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INCOME TAX: TWO CASES OF INTEREST TO PRACTITIONERS.

III.

In *Newsom* v. *Robertson (Inspector of Taxes)*, [1952] 1 All E.R. 1290, the appellant, in computing the profits of his profession of barrister for assessment to income-tax, claimed to deduct the expenses of travelling between his home, where he carried on part of his professional work, and his chambers. The Special Commissioners found that he exercised his profession partly at his chambers and partly at his home. They held that the travelling-expenses incurred during term-time were not money wholly and exclusively laid out or expended for the purposes of his profession within the meaning of r. 3 (*a*) of the Rules Applicable to Cases I and II of Schedule D (as set out above), but that during vacation the base of his operations was changed to his home, so that travelling-expenses then incurred were allowable.

The taxpayer appealed against the disallowance of expenses incurred during term, and the Crown appealed against the allowance of expenses incurred during vacation. There was also a cross-appeal by the Crown in respect of an allowance which was made by the Special Commissioners to the taxpayer in respect of a certain period of his activities.

Mr. Justice Danckwerts, who heard the appeal, said that it seemed to him that r. 3 (*a*) and (*b*) of the Rules Applicable to Cases I and II of Schedule D to the Income Tax Act, 1918 (as set forth above), was the only rule which was material in the present case.

His Lordship said that, substantially, the point in issue was to be found in para. 3 of the Case, where it was said that the taxpayer exercised his profession as a barrister partly at his chambers (15 Old Square) and partly at his home (the Old Rectory, Whipsnade), " as hereinafter more particularly described ". It was said in the Case that at his home he had a study, which was a large room occupying about one-eighth of the house, where he kept a set of law reports and a number of legal text-books. He received from the Inland Revenue, for income-tax purposes, a " study allowance " under r. 3 (*c*) of the Rules Applicable to Cases I and II, being a proportionate part of the rates and the annual value of the entire house, together with a sum in respect of the cost of lighting, cleaning, and heating the study. As a member of the Bar during term-time, the taxpayer carried on the greater part of his work at his chambers at 15 Old Square. On the other hand, he had the law reports and other facilities at his house, and, when he came back to his house at night, after dinner he continued to do a considerable amount of work there. During the week-end and in the day time, he also did work at his house. In the vacation, he seldom went to his chambers, but, it would appear, he did his work for the most part—and he had to do quite a lot of work in the vacation—at his house. Sometimes he had engagements outside London; and to those places where the engagements were he would very often go from Whipsnade rather than from his chambers at 15 Old Square, Lincoln's Inn.

In a sense, the Special Commissioners reached two conclusions. They found that the expenses of travelling between Whipsnade and London during term-time were not expenses " wholly and exclusively laid out or expended for the purposes " of the taxpayer's profession; and, therefore, they disallowed that portion of the expenses claimed which related to that period of the year. On the other hand, they thought that during the vacation the base of operations of the taxpayer was changed to Whipsnade, and they did allow expenses (which, of course, were a very small amount) in respect of the period of the vacation. Both parties were dissatisfied with the conclusion reached by the Special Commissioners.

Mr. Justice Danckwerts said that, in dividing the matter in this way, the Special Commissioners had come to a wrong conclusion. He thought that they had either misdirected themselves or reached a conclusion which was not supported by any evidence. His Lordship, at p. 1292, continued:

> It seems to me that one must take the position throughout the period of assessment as a whole, and it is not right to split up the activities of the taxpayer into two bases, 15 Old Square in term time, and the Old Rectory, Whipsnade, in the vacation. It appears to me that the right way is to look at the expenses and to consider what is the purpose of the journeys in respect of which they are incurred throughout the period in question. One is a little startled to find, after so many years in which the Income Tax Acts have been in operation, that there is a claim of this kind made which, so far as I know, has not been put forward or allowed on a previous occasion. It seems to me, in some respects, a novel claim. The basis of the taxpayer's case is this. As found by the Commissioners, he has two places of business. He practises his profession not only at 15 Old Square, but also at the Old Rectory, Whipsnade. The Commissioners have found, says counsel for the taxpayer, that it is just the same as where a barrister may have two sets of chambers and would be entitled to be allowed the expenses in moving from one set of chambers to the other set of chambers. But that does not seem to me to be the right way to look at this case. It is, perhaps, a matter of first impression, but it is really a case, I think, in which the travelling in question is done for

a dual purpose. As counsel for the taxpayer has said, that does not necessarily involve a disallowance of the whole of the expenses if they could be split, but, admittedly, it would be very difficult to split the expenses of travelling between the amount which is referable to professional purposes and the amount which is referable to other purposes in such a case as this. I think that is really the answer to the point on the question of splitting.

There were a number of cases to which His Lordship was referred as illustrations in which it had been found that the expenditure was incurred by the taxpayer for more than one purpose—a commercial purpose in the sense that it was incurred for the purpose of earning the profits of the trade, and also some outside purpose different from that—and the decisions of the Courts had been that the expenses could not be claimed at all, for the simple reason that they were not " wholly and exclusively laid out or expended for the purposes of the trade, profession, employment, or vocation ". The cases in question were *Smith's Potato Estates, Ltd.* v. *Bolland*: *Smith's Potato Crisps (1929), Ltd.* v. *Inland Revenue Commissioners*, [1948] A.C. 508; [1948] 2 All E.R. 367, *Norman* v. *Golder*, [1945] 1 All E.R. 352, *Spofforth and Prince* v. *Golder*, [1945] 1 All E.R. 363, and *Inland Revenue Commissioners* v. *Von Glehn*, [1920] 2 K.B. 553.

The result of the facts, which had been found by the Commissioners was, in His Lordship's view, as follows, at pp. 1292, 1293:

It is true that the taxpayer carries on his profession at two places, but he travels between those two places not simply for the purposes of carrying on his profession, but also because his home, as the Commissioners have found, is at the Old Rectory, Whipsnade. He travels backwards and forwards between his home and his chambers in 15 Old Square, because he has to live somewhere and because he wishes to go backwards and forward between his chambers and his home. It does not seem to me that it makes any substantial difference that he also carries on his profession and does a lot of work at a place which happens to be his home. His motive, his object, and his purpose in travelling between these places, as it seems to me, are mixed. I feel considerable sympathy over a claim of this kind as, indeed, with a claim by anybody to be allowed the expenses which he necessarily has to incur to get to his place of business from his home, whether he actually works at his home or not. The days have long gone by, if they ever really existed, when a person lived over his shop or at his place of business. At the present time, a person is more or less tied to the particular place where he resides, because, under present housing and living conditions, it is not possible to alter one's residence at will.

But Mr. Justice Danckwerts emphasized the element in this case that the taxpayer had chosen to live at Whipsnade because he liked living in the country and enjoying the amenities which living at that place conferred on him. Therefore, it seemed to His Lordship that his expenditure on travelling between Whipsnade and Lincoln's Inn was due partly to the calls of his profession, but also partly to the requirements of his existence as a person having a wife and a family and a home. Therefore, it was not an expense incurred " wholly and exclusively for the purposes of the profession ". His Lordship concluded that the Commissioners had reached a right conclusion in respect of the period of term-time, but that they were not justified in reaching a different conclusion as regards the period of the vacation.

This decision follows the course of a number of previous decisions, such, for example, as *Ricketts* v. *Colquhoun*, [1926] A.C. 1, the barrister's case which related to travelling and hotel expenses while away from home carrying out his duties as Recorder. The recent judgment does not apply where a solicitor has to travel between his main office and a country or suburban branch office, as, in such a case, his travelling expenses would be deductible as an expenditure " exclusively incurred in the production of the assessable income for any income year " within s. 80 (2) of the Land and Income Tax Act, 1923. Moreover, those practitioners who make considerable use of their study to attend to their clients' business at home at nights and during week-ends—as so many do—should investigate the possibilities afforded by s. 80 (1) (*f*) on which, it would appear, they could, on proper proof, establish a claim to deduction of a " study allowance ", which seems to have been conceded without question to Mr. Newsom, of the Chancery Bar, under the corresponding provision of the United Kingdom legislation.

After having written the foregoing, we thought that it might be helpful to practitioners if we asked the Commissioner of Taxes for a ruling on the question whether, in a proper case, he would exercise the discretion given to him by s. 80 (1) of the Land and Income Tax Act, 1923, and give a practitioner the benefit of a " study allowance " as a deduction from his assessable income. Our letter was to the following effect:

We have had several recent inquiries as to whether there is any " study allowance " made by you to solicitors who do much of their clients' work at home.

The questions are evidently prompted by the statement in the judgment, *Newsom* v. *Robinson*, [1952] 1 All E.R. 1290, 1291, where His Lordship says, of a barrister, " he receives from the Inland Revenue, for income tax purposes, a ' study allowance ' un r. 3 (*c*) of the Rules Applicable to Cases I and II, being a proportionate part of the rates and the annual value of the entire house together with a sum in respect of the cost of lighting, cleaning, and heating the study."

We hesitate to answer questions asked of the JOURNAL on income-tax matters, being aware of the danger of generalizing in the absence of the specific facts of each case. It seems to us, however, that r. 3 (*c*) referred to in the judgment has some relation, in effect, to s. 80 (1) (*f*) of the Land and Income Tax Act, 1923, and the questions are susceptible to a ruling by you which would be a useful guide to solicitor taxpayers.

It would be a great convenience if you would be so good as to let us have a ruling on the point, in a form that can be reproduced as authoritative in the JOURNAL.

To that letter, we received the following reply by the Commissioner of Taxes:

I have your letter dated September 16, 1952, in which you ask whether for income-tax purposes any " study allowance " is made to solicitors who do much of their clients' work at home.

The practice of the Inland Revenue in the United Kingdom is no doubt based on specific provision in the Rules, but these Rules, as such, have no application in New Zealand.

The test of deductibility in New Zealand is whether or not the expenditure is exclusively incurred in the production of the assessable income for the income year, and, in the circumstances outlined by you, the question of deductibility would depend on the actual facts in each case.

It is not possible therefore to give you a general ruling for publication, and the position is that, where expenditure is claimed as a deduction, it must be expenditure which is actually incurred, and I must be satisfied that it was exclusively incurred in the production of assessable income.

It is now up to any practitioner who considers himself entitled to a deduction in the nature of a " study allowance " to claim it. We disagree, however, with the Commissioner's inference that there is nothing in the Land and Income Tax Act, 1923, comparable with r. 3 (*a*) and (*c*) of the Rules Applicable to Cases I and II of Schedule D to the Income Tax Act, 1918 (Gt. Brit.). For purposes of comparison, we again set out that rule:

3. In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of—

(*a*) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment, or vocation . . .

(*c*) the rent or annual value of any dwellinghouse or domestic offices or any part thereof, except such part thereof as is used for the purposes of the trade or profession: Provided that where any such part is so used, the sum so deducted shall be such as may be determined by the commissioners, and shall not, unless in any particular case the Commissioners are of opinion that, having regard to all the circumstances, some greater sum ought to be deducted, exceed two-thirds of the annual value or of the rent *bona fide* paid for the said dwellinghouse or offices.

The relevant and corresponding provisions in the Land and Income Tax Act, 1923, are s. 80 (1) (*f*) and s. 80 (2), which are as follows:

80. (1) In calculating the assessable income derived by any person from any source no deduction shall be made in respect of any of the following sums or matters . . .

(*f*) Rent of any dwellinghouse or domestic offices, save that, so far as such dwellinghouse or offices are used in the production of the assessable income, the Commissioner may allow a deduction of such proportion of the rent as he may think just and reasonable.

(2) In calculating the assessable income of any person deriving such income from one source only, any expenditure or loss exclusively incurred in the production of the assessable income for any income year may be deducted from the total income derived for that year . . . Save as herein provided, no deduction shall be made in respect of any expenditure or loss of any kind for the purpose of calculating the assessable income of any taxpayer.

We leave it to our readers to compare the effect of both those provisions. It seems to us that r. 3 (*c*) qualifies r. 3 (*a*) in the same manner as s. 80 (2) (to which the Commissioner of Taxes makes special reference) is qualified by the latter part of s. 80 (1) (*f*). We think our readers will agree that the effect is indistinguishable. Moreover, subs. 2 of s. 80 must be read as subject to the concessions already made in s. 80 (1) (*f*) and in the other paragraphs of subs. 1, as the Court of Appeal held in *Public Trustee* v. *Commissioner of Taxes*, [1938] N.Z.L.R. 436; and see, thereon, the learned Chief Justice's judgment in *Grant* v. *Commissioner of Taxes*, [1948] N.Z.L.R. 871, 877.

SUMMARY OF RECENT LAW.

ACTS PASSED, 1952.

No. 16. Land and Income Tax (Annual), 1952 (*September 19*).
17. Workers' Compensation Amendment Act, 1952 (*September 19*).
18. Minimum Wage Amendment Act, 1952 (*September 19*).
19. Imprest Supply (No. 4) Act, 1952 (*September 23*).
20. Wool Commission Amendment Act, 1952 (*September 26*).

BANKING.

Joint Account—Mandate to honour Drawings signed by Joint Customers—Forgery by One Customer of Other Customer's Signature—Action by Innocent Customer for Declaration of Bank's Liability—Guilty Customer joined as Defendant—Competency—No Implied Term that Both Customers act honestly—No Duty to supervise Joint Customer—Bank not discharged by paying Forged Cheques. Two executors of a testator's estate, one being a beneficiary and the other the managing clerk of a firm of solicitors, opened a joint account with a bank, completing a standard form of mandate supplied by the bank for the purpose. The mandate authorized the bank to honour any drawings on the account signed by both executors, and under it the executors agreed that any liability to the bank incurred by the executors on the account should be joint and several. Following the practice which they usually adopted in relation to joint accounts where one executor was a solicitor, the bank sent the periodical bank statements to the managing clerk only, and, apart from cashing monthly cheques which had been duly signed by both executors and were presented by the beneficiary, they gave her no indication of the state of the account. The managing clerk forged the signature of the beneficiary to a series of cheques and over a period of years drew nearly £3,000 from the account and used it for his own purposes. The forgeries were so skilful that no negligence could be imputed to the bank officials in not detecting them. The beneficiary brought an action for a declaration that the bank had wrongfully debited the joint account with the amount of the forged cheques, joining the managing clerk as co-defendant with the bank. *Held*, That the executors' right to have cheques honoured by the bank only if signed by both of them was a right owed to them jointly, and it could only be relied on in an action brought either by both executors joining as plaintiffs or by one as plaintiff joining the other as defendant; the way in which the action was brought being a procedural matter, the bank's liability was the same in either case; since an essential step in the action was that the cheques were forged by one of them, the executors, suing jointly, could not have obtained the declaration sought; and, therefore, the beneficiary could not obtain the declaration in an action in which she joined the managing clerk as defendant. (*Hirschorn* v. *Evans*, [1938] 3 All E.R. 491, applied.) *Semble*, The beneficiary would not otherwise have been debarred from obtaining the declaration, since (*a*) it was not an implied term of the mandate to the bank that each executor should act honestly in relation to the working of the account and should not deceive the bank by fraud; (*b*) acceptance of the bank statements by the managing clerk did not constitute them accounts stated binding on the beneficiary who had not received them, and she was not estopped from contending that they were not correct; (*c*) the beneficiary was under no duty to control or supervise her co-executor *vis-a-vis* the bank, and was not, therefore, negligent in failing to do so; and (*d*) the bank did not obtain a good discharge against both executors by paying the forged cheques. *Brewer* v. *Westminster Bank, Ltd., and Another*, [1952] 2 All E.R. 650 (Q.B.D.).

CHARITABLE TRUST.

Accumulation Trusts for Charitable Purposes. *96 Solicitors' Journal*, 475.

COMMERCIAL LAW.

Commercial Letters of Credit. *102 Law Journal*, 410.

COMPANY.

Foreign Company—Winding-up—Dissolution under Laws of Country of Incorporation—Crown's Claim to Assets in England as bona vacantia. By an order of the Court made on June 11, 1951, on a petition presented by creditors in England, a Russian company, which was dissolved over thirty years ago under the laws of Russia, and was alleged to have assets in England, was ordered to be wound up under the Companies Act, 1948, and a liquidator was appointed. The Treasury Solicitor having appeared by counsel at the hearing of the petition to ask that there should be some degree of protection for the Crown in regard to its claim against the assets as *bona vacantia*, the penultimate paragraph of the order provided that his costs, as well as those of the petitioners, should be taxed and paid out of the assets of the company, and the last paragraph of the order was: "And this order is without prejudice to the claim of the Crown to any of the assets of the said company which may have become *bona vacantia*". *Held*, That the last paragraph of the order was to be read subject to the qualification that the right of the Crown to the assets as *bona vacantia*, which, though defeasible, existed until the winding-up order was made, was to be temporarily defeated to the extent necessary to give effect to the order and to the administration which was to follow consequent on the order, and the Crown was entitled only to any surplus that remained after the completion of the winding-up. *Per curiam*, "The form of the last paragraph of the order ought to be the subject of very careful consideration for the future. It is clearly advisable that a modified form should be produced so as to remove any such doubt as has arisen and had to be resolved on this summons," *Re Banque Industrielle de Moscou*, [1952] 2 All E.R. 532 (Ch.D.).

CRIMINAL LAW.

Practice—Children's Court—Appeal—Committal to Borstal Institution—Right of Appeal from Sentence—Child Welfare Amendment Act, 1927, ss. 19 (1), 24—Prevention of Crime (Borstal Institutions Establishment) Act, 1924, s. 8. There is a right of appeal to the Supreme Court from the order of a Magistrate when, in the Children's Court, he exercises the jurisdiction given him by s. 19 (1) of the Child Welfare Amendment Act, 1927, and imposes a sentence which would be appealable if he were sitting in the Magistrates' Court and exercising the powers conferred on him by the Justices of the Peace Act, 1927. Although, by virtue of s. 24 of the Child Welfare Amendment Act, 1927, there need not be a formal conviction in the Children's Court, the effect of that section is that the position is to be regarded as if a conviction had been recorded, not merely a justifying a penalty but as giving a right of appeal as well. (*Tippins* v. *McIntyre*, [1941] N.Z.L.R. 532, distinguished.) (*Burgess* v. *Boetefeur and Brown*, (1844) 7 Man. & G. 481; 135 E.R. 193, referred to.) Independently of the foregoing: Where a Magistrate imposes a sentence of detention in a Borstal institution, he does so by virtue of the power given him in that behalf by s. 8 of the Prevention of Crime (Borstal Institutions Establishment) Act, 1924, and, when that special power is invoked in the Children's Court, its exercise is subject to the right of appeal against that sentence given by s. 8 (3). *Re M., G., J., and W.* (S.C. Wellington. September 12, 1952. Gresson, J.; Hutchison, J.)

Theft—Theft from Dwellinghouse—Dwellinghouse subject to Closing-order at Time of Theft therefrom—"Dwellinghouse" to be construed in Its Ordinary Common-law Meaning—Crimes Act, 1908, s. 247 (b) (iv)—Health Act, 1920, s. 40. The word "dwellinghouse", which is used with its common-law meaning in s. 247 (*b*) (iv) of the Crimes Act, 1908, should be construed in its ordinary meaning. Consequently, the issue of a closing-order under s. 40 of the Health Act, 1920, in respect of a building occupied as a residence does not, during the subsistence of the closing-order, take that building out of the category of a dwellinghouse for the purposes of s. 247 (*b*) (iv), under which a charge of theft from a dwellinghouse may be laid. *So held*, by the Court of Appeal, on the footing that a dwellinghouse was subject to a closing-order, dismissing an appeal against conviction on the count of theft from a dwellinghouse under s. 247 (*b*) (iv) of the Crimes Act, 1908. *The Queen* v. *Ryan*. (C.A. Wellington. September 19, 1952. Fair, J.; Gresson, J.; Hay, J.)

DESTITUTE PERSONS.

Maintenance—Enforceability of Order—Husband returning after Interval to live with Wife—Residence for More than Three Months under Same Roof—No Resumption of Cohabitation—Summary Jurisdiction (Separation and Maintenance) Act, 1925 (c. 51), ss. 1 (4), 2 (2). A husband and wife resided in a dwellinghouse of which they were joint owners. On May 26, 1950, the husband was ordered by a Court of summary jurisdiction to make certain payments to the wife on the ground that he had been guilty of wilful neglect to provide reasonable maintenance for her and her infant children. He continued to reside in the house until June, 1950, when he left to live elsewhere. In October, he returned to live in the house, and remained there until November 30, 1951. After May 26, 1950, the husband, when living in the house, occupied a separate room, and the wife performed no domestic duties for him, and there was no cohabitation by the parties. The husband failed to make payments in accordance with the order of the Court of summary jurisdiction in respect of a period during which both husband and wife lived in the house. *Held*, (i) That the effect of s. 1 (4) and s. 2 (2) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, was that an order for maintenance under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, should be suspended so long as the wife continued to reside with the husband after the date of the order, and should cease to have effect if that residence continued for a period of three months, but that, if, before the end of that period, the parties ceased to reside together, the order then became effective, and ceased to have effect only if the parties resumed cohabitation. (ii) That, as the husband had ceased to reside in the house within three months of the order, and did not resume cohabitation on returning to reside there, notwithstanding his residence for more than three months in the house, the order had not ceased to be in force, and he remained liable under it. *Hewitt* v. *Hewitt*, [1952] 2 All E.R. 250 (Q.B.D.).

For the Summary Jurisdiction (Separation and Maintenance) Act, 1925, ss. 1 (4), 2 (2), see *11 Halsbury's Statutes of England*, 2nd Ed. 864, 865.

Maintenance: Problems arising from Dual Jurisdiction. *96 Solicitors' Journal*, 505.

Separation—Separation Order made—Parties later reconciled and resuming Cohabitation—Reconciliation Unsuccessful and Parties entering into Separation Order—Subsequent Complaint for Separation Order and Order made—Latter Order of No Effect—Such Order vacated and Case remitted to Magistrate for Rehearing after Wife makes Application for Cancellation of First Order—Destitute Persons Act, 1910, ss. 18, 21, 24—Magistrates' Courts Act, 1947, s. 77 (1). The parties were married in June, 1948, and there was a child of the wife's former marriage and a child of the parties' marriage. On April 16, 1951, orders for separation, guardianship, and maintenance were made. In September, 1951, the husband, on promising to reform, was taken back by his wife on the understanding that, if the reconciliation should not be successful, the parties would enter into an agreement for separation. The reconciliation did not last; and in October, 1951, an agreement for separation was executed. The husband's conduct towards his wife was such that she laid a further complaint on February 20, 1952; and the Magistrate, on July 28, 1952, made further separation, guardianship, and maintenance orders. Against the making of these orders the husband appealed. *Held*, 1. That the separation order purporting to have been made on July 28, 1952, while the first order was in existence, was of no effect, and could not stand. 2. That the order should be vacated and the case remitted to the Magistrate for a rehearing of the complaint of February 20, 1952, with the direction that such rehearing should not take place until after the wife had made an application under s. 24 of the Destitute Persons Act, 1910, to cancel the order of April 16, 1951. *Revell* v. *Revell*. (S.C. Wellington. September 19, 1952. Sir Humphrey O'Leary, C.J.)

DIVORCE AND MATRIMONIAL CAUSES.

Cruelty—Nagging—Matters to be taken into Consideration. The general rule in all questions of cruelty in a matrimonial cause is that the whole of the relations between the husband and wife and all the relevant circumstances must be considered, and that rule is of special value when the cruelty consists, not of violent acts, but of injurious reproaches, complaints, accusations, or taunts. The test whether the conduct complained of was wilful and unjustifiable is not exhaustive. Wilful accusations may be made which are not true and for which there are no probable grounds, and yet they may not amount to cruelty—for example, they may have been provoked by the cruel conduct of the other spouse. Where it is appropriate to consider the justifiability of the respondent's accusations, "justifiable" does not mean simply "true". It is not the accusations themselves, but the acts of the spouse in making them, which have to be justified, and a spouse's conduct in making charges may be perfectly justified notwithstanding that the charges are untrue, for such data as he or she has may point almost irresistibly to the guilt of the accused spouse, although the latter is, in fact, innocent. The general circumstances must be considered, including conduct of the petitioner calculated to afford provocation or excuse for the making of charges which are untrue and in the absence of excuse would have been unjustifiable. It is not right first to ask whether the respondent's conduct was cruel in fact, and then to ask whether it can in any way be justified. The question whether the respondent treated the petitioner with cruelty is a single question only to be answered after all the facts have been taken into account. On the other hand, it is proper to have regard to conduct of the respondent which is not the result of provocation, but is designed to hurt the petitioner for the sake of hurting him. On a petition by a husband based on cruelty consisting of nagging by the wife in the form of reiterated and false charges of adultery, if the trial Judge, in the exercise of his discretion, after considering the conduct of both parties and the whole of the circumstances in relation to the temperament and character of the wife, comes to the conclusion that the wife's conduct is, not withstanding the provocation received or the difficulties and stresses endured, an inexcusable offence against the husband, his judgment should be treated as conclusive. (Observations of *Lord Herschell* in *Russell* v. *Russell*, [1897] A.C. 445, and of *Bucknill*, J., in *Horton* v. *Horton*, [1940] 3 All E.R. 384, examined.) *King* v. *King*, [1952] 2 All E.R. 584 (H.L.).

The Period of Desertion. *102 Law Journal*, 451.

DONATIO MORTIS CAUSA.

Delivery of Gifts *mortis causa*. *96 Solicitors' Journal*, 471.

ESTATE DUTY.

Points in Practice. *102 Law Journal*, 368.

JUDICIARY.

Bench and Bar in Ireland. *214 Law Times*, 5.

From Bench to Bar. *213 Law Times*, 309.

LAND AGENT.

Land Agent's Commission. *96 Solicitors' Journal*, 404.

LAND TRANSFER.

Partition: Compensation for Improvements by Tenants in Common. (K. W. Ryan.) *5 Australian Conveyancer and Solicitors Journal*, 61.

NEGLIGENCE.

Liability of Schoolmasters and Education Authorities. *214 Law Times*, 32.

OBITUARY.

Lord Macmillan, a Lord of Appeal in Ordinary from 1930 to 1939 and from 1941 to 1947, when he retired, at the age of 79 years.

PRACTICE.

Pleadings—Statement of Claim—Place for Filing—Claim for Debt—No Place of Payment stipulated in Contract—Items in Claim so connected as to form One Cause of Action—Cause of Action in respect of One Item arising in District wherein Plaintiff resides—Jurisdiction in That District over Whole Debt—Whether Actusl Place of Payment justifies Issue of Writ there—Code of Civil Procedure, R. 9—Change of Venue—Plaintiff residing in One Judicial District and Defendant in Another—Some Items in Claim disputed by Defendants—Matters actually in Dispute of Primary Importance in relation to Place of Trial—Code of Civil Procedure, R. 249. In applying R. 9 of the Code of Civil Procedure (as to the cause of action arising in the plaintiff's district). the Court is entitled to limit consideration to the matters that are actually in dispute; and, where the items of a claim are so connected as to form one cause of action, the fact that a cause of action in respect of one item arises within the district in which the plaintiff resides gives jurisdiction in that district over the whole debt. (*Copeman* v. *Hart*, (1863) 14 C.B. (N.S.) 731; 143 E.R. 632, and *Bonsey* v. *Wordsworth*, (1856) 18 C.B. 325; 139 E.R. 1395, applied.) *Quaere*, Whether, in respect of R. 9 of the Code of Civil Procedure, the place of payment can be relied on as a material part of the cause of action justifying the issue of a writ in the district in which the plaintiff resides and the filing of the statement of defence at such place, where there is no special stipulation for payment at a particular place. (*Golden Horseshoe Dredging Co., Ltd.* v. *Anderson*, (1903) 22 N.Z.L.R. 773, and *Stratford County Council* v. *Miller*, (1913) 32 N.Z.L.R. 862, referred to.) In applying R. 249 (as to the place of trial), the matters which are actually in dispute are of primary importance in relation to an application for change of venue when the statement of claim dealt with a series of sales of goods by plaintiff, which had its registered office in one district, to the defendant, which had its registered office in another district, and the defendant disputed only some of the items in the account. The writ was issued out of the Court at Auckland, which was the place of trial. The statement of claim set out a series of sales of goods by plaintiff to defendant commencing early in December, 1951, and continuing down to May 20, 1952. Certain payments had been made, and the balance claimed was £3,080 8s. 9d. Defendant admitted liability to the extent of £2,024 16s. 3d. The only controversy between the parties was as to four items in the account, totalling £1,055 12s. 6d. Although these four items were set out as separate items in the account, they represented a single transaction. The plaintiff had its head office in Auckland, with warehouses in Wellington, Christchurch, and Dunedin. The defendant had its registered office and only place of business in Dunedin. The disputed transaction was wholly entered into and carried out in Dunedin, nothing being in writing, and nothing being said or done by defendant in any place but Dunedin. Everything that was done on plaintiff's part was done by, or under the instructions of, its agent in Dunedin. Except for admitted purchases in Auckland to the total value of £465 13s. 1d., the defendant alleged that all the goods in dispute were purchased and delivered from the plaintiff's office in Dunedin. The defendant alleged, and plaintiff did not deny, that, except for goods to the value of £65 16s. 1d. dispatched from the plaintiff's Wellington warehouse, all the invoices were sent from the plaintiff's Dunedin office. There was no evidence to show whether the invoices stipulated for payment in Auckland; but, apart from cash purchases made in Dunedin, which did not figure in the account, the defendant admitted that all payments were made in Auckland. On a summons asking that the writ be set aside or amended, on the ground that it required defendant to file its statement of defence and to attend for trial at Auckland, instead of at Dunedin; alternatively, that a change of venue to Dunedin be granted under R. 249 of the Code of Civil Procedure, *Held*, 1. That the items comprising the claim were so connected as to form one cause of action for the purposes of R. 9; and the writ had been properly issued for trial at Auckland. 2. That, although part of the goods were ordered in Auckland, this was a ground which had no direct relation to the parcels of goods which were the subject-matter of the only dispute requiring to be litigated. 3. That, for the purposes of R. 249, the action, in respect of those particular goods, could not be "conveniently or fairly tried" at Auckland, having regard to the case in all its bearings, as it would be unjust, in the circumstances, to impose on the defendant the inconvenience of a trial in Auckland; and, on balance, justice required that the case should be tried in Dunedin. (*Fitzgerald* v. *Kennedy*, (1909) 28 N.Z.L.R. 335, and *Dansey* v. *Orr*, (1908) 28 N.Z.L.R. 115, followed.) (*Scoullar Co., Ltd.* v. *Hall*, [1930] N.Z.L.R. 434, distinguished.) 4. That the defendant should be put on terms, which would enable the plaintiff, if it so desired, to have judgment for the admitted liability of £2,024 16s. 3d., with the appropriate costs; and, subject thereto, the plaintiff should be permitted to proceed with its claim for the balance in an action to be tried in Dunedin. *Snow Rainger, Ltd.* v. *Dereck Van Splunteren, Ltd.* (S.C. Auckland. August 26, 1952. F. B. Adams, J.)

PROBATE AND ADMINISTRATION.

Points in Practice. *102 Law Journal*, 298.

SALE OF LAND.

Contract—Rescission—Purchaser committing Act of Bankruptcy before Completion—Right of Vendor to rescind. On August 29, 1951, a written contract was made between A. and B. whereby B. agreed to purchase freehold property from A. The date fixed for completion was November 30, 1951, and the National Conditions of Sale, 15th Ed. (1948), were incorporated in the contract. B. paid a deposit of 10 per cent. of the purchase price. On November 21, 1951, B. committed an act of bankruptcy. On December 3, 1951, A. purported, by letter to B., to repudiate their contract and to forfeit the deposit. On December 5, 1951, B. was adjudicated bankrupt. In an action by B.'s trustee in bankruptcy against A. for damages for breach of the contract, *Held*, That A. was not entitled to treat the act of bankruptcy as an anticipatory breach entitling him immediately to repudiate the contract, or, after the passing of the date for completion, to treat the contract as though time were of its essence, entitling him to rescind the contract for B.'s failure to complete on the due date, and, therefore, A. was in breach of the contract and liable in damages. (*Collins* v. *Stimson*, (1883) 11 Q.B.D. 142, explained.) (*Powell* v. *Marshall, Parkes and Co.*, [1899] 1 Q.B. 710, distinguished.) *Jennings's (A Bankrupt) Trustee* v. *King*, [1952] 2 All E.R. 608 (Ch.D.).

TENANCY.

Rent Fixation—Urban Property—"Special circumstances"—Circumstances Special to or Peculiar to Particular "property" or Particular Class of "property"—Basic Rent permitting No Return to Owner, Capable of being a "special circumstance" if Peculiar to Particular "property" or Special Class of "properties"—Increase in Rates and Values in Area wherein Building situated not "special circumstances"—Any Increase in Rent to be confined to Evaluation of "special circumstances" found to exist—Tenancy Act, 1948, s. 9 (1) (2). In relation to the term "special circumstances" as used in subss. 1 and 2 of s. 9 of the Tenancy Act, 1948, in its application to "property", as defined by s. 2 of that statute: (*a*) All that was said in *Otago Harbour Board* v. *Mackintosh, Caley, Phoenix, Ltd.*, [1944] N.Z.L.R. 24, and *Schneideman and Sons, Ltd.* v. *H. E. Perry, Ltd.*, [1949] N.Z.L.R. 700 (decisions on Reg. 16 of the Economic Stabilization Emergency Regulations, 1942), as to the qualities that a circumstance must possess before it can be regarded as "special" is applicable to the term "special circumstances" in s. 9 (2) of the Tenancy Act, 1948. (*b*) Recognizing that "special circumstances" must be normally circumstances that are special to or peculiar to the particular case, it may nevertheless in certain conditions or situations be proper to regard as "special" certain circumstances which are not peculiar to one individual case, but which are peculiar to a special class of cases; but it must always be a question of fact as to whether a class of buildings is sufficiently limited in its nature

to justify its being treated as a special class for the purposes of s. 9 (2). (Dictum of *Fair*, J., in *Otago Harbour Board* v. *Mackintosh, Caley, Phoenix, Ltd.*, [1944] N.Z.L.R. 24, 42, and *Schneideman and Sons, Ltd.* v. *H. E. Perry, Ltd.*, [1949] N.Z.L.R. 700, 719, and *Jewellers' Chambers, Ltd.* v. *Red Seal Coffee House, Ltd.*, [1949] N.Z.L.R. 204, 207, referred to.) (c) Circumstances are not "special" unless they have some special application to a particular property or a particular class of property; and circumstances that are not "special circumstances" include the following: (i) That during the period of rent restriction the basic rent from a tenement has permitted no return to the owner. This is a relevant consideration, and it is capable, too, of being a "special circumstance"; but whether or not it amounts to a "special circumstance" depends on the particular facts of the case; before it can be such, it must be peculiar to the particular property or to a special or limited class of properties. (Dicta of *Kennedy*, J., and *Finlay*, J., in *Schneideman and Sons, Ltd.* v. *H. E. Perry, Ltd.*, [1949] N.Z.L.R. 700, 713, 714, applied.) (ii) That there was an increase in rates in the city in which the building was situated, and an increase in values since 1939. A general or local increase in values is a matter of such a general nature that it cannot be regarded as a "special circumstance"; and, similarly, an increase in rates cannot be regarded as a "special circumstance", save perhaps in exceptional cases. Any increase in rent under s. 9 (2) must be confined to an evaluation of whatever "special circumstances" are found to exist. (*Otago Harbour Board* v. *Mackintosh, Caley, Phoenix, Ltd.* (*No. 2*), [1944] N.Z.L.R. 509, *Humphreys Furniture Warehouse, Ltd.* v. *Cuthbert*, [1949] N.Z.L.R. 913, *In re A Lease, Wellington City Corporation to North British and Mercantile Insurance Co., Ltd.*, [1950] N.Z.L.R. 478, and dicta of *Sir Humphrey O'Leary*, C.J., in *Schneideman and Sons, Ltd.* v. *H. E. Perry, Ltd.*, [1949] N.Z.L.R. 700, 712, followed.) (*Jewellers' Chambers, Ltd.* v. *Red Seal Coffee House, Ltd.*, [1949] N.Z.L.R. 204, *Reids Furnishings, Ltd.* v. *Hamilton Autos, Ltd.*, [1951] N.Z.L.R. 730, and *Truth (N.Z.), Ltd.* v. *Magnus Motors, Ltd.*, [1951] N.Z.L.R. 859, not followed.) *So held* by a Full Bench of the Supreme Court, allowing an appeal from the decisions of a Magistrate fixing fair rents of premises in the respondent's building. Per *Finlay*, J., *Semble*, 1. That the "circumstances of the landlord and of the tenant" to which the prohibition in s. 9 (1) extends are those circumstances of a personal character which lie outside the range of the circumstances that are directly and immediately involved in the particular application under consideration, and do not comprehend an absence of return from the building, so that lowness of rent is not a circumstance the Court is restrained from considering. It is a relevant circumstance, and may be a "special circumstance", but inherently and taken alone, it is not, and cannot be, a "special circumstance". (Dictum of *Sir Michael Myers*, C.J., and *Smith*, J., in *Otago Harbour Board* v. *Mackintosh, Caley, Phoenix, Ltd.*, [1944] N.Z.L.R. 24, 29, 34, applied.) 2. That it would not be proper to say that an increase in rates is so general in character that it cannot be a "special circumstance", as in a particular locality and in particular circumstances an increase in rates might bear so heavily upon a specific property, or upon properties of a specific and limited class, that it would not be unreasonable for a Magistrate to hold that the effect of an increase was a "special circumstance". Three tenants appealed against decisions of the Magistrates' Court fixing the fair rent of premises occupied by them respectively in Selwyn Buildings, a commercial building in Wanganui, situated on a property of which the respondent company was the lessee. The appellants, whose rents were fixed respectively by the Magistrate in excess of £525 per annum, appealed to the Supreme Court from that judgment, and an order was made for the hearing of the appeals before a Full Bench; and it was agreed that the three appeals should be heard together. By agreement between counsel, the Court was asked to have regard only to the question of the total or global rental, and not to the position as between any one particular tenant and the respondent. The relevant facts fully appear on p. 281, *post*. *Held*, *per totam curiam*, 1. That the evidence was not sufficient to satisfy the Court that Selwyn Buildings belonged to a class of buildings that was sufficiently special or limited to justify a finding that the characteristic of not showing a return to the owner was, though common to them all, a "special circumstance" in the case of each of them. 2. That any discrepancy between the basic rents of almost identical portions of the building disclosed by a comparison of the individual rentals, *inter se*, was irrelevant, because all the Court was asked to determine was whether or not the conclusion reached by the Magistrate as to the global rental of the building was right. 3. That there was no evidence before the Court to justify a finding that the rents of Selwyn Buildings were for the most part depressed rents because of circumstances existing in Wanganui in 1942; but, if there could be such a finding by the Magistrate, with evidence to support it, it was at least doubtful whether commercial buildings throughout a whole city constituted a class of buildings that was sufficiently limited to make it proper to describe as a "special circumstance" some characteristic that they all possessed. 4. That, even if there were a finding by the Magistrate in 1948 to the effect that there were "special circumstances", that finding could not have been fundamental to his decision, as the fair rent was then fixed at a figure lower than the basic rent. (*Hoystead* v. *Taxation Commissioner*, [1926] A.C. 155, applied.) 5. That an increase in rates in the City of Wanganui, and the increase in values since 1939, did not constitute "special circumstances". 6. That, consequently, the respondent had not established the existence of any "special circumstances", and no increase in the basic rent was permissible. *So held* by a Full Bench of the Supreme Court allowing appeals from the judgments of a Magistrate at Wanganui fixing the fair rents of the appellant-tenants of the respondent's premises. *Harold Hall and Co. and Others* v. *Selwyn Buildings, Ltd.* (S.C. Wellington. September 18, 1952. Sir Humphrey O'Leary, C.J.; Northcroft, J.; Finlay, J.; Hutchison, J.; Cooke, J.)

Possession—Dwellinghouse let to Husband—Subsequent Desertion by Husband—Wife remaining in Occupation—Adultery by Wife—No Step by Husband to revoke Wife's Authority to occupy. The tenant of a dwellinghouse within the Rent Restrictions Acts deserted his wife, who remained in the house and continued to pay the rent. Subsequently, she committed adultery with a man whom she had taken as a lodger in the house, but the husband took no steps to revoke the permission he had given her to reside therein. On a claim by the landlord for the possession of the house, on the ground that the husband had abandoned possession and the wife was a trespasser, *Held*, That, assuming that the commission of adultery by the wife gave the husband the right to revoke her authority to reside in the house, it was irrelevant on a question between her and the landlord, and, therefore, in the absence of such revocation by the husband, the landlord was not entitled to possession. (*Old Gate Estates, Ltd.* v. *Alexander*, [1949] 2 All E.R. 822, and *Middleton* v. *Baldock*, [1950] 1 All E.R. 708, considered.) (Observation of *Sir Raymond Evershed*, M.R., in *Middleton* v. *Baldock*, [1950] 1 All E.R. 708, 710, considered.) *Wabe* v. *Taylor*, [1952] 2 All E.R. 420 (C.A.).

TORTS.

Insanity in Tort. *96 Solicitors' Journal*, 421.

Tortious Responsibility of the Insane. *213 Law Times*, 369.

TRANSPORT.

Pedestrian Crossings Reconsidered. *102 Law Journal*, 367.

TRUSTS AND TRUSTEES.

Duties of Trustees—Thermal Springs Crown Lease part of Residuary Estate—Property therein specifically bequeathed and not subject to Trust for Conversion—Successive Life Tenants entitled to Income therefrom—Non-application of Rule in Howe *v.* Dartmouth*—Duty of Trustees in respect of Proceeds of Freeholding—Investment in Purchase of Annuity having Same Period to run as Unexpired Term of Lease—Annuity to be paid to Tenants for Life during Respective Lives and thereafter to Remaindermen.* The testatrix, at her death in 1942, was the lessee of Crown leasehold land in the town of Rotorua under a Thermal Springs Crown Lease dated February 4, 1911. Notwithstanding a recital and other provisions relating to rent, there was no rent reserved, because the original grantee had some claim upon the State, and the lease was granted in satisfaction of that claim. The Rotorua Town Lands Act, 1920, applied to the lease, with the results that the lessee could acquire the fee simple, and any sublessee holding under any lease direct from the lessee, or any underlessee as defined by that statute, might also acquire the fee simple of so much of the land as was comprised in his holding. The term of the lease was for ninety-nine years commencing on January 1, 1894. There was a sublease registered against the testatrix's title, for a term commencing on November 22, 1902, and ending on December 31, 1992; but, by deed executed in 1949, the term was reduced by one day; and it comprised the whole of the land still held under the lease. The land had been subdivided and underlet to various persons by the sublessee. Part of the land had been taken by the Crown, and the trustees had in their hands a sum of £550 received as compensation for it. No application had been made by anyone to purchase the fee simple of the whole or any part of the land. The will of the testatrix appointed her daughter, Mrs. C., and the defendants executors and trustees, and they were now the trustees. After

a bequest was given to Mrs. C., by cl. 5 the residue was given to the trustees upon, *inter alia*, the following trusts: " 5. (*a*) To sell and convert into money all such parts thereof as shall not consist of money or securities for money BUT I EXPRESSLY GRANT to my trustees full power in their absolute and uncontrolled discretion to postpone for any time however remote the sale realisation and conversion of the whole or any part or parts of my property real and personal (*b*) To pay thereout my debts and funeral and testamentary expenses and estate succession or other duty (*c*) To invest upon some one or more securities as authorised hereunder the proceeds of the said sale calling in and conversion and to stand possessed of such investments and of such part of my estate as shall at my death consist of such investments as aforesaid (hereinafter called 'my residuary estate') upon the following trusts that is to say: (i) To pay the income thereof to my daughter MIRIEL ANN CUPPLES during her life for her separate use and subject to restraint upon anticipation during coverture and after her death UPON TRUST (ii) To set apart all my leasehold estate and interest in Block XVII Town of Rotorua being all the land in Lease Register Book Volume 343 Folio 172 Auckland Registry free of all estate succession or other duty and in addition to set apart and invest upon some one or more securities as authorised herein a sum equal to one half of the whole of the net residue of my residuary estate excepting thereout my leasehold estate and interest in Block XVII Town of Rotorua aforementioned and to stand possessed of such one half share together with the aforesaid leasehold interest UPON TRUST to pay the income therefrom to my grandchild RHONDDA JEAN CUPPLES during her lifetime for her separate use and subject to restraint upon anticipation during coverture and after her death UPON TRUST . . . " (The leasehold property referred to in cl. 5 (c) (ii) is the leasehold described above.) Upon Rhondda's death, the trustees were directed " to pay and divide the capital and income of the trust moneys " among her children as she might appoint, with remainder in default of appointment to her children equally; and, if no child took, " to pay and divide the share of capital and accrued income set apart for such deceased granddaughter " among other children of testatrix, and, if there should be none, then " to pay and divide the share of capital and accrued income " among testatrix's grandchildren. There followed a trust to set apart and invest " a sum equal to the remaining one half share of the remainder of the residuary estate ", upon trusts for testatrix's grandson, S. L. Cupples, during his life, with trusts upon his death corresponding with those already detailed in regard to Rhondda's share. His share did not include any specific property such as the leasehold in the case of Rhondda. Clause 7 confers powers on the trustees, including in para. (*e*) power " to carry on my estate or any part thereof for such period as they shall think proper ", and for that purpose (*inter alia*) " to lease any lands or buildings of which I may die possessed for such term and upon such conditions as my trustees may in their absolute discretion think fit "; and in para (i) power to " appropriate and partition any real and personal property . . . in and towards the share of any person or persons "; and the following powers of investment and retention: " 7. (*g*) To invest any moneys hereinbefore directed to be invested upon any securities authorised by law for the investment of trust funds or upon deposit with any bank or limited liability company or upon any Thermal Springs Crown leaseholds and subleases of the same affecting lands in the Town or suburbs of Rotorua I SPECIALLY DIRECT that my trustees may if they think fit retain without realising any investments made or held by me in my lifetime and may constitute such investments a part of the investment of any trust fund which it is hereby directed to set apart." On summons taken out by the trustees for directions in relation to certain matters arising out of the execution of the trusts of the will, *Held*, 1. That successive life tenants were entitled to the income from the land comprised in the Thermal Springs Crown Lease *in specie*, notwithstanding that the property was a wasting asset, because the property was specifically bequeathed, and was not affected by the trust for conversion. (*Howe* v. *Earl of Dartmouth*, (1802) 7 Ves. 137; 32 E.R. 56, distinguished.) 2. That, even if there were no specific provision for the setting apart of the property at the commencement of the second life estate, the same result would follow from the power to postpone indefinitely conversion coupled with the power to retain " investments " (Thermal Springs Crown leaseholds being " authorized investments " in terms of the will). (*In re Inman, Inman* v. *Inman*, [1915] 1 Ch. 187, followed.) 3. That the rule in *Howe* v. *Earl of Dartmouth* did not apply, even if the retention of the property were discretionary, because the income therefrom was specifically given to the second life tenant; and, in dealing with any such proceeds of the property as are referred to below, no occasion can arise for adjustment of the rights of tenants for life and remaindermen in accordance with that rule. 4. That, in view of the fact that the sublessees and underlessees of the property have the right to acquire the freehold thereof under the Rotorua Town Lands Act, 1920, the proceeds of any such freeholding, and the proceeds already received from the Crown by way of compensation, the duty of the trustees on each occasion is to invest the money in the purchase of an annuity having the same period to run as there remained in the term at the end of the expropriation, and to pay such annuity to the tenants for life during their respective lives, and after their deaths to the remaindermen; or, in the alternative, the trustees must ascertain what yearly sum, if raised out of the income and corpus of the particular fund, would exhaust it in the period which the lease had to run when the expropriation occurred, and the yearly sums so ascertained must be paid to the tenants for life during their respective lives as from the date of the expropriation. (*Askew* v. *Woodhead*, (1880) 14 Ch.D. 27, applied.) 5. That the appropriate fund out of which costs should be paid was the sum of £550 received as compensation from the Crown for part of the property. *In re Robertson* (*deceased*), *Davys and Another* v. *Cupples and Others*. (S.C. Hamilton. June 16, 1952. F. B. Adams, J.)

Trustees' Power to Decide Questions. *102 Law Journal*, 341.

VENDOR AND PURCHASER.

Contract—Sale of Land—Specific Performance—Oral Agreement—No Memorandum or Note thereof signed by Party to be charged—Part Performance—What constitutes—Certificate of Title handed to Plaintiff—Plaintiff and Defendant Son and Mother respectively—Equivocality. The plaintiff claimed specific performance of a verbal agreement, alleged to have been made between himself and his elderly mother, that, in consideration of the plaintiff's paying to his sister the sum of £500, the defendant would transfer to him the dwellinghouse which they occupied together. The defendant handed the certificate of title relating to the premises to the plaintiff some weeks after he had paid the £500 to his sister, with a direction that he " see a solicitor ". *Held*, That the act relied upon as part performance of the contract was, having regard to the relationship and relations of the parties, equivocal and insufficient to take the case out of s. 128 of the Instruments Act, 1928. (*Cooney* v. *Burns*, (1922) 30 C.L.R. 216, considered and applied.) Per *Smith*, J., In applying the doctrine of part performance, the act relied upon as sufficient part performance of the contract must point plainly and unequivocally to the existence of an agreement between the parties falling within the general class to which the agreement alleged belongs. If this requirement is satisfied, then at leat two further requirements must be satisfied—namely, (*a*) that the act relied upon must be a part execution of the substance of the agreement, and not merely of matters preparatory or ancillary to performance; and (*b*) that the act relied upon must have been done upon the faith of the agreement, and must have involved on the part of the person doing it a change of position in relation to the subject-matter of the contract of such a character that he would be unfairly prejudiced if the other party were to take advantage of the absence of written evidence. *Francis* v. *Francis*, [1952] V.L.R. 321 (F.C.).

Fraudulent Misrepresentation by Agent. (R. Ellicott.) *5 Australian Conveyancer and Solicitors Journal*, 61.

Withdrawal of Property from Auction. *102 Law Journal*, 312.

WILL.

Condition—Certainty—Condition subsequent—" Take up permanent residence in England ". By her will, dated October 27, 1942, a testatrix, who died on December 30, 1950, directed that her residuary estate should be held on trust for various people in succession. She further provided: " every person who under the trusts aforesaid (including the divesting limitations in this clause contained) shall become entitled in possession of my residuary estate as tenant for life or in tail male or in tail shall within six months from the date of becoming so entitled take up permanent residence in England and in default of continuance of compliance with this condition or in case of subsequent discontinuance of compliance with this condition the trusts hereinbefore declared in favour of such person and his issue shall determine ". *Held*, That the use of the word " permanent " in the phrase " take up permanent residence in England " imported into the phrase the notion of the intention of the person concerned, and, on its true construction, the phrase meant " making England one's permanent home "—

i.e., residing in England with the intention of continuing to reside there until one died (which was another way of referring to the characteristic essential to domicil); and, therefore, the phrase had a sufficient quality of precision and distinctness for the defeasance clause to be valid. (*Sifton* v. *Sifton*, [1938] 3 All E.R. 435, distinguished.) Decision of *Roxburgh*, J. ([1952] 1 All E.R. 827) affirmed. *Re Gape's Will Trusts, Verey and Another* v. *Gape and Others*, [1952] 2 All E.R. 579 (C.A.).

As to Uncertainty, see *34 Halsbury's Laws of England*, 2nd Ed. 219-222, paras. 274-277; and for Cases, see *44 E. and E. Digest*, 440-444, Nos. *2667-2687*.

Revocation—By Oral Evidence—Standard of Proof required. In 1935, the deceased made a will, and in 1937 she executed a codicil thereto by which she appointed the plaintiff Bank to be executors of her will. In October, 1937, she instructed a solicitor to prepare another will, which was duly executed and deposited with the plaintiff Bank. On May 4, 1939, the deceased withdrew this later will from the Bank, and it was never seen again, nor was there any information available concerning its contents, except that it was the solicitor's usual practice to include a revocation clause in any draft will and to submit each draft will to the proposed testator or testatrix for perusal and approval. On a motion by the plaintiff Bank for an order that the first will and codicil be admitted to probate, *Held*, That, where it is sought to prove the revocation of an earlier will by oral evidence only, such evidence must be "stringent and conclusive"; there was no such evidence in this case; and, therefore, probate of the first will and codicil would be granted. (*Cutto* v. *Gilbert*, (1854) 9 Moo. P.C.C. 131, applied.) *Re Wyatt (deceased)*, [1952] 1 All E.R. 1030 (P.D. & A.).

As to Revocation of Will by Later Will, see *34 Halsbury's Laws of England*, 2nd Ed. 78-83, paras. 110-116; and for Cases, see *44 E. and E. Digest*, 320-348, Nos. *1532-1781*.

WORKERS' COMPENSATION.

Accident arising out of and in the Course of the Employment—Worker engaged in Logging Operations in Bush Area and living in Bush Camp—Death occurring while travelling from There at Week-end to Place where He had No Permanent Residence—Deceased not "travelling from his work" when killed—"Travelling from . . . work"—Workers' Compensation Amendment Act, 1947, s. 45 (1) (b). A worker has ceased "travelling from his work" within the meaning of that phrase as used in s. 45 (1) (*b*) of the Workers' Compensation Amendment Act, 1947, when he has reached the place where he resides. (*Hassett* v. *Bridgeman (No. 2)*, [1948] N.Z.L.R. 1220, and *James* v. *Williams (State Fire Insurance General Manager, Third Party)*, [1951] N.Z.L.R. 290, referred to.) The deceased was a member and director of the defendant company, the managing director of which was his brother. For about six years, the company had been carrying on logging operations in a bush area about twenty-two miles from Taumarunui. The company had a bush foreman in charge of the operations, and the deceased was second in charge. It was part of the deceased's responsibilities to look after the tallies and the time-book. Once a fortnight he took the time-book into the company's office in Taumarunui, and once a month he took in the tallies. There was a bush camp near the scene of operations, and the men working on the block for the company were accommodated there. The deceased had a hut at the camp, and, apart from any special business, he remained there the whole working-week, living in the hut; and it was there that he had his only fixed place of abode. On most Fridays, the deceased left the camp, usually to spend the week-ends at Taumarunui, but sometimes to go to Auckland. He had no permanent room or residence in Taumarunui. On Fridays, the deceased mostly went into Taumarunui with his brother in the latter's car; or he made his own arrangements with the drivers of cars and lorries going backwards and forwards, some belonging to defendant company and others belonging to different contractors in the area. So far as the deceased's brother was concerned, the deceased went to Taumarunui on Friday or when it suited him. When the deceased arrived in Taumarunui on Fridays, he sometimes went to the office of the company for the purposes of the company. He took in the time-book once a fortnight, and once a month he took in the tallies. If there were any complaints from the men, he would see the accountant about them, or he might attend to them himself, or tell his brother about them. The time he spent in the office varied. The tallies would sometimes take him as much as two hours. Normally, on a Monday morning the deceased and his brother, who lived in Taumarunui, left there about 6.30 a.m. in the latter's car. If the car was not available, they caught a lorry; otherwise, the brother generally remained, and the deceased arranged to go out to the bush by taxi. The brother returned to Taumarunui each night. On the other four days a week, the deceased regularly, and apparently without exception, went from his work only to his hut in the bush camp. On the day of his death, he left his working-clothes at the hut and changed into good clothes there. The deceased met his death on a Friday as a result of falling or being thrown from the tray of a truck belonging to another timber company while the truck was on its way to Taumarunui from the area in which the defendant company carried on its operations. In an action by the widow of the deceased claiming compensation, *Held*, 1. That the plaintiff had not discharged the onus of proving that the deceased was on the business of the defendant company at the time of the accident in which he was killed. 2. That s. 45 (1) (*b*) of the Workers' Compensation Amendment Act, 1947, did not extend to apply to the journey which the deceased was taking on the occasion of his death, as he was not "travelling from his work" when, during the continuance of his employment, he was travelling from the place where he resided, near the place where he regularly worked, to Taumarunui, a place where he did not reside. *Jones* v. *Tamaiwhana Timber Co., Ltd.* (Comp. Ct. Auckland. August 6, 1952. Dalglish, J.)

Delay in Commencing Action—Limitation of Time—Period running against Infant Claimant—Time occupied in taking of Counsel's Opinion and Delay of Plaintiff's Solicitor in commencing Action for Three and a Half Weeks after receiving Instructions to proceed not "reasonable cause"—Workers' Compensation Act, 1922, s. 27 (1) (4). The limitation period of six months specified in s. 27 of the Workers' Compensation Act, 1922, runs against an infant claimant, unless the case falls within subs. 2 or subs. 3, or unless the delay is excusable under subs. 4. (*Milligan* v. *Young Men's Christian Association*, [1930] G.L.R. 613, and *Jacobs* v. *London County Council*, [1935] 1 K.B. 67, applied.) (Dictum of *O'Regan*, J., in *Sutton* v. *Esive Singh*, [1940] N.Z.L.R. 695, 701, not followed.) On May 4, 1951, the plaintiff, who was then seventeen years of age, suffered injury by accident while employed by the defendant Borough. He was in hospital until August 30, and was at home and in plaster for about another four months. About October 15, the plaintiff's father spoke to the Town Clerk of the defendant Borough and asked whether the plaintiff had a right to claim compensation, and the Town Clerk said he would inquire as to the position. On January 30, 1952, the plaintiff attained the age of eighteen years, and became capable of suing in his own name in the Compensation Court. Nothing further occurred until February, 1952, when the plaintiff's father again saw the Town Clerk, and was told he should consult a solicitor. The plaintiff's father and the Town Clerk then went to see a solicitor, who, on March 24, 1952, wrote to the Borough's insurer, the State Fire Office, on plaintiff's behalf claiming compensation. On March 31, the solicitor received a letter from the State Fire Office declining liability and pointing out that the claim was out of time. On April 10, the last day before the Easter legal vacation, the plaintiff received a letter from the solicitor asking him and his father to call. After the vacation, which ended on April 21, the plaintiff and his father called on the solicitor, who suggested taking counsel's advice on his chances of recovering compensation. This was given on April 28. On April 29, counsel was authorized to act on the claim for compensation. Proceedings were filed on May 16. Counsel for the defendant did not rely on any delay that occurred before March 31, 1952. *Held*, 1. That there was no explanation for the ten days' delay of the plaintiff's solicitor in communicating to the plaintiff the refusal of the defendant Borough's insurer to meet the claim for compensation. 2. That the taking of counsel's opinion did not constitute "reasonable cause" for delay within the meaning of s. 27 (4) of the Workers' Compensation Act, 1922; and that the period of three and a half weeks from the date of the first consultation which the plaintiff had with his solicitor until the issue of the writ was too long to be excused. 3. That, though the delays from March 31, 1952, until the issue of the writ on May 16, 1952, were not the delays of the plaintiff himself, they affected his claim as if they were his own delays. (*Morrison* v. *Liddle Construction, Ltd.*, [1951] N.Z.L.R. 1079, followed.) 4. That the fact that the plaintiff was under the age of eighteen years at the expiry of the six months' period did not constitute "reasonable cause" for delay within the meaning of s. 27 (4) of the Workers' Compensation Act, 1922. (*Wright* v. *Evans*, [1924] G.L.R. 469, followed.) The plaintiff's claim was accordingly out of time. *Stewart* v. *Papakura Borough.* (Comp. Ct. Auckland. August 22, 1952. Dalglish, J.)

TENANCY: URBAN PROPERTY: "SPECIAL CIRCUMSTANCES".

A judgment of more than usual importance and of far-reaching application was given by the Full Bench of the Supreme Court after our last issue went to press: *Harold Hall and Co.* v. *Selwyn Buildings, Ltd.*

The judgment covers three consolidated appeals from judgments of a Magistrate, moved into a Full Court on the application of the appellants.

It is confined to an interpretation of the term "special circumstances" as used in s. 9 of the Tenancy Act, 1948, in its application to "property", which is defined in s. 2 as "any land or interest in land or any building or part of a building let for any purposes under a separate tenancy; and includes any chattels that may be let therewith; but does not include any dwellinghouse". (This is not the complete definition, but it is that part of it which is important here.)

For the convenience of our readers, and anticipating that some weeks must elapse before the several judgments may appear in the *Law Reports*, we now give the principal features of the main judgment, which was delivered by Mr. Justice Cooke.

The facts as taken from the judgment of the learned Judge were as follows:

These appeals are by three tenants against decisions of the Magistrates' Court fixing the fair rent of premises occupied by them respectively in a commercial building in Wanganui known as Selwyn Buildings and situated on a property in Victoria Avenue, Wanganui, of which the respondent company is the lessee. The property is owned by the Diocesan Board of Trustees, and that Board granted a perpetually renewable lease to the respondent in or about 1923 at a ground rent. The building is of two stories, and was erected by the respondent on the front of the property in 1923 at a cost of £20,160. It contains, on the ground floor, ten shops and a vestibule giving access by a stairway to the first floor, and, on the first floor, seventeen office rooms and a specially laid out photographic studio. These are let to various tenants. The building has a frontage of 164 ft. to Victoria Avenue and a depth of 51 ft. 6 in. At the back of the building is an area of land. That area, which is part of the property on which the building stands, is vacant, with the exception of part of it that is occupied by a billiard-room. The billiard-room is not the subject of these proceedings. On the eastern end of the property, a right-of-way 10 ft. wide provides back access to most of the shops in Selwyn Buildings.

In 1948, the respondent requested increases of the various rents, but agreement could not be reached, and, by arrangement with the tenants, an application was made to the Magistrates' Court to fix the rent of one shop—namely, that occupied by Maypole Stores, Ltd. Upon such application, the then Magistrate at Wanganui was by agreement asked to determine the total rent of the building and thereafter to adjourn the matter to enable the parties to discuss apportionment among the tenants. The Magistrate dealt with the matter as requested, and the parties then by agreement apportioned the rent so fixed among the tenants without formal orders being made by the Court.

In 1950, the respondent again requested an increase of rent from each tenant, and, as agreement could not be reached, an application was by arrangement again made to the Magistrates' Court to fix the rent of the shop occupied by Maypole Stores, Ltd. On such application, the Magistrate (who had succeeded the Magistrate who heard the application in 1948) was asked to follow the same procedure as had been then adopted by his predecessor, and on August 3, 1951, he delivered a written judgment fixing the total fair rent at £80 16s. 0d. per week, but reserving leave to the parties to the application and to the tenant of any particular portion of the buildings to apply to the Court to determine the fair rent of such portion by way of apportionment of the total fair rent as determined by the Court. Against that judgment Maypole Stores, Ltd., appealed, and the appeal came on for hearing before *Fell*, J., on December 12, 1951. The learned Judge in an oral judgment, held that the Magistrate's judgment of August 3, 1951, was not appealable, as no final order had been made fixing any particular rent and the judgment appealed from was, on the face of the proceedings, only one step towards the fixing of the rent of Maypole Stores, Ltd., which, it was admitted, would not reach an appealable amount. He therefore dismissed the appeal. The respondent then proceeded with separate applications for the fixing of the individual rents of the various tenants, and, upon such applications, the Magistrate, after hearing further evidence, gave a written judgment on January 28, 1952, by which he apportioned among the tenants the total rent of the building as previously determined by him. The rents fixed in respect of the three appellants exceeded £525 per annum in each case. All other rents were below this amount. From that judgment the three appellants apealed, and such appeals came on for hearing before me at Wanganui on February 13, 1952. After the appeals had been partly heard, it became apparent that the questions arising were of considerable importance, and that upon one of them there was a difference of judicial opinion. In those circumstances, I indicated to counsel that, as there could have been no appeal by leave or otherwise from my decision, I thought it desirable that the appeals should be determined by a Full Court, but I said that, unless one side or the other desired that course to be adopted, I would decide the appeals myself. Counsel for the appellants later asked that the appeals be heard before the Full Court. The application was opposed by counsel for the respondent, but was granted.

Counsel agreed that the three appeals should be heard together, that the evidence given by Messrs. B. M. Silk and R. G. Talboys in the proceedings in the Magistrates' Court in 1948 was to be treated as evidence in these appeals; that the Full Court be asked to deal only with questions other than those of amount, leaving the quantum for subsequent determination, if necessary; and that the first judgment of the learned Magistrate of August 3, 1951, was, by necessary implication, to be treated as incorporated in his second judgment of January 28, 1952, and the whole was to be open to review by the Court on the present appeals.

The basic rent of Selwyn Buildings was £60 0s. 2d. per week, or approximately £3,120 per annum. The fair rent was fixed by the Magistrate in February, 1948, at slightly less than that; and the second Magistrate had fixed the fair rent at £80 16s. 0d. per week, or approximately £4,202 per annum.

All the other members of the Court (Sir Humphrey O'Leary, C.J., and Northcroft, Finlay, and Hutchison, JJ.) agreed with Cooke, J., that the appeal should be dismissed; and, with the exception of Finlay, J., who made some observations, without expressing any concluded opinion, all agreed with the reasons given by Cooke, J., for his judgment.

Mr. Justice Cooke said that the three main questions to which the appeals gave rise were (i) whether there are any "special circumstances" established by the evidence called by the respondent, (ii) whether, if "special circumstances" are so established, any increase above the amount of the basic rent should be no more than is justified by those "special circumstances"; and (iii) the proper method of valuation to adopt in arriving at the fair rent of shop and office premises.

The History of The Legislation.

At the outset, His Honour referred shortly to the legislative provisions that were the forerunners of s. 9 of the Tenancy Act, 1948. One reason why it was

convenient to do that was that the two decisions of the Full Court and the Court of Appeal respectively—*Otago Harbour Board* v. *Mackintosh, Caley, Phoenix, Ltd.*, [1944] N.Z.L.R. 24, and *Schneideman and Sons, Ltd.* v. *H. E. Perry, Ltd.*, [1949] N.Z.L.R. 700—were both decisions on Reg. 16 of the Economic Stabilization Regulations, 1942; and it was necessary to consider the effect of the differences between the language of that repealed Regulation and the language of the substituted provisions contained in s. 9 of the Tenancy Act, 1948.

The Fair Rents Act, 1936, which was renewed annually, applied to certain classes of dwellinghouses, and contained provisions defining the basic rent. The provisions of s. 7 of that Act, as amended by s. 5 (1) of the Fair Rents Amendment Act, 1942, were as follows:

> (1) On the hearing of any application to fix the fair rent of any dwellinghouse to which this Act applies, the Magistrate shall have regard to the relative circumstances of the landlord and of the tenant, and, after taking such circumstances and all other relevant matters into consideration shall, subject to any regulations that may be made for the purposes of this Act, fix as the fair rent such rent as in his opinion it would be fair and equitable for the tenant to pay.
>
> (2) Subject to any regulations as aforesaid, the fair rent fixed as aforesaid shall not exceed the basic rent, unless the Magistrate is satisfied, by evidence produced by the landlord, that in the special circumstances of the case it is fair and equitable that the fair rent should exceed such basic rent.

By the Fair Rents Amendment Act, 1942, which was assented to on October 26, 1942, the provisions of the principal Act were extended to all dwellinghouses, and it was provided that, generally speaking, the date by reference to which the basic rent was to be determined was to be September 1, 1942.

On December 15, 1942, the Economic Stabilization Emergency Regulations, 1942, came into force. Part III of those Regulations related to the stabilization of rents of "property" as therein defined, but did not apply to a dwellinghouse to which the Fair Rents Act, 1936, applied. The effect of Reg. 14 was that, generally speaking, the date by reference to which the basic rent was to be determined was to be September 1, 1942. Regulation 16 was as follows:

> (1) On the hearing of any application to fix the fair rent of any property, the Court shall not have regard to the circumstances of the landlord or of the tenant or to any general or local increase in values since the 1st day of September, 1939, but after taking the general purpose of these regulations, any improvements to the property, and all other relevant matters into consideration shall fix as the fair rent such rent as in the opinion of the Court it would be fair and equitable for a tenant to pay for the property.
>
> (2) The fair rent fixed as aforesaid shall not exceed the basic rent, unless the Court is satisfied, by evidence produced by the landlord, that in the special circumstances of the case it is fair and equitable that the fair rent should exceed the basic rent.

By the Economic Stabilization Act, 1948, which was assented to on November 19, 1948, the Regulations of 1942 were continued in force. Part III of the Regulations was, however, revoked by the Tenancy Act, 1948, which was assented to on December 3, 1948, and by subss. 1 and 2 of s. 9 of that Act it is provided as follows:

> (1) On the hearing of any application to fix the fair rent of any dwellinghouse or property (not being licensed premises), the Court shall have regard to the general purpose of the Economic Stabilization Act, 1948, and after taking into consideration all relevant matters (including in the case of a dwellinghouse, but not in the case of a property, the relative circumstances of the landlord and of the tenant), shall, subject to the provisions of any regulations made under this Act, fix as the fair rent such rent as in its opinion it would be fair and equitable for the tenant to pay.
>
> (2) Subject to any regulations as aforesaid, the fair rent fixed for any dwellinghouse or property . . . under this section shall not exceed the basic rent unless the Court is satisfied, by evidence produced by the landlord, that in the special circumstances of the case it is fair and equitable that the fair rent should exceed the basic rent.

The learned Judge continued:

I have omitted from subs. 2 of s. 9 the reference to licensed premises that was repealed by the Tenancy Amendment Act, 1950, s. 16 (*b*). It will be observed that s. 9 of the Tenancy Act, 1948, applies not only to any "dwellinghouse", but also to any "property" as defined in that Act. The premises to which these present proceedings relate being, not a "dwellinghouse", but "property" within the meaning of that Act, it is, of course, only in its application to "property" that s. 9 is of importance in the present case. In its application to that term, s. 9 differs from Reg. 16 of the Economic Stabilization Emergency Regulations, 1942, in the following respects:

(i) It contains a prohibition against taking into consideration the "relative" circumstances of the landlord and of the tenant, whereas the word "relative" does not appear in the otherwise similar provision that is contained in Reg. 16.

(ii) It does not contain a prohibition similar to that contained in Reg. 16 against having regard to any general or local increase in values since September 1, 1939.

(iii) It does not contain a direction similar to that contained in Reg. 16 to take into consideration any improvements to the property.

(iv) It contains the words "subject to the provisions of any regulations made under this Act."

The first difference referred to above is the presence of the word "relative". It is plain, I think, that a matter that the Court is forbidden to consider cannot be a "special circumstance" within the meaning of subs. 2 of s. 9, and it is possible that the presence of the word "relative" in subs. 1 of s. 9 may to some extent narrow the prohibition against taking into account the circumstances of the landlord and of the tenant, and may thus to a corresponding extent enlarge the field in which "special circumstances" can be found. In my view, however, it is clear that, even if that is so, the presence of the word "relative" cannot prevent the observations that are contained in the *Otago Harbour Board* case and *Schneideman and Sons, Ltd.* v. *H. E. Perry, Ltd.*, as to the attributes circumstances must possess before they could be regarded as "special" within the meaning of Reg. 16 (2) from applying with undiminished force to the expression "special circumstances" in subs. 2 of s. 9 of the Tenancy Act, 1948.

The second difference I have mentioned is probably due to the fact that, at the time of the passing of the Tenancy Act, 1948, the control provided for by the Servicemen's Settlement and Land Sales Act, 1943, was in full operation, and appears to have made a reference to increase in values unnecessary. In so far as that control related to "dwellinghouses" or other "property" falling within the purview of the Tenancy Act, 1948, it was removed in 1950: and I think that the effect of s. 9 of the Tenancy Act, 1948, is that, as from the removal of that control, any general or local increase in values has become a relevant matter within the meaning of subs. 1 of that section. In my opinion, however, that difference between Reg. 16 (1) and subs. 1 of s. 9 does not affect the application to the expression "special circumstances" in subs. 2 of s. 9 of what was said in the two decisions to which I have just referred as to the characteristics of "special circumstances" under Reg. 16 (2).

The third difference referred to above is, in my view, not really material, because I think that, notwithstanding the omission of the direction to take into consideration any improvements to the property, any such improvements constitute a relevant matter within the meaning of subs. 1 of s. 9: see *Schneideman and Sons, Ltd.* v. *H. E. Perry, Ltd.* ([1949] N.Z.L.R. 700, 712).

The fourth difference is immaterial for present purposes, because the only Regulations made under the Act in connection with the fixation of fair rents relate to dwellinghouses: see the Tenancy Regulations, 1951 (Serial No. 1951/270).

It will be seen, then, from what I have said that, in my view, all that was said in the two cases to which I have referred as to the qualities that a circumstance must possess before it can be regarded as "special" is applicable to the expression "special circumstances" in subs. 2 of s. 9 of the Tenancy Act, 1948.

"SPECIAL CIRCUMSTANCES."

His Honour went on to consider whether there were any "special circumstances" disclosed in the evidence called by the landlord, the respondent, in the present case. He said:

> It is, I think, wholly unnecessary—and, indeed, it is probably inadvisable—to attempt to say anything more in a general way about the meaning of the expression "special circumstances" than has already been said in the *Otago Harbour Board* case and in *Schneideman and Sons, Ltd.* v. *H. E. Perry, Ltd.* I would for myself venture to say that, recognizing that "special circumstances" must be normally circumstances that are special to or peculiar to the particular case, it may nevertheless in certain conditions or situations be proper to regard as "special" certain circumstances that are not peculiar to one individual case but that are peculiar to a special class of cases. There is, I think, nothing in the authorities that is intended to run counter to that view, and it has the support of *Fair*, J., in a passage in his judgment in the *Otago Harbour Board* case ([1944] N.Z.L.R. 24, 41, 42) that was cited by *Gresson*, J., in *Schneideman and Sons, Ltd.* v. *H. E. Perry, Ltd.* ([1949] N.Z.L.R. 700, 718, 719); see also *Jewellers' Chambers, Ltd.* v. *Red Seal Coffee House, Ltd.* ([1949] N.Z.L.R. 204, 207). I think, however, that it must always be a question of fact as to whether a class of buildings is sufficiently limited in its nature to justify its being treated as a special class for present purposes.
>
> For the respondent, it was not disputed that circumstances are not "special" unless they have some special application to a particular property or a particular class of property, but reliance was placed on a number of matters, each of which, it was said, constituted a "special circumstance".
>
> The first matter relied on was that during the period of rent restriction the basic rent from this building has permitted no return to the owner. As I have said, a matter that by subs. 1 of s. 9 the Court is forbidden to consider cannot be a "special circumstance" within subs. 2 of that section; but it was submitted that the presence of the word "relative" in the phrase "the relative circumstances of the landlord and of the tenant" is important, and that the Court, in being asked to consider the circumstance that the rent of this building has permitted no return to the owners, is not being asked to take into consideration the "relative" circumstances of the landlord and of the tenant.

NO RETURN TO OWNER.

Indeed, it was said that, for the purposes of the submission that the fact that the basic rent had permitted no return to the owners was a "special circumstance", it did not matter whether the owners of the building were prosperous or otherwise. Mr. Justice Cooke said of this submission:

> So construed, the submission is, I think, nothing more or less than a submission that regard should be had to the circumstance that the rent is too low, and is, therefore, not a submission that makes it necessary to consider the significance of the presence of the word "relative" in s. 9 or the question as to the true meaning of the expression "circumstances of the landlord and of the tenant". Lowness of rent is a relevant consideration. It is capable, too, of being a "special circumstance; but whether or not it amounts to a "special circumstance" depends on the particular facts of the case.

The learned Judge observed that that question was referred to by Sir Michael Myers, C.J., in the *Otago Harbour Board* case ([1944] N.Z.L.R. 24, 29, 30) and by each of the members of the Court in *Schneideman and Sons, Ltd.* v. *H. E. Perry, Ltd.* He proceeded:

> It is not difficult to understand that, since the time when, as a result of the Servicemen's Settlement Act, 1950, general or local increases in values have become revelant matters within the meaning of subs. 1 of s. 9 of the Tenancy Act, 1948, lowness of rents is a circumstance that has acquired added importance as a relevant matter; but difficulty in treating it as a "special circumstance" still exists, because, before it can be such, it must be peculiar to the particular property or to a special or limited class of properties. I do not think that there is anything in what was said by *Sir Michael Myers*, C.J., in the *Otago Harbour Board* case that is really inconsistent with that view, while in *Schneideman and Sons, Ltd.* v. *H. E. Perry, Ltd.* ([1949] N.Z.L.R. 700) *Kennedy*, J., said: "I should not have regarded mere general lowness of rents as a special circumstance in any case. It is the anomalous lowness of some rents which is a special circumstance of their case" (*ibid.*, 713); see also the observations of *Finlay*, J. (*ibid.*, 714).

In the present case, His Honour had said that it was significant that Mr. Talboys, who was called by the landlord, said in his evidence that he was connected with a number of large commercial buildings, and that in most cases the buildings were not showing a return. That evidence, His Honour added, made it impossible to hold that the failure to produce a return was a characteristic that was peculiar to the Selwyn Buildings. There was no hint in Mr. Talboys's evidence that what he said was inapplicable to other commercial buildings in Wanganui, and in that state of affairs it appeared to His Honour to be impossible to hold that Mr. Talboys's evidence was sufficient to satisfy the Court that Selwyn Buildings belonged to a class of buildings that was sufficiently special or limited to justify a finding that the characteristic of not showing a return was, although common to them all, a "special circumstance" in the case of each of them.

OTHER MATTERS RELIED ON.

The second matter relied on as a "special" circumstance was the discrepancy between the basic rents of almost identical portions of the building. The answer of the appellants was that any such anomaly was irrelevant in these appeals, because all the Court was asked to determine was whether the conclusion reached by the learned Magistrate as to the total rent of the building was right or not. The learned Judge said on this point:

> In my view, that answer is sound. Although these proceedings are in form appeals by three separate tenants against the share of the total rental apportioned to them by the Magistrate, the question—and, indeed, the only question with which this Court has been invited to deal—is the question of the total or global rental; and I think that, while any such anomaly as is relied on by the respondent might well be a material matter on an application by an individual tenant, the whole basis upon which these appeals have been conducted is that only the global rental is at present the subject of dispute. In that situation, it appears to me that any anomalies that are disclosed by a comparison of the individual rentals *inter se* are irrelevant for present purposes.

The third suggestion was that the basic rents of Selwyn Buildings were for the most part depressed rents, because of the circumstances existing in Wanganui in 1942. It was said that this was a circumstance of local application to Wanganui. In his judgment of August 3, 1951, the learned Magistrate said:

> It is generally admitted that the City of Wanganui suffered as severely as, if not more severely than, any city in New Zealand during the slump years preceding the second World War, and that, as a result, values and rents fell to very low figures and many commercial premises were unoccupied. Values and rents had not recovered at the time of the passing of the Economic Stabilization Regulations, 1942, which tied rents of urban properties to the rents existing as at September 1, 1939.

In His Honour's view, that passage did not contain a clear finding of fact that the situation in Wanganui was any worse than it was elsewhere in New Zealand. Even, however, if the passage could fairly be construed as containing such a finding, there was no evidence before the Court to support it. For those reasons alone, the learned Judge said that it was clear that, on the material before it, the Court could not hold that such depressed rents as existed in Wanganui constituted a "special circumstance". He went on to say:

It should perhaps be added, however, that, even if the passage does contain such a finding and there is evidence to support it, it is at least doubtful whether the commercial buildings throughout a whole city constitute a class of buildings that is sufficiently limited to make it proper to describe as a " special circumstance " some characteristic that they all possess. It was also said that, as there is evidence that in 1943 there were thirteen empty shops in Wanganui and that in 1942 two shops in Selwyn Buildings were empty there are grounds for suggesting that the depressed state of affairs affected Selwyn Buildings particularly. I think, however, that, once it becomes apparent that there is no evidence before the Court to justify a finding that the depressed state of affairs was peculiar to Wanganui, any figures that relate solely to Wanganui necessarily fall short of establishing that Selwyn Buildings in particular was affected by that situation.

The fourth matter that was said to constitute a " special circumstance " was that in 1948 there was, upon the previous application made by one of the tenants, a fixation of fair rents which must have involved a finding of " special circumstances ".

After pointing out that the total rental fixed by the Magistrate in 1948 was slightly less than the basic rental, His Honour said :

Assuming that a finding of " special circumstances " contained in the decision of the Magistrate in 1948 is capable of operating as conclusive proof of that matter in subsequent proceedings between the parties, I do not think it could so operate unless it were fundamental to the judgment or decision in which it is contained : *Hoystead* v. *Taxation Commissioner* ([1926] A.C. 155, 170). In the present case, the information as to what happened in that respect in 1948 is certainly meagre ; but, having regard to the fact that the fair rent was then fixed at a figure lower than the basic rent, a finding of " special circumstances " could not have been fundamental to the decision that was then arrived at. That conclusion is a sufficient answer to the argument based on a finding of " special circumstances " in 1948.

The learned Judge observed, however, that, even if a finding of " special circumstances " was fundamental to the decision of 1948, the respondent would be faced with the further difficulty that there was apparently then a judgment *inter partes* to the effect that such " special circumstances " were not such as to justify an increase of total rent to an amount in excess of the basic rent. It appeared to His Honour that, if a finding of " special circumstances " in 1948 was such as to operate as conclusive proof of that matter in subsequent proceedings between the parties, a finding that those " special circumstances " were not such as to justify an increase in rent would similarly be conclusive proof of that matter in subsequent proceedings between the parties.

Increase in Local Rents and Values.

The last matters that were relied on as " special circumstances " were the increase in rates in the City of Wanganui and the increase in values since 1939. His Honour's answer to that submission was as follows :

In my opinion, a general or local increase in values is a matter of such a general nature that it cannot be regarded as a " special circumstance " within the meaning of the authorities. So, too, I think that an increase in rates cannot be regarded as a " special circumstance " save perhaps in exceptional cases, of which the present case is not one. For the reasons I have given, I do not think that the respondent has established the existence of any " special circumstances ".

The conclusion that the respondent had not established the existence of any " special circumstances " really made it unnecessary, in His Honour's opinion, to deal with the question as to whether, in cases in which " special circumstances " exist, any increase must be no more than commensurate with them ; but certain contentions were advanced for the respondent in which a close interdependence was in effect said to exist between that question and the question whether increases in rates or general or local increases in values could be "special circumstances". It was said that an increase in rates, which is a relevant consideration, may also be a " special circumstance," and that, if it is, it can plainly be taken into account under subs. 2, but that, if it is not, evident justice demands that, once any " special circumstance " exists, all relevant considerations, including an increase in rates, should be taken into account in applying subs. 2. So also it was said that a general or local increase in values probably does not amount to a " special circumstance ", but that, if it does not, it should, if any " special circumstance " exists, similarly be taken into account in applying subs. 2. His Honour said that having regard to the nature of those contentions, he thought that, although he had reached the conclusion that there were no " special circumstances " shown here, and that subs. 2 of s. 9 therefore forbade an increase of the rent beyond the basic rent, it was desirable to deal with the question whether, in cases in which " special circumstances " exist, any increase must be no more than commensurate with them. He then said in this connection :

Neither the report of the argument nor any of the judgments in the *Otago Harbour Board* case ([1944] N.Z.L.R. 24) contains any clear indication whether a contention to the effect of the appellants' second submission was there argued. However, *Sir Michael Myers*, C.J., speaking, as I think, of the fixation of the fair rent if " special circumstances " exist, said : " It is to be observed, however, that, so far as any general or local increase in values is concerned, it is only any such general or local increase since September 1, 1939, that is prohibited from being taken into consideration " (*ibid.*, 30). A general or local increase in values before September 1, 1939, not being a " special " circumstance, that passage in his judgment, when read with its context, rather appears to me to indicate that he took the view that the increase need not be confined to an amount commensurate with the " special circumstances." The judgment of *Blair*, J., is silent on that question, because his concurrence in the judgment of the Chief Justice is confined to the form of the answers to the two questions submitted to the Court. *Smith*, J., said : " It should then determine whether among them there are 'special circumstances of the case.' If there are, the Court must take all the relevant matters into consideration and decide whether it is satisfied by the evidence produced by the landlord concerning the special circumstances that the weight to be attached to them when considered with all the relevant matters, and particularly with the general purpose of the regulations, is such as to render it fair and equitable that the fair rent should exceed the basic rent ; and the Court will fix the rent which is fair and equitable as the fair rent accordingly " (*ibid.*, 37). *Fair*, J., did not express any opinion on the particular question. The passage referred to above from the judgment of *Smith*, J., may indicate that he also took the view that the increase need not be confined to an amount commensurate with the " special circumstances ", although I am not quite sure about that. With regard, however, both to what was said by *Sir Michael Myers*, C.J., and to what was said by *Smith*, J., I think that the very language employed by them makes it doubtful whether their minds were directed to the precise point that is in issue here.

In *Schneideman and Sons, Ltd.* v. *H. E. Perry, Ltd.*, the question was fully argued and *Sir Humphrey O'Leary*, C.J., expressed in unequivocal terms the view that, if there is a " special circumstance " or " special circumstances", the amount of the increase should be limited to what is attributable to such " special circumstance " or " special circumstances ". *Kennedy*, J., *Finlay*, J., and *Gresson*, J., expressed no opinion on the point. The matter does not, however, end with what was said in the two cases to which I have just referred, because there have been decisions of Judges at first instance to which it is necessary to refer.

In *Otago Harbour Board* v. *Mackintosh, Caley, Phoenix, Ltd.* (*No. 2*) ([1944] N.Z.L.R. 509) itself, *Northcroft*, J., when the matter came before him after it had been dealt with by the Full Court, held that there was a " special circumstance "

and allowed an increase that was commensurate with it. In *Jewellers' Chambers, Ltd.* v. *Red Seal Coffee House, Ltd.* ([1949] N.Z.L.R. 204), *Christie*, J., appears to have taken a different view. On the other hand, in *Humphreys Furniture Warehouse, Ltd.* v. *Cuthbert* ([1949] N.Z.L.R. 913) *Hutchison*, J., clearly proceeded on the principle that the increase in rent should be justified by the "special circumstances" that are proved. So, too, in *In re A Lease, Wellington City Corporation to North British and Mercantile Insurance Co., Ltd.* ([1950] N.Z.L.R. 478) he took the same view. There are, however, two later decisions of *Fell*, J.—namely, *Reids Furnishings, Ltd.* v. *Hamilton Autos, Ltd.* ([1951] N.Z.L.R. 730) and *Truth (N.Z.), Ltd.* v. *Magnus Motors, Ltd.* ([1951] N.Z.L.R. 859)—in which that learned Judge took the contrary view.

In considering these various expressions of judicial opinion, it is, I think, true to say that the observations of *Sir Michael Myers*, C.J., and *Smith*, J., in the *Otago Harbour Board* case, being observations made by two Judges in a Court of four on a matter with regard to which the other members of the Court remained silent, cannot properly be treated as anything more than dicta. So, too, I think, were the observations of *Sir Humphrey O'Leary*, C.J., in *Schneideman and Sons, Ltd.* v. *H. E. Perry, Ltd.* The position therefore appears to me to be one in which the only decisions that exist are those of Judges at first instance, and, therefore, to be one in which a Full Court is free to adopt whichever it thinks is the better view. For my part, I take the view expressed by *Sir Humphrey O'Leary*, C.J., and *Hutchison*, J., because it appears to me that that view not only more nearly accords with the language of the statute but also is more consistent with considerations of uniformity. For instance, it is clear that, generally speaking, an increase in rates is not a "special circumstance", and, however desirable it may be that the fair rent should be increased because of an increase in rates, it appears to me that to adopt a construction of the statute that has the result that a right to an increase in rent bearing a relation to an increase in rates should be entirely dependent upon the fortuitous existence of some, perhaps trifling, "special circumstance" is to adopt a construction that does not make for uniformity.

Commensurate Increase in Rent.

It was argued that the view that any increase must be commensurate with the "special circumstances" involves treating subs. 2 of s. 9 as the only provision applicable to a case where a fair rent is fixed in excess of the basic rent, and treating subs. 1 as having no application to such a case. Mr. Justice Cooke did not agree that that view had that result. In his opinion, that view did not deprive subs. 1 of all application to a case where a fair rent is fixed in excess of the basic rent. In such a case—as, indeed, in all cases—the first inquiry under the section is the fixation of a fair rent in obedience to, and in accordance with, the directions contained in subs. 1. If the amount so fixed does not exceed the basic rent, the fixation is final, and there the matter ends. If the amount so fixed does exceed the basic rent, the fixation is only provisional, and the provisions of subs. 2 must be put into operation before finality can be reached. That, however, is not to say that subs. 1 has no application to such a case. He concluded :

> The contentions for the respondent that have led me to deal with the question of the true construction of subs. 2 of s. 9 undoubtedly have force from a practical point of view; but, in my opinion, their apparent force is very materially diminished by the fact that the adoption of the view that all relevant considerations should be taken into account in applying subs. 2 would still leave the question whether effect could be given to such weighty matters as increases in rates and general or local increases in values completely dependent on the fortuitous existence of some "special circumstance" the value of which could even be comparatively insignificant. In my opinion, the answers to the contentions are, first, that it is clear on the authorities that neither an increase in rates (except perhaps in exceptional cases) nor a general or local increase in values can be a "special circumstance", and, secondly, that the true construction of the statute is that any increase under subs. 2 must be confined to an evaluation of whatever "special circumstances" are found to exist.

The Legislation Criticized.

The learned Chief Justice said that he entirely agreed with Mr. Justice Cooke's judgment, and, accepting it without reserve or qualification, he felt that he did not need to write a separate judgment on the particular questions so fully dealt with by him. He added :

> I think, however, it would not be out of place to make this observation. The present tenancy law and the interpretation that has been placed on it make it extremely difficult for the owner of a property to secure what would generally be considered a fair rent in excess of the basic rent—that is, the rent which was being paid on September 1, 1942. In many cases, it would appear on the facts that a rent to-day in excess of the basic rent would be justified; but, in the present state of the law, an excess cannot be obtained when an application for an increase is resisted. It seems to me that this situation calls for some legislative action, for it is only by such means that a position unfair to many members of the community can be altered and redress given. So far as the Courts are concerned, they can only interpret the legislation and apply the law.

Mr. Justice Cooke said on the same topic that it seemed to him that the difficulties that were emphasized by the respondent's contentions were really due to the form of the legislation :

> After the decision in the *Otago Harbour Board* case, there was really no room for doubt as to the general tests that were applicable for the purpose of determining whether or not any particular matter constituted a "special circumstance". The Legislature, in enacting the Tenancy Act, 1948, must, I think, be taken to have intended that the expression "special circumstances" in that Act should be construed in the light of that well-known decision, that had then been continuously acted on for five years. It thus became inevitable that, after the passing of that Act, neither an increase in rates (unless perhaps in exceptional cases) nor a general or local increase in values (if and when the latter were legislatively allowed to occur) could be held to be a "special circumstance" unless it were made so by statute; and it appears to me that the absence of any statutory provision to that effect is now creating undesirable results. It is, of course, not for the Court to concern itself with matters of legislative policy; but it is proper for the Court on occasions to draw attention to inconsistencies in, and difficulties caused by, existing legislation; and this present case does appear to me to show that, whereas on the one hand control over the value of urban property has been abolished since 1950 and increases in rates are matters that cannot be said to be uncommon, on the other hand a landlord of urban property cannot, as the law at present stands, obtain an increase in rent, either to represent an increase in value or, speaking generally, to cover an increase in rates. In so far as the question of increase in rates is concerned, it is not without significance that we were informed by counsel for the Rents Officer that the Department has invariably regarded an increase in rates as a "special circumstance". The present proceedings relate only to urban property, and what I have said about the present state of the law is directed to urban property only. The position with regard to dwellinghouses differs from that with regard to urban property, in that the former depends, not only on the legislation to which I have referred, but also on the Tenancy Regulations, 1951: and it would be wrong to express in these proceedings any opinion on the effect of those Regulations.

Some Observations.

Mr. Justice Finlay agreed that the Magistrate did not find, and that in any event the evidence did not establish, any "special circumstance" such as was necessary before the Magistrate could fix a fair rent in excess of the basic rent. His Honour then made reference to two aspects of the matter, without expressing any concluded opinion on them. First, he observed that the "circumstances of the landlord and of the tenant" to which the prohibition in s. 9 (1) extends

are those circumstances of a personal character which lie outside the range of the circumstances that are directly and immediately involved in the particular application under consideration, and do not comprehend an absence of return from the building, so that lowness of rent is not a circumstance the Court is restrained from considering. It is a relevant circumstance, and may be a "special circumstance", but, inherently and taken alone, it is not, and cannot be, a "special circumstance".

Secondly, His Honour observed that it would not be proper to say that an increase in rates is so general in character that it cannot be a "special circumstance", as it might be that in a particular locality and in particular circumstances an increase in rates might bear so heavily upon a specific property, or upon properties of a specific and limited class, that it would not be unreasonable for a Magistrate in his discretion to hold that the effect of an increase was a "special circumstance".

THE EDITOR.

ACCOMPLICES' EVIDENCE.

By L. M. INGLIS.

Because they were not written for lawyers, I doubted the suitability of two articles of mine recently reprinted in the NEW ZEALAND LAW JOURNAL. It appears, however, that not only the learned, but students and others, also read, and that, for them, crude and graphic illustrations of the reasons for adhering to principles of evidence and procedure, long established as commonplaces in our own Courts, can be drawn from the reports of Courts which, like the Occupation Courts in Germany, set out to administer the British brand of justice in places where it was generally unfamiliar. Perhaps, then, the 1947 Control Commission Court of Appeal case, *Grabicanin* v. *Director of Prosecutions*, will provide a usefully awful warning on the subject of accomplices' evidence.

On October 1, 1945, the body of an elderly German widow, Frau Wilhelmina Ottolin, was found in the flat where she lived alone in the bomb-damaged city of Hanover. She had been strangled some time during the previous night, and her flat had been ransacked. None of the other tenants in the block of flats had noticed anything suspicious or seen anyone entering or leaving Frau Ottolin's flat. Neighbours and relatives of the murdered woman were able to tell the Police that a canteen of silver and cutlery had been stolen. The only clue to the identity of the visitor was a single fingerprint, which the Police photographed but were unable to match with any other in their records.

A year later, British Public Safety Officers, searching a Yugoslav displaced persons' camp near Hanover for some reason quite unconnected with the Ottolin murder—of which, indeed, they had never heard—found a canteen of cutlery in the quarters occupied by a man named Wokadenovic and his wife. As the quality of this cutlery was unusually good for people living in those rather sordid circumstances, the Public Safety Officers told the German Police in Hanover what they had found. The Police had the canteen identified as the one stolen from Frau Ottolin. The Wokadenovics said they had bought it from a Pole who was selling off his possessions before being repatriated, but the memories of both husband and wife were not good enough to enable them to recollect the Pole's name, or even to describe his appearance. Then the Police, having taken Wokadenovic's fingerprints, discovered that the single fingerprint photographed in Frau Ottolin's flat was his. Invited to explain this, Wokadenovic volunteered a statement which he seems naively to have thought would save his life. He said that the murder was done in his presence by Grabicanin and Milicewic, two Yugoslavs from the same camp. This explanation, and a slight improvement he made upon it at his trial, only served to make his guilt certain. He was tried, convicted, and sentenced to death by a General Military Government Court.

In the meantime, although there was nothing except Wokadenovic's statement to connect him with Frau Ottolin's murder, of which they both denied all knowledge, and although they could not be shown to have even known Wokadenovic except by sight and name as an inmate of the same camp, Grabicanin and Milicewic had been arrested with undue haste, and were embarrassing the Public Safety Officers and the prosecutor, who had insufficient evidence to proceed with the case against them.

Control Commission Courts were established in time for Wokadenovic to appeal unsuccessfully, and, when his last hope for the commutation of his sentence rested on the exercise by the British Military Governor of his prerogative of mercy, Wokadenovic's wife and his mother-in-law went to the prosecutor with a story they hoped would save the condemned man's life. They said that Grabicanin had confessed to them that he was Frau Ottolin's murderer. They also said that, after his arrest, he had written from prison to Wokadenovic's wife threatening to murder her, too, if she should ever disclose his confession; but she never produced the letter to anyone, a circumstance for which she accounted under cross-examination at Grabicanin's trial by the virtually incredible statement that she had burnt the letter under the impression that her husband had been pardoned. In any event, neither the guilt nor innocence of Grabicanin could have made any difference to the fate of Wokadenovic, as to whose guilt there was no shadow of doubt, and his sentence was confirmed about the middle of February, 1947. But the story told by the two women was seized on as a way out of his difficulty by a worried prosecutor, who was by this time responsible for having kept in custody for nearly five months two men against whom he had quite inadequate evidence. By some very questionable arrangement between the local Public Safety and legal officials, Wokadenovic's execution was postponed until after February 20, when Grabicanin and Milicewic were charged before a Magistrate with having, together with Wokadenovic, murdered Frau Ottolin. The depositions of the prosecution's

(*Concluded on p. 288.*)

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Etiquette Note.—The other day, Scriblex was somewhat startled to notice counsel appearing in the Supreme Court in a suit of mahogany brown, thereby striking a rich note in what would otherwise have been drab surroundings. This choice of suiting for Court wear is more uncommon, but not less objectionable, than the range of light greys that are frequently to be seen, and in particular on interlocutory applications and undefended divorces. Practitioners so offending would do well to remember the case of Mr. Black, who, having a short appearance before Johnston, J., and a tennis appointment, hoped that his black coat, waistcoat, and stuff gown would combine to conceal a pair of light grey flannel trousers. The incident is mentioned by O. T. J. Alpers in his *Cheerful Yesterdays* :

> " I appear, may it please your Honour, for the defendant," said Mr. Black. The Judge stared blankly at him. " Is the defendant not represented by counsel ? " asked His Honour. Mr. Black raised his voice, thinking he had not been heard. " Yes, if your Honour pleases, I appear." " Who appears for the defendant ? " said His Honour, still asking for information. " I cannot see any counsel appearing for defendant." Counsel for the plaintiff sought to come to the rescue. " My learned friend Mr. Black, sir, represents the defendant." " You must be mistaken," said the Judge, with freezing courtesy. " I cannot see Mr. Black. I am sure he would never present himself in *my* Court in light grey flannel trousers. The Court is adjourned for fifteen minutes to enable the defendant to be represented." And, black trousers having been obtained for defendant's counsel, he was duly " seen " and the trial proceeded.

Such derelictions are but minor breaches of legal etiquette, but it is of importance that judicial dignity and decorum should be preserved at all times. Once, when asked to say to what he ascribed his great standing at the Bar, Sir Edward Clarke replied that throughout his long career he had always managed to be in his seat five minutes before the Judge arrived in Court.

Meat and Horses.—The days of Dr. Johnson were invoked by Lord Goddard, L.C.J., in *A. F. Wardhaugh, Ltd.* v. *Mace*, [1952] 2 All E.R. 28, when considering the question whether, in the expression " meat " as defined in the Transport Act, 1947, fish is included. According to the definition in s. 125 (1) :

> " Meat " means carcases of animals, parts of carcases of animals, or offals of animals, being carcases, parts of carcases or offals suitable for human consumption, whether fresh, chilled or frozen, but not being carcases, parts of carcases or offals which have been cooked or subjected to any process other than skinning, trimming or cleaning.

In Dr. Johnson's time, it was common in the English language to talk about " meat " as meaning food. " Meat ", thinks Lord Goddard, meant a meal ; and, if a person was partaking of his " meat ", it meant that he was partaking of the solid part of his food, and if he was also partaking (as he generally would be) of drink, that was the liquid part of his food. It would be only the extremely unworldly who would deny the latter part of the dictum, despite the adage that one man's drink is another man's poison. " Meat " within the definition, he holds, does not include fish, the precise position of the whale (being a mammal) being left over until this big question arises. On the other hand, Mr. W. Blake Odgers, Q.C., sitting at Clerkenwell, has held that, for the purposes of the Diseases of Animals Act, 1950, a horse is not an animal. The charge related to a failure to provide proper accommodation for the detention of 190 asses. It seems that, although " asses " are included in the definition of " horses ", " horses " are not included in the definition of " animals ", which includes cattle, sheep, goats, swine, and any other four-footed beats when the Minister gets around to extending the definition, which so far he has not done. Anyway, there is no doubt whatever that horses are now included in the definition of " meat."

Law and Public Life.—There are many members of the legal profession who divide their time between the lure of public service and the calls of their professional life. Whether or not they would serve their profession the better if their time was less diversified is a topic upon which there is ample scope for more than one honest opinion ; but, in his recently-published memoirs (*Retrospect* (Hutchinson and Co., Ltd., 1952)), the Rt. Hon. Viscount Simon, G.C.S.I., G.C.V.O., leaves no doubt as to what his opinion is. He had earlier told the Canadian Bar Association, in an address, that one of the great attractions of our profession is that it is the road to public service. In his memoirs, he has surprisingly little to say about his experiences in the law, and he declares that he does not much care to revive " ancient encounters " in Court, which may have created a sensation at the time, but have now " passed into an oblivion which to some concerned may be welcome." He writes :

> Advocacy, as practised at the English Bar, is just a way of earning one's living—a very exacting one, calling for the strictest observance of rules of honour and of faithfulness to duty, and it is, moreover, an essential instrument for the promotion of justice. But it is argument within blinkers.

Many readers may well think that the paradox of Viscount Simon's political life lies in his inability to submerge the brilliance of his legal reputation, and it is common knowledge that his vocation lost for him the friendship of Arthur Balfour, who possessed to the full the layman's deep-rooted suspicion of the lawyer in politics.

From My Notebook.—

" The ' law's delay ' which, to people who are professionally engaged in it, means nothing but the passage of a little time between one case and another, is to the unfortunate litigant a period of anxiety and distress which it is very difficult indeed for people to realize. I have always felt, and always said, that if you want to consider these questions properly you must look upon them from the point of view of the litigant, and not from that of the solicitor, or the counsel, or the Judge. It is the litigant who has invoked the protection of the Courts, and it is his interest which ought to be first considered " : Lord Buckmaster, commenting in the House of Lords on delay in revenue cases.

" If one party, by his conduct, leads another to believe that his strict rights arising under the contract will not be insisted on, intending the other to act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict rights when it would be inequitable for him so to do " : per Denning, L.J., in *Plasticmoda Societa per Azioni* v. *Davidsons (Manchester), Ltd.*, (1952) 1 Lloyd L.R. 527, 539.

ACCOMPLICES' EVIDENCE.

(*Concluded from p. 286.*)

witnesses, including Wokadenovic, were taken, and the two accused were committed to the High Court for trial. A few days later, Wokadenovic was executed.

The law provided that a deposition made in a summary Court by a witness who had since died could be used in evidence at the trial, provided it were materially corroborated, so the prosecution put in the deposition of the wretched Wokadenovic, and tendered the evidence of his widow and mother-in-law to corroborate it. There being, of course, not even an appearance of corroboration so far as Milicewic was concerned, he had no case to answer, and was acquitted; but Grabicanin was convicted and sentenced to death. He appealed, and the disapproval of the Court of Appeal, both as to the course taken by the prosecution and as to the conclusions of the acting-Judge who tried the case, shows acidly through the more or less polite language of its judgments.

After a brief summary of the facts and history of the case, the judgment of the Court of Appeal pointed out that, according to the statement voluntarily made and signed by Wokadenovic before his own trial, he was an accomplice of Grabicanin in the commission of the murder. The Court then went on to discuss and aprove the usual practice of English Courts where an accomplice is called as a witness for the prosecution. (Students can find this practice conveniently set out in *Archbold's Criminal Pleading, Evidence, and Practice*, 31st Ed. 438. The Judges said they knew of no English case in modern times where a prisoner under sentence of death had been called as a witness against another person accused of complicity in the crime for which the witness himself had been sentenced, and that the present case clearly demonstrated the impropriety of calling such a witness. They said that, although Wokadenovic's appeal had been dismissed before he made his deposition against Grabicanin, he must still have harboured some hope that his sentence might be commuted if he did what the prosecution wanted, and must have given his evidence with the motive of saving his own life, regardless of the consequences to others. That he had, indeed, some such motive was, they thought, borne out by an examination of his successive statements.

He had first been connected with the crime at Frau Ottolin's by the fingerprint and the possession of the stolen cutlery, so that it became necessary for him to make some explanation to the Police, and, on August 27, 1946, he made a statement admitting his presence in the flat on the night of the crime but alleging that Grabicanin and Milicewic had committed the actual murder. He said:

> My comrades attacked Frau Ottolin, closing her mouth and holding her neck. I got hold of the hands of Frau Ottolin. Frau Ottolin did not scream any more; she only resisted with her hands. I cannot say who strangled her. It did not last very long, She soon died.

The statement went on to describe how, after the murder, the flat was ransacked and the canteen stolen by himself and the other two.

In the witness-box at his own trial, the record of which was before the Court of Appeal, Wokadenovic, having no doubt been advised in the meantime that his statement had made matters worse rather than better for him, adhered to the main points of it, but tried to improve his desperate situation by saying that he was drunk when he was at Frau Ottolin's and by becoming hazy about details. He said: "I remember holding her hands tight for about two minutes"; and, in cross-examination: "The marks on her neck were caused by the others with their hands. I cannot say exactly how it happened." It was clear enough, from his statements up to this point, and from the general nature of his defence, that he hoped to escape conviction on the capital charge by representing that someone else had done the actual strangling.

By the time he came to make his deposition on February 20, 1947, however, he had discovered that he had not gone far enough to exculpate himself, so he now told quite a different story, in which he removed himself from the murder in time and place and which can be construed only as a final attempt to save his life. This time he swore that he left Frau Ottolin's flat while she was still alive. He said:

> I remember holding the hand of the woman when saying goodbye. Next morning I heard she had been murdered. I did not know she had been murdered while I was in the house. I have heard the statement read over to me which I made to the Police on August 27, 1946, but it is not completely true. Only part of it is. I only held her hands when I said goodbye to her. I did not see either of the other two attack the woman, and, as I was drunk, I left and went outside. I do not know any more. I was outside but the other two remained with her.

When the Court had traversed this evolution of Wokadenovic's story, it said that his deposition was worthless and that the trial Judge had been wrong to give it any weight whatever as evidence against Grabicanin. The Court then destructively criticized the so-called corroboration, and concluded by saying that, in its opinion, the whole of the evidence purporting to implicate Grabicanin in the murder of Wilhelmina Ottolin was so tainted that it would be a miscarriage of justice to allow his conviction to stand.

During the hearing of the appeal, the Judges were inquisitive about certain aspects of the case over and beyond those bearing directly on the propriety or otherwise of the conviction. They wanted to know how the prosecution had been able to hold two men in custody for five months with nothing more to connect them with a crime than a worthless statement of an obviously guilty man who alleged that they were his accomplices; how, since the maximum period for which any single remand could be granted was a fortnight, a Magistrate had been so accommodating as to grant remand after remand without some pertinent inquiry; why there had been an interval of three months between the committal of Grabicanin and Milicewic and their trial in the High Court; and how the execution of the death warrant sealed by the Military Governor had been delayed by local arrangement.

That such things could occur in 1947 was due to the fact that administration arrangements had not kept pace with the then new system of Control Commission Courts, which had replaced the earlier Military Government Courts at the beginning of that year, and, in particular, to the insistent efforts of some executive officers to retain control of the summary Courts, the prosecutors, and the Registrars and Clerks of all the Courts. The remedy was constant vigilance on the part of the Judges, at whose instance successive reforms were introduced, often against considerable opposition.