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CRIMINAL LAW: UNSWORN STATEMENT FROM THE DOCK.

THE recent judgment of the Court of Appeal in *Reg.* v. *Kerr* (to be reported) settles once and for all the often-discussed problem whether an accused person, in addition to calling evidence, has the right to make an unsworn statement from the dock. The Court of Appeal also indicated the point of time in a trial at which an unsworn statement from the dock should be made.

The circumstances in which the matter came before the Court were that the appellant was charged with indecent assault on a female. During the course of the trial, counsel for the accused called evidence, and he also sought the opportunity for the accused to make an unsworn statement from the dock. The learned Judge, Mr. Justice North, declined to allow the accused to make the proposed unsworn statement. The accused was convicted, and Mr. Justice North gave a certificate under s. 3 (*b*) of the Criminal Appeal Act, 1945, that the case was a fit one for appeal.

Before we consider the Court of Appeal's judgment, it may be of interest to trace the history of the practice of allowing, in changing circumstances, the accused to make an unsworn statement from the dock in the course of his trial.

Until 1836, in Great Britain, prisoners on trial in cases of felony were not allowed either to give evidence on their own behalf or (except in cases of treason) to be defended by counsel, although they were allowed counsel to cross-examine witnesses. While the laws of evidence prevented the accused from giving testimony on his own behalf under oath, it was manifest that a great injustice might often be done unless the story of the accused was allowed to be heard by the jury in some form. To meet that difficulty, Judges adopted the practice of permitting the prisoner to make an unsworn statement from the dock and to address the jury on his own behalf.

In 1836, the Prisoners' Counsel Act (6 & 7 Will. 4, c. 114) was passed, conferring upon prisoners the right to make their full defence by counsel. Notwithstanding that, accused persons were still deprived of the privilege of giving evidence in their own defence. Many Judges held that this Act, in effect, took away from prisoners who were defended by counsel the right hitherto accorded them of making a statement on their own account.

Acting upon this belief, Coleridge, J., in *Reg.* v. *Boucher*, (1837) 8 C. & P. 141; 173 E.R. 433, refused to allow a prisoner to make a statement after his counsel had addressed the jury, observing, at p. 141; 433: "Prisoner, your counsel has spoken for you. I cannot hear both." The same Judge in *Reg.* v. *Beard*, (1837) 8 C. & P. 142; 173 E.R. 434, stopped the prisoner's counsel from telling the jury facts related to him by the prisoner. He said, at p. 142; 434:

> I cannot permit a prisoner's counsel to tell the jury anything which he is not in a situation to prove. If the prisoner does not employ counsel, he is at liberty to make a statement for himself and tell his own story; which is to have such weight with the jury, as all circumstances considered it is entitled to; but if he employs counsel, he must submit to the rules which have been established with respect to the conducting of cases by counsel.

In the following year, Alderson, B., allowed a prisoner to make a statement before his counsel addressed the jury in *Reg.* v. *Malings*, (1838) 8 C. & P. 242; 173 E.R. 478. In that case, the prisoner's counsel had commenced his address to the jury and had expressed regret that, as the prisoner was defended by counsel, he could not be allowed to make his own statement. Thereupon Alderson, B., said, at pp. 242, 243; 478:

> I see no objection in this case to his doing so . . . I think it is right that a person should have an opportunity of stating such facts as he may think material, and that his counsel should be allowed to comment on that statement, as one of the circumstances of the case. On trials for high treason, the prisoner is always allowed to make his own statement after his counsel has addressed the jury.

At the same Assizes, Gurney, B., in *Reg.* v. *Walking*, (1838) 8 C. & P. 243; 173 E.R. 479, permitted the same practice to be followed after conferring with Alderson, B., but, he added, at p. 244; 479: "I think that it ought not to be drawn into a precedent". In that case, the prisoner was allowed to read a written statement.

In the same year, in *Reg.* v. *Burrows, Huddy, and Day*, (1838) 2 M. & Rob. 124; 174 E.R. 236, Bosanquet, J., refused to allow a prisoner who was defended by counsel to make a statement. He was told of the decision of Alderson, B., in the previous case, and also of a similar permission by Lord Denman, C.J., but expressed the opinion that under the then recent statute the prisoner and his counsel could not both make statements.

Later in that year, Patteson, J., refused, in a trial for murder, in the case of *Reg.* v. *Rider*, (1838) 8 C. & P. 539; 173 E.R. 609, to allow the prisoner, who was defended by counsel, to make a statement. He there said, at p. 540; 609, 610:

> The general rule certainly ought to be, that a prisoner defended by counsel should be entirely in the hands of his counsel, and that rule should not be infringed on, except in very special cases indeed. If the prisoner were allowed to make a statement, and stated as a fact anything which could not be proved by evidence, the jury should dismiss that statement from their minds; but if what the prisoner states is merely a comment on what is already in evidence, his counsel can do that much better than he can.

The question came up again before Alderson, B., in *Reg.* v. *Dyer*, (1844) 1 Cox C.C. 113. Counsel for the prisoner remarked to the jury upon the hardship to the prisoner, who could himself give no evidence to contradict the statement of the witnesses against him. The learned Baron interrupted him, saying:

> You have no right to make such an observation. The prisoner might make his own statement in explanation or contradiction of the evidence against him.

And, later, he added:

> I would *never* prevent a prisoner from making a statement though he has counsel. He may make any statement he pleases before his counsel addresses the jury, and then his counsel may comment upon that statement as part of the case. If it were otherwise the most monstrous injustice might result to prisoners. If the statement of the prisoner fits in with the evidence it would be very material and we should have no right to shut it out.

In *Reg.* v. *Williams*, (1846) 1 Cox C.C. 363, Rolfe, B., on being requested by the prisoner's counsel to allow the accused to make a statement to the jury before his counsel should address them, said, at p. 363: "That is quite a new request. I never heard of such a thing." He, however, upon *Dyer's* case being cited to him, approved of it and said it was a proper practice to follow.

The point was next dealt with by Byles, J., in *Reg.* v. *Taylor*, (1859) 1 F. & F. 535; 175 E.R. 841. He was referred to *Dyer's* case and *Malings's* case, the latter of which was erroneously attributed to Patteson, J., instead of to Alderson, B.; but he nevertheless refused to permit a defended prisoner to make a statement. He said, at p. 536; 841:

> I foresee to what it will lead: to prisoners being examined on their own behalf without the sanction of an oath, and then a speech commenting upon their statements; but I will allow the prisoner to exercise the option of either speaking himself or of having his counsel to speak for him.

The prisoner then addressed the jury.

In 1860, Martin, B., after consulting Channell, B., allowed a prisoner to make a stament before his counsel's speech, on the authority of *Malings's* case (there called *Martin's* case), though he said he was entirely opposed to the practice of allowing prisoners to make any statements to the jury when they were defended by counsel, yet, as there was a precedent, he allowed it because of the importance of the case. He considered it a bad practice, however.

In *Reg.* v. *Weston*, (1879) 14 Cox C.C. 346, tried before Lord Cockburn, L.C.J., counsel for the defence, at p. 350, regretted that he could not give the prisoner's account of the matter, whereupon Lord Cockburn, L.C.J., is reported to have said, at p. 350:

> He might do so, as the prisoner's counsel were in place of the prisoner, and entitled to say anything which he might say, for which he would be entitled to consideration and credence if consistent with the rest of the evidence.

In 1881, a resolution was passed by the English Judges as follows:

> In the opinion of the Judges it is contrary to the administration and practice of the criminal law as hitherto allowed that counsel for prisoners should state to the jury, as alleged existing facts, matters which they have been told in their instructions on the authority of the prisoner but which they do not propose to prove in evidence.

In *Reg.* v. *Shimmin*, (1882) 15 Cox C.C. 122, Cave, J., is reported to have said, in effect, at p. 123:

> Every prisoner was entitled to have an opportunity of making a statement, and offering his explanation of the charges alleged against him . . . whether he be defended by counsel or not; in the former case at the conclusion of his counsel's speech, with this proviso, that what he states from the dock is subject to the right of reply . . . as being in the nature of new matter.

That was the rule which he intended to follow and which was concurred in by the other Judges.

In *Reg.* v. *Millhouse*, (1885) 15 Cox C.C. 622, Lord Coleridge, L.C.J., refued to extend the rule to a case where a prisoner proposed to call witnesses. He said, at p. 622:

> By the resolution of the majority of the Judges in which I did not agree, but by which I am bound, it appears to me that it is undoubtedly competent for the prisoner to make a statement of facts to the jury, and the proper time is after his counsel has addressed the jury.

And he added, at p. 623:

> I cannot permit the prisoner to make a statement of fact to the jury, he having elected to call witnesses. To allow such a course would be to give him a most unfair advantage, especially if he were an intelligent man. If it were to be allowed, the result would be that, after counsel had made a defence and called witnesses to facts . . . then the prisoner, who was not liable to be cross-examined, could supplement what had been said by his counsel and witnesses, and supply facts by means of a statement made without the sanction of an oath, which it would be impossible to test by the ordinary means of cross-examination . . . it would be most mischievous and contrary to all precedent to allow the prisoner to call witnesses and then to volunteer his own statement, and perhaps ingeniously supply what was omitted in the speech of his counsel or the evidence of the witnesses—a statement which in the present state of the law could not be contradicted, and upon which the prisoner cannot be cross-examined.

In *Reg.* v. *Doherty*, (1887) 16 Cox C.C. 306, Stephen, J., permitted a prisoner who had not called witnesses to make a statement before his counsel's speech, observing that, although he could not be questioned upon his statement, his making it would give counsel for the prosecution a right of reply.

In 1898, the Criminal Evidence Act, 1898 (61 & 62 Vict., c. 36), was passed making all accused persons competent witnesses on their own behalf. By s. 1 (*h*) of that Act, it is provided as follows:

> Nothing in this Act shall affect . . . any right of the person charged to make a statement without being sworn.

This subsection gives the right to make an unsworn statement a statutory consecration.

The first case in which the point arose after the passing of this Act was *R.* v. *Pope*, (1902) 18 T.L.R. 717. When the prisoner's counsel asked that the prisoner be allowed to make a statement from the dock before his counsel addressed the jury, Mr. Justice Phillimore, before whom the matter was pending, said, at p. 718:

> Now that the prisoner is entitled to give evidence on his own behalf under the Criminal Evidence Act, 1898, is not his right to make a statement gone?

But, on his attention being drawn to para. (*h*), he allowed it. The same course was followed by Darling, J., in *R.* v. *Sherriff*, (1903) 20 Cox C.C. 334.

In *R.* v. *Perry and Pledger* [1920] N.Z.L.R. 21, 23, Hosking, J., delivering the judgment of the Court of Appeal, said our practice in criminal trials, whether the accused is defended by counsel or not, is to permit

him as part of his defence to make a statement not on oath if he does not elect to be sworn as a witness. This right or privilege is not provided for by the Crimes Act, 1908, unless it is involved in s. 424 (2), which enacts as follows :

> Upon the trial of any accused person, whether he is defended by counsel or not, he shall be allowed, if he thinks fit, to open his case, and after the conclusion of such opening shall be entitled to examine such witnesses as he thinks fit, and, when all the evidence is concluded, to sum up the evidence.

But, notwithstanding any silence of the Act on the subject, the right of privilege referred to has always been allowed.

In *Reg.* v. *Kerr*, the judgment of the Court of Appeal was delivered by Finlay, J., who said that the learned trial Judge, adopting what the members of the Court of Appeal thought was the proper course in the circumstances, acted upon the authority of the only decision that was before him—namely, *R.* v. *Millhouse*, (1885) 15 Cox C.C. 622—and declined to allow the appellant to make the unsworn statement proposed.

What was primarily involved in the appeal was the question of whether or not *R.* v. *Millhouse* was a precedent which ought to be followed in New Zealand at the present time. The judgment went on to say that that case

> has been followed in three cases in Queensland in recent years, but departed from there in one, and that the most recent. It was followed first by *Sir William Webb*, C.J., in *R.* v. *Sturdy* ([1946] Q.W.N. 41). It was next followed by Mr. Justice *E. A. Douglas* in somewhat curious circumstances in *R.* v. *Daniel* ([1946] Q.W.N. 42); and then, finally, it was followed by Mr. Justice *Stanley* in *R.* v. *Toms* ([1947] Q.W.N. 66).
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> With these authorities in existence, it might have been expected that the authority of *R.* v. *Millhouse* would have been accepted without question in subsequent criminal trials in Queensland. This, however, did not happen, for in *R.* v. *Harrald (No. 2)* ([1948] Q.W.N. 36) *Mansfield*, S.P.J., allowed the prisoner to make a statement from the dock and call witnesses. Permission to do so was granted after argument in which *R.* v. *Sturdy*, *R.* v. *Daniel*, and *R.* v. *Toms* were specifically referred to. The prisoner was found guilty, so that the Judge's ruling was not made the subject of appeal. The prisoner having been convicted, the Crown had no interest in doing so, and, as the ruling was entirely advantageous to the prisoner, the prisoner had no ground for complaint.
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> In *R.* v. *McKenna* ([1951] St.R.Qd. 299), *Mansfield*, S.P.J., had followed the course adopted by him in *R.* v. *Harrald (No. 2)*, and no comment of any kind concerning it was made by the Court of Criminal Appeal, although the fact that the prisoner had called evidence as well as made a statement from the dock is mentioned in the judgment.

Their Honours said that, in the result, the position in Queensland could only be said to be to some extent uncertain. They continued :

> In New Zealand, we have no authority in point. The nearest approach is *R.* v. *Perry and Pledger*, [1920] N.Z.L.R. 21, in which the practice of allowing an accused person to make an unsworn statement as part of his defence was recognized. In the judgment of the Court, the making of such a statement is described as "a right or privilege".
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> It is to be observed, however, that s. 5 of the Evidence Act, 1908, which first appeared in a somewhat different form as s. 398 of the Criminal Code Act, 1893, contains no proviso such as appears in para. (*h*) of s. 1 of the Criminal Evidence Act, 1898 (Eng.), which reads as follows: "Nothing in this Act shall affect . . . any right of the person charged to make a statement without being sworn". It would appear that, but for this provision, *Phillimore*, J., in *R.* v. *Pope*, (1902) 18 T.L.R. 717, might have been disposed to hold that the right to make an unsworn statement was revoked by the statutory right to give evidence. It is a view which has much to commend it and has won specific acceptance in at least one of the superior Courts of Canada: see *R.* v. *Krafchenko*, (1914) 17 D.L.R. 244. That question, however, does not arise before us because counsel for the Crown did not submit that the right or privilege no longer exists. It may perhaps be that in future proceedings the existence of that right or privilege will be challenged. Meantime, however, the right or privilege must be recognized by this Court and recognition of it leaves open only the question as to how far *R.* v. *Millhouse* is an authority which the Courts in New Zealand are constrained to follow.

Their Honours said that Lord Coleridge's reasons in *Millhouse's* case appeared to be largely founded upon an anticipation of evil consequences if a prisoner were allowed to make a statement of fact in addition to calling evidence. The judgment in this respect reads (p. 623) :

> To allow such a course would be to give him a most unfair advantage, especially if he were an intelligent man. If it were to be allowed, the result would be that, after counsel had made a defence and called witnesses to facts . . . then the prisoner, who was not liable to be cross-examined, could supplement what had been said by his counsel and witnesses, and supply facts by means of a statement made without the sanction of an oath, which it would be impossible to test by the ordinary means of cross-examination.

This quotation is amplified by the later statement, at p. 623 :

> but it would be most mischievous and contrary to all precedent to allow the prisoner to call witnesses and then to volunteer his own statement, and, perhaps ingeniously supply what was omitted in the speech of his counsel or the evidence of the witnesses—a statement which in the present state of the law could not be contradicted, and upon which the prisoner cannot be cross-examined.

It appeared to their Honours, however, that there was really no logical basis for refusing to allow an unsworn statement simply because evidence was called for the defence: and, indeed, the difficulty pointed out by Lord Coleridge could at least partly be met by requiring the prisoner to make his statement before evidence was called for the defence.

On the other hand, their Honours said that they could not but feel that the interests of justice demanded that the prisoner should have both rights concurrently. They continued :

> If an accused can prove through witnesses certain facts confirmatory or corroborative of the facts, or some of them, which he asserts in his statement, or can prove through witnesses facts to which his statement does not extend, it is difficult to conceive that he is not entitled in the interests of justice to establish those particular facts by the sworn testimony of others. It may be, of course, that his statement will extend to assertions of fact beyond the facts purported to be established by the testimony of his witnesses, but at least, it seems to us, he is entitled to reinforce his assertion as to as many facts as possible by the testimony of witnesses.
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> We think it necessary, however, to say that, in our opinion, the practice that should be adopted in cases in which a prisoner desires both to call witnesses and to make an unsworn statement is that the statement should be made before any evidence is called for the defence.

In the face of the authority of Lord Coleridge, L.C.J., their Honours came to their conclusion with diffidence, but they reminded us that so eminent a Judge as Mr. Justice Stephen in 1889 allowed Mrs. Maybrick both to make a statement and to call evidence, and that there had been a lack of uniformity of the practice in Queensland.

In the circumstances, the Court of Appeal stated it could not hold that the refusal to allow the appellant to make a statement did not cause a substantial miscarriage of justice. The conviction was quashed and an order for a new trial was made.

SUMMARY OF RECENT LAW.

CONTRACT.

Breach—Repudiation by Anticipatory Breach—Letter taken to be Repudiation—Letter, in Prevailing Circumstances, not showing Intention of Repudiation—" Proper price " to be paid for Company Shares ascertainable by Valuation of Company's Assets, less Any Liabilities. In October, 1945, as the result of an interview between the appellant's solicitor and the respondent and his solicitor and of three letters between the two solicitors, an arrangement was reached by the parties in the circumstances set out in the judgment whereby the respondent was to purchase the appellant's shares in the private company of which they had been directors and the principal shareholders. The price was to be " such price as may be found to be the proper price " after valuations had been made of the company's assets and a public accountant had fixed the amount owing by the appellant to the company. Any disputes which might " possibly arise between the parties in the implementation of the agreement " were to be settled by the parties' two solicitors. There were delays in the completion of the valuations; and, up to August 22, 1947, the respondent thought the agreement of October, 1945, was not in force or binding on him. Between October, 1947, and June 30, 1949, the respondent did not again deny that the contract was binding on him. On June 30, 1949, the respondent's solicitors wrote a letter to the appellant's solicitors, as set out in the judgment, which the appellant alleged was a repudiation by the respondent of the contract. The appellant then issued a writ claiming damages as for breach of contract. The statement of claim set out a parol agreement but did not allege a written contract contained in the three letters. It alleged that the proper price of the shares had been ascertained but that the respondent had failed or refused to complete the agreement. The learned Judge held that the appellant had made out a binding contract, consisting of those letters, and that the respondent had not repudiated that contract, which still awaited performance; and he gave judgment for the respondent. On appeal from that determination, the appellant did not contest the finding that the three letters constituted a binding contract; but he contended that the respondent had repudiated it and the appellant could claim in damages. The appellant contested the finding of the learned Judge as to the method of valuing the shares (as reported [1951] N.Z.L.R. 789), and contended that His Honour should have founded his judgment on the submission made by the appellant that the " proper price " was to be determined on an " assets valuation ". *Held*, by the Court of Appeal, 1. That the respondent's conduct and statements during the period before October, 1947, amounted to renunciation of the contract on his part, and, further, from his " shilly-shallying " attitude in regard to the contract during the whole of that period, the appellant might have been entitled to draw the inference that the respondent did not really mean to fulfil his part of the contract; but, during the whole of that period, the appellant had continued in his endeavours to bring about performance of the contract, and he had thus kept the contract alive for the benefit of the respondent as well as for his own benefit. (*Frost* v. *Knight*, (1872) L.R. 7 Ex. 111, followed.) (*Heyman* v. *Darwins, Ltd.*, [1942] A.C. 356; [1942] 1 All E.R. 337, referred to.) 2. That, in the circumstances of this case, the appellant could not invoke the respondent's earlier behaviour in aid of his submission that the letter of June 30, 1949, was a repudiation of the contract, as that letter had to be examined in the light of the then relevant circumstances, which were of an entirely different character. (*Rhymney Railway Co.* v. *Brecon and Merthyr Tydfil Railway Co.*, (1900) 83 L.T. 111, applied.) 3. That the letter of June 30, 1949, merely gave the respondent notice that, subject to the final views of counsel, the respondent had in mind the raising in the alternative of each of the matters mentioned in paras. (*a*) to (*e*) thereof, either in proceedings of his own or in an action by the appellant to enforce payment of the moneys then alleged to be due and payable; and that, on the facts as well as on the true construction of the letter, the letter could not be construed as a repudiation by the respondent of the contract. (*Consorzio Veneziano di Armamento e Navigazione* v. *Northumberland Shipbuilding Co., Ltd.*, (1919) 88 L.J.K.B. 1194, applied.) 4. That, when the appellant issued his writ claiming damages from the respondent for his alleged breach of the contract, the time for performance had not in fact arrived; and the respondent was, therefore, justified in refusing to complete the contract on the appellant's terms. 5. That, in relation to the valuation of the shares, the parties had selected their own tribunal, and, as it did not necessarily follow that the Court would require the arbitrators to state a case for the opinion of the Court on a question of construction, it was doubtful whether the Court of Appeal in the present proceedings should turn itself into a Court of construction and purport to decide the true interpretation of the contract. (*In re An Arbitration, Roke* v. *Stevens*, [1951] N.Z.L.R. 375, referred to.) *Semble*, That, on the true construction of the contract, as examined in the light only of the surrounding circumstances, the proper price for the shares should be determined, without regard to the company's trading history, by a valuation of the assets of the company, from which should be deducted any liabilities whatever they might be. (*Keesing* v. *Commissioner of Stamp Duties*, [1935] G.L.R. 58, and *In re Kennedy, Public Trustee* v. *Commissioner of Stamp Duties*, [1943] G.L.R. 8, referred to.) Appeal from the judgment of *F. B. Adams*, J. (in part reported [1951] N.Z.L.R. 789), dismissed. *Cameron and Another* v. *Worboys*. (Court of Appeal. Wellington. September 5, 1952. Northcroft, J.; Hutchison, J.; Cooke, J.; North, J.)

CONVEYANCING.

Evidence of Legitimacy. *96 Solicitors' Journal*, 555.

Trading with the Enemy Legislation and Forfeiture Provisions. *96 Solicitors' Journal*, 572.

CRIMINAL LAW.

Appeal—Court of Criminal Appeal—Error in Order of Court—Inherent Power of Court to ensure that Its Own Orders are properly carried out. On November 20, 1950, the Court of Criminal Appeal, finding that an irregularity had been committed in a case, in that the Recorder at Quarter Sessions had failed to take the formal verdict of the jury after the appellant had withdrawn a plea of " not guilty " and had pleaded " guilty," set aside the judgment and ordered a *venire de novo* to issue. In error, the order issued by the Criminal Appeal Office stated: " The Court doth finally determine the [appeal] and doth allow the said appeal and doth quash the conviction that direct judgment and a verdict of acquittal on the indictment whereon the appellant was convicted be entered, but doth order that the appellant be kept in custody and remitted for trial at the Manchester Assizes now in progress." *R.* v. *Gatenby*, [1951] 1 All E.R. 173 (C.C.A.).

Nolle Prosequi. 214 Law Times, 108.

DIVORCE AND MATRIMONIAL CAUSES.

Desertion—Domicil—Acquisition of Domicil of Choice—Whether Acquisition of Domicil of Choice possible while Petitioner a Member of Royal Australian Navy—Marriage Act, 1928 (No. 3720), s. 75. The petitioner, who was born in England but had been resident in Queensland since the age of two years, and was so resident in 1939 at the time of joining the Royal Australian Navy, was drafted overseas in June, 1947, and returned to Australia in December, 1947, when he became entitled to a shore posting in either New South Wales or Victoria. He preferred the latter, and was sent there in December, 1947. He endeavoured to persuade his wife to come from Queensland to live with him, but she refused. The petitioner was discharged from the Navy in March, 1951, and since that date had set up business in Victoria, where he intended to remain. He petitioned in Victoria in July, 1951, for dissolution of his marriage. *Held*, That the petitioner had not been domiciled in Victoria for the period of two years before the presentation of the petition, and that it must therefore be dismissed. *Auld* v. *Auld*, [1952] V.L.R. 455.

Desertion—Termination—Offer by Deserting Husband to resume Cohabitation—Wife asked to return to look after Children. On September 20, 1951, the husband constructively deserted the wife by refusing, without any reasonable cause, to allow her to enter the house. A fortnight later, he asked her to return to him, as he wanted her to look after the children, but he said he would not sleep with her and would not take her out. The parties were both in early middle age, and there was no physical or moral impediment why they should not live together as man and wife in the full sense of the words. *Held*, That, in the circumstances, the offer was not a genuine offer to resume cohabitation which the wife was bound to accept. *Casey* v. *Casey*, [1952] 1 All E.R. 453 (P.D. & A.).

Unreasonable Delay. *96 Solicitors' Journal*, 567.

LAND TRANSFER.

The Assurance Fund in British Columbia. (H. L. Robinson.) *30 Canadian Bar Review*, 445.

Two Registered Proprietors—Successive Registered Mortgages—Sale by First Mortgagee to One of Proprietors—Whether Purchaser takes free from Second and Subsequent Mortgages—Rule in Otter v. Lord Vaux*—Applicability to Registered Land—Transfer of Land Act, 1928 (No. 3791), ss. 3, 148, 150.* The general principle that a mortgagor cannot set up against his own incumbrancer any other incumbrance created by himself, which has application to the case where the mortgagor's title arises under the power of sale of the first incumbrancer, applies to mortgages under the Transfer of Land Act, 1928. The principle applies with equal force where there are two mortgagors and either of them seeks to set up their incumbrance as aforesaid. (*Otter* v. *Lord Vaux*, (1856) 2 K. & J. 650; (1856), 6 de G.M. & G. 638, applied.) *The Queen* v. *Registrar of Titles, Ex parte Watson*, [1952] V.L.R. 470.

LANDLORD AND TENANT.

Rent Books. *102 Law Journal*, 496.

LAW PRACTITIONERS.

A Question of Privilege. *214 Law Times*, 112.

Interrogatories and Professional Privilege. *96 Solicitors' Journal*, 570.

MASTER AND SERVANT.

*Negligence—Company's Motor-vehicles made available to Employees' Cricket Team—Car driven by Employee with Owner's Permission meeting with Accident—*Prima facie *Presumption of Car being used in Owner's Business—Displacement or Strengthening of Such Presumption Question for Jury—Principles applicable.* When a person lends his motor-car to another, that other in driving it may or may not be the agent of the owner. The answer depends on all the circumstances present, particularly whether the owner is so interested or so connected with the purposes for which the motor-car is going to be, or is, used by the borrower as to permit the borrower's being regarded as the agent of the owner. The question is one on which the jury should be invited to pronounce. Evidence that at a particular time a particular vehicle was being driven is, in the absence of evidence sufficient to justify a different conclusion, evidence that it was being driven by or on behalf of its owner, since it is a matter of common knowledge that it is more usual than not for a motor-car to be used by or on behalf of its owner. (*Christmas* v. *Nicol Bros. Pty., Ltd.*, (1941) 41 N.S.W. S.R. 317, and *Wiseman* v. *Harse*, (1948) 65 N.S.W.W.N. 159, followed.) (*Barnard* v. *Sully*, (1931) 47 T.L.R. 557, and *Daniels* v. *Vaux*, [1938] 2 All E.R. 271, referred to.) Where it is the owner of the car whom it is sought to make liable, and the use of the car was with the owner's authority or approval, the situation calls for a careful examination of the facts to ascertain whether they warrant an inference that the driving was done on behalf of the owner, or whether, on the other hand, they are such as to negative the *prima facie* presumption that the vehicle was at the relative time being used in the owner's business. Whether the driver was truly engaged on the owner's affairs, so that he can be regarded as having been acting on behalf of the owner, is a question of fact. An action was brought against the defendant company, as first defendant, and against one Powell, as second defendant, alleging that the plaintiff had suffered damage through the negligent driving by Powell of a motor-car in which plaintiff was travelling as a passenger, and also alleging that Powell was driving the car (which was the property of the first defendant) in such circumstances as to impose liability on the first defendant for such negligent driving. From the evidence, it appeared that the defendant company had encouraged the establishment of a cricket club comprised of its own employees; it had provided some gear for the club in 1941 and 1943, and it had prepared and made available, at the factory premises, a practice ground. The defendant company from time to time had permitted its trucks or cars to be used for the transport of the cricket gear to other grounds, and on occasions for the transport of members of the team. In February, 1949, when its employees' team was playing a match outside Wellington, the defendant company made one of its trucks available; permission was conveyed in a letter which laid down conditions —namely, that the truck was to be under the sole charge of Powell, and was to be used by members of the team only; that no alcholic liquor was to be taken on the truck; that suitable seating accommodation was to be provided on the tray of the truck by the cricket club; and that all persons riding on the truck were to sign an indemnity to the effect that they rode at their own risk. Upon the particular occasion on which the accident happened, an oral permission for the use of two cars was given. Arrangements had been made for a match at Marton. The cricket club had difficulty in making up a team. The plaintiff, who was employed by another firm, accepted an invitation to join the team provided he was picked up and transported. Powell, who was the chairman of the cricket club, and a man named Gearin, who was the secretary, sought and obtained permission to use the firm's cars; they inquired as to an indemnity, and were told that with cars it was not necessary. On the Friday before the Sunday excursion, Powell took one of the cars to his own home, where it was parked in his driveway. On the Saturday, he went to the company's premises and collected the gear, the car again standing in his driveway during the night. Early on Sunday morning, he picked up the plaintiff and set out on the journey. The petrol used was the company's petrol, under licence from the Oil Fuel Controller, and its cost was charged to the company's profit-and-loss account. The issues which were put to the jury asked whether Powell was negligent, directed assessment of damages, and, in the third issue (which the learned trial Judge, after objection by defendant's counsel, had held to be a proper issue to be put), asked: "Was the second defendant Owen Powell when driving to Marton on January 22, 1950, with the Company's authority driving on behalf of the Company?" The first and third issues were answered in the affirmative, and damages were assessed as requested by the second issue. On motion by the defendant company for judgment *non obstante veredicto*, on the ground that there was no evidence to go to the jury that Powell was an employee or agent of the company at the time of the accident, or, alternatively, that there was no evidence to support the jury's verdict that Powell was, with the defendant company's authority, then driving on its behalf, *Held*, That, upon the evidence, a jury could reasonably hold that the defendant company was in such a position, *vis-a-vis* Powell's driving its vehicle on the particular occasion, as to make the principle of *respondeat superior* apply. (*Hewitt* v. *Bouvin*, [1940] 1 K.B. 188, applied.) *Minihan* v. *B.A.L.M. (N.Z.), Ltd.* (S.C. Wellington. July 28, 1952. Gresson, J.)

PRACTICE.

Costs—Successful Defendant—Costs in Court's Discretion—Nature and Extent of Such Discretion—Regard had to All Matters connected with or leading up to Litigation—No Order for Costs—Code of Civil Procedure, R. 555. The discretion vested in the Court by R. 555 of the Code of Civil Procedure to award or not to award costs is an absolute and uncontrolled discretion. While a successful defendant has a reasonable expectation of obtaining an order for payment of his costs by the plaintiff, he has no right to costs unless and until the Court awards them to him, whether the trial was with or without a jury. This discretion, like any other discretion, must be exercised judicially; and the Judge ought not to exercise it against the successful party except for some reason connected with the case. Consequently, the Court is not bound to any positive rules in the exercise of the discretion conferred by R. 555, and it may have regard to all matters connected with or leading up to the litigation. (*Donald Campbell and Co., Ltd.* v. *Pollak*, [1927] A.C. 732, applied.) In a claim for damages for the defendant's repudiation of an alleged contract for the sale of land, the defendant was entitled to judgment, as the consent of the Land Valuation Court had not been obtained. The defendant's agent, at the time when the plaintiff could have had the contract put into proper form and submitted to the Land Valuation Court for its consent, had led the plaintiff to suppose that there was no need for him to take any action in the matter. It appeared that the defendant had sold the land at an increased price, thus making a profit of £550 by her breach of contract, which, on the facts, was binding on her apart from the provisions of Part II of the Servicemen's Settlement Act, 1950. On the question of costs reserved, *Held*, 1. That, as the defendant's agent had led the plaintiff to suppose that he need take no action to obtain the consent of the Land Valuation Court to the proposed sale, a technical statutory defence was left open to the defendant, who had taken advantage of it, and made a substantial profit by so doing. 2. That, on the totality of those circumstances, it was more just, or more fair between the parties, that she should not be allowed to exact costs from the party with whom she had failed to keep faith; and no order would be made for costs. (*Cates* v. *Glass*, [1920] N.Z.L.R. 37, followed.) *Voyce* v. *Lawrie*. (S.C. Hamilton. June 10, 1952. F. B. Adams, J.)

TENANCY.

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

THE ART OF ADVOCACY.

An Address to Newly Called Members of the Bar.*

By SIR RAYMOND EVERSHED, M.R.

My first message to you is my hope that you will be in all respects happy in your calling; and that, I assure you, is no mere perfunctory observation. You live only one life—at least, there is no reliable evidence to the contrary—and it will therefore be a poor thing for you if you do not find happiness in the profession you have chosen. More than that, as was said by Emerson, no success is possible without enthusiasm. For that reason, I am sure that, unless you are happy in the work you do, you will not give to yourself or to others the satisfaction which you should.

Let me tell you not to be unduly oppressed at any time by what may be said to be the cynical view of our profession. There will be many who will say that a lawyer is but a parasite; and, if they have read even small parts of the works of Shakespeare and Dickens, they will no doubt add to what they themselves say pungent quotations from those writers. A less cynical view is—and you may have heard it—that the function of a lawyer is to protect people who have been persuaded by other people, whom they do not know, to enter into contracts, which they do not understand, to buy goods which they do not want, with money that they have not got. You may, on some occasion, find that some such experience comes your way; but—and I use the language of Sir Richard Livingstone—though the evils that society still owes to lawyers are great, the legal profession is a civilizing agency, and represents at least the triumph of reason and education over caprice and brute force.

In truth, in these somewhat anxious days, I think you can and should assume that you have had an important and highly responsible part to play. It is all very well to suggest that the law is highly artificial and complex, and that we should all be much better off if juries of our fellow-beings were able to say on a given occasion: "A was right and B was wrong." But any such system is, in truth, a return to palm-tree justice and the methods of barbarism. In a society which is complex, it is unavoidable that the law also should be complex.

The value of the law is in its impartiality and in its certainty. It provides, or it should provide, that the consequences of a particular activity will be certain and foreseeable. It requires that you, as members of the profession, should be partakers in the administration of a known body of established doctrine. If you do that job properly, you will find that you are a part of a great profession which in truth provides for society its stability and coherence. Let it therefore be your aim to do so.

In order that you may achieve that end, it is quite plain that you must retain the confidence of the rest of humanity. And, to do that, it is right that you should avoid allowing the law to become a great mystique. I am quite sure that you will find that, complex though some of its rules and principles may appear to be, they are in truth well established on the basis of common sense and on what society, for century after century, has regarded as the just standard. Furthermore, in order that you may retain the confidence of the rest of humanity, you must in no regard whatever depart from your professional independence and integrity. Remember always that you are members of a learned profession, and as such claim to grasp at, even if you cannot reach, the integrity of scholarship; and there is no higher integrity.

Having said that much, may I suggest to you six short sentences of advice, to each of which I will venture to add a word or two of explanation. From what I have already said, you will, I am sure, appreciate that my first principle is that never in any circumstance whatever must you deliberately deceive the Court. Observance of this principle is your first duty, not only to yourselves and to your consciences, but also to your clients and to the whole profession of which you have now become members. I need hardly add that to deceive the Court is a futile thing for a man to do in any event. The man at the Bar who is known to be likely to deceive the Court is regarded with suspicion by the Court; and that state of affairs is good neither for the man nor for his clients. But, leaving aside that material consideration, I put it to you that the most fundamental duty of all which you owe to your profession and to yourselves is that you should never deliberately deceive the Court. That is my first sentence.

My second point is that, subject to the prior consideration which I have just mentioned, your whole duty is to fight for your clients to the utmost of your ability. No personal consideration, no offer of a more highly paid brief, no matter of convenience, no consideration of feeling unwell, no other like consideration whatever must stand in the way of your whole duty to do your best for your clients.

Those are two quite obvious things, but there are perhaps occasions when the obvious is worth stating. At any rate, I have now stated them, and you will, I hope, forgive me if you regard them as platitudinous. Indeed, you may perhaps think all my six points, of which four now remain to be stated, to be somewhat of that character.

My next point is, on the face of it, perhaps the most obvious of them all. It consists of the two words: Speak up. It is a most remarkable thing that there are many who appear not to appreciate the fact that the best argument ever thought out is quite futile if nobody at all can hear it. There will no doubt be times when you will feel some irritation at the behaviour of the Judge. You will regard him as obtuse, impatient, deaf, old, and otherwise unfitted for the job. It is possible, though not by any means certain, that you will be right. But you must remember that your remedy is the higher Court. Your duty is to win the case for your client. In order to do that, it is really most important to note whether the Judge hears what you are saying.

Most Judges, however decrepit they may be, are still capable of giving some sort of sign that they cannot hear what you are saying. I think most Judges are kindly men who rather dislike having to say in open

* An address to new members of the Bar at a Convocation for Call to the Bar in Osgoode Hall, Toronto, on September 14, 1951. With acknowledgments to the *Canadian Bar Review*.

Court: "Mr. So-and-so, I am sorry, but I cannot hear what you are saying." Hence they are inclined to give well-known signs to indicate that they are not hearing. I accordingly suggest that you watch the Judge, because, for better or for worse, he is going to decide the case. For that reason, keep in his good books, if you can. You will succeed in doing so in direct proportion to the extent to which you make yourself audible.

Do forgive me for having mentioned that matter. I am now a Judge of seven years' standing; and it is indeed astonishing to me to note how apparently lacking in sentiveness some members of the Bar can be: for it is lack of sensitiveness which allows a man to address any person or group of persons without himself being aware of whether he or they can hear him. Thus, my third point is: Speak up.

My fourth point is like unto the third in that it also consists of two words: Stand up. You may perhaps think this is a foible of my own: but I may tell you that I have consulted my brethren on the Bench about the matter. I think that all Judges would agree that the counsel who adopts a sloppy attitude—one who, if you like, puts his hands in his trousers pockets, his feet on the desk, and so on—is far less attractive to listen to than one who stands upright. And I think there is great good sense in the point, for those who are far better qualified than am I to speak on such matters have told me—and I think they would tell you the same—that, if you stand upright, in what used to be called a soldier-like position, all your physical and mental qualities will be at their best and keenest.

A man who looks tidy and stands tidily probably has a tidy mind and a tidy argument. Again, it is perhaps a matter of doing what will please the Judge. But, again, that is what you are there to do. However much you may think you are superior to the Judge, intellectually or otherwise, that consideration will be no satisfaction whatever to your client if he loses his case.

So much for the fourth point. My fifth point I will perhaps expand more fully, though you may think that the title of it is small recommendation for any expansion. The title is: Be brief. Again, I fear I am repeating, but let me say that it is no good to go on and on just for the sake of doing so. If you cannot make your argument good by putting it clearly and properly, it is on the whole unlikely that you will make it good by a process of attrition. In that respect, I believe that advocacy differs from the science of advertising, for I am told that if you tell people often enough that they ought to buy somebody's pills or somebody's salts, they will ultimately be persuaded that that is the thing to do. But Judges, by and large, are not quite so susceptible.

It may, of course, be most desirable to put your point more than once. In that event, it will be all the better if, in putting it the second time, you can make the approach by a slightly different route from that taken when putting it the first time. But repetition more than once ceases to be prudent and is apt to be regarded as insulting. Therefore, try always to formulate your argument precisely.

Nothing is more likely to lead to prolixity than a failure to have formulated in your own mind the point you want to make. I have often had the thought—and I give it to you for what it is worth—that the time is well spent in writing down your opening and closing observations in a speech and in studying each word in the sentences. If you can start your speech with a clear and attractive presentation of the point in the case, the effect will last throughout the argument—unless, of course, you go on for so long that the beginning is forgotten. I remember a man who, after repeating an argument for the n'th time, eventually observed that perhaps their Lordships would remember that he had put the point before. To this observation the President replied: "Yes, we remember it quite well; but it was so many days ago we were afraid *you* might have forgotten." In all seriousness, however, I am sure you will find that the writing out of the first and the last sentences of your speech, and a careful study of them, will produce such good results as to be well worth the trouble taken. How many times have you heard people who are never quite able to sit down because, through having failed to formulate their sentences precisely, they are never satisfied with those they have just spoken, and must therefore put the matter all over again in order to pick up something they have forgotten?

What I have said as to speeches is generally true also as to examinations and cross-examinations. Let me say just a word about cross-examination. To the layman, of course, that has the greatest and the most histrionic appeal. Nothing is so tremendous in its effect or so attractive to the hearer as a really brilliant cross-examination. Brilliance in cross-examination is a desirable objective, but it is not given to all to be able to achieve it. Indeed, it may be achieved only by long years of experience. I cannot suggest any particular method. Everyone's own individuality will eventually emerge as he develops his style of cross-examination. We cannot all be great cross-examiners.

I might just tell you the old story—you probably have heard it—about Sir Edward Carson; for in England, as in Ontario, the name of Carson has been a badge of great advocacy. When I began my career, Edward Carson was the most formidable advocate of the day. Of him it was said that he built around his client a shield which it was impossible to penetrate. This particular and notable cross-examination to which I have made reference consisted of two questions. The witness had really nothing much to contribute, but he was of a somewhat pontifical character, and Carson desired to prick the bubble. His first question was: "Sir, are you a habitual drinker?" To this question the witness, in great indignation, was foolish enough to answer: "That, sir, is my business." Quick as a flash, Sir Edward said: "And have you any other business?"

Not all of us can achieve that particular brevity and style. I can say this, however, and it is relevant to the heading under discussion: if carried on for a long enough time, any cross-examination can utterly destroy itself. I have heard people cross-examine a witness on the other side for such a length of time that, eventually, the witness has succeeded in bringing out every single point that had been omitted in his examination in chief; mere wordiness destroyed all possible points which the cross-examiner had gained. So, in cross-examining, always err on the side of brevity. It is also not a bad rule never to ask any question in cross-examination unless you know, or have good reason to think you know, what the answer to that question really is.

Now, I venture to recommend that you pay to examination in chief more attention than is commonly given to it. That is your opportunity for doing your client

the greatest service that you possibly can do him. Do not forget that the client is probably in a wholly strange atmosphere, that he is nervous, and that he is finding that questions are being put in language with which he is quite unfamiliar. If his own counsel, looking severely at him over the top of his spectacles, simply puts a series of questions in stilted language, it is quite likely that the witness will not do himself anything like justice, and that he will, indeed, get more and more nervous and agitated as the examination proceeds. If the worst comes to the worst, you can only hope that the man on the other side will cross-examine him for such a great length of time that he will do what you yourself ought to have done.

Try, then, always to remember that the witness is in an unfamiliar situation. There are many people—and this is one of the justifications for your profession—who, great though their education may be, and great though their intelligence may be, are themselves quite inarticulate. It is your duty to try to get your witness to tell his story in a way which is natural to him. Take great pains to do that, for, if the witness gives a good impression from the start, that is something which the ordinary mortal Judge will appreciate, and it is something which the other side will find it quite difficult to overcome. Accordingly, as I say, take great trouble with your examination in chief. Remember that you are there to do your client justice and, if possible, to let him do himself justice.

My sixth and final sentence of advice is: Argue, and do not quote. Sometimes there is a temptation to quote long passages from judgments, but such quotations are apt to be somewhat disturbing to the Judge. You may think that I am here as a kind of protagonist of the Society for the Protection of Judges, but really I am not. I am merely telling you what I have already told you—namely, that your duty is to persuade the Judge.

Judges must try to make an intelligible note of what is said by counsel and to apprehend the point that is being made. A good argument should stand up on its own legs, without the necessity for any references from authorities. You do not need to cite decisions of the House of Lords or of the Supreme Court of Canada in order to make good the proposition that the night follows the day, although you will probably find that many Judges, at some time or another in some of their judgments, have so asserted.

Make your argument sound and satisfactory in itself, and present it. If the Judges are good ones—as are all the Judges in Ontario—they will tell you whether the proposition is one which, to their minds, requires the support of authority, and you will be prepared to deal with it. But let the argument speak for itself and persuade of itself.

You will find that such a practice has this great advantage. I know not to what extent in this Province the Judges of the High Court or of the Appeal Court are apt to intervene in the course of counsel's argument by the asking of questions, pertinent or otherwise. Should you be asked questions, if your argument has been thought out and if you are satisfied that it is sound, you will find no difficulty in answering. But, if, on the other hand, your argument consists of a series of quotations, you will find that the effect of questions is very seriously to put you out of your stride. That is another reason for doing what I suggest is the obvious thing to do. Present your case as an argument which will stand up and persuade of itself.

You may find that Judges will, in the course of your argument, say to you: "Then is your point so-and-so?" I have often done that myself. It is a very good way of communication between the Bench and the Bar designed to shorten proceedings. Many Judges can never resist the temptation—and I myself am guilty often enough—of putting a point to counsel in order to demolish the argument and to show how much more intelligent are those on the Bench than are those at the Bar. But, on the whole, if you put such a question, it is unlikely that counsel will fall flat upon his face and say: "I never thought of that before. Of course, that is the end of my case." On the other hand, it will often be extremely useful, both to the arguing counsel and to the Bench, if the question is put: "If I get your argument correctly, is it so-and-so?"

Now, if you have not thought out the argument, you may, of course, find that question to be an exceedingly dangerous one. You may feel embarrassed by it and you may find difficulty in answering it at all; or, what is worse, you may give an answer which you think will please the Judge and find out, ten minutes afterwards, that you have prejudiced yourself beyond all possible recovery. Because I regard this point to be of such great importance, I repeat what I have said. Think out your argument and present it as an argument standing up of itself, having your authorities there to buttress any point which may seem doubtful which to demolish the other side when their turn comes. to the Bench or to you, or as a piece of ammunition with

Those are my six suggestions. To recapitulate them, they are as follows:

1. Never deceive the Court.
2. Fight for your clients.
3. Speak up.
4. Stand up.
5. Be brief.
6. Argue, do not quote.

As I have already said, you will probably think them all to be platitudinous, but forgive me if that is so. My own experience has impressed upon my mind more and more the value of these six quite simple propositions.

Now, by way of conclusion, I return whence I have strayed, to repeat to you my good wishes for a happy and successful career, and, if I can, to impress upon you a realization of the great and responsible work for the happiness of society which it will be in your power to perform. As I have done on similar occasions previously, I should like to give a quotation from perhaps the greatest advocate there has ever been in my country. I refer to Erskine, who defended Tom Paine. It was murmured against Erskine that a man of his position should not so demean himself as to appear for a character so lacking in respectability. To that challenge, which in his opinion struck at the very root of the independence of our profession, Erskine made this magnificient reply:

> I will forever, at all hazards, assert the dignity, independence, and integrity of the English Bar, without which impartial justice, the most valuable part of the English constitution, can have no existence. From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the Court where he daily sits to practise, from that moment the liberties of England are at an end. If the advocate refuses to defend, from what he may think of the charge or of the defence, he assumes the character of the Judge; nay, he assumes it before the hour of judgment; and in proportion to his rank and reputation, puts the heavy influence of, perhaps, a mistaken opinion into the scale against the accused, in whose favour the benevolent principle of English law makes all presumptions, and which commands the very Judge to be his counsel.

I wish you all possible prosperity.

STUDYING FOR THE LAW.

Traditions of Centuries-old Legal Schools.

By NORMAN HILLSON.

An average of a thousand students enter the four Inns of Court in London every year to study law. Of these to-day about six hundred are from other Commonwealth countries, the Colonies, and overseas. The Inns of Court are the leading legal schools of England. They are four in number, and of great antiquity. The Inner and Middle Temple succeeded, in the fourteenth century, to the estates of the Knights Templars on the bank of the Thames outside the City of London. The other two Inns—Lincoln's and Gray's—were more or less contemporaneous.

Originally they were societies of clerks, learned in the law, who pursued a semi-communal life, worshipping together and eating in a common dining-hall. Each Inn of Court through the centuries established its own traditions. Two of the dining-halls—those of the Inner Temple and Gray's Inn—were completely burned out in World War II during the bombing of London, but the custom of members eating together is still maintained, and no student may be called to the Bar unless he has eaten the requisite number of dinners spread over a prescribed number of years.

To-day, it requires years of study for a student to qualify for call to the Bar. The Inns of Court still jealously guard their individual privileges. No man or woman can become a barrister in England without being a member of one of the four Inns. Through a joint organization, called the Council of Legal Education, the four Inns of Court constitute the examining body.

OPEN TO WOMEN.

Membership of the Inns of Court has been open, with certain reservations, to all citizens of Britain and the Commonwealth for many years. In certain conditions, foreign students may also be admitted. Women were permitted to join the Inns shortly after World War I, and since then a number have attained considerable eminence as practising barristers.

Before a student can qualify for initial membership, he must produce certificates of good character and proof of a good education to the satisfaction of the Master Benchers, or controlling body, of the Inn of Court he purposes to join. The subsequent course of study is regulated by the student's having to " keep " twelve dining terms, which normally means a matter of four years.

The fact that many students are from overseas, notably the Union of South Africa, India, and equatorial Africa, is taken into account. They are given instruction in the legal practice of their own territories, and in each library of the four Inns are sections devoted to the jurisprudence of nearly every country. (The libraries are world famous. That of Lincoln's Inn is estimated at 70,000 volumes.)

All students, no matter what their nationality, race, or sex, are equal in the eyes of the Masters of the Bench and the Council of Legal Education. Some of the most learned lawyers in Britain give lectures, admission to which is free.

COURSES OF STUDY.

A student on joining is advised to pay a personal call on the head of his school of law, who will give advice as to a suitable course of study. Subjects taught include Evidence, Civil and Criminal Procedure, Criminal Law, Roman Dutch Law, Equity, Divorce, Real Property and Conveyancing, Constitutional Law and English Legal History, and Common Law. There are also courses in Hindu Law and Mohammedan Law.

In addition to attendance at these set lectures, students are advised to work in the chambers of a practising lawyer, so that they can learn the practical side of the profession. In fact, in several Colonies, no qualified barrister is permitted to practise unless he can show he has " read " in such chambers for at least a year.

Examinations fall into two parts, and the candidate has to satisfy the examiners in every paper, without exception. The first part, generally taken after two years, consists of five sections—Roman Law, Constitutional Law (English, Dominion, and Colonial), Contract and Tort, Real Property (or Hindu, Mohammedan, or Roman Dutch Law for overseas students), and Criminal Law. Papers may be taken at different times, and examinations are held three times a year.

But, when it comes to the Final, then all candidates must sit for the whole examination at the same time. It is one of the most exacting educational tests of any academic institution in Britain, and includes such specialized subjects as Company Law, a special subject in Common Law, Construction of Documents, and a general paper in Equity and Conflict of Laws.

When a student has passed in both parts and has " kept " the required number of dining terms, he is qualified to pray for admission to the Bar of England. But only on those conditions.

FROM ALL PARTS OF THE WORLD.

In the four Inns of Court to-day, as I have said, the number of students from overseas far exceeds those from Britain. They come from all parts of the world, and at the moment there are large numbers from West and East Africa. Likewise in all parts of the world there are lawyers in practice who received their legal training in the London Inns of Court. And it has long been the case.

The late General Smuts, for so long a leading figure of the Union of South Africa, was called to the Bar of the Middle Temple before the South African War of 1899-1901. He became a King's Counsel, and was a Bencher of the Inn at the time of his death. Mahatma Gandhi was called at the Inner Temple in 1891. An equally famous Indian, Lord Sinha of Raipur, the first to be raised to the peerage, belongs to Lincoln's Inn, while Pandit Nehru, Prime Minister of India, is a distinguished member of the Inner Temple.

All these famous men went back to practise in their own countries, self-governing territories of the Commonwealth. But it is the same with the Colonies. In Nigeria, for example, one of the puisne Judges of the High Court at Benin City is Olumuyiwa Jibowu, who was called to the Bar at the Middle Temple in 1923. Other members of the same Inn are Judge Kobina Aaku Korsan, of the Gold Coast, and Judge Samuel Beoku-Betts, of Sierra Leone. And the number of members will increase in the course of the next few years.

MORTGAGES OF LEASEHOLD. SPECIAL COVENANTS.

By E. C. ADAMS, LL.M.

Recently (*Ante*, p. 221), I gave examples of covenants common to almost every mortgage of land under the Land Transfer Act, 1915. The following special covenants have been compiled, as being suitable to a mortgage of leasehold :

1. That the Mortgagor will take all such steps and do all such things as may be necessary for preventing any noxious growth upon such parts of the mortgaged property as shall or may consist of pastoral or agricultural lands and which might by its existence thereon interfere with or lessen the value or utility of the mortgaged property for grazing or agricultural purposes and will comply with all the provisions of the Noxious Weeds Act, 1950, or any Act amending or in substitution therefor And also that the Mortgagor shall and will in the case of such lands as are of the character aforesaid whenever requested so to do by the Mortgagee as aforesaid erect and maintain or cause to be erected and maintained during the continuance of this security such fencing as may be required by the Mortgagee as aforesaid in order to prevent the inroad of rabbits and other noxious animals on the mortgaged property and if any such fence shall be erected by the owner or occupier of the adjoining land then will pay the Mortgagor's share and proportion of the expenses of erecting and maintaining the same and if and in case at any time during the continuance of this security rabbits or other noxious animals shall prevail in or upon the mortgaged property then the Mortgagor shall and will adopt and use all proper and necessary measures in order to exterminate rabbits and other noxious animals and will comply with all fencing notices in respect of the said lands or relating thereto that may be served under the provisions of the Fencing Act, 1908, or any Act amending or in substitution therefor.

It is customary to insert a clause in the above form, or to the same effect, where the lease is a farm property. A mortgage of an orchard should contain a covenant by the mortgagor to comply with the Orchard and Garden Diseases Act, 1928.

2. That the hereinbefore mentioned Lease is now a valid and subsisting Lease of the said premises thereby leased and is in nowise void or voidable And that the rent and all the covenants by the Lessee and conditions by and in the said Lease reserved and contained have been paid performed and observed up to the date of these presents And also that the Mortgagor will so long as any money shall remain owing on the security of these presents pay the said yearly rent made payable by the said Lease and will perform and observe all the covenants by the Lessee and conditions in the said Lease contained and keep the Mortgagee and its assigns indemnified against all actions suits proceedings costs damages claims and demands which may be incurred or sustained by reason of the nonpayment of the said rent or any part thereof or the breach nonperformance or nonobservance of the said covenants and conditions or any of them.

3. That the Mortgagor shall and will duly comply with all the conditions of the hereinbefore mentioned Lease [licence or title] and all the provisions of the Act or Acts regulations and conditions for the time being in force under which the Lease [licence or title] has been granted or which affect or are applicable to the Lease [licence or title] for the purpose of entitling the Mortgagor to obtain a conversion of the Lease [licence or title] into freehold or to exchange the Lease [licence or title] for a renewable or renewed or new Lease [licence or title] if deemed expedient so to do and shall and will comply with all conditions and provisions if any necessary to be observed in the exercise of any right or option of purchase conferred upon the Mortgagor in or by the Lease [licence or title] AND that the Mortgagor will on receipt of the freehold title or any renewed or renewable or new Lease [licence or title] execute at the cost of the Mortgagor a mortgage over the same to the Mortgagee to secure the payment in manner provided by these presents of all principal interest cost charges expenses and other moneys then owing or thereafter to become payable by the Mortgagor to the Mortgagee AND the Mortgagor hereby irrevocably appoints the Mortgagee his executors administrators and assigns the Attorney of the Mortgagor during the continuance of this security if and to the extent the Mortgagee (without being under any obligation) shall think fit for and in the name on behalf and at the cost and risk of the Mortgagor to give all notices apply for such consents as may be necessary or advisable make all applications pay any moneys and do all things necessary for the purposes of this security or to obtain the freehold title or any renewed or renewable or new Lease [licence or title] and on receipt of the same to execute to the Mortgagee any memorandum of mortgage or other security the Mortgagee may require to secure or collaterally secure the payment by the Mortgagor of all such principal interest costs charges expenses and other moneys as aforesaid and to sign and execute in the name as the Attorney and on behalf of the Mortgagor all notices applications mortgages leases deeds and other documents necessary to give full effect to this clause.

Some such clause as the above is necessary, if the mortgagor lessee has a right to obtain the freehold. In the case of a Crown lessee or licensee under the Land Acts, the bringing forward of the memorial of the mortgage on the freehold title is automatic, and the estate in fee-simple shall be subject thereto in like manner as if the mortgage had originally been created in respect of the fee-simple : s. 114 of the Land Act, 1948. The above clause is also applicable where the lessee has a right of renewal. If there is a right of renewal but no right to acquire the freehold, the following clause (which is somewhat neater in form) may be used in lieu thereof :

4. That the Mortgagor will from time to time give all notices pay all moneys and do and perform every act deed matter and thing necessary in the premises to obtain a renewal of the Lease of the said premises AND the Mortgagor doth hereby for himself and the registered proprietor or proprietors for the time being of the said Lease irrevocably nominate constitute and appoint the Mortgagee his executors administrators and assigns and his or their nominee to be the attorney of the Mortgagor and such registered proprietor or proprietors for the time being of the said premises for them and in their or his name but at the expense of the Mortgagor to give such notices as aforesaid and pay such fees and do perform and execute every act and deed necessary in the premises to obtain such renewal as aforesaid.

But, if the right to a renewal is contingent on a valuation (which is often the case in New Zealand), the following clauses may be used. These have the advantage of binding the mortgagor to comply with the provisions of s. 4 or s. 5 (or both) of the Land Transfer Amendment Act, 1939. As to these two sections, see the article in (1947) 23 NEW ZEALAND LAW JOURNAL, 278, 290. It is suggested in *Goodall's Conveyancing in New Zealand*, 2nd Ed. 477, note (*a*), that an additional covenant would be advisable, enabling the mortgagee to obtain relief against forfeiture, including a refusal to grant a renewal : see s. 92 of the Property Law Act, 1908, and ss. 2 and 3 of the Property Law Amendment Act, 1928.

5. That if by any of the said present or future Lease the Mortgagor or his successor in title as Lessee thereunder has or shall have the option of a right of renewal or extension thereof at a rental to be determined by valuation or of some alternative right or rights then the Mortgagor or his successor in title will in each case exercise such option by obtaining a renewal or extension of such Lease at a rental to be determined by valuation as aforesaid.

6. That for the purpose of obtaining the renewal or extension of any present or future Lease as aforesaid the Mortgagor or his successor in title will whenever necessary and within the time and in the manner prescribed respectively by such Lease appoint an arbitrator to act in the making of any

valuation thereby prescribed and give to the Lessor notice in writing that the Mortgagor or his successor in title desires to have a renewed Lease of the land comprised therein and will duly and punctually make perform and do and concur in making performing and doing all other acts matters and things prescribed by such Lease in order to obtain such renewal or extension and will duly and punctually pay all fines costs and fees attending all or any of the aforesaid acts matters and things.

7. That the Mortgagor or his successor in title will immediately after obtaining any Lease granted in renewal extension or substitution as aforesaid do all things necessary to comply with the provisions of sections 4 and/or 5 of the Land Transfer Amendment Act 1939 (so far as either or both of the said sections shall apply) and will procure the registration of such Lease within the time or times prescribed in the said sections and in particular where the said section 5 of the said Act shall apply will duly and punctually make perform and do and concur in making performing and doing all the requests acts and things prescribed thereunder to satisfy the District Land Registrar and to ensure the proper entry and completion of the memorials and records therein prescribed relating to such Lease and the continuance of this present security thereover as a first Mortgage AND FURTHER that if by reason of the refusal or neglect of the Mortgagor to comply with the provisions of the said Land Transfer Amendment Act 1939 or all or any of them or for any other cause this present security shall not be registered or recorded as a [first] Mortgage against any such lease the Mortgagor or his successor in title will immediately execute in favour of the Mortgagee or its successor in title a new [first] Mortgage thereof to secure payment to the Mortgagee or his successor in title of the said principal sum and interest such mortgage to be at the Mortgagor's expense and to contain similar covenants (including this present covenant) as are herein contained AND FURTHER that if the Mortgagor or his successor in title shall refuse or neglect to make give do or perform all or any of the aforesaid appointments notices requests acts matters or things or to comply with all or any of the provisions of the said Land Transfer Amendment Act 1939 or all or any of the foregoing provisions hereof for the purpose of procuring any such renewal or extension as aforesaid or the continuance of this present security over any Lease granted in renewal extension or substitution as aforesaid or for any of the purposes hereinbefore mentioned or to pay the fines costs and fees attending all or any of the aforesaid acts matters and things it shall be lawful for but not obligatory upon the Mortgagee or his successor in title on behalf of the Mortgagor or his successor in title to make do and perform all or any of the said appointments notices requests acts matters and things and to do all other acts matters and things necessary or incidental to the attainment of the aforesaid purposes or any of them and to pay all costs and expenses incidental thereto and for all the purposes aforesaid including the obtaining and mortgaging as aforesaid of any Lease granted in renewal extension or substitution as aforesaid AND the Mortgagor or his successor in title doth hereby irrevocably appoint the Mortgagee or his successor in title the Attorney of the Mortgagor or his successor in title in the name and on behalf of the Mortgagor or his successor in title if and when and so soon as the Mortgagee or his successor in title shall think proper to make execute and do or concur in making executing and doing all such appointments requests contracts notices references leases mortgages assurances acts and things as he shall deem expedient.

MILITARY GOVERNMENT COURTS IN GERMANY.

By L. M. INGLIS.

I. REVIEWING.

From the beginning of the occupation until the reformed system of Control Commission Courts came in with the year 1947, the tribunals responsible for the judicial part in preserving the security of the Allied Forces and maintaining public order in the British Zone of Occupied Germany were the Military Government Courts, which owed their establishment and procedure to ordinances and rules first issued by General Eisenhower's Supreme Headquarters before D-Day and later repromulgated by the British Military Governor in his own Zone.

Within ten days after sentence, a convicted person could petition the appropriate Reviewing Authority against the decision of the Court which had tried him, and could support his petition with submissions and argument in writing; but there was no appeal properly so called. Reviews were not limited to cases where there were petitions; they were required in every case; but they were done in a closed office, without any hearing in open Court, and without the public delivery of reasoned judgments.

The powers of the Reviewing Authority were set out in the Rules of Procedure as follows:

1. To affirm any finding of guilty or set aside any such finding with or without ordering a new trial.
2. To substitute for any finding of guilty a finding of guilty on an amended charge if it appears that the Court before finding and without prejudice to the accused have so amended that charge and that the Court would have been satisfied on the evidence that the accused was guilty on the charge as amended.
3. To affirm, suspend, reduce, commute, or modify any sentence or order and make appropriate order for the discharge of the accused or the return of fine or restitution of property.
4. To increase any sentence where a petition for review which is considered frivolous has been filed and the evidence in the case warrants such increase; and
5. At any time to remit or suspend any sentence or part thereof.

It will be apparent that whether or not these rules were to operate as safeguards against miscarriages of justice depended entirely on the spirit in which the Reviewing Authority approached his task and the competence and good sense with which he carried it out.

Until the Control Commission went to Germany early in July, 1945, to take over the government and administration of occupied territory from the Army, the administration of Military Government Courts and the reviewing of their cases had been mainly the responsibility of the Civil Affairs Legal Officers at the Headquarters of the three Army Corps, each of which controlled the military government of its own district. When the Military Government Courts Branch of the Control Commission arrived, the responsibility for reviewing passed to the Director of that Branch.

Among his many problems, the Director soon discovered that the chief ones as regards reviewing arose out of three circumstances—namely, the volume of work, the rules (or lack of rules) of evidence, and the difficulty of arriving at proper standards of sentences and procuring adherence to them by *ad hoc* Courts composed of uninstructed members.

During the eighteen months that the Military Government Courts Branch existed, the numbers of cases in the two higher grades of Courts, General and Intermediate Courts, were:

1945	*Trials of Germans*	*Trials of Other Nationals*	*Totals*
July/December ..	3,464	2,049	5,513
1946			
January/July ..	2,857	1,463	4,320
July/December ..	2,995	980	3,975
			13,808

That volume of work was too great to enable the six qualified barristers whom the Branch had available as Permanent Presidents to preside over more than a proportion of the General Courts. This did not ease the burden of reviewing, which, as regards the General and Intermediate Courts, fell upon the Director, his deputy (when he had one), and his executive and reviewing staff of three legal officers. Over the same period, approximately 130,000 cases were tried in summary Military Government Courts. The reviewing of these lesser cases, an impossible task for the Director and his staff, was delegated to legal officers in the " Regions ", Military Government districts coinciding with the German States or Laender.

One Rule of Procedure covered the whole subject of evidence as follows :

> 12. *Evidence.*—(1) A Military Government Court shall in general admit oral, written and physical evidence having a bearing on the issues before it, and may exclude any evidence which in its opinion is of no value as proof. If security is at stake, evidence may be taken *in camera* or in exceptional cases where security demands it may be excluded altogether.
>
> (2) The Court shall in general require the production of the best evidence available.
>
> (3) Evidence of bad character of an accused shall be admissible before finding only when the accused has introduced evidence as to his own good character or as to the character of any witness for the prosecution.

The only other Rules having a bearing on the matter were one (R. 17) providing that a husband, wife, parent, or child of the accused, a legal adviser (as to any proper communication between him and his client), and a priest (as to communications in the course of confession) were not compellable witnesses, and another (R. 10 (5)) providing that the accused need not give evidence unless he chose to do so, and in any case would not be sworn. A " Guide to Procedure " pointed out that :

> Rule 12 does not incorporate the rules of evidence of British or American Courts or courts martial. The only positive rules binding upon the Military Government Courts are found in R. 12 (3), R. 17, and R. 10 (5). Hearsay evidence, including the statement of a witness not produced, is thus admissible, but if the matter is important and controverted every effort should be made to obtain the presence of the witness, and an adjournment may be ordered for that purpose. The guiding principle is to admit only evidence that will aid in determining the truth.

The same " Guide " further encouraged the unlearned members of Courts to rely on their own inexperience by informing them that a technical and legalistic viewpoint must not be allowed to interfere with the result of a trial.

As might have been expected in view of such rules and official advice, worthless " evidence " often appeared on the record to embarrass the Reviewing Authority, who had to decide whether such material had so influenced the Court in its consideration of the real evidence as to make a miscarriage of justice likely. Sometimes, too, even qualified barristers and solicitors, unrestrained by proper rules, advised or decided dangerously upon testimony that should not have been given any weight.

In spite of all these factors, the findings of the great majority of the Courts were remarkably just, and it was their erratic sentences that worried the Reviewing Authority most. Military Government Ordinance No. 1, which set out forty-three offences against the occupation authorities and their property, gave the Courts an enormous discretion as to sentences. Twenty of these offences were punishable by " death or such less penalty as a Military Government Court may impose ", and the other twenty-three by " such penalty other than death as a Military Government Court may impose ". Given such discretion, Courts had widely different ideas as to what were appropriate sentences.

In the early days of the occupation, it was not easy for the Reviewing Authority to arrive at his own standards, because no one knew how the Germans were going to behave when they recovered from the shock and inevitable disorganization of defeat. There had been wild talk of " werewolves ". There was a marked disinclination on the part of Germans to surrender their fire-arms, the unlawful possession or unauthorized use of which could be punished with death. During the first few months, these circumstances led to many capital sentences for fire-arms offences, sentences which were generally confirmed when there was evidence of careful preservation and concealment of the weapons, or when they were used against troops or Police ; but, before long, death sentences were allowed to stand only for murder or offences tantamount to murder, such as the " unauthorized use of a fire-arm " to commit a malicious homicide. While the Germans were still in desperate straits for the means of livelihood, Allied food, petrol, and other stores were a constant temptation, and were regarded by them as fair game, which it was not immoral to steal. Severe sentences were, therefore, necessary to discourage offences against Allied property.

Perhaps the gravest threat to public order came from the hundreds of thousands of displaced persons who had been brought into Germany as forced labourers during the war, and whom the end of hostilities had set loose in the Zone. Of these, the Poles were in the majority, and were the most lawless. By then, the German collapse was regarded as a heaven-sent opportunity to retaliate against people who had ill-used them for years. They armed themselves and went in for murder, rape, and armed robbery on the grand scale, usually selecting isolated German farms as their objectives. The result was that mutual hatreds between Poles and Germans were intensified, that the Germans, too, kept forbidden arms to protect themselves, and that crime bred crime. In the interest of public order, severe measures were necessary against both parties.

In these circumstances, it was inevitable, perhaps, that the inexperience, the emotional reactions, and the prejudices of Court members—and occasionally, I fear, the comprehensible but unworthy desire to humble the defeated " master race "—should sometimes lead to the imposition of excessive sentences, so that, to quote a friend who loved to embellish plain language, " a cool-headed steersman was needed to navigate the barge of justice safely between the Scylla of inhumane severity and the Charybdis of dangerous leniency ". That steering was the task of the Reviewing Authority, who adopted the policy of immediately varying only those sentences that were absurd or manifestly excessive in any circumstances and marking down the doubtful ones for subsequent review, so that, in the

final result, and in the light of longer experience and later knowledge, reasonable justice in the matter of sentences might be achieved.

If by this recital of difficulties and defects I have made it appear that Military Government Courts were a failure, let me correct that impression at once. Unjust convictions were a very small proportion of the whole, owing, I think, to the fortunate fact that almost every British officer who sat on a Court was prepared to convict only when he was morally convinced that the accused, whoever he might be, was guilty. Notwithstanding that, with after-knowledge, it is obvious that their procedure and administration could have been improved, these Courts were probably as practicable a means of administering justice in the immediate post-war situation as could reasonably have been expected. The Germans were impressed by, and acknowledged, their objectivity and fairness; and their dangerous or seriously mistaken findings were, I hope and believe, almost always detected and cured on review.

The system was not, however, suited to the conditions of a prolonged occupation; and Control Commission Courts, established in the British Zone on January 1, 1947, were not introduced too soon. From that day, the Courts were able to fulfil their ideological objects as well as their utilitarian ones—that is to say, to demonstrate to Germany the impartial administration of justice by an independent judiciary.

II. Public Disorder at Furstenau.

A General Military Government Court trial, which took place in 1945, illustrates some of the matters discussed in my previous article—the dangerous tension between Germans and displaced Poles, the disadvantages of *ad hoc* Courts with *ad hoc* presidents, the conscientious care of British officers to convict only those of whose guilt they felt assured, and the arbitrariness of those officers when they proceeded to sentence those whom they convicted.

On the night of July 26, 1945, three armed Poles from a displaced persons' camp at Hoxter in the valley of the Weser raided a German farm which stood a little apart from the agricultural village of Furstenau. The German farmer and his hired man, defending themselves with pitchforks, stabbed and killed one of the raiders, whose two companions thereupon ran off. Next morning, the body of the dead Pole was taken to the camp at Hoxter, where it was exhibited in an open coffin to the camp inmates, who, disregarding the facts that the Poles had been unlawful aggressors and the Germans had on this occasion acted in self-defence, worked themselves up into so fine a state of excited indignation that, on the afternoon of July 29, a numerous armed and organized band of them assembled in Furstenau and there burned down seven houses, damaged others, and attacked the villagers, of whom they killed five men and two women.

The arrival of two British Military Police, followed soon afterwards by a British patrol of a lieutenant and five soldiers, put a sudden stop to the rioting. Many of the Poles bolted, and fifty-four of them were rounded up and marched off to Hoxter prison by the eight British soldiers. At the subsequent trial, only four of the Poles were said to have been armed when they were arrested, but most of the others, too, must have been carrying weapons during the disorder, because at or near the place of arrest the patrol collected six sawn-off rifles, a revolver, a pistol, five daggers, twenty-six knives, and about a hundred rounds of rifle and pistol ammunition.

A few days later, in the course of preliminary proceedings before it, a summary Military Government Court directed that four of the Poles, whom it found to be ex-prisoners of war with military status, be handed over to be dealt with by their own Army, and remanded the others for trial by a General Court.

As the transfer of military government from the Corps to the regional administration of the Control Commission was incomplete, the General Court was convened by the Corps Commander, who, instead of appointing one of the Permanent Presidents, detailed his own Corps Legal Officer to preside. This officer was a qualified barrister, who later held a high legal—not judicial—appointment with the Control Commission, but, learned though he was in his own special field of the law, that field had included neither criminal practice at the Bar nor the administration of criminal law. The other four members of the Court were regimental officers detailed by the Army.

The trial, which began early in September and lasted several days, was a mass one of forty-eight accused, two of the fifty remanded for trial having escaped after the summary Court proceedings.

In due course, the case record, accompanied by a thick file of petitions against the several convictions and sentences, reached the Military Government Courts Branch for review. The Court had not used a typewriter, and the bulky notes of evidence had been taken down in the handwritings of several different members. Some parts of the record were beautifully clear and others reasonably legible; but about half the whole was in a script as tangled as the outside of a bird's nest and most exhaustive of the time and temper of the Reviewing Authority, who had to decipher it.

The evidence adduced by the prosecution had established with certainty the occurrence and general nature of the public disorder at Furstenau, the numbers of killings and burnings, certain injuries to villagers, and other damage to property, and had also established that a disorderly mob of Polish displaced persons had been responsible for it all; and a strong *prima facie* case had been made out that all forty-eight Poles in the dock were parties to the disorder. This did not, of course, preclude any of them from establishing a reasonable doubt that he had been in the village for an unlawful purpose—an onus which five of them discharged to the satisfaction of the Court, and were acquitted. The remaining forty-three were found guilty of " participation in public disorder ", an offence which the Court was empowered by Ordinance No. 1 to punish with death or such less penalty as it thought fit.

What the Court thought fit to do in this respect was:

1. To bind over under the care of their parents or the Hoxter Camp Commandant three youths aged sixteen and seventeen and a twenty-four-years-old man who had been physically and mentally broken by his ill treatment in Buchenwald concentration camp.

2. To order the detention for three years in a youth prison of three lads from eighteen to twenty years of age.

3. To send four men aged twenty-one to prison for six years.

4. To sentence fifteen men aged from twenty-two to twenty-five to ten years' imprisonment.

5. To sentence seven men over the age of twenty-five and one twenty-one-years-old (the latter because he was " an associate of Szukalo ", one of the four in the next category) to twenty years' imprisonment.

6. To sentence the remaining four to death, on the ground that, when they were arrested, they were armed.

That the Court should have taken the youth of the first two categories into account and dealt with them more leniently than the others seemed reasonable and proper; but the Reviewing Authority was horrified by the differentiation between the men of full age. No witness had identified, or had been invited to identify, any of the accused as an actual ringleader, murderer, or incendiarist. The evidence was adequate to support their convictions as parties to the disorder, but wholly insufficient to establish whether their participation was on a major or a minor scale, and certainly inadequate to distinguish gradations of guilt. Judging from the quantity of weapons collected at the place of arrest, not only the four unfortunates who were sentenced to death had been armed, but most of the others too. Their degree of guilt could not really be distinguished from that of the rest. It may well have been that they were just the stupid ones, too slow-witted to throw away their weapons before they were searched. The Reviewing Authority hastened to recommend, and the Military Governor to order, the commutation of the capital sentences to imprisonment.

The matter could not be allowed to rest finally at that, for there were still the unjustifiable differences between the various sentences of imprisonment to be set right. As it was inadvisable, however, to make immediate adjustments, which might be interpreted by displaced Poles as a sign that the British authorities regarded their overt hostility to Germans as mere playfulness, the sentences were quietly reduced in the course of successive reviews to six years, the lowest common figure fixed by the Court for men of full age; and, in the end, when the usual one-third remission for good conduct had been granted, none of the convicted men actually served more than four years in prison.

When I visited the Court-house at Minden two or three weeks after the case had been disposed of, the Legal Officer there told me he had in his custody the Furstenau trial exhibits (a large case of assorted weapons and a smaller box of ammunition), and asked permission to destroy them. Remembering that the witnesses who had searched the four condemned men had just said in evidence that they were " armed ", without describing what kind of arms they had, and recollecting that Szukalo, one of the four, had insisted that he had never used, or even possessed, a lethal weapon, but had been carrying in his pocket " a clip of three dummy cartridges with pink wooden bullets, one of which was broken ", I asked for the ammunition to be turned out on a table. The sequel pointed to the Court's having regarded the production of exhibits as some formal legalistic rite rather than as a contribution to the evidence, for there among the ammunition was a clip of dummy cartridges, exactly as Szukalo had described it, broken bullet and all. The presence of the clip fell short of corroborating Szukalo's story, but it added a great deal to the possibility that it was true; and, had the Court thought of examining the exhibits and found the clip, I am sure it would not have sentenced Szukalo to death—or his twenty-one-years-old " associate " to twenty years' imprisonment. In the event, it did not matter; but, if the Reviewing Authority and the Military Governor had been as bloody-minded as the Court, it might have mattered very much indeed.

CRIME AND PUNISHMENT.

From One Extreme to Another.

By H. F. VON HAAST, M.A., LL.B., D.LITT.

I was reading *My Ten Years' Imprisonment*, by Silvio Pellico, when I received from London the July number of *Individualism*, the Journal of the Society for Individual Freedom. Pellico was an Italian poet associated with the Carbonari, a secret political association which effected a temporary revolution but was crushed by the Austrians. Pellico was sentenced to fifteen years' imprisonment and served ten (1820-1830), the last eight in the underground dungeons of Spielberg, where the majority of the prisoners were robbers and assassins. Although suffering from fever, he had only a wooden bench to lie on. His diet was on the verge of starvation, black bread, cold water and soup and herbs undrinkable. He was chained by the feet, and forbidden to speak to his fellow-prisoners, though he managed to do so with the connivance of merciful guards; deprived of books, paper, and pen (a restriction later slightly relaxed); dressed in a parti-coloured costume; prohibited the use of any of his own clothes; allowed to walk an hour twice in the week; and forbidden any communication with his family and all information as to what was going on outside. The ordinary criminals had more freedom than he had.

The distance the penal pendulum has swung since then was revealed by an article by H. Wilson in *Individualism* on " Life To-day under The Welfare State ", in which he describes the life of convicts in Broadmoor. By way of contrast, he refers to a well-known doctor in a well-known paper regretting the tendency of business men to die young, often at fifty-nine, from worry, complexity, and excessive taxation. In the same paper, one with personal experience paints this picture of Broadmoor:

> " Broadmoor had the lowest death rate of any institution on record, far below that of any British town or city." Between 2 per cent. and 3 per cent. only, with fifty patients over the age of seventy-five, more than ever before. Work is (or was) voluntary, clothes if required ordered from outside, charabancs take them for trips round Berkshire with " delightful teas including cakes and buttered toast in a village café." Extra food may be purchased from outside. " They live comfortable lives in Broadmoor to-day . . .

[*Concluded on p. 320.*]

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Barristers and Solicitors.—A recent visitor to New Zealand, a solicitor, on being asked to describe the difference between the two branches of the legal profession in England, replied that barristers read the judgments in the Law Reports while solicitors only look at the headnotes. That whimsical philosopher Samuel Butler, who once farmed an area between the Rakaia and Rangitata Rivers, considered that solicitors had their uses. "A solicitor", he said, "can do more to keep a tolerably well-meaning fool straight than a doctor can do for an invalid. Money is to the solicitor what souls are to the parson or life to the physician. He is our money-doctor." Even in the posthumous *Note-books*, Butler has little to say of barristers, unless this branch of the profession can find its epitaph in the concluding lines of his famous sonnet:

"*We shall not argue saying 'Twas thus' or 'Thus',*
Our argument's whole drift we shall forget;
Who's right, who's wrong, 'twill be all one to us;
We shall not even know that we have met.
Yet meet we shall, and part, and meet again,
Where dead men meet, on lips of living men."

Babies and The Law.—At the Woolwich Magistrates' Court in August, a defendant charged with carrying on a two-wheeled motor-cycle more than one person, to wit, his wife and their twelve-months-old baby, contrary to s. 16 of the Road Traffic Act, 1930, set up the defence that he thought a baby was not a person. Considerable indignation at the inadequacy of the fine (10s.) is felt by a number of young married women, who consider that a baby is not only a person but a very important person indeed. At least the conviction confirms the view (which Mr. A. A. McLachlan, S.M., supported vigorously in a recent address to the Church of England Men's Luncheon Club), that the law is not "an ass", Mr. Bumble *dissentiente*. But to be fair to Bumble, who could never have intended his remark to have so general an application, what he really was contesting was the presumption that, if a wife commits a crime in the presence of her husband, she is presumed to have done it under his coercion, and, "if the law supposes that, the law is an ass".

Taxation Sinners.—Students of the opera of Gilbert and Sullivan may recall that *Ruddigore* so incensed several Frenchmen who thought their country had been insulted that they challenged Gilbert to duels. The Revenue Department also voiced its displeasure at the scene in which Sir Ruthven Murgatroyd, Bart., is confronted by the ghosts of his evil ancestors, who require to know into what crimes the due performance of his duties as the latest scion of a line of Bold, Bad Baronets has led him:

Sir Ruthven	:	On Tuesday I made a false income-tax return.
All	:	Ha! Ha!
1st Ghost	:	That's nothing!
2nd Ghost	:	Nothing at all!
3rd Ghost	:	Everybody does that!
4th Ghost	:	It's expected of you.

Appropriate as these sentiments may have been in the 1880's, when the rate of tax hovered perilously between 6d. and 8d., Mr. Harlow, S.M., would be the first to deplore them to-day. In *Commissioner of Taxes* v. *A.*, he has recently delivered himself of the following homily:

> I can well believe that Mr. A. is a man of complete probity in his dealing with other men; he might be hard, but he would be just. By the same token, he would stand aghast at the very thought of failing to account for moneys entrusted to his care; in my impression, he would be no more likely to heave a brick through a jeweller's window or burgle a house than convert to his own use money deducted from his servant's wages to meet the latter's tax obligations. That would be dishonest and against his creed, and the very thought of it would not enter his head. But to save himself from the payment of tax or duty or any such impost is another matter altogether, and, even although it meant defrauding the revenue, would not, in his mind, constitute "dishonesty" at all. "*They*" are after *his* money; he is entitled to keep it if he can. There are, at the present time, too many people of similar mind and disposition. Such an attitude is contrary to law, is plainly indefensible on any ground, and must be actively discouraged.

No doubt these misguided views could be gradually dissipated if the public could be educated to look upon the Commissioner of Inland Revenue (as the Commissioner of Taxes is now officially called) in his true role—a sort of Father Christmas in disguise.

The Children's Religion.—The religious upbringing of children invariably presents a problem to the Courts. In *Tilson* v. *Tilson*, (1925) 86 I.L.T. 49, the matter has received consideration by the Supreme Court of Eire. Prior to his marriage, the husband, a Protestant, signed with his Catholic wife an undertaking that the issue of the marriage would be brought up as Catholics. Differences having arisen, the husband took the three boys (aged seven, six, and four), who had been baptized in the Catholic Church, from the home of the wife's parents, where the family had been residing, and placed them in a Protestant institution. The wife took *habeas corpus* proceedings before Gavan Duffy, J., who held that the prospective general welfare of the children required that they should be returned to the mother to live in her home. On appeal, the Supreme Court (Maguire, C.J., Murnaghan, O'Byrne, and Lavery, JJ., Black, J., dissenting) affirmed his view. In its view, both parents have a joint power and duty in respect of the religious education of their children; and, if they make a decision and put it into practice, it is not within the power of either alone to revoke such decision against the will of the other. An agreement made before marriage dealing with matters that will arise during the marriage and put into effect after the marriage is equally effective and of binding force in law.

The Innocence of Hiss.—Lloyd Paul Stryker, famous American criminal advocate has, according to the *New Yorker*, proclaimed his belief in the innocence of Alger Hiss, whom he defended on the first trial for perjury. "If Hiss was innocent, there occurred one of the gravest miscarriages of justice of our times," he told the members of the Lackawanna Bar Association in a dinner tendered to the members of the Superior Court Bench. "Of course, if Hiss was guilty, then there was no miscarriage of justice at all," the speaker added. "And so," comments the *New Yorker*, "that's the way the land lies!"

FROM ONE EXTREME TO ANOTHER.

[*Concluded from p. 318.*]

Small wonder they live to ripe old age." There are 300 nurses and doctors to attend to the 900 patients—one servant for every three patients. They are provided with huge sports fields, bowling-greens, football pitches, tennis courts, croquet lawns, a terraced garden, acres of flower beds, and a cinema, a band, and a magazine run by the inmates. "Fifty per cent. are convicted or self-confessed murderers, 30 per cent. are attempted murderers, 12 per cent. are in for sex offences, 5 per cent. for arson, and the remaining 3 per cent. for varied offences, ranging from sabotage to highway robbery."

The "Welfare" State, where criminals are pampered and those who pay the cost are worked and worried into nervous breakdowns and too-early deaths! I am speculating which man to murder or which gas works to set on fire, for I want to live in Broadmoor. I have worked and worried and paid excessive taxes long enough!

We heard the other day that in the U.S.A. delinquent girls are provided with hairdressers, cosmetics, and bright dresses. The attitude of some well-meaning reformers is that every one other than the prisoner is responsible for his crime, and that he is the victim of circumstances. In short, the tendency is to be over-lenient with the offender in the first place, and to give him so good a time in gaol as to discourage hard work, thrift, and honesty and to encourage the commission of crime by making the prison a home where the criminal can live in greater comfort than the model citizen who is taxed to support him. No thought appears to be given to the unfortunate victim of the criminal. The same misplaced leniency in not making cancellation of a driving licence compulsory in cases of death caused by negligence continues the heavy toll on the roads.

New Zealand seems to be following in the wake of England. The result of leniency appears in the escape of prisoners and the consequent trouble and expense to the country in their recapture.

CHANGES IN COLLECTION OF ANNUAL LICENCE DUTY PAYABLE BY COMPANIES.

Capital Issues Committee.

Consequent upon the passing of the Companies Amendment Act, 1952, changes have been made in the administration of annual licence duty—in future to be called annual licence *fee*—payable by companies each year.

Hitherto annual licence duty has been payable at the office of the Assistant Commissioner of Stamp Duties, but in future it will be payable at the office of the Assistant Registrar of Companies in the various centres.

The following are the postal addresses of the various Assistant Registrars of Companies:

Auckland	.. .. ..	P.O. Box	2202
Gisborne	.. ..	„ „	127
Napier	.. ..	„ „	155
Wellington	.. ..	„ „	5069
Blenheim	.. ..	„ „	6
Nelson	.. ..	„ „	128
Hokitika	.. ..	„ „	60
Christchurch	.. ..	„ „	1323
Dunedin	.. ..	„ „	891
Invercargill	.. ..	„ „	19

The annual licence fee is payable on January 1, and demands are issued early in December.

All correspondence and inquiries regarding Capital Issues should be addressed to The Secretary, Capital Issues Committee, P.O. Box 5010, Wellington, and not to the Registrar of Companies.

On the Writing of Judgments

"We arrive at the last endowment of the great Judge—an endowment without which the exercise of the others is apt to be handicapped—I mean the gift of lucid and graceful speech. Without lucidity a judgment will not be understood with that complete accuracy which is necessary in so exact a science as law, and without grace it will not be effectively remembered. Some very great Judges have been clear enough, but they have lacked grace, and the result is that they have not had that influence on legal history which they deserved. Eldon is a case in point. He is probably the greatest equity Judge, except Hardwicke, that ever lived, but I have yet to meet the man who can read him with pleasure. Take the case of *Wykham* v. *Wykham* (18 Ves. 415), which laid down the distinction between law and equity in the case of contracts—a masterly and epoch-making judgment, but as flat as ditch-water and as ponderous as a tombstone.

"A wide culture will beyond doubt be of inestimable advantage to a man when he comes to the preparation of judgments, for no scholar, born with a love of good English, will content himself with the clumsy jargon which sometimes does duty for legal terminology. I am prepared to maintain that there is a surprising amount of fine literature in the Law Reports. Indeed, I am ready to assert that almost the best prose has been written by men who were not professional men of letters, and who therefore escaped the faded and weary mannerisms of the self-conscious littérateur. As an example I would point to the prose of Cromwell, of Abraham Lincoln, of a dozen explorers like Captain Scott and Captain Boyd Alexander, and of soldiers in the recent war like the Canadian General Sir Arthur Currie. It is the same with the great Judges. Mansfield's prose has the massive dignity of the best Georgian manner. Bowen's is often as delicate and careful as an essay of Stevenson's. John Marshall was not, generally speaking, a master of style, as those who have tried to read his *Life of Washington* will bear witness. But he could rise at a great moment to a noble and restrained eloquence, as may be learned from his judgment in *M'Culloch* v. *Maryland*. I have sometimes had an idea of compiling a legal anthology of those judgments which are good literature as well as good law. It would be a fascinating book, and it would put some professional stylists to shame. There is only one rule for good prose, the rule which Newman and Huxley in their different ways enunciated and followed—to set down your exact, full, and precise meaning so lucidly and simply that no man can mistake it. That, and not flowers of rhetoric, has been the aim of the best Judges, and small wonder that good prose has been the result": John Buchan, "The Judicial Temperament," from *Homilies and Recreations*.