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DIVORCE: ADULTERY: THE STANDARD OF PROOF.

IN a recent judgment, *McDonald* v. *McDonald* (to be reported), Mr. Justice F. B. Adams, after discussing the various judgments on the question of the standard of proof of adultery in divorce suits, held that, in view of the latest authoritative judicial pronouncements, the law at the present time is that adultery must in all cases be proved beyond reasonable doubt, or, to put it another way, the facts must not be reasonably capable of an innocent construction. His Honour observed that it is unnecessary, and perhaps undesirable, in any event, to amplify the foregoing by reference to the suggested analogy between adultery and crime.

Before we consider that judgment in more detail, we take the opportunity of considering again the standard of proof in divorce. We discussed this in these pages in (1948) 24 NEW ZEALAND LAW JOURNAL, 215, shortly after the decision of the Court of Appeal in *Ginesi* v. *Ginesi*, [1948] P. 179; [1948] 1 All E.R. 373, a judgment which has recently come in for criticism by the House of Lords, and which requires reconsideration in consequence.

Although the common-law remedy of a husband against a man who had committed adultery with his wife was known as an action of criminal conversation, English law, unlike some foreign systems, never regarded adultery as a crime in the strict sense of that word. Nevertheless, the offence was regarded with such gravity by the Ecclesiastical Courts in England that they insisted on a standard of proof closely comparable to that reserved for criminal cases. A *suspicio probabilis*, or balance of probabilities, such as would suffice in civil proceedings, was not enough: there had to be *vehemens praesumptio*, or, as we should now say, proof beyond all reasonable doubt, before the Ecclesiastical Courts would hold that adultery had been established.

That this appeared still to be the law to be applied by a Court sitting in its divorce jurisdiction was shown by the decision of the Court of Appeal in *Ginesi* v. *Ginesi*, [1948] P. 179; [1948] 1 All E.R. 373, in which Wrottesley, L.J., emphasized that the Court of Appeal in that case was dealing with adultery only, leaving open the question whether the same standard of proof was required in relation to other matrimonial offences.

In *Churchman* v. *Churchman*, [1945] 2 All E.R. 190, Lord Merriman, P., at p. 195, said:

> The same strict proof is required in the case of a matrimonial offence as is required in connection with criminal offences properly so called.

That dictum was adopted by the Court of Appeal in *Ginesi* v. *Ginesi*, when it held that adultery, being a quasi-criminal offence, must be proved beyond all reasonable doubt.

The matter reached its high-water mark in *Fairman* v. *Fairman*, [1949] 1 All E.R. 938, where the Divisional Court set aside a finding by Justices that a wife had committed adultery, because they had not, in accordance with the law relating to the proof of criminal offences, directed themselves that it was unsafe to rely on the uncorroborated evidence of an accomplice—namely, the man with whom the adultery was alleged to have been committed.

Grave doubts regarding both those judgments were expressed by legal writers. They pointed out that a divorce suit is not a penal or a criminal proceeding: *Mordaunt* v. *Moncrieffe*, (1874) L.R. 2 Sc. & Div. 374; and, although adultery may theoretically expose a guilty party to some punishment, it had been held in *Blunt* v. *Park Lane Hotel, Ltd., and Briscoe*, [1942] 2 All E.R. 187, that such punishment would not justify a person's refusal to answer interrogatories on the ground of self-incrimination. It was hoped that, sooner or later, the House of Lords might have the opportunity of considering the standard of proof of adultery in divorce suits.

There were other indications that all was not well with the decision in *Ginesi* v. *Ginesi*.

The High Court of Australia in *Wright* v. *Wright*, (1948) 77 C.L.R. 191, disagreed with the English Court of Appeal's reasoning in *Ginesi* v. *Ginesi*, and reaffirmed its previous decision in *Briginshaw* v. *Briginshaw*, (1938) 60 C.L.R. 336, which Dixon, J. (as he then was), said was a well-considered decision based on as complete an examination and survey of the position as the Court could make. In *Briginshaw's* case, the High Court had held that, on a petition for divorce on the grounds of adultery, the standard of proof required was not the criminal standard of proof beyond reasonable doubt, but that the civil standard of proof, by preponderance of probability, applied.

In the then state of the law, *Ginesi* v. *Ginesi* was followed by Fair, J., in *Andrews* v. *Andrews*, [1949] N.Z.L.R. 173.

The tide turned in the English Court of Appeal in *Davis* v. *Davis*, [1950] 1 All E.R. 40, where Denning, L.J., said it was probable that, if the matter had been *res integra*, he would have rejected the criminal standard even in cases of adultery, as he and his fellow Lords

Justices had rejected it in the case before them in relation to a charge of cruelty. His Lordship pointed out that a divorce suit was a civil proceeding, and there was a considerable difference between the standard of proof required in a criminal case and that required in a civil case. In the former, the standard was higher because of the respect which the law has for the liberty of the individual; but the same stringency was not necessarily called for in divorce suits, or at any rate in divorce suits on the ground of cruelty or desertion, where the Court is concerned, not to punish anyone, but to give statutory relief from a marriage that has broken down. In his Lordship's view, the Court of Judicature (Consolidation) Act, 1925, laid down a sufficient test by providing that a decree shall be pronounced by the Court "if satisfied on the evidence the case for the petitioner has been proved" (*cf.* s. 17 (1) (*c*) of the Divorce and Matrimonial Causes Act, 1928).

The Court of Appeal in *Ginesi* v. *Ginesi* had consisted of Tucker and Wrottesley, L.JJ., and Vaisey, J., who had asked that the authorities on the standard of proof should be brought to their attention. Counsel, in doing this, accepted the statement quoted above from *Churchman* v. *Churchman* that the same strict proof is required in the case of a matrimonial offence as is required in connection with criminal offences so called. As Mr. Justice Fell said in *Price* v. *Price*, [1951] N.Z.L.R. 1097, 1101, "It would seem that counsel sold the pass before the battle began". His Honour then provided an illuminating review of the authorities, including *Davis* v. *Davis*, [1950] 1 All E.R. 40, and *Gower* v. *Gower*, [1950] 1 All E.R. 804 (where the position was practically the same as in *Ginesi* v. *Ginesi*, with which Bucknill and Denning, L.JJ., then expressed dissatisfaction). These are fully summarized in His Honour's judgment, as reported.

Two years after *Ginesi* v. *Ginesi*, the Court of Appeal (consisting this time of Bucknill, Somervell, and Denning, L.JJ.) again considered the question of standard of proof in *Bater* v. *Bater*, [1951] P. 35; [1950] 2 All E.R. 458, which was a cruelty case, in which the wife appealed from a judgment of the Commissioner dismissing her petition for divorce on the ground that the charges made by her were not proved beyond reasonable doubt, as, she contended, the Commissioner, in so holding, had misdirected himself in law, as it meant that the standard of proof required was the same as in a criminal case. Bucknill, L.J., at p. 36; 458, said:

> On the point on which misdirection is alleged, the learned Commissioner, in his judgment, said: "This is the evidence and in order to succeed the wife has to satisfy me that there has been injury to life, limb, or health, bodily or mentally, or reasonable apprehension of it, and she has to prove her case beyond reasonable doubt." In my opinion, that was a correct statement of law, and I adhere to what I said in *Gower* v. *Gower* ([1950] 1 All E.R. 804) and in *Davis* v. *Davis* ([1950] 1 All E.R. 40). In *Gower* v. *Gower* I should, perhaps, have said: "The standard of proof required in a criminal case is higher than required in *some* civil actions." Subject to that, I stand by what I said then. I do not understand how a Court can be satisfied that a charge has been proved—and the statute requires that the Court shall be satisfied before pronouncing a decree—if at the end of the case the Court has a reasonable doubt whether the case has been proved. To be satisfied and at the same time to have a reasonable doubt seems to me to be an impossible state of mind.

His Lordship added this, at pp. 36; 458, 459:

> I regard proceedings for divorce as proceedings of very great importance, not only to the parties, but also to the State. If a wife is divorced, she not only has that stigma resting on her for the rest of her life, but it may mean she will lose the maintenance to which she is entitled from her husband and the custody of her children. It may, indeed, mean ruin to her. If a high standard of proof is to be required because of the importance of a particular case to the parties and also to the community, divorce proceedings require that high standard. I think that this appeal fails.

Somervell, L.J., agreed, and expressed his concurrence with what Bucknill, L.J., had said in *Davis* v. *Davis*, [1950] 1 All E.R. 40. Denning, L.J., at pp. 36, 37; 459, said:

> The difference of opinion which has been evoked about the standard of proof in these cases may well turn out to be more a matter of words than anything else. It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great Judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil Court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal Court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion. Likewise, a divorce Court should require a degree of probability which is proportionate to the subject-matter. I do not think the matter can be better put than *Sir William Scott* put it in *Loveden* v. *Loveden* ((1810) 2 Hag. Con. 1, 3; 161 E.R. 648, 649): "The only general rule that can be laid down upon the subject is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion . . ." The degree of probability which a reasonable and just man would require to come to a conclusion—and likewise the degree of doubt which would prevent him from coming to it—depends on the conclusion to which he is required to come. It would depend on whether it was a criminal case or a civil case, what the charge was, and what the consequences might be, and if he was left in real and substantial doubt on the particular matter, he would hold the charge not to be established. He would not be satisfied about it.

His Lordship continued, at pp. 37, 38; 459:

> What is a real and substantial doubt? It is only another way of saying a reasonable doubt, and a "reasonable doubt" is simply that degree of doubt which would prevent a reasonable and just man from coming to a conclusion. So the phrase "reasonable doubt" gets one no further. It does not say that the degree of probability must be as high as 99 per cent. or as low as 51 per cent. The degree required must depend on the mind of the reasonable and just man who is considering the particular subject-matter. In some cases 51 per cent. would be enough, but not in others. When this is realized, the phrase "reasonable doubt" can be used just as aptly in a civil case or a divorce case as in a criminal case, and, indeed, it was so used by *Bucknill*, L.J., in *Davis* v. *Davis* ([1950] 1 All E.R. 40) and *Gower* v. *Gower* ([1950] 1 All E.R. 804). The only difference is that, because of our high regard for the liberty of the individual, a doubt may be regarded as reasonable in the criminal Courts which would not be so in the civil Courts. I agree, therefore, with my brothers that the use of the phrase "reasonable doubt" by the Commissioner was not a misdirection, any more than it was in *Briginshaw* v. *Briginshaw* ((1938) 60 C.L.R. 336.)

The House of Lords did not have to wait long for an opportunity to comment on *Ginesi* v. *Ginesi*. It came when it had to consider *Preston-Jones* v. *Preston-Jones*, [1951] A.C. 391; [1951] 1 All E.R. 124. Their Lordships held, to use Lord Simonds's phrase, that no higher proof of adultery is demanded than that the fact be established beyond reasonable doubt.

Lord Morton of Henryton inquired as to the burden of proof in a divorce suit on the ground of adultery; and he referred to s. 178 (2) of the Court of Judicature (Consolidation) Act, 1925, which lays down that, if the Court is satisfied on the evidence that the case for the petitioner has been proved, it must pronounce a decree of divorce (*cf.* ss. 6 and 17 (1) (*c*) of the Divorce and Matrimonial Causes Act, 1928). His Lordship briefly referred to *Ginesi* v. *Ginesi*, which he interpreted to mean that a petitioner must prove adultery " beyond reasonable doubt ". And, he added, at p. 412; 135:

> In my view, the burden of proof is certainly no heavier than this, and counsel for the appellant did not contend that it was any lighter.

Lord MacDermott, in his speech, put the standard of proof on the statutory basis, by saying that the duty of the Court on hearing a petition for divorce is, in so far as material, to pronounce a decree if " satisfied on the evidence " that the case for the petitioner has been proved, and to dismiss the petition if not so satisfied: s. 178 of the Supreme Court of Judicature (Consolidation) Act, 1925. He went on, at p. 417; 138, to say:

> The evidence must, no doubt, be clear and satisfactory, beyond a mere balance of probabilities, and conclusive in the sense that it will satisfy what *Lord Stowell*, when *Sir William Scott*, described in *Loveden* v. *Loveden* ((1810) 2 Hag. Con. 1, 3; 161 E.R. 648, 649) as "the guarded discretion of a reasonable and just man"; but these desiderata appear to me entirely consistent with the acceptance of proof beyond reasonable doubt as the standard required. Such, in my opinion, is the standard required by the statute. If a Judge is satisfied beyond reasonable doubt as to the commission of the matrimonial offence relied upon by a petitioner as ground for divorce, he must surely be " satisfied " within the meaning of the enactment, and no less so in cases of adultery where the circumstances are such as to involve the paternity of a child.
>
> On the other hand, I am unable to subscribe to the view which, though not propounded here, has had its adherents, namely, that on its true construction the word " satisfied " is capable of connoting something less than proof beyond reasonable doubt. The jurisdiction in divorce involves the status of the parties and the public interest requires that the marriage bond shall not be set aside lightly or without strict inquiry. The terms of the statute recognize this plainly, and I think it would be quite out of keeping with the anxious nature of its provisions to hold that the Court might be " satisfied ", in respect of a ground for dissolution, with something less than proof beyond reasonable doubt. I should, perhaps, add that I do not base my conclusions as to the appropriate standard of proof on any analogy drawn from the criminal law. I do not think it is possible to say, at any rate since the decision of this House in *Mordaunt* v. *Moncreiffe* ((1874) L.R. 2 Sc. & Div. 374), that the two jurisdictions are other than distinct. The true reason, as it seems to me, why both accept the same general standard—proof beyond reasonable doubt—lies not in an analogy, but in the gravity and public importance of the issues with which each is concerned.

In *Preston-Jones's* case, Lord Oaksey (who was in a minority) said, at p. 409; 133:

> the law, as I understand it, has always been that the onus upon the husband in a divorce petition for adultery is as heavy as the onus which rests upon the prosecution in criminal cases. That onus is generally described as being a duty to prove guilt beyond reasonable doubt but what is reasonable doubt is always difficult to decide and varies in practice according to the nature of the case and the punishment which may be awarded. The principle upon which this rule of proof depends is that it is better that many criminals should be acquitted than that one innocent person should be convicted. But the onus in such a case as the present is not founded solely upon such considerations, but upon the interest of the child and the interest of the State in matters of legitimacy, since the decision involves not only the wife's chastity and status but in effect the legitimacy of her child see *Russell* v. *Russell* ([1924] A.C. 687).

In *Price* v. *Price*, [1951] N.Z.L.R. 1097, as we have said, Fell, J., reviewed most of the authorities on the question of the standard of proof of adultery. But, as Mr. Justice F. B. Adams pointed out in *McDonald* v. *McDonald*, to the decisions discussed in *Price's* case there must now be added *Bater* v. *Bater*, [1951] P. 35; [1950] 2 All E.R. 458, and *Preston-Jones* v. *Preston-Jones*, to which reference has just been made.

In *Bater's* case, a case of cruelty, Denning, J., said—and Mr. Justice F. B. Adams said he respectfully agreed—that the difference of opinion on the standard of proof may well turn out to be more a matter of words than anything else. Perhaps, His Honour said, the real controversy was on the question referred to in Denning, L.J.'s, concluding paragraph—namely, it is right to say, not only that there must be proof beyond reasonable doubt, but that there must be the same strictness of proof as on a criminal charge.

Mr. Justice F. B. Adams inclined to the view that that was a matter of words, and that it is better in any event to discard the supposed analogy between adultery and crime, as being without value, and possibly misleading. He added:

> If it means merely that there must be proof beyond reasonable doubt, there is no need to use the analogy. If it means more, it may be wrong.

His Honour then referred to the passage in Lord MacDermott's speech in *Preston-Jones* v. *Preston-Jones* (already quoted) in which Lord Simonds had concurred. In that case, the finding of adultery had the effect of bastardizing a child, and, as we have seen from the passage cited from Lord Oaksey's speech, the proposition that there must be proof beyond reasonable doubt was expressed in terms capable of being understood as limited to cases of that kind. But, His Honour added:

> the views of *Lord MacDermott*, concurred in by *Lord Simonds*, were expressed in perfectly general terms, and I think the decision is authority for the view that adultery must in all cases be proved beyond reasonable doubt. Whether adultery differs in that respect from other matrimonial offences need not be considered.
>
> Even *Ginesi* v. *Ginesi* ([1948] P. 179; [1948] 1 All E.R., 373)—the leading case for the criminal analogy—probably means no more than that adultery must be " proved beyond all reasonable doubt to the satisfaction of the tribunal of fact ". Those, indeed, are the words in which *Tucker*, L.J., summed up his conclusions of fact.

His Honour then said that another way of putting the matter, without, he thought, any change of meaning, was to say that the facts must not be " reasonably capable of an innocent construction ", as Lord Thankerton said in *Ross* v. *Ross*, [1930] A.C. 1, 25. That accords with the rule applied by Fell, J., in *Price* v. *Price*, [1951] N.Z.L.R. 1097, 1101, that there must be no other reasonable solution than that of guilt.

Mr. Justice F. B. Adams said that the words of Fell, J.'s, conclusion were taken from those of the Court of Appeal in *Allen* v. *Allen and Bell*, [1894] P. 248, 252. The same thing was expressed in different forms of words by three of the Judges in *Hall* v. *Hall*, (1902) 21 N.Z.L.R. 251, and by Fair, J., in *Andrews* v. *Andrews*, [1949] N.Z.L.R. 173, 176. His Honour concluded by saying that there can be no doubt that the proof required is proof beyond reasonable doubt; and it seems unnecessary, and perhaps undesirable, to amplify this by reference to the suggested analogy between crime and adultery.

His Honour observed that, while proof beyond reasonable doubt is necessary, it is, of course, clear that what is required is not a mathematical or scientific demonstration, but a reasonable conclusion based on fair inferences which satisfy the mind of the Court that adultery has been committed.

From His Honour's judgment it is clear that he has put the whole matter in its true perspective, aided by the most recent authoritative judgments, with which, it is clear, he thoroughly agrees. This judgment will be, we think, the authoritative guide if the question of the standard of proof of adultery in a divorce suit should again arise. Furthermore, it is helpful in giving its true meaning to the word "satisfied" in s. 17 (1) (c) of the Divorce and Matrimonial Causes Act, 1928, which differs little in its language from the subsection of the English divorce legislation to which reference has earlier been made.

SUMMARY OF RECENT LAW.

AGED AND INFIRM PERSONS PROTECTION.

Protection-order—Appointment of Solicitors as Managers of Estate—Consideration of Whole of Circumstances—Such Appointment to be made where Named Solicitors Most Suitable Persons to be appointed—Aged and Infirm Persons Protection Act, 1912, ss. 7, 9. Although the practice of the Courts in England in lunacy applications is to consider it usually unwise for solicitors to be appointed in circumstances similar to the making of a protection-order under s. 7 of the Aged and Infirm Persons Protection Act, 1912, the rule is not an inflexible one, and, in every case, the whole of the circumstances have to be considered. Consequently, when the Court is satisfied from the whole of the circumstances that the solicitors named are the most suitable persons to be appointed under the Aged and Infirm Persons Protection Act, 1912, they may be appointed the managers of the estate of the protected person; and it is unnecessary to make an order under s. 9 requiring them to give security. *In re E.* (S.C. Palmerston North. September 11, 1952. Fair, J.)

CONSTITUTIONAL LAW.

Parliamentary Sovereignty and The Limits of Legal Change. (Professor Zelman Cowen.) *26 Australian Law Journal*, 237.

CONTEMPT OF COURT.

Divorce—Child—Child taken by Petitioner out of Jurisdiction in Disobedience of Order—Application by Respondent for Enforcement of Order—Right of Petitioner to be heard. On a petition by a wife for the dissolution of her marriage, a decree *nisi* was granted, and it was directed that the child of the marriage should remain in the custody of his mother, but that he should not be removed out of the jurisdiction without the sanction of the Court. On the decree being made absolute, the mother remarried, and, without the sanction of the Court, she removed the child to Australia. On a summons by the father, an order was made directing the mother to return the child within the jurisdiction. On an appeal by the mother against the order, the father objected that, as she was in contempt, she was not entitled to be heard. *Held*, That it was the plain and unqualified obligation of every person against, or in respect of, whom an order was made by a Court of competent jurisdiction to obey it unless and until it was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment, and in an application to the Court by him not being entertained until he had purged his contempt. Where an order related to a child, the Court would be adamant on its due observance, for such an order was made in the interests of the welfare of the child, and the Court would not tolerate any interference with, or disregard of, its decisions on those matters, and least of all would permit disobedience of an order that a child should not be removed outside its jurisdiction. In the present case, the mother was not entitled to prosecute or be heard in support of her appeal until she had taken the first and essential step towards purging her contempt of returning the child within the jurisdiction. Per *Denning*, L.J., The Court would only refuse to hear a party to a case when the contempt impeded the course of justice by making it more difficult for the Court to ascertain the truth or to enforce its orders and there was no other effective means of securing his compliance. The Court might then in its discretion refuse to hear him until the impediment was removed or good reason was shown why it should not be removed. *Hadkinson* v. *Hadkinson*, [1952] 2 All E.R. 567 (C.A.).

CONVEYANCING.

The Purchase of A Vendor's Matrimonial Home. *214 Law Times*, 86.

Voluntary Transfers of Property: The Essential Requirements. *96 Solicitors' Journal*, 540.

Way of Necessity. *214 Law Times*, 101.

Ways of Necessity. *96 Solicitors' Journal*, 523.

CRIMINAL LAW.

Fresh Evidence after Conviction. *214 Law Times*, 85.

DIVORCE AND MATRIMONIAL CAUSES.

Adultery—Standard of Proof—Divorce and Matrimonial Causes Act, 1928, ss. 10 (a), *17* (*1*) (c). Adultery must in all cases be proved beyond reasonable doubt, or, to put it another way, the facts must not be reasonably capable of an innocent construction. (*Preston-Jones* v. *Preston-Jones*, [1951] A.C. 391; [1951] 1 All E.R. 124, and *Ross* v. *Ross*, [1930] A.C. 1, followed.) (*Bater* v. *Bater*, [1951] P. 35; [1950] 2 All E.R. 458, and *Price* v. *Price*, [1951] N.Z.L.R. 1097, referred to.) *Semble*, That it is unnecessary, and perhaps undesirable, in any event, to amplify the foregoing by reference to the suggested analogy between adultery and crime. (*Ginesi* v. *Ginesi*, [1948] P. 179; [1948] 1 All E.R. 373, explained.) *McDonald* v. *McDonald and Another*. (S.C. Auckland. October 6, 1952. F. B. Adams, J.)

Decrees of Nullity and The Status of Children. *214 Law Times*, 58.

Desertion—Constructive Desertion—Conduct Equivalent to Expulsion—Expulsion established only when Capable of being fairly so described—Use of Expulsive Words Insufficient—Divorce and Matrimonial Causes Act, 1928, s. 10 (b)*—Practice—Petition—Amendment—Decree for Restitution of Conjugal Rights by Husband not complied with—Wife Unsuccessfully petitioning on Ground of Desertion—Commencement* de novo *by Wife on Ground of Failure to comply with Decree for Restitution of Conjugal Rights preferable to amendment of Petition for Divorce on Ground of Desertion and Reservice as amended—Divorce and Matrimonial Causes Rules, 1943, RR. 27, 28.* Where desertion is alleged, the party charged with desertion must be shown to have been guilty of acts equivalent to expulsion from the matrimonial home, and to have acted with the intention of bringing the matrimonial *consortium* to an end. Conduct amounts to expulsion only when it can fairly be so described. The mere use of expulsive words is not enough. (*Buchler* v. *Buchler*, [1947] P. 25; [1947] 1 All E.R. 319, followed.) (*Lane* v. *Lane*, [1951] P. 284; aff. on app., [1952] P. 34, distinguished.) *Semble*, Where a husband has failed to comply with a decree for restitution of conjugal rights, and the wife has later unsuccessfully petitioned for divorce on the ground of desertion, it is preferable that she should commence *de novo* on the ground available to her, instead of applying for leave to amend the petition founded on desertion and reservicing it as amended. *McNae* v. *McNae*. (S.C. New Plymouth. September 19, 1952. Gresson, J.)

Practice—Petition—Service—Respondent serving in New Zealand Korean Forces Overseas—Form of Service—Information to be supplied—Time for filing Answer—Divorce and Matrimonial Causes Rules, 1943, RR. 9, 12. Practice as to the manner of service on a respondent on service overseas with the New Zealand Korean Forces. *A.* v. *A.* (S.C. Wellington. June 27, 1952. Cooke, J.)

FACTORIES.

Safe System of Work—Factory flooded in Exceptional Storm—Water mixed with Oil—Floor rendered Dangerously Slippery—No Want of Care by Occupiers—Accident through Workman slipping—Liability of Occupiers—Factories Act, 1937, s. 25 (1) (*cf. Factories Act, 1946* (*N.Z.*), *s. 48*). Owing to a downpour of rain of unprecedented character, and through no want of reasonable care on the part of the occupiers, a factory was flooded, and oil from a cooling mixture pumped to machines through channels in the floor mixed with the water. As the water receded, the floor, which was level and structurally perfect, was left in a wet and oily and slippery state, and could not be entirely cleared at once. In the course of his duty, a workman slipped on the floor and was injured. *Held*, (i) That the occupiers were not in breach of their duty to see that the floor was "properly maintained" under s. 25 (1) of the Factories Act, 1937, since "maintained," as defined in s. 152 (1), meant maintained in good repair, and not free from danger through slipperiness. (ii) That the occupiers had failed to provide a safe system of work, in permitting the workman to work in the factory when they knew it to be in a potentially dangerous condition, although through no fault of theirs, and, therefore, they were liable to the workman at common law. *Latimer* v. *A.E.C., Ltd.*, [1952] 1 All E.R. 443 (Q.B.D.).

FAMILY PROTECTION.

Inheritance Act Orders: Spreading The Burden. *96 Solicitors' Journal*, 509.

HUSBAND AND WIFE.

Deserted Wife in occupation of Husband's Dwellinghouse—Licence to occupy—Purchaser acquiring Property with Notice of Licence. A husband, after deserting his wife, sent her a letter in which he said: "I will carry on paying on the house [the matrimonial home] providing you do not annoy me. If you come here, I will not pay another penny, and don't forget you have my house of furniture." The wife continued to reside in the house, and the husband paid the rates and certain mortgage instalments in respect of it. After ten years, the husband sold the house for £30 to a purchaser who bought it with full notice of the arrangement between the husband and the wife and of the fact that that arrangement had been, and was being, acted on, and with the intention of enabling the husband to defeat any right which the wife had as a result of that arrangement. In an action by the purchaser for possession of the house, *Held*, That the wife was a licensee with a contractual right to remain in the house as a result of the arrangement with her husband, and, in the circumstances, the purchaser was not entitled to recover possession of the house. (*Bendall* v. *McWhirter*, [1952] 1 All E.R. 1307, applied.) *Ferris* v. *Weaven*, [1952] 2 All E.R. 233 (Q.B.D.).

As to Licence, see *20 Halsbury's Laws of England*, 2nd Ed. 8-12, paras. 5, 6; and for Cases, see *E. and E. Digest*, Replacement Vol. 30, pp. 526-543, Nos. *1635-1773*.

Married Women's Property—Claim by Wife for Possession of Former Matrimonial Home—Wife living Apart from Husband under Separation Order obtained by Her—Home owned and occupied by Husband—No "Question" as to Title or Possession—No Jurisdiction to make Order—Nature and Extent of Court's Discretion—Married Women's Property Act, 1908, s. 23. A spouse cannot create a "question between the husband and wife", as to either "the title to or possession of property" within the meaning of those words in s. 23 of the Married Women's Property Act, 1908, merely by asking to be let into possession of property owned by, and in the possession of, the other spouse, in regard to which the first-mentioned spouse had no sort of legal interest, proprietary or possessory, and no rights based on the duty of one spouse to live with the other or to occupy the matrimonial home. Section 23 does not give the Court jurisdiction to oust a husband from the possession of his home at the instance of a wife who has no legal title, who is not in possession or occupation, and who is not asserting any right to live with her husband in his home, but who, on the contrary, is insisting on a right to live apart from him, and who, having abandoned her domicil there, cannot maintain that the house is in any sense her home. (*Simpson* v. *Simpson*, *Ante*, p. 278, and *Nish* v. *Nish*, [1946] G.L.R. 202, distinguished.) Whatever may be the extent of the discretion given to the Court in cases where s. 23 can properly be invoked, there is neither authority nor principle for the interpretation of s. 23 in such a way as would justify the exercise of any discretion to override legal rights in a case such as this. (*Simpson* v. *Simpson*, *Ante*, p. 278, *Barrow* v. *Barrow*, [1946] N.Z.L.R. 438, and *Kelner* v. *Kelner*, [1939] 3 All E.R. 957, applied.) (*Thomson* v. *Thomson*, [1944] N.Z.L.R. 469, and *Hutchison* v. *Hutchison*, [1947] 2 All E.R. 792, distinguished.) (*Miller* v. *Miller*, [1946] Q.W.N 31, referred to.) The parties were married in 1937, and there were two sons, aged respectively thirteen years and ten years. On April 27, 1951, separation and guardianship orders were made on a complaint by the wife alleging persistent cruelty. The parties continued to live in the matrimonial home, but separately from each other, the understanding being that the wife should find other accommodation for herself and the children. On June 6, 1951, the wife consented to an order giving the custody of the children to the husband, and an order was made for her maintenance; and she went to live with her parents. In November, 1951, an order was made giving her the custody and control of the two children, who were taken by her to live in her parents' home; and she said that she would live permanently there. The husband continued in occupation of the former matrimonial home. The wife had not, and never had had, any legal interest in the home, which was purchased by the husband in 1944. On summons under s. 23 of the Married Women's Property Act, 1908, by the wife asking for an order declaring that she was entitled to possession of the house and directing the husband to deliver up possession to her, *Held*, 1. That, in the circumstances, a claim by the wife to possession did not raise a "question between the husband and wife", as to either "the title to or possession of property", within the meaning of those words in s. 23 of the Married Women's Property Act, 1908, and, consequently, the Court had no jurisdiction. 2. That s. 23 does not give the Court a special discretion such as would justify the exercise of any discretion in favour of the applicant. The nature and extent of the discretion given by s. 23 of the Married Women's Property Act, 1908, examined. *Watson* v. *Watson*. (S.C. Auckland. September 16, 1952. F. B. Adams, J.)

INCOME TAX.

Employment Abroad. *96 Solicitors' Journal*, 507.

INTERNATIONAL LAW.

The Anglo-Iranian Oil Company Case. *102 Law Journal*, 481.

The Immunity of Sovereigns. *102 Law Journal*, 466.

JUDICIARY.

Mr. W. A. Davies, Q.C., Recorder of Chester, has been appointed to the High Court Bench, and will be attached to the Probate, Divorce, and Admiralty Division.

Mr. Justice Havers has been transferred to the Queen's Bench Division.

LANDLORD AND TENANT.

Assignment of Leasehold Houses. *96 Solicitors' Journal*, 525.

Modernization as Repair. *96 Solicitors' Journal*, 510.

Statutory Tenants' Licensees. *96 Solicitors' Journal*, 524.

Subtenants' Goodwill Claims. *96 Solicitors' Journal*, 477.

Tenancies at Will, Service Occupancies and Licences. *102 Law Journal*, 437.

The Problem of The Statutory Tenancy. (Professor W. N. Harrison.) *26 Australian Law Journal*, 232.

LEGITIMATION.

Statute and Common Law Contrasted. *96 Solicitors' Journal*, 489.

LICENSING.

Licences—New Licence authorized by Licensing Control Commission in Certain Locality—Application to Licensing Committee for Such Licence—Powers of Licensing Committee in respect thereof—Grounds of Objection to issue of New Licence to be considered—Appeal to Licensing Control Commission Proper Remedy for Committee's Refusal to grant New Licence—Licensing Act, 1908, ss. 91, 92, 103—Licensing Amendment Act, 1948, ss. 13, 49 (2), 50, 58, 64, 65. A Licensing Committee has a discretion to grant or refuse a certificate for a new licence where the Licensing Control Commission has decided to authorize the granting of a new licence pursuant to s. 50 of the Licensing Amendment Act, 1948, and has issued a certificate under s. 51 of that statute authorizing the Licensing Committee in accordance with the principal Act and the Licensing Amendment

Act, 1948, to receive and consider applications for such licence. All provisions of ss. 91 and 92 of the Licensing Act, 1908, are applicable and must be taken into consideration by the Licensing Committee when receiving and considering applications for a licence authorized by the Licensing Control Commission, except that s. 91 (*b*) must be read subject to the provisions of the Licensing Amendment Act, 1948. *Semble*, That the repeal of the concluding sentence of s. 103 of the Licensing Act, 1908, by s. 49 (2) of the Licensing Amendment Act, 1948, enlarged the discretion of a Licensing Committee. If a Licensing Committee has refused an application for a new licence in such circumstances as to suggest that the Committee was attempting to defy or thwart the decision of the Licensing Control Commission, or was refusing to implement its fiat for the granting of a new licence, the proper remedy of an applicant is an appeal to the Commission. *Agnew* v. *Tauranga Licensing Committee.* (S.C. Auckland. October 7, 1952. Stanton, J.)

MONEY-LENDER.

Cash-order Business—Customer receiving Order to Retail Vendor to supply Goods purchased by Customer from Such Vendor —Payment for Order including "administration fee" of Five per cent. of Cost of Goods—Agreement between Cash Order Company and Retail Vendor for Sale and Purchase of Goods to Amount of Each Order—Court entitled to inquire into Real Nature of Transaction and go behind Agreements—Transactions not Sales between Cash Order Company and Customer but Money-lending Transactions—Cash Order Company a "money-lender" and required to register as Such—Money-lenders Act, 1908, ss. 2, 4 (1) (a). The appellant carried on what is known as a "cash order" business. It had power under its memorandum of association to carry on the business of a cash order and finance company, and to carry on the business of a lending and investing company, in addition to other businesses. A customer, on applying to the appellant, received a document addressed to the appellant to be signed by her, wherein she agreed to purchase goods as stocked by the appellant's named vendors, such goods to be selected by her at the appellant's vendors' shops; and it continued: "your sale to me in each instance to be completed by your Vendor's delivery to me of the goods, upon my presentation to your Vendor of the Delivery Order executed by you." The terms of payment were, *inter alia*, as follows: "I will pay for same the price set out in column 5 on back hereof (such amount being the amount specified in the Delivery Order plus the sum of 5 per cent. thereon as administrative fee). I agree to pay this amount as follows: On agreeing to purchase from Cash Order Purchases Ltd., and receiving Delivery Order—5 per cent. of amount of Order plus the administrative fee: thereafter on the same day in each succeeding week a further 5 per cent. of such amount until the whole has been paid." On the reverse side of the document, the following words appeared: "In accordance with my agreement to Purchase from you please make out Delivery Order/s on your Vendors for goods to the amount indicated in Column 3 below, which goods I am purchasing from you for the amount set out in Column 5 below." Below, there were columns in which the particular transaction was indicated in detail. The linking-up of the retailer was effected by an agreement between the appellant and each retailer, whereby the appellant agreed to buy from the retailer and the retailer agreed to sell to the appellant (up to the amount stated on the respective delivery orders) at the ordinary retail selling price to the public all such goods stocked as should be selected by a customer of the appellant upon presenting a delivery order signed by the appellant. The appellant agreed to pay monthly the amount of all the delivery orders presented to the retailer "less a discount of seven and a half per centum or any lesser amount which may be determined" by the appellant "for all payments made in such manner." The appellant was convicted by a Magistrate of failing to register as a money-lender, contrary to s. 4 (1) (*a*) of the Money-lenders Act, 1908, and was fined £50. Its appeal against the conviction and fine was, at the request of both parties, directed to be heard by a Full Bench of the Supreme Court. *Held, per totam curiam*, dismissing the appeal, That the Court was entitled to inquire into the true and real nature of the transaction, and it could go behind the agreements, whatever they purported on their face to effect; and that, as the true and real substance of the transaction indicated a business of providing money with which to buy from a third person, the proper conclusion from the evidence was that the transactions were not sales between the appellant and the customer, but were transactions of a finance company lending money to its customers to purchase goods or services; and that the appellant had been properly convicted and fined. (*Goldberg* v. *Tait*, [1950] N.Z.L.R. 976, *Allchurch* v. *Popular Cash Order Co., Ltd.*, [1929] S.A.S.R. 212, and *General Motors Acceptance Corporation* v. *Traders' Finance Corporation, Ltd.*, [1932] N.Z.L.R. 1, followed.) (*Olds Discount Co., Ltd.* v. *John Playfair, Ltd.*, [1938] 3 All E.R. 275, and *Olds Discount Co., Ltd.* v. *Cohen*, [1938] 3 All E.R. 281, n., distinguished.) Per *Finlay*, J., 1. That the Court must first find the pith and substance of the arrangement before it by a consideration of the documents, with a view to ascertaining the substance of each by a consideration of the rights and obligations of the parties to each, as settled and determined by the document creating them, and, in so doing, the Court could consider all the agreements conjointly, since, in respect of the appellant, they constituted the whole basis on which every transaction with every customer depended. (*Helby* v. *Matthews*, [1895] A.C. 471, followed.) (*In re George Inglefield, Ltd.*, [1933] Ch. 1, *Inland Revenue Commissioners* v. *Duke of Westminster*, [1936] A.C. 1, *In re Lovegrove, Ex parte G. Lovegrove and Co. (Sales), Ltd.*, [1935] Ch. 464, *Hutton* v. *Lippert*, (1883) 8 App. Cas. 309, and *Tiki Paaka* v. *Maclarn*, [1937] N.Z.L.R. 369, applied.) 2. That, if necessary, the Court's secondary subject of inquiry was whether it was established by relevant evidence that the pith and substance as represented by the documents were not their true pith and substance, but that the documents were a mere cloak to conceal the true character of the arrangement covered by them. (*General Motors Acceptance Corporation* v. *Traders' Finance Corporation, Ltd.*, [1932] N.Z.L.R. 1, followed.) (*Allchurch* v. *Popular Cash Order Co., Ltd.*, [1929] S.A.S.R. 212, applied.) 3. That, while, on the face of the agreements, there was nothing which would justify a finding that there was any lending, the true and real nature of the transaction (having regard to both the form and the substance of the transaction, the position of the parties, the unreality that the appellant was a seller of goods and supplier of services, and the whole of the circumstances in which the transaction came about) was that the customer went to the appellant to be provided with the financial means of making a purchase on the retailer's shop, and was supplied with those means in the form of an order; and the form into which the transaction was put was a mere cloak for what was a money-lending transaction. Per *North*, J., 1. That, as the present case was a prosecution charging the appellant with the offence of failing to register as a money-lender, the Crown was entitled to invite the Court to have regard to the whole body of evidence, including the pamphlets and advertisements used to attract customers; and that, accordingly, the matter should not be judged exclusively on the form of the documents which it induced customers to sign; and that, in any event, the unusual nature of the documents was in itself a matter of which the Court could take notice. (*Gavin's Trustee* v. *Fraser*, [1920] S.C. (Ct. of Sess.) 674, referred to.) 2. That, so viewed, the documents were so unusual in themselves as to negative any belief that the parties had seriously intended to make such a contract; and that the evidence, apart from the documents, confirmed the view that the whole of the arrangement was a sham intended to disguise the true nature of the transaction, which was the carrying on of the business of money-lending. *Cash Order Purchases, Ltd.* v. *Brady.* (S.C. Wellington. September 5, 1952. Sir Humphrey O'Leary, C.J.; Northcroft, J.; Finlay, J.; North, J.)

NEGLIGENCE.

Breach of Statutory Duty: Two Defences. *102 Law Journal*, 425.

POLICE OFFENCES.

Cruelty to Animals—Wantonly or Unreasonably causing Unnecessary Suffering to Animal—Proof of Intentional Cruelty not required—Requisite mens rea *defined by Words "wantonly or unreasonably"—"Wantonly"—Police Offences Act, 1927, s. 7 (1)* (a). The word "wantonly", used in collocation with the word "unreasonably" in s. 7 (1) (*a*) of the Police Offences Act, 1927, is intended to cover all states of mind that go beyond what would ordinarily be described as unreasonableness; and it applies, not only to acts or omissions with cruel intent, but also to acts or omissions where the known likelihood that suffering may be caused is callously disregarded, or where there is reckless indifference to the suffering that may be caused. (*Clarke* v. *Hoggins*, (1862) 11 C.B. (N.S.) 545; 142 E.R. 909, distinguished.) Under the second part of s. 7 (1) (*a*) of the Police Offences Act, 1927, intentional cruelty need not be proved, since para. (*a*) contains its own definition of the requisite *mens rea* in the words "wantonly or unreasonably", and, accordingly, there must be volition, positive or negative (as the case may be), in the act or omission that causes the unnecessary suffering, and it must be a wanton or unreasonable act or omission. No other intent is required. (*Bowden* v. *Alder*, (1913) 15 G.L.R. 595, and *McFarlane* v. *Robson*, [1916]

N.Z.L.R. 216, distinguished.) At about 10 p.m., appellant, who had had many years of experience in the care and training of greyhounds, left his home in Remuera, having with him two unmuzzled greyhounds, both of which he intended to race on the following day. After walking about a hundred yards, he removed the collar and lead from one of them, keeping the other on the lead. His purpose was that the dogs should have some moderate exercise. Shortly after being released, the appellant's dog chased and caught respondent's cat, and killed it. The evidence showed that the cat suffered intensely over a period of several minutes. The appellant was convicted, under s. 7 (1) (*a*) of the Police Offences Act, 1927, of wantonly and unreasonably causing unnecessary suffering to the cat. On appeal from that conviction, *Held*, 1. That it had been proved that the cat had suffered over a period of several minutes; that the fact that it had then died was irrelevant; and that there was no element of sport to justify the suffering inflicted. (*Tucker* v. *Hazelhurst*, (1906) 26 N.Z.L.R. 263, distinguished.) (*Jenkins* v. *Ash*, (1929) 141 L.T. 591, referred to.) 2. That the appellant had not to be fixed with knowledge of the presence of a cat when he released the greyhound, as the wantonness or unreasonableness of the act of releasing an unmuzzled greyhound must be judged, as far as cats are concerned, not by reference to the appellant's knowledge of the presence of cats, but by reference to the possibility or probability of their presence in the particular vicinity, and to his knowledge on that point. (*Thielbar* v. *Craigen*, (1905) 69 J.P. 421, applied.) *McEwen* v. *Roddick*. (S. C. Auckland. September 4, 1952. F. B. Adams, J.)

PROBATE AND ADMINISTRATION.

Testator resident and domiciled in Queensland—Administration granted in Queensland in respect of Whole Estate to Attorney of New Zealand Executor for Use and Benefit of Such Executor—Grant not resealed in New Zealand—Executor applying for Probate in New Zealand—Grant to Executor of Probate of Copy Will in Exemplification of Queensland Grant, limited to New Zealand Estate and limited to Time elapsing before Original Will brought in—Administration Act, 1908, s. 42. The testator in a will made in New Zealand appointed an executor and trustee resident here. He died when resident and domiciled in Queensland. The will was proved before the Supreme Court of Queensland, which granted administration with will annexed to P., "the duly constituted attorney of C. [the executor], for the use and benefit of" C. "and until he should apply for and obtain a grant of probate to be made to himself personally". Exemplification of the letters of administration with will annexed was issued out of the Registry of that Court. The grant was not resealed in New Zealand. The executor applied to the Supreme Court of New Zealand for an order granting to him probate of the testator's will in respect of the real and personal estate of the deceased situated within the Dominion of New Zealand and that such probate be a copy of the will contained in the exemplification issued out of the Supreme Court of Queensland of letters of administration with will annexed. *Held*, 1. That there is power to grant administration in New Zealand when in fact the grant made overseas has not been resealed. (*Irwin* v. *Caruth*, [1916] P. 23, applied.) (*In re Wrightson*, [1929] N.Z.L.R. 96, distinguished.) 2. That probate could be granted to the applicant of a copy of the original will as proved in Queensland, limited to such time as may elapse before the original will is brought in, and such grant was limited to the testator's estate in New Zealand. (*In the Goods of Earl*, (1867) L.R. 1 P. & D. 450, and *In the Goods of Briesemann*, [1894] P. 260, referred to.) *In re O'Driscoll (deceased)*. (S.C. New Plymouth. September 18, 1952. Gresson, J.)

SETTLEMENT.

Variation of Trusts—Transaction not authorized by Settlement or by Law—No Administrative Problem—Jurisdiction of Court to authorize transaction—Trusts and Trustees—Variation of Trusts by Court—No Administrative Problem—Jurisdiction—Trustee Act, 1925 (c. 19), s. 57 (1) (cf. Trustee Act, 1908, s. 75). To reduce the incidence of taxation on assets the subject of a personalty settlement, a scheme was devised which could not be effected owing to the absence of any power in that behalf contained in the settlement or given by law. Application was, therefore, made to the Court to sanction the scheme either under its general jurisdiction or under the Trustee Act, 1925, s. 57 (1). The Court found that the transactions involved in the scheme amounted in substance to a rewriting of the trusts or a substantial part thereof, or to directions to administer the trust property on the footing that new trusts had been declared and the existing trusts had been struck out or varied, and it was admitted that the purpose of the scheme was not to solve any administrative problem, but was to rearrange the beneficial interests to greater advantage. *Held*, That the transactions could not be authorized under the general jurisdiction of the Court; s. 57 (1) did not authorize a transaction not of an administrative character, and the Court could not confer on the trustees the power to execute a resettlement or to deal with the trust estate on the footing that a resettlement had been executed; but, even if s. 57 (1) did authorize such a transaction, the language of the subsection gave a clear indication that the Court ought not to exercise its discretion in favour of a transaction which was not of an administrative character and involved substantial rewriting of the trusts in order to rearrange beneficial interests to greater advantage. (Observations in *Re D.'s Settled Estates*, [1952] 2 All E.R. 603, applied.) *Re B.'s Settlement*, [1952] 2 All E.R. 647 (Ch.D.).

TENANCY.

Conditional Order for Possession. *96 Solicitors' Journal*, 556.

TRUSTS AND TRUSTEES.

Release of Capital from Protective Trusts. *213 Law Times*, 369.
Remuneration and Income Tax. *213 Law Times*, 368.

VENDOR AND PURCHASER.

Agreement for Sale and Purchase of Land—Construction—Usual Form of Default Clause—Vendor, on Purchaser's Default, selling to New Purchaser—Claim for Deficiency and Legal Costs—Vendor's Rights under Default Clause—Measure of Damages thereunder—"Without prejudice to his other remedies"—"Expenses attending a re-sale"—"Any deficiency in price". By an agreement, on a printed form issued by the Real Estate Institute of New Zealand, Inc., the plaintiff sold a house and certain chattels to the defendant for the total price of £5,750, a deposit of £250 being paid and the balance of the purchase-money was to be paid on settlement. The sale was to be completed on May 11, 1951. A clause in the agreement provided that, if from any cause other than the default of the vendor any portion of the purchase-money was not paid upon the due date the purchaser was to pay interest thereon until completion. Clause 7 of the agreement was in the following terms: "7. If the Purchaser shall make default in payment of any instalment of the purchase moneys hereby agreed to be paid or of interest thereon or in the performance or observance of any other stipulation or agreement on the part of the Purchaser herein contained and such default shall be continued for the space of fourteen days then and in such case the Vendor without prejudice to his other remedies may at his option exercise all or any of the following remedies namely:—(*a*) May rescind this contract of sale and thereupon all moneys theretofore paid shall be forfeited to the Vendor as liquidated damages. (*b*) May re-enter upon and take possession of the said lands and property without the necessity of giving any notice or making any formal demand. (*c*) May re-sell the said lands and property either by public auction or private contract subject to such stipulations as he may think fit and any deficiency in price which may result on and all expenses attending a re-sale or attempted re-sale shall be made good by the Purchaser and shall be recoverable by the Vendor as liquidated damages the Purchaser receiving credit for any payments made in reduction of the purchase money. Any increase in price on re-sale after deduction of expenses shall belong to the Vendor." A transfer was prepared by the defendant's solicitor, and, on its being tendered to the plaintiff, it was executed by him; but no further steps were taken by the defendant. After a formal notice to the defendant under s. 94 of the Property Law Act, 1908, proceedings were taken by the plaintiff for possession, and an order was made by consent for delivery of possession on or before January 15, 1952. As possession was not given in terms of the order, the defendant was ejected under a warrant issued out of Court. The plaintiff did not exercise the right of rescission and forfeiture conferred by cl. 7 (*a*) of the agreement, but on March 26, 1952, he sold the house and chattels to another purchaser for £4,550. The plaintiff claimed from the defendant, after giving credit for the deposit of £250, the amount of the deficiency on the resale (the sum of £950), and, as expenses of the resale, the land agent's commission. In addition, the plaintiff claimed (*a*) interest on the £950 to date of judgment, and (*b*) the sum of £61 17s. 6d. for legal expenses. In his statement of claim, he alleged, *inter alia*: "4. That the said agreement provided *inter alia* that if the Defendant made default in the performance or observance thereof the Plaintiff might re-enter upon and take possession of the premises and might re-sell the same and any deficiency in price and all expenses attending a re-sale should be made good by the Defendant and recoverable from the Defendant as liquidated damages." On the question whether the plaintiff was entitled in law to recover the amount claimed for interest and legal expenses,

vendor had elected to proceed under cl. 7 (*c*), and he could not substitute a different measure of damages for the measure provided therein, and on a resale he must be content with that measure of damages. (*Harold Wood Brick Co., Ltd.* v. *Ferris*, [1935] 2 K.B. 198, applied.) *Semble*, That the vendor could *Held*, 1. That, in so far as an election may be relevant, the have proceeded on a different basis, alleging breach amounting to repudiation and claiming damages for such breach; but, in that event, the measure of damages was not necessarily the same as under cl. 7 (*c*) of the agreement. (*York Glass Co., Ltd.* v. *Jubb*, (1925) 134 L.T. 36, *Harold Wood Brick Co., Ltd.* v. *Ferris*, [1935] 2 K.B. 198, and *Laird* v. *Pim*, (1841) 7 M. & W. 474; 151 E.R. 852, referred to.) 2. That cl. 7 (*c*) conferred rights in regard to the assessment of damages which would not exist apart from express stipulations; and, as the parties had agreed upon provisions for the payment of liquidated damages measured in a particular way, other damages (such as interest on the deficiency in price on the resale, or legal expenses for work done in the effort to ensure completion of the sale, or costs connected with the eviction) were excluded. 3. That the words "without prejudice to his other remedies" in cl. 7 meant that, if there were other remedies open to the vendor in respect of any particular breach, he was free to pursue them notwithstanding cl. 7. (*Hayes* v. *Ross* (*No. 3*), [1919] N.Z.L.R. 786, distinguished.) 4. That cl. 7 (*c*) could not be construed as conferring a right to interest to the date of judgment on the amount of the deficiency in price on the resale, though it would include any legal expenses which could properly be regarded as "expenses attending a resale"; and that neither interest nor legal expenses can be brought within the words "any deficiency in price", as, by the express words of cl. 1, "the price is £5,750". 5. That the interest claimed was not made payable at a fixed time or from time to time, and the obligation in regard to interest was analogous to the obligation in regard to the price itself. Like the price, it could not be recovered by action unless the contract had been completed by conveyance and the purchase-money left outstanding; and the clause in the agreement providing for its payment was merely one which, if the contract had been carried into effect, would have resulted in the interest becoming payable. (*Barber* v. *Wolfe*, [1945] Ch. 187, applied.) *Hoskins* v. *Rule*. (S.C. Auckland. September 9, 1952. F. B. Adams, J.)

WILL.

Construction—Next-of-kin—Meaning of "Next-of-kin" when used simpliciter *in Will—Point of Time for Ascertainment.* The word "next-of-kin" when used in a will has acquired a definite and precise meaning, when used *simpliciter* and without qualification by the context or the scheme of the will read as a whole; and it means "nearest in blood". *Gutheil* v. *Ballarat Trustees, Executors and Agency Co., Ltd.*, (1922) 30 C.L.R. 293, followed.) (*In re Taare Waitara, Beere* v. *Bates*, [1938] N.Z.L.R. 1029, distinguished.) *In re Goldie* (*deceased*), *Goldie and Others* v. *Goldie and Others*. (S.C. Auckland. May 26, 1952. Fair, J.)

Construction—Rule against Perpetuities—Trustees to offer Farm Property to Grandsons according to Their Seniorities on attaining Age of Twenty-five Years or Month thereafter with Further Month to declare Acceptance—Gift to Such Grandson of "such sum of money as shall be sufficient to enable him to complete the said purchase"—Effect of s. 6 of Law Reform Act, 1944—Gift Void for Uncertainty and Remoteness—Law Reform Act, 1944, s. 6 (1). When the testator died on July 25, 1949, he was survived by his daughter who then had one child, born on August 26, 1940. Since his death, the daughter had had two other children, born respectively on September 28, 1949, and June 18, 1951. The daughter was almost thirty-six years of age, and she was the existing life for the purposes of the rule against perpetuities. The will provided an annuity for the testator's sister, and the trustees were directed to pay all premiums as they became due on each endowment policy effected by the testator in his lifetime on the lives of two grandchildren. The validity of these was not questioned. Clause 4 of the will was as follows: "(*a*) I declare that it is my wish that the trustees of the estate of my late wife Mary Catherine Gibson (and in expressing such wish I do so with the knowledge that the same is not binding on such trustees) in the event of their exercising the power of sale vested in them under the will of the said Mary Catherine Gibson shall offer to sell as a going concern the farm property belonging to the estate of the said Mary Catherine Gibson situate at Bonny Glen, Marton and called 'Omaha' and all the farm stock farming implements and machinery and farming effects used or employed in and about the said property (hereinafter called 'the Omaha farm') or to lease the same with a compulsory purchasing clause successively and according to their respective seniorities to my grandsons being sons of my daughter Catherine Mary Shand whether by her present or a previous marriage upon their attaining the age of 25 years respectively or within one month thereafter at a value to be made by two independent valuers one to be appointed by the said trustees and one by the grandson so purchasing or in the event of such valuers failing to agree then by a third valuer to be appointed by the said two valuers before entering upon the valuation the acceptance of such offer to be declared by the grandson in writing within one calendar month after the date of the making by the said trustees of the said offer But any such purchase or lease is always to be subject to the right of my daughter Catherine Mary Shand to occupy during her life the residence and surrounding grounds free of charge. (*b*) If any one of my said grandsons shall agree to purchase as aforesaid the Omaha farm and has not in the sole opinion of my trustees sufficient money of his own after making provision for a reasonable sum for one year's working capital to complete the sale purchase then I Hereby Give and Bequeath to such grandson such sum of money as shall be sufficient to enable him to complete the said purchase." On originating summons for the interpretation of the will, *Held*, 1. That the bequest given by cl. 4 (*b*) was void for uncertainty, and it was also void for remoteness as infringing the rule against perpetuities, unless it was saved by s. 6 (1) of the Law Reform Act, 1944. 2. That, if s. 6 (1) of the Law Reform Act, 1944, was applicable, then "21" must be substituted for "25" in cl. 4 (*a*); but, even with that substitution, as there was provision for a further month after the attained age to make an offer and a further month for acceptance, the rule against perpetuities could still in any event be infringed in respect of the gift of "such sum of money as shall be sufficient". 3. That all the other gifts in the will, in cls. 6 (*b*), 7 (*a*), 7 (*b*), and 7 (*c*), were also void for uncertainty or for remoteness, or for both. 4. That, apart from the annuity and the payment of insurance premiums, an intestacy as to the greater part of the estate resulted. (*Re Abbott, Public Trustee* v. *St. Dunstan's British Home and Hospital for Incurables and Western Ophthalmic Hospital Trustees, and Dugan*, [1944] 2 All E.R. 457, and *In re Stevens, Pateman* v. *James*, [1952] W.N. 133, applied.) (*In re Harrison, Turner* v. *Hellard*, (1885) 30 Ch.D. 390, referred to.) *In re Gibson* (*deceased*), *Simpson and Others* v. *Nevill and Others*. (S.C. Wanganui. July 11, 1952. Sir Humphrey O'Leary, C.J.)

WORKERS' COMPENSATION.

Liability for Compensation—Fire Authority—Deceased nominated as Fire Officer and serving as Such when killed—Notice of Resolution appointing Him Fire Officer not sent to Him before Accident causing Death while helping to fight Fire—Deceased deemed to be employed pursuant to "arrangement"—Forest and Rural Fires Act, 1947, s. 30 (5)—Workers' Compensation Act, 1922, s. 3—Practice—Case Stated for Opinion of Court of Appeal—Case to be restricted to Question of Law only—Workers' Compensation Rules, 1939, Ch. VIII (5). The Waimea County Council was the Fire Authority charged with the duty under the Forest and Rural Fires Act, 1947, of promoting and carrying out measures for the prevention, control, and suppression of fires. The Authority appointed a Fire Officer, its acting-engineer, who in turn set about organizing fire-fighting services for the various areas under the jurisdiction of the Authority. The deceased was willing to serve and was nominated as a suitable Fire Officer, and his duties were to extinguish or restrict the spread of fire. He was told by the Authority's Fire Officer that his nomination would be confirmed at the Council meeting on November 11; and the Council on that day passed a resolution to that effect. The next day a fire broke out, and the deceased turned out to help fight it and lost his life in so doing. Notice of the passing of the resolution appointing him had not been sent to him. On questions submitted by the Compensation Court for the opinion of the Court of Appeal, *Held*, That, by virtue of s. 30 (5) of the Forest and Rural Fires Act, 1947, the deceased was to be deemed for the purposes of the Workers' Compensation Act, 1922, to have been employed by the Fire Authority at the time of his death, as the provisions of that subsection are wide enough to include persons who, pursuant to an arrangement earlier made with the Fire Officer entitled to make it, proceed to the fire and render assistance. (*Manning* v. *Eastern Counties Railway Co.*, (1843) 12 M. & W. 237; 152 E.R. 1185, referred to.) Observations as to the restriction of the stating of a Case by the Compensation Court for the opinion of the Court of Appeal strictly to a point of law, and nothing else. (*Boyes* v. *Smyth*, [1933] N.Z.L.R. 1427, referred to.) *Public Trustee* v. *H. Baigent and Sons, Ltd., and Waimea County*. (C.A. Wellington. July 17, 1952. Sir Humphrey O'Leary, C.J.; Northcroft, J.; Hutchison, J.; North, J.)

"ENTRENCHED" LEGISLATION FOR NEW ZEALAND.

Does the Separate Representation of Voters Case Apply?

By F. D. O'FLYNN, B.A., LL.M.

It is evident from the report recently presented to Parliament by the Hon. R. M. Algie, the Chairman of the Constitutional Reform Committee, that the Committee considers that Parliament cannot effectively protect the existence or the constitution and powers of any Second Chamber from capricious or hasty change by the safeguard of what is called " entrenched " legislation—that is, by prescribing a special and restrictive form for future legislation to abolish such a Chamber or to amend its constitution.

Added value is, therefore, given to the article (*Ante*, p. 234) by Dr. J. F. Northey reviewing the decision of the Appellate Division of the Supreme Court of South Africa in the Separate Representation of Voters Case (*Harris* v. *Minister of Interior*, [1952] 2 A.D. 428), in which it was held that similar " entrenched " provisions in the South Africa Act, 1909, remain binding on the Union Parliament, which can validly legislate on the topics covered by those provisions only by following the restrictive procedure therein prescribed. Before that decision was given, the learned author of the article referred to had already ((1951) 27 NEW ZEALAND LAW JOURNAL, 140) drawn attention to the importance of the outcome of the case to the constitutional questions which are causing wide concern while this country continues to have a unicameral Legislature.

In his latest article, Dr. Northey also refers briefly to the earlier decision of the South African Court in *Ndlwana* v. *Hofmeyr, N.O.*, [1937] A.D. 229, and shows that, despite certain wide dicta in the judgment, that decision was not necessarily inconsistent with the latest decision, as is still contended by Dr. Malan and his law advisers. It is the purpose of the present article to consider more fully whether the recent decision is correct; for, if it is, it would appear to be equally applicable in New Zealand, and conclusive against the view of the Constitutional Reform Committee.

The proper starting-point of such an inquiry is the doctrine of the sovereignty of Parliament, which is no doubt the basis of the view of our Committee, as it was also of the arguments for the Government in *Harris* v. *Minister of Interior*. The classic statement of this doctrine in modern times is that in *1 Anson's Law and Custom of The Constitution*, 5th Ed. 7, 8 :

> Our Parliament is omnipotent and works with the same procedure whether it is removing an obsolete form, or whether it is disestablishing a Church or extending the franchise to a million or more of its fellow-citizens.
>
> One thing no Parliament can do: the omnipotence of Parliament is available for change but it cannot stereotype rule or practice. Its power is a present power, and cannot be projected into the future so as to bind the same Parliament on a future day, or a future Parliament.

The latter part of this statement is probably the source of the well-known maxim, " No Parliament can bind its successor ", and one cannot but think that, as is all too often the case, the very brevity of the maxim has served rather to conceal than to elucidate the doctrine it is intended to epitomize. The doctrine is, of course, very old. There are statements of it in *Blackstone* and in *Coke*. The great difficulty in securing a complete and authoritative exposition of the doctrine of parliamentary sovereignty is one which is common to most fields of English law. Whatever the powers of Parliament may be, authorities ancient and modern are agreed that they are legal powers, and, apart from modern statutes like the Parliament Act, 1911, they must, therefore, find their roots in the common law. But the extent and limits of a common-law doctrine can be conclusively established only by decisions of the Courts, of which, until recent times, there have been very few.

Perhaps the most satisfactory approach to the question is to narrow it by a brief statement of certain features of the doctrine which may now be regarded as settled either by authority or by unquestioned historical precedent. In the first place, there can be no inquiry in the Courts into allegations of irregularities or want of form in carrying out the customary or prescribed parliamentary procedure : *Edinburgh and Dalkeith Railway Co.* v. *Wauchope*, (1842) 8 Cl. & F. 710 ; 8 E.R. 279. It is necessary to insist here that this is, of course, a different question from the question whether the customary procedure, or any particular prescribed procedure, is mandatory. Secondly, there can be no inquiry into the motive of legislation or whether, for example, it arose out of incorrect information, or even deception : *Te Heu Heu Tukino* v. *Aotea District Maori Land Board*, [1941] N.Z.L.R. 590.

Again, unchallenged historical precedent supports the proposition elaborately developed in *Dicey's Law of The Constitution*, 9th Ed. 64-68, that Parliament cannot pass immutable laws, safe against any repeal by a later Parliament. *Dicey* illustrates this by reference to the Acts of Union with Scotland, 1706, and Ireland, 1808, both of which, being in the nature of treaties, contained provisions expressed to be " essential and fundamental ", and, in one case, to " remain in full force for ever ". *Dicey* then points to amendments and partial repeals of these statutes, and he lived to see the Act of Union with Ireland superseded as to three-quarters of that country by the Treaty of 1921, which was scheduled to the Imperial statute of 1922 as part of the Constitution of the Irish Free State, and was itself abrogated by that Dominion in 1937 by its own legislation under the Statute of Westminster, 1931. Indeed, in *British Coal Corporation* v. *The King*, [1935] A.C. 500, 520, the Privy Council remarked of the latter statute, which also arose out of agreement and may be considered to have been intended to be beyond repeal, that " the Imperial Parliament could, as a matter of abstract law, repeal or disregard s. 4 of the Statute " (the section which provided that the Imperial Parliament should not legislate for the Dominions except at the request and with the consent of the Dominion concerned).

Moreover, it has been decided in two interesting cases, *Ellen Street Estates, Ltd.* v. *Minister of Health*, [1934] 1 K.B. 590, and *South-Eastern Drainage Board (South Australia)* v. *Savings Bank of South Australia*, (1939) 62 C.L.R. 603, that even implied repeal of statutes cannot be prevented. In *Ellen Street Estates, Ltd.* v. *Minister of Health*, [1934] 1 K.B. 590, Maugham, L.J. (as he then was), observed, at p. 597 :

> The Legislature cannot, according to our constitution, bind itself as to the form of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject-matter there can be no implied repeal. If in a subsequent Act Parliament chooses to make it plain that the earlier statute is being to some extent repealed, effect must be given to that intention just because it is the will of the Legislature.

In *South-Eastern Drainage Board (South Australia)* v. *Savings Bank of South Australia*, (1939) 62 C.L.R. 603, s. 6 of the Real Property Act, 1886 (S.A.) (the Torrens statute), provided :

> No law, so far as inconsistent with this Act, shall apply to land subject to the provisions of this Act—nor shall any future law, so far as inconsistent with this Act, so apply unless it shall be expressly enacted that it shall so apply "notwithstanding the provisions of the Real Property Act, 1886".

Acts relating to the Drainage Board which did not contain the provision mentioned purported to create a first charge over land subject to the Torrens Act for construction work and rates. It was held, *per totam curiam*, that the charge—which incidentally was not required to be, and was not in fact, registered on the Titles—took priority over mortgages whether given and registered before or after the charge came into existence. All the Judges except Evatt, J., regarded the section as a mere interpretation section, which had to give way to the plain intention of the later Act to affect the land. Evatt, J., however, after citing the passage already set out from the judgment of Maugham, L.J., thus applied it to the section, at p. 634 :

> Section 6 is not a mere interpretation section, for it is not expressed to operate only so far as the contrary intention does not appear. It purports to lay down a rigid rule binding upon all future Parliaments. It declares that, however clearly the intention of such Parliaments may be expressed in an enactment, that intention shall not be given effect to unless it contains the magic formula. I think that the command in s. 6 was quite ineffective and inoperative.

The question then arises whether one Parliament can bind another, not by passing an "immutable" statute or requiring the use of a "magic formula" for repeal or amendment, but by laying down a procedural requirement of substance, such as passage by a specified majority, or approval at a subsequent referendum, for future legislation on any particular topic or topics. In other words, can Parliament validly prescribe a particular (and restrictive) mode of legislation for certain matters, so as to bind its successors to legislate on those matters only in the manner so prescribed ? Apart from the South African cases, direct authority is lacking, though there are dicta either way. The Privy Council in the *British Coal Corporation* case evidently thought Parliament could not do so, for the dictum already cited asserted not only that the Imperial Parliament might *repeal* s. 4 of the Statute of Westminster, 1931, but also that it might disregard it—that is, their Lordships asserted that, without troubling to repeal the section, the Imperial Parliament could still legislate for the Dominions as it had before without complying with the new procedure (required by that section) of first having the request and the consent of the Dominion concerned.

On the other hand, Dixon, J. (as he then was), a Judge of the highest authority on constitutional law, expressed the opposite opinion, equally *obiter*, in *Attorney-General for New South Wales* v. *Trethowan*, (1931) 44 C.L.R. 394. This was the case in which New South Wales legislation providing that the State Second Chamber should not be abolished, or its constitution or powers altered, or the legislation itself amended or repealed except by a Bill subsequently approved at a referendum, was upheld by the High Court of Australia and, on appeal, by the Privy Council : [1932] A.C. 526. The imposition by one Parliament of New South Wales upon its successor of the restrictive mode of legislation subject to approval by referendum was upheld in both Courts on the narrow ground that the power of the New South Wales Legislature to pass laws respecting its own constitution, powers, or procedure was governed by s. 5 of the Colonial Laws Validity Act, 1865 (28 and 29 Vict., c. 63), the proviso to which was as follows :

> provided that such laws shall have been passed in such manner and form as may from time to time be required by [*inter alia*] any colonial law for the time being in force in the said colony.

For this reason, the decision has been put aside by constitutional authorities as having no relevance in the case of fully sovereign Legislatures. Section 2 (1) of the Statute of Westminster, 1931, had already expressly declared that the Colonial Laws Validity Act, 1865, should not thenceforth apply to Dominion Legislatures, and the Statute had also removed all externally imposed limits upon their sovereignty save those, if any, in the Imperial Acts containing their respective Constitutions.

Nevertheless, in *Trethowan's* case, Dixon, J., expressed the opinion that the principle did not depend only on the Colonial Laws Validity Act, 1865, and would apply equally to the Imperial Parliament. At p. 426, he said :

> It must not be supposed, however, that all difficulties would vanish if the full doctrine of parliamentary supremacy could be invoked. An Act of the British Parliament which contained a provision that no Bill repealing any part of the Act including the part so restraining its own repeal should be presented for the Royal Assent unless the Bill were first approved by the electors, would have the force of law until the Sovereign actually did assent to a Bill for its repeal. In strictness it would be an unlawful proceeding to present such a Bill for the Royal Assent before it had been approved by the electors. If, before the Bill received the assent of the Crown, it was found possible, as appears to have been done in this appeal, to raise for judicial decision the question whether it was lawful to present the Bill for that assent, the Courts would be bound to pronounce it unlawful to do so. Moreover, if it happened that, notwithstanding the statutory inhibition, the Bill did receive the Royal Assent although it was not submitted to the electors, the Courts might be called upon to consider whether the supreme legislative power in respect of the matter had in truth been exercised in the manner required for its authentic expression and by the elements in which it had come to reside.

In *Harris's* case, the correctness of this view of the law as applied to a sovereign Legislature directly arose, for the Court, at pains to make it clear that the sovereignty of South Africa as a State was not at stake, observed, at pp. 467, 468 :

> The only Legislature which is competent to pass laws binding in the Union is the Union Legislature. There is no other Legislature in the world that can pass laws which are enforceable by Courts of law in the Union . . . The Union is an autonomous State in no way subordinate to any other country in the world.

Notwithstanding the expression of a contrary opinion in *Ndlwana* v. *Hofmeyr, N. O.*, [1937] A.D. 229, an earlier decision of the Court, the Appellate Division unanimously adopted and applied the view of Dixon, J., to the sovereign legislative powers of the Union Parliament. Dr. Northey has pointed out the curious fact that the argument against the legislation in the earlier case was the reverse of that advanced against the Malan legislation in the recent case—that is, in the earlier case the disqualifying Act had been passed at a joint sitting by a two-thirds majority, as required

by ss. 35 and 152 of the South Africa Act, 1909—but it was objected that some of its provisions were not such as required this restrictive process, and, therefore, that the Act could not be validly passed in this way. The learned contributor then pointed out that, once the Court held (as the Cape Provincial Division did, at p. 233) that the Act fell within the scope of s. 35, although certain of its provisions, standing alone, would not have done, it became unnecessary to consider whether the restrictive process under that section and under s. 152 was binding or not, since it had in any case been followed. He then cited a passage to that precise effect from the judgment of Van Zyl, J.P., in the Court below, concluding that any statement in the appellate judgment as to the effect of the Statute of Westminster, 1931, on the "entrenched sections" was probably *obiter*. Although the Court in *Harris's* case did not dismiss the *Ndlwana* judgment thus shortly, but considered it carefully with due regard to the *stare decisis* principle, a perusal of that judgment shows that the whole of the judgment on appeal, though not strictly *obiter*, was devoted to this wide and entirely unnecessary ground. Nowhere in it is there any reference to the relevant and cautiously lawyer-like reasoning of Van Zyl, J.P., which appears sound, and, if so, is clearly sufficient to dispose of the case. Instead, the Appellate Division (p. 236):

> requested Mr. Buchanan (for appellants) to deal with the *preliminary* question whether this Court had any power at the present time to pronounce upon the validity of an Act of Parliament duly promulgated and printed and published by proper authority in as much as Parliament is now, since the passing of the Statute of Westminster, the supreme and sovereign law-making body in the Union. Parliament has, moreover, in the Status Act, 1934, defined its own powers and declared them to be "sovereign".

And, in answer to that question, the judgment proceeds to enunciate the sweeping propositions set out in Dr. Northey's article, with the conclusion he cites that:

> Parliament . . . can adopt any procedure it thinks fit; the procedure express or implied in the South Africa Act is so far as Courts of law are concerned at the mercy of Parliament like everything else.

These two conflicting decisions, and the equally conflicting dicta of the Privy Council and of Dixon, J., already cited, exhaust authority, and the matter falls to be considered on principle and in the light of older learning. We may begin by observing that, if the *Ndlwana* case is right, and if the Privy Council dictum is right, then, as *Jennings's The Law and The Constitution*, 3rd Ed. 64, puts it:

> There is no constitutional law at all in Great Britain; there is only the arbitrary power of Parliament.

And what is true of Britain must be true also of South Africa or of any other Dominion to-day. *Jennings's* comment shows the *Ndlwana* doctrine of parliamentary sovereignty to be a *brutum fulmen*. It is really a *denial*, not an *assertion*, of power, for the over-assertion of sovereignty has the result that the exercise of the "sovereign" power becomes, in the end, vain and ineffective.

There are grounds for supposing that the error, like some other constitutional heresies, is due to an uncritical surfeit of *Dicey*. As has been pointed out, his treatment of the subject is developed from the undoubted truth that Parliament cannot pass a statute which is entirely proof against repeal. He did not consider the possibility of imposing restrictive legislative processes for particular subjects, but it is submitted that there is a clear distinction between checking the exercise of legislative power in this way and endeavouring to legislate "once and for all" by passing an "immutable" statute. The latter is an attempted abdication by the Legislature of its sovereign power, while the former merely limits its future exercise by prescribing a restrictive mode of doing so. The sovereign power can still be fully exercised by following the method so prescribed. To put the matter concretely, Dr. Malan could pass his Separate Representation of Voters Act, or, indeed, disfranchise the natives altogether, by following the procedure of ss. 35 and 152 of the South Africa Act, 1909, and convening a joint sitting of both Houses, if he had the political support to secure the required two-thirds majority.

This fact suggests that the key to the whole question lies in distinguishing the sovereignty of Parliament from political sovereignty. *Dicey* (*op. cit.*, 73), criticizing *Austin's Jurisprudence* for confusion on the matter, makes this distinction. He defines political sovereignty by saying:

> that body is politically sovereign or supreme in a State the will of which is ultimately obeyed by the citizens of the State.

No doubt in a democracy there are difficulties in determining the real seat of political sovereignty at any particular time or in any particular matter, but these need not concern us. For present purposes, we may agree with *Dicey* that the electors, or the majority for the time being of them, are politically sovereign. Albeit remotely and intermittently, they control the actions of Parliament, which is clearly not the political sovereign. Of its sovereignty *Dicey* said:

> It is a merely legal conception, and means simply the power of law making unrestricted by any legal limit.

While criticizing *Austin*, *Dicey* himself failed to apply his distinction. If the sovereignty of Parliament is not political sovereignty or absolute power, but is merely a legal conception, then there should not be applied to it the attribute of an absolute power that it cannot, while it retains that character, restrict its power by any particular exercise of it. Yet this is precisely what *Dicey* (*op. cit.*, 68, n.) asserts of the power of Parliament, and it is precisely what the Court in the *Ndlwana* case asserted when they said, at p. 237:

> It is obviously senseless to speak of an Act of a sovereign law-making body as *ultra vires*. There can be no exceeding of power when that power is limitless.

But *Dicey* was at pains to show that there are many things Parliament cannot do in practice, just because it is not the political sovereign, and he admitted, too, that its powers came from the law. If its sovereignty is not absolute power, but is "a merely legal conception", it is submitted that *Jennings* correctly defined that conception (*op. cit.*, 140) as:

> a form of expression which lawyers use to express the relationship between Parliament and the Courts. It means that the Courts will always recognize as law the rules which Parliament makes by legislation; *that is rules made in the customary manner* and *expressed in the customary form.*

The customary manner and form were, of course, originally laid down by the common law, a part of which, indeed, came to be called *lex et consuetudo parliamenti*.

It is but a short step from this to say that Parliament may, if it chooses, and if its political masters (the electors) approve, substitute another manner and form. In the Parliament Act, 1911, the Imperial Parliament provided an *alternative* manner and form. It is

submitted that it could with equal validity *substitute* a new manner and form for all future legislation, and that such new manner and form would then be binding until it was itself altered by legislation passed in that new form. In short, it is submitted that the law is that Parliament may make or repeal any law in the manner and form for the time being provided by the law, including laws which alter that manner and form for the future. Again putting the matter concretely, not only may Dr. Malan pass his Separate Representation of Voters Act by legislation in the manner and form at present required for such an Act—namely, passage by a two-thirds majority at a joint sitting—but, provided that he follows this form in so doing, he may also abolish this process altogether and substitute a new manner and form for such legislation in the future.

So understood, the doctrine of parliamentary sovereignty is an intelligible doctrine, under which every exercise of parliamentary power will be effective. It has also the merit of being consistent with older learning. I am indebted to the scholarship of Professor R. O. McGechan for pointing out that in the passage from *1 Blackstone's Commentaries*, 160, 161, which *Dicey* (*op. cit.*, 41) sets out as the classical passage on the subject there occurs a curious misquotation of *Coke*. *1 Blackstone's Commentaries*, 160, says :

> The power and jurisdiction of Parliament, says Sir Edward Coke, is so transcendant and absolute, that it cannot be confined . . . within any bounds.

4 Coke's Institutes, 36, is referred to as the source of *Coke's* opinion, but the passage in the *Institutes* refers to " the power and jurisdiction of the Parliament, *for making of laws in proceeding by Bill* ". Earlier, in *4 Coke's Institutes*, 25, Coke had distinguished between an *Act* of Parliament and an *Ordinance* in Parliament, saying that the former " must have the consent of the Lords, the Commons, and the Royal Assent of the King ", while the latter " wanteth the threefold consent, and is ordained by one or two of them ". It cannot be doubted that, in insisting upon proceedings *by Bill* for the exercise of the power of Parliament, Coke was insisting upon the customary manner and form for so doing so far as was necessary in his times. In his times, indeed, the validity of " royal " legislation by Ordinance was an important and much agitated question. This important qualification in the passage from the *Institutes* was, as we have seen, omitted by *Blackstone*. We may confidently suppose, however, that he would not have disputed it, for, after describing minutely the forms of parliamentary action (*1 Blackstone's Commentaries*, 181-185), he concludes :

> An Act of Parliament, *thus made*, is the exercise of the highest authority that this kingdom acknowledges upon earth. It hath power to bind every subject in the land, and the dominions thereunto belonging; nay, even the King himself, if particularly named therein. And it cannot be altered, amended, dispensed with, suspended, or repealed, but *in the same forms*, and by the same authority of Parliament.

Of the *lex et consuetudo parliamenti*, *1 Coke's Institutes*, 11b, had also remarked : " *Ista lex est ab omnibus quaerenda, a multis ignorata, a paucis cognita.*" Referring to this, Lord Holt, C.J., observed in *Reg.* v. *Paty*, (1704) 2 Ld. Raym. 1105, 1114; 92 E.R. 232, 237, 238, that it is " a *multis ignorata* . . . because they will not apply themselves to understand it." Thus encouraged, the writer makes bold to submit that the conclusion from the foregoing examination of it must be that the sovereignty or power of Parliament is not, like political sovereignty, an absolute power; it is only an absolute *legal* power, and it must, therefore, be exercised in the prescribed legal manner. In the same way, for example, we commonly speak of an absolute power of testamentary disposition, but we do not mean a power to make a will in any manner that a particular individual may fancy. We mean a power to dispose of property by will in any way whatever, provided always that the formalities prescribed by the Wills Act are observed in making the will. And so it is also with Parliament. In the exercise of its legislative power, a sovereign Legislature may make any law whatever, provided that it follows the manner and form prescribed by the law in so doing. It follows that it would be competent for the New Zealand Parliament to pass " entrenched " legislation providing a restrictive process for future legislation upon the constitution or powers of a Second Chamber, or upon any other constitutional matters for which such safeguards might be desired, and providing also that the legislation itself should be repealed or amended only by means of that restrictive process.

* * * * *

Since writing the foregoing, the writer's attention has been drawn to an article in (1952) *65 Harvard Law Review*, 1361, by Dr. Erwin N. Griswold, Dean and Langdell Professor of Law, Harvard Law School, whose visit to New Zealand last year will be remembered by readers. The learned author takes a view of *Ndlwana's* case similar to that expressed above, and at p. 1371 describes it as " a sort of vigorous dictum ".

Liberty and Freedom

There is a subtle difference in the suggestions of the two synonyms, " liberty " and " freedom". The first word is Latin, the second Teutonic. We may notice that, of the " four freedoms " demanded by President Roosevelt in the name of mankind, two are negative, being freedoms *from*, not freedoms *to*. Had he chosen the word " liberty ", he would have stumbled on reaching these desired exemptions, because the phrase " freedom from " is idiomatic, but the phrase " liberty from " would have been impossible. " Liberty " thus seems to imply vital liberty, the exercise of powers and virtues native to oneself and to one's country. But freedom from want or from fear is only a condition for the steady exercise of true liberty. On the other hand, it is more than a demand for liberty; for it demands insurance and protection by provident institutions, which imply the dominance of a paternal government, with artificial privileges secured by law. This would be freedom from the dangers of a free life. It shows us liberty contracting its field and bargaining for safety first.—Santayana, *Dominations and Powers : Reflections on Liberty, Society, and Government* (New York : Charles Scribner's Sons. 1951).

NEGLIGENCE: THE STANDARD OF CARE.

By JOHN MUNKMAN.

The standard of care in actions for negligence has not attracted as much attention as it deserves: and yet there are many cases—especially those arising out of industrial injuries—where it is not enough for the plaintiff to produce evidence of the facts of the accident, but he must also offer proof of care which the defendant ought to have taken.

It is familiar law that "due care" is determined by what a reasonable man, "guided upon those considerations which ordinarily regulate the conduct of human affairs", would do or refrain from doing in given circumstances: *Blyth* v. *Birmingham Waterworks Co.*, (1856) 11 Ex. 781, 784; 156 E.R. 1047, 1049. Furthermore, it is well known that the legal fiction of a "reasonable man" is intended to eliminate the personal factor and strike a fair balance between those who are "unduly timorous" on the one hand and those who "nonchalantly disregard" obvious dangers on the other hand: per Lord Macmillan in *Glasgow Corporation* v. *Muir*, [1943] 2 All E.R. 44, 48.

But this broad principle of the conduct of a reasonable man as the criterion of "due care" is in itself no more than a starting-point. Now that actions for negligence are tried by a single Judge, instead of by a jury, Judges have tended more and more, in their search for objectivity, to elucidate the "considerations which ordinarily regulate the conduct of human affairs"; and the trend of recent case-law has revolved round three major factors—namely, the magnitude of the risk, practicability, and the "general and approved" practice of the profession or industry concerned.

THE MAGNITUDE OF THE RISK.

If, so far as anyone could foresee before the accident, there was only a *remote possibility* of injury to the plaintiff, the defendant is not required to take any precautions whatever: see *Fardon* v. *Harcourt-Rivington*, (1932) 146 L.T. 391, where a dog locked in a car broke a window and injured the plaintiff's eye, and *Bolton* v. *Stone*, [1951] 1 All E.R. 1078, where the plaintiff, who was outside the club ground, was hit by an unusual stroke over the boundary of the cricket pitch. But, said Lord Reid in the latter case, at p. 1086: "I do not think that a reasonable man . . . should disregard any risk unless it is extremely small."

Assuming that there is a perceptible danger of injury, the extent of the care to be taken, and the amount of money and resources to be applied to safety requirements, must be proportionate to the magnitude of the risk. Thus, a farmer need hardly concern himself for the safety of his men, unless he is using unfenced machinery. But "an exacting standard of care is incumbent on manufacturers of explosive shells": *Read* v. *J. Lyons and Co., Ltd.*, [1946] 2 All E.R. 471, 476. In the same case, Lord Macmillan said, at p. 477: "The law in all cases exacts a degree of care commensurate with the risk created." When there is grave danger to life which cannot otherwise be avoided, reasonable care may involve great expense and trouble—*e.g.*, the total dismantling of a furnace in a dangerous condition: *Henderson* v. *Carron Co.*, (1889) 16 R. (Ct. of Sess.) 633.

In *Paris* v. *Stepney Borough Council*, [1951] 1 All E.R. 42, the well-known case where it was held that a one-eyed man ought to have been given goggles when hammering at a rusty bolt, the House of Lords have made it clear that the magnitude of a risk may involve two factors. On the one hand, if there is great likelihood of accidents happening—if they are frequent—this calls for greater safety measures: if, on the other hand, accidents are not very likely, but will cause grave injury if they do occur, this likewise calls for greater care. Where accidents are likely to happen, and in addition are likely to have grave results—as is frequently the case in iron foundries, for example—a very high degree of care is necessary.

PRACTICABILITY.

The question of practicability has already been touched upon in pointing out that great expense and trouble are not required unless the risk is considerable. Thus, in a recent case, the Court of Appeal said that (apart from special circumstances) it would be absurd to say that a man must always be stationed at the foot of a ladder to keep it from slipping: *McCarthy* v. *Coldair, Ltd.*, [1951] 2 T.L.R. 1226.

Likewise, cases seldom occur where the danger is so great that an operation must be stopped altogether, or slowed down to an uneconomic degree: per Asquith, L.J., in *Daborn* v. *Bath Tramways Motor Co., Ltd., and Trevor Smithey*, [1946] 2 All E.R. 333, 336; but even this may be necessary if there is a grave risk to life, as in *Henderson* v. *Carron Co.*, (1889) 16 R. (Ct. of Sess.) 633.

The law does not compel a man to do the impossible, and he cannot be held liable where there is no known method of preventing an accident. Where a safety device has been discovered fairly recently, it seems that a defendant is entitled to wait for a reasonable time to measure its advantages and disadvantages; and, in any case, the difficulty of obtaining the device must be taken into account if it is in short supply: *Whiteford* v. *Hunter*, [1950] W.N. 553, a medical case where the House of Lords held on the facts that failure to use a new instrument in diagnosis was not negligent.

"GENERAL AND APPROVED PRACTICE."

It has been held in a series of medical cases that "A defendant . . . can clear [himself] if he shows that he has acted in accord with general and approved practice": per Lord Alness in *Vancouver General Hospital* v. *McDaniel*, (1934) 152 L.T. 56, 57, 58, followed in *Marshall* v. *Lindsey County Council*, [1935] 1 K.B. 516, 540, *Mahon* v. *Osborne*, [1939] 2 K.B. 14, 43; [1939] 1 All E.R. 535, 556, 557, and *Whiteford* v. *Hunter*, [1950] W.N. 553.

The justification for taking general practice into consideration (especially in matters of a specialist kind) is that skilled judgment may be necessary to assess (i) the degree of risk, and (ii) what measures are practicable to avoid it. These factors, without doubt, are the primary criterion, and "general practice" is a secondary criterion which depends on them for its validity; for, as Sir Alexander Cockburn, L.C.J., said in *Blenkiron* v. *Great Central Gas Consumers Co.*, (1860) 2 F. & F. 437, 440; 175 E.R. 1131, 1132: "no one can claim to be excused for want of care because others are as careless as himself." Accordingly, "general and approved practice" means a practice approved, not only by experts, but also, in the last resort, by the Court itself. In England, at any rate, though the posi-

tion may be different in Scotland, the Courts (including the House of Lords) have never hesitated to investigate for themselves, with the aid of expert evidence, the soundness of any general practice relied upon by a defendant. Thus, conformity to general practice has been held to fall short of due care in the following cases, among others: *Lloyds Bank, Ltd.* v. *E. B. Savory and Co.*, [1933] A.C. 201 (bank's system for preventing clearance of stolen cheques broke down when cheques paid in for credit at another branch), *Manchester Corporation* v. *Markland*, [1936] A.C. 360 (inspection once a week for water bursts was insufficient), and *Barkway* v. *South Wales Transport Co., Ltd.*, [1950] 1 All E.R. 392 (omnibus company should have directed drivers to report accidents which might cause an "impact fracture" of tyres, though this was not the general practice).

"NEGLIGENCE OF OMISSION."

This question of trade practice received application in a forceful and thoroughgoing dictum of the Lord President, Lord Dunedin, in *Morton* v. *William Dixon, Ltd.*, [1909] S.C. (Ct. of Sess.) 807, 809:

> Where the negligence of the employer consists of what I may call a fault of omission, I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds, either—to show that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or—to show that it was a thing which was so obviously wanted that it would be folly . . . to neglect to provide it.

This dictum of a great Judge (who, however, often expressed himself in forceful terms) has received qualified approval in three successive cases in the House of Lords—namely, *Bristol Aeroplane Co., Ltd.* v. *Franklin*, (1948) 92 Sol. Jo. 573 (unreported on this point), *Barkway* v. *South Wales Transport Co., Ltd.*, [1950] 1 All E.R. 392, and *Paris* v. *Stepney Borough Council*, [1951] 1 All E.R. 42. Lord Normand, who imported the dictum from Scotland, was careful to indicate on each occasion that the passage contained some rhetorical exaggeration—*e.g.*, "absolutely necessary", "folly"—and said in *Paris's* case, at p. 49, that "it does not detract from the test of the conduct and judgment of the reasonable and prudent man". In New Zealand, the dictum in its literal form has been criticized in the dissenting judgment of Fair, A.C.J., in *Donohue* v. *Union Steam Ship Co. of New Zealand, Ltd.*, [1951] N.Z.L.R. 862, 879, where he points out that it is a novel idea to make "foolishness" the test of negligence. It is surprising, therefore, that the Inner House of the Court of Session have recently affirmed Lord Dunedin's test in more trenchant terms than ever, overriding the qualifications added by Lord Normand: see *Gallagher* v. *Balfour Beatty and Co., Ltd.*, (1951) 101 L.J. 455 (the case does not appear to have been reported in the Scots Law Reports or in other journals). The law in England, at least, is not so uncompromising. It is submitted that the correct principle, both in England and Scotland, is this: *General and approved practice in an industry is a proper guide in determining the standard of care; but it is not inflexible, and may be departed from where there is a failure to take account of some proved danger.* The way in which the principle is stated, is of some importance where industrial accidents are concerned, for economical working is a paramount objective in industry, and there is often a tendency to lean more towards economy than towards safety.

This article has condensed a large subject into a very small space. In its application to the preparation of evidence, it is intended to draw attention to the necessity for proof of the following points: (i) that the risk of injury could (or could not) have been appreciated before the accident; (ii) the magnitude of the risk; (iii) what safety measures were (or were not) practicable; (iv) "general and approved practice."

MR. ARTHUR MANSON.

Fifty-seven Years of Service.

A remarkable period of service in law offices is disclosed by the career of Mr. Arthur Horatio Manson of Palmerston North. He was born in Wellington in 1880, and lived at Thorndon and was at school there. In 1894, he commenced as office-boy to the late Mr. W. T. L. Travers, who was then in practice in Wellington. He was there for a year, and then went with his family to Palmerston North. A little later, he began work in the office of Mr. J. P. Innes, who was then in practice on his own account. He stayed in that office for seven years and seven months. On March 3, 1903, he entered the office of the late Mr. H. R. Cooper, then practising in Palmerston North under the name of Bell, Gully, and Cooper. Until Mr. Manson's retirement last Christmas, he remained continuously in the service of that firm, though of course it has changed its name once or twice in the interim. Mr. J. W. Rutherfurd joined it in 1913, and the name was changed to Cooper and Rutherfurd; Mr. S. W. Rapley came in in 1920, and it became Cooper, Rapley, and Rutherfurd; and, three years ago, following Mr. Cooper's death, Mr. J. A. L. Bennett joined, and the name was once more changed.

Mr. Manson was one of the fast-disappearing class of true conveyancing clerks. He gave his last firm nearly forty-nine years of unbroken and extraordinarily faithful service. His retirement was due solely to ill health; and he is now living very quietly in Palmerston North.

DEVIL'S OWN GOLF TOURNAMENT.

The Labour Day week-end mecca of the golf-players of the profession was, as usual, Palmerston North and the "Devil's Own" Tournament. This year, they represented twenty-six different towns, and their attendance was a record one. Favoured by good weather, the gathering achieved its accustomed success, socially and otherwise, and the hospitality of the Manawatu practitioners was outstanding.

The results of the play were as follows:

Devil's Own Cup: Winner, I. W. Mackie (Waipukurau); Runner-up, P. S. Page (Te Awamutu).

The Ancient Lights: Winner, A. M. Hollings (Wellington); Runner-up, P. C. Miles (Feilding).

The Paupers' Appeal Stakes: Winner, J. A. McBride (Palmerston North); Runner-up, S. A. Wiren (Wellington).

The Dorrington Handicap: Winner, E. L. Bartleet (Auckland); Runner-up, D. L. Taverner (Carterton).

The Dock Briefs: Winner, W. S. Alcock (Palmerston North).

The Guarantee Fund Handicap: Winner, D. B. Stanford (Marton); Runner-up, J. P. Quilliam (New Plymouth).

Stabilization Handicap: Winner, F. P. Fawcett (Feilding); Runner-up, J. A. Ongley (Palmerston North).

Best Two Qualifying Rounds: Winner, F. P. Fawcett (Feilding).

The Certiorari Handicap: Winner, F. C. Christensen (Marton); Runner-up, J. Fisher (Te Awamutu).

Public Trust Bogey Handicap: Winner, J. R. E. Bennett (Wellington); Runner-up, R. J. Carruthers (Pahiatua).

Teams Match: Winners, St.L. Reeves, R. D. Jamieson, W. Middleton, and A. W. Middleton (all of New Plymouth).

Distress Foursome: Winner, F. D. O'Flynn and D. Perry (both of Wellington).

Butterworth's Hurdle Four Ball: Winners, M. Barltrop (Feilding) and D. B. Stanford (Marton).

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

In the Court of Appeal.—"Earlier this morning, you shocked me with your submission that the Commissioner of Taxes might be bound by the entry made by the appellant company in its books," said Finlay, J., to counsel in a recent tax case. "Now," he continued, "you have given me another shock, by suggesting that we are affected by what the Court of Appeal said in 1946 when determining the effect of the National Adjustment Expenditure Act upon the company's lease." "Well, it's just on one o'clock," observed the President (Northcroft, J.) mildly, "and it might be advisable to take the luncheon adjournment to give Mr. Justice Finlay an opportunity to recover from the two shocks he has received."

The Assimilating Glance.—In a recent issue, *Time* has drawn attention to the brilliant mental attainments of two gentlemen named Amon Carter and General Robert E. Wood, respectively. Of the first, it says: "Limited as his education has been, he can get the gist of a complicated legal document or accountant's report at a glance"; and, of the second, no less remarkable: "Once, at an evening meeting, a lawyer handed Wood a complicated report on a project. Wood leaped through it in a matter of seconds." A correspondent from Suva (to whom Scriblex is indebted) has noted Arthur Kramer's commentary in *The New Yorker* upon this noteworthy situation:

> "*I knew a lawyer once—*
> *Accounted, I fear, a dunce—*
> *Who'd take half an hour to leap*
> *Through a simple, sixty-page brief.*
> *Lawyers of normal ability,*
> *Of course, have greater facility,*
> *And some are of such agility*
> *They can read and understand*
> *An opinion by Learned Hand*
> *As quickly as you'd peruse*
> *A column of Hollywood news.*
> *But few of the local Bar—*
> *At least that I've met so far—*
> *Are smarter*
> *Than Mr. Carter*
> *Or as good*
> *As General Wood,*
> *Both of whom are speedy*
> *Indeedy.*"

The Law's Hunger.—It is very rare indeed to find the Council of any Law Society giving its financial support to private litigation. An instance, however, is to be found in the case of *Bentley, Stokes and Lowless* v. *Beeson*, in which in July, 1951, Roxburgh, J., decided, on appeal against the Special Commissioners of Income Tax, that this popular and courageous firm of solicitors were entitled to deduct, in computing their tax liability, expenses in entertaining to luncheon and dinner clients who liked to eat while asking for and receiving advice on their business affairs. The Council of the Law Society permitted evidence to be given on its behalf that the entertainment of existing clients, whether with a view to retaining them as clients or with a view to obtaining new business, was not unprofessional, and that it was not uncommon for solicitors who were pressed for time to entertain clients at luncheon and there discuss their business affairs. An appeal to the Court of Appeal failed, and the Board of Inland Revenue has now obtained leave to appeal to the House of Lords, but only upon terms that in any event the Board pay its own costs. It has now been decided by the Council that, in the event of the case going to the House of Lords, financial support will be given to Messrs. Bentley, Stokes and Lowless in respect of their costs. This seems to be one of those cases where the principle is great even if the stake is small.

The Function of a Judge.—In concluding an article on "The Coloured Voters' Case in South Africa" in (1952) *65 Harvard Law Review*, 1361, 1372, Dean Erwin Griswold, Dean of the Harvard Law School, who was in New Zealand last year, says:

> Through many years, and in many different places, independent Judges have thus carried out the function of Courts to decide controversies between citizens and between citizens and their Government. In such judgments, we hear the echoes of Lord Coke, when, quoting from Bracton, he spoke these words to the King: *Non sub homine sed sub deo et lege.* Some will say that Judges are men, too, and that Judges also can be tyrants. But to speak thus is to miss the point, as this case itself shows. For the ambit of the Judge is limited. His normal action is to restrain, to protect. He acts defensively. It would not be well to underestimate the contribution to history which has been made by the firm wisdom of courageous Judges.

In the present state of the world, it would seem that at times more is needed than (to use a phrase of Edmund Burke's) the cold neutrality of an impartial Judge. Sectional intolerance and Executive wiles require a stronger stand.

From My Notebook. When entirely in the right, never reduce the account: there are a dozen ways of making an allowance.

The author of *The Manual of Fire Service Law* (Thames Bank Publishing Co., Ltd., 1951) is one Peter Pain, M.A., barrister-at-law, who has himself had considerable experience as a member of the Fire Service.

When giving evidence on behalf of the Bar Council before the Royal Commission on Marriage and Divorce on May 21, Mr. R. J. A. Temple, Q.C., said that in his twenty-one years' experience he had not come across more than half a dozen cases in which it would be held that there was collusion. Mr. Latey, an acknowledged authority in divorce, gave evidence that his experience was the same as Mr. Temple's.

In *Adair* v. *McKenna*, [1951] *Sheriff Court Reports*, 40, a mechanic, while repairing a motor-vehicle standing by the roadside, was alleged to be so much under the influence of drink as to be incapable of having proper control of the vehicle, and he was charged under s. 15 (1) of the Road Traffic Act, 1930. It was held that, as his authority did not extend to permission to drive the car, he had not committed any offence, and the charge was dismissed.

THEIR LORDSHIPS CONSIDER.

By COLONUS.

Power of Attorney.—It is common practice to include in a power of attorney a clause whereby the principal "ratifies and confirms and agrees to ratify and confirm whatsoever the attorney . . . shall do or purports to do by virtue of these presents". The value of this clause, and the extent to which persons dealing with the attorney may rely on it, is of some practical importance, as the Midland Bank of England found to its cost: *Midland Bank, Ltd.* v. *Reckitt*, [1933] A.C. 1. Here an attorney, being pressed by his bank to liquidate his overdraft, drew cheques on his principal's account in another bank and lodged them to the credit of his own account. On discovering the facts, the principal brought an action against the attorney's bank for damages for conversion of the cheques, and succeeded. In respect of the defence that the clause quoted above protected the bank, Lord Atkin clearly explained the limits of the clause, at p. 18:

> The clause in some such form is of long standing. It does not appear to be happily worded; for a ratification in advance seems to contradict the essential attributes of ratification as generally understood. It cannot, I think, be construed as extending the actual authority given by the power of attorney; it may amount to a promise to adopt acts done within the ostensible authority; and this strengthens the position of those who rely on the ostensible authority by an express promise as well as by an estoppel. If this be so it is difficult to see how the promise could be available except to someone who was aware of it and who acted on the strength of it. But in any case it would appear to be a highly improbable construction to suppose that a principal using this form has precluded himself from objecting to a dealing with his property by a person who had notice in ordinary circumstances that the agent was exceeding his authority actual and ostensible. It would mean that the principal was saying either "I give you actual authority within defined limits but ostensible authority to do what you like with my property so long as you pretend ('purport') to be doing it under this document"; or "I give you similar actual authority." Such a construction would make powers of attorney a danger instead of a business facility and would certainly defeat the intention of any reasonable principal. I think, therefore, that the notice in this case defeats this defence.

In other words, the House considered that the bank, being notionally aware that the agent was feathering his own nest, could not claim that this was in pursuance of his principal's affairs and that the principal should confirm such acts.

Custom.—"The exclusion of women from all public offices is a relic of days more barbarous than ours, but it must be remembered that the necessity of the times often forced on man customs which in later years were not necessary . . . Customs are apt to develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared": Lord Sankey, L.C., delivering the judgment of their Lordships in *Edwards* v. *Attorney-General for Canada*, [1930] A.C. 124, 128, 134.

Laches.—In *Erlanger* v. *New Sombrero Phosphate Co.*, (1878) L.R. 3 App. Cas. 1218, a syndicate which had acquired phosphate mines formed a company to purchase the mines from the syndicate's nominees, the price being about double what the syndicate had paid. The shareholders, on ascertaining the facts, sought to have the company's contract rescinded as inequitable, and succeeded. One defence was that relief had not been sought with sufficient promptitude. Lord Penzance, who pointed out that the bulk of the shareholders could not take action till they came to a knowledge of the facts, said, at pp. 1230, 1231:

> Now, on this question of delay, I confess that I do not think it easy, guiding myself by any decided cases, to come to a conclusion adverse to the company's claim. The nearest approach to a definition of the equitable doctrine upon this head which is to be found amongst the cases cited, is the statement made in the case of *The Lindsay Petroleum Company* v. *Hurd* (L.R. 5 P.C. 221). Delay is there said to be "material where it would be practically unjust to give a remedy either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were to be afterwards asserted."
>
> How far the company has brought itself by its conduct within either branch of this definition, I will presently inquire, but I think it is clear that the company having, in the first instance, a right to relieve itself from this contract, which the promoters have unfairly fastened upon it, it is for the vendors to show affirmatively that the company has forfeited that right. The actual lapse of time before commencing the suit was not very great. Delay, as it seems to me, has two aspects. Lapse of time may so change the condition of the thing sold, or bring about such a state of things that justice cannot be done by rescinding the contract subject to any amount of allowances or compensations. This is one aspect of delay, and it is in many cases particularly applicable to property of a mining character. But delay may also imply acquiescence.

Public Men Criticized.—The *Natal Witness* of May 16, 1883, published the following article:

> Some time ago we stated in these columns that Mr. John Shepstone, whilst in Zululand, had committed a most unprovoked and altogether incomprehensible assault upon certain Zulu chiefs. At the time the statement was made a good deal of doubt was thrown upon the truth of the story. We are now in a position to make public full details of the affair, which the closest investigation will prove to be correct. A representative of this journal, learning that a deputation had come to Natal to complain of the attack, met five of the number, and in the presence of the competent interpreters took down the stories of each man.

The article then gave at length the statements so taken down, which disclosed, if true, the grossest misconduct on the part of Mr. Shepstone, who brought action to recover damages for libel. The case reached their Lordships as *Davis and Sons* v. *Shepstone*, (1886) L.R. 11 App. Cas. 187, and Lord Herschell, L.C., delivering the judgment of their Lordships, pointed out, at p. 190:

> There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the Press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed, or discreditable language used. It is one thing to comment upon or criticize, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct.

Authorities.—Seventy or eighty years ago, their Lordships were not backward in rebuking counsel appearing before them, and, furthermore, the rebukes were perpetuated in the judgments. In *Lyell* v. *Kennedy* (*No. 2*), (1883) 9 App. Cas. 81, Lord Blackburn opened his speech with this bombshell, at pp. 84, 85:

> My Lords, this case has occupied a good deal of time, and a vast number of cases have been cited; but, as it seems to me, most of them are authorities upon matters which nobody would dispute, or for propositions which are not involved in the question in controversy before us.