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VENDOR AND PURCHASER: NOTICE OF FORFEITURE.

IT would appear that a vendor of freehold land, who wishes to exercise his remedies against a purchaser in possession under an agreement for sale and purchase, wholly unconnected with a lease, must, as the law now stands, give notice to the purchaser by reason of s. 94 of the Property Law Act, 1908, before he can proceed to enforce his rights.

Sections 93 to 96 of the Property Law Act, 1908, are under the special heading "Forfeiture." They appear in "Part IX—Leases."

In s. 93, there are a series of definitions for the purposes of the three next succeeding sections. They are, so far as material to the present discussion, as follows:

> 93. For the purposes of the three next succeeding sections . . .
>
> "Lease" includes an original or derivative under-lease, a grant securing a rent by condition, and an agreement for a lease where the lessee has become entitled to have his lease granted:
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> "Lessee" includes an original or derivative under-lessee, a grantee under any such grant as aforesaid, a person entitled under an agreement as aforesaid, and the executors, administrators, and assigns of a lessee:
>
> "Lessor" includes an original or derivative under-lessor, a grantor as aforesaid, a person bound to grant a lease under an agreement as aforesaid, and the executors, administrators, and assigns of a lessor:
>
> "Under-lease" includes an agreement for an under-lease where the under-lessee has become entitled to have his under-lease granted:
>
> "Under-lessee" includes any person deriving title through or from an under-lessee.

Then the following section, s. 94, with which we are particularly concerned, is as follows:

> 94. *Restrictions on and relief against forfeiture of leases.*—(1) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable by action or otherwise unless and until the lessor serves on or sends by registered letter to the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and in any case requiring the lessee to make compensation in money for the breach, and the lessee fails within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and to make reasonable compensation therefor in money to the satisfaction of the lessor.
>
> (2) Where a lessor is proceeding by action or otherwise to enforce such a right of re-entry or forfeiture, or has re-entered without action, the lessee may, in the lessor's action (if any), or in any action brought by himself, or on motion, apply to the Court for relief; and the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the circumstances of the case, may grant or refuse relief, as it thinks fit; and in case of relief may grant the same on such terms (if any) as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court in the circumstances of each case thinks fit.
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> (3) Where any such relief as aforesaid is granted, the Court shall direct a minute or record thereof to be made on the lease or otherwise.
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> (4) This section applies although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of any Act of Parliament.
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> (5) For the purposes of this section a lease limited to continue so long as the lessee abstains from committing a breach of covenant shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach.
>
> (6) This section applies to any right or option to purchase any land where the purchaser is in possession of that land.
>
> (7) This section does not extend—
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> (*a*) To a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest; or
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> (*b*) In the case of a lease of any premises licensed under the Licensing Act, 1908, to a covenant not to do or omit any act or thing whereby the licence may be lost or forfeited.
>
> (8) This section shall not affect the law relating to re-entry or forfeiture in case of non-payment of rent.
>
> (9) This section applies to leases made either before or after the coming into operation of this Act, and shall have effect notwithstanding any stipulation to the contrary.

A brief examination of the section will show that its drafting is designed to deal with leases and the incidents of leases, and with them alone. Subsection 6 is an intrusion into that scheme.

It will be noted that the first five subsections, as well as the seventh, all use the word "lease" specifically. The keynote of the section is contained in subs. 1, which provides:

> A right of re-entry or forfeiture under any proviso or stipulation in a *lease*, for a breach of any covenant or condition in the *lease*, shall not be enforceable by action or otherwise unless and until the *lessor* serves on or sends by registered letter to the *lessee* a notice specifying the particular breach complained of . . .

As was seen above, all the italicized words are specially defined in s. 93 for the purpose of the section in which they appear. There is every indication that the whole of s. 94 applies to leases, with or without a purchasing clause. This can be gathered from the Part of the Property Law Act, 1908, in which s. 94 appears, as well as from the reiteration in all the subsections, except subs. 6, of the words "lease", "lessor", and "lessee", yet it has been held that any vendor of freehold land subject to an agreement for sale and pur-

chase, wholly unrelated to a lease, must comply with s. 94 (1) before he can exercise his remedies against a purchaser in possession.

Subsection 6 is as follows :

> This section applies to any right or option to purchase any land where the purchaser is in possession of that land.

It would seem almost obvious that that subsection in its context applies the remainder of the section, which deals exclusively with leases, to leases containing a right of option to purchase the leased land. But it is not so obvious, as decided cases demonstrate.

In the first place, is it apposite to refer to the remedies of a vendor of land under an agreement for the sale and purchase of freehold as " a right of re-entry or forfeiture under any proviso or stipulation in a lease " ?

The chief remedy of a vendor, if the agreement for sale and purchase contains a condition entitling him to rescind on the happening of certain events, is to rescind the agreement. In the absence of such a condition, the vendor can rescind only if the conduct of the purchaser is such as to amount to a repudiation of the contract. If the vendor, being within his rights, rescinds the contract, he may resell the property as owner, and the purchaser forfeits his deposit, whatever the result of the sale. The vendor may sue for specific performance, or he may maintain an action for damages against the purchaser for breach of contract. If one tries to read any of these remedies, apart from resale, into subss. 1-5 and subs. 7 of s. 94 of the Property Law Act, 1908, difficulties immediately arise. These difficulties emphasize the inclusion of subs. 6 as being intended to relate to rights of purchase or options to purchase contained in a lease.

We must, however, consider the authorities that purport to interpret s. 94. But, first, we refer to *Nash* v. *Preece*, (1901) 20 N.Z.L.R. 141, 147, a decision of the Court of Appeal, which has been cited several times in judgments affecting s. 94.

In *Nash's* case, there was a motion under s. 25 of the Supreme Court Act, 1882, for relief against forfeiture of an option to purchase under a lease. That section was as follows :

> The Court may on motion relieve against a forfeiture of any lease or of any right to purchase (where the purchaser is in possession) for the breach of any covenant, condition, or agreement, if the Court is of opinion that such breach has been committed through accident or mistake, without fraud or gross negligence, and that no injury has happened to the landlord or vendor other than can be compensated in damages, and may in granting such relief order the person relieved to pay such damages and costs as to the Court may seem meet.

It must be noted here that ss. 25 and 26 came under the special heading : " Relief in Respect of Breach of Covenant or Contract."

The Court of Appeal (Edwards, J., dissenting) affirmed the judgment of Sir Robert Stout, C.J., in the Court below, and held that there had been a forfeiture of a right to purchase within the meaning of the section, and that the case was one in which the Court had power and ought to give relief.

In his judgment, the learned Chief Justice, in the Court of first instance, said, at p. 145, that it had been held that the section should " ' receive a wide and liberal construction in favour of the tenant ' : *Hammond* v. *Mangham* ((17 N.Z.L.R. 24, 44)." He went on, at pp. 145, 146, to say :

> The right to purchase is at an end if notice has been given and the relationship of the vendor and purchaser established between the lessor and lessee. The " right " has been transformed into an " agreement " to purchase. There is no longer an option. " Right to purchase " must mean a right to become a purchaser. If the section was not to relieve against breaches of covenant prior to the right being exercised, it was incorrect to use the term " right to purchase." I cannot so read it. In my opinion it gives power to the Court to relieve against the forfeiture of the " right to purchase " through the breach of a covenant by the lessee. Reference was made to the words " where the purchaser is in possession." It may be that the use of these words was meant to limit relief to the case of a tenant with " a right to purchase." They may have a wider meaning. But, whatever the meaning, the purchaser—that is, the person who claims to exercise the right to purchase—is here in possession. I presume the Legislature meant to authorize a Court to grant relief where a tenant in possession had acted as if the property was to become his own. Those words cannot nullify the words " right to purchase ", nor enable a Court to read them " agreement to purchase."

It will be observed that the learned Chief Justice in that passage, which forms the *ratio decidendi* of his judgment, confined his attention, in interpreting the section, to a lessee or tenant in possession whose *lease* gave him a right to purchase.

In his judgment in the Court of Appeal, Williams, J., referred to his experience of conveyancing in New Zealand, which extended back all but forty years—he was Canterbury's first District Land Registrar and New Zealand's second Registrar-General of Land—and he spoke of the common form of lease which gave the lessee the right to purchase the freehold, and, he said, the lease with a purchasing clause had always remained a favourite means of alienation, and was in common use when the Supreme Court Act, 1882, was passed. But, when he said that he saw no reason why relief should not be granted under the section to a purchaser under an ordinary agreement for sale and purchase, providing for payment of the purchase-money by instalments extending over a series of years, with the condition that non-payment of instalments should involve a forfeiture, it is submitted that those remarks were *obiter*. Because he went on, at p. 153, to say :

> The question here is, whether the respondent [the lessee] has brought herself within the conditions of the section.

In the remainder of his judgment, His Honour confined himself to consideration of the parties as lessor and lessee.

Mr. Justice Denniston said that the section might be better expressed ; but, taking the section as a whole, and taking into consideration the recognized practice amongst conveyancers in the Colony (as to which he concurred in what was said by Mr. Justice Williams), at p. 156, he added :

> I am satisfied that the words " right to purchase " include the contingent right to purchase under a lease, although the actual right is dependent upon the precedent condition of the due performance of the covenants in the lease. If so, the loss of such contingent right by the breach of a covenant may well be spoken of as a forfeiture of a right to purchase.

Before concluding his judgment, Denniston J., observed at p. 156 (and we submit that his remarks were purely *obiter*) :

> I wish, however, carefully to guard against being understood to concur in the suggestion that holding the section to apply to a conditional right of purchase in a lease in any way prevents it from applying to other agreements or rights to purchase.

Mr. Justice Conolly carefully confined himself to consideration of s. 25 in relation to forfeiture under a lease. He said, at p. 162, that the section, therefore,

> gives the Court power not only to relieve against forfeiture of the lease, but to relieve against forfeiture of any right to purchase ; and there can, I think, be no doubt that an option

to purchase (the precise words in the lease are, "the lessee shall be at liberty at any time before the 4th day of April, 1903, to purchase") is the same thing as a right to purchase . . . It does not appear to me that, in holding that the Court in the present case may relieve against the forfeiture of the right to purchase, I am doing more than giving a plain interpretation of the words of the statute. But if I should be considered as in any way going beyond this, I am at least going no further than cases already decided upon it, in holding that the provisions of the section in question were intended to protect tenants from oppressive forfeitures, and should receive a wide and liberal interpretation: *Lawson* v. *Douglas* (7 N.Z.L.R. 55); *Hammond* v. *Mangham* (17 N.Z.L.R. 24). And with regard to the present case I adopt the words of His Honour the Chief Justice in the last paragraph but one of his judgment.

Mr. Justice Cooper also said—and, we submit, his observations were *obiter*—that the Legislature, in enacting s. 25, had in view, in addition to the right to purchase so frequently contained in leases, an extension of the power to grant relief to agreements for purchase where the relation of landlord and tenant did not exist. Later on, His Honour gave point to our remarks when, at pp. 173, 174, he said:

I think also, *although it is unnecessary to decide it in this case*,* that s. 25 is amply sufficient to give this power to the Court in cases of agreement for sale and purchase not contained in a lease. The heading of the section, "Relief in respect of Breach of Covenant or Contract," the words already referred to, "right of purchase," the provision for compensation in damages to the *landlord* or *vendor*†, and the direction in s. 26 that a minute or record is to be made by endorsement on the lease "or otherwise," all show that the section is intended to apply to both cases, and I can see nothing in the language used which can compel the conclusion that the application of the power to the one class of cases necessarily involves the exclusion from the power of the other class.

Mr. Justice Edwards, who dissented, does not add to the varied dessert of his brother Judges' *obiter dicta*, which have proved such tempting morsels to later Judges. He says, at pp. 169, 170, after an illuminating examination of s. 25, in summarizing his dissenting opinion:

With the utmost possible deference to the views of those who hold the contrary opinion, I am unable to read the section in question in the double and conflicting sense which appears to me to be necessary to support the view that it applies alike to options of purchase and contracts to purchase. To support the view that this enactment relates to options of purchase requires, in my opinion, that a strained construction should be placed upon it throughout. As applied to contracts of purchase the words have, in my opinion, a clear definite legal meaning, and I think that that is the meaning which should be applied to them.

As His Honour had pointed out, at p. 167, the use of the word "vendor" in the latter part of the section, and the heading which preceded the section, "Relief in respect of Breach of Covenant or Contract," assisted in that construction.

Section 25 of the Supreme Court Act, 1882, was repealed by s. 121 and the Fifth Schedule of the Property Law Act, 1905, and was replaced in a totally different form by s. 93 of the Property Law Act, 1905; and that section, in turn, was replaced, as s. 94, as it appears above, in the same words, in the Property Law Act, 1908. In both those statutes, it appears under the special heading "Forfeiture" in "Part IX—Leases."

The next case in point is *Bray* v. *Kuch*, (1909) 28 N.Z.L.R. 667, a judgment of Mr. Justice Sim. Here, an agreement for the sale and purchase of a freehold property was under consideration. It had no relation whatever to a lease; but it was decided with particular reference to s. 94 (6). It was held that such an agreement for sale and purchase, the purchaser being in possession, was within s. 94 of the Property Law Act, 1908, by reason of subs. 6, and the serving of a notice required by subs. 1 was a condition precedent to the sale by the vendor on the purchaser's default, as that was the enforcement of a right of forfeiture "by action or otherwise" within the meaning of that subsection.

Mr. Justice Sim said that the question to be considered was whether the case came within the provisions of s. 94 of the Property Law Act, 1908, which provided in subs. 6 that the section applied to any right or option to purchase any land where the purchaser was in possession. His Honour continued, at p. 671:

The plaintiff in the present case had a right to purchase the land in question, and he was in possession thereof. His case came, therefore, within the scope of the section. Was the defendant before exercising the power of sale under the agreement obliged, then, to give the notice required by subs. 1 of s. 94? The decision of the Court of Appeal in the case of *Parker* v. *Greville* (28 N.Z.L.R. 461) is an authority directly in point. It was there held that to set up breaches of covenants in a lease as an answer to an action for specific performance of a covenant to grant a new lease amounted to enforcing a right of forfeiture within the meaning of s. 94, and that as the lessor had not given the notice prescribed by that section the lessees were entitled to specific performance of the covenant to grant a new lease. That decision is clearly an authority for holding in the present case that the sale made by the defendant was the enforcement of a right of forfeiture "by action or otherwise" within the meaning of s. 94, and that before making the sale she ought to have given the notice prescribed by that section. The defendant did not give any such notice, and it follows, therefore, that the sale must be treated as a nullity. The plaintiff is entitled to a declaration that the sale which the defendant purported to make on May 5 was of no force or effect, and that the agreement of May 31, 1906, is still subsisting, and is binding on the parties.

It will be noted that His Honour emphasized that *Parker* v. *Greville*, (1909) 28 N.Z.L.R. 461, with the reference to that case in the Court of Appeal, was an authority directly in point. That case related solely to a lease. Moreover, the Judicial Committee of the Privy Council in the following year reversed that judgment of the Court of Appeal: *Greville* v. *Parker*, (1910) N.Z.P.C.C. 262; and it restored the judgment of Chapman, J.: (1908) 28 N.Z.L.R. 164. Actually, *Greville* v. *Parker* decided that the power given to the Court by s. 94 of the Property Law Act, 1908, to give relief against the enforcement of a right of entry or forfeiture of a lease does not enable the Court to give relief against failure to perform a condition precedent to the lessee's right to a renewal of his lease—namely, the observance of the lessee's covenants in a lease. (See, now, s. 2 of the Property Law Amendment Act, 1928.)

With *Bray* v. *Kuch*, (1909) 28 N.Z.L.R. 667, of somewhat doubtful authority, we come to *Hargreaves* v. *Dukes*, [1931] N.Z.L.R. 1143, where there was a sale of freehold by a mortgagee, with the consent of his mortgagor, and assignment of the purchaser's benefits under the agreement to a third person, whom the vendor dispossessed without giving a notice under s. 94 of the Property Law Act, 1908. In his judgment, Smith, J., at p. 1152, shows that he did not have to decide the merits of *Nash* v. *Preece* or *Bray* v. *Kuch* as authorities for the application of s. 94 to agreements for sale and purchase unrelated in any way to a lease,

* Our italics.
† The Judge's italics.

where the purchaser of the freehold was in possession, because, as His Honour, at p. 1152, says :

> Both sides have accepted the position that it was necessary for Dr. Dukes to give a notice under s. 94 of the Property Law Act, 1908, in order that he might validly re-enter : *Nash* v. *Preece* (20 N.Z.L.R. 141)—a decision of the Court of Appeal—and *Bray* v. *Kuch* (28 N.Z.L.R. 667).

As we have endeavoured to show, *Nash* v. *Preece* had nothing whatever to do with an agreement for the sale and purchase of freehold, but was concerned solely with a right to purchase given in a lease, and any reference in the judgment of the majority to such agreements is purely *obiter*. And we have already said all we need to say about *Bray* v. *Kuch*.

The only other case that seems in point is *McConnell* v. *McCormick*, [1929] N.Z.L.R. 560, which was an action to recover possession from a purchaser in possession under an agreement for the sale and purchase of freehold, unrelated to a lease, after his failure to comply with a notice to remedy breaches of covenant.

That case is a curious one : it illustrates the straitjacket in which the Courts have placed themselves by applying s. 94 to a pure contract of sale and purchase of land where the purchaser is in possession. A notice, required by s. 94 (1), had been given ; the decision of the Court was that it was bad in that it was insufficiently precise. At p. 565, Smith, J., said :

> *Bray* v. *Kuch* (28 N.Z.L.R. 667) is an authority for the proposition that s. 94 applies to an agreement for sale and purchase of land when the purchaser is in possession under the agreement. That is the case here. Section 94 requires a notice to be given, which is a condition precedent to the exercise of the lessor's (or vendor's) right of re-entry by action or otherwise. The nature of the notice is important. The principal English cases decided on s. 14 (1) of the Conveyancing and Law of Property Act, 1881 (corresponding with s. 94 (1), New Zealand), were reviewed by *Lord Buckmaster* in *Fox* v. *Jolly* ([1916] 1 A.C. 1). There were other judgments in that case, and they do not agree in all respects.

Our comment must be brief. Section 14 (1) of the Conveyancing Act, 1881 (known until 1911 as the Conveyancing and Law of Property Act, 1881) (U.K.), now repealed, related solely to notices by lessors to lessees. Subsection 1 is in the same words as s. 94 (1) of the Property Law Act, 1908 ; subs. 2 of both enactments are the same ; subs. 4 in both are the same. There is nothing corresponding to our subs. 6 ; subs. 6 of the English statute appears in our statute as subs. 7 ; and subss. 8 and 9 in both Acts are the same. *Fox* v. *Jolly*, [1916] 1 A.C. 1, related to a covenant to repair in a straight-out lease of six small houses, and the sufficiency of the landlord's notice of breaches of that covenant.

His Honour then states the law " So far as is required for the decision of this case " ([1929] N.Z.L.R. 560, 565). He sets out the requirements of a notice of breach. That case, it must be remembered, related to a notice under a contract for sale and purchase *simpliciter*. And every one of the enumerated requirements relates to giving notice to a *lessee*, and the supporting authorities all were decided in relation to notices of breaches of covenants in leases.

In view of the state of the authorities on the application of s. 94 of the Property Law Act, 1908, we think it would be advisable if the Law Revision Committee considered making subs. 6 clearly applicable only to leases in which there is given " any right or option to purchase any land where the purchaser is in possession of that land ", by inserting the words " contained in a lease ". The subsection would then read : " This section applies to any right or option to purchase any land contained in a lease where the purchaser is in possession of the land." The insertion of those words would be justified by the application of the remainder of the section solely to leases and to the incidents of leases, as appears from each of the other subsections.

Such an amendment would place beyond all doubt any need for a vendor to give notice to a purchaser in possession under a contract for sale and purchase of freehold land under the compulsion, real or imaginary, of s. 94 of the Property Law Act, 1908 ; and it would tidy up a section that has as its explanatory marginal note : " Restrictions on and relief against forfeiture of leases."

Finally, the question has arisen whether the notice required by s. 3 of the Property Law Amendment Act, 1939, must be given before the vendor under an agreement for the sale and purchase of land can " exercise his power to sell land or enter into possession of land." There are two views on this matter.

One view is that, since the definitions of the words " mortgage " and " mortgagee " in s. 2 of the Property Law Act, 1908, are available in interpreting s. 3 of the Property Law Amendment Act, 1939, the term " mortgage ", as defined, includes a charge on any *property* for securing money or money's worth, and the word " property " is defined to include " real and personal property, and any estate or interest in any property real or personal, and any debt, and any thing in action, and *any other right or interest*." It is argued, therefore, that the equitable interest of a purchaser under an agreement for sale and purchase with an unpaid balance of purchase-money constitutes " property ", and the contract of sale a " mortgage ". And s. 3 of the Property Law Amendment Act, 1939, restricts a mortgagee's " exercise of power to sell land or enter into possession of land conferred by *any mortgage* " unless previous notice of breach has been given by the mortgagee, thus including the vendor under an agreement for sale and purchase where the purchaser is in possession ; and the notice should be given.

The other view, which we prefer, is that there is a great difference in law and in equity between the rights and liabilities of vendor and purchaser under an agreement for sale and purchase and the rights and liabilities of mortgagee and mortgagor (or, for that matter, of lessor and lessee). This view is reinforced by reference to the moratorium legislation in New Zealand over the past thirty years. Reference need only be made to s. 2 of the Mortgagors and Tenants Relief Act, 1933, where the term " mortgage " is defined. The definition concludes with the words : " and also includes any agreement for the sale and purchase of land." Later, in the Mortgages Extension Emergency Regulations, 1940 (Serial No. 1940/163), Reg. 2 (1) (the interpretation Regulation) defines the term " mortgage ", and adds that it " also includes an agreement for the sale and purchase of land " ; and in Regs. 4 and 5 a differentiation is made between mortgages to which the Regulations apply and agreements for the sale and purchase of land to which the definition of " mortgage " is applied. In the latter Regulation, the application of the Regulations to agreements for sale and purchase is specifically made clear.

The term "mortgage" as defined in s. 2 of the Mortgagors and Lessees Rehabilitation Act, 1936, also shows that an agreement for sale and purchase is not a "mortgage" unless it is expressly deemed to be one for the purposes of a particular enactment. The definition is as follows:

> "Mortgage" means a deed, memorandum of mortgage, instrument, or agreement whereby security for the payment of any moneys or for the performance of any contract is granted over any property as hereinafter defined; and includes an agreement for the sale and purchase of land.

We think that purchasers under agreements for sale and purchase should have protection from the exercise of the vendor's rights; and that may be a widely held view. It would seem that s. 3 of the Property Law Amendment Act, 1939, is the proper place in which such protection could be given. This could be done by adding a subsection to the effect that, for the purposes of that section, the term "mortgage" also includes an agreement for sale and purchase, and that the terms "mortgagor" and "mortgagee" have corresponding meanings.

In this way, s. 94 of the Property Law Act, 1908, amended as we have indicated, will be confined to what its marginal note says: "Restriction on and relief against forfeiture of leases." And an additional subsection to s. 3 of the Property Law Amendment Act, 1939, will apply the present protection given to a mortgagor to a purchaser under an agreement for the sale and purchase of land, whether or not the purchaser is in possession.

Such a tidying up of the two sections will, at least, halt the hitherto popular pursuit, in this connection, of what Lord Sumner has called "the will o' the wisp of *obiter dictum*."

SUMMARY OF RECENT LAW.

AVIATION.

State Control of the Airspace. (J. A. Martial.) *30 Canadian Bar Review*, 245.

COMPANY LAW.

Points in Practice. *102 Law Journal*, 340.

CONSTITUTIONAL LAW.

Judicial Committee of Privy Council—Competency of New Zealand Legislature to enact in 1946 Provision conferring on Court of Appeal Jurisdiction to give Leave to Appeal in Criminal Matters—Enactment not Repugnant to Law of England or Void as having Extraterritorial Effect—New Zealand Constitution Act, 1852 (15 & 16 Vict., c. 72), s. 53—Colonial Laws Validity Act, 1865 (28 & 29 Vict., c. 63), ss. 2, 3—Justices of the Peace Amendment Act, 1946, s. 5—Statute of Westminster Adoption Act, 1947, s. 2—Criminal Law—Practice—Appeals to Privy Council—Criminal Matter—Power of Court of Appeal to grant Leave to Appeal—Provision in Statute conferring Jurisdiction in Criminal Cases on Court of Appeal to give Leave to Appeal to Privy Council in Proper Cases, though Criminal in Nature—Justices of the Peace Act, 1927, s. 303—Justices of the Peace Amendment Act, 1946, s. 5—Privy Council Appeals Rules, 1910 (Order in Council, January 10, 1910), R. 2. On a summary conviction under the Justices of the Peace Act, 1927, the appellant appealed to the Supreme Court on point of law by way of Case Stated under s. 303 of that statute, and the case was removed into the Court of Appeal in pursuance of s. 5 of the Justices of the Peace Amendment Act, 1946, which was enacted before the passing of the Statute of Westminster Adoption Act, 1947. Section 5 (2) makes the decision of the Court of Appeal "final as regards the tribunals of New Zealand", but with the following proviso: "Provided that the Court of Appeal may give leave to either party to appeal to the Privy Council." The appeal was dismissed (*Woolworths (N.Z.), Ltd.* v. *Wynne* ([1951] N.Z.L.R. 923)). On motion by the appellant in the Court of Appeal for leave to appeal to the Privy Council, *Held, per totam curiam*, That the granting of such leave was not authorized by the Privy Council Appeals Rules, 1910, the matter being a criminal matter. (*Chung Chuck* v. *The King*, [1930] A.C. 244, and *Bowron Bros.* v. *Bishop (No. 2)*, (1910) 29 N.Z.L.R. 821, followed.) *Held further (Stanton, J., dissenting)*, 1. That the proviso to s. 5 (2) of the Justices of the Peace Amendment Act, 1946, was not repugnant to the Privy Council Appeals Rules, 1910, or otherwise repugnant to the law of England within the meaning of ss. 2 and 3 of the Colonial Laws Validity Act, 1865. 2. That it was not void as having extraterritorial operation. (*Nadan* v. *The King*, [1926] A.C. 482, explained.) (*British Coal Corporation* v. *The King*, [1935] A.C. 500, *Hull and Co.* v. *M'Kenna*, [1926] I.R. 402, *Croft* v. *Dunphy*, [1933] A.C. 156, *Moore* v. *Attorney-General for Irish Free State*, [1935] A.C. 484, *Attorney-General for Ontario* v. *Attorney-General for Canada*, [1947] A.C. 127; [1947] 1 All E.R. 137, and *The Commonwealth* v. *Kreglinger and Fernau, Ltd.*, (1926) 37 C.L.R. 393, applied.) 3. That the enactment of the proviso was within the competence of the New Zealand Legislature. 4. That leave may be granted in pursuance of the proviso where the Court of Appeal considers that the case is a proper one for appeal to the Privy Council, and it is not necessary that the case should be one in which the Privy Council would itself grant special leave to appeal in accordance with the rule of practice whereunder it grants such leave in criminal matters only in exceptional cases. 5. That the Court of Appeal has jurisdiction to impose proper terms as to security for costs, the preparation and forwarding of the record, and other matters; and it should follow by analogy the Privy Council Appeals Rules, 1910, in so far as they may properly be applied. Conditional leave to appeal was accordingly granted on the terms set out in the judgment of *F. B. Adams*, J. *Woolworths (N.Z.), Ltd.* v. *Wynne*. (C.A. Wellington. June 6, 1952. Stanton, J.; Hay, J.; F. B. Adams, J.)

COUNTIES.

Water-supply Special Rating Area—Water-supply installed therein—No Extension of Scheme—Part of Block of Land within Such Area and Part outside It but within County Boundaries—Water-supply connected to House on Such Block within Rating Area—Owner extending Water-connection to House on Block but outside Rating Area—Council cutting Water Pipe-line at Boundary thereof—Water-supply Scheme confined to Lands situated within Rating Area—No Trespass in entering Land and cutting Pipe-line—Counties Act, 1920, ss. 122, 150—Local Bodies Loans Act, 1926, s. 3 (3)—Municipal Corporations Act, 1933, ss. 87, 248. Though there is nothing in the Counties Act, 1920, conferring power on a County Council to set up a water-supply for a limited district within the county, it is implied in ss. 122 and 150 of that statute and in s. 3 (3) of the Local Bodies Loans Act, 1926, that a public work (which includes a waterwork) may be undertaken by a County Council for the benefit of portion of the county area, and on terms that the cost is to be borne by the ratepayers of that portion alone. In 1939, the defendant created a water-supply special rating area for that portion of the Te Horo Riding known as the Waimeha Township. Pursuant to the authority of a poll of ratepayers in that area, a loan of £3,300 was raised by the Council under the Local Bodies Loans Act, 1926, the interest and other charges in respect of the loan being secured by a special rate of 2d. in the £ upon the rateable value (on the basis of the capital value) of all the rateable property in the special rating area as defined in the special resolution passed for the purpose. The water-supply was installed, and a special by-law, entitled the Waimeha Township Water Supply By-law, 1939, was made and ordained by the Council in relation thereto. An Order in Council was issued on December 17, 1929 (*1929 New Zealand Gazette*, 3323), pursuant to s. 182 of the Counties Act, 1920, conferring on the Council all the powers with respect to the supply of water for domestic or industrial purposes exercisable by a duly constituted Borough Council under specified portions of the Municipal Corporations Act, 1920 and its Amendments. The powers so conferred are those now appearing in the Municipal Corporations Act, 1933, as ss. 82-84, 87, 88, Part XX (with the exception of ss. 251, 253, and 254), and s. 346. The plaintiff was the owner and occupier of a block of land (containing in all approximately 6 acres), a small portion of which was within the special rating area and the greater portion of which was outside the area, though within the boundaries of the

county. On or about October 23, 1942, the plaintiff's predecessor in title made application to the defendant for a permit to make a connection to the water-supply system for an ordinary water-supply in respect of that portion of the land situated within the special rating area. A permit to make the connection applied for was granted, the permission being expressly limited to an ordinary supply. The connection of water not only served a cottage upon the land within the special rating area, but also led to and supplied certain standpipes upon the adjacent land (outside the area), to enable a market-garden then operated upon such adjacent land to be watered. In 1948, the plaintiff extended the water-supply line from the then existing reticulation to a more distant part of his land, on which was erected another dwellinghouse, in order to provide a domestic supply to that dwellinghouse, which was situated at a considerable distance beyond the boundary of the special rating area. The Council wrote to plaintiff drawing attention to what was called the unauthorized connections outside the special area, and notifying him that a disconnection would be made at the expiration of fourteen days from that date. In spite of plaintiff's protest, the water pipe-line on plaintiff's property was cut by the Council at a point just beyond the boundary of the special area. The plaintiff thereupon reconnected the supply. Notwithstanding his respresentations to the Council with the object of arriving at some arrangement which would ensure to him the use of the water for his house beyond the special area, the Council, on March 28, 1949, again cut the pipe-line at the same point as before, and again the plaintiff repaired it. On April 6, 1949, the Council for the third time cut the pipe-line at the same point. In an action claiming an injunction to restrain the defendant's Council from trespassing by its servants or agents on the plaintiff's land, from interfering with the water-supply thereon, and from moving or removing any part of his property, *Held*, 1. That the Council had full authority to create a water-supply scheme for the benefit exclusively of the Waimeha Township, and to define a special rating area for the purpose. 2. That the benefit of the water-supply scheme inaugurated by the Council was confined to lands situated within the boundaries of the special rating area, and to any further areas to which the scheme might be extended. 3. That, as no extension of the scheme had, in fact, been made, it is not open to an owner of land lying partly within and partly without the special rating area to contend that, because he lawfully receives a supply of water in respect of one portion of his land, he is at liberty to extend the supply to a contiguous portion lying beyond the area. (*State Advances Superintendent* v. *Auckland City Corporation and One Tree Hill Borough*, [1932] N.Z.L.R. 1709, and *The King* v. *Mayor, &c., of Napier*, (1907) 26 N.Z.L.R. 917, distinguished.) 4. That the Council had acted within its rights and powers in entering upon the plaintiff's land and taking the steps it did to prevent the misuse of its water; and there was, consequently, no trespass by it. *Crimp* v. *Horowhenua County*. (S.C. Wellington. June 26, 1952. Hay, J.)

CRIMINAL LAW.

Criminal Contempt of Court Procedure. (Hon. J. C. McRuer.) *30 Canadian Bar Review*, 225.

Evidence—Crown Witnesses—Prosecutor's Discretion as to calling Witnesses known or examined by It—Prosecution not bound to make Available to Defence Any Statements of Uncalled Witnesses—Defence to be told on Witnesses not being tendered by Crown in Time for Defence to call Them—Transport—Offences—Person in charge of Motor-vehicle in State of Intoxication—Judgment and Mental Faculties affected to Appreciable and Material Extent by Drink taken—"State of intoxication"—Transport Act, 1949, s. 40. The prosecution has a discretion as to whether it should call all the witnesses known to it, or examined by it. The Court will not interfere with that discretion and require them to be so called unless it can be shown that the prosecution's failure to call them has been influenced by some improper reason. (*Adel Muhammed El Dabbah* v. *Attorney-General for Palestine*, [1944] A.C. 156; [1944] 2 All E.R. 139, followed.) (*Seneviratne* v. *The King*, [1936] 3 All E.R. 36, *R.* v. *Sing*, [1936] 1 D.L.R. 36, and *R.* v. *Hop Lee*, [1941] 2 D.L.R. 229, referred to.) (Dictum in *R.* v. *Treacy*, [1944] 2 All E.R. 229, 234, 235, explained.) The Crown performs its duty when it informs the defence of the witnesses whom it had intended to call, and of its intention not to call them, in time to enable the defence to call them. It is not bound to give to the defence the statements which it had obtained from those witnesses. (*Bryant* v. *The King*, (1946) 31 Cr.App.R. 146, followed.) About twenty minutes after the defendant had been stopped by the Police while driving his motor-car, he was examined by a doctor chosen by the Police, and was subjected to exhaustive tests. The doctor then said that he was unable to say that the defendant was in a state of intoxication at the time of the examination. The defendant was afterwards charged with being in a state of intoxication while in charge of a motor-car. The doctor was not called by the Police at the hearing before a Magistrate. The defendant knew that the doctor was available to him as a witness, and knew the nature of his evidence. The defendant, on the evidence given, was convicted and fined £40, and his licence was cancelled with disqualification for eighteen months. On appeal from the conviction and sentence, *Held*, 1. That the fact that the doctor was requested by the Police to make an examination of the appellant was not a ground for treating it as an exception from the general rule, as stated above. 2. That, on the whole of the evidence (including that of the doctor who gave evidence for the appellant), both the appellant's judgment and his mental faculties, at a time earlier than his medical examination, were affected to an appreciable and material extent by the drink he had taken, and, though mild, the degree of intoxication was within s. 40 of the Transport Act, 1949. (*R.* v. *Ormsby*, [1945] N.Z.L.R. 109, applied.) The appeal against conviction was dismissed and the sentence was reduced. *Jennings* v. *Taylor*. (S.C. New Plymouth. June 9, 1952. Fair, J.)

Plea—Plea of "Guilty" on taking of Depositions—Application to set aside Such Plea and substitute Plea of "Not Guilty"—Application refused—Appeal from Such Refusal to Court of Appeal—No Miscarriage of Justice—Justices of the Peace Act, 1927, s. 181—Jurisdiction—Appeal from Refusal to set aside Plea of "Guilty" and substitute Plea of "Not Guilty"—Jurisdiction of Court of Appeal to hear Such Appeal—Criminal Appeal Act, 1945, ss. 2, 3, 4—Justices of the Peace Act, 1927, s. 181 (4). Under ss. 2 and 3 of the Criminal Appeal Act, 1945, there is jurisdiction to hear an appeal from a person who has pleaded "guilty" and has been committed to the Supreme Court under s. 181 of the Justices of the Peace Act, 1927; and this jurisdiction may possibly be wider than the inherent jurisdiction which, notwithstanding the provisions of s. 181 (4), the Supreme Court had to set aside a plea of "guilty", since, under s. 4 of the Criminal Appeal Act, 1945, the conviction must be set aside if the Court of Appeal considers that, on any ground, there was a miscarriage of justice. (*R.* v. *Reyland*, [1919] N.Z.L.R. 252, and *R.* v. *Walsh*, [1948] N.Z.L.R. 937, referred to.) A plea of "guilty" should not be set aside unless the Court of Appeal is satisfied that the accused has not really pleaded "guilty", or that there has been some mistake, or that there was a clear defence to the charge. It is not a ground for appeal that the accused did not understand or appreciate the effect of the plea. (*R.* v. *Golathan*, (1915) 11 Cr.App.R. 79, and *R.* v. *Griffiths*, (1932) 23 Cr.App.R. 153, followed.) The accused was charged with the theft of a gas cylinder as an indictable offence. After the preliminary hearing in the Magistrates' Court, he was given the statutory warning. He pleaded "guilty", and was committed to the Supreme Court for sentence. Subsequently, the accused moved to have the plea of "guilty" set aside and a plea of "not guilty" entered, on the grounds that it was in the interests of justice that the plea be set aside, and that the plea had been the result of improper practice on the part of actors in the prosecution. It was held by *Northcroft*, J., that no improper practice on the part of actors in the prosecution had been established, and he refused to set the plea aside. He then proceeded to consider the question of sentence, and directed that the accused be released on probation for a period of two years. From the dismissal of the motion, the accused appealed. *Held*, by the Court of Appeal, That there was no miscarriage of justice arising out of the conduct of the Police officers who interviewed the appellant and conducted the prosecution. Judgment of *Northcroft*, J., affirmed. *The Queen* v. *Le Comte*. (C.A. Wellington. July 3, 1952. Fair, J.; Gresson, J.; Stanton, J.; Hay, J.)

DIVORCE AND MATRIMONIAL CAUSES.

Aspects of Divorce Court Damages. *213 Law Times*, 249.

Custody of Children—Mother, divorced on Ground of Adultery, married to Co-respondent—Custody of Two Girls, Ten Years Old, given to Mother—Welfare of Children Paramount Consideration—Overriding Importance of Mother's Affection and Care—Rival Claims of Parents—Considerations of Guilt or Innocence Irrelevant except as bearing on Interests of Children—Nature of Change of Circumstances justifying Change in Custody—Guardianship of Infants Act, 1926, s. 2—Divorce and Matrimonial Causes Act, 1928, s. 38. The parties were married in February, 1941, and their two children, twin daughters, were born on December 6, 1941. On June 9, 1950, the respondent (herein referred to as "the father") obtained a decree *nisi* for divorce, on the ground of the adultery of his wife (herein referred to as "the mother") with one Miller. In a judgment delivered on December 7, 1950, before this decree had been made absolute, *Cooke*, J., dis-

missed a motion for interim custody filed by the father, gave the interim custody of the children to the mother, in whose care and control, until then, the children had been, and adjourned her application for permanent custody: *Low* v. *Low* ([1951] N.Z.L.R. 206). The mother and the children were then occupying the former matrimonial home. The home to which the father, at the time of this decision of *Cooke*, J., desired to remove the children was that of his sister, where she and her husband resided with their son and had sufficient accommodation, the sister being prepared to help in their upbringing. Their mother then intended to live with the children in her mother's home, where also there was sufficient accommodation. After the decree had been made absolute, the question of custody came again before *Cooke*, J.; and on August 3, 1951, he made an order granting custody of the children to the mother. There was no appeal from this decision. On December 4, 1951, the mother married Miller; and the father filed a motion that the order made by *Cooke*, J., be varied and that custody of the children be given to him. The mother had continued to live in the former matrimonial home, Miller having joined her there on their marriage. As the father's living-quarters were unsuitable, he desired to board the children with neighbours of his at their flat, where he would have easy access to them. The application was heard by *Gresson*, J., who held that, on balance, the interests of the children would be best served by giving custody to the father; and he made an order to that effect. On appeal by the mother against that order, *Held*, by the Court of Appeal, 1. That, in all the circumstances of this case, the factor which overrode every other consideration, and which was a matter to be regarded as crucial, was the importance to the two girls of their mother's affection and care compared with the affection and care which might be expected to be given by any stranger, however kindly, bearing in mind in particular that the mother's relation to these children was founded on the natural tie between mother and children, had subsisted throughout the children's lives, and might fairly be regarded as a permanent bond between them and her. (*Allen* v. *Allen*, [1948] 2 All E.R. 413, referred to.) 2. That, where a case can be determined solely by reference to the substantial interests of the children, the rival claims of parents based on considerations of their guilt or innocence are irrelevant, except in so far as they bear on the interests of the children; and, in the present case, from the viewpoint of the children's interests, the mere fact that the mother had married her former companion in adultery did not outweigh the important consideration that, in their interests, they should continue to have their mother's care and attention. 3. That, in order to justify an alteration under s. 38 of the Divorce and Matrimonial Causes Act, 1928, in an order for custody, it must be shown that the circumstances have changed since the time of the making of the order to such a material degree as to require a change in the custody to ensure the welfare of the children in the new circumstances. *Semble*, Where a mother has married her former companion in adultery, it is right for the Court to assume, unless and until the contrary appears, that her new *ménage* will be, not loose and immoral, but conducted with normal propriety; and, although it has originated in wrong, it should not be inferred that its wrongful origin will so cloud the home as to affect the children unduly. (*Allen* v. *Allen*, [1948] 2 All E.R. 413, referred to.) Observations as to the desirability of maintaining the normal relationship between a mother and her adolescent daughters. Appeal from the judgment of *Gresson*, J., allowed. *Miller* v. *Low*. (S.C. Christchurch. August 3, 1951. Cooke, J. S.C. Wellington. April 29, 1952. Gresson, J. C.A. Wellington. July 3, 1952. Fair, J.; Stanton, J.; Hay, J.; F. B. Adams, J.)

Desertion—Parties living under Same Roof—Occupation of Separate Rooms—Wife performing No Household Duties for Husband—No Verbal Communication. The husband and the wife were married in 1918. From 1945 until the husband presented a petition for divorce in 1951 on the ground of his wife's desertion, the parties lived in the same house, but the wife withdrew into a separate bedroom, which she kept locked. She performed no household duties for the husband, who had to do his own washing, mending, and ironing. As his wife would do no cooking for him, the husband had his meals out as often as possible, and only cooked for himself on Sunday mornings, always at a time when the wife was not using the kitchen herself. When the parties wished to communicate with one another, they did so by written notes. The wife rejected an attempt by the husband at reconciliation, saying that she was not coming back to live with him. *Held*, That the facts were such that the parties were not living together in one household, and the wife had deserted the husband. (*Smith* v. *Smith*, [1939] 4 All E.R. 533, applied.) *Walker* v. *Walker*, [1952] 2 All E.R. 138 (C.A.)

Maintenance of Wife—Remarriage of Wife—Application after Remarriage—Matrimonial Causes Act, 1950 (*c. 25*), *s. 19* (*2*) (*3*). The wife obtained a decree *nisi* of divorce which was made absolute on November 21, 1951. On November 26, 1951, the wife remarried, but two days later the husband by that marriage died. On December 18, 1951, the wife applied for an order for permanent maintenance against her former husband, and on April 4, 1952, the Registrar made an order for 1s. a year. On appeal by the husband, *Held*, That the fact of remarriage, though relevant in considering quantum, was no bar to the wife's application for maintenance. (*Bellenden* (*formerly Satterthwaite*, [1948] 1 All E.R. 343, applied.) *Snelling* v. *Snelling*, [1952] 2 All E.R. 196 (P.D. & A.).

FACTORY.

Dust—No Failure to ventilate—Dust not of Character or Extent likely to be injurious—Duty of Occupier—Factories Act, 1937 (*c. 67*), *ss. 4* (*1*), *47* (*1*) (*Factories Act, 1946, s. 56*). The plaintiff was employed by the defendants on work which involved scraping and sandpapering monsonia wood. No special precautions in the way of protective clothing or otherwise were taken by the defendants to safeguard the health of the plaintiff, as they were unaware that any danger was involved in working on monsonia wood, which was a Nigerian hardwood, little used in this country until 1946. The plaintiff contracted dermatitis through the monsonia wood dust, and claimed damages for breach of statutory duty under ss. 4 (1) and 47 (1) of the Factories Act, 1937, and for negligence at common law. *Held*, (i) That the requirements of s. 4 (1) of the Factories Act, 1937, for rendering dust harmless could not be called in aid by the plaintiff, as that section related only to ventilation, as to which the plaintiffs were not at fault, and not to other methods of rendering dust harmless. (ii) That there was evidence to support the Judge's finding of fact that the dust was not of such a character and given off to such extent or in such a substantial quantity as to be likely to be injurious or offensive, and, accordingly, the defendants had not infringed s. 47 (1) of the Factories Act, 1937. (iii) That, on the state of knowledge then existing of the danger of exposure to monsonia wood dust, there was no such probability that exposure would result in injury as to lead a reasonable man placed in the defendants' position to anticipate it, and, accordingly, the defendants had not been negligent at common law. *Ebbs* v. *James Whitson and Co., Ltd.*, [1952] 2 All E.R. 192 (C.A.).

GIFT.

Donatio mortis causa—Delivery—Key to Safe Deposit containing Jewellery—Safe Deposit containing Key to Further Safe Deposit containing Jewellery—Sufficiency of Delivery of Jewellery. On February 6, 1950, L., who had been in poor health for some months and was confined to her bed by illness, said to P. that she felt that she was "done for", that she was very near her end, and would die without leaving her room again. L. then said: "I am going to give you all my jewellery. I am giving you my key to the safe deposit at Harrods, and when I am gone you can go and get the jewellery." She then handed to P. the keys of her trunk, and said: "Here is the key to the trunk over there. You will find the key to the Harrods safe deposit on the right hand side in the finger of a glove. I have shown you where it is before. The key to my City safe is at Harrods. I want you to have all my jewellery except the diamond necklace which is for my goddaughter. That is in my City safe." L. then took a packet from under her pillow and said: "This is also for you." P. opened it and saw that it contained jewellery. L. and P. and P.'s husband agreed that the packet should be kept in the trunk (which was in L.'s room), and P. opened the trunk with the key given her by L. and placed the packet inside. L. then said: "Keep the key; it is now yours." On February 12, 1950, L. died. The safe deposits referred to by L. contained jewellery, and the safe deposit at Harrods, Ltd., also contained the key to the second safe deposit. P. claimed to be entitled to the jewellery in the packet and in the safe deposits. *Held*, That, on the evidence, it was not certain on February 6, 1950, that L. would die within a few days, although she thought that she was almost certain to die soon, and, in those circumstances, the essential condition of a *donatio mortis causa* that the donor must intend the subject-matter of the gift to revert to him should he recover was satisfied, and, there having been sufficient delivery of the jewellery in the packet and also of the jewellery in each of the safe deposits, a valid *donatio mortis causa* had been made thereof. (*Gardner* v. *Parker*, (1818) 3 Madd. 184, and *Re Wasserberg*, [1915] 1 Ch. 195, applied.) (*Re Mustapha*, (1891) 8 T.L.R. 160, considered.) (*Lord Advocate* v. *M'Court*, (1893) 20 R. (Ct. of Sess.) 488, explained and distinguished.) *Re Lillingston* (*deceased*), *Pembery* v. *Pembery and Another*, [1952] 2 All E.R. 184 (Ch.D.).

HUSBAND AND WIFE.

Variation of Deeds of Separation. *213 Law Times*, 266.

INCOME TAX.

Computation of Profits—Deduction—Entertainment of Clients—Income Tax Act, 1918 (c. 40), Sched.D, Cases I and II, r. 3 (a). The partners in a firm of solicitors were accustomed to entertain existing clients of the firm to luncheon at a social club and various restaurants. During luncheon, business was discussed. The legal advice given to clients at luncheon was charged to them in the normal way, but the fees charged did not include the expenses of the meals, which were paid by the firm. This practice was adopted by the partners both for their own convenience, so that they could devote the remainder of the day to other work in their offices, and for the convenience of clients. The partners claimed to deduct the cost of these entertainments (which included the cost of their own meals) in computing the profits of the firm for assessment to income-tax. The Income Tax Act, 1918, Sched. D, Cases I and II, r. 3 (*a*), forbids the deduction of " any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment, or vocation." *Held*, That, in spite of an element of hospitality which was necessarily inherent in what was done, in the circumstances the sole object in incurring the expenses was the promotion of the business of the firm, and, therefore, they were " money wholly and exclusively laid out or expended for the purposes of the profession " within r. 3 (*a*), and were properly to be deducted in computing the amount of the firm's profits to be charged to tax. *Per curiam*, " If the activity be undertaken with the object both of promoting business and also with some other purpose, for example, with the object of indulging an independent wish of entertaining a friend or stranger or of supporting a charitable or benevolent object, then the rule is not satisfied though in the mind of the actor the business motive may predominate." Decision of *Roxburgh*, J., [1951] 2 All E.R. 667, affirmed. *Bentleys, Stokes and Lowless* v. *Beeson* (*Inspector of Taxes*), [1952] 1 All E.R. 82 (C.A.).

As to Deduction for Expenses, see *17 Halsbury's Laws of England*, 2nd Ed. 149-156, paras. 309-320; and for Cases, see *28 E. and E. Digest*, 42-45, Nos. *215-226*.

JUSTICES.

Husband and Wife—Maintenance Order—Wilful Neglect to maintain—Reasonable and Honest Belief of Wife's Adultery. As a result of quarrels over the wife's relationship with another man, the husband turned the wife out of the matrimonial home. On the wife's summonses against the husband charging him with desertion and wilful neglect to provide her with reasonable maintenance, *Held*, That the husband's *bona fide* belief, induced by the wife, that she had committed adultery was a good defence, not only to the charge of desertion, but also to the charge of wilful neglect to maintain. (*Morris* v. *Edmonds*, (1897) 77 L.T. 56, and *Glenister* v. *Glenister*, [1945] 1 All E.R. 513, applied.) *Chilton* v. *Chilton*, [1952] 1 All E.R. 1322 (P.D. and A.).

PRACTICE.

Commission to take Evidence—Claim under Law Reform (Testamentary Promises) Act, 1949—Evidence of Witness Corroborative of That of Plaintiff—Desirability of Witness being examined in Court and being seen by Trial Judge—Witness Resident in Melbourne—Expense of Attendance in New Zealand in excess of Cost of taking Her Evidence in Melbourne relatively not Important—Witness's Attendance Inconvenient but not Impracticable—Commission to take Evidence in Melbourne refused. In an action under the Law Reform (Testamentary Promises) Act, 1949, evidence on behalf of the plaintiff requires to be looked at with great care, and even with suspicion, and it is desirable for the trial Judge to see the witnesses. Even though the witness is not a principal, the desirability of his being examined in open Court and being seen by the Judge before whom the case comes is an important element where application is made for the evidence of such a witness to be taken on commission in Australia; as against that consideration, the question of expense is not of great importance. If it is not impracticable for the witness to come to New Zealand, the order for taking his evidence on commission should not be made if the transport facilities are good, and if, having regard to the circumstances, the attendance of the witness would merely be inconvenient in relation to his business. (*Coch* v. *Allcock and Co.*, (1888) 21 Q.B.D. 178, applied.) An application for an order for a commission to take the evidence of a witness who resided in Melbourne was made in an action claiming the whole of the net estate of a deceased person, amounting in value to about £7,000, under the Law Reform (Testamentary Promises) Act, 1949. The affidavits showed that the witness's evidence would be corroborative of that of the plaintiff. The expense incurred in coming to New Zealand would be from £30 to £40 in excess of the cost of taking her evidence in Melbourne on commission. During the time the witness would be away from Melbourne if she had to give evidence at the trial, there would be no one in the business of a skin specialist, which she conducted with her husband, qualified to do consultation work and direct treatment. Her absence would be inconvenient, and it would delay for possibly up to a fortnight the commencement of treatment or the alteration of treatment of certain patients, though it would not affect the continuation of their treatment if no change had to be made in it. Transport facilities from Melbourne were good, provided sufficient time were available to make bookings. *Held*, That, having regard to the circumstances of the case, and, in particular, to the desirability of the trial Judge's seeing the witness, the difficulties put forward by the witness were not sufficient to justify an order that the evidence be taken on commission in Melbourne. *Williams* v. *Sievers and Another*. (S.C. Wanganui. March 24, 1952. Hutchison, J.)

WORKERS' COMPENSATION.

Accident arising out of and in the Course of the Employment—Farm Worker occasionally using his own Motor-car in Connection with Farm Work—Such Casual Use known to Employer—Definite Arrangement or Approval as to Use of Worker's Means of Transport Necessary—" Authorized "—Workers' Compensation Amendment Act, 1947, s. 45 (1) (b). The suppliant was a farm labourer employed by the Maori Affairs Department, and lived about half a mile from the nearest part of the farm on which he worked. His work included fencing and general farm work, and occasionally assisting with mustering. On September 20, 1950, while driving home in his own motor-car from his work, the suppliant met with an accident by reason of his motor-car leaving the road and going over a bank, whereby he became permanently partially incapacitated. The suppliant who had been working on the farm for about a year before the accident, used to drive his own car to work on two or three days a week. On the facts as admitted or established, there were altogether six occasions when the car was used for the benefit of the farm at the specific request of the employer's representative, and another six occasions when wire and staples were carried out to a job in the car. The other occasions on which the car was used on the farm were either for the purpose of transporting suppliant himself to the particular point on the farm where he was to work or for the purpose of transporting suppliant with fellow-workers from the woolshed to the place on the farm where some particular work was to be done. So far as the use of the car on these other occasions was concerned, the manager of the farm knew of the practice, but he did not request the suppliant to transport the workers. Altogether, the suppliant did not use the car for the benefit of the farm and at the request of the farm-manager (or some other representative of the employer) more than once a month on an average. He used the car for travelling to and from work about ten to a dozen times a month. *Held*, 1. That the casual use of the suppliant's car at the request and for the benefit of the employer on not more than twelve occasions in twelve months, when the car happened to be on the farm, could not be regarded as implying an authority within the meaning of s. 45 (1) (*b*) of the Workers' Compensation Amendment Act, 1947, for the suppliant to use his car as a means of transport to and from work whenever he wished, or whenever it was convenient for him to do so: something more definite in the way of an arrangement or approval had to be established. (*Hassett* v. *Bridgeman* (*No. 2*), [1948] N.Z.L.R. 1220, applied.) (*James* v. *Williams* (*State Fire Insurance General Manager, Third Party*), [1951] N.Z.L.R. 290, distinguished.) 2. That, accordingly, the accident did not arise " out of and in the course of the employment " of the suppliant within the meaning of those words as used in s. 3 of the Workers' Compensation Act, 1922. *Harvison* v. *The King* (Comp. Ct. Hamilton. May 29, 1952. Dalglish, J.)

Accident arising out of and in the Course of the Employment—Heart Disease—Death of Worker while walking up Incline—Death due to Natural Heart Disease—Workers' Compensation Act, 1922, s. 3. The deceased worker, who was sixty-six years of age, collapsed and died immediately after walking up the Rewanui incline at the Liverpool State Colliery. The grade and distance, plus hurry and the prevailing weather conditions at the time of the happening, taken in conjunction with the deceased's heart condition, were the basis of the claim. The question was whether the deceased died from accident arising out of and in the course of his employment. *Held*, That the question was a medical one, and none of the medical witnesses said that the walk caused the worker's death, and two of them said that it did not; and, consequently, his death was due to the natural heart disease from which he was suffering as disclosed by the post-mortem. General medical observations as to the effect of the degenerated heart disease; as to death therefrom not being attributable to the effect of injury or effort; and as to the special sort of circumstances in which effort in itself can produce any deleterious effect on a heart. *Rose* v. *The King*. (Comp. Ct. Greymouth. December 13, 1951. Ongley, J.)

THE ANGLO-NORWEGIAN FISHERIES CASE,

And Other Problems Connected with Coastal Waters.[1]

Even the most ardent advocates of the principle of the " freedom of the seas " have agreed that a State is entitled to exercise some control over the waters adjoining its coastline. However, a number of events over the past few years, of which the Anglo-Norwegian dispute over fishing in the North Sea provides an example, have made it clear that there is not the same agreement as to the nature and extent of that control.

Internal Waters.

The navigable waters of the world can conveniently be divided into internal waters, territorial waters, and the high seas. Internal waters clearly include all rivers and fresh-water lakes and the waters within ports, but they also include other landlocked waters, such as bays, which are more difficult to define. The common legal feature of all these waters is that the State concerned has precisely the same sovereignty over them as it has over its land territory.

Territorial Waters.

Territorial waters are the strip of sea immediately off the coast of a State. These waters, together with the sea-bed, the subsoil, and the air space above, form part of the national territory of the shore State, and are subject to its legislation. They differ, however, from internal waters in that sovereignty is subject to what is known as a right of innocent passage in time of peace for foreign merchantmen and, perhaps, for foreign warships.[2]

The width of the territorial belt has been much discussed. It certainly extends for three nautical miles; and the general view of the major maritime powers, including the United Kingdom, has been that this is its greatest width. The doctrine of a " three-mile limit " is said to have arisen from the fact that three miles was once the furthest range of shore artillery—the " cannon-shot rule "—but States have not hesitated to make claims to an off shore limit of four, six, or even twelve miles.[3] Recent claims have been still more extensive.[4]

Anglo-Norwegian Dispute.

Of late, as much attention has been paid to the drawing of " base-lines "—*i.e.*, the lines from which the territorial belt, whatever its width, is measured—as to the actual width of the belt. The traditional view has been that these lines should be drawn at the mean low-water mark, but there has been uncertainty concerning the course which should be adopted when the coastline is deeply indented or fringed with islands. Norway has such a coast, and the *Fisheries Case* (*United Kingdom* v. *Norway*) has given the International Court of Justice an opportunity to consider this problem.

For many years there had been controversy between the United Kingdom and Norwegian Governments over the activities of British fishermen off the coast of Norway, the Norwegian Government alleging that these fishermen were in the habit of violating Norwegian internal and territorial waters. The width of the territorial belt itself was not disputed, as the United Kingdom conceded the Norwegian claim to four miles. The two States did, however, disagree over the method of determining the base-line from which the four-mile belt should be calculated, and on September 28, 1949, the United Kingdom Government referred the matter to the International Court.

It is not possible to describe in detail the somewhat involved method by which the United Kingdom Government claimed that the base-line should be drawn. In short, it submitted that the base-line should generally follow the indentations of the coast. At the mouth of bays, other than historic bays,[5] the line should be straight, and should be drawn between the two outermost points at which the width of the bay did not exceed ten miles; and, applying this last rule to the indentations between the island fringe and the mainland, the straight line joining any two selected points should not be more than ten miles long.

The Norwegians, on the other hand, had adopted less exacting rules. In a decree of July 12, 1935, they had nominated various points on the mainland, on islands, and on rocks off the coast, and had established a base-line by joining these points by straight lines up to forty miles long.

In its judgment, the Court, relying on certain basic considerations " inherent in the nature of the territorial sea ", laid down three criteria for the delimitation of territorial waters:

(i) While a State should be allowed to adapt its delimitation to practical needs and local requirements, base-lines should follow the general direction of the coast.

(ii) Sea areas lying within the base-lines should be sufficiently closely linked to the land to justify their being regarded as internal waters.

(iii) Consideration should be given to " certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage."

The Court, in effect, found that the Norwegian Decree of July 12, 1935, complied with these criteria. It also found that general toleration by foreign States of the Norwegian practice was " an unchallenged fact ", and that for a period of sixty years the United Kingdom Government itself had in no way contested that practice. This led to the conclusion:

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[1] This article is reproduced with some modification from (1952) *2 External Affairs Review*, published by the New Zealand Department of External Affairs. The modifications have been made and the references supplied by the Department.

[2] See discussion below of *The Corfu Channel Case*.

[3] For a discussion of the claims by the Soviet Union to exclude foreign fishing-vessels from a twelve-mile belt of water on the Baltic Coast, see (1950) *27 British Year Book of International Law*, 439. Swedish and Danish notes affirming the view that the validity of this claim should be submitted to the International Court of Justice were delivered to the Soviet Government on June 6, 1952.

[4] See (1950) *27 British Year Book of International Law*, 376, 380-383, 412-415.

[5] " Historic bays " are large bays which are regarded by the States concerned as part of their territory. These claims have been explicitly, or, more often, tacitly, accepted by the rest of the world, so that a title has been acquired by prescription. Recognized historic bays include Chesapeake Bay, on the Atlantic Coast of the United States, and Conception Bay, in Newfoundland.

the method of straight lines, established in the Norwegian system, was imposed by the peculiar geography of the Norwegian coast; that even before the dispute arose, this method had been consolidated by a constant and sufficiently long practice, in the face of which the attitude of governments bears witness to the fact that they did not consider it to be contrary to international law.[6]

Fishing in Icelandic Waters.

The decision in the Anglo-Norwegian case has already had repercussions in another traditional British fishing-ground. On March 19, 1952, the Icelandic Government issued regulations under which " base-lines " were drawn between promontories, islands, and rocks off the Icelandic coast, and the territorial limits within which foreign fishermen were forbidden to fish were extended to four miles from these base-lines. The regulations came into force on May 15, 1952.

The United Kingdom Government, in protesting against this unilateral announcement by Iceland, has pointed out that the effect will be to exclude British fishing-vessels from large areas where they have been accustomed to fish for more than half a century. In the United Kingdom view, the principle of a three-mile limit has been part of general international law ever since the nineteenth century, and the recent judgment of the International Court of Justice does not support the Icelandic claim to extend their territorial limits unilaterally: " exceptional historial factors which led His Majesty's Government to recognize Norway's title to a four-mile belt of territorial waters do not exist in the case of Iceland ".

In face of the Icelandic Government's rejection of a request that it should return to the three-mile limit and change one of the base-lines, the United Kingdom Government has reserved the right to claim compensation for any interference with British fishing-vessels in waters which it regards as high seas. It appears that the most important effect of the new regulations will be to exclude British fishermen from Faxa Fiord, which is some sixty miles across and twenty-five miles deep, and where in the past they have without challenge reaped a rich harvest amounting latterly to about 1,500,000 cwt. of fish a year.[7]

Straits: The Corfu Channel Case.

There are a number of places in which territorial or internal straits, bordered by the territories of different States, form a means of passage between two areas of the high seas. In such cases, each State normally exercises sovereignty up to the limit of its territorial waters, and, if these run into each other, up to the middle of the strait or to the centre of the mid-channel.

The North channel of Corfu Strait, barely more than one mile wide at its narrowest point and less than six miles wide at other points, lies between the Greek island of Corfu and Albanian territory on the mainland. The whole of its area is therefore territorial waters of the two States. On October 22, 1946, two British warships, while proceeding northward through the Channel in Albanian territorial waters, ran into a mine field and were damaged with loss of life.

The United Kingdom Government commenced proceedings against the Albanian Government before the International Court of Justice on May 13, 1947, and, after a preliminary objection by the latter Government to the jurisdiction had been dismissed, the two Governments agreed to submit two issues to the Court. The Court, in its judgment of April 9, 1949, reached the conclusion, in respect of the first of these issues, that Albania was responsible under international law for the explosions which had occurred and for the resulting damage and loss of life, and was accordingly under a duty to pay compensation.

The second issue submitted to the Court was whether the British warships, by entering Albanian waters on October 22, and by conducting mine-sweeping operations in the Channel on November 12 and November 13, had violated Albanian sovereignty and had therefore placed the United Kingdom Government under a duty to give satisfaction. The Court held that the warships did not violate Albanian sovereignty on October 22, because they were exercising a right of innocent passage. In the words of the judgment:

> It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is *innocent*. Unless otherwise prescribed in an international Convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.[8]

The Court pointed out that it had found it unnecessary to consider the more general question, much debated by the parties, whether foreign warships had in time of peace a right of innocent passage through territorial waters not included in a strait. In finding that the North Corfu Channel was a strait used for international navigation, the Court adopted the criterion of " its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation ".

On the other hand, the action of the United Kingdom authorities in carrying out, against the clearly expressed wish of the Albanian Government, operations to remove the mine field responsible for the damage was found by the Court to be a violation of Albanian sovereignty.

High Seas: Contiguous Zone.

It has long been recognized that the exercise of sovereignty over a limited territorial belt may not enable the shore State to obtain all the protection it considers it requires. Some States have sought to solve this problem by claiming an extension of the width of the territorial belt; others have adopted the principle of a high-seas zone contiguous to territorial waters in which the coastal State exercises jurisdiction for special purposes, such as self-defence, customs inspection, and the maintenance of aids to navigation.

Although this conception of the " contiguous zone " is now well established, there is little agreement on the extent of the zone or on the rights which the shore State may exercise in it. This question has recently been

[6] *Fisheries Case* (*United Kingdom* v. *Norway*), (1951) I.C.J. Reports, 116-206. See also (1952) *46 American Journal of International Law*, 23.

[7] The original United Kingdom Note was delivered on May 2, the Icelandic reply on May 12, and a further United Kingdom Note on June 18, 1952: see *The Times*, May 5 and June 20, 1952.

[8] *The Corfu Channel Case* (*Merits*), (1949) I.C.J. Reports, 4, 28. See also (1949) *26 British Year Book of International Law*, 447, and (1950) *44 American Journal of International Law*, 1.

examined by the International Law Commission,[9] which has been endeavouring to prepare a codification of the law relating to the régime of the high seas. The Commission has drafted the following article for consideration by member States of the United Nations :

> On the high seas adjacent to its territorial waters, a coastal State may exercise the control necessary to prevent the infringement, within its territory or territorial waters, of its customs, fiscal or sanitary regulations. Such control may not be exercised more than 12 miles from the coast.[10]

The report of the International Law Commission significantly comments that the proposed contiguous zones are not intended for purposes of security or of exclusive fishing rights.

High Seas Fisheries.

Of the many problems associated with control by a shore State over coastal waters and over the high seas, the most important are connected with fishing. The diet of many countries is dependent on plentiful supplies of fish, and the more powerful maritime countries, such as the United Kingdom and Japan, have relied on large fishing fleets operating many miles away from their home shores. Other countries, like Norway and Iceland, have been concerned to protect the supplies of fish in their coastal waters from what they regard as the depredations of foreign fishermen. This has been one of the reasons why the maritime powers have tended to support a rigid adherence to the three-mile limit, while smaller countries have sought, in various ways, to extend their jurisdiction over a wider area.

The obvious method of dealing with the fisheries problem is the conclusion of international agreements or conventions regulating fishing rights and establishing joint conservation measures. The past century provides a number of examples, one of the most recent of which is the International Convention for the North-West Atlantic Fisheries, concluded in 1949 by Canada (including Newfoundland), Denmark, France, Iceland, Italy, Norway, Portugal, Spain, the United Kingdom, and the United States.[11] A further example from the North Atlantic area is provided by the Agreement regarding the Rights of Fishery in areas of the Ecrehos and Minquiers, signed by the United Kingdom and French Governments on January 30, 1951.[12] By the terms of this Agreement, both parties have equal fishing rights in some areas, while other areas are reserved for the nationals of one or other party alone. It is worthy of note that the Agreement is without prejudice to a dispute as to the sovereignty over the islands, which the two Governments have agreed to submit to the International Court of Justice.[13]

The reconciliation of conflicting interests must necessarily precede the conclusion of an international agreement, and, from what has already been said, the difficulty of effecting this reconciliation in fisheries matters is apparent. There is, therefore, a growing body of opinion in favour of the view that a territorial State may exercise some measure of control over its high-seas fisheries, provided the rights of foreign nationals are respected. For instance, the President of the United States issued a Proclamation on September 28, 1948, in which he enunciated the following policy :[14]

> In view of the pressing need for conservation and protection of fishery resources, the Government of the United States regards it as proper to establish conservation zones in those areas of the high seas contiguous to the coasts of the United States wherein fishing activities have been or in the future may be developed and maintained on a substantial scale. Where such activities have been or shall hereafter be developed and maintained by its nationals alone, the United States regards it as proper to establish explicitly bounded conservation zones in which fishing activities shall be subject to the regulation and control of the United States. Where such activities have been or shall hereafter be legitimately developed and maintained jointly by nationals of the United States and nationals of other States, explicitly bounded conservation zones may be established under agreements between the United States and such other States ; and all fishing activities in such zones shall be subject to regulation and control as provided in such agreements. The right of any State to establish conservation zones off its shores in accordance with the above principles is conceded, provided that corresponding recognition is given to any fishing interests of nationals of the United States which may exist in such areas.

This Proclamation may be compared with action recently taken in Australia. The Fisheries Act, 1952, passed by the Commonwealth Parliament, has authorized the Australian Government to regulate fishing in Australian waters, which are defined to include Australian waters beyond territorial limits. The Minister for Commerce and Agriculture, when introducing the legislation, explained that the Commonwealth intended to undertake a programme of management and development in the fishing industry. After referring to action already taken in the United States, Mexico, Peru, and Argentina, he said :

> Such assertions of rights have not been tested in international law, but they are indicative of the present-day thinking of nations with interests comparable to those of Australia.

The Minister pointed out, however, that the operations in Australian extraterritorial waters by fishermen from other countries could be regulated only by agreement with the Governments of those countries.[15]

Before the war, the activities of Japanese fishermen in the North-east Pacific were a cause for concern to the Canadian and United States Governments. Although the problem was left unresolved by the Treaty of Peace with Japan, signed at San Francisco on September 8, 1951, Article 9 of the Treaty provided as follows :[16]

> Japan will enter promptly into negotiations with the Allied Powers so desiring for the conclusion of bilateral and multi-

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[9] The International Law Commission was established in accordance with a resolution of the General Assembly of the United Nations of November 21, 1947. It consists of fifteen members elected by the General Assembly, for a term of three years, from a list of candidates nominated by the Governments of States members of the United Nations. The present members of the Commission are Ricardo J. Alfaro (Panama), Gilberto Amado (Brazil), Roberto Cordova (Mexico), J. P. A. François (Netherlands), Shuhsi Hsu (China), Manley O. Hudson (United States of America), Faris Bey el-Khouri (Syria), F. I. Kozhednikov (U.S.S.R.), H. Lauterpacht (United Kingdom), A. E. F. Sandström (Sweden), Georges Scelle (France), Jean Spiropoulos (Greece), J. M. Yepes (Colombia), and Jaroslav Zourek (Czechoslovakia). Sir Benegal Rau (India), who was elected a member of the International Court of Justice, has resigned, and has not yet been replaced.

The Commission has two functions—namely, (i) that of considering proposals referred to it by the General Assembly for the progressive development of international law, and embodying them in draft conventions ; (ii) that of codifying international law and preparing draft articles for the consideration of the Assembly.

[10] *Report of the International Law Commission (Third Session, May 16—July 27, 1951)*, 20.

[11] Cmd. 8071 (United Kingdom Treaty Series 62/1950).

[12] Cmd. 8444 (United Kingdom Treaty Series 4/1952).

[13] Cmd. 8422 (United Kingdom Treaty Series 103/1951).

[14] (1945) *13 Department of State Bulletin*, 486.

[15] *Commonwealth of Australia, Parliamentary Debates, First Session, 1952 (Third Period)*, 564-567.

[16] Department of External Affairs Publication No. 121 (New Zealand Treaty Series 1952/8).

lateral agreements providing for the regulation or limitation of fishing and the conservation and development of fisheries on the high seas.

In accordance with this provision, a Tripartite Fisheries Conference was held at Tokyo by the United States, Canada, and Japan from November 4 to December 14, 1951.

In the International Convention for the High Seas Fisheries of the North Pacific Ocean, which was adopted at the Tripartite Fisheries Conference, an attempt was made to establish certain principles for the exploitation of fishing-grounds in respect of which a conservation programme is maintained by the adjacent State or States. The approach adopted is that, where there is a stock of fish which is being fully utilized and which is subject to a conservation programme involving limitations on exploitation and an intensive research programme, this situation should be recognized by countries which have not been sharing in the exploitation of the stock. These countries should agree to abstain from fishing in the area in order to ensure the success of the conservation programme.

The application of these principles to fishing in the waters off the West coast of North America led to an initial agreement that Japan would abstain from fishing for halibut, salmon, and herring in those waters, and that Canada would abstain from fishing for salmon in the East Bering Sea. Agreement to abstain might be withdrawn after five years if the International North Pacific Fisheries Commission, to be established under the Convention, should find that the fisheries concerned no longer qualified for abstention under the principles set out in the Convention.[17]

The North Pacific Convention has not yet come into force, and it is not clear whether the principles on which it is based will be given more general application. It does seem, however, that the rights of a shore State which is pursuing an active programme of research and conservation in respect of fisheries in its coastal waters are receiving increasing international recognition.[18]

Continental Shelf.

In recent years, technical developments have made it possible to exploit the natural resources of the sea-bed and its subsoil adjacent to the coast. The most important of these resources is, of course, oil. No difficulty arises in respect of the sea-bed and subsoil under territorial waters, since the shore State's sovereignty over this area is well established; but uncertainty persists concerning the submarine areas of the high seas. Whatever solution may be reached, it is likely to be a development of the doctrine of the continental shelf.

Geologically, the continental shelf is the seaward prolongation of the land mass of a continent or an island. It is a gradually sloping shelf covered with comparatively shallow waters only, until, at about the depth of 600 ft., it "falls off" to a steep slope, which declines rapidly to the floor of the ocean itself. It is, however, clear that, although many submarine areas adjacent to the coast do not conform to this pattern, they would permit of exploitation.

A long list could be given of Proclamations and of other instruments relating to the continental shelf and submarine areas.[19] The first was the Treaty of February 26, 1942, between the United Kingdom and Venezuela, under which the sea-bed and subsoil outside territorial waters of the Gulf of Paria, which lies between Venezuela and the Island of Trinidad, were divided between the United Kingdom and Venezuela on the assumption that these areas were rich in oil.[20] The submarine areas renounced by Venezuela were eventually annexed to His Majesty's Dominions by an Order in Council of August 6, 1942.[21]

The first instrument to attempt to establish a doctrine of the continental shelf was a second Proclamation made by the President of the United States on September 28, 1945. After referring to the need for new resources of petroleum and other minerals and to their likely existence underneath parts of the continental shelf of the coasts of the United States, the Proclamation stated that, in the view of the Government of the United States, the exercise of jurisdiction over the natural resources of the subsoil and sea-bed of the continental shelf by the contiguous nation was reasonable, and concluded:[22]

> Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea-bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control. In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles. The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected.

The majority of the subsequent Proclamations and declarations have been made by Latin-American States and by the rulers of territories in the oil-bearing regions of the Middle East. The claims made in these instruments differ in their extent and in their formulation, some being limited to a statement of claims and principles affecting the continental shelf (or, where there is no continental shelf, submarine areas generally), and others combining a claim to jurisdiction or sovereignty over the sea and the air space above the sea. The instruments have, on the other hand, two features in common. First, they all disclaim any intention of interfering with the principle of the freedom of navigation on the high seas, and, secondly, none but the most exorbitant have evoked protests from other States.

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[17] See (1952) *26 Department of State Bulletin*, 346 *et seq.*, for text of draft Convention. For an account of the background to the Convention, see (1952) *4 External Affairs*, Monthly Bulletin of the Department of External Affairs, Ottawa, Canada, 67.

[18] The preservation of the resources of the high seas from extermination has been considered by the International Law Commission, and it has prepared two draft articles on the subject: *Report of the International Law Commission (Third Session, May 16-July 27, 1951)*, 19.

[19] The subject of "Sovereignty over Submarine Areas" is fully discussed by Professor H. Lauterpacht in (1950) *27 British Year Book of International Law*, 376 *et seq.* For further discussion of the continental shelf, see (1948) *34 Transactions of the Grotius Society*, 153, and (1950) *36 Transactions of the Grotius Society*, 115.

[20] Cmd. 6400 (United Kingdom Treaty Series 10/1942). See also (1946) *23 British Year Book of International Law*, 333.

[21] The Submarine Areas of the Gulf of Paria (Annexation) Order, 1942 (S.R. & O., 1942, Vol. I, p. 919). See also the Jamaica (Alteration of Boundaries) Order in Council, 1948, S.I. No. 2575 (Vol. 1, p. 1664); the Bahamas (Alteration of Boundaries) Order in Council 1948, S.I. No. 2574 (Vol. 1, p. 250); and the British Honduras (Alteration of Boundaries) Order in Council 1950, S.I. No. 1649 (Vol. 1, p. 210).

[22] (1945) *13 Department of State Bulletin*, 485. The question whether the subsoil and the sea-bed are subject to the jurisdiction and control of the Federal Government or to that of the individual States has been the subject of political and legal controversy in the United States: (1947) *24 British Year Book of International Law*, 382.

The conception that a State can exercise some jurisdiction or control over its " contiguous submarine area " appears to have received general international acquiescence and approval. Thus, the International Law Commission, in draft articles which it has prepared in the course of its work on the régime of the high seas, has recognized that the sea-bed and subsoil of submarine areas outside territorial waters are subject to the exercise by the coastal State of control and jurisdiction for the purpose of exploring them and exploiting their natural resources. The Commission has conceded that the areas concerned need definition, and that they do not necessarily depend on the existence of a geological continental shelf.[23]

[23] *Report of the International Law Commission (Third Session, May 16-July 27, 1951)*, 17, and (1952) *46 American Journal of International Law*, 123.

CONCLUSION.

The problems which have been discussed, particularly those relating to the use of the resources of the sea, contiguous zones, and the continental shelf, have a special bearing on the principle of the freedom of the seas. It seems clear that some qualifications to the full rigidity of the principle must now be admitted, and that the basic problem is to evolve an orderly régime for the high seas which is consistent with the needs of the international community. The International Law Commission has been given the opportunity to guide this evolution, and it is gratifying that members of the Commission have stated that this is one of the most important of the many matters which have claimed its attention.

ACCESS-WAYS AND SERVICE-LANES.

By E. C. ADAMS, LL.M.

EXPLANATORY NOTE.

As I pointed out in (1949) 25 NEW ZEALAND LAW JOURNAL, 11, " *access-ways* " and " *service-lanes* " are very modern legal terms, which one will not find in *Williams*, *Garrow*, or *Goodall*, but the New Zealand conveyancer will have to get used to them and appreciate their legal effect.

Access-ways and service-lanes may be defined as public easements possessing some, but not all, of the characteristics of a public highway.

Access-ways exist for the purpose of providing the *public* with a shorter route for *pedestrians* from any road, street, or reserve to any road, street, or reserve. Thus, it is a public right-of-way for foot-passengers only.

Section 8 (1) of the Public Works Amendment Act, 1948, provides that access-ways shall be used by pedestrians only. Subsection 2 provides that, unless the Governor-General by Order in Council in any case otherwise directs, every access-way shall be of a width of not less than 4 ft. 6 in. and not more than 12 ft. measured at right angles to its course, provided that this subsection shall not apply to any access-way lawfully constructed under any other Act. (Section 2 (3) of the same statute provides that Part One of that Act shall not apply to any access-way created under the Housing Amendment Act, 1940, or the Land Subdivision in Counties Act, 1946, unless it is declared an access-way under s. 3 of the Public Works Amendment Act, 1948.) To find all the statute law relating to access-ways and service-lanes, therefore, we must look up, not only the Public Works Amendment Act, 1948, but also the Housing Amendment Act, 1940, and the Land Subdivision in Counties Act, 1946.

Section 2 (1) of the Public Works Amendment Act, 1948, defines " access-way " as follows :

> " Access-way " means an access-way declared as such by the Governor-General by Order in Council or by a Borough Council or Town Board by resolution under this Part of this Act ; and includes an access-way lawfully created under any other Act except the Housing Amendment Act, 1940, and the Land Subdivision in Counties Act, 1946.

It may be convenient to mention here that, before the passing of the Public Works Amendment Act, 1948, certain local legislation had authorized the creation of access-ways and service-lanes—*e.g.*, in Wellington, Lower Hutt, Timaru, and Napier.

A service-lane is a lane created for the purpose of providing the *public* with side or rear access for *vehicular* traffic to any land. Thus, it is a public right-of-way for carriages or vehicles only.

Service-lanes must be between 12 ft. and 35 ft. in width, unless the Governor-General by Order in Council in any case otherwise directs, provided that a service-lane may be of any greater width for a distance of not more than 20 ft. from where it meets any road or street, and provided also that any service-lane which has a blind end may have a turning space of any width at that end : s. 9 (1) of the Public Works Amendment Act, 1948. These two provisions—namely, that a service-lane may have a turning space at the end, and that entrances to a highway may be splayed back—are most useful in practice, and it is to be exceedingly regretted that, so far, no similar alleviation has yet been granted by the Legislature with respect to the creation of private rights-of-way in a city, borough, or town district. In this age of motor-cars, the present statutory restriction that no private right-of-way in a city, borough, or town district shall be of a greater width than 20 ft. measured at right angles to its course is causing grave inconvenience. This is indeed an example where law lags behind the necessities of the times.

Section 2 (1) of the Public Works Amendment Act, 1948, defines " service-lane " as follows :

> " Service-lane " means a service-lane declared as such by the Governor-General by Order in Council or by a Borough Council or Town Board by resolution under this Part of this Act, and includes a service-lane lawfully created under any other Act.

Although access-ways and service-lanes are for the use of the public, and may be closed in the same manner as roads or streets, they do not constitute legal road or street frontage for the purpose of ss. 125 and 128 of the Public Works Act, 1928, which are the provisions referring to the laying-off of new streets and street-widening on the subdivision of land. Attention is

drawn to a new provision restricting the subdivision of land. Section 7 (3) of the Public Works Amendment Act, 1948, provides that no person shall make any fresh subdivision of any land or building adjoining any access-way or service-lane unless the interest, if any, retained by the person making the subdivision, and each interest with which he is parting, has such frontage or access to a road, street, or private street, other than an access-way or service-lane, as may be required by any Act, regulation, or by-law for the time being in force and applying thereto. Section 2 (1) defines " subdivision " as follows :

> " Subdivision " includes any transfer, assignment, devise, letting, subletting, or other parting with ownership or possession (whether or not for any definite period) of any part of any piece of land or of any part of any building by a person who in either case retains or also disposes of an adjoining part.

I pause to observe here that the term " private street " as used in s. 7 (3) of the Public Works Amendment Act, 1948, must have the same meaning as it has in s. 125 of the Public Works Act, 1928, and in the Municipal Corporations Act, 1933. It is not really a *private* street as commonly understood, but it is one intended to be dedicated to the use of the public. The term " private street " is very much of a misnomer. The Municipal Corporations Acts which have been in force from time to time have contained stringent provisions as to the laying-out of " private streets ", and there can be very few " private streets " in New Zealand.

I have left the most important provision to the last.

Section 4 (3) provides that where pursuant to an authorization by the Minister or by a Borough Council or Town Board the owner of any land proceeds to lay out and construct a proposed access-way or service-land, he shall form and completely construct the same to the satisfaction of the controlling authority, and shall transfer the proposed access-way or service-lane to Her Majesty, or to the Corporation of the borough or town district, as the case may be, by instrument in writing, which shall be deposited for registration in the office of the District Land Registrar or, as the case may require, of the Registrar of Deeds, and the Registrar shall refuse to register any such instrument as aforesaid unless he is satisfied that the requirements of this section have been complied with. Section 6 provides, so far as relevant, that the control and management of every access-way and service-lane shall vest in the authority which would be entitled to control it if it were a road or street.

Obviously, the best way to prove to the Registrar that the access-way or service-lane has been formed and completely constructed to the satisfaction of the local authority is to produce a certificate to that effect under the seal of the corporation : such a method has received judicial sanction : *Scott* v. *Waitemata County*, [1935] N.Z.L.R. 816. Satisfaction should be signified by a formal resolution duly minuted : *Christchurch Drainage Board* v. *District Land Registrar and Registrar of Deeds*, [1925] N.Z.L.R. 842, 848.

CONVEYANCING PRECEDENT.

DEDICATION OF AN ACCESS-WAY IN A BOROUGH.

MEMORANDUM OF TRANSFER.

WHEREAS A. B. of Feilding, Farmer, (hereinafter called " the Transferor ") is registered as proprietor of an estate in fee simple subject, however, to such encumbrances, liens and interests as are notified by memorandum underwritten or endorsed hereon, in all that piece of land situate in the Borough of Feilding containing by admeasurement [*Set out here area*] be the same a little more or less BEING [*Set out here official description of land to be dedicated as an access-way*] and part of the land in Certificate of Title Volume Folio (Wellington Registry) AND WHEREAS the Transferor is desirous of transferring and dedicating the said land to the Mayor Councillors and Burgesses of the Borough of Feilding for the purposes of an access-way NOW THEREFORE THESE PRESENTS WITNESSETH that in consideration of the premises the Transferor doth hereby transfer and dedicate to the Mayor Councillors and Burgesses of the Borough of Feilding all his estate and interest in the said piece of land for the purpose of an access-way and the said Mayor Councillors and Burgesses of the Borough of Feilding do hereby accept the same for the purposes of an access-way in accordance with the provisions of s. 4 of the Public Works Amendment Act, 1948.

IN WITNESS WHEREOF these presents have been executed this day of 1952.

A. B.

SIGNED on the day above named by the said A. B. in the presence of

C. D.,
Solicitor,
Feilding.

THE COMMON SEAL of THE MAYOR COUNCILLORS AND BURGESSES of THE BOROUGH OF FEILDING as the local authority within whose jurisdiction the within-described land is situate was hereunto affixed in the presence of : L. S.

E. F. } Councillors.
G. H. }

I. J. Town Clerk.

EXTRACT FROM THE MINUTES OF AN ORDINARY MEETING OF THE FEILDING BOROUGH COUNCIL HELD ON THE DAY OF 1952.

In re Access-Way—A. B. [*Set out here short official description of land*].

Moved by Councillor K. L.

Seconded by Councillor M. N. and carried

THAT THE FEILDING BOROUGH COUNCIL HEREBY RESOLVES :

(i) That pursuant to the provisions of s. 3 (2) of the Public Works Amendment Act, 1948 all that piece of land situate in the Borough of Feilding containing [*Set out here area of land dedicated*] more or less [*Set out here official description of land dedicated*] and part of the land in Certificate of Title Volume Folio (Wellington Registry) be and the same is hereby declared to be an access-way for the purposes of Part I of the Public Works Amendment Act, 1948, and

(ii) That pursuant to the provisions of s. 4 (2) of the Public Works Amendment Act, 1948, authority is hereby given to construct an access-way over the piece of land above described.

(iii) That the provisions of s. 4 (3) of the Public Works Amendment Act, 1948, have been duly complied with.

THE COMMON SEAL of THE MAYOR COUNCILLORS AND BURGESSES of THE BOROUGH OF FEILDING was hereunto affixed pursuant to a resolution of the Council in the presence of : L.S.

E. F. } Councillors.
G. H. }

I. J. Town Clerk.

I hereby certify that the foregoing is a true and correct extract from the Minutes of an Ordinary Meeting of the Feilding Borough Council held on Tuesday the day of 1952.

O. P.,
Mayor.

Correct for the purposes of the Land Transfer Act.

Q. R.,
Solicitor for the transferee.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

On Books.—The Library Committee of the Melbourne Supreme Court Library has been so concerned to notice that borrowers have been retaining books for very long periods, often running into months, that it has altered its rules to provide that persons retaining books for longer than a fortnight must pay a fine of 5s. weekly. The advice of Anatole France was never to lend books, for no one ever returns them. "The only books I have in my library are books that other people have lent me." And the biographer of Sir Walter Scott recounts that the novelist would write inside his covers: "Please return this book; I find that, though many of my friends are poor arithmeticians, they are nearly all bookkeepers."

In Limerick County.—Should the Bench suddenly confront a bewildered witness with a Latin phrase? Richard Adams, Judge of the County of Limerick, did so once with surprising results. The case concerned an old lady who was suing the driver of a pony trap that had collided with her at a crossing, and his defence was that something had caused the pony to bolt. His witness was a young constable. "The way it was, your Honour," he said, "whin the pony came to the crossing there was a low wall on the right-hand side belonging to Flaherty's, an' inside in the garden behind the wall Mrs. Flaherty had hung up some female garments on a line. I couldn't tell you now what they were, but they were garments of some sort, your Honour, and whin the pony kem round he just pricked up his ears an' he looked at thim, and thin the wind blew them out into all sorts of quare shapes, an' the pony, because he couldn't make them out at all at all, he tuk fright." "Quite so," said Adams, "there is something about that in Tacitus: *Omne ignotum pro magnifico.*" "Your Honour," replied the witness, "has just tuk the words out of me mouth."

Ancient Law Clerk.—Reference is frequently made by legal journals and magazines to Judges who, despite great age, have carried on their judicial duties, although in some instances not without criticism. Scriblex himself has swallowed many a toothsome morsel at banquets given by our Societies in honour of practitioners who have survived the rigours of fifty years at the New Zealand Bar. It is difficult, however, to better the record of John Henry Dunmore, managing clerk and cashier for the firm of Crane and Walton, solicitors, of Ashby-de-la-Zouch, and its predecessors, who on April 23, 1952, completed seventy-five years of continuous service. It seems that on April 23, 1877, he went from school and obtained work in this office. Up to the end of last year, he worked a full day from 9 a.m., and, despite a slight set-back in health early this year, he expects in his ninetieth year to give the same loyal and devoted service as formerly.

Defective Roofs.—Actions for damages arising out of defective roofing materials or methods are not uncommon in this country, and for that reason the recent decision of the Outer House of the Court of Session in *Jack* v. *Keiller and Son, Ltd.* is of interest. Here, a slater's labourer fell through a factory roof while doing repairs, and he sued both his employers and the owners of the factory. The negligence alleged was that, at the place where he fell, the purlins were more widely spaced than the maximum recommended by the manufacturers. Lord Blades sustained the plea of the factory owners that they owed no duty to the labourer. He thought that, where the persons invited to the premises were a particular class of tradesmen, the question was whether there was an unusual danger for that class, for an unusual danger was one which was not usually found in performing the work which the invitee had in hand. To argue that, before allowing the workmen employed by the contractor to carry out work on their roof, the owners were under an obligation to satisfy themselves that the roof was reasonably safe for the workmen to walk or crawl over, would be to impose on occupiers a duty to an invitee far more onerous than had hitherto been imposed on them. It was for the contractor, who undertook to carry out the work on the roof and sent his men to the premises to do the work, to take reasonable steps to see that the premises were safe for his men, or else to take proper steps to protect them from the dangers into which he sent them.

In The House of Lords.—Fascinated by the growing numbers of un-English names of plaintiff and defendant in our Courts, Scriblex notices in the list of cases awaiting hearing in the House of Lords that of *Gdynia Ameryka Linie Zeglugowe Spolka Abcyjna* v. *Boguslawski*. This is an appeal involving the principle of retroactivity, the recognition by the British Government of the new Polish Government as from July, 1945, and its control over Polish ships and men then in England. On the other hand, the list contains *Inland Revenue Commissioners* v. *Albion Rovers Football Club, Ltd.*—an income-tax case as English as Shakespeare or apple-pie. In the same list is also *Best* v. *Samuel Fox and Co., Ltd.*, wherein the appellant seeks to show (Croom-Johnson, J., and the Court of Appeal to the contrary) that a wife whose husband has been rendered impotent by the defendant's negligence is entitled to damages for loss of consortium.

From My Notebook (Judicial Division).—"I think few counsel who are invited to accept judicial office could analyse their motives for doing so, but, probably, they all feel that judicial work presents a challenge to their legal and intellectual capacity. It is a challenge which they feel, I fancy, would be ignoble not to take up, most if not all of them having been penetrating and perhaps unrestrained critics of the work of the Judges before whom they have been accustomed to appear": Sir Owen Dixon, Chief Justice of the High Court of Australia.

"Before the war, a barrister could at any rate expect to make some provision for his family, for the education of his children, and for his old age. To-day, it is almost impossible for him to save anything at all. A High Court Judgeship used to be a great incentive to members of the Bar. To-day, that promotion bids fair to become an expensive luxury which no one can afford. We are told that doctors must have double the remuneration which they had before the war in order that the standard of medicine should not decline. I would remind you that Judges of the High Court of Justice receive the same salary as they enjoyed one hundred years ago": Sir Lionel Heald, Q.C., Attorney-General, at the Annual General Meeting of the Bar.

PRACTICAL POINTS.

This service is available free to all paid annual subscribers, but the number of questions accepted for reply from subscribers during each subscription year must necessarily be limited, such limit being entirely within the Publishers' discretion. Questions should be as brief as the circumstances will allow; the reply will be in similar form. The questions should be typewritten, and sent in duplicate, the name and address of the subscriber being stated, and a stamped addressed envelope enclosed for reply. They should be addressed to: "THE NEW ZEALAND LAW JOURNAL" (Practical Points), P.O. Box 472, Wellington.

1. Crown Land.—*Trespasser and Trespasser's Predecessors in Title alleged to be in Possession since 1887—Maori Land Court given Statutory Authority to issue Freehold Orders—Such Jurisdiction never exercised—Trespasser desiring Land Transfer Title—Procedure—Limitation Act, 1950, s. 7—Crown Grants Act, 1908, s. 3—Land Transfer Act, 1915, s. 19—Deeds Registration Act, 1908.*

QUESTION: H., who is a European but partly of Maori descent, has been in occupation of a section of land since 1931. He does not hold such land under Maori custom or usage. Evidence is available to show that the section has been continuously occupied by H., his father, and his grandfather since 1887. Borough Council records were destroyed by fire in 1910, but since that year show payment of rates by H.'s. father and by H. No payment of rent has ever been demanded from H. or (to his knowledge) from his father or grandfather. Neither H. nor, as far as he knows, his ancestors have ever received notice of any adverse claim to the land.

No title to the section is held in the Land Transfer Office, but the records of that Office show that the land appears to be Maori-owned and that ownership originated under s. 52 of the Maori Land Amendment Act, 1929. The records do not give the name of the owner. The section is marked "N.R." on a lithograph held by the Maori Trustee, but is not administered by that office.

The section is specifically referred to in s. 39 of the Maori Land Amendment and Maori Land Claims Adjustment Act, 1927, as amended by s. 52 (*a*) of the Maori Land Amendment Act, 1929, the machinery clauses of which are now replaced by s. 80 of the Maori Purposes Act, 1931. Section 80 appears under the heading of a Maori Land District which is not the District in which the section is situated.

The land was subject to an investigation under s. 60 of the Maori Land Amendment and Maori Land Claims Adjustment Act, 1922, on October 16, 1924: The case was adjourned and heard further on December 2, 1924, and was then stood over. At the hearing, claims were made by three *hapus*, which claims appeared equally difficult to prove or disprove. H. was not made a party to the proceedings, and the case has not been before the Court again.

In 1945, the Minister of Lands applied to the Maori Land Court for investigation of title under s. 80 of the Maori Purposes Act, 1931. The Minister did not prosecute his application, and the matter has been allowed to drop.

H. made application to the District Land Registrar in 1948 to bring the land under the Land Transfer Act, 1915, but this application was rejected, on the ground that no Crown grant had been issued and the consents required under s. 19 of the Land Transfer Act, 1915, had not been obtained.

We do not wish to apply to the Maori Land Court under s. 80 of the Maori Purposes Act, 1931, since former proceedings have been abortive. We feel that future proceedings would be long-drawn-out and might be equally inconclusive.

We have considered the possibility of proceeding under the Declaratory Judgments Act, 1908, for interpretation of the effect of s. 7 of the Limitation Act, 1950, coupled with s. 80 of the Maori Purposes Act, 1931, in regard to the section, and for a declaration that H. is the owner of the land. We have also considered the possibility of application for a writ of mandamus against the Surveyor-General and the Governor-General should these authorities withhold their consent (under s. 19 of the Land Transfer Act, 1915) to an application to bring the section under the Act.

We would prefer, however, to use some simpler and less expensive procedure, if any exists. In particular, we desire to know whether it is possible for H. to apply under the Crown Grants Act, 1908. Does the acquisition of title by prescription under s. 7 of the Limitation Act, 1950, amount to a "disposal" of Crown land referred to in s. 3 of the Crown Grants Act, 1908? Alternatively, is there any procedure by which H. may lodge evidence of his title with a Deeds Register Office?

ANSWER: If the facts are correctly stated in the question and in the various Maori Land Acts cited, then this is a case of a trespasser and his predecessors in title having been in adverse possession of a parcel of Crown land for very many years.

Section 3 of the Crown Grants Act, 1908, does not apply. That applies only to persons claiming from the Crown, and not to persons claiming against the Crown. Provided the Maori title has become validly extinguished (and that would appear to be so), declarations establishing the facts of possession could be registered under the Deeds Registration Act, 1908, but they would be merely evidential, and not constitutive of title.

If long, undisturbed, and continuous possession for the necessary period of sixty years cannot be proved, then an action to perpetuate testimony should be initiated against the Crown in the Supreme Court.

If it is considered that adverse possession for the necessary period of sixty years can be proved, then an action for declaration of title should be begun against the Crown in the Supreme Court.

The only person who can give H. a legal title is the District Land Registrar, but he can do nothing until the consents under s. 19 of the Land Transfer Act, 1915, are given. It is not considered that the Supreme Court would grant a writ of mandamus against the Surveyor-General or the Governor-General in this respect. At the same time, if the Land Officers of the Crown were satisfied that H. had acquired a good title by adverse possession, it is inconceivable that the necessary consents under s. 19 of the Land Transfer Act, 1915, would not be given.

Quaere, As to whether s. 172 (2) of the Land Act, 1924, bars H.: see also *Whatatiri* v. *The King*, [1938] N.Z.L.R. 676.

X.2.

2. Life Insurance.—*Policy under Married Women's Property Act—English Death-duties Practice.*

QUESTION: What is the English view or practice with regard to death duties on policies coming under the Married Women's Property Act, 1882, with regard to death duties? The position will be the same as regards the law in New Zealand.

ANSWER: The English practice with regard to such policies coming under the Married Women's Property Act, 1882, is that, as a general rule, duty is payable on the proceeds on the death of the assured, just as it is payable here on the proceeds of similar policies.

This seems to be so from the following references in English text-books: *Green on Death Duties*, 2nd Ed. 231, *Dymond on Death Duties*, 10th Ed. 111, 141, and *Hanson on Death Duties*, 9th Ed. 117.

These references show that in England policy proceeds form part of deceased's dutiable estate, although they do not form part of deceased's free estate. The proceeds are includable under the provisions in s. 2 (1) (*c*) and (*d*) of the Finance Act, 1894 (U.K.), corresponding to our s. 5 (1) (*f*) and (*g*) of the Death Duties Act, 1921. There is, however, this difference in the assessment of the estate duty. In New Zealand, the policy proceeds are aggregated with the other property of deceased and estate duty assessed on the whole at a rate fixed by the aggregate value. It will be seen from the above text-book references that in England the practice is different, because of a provision in s. 4 of the Finance Act, 1894 (U.K.). Such a policy under the Married Women's Property Act, 1882, liable to duty, is not aggregated with the other property to fix the rate of duty on the whole, but itself forms a separate estate, on which the duty is leviable at a rate fixed by its own value.

B.2.