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VALUATION OF LAND: THE "CAPITAL VALUE" OF HOUSES IN A TIME OF SCARCITY.

FOR some time past there has been much discussion whether the "capital value" of a residential property, for the purposes of a valuation under the Valuation of Land Act, 1951, should be based on "replacement cost" value or on market value. There have been two distinct schools of thought on the subject. An example of one is the judgment of the Auckland No. 2 Land Valuation Committee in *In re Manning*, (1952) 7 M.C.D. 479, where the value of a residential property for death-duty purposes was based on conscientiously prepared "replacement cost" estimates. On an appeal by the Valuer-General from that determination, the Land Valuation Court showed that market value must take precedence over replacement value where there is shown to be a divergence between them: *Valuer-General* v. *Manning*, [1952] N.Z.L.R. 701.

As that judgment discusses the capital value of houses in a seller's market and the effects of the present scarcity of houses in determining what is a fair market value for any particular house, it is of interest to see how the Land Valuation Court arrived at its decision. There is also the interesting feature relating to an award of costs to the objector against the successful Valuer-General.

The facts, as presented to the Land Valuation Committee, were that in 1940 a house was built at Masons Avenue, Herne Bay, Auckland, at a cost of £1,134 9s. 5d., the section costing a further sum of £425. From 1940 until 1951, the property was occupied by the owner, Mrs. A. R. Manning, and her husband and daughter.

Mrs. Manning died on May 18, 1951, and her husband and daughter had continued to occupy the house. The property was valued for death-duty purposes by the Valuation Department at £3,125, and against this assessment the objector appealed. At the date of Mrs. Manning's death, the then-existing Government valuation of the property was £1,760.

Mr. C. H. Webb, a valuer called in support of the objection, gave evidence that, in his opinion, the value of the property at the date of Mrs. Manning's death was £2,970. In reaching this figure, he used what is called the "replacement cost" method, but admitted, in reply to questions, that he would anticipate that a price of up to £3,300 might have been obtained had the property been offered for sale on the open market at the date of deceased's death.

Mr. I. McIndoe, who gave evidence as to value on behalf of the Valuation Department, also stated that he had used the "replacement cost" method in reaching his figure of £3,125.

These witnesses were both experienced valuers. They agreed on an unimproved value of £840, and, as has been seen, both, in valuing the improvements, used the method of "replacement cost less depreciation", and with a considerable measure of agreement. By reason of his greater deduction for defects in construction, however, Mr. Webb's final figure for improvements was £2,130, as against Mr. McIndoe's figure of £2,285. The Committee accepted Mr. Webb's assessment with one small adjustment, and reduced the Department's valuation to: Unimproved value: £840; Improvements: £2,140; Capital value: £2,980.

It was acknowledged that, at the relevant date for this valuation, May 13, 1951, there was a grave shortage of houses, and very high prices were commonly being paid, particularly where vacant possession could be given. The notes of evidence show that Mr. Webb said to the Committee:

> I am not suggesting that £3,125 could not have been got for it on the open market. Prices are well up in the air. If I had been asked what price to put on this property, I would have said £3,200 to £3,300, and would expect that figure to be obtained.

Mr. McIndoe's evidence before the Committee included:

> If advising a purchaser as to what to pay for the property, I would say: "My valuation is £3,125. Go and look at it. If you like it, pay up to £3,500, because, if you don't like it, someone else will" . . . Judging by prices being paid, I would say a purchaser would be making quite a good purchase at £3,500 by comparison with other places.

It was on this evidence that the Valuer-General invited the Committee to confirm the Department's valuation of £3,125.

The Land Valuation Court observed that the Government valuer, in his evidence before the Committee, had arrived at this value by the "replacement cost" method; and, apart from the expression of opinion quoted, he gave no evidence as to market value or as to actual sales as a basis for market value. The Committee had held that its duty was to ascertain "the true value of the property for sale purposes", and that ((1952) 7 M.C.D. 479, 482):

> the method best calculated to show the correct value under conditions such as exist to-day would be to assess the market

value of the land (unimproved) and add to that the reasonable cost (less depreciation, &c.) of the improvements.

It found confirmation of this view in the fact that both valuers had used the method described, and that the Department had placed no higher value on the property than its valuer's assessment of its replacement value. In rejecting the Department's contention, the Committee, at p. 482, said :

> It would not be equitable . . . in a case such as this to abandon conscientiously prepared replacement cost estimates, which may be made the subject of careful check, for the vagaries of mere " opinion " evidence unsupported by factual data.

On the hearing of the appeal from this decision, the value of the improvements on a replacement basis was again traversed by both parties, but, upon this aspect of the case, the Court did not question the Committee's decision ; and it held that the " replacement value " of this property (allowing £840 for the land) was £2,980.

The substantial ground of appeal, however, was that the amount so found was not the true value of the property, and was not, in the circumstances, in conformity with the value required to be found under the Death Duties Act, 1921, of which s. 70 (5) provides as follows :

> In this section the term " land " has the same meaning as in the Valuation of Land Act, 1908 [now 1951], and the term " value " means capital value as defined by that Act.

In s. 2 of the Valuation of Land Act, 1951 (formerly 1925) " capital value " is defined as follows :

> " Capital value " of land means the sum which the owner's estate or interest therein, if unencumbered by any mortgage or other charge thereon, might be expected to realize at the time of valuation if offered for sale on such reasonable terms and conditions as a *bona fide* seller might be expected to require.

Before the Land Valuation Court, on the Valuer-General's appeal, the issue of " market value " was developed on behalf of the Valuer-General with much greater care. Mr. McIndoe said that in May, 1951, the property would have brought £3,500. He acknowledged the discrepancy between this figure and his valuation of £3,125, and admitted that, in making his valuation, he had relied entirely on the replacement method. He maintained, however, that selling value was, at the time, in excess of replacement value, and that an amount for " saleability " should be added to replacement value, in order to arrive at market value. Why Mr. McIndoe had not done this when making his original valuation was not adequately explained, but he professed to have been wrong in failing to add something for " saleability ".

Mr. J. D. Mahoney, a senior officer of the Valuation Department, elaborated the contention that the market value of house properties was, at the relevant date, in excess of replacement value, and assessed the difference at from 10 per cent. to 12½ per cent. Mr. Mahoney valued the property at £3,325, a figure arrived at by valuing it by the replacement method and adding 10 per cent. to the replacement value of the improvements. In support of his views as to the relationship between market value and replacement value, Mr. Mahoney submitted an analysis of sales of untenanted houses in Herne Bay and the adjoining district of Westmere, to show that the value of properties as indicated by actual sales was substantially higher than if calculated by the replacement method.

For the estate of the deceased owner, evidence was given by Mr. E. L. Whelan, of the State Advances Corporation, and by Mr. C. H. Webb. Mr. Whelan said his Department had recently sold a large number of houses as mortgagee in possession. He said that these houses had first been valued by the replacement method ; but he agreed that, in the Corporation's experience, houses in average residential areas, in fair repair, and with vacant possession, were generally saleable at from £200 to £300 in excess of their replacement value. Mr. Webb confirmed his evidence before the Committee, and his valuation of £2,970. He added, however :

> The property would probably bring £3,200 in the open market at that time. If asked in May, 1951, what the property should have been sold for, I would have given that figure.

When asked to elaborate this statement, he said :

> I am asked to make what I consider a fair valuation of this property. To arrive at that, I must adopt a fair replacement value less depreciation. That is a fair value of that property. The question then comes up : What would a purchaser pay for it ? That is where I have the other set of figures. In my view, the true value is shown by replacement cost, and any additional money is by way of premium. There is a general tendency to pay more than replacement value.

It will be seen that, as to the relationship between replacement value and selling value, these witnesses were substantially in agreement with the valuers called by the appellant. On this topic, the Court said :

> More comprehensive and convincing evidence as to the selling value of the property at the date of death was thus before the Court than that which the Committee rejected as " ' opinion ' evidence unsupported by factual data ". The Department had been in difficulty before the Committee, when, depending on a witness who had relied solely on the replacement method, it sought to sustain his valuation by a belated reliance upon selling value in the open market. In these circumstances, it is little wonder that the Committee rejected its plea for a higher value than that which it found to have been established by the replacement method.

The judgment of the Court went on to say that, in accordance with the Court's practice, the appeal fell to be decided upon the evidence as presented at the hearing of the appeal. On that evidence, the Court was in agreement with the Committee that, at the date of death, the replacement value of the property was £2,980. The judgment proceeds :

> We find, however, that the property could have been sold at that date at a higher figure. All the valuers and Mr. Whelan were in general agreement with that proposition, the respective estimates of selling value being : Mr. McIndoe, £3,500 ; Mr. Mahoney, £3,325 ; Mr. Webb, £3,200. Mr. Mahoney's method was to add 10 per cent. to his replacement value of improvements, and his analysis of actual sales appeared to indicate that 10 per cent. was not an excessive allowance. The addition of 10 per cent. to the Committee's valuation of the improvements would increase its total valuation from £2,980 to £3,194, a figure very close to Mr. Webb's assessment of selling value of £3,200, and higher than the valuation of £3,125, which is the subject of this appeal. On the evidence, we are bound to hold that the property could have been sold in May, 1951, for £3,125.

As appellant, the Valuer-General contended that a finding that the property was saleable at the relevant date for £3,125 was conclusive in his favour. The estate nevertheless maintained that the true value of the property at that date was its replacement value of £2,980.

The Court went on to consider which was the correct basis of valuation, having regard to the definition of " capital value " contained in s. 2 of the Valuation of Land Act, 1925.

Mr. Webb had qualified his evidence as to selling value by saying that, in his opinion, the true value of the property was shown by its replacement cost, and

that any additional amount paid by a purchaser would be by way of "premium". Mr. McIndoe also appears to have regarded his assessment of replacement value as the true value of the property, and to justify a higher selling price only on the ground that a prospective purchaser who offered only the replacement value would lose the property to someone prepared to pay more.

Relying on those expressions of opinion, the executor of the estate claimed that replacement value is the true value, and that any sum offered in excess of replacement value is not added "value", but is a "premium" paid in consequence of the scarcity of houses and of the dire needs of prospective purchasers. The Court said:

> It is, of course, elementary that we must give full effect to the statutory definition of "capital value." As was said by *Sir Robert Stout*, C.J., in *Duthie* v. *Valuer-General* ((1901) 20 N.Z.L.R. 585): "This definition is clear and specific, and it should be followed, whatever the results may be" (*ibid.*, 589).
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> It is true, moreover, that in terms the definition relates capital value to saleability at a hypothetical sale. *Hosking*, J., said in *Thomas* v. *Valuer-General* ([1918] N.Z.L.R. 164): "The saleability of the estate or interest to be valued must be assumed as the basis" (*ibid.*, 173). And *Kennedy*, J., said in *Valuer-General* v. *Wellington City Corporation* ([1933] N.Z.L.R. 855): "The sale is a hypothetical sale and the buyer is likewise fictional, because no person actually does buy" (*ibid.*, 866).
>
> It is equally true, however, that the definition envisages by implication, not only a reasonable and *bona fide* seller, but also a willing and informed purchaser, and that the sum which a property may be expected to realize at any given date is dependent as much on what purchasers may be prepared to pay as on what a vendor may be inclined to ask. We conceive that the definition is not intended to create a new standard of valuation for rating and duty purposes, but is intended to apply to valuations made for those purposes the conception of "fair market value" long established in English law and assessed by reference to a hypothetical sale between a willing seller and a willing buyer. Dicta as to "fair value" for the purposes of the Servicemen's Settlement and Land Sales Act, 1943, and as to the valuation of property for the purposes of compensation claims are accordingly relevant, in many cases, to the issue now before us.

The Court then referred to "fair value" under the Servicemen's Settlement and Land Sales Act, 1943, and pointed out that *Finlay*, J., had held in *In re Oriental Hotel, Muir to Niall*, [1944] N.Z.L.R. 512, 516:

> "Value" means what, with all its advantages and disadvantages, the premises were worth to the owner on the critical date, assuming him to have been, at that date, a man of ordinary prudence and foresight, not anxious to sell for any compelling or private reason, but willing to sell as one business man would to another, both of them being alike uninfluenced by any consideration of sentiment or need.

In the Australian compensation case, *Spencer* v. *Commonwealth of Australia*, (1907) 5 C.L.R. 418, there are numerous passages which appear apposite to the issue in the present case.

The Court said that numerous authorities have justified the use, in the valuation of improvements, of the replacement cost method. Thus, in *Valuer-General* v. *Wellington City Corporation*, [1933] N.Z.L.R. 855, *Kennedy*, J., delivering the judgment of the Court, at pp. 872, 873, held:

> the Assessment Court is entitled to take into consideration . . . the cost of erecting the buildings upon the land assessed. This does not mean that the Court should necessarily fix capital value at cost, less proper allowance for obsolescence and suchlike, but only that cost is a factor which may be considered.

In the Land Sales Court, where frequently there was little evidence as to sales on or about the relevant date for valuation, December 15, 1942, the replacement method was commonly relied on. In *D. to E.*, (1944) (No. 1) 20 N.Z.L.J. 155, *Finlay*, J., said:

> The safer and better course is to employ the basis of replacement cost, paying due regard to the fact that a calculation of such costs is necessarily only approximate and is at most an indication of the value which the Court has to determine.

The Court concluded that the replacement cost method is not conclusive or infallible. It should be regarded, not as an alternative to market value, but as a factor to be considered in the assessment of a fair market value. Its advantages arise from the facility with which it may be examined and checked, and from its availability when it is impracticable to assess values by reference to actual sales. Its validity depends on the assumption that a prospective purchaser will not pay more for premises than it would cost him to build similar premises elsewhere. That assumption holds good only when the building situation is such as to give prospective buyers an effective choice as to whether to buy or to build. The judgment continued:

> It is well recognized that "price" is not synonymous with "value", and that sales at excessive prices, and appearing to be attributable only to the whim, extravagance, or compelling need of individual purchasers, should be disregarded in the assessment of market value. The estate invites us to disregard the high prices generally paid for houses in 1951, on the ground that they were induced by the pressure of compelling need. We think, however, that a distinction must be drawn between an individual case where an excessive price is paid for personal reasons and a general situation where the prices of houses are found to exceed replacement costs in consequence of an insistent and unsatisfied demand for homes. In the former case, the price paid is out of line with market prices and it is for that reason that the sale is disregarded. In the latter, the price level is constituted by actual sales, and follows naturally from an excess of demand over supply. We conceive that supply and demand are factors in the determination, not only of price, but also of value, and that the effect of demand upon the property market is not to be disregarded merely because it reflects in varying measure the needs of prospective buyers.

The estate's case appeared to envisage two contemporaneous standards of value—namely, an intrinsic value determined by replacement cost, and a selling value dependent upon the state of the property market—the judgment continued. Thus, the estate's valuer, Mr. Webb, spoke of a "fair value", which he assessed on a replacement basis at £2,980, and of "what a purchaser would pay", which he assessed by reference to his knowledge of the market at £3,200. The Court could find no justification for such a distinction in the definition contained in the Valuation of Land Act, 1925:

> The definition limits our consideration to one thing only—namely, the amount which the property, if offered for sale on reasonable terms at the relevant date, might have been expected to realize. It follows that we are not entitled to give weight to certain factors which were mentioned in argument, and which may have weighed with the Committee. We are not concerned with the view or methods of the Valuation Department, save as to its method of assessing the market value of this particular property at the relevant date. Nor are we concerned with public policy, or with the incidence of death duty, and we are not entitled to take into account the possibility of hardship which may result from the basing of a death-duty valuation on current selling prices.

The substantial issue in this case was really this: May the replacement value be accepted notwithstanding that the evidence shows that a higher figure could have been obtained at the relevant date in the open market? The Court's answer to this question was "No"; and its reason for that answer was that, both in principle and by virtue of the statutory definition, market value must take precedence over replacement value where

there is shown to be a divergence between them. The unanimous agreement of the valuers that the deceased's property could have been sold at the date of death for £3,125 affords, the Court thought, conclusive evidence on which it must hold that £3,125 is the capital value of the property for the purposes of s. 70 of the Death Duties Act, 1921. In addition, the Court said :

> In so holding, however, we wish it to be understood that it is the amount of the appellant's valuation which we confirm, rather than his Department's method of assessment. The association of the Valuation Department with these proceedings has been by no means a happy one. Before the Committee, it relied upon Mr. McIndoe to support a valuation of £3,125 based solely upon replacement cost. When the Committee reduced this valuation by the comparatively small sum of £145, the Department conceived that its original figure might be restored by the addition of a suitable sum for " saleability ", and it appealed, to test the validity of this somewhat novel proposal. Mr. Mahoney then advanced for the first time the theory that a percentage should be added to the replacement value. Mr. Mahoney's valuation of the property was £3,325, but the appellant asked no more than that Mr. McIndoe's figure of £3,125 should be restored. The appeal is entitled to succeed, because the evidence establishes a market value at the date of death of not less than £3,125.

The Court then proceeded to consider the question of the costs of the appeal. It said that the amount in issue in the appeal was small, and it was questionable whether an appeal would have been justified, save as a test case upon some point of law :

> The essential issue was not adequately presented before the Committee, and was in substance raised for the first time at the hearing of the appeal. In these circumstances, we think the estate should be reimbursed in part for the costs which it has incurred as a result of the unusual course followed by the Department.
>
> We accordingly allow the appeal and restore and confirm the appellant's valuation, dated September 26, 1951, of £3,125, but we direct the Valuer-General to pay to the objector the sum of £10 10s. towards his costs.

To summarize the Court's decision :

The Court held that the definition of " capital value ", which relates capital value to saleability at a hypothetical sale, is not intended to create a new standard of valuation for rating and duty purposes, but is intended to apply to valuations made for those purposes the established conception of " fair market value ", which is assessed by reference to a hypothetical sale between a willing seller and a willing buyer. The "replacement cost " method of valuation should be regarded, not as an alternative to market value, but as a factor to be considered in the assessment of a fair market value.

A distinction must be made between an individual case where an excessive price is paid for personal reasons (since the price paid is out of line with market prices) and a general situation where the prices of houses are found to exceed replacement costs in consequence of an insistent and unsatisfied demand for homes (the price level being constituted by actual sales, and following naturally from an excess of demand over supply). Supply and demand are factors in the determination, not only of price, but also of value ; and the effect of demand upon the property market is not to be disregarded merely because it reflects in varying measure the needs of prospective buyers.

SUMMARY OF RECENT LAW.

ACTS PASSED, 1952.

No. 1. Imprest Supply Act, 1952.
2. Imprest Supply Act (No. 2), 1952.
3. Imprest Supply Act (No. 3), 1952.
4. Public Service Amendment Act, 1952 (*August 25*).
5. Geothermal Steam Act, 1952 (*August 25*).
6. Rehabilitation Amendment Act, 1952 (*August 25*).
7. Fire Service Amendment Act, 1952 (*August 25*).
8. Military Training Amendment Act, 1952 (*August 25*).

CONVEYANCING.

Infants' Settlements. *96 Solicitors' Journal*, 403.

CRIMINAL LAW.

Evidence—Admissibility—Evidence of Similar but Unrelated Criminal Acts—Admissible upon Issue whether Acts Charged designed or accidental or to rebut Defence open to Accused—General Denial of Offence charged satisfying Such Condition when necessarily raising Particular Defence—Qualification as to Exercise of Judicial Discretion in Proper Cases—Trial—Summing-up—Suggested Corroboration—No Corroboration on Some Points as mentioned—Final Passage in Summing-up insufficient to dispose of Earlier Suggestion of Corroboration—Conviction quashed—New Trial ordered. Evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment is admissible upon the issue whether the acts charged against the accused were designed or accidental, or to rebut a defence otherwise open to him. The condition of its admissibility is that it is relevant to an issue raised in substance in the case : and that condition may be satisfied if a general denial by the accused person necessarily raises a particular defence to the crime alleged. (*Makin* v. *Attorney-General for New South Wales*, [1894] A.C. 57, and *Noor Mohamed* v. *The King*, [1949] A.C. 182 ; [1949] 1 All E.R. 365, followed.) (Dictum of *Lord Sumner* in *Thompson* v. *The King*, [1918] A.C. 221, 232, explained.) The trial Judge in all such cases ought to consider whether the evidence the prosecution proposes to adduce as to similar facts is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable that it should be admitted. If, so far as that purpose is concerned, it can, in the circumstances of the case, have only trifling weight, the trial Judge will be right to exclude it. (*Noor Mohamed* v. *The King*, [1949] A.C. 182 ; [1949] 1 All E.R. 365, applied.) The counts in the indictment on which the appellant was convicted charged him with indecent assaults on two girls, E., aged twelve years and four months, and J., aged ten years and seven months. J. was a daughter of the appellant and E. was a daughter of a neighbour and an associate of J.'s. The assaults were alleged to have occurred in a factory occupied by the appellant in connection with his work. Objection was taken by accused's counsel to admission of evidence relating to incidents that were alleged to have occurred between the accused, on the one hand, and the two girls named and a third and younger girl, or one or more of them, on the other hand, at various times and places. One of the incidents alleged to have taken place with the third girl was the subject of the third count against the appellant, on which he was acquitted by the jury. On appeal against the appellant's conviction, *Held*, by the Court of Appeal, 1. That the evidence objected to was admissible to rebut the defence which necessarily arose, that the association of the two girls with the appellant in the factory was an innocent association. (*R.* v. *Ratu Huihui*, [1947] N.Z.L.R. 581, applied.) (*R.* v. *Sims*, [1946] K.B. 531 ; [1946] 1 All E.R. 697, and *Harris* v. *Director of Public Prosecutions*, [1952] 1 All E.R. 1044, distinguished.) (*R.* v. *Rogan*, [1916] N.Z.L.R. 265, considered.) 2. That, in the circumstances of the case, the evidence objected to was sufficiently substantial to justify its admission, notwithstanding its prejudicial character. (*Noor Mohamed* v. *The King*, [1949] A.C. 182 ; [1949] 1 All E.R. 365, applied.) The trial Judge in his summing-up referred to certain evidence of the accused as " affording corroboration, or something approaching corroboration ", of material particulars related by the children concerned in the two counts. His Honour referred to three particular matters. At the end of his summing-up, he said : " Do not forget that those parts of the accused's own evidence which I have suggested to you as something approaching corroboration in the material respect of the evidence of the girls were brought to your notice on my

own responsibility, and not by counsel for the Crown. He put the case to you on the basis that there was no corroboration, and, on the assumption that that might be the position, I called your attention to the sterling rule that the uncorroborated evidence of young girls was to be viewed with great care and caution." Counsel for the Crown admitted that there was no corroboration in two of the points mentioned. The third point, even if corroborative of the evidence of the girls as to certain similar acts on other occasions, was not, as the learned Judge himself pointed out, corroborative of their evidence as to the incidents to which the charges related. On appeal by the accused against his conviction, it was submitted that in the end the learned Judge put the case to the jury as one depending on uncorroborated evidence. *Held*, by the Court of Appeal, That the way in which the matter was put at the end of the summing-up was not sufficient to dispose of the earlier suggestion that there was corroboration. On this ground, the appeal was allowed, the conviction was quashed, and a new trial was ordered. *The Queen* v. *Hare*. (C.A. Wellington. July 25, 1952. Sir Humphrey O'Leary, C.J.; Finlay, J.; Hutchison, J.; Cooke, J.; North, J.)

Evidence—Admissibility—Hearsay—Evidence of Identification —Part of res gestae. The rule that in a criminal trial hearsay evidence is admissible if it forms part of the *res gestae* is based on the propositions that the human utterance is both a fact and a means of communication, and that human action may be so interwoven with words that the significance of the action cannot be understood without the correlative words, and the dissociation of the words from the action would impede the discovery of the truth. It is essential that the words sought to be proved by hearsay should be, if not absolutely contemporaneous with the action or event, at least so clearly associated with it that they are part of the thing being done, and so an item or part of the real evidence, and not merely a reported statement. Where the words are sought to be proved for the purpose of identification in a criminal trial, the action or event with which the words must be associated is the commission of the crime itself, and the evidence shall be admitted only if it satisfies the strictest test of close association with the crime in time, place, and circumstances. On a charge of maliciously setting fire to a shop with intent to defraud, the prosecution called a witness who deposed that, after hearing the fire alarm, he heard a woman's voice shouting, "Your place burning " and you going away from the fire ", and immediately afterwards he saw a car being driven away by a man resembling the appellant. The words were spoken some 220 yards from the site of the fire and about twenty-six minutes after the fire was started. *Held*, That the evidence was inadmissible. *Teper* v. *The Queen*, [1952] 2 All E.R. 447 (P.C.).

As to Statements forming Part of the *Res gestae*, see *9 Halsbury's Laws of England*, 2nd Ed. 183, para. 268; and for Cases, see *14 E. and E. Digest*, 397, 398, Nos. *4172-4181*.

The Plea of Guilty. *102 Law Journal*, 353.

DAMAGES.

Mental Shock—Accident to Child—Mother hearing Scream and seeing Something of Accident while Seventy to Eighty Yards away. A driver negligently backed his taxicab into a child who was on a tricycle immediately behind him, slightly injuring him. The child's mother, who was in her house seventy or eighty yards away, heard the child scream and saw the cab back into the tricycle, but she could not see the child. In an action for damages for shock suffered by the mother, *Held*, That, in the circumstances, the taxi-driver could not reasonably have anticipated that to back the cab in the way he backed it would cause to the mother the injury complained of, and he was, therefore, not liable to her for negligence. (Principles laid down in *Bourhill* v. *Young*, [1942] 2 All E.R. 396, applied.) *King and Another* v. *Phillips*, [1952] 2 All E.R. 459 (Q.B.D.).

DEATHS BY ACCIDENTS COMPENSATION.

Damages—Excessive Award—Principles on which Jury's Verdict set aside—Compensation not Assessable by Arithmetical Process or by applying Statistical or Actuarial Test—Deductions to be made in Respect of Future Vicissitudes or Contingencies in relation to Deceased and His Dependants—Deaths by Accidents Compensation Act, 1908, s. 5—Statutes Amendment Act, 1937, s. 7 (1). The verdict of a jury as to damages will be set aside if it is wholly out of all proportion to the circumstances of the case; and, in any case, the verdict may be set aside if the Court is satisfied that the jury, in assessing the damages, applied a wrong principle of law. (*Davies* v. *Powell Duffryn Associated Collieries, Ltd.*, [1942] A.C. 601; [1942] 1 All E.R. 657, *Nance* v. *British Columbia Electric Railway Co., Ltd.*, [1951] A.C. 601, and *Mechanical and General Inventions Co., Ltd., and Lehwess* v. *Austin and Austin Motor Co., Ltd.*, [1935] A.C. 346, followed.) (*Johnston* v. *Great Western Railway Co.*, [1904] 2 K.B. 250, referred to.) On a claim under the Deaths by Accidents Compensation Act, 1908, a fair compensation in damages for pecuniary loss is not to be arrived at by any arithmetical process; or by applying a statistical or actuarial test. Appropriate deductions must be made in respect of the vicissitudes and contingencies of the future in the case of a particular individual (as if he had lived) and his dependants. (*Phillips* v. *London and South Western Railway Co.*, (1879) 5 C.P.D. 280, and *Benham* v. *Gambling*, [1941] A.C. 157; [1941] 1 All E.R. 7, followed.) (*Ritchie* v. *Victorian Railways Commissioner*, (1899) 25 V.L.R. 272, referred to.) Where, as in this case, a verdict involves either taking a wholly excessive figure as representing the value of such parts of the deceased's future savings as, but for the accident, his family could reasonably be expected to receive during his lifetime or on his death, or making wholly insufficient deductions in respect of all the vicissitudes and contingencies of the future that should have been taken into account, and the verdict is, in consequence, wholly out of all proportion to the circumstances of the case, the jury has acted on a wrong principle of law or has made a wholly erroneous estimate of the damage suffered. (*Davies* v. *Powell Duffryn Associated Collieries, Ltd.*, [1942] A.C. 601; [1942] 1 All E.R. 657, and *Nance* v. *British Columbia Electric Railway Co., Ltd.*, [1951] A.C. 601, applied.) *Donaldson* v. *Waikohu County*. (C.A. Wellington. July 17, 1952. Sir Humphrey O'Leary, C.J., Northcroft, J.; Finlay, J.; Cooke, J.; North, J.)

DESTITUTE PERSONS.

Res Judicata in Matrimonial Cases. *116 Justice of the Peace Journal*, 419.

DIVORCE AND MATRIMONIAL CAUSES.

Desertion—Parties living under Same Roof—House owned by Both Spouses—No Allowance paid to Wife—Provision of Meals separately—Occupation of Separate Rooms—Other Parts of House shared. On an undefended petition for divorce brought by a husband against his wife on the ground of desertion, it was proved that for more than three years before the presentation of the petition the parties had lived in the same house, which belonged to them both, but each occupied a separate bedroom and sitting-room and cooked their own food separately. During that time the husband had not paid any allowance to the wife. They shared the kitchen and the passages and other parts of the house, but whenever possible they avoided meeting. *Held*, That, on these facts, the parties had ceased to be one household and had become two separate households, and the wife had deserted the husband. (*Walker* v. *Walker*, [1952] 2 All E.R. 138, followed.) Decision of *Willmer*, J., [1952] 1 All E.R. 297, reversed. *Baker* v. *Baker*, [1952] 2 All E.R. 248 (C.A.).

As to What Constitutes Desertion, see *10 Halsbury's Laws of England*, 2nd Ed. 835, para. 1338; and for Cases, see *27 E. and E. Digest*, pp. 307-310, Nos. *2840-2880*, and p. 322, Nos. *3000-3013*, and Digest Supplements.

Nullity: Approbation of Marriage. *96 Solicitors' Journal*, 369.

Practice — Particulars — Adultery — Allegation that Husband not Father of Wife's Child—Need for Particulars of Facts on which Statement based. On a petition by a husband for divorce on the ground of the adultery of the wife at a place and with a man unknown to the husband, the wife asked for particulars of the date and place of the alleged offence, and, if those particulars could not be furnished, the nature of the husband's case. In reply, the husband stated that he was unable to furnish the particulars requested, but that the nature of his case was that he was not the father of a child born to the wife. *Held*, That the assertion that the husband was not the father of the child could only be established by inference from facts, and those facts, as opposed to the evidence in support of them, either should have been set out in the petition or should now be included in further particulars or an explanatory affidavit. *Banks* v. *Banks*, [1952] 2 All E.R. 232 (C.A.).

As to Particulars, see *10 Halsbury's Laws of England*, 2nd Ed. 709, 710, paras. 1067-1070; and for Cases, see *27 E. and E. Digest*, 399, 400, Nos. *3956-3980*.

EVIDENCE.

Witness refreshing Memory from Document containing Statement made before Hearing—Cross-examination of Witness for Purpose or Possible Purpose of Imputing Recent Invention—Whether Statement admissible in Re-examination. Where the purpose or possible effect of cross-examination of a witness who has refreshed his memory from a document containing a statement made by him before the hearing is to suggest recent invention of his evidence, counsel calling the witness may, on re-examination of the witness, tender in evidence the document itself. *Woodward* v. *Shea*, [1952] V.L.R. 313.

GAMING.

Evidence—Gaming Offences—Telephone Statements to Police—At Premises in question—In connection with Betting—Statements not heard by Defendant—Statements admissible—Police Offences Act, 1928 (No. 3749), ss. 98, 125 (cf. Gaming Act, 1908, s. 4). Upon a defendant being charged that being the occupier of a certain house he did use the same for the purpose of betting contrary to s. 98 of the Police Offences Act, 1928, the prosecution tendered in evidence statements made over the telephone to Police on the said premises wherein the callers sought either to place bets or give betting information. The defendant could not hear what the callers had to say. The evidence was rejected. *Held*, That the hearsay rule had no application to the conversations tendered in evidence, and that they were admissible in evidence in proof of the offence charged. (*Davidson* v. *Quirke*, [1923] N.Z.L.R. 552, followed.) *McGregor* v. *Stokes*, [1952] V.L.R. 347.

HUSBAND AND WIFE.

Necessaries—Wife independently possessed of Means—Liability of Husband to repay Loans made to Her to buy Necessaries. A wife, who was compelled to leave her husband by reason of his cruelty, borrowed money from the plaintiff for the purchase of necessaries. The wife possessed savings certificates worh £1,125, a balance of £37 at her bank, a co-operative society's dividend of £7 5s. 9d., and jewellery worth £250. The plaintiff sued the husband for repayment of the money lent, on the ground that the wife had borrowed it as the husband's agent of necessity. *Held*, That, in considering whether a wife, who has been compelled by her husband's conduct to leave him, is her husband's agent of necessity, regard must be had to her means. In the present case, the wife had assets which she could have been reasonably expected to use to pay for necessaries; and, accordingly, she was not her husband's agent of necessity, and the plaintiff's claim failed. (Direction of *Lord Ellenborough*, C.J., in *Liddlow* v. *Wilmot*, (1817) 2 Stark. 86, applied.) (Dicta of *McCardie*, J., in *Callot* v. *Nash*, (1923) 39 T.L.R. 293, criticized.) *Biberfeld* v. *Berens*, [1952] 2 All E.R. 237 (C.A.).

As to Wife's Implied Authority to Pledge Husband's Credit while Living Apart, see *16 Halsbury's Laws of England*, 2nd Ed. 697-701, paras. 1122-1132; and for Cases, see *27 E. and E. Digest*, 196-202, Nos. *1648-1735*.

LAND TRANSFER.

Lease—Implied Covenants—Express Covenant to effect Improvements to Specified Value—Such Covenant neither Exclusion nor Modification of Implied Covenant to repair—Land Transfer Act, 1915, ss. 97 (b), *166.* The respondents were the owners of 1,461 acres 2 roods 5 perches of land, which was the subject of a lease which had expired. At the commencement of the lease, the land was mostly in native bush, but a mile of 7-wire substantial fences had been erected. As lessors, the respondents had claimed damages from the lessee on the ground of his alleged failure to keep and yield up the demised premises in good and tenantable repair. There was no express covenant to repair in the lease, but the lessors contended that such a covenant was implied therein by virtue of s. 97 of the Land Transfer Act, 1915. The lessee contended that the implied covenant to repair was excluded by the operation of cl. 3 of the lease, which was as follows: "3. The Lessees shall during the first five years of the term hereby granted and in each succeeding quinquennial period up to the expiration of the twentieth year of the said term make and effect upon and to the hereby demised land improvements to a value not being less than Two hundred and fifty pounds and shall at the expiration of the said term leave on the said land substantial improvements to a value not being less than One thousand pounds provided nevertheless that the Lessees shall not be entitled to nor shall the Lessors be liable to pay any compensation for such improvements." Section 97 of the Land Transfer Act, 1915, provides: "In every memorandum of lease there shall be implied the following covenants against the lessee, that is to say . . . (*b*) That he will keep and yield up the demised property in good and tenantable repair." Section 166 of the Land Transfer Act, 1915, requires an "express declaration" in the lease to negative, modify, enlarge, or extend any implied covenant. On special Case Stated for the opinion of the Court, pursuant to s. 11 of the Arbitration Amendment Act, 1938, it was held by *Stanton*, J. ([1951] N.Z.L.R. 891), that the express provision in cl. 3 neither excluded nor modified the covenant implied in leases by virtue of s. 97 of the Land Transfer Act, 1915. On appeal from that determination, *Held*, by the Court of Appeal, That the covenant to repair implied in leases by s. 97 of the Land Transfer Act, 1915, was not modified or negatived by cl. 3 of the lease. Appeal from the judgment of *Stanton*, J., [1951] N.Z.L.R. 891, dismissed. *Herlihy* v. *Hinurewa Kawe and Others*. (C.A. Wellington. July 17, 1952. Northcroft, J.; Hutchison, J.; Cooke, J.; North, J.)

LANDLORD AND TENANT.

Holding Over: The Habendum. *96 Solicitors' Journal*, 405.

LICENSING.

Offences—Found Drunk on Licensed Premises—Upper Room let to Private Party—Defendants found Drunk there—Licensing Act, 1872 (c. 94), s. 12 (cf. Licensing Act, 1908, s. 180). An upper room of licensed premises was hired out for a wedding reception. Alcoholic liquor was supplied to the party, and later two of the guests were found drunk in the room. They having been charged with being found drunk on licensed premises, contrary to s. 12 of the Licensing Act, 1872, *Held*, That the room was part of the licensed premises, and, therefore, the offence charged had been committed. *Stevens* v. *Dickson and Another*, [1952] 2 All E.R. 246 (Q.B.D.).

As to "Licensed Premises," see *19 Halsbury's Laws of England*, 2nd Ed. 9, para. 5; and for Cases, see *E. and E. Digest*, Replacement Vol. 30, p. 111, Nos. *808-811*.

LOCAL GOVERNMENT.

By-law—Prohibiting Use of Land for Purposes of Business Within Residential Area—Exemption therefrom—In Case of Single Worker carrying on Business in Private Dwelling—Dealer in Used Cars—Cars parked in Grounds surrounding House—"Private dwelling". The defendant was charged with using certain land within a declared residential area contrary to a municipal by-law which prohibited the use of any land or building within defined areas for purposes of trade or business. The by-law allowed an exemption in the case of "a single worker who carried on business in a private dwelling". The defendant carried on alone at his residence the business of a dealer in used cars, and parked such cars in the grounds surrounding his house and within the boundary fences of his residence. *Held*, on order to review, That the area on which the defendant was conducting his business was part of his "private dwelling", and, accordingly, he came within the exemption. *Grimsley* v. *Hunt*, [1952] V.L.R. 358.

MAGISTRATES' COURT.

Equity and Good Conscience—Claim against Adjoining Owner for Half Cost of Fencing Material—Action not defended—Fencing Notice not Legal—Failure to give Proper Notice going to Root of Cause of Action wherein Court had Jurisdiction—No Jurisdiction to apply Equity and Good Conscience Provisions—Magistrates' Courts Act, 1947, s. 59. A fencing notice given by the plaintiff to the defendant was not a legal notice under s. 12 of the Fencing Act, 1908; and the fence erected by the plaintiff was a new fence of a type different from that which had fallen into disrepair, and it did not conform with any of the kinds of fences referred to in the Second Schedule of the statute. Under s. 59 of the Magistrates' Courts Act, 1947, the plaintiff claimed £5 1s. 4d., being half the cost of material used by him in erecting a boundary-fence between his land and the defendant's land. The defendant filed a notice of intention to defend, but he did not appear at the hearing. The plaintiff's solicitor then asked for a judgment in equity and good conscience. *Held*, That, as the failure to give a proper notice under the Fencing Act, 1908, went to the root of the cause of action in which the Court had jurisdiction, the Court had no power to apply the provisions of s. 59 of the Magistrates' Courts Act, 1947. (*Tait* v. *McCallum*, (1894) 13 N.Z.L.R. 232, and *James* v. *Crockett*, [1920] G.L.R. 368, followed.) (*Newling* v. *Le Fevre*, (1952) 7 M.C.D. 477, distinguished.) (*Whittaker* v. *Powell*, (1940) 1 M.C.D. 443, referred to.) *Cullington* v. *Johnston*. (Auckland. August 11, 1952. Jenner Wily, S.M.)

NEGLIGENCE.

Child—Licensee or Trespasser—Proof of Licence—Onus—Rebuttal of Inference—Injury on Railway Line adjacent to Recreation Ground—Access to Line through Hole made by Children in Fence—Duty of Railway Executive. While on a railway company's property, a boy aged nine years was run over by an electric train and injured. The railway line was laid on an embankment, at the foot of and adjacent to which was situated a public recreation ground. Between the foot of the embankment and the recreation ground, the company had erected a fence, consisting of concrete posts between which ran strands of wire, fixed to the posts by split pins. For many years children had been accustomed to climb through the fence, by pulling out the split pins and removing the wire, and to toboggan down the embankment. The fence was repaired by the company's servants whenever it was seen to have been interfered with. The accident occurred when the boy, looking for a ball which had been propelled on to the embankment, went through an opening in the fence, climbed the embankment, and, while crossing the line, slipped and fell between the rails and was run over. Until the day of the accident the boy had never been through the fence and on the embankment, and he had been warned by his father not to go through the fence. He had no knowledge of the practice of other boys' sliding down the embankment, and had not wanted to do so himself. In an action by the boy and his father against the respondents for negligence, *Held*, That, to establish that the boy was on the embankment as a licensee, the onus was on those claiming it either to show express permission by the railway company or to show that the company had so conducted itself that it could not be heard to say that it did not assent to the use of the premises by children. A licence was not to be lightly inferred, and the onus was not discharged by showing that, in spite of the fence, children constantly broke through. Even assuming that the company had knowledge of the intrusion, that of itself did not constitute the children licensees, nor was the company bound to take every possible step to keep out intruders, but, so long as it took some steps to show that it resented, and would try to prevent, the intrusion, that was strong evidence to rebut the inference of a licence. In this connection, it was material to consider the state of mind of the boy, and whether, in the circumstances, he thought that he was on the premises with the leave of the company. On the facts, there was no evidence from which it could reasonably be inferred that the railway company acquiesced in the use of the embankment by the children; and, therefore, the boy was a trespasser, and, as such, the company did not owe him the duty which they would have owed to a licensee. *Edwards and Another* v. *Railway Executive*, [1952] 2 All E.R. 430 (H.L.).

As to Degree of Care Required in relation to Acts by Children, see *23 Halsbury's Laws of England*, 2nd Ed. 584, para. 836; and for Cases, see *36 E. and E. Digest*, 68-71, Nos. *433-462*.

Contributory Negligence—Apportionment of Liability—Breach of Building Regulations—Fatal Accident—Employee's Fall from Platform—Employee failing to disclose Liability to Epileptic Fits—Law Reform (Contributory Negligence) Act, 1945 (c. *28*), *s. 1 (1)*. A workman entered the defendants' employment as a painter without informing them that he was subject to epileptic fits and that his doctor had forbidden him to work at a height above ground. While working on a platform some 20 ft. above ground, which, in breach of the duty imposed on the defendants by Regs. 22 (c) and 24 (1) of the Building (Safety, Health and Welfare) Regulations, 1948, was less than 34 in. wide, and was not provided with guard-rails and toe-boards, he had a fit, fell to the ground, and was killed. On a claim by the workman's widow, as administratrix of his estate, for damages under the Law Reform (Miscellaneous Provisions) Act, 1934, and the Fatal Accidents Acts, 1846 to 1908, for breach of statutory duty, *Held*, That there was no burden on the defendants to prove that the workman would have fallen from the platform even if the Regulations had been complied with. The true inference from the evidence was that there were two causes of the accident, the defendants being at fault in not complying with the Regulations and the workman being at fault in not disclosing that he was subject to epileptic fits. The responsibility for the accident fell equally on the workman and on the defendants; and, therefore, under s. 1 (1) of the Law Reform (Contributory Negligence) Act, 1945, the damages recoverable by the plaintiff in respect of the accident must be reduced by one half. (Observations of *Scott*, L.J., in *Vyner* v. *Waldenberg Bros., Ltd.*, [1945] 2 All E.R. 549, explained.) Decision of *Donovan*, J., [1952] 1 All E.R. 1064, reversed in part. *Cork* v. *Kirby MacLean, Ltd.*, [1952] 2 All E.R. 402 (C.A.).

PRACTICE.

Costs—Plaintiff succeeding on One of Two Alternative Issues—Allowances made to Defendant out of Plaintiff's Costs—Code of Civil Procedure, RR. 148, 555, 565. In an action, the plaintiff claimed £1,000 either for breach of contract or for tort. The plaintiff filed an amended statement of claim, and, in answer, the defendants filed an amended statement of defence. The plaintiff failed in his claim in tort; and, on his claim founded on contract, he was awarded £107 5s. 6d. On the question of costs, *Held*, 1. That R. 565 of the Code of Civil Procedure did not apply, as there was only one cause of action. 2. That the plaintiff apparently would not have obtained more than £107 5s. 6d. if he had succeeded on all issues, and he should have costs on that amount. 3. That the defendant should receive from the plaintiff half the amount allowed for trial and half the amount of the jury fees. 4. That, under R. 148, the plaintiff should be allowed the costs of one statement of claim only, and he must allow the defendant the costs of one statement of defence. (*Cates* v. *Glass*, [1920] N.Z.L.R. 37, and *Holmwood* v. *Reid*, (1910) 12 G.L.R. 568, followed.) (*Macarthy* v. *Kelleher* (*No. 2*), (1897) 15 N.Z.L.R. 382, referred to.) *Rorison* v. *McKey* (*No. 2*). (S.C. Hamilton. July 24, 1952. Stanton, J.)

Discovery—Privilege—Interrogatory—Communication between Solicitor and Client—Authority to Solicitor to settle Claim—Interrogatory as to whether Authority given. The plaintiff having claimed damages from the defendants for personal injuries, his solicitors wrote to the defendants' insurers offering terms of settlement. Later, the plaintiff issued a writ, and in their defence the defendants pleaded that the terms of settlement offered by the plaintiff's solicitors had been accepted and that the plaintiff's claim had thus been compromised by way of accord and satisfaction. In his reply, the plaintiff denied having made any agreement to compromise his claim, and pleaded that, if any such agreement purported to have been entered into, his solicitors had no authority to enter into it. The defendants administered interrogatories asking whether the plaintiff had not authorized his solicitors to negotiate for the settlement of his claim or to hold themselves out as having authority to do so, and whether he had not authorized them to offer terms of settlement. The plaintiff declined to answer the interrogatories, on the ground that they were inquiries as to communications passing between him and his solicitors confidentially and in their professional character, and were, therefore, privileged. *Held*, That the rule as to privilege did not extend to communications between a client and his solicitor which the client instructed his solicitor to repeat to the other party, for such communications were not confidential, and, therefore, the plaintiff was bound to answer the interrogatories. *Conlon* v. *Conlons, Ltd.*, [1952] 2 All E.R. 462 (C.A.).

As to Legal Professional Privilege, see *10 Halsbury's Laws of England*, 2nd Ed. 381-394, paras. 462-475; and for Cases, see *18 E. and E. Digest*, 120-148, Nos. *705-982*.

Interrogatories—Interrogatories forming Links in Chain of Proof in Possible Criminal Proceedings disallowed—Interrogatory seeking Information as to Evidence in Possession of Other Party disallowed—Interrogatories asking for Particulars of Issue raised in Statement of Defence—Order requiring Such Particulars to be given as Further Particulars to Statement of Defence—Code of Civil Procedure, RR. 148, 155. Where interrogatories are, or might be, links in the chain of proof if criminal proceedings were commenced, the proper course is to disallow them. (*Maccallum* v. *Turton*, (1828) 2 Y. & J. 183; 148 E.R. 883, followed.) Where an interrogatory seeks information, not merely of the facts alleged, but of the evidence in possession of the party in support of those facts, it should be disallowed. (*Skelton* v. *Holt*, (1914) 17 G.L.R. 251, followed.) The defendant in his statement of defence alleged a loan to the plaintiff. The plaintiff sought leave to administer interrogatories relating to the date, time, place, and other circumstances surrounding that payment, which, the plaintiff alleged, was made in pursuance of an agreement to pay for the expenses of the birth of her illegitimate child, of whom she alleged the defendant was the father. The defendant objected to such question, on the ground that his answer might incriminate him. *Held*, That the questions asked were really for particulars, and some, if not all, of them could have been obtained on a summons for particulars under R. 136 of the Code of Civil Procedure; and the defendant was required to give the information sought in the interrogatory by way of further particulars to his statement of defence. (*Wilkins* v. *Connell*, (1903) 22 N.Z.L.R. 961, referred to.) *Thomson* v. *Scheib*. (S.C. Invercargill. July 24, 1952. North, J.)

PROBATE AND ADMINISTRATION.

Foreign Intestacies. *102 Law Journal*, 354.

Signature of Will—Place of Testator's Signature—Wills Act Amendment Act, 1852 (c. 24), s. 1. Across the top of a piece of paper the testator wrote "My last will and testament", and immediately below, but on the right-hand side of the paper, he placed his signature. Below that, he set out the dispositive provisions. *Held*, That the signature was not so placed that it was apparent on the face of the document that the testator intended to give effect by his signature to the document as his will, and, therefore, the document could not be admitted to probate. (*Re Stalman*, (1931) 145 L.T. 339, applied.) *Re Harris (deceased), Murray* v. *Everard*, [1952] 2 All E.R. 409 (P.D. & A.).

PUBLIC REVENUE.

Death Duties (Succession Duty)—Charitable Trust—Bequest "for the general purposes of the Wellington Centre" of the New Zealand Red Cross Society—General Purposes of Such Centre entitling It to expend Bequest or Substantial Part thereof 'outside New Zealand—Bequest not "held on any charitable trust in New Zealand"—Death Duties Act, 1921, s. 18. The testatrix by her will directed her trustees to pay one-quarter of the residue of her estate to the New Zealand Red Cross Society Incorporated "for the general purposes of the Wellington Centre of such Society". On appeal from the assessment of succession duty on the succession acquired by the Society in accordance with s. 27 (7) of the Finance Act, 1940, adjusted as provided by s. 28 of the Finance Act, 1939, *Held*, That the general purposes of the Wellington Centre of the New Zealand Red Cross Society, Incorporated, were such as to entitle it to expend the bequest, or a substantial part of it, for purposes outside New Zealand; and, consequently, succession duty was payable on the bequest, as it was not within the exemption created by s. 18 of the Death Duties Act, 1921. (*Weston and Guardian, Trust, and Executors Co. of New Zealand, Ltd.* v. *Commissioner of Stamp Duties*, [1945] N.Z.L.R. 316, followed.) *Hewitt and Another* v. *Commissioner of Stamp Duties.* (S.C. Wellington. August 11, 1952. Fair, J.)

SETTLEMENT.

Construction—Settlor Unmarried when Deed of Settlement made—Settlement providing Life Interest for "Wife" in Income from Trust Investments with Remainder to "Children"—Subsequent Marriage and Children—Marriage dissolved—Remarriage of Settlor—First Wife and Her Children the "wife" and "children" indicated in Deed of Settlement—Divorce and Matrimonial Causes Act, 1928, s. 37. A deed of settlement was made on December 1, 1924, by C., who was then unmarried. On May 12, 1926, he married his first wife. There were five children of that marriage. On May 12, 1944, the settlor and his wife entered into a deed of separation. By this deed, the settlor undertook to provide his wife with a dwellinghouse, named in the deed, for the use and occupation of herself and of their children, of whom she was given the custody. Before the separation, the settlor and his wife and family had lived in a property which was part of the settled estate, and which was still occupied by the settlor as his home. For the purpose of providing a home for his wife and children in the terms of the deed of separation, the trustees of the settlement invested part of the settled fund in the purchase of the property named in the deed of separation, which property was treated as part of the settled estate. At that time the settled estate consisted of certain funds and of the house property in which the settlor and his wife had been living before the separation, and another adjoining property let to a tenant. In 1948, the settlor took proceedings for divorce, based upon the deed of separation entered into in 1944. When the divorce proceedings were commenced, the wife was assured by the surviving trustee of the settlement that her rights and those of her children were protected by the deed of settlement, and would not be prejudiced by divorce. In December, 1948, the settlor applied for his decree absolute. The parties agreed upon the form of the decree absolute, which, by consent, was sealed on December 15, 1948. This decree, after pronouncing the marriage dissolved, went on to provide: "And this Court doth further order and by consent that the provisions for maintenance and other benefits in favour of the respondent provided under the separation agreement dated May 12, 1944, and entered into between the petitioner and the respondent herein . . . shall remain in full force and effect during the joint lives of the parties or until the remarriage of the respondent so long as the respondent shall remain chaste and the Court doth hereby make an order in such terms and this Court doth further order and by consent that the provisions of the deed of voluntary settlement entered into by the petitioner and dated the 1st day of December, 1924 shall continue and remain in full force until the remarriage of the respondent the petitioner undertaking to facilitate an order being made under section 37 of the Divorce and Matrimonial Causes Act 1928 providing that the respondent be considered to be the wife of the petitioner for the purposes of the settlement." The decree having been pronounced, the settlor married his second wife on December 29, 1948. Of that marriage there were two children. Pursuant to the arrangement made in December, 1948, an application to the Court for ancillary relief was made by the first wife, whereupon, by consent, an order was made on June 7, 1949. It was, in part, as follows: "that the deed of voluntary settlement made on the first day of December 1924 by the petitioner . . . continue in full force and to the same effect as if the respondent had continued to be the wife of the petitioner until the remarriage of the respondent so long as she remains chaste." On originating summons to determine questions arising upon the deed of settlement, *Held*, 1. That no order of variation of the settlement was sought or made by the Court under s. 37 of the Divorce and Matrimonial Causes Act, 1928; and the order made by the Court on June 7, 1949, was not a nuptial settlement made because of, or in relation to, the marriage being dissolved, as it did no more than, by consent, affirm that the settlement made by the petitioner continued in full force and to the same effect as if the respondent had continued to be the wife of the petitioner. (*Hargreaves* v. *Hargreaves*, [1926] P. 42, *Melvill* v. *Melvill and Woodward*, [1930] P. 159, *Burnett* v. *Burnett*, [1936] P. 1, and *Joss* v. *Joss*, [1943] 1 All E.R. 102, followed.) 2. That, on the true construction of the deed of settlement, the settlement was made because of and in relation to the settlor's marriage with his first wife, who was "the wife" referred to in the deed of settlement; and that the children of the first marriage were those who alone took under the settlement. 3. That, in the passage in the deed of settlement, "should [the settlor] ever marry then upon his death [the trustees] shall pay the income therefrom to the wife [of the settlor] for her life or so long as she shall remain his widow", the word "widow" was used for the purpose of indicating a point of time rather than a person, as the deed went on to provide for the children of the marriage "after the death of the survivor of them [the settlor and his wife] or upon the remarriage of the said wife". (*In re Couturier, Couturier* v. *Shea*, [1907] 1 Ch. 470, applied.) 4. That, as the settlement envisaged one marriage only, and only the children of that marriage, neither the second wife nor the children of the second marriage took any benefit under the deed of settlement. *Brown and Another* v. *Cowlishaw and Another.* (S.C. Christchurch. July 4, 1952. Northcroft, J.)

TENANCY.

Dwellinghouse—Possession claimed on Ground that Owner Landlord for Three Years preceding Notice of Intention to apply for Possession—Mortgagee in Possession up to Two Years before Landlord's giving Notice—Owner not "Landlord" while Mortgagee in Possession—Order for Possession refused—Tenancy Act, 1948, s. 24 (5)—Tenancy Amendment Act, 1950, s. 10—Property Law Amendment Act, 1932, s. 2 (1), (11), (13). While a mortgagee is in possession, the mortgagor's rights as a landlord and reversioner are suspended; and, for the time being, the mortgagee is the only person entitled to the immediate reversion, and, while he is in possession, he is the "landlord" for the purposes of the Magistrates' Courts Act, 1947, and the Tenancy Act, 1948. (*Stable Securities, Ltd.* v. *Cooper*, [1941] N.Z.L.R. 879, and *Burnett* v. *Smith*, [1950] N.Z.L.R. 454, applied.) The owner of a dwellinghouse claimed possession from the tenant on the ground set out in subs. 5 of s. 24 of the Tenancy Act, 1948, as added by s. 10 of the Tenancy Amendment Act, 1950. The plaintiff had owned the dwellinghouse for many years, and it was subject to a mortgage to the State Advances Corporation. By reason of default in payments due under that mortgage, the State Advances Corporation entered into possession in 1935 as mortgagee by receiving the rents and profits from it. On November 25, 1950, the plaintiff redeemed the property, and had since received the rent payable by the defendant. On February 10, 1951, he gave notice of intention to apply for an order for possession. *Held*, refusing an order for possession, That the plaintiff did not become the landlord of the premises in question until he redeemed them on November 25, 1950; and he thus failed to fulfil the qualification of having been the landlord for three years immediately preceding the giving of the notice of his intention to apply for an order for possession on the special grounds set out in s. 24 (5) of the Tenancy Act, 1948. *Smith* v. *Jordan.* (Auckland. June 25, 1952. Sinclair, S.M.)

CURIAL REVIEW OF THE DETERMINATIONS OF ADMINISTRATIVE TRIBUNALS.

An American Reaction.

By BERNARD SCHWARTZ, Associate Professor of Law,
New York University.

An American reader of Dr. Northey's interesting series of articles on *Curial Review of the Determinations of Administrative Tribunals* (*Ante*, p. 89), cannot help but be taken aback by a remark made by the learned author, at p. 136, in his concluding instalment :

> The introduction of statutory procedures for administrative agencies and statutory review of their decisions, judged by the experience in the United States with the Administrative Procedure Act, 1946, has little to commend it.

With this sentence is cavalierly dismissed one of the most significant developments in the field of administrative law that has yet occurred in the common-law world.

" It has been truly said," reads the *Report of the Committee on Ministers' Powers*, " that, however much a Minister in exercising such [*i.e.*, judicial] functions may depart from the usual forms of legal procedure or from the common law rules of evidence, he ought not to depart from or offend against ' natural justice.' "[1] The American equivalent of " natural justice " has been the doctrine of procedural due process. That doctrine has ensured that those affected by particular administrative action have been afforded at least the minimum procedural safeguards of notice and hearing. It has, however, been widely felt in recent years that the safeguards afforded by the due process doctrine have not, of themselves, proved adequate. As was said in *Wong Yang Sung* v. *McGrath*, (1950) 339 U.S. 33 :

> The conviction developed, particularly within the legal profession, that [administrative] power was not sufficiently safeguarded and sometimes was put to arbitrary and biased use.

Apprehension over administrative impartiality and response to growing discontent, was reflected in a number of Bills offering various remedies. The Executive branch of the Federal Government also became concerned as to whether the structure and procedure of the many administrative agencies was conducive to fairness. This led to the appointment of the Attorney-General's Committee on Administrative Procedure, whose contribution to American administrative law has been equivalent to that made by the Committee on Ministers' Powers to the subject in Britain.

The result of this widespread concern and inquiry has been the enactment of the Administrative Procedure Act, 1946. That Act, as was said in *Wong Yang Sung's* case, " is a new, basic and comprehensive regulation of procedures in many agencies ". As the first attempt by the Congress to state the essentials of the procedures to be followed by the administrative process, it has been characterized as " the beginning of a new era in administrative law"[2] in the United States. Hitherto, the control of administrative procedure has been limited to intervention by the Courts, based upon the concept of procedural due process. With the Act of 1946, the American Legislature has now taken a vital part.

It is erroneous to assume that the Administrative Procedure Act is an attempt by the American Congress to enact a detailed procedural code which must be observed by the administration. Such a minute prescription of procedure would destroy that flexibility in operation which is one of the great advantages of the administrative, as compared with the judicial, process. What the American Act seeks to do is to lay down certain basic principles which must be followed by the administration in every case in which its provisions are applicable.

Thus, the Act provides for a system of antecedent publicity for delegated legislation similar to that stipulated for in the English Rules Publication Act, 1893. And, with regard to administrative adjudications, the essentials of notice and fair hearing are set forth. Provision is made for a corps of semi-independent hearing officers, called examiners, with proper professional qualifications, before whom administrative hearings are to be held. These examiners are vested with authority to preside over the hearing analogous to that exercised by a trial Judge in the American system. They may render an initial or recommended decision in cases heard by them. Their position is thus far superior to that of the inspectors who preside at the public local inquiries which are common in English administrative law.

In so far as the conduct of the hearing itself is concerned, the American Act provides that the common-law rules of evidence are not controlling, but no administrative decision is to be rendered except " as supported by and in accordance with the reliable, probative, and substantial evidence ". The rights of counsel and cross-examination are expressly preserved. The problem presented in cases like *Errington* v. *Minister of Health*, [1935] 1 K.B. 249, is dealt with by provision for the insulation of the hearing examiner. No such officer is to " consult any person or party upon any fact in issue except upon notice and opportunity for all parties to participate ". Attempts by administrative officials to influence decisions in which they are interested are likewise precluded. And, finally, the administrative decision itself must be a reasoned one. It must include " findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record ".

The above summarizes the essentials of the procedures prescribed by the American Administrative Procedure Act, 1946. To one familiar with its provisions, it is difficult to see the basis for Dr. Northey's conclusion that its prescription of procedures " has little to commend it ". From the point of view of individuals who are adversely affected by administrative action, the American Act would, on the contrary, seem to

[1] Report (Cmd. 4060, 1932), 75.
[2] Arthur T. Vanderbilt's *The Federal Administrative Procedure Act and The Administrative Agencies*, (1947), iv.

mark a substantial step forward in the direction of insuring adequate procedural safeguards in their dealings with the administration.

It may well be that Dr. Northey's comment is based upon the view that the provisions of the American Act, though motivated by a laudable purpose, must, as a practical matter, prove ineffective. This is, indeed, a key point in the consideration of any law. A statute is not self-executing. The legislative *ought* must run the gauntlet of judicial interpretation before it attains the practical status of an *is*. This is true in all legal systems; but it is especially true in the United States, where the Courts of law play so prominent a constitutional role. The Administrative Procedure Act, like other legislation, would lose much of its efficacy if its terms were to be read by the Courts in a decimating spirit.

The American Courts have, however, clearly indicated that they will give to the Administrative Procedure Act the full remedial effect that the Legislature intended it to have. The leading case is *Wong Yang Sung* v. *McGrath*, (1950) 339 U.S. 33, a decision of the United States Supreme Court. In that case, the Court set aside an order for the deportation of an alien where the alien had not been afforded a hearing before an independent examiner such as that required under the American Act. A case like this, in which an administrative decision is quashed because of the administration's failure to observe the essentials of fair procedure prescribed by the Administrative Procedure Act, furnishes a pragmatic answer to those who deride the value of that law. Certainly, it would be difficult for Wong Yang Sung, saved from deportation only by the American Act, to agree with Dr. Northey's conclusion that an Act like it "has little to commend it".

American developments in the field of administrative procedure are, despite Dr. Northey's view, particularly pertinent in other countries. The Administrative Procedure Act represents the first legislative attempt in the common-law world to ameliorate the defects that have arisen in the administrative process. It is not contended, of course, that a detailed code of administrativ proceedure is desirable, or even feasible. One must ever bear in mind the warning of Lord Shaw against the over-crystallization of the principles of natural justice.[3] The recognition of that fact does not, however, deny the need for a rigid insistence upon the "fundamentals of fair play"[4] in administrative action. "There are certain fundamentals of just procedure which are the same for every type of tribunal and every type of proceeding"[5]. The American Administrative Procedure Act points the way to a legislative formulation of these fundamentals. As it has recently been expressed by an acute English observer: "American administrative law is so much more developed than the English that there is little for the American lawyer to learn from British experience —except to be on guard against a weakening of judicial control. Cannot Marshall Plan Aid include 'administrative law'?"[6]

[3] *Local Government Board* v. *Arlidge*, [1915] A.C. 120, 138.

[4] *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, (1940) 309 U.S. 134.

[5] *Pound's Administrative Law*, (1942) 75.

[6] *Street*, (1950) *59 Yale Law Journal*, 590, 593.

TREES GROWING ON BOUNDARIES.

By T. B. Mooney.

The recent editorial on the subject of "The Neighbour's Trees," (*Ante*, pp. 145, 161) prompts a further question: What are the respective rights of neighbours as to trees growing on the common boundary? Are such trees held in common, or does each party own that moiety of each tree which stands on his land? The point could be of considerable importance, for, apart from hedges, it can be and has been shown that a line of poplars or willows will spring from fencing posts placed along a common boundary.

To put the question another way, if a tree growing on a common boundary robs A's soil, shuts out the light, and sheds leaves which litter the ground, block gutters and down pipes, and poison a water supply, may A fell that tree? If he does, must he account to his neighbour B for half the value of the timber, or is he bound also to compensate B for loss of shade and shelter, of protection of a building, of support for a bank or a stream, or of possible profits which B derived from fruit borne on such portions of the tree as grew within his boundary?

At common law, A and B held such a tree as tenants in common, and, as such, either had the right to cut it down without being liable in suit for conversion. The rights of the adjoining owners did not arise at common law but in an equitable action of account for the timber: *33 Halsbury's Laws of England*, 2nd Ed. 60, para. 95 (*g*). The law is of considerable antiquity. The most recent case directly in point is *Anon.*, (1622) 2 Roll. Rep. 255; 81 E.R. 783, where it was held:

> If a tree grows in a hedge which divides the land of A and also of B, the roots taking nourishment from the lands of both, they are tenants in common of the tree.

The authorities were reviewed in *Browning* v. *Nyhon*, (1949) 6 M.C.D. 260, where the learned Magistrate, relying on *Masters* v. *Pollie*, (1620) 2 Roll. Rep. 141; 81 E.R. 712, *Holder* v. *Coates*, (1827) M. & M. 112; 173 E.R. 1099, *Speed* v. *Money and Musson*, (1904) 48 Sol. Jo. 674, and *Minister for Lands* v. *Australian Joint Stock Bank*, (1900) 21 N.S.W.L.R. (L.) 209, found that the common-law principle was altered and that each adjoining owner owns that moiety of a tree which stands on his land. Nevertheless, dicta of the English Court of Appeal in 1894 and of the Court of Session in Scotland in 1905 recognize the original rule.

In *Masters* v. *Pollie*, (1620) 2 Roll. Rep. 141; 81 E.R. 712, a tree grew between the properties of the plaintiff and the defendant. The plaintiff cut it down and sawed it into boards, and the defendant entered and took some of the boards. It was held that, though some of the roots were in the defendant's ground, still the body of the main part of the tree was in the plaintiff's ground, wherefore the remainder of the tree belonged to him.

In *Holder* v. *Coates*, (1827) M. & M. 112; 173 E.R. 1099, Littledale, J., directed the jury, at pp. 113, 114;

1100, that, if it was able to determine in whose land a tree was first planted, it should find for that party. The jury saying it was unable to determine this, and the trunk of the tree growing wholly on the defendant's land, judgment was entered *by consent* for the latter.

In *Speed* v. *Money and Musson*, (1904) 48 Sol. Jo. 674, an ash tree originally planted in land belonging to Money moved its position through subsidence of a bank so that it was wholly on the plaintiff's land. Applying *Holder* v. *Coates*, (1827) M. & M. 112; 173 E.R. 1099, the County Court gave judgment for the defendant, as a small portion of the roots of the tree were still growing on the defendant's land.

Minister for Lands v. *Australian Joint Stock Bank*, (1900) 21 N.S.W.L.R. (L.) 209, was a case where a fence—not described as consisting of trees or bushes—was erected on a boundary between two allotments of land both held by the Bank. The Bank later surrendered the improvements on one of the allotments, and the Minister for Lands claimed the whole fence. It was held that the surrender passed only the moiety of the fence on the freehold.

The common-law principle is not necessarily disturbed by any of the above cases, which show an endeavour to give some recognition to trees at or near a common boundary having been nourished by the adjoining properties. An extensive footnote is printed with *Holder* v. *Coates*, (1827) M. & M. 112; 173 E.R. 1099, quoting the civil law set out in the *Institutes*, which has been written in, in detail, into French law. The New York Civil Code has also adopted the common law.

Lemmon v. *Webb*, [1895] A.C. 1, is authority for the proposition that a property owner may cut back trees overhanging a boundary. The House of Lords did not discuss boundary trees, but, in the Court of Appeal, ([1894] 3 Ch. 1), Kay, L.J., approved *Anon.*, (1622) 2 Roll. Rep. 255; 81 E.R. 783, commenting, at p. 20: "it is only where the tree is on the boundary line, so that the trunk is partly in the land of each of the adjoining owners, that they become joint owners of the tree". For this dictum he quotes *Holder* v. *Coates*, (1827) M. & M. 112; 173 E.R. 1099!

Hetherington v. *Galt*, (1905) 7 F. (Ct. of Sess.) 706, was a dispute as to the whereabouts of a mutual boundary, and it appeared common ground that, if a particular line of trees did in fact mark the boundary, those trees were held in common. The decision approved, that of the Lord Ordinary, is printed fully, and includes, at p. 708, the categorical statement: "If the trees are on the line of march, they are undoubtedly common property."

The position is succinctly summed up by *Hunt on Boundaries and Fences*, Ch. XII, where he says: "Trees whose trunks stand partly on the land of two or more coterminous owners belong to them in common." And again:

> If trees be severed from the freehold by one of the two tenants in common and converted into money the joint interest is at an end; they are owners in severalty of the money produced by the sale and an action for money had and received may be supported by one against the other for his share.

Any value these notes may have would be nugatory without some consideration of the possible effect on the common law of our Land Transfer Act, 1915. The method of approaching this difficult aspect may possibly be simplified by proceeding by way of remotion.

In the first place, rights not registrable under the Land Transfer Act, 1915, are not affected by the provisions of that Act: *Martin* v. *Cameron*, (1893) 12 N.Z.L.R. 769, 771, approved in *Staples and Co., Ltd.* v. *Corby and District Land Registrar*, (1900) 19 N.Z.L.R. 517.

In *Brown* v. *Wellington and Manawatu Railway Co., Ltd.*, (1898) 17 N.Z.L.R. 471, a registered memorandum of transfer contained a fencing covenant. Such a covenant was then not registrable against the title, and the Court held that a subsequent purchaser had no actual notice of the covenant. On the other hand, a purchaser of a property cannot but have constructive notice of a tree growing on a common boundary. To quote the Lord Ordinary in *Hetherington* v. *Galt*, (1905) 7 F. (Ct. of Sess.) 706, 709: "At all events . . . the existence of the row of trees ought to have put the respondent on his inquiry."

If the dictum of Littledale, J., in *Holder* v. *Coates*, (1827) M. & M. 112, 113, 114; 173 E.R. 1099, 1100—and it is only *obiter*—is correct, such a decision might not be arrived at in New Zealand, in the light of *Morrison* v. *Song Hing*, (*Steggall, Third Party*), [1949] N.Z.L.R. 101. There, B purchased from A, the registered proprietor under the Land Transfer Act, 1915, by sale and purchase agreement, a freehold property, subject (as stated in the agreement) to a tenancy to C for one year. C in terms of his tenancy agreement subsequently removed buildings affixed to the soil. It was held that B was entitled to damages from C for the value of the buildings removed.

This case was considered by Mr. E. C. Adams in an article, "Indefeasibility of Land Transfer Title", (1949) 25 NEW ZEALAND LAW JOURNAL, 216, and, to quote the learned Registrar-General, at p. 219:

> C could have protected his rights by registration of a lease in his favour or by caveat . . . But, if C's right against the land had not been capable of being protected by registration under the Land Transfer Act then the decision would have had to be the other way.

Returning to the boundary trees, if they are planted before the land is brought under the Land Transfer Act, 1915, then they continue to be subject to the rights of adjoining owners, because prescriptive easements are not registrable: *Carpet Import Co., Ltd.* v. *Beath and Co., Ltd.*, [1927] N.Z.L.R. 37. But are such rights even easements? *Gale on Easements*, 12th Ed., defines an easement as "a convenience to be exercised over the neighbouring land without any participation in the profit." What is under present consideration is not the right to grow trees on another's land but the ownership of a tree which actually so grows in part. To quote *Gale on Easements*, 12th Ed. 416:

> The decided cases bearing upon this subject have turned rather upon the question of property in trees growing upon the limits of two adjoining tenements than upon the question of easement.

Reaching the essence, can the estate or interest of neighbours in boundary trees ultimately be registered under the Land Transfer Act, 1915? It seems to the writer that such an interest cannot be validly included in a Land Transfer instrument. A tree is a live, a growing thing, adding to its girth year by year, its trunk imperceptibly but continuously encroaching further upon the soil. As compared with party walls, there can be no certainty of description of such an interest. There is, however, no authority on the point in relation to the Land Transfer legislation.

VARIATION OF MORTGAGES UNDER THE LAND TRANSFER ACT, 1915.

By E. C. ADAMS, LL.M.

Section 104 of the Land Transfer Act, 1915 (as extended by s. 6 of the Land Transfer Amendment Act, 1950), and the Fifth Schedule to the Land Transfer Act, 1915, authorize the use of certain short forms by which a registered mortgage of land under the Land Transfer Act, 1915, may be varied. A registered memorandum of mortgage may also be varied by a new mortgage, as was done in the leading case, *In re Goldstone's Mortgage, Registrar-General of Land* v. *Dixon Investment Co., Ltd.*, [1916] N.Z.L.R. 489. The purpose of these short forms is to provide a simple and inexpensive method of conveyancing. It appears from the argument of counsel in *Gower* v. *Cornford*, [1937] N.Z.L.R. 1176, that there are no such provisions in England, and that there new mortgages are necessary to effect variations of existing mortgages.

Currie's Conveyancing Charges in New Zealand, 17, states that it is for the mortgagee's solicitor to decide upon the propriety of adopting these short special forms. The learned author enumerates several instances where, in his opinion, it is reasonable to consider these forms inapplicable, but the general practice has been to make use of these short forms in almost all circumstances, and this practice now appears to be sanctioned by s. 6 of the Land Transfer Amendment Act, 1950, which authorizes the variation or cancellation of existing covenants or the addition of new ones, even where no alteration is made to the principal sum, the rate of interest, or the term of currency of the mortgage. However, as stated in *Goodall's Conveyancing in New Zealand*, 2nd Ed. 473, note (*a*), where the ownership of the mortgaged property has changed hands in the meantime, and it is desired to retain the personal liability of the original mortgagor, a new mortgage appears to be preferable. The execution of a variation of the mortgage in the authorized short form will make the present registered proprietor liable under the covenants of the original mortgage as varied by the memorandum of variation, but the original mortgagor will be discharged (the doctrine of novation operating), unless he consents to the variation or joins in the covenants, if any, in the memorandum of variation: *Nelson Diocesan Trust Board* v. *Hamilton*, [1926] N.Z.L.R. 342, and *Public Trustee* v. *Mortleman*, [1928] N.Z.L.R. 337.

In *Paterson* v. *Irvine*, [1926] N.Z.L.R. 352, a memorandum of variation merely increasing the rate of interest was held to discharge the original mortgagor and a guarantor who had given collateral security. In that case, the crucial facts were that land subject to a mortgage was transferred to a purchaser subject to the mortgage, and the mortgagee and the purchaser subsequently executed a memorandum of increase of the rate of interest.

It is instructive to study the *ratio decidendi* of this case. After pointing out that the outstanding facts were strangely like those in *Nelson Diocesan Trust Board* v. *Hamilton*, [1926] N.Z.L.R. 342, the Court of Appeal proceeded thus ([1926] N.Z.L.R. 352, 355, 356):

> In that case, as in the present one, there was a memorandum of mortgage, followed after an interval by a transfer of the property, and finally by a memorandum of increase of interest executed by the transferee as "mortgagor," and also by the mortgagees. In at least two respects, however, the facts in the two cases under discussion are not identical. In the present case the memorandum of increase was duly registered under the Land Transfer Act but did not, as in the *Nelson* case, extend the time for payment of the principal moneys secured by the mortgage.

The Court ruled, after full consideration, that it was unable to make any effective distinction between the two cases (at pp. 356, 357):

> We think that here, as in the *Nelson* case, the effect of the memorandum of increase was to create a *new contract compounded of the original mortgage and the memorandum of increase itself*. We think, also, that *the original contract of mortgage has been discharged* by means of the substituted contract so created, which has, by necessary implication, superseded the original contract. The express language of the memorandum of increase strongly supports the notion that it was intended thereby to create a new compound contract to modify and, in effect, to supersede the original mortgage. The operative words, "The rate of interest payable under the annexed mortgage . . . is hereby increased to," &c., are indeed scarcely consistent with any other reasonable view.
>
> Mr. *McVeagh*, for the respondents, was in the end driven to contend that the mortgagees here could have sued Slater (the transferee) for overdue interest calculated at the higher rate under the memorandum of increase, and at the same time could have proceeded at law against the appellant [the original mortgagor] for the same instalment of interest calculated at the lower rate provided by the original mortgage. In our opinion this contention is plainly untenable. *Had the memorandum in the present case been for a reduction in the rate of interest* under the mortgage, instead of for its increase, it could not possibly have been contended with success that the mortgagees could still sue the mortgagors for interest at the higher rate originally fixed by the mortgage itself.

Apparently there is nothing in the Property Law Amendment Act, 1951 (which comes into force on January 1, 1953), affecting this principle of *novation* of contract, as applied to memoranda of variation of mortgages of land under the Land Transfer Act, 1915. Therefore, when the ownership of the mortgaged land has changed between the date of the mortgage and that of the instrument of variation, the mortgagee's solicitor is under a duty to consider the legal effect the variation will have on the original personal covenants in the mortgage or in any collateral security or on any subsisting instrument of guarantee or suretyship.

The effect of the personal covenants expressed or implied in an instrument of variation may also greatly concern the mortgagor's solicitor, especially where the mortgagor holds the land in a fiduciary or representative capacity—for example, as trustee (the trust, of course, not being noted on the Land Transfer Register), or as executor or administrator of a deceased registered proprietor (where the representative capacity would be obvious from a search of the Land Transfer Register.) As pointed out by Fair, J., in *Gower* v. *Cornford*, [1937] N.Z.L.R. 1176, 1199, an instrument of variation may

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LAND TRANSFER MORTGAGES.
(*Ante*, p. 221).

Correction: In the last line of the last paragraph of the Explanatory Note (p. 221, col. 2), substitute "as from January 1, 1953" for "January 1, 1952" (as printed), as the Property Law Amendment Act, 1951, does not come into force until January 1, 1953.

make a legal personal representative or trustee liable (*a*) only in his capacity as legal personal representative or trustee, in which case the covenants, express or implied, will be limited to the assets of the estate or trust; or (*b*) personally (*de bonis propriis*) to the exclusion of the liability of the estate or trust; or (*c*) both as legal personal representative or trustee and personally, in which last case the mortgagee would have recourse against both the assets of the estate or trust funds and the private property of the mortgagor. Usually, the intention is that the mortgagee is to have recourse against the funds or assets of the trust or estate only, or, to put it in another way, that the mortgagor should be liable only to the extent of the assets in the estate or the funds of the trust.

It is the task of the conveyancer to carry out this intention when varying a Land Transfer mortgage by means of the short forms authorized by s. 104 of the Land Transfer Act, 1915, as amended by s. 6 of the Land Transfer Amendment Act, 1950.

It appears that there is little likelihood of the legal personal representative's making himself personally liable under a memorandum of variation if he is registered by virtue of a transmission and if no express covenants are inserted in the memorandum. The Register Book itself will show that he is registered proprietor of the mortgage in a representative capacity, and the memorandum of variation will refer to the mortgage of which the deceased was the mortgagor. As pointed out by Sir Michael Myers, C.J., and Ostler, J., in *Gower* v. *Cornford*, [1937] N.Z.L.R. 1176, 1189, and by Sim, J., in *Perpetual Trustees, Estate, and Agency Co. of New Zealand, Ltd.* v. *Elworthy*, [1926] N.Z.L.R. 621, 624, a memorandum *simpliciter* as provided for by s. 104 of the Land Transfer Act, 1915, and the Fifth Schedule (Form No. 3) thereof—*i.e.*, not relying for its registrability in any way on s. 6 of the Land Transfer Amendment Act, 1950—renders the estate of the deceased registered proprietor liable. From *Gower's* case, [1937] N.Z.L.R. 1176, there also emerges the further important rule that the legal personal representatives of the deceased mortgagor are personally liable only to the extent of the assets of deceased.

But, if the mortgagors are trustees and there is nothing on the Land Register to show that they own the land in *autre droit*—and that may well be the position, for notice of a private trust cannot be entered on the Land Transfer Register—a memorandum of variation *simpliciter* might make them personally liable to the extent of their own private property. It appears to the writer of this article that it is by no means clear that in such circumstances the Court would draw the inference that the liability of the mortgagors was intended by the parties to be restricted to the assets of the trust. An express limitation of the implied personal covenant therefore appears necessary. It may be mentioned here that a provision in a Land Transfer instrument limiting liability thereunder to the assets of a trust is now permissible by virtue of s. 9 of the Land Transfer Amendment Act, 1939; such a provision, of course, should now be in the original mortgage.

But the memorandum of variation employed in *Gower* v. *Cornford*, [1937] N.Z.L.R. 1176, was not just an extension. After the statement in the statutory form that the term or currency of the mortgage was extended, there followed an *express* covenant by the administrators jointly and severally with the mortgagee that they would duly and punctually pay to the mortgagee the principal sum and interest and other moneys secured by the mortgage "as modified by this present memorandum of extension", and that they would well and faithfully keep perform and observe all the covenants, &c., in the mortgage "as modified by this present memorandum of extension". In construing the instrument, Sir Michael Myers, C.J., and Ostler, J., at pp. 1190, 1191, said:

> The document is signed by the appellants without their signature being followed by the word "mortgagors" as appears in the statutory form of memorandum of extension, but it is attested in the manner required by that form, thus: "Witness to the signature of Robert Llewellyn Gower and James Raymond Gower as mortgagors"; and their execution of the document was attested by their own solicitor. In our view the instrument effects two different objects. First of all, there is the memorandum of extension, and, secondly, there is the covenant to create some new and additional obligation. We think that the instrument may be construed in the same way as if there were two separate and distinct documents, the first being a memorandum of extension *simpliciter*, and the second a deed of covenant in the form or to the effect of the covenant which is in fact included in the instrument. Construing the document in this way, and taking the new covenant as a separate document, the presumption would necessarily be that the appellants [the administrators] had executed the simple memorandum of extension in their representative capacity, but *there would be no presumption that they* were entering into the new covenant merely or at all in that capacity. There is no express statement in the covenant that they are so covenanting. Nor is there, as one would expect to find where persons are binding themselves in a representative capacity only, a provision expressly negativing personal liability. More than that, the covenant is expressed to be a joint and several covenant, the appellants covenanting jointly with Fulton. The authorities show we think that in these circumstances the covenant is to be construed as a personal covenant.

Their Honours concluded this part of their judgment by pointing out that whether or not the new covenant operated in addition as a personal obligation on the administrators it became unnecessary for the purposes of the appeal to decide. The other member of the Court (Fair, J.) apparently thought that the administrators had not by the express covenant in the memorandum of extension incurred liability *de bonis propriis*. This precise point, therefore, is still *res integra*, but the conveyancer should play safe and expressly limit the liability of the mortgagors to the assets of the estate or trust, as the case may be.

The attempt so to limit liability may, however, well cause the conveyancer to come to grief. Care must be taken to see that the limitation of liability is not repugnant to the covenant to pay. If it is so repugnant, it will have no effect and the mortgagors will be liable personally under the covenant as if there were no limitation of their liability inserted in the covenant. A covenant "as trustees", "as executors", or "as administrators" will not in itself suffice to limit liability to the assets of the estate or of the trust. As *Goodall's Conveyancing in New Zealand*, 2nd Ed. 468, note (*c*), observes, the proper limitation of the liability of a personal representative or trustee under a covenant is a matter of some nicety. If the mortgagor expressly covenants as a personal representative or trustee to pay moneys and perform acts, and then adds a proviso that he is not to be personally liable, the words "as executor", "as personal representative", or "as trustee" may be descriptive only, and of no effect at all. The proviso purporting not merely to limit but to destroy the liability of the mortgagor is repugnant to the covenant, and likewise of no effect, with the result that the mortgagor remains personally

liable *de bonis propriis* as if the proviso had not been inserted.

Another useful rule emerges from *Gower* v. *Cornford*, [1937] N.Z.L.R. 1176. The power given by s. 5 of the Administration Act, 1908, to an executor or administrator to mortgage the testator's real estate for the payment of his debts in the ordinary course of administration is sufficient to include a power to extend the term of a mortgage if he is unable, for the time being, to find the money necessary to pay the debt in cash. Unless he has lodged a Registrar's caveat, the District Land Registrar is not concerned as to whether or not a trustee or a legal personal representative has power to extend a Land Transfer mortgage: *In re Fairbrother to Allen*, (1896) 15 N.Z.L.R. 196.

If the memorandum of variation is a reduction of a first mortgage and is intended to be by way of a gift, the mortgagor's solicitor should get the mortgagee to produce the certificate of title to the Land Registry Office, or to hand it to him, to enable the memorandum of reduction to be registered: *Commissioner of Stamp Duties* v. *Halliday*, [1922] N.Z.L.R. 507. It appears to be the mortgagor's solicitor's duty to register the memorandum of reduction at the earliest possible moment. A donor can at any time revoke any intended gift, which remains imperfect. Referring to *Halliday's* case in *Scoones* v. *Galvin*, [1934] N.Z.L.R. 1004, 1013, Sir Michael Myers, C.J., delivering the judgment of himself and of Blair and Kennedy, JJ., said:

> Even if there had been delivery of the memorandum of reduction to the donee, the judgment of *Sim*, J., would not have been affected, because in such a case the certificate of title remains with the mortgagee and would have to be produced by him to the District Land Registrar before the memorandum of reduction could be registered. Consequently, there would still be something left for him to do to perfect the gift.

If the memorandum of reduction is of a puisne mortgage, then apparently the gift will be complete when the memorandum of reduction is delivered to the mortgagor or his agent: *Brunker* v. *Perpetual Trustee Co., Ltd.*, (1937) 57 C.L.R. 555.

The conclusion I come to is that, although the memorandum of variation of a mortgage under the Land Transfer Act, 1915, may be effected by the authorized short simple form, nevertheless there is ample scope for the exercise of the conveyancer's skill. Indeed, it is easy to make a slip and frustrate the true intention of the parties, and perhaps cause loss to one's client.

CONVEYANCING PRECEDENT.

VARIATION OF A MORTGAGE: MORTGAGOR EXECUTING AS EXECUTRIX.

MEMORANDUM IN RESPECT OF MORTGAGE.

Registered No. , Registry

Estate A. B. deceased, Mortgagor.

C. D., Mortgagee.

(*a*) Extending Term.

(*b*) Reducting Rate of Interest.

THE TERM OF CURRENCY of the above-mentioned Mortgage, Registered No. , Registry, is hereby extended to the 3rd day of November 1958.

THE RATE OF INTEREST payable under the above-mentioned Mortgage Registered Number is hereby reduced as from the 3rd day of November 1952 to Five pounds ten shillings (£5 10s.) per centum per annum reducible to Four pounds ten shillings (£4 10s.) per centum per annum upon the same terms and conditions as the interest payable under the said Mortgage is expressed to be reducible.

AND, E. F. of Wanganui, Married Woman, being the present registered proprietor, as Executrix, of the land affected by the said Mortgage Number DOTH HEREBY admit that the said Mortgage is a good, valid and subsisting Mortgage of the land described therein and that the execution of this Memorandum of Variation shall not operate by novation to release the Estate of the original Mortgagor, A. B., now deceased, from its present liability under the said Mortgage PROVIDED HOWEVER and it is hereby agreed and declared that the liability of the said E. F. shall be limited to the assets or or in the estate of the said A. B. deceased which are in or should have come to her hands as Executrix and not further or otherwise.

Dated this day of 1952.

Witness to the signature of E. F. as mortgagor } E. F.

G. H.,
Solicitor,
Wanganui.

Witness to the signature of C. D. as mortgagee } C. D.

I. J.,
Solicitor,
Wanganui.

PRACTICAL POINTS.

1. Landlord and Tenant.—*Covenant by Lessee to pay Rates—Whether Rates apportionable for Current Year on Expiration of Lease.*

QUESTION: A lease contains an express covenant on the part of the lessee to pay rates, taxes, charges, impositions, and outgoings (except the lessor's land tax) at any time during the continuance of the term imposed upon or payable in respect of the premises. There is no provision in the lease for apportioning these items at the beginning and end of the term. The lease also includes an express covenant by the lessee to insure. On the expiry of the lease, are these outgoings apportionable in practice, despite the decision in *McKerrow* v. *Tattle*, (1905) 25 N.Z.L.R. 881?

ANSWER: The liability *inter se* of a lessor and lessee for rates depends on the agreement between the parties. In this case, it would depend on the construction of the covenant in the lease by the lessee to pay rates, &c.

If, as is probable, the covenant is in the usual form, it would appear that, on the expiration of the lease, the lessee cannot demand apportionment in respect of the current year's rates. As to when a rate becomes a statutory debt, see *Hobbs* v. *Commissioner of Stamp Duties*, [1948] N.Z.L.R. 682. *McKerrow* v. *Tattle*, (1905) 25 N.Z.L.R. 881, is cited in *Garrow's Real Property in New Zealand*, 3rd Ed. 530, as authority for the proposition that a covenant in a lease to pay rates applies to all rates which become due and payable during the term of the lease, although the period for which the rate is levied may extend beyond the term of the lease. It appears that this case is still good law.

X.2.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

The Unmarried Mother.—Scriblex has been reading some biographical data on one S. Stanwood Menken, an American lawyer, who last year at the ripe age of eighty-one dissolved his fifty-six-years old partnership (in which the whole staff of fifty-four "all shared the intake") and commenced to practise on his own account. In the course of an interview, Mr. Menken touched upon a point that used to worry Scriblex a lot in his younger days—the extent to which counsel should worry if the tribunal found against his believedly-innocent client and put him in jail. It appears that on one occasion, and on one only, Mr. Menken had a rape case, which involved the son of his laundress, and which his wife had urged him to accept. "The boy was as innocent as the morning dew, but the Judge gave him a year in Elmera Reformatory. Well, the girl later came to see me and said that it might have been another boy; and I was about to prepare an affidavit, but the boy's mother said to me, 'Leave him where he is. He is learning to be an electrician,' so I did." Practising law at eighty-two, Menken told his biographer, is gorgeous fun—inspirational but speculative.

The Knight Move.—A correspondent whose ambition does not seemingly encompass the judiciary has sought to put a damper on Scriblex's campaign to make the world a more secure place for Judges. These gentlemen, he says, were not disposed to take a cut in depression years when the times were out of joint. This matter is raised by E. S. P. Haynes in his *Pages from A Lawyer's Notebooks*. The New Zealand Judges, he observes, "who are mostly of Caledonian origin, very properly declined to make any concession in derogation of their constitutional position, which is the same as that of the English Judges." He points out that the only weapon of the New Zealand Government was the power of refusing the Judges a Knighthood on their retirement; but the Scottish Judges refused to be made Knights on their retirement and won the day. Each English Judge was created a Knight on his appointment, so the British Cabinet, not being able to hold him, as it were, *in terrorem*, imposed a system of cuts without consulting him at all.

An Abundance of Questioning.—In *Yuill* v. *Yuill*, [1945] 1 All E.R. 183, 185, Lord Greene, M.R., pointed out that in cross-examination experienced counsel would see just as clearly as the Judge that, for example, a particular question would be a crucial one; but it was for the counsel to decide at what stage he would put the question, and the whole strength of the cross-examination would be destroyed if the Judge, in his desire to get at what seemed to him the crucial point, intervened and prematurely put the question himself. A Judge who observed the demeanour of the witnesses while they were being examined by counsel had from his detached position a much more favourable opportunity of forming a just appreciation than a Judge who himself conducted the examination. If he took the latter course, he, so to speak, descended into the arena, and was liable to have his vision clouded by the dust of the conflict. Unconsciously he deprived himself of the advantage of calm and dispassionate observation. The same Judge who invoked these comments has again been the subject of criticism by the Court of Appeal in *Heayns* v. *Heayns* (*The Times*, March 12) and *Harris* v. *Harris* (*The Times*, April 9). In the first of these cases, the Court felt it should not disturb his findings; in the second, a new trial was ordered. In both, the complaint was one of interrupting, at an early stage and without adequate cause, the examination of witnesses by counsel. "The Judge does appear to have intervened more often than was desirable," observed Jenkins, L.J., "and does seem to have left counsel labouring under a sense of grievance and the feeling that the conduct of the case had been taken out of his hands and assumed by the Judge. It is undesirable that a Judge should give the impression that he is not allowing counsel to conduct his case in a way which seems best to him." Similar views were expressed by Singleton and Birkett, L.JJ.; and the latter stressed the fact that the parties had received legal aid, and, being unaccustomed to procedure in the Courts, were likely to be overawed or confused or to become distressed under prolonged questioning by the Judge. And, he might well have added, the effect of this type of interference is to give doubtful assistance to one counsel to the great detriment of the other.

Reflections.—It is reported that Fala, the late President Roosevelt's Scotty and faithful companion, has just died, his survivors being his wife (Button), two children, two grandchildren, twenty-five great-grandchildren, a brother, and a half-sister. If the world of dogs had its own Family Protection Act, what a problem might present itself here to some canine Judge, hemmed in with the restrictions against redrawing the last will, and required to decide conflicting claims upon Fala's bounty!

At a West End dinner given in his honour by the National Club Cricket Association, Sir Walter Monckton, Q.C., counsel for the successful appellant in the House of Lords, was solemnly presented with the very ball, mounted on an oak plinth, that struck the unassuming but persistent Mrs. Bessie Stone at her garden gate. It might not be inappropriate if *her* counsel, in the course of time, became the fortunate possessor of some material portion of a cranium, perhaps less elaborately framed.

Bigamy Note.—Arrested and charged with bigamy in Brisbane, Nicholas Fragale, the father of seven children, has protested against the iniquity of the criminal law. "I am populating the country," he said, "and all that happens to me is trouble!"

Tailpiece.—A well-known practitioner became concerned the other day about the estate of a wealthy but close-fisted client. "You have good children and grandchildren," he said. "It seems a pity not to make some provision for them in your lifetime." With a faint chuckle, he added: "You can't take it with you when you go." The client looked at him coldly. "Is that so?" he replied. "Then I'm not going."

THEIR LORDSHIPS CONSIDER.

By COLONUS.

Res Judicata.—Although this is a well-known legal concept, its practical application is not always easy. Earl Cairns, L.C., in considering a Scottish appeal, *Phosphate Sewage Co., Ltd.* v. *Molleson*, (1879) 4 App. Cas. 801, contrasted two possible situations in which the question might arise for investigation, and his remarks are helpful in showing when the doctrine would apply and when it would not. He said, at pp. 814, 815 :

> As I understand the law with regard to *res judicata*, it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to reopen that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. My Lords, the only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show you that this is a fact which entirely changes the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have been, ascertained by me before. Now I do not stop to consider whether the fact here, if it had come under the description which is represented by the words *res noviter veniens in notitiam*, would have been sufficient to have changed the whole aspect of the case. I very much doubt it. It appears to me to be nothing more than an additional ingredient which alone would not have been sufficient to give a right to relief which otherwise the parties were not entitled to. But it is unnecessary to dwell upon that, because it is perfectly clear upon the statement of the present appellants themselves that this fact was within their knowledge before their proof was led in the former action, and they were just as free to have had the record opened and to have had it stated, as if it had come to their knowledge before the record was closed.

These remarks were endorsed by the other members of the House, Lord Hatherley remarking, at p. 818, that litigation on such a piecemeal basis might drag on for years.

Lists of Judges and Law Officers.—It is now common practice for the various series of Reports to contain lists of the judiciary and of the officers associated in the work of the profession, but this was not always so. At the commencement of (1887) 12 App. Cas. there is a note that the need for a record of changes and appointments had been felt, and that the Council of Law Reporting had caused a list to be compiled. It ranges from 1865 to 1887, and gives a brief history of each individual named. That Lord Penzance was formerly Sir James Plaisted Wilde, or that the Rt. Hon. Earl of Selborne had been Sir Roundell Palmer, may not be as well known as the fact that the Rt. Hon. Lord Halsbury used to be Sir Hardinge Stanley Giffard, but it is interesting, and may sometimes be useful, to know where to look for information of this kind. Just in passing, we may note the rapid rise of Lord Macnaghten, who took silk in 1880 and was in 1887 appointed a Lord of Appeal in Ordinary in place of Lord Blackburn. We can speculate, too, upon the probable great age of Dr. Lushington, who became a Member of Parliament in 1807 and resigned from the Court of Arches in 1867. *Requiescant in pace !*

LEGAL LITERATURE.

Mazengarb's Negligence on the Highway, 2nd Ed. By O. C. MAZENGARB, M.A., LL.D. Wellington: Butterworth and Co. (Aus.), Ltd. Price 65s., post free.

A decade has elapsed since the first edition of *Mazengarb's Negligence on the Highway* was published. The important changes made in the law on the subject by statute and by the numerous judicial decisions interpreting it, many of which, as Shakespeare says, "stand upon a tickle point", or the attempted distinctions between which are often "as keen as is the razor's edge invisible", demand a second edition. In that decade, Dr. Mazengarb—with a large proportion of his practice spent in specializing upon the subject of his book—has further established himself as a master of his craft in Court, as a diplomat in negotiation and settlement, and as an interpreter, expounder, and unraveller of those subtle skeins which entangle the legal wayfarer on the highway. There is, therefore, no need of praise from the reviewer. To the novice and the Q.C. alike, in New Zealand and in other parts of the Commonwealth, the book will be indispensable. Many a layman, on glancing at those potted cases which the author reports with such terseness and such point, will be tempted to peruse the book and discuss the effect of the judgments upon his practical life as a motorist, pedestrian, owner of a varied collection of animals, or juryman. The reviewer's task is to indicate to the prospective reader in what respects the first edition differs from the second, what new matter has been added, and what uncertainties still exist in the decisive determination of the doctrines of the law.

First of all, deletion. A substantial section of the work which constituted the thesis for which the author was awarded by the University his Doctorate of Law has been eliminated as academic and theoretical, and has made way for more practical discussion of the law as it is. In Chapter II, on "Negligence", "the duty of care" has been restated so as to make the test of obligation "foreseeability" rather than "proximity": *Bourhill* v. *Young*, [1943] A.C. 92 ; [1942] 2 All E.R. 396, *Bolton* v. *Stone*, [1951] A.C. 850 ; [1951] 1 All E.R. 1078, and *Thurogood* v. *Van den Berghs and Jurgens, Ltd.*, [1951] 2 K.B. 537 ; [1951] 1 All E.R. 682.

In the first edition, the author expressed the view, then current, that in English civil law different degrees of negligence were not recognized. In the present one, from the use of the expression "gross negligence", in civil as well as in criminal cases, he considers that English law is tending towards the recognition of the distinction between gross, ordinary, and slight negligence, which degrees he would like to see recognized.

The most controversial question that Dr. Mazengarb discusses is whether, since the Contributory Negligence Act, 1947, the rule of last opportunity is still good law. He examines at length the legislation in Canada, Great Britain, New Zealand, and some Australian States to combine the rules as to contributory negligence under the English common law and the Admiralty rules as to apportionment, and the uncertainty that has resulted, especially in Canada and in New Zealand :

> "*Davies* v. *Mann* has not been overruled. It seems that when both parties are moving and both are negligent, damages will be apportionable, but when the negligence of one party has been completely spent so that he cannot do anything to avoid an accident the position is not clear."

As witness *Davies* v. *Swan Motor Co.* (*Swansea*), *Ltd.* (*Swansea Corporation and James, Third Parties*), [1949] 1 All E.R. 620, and *Helson* v. *McKenzies* (*Cuba Street*), *Ltd.*, [1950] N.Z.L.R. 878. At p. 90, the author expresses the opinion that, as an expression of a principle, the rule of last opportunity is so well understood by laymen that it may be sufficient to use it in a summing-up without further explanation. One would have thought that nothing was better calculated to befog a jury than the rule (with the rule in *Loach's* case, [1916] 1 A.C. 719, tacked on to it), and the various attempts to explain it, and that that was one of the vital reasons for the 1947 legislation.

Further new matter will be found in Chapter IV, on "Nuisance", Chapter VI, on "Animals", and Chapter XVIII, on "Criminal Liability". In Chapter IV, nuisance is compared with negligence, the liability of highway authorities for misfeasance and not for non-feasance is explained, and the bodies which do not enjoy exemption from liability for non-feasance are specified. A series of illustrative cases is enlightening.

In the advice as to the conduct of the case in Court, counsel will find a suggested form of issues in cases of contributory negligence, and Judges are reminded, by a reference to a case of 1951, that a new trial may be granted if they are too technical when expounding the rule of last opportunity.

—H. F. VON HAAST.