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AUCTIONEERS: CONDITIONS AND ORAL WARRANTIES.

IN *Wilson* v. *Pike*, [1948] 2 All E.R. 267, 269, the Court of Appeal, in its judgment delivered by Tucker, L.J., said :

> There can be no doubt that the auctioneer, for the purpose of enforcing his right to receive the purchase price, can sue in his own name as for goods sold and delivered or bargained and sold, and this is so even where he has sold for a disclosed principal : see *Williams* v. *Millington* ((1788) 1 Hy. Bl. 81).

Their Lordships said that, none the less, they desired to reserve the question whether the true position is not as stated by Salter, J., in his judgment in *Benton* v. *Campbell, Parker and Co., Ltd.*, [1925] 2 K.B. 410, where, after a review of the authorities, he expressed the opinion that the auctioneer sues for the price, not by virtue of the contract of sale, but by virtue of his special property and his lien, and also, in most cases, by virtue of his contract with the buyer that the price shall be paid into his hands.

The question raised but not answered by their Lordships in *Wilson* v. *Pike* was in the forefront of a recent action in the Magistrates' Court, *Dalgety and Co., Ltd.* v. *Fraser* (1952) 7 M.C.D. 558, which has recently been reversed on appeal (to be reported).

The matter first came before the Magistrates' Court as an action for the purchase of a prefabricated cottage sold by auction. It was brought by the auctioneering company in its own name by virtue of its lien, or special property, on the goods sold, and not under the contract of sale made between the purchaser and the auctioneering company's principal, the owner of the cottage. The learned Magistrate held that any defence, such as an alleged breach of warranty of fitness, which might be available to the purchaser of the goods under the contract of sale was not available in this action.

The appeal was heard by Mr. Justice Fair, and the auctioneering company will be referred to as " the respondent " and the purchaser of the cottage at auction as " the appellant ".

The respondent advertised in the *Manawatu Daily Times* an intended sale in the following terms :

> *Account Estate I. B. Johnston, Wanganui.*
>
> Prefabricated cottage 24 x 12, Gardner Construction, 8 ft. stud, gable roof, flooring, 1 double window, 4 single windows, 3 ft. door, packed in 4 lots of 6 ft. section. This cottage is most suitable for a farmer or beach bach and is in first-class order. To be offered at 2.30 p.m. sharp.

On October 12, 1951, the respondent's auctioneer offered it at auction ; the defendant was present and bid, and it was knocked down to him for £160.

The appellant's evidence was that he attended the sale as the result of the newspaper advertisement, as he wished to erect the cottage on a vacant section that his brother-in-law had at Foxton Beach. Just before the sale, the appellant told Mr. Edwards, the manager of the respondent company at Feilding, what he wanted the cottage for. He first saw the unassembled timbers and fittings, which were in three or four stacks on the respondent's property, on the day of the sale (a Friday), and did not examine them closely, as he relied on the advertisement describing what was being sold as being " most suitable for a farmer or beach bach ".

On the following Monday or Tuesday—*i.e.*, three or four days after the sale—the appellant told the respondent's manager that he would not take the cottage, as he was unable to get a permit to erect it as a cottage. It was proved in evidence that the studs provided for the cottage were only 2 in. x 2 in. in cross-section, and that the requirements of the local authority controlling Foxton Beach as regards studs were that they should be not less than 4 in. x 2 in. It was proved also that the building by-laws of all local bodies between Wellington and Wanganui (inclusive) prescribed a minimum of 4 in. x 2 in. for studs. The Magistrate found that, such being the case, the cottage could not be erected, and was useless as a cottage.

It was for this reason that the appellant refused to take delivery of it or to pay for it, and it still remains on the respondent's premises. The appellant alleged as his first ground of defence that the statement that the cottage was " most suitable for a farmer or beach bach " was untrue and a misrepresentation, and that, in bidding for it, he relied upon the representation as to its suitability, which, its counsel submitted, was a warranty, and that a breach entitled him to rescind.

A second ground of defence was that no note or memorandum of the contract of sale had been made sufficient to satisfy the provisions of s. 6 of the Sale of Goods Act, 1908 ; but we do not propose to consider this ground of defence any further, as the learned Judge said that, so far as it was concerned, he did not find it necessary to arrive at a decision on it.

Certain aspects of the law bearing on the first defence were not in dispute, and they were briefly stated by Mr. Justice Fair in his judgment.

It is established that a licensed auctioneer, carrying on business as such, generally has the right, unusual in a disclosed agent, of suing a purchaser for the purchase price of an article sold by him by auction where default is made in payment, even though the name of the owner is disclosed, and certainly where he does not disclose the name of his principal. It has been much debated whether, in taking such proceedings, the auctioneer is suing upon a special contract between himself and the purchaser. The terms in such a contract are suggested to be that the auctioneer warrants that he has authority to sell and will deliver possession of the goods to the purchaser. The contract of the purchaser is to pay the purchase price in accordance with the conditions of sale. Alternatively, it has been put that the auctioneer has this right of suing in his own name to enforce the contract of sale made by the purchaser with his principal. The whole matter was adverted to at length by Mr. Justice Salter in *Benton* v. *Campbell, Parker and Co., Ltd.*, [1925] 2 K.B. 410, in which it was held that, on the sale of a motor-car, the auctioneers did not warrant the title of the vendor where he had disclosed the fact of agency *but not the name of his principal*, and so the purchaser could not recover from *the auctioneer* moneys paid him. That was the sole question decided, but, in the course of it, the general position was carefully examined by the Court, and the cases bearing upon it were considered.

The Court pointed out during argument that the question was whether the contract was a contract to make delivery or to pass the property. The learned Judge said, at pp. 415, 416, 417, referring to a sale by an auctioneer :

> If he is an auctioneer to whom a chattel has been delivered for sale he gives both these warranties, he undertakes to give possession against the price paid into his hands, and he undertakes that such possession will not be disturbed by his principal or himself. *There may, of course, be other terms in this contract arising* on the facts of the case . . . But whatever its terms may be, the contract is *entirely independent* of the contract of sale. To that contract the auctioneer who sells a specific chattel as an agent is, in my opinion, no party. He has no right to enforce it and is not bound by it . . . It is clear, therefore, that the auctioneer does not sue for the price by virtue of the contract of sale . . . He is not the seller, nor had he undertaken to discharge the liabilities of a seller except so far as those liabilities may be included in his own contract with the buyer.

Later on, at pp. 420, 421, referring to the decision in *Wood* v. *Baxter*, (1883) 49 L.T. 45, 46, 47, he quotes from the judgment as follows :

> Upon making such delivery, his obligation would ordinarily be fulfilled. For example, upon such a contract there would not be necessarily implied any warranty of title in the goods, though he might, of course, like anyone else, by his conduct or by declaration at the time of the sale. afford evidence of an actual warranty of title : see *Morley* v. *Attenborough* (3 Ex. 500) ; *Eichholz* v. *Bannister* (17 C.B. N.S. 708) . . . In fact, *whenever the question is raised as to the extent of the contract that the auctioneer enters into when he sells goods by auction*, this question must be determined, as in other cases, upon the evidence as to the conduct and declarations of the auctioneer, the nature of the subject-matter of the sale, and the surrounding circumstances.

His Honour, assuming this statement of the law by Salter, J., to be correct, and that the question was left open in *Wilson* v. *Pike*, [1948] 2 All E.R. 269, said that it appeared to him to be unnecessary to decide in the present case the question whether a memorandum under the Sale of Goods Act, 1908, is required to enable the respondent to succeed.

It seems clearly established that an auctioneer who discloses the name of the vendor and sells a specific article does not give a warranty of title, but it also seems clear that, even if the auctioneer's contract is regarded merely as a contract to deliver the goods, as Salter, J., thought, the contract is to deliver goods of the kind and type that he offers for sale.

In the course of his judgment, Fair, J., said that it seemed to him that the first question to be decided was whether it was a condition of the contract between the auctioneer and the appellant that he would deliver material " suitable for erection as a cottage or beach bach ".

The preliminary question to be decided was whether such a statement was a mere expression of opinion, or other mere representation or " puff ", or whether it was a stipulation in the contract, being either a warranty or a condition. Although the Magistrate did not expressly decide this question, the whole of the evidence was before the Supreme Court. The learned Judge continued :

> From that and the Magistrate's judgment, this Court is in a position to determine this issue, whether it be regarded as a question of law or as a mixed question of law and fact. There is no doubt that to describe prefabricated material as a " cottage " ordinarily implies that it can be erected and used as a residence. Unless this can be done, the material may be suitable for use either as a shed or similar building, or as building or other material, but it cannot answer the description of a " cottage ". When there are added the words " This cottage is most suitable for a farmer or beach bach ", the former meaning is emphasized, as it is also by the details that were given as to the constituents of the material described. There is an element of mere commendation in the word " most ", but that does not detract from the other positive and definite statements.
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> It clearly was intended as a statement of fact ; and, though it has intermingled, necessarily, a statement as to the law, it is considered a pure statement of fact : *23 Halsbury's Laws of England*, 2nd Ed. 17, para. 23. Clearly, it was intended that it should be acted upon by intending purchasers. It would unquestionably lead them to believe that this was a prefabricated cottage, able to be used as such by any purchaser. They would be entitled to assume that a statement to this effect, made by the respondents, an old-established firm of high standing with a very large business, could be relied upon as correct. They would be justified in assuming that they might reasonably refrain from inspecting it or checking its suitability for such purposes. The appellant in his evidence states that he made this assumption and acted upon this view as to the correctness of the statements made.

In determining whether a statement be a promise, whether by way of warranty or by way of condition, His Honour said that it might be relevant to consider whether the seller asserts a fact of which the buyer is ignorant, or merely states his own opinion without special knowledge. He referred to *29 Halsbury's Laws of England*, 2nd Ed. 52 (*r*), citing *Lomi* v. *Tucker*, (1829) 4 C. & P. 15; 172 E.R. 586, in which the description of two paintings as " a couple of Poussins " was held a condition ; and also to *Benjamin on Sale*, 8th Ed. 610, 611, 613.

The learned Judge pointed out that, where there is an express condition, the rule *caveat emptor* does not apply : *Chanter* v. *Hopkins*, (1838) 4 M. & W. 398, 404 ; 150 E.R. 1484, 1486, 1487, and *Randall* v. *Newson*, (1877) 2 Q.B.D. 102, 109 ; and the rule has no application to a case in which the seller has undertaken, and a buyer has left it to the seller, to supply goods to be used for a purpose known to both parties at the time

of the sale: *Wallis* v. *Russell*, [1902] 2 I.R. 585, 615. In *Baldry* v. *Marshall*, [1925] 1 K.B. 260, it was not even argued on behalf of the vendor that a condition that a car was to be "suitable for touring" was other than a warranty at least, and it was held to be a condition entitling the buyer to rescind. His Honour then said:

> I have no doubt that in the present case it was a condition of the sale that the auctioneer undertook to deliver to the appellant goods fit for erection as a cottage. So whether the contract sued on by the respondent is dependent on the continued existence of a valid contract of sale by the vendor, or is an independent contract between the auctioneer and the appellant for the sale and delivery seems immaterial in the present case. If it was the latter, it was to deliver a "cottage", and the respondent was unable to do this. It was clearly a breach of the condition, which entitled the appellant to rescind, and he did so *qua* both the auctioneer and the vendor, and so the respondent's action should have failed on this ground.
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> As I have indicated, in my view neither *Benton's* case ([1925] 2 K.B. 410) nor *Wilson's* case ([1948] 2 All E.R. 267) is a direct authority on this matter. The first-named dealt with the question of warranty of title, and the second with the necessity for a memorandum.
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> The above conclusion seems also confirmed by the statements in the text-books, particularly those in *1 Halsbury's Laws of England*, 2nd Ed. 706, para. 1162, where it is stated: "Misstatements by the auctioneer may render him liable to an action for negligence for any loss sustained, or to an action by the purchaser for breach of warranty of authority. Where material misstatements of fact are made by the auctioneer, the contract may be avoided on the ground of misrepresentation".

Mr. Justice Fair, after referring to *Hart on Auctioneers*, 2nd Ed. 57, said that it would be unfortunate if it were otherwise; because in this case it did not appear that the owners had authorized the advertised description of the prefabricated cottage. From the evidence, it appeared that the auctioneers had taken it from the handbook of the manufacturers. He also referred to the cases cited in *Hart on Auctioneers*, 2nd Ed. 238, 239. In the present case, the appellants did not establish that they had paid the respondent before they got notice of rescission by the appellant. Reference may also be made to *Dickenson* v. *Naul*, (1833) 4 B. & Ad. 638; 110 E.R. 596, where it is said at p. 639; 597, by a Court consisting of Lord Denman, C.J., and Littledale and Parke, JJ.:

> For the plaintiff it was contended, that the auctioneer had a right of action for goods sold by him in the course of his business; and undoubtedly he may sue, where the right of no third person intervenes. But where such right is established, and the person employing the auctioneer is proved not to be the owner, *it then becomes clear that the auctioneer, who can have no interest in the goods but what he derives from his employer, has no longer any claim upon the property against the right owner.* The defendant was therefore justified in withholding payment to the agent of the supposed executrix [auctioneer] after notice of the title of the real executrix, to whom he is certainly liable.

The learned Judge, Fair, J., said that it seemed an irresistible inference from that statement that, if the appellant was entitled to rescind the contract as against the owners of the building, then there was nothing upon which the lien of the auctioneer could operate, for the contract for payment of the price to the auctioneer fell with the main contract, to which it was subsidiary. The position may be different when the money has been paid over to an owner, who personally made the misrepresentation relied on before notice of rescission; it was not necessary to consider that topic. The decision in *Franklyn* v. *Lamond*, (1847) 4 C.B. 637; 136 E.R. 658, is to the same effect. There, the purchaser succeeded in an action for damages against the auctioneers for non-delivery of some shares. Possession of the shares not having been given to the purchaser, he was held entitled to sue the auctioneers. So, too, here the respondent, not being in a position to deliver goods of the description purported to be sold, would probably have been liable to an action for damages as for a breach of warranty, but the appellant was, in the view of the Judge, entitled to exercise the alternative right of rescission for non-delivery of the goods contracted for.

Mr. Justice Fair said that the appellant was entitled to succeed also on the ground that there was a mutual mistake as to the essential nature and kind of the article intended to be sold and bought. The respondent believed itself to be selling, and the appellant believed himself to be purchasing, something essentially different from what was actually available for sale. In such circumstances, there is no *consensus ad idem*, and the contract is void on the ground of mutual mistake: *Nicholson and Venn* v. *Smith Marriott*, (1947) 177 L.T. 189, *Raffles* v. *Wichelhaus*, (1864) 2 H. & C. 906; 159 E.R. 375, and *3 Halsbury's Laws of England*, 2nd Ed. 95, para. 134.

The sale of goods by auction and the incorporation in the contract of warranties made orally at the time is a subject of infinite variety of facts. It has recently again fallen to the Court of Appeal in England to decide on the efficacy of an oral assurance made in clear contradiction of the printed conditions of sale contained in an auction catalogue.

The auction in *Harling* v. *Eddy*, [1951] 2 All E.R. 212, was of cattle which were catalogued as "tuberculin-tested Guernseys". Included in the catalogue also were a number of conditions, including the following:

> (12) No animal, article, or thing is sold with a warranty unless specially mentioned at the time of offering, and no warranty so given shall have any legal force or effect unless the terms thereof appear on the purchaser's account.

At the sale, the defendant offered a heifer of such unprepossessing appearance that no bids were forthcoming. The defendant then stated that nothing was wrong with her, that he would absolutely guarantee her, and that he would take her back if she proved not to be as stated. Acting on these assurances, the plaintiff purchased the heifer, but no reference to the defendant's statement appeared on the plaintiff's account. The animal steadily wasted away, and died of tuberculosis rather less than three months later.

The facts were somewhat similar to those in *Couchman* v. *Hill*, [1947] 1 All E.R. 103, where there had been a sale by auction of heifers described in the catalogue as "unserved". The catalogue further stated that the sale would be subject to the auctioneer's usual conditions, and that all lots must be taken subject to all faults or errors of description. The auctioneer's conditions, which were exhibited at the auction, stated that the lots were sold "with all faults, imperfections and errors of description". At the sale, the plaintiff asked both the seller and the auctioneer to confirm that a heifer was unserved. Both answered "yes", and the plaintiff accordingly bid for and bought the animal, which was found to be in calf, and which died some weeks later through carrying a calf at too young an age.

It is obvious that the facts in *Couchman's* case and *Harling's* case are virtually indistinguishable. In both there were printed conditions duly brought to the

notice of the buyer, which the buyer claimed to be overridden by oral representations made at the time of the sale. In *Couchman's* case, however, Scott, L.J., held that the description " unserved " constituted an unqualified oral condition, for a breach of which the plaintiff was entitled to elect to recover damages as though it were a breach of warranty. In *Harling's* case, the defendant's statements were also regarded by the Court as creating a condition, in which case the plaintiff could not be prevented from recovering by the written conditions of sale which sought to exclude only " warranties ", but, even if, for the purposes of the judgments, the words were assumed to amount to a mere warranty only, then, on this assumption, the defendant thereby implied that the heifer should be sold on the faith thereof, to the exclusion of printed condition No. 12. Judgment was accordingly given for the plaintiff.

The County Court Judge in *Couchman's* case, who had found for the defendant, had considered that, notwithstanding the express oral warranty, he was bound by the decision in *Ward* v. *Hobbs*, (1878) 4 App. Cas. 13, where it was held, *inter alia*, that a statement that a purchaser must take the article " with all faults ", and that the vendor will give no warranty with it, and will refuse all future claims for compensation, relieves the vendor from all liability in respect of any defect in the article. In that case, however, there was no express oral warranty, but it was sought to imply a warranty of freedom from disease by the conduct of the defendant in sending pigs to a market to which an Act applied making it an offence to send there a diseased animal. It was, therefore, clearly distinguishable.

Denning, L.J., in his judgment in *Harling's* case referred to the unreported case of *Lee* v. *Gray* (1929), which was a case of a gelding described in the auction catalogue as a " quiet and good worker in all gears ", which warranty was orally repeated by the auctioneer. Elsewhere in the catalogue were printed conditions negativing any warranty. There, the County Court Judge had been unable to distinguish the facts from *Taylor* v. *Bullen*, (1850) 5 Exch. 779; 155 E.R. 341. The Divisional Court, however, held not only that the latter case was clearly distinguishable, since there the buyer had actually signed the document containing the exempting condition, but also that an express oral warranty could override a condition in a catalogue excluding any warranties. In both *Harling's* case and *Couchman's* case, therefore, the view was taken that the oral representations of the seller overrode the condition in the catalogue and the buyer could recover damages.

The editorial note in the report of *Couchman* v. *Hill* referred to the old case of *Hopkins* v. *Tanqueray*, (1854) 23 L.J.C.P. 162, and, in stating that this had not been brought to the notice of the Court of Appeal in *Couchman* v. *Hill*, suggested that, if it had, the latter might have been differently decided. In *Hopkins* v. *Tanqueray*, the defendant had sent his horse to Tattersall's for sale by auction without warranty. The day before the sale, when he saw the plaintiff examining the horse at the stable, he approached the plaintiff and told him : " You have nothing to look for. I assure you he is perfectly sound in every respect." The plaintiff replied, " If you say so, I am perfectly satisfied ", and, on the faith of this assurance, the following day bought the horse. It was held that there was no evidence of a warranty to go to the jury, as the representation made on the previous day formed no part of the contract of sale. This seems clear enough, and can be distinguished from *Couchman* v. *Hill* at least on the ground that the supposed warranty was given too long before the auction in time for it to override the conditions governing any bargain struck at the auction. This, at any rate, was the view expressed by Sir Raymond Evershed, M.R., in *Harling* v. *Eddy* in disapproving the editorial note in the reports mentioned above.

The foregoing decisions still leave one question at least unanswered. Denning, L.J., said (at p. 218) that " the principle which underlies these cases is that if a person wishes to exempt himself from a liability which the common law imposes on him, he can only do it by an express stipulation brought home to the party affected and assented to by him as part of the contract ". What then is the position where a seller makes and brings home to a buyer a printed exempting condition which is even signed by the buyer as in *Taylor* v. *Bullen* and then at the time of the sale fresh representations are made orally ? It would appear from both *Couchman* v. *Hill* and *Harling* v. *Eddy* that the oral representations will be regarded as overriding the printed condition. But in that case is *Taylor* v. *Bullen* now of doubtful authority ? The question did not arise in *Harling* v. *Eddy* that the printed conditions were not brought home to the buyer, and in any event the fact that the buyer had signed the document containing the condition in *Taylor* v. *Bullen* was surely no more than evidence that the condition had been brought to his notice.

The answer seems to be that it is impossible to generalize to the extent of saying that oral representations at the moment of sale must always be taken to override an exempting printed condition. The only criterion in any set of facts is—what did the parties understand by whatever was said at the sale, whether in the form of question and answer or an outright statement by the seller ? Scott, L.J., in his judgment in *Couchman* v. *Hill* referred to the finding of the County Court Judge that the oral statement that the heifer in question was " unserved " was made and that it was a warranty whose value was destroyed by the qualifying stipulations. He went on to say (at p. 559) : " he has not in terms put the question to himself ' did the parties by this question and answer intend to exclude the stipulations from the contract that resulted on the fall of the hammer ' " ?

Another obvious feature of this type of case is that the printed conditions may well constitute a trap for buyers. A printed condition that the vendor will take no responsibility for errors of description of things specifically offered for sale on inspection is reasonable for visible defects, but surely most unfair for anything that no ordinary inspection could reveal. The only protection against that is, of course, not to do business on those terms, but to act as did the farmer in *Couchman* v. *Hill* ; as Scott, L.J., so succinctly put it : "the plaintiff was not a lawyer, but he knew what he wanted, and he got it : so did the vendor, and he gave it ". One suspects that the learned Lord Justice was here showing some admiration for a layman who was determined not to be bamboozled and twisted about with entrapping legal jargon !

SUMMARY OF RECENT LAW.

ANIMALS.

Liability for Damage done by Animals. *96 Solicitors' Journal*, 653.

BAILMENT.

Cool Storage—Bailment for Reward—Contract to keep in Cool Storage and take Care of Bags of Peanuts—Growth of Mould on Peanuts while in Cool Store—Duty of Bailee to make Reasonable Inspection of Goods while in Storage. The duties of a bailee for hire are (*a*) that the bailee is bound to store in a proper manner the goods he receives; and (*b*) that the bailee has the duty of reasonable inspection so as to see that the goods are not sustaining damage. (*Brabant and Co.* v. *King*, [1895] A.C. 632, and *Aurora Trading Co., Ltd., and Jackson* v. *Nelson Freezing Co., Ltd.*, [1922] N.Z.L.R. 662, followed.) (*Allan and Poynter* v. *J. and R. Williamson*, (1870) 7 Sc.L.R. 214, and *J. and R. Snodgrass* v. *Ritchie and Lamberton*, (1890) 17 R. (Ct. of Sess.) 712, applied.) The appellant company placed bags of peanuts in good condition with the respondent company, which carried on the business of cool storage, and which accepted them at its storage rate for peanuts, subject to conditions which did not mention inspection by the respondent during the term of the cool storage. It was admitted by the respondent that no routine inspection of the peanuts was made during the lengthy period of storage, and some of the bags of peanuts became infected with mould fungus in varying degrees. In an action claiming damages for breach of the respondent's contract properly to store and take care of the peanuts, whereby the respondent permitted or failed to prevent the growth of mould, or for negligence, a Magistrate nonsuited the plaintiff. On appeal from that determination, *Held*, 1. That there was no evidence that a duty of regular inspection of goods is contrary to trade custom or practice; and that it was irrelevant that inspection was not allowed for in the standard schedule of cool-storage charges. 2. That the duty of inspection at all reasonable times existed, since the respondent, through its skilled refrigeration engineer, must be presumed to have had full knowledge of the tendency of peanuts to grow and develop mould in a cool store under certain conditions. 3. That there was a definite causal connection between the failure of the respondent to perform the duty of reasonable inspection and the damage suffered by the appellant. *Semble*, That the onus was on the respondent of proving that throughout the period of storage the proper temperature and humidity were maintained, so as to prevent the growth and development of mould, and that the mould did not arise from the conditions as to temperature and humidity which it adopted from time to time. *Adams Bruce, Ltd.* v. *Frozen Products, Ltd.* (S.C. Wellington. October 13, 1952. Hay, J.)

BANKING.

Joint Account: Bankers' Liability. *214 Law Times*, 179.

CHARITABLE TRUST.

Charities for Promotion of Professional Interests. *102 Law Journal*, 565.

COMPANY LAW.

Acquisition of Shares of Dissentients. *96 Solicitors' Journal*, 655.

CRIMINAL LAW.

The Innocent Accessory. *102 Law Journal*, 522.

Trial—Evidence—Accused calling Evidence and making Unsworn Statement from Dock—Concurrent Rights—Unsworn Statement to be made before Evidence called for Defence—Criminal Appeal Act, 1945, s. 4 (1). During the course of his trial, an accused person, besides calling evidence, may make an unsworn statement from the dock. When an accused person desires both to make an unsworn statement and to call witnesses, the statement should be made before any evidence is called for the defence. (*Reg.* v. *Millhouse*, (1885) 15 Cox C.C. 622, not followed.) (*R.* v. *Perry and Pledger*, [1920] N.Z.L.R. 21, *R.* v. *Pope*, (1902) 18 T.L.R. 717, *R.* v. *Krafchenko*, (1914) 17 D.L.R. 244, *R.* v. *Harrald (No. 2)*, [1948] Q.W.N. 28, and *R.* v. *McKenna*, [1951] St.R.Qd. 299, referred to.) Where, therefore, it could not be held that the refusal of the trial Judge to allow the accused to make a statement did not cause a miscarriage of justice, the conviction was quashed and a new trial was ordered. *Kerr* v. *The Queen*. (C.A. Wellington. October 20, 1952. Northcroft, J.; Finlay, J.; Hutchison, J.; Cooke, J.)

DIVORCE AND MATRIMONIAL CAUSES.

Anomalies as to Financial Rights in the Divorce Court. *214 Law Times*, 161, 176, 189.

Estoppel in Matrimonial Proceedings. *102 Law Journal*, 634.

Maintenance: Secured Maintenance. *102 Law Journal*, 563.

FISHERIES.

Offences—Taking Under-sized Crayfish—Duty of Fisherman—Defence of having "immediately returned it alive to the water"—Nature of Such Defence—"Immediately"—Fisheries (General) Regulations, 1950 (Serial No. 1950/147), Regs. 95, 113. Regulation 113 of the Fisheries (General) Regulations, 1950, provides that it is a defence to a charge under Reg. 95 of being possessed of an under-sized crayfish that the defendant "immediately returned it alive to the water". To avail himself of that defence, the fisherman must show that he returned all under-sized crayfish collected out of the first pot before he tipped the contents of the second and subsequent pots on top of them, and so on throughout the harvesting. *Letcher* v. *Williams*. (Napier. September 8, 1952. Harlow, S.M.)

HUSBAND AND WIFE.

Claims for Ownership and Possession of The Matrimonial Home. *96 Solicitors' Journal*, 601, 620.

Division of Matrimonial Property. *102 Law Journal*, 619.

INFANTS AND CHILDREN.

Legitimation and The Conflict of Laws. *102 Law Journal*, 605.

JUDICIARY.

The Office of Chief Justice. *214 Law Times*, 174.

LAND TRANSFER.

Memorandum of Transfer—Purchase of Land with Knowledge of Existence of Agreement granting Rights over It—Registration of Transfer with Knowledge of Rights—Subsequent Claim to hold Land discharged from Rights under Agreement Fraudulent for Purposes of Land Transfer Act, 1915—Land held subject to Those Rights—Land Transfer Act, 1915, s. 197. H. sold a property to P., who agreed to H.'s retaining a shed on the property for a period of ten years, together with the right to pass to and from it in the meantime and to remove it at any time during that period. Later, W. bought from H. an adjoining property, and H. assigned to W. his rights under his agreement with P. No caveat to protect the agreement was lodged. H. subsequently bought P.'s property and the business being carried on there; but the agreement for sale and purchase contained no reference to W.'s rights. On the day before H.'s completion of the purchase, W.'s solicitor informed H. of W.'s rights under the agreement. On completion, H. registered his transfer from P. W. sought an injunction to restrain H. from interfering with the shed on his property. H. contended that, as registered proprietor, he was entitled to hold the property free and discharged from any right or claim asserted by W. *Held*, 1. That, on the facts, H., before he registered his transfer, had full knowledge of W.'s subsisting rights and of his intention to continue them. 2. That, whether or not s. 197 of the Land Transfer Act, 1915, applied, a claim by H., after registration, to hold the land discharged from those rights was fraudulent for the purposes of the Land Transfer Act, 1915, and, accordingly, H., at the date of registration of his transfer, held the property subject to the rights vested in W., who was entitled to the injunction he sought to restrain H. from interfering with the exercise of those rights. (*Merrie* v. *McKay*, (1897) 16 N.Z.L.R. 124 (approved in *Waimiha Sawmilling Co., Ltd.* v. *Waione Timber Co., Ltd.*, [1923] N.Z.L.R. 1137; aff. on app., (1925) N.Z.P.C.C. 267), followed.) (Dictum of *Edwards*, J., in *In re Mangatainoka I* BC *No. 2*, (1913) 33 N.Z.L.R. 23, 68, applied.) *Semble*, That, as the agreement between H. and P., on which W. relied, did not create any interest which was capable of being registered under the Land Transfer Act, 1915, W. was not entitled to invoke s. 197 of that statute. (*Carpet Import Co., Ltd.* v. *Beath and Co., Ltd.*, [1927] N.Z.L.R. 37, and *Gray* v. *Urquhart*, (1911) 30 N.Z.L.R. 303, referred to.) *Webb* v. *Hooper*. (S.C. Auckland. October 30, 1952. Stanton, J.)

LICENSING.

Offences—Illegally on Premises after Closing-hours—Defendant visiting Hotel after Closing-hours to hand to Barman Money owned by Him—Defendant, when leaving Premises, handed Gift of Beer by Barman—Original Lawful Purpose not Test—Defendant's Act Essential Part in Offence committed by Barman of supplying Liquor during Hours when Premises required to be closed—Licensing Act, 1908, ss. 194 (1), 205 (e). The appellant had gone to an hotel after 6 p.m. for a lawful purpose—namely, to pay a barman some money which he was holding for him. He consumed no liquor while on the premises. He handed over the money to the barman, and both were about to leave the premises when the barman handed him an unsolicited gift of two bottles of beer belonging to the barman inside the door of the hotel. The appellant was convicted on a charge, laid under s. 194 (1) of the Licensing Act, 1908, of being found on licensed premises at a time when they were required by the statute to be closed. On appeal from that conviction, *Held*, dismissing the appeal, 1. That the crucial test, in the circumstances of this case, was not necessarily the purpose which the appellant had in mind when he originally entered the premises, as such lawful purpose could be changed into an unlawful purpose in the course of his stay on the premises. 2. That the appellant had an unlawful purpose when he took an essential part in the transaction giving rise to the offence committed by the barman under s. 205 (*e*) of the Licensing Act, 1908, as his acceptance of the gift of the two bottles of beer made the donor answerable to a charge of supplying liquor at a time when the appellant was not entitled lawfully to be supplied with liquor. (*Hopper* v. *Cahill*, [1925] G.L.R. 380, and *O'Connell* v. *Clausen*, [1928] N.Z.L.R. 227, applied.) (*Reg.* v. *Coney*, (1882) 8 Q.B.D. 534, *Pine* v. *Barnes*, (1887) 20 Q.B.D. 221, and *Cope* v. *Landles*, (1896) 13 T.L.R. 18, distinguished.) (*Atkins* v. *Agar*, [1914] 1 K.B. 26, and *Fox* v. *Phillips*, [1930] G.L.R. 617, referred to.) *Byrne* v. *Leveridge*. (S.C. Wellington. October 22, 1952. Hay, J.)

MALICIOUS PROSECUTION.

Malicious Prosecution. *214 Law Times*, 191.

MUNICIPAL CORPORATION.

Laying Drains through Private Lands—Council's Hearing of Objections—Decision Quasi-judicial—Requirements of Natural Justice to be satisfied—Objector to be Present and to have Fair Opportunity to present Case and reply to Opposing Statements—Municipal Corporations Act, 1933, Ninth Schedule, cl. (d). Clause (*d*) of the Ninth Schedule to the Municipal Corporations Act, 1933, which relates to objections by occupiers of lands through which it is proposed to lay a drain, provides as follows: "The Council shall hold a meeting on the day so appointed, and may, after hearing any person making such objection, if present, determine to abandon the work proposed, or to proceed therewith, with or without such alterations as the Council thinks fit." The decision to be made by the whole Council as the body to hear the objection is a quasi-judicial one; and, in such an inquiry, any evidence or arguments additional to those which the Council has already considered should, in general, be presented in the presence of the objector. The general rule as to such procedure is that it must satisfy the requirements of "natural justice" by giving a fair opportunity to each party to present his case, including a right to reply to statements made by an opposing party at the hearing. (*Board of Education* v. *Rice*, [1911] A.C. 179, and *Local Government Board* v. *Arlidge*, [1915] A.C. 120, followed.) (*Errington* v. *Minister of Health*, [1935] 1 K.B. 249, referred to.) The plaintiffs received notice in writing of the Council's intention to construct a drain through their land, and they served on the Council a written objection to the work. At the appointed hearing by the Council of the objection, the first-named plaintiff, the husband of the second-named plaintiff, was given an opportunity of stating his objection, and he was represented by counsel. After they had been heard, they withdrew. The Council then heard a written and verbal report from the City Engineer. No matters were raised or brought before the Council, by the City Engineer or by any other person, of which the first-named plaintiff had not been aware before the hearing of his objection. The plaintiffs were not present when the City Engineer's report was made, and they had no opportunity of answering or otherwise commenting on it after it was made. The Council, after full consideration and discussion, determined by resolution to proceed with the drain. On application by the plaintiffs for an order restraining the defendant Corporation from proceeding with the construction of the proposed drain through their property, *Held*, 1. That the plaintiffs were entitled to have a hearing by the Council of their objections at which they would be given the opportunity of hearing the written and verbal report of the City Engineer, either on the objections made by them or, possibly, on the fresh alternative proposals that they adduced at the hearing of the objection. (*Errington* v. *Minister of Health*, [1935] 1 K.B. 249, applied.) 2. That the plaintiffs were entitled *ex debito justitiae* to a writ of prohibition, the smallness of the matters in dispute not being in itself a ground for refusing to grant it. The defendant Corporation was prohibited from proceeding with the construction of the drain until the plaintiffs' objection had been duly heard and determined in accordance with the requirements of the law; and a mandamus was issued commanding it to fix the time for such fresh hearing. *Connolly and Another* v. *Palmerston North City Corporation*. (S.C. Palmerston North. October 28, 1952. Fair, J.)

NEGLIGENCE.

"Foreseeability" and the Factories Act. *102 Law Journal*, 549.

Liability for Nervous Shock. *102 Law Journal*, 523.

Motor-car overtaking and colliding with Tractor and Attached Trailer on Straight and Dry Highway on Dark but Clear Night—Trailer not equipped with Regulation Tail-lamp—Tractor showing Rear White Light—Lights not Adequate Substitute for Regulation Lights—Driver of Motor-car not keeping Proper Look-out and driving at Excessive Speed—Both Negligent in Equal Degrees—Traffic Regulations, 1936 (Serial No. 1936/186), Reg. 7 (6) (13). A collision took place at night on a main highway between a tractor and a trailer belonging to the plaintiffs and a motor-car, the property of the Crown, which was overtaking. The tractor was not wholly without a warning light, but the Crown alleged that the plaintiff's driver was negligent in driving upon the road during the hours of darkness a trailer which was not equipped with a tail-lamp, contrary to Reg. 7 (6) of the Traffic Regulations, 1936, and in driving at such time a tractor equipped with a lamp displaying a rear white light, contrary to Reg. 7 (13) of the Regulations; and, further, that the absence of a tail-light on the trailer and the presence of the white light on the tractor constituted a nuisance on the highway. The road was a wide one, and was straight for some distance before the point of impact. The night was dark and clear. *Held*, 1. That the plaintiffs were negligent, in that the light on the tractor was not a reasonably adequate substitute for the tail-lamp required by Reg. 7 (6) of the Traffic Regulations, 1936, because an overtaking driver would be looking for the regulation red light, and because it was attached to the trailer, the body of which extended 9 ft. behind the tractor, which was painted a dark colour, and it was doubtful whether it was shown up by the light, and the onus on the plaintiffs to satisfy the Court that it did, had not been discharged. (*Connachan* v. *Scottish Motor Traction Co.*, [1946] S.C. (Ct. of Sess.) 428, applied.) 2. That the defendant's driver was negligent in not keeping a proper look-out and in driving at too high a speed, having regard to the conditions. 3. That the negligence of both drivers contributed directly to the collision, and their respective negligence contributed equally to it, and each party was entitled to the amount he claimed, but reduced by 50 per cent. *Rudd and Coxon* v. *Attorney-General*. (Hamilton. July 24, 1952. Paterson, S.M.)

PROBATE AND ADMINISTRATION.

Probate with Omissions. *96 Solicitors' Journal*, 623.

PUBLIC REVENUE.

Income-tax—Amended Assessment—Magistrate finding Assessment of Income Excessive—Appeal by Commissioner to Supreme Court—Issue of Amended Assessment and Demand in accordance with Magistrate's Judgment—Commissioner of Taxes not estopped thereby from proceeding with Appeal—Land and Income Tax Act, 1923, s. 27. A case was stated by the Commissioner of Taxes under s. 23 of the Land and Income Tax Act, 1923, and judgment was given in the Magistrates' Court in favour of the taxpayer, the present respondent, allowing the deduction of a sum of £2,000 as a loss incurred in production of his income in the tax year. The Commissioner gave notice of appeal, on the ground that the judgment was erroneous in law and in fact. On December 21, 1951, a case on appeal was stated pursuant to s. 30 of the statute. On March 20, 1952, the taxpayer received an adjustment of the tax due, assessed in accordance with the Magistrate's judgment. He paid the balance of income-tax disclosed in the adjusted assessment. The appeal did not come on for hearing on the date fixed, and the hearing

was adjourned *sine die* by consent, to enable counsel for the respondent taxpayer to consider the position. The respondent subsequently filed a motion to strike out or stay proceedings on the case on appeal, upon the ground that the Commissioner of Taxes, by reason of his conduct and actions in relation to the subject-matter of the case orignally stated by him and of the case on appeal, had disentitled himself from proceeding with his appeal. *Held*, 1. That there is nothing in the Land and Income Tax Act, 1923, to justify or to necessitate the conclusion that an alteration or adjustment in an assessment to conform with a Magistrate's determination under s. 37 precludes an appeal to the Supreme Court under s. 28; and that, pending such appeal, the Magistrate's determination for the time being stands, and the Commissioner of Taxes is obliged by s. 27 to alter the assessment to conform to that determination. 2. That there was no basis on which to show that the respondent had in any way altered his position to his prejudice by reason of the issue of the amended assessment; and, consequently, the Commissioner was not estopped thereby from proceeding with his appeal. *Commissioner of Taxes* v. *Webber*. (S.C. Wellington. November 12, 1952. Hay, J.)

SALE OF GOODS.

Licences and Sale of Goods. *102 Law Journal*, 633.

TENANCY.

Subtenant—Dwelling let to Tenant at 25s. per week and sublet at 30s. per Week—Basic Rent 15s. per Week—Agreement between Landlord and Tenant for Payment of 25s. per Week approved by Rents Officer from Specified Date—Tenancy later surrendered by Tenant during Term of Subtenancy—Landlord entitled to recover from Subtenant Balance of Basic Rent payable to Such Specified Date and Fair Rent of Premises thereafter during Currency of Approved Agreement—Tenancy Act, 1948, ss. 7 (2), 16, 40. Although s. 7 of the Tenancy Act, 1948, restricts the recovery of any rent in excess of the basic rent, s. 7 (2) expressly provides that nothing in s. 7 shall render irrecoverable any rent payable in respect of a dwellinghouse for any period, if a fair rent has been fixed in accordance with the statute and the rent charged does not exceed the fair rent so fixed. The fair rent (whether fixed by an order of the Court or by agreement of the parties approved by a Rents Officer) is a rental of the premises, and applies with respect to every tenancy of the same property, including a subtenancy, until replaced by a fresh fair rent. Where the fair rent has been fixed by agreement approved by the Rents Officer under s. 16 of the statute, the duration of the payment of that rent is the period during which the agreement remains in force. Section 40 continues the approved agreement for the benefit of the subtenant until its date of expiry, as it imposes upon the subtenant of a dwellinghouse, where the tenant's tenancy has been determined, the same terms of tenancy as if the original tenancy had continued. T. owned a cottage, and before January 18, 1949, she let it to S. at a rental of 25s. per week. S., with the owner's consent, sublet the cottage to C., who took possession on January 18, 1949, as subtenant, and agreed to pay S. a rental of 30s. per week. S. paid rent in advance at 30s. per week to July 18, 1949. On September 13, 1949, C. notified S. that the rent in future would be paid at 15s. per week, which was the basic rent, and that he would deduct the amount paid in excess during the year ending January 19, 1950, so that the rent paid him on January 18, 1949, represented a full year's rent at 15s. per week. As from October 1, 1949, the fair rent was fixed by agreement between T. and S., with the approval of the Rents Officer, at 25s. per week. S. died on July 19, 1950, and his widow and administratrix surrendered the tenancy to T. and assigned to T. all the rent due and owing by C. at the date of S.'s death, with power to sue for recovery of, and give discharges for, such rent. Notice of the assignment was given to C. C. vacated the property on March 14, 1952. T. sued C. to recover the balance of the rent payable to October 4, 1949, at 15s. per week, and payable after that date until March 14, 1952, at the rate of the fair rent, 25s. per week. *Held*, 1. That, although the tenancy between T and S. was surrendered as from July 19, 1950, C. became the tenant of the landlord from that date at the terms on which he would have held it from T. if his subtenancy had continued. 2. That the fair rent approved by the Rents Officer continued to attach to the premises throughout the period from October 1, 1949, to March 14, 1952, at which date the fair rent ceased to attach to the property. 3. That, accordingly, T. was entitled to recover from C. the basic rent at 15s. per week until the date of the fixing of the fair rent, and also the fair rent at 25s. per week from the date on which the fair rent became operative (October 1, 1949) until the expiration of the subtenancy. *Turnbull* v. *Collis*. (Levin. October 27, 1952. Grant, S.M.)

TRANSPORT.

Motor-driver, showing Signs of Intoxication, forbidden by Constable to continue Driving—Ignition-key taken by Constable—Driver, using Another Ignition-key, driving Car to His Home—No Offence—Traffic Regulations, 1936 (Serial No. 1936/86), Regs. 3 (5), 5 (2). No duty or obligation is expressly imposed on any motor-driver or other member of the public by Reg. 3 of the Traffic Regulations, 1936, and subs. 5 thereof is empowering, and not penal. Consequently, if a person drives his motor-vehicle after he has been forbidden by a Police officer or traffic inspector under Reg. 3 (5) to do so, he does not come within Reg. 5 (2) (*a*) as being a person who failed to comply with any condition, duty, or obligation imposed by the Regulation, and he does not come within Reg. 5 (2) (*b*) as being a person who offends against or fails to comply with any of the Regulations, as that paragraph cannot be construed as if it were worded to make it an offence to fail to comply with a direction given under the Regulations. (*Te Aroha News Printing and Publishing Co., Ltd.* v. *Murray*, [1946] N.Z.L.R. 8, applied.) A few minutes after midnight, a constable observed the defendant driving his disengaged taxi-cab in a faintly unorthodox fashion along the otherwise deserted street. There was no suggestion of speed or of dangerous driving, but apparently just sufficient in the way of irregularity to attract attention. The officer found the general demeanour of defendant to be in keeping with his driving; not drunk, not even sufficiently under the influence to be regarded as being in a state of intoxication for the purposes of s. 40 or s. 44 of the Transport Act, 1949. Defendant admitted having had "a few beers", and said he was not on duty as a taxi-driver. Fearing that defendant would permit himself some further indulgence in liquor and then later answer a call, the constable took the ignition-key, told the defendant that he could pick it up at the Police station next morning, and forbade him to drive in the meantime. The constable knew that the defendant lived in the next block, so that it was no hardship to walk home. After the constable had taken the ignition-key and resumed his beat, the defendant produced a duplicate key and drove himself home. On arrival there, he had telephoned the Police station and had informed the sergeant. The defendant was charged under Reg. 3 (5) of the Traffic Regulations, 1936, that, being a person in charge of a motor-vehicle, he drove it after having been forbidden to drive it for the time being. The information was dismissed by a Magistrate. On appeal from that determination, *Held*, That, as Reg. 3 (5) of the Traffic Regulations, 1936, was empowering, and not penal, the respondent's conduct did not amount to an offence, as he had not failed to comply with any condition, duty, or obligation imposed by the Regulations, or offended against, or failed to comply with, any of them. *Murray* v. *Fisher*. (S.C. Napier. October 17, 1952. Hutchison, J.)

Offences—Failure to notify Change of Ownership of Motor-vehicle—Information laid Ten Months after Sale of Car—Continuing Offence—Penalty and Cumulative Penalties for Each Day on which Car used by Purchaser—Transport Act, 1949, s. 26. The defendant was charged with a breach of s. 26 of the Transport Act, 1949, in that he had failed to notify the Deputy-Registrar of Motor-vehicles of the change of ownership of a motor-car which he had sold in September, 1951. The information was not laid until ten months later. The question arose whether, in view of the period which had elapsed, the defendant was liable to summary prosecution. *Held*, 1. That the offence with which the defendant was charged was a continuing offence, without intermission so long as the duty to notify the change of ownership remained unperformed; and that the lodging of the information was not out of time. (*Re Wolter*, [1923] N.Z.L.R. 328, applied.) 2. That, under s. 26 (5) of the Transport Act, 1949, the defendant was liable to a fine of £10 (whether or not the vehicle was used by the new owner), and he was liable to an increase of such fine by £10 for every day on which such user was proved to have occurred. *Semble*, Where user can be established after a change of ownership, and the prosecution proposes to advance that by way of aggravation, the dates of such user should be set forth in the information, so that the defendant will be apprised both of these aggravating circumstances and of his additional liability; and these incidents should be limited to occurrences within the six months preceding the laying of the information. *Revell* v. *Bennett*. (Hastings. July 29, 1952. Harlow, S.M.)

VENDOR AND PURCHASER.

Time and Bankruptcy Pending Completion. *102 Law Journal*, 550.

Time in Contracts for The Sale of Houses. *96 Solicitors' Journal*, 658.

THE INDUSTRIAL AND PROVIDENT SOCIETIES AMENDMENT ACT, 1952.

Compulsory Registration of Charges.

By E. C. Adams, LL.M.

Introductory.

Although there are only 127 societies in New Zealand registered under the Industrial and Provident Societies Act, 1908, the practising solicitor cannot afford to ignore the amendments made to the Act this Session, especially the provisions providing for the compulsory registration of charges given by a society. Some of these societies operate in a very large way, and a solicitor may well have a client who desires to lend money to a society, secured by a charge given by the society.

Reason for Compulsory Registration of Charges.

Several societies have in the past experienced difficulty in raising money by debentures, because, in the absence of any compulsory registration of charges, a proposed lender has had no means of knowing whether or not a society has created some prior charge. It may be mentioned in passing that, provided there is express power in a society's rules to borrow money by way of debentures, there is nothing to prevent it from issuing debentures accordingly, provided, of course, that the amount is not sufficiently large to require the consent of the Capital Issues Committee under the Finance Emergency Regulations, 1940, as amended: *Co-operative Fruitgrowers of Otago, Ltd.* v. *Central Produce Mart, Ltd.*, [1918] N.Z.L.R. 610, and *Sadler* v. *Auckland Co-operative Society, Ltd.*, [1926] N.Z.L.R. 84. The facts in the first-cited case are interesting and make that case an exception to the general principle stated above. The objects of the society were to carry on any business connected with the growing, sale, or distribution of, or other dealing with, fruit or any other product of the soil, and to buy and sell any commodities connected with any such business. A rule stated that the committee of management might, for the purpose of the society, obtain advances or deposits of money from a person, whether or not a member of the society, and might secure the repayment thereof, or any money owing by the society, in any manner that the committee might think fit, and in particular by the issue of *debentures* or bonds, or by mortgage, charge, or lien upon the whole or any part of the society's property. The Court held that that rule was valid. Nevertheless, it also held that the society had no power to issue a debenture to secure to a vendor the unpaid purchase-money owing on a sale of a business as a going concern to the society, because such purchase itself was outside the scope of its rules.

Special Provisions as to Debentures.

Sections 8-13 of the Industrial and Provident Societies Amendment Act, 1952, introduce the special provisions of ss. 84-88 of the Companies Act, 1933, with regard to debentures, with one interesting but rather unimportant exception, and with one addition based on s. 88 of the Companies Act, 1948 (U.K.). The exception is that, whereas s. 86 of the Companies Act, 1933, permits the reissue of debentures by companies in certain cases, s. 11 of the Industrial and Provident Societies Amendment Act, 1952, prohibits the reissue of redeemed debentures. The additional provision is s. 9, which in effect provides that, with certain exceptions, a trustee for debenture-holders cannot be exempted from liability for breach of trust if he fails to show the degree of care and diligence that the circumstances require of him as a trustee.

Section 8 of the Industrial and Provident Societies Amendment Act, 1952 (following s. 84 of the Companies Act, 1933), provides for the rights of inspection of the register of debenture-holders and the right to copies of the register and trust deed.

Section 10 (following s. 85 of the Companies Act, 1933) provides that a condition in any debentures or in any deed for securing any debentures, whether issued or executed before or after the commencement of the Amendment Act, shall not be invalid by reason only that the debentures are thereby made irredeemable or redeemable only on the happening of a contingency, however remote, or on the expiration of a period, however long, any rule of equity to the contrary notwithstanding.

As previously pointed out, s. 11 of the Amendment Act prohibits a society from reissuing any debentures that it has redeemed, but subs. 2 contains a useful safeguard to those advancing money on current account, and reads as follows:

> Where a registered society has either before or after the commencement of the Act deposited any of its debentures to secure advances from time to to time on current account or otherwise, the debentures shall not be deemed to have been redeemed by reason only of the account of the society having ceased to be in debit whilst the debentures remained so deposited.

Section 12 of the Amendment Act provides that a contract with a registered society to take up and pay for any debentures of the society may be enforced by an order for specific performance.

Compulsory Registration of Charges created after December 31, 1952.

Part II of the Industrial and Provident Societies Amendment Act, 1952, which provides for the compulsory registration of charges created by industrial and provident societies, follows very closely the corresponding provisions in the Companies Act, 1933, which are well known to every practising solicitor and conveyancing clerk. *This part of the Act comes into operation on January 1, 1953.* It follows, therefore, that charges (other than charges registrable under any other Act) will be void unless registered in the office of the Registrar of Industrial and Provident Societies within twenty-one days after the date of execution: this will apply to charges created on or after January 1, 1953. Charges registrable under any other Act are also to be registered within the time aforesaid in the office of the Registrar of Industrial and Provident Societies, but they will not be void if not so registered: failure so to register, however, renders the society and every officer thereof liable to penalties. As in the

Companies Act, 1933, it is provided that land held by a registered society under agreement for sale and purchase shall be deemed to be the property of the society subject to a charge created by the agreement and securing the balance of the purchase-money for the time being unpaid.

Compulsory Registration of Charges existing on January 1, 1953.

Section 29 of the Amendment Act requires every society to register existing charges created before January 1, 1953, within six months after that date. Failure to register existing charges will not affect their validity, but will render the society and its officers liable to penalties.

It will be observed—with interest, no doubt—that Part II of the Amendment Act (dealing with the registration of charges) is made to bind the Crown : s. 28. There is no similar provision in the present Companies Act, 1933, but there is in the Companies Bill of 1952, which has been referred to a special Parliamentary Recess Committee, and will probably be passed next Session.

Satisfaction of Charges.

The provisions as to registration of satisfaction of charges have been improved upon, also as contemplated in the Companies Bill. Partial discharges as well as complete discharges are made registrable.

Increase of Permissible Maximum of Member's Interest in Society.

Another important amendment designed to facilitate the operation of these societies is s. 4, which increases the maximum interest which a member may have in the *funds* of a society. That maximum was fixed by s. 2 of the Industrial and Provident Societies Amendment Act, 1923, which fell to be construed in accordance with the reasoning of Blair, J., in *In re Baldwin (A Bankrupt) and Tasman Fruit-packers, Ltd.*, [1940] N.Z.L.R. 848. In ascertaining what interest a member had in the *funds* of a society, there had to be taken into consideration, not only his shares in the society, but also the amount of money which he had lent to a society or deposited with a society. Thus, although there were no limits to what a non-member might lend to a society, a member had to confine his total holdings in the *funds* of a society to £300. This has now been altered by s. 4 of the Amendment Act, which substitutes for the word " funds " the word " shares " in the proviso to subs. 1 of s. 2 of the Industrial and Provident Societies Amendment Act, 1923. The result is that, although a member's *shareholding* must not exceed £300, there is now no limit to the amount of *money* a member may lend to or deposit with a society, subject, of course, to the Finance Emergency Regulations, 1940.

Partial Abrogation of Ultra Vires Doctrine.

This leads us to s. 7 of the Amendment Act, which in effect partially abrogates the *ultra vires* doctrine, and is therefore of great interest to the student of the law of contract. It will doubtless be remembered by those who have read the Cohen Report on Company Law that one of the reforms recommended by that Report was the abrogation of the *ultra vires* doctrine. But that recommendation was not carried out in Great Britain. The Companies Amendment Act, 1947 (U.K.), now embodied in the Companies Act, 1948 (U.K.), left that doctrine untouched. The Companies Bill introduced into the New Zealand Parliament this Session also did not alter the *ultra vires* doctrine in any way whatsoever.

The application of the *ultra vires* doctrine to a society registered under the Industrial and Provident Societies Act, 1908, and the loss it may cause to a lender, may perhaps best be seen in *Sadler* v. *Auckland Co-operative Society, Ltd.*, [1926] N.Z.L.R. 84. In that case, which went to the Court of Appeal, the society carried on the business of a retail grocer. The plaintiff claimed that he, being the holder of eight debentures of the face value of £100 each issued by the defendant society, was entitled, on the winding up of the society, to rank as a secured creditor in respect of such debentures. By its rules, the society was empowered to receive money on deposit and to obtain loans on the security of *bonds*, but there was no rule expressly authorizing the issue of debentures. The Court of Appeal held that, as a debenture was something more than a bond, the society had no power to borrow money by the issue of debentures, and therefore the issue of debentures to the plaintiff was held to be *ultra vires* the society. In delivering the judgment of the Court of Appeal, Sim, J., at p. 93, said :

> In such a case the proposed lender must satisfy himself as to the power to borrow, and must see that the loan which he is about to make is within the limits of that power. If the borrowing is not within such limits, then it is *ultra vires*.

Section 7 of the Industrial and Provident Societies Amendment Act, 1952 (which, of course, is not retrospective), provides that a member or other person who in good faith lends money to or deposits money with a registered society shall not be bound to see to the application thereof, or to see that the society has not exceeded its borrowing *limit*.

Although to what exact extent this provision abrogates the *ultra vires* rule may yet some day have to be determined by the Courts, it appears clear that it would protect the lenders in such cases as *Co-operative Fruitgrowers of Otago, Ltd.* v. *Central Produce Mart, Ltd.*, [1918] N.Z.L.R. 610, and *Sadler* v. *Auckland Co-operative Society, Ltd.*, [1926] N.Z.L.R. 84, for in those cases both societies had power to borrow. It may be that a depositor or a lender is still under a duty to satisfy himself that a society has power by its rules to receive money on deposit or to borrow money ; but beyond that he is not concerned, provided he acts in good faith.

Restrictions on Names of Societies.

For several years before the hearing of *Dominion Council of Commercial Gardeners, Ltd.* v. *Registrar of Industrial and Provident Societies*, [1951] N.Z.L.R. 842, it had been the practice of the Department to insist that the penultimate word in the name of a new society or in the altered name of an existing society should be the word " Society ", the last word, of course, being " Limited ". The reason for the practice was that the placing of the word " Society " before the last word " Limited " effectually distinguished a society from a company registed under the Companies Act, 1933. We all know that the last word of the name of a society registered under the Incorporated Societies Act, 1908, must be " Incorporated ", and that effectually brands every society registered under that Act. The practice of the Department has now received legislative sanction, s. 3 of the Amendment Act providing that the words " Society Limited " shall be the last words in the name of every society registered under the Act.

DISPENSING WITH GRANT OF ADMINISTRATION.

Section 5 of the Amendment Act increases to £200 the maximum amount of the interest of a member that may be transferred on his death either on his nomination or otherwise without production of a grant of administration where no grant has been taken out. Thus the Act is brought into line with the statutes dealing with Trustee Savings-banks and the Post Office Savings-bank.

APPOINTMENT OF AUDITOR.

What it is hoped will prove a very useful machinery provision is s. 6 of the Amendment Act, under which the Registrar has power to appoint an auditor where a society has no auditor, and to fix his remuneration. This brings the Act into line in this respect with the Companies Act, 1933, and is designed to protect the interests of members and of the public.

CONCLUSION.

The Industrial and Provident Societies Act, 1908, is the Act under which most co-operative societies are registered and operate. The provisions of the Amendment Act ought to prove of great benefit to these societies and to their members, as well as to persons and institutions who finance them. It may safely be predicted that the co-operative movement will gradually grow in New Zealand, as it has done in the United Kingdom.

LIVESTOCK VALUES AND TAXATION.

Effects of Recent Legislation.*

Recent amendments to the law in relation to the treatment of livestock for income-taxation and death-duty purposes have made some alterations to the position which has hitherto obtained in regard to the valuation of livestock in farming businesses on death or disposition by way of gift. In order that farmers generally and their advisers may be familiar with the amended law and practice, the general effect of the new provisions is here outlined.

The question of livestock valuation is a very complex one, particularly in the case of estates of deceased persons where death duties are also involved as well as the preservation of the interests of the beneficiaries. An endeavour has been made here to set out, merely in a general way, some implications of the various alternatives which will require to be considered in so far as they may be applicable in the circumstances of a particular case. There will no doubt be other implications in certain cases. In any case, it cannot be too strongly stressed that, before deciding what course should be followed under any of the alternatives available taxpayers would be well advised to seek competent professional advice.

All references herein to " income-tax " may be taken to include social security charge where appropriate. In some instances, as, for example, references to tax on income derived to the date of death, income-tax only may be involved by reason of the operation of s. 4 (3) of the Finance Act (No. 3), 1940, which provides that, on the death of a person whose income for the year ended July 31, 1931, was principally or exclusively income from other than salary or wages, the liability of his personal representatives for social security charge on income from other than salary or wages shall be limited to liability for every instalment of the charge that becomes due and payable *before* the date of death. In consequence it will be found in many cases that there will be no liability for social security charge on income derived up to the date of death.

An important factor which must not be lost sight of is that, *in all cases* where livestock is ultimately sold at a price in excess of the standard value or other value adopted, the excess is treated as income and subject to tax accordingly. In certain circumstances, however, this income may be spread in terms of s. 8 of the Land and Income Tax Amendment Act, 1949.

CONTINUING BUSINESSES.

The position in regard to continuing businesses is not altered by the new provisions. Standard values may still be adopted in respect of livestock on hand at balance date. As has previously been the case, the standard value adopted will require to have been approved by the Commissioner, and, where returns have been furnished to and accepted by the Department, the standard value therein is deemed to have been approved. The Commissioner has power to require the adoption of true values at the end of any year, but this requirement is exercised only in exceptional circumstances, and generally not in any case where the farmer is continuing his farming operations and retains full ownership of the livestock in the farming business carried on by him.

POSITION ON DEATH WHERE MARKET VALUES USED.

The various options provided by the amended legislation, which are dealt with later, are alternatives to the valuation of livestock at date of death at market values. Valuation on this basis was required where death took place before September 1, 1950, and may still be adopted in estates where death occurred after that date, if the executor so desires.

The position where livestock on hand at date of death is taken into account at market values is as follows :

(i) The additional income, being the difference between standard values and market values, will be subject to tax but, on application in appropriate circumstances, the assessment of the amount may be spread over the period to date of death and the three preceding years. This adjustment is provided for by s. 8 of the Land and Income Tax Amendment Act, 1949.

(ii) The income-tax payable on the income to the date of death, which income will include the additional income in respect of the livestock taken into account at market values, will be allowable as a debt in arriving at the balance of the estate for death-duty purposes, and the effect, briefly, is that, when the income-tax liability is so increased, the death-duty liability is decreased. In consequence, therefore, what might be described as the " income-tax cost " of bringing live-

* This statement was prepared by the Inland Revenue Department, and it is reproduced by courtesy of the Commissioner of Inland Revenue.

stock up to market values is reduced by the amount of the benefit arising from the reduction in death duty.

(iii) In the return for the period following the date of death, the livestock is entered as *commencing stock* at the market value. It will then be open to the executor, if he carries on the farming business, to apply to the Commissioner for approval of *a standard value* to be adopted by the estate at the end of the first estate year. Where that standard value, being approved by the Commissioner, is lower than the market value at death, the writing down of the stock from market value will be deductible from income derived in the particular period, with consequential saving in tax at that time.

(iv) The writing down from market value as outlined in para. (iii) above will not, in normal circumstances, be available during the term of a life tenancy where the life tenant is entitled to the farming income. The income to which the life tenant is entitled cannot be reduced by a writing down of stock, and consequently such a write down of values is of no benefit for income-tax purposes unless there is income which is subject to tax and against which the writing down may properly be charged. In a case where the income is payable to a life tenant, the writing down would require to be deferred until after the termination of the life tenancy, at which point it could be charged against income payable to remaindermen beneficiaries, with consequent saving of tax. This is the position generally, but there are circumstances where, even though a life tenant may be entitled to current income in full, a writing down of stock may be effected with a taxation benefit. This could be done where the executor is in receipt of income to which the life tenant is not entitled and which is required to be credited to corpus. Such income could comprise releases of wool retention money withheld from the deceased in his lifetime. A similar position could, in certain circumstances, arise in respect of refunds of deferred maintenance moneys deposited by deceased in his lifetime and received subsequently by the trustee. A factor to be taken into account, however, would be the effect on death duties of any reduction in tax which would otherwise be payable in respect of income from refunds of wool retention moneys or deferred maintenance deposits. If and so far as tax on such income would be allowable as a debt for death-duty purposes, then a reduction of such tax would increase the death-duty liability.

ALTERNATIVE TO MARKET VALUES FOR SHEEP.

Death during period from September 1, 1950, to August 31, 1951.—Section 3 of the Finance Act (No. 2), 1952, contains provisions relating to the valuation of *sheep* for income-tax and death-duty purposes in estates where death occurred in the period from September 1, 1950, to August 31, 1951.

Application for adjustment of income-tax and death duty under this provision should be addressed to the District Commissioner of Taxes, and should be supported by valuations of sheep owned at the date of death, made as at a date one year before the date of death and as at a date one year subsequent to the date of death. The average of these two values—known as the " basic value "—will be used in lieu of the market value at the date of death for the purpose of assessing income-tax on income to the date of death, and for the assessment of death duty. The " basic value " will be the commencing value of sheep in the return of income for the period following the date of death.

The valuations are required to be made by a valuer employed by a member of the New Zealand Stock and Station Agents' Association, and certified as approved by the District Stock and Station Agents' Association.

The difference between standard values and the " basic value " may be assessed over the period to the date of death and the three preceding years in terms of s. 8 of the Land and Income Tax Amendment Act, 1949, if applicable, and, if this adjustment is desired, this should also be indicated in the application.

The application for adjustment should contain an application for refund of any income-tax or death duty which may be found to be overpaid as a consequence of the adjustment.

On completion of the adjustments in respect of income-tax, the District Commissioner of Taxes will pass the application for adjustment to the District Commissioner of Stamp Duties for adjustment of the death-duty liability, so that the one application will be sufficient for all adjustments.

The application for adjustment under this provision is required to be made on or before *April 24, 1953* (six months from the passing of the Act), or within such extended time, not exceeding a further twelve months, as the Commissioner in any case allows. (*a*) There is an additional alternative in conjunction with the above for estates where death occurred on or after September 1, 1950, and this is provided by s. 9 of the Land and Income Tax Amendment Act, 1952, which section is covered in more detail below. This permits all livestock to be taken into account at date of death, *for income-tax purposes only*, at the standard value in force immediately before the date of death. Death duty would still be assessed on market values or " basic values " if the latter is elected. (*b*) In lieu of the standard value previously in force the executor may adopt a higher standard value, but, in any case where a " basic value " for sheep as set out above is adopted for death-duty purposes, the new standard value for income-tax purposes may not exceed the " basic value ".

ALTERNATIVE TO MARKET VALUES FOR ALL LIVESTOCK.

Death on or after September 1, 1950.—Section 9 of the Land and Income Tax Amendment Act, 1952, provides that, in estates where death occurred on or after September 1, 1950, the executor may elect to have *the income-tax* on income to the date of death assessed on the basis of a valuation of livestock at the *existing* standard values *in lieu of the market values.* Market values must still be used for death-duty purposes, except in the case of sheep as covered above. Alternatively, he may elect to take the livestock into account at a new standard value higher than the existing standard value but not in excess of market value, or of " basic value " where that value is elected under s. 3 of the Finance Act (No. 2), 1952.

If the executor elects a standard value higher than the original standard value, the difference is assessable as income in the period to date of death, and, on application, that difference may be spread for assessment purposes over the period to date of death and the three preceding years in terms of s. 8 of the Land and Income Tax Amendment Act, 1949, where that section applies.

Whatever value is elected will be the commencing value of the livestock for the purposes of computing

income in the period subsequent to the date of death. The consequence of electing a value lower than market value is that the immediate income-tax liability is reduced, and the amount of the debt in respect thereof which is allowable in arriving at the dutiable balance of the estate for death-duty purposes is also reduced, with a resulting increase in the death-duty liability. Another factor is the contingent liability for tax on subsequent disposal of the livestock at prices in excess of the standard value adopted. On the other hand, if market values, or (in the case of sheep in the special period) " basic values ", are adopted for income-tax purposes, there is the possibility of a future taxation benefit by a subsequent writing down of the livestock as explained in paras. (iii) and (iv) above.

Where the executor elects to adopt the existing standard value for livestock at the date of death, that value is entered as the commencing value in the return for the estate in the period following death, and on the winding up of the estate and the transfer of the livestock to the beneficiaries entitled thereto, the livestock is transferred for income-tax purposes, *at the same standard value*, and market values are *not* required. The view is taken that the conversion of an interest in remainder to an interest in possession is not a disposition calling for the adoption of market values.

Partnerships.—This provision, which enables the retention of the standard values in force at the date of death (or the adoption of a new standard value), applies also where the deceased owned *an interest* in livestock in a partnership in which he was a partner. In these cases where the election is to retain the standard value in force at the date of death, no difficulty arises, and the partnership will continue to use the same standard values. Where, however, it is desired to adopt a *higher* standard value, this can be done only with the concurrence of all the partners, and the partnership will then use the new standard values in future. Where *market value* is used for livestock owned by a partnership for the purpose of determining the income of the deceased partner from the partnership for the period up to the date of death, that value will be the commencing value of the stock in the partnership accounts for the period from date of death to the next balance date of the partnership, and at the latter date the partnership livestock may be taken into the accounts at the original standard values. The result is that the income of the surviving partners for the year in which death occurred is not affected by the necessity for taking accounts as at the date of death of the deceased partner.

Appeal Commission : Death Duties.

Death between September 1, 1950, and August 7, 1952. Under s. 4 of the Finance Act (No. 2), 1952, a Commission is to be set up to inquire into and make recommendations on cases where, by reason of the liability for *death duties*, a beneficiary may be forced to sell farm land or farm stock to meet that liability.

The cases which will come within the scope of this Commission will be those where death occurred between September 1, 1950, and August 7, 1952, after which date the 20 per cent. reduction in death-duty rates became operative.

The Commission may recommend relief in all or any of the following ways :

(*a*) Postponement of payment of the whole or part of the death duty without penalty for a period not exceeding five years from the date of death.

(*b*) Reduction or remittance of interest on unpaid death duty.

(*c*) Reduction of death duty by an amount not exceeding one-fifth, subject to the condition that the farm land is not sold for a period of five years from the date of death and that the farm stock is maintained as to numbers and quality.

Full details as to the procedure in lodging applications to the Commission for death-duty relief will be advertised in due course, and in the meantime any inquiries should be addressed to the Deputy Commissioner, Duties Division, Inland Revenue Department, Wellington.

Gifts of Livestock to Children.

The position hitherto has been that gifts of livestock have been required to be entered in the return of the taxpayer-donor as a sale at market value, and in the return of the donee as a purchase at the same price.

The amendment to the law—s. 10 of the Land and Income Tax Amendment Act, 1952—now provides that, for income-tax purposes, a gift of livestock to a child of the taxpayer for use in a farming business carried on by the child is regarded as a sale at market price *unless* the taxpayer *elects* to adopt for that stock an alternative price which must be equal to the *greatest* of the following amounts :

(i) The actual price (if any) at which the livestock was sold. (This covers the case where the livestock may be sold to a child at a nominal price less than the market value.)

(ii) The standard value last adopted by the taxpayer —*i.e.*, the standard value in force in the taxpayer's returns at the time of the gift.

(iii) Such standard value as the Commissioner considers reasonable having regard to the standard values generally in force in respect of livestock of the same type and quality. (This is to cover the case of a taxpayer who may have adopted an unreasonably low standard value in respect of his stock, and enables the Commissioner to require the gift to be brought into account as a sale at what would be considered a reasonable standard value in line with standard values generally adopted by other taxpayers in respect of similar stock.)

A determination of a standard value as contemplated by para. (iii) above might be necessary where, for example, a taxpayer had adopted a standard value for sheep of, say, 10s. per head, and the stock gifted had a market value of, say, £2 10s. The standard values generally adopted for the particular class of sheep might be in the vicinity of, say, £1 10s., and the Commissioner would, in these circumstances, require the standard value *for the stock gifted* to be raised to £1 10s., and the gift would then be regarded as a sale at that figure. The standard value for the *stock retained* by the farmer would not be affected, and he could continue with that standard value, subject, of course, to a liability for tax on any difference between that standard value and the selling-price at a later sale.

The price at which the stock is taken into the return of income of the donor *as a sale* is the price at which the

stock gifted must be taken into the return of the donee *as a purchase.*

The election provided under the section is also available where a taxpayer gifts or otherwise disposes of *an interest* in livestock to a child, as, for example, where a taxpayer, desiring to take his son into partnership in his farming business, transfers to the son *an interest* in the livestock owned by him. In these circumstances, the transfer may be made at the standard value in force at the time the gift is made—provided that the standard value is a reasonable one—and the new partnership may continue to use the standard values formerly used by the parent, no additional income-tax being involved. If, however, the standard value for the purpose of the transfer is raised, taxation will be payable on the amount of the increase, and the new standard value must be adopted by the partnership in respect of the partnership stock. For example, if a farmer with a standard value for sheep of £1 10s. gifts a half-interest in the stock to his son in order to take him into partnership, *no income-tax liability* will arise in respect of the gift, provided the standard value is considered reasonable, and the partnership would continue with a standard value of £1 10s. per head. If, however, the standard value which had been adopted by the parent was, say, 10s. per head, and the Commissioner determined that a reasonable standard value would be £1 10s. per head, *the whole of the livestock* would, on transfer to the partnership, require to be taken into account in the return of the parent up to the date of formation of the partnership as a sale at £1 10s. per head, and he would pay tax on the difference between 10s. and £1 10s. The partnership would then commence with the livestock shown as a purchase at £1 10s. per head, and continue with that standard value.

Where the livestock in which an interest is to be transferred to a child is owned by a partnership in which the parent is a partner, the parent may not elect to adopt a price other than the standard value in force in the returns of the partnership, unless that price is based on a standard value agreed on by the child and the other partner or partners for the purposes of the partnership.

These provisions operate in respect of gifts which take place, or have taken place, after the beginning of the income year which commenced on April 1, 1951, and they apply only where the child to whom the stock, or any interest therein, is transferred had at the date of the gift *attained the age of eighteen years*, and the livestock is thereupon used in a farming business carried on by that child either on his own account or in partnership.

These provisions apply *for income-tax purposes only*, and gift duty, if payable, is still assessed on *market value.*

NEW ZEALAND LAW SOCIETY.

Meeting of Council.

The September Meeting of the Council of the New Zealand Law Society was held on September 12, 1952.

The following Societies were represented: Auckland, Messrs. M. R. Grierson, J. B. Johnston, H. R. A. Vialoux, and G. H. Wallace; Canterbury, Messrs. A. L. Haslam and G. C. Penlington; Gisborne, Mr. L. T. Burnard (proxy); Hamilton, Mr. G. G. Briggs; Hawke's Bay, Mr. L. W. Willis; Marlborough, Mr. A. McNab; Nelson, Mr. J. Glasgow; Southland, Mr. I. G. Arthur; Taranaki, Mr. R. D. Jamieson; Wanganui, Mr. W. M. Willis (proxy); and Wellington, Messrs. E. D. Blundell, W. H. Cunningham, E. F. Rothwell, and C. A. L. Treadwell.

The President (Mr. W. H. Cunningham) occupied the chair.

Apologies for absence were received from Messrs. M. R. Maude, N. M. Izard, and the Westland delegate.

In a letter from Mr. Tompkins, the New Zealand Law Society delegate to the International Bar Association Conference, he stated that he had nominated Mr. W. H. Cunningham as a member of the Executive Committee of the International Bar Association, to fill the vacancy created by the resignation of Sir David Smith. Mr. Cunningham has been duly elected. The members expressed approval of the action of Mr. Tompkins.

Progress Payments: Wages Protection and Contractors' Liens Act, 1939.—The General Manager of the State Advances Corporation wrote as follows:

> Under the scheme we now wish to adopt, the responsibility of solicitors to us would be *only* to see that no lien claims obtained priority over our advances, and this, we apprehend, is no less than any mortgagee would expect of his solicitor. Apart from this aspect, solicitors will take such steps as they think necessary under the Act to protect the mortgagor as employer, and to facilitate this, we proposed to quote in our advice note of payment the value of the work done to date.
>
> We have decided to ask the mortgagor to make only one application for inspection early enough for foundations to be inspected. Progress payments will then be made to solicitors (subject to usual formalities) at monthly intervals as the work proceeds, without further request from the mortgagor.
>
> We think that this procedure, coupled with our decision to accept the risk of our being an employer in any particular case, will result in mortgagors and their builders receiving progress payments more promptly, and will minimize any complaints of delay.
>
> We would like to give this procedure a trial, and we feel sure that the profession will co-operate with us in our wish to avoid charges of delay. If the scheme proves unworkable we can reconsider it . . .

A later letter said that action in so far as liens retention would be delayed by the Department until after the Council had met.

It was resolved to bring the matter to the attention of District Societies and to express to the Department the wish that the scheme would be successful.

Revision of the Rules of the Court of Appeal.—It was resolved to forward to the Rules Committee for its information copies of the reports submitted by District Societies.

Coroners Act.—Letters from nine District Societies were received expressing their views as to statements of witnesses being prepared by the Police before, and produced at, the inquest.

The Auckland Society was of opinion that it was not necessary to lay down a strict rule, and that, in the system of inquests now in force, it should be sufficient to leave the Coroner a wide discretion as to his method of fulfilling his statutory duty to "put evidence into writing".

It was resolved that, while the exact procedure under the statute is in the discretion of the Coroner, if counsel appearing at an inquest requests the evidence of any witness to be taken *viva voce*, this request should be acceded to, and that the Standing Committee should ask the Secretary of Justice to instruct Coroners accordingly.

Number of Council Meetings: Amendment to Rules.—It was resolved to revoke the present r. 10 of the Rules of the New Zealand Law Society and to substitute the following new rule:

The Council shall meet at Wellington *"At least three times in each year,* on such days as shall be fixed by the Council or by the President, and one of such meetings shall be the annual meeting of the Council. Other meetings of the Council may be summoned for any time or place by the President or any four members of the Council. Any meeting of the Council lapsing for want of a quorum shall stand adjourned to such time and place as shall be fixed by the President, or, in his absence, by the Vice-President."

Evidence Amendment Bill: Competence and Compellability of Husband and Wife as Witnesses.—The following letter was received from the Secretary of the Law Revision Committee:

Proposals for amendment of the Evidence Act, on the lines mentioned below, came before the Law Revision Committee at its last meeting on the 10th instant, and were discussed at considerable length. Tentative decisions were reached, and it was decided that the views of the District Law Societies should be sought before the Committee makes any final recommendation to the Government.

In the case of *The King* v. *Houkamau*, [1951] N.Z.L.R. 251, the presiding Judge drew attention to the defects of s. 5 of the Evidence Act, 1908. A new section has, accordingly, been drafted. This new section replaces the existing ss. 5 and 5A, and makes the rules on the above subject wholly statutory, and not, as at present, partly a matter of common law. The new section, however, does not affect certain other statutory provisions whereby an accused person or the wife or husband of the accused is compellable to give evidence in special cases, such as s. 69 of the Destitute Persons Act, 1910.

The aim of the Bill has been to clarify the rules relating to these matters and to make them wholly statutory. *The Bill makes no radical changes in the existing law* and it will be seen that the *general rule remains that in no case is a wife a compellable witness for the prosecution.* In a limited class of case she is a competent witness for the prosecution, and on the accused's application is both a competent and compellable witness for the defence.

At the last meeting of the Law Revision Committee, it was suggested that the present is an opportune time to review, and perhaps widen, the rules relating to the competence of the accused's spouse to give evidence for the prosecution. As the law stands, the cases where a wife is permitted to give evidence for the prosecution should she so desire are limited, and the interests of justice may well demand that she should be allowed to give evidence for the prosecution in more instances if she so desires. For example, a wife leaves her husband and goes to live with her mother. Later, the husband goes to the mother's house, quarrels with the mother for sheltering his wife, and eventually shoots her in the presence of the wife. Should the wife be *competent* to give evidence for the prosecution? Opponents of a change, however, point out the very special relationship existing between man and wife and argue that such a change would tend to destroy the unlimited confidence that should always exist during that relationship.

If a change is considered desirable it might be possible to distinguish between privileged *communications* between husband and wife during marriage (s. 6) and other matters of evidentiary value on the part of the spouse which do not in any way spring from the conjugal relationship.

The whole question is a most difficult and arguable one and it may well be that the Bill should confine itself to codifying the existing rules without amendment.

I shall be glad to hear from you as soon as possible, so that the Law Revision Committee may have the benefit of the views of the District Law Societies.

The Council resolved that the Minister should be advised that, in the opinion of the Council, the Bill should confine itself to a codification of the existing rules without amendment.

Conveyancing Scale: Costs of Release of Trustee Mortgage.—The Conveyancing Committee submitted the following report:

A purchaser of land subject to a mortgage to two trustees, one of whom died before the date of the contract for sale, asks whether the vendor should allow on settlement the costs of transmission which the purchaser may be asked to pay on the release of the mortgage.

This is a question of law and may depend on the wording of the contract for sale; but if the question is referred to the Council as an arbitrator, the view of the Committee is:

(*a*) Ruling 153 is that if the transmission affects one mortgage only the mortgagor must pay the cost of transmission on release, but, if the transmission affects other property, then, whatever the legal position, the mortgagee invariably pays the cost of transmission owing to the impossibility of apportioning the cost.

(*b*) The same difficulty of apportioning the cost of transmission might arise in this case if the surviving mortgagee died before release, and one transmission is prepared in respect of both deaths.

(*c*) The purchaser claims that the vendor must put his title in order, but, though on a sale the vendor must pay the cost of getting all necessary parties to join in the transfer to the purchaser, the vendor cannot compel the surviving mortgagee to register a transmission, nor is the transmission necessary to perfect the purchaser's title.

(*d*) When land is sold subject to a mortgage the duty of the vendor is to observe and fulfil the obligations of the mortgage to the date of settlement but the obligation to pay the costs of transmission does not accrue until release and may never accrue.

(*e*) The purchaser might claim that though he had purchased the land subject to the mortgage because the vendor had sold on these terms to save himself the cost of release and possible premium or repayment the purchaser nevertheless intended to repay immediately and had arranged with the mortgagee to have the release and transmission available on settlement and that accordingly the cost of transmission had actually accrued on settlement and should be paid by the vendor. We think the vendor could claim that the cost of the transmission was part of the cost of release and that on a sale subject to a mortgage the cost of release falls on the purchaser.

For the above reason we think that unless the contract of sale otherwise provides the cost of any transmission necessary to make the release registrable is part of the release and falls on the person liable to pay the release fee.

The Council adopted the ruling of the Conveyancing Committee.

Bills before Parliament.—The following report was received concerning proposed legislation:

Since the opening of the session, eighty-four Bills have been received and perused.

Among the Bills considered are Workers' Compensation Amendment, Police Offences Amendment, Land Transfer Amendment, Deaths by Accidents Compensation, and Judicature Amendment. It was not thought necessary to make any representations in these matters.

In the Land Settlement and Promotion Bill, Messrs. A. B. Buxton, G. C. Phillips, and the Secretary appeared before the Lands Committee and drew the attention of the Committee to twenty-four matters, some of which related to ambiguities in drafting.

The Industrial and Provident Societies Amendment Bill was considered by Mr. A. H. Hornblow, who reported that the matters in which modification were necessary were cls. 15 (2), 16 (2) (*e*), 17, and 22. The suggestions made were discussed with the Law Draftsman.

The Administration Amendment Bill is being considered by Messrs. F. C. Clere and R. C. Christie.

The Law Practitioners Amendment Bill, which has recently had its first reading, contains the urgent machinery clauses approved by the Council and forwarded to the Attorney-General in June, 1951. At the request of the Post War Aid Committee, a clause was inserted amending s. 12 of the principal Act to permit a Judge to admit as a *solicitor* a returned serviceman of the First World War when he has, except in Latin, passed or been credited with a pass the examinations in general knowledge and law prescribed at that time.

Companies Bill: The Standing Committee decided to leave this Bill to its representatives on the special committee unless there was anything of importance suggested by them which was not adopted.

On inquiry from Mr. Spratt and Mr. Anderson, the Secretary was informed that they knew of no instances.

It was resolved to thank Messrs. H. E. Anderson and F. C. Spratt for their attendance on the special Companies Bill Committee as the representatives of the Society, which had involved fifty-three meetings.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Judges as Witnesses.—The London *Times* contains an account of part of the hearing in October of *Appleby* v. *Errington and Others*, an action in the Chancery Division of the High Court of Justice in which the plaintiff sought a declaration that there was a contract, personally binding upon the defendants, for a compromise on certain terms of a probate action in 1949 which came before Hodson, J. (as he then was), and in which Karminski, J. (then Mr. Karminski, K.C.), was acting as counsel. When the case was resumed on October 17, Vaisey, J., before whom it was being heard, said that he understood that Hodson, L.J., had been good enough to offer to give such help as he could in Court, whereupon Sir Francis Hodson unrobed and, accompanied by an usher, took his seat on the Bench beside the Judge, who observed :

> Lord Justice Hodson has been kind enough to come into Court in the interest of justice so that justice should not only be done but be seen to be done. In no circumstances would I have allowed or invited him to make a statement from the well of the Court, still less would I allow him to make a statement on oath, but I will allow both counsel to put any question to him. I shall be surprised, however, if his recollection or any note which he may have made will throw much light on this; but, as he has been so kind as to help in this way, it will remove any possible suspicion that some source of information might not have been investigated. I am sure that you all will join with me in expressing your thanks to Lord Justice Hodson for coming here.

After His Lordship had expressed his recollection that he had seen Mr. Karminski and Mr. Mortimer, counsel in the probate action, in his room, and the former had said that there was no compromise, he was questioned by plaintiff's counsel. Mr. Mortimer then went into the witness-box. He was also unrobed, and gave evidence on oath that Colonel Errington, one of the defendants, had given an assurance as to the payment of a stated amount to Miss Appleby, and, upon that assurance, the probate action was withdrawn. Under cross-examination, this witness admitted that he had made no note of the terms of the settlement, and had been mistaken not to do so. ("This should be a warning to you all," remarked Mr. Justice Vaisey.) Upon the opening of the defendant's case, Sir Seymour Karminski, likewise unrobed, came into Court, and, having said that he preferred to give evidence from the witness-box, was put on oath, examined, and cross-examined. At the conclusion of his testimony to the effect that there had been no compromise (the endorsement on his brief made no reference to any terms), Vaisey, J., asked : "Any more Judges ?" There being none, further evidence was given for the defendants, counsel addressed the Court, and the hearing was adjourned.

Lord Macmillan.—The death of Lord Macmillan of Aberfeldy in his eightieth year draws further attention to the extent of the distinguished service to the community given by legal men. Fifteen years in the appellate jurisdiction of the House of Lords—a period broken only by his work as Minister of Information during the war—is in itself outstanding. But it was eclipsed by the range of his outside activities. He presided over the Royal Commission on Lunacy and Mental Disorders and took charge of the Inquiries into the Coal-mining Industry Dispute, Street Offences, and Treasury Finance. The Canadian Government persuaded him to act as Chairman of the Royal Canadian Commission on Banking, and later in the same capacity he served the London University Court and the Lord Chancellor's Committee on Advanced Legal Studies. Amongst other institutions which continually sought his assistance were the British Museum, the Soane Museum, the National Trust, the Carnegie Trust for the University of Scotland, and the Society for the Promotion of Nature Reserves. More recently, he was chairman of the Committee on Post-war Restitution of Art Treasures. This learned Scots lawyer and philosopher, in his early years a journalist, was the author of a collection of essays, *Law and Other Things*, and the editor of the monumental *Macmillan's Local Government Law and Administration*; and in *The Spectator*, in 1949, he made a profound observation that deserves to be more widely known. "The most sinister feature of our times," he wrote, "is the attempted processing and rationing not only of our bodily but of our mental food."

Mystics and Poets.—The average English practitioner who looks somewhat askance at the fusion of the profession in this country might well have his attention directed to the curious combination that has produced *Quietly She Lies*, a sinister mystery story well reviewed on both sides of the Atlantic. Its author, E. M. D. Hawthorn, is two persons—Geoffrey May, an American lawyer who lives in a village near Cambridge, Massachusetts, and Ethel Dolbey, an English solicitor who lives in a village near Oxford, England. Another English solicitor, Dorothy Heaton, who has been in private practice at Preston since 1936, has written a neo-Elizabethan marching song, "Good Queen Bess", for the Coronation—a stirring song all about truth and liberty and set to music composed by her husband, a manufacturing chemist in his business hours and an accomplished 'cellist and pianist in his spare ones. It is reported that this lady's music dwells at times on such subjects as divorce—a subject that in a female solicitor-poet could give rise to more inspiration than such mundane subjects as easements or housework.

Churchillian Note.—Robert Lewis Taylor in his informal biography of Winston Churchill (Doubleday and Co., 1952) gives a reply to this celebrated statesman that will appeal to the criminal advocate. A female Balkan visitor was speaking to him in July, 1945, when "the British admirably concealed their enthusiasm for their hero when they went to the polls and voted him out of office." With honest *naiveté*, she said to him : "It is terrible. Now they will shoot you." And he replied : "I have hopes, madam, that the sentence will be mitigated to a life-term at various forms of hard labour." It is at this time that the story circulated concerning his answer to an offer of the Garter : "Why should I accept the Garter from His Majesty, when his people have just given me the boot ?"

LEGAL LITERATURE.

The Law of Contract, 3rd Ed., by G. C. Cheshire, D.C.L., F.B.A., Barrister-at-Law, Reader in the Law of Real Property to the Council of Legal Education, and C. H. S. Fifoot, M.A., Barrister-at-Law, Fellow of Hertford College, Oxford, All Souls Reader in English Law. Pp. 545 + lxi + Index. London. Butterworth and Co. (Publishers), Ltd. Price, 55s. 6d., post free.

When reviewing the first edition of this book, which was published four years ago, the opinion was expressed that the authors had succeeded in producing a modern text-book on the law of contract of quite unusual merit. The Third Edition, which is now to hand, gives no reason to revise that view. The passage of time has made it necessary, however, to subject the whole text to a careful general scrutiny, and, as a result, several changes have been made. The chapters dealing with illegal contracts and with discharge under the doctrine of frustration have been entirely rewritten; the text relating to innocent misrepresentation and to discharge by performance has been rearranged; and other parts of the text have been given an expanded treatment. Among the chapters which have been considerably amplified is that dealing with the important distinction between a mistake of fact and a mistake of law. In addition, a new introduction to the chapter on consideration brings to notice the problems involved in the changing economic and social background against which the classical concept of contract must be set.

The book is divided into nine Parts, of which Part I is an historical introduction. Part II deals with the formation of contract, Part III with unenforceable contracts, Part IV with contracts that contain a vitiating element, Part V with the capacity of parties, Part VI with privity of contract, Part VII with the discharge of contracts, Part VIII with remedies for breach of contract, and Part IX with quasi-contract. Each part is again divided into chapters, and each chapter into sections, so that a glance through the Table of Contents shows the reader where he will find any particular topic discussed.

The trend of legislation in New Zealand, as inspired by our Law Revision Committee, is to make New Zealand law as uniform as is possible with the modifications of the common law effected by statutes of the United Kingdom Parliament. One advantage of this policy is that it renders this work on contract particularly useful here, for its commentaries and its explanations of statutes of this kind, such as the Law Reform (Frustrated Contracts) Act, 1943 (U.K.), which reappears as our Frustrated Contracts Act, 1944, and the Limitation Act, 1939 (U.K.), which is re-enacted (with little variation) as our Limitation Act, 1950; and our Law Reform Act, 1936, which combines two United Kingdom statutes. The authors of the work under notice weave the effects of these statutes into their text (and do not keep them in compartments of their own), and thus supply a want which no New Zealand text-book has filled.

The work is written in a style which one hesitates to call colloquial, but it is, none the less, a most readable text-book, as the way in which illustrative cases are brought into the dissertation and discussed adds greatly both to its attractions and to its usefulness. Moreover, the authors do not hesitate to criticize judgments of which they disapprove; and, since the first edition appeared, some of their comments have been justified by judgments of authority.

Stroud's Judicial Dictionary of Words and Phrases, 3rd Ed., by JOHN BURKE and PETER ALLSOP, M.A. (Volumes 1 and 2). Pp. 1696. London. Sweet and Maxwell, Ltd. Price, 90s. per volume.

The first edition of the *Judicial Dictionary of Words and Phrases* appeared in 1890, and its author, the late F. Stroud, stressed in the Preface that it was "a Dictionary of the English Language (in its phrases as well as single words) so far as that language has received interpretation by the Judges. Its chief aim is that it may be a practical companion to the English-speaking lawyer". The work, which was original in its idea, and did not trespass on the domain of law dictionaries like those of *Wharton* or *Sweet*, attained instant success. A second edition was published in 1903, and this was brought up to date in 1947 by the publication of a second supplement covering some six hundred pages of text. An entirely new edition has now been prepared, which, judged by the first two volumes, should enjoy the same popularity as the previous two editions have done. The regrouping of the text in numbered paragraphs and other rearrangements will certainly make for greater ease of reference. The work is being published in five volumes, four volumes of text and a volume containing consolidated tables of cases cited and of statutes judicially construed. In the present volumes the law is stated as at January 1 and July 1, 1951, respectively, and a supplement will be issued periodically, keeping the work always up to date.

Green's Death Duties, 3rd Ed., by H. W. HEWITT, LL.B., and O. M. W. SWINGLAND, LL.B. Pp. 1115 and Index. London. Butterworth and Co. (Publishers), Ltd. Price, 97s. 6d., post free.

This is the first edition of *Green's Death Duties* to appear since the author's death. During the comparatively short period since its first appearance, *Green* has rapidly established itself as a standard work on its subject, and this new edition, which retains the form and layout of the earlier editions, in no way departs from the high standard set by its predecessors. One of the great merits of *Green* is the way in which the law on this most difficult subject is clearly stated—all propositions of law are given expressly, and the reader is not left to find his own conclusions by implication.

The new editor is on the staff of the Estate Duty Office, as was the author, and, although the book is not an official publication, it is obviously written by one who has in mind, not only the theoretical, but also the practical, aspects of the subject with which he is dealing.

Since 1947, when the last edition of this work appeared, there have not been any major changes in this branch of the law, but a large number of decided cases have necessitated a considerable amount of detailed revision. A careful inspection reveals the omission of no relevant case decided in the United Kingdom during the past five years. Two of the most important recent cases are *Re D'Avigdor-Goldsmid's Life Policy, D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners*, [1951] 2 All E.R. 543, and *St. Aubyn (L.M.)* v. *Attorney-General (No. 2)*, [1951] 2 All E.R. 473, and both are fully dealt with in the relevant sections of the text. On p. 116, the case of *Re Miller's Agreement, Uniacke* v. *Attorney-General*, [1947] 2 All E.R. 78, is cited as authority for the proposition that, in the case of an annuity or lump sum payable under partnership articles to the widow of a deceased partner, estate duty is payable only where the beneficiary has some enforceable right to the payment. It would be as well to indicate, however, that this decision has been criticized by Denning, L.J., in *Smith* v. *River Douglas Catchment Board*, [1949] 2 All E.R. 179, and that it may therefore be unwise to rely unreservedly on *Re Miller's Agreement*.

County Court Practice, 1952, by His Honour Judge Edgar Dale, Mr. Registrar Bruce Humfrey, D.L., J.P., and R. C. L. Gregory, LL.B. Pp. ccxvii + 1,777 + Index. London. Butterworth and Co. (Publishers), Ltd. Price 97s. 6d., post free.

A work of such importance, that makes a fresh appearance every year, leaves a reviewer with little to say. Naturally one does not look for any startling changes, but there is no practitioner who takes work seriously who can afford to do without each new annual volume. To anyone with a substantial Magistrates' Court practice, the innumerable times he has had recourse to it during the last twelve months is a sufficient reason for ensuring that his copy is always an up-to-date one, since so much of our Magistrates' Courts Act, 1947, and our Rules closely follows the English County Courts legislation. The new edition shows an increase of authorities rather than of any radical changes in the statutory provisions. Its value in New Zealand is unquestioned when applied to the corresponding statutory provisions in our legislation.