: s. 9 (*b*) of the Joint Family Homes Act, 1950.

Your second question (as to s. 23 of the Married Women's Property Act, 1908) is really outside the scope of Practical Points. The opinion of counsel should be sought, but reference may be made here to *Barrow* v. *Barrow*, [1946] N.Z.L.R. 438, and to the recent discussion of that case by Fell, J., in *Thomson* v. *Thomson*, [1951] N.Z.L.R. 1047. X 1.

2. Gift Duty.—*Purchase by Relative of Land for Less than Government Valuation—Liability for Gift Duty not desired—Death Duties Act, 1921, s. 49.*

QUESTION: A father has entered into a written agreement with his son for the purchase by the son of his land for the sum of £9,000. The land is valued by the Government at £9,100. £100 was paid in cash on execution of agreement; the balance (£8,900) will be paid one month after the agreement, when title is to be taken. It was not intended by the parties that any gift duty should be payable, it being considered that the amount of the gift was only £100. But will the £8,900 be a future benefit for the purpose of s. 49 of the Death Duties Act, 1921, thus making gift duty payable on £9,000? If gift duty is so payable, is there any way of legitimately avoiding payment, as no gift was intended except to the extent of £100, an inadequate consideration?

ANSWER: It would appear that s. 49 of the Death Duties Act, 1921, does operate so as to render gift duty payable on the sum of £9,000, for there is present the element of inadequacy of consideration, and the only cash payment was the sum of £100: see *Taylor* v. *Commissioner of Stamp Duties*, [1924] N.Z.L.R. 499, and *Commissioner of Stamps* v. *Finch*, (1912) 32 N.Z.L.R. 514. But it is submitted that the agreement could now be cancelled by the parties under s. 2 of the Death Duties Amendment Act, 1950. No gift duty would be payable then, and the parties would be at liberty to enter into a fresh transaction. On the facts submitted, gift duty would not be payable if the parties refrained from entering into a prior agreement but paid the £9,000 cash on the execution of the transfer. Gift duty would also be avoided if an agreement were entered into but the consideration made at least equal to the present Government valuation or to a special valuation, if the Department called for one: see, for example, the precedent in (1941) 17 NEW ZEALAND LAW JOURNAL, 165, and in *Adams's Law of Death and Gift Duties in New Zealand*, 2nd Ed. 245. X.1.