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CRIMINAL LAW: RECENT STATUTORY CHANGES.

I.

THE Statute-book for 1952 contains several statutes dealing with criminal law. In general, they are designed to give Magistrates a wider jurisdiction in dealing with indictable cases, and they make for a greater flexibility in criminal practice in the earliest stages of the trial of an accused person. The general scheme of extending summary jurisdiction in relation to indictable offences, and of simplifying the law containing it, is spread over the statutes we are now about to consider.

All these statutes came into force on January 1, 1953.

SUMMARY JURISDICTION ACT, 1952.

The main purpose of this Act is to extend the list of indictable offences that may be dealt with in a summary way by Magistrates, subject to the right of the accused to claim trial by jury where the maximum penalty on indictment would exceed three months' imprisonment, and subject to the general right of appeal to the Supreme Court against summary conviction. The existing summary jurisdiction of Justices of the Peace is also preserved, with some modifications.

Apart from the right of the defendant to claim trial by jury and his general right of appeal, Magistrates or Justices have a discretion to decline to deal summarily with any case. The existing right to prosecute by indictment instead of in a summary way is not affected.

The Act is in substitution for Part V of the Justices of the Peace Act, 1927, which conferred summary jurisdiction on Magistrates and Justices in the cases mentioned below. Part V also created a certain number of summary offences which were not indictable; but those provisions are out of place in legislation dealing with indictable offences. They have been redrafted, and now appear in the Police Offences Amendment Act (No. 2), 1952. Other provisions of Part V, which prescribe summary penalties not exceeding three months' imprisonment for the indictable offences of common assault, mischief, theft, and false pretences, have been disposed of either by amending the corresponding sections of the Crimes Act, 1908, so as to provide for those penalties in minor cases (see the Crimes Amendment Act, 1952), or by making similar provision in the Police Offences Amendment Act (No. 2), 1952.

Certain obsolete provisions of Part V have not been reenacted. In particular, ss. 241 and 242, which conferred a limited summary jurisdiction in respect of certain indictable offences committed by young persons under sixteen years and children under twelve years, are repealed, because for all practical purposes they have been superseded by the provisions of the Child Welfare Act, 1925. Children's Courts have exclusive jurisdiction over children under seventeen.

Summary Jurisdiction of Magistrates.—Before the passing of the Summary Jurisdiction Act, 1952, Magistrates could deal summarily, under Part V of the Justices of the Peace Act, 1927, with the following indictable offences: (*a*) attempted suicide (s. 188); (*b*) certain cases of mischief, generally where the value of the damage done is not more than £50 (ss. 188, 217); (*c*) certain cases of theft, false pretences, and receiving, where the value of the property is not more than £50 (s. 188); (*d*) false declarations, and certain other offences under the Marriage Act, 1908, and the Births and Deaths Registration Act, 1951 (s. 188, as amended by s. 19 of the Statutes Amendment Act, 1942); (*e*) common assault (s. 202); and (*f*) fortune-telling (s. 236).

Section 2 of the Summary Jurisdiction Act, 1952, empowers Magistrates to deal summarily, without monetary limits on their jurisdiction, with the large number of indictable offences described in Parts I and II of the First Schedule to the Act. Part I of that Schedule refers to indictable offences under the Crimes Act, 1908, including all crimes against rights of property, but excluding graver crimes such as treason, perjury, unnatural offences, homicide, and rape.

Part II of the First Schedule, which is too long to reproduce here, refers to certain indictable offences under other Acts.

The crimes defined in the Crimes Act, 1908, in respect of which summary jurisdiction is *not* given are as follows:

Treason, treasonable crimes, or inciting to mutiny (Crimes Act, 1908, ss. 95-100); Riotous assembly, riotous damage, or unlawful drilling (ss. 103-109); Challenge to fight a duel (s. 113); Taking part in prize-fight (s. 114); Seditious offences (ss. 115-120); Piracy and piratical acts (ss. 121-124); Judicial and official corruption, or selling offices (ss. 126-128); Perjury (s. 131); Fabricating evidence, conspiring to bring false accusations or to defeat justice, or corrupting juries or witnesses (ss. 135-138); Being at large while under sentence of penal servitude (s. 139); Blasphemous libel (s. 150); Unnatural offences, or attempted unnatural offence (ss. 153, 154 (*a*), (*b*)); Incest (s. 155); Murder, attempted murder, conspiracy to murder, or being accessory after the fact (ss. 187-190); Manslaughter (s. 191); Aiding or abetting suicide (s. 192); Disabling or stupefying in order to commit a crime

(ss. 195, 196); Wounding with intent to do bodily harm (s. 197); Attempting to injure by explosives, or intentionally endangering persons on railways, &c. (ss. 198, 199); Intentionally endangering persons in vehicles (s. 200A (1)); Intentionally preventing escape from wreck (s. 201); Administering poison with intent to injure or annoy (s. 203); Common assault (s. 210); Rape, or attempted rape (ss. 212, 213); Killing unborn child (s. 220); Procuring abortion (s. 221); and Defamatory libel, or criminal defamation (ss. 235, 236).

Subsection 2 includes in the Magistrates' summary jurisdiction cases of conspiring or attempting to commit any of those offences or being accessory after the fact thereto.

Summary Jurisdiction of Justices of the Peace.—Previously, two or more Justices of the Peace could deal summarily, under Part V of the Justices of the Peace Act, 1927, with the following indictable offences as set out in that statute: (*a*) minor cases of mischief, generally where the value of the damage done is not more than £5 (ss. 216, 217); (*b*) minor cases of theft, false pretences, and receiving, generally where the value of the property is not more than £20 (ss. 234, 235, 238); (*c*) common assault (s. 202); and (*d*) fortune-telling (s. 236).

Under s. 3 of the Summary Jurisdiction Act, 1952, two or more Justices may deal summarily with any case of theft, attempted theft, or receiving where the value of the property involved is not more than £20. Minor cases of mischief, common assault, and fortune-telling are now dealt with in the Police Offences Amendment Act (No. 2), 1952, to which reference is made below.

Section 3 sets out the indictable offences that may be dealt with summarily by two or more Justices of the Peace, but does not limit the power of Magistrates, under s. 2, to deal with those offences. The offences are theft, attempted theft, and receiving, with a monetary limit of £20 in value.

Where the penalty on indictment would exceed three months' imprisonment, s. 4 provides that the accused may, as previously, claim to be tried by a jury under s. 124 of the Justices of the Peace Act, 1927, and, if he does so, the case is to be dealt with as an indictable one.

Section 5 re-enacts the existing provisions under which the Magistrate or Justices may, at any time during the hearing, decline to deal summarily with the case, and treat it as a charge of an indictable offence.

It is made clear by s. 6 that all relevant provisions of the Crimes Act, 1908, apply to summary proceedings, including the provisions as to powers of arrest, search warrants, the granting of bail, and the obtaining of the consent of the Attorney-General in certain cases (ss. 402-405).

The maximum penalties that may be imposed on summary conviction under the Summary Jurisdiction Act, 1952, are prescribed by s. 7. Where a Magistrate has jurisdiction, he may sentence the accused to imprisonment for not more than three years or to a fine of not more than £200. Justices, within their jurisdiction, may sentence the accused to imprisonment for not more than six months or to a fine of not more than £50. In either case, the maximum penalty that could have been imposed on indictment, if less than the above, is not to be exceeded. Hitherto, in the limited classes of cases where summary jurisdiction existed under Part V of the Justices of the Peace Act, 1927, Magistrates could not impose imprisonment for more than one year or a fine of more than £50 (ss. 188, 192). The only change made in the powers of Justices is to increase the maximum fine from £20 (s. 238) to £50. The existing powers to impose reformative detention, or to commit to a Borstal institution, or to grant probation, or to dismiss the case as trivial, are preserved by s. 12 (1) (*f*).

Section 8 re-enacts, with minor drafting alterations, s. 243 of the Justices of the Peace Act, 1927, under which an order may be made for restitution of stolen property or for the payment of its value.

The effect of s. 9 is that proceedings under the Act are to be commenced by information in the summary form under Part II of the Justices of the Peace Act, 1927. This section does not change the existing law in that respect, but it expressly applies the Justices of the Peace Act, 1927, thus making it clear that the Court has the powers conferred by that Act and that the general right of appeal to the Supreme Court against a conviction is preserved.

Section 10 provides that proceedings under the Act may be commenced at any time after the commission of the offence, unless a time-limit is imposed by any Act creating the offence. At present, there is a time-limit of two years (s. 190). There is no time-limit for an indictment in the majority of cases under the Crimes Act, 1908.

The provisions of s. 260 of the Justices of the Peace Act, 1927, under which proceedings are not to be quashed because of formal defects, are re-enacted in s. 11.

Section 12 preserves the alternative jurisdiction of the Supreme Court, and of Magistrates or Justices under other enactments, and also declares that the jurisdiction of the Children's Court is not affected. By subs. 2, the defences of previous conviction or previous acquittal are expressly made available to persons prosecuted under this Act and subsequently prosecuted under any other Act, or *vice versa*.

The effect of s. 13 is that, where in any matter the Child Welfare Act, 1925, is inconsistent with the Summary Jurisdiction Act, 1952, the latter is to be read subject to the former statute.

Section 14 makes the consequential amendments detailed in the Second Schedule. The only amendment in that Schedule requiring special mention is the omission from s. 124 of the Justices of the Peace Act, 1927, of the words " and which is not an assault." That section gives a right to claim trial by jury where the penalty exceeds three months' imprisonment, except in cases of assault. The effect of this amendment is to give the right of trial by jury in cases of assault, except in the case of the summary offence of common assault as it was created by s. 202 of the Justices of the Peace Act (which is transferred, by the Police Offences Amendment Act (No. 2), 1952, to the Police Offences Act, 1927).

Section 15 repeals Part V of the Justices of the Peace Act, 1927, and the amendments to that Part.

Crimes Amendment Act, 1952.

This Act makes miscellaneous amendments to the Crimes Act, 1908, and is part of the general scheme, of which the Summary Jurisdiction Act, 1952, forms the major part, for the extension of summary juris-

diction in indictable offences and the simplification of the law relating to it. Except in the case of s. 2, the purpose of this Act is to bring into the Crimes Act, 1908, a number of provisions formerly contained in Part V of the Justices of the Peace Act, 1927, and now repealed, as above; this was the source of summary jurisdiction in indictable offences. The offences so dealt with—namely, abduction (s. 3), theft (ss. 4 and 5), false pretences (s. 6), receiving (s. 7), coinage offences (ss. 8 and 9), and mischief (s. 10)—are indictable offences in which the present limited summary jurisdiction is extended by the Summary Jurisdiction Act, 1952.

Section 2: This section adds to the Crimes Act, 1908, a new s. 200A, which makes it an indictable offence to shoot at, or throw anything at, a vehicle with intent to injure or endanger the safety of anyone in the vehicle. Subsection 2 of s. 200A makes it an offence to do any such act wilfully, but without such an intent, if the act is done in a manner likely to injure or endanger the safety of anyone in the vehicle. The subsections are based on the similar provisions of ss. 199 (*c*) and 200 (*c*) of the Crimes Act, 1908, which apply only to railways, tramways, or aircraft.

Section 3: Under s. 229 of the Crimes Act, 1908, it is an offence to abduct, for immoral purposes, a girl under sixteen years, whether or not she consents to the abduction, and whether or not the offender believes her to be sixteen years or over. That section is now extended to apply to a girl under eighteen years, and to make it a good defence if the offender has reasonable cause to believe that the girl is eighteen years or over. As amended by this section, s. 229 takes the place of s. 209 of the Justices of the Peace Act, 1927, which created a similar summary offence in respect of girls under eighteen years. The maximum penalty is two years' imprisonment.

Section 4 re-enacts (as s. 238A of the Crimes Act, 1908) s. 222 of the Justices of the Peace Act, 1927, which made it an indictable offence to steal electricity.

Section 5 (1) substitutes a new section for s. 247 of the Crimes Act, 1908, which prescribes four different grades of punishment for various kinds of theft. The former maximum penalty of life imprisonment for the theft of a testamentary instrument is altered in the new section to fourteen years. Four other grades of maximum penalty are prescribed—namely, seven years for certain specific kinds of theft, three years for the theft of any property valued at more than £20, six months where the value of the property is more than £2 and not more than £20, and three months where it is not more than £2. The last two provisions replace ss. 238 and 234 of the Justices of the Peace Act, 1927. Subsections 2 and 3 are consequential amendments.

False pretences is the subject of s. 6. Subsection 1, in amending s. 252 of the Crimes Act, 1908, limits the application of the present maximum penalty of three years' imprisonment to cases where the property involved is valued at more than £2. A maximum penalty of three months is provided for other cases. The section, as amended, replaces s. 235 of the Justices of the Peace Act, 1927.

Receiving is dealt with in s. 7. Subsection 1, in amending s. 284 of the Crimes Act, 1908, limits the application of the existing maximum penalty of seven years' imprisonment to cases where the property involved is valued at more than £2. The amendment in that section made by subs. 2 of s. 7, provides for a maximum penalty of three months in other cases. It replaces s. 250 of the Justices of the Peace Act, 1927. Subsection 3, by further amending s. 284, reduces the maximum penalty on a subsequent conviction from life imprisonment to fourteen years' imprisonment.

Section 8: An amendment of the Crimes Act, 1908, makes it an offence under s. 326 to utter any current coin which is defaced by having any word stamped on it. It replaces s. 197 of the Justices of the Peace Act, 1927. Subsection 2 amends s. 326 so as to bring it up to date in its application to current coin.

Section 9 re-enacts, in a re-drafted form, both s. 48 of the Finance Act, 1920 (which prohibited the melting down or breaking up of current coin), and s. 199 of the Justices of the Peace Act, 1927 (which exempts persons from the prohibition on the breaking of coin where the coin is suspected to be diminished or to be counterfeit). The new section appears as s. 326A of the Crimes Act, 1908.

Section 339 of the Crimes Act, 1908 (which prescribes punishments for various kinds of damage to property coming under the head of mischief) is amended by s. 10: The paragraphs amended refer to damage for which no special punishment is "by law" prescribed. The amendment alters that wording so as to preserve the alternative summary jurisdiction under s. 6 of the Police Offences Act, 1927: see the Police Offences Amendment Act (No. 2), 1952, *infra*.

Section 359 of the Crimes Act, 1908, which deals with powers of arrest, is amended by s. 11. The general rules as to arrest are that anyone charged with a crime for which the penalty is three years' imprisonment or more may be arrested without warrant (s. 358), and that anyone charged with a crime for which the penalty is less than three years' imprisonment shall not be arrested without warrant (s. 359); but there are a number of specified exceptions to each rule. Section 359, as amended, includes the crimes of endangering persons in vehicles (see its reference to s. 2, *supra*) and theft (in cases where the penalty is less than three years) in the list of crimes for which the accused may be arrested without warrant. It replaces s. 248 of the Justices of the Peace Act, 1927, which provided that anyone found committing a theft punishable on summary conviction might be arrested without warrant.

Under s. 449 of the principal Act, the Court may, on convicting anyone, order him to pay any sum up to £100 by way of compensation for loss of property caused by the crime. Section 14 adds subs. 3A to s. 449, to make it clear that such an order is not to affect the right to recover by civil proceedings any damages in excess of the amount awarded.

Under s. 451 of the Crimes Act, 1908, the Court may, on convicting anyone, order property found in his possession to be returned to the true owner. Section 13 adds a new subs. 1A, which is to the effect that, where, in a case of theft, the stolen property has been sold to an innocent purchaser, the Court may order that, on the restitution of the property to the true owner, the purchaser is to be reimbursed out of any moneys found in the possession of the convicted thief. The section replaces s. 244 of the Justices of the Peace Act, 1927.

The words "and may direct that on the expiration of his sentence he shall be detained in a reformatory prison under this Act" in s. 30 (3) of the Crimes Act, 1908

(which empowers a Judge to declare any person to be an habitual offender), are deleted by s. 14, as from the date of the coming into operation of the Crimes Amendment Act, 1910.

* * * *

In our next issue, we shall consider the Justices of the Peace Amendment Act, 1952, and the Police Offences Amendment Act (No. 2), 1952, both of which are parts of the interlocking series of statutes which includes the Summary Jurisdiction Act, 1952, and the Crimes Amendment Act, 1952, which are dealt with above. We shall also make reference to the Police Offences Amendment Act, 1952, which, however, does not form part of the series to which we have referred.

SUMMARY OF RECENT LAW.

CONVEYANCING.

Appointments: Freedom from Estate Duty. *96 Solicitors' Journal*, 772.

CRIMINAL LAW.

Indictment—Indictment charging Two Persons with Conspiracy—One pleading "Guilty" in Lower Court—True Bill found against Both—Indictment against Party pleading "Guilty" quashed by Trial Judge—Indictment Good against Other and Counts Divisible and Good against Him—Crimes Act, 1908, ss. 387, 392—Evidence—Admissibility—Accused charged with Conspiracy—Evidence of Plea of "Guilty" before Trial by Party originally charged with Him—Such Evidence Irrelevant and Inadmissible against Him in His Trial. W. and B. were jointly charged in the lower Court on the charge of conspiracy to defeat the course of justice, and depositions were taken. B. pleaded "guilty" and was committed for sentence. W. was committed for trial. Notwithstanding B.'s plea of "guilty" and committal for sentence, the bill of indictment presented to the Grand Jury charged both B. and W. The Grand Jury found a true bill. The Crown Prosecutor moved the trial Judge to quash the indictment as regards B.; and this was done. W. was then tried on an indictment containing two counts—namely, (*a*) alleging conspiracy with B. to defeat the course of justice, and (*b*) alleging that he and B. wilfully attempted to defeat the course of justice. He was convicted on the first count, no verdict being taken on the alternative count. On his appeal against his conviction, it was argued on his behalf (*a*) that the indictment was bad, in that it was not preferred in accordance with s. 407 of the Crimes Act, 1908; (*b*) that, if that defect had been cured by the trial Judge's quashing the indictment against B., the first count did not contain a statement describing the crime; (*c*) that evidence given by B. at W.'s trial that B. had pleaded "guilty" to the charge of conspiring with W. was strongly admitted; (*d*) that, in particular, having regard to the admission of this evidence and notwithstanding the full warning given by the trial Judge as to the danger of convicting on the uncorroborated evidence of an accomplice, the verdict should be set aside, on the ground that it was unsatisfactory and that it would be dangerous to let it stand. It was admitted for the Crown that the bill of indictment was a nullity against B. *Held*, 1. That the indictment was severable, and was good against W.; and the counts in it were divisible in such a way as to leave each of them good against W. (*Reg.* v. *Fuidge*, (1864) Le. & Ca. 390; 169 E.R. 1443, followed.) (*Reg.* v. *Gardner and Humbler*, (1862) 9 Cox C.C. 332), *R.* v. *Mills*, (1935) 25 Cr.App.R. 138, *R.* v. *Graham*, (1919) 14 Cr.App.R. 7, and *R.* v. *Twigg*, (1919) 14 Cr.App.R. 71, referred to.) 2. That the indictment, although expressed jointly, was efficient in respect of each person charged individually; and the quashing of the indictment against B. did not affect the validity of the indictment against W. 3. That, whether B.'s plea of "guilty" be regarded as an act or a declaration, evidence of it was not relevant and so inadmissible against B. on his trial; and, if it were regarded as a confession, then it was still inadmissible, for a prisoner can be affected only by his own confessions, and not by those of accomplices; it was not made in his presence otherwise than in a judicial proceeding, and it was not assented to by him; and he did not, by his answer, conduct, or silence, acquiesce in the contents of B.'s plea. (*R.* v. *Turner*, (1832) 1 Mood. C.C. 347; 168 E.R. 1298, *Reg.* v. *Gardner and Humbler*, (1862) 9 Cox C.C. 332, and *R.* v. *Dibble*, (1908) 72 J.P. 498, followed.) 4. That the Court of Appeal could not say that, if the inadmissible evidence had not been given, a reasonable jury would, without doubt, have convicted. The appeal was accordingly allowed, the conviction was quashed, and a new trial was ordered. *The Queen* v. *Windsor*. (C.A. Wellington. October 28, 1952. Finlay, J.; Hutchison, J.; Cooke, J.)

DEATH DUTIES.

Policy taken out by National Airways Corporation in Its Own Name in respect of Flying Personnel—Persons entitled individually on Death or Disablement set out in List attached to Policy—Death of Pilot by Accident in Course of Employment with Corporation—Name of Deceased in List attached to Policy—Consideration passing between Deceased and Insurer leading to Creation of Contractual Right disposable by Will—Policy Moneys less £1,500 in lieu of Workers' Compensation, paid to Executor—Moneys so paid "property of the deceased"—Death Duties Act, 1921, s. 5 (1) (a). On July 1, 1948, a policy was taken out by the New Zealand National Airways Corporation to provide for payment of £4,000 on the death or permanent disablement between July 1, 1948, and March 31, 1949, of any of certain flying personnel employed by it. The person named and described as "the Assured" was the Corporation. Endorsements on the policy included the following provisions: "(*a*) For the purpose of the benefits payable hereunder the term Assured shall be deemed to refer to the individual Pilots and other Flying Personnel of the New Zealand National Airways Corporation set out in the 'List of Persons covered' attached hereto and to such further personnel as may from time to time be added thereto at the request of the New Zealand Airways Corporation in the same manner as if a proposal had been completed by each person mentioned in or added to the said list. (*b*) Notwithstanding anything contained herein to the contrary it is hereby declared and agreed that the within proposal is extended to include death or permanent disablement sustained by the Assured whilst travelling by air in New Zealand or in the South West Pacific subject otherwise to the terms provisions and conditions of the Policy to be issued in respect thereof." The deceased was a pilot employed by the Corporation. His name was among those set out in the "List of Persons covered. £4,000 cover." He was killed on August 9, 1948, in an accident in the course of his employment. There was evidence that the deceased knew of the accident insurance cover. On receipt of notice of the deceased's death and of the usual proofs, the sum of £4,000 was paid by the insurer to the Corporation, and, on production of probate, that amount was paid to the deceased pilot's executor. Pursuant to a certificate of exemption granted by the Compensation Court under s. 9 (5) of the Workers' Compensation Amendment Act, 1943, the Corporation was wholly exempt at the date of deceased's death, in respect of its employees engaged on flying duties, from the obligation to insure against liability imposed under the principal Act, and no such insurance was held by the Corporation. In assessing the death duties payable in respect of the deceased's estate, the Commissioner of Stamp Duties included in the final balance of the deceased's estate the sum of £2,500, being the sum of £4,000 paid under the policy, less £1,500, which was the maximum compensation claimable under s. 4 (1) (*a*) of the Workers' Compensation Act, 1922 (as substituted by s. 38 (1) of the Workers' Compensation Amendment Act, 1947). The appellant objected to the assessment. On Case Stated by the Commissioner of Stamp Duties, it was stated by him that the £2,500 was rightly included in the final balance pursuant to s. 5 (1) (*a*) or s. 5 (1) (*h*) of the Death Duties Act, 1921. *Held*, 1. That, on the true construction of the policy, the dominant provision was that expressed in para. (*a*) of the endorsement quoted above, to the effect that the persons entitled to the benefits that might accrue under the policy were the individual pilots named in the attached list and such further personnel as might be added thereto at the request of the Corporation "in the same manner as if a proposal had been completed by each person mentioned in or added to the said list." 2. That each pilot named in the list was made, by the express terms of the policy, a party to the contract and a beneficiary thereunder; and, whether or not he or his representative could have claimed directly thereunder (a point

which it was unnecessary to decide for the purposes of these proceedings), he had such an interest in the proceeds, so far as they affected himself, as to make the same his property, disposable by him by will, or *inter vivos*. 3. That, on the facts, there was consideration passing between the pilot and the insurer leading to the creation of a contractual right, as the taking out of the policy was a regular term of the contract of employment of a pilot by the Corporation; and it was a fair inference that he was covered by a personal accident insurance up to July 1, 1948, and the existence of that insurance and the later cover of £4,000 constituted one of the factors that induced him to remain in the Corporation's employment to the time of his death. (*Re J. Bibby and Sons, Ltd., Pensions Trust Deed, Davies* v. *Inland Revenue Commissioners*, [1952] 2 All E.R. 483, distinguished.) (*Johnston* v. *Ocean Accident and Guarantee Corporation, Ltd.*, (1915) 34 N.Z.L.R. 356, referred to.) 4. That it was implicit in the arrangements made between the Corporation and its pilots that any payment accruing under the policy in favour of a pilot or his representatives was not to be in addition to any claim under the Workers' Compensation Act, 1922, in the case of death arising out of and in the course of his employment, or in the case of permanent disability similarly arising and of the nature indicated in the policy. 5. That, accordingly, on the facts, the insurance moneys were a contractually-secured benefit in favour of the deceased, and, therefore, "Property of the deceased" within the meaning of s. 5 (1) (*a*) of the Death Duties Act, 1921. *Buxton* v. *Commissioner of Stamp Duties*. (S.C. Wellington. November 5, 1952. Hay, J.)

JUDICIARY.

Mr. Hildreth Glyn-Jones, Q.C., Recorder of Cardiff, has been appointed a Judge of the High Court of Justice.

Mr. Justice Finlay will be absent during the present year on vacation. He has left for a visit to Great Britain.

LAND AGENT.

Commission—Prospective Purchaser introduced by Plaintiff Land Agent but no Sale resulting—Same Person purchasing Two Months later after Introduction by Another Agent—Commission payable "in the event of a sale or exchange being effected to anyone introduced" through Plaintiff's Agency—Such Introduction not Efficient Cause in bringing about Sale—Plaintiff not entitled to Commission—"Introduction." About April 28, 1952, the plaintiff land agent prepared the following authority to sell, and obtained the defendant's signature to it: "You are hereby authorized to sell or exchange my property at the price and terms as described overleaf, and to sign a contract of sale and receive a deposit on my behalf. In the event of a sale or exchange being effected to anyone introduced through your agency at the above-mentioned price or any variation of the same agreed to by me, I agree to pay you commission on the gross purchase price." About the same time, the plaintiff took M. to inspect the house, but no contract was made, as M. thought the price was too high, and the plaintiff told him the defendant would not reduce it. About two months later, another agent, J., also took M. to inspect the house, and as a result of his efforts a contract of sale was entered into at a reduced price. On the evidence, the sale was due to J.'s personal effort and persuasive ability. The plaintiff claimed that, by virtue of the terms of his authority, he was entitled to be paid commission. *Held*, 1. That the authority was to be construed *contra proferentem*, and in the light of the particular agency—*i.e.*, the purpose for which the plaintiff was employed as agent—to sell or exchange the defendant's property. 2. That, on the true construction of the authority to sell, the purpose for which the plaintiff was employed was to sell or exchange the property, and the event in respect of which he was entitled to commission was the sale of the property effected to anyone introduced through his agency; and the use of the words "effected" and "introduced through your agency" connoted some activity on his part. 3. That the word "introduction" as used in land-agents' contracts means the introduction that is effective in bringing about a final sale, and the word "agency", used in collocation with the word "introduction" involves some active working or operation towards the end for which the agent is employed, in this case the sale or exchange of property. (*Hornbrook* v. *Atkinson* ([1911] 31 N.Z.L.R. 86); *Bow's Emporium, Ltd.* v. *A. R. Brett and Co., Ltd.* (1927) 44 T.L.R. 194; *Parker* v. *Dillon* (1909). 12 G.L.R. 93, and *Renner* v. *Fraser* (1911) 31 N.Z.L.R. 205) followed.) 4. That, as the plaintiff had done nothing more than bring the purchaser to the propery and the property was not sold until two months later, and, in the meantime he had done nothing to further the sale to the purchaser, and as any effect the introduction might have had was spent at the time when the sale was effected, the plaintiff's introduction of M. was not the efficient cause in bringing about the sale, and he was not entitled to receive commission. (*Dennis Reed, Ltd.* v. *Goody* [1950] 1 All E.R. 919, followed.) (*Jackson* v. *Cook* [1934] G.L.R. 104, referred to.) *Weir* v. *Rush* (Auckland. November 7, 1952. Paterson, S.M.).

LIFE INSURANCE.

The Unnamed Wife. *96 Solicitors' Journal*, 720.

MUNICIPAL CORPORATION.

Nuisance—Negligence—Removal of Tram-tracks and filling in Excavations preparatory to Resealing Roadway—Natural User of Street—Shop Window broken by Metal propelled from Spoil by Vehicular Traffic—Corporation not bound to take Extravagant Precautions against Such Happening—Inevitable Result of Exercise of Statutory Powers—Corporation not Liable on Grounds of Nuisance or Negligence—Municipal Corporations Act, 1933, ss. 173, 175. The acts of a city corporation in filling in excavations caused by the removal of tram-tracks and in dealing with the work and the street preparatory to resurfacing the roadway constitute a natural user of the roadway within the powers given by s. 175 of the Municipal Corporations Act, 1933. Road metal spread evenly upon a level road does not come within the definition of dangerous substances as being likely to do mischief if it escapes and as having an inherent power of escape. (*Rylands* v. *Fletcher*, (1866) L.R. 1 Ex. 265; aff. on app., (1868) L.R. 3 H.L. 330, distinguished.) The duty of repairing streets is one of the primary duties which municipal corporations are called upon to perform, and it involves the supply of road metal and its application to the street surface. If the work is carried out according to standard engineering practice and could not have been done in any other way, the corporation is not liable for the creation of a nuisance within the meaning of s. 173 of the Municipal Corporations Act, 1933. (*Blamires* v. *Lancashire and Yorkshire Railway Co.*, (1873) L.R. 8 Ex. 283, *Great Western Railway Co.* v. *Davies*, (1878) 39 L.T. 475, *Keeble* v. *East and West India Dock Co.*, (1889) 5 T.L.R. 312, and *Wright* v. *Midland Railway Co.*, (1884) 51 L.T. 539; rev. on app., (1885) 1 T.L.R. 406, followed.) The breaking of a window of a shop facing the street where the work was being done, by road metal propelled by vehicular traffic from the spoil from the excavations on the roadway, is an inevitable result of the exercise of the statutory powers. (*Manchester Corporation* v. *Farnworth*, [1930] A.C. 171, followed.) What is habitually done in the same, or in similar, circumstances furnishes a test of reasonable care; and, where simple operations are being performed, persons are not as a rule required to guard against every conceivable result of their actions or to take extravagant precautions. Thus, it would be unreasonable to employ men for twenty-four hours a day for eight or nine weeks throughout the year in a business area in order to guard against the eventuality of a stone from a municipal corporation's road work striking a shop window. Early in 1951, the defendant Corporation, which was a "tramway authority" as defined by the Tramways Act, 1908, commenced the work of removing the tram-tracks throughout the city of Wanganui. The plaintiff company owned and occupied business premises in Victoria Avenue, Wanganui, past which the tram-tracks ran. The actual removal of the tracks and sleepers was performed for the defendant by independent contractors; but the defendant itself undertook and did the work of filling in the excavations caused by the removal of the rails and sleepers and of resurfacing the damaged roadway, and, subsequently, of bituminizing the resurfaced area. The tram-tracks in front of, and for a considerable distance on each side of, the plaintiff's premises were removed on April 10, 1951, and were sealed with bitumen on June 25, 1951. On or about June 6, 1951, one of the plate-glass windows in the plaintiff company's premises was broken. It alleged that this was caused by the negligence of the defendant Corporation in allowing spoil and road metal from the excavations to lie on the unexcavated surface of that part of the roadway, so that vehicular traffic permitted by the defendant Corporation to pass over and along the street caused a stone or stones to be propelled from the spoil lying on the roadway against the plate-glass window of the plaintiff's business premises, whereby it was broken. The plaintiff claimed damages for the value of the glass and the signwriting thereon, on the grounds of negligence and of nuisance. *Held*, 1. That the defendant Corporation had taken all reasonable care in carrying out the work which it was alleged had resulted in damage to the window, and was not in any way negligent. 2. That the road works were a necessary nuisance created under statutory authority; and the defendant Corporation had discharged the onus of proving

the inevitability of the result of the exercise of its statutory powers, and, accordingly, it was not liable on the ground of nuisance. *Brownie and Co., Ltd.* v. *Wanganui City Corporation.* (Wanganui. October 29, 1952. Coleman, S.M.)

OBITUARY.

The Rt. Hon. Sir Paul Lawrence, a Lord Justice of Appeal from 1926 to 1934, aged 91.

PRACTICE.

Joinder of Party—Action to recover Possession of Dwellinghouse—No Jurisdiction to join "Another person"—Magistrates' Courts Act, 1947, s. 31 (1) (a)*—Tenancy Act, 1948, s. 24 (2).* No jurisdiction given by the Magistrates' Courts Act, 1947, to join as a party to an action to recover possession of a dwellinghouse from the tenant "another person" within the meaning of that term as used in s. 24 (2) of the Tenancy Act, 1948. (*Purcell* v. *Silva* (1941) 2 M.C.D. 255, not followed.) *Davy* v. *Skinner, Exparte Wilson* (Auckland, December 1, 1952. Wily, S.M.).

PROBATE AND ADMINISTRATION.

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

SHIPPING AND SEAMEN.

Ship Desertion—Seaman signing Articles in England for Round Voyage—Desertion in New Zealand and Sentence of Deportation—Seaman put on Board Original Ship and signing Same Articles then Still Current—Seaman by Such Articles not becoming a "seaman engaged in New Zealand"—Shipping and Seamen Act, 1908, s. 132 (1) (b). The defendant entered into a contract of service on the *Wellpark* by signing articles in England to serve as a member of the ship's crew for a period of two years from January 18, 1951, to any ports commencing at Tilbury, thence to New Zealand, and ending at such port in the United Kingdom or continent of Europe as might be required by the master. The articles were still current at the time of the present proceedings. The defendant deserted the *Wellpark* at Auckland on May 17, 1951. He was arrested and charged with desertion under s. 132 of the Shipping and Seamen Act, 1908, as being a seaman not engaged in New Zealand. He pleaded "guilty"; and, on July 12, 1952, he was convicted and ordered to be detained under the provisions of that section. On July 17, 1951, the Police placed him on board the *Wellpark,* then in port at Auckland. He then signed his name upon the articles of agreement of service above referred to. The ship sailed with the defendant on board, but returned unexpectedly to Auckland in the following November. On November 3, the defendant absented himself without leave from the ship, which sailed on November 8 without him. The defendant was charged with having been absent without leave from the British ship *Wellpark* on November 3, 1951, he having signed articles in England, having previously deserted his ship, and being under deportation from New Zealand. The question at issue was whether the defendant, by joining the ship at Auckland on July 17, 1951, or, alternatively, by signing his name on the articles at that time, became a "seaman engaged in New Zealand" within the meaning of s. 132 (1) (*b*) of the Shipping and Seamen Act, 1908. *Held,* 1. That, although the defendant on July 17, 1951, signed the articles of agreement made by the master with his crew, they were the articles which had already been signed by him in England, and his signing them was superfluous, and ineffective to alter or affect the agreement itself, of which the defendant was already a signatory and a party in England; and they and the contract of service, which he was re-entering after his desertion, were still current; and he could not be regarded as having been "engaged in New Zealand upon a contract of service with the master" within the meaning of s. 132 (1) (*b*) of the Shipping and Seamen Act, 1908. 2. That, alternatively, by the terms of s. 132 of the statute, as it was applied to the defendant in respect of the charge brought against him on the first occasion on July 12, 1951, by the Court record, and upon his own admission, the defendant was placed on board the *Wellpark* "as not being a seaman engaged in New Zealand". 3. That, accordingly, the original agreement of service being at the time of the present offence still in full force, and the previous committal and deportation having had no effect upon the defendant's status as to his engagement, he had committed an offence under s. 132. *Union Steamship Co., Ltd.* v. *Holmes.* (Auckland. October 23, 1952. Astley, S.M.)

STAMP DUTIES.

Implied Surrender and Stamp Duty. *102 Law Journal,* 591.

STATUTE.

Construction—Auckland Harbour Bridge Act, 1950—Claim against Authority for Compensation—"Fair commercial value"—No Right of "compensation for loss of goodwill"—Matters to be determined by Commission in assessing Compensation—"Goodwill"—Auckland Harbour Bridge Act, 1950, s. 68 (1) (a)*, (3).* The proper construction to be placed on s. 68 (1) (*a*) of the Auckland Harbour Bridge Act, 1950, is: (*a*) The Compensation Assessment Commission is to determine the fair commercial value of the Devonport Steam Ferry Co., Ltd.'s, fleet of vessels, but without any allowance for goodwill or loss of profits. (*b*) In making such valuation, every proper method of valuation is available to the Commission, provided it is not based on a capitalization of the profits from the operation of the vessels. The method of replacement cost less depreciation and obsolescence, while a proper method to use, does not necessarily mean, as a starting-point, replacement cost as at December 1, 1950 (the date of the passing of the statute), with an allowance for depreciation and obsolescence. The Commission should consider also original cost, and the question of averaging costs over a period, and it should determine the period. These and all other relevant circumstances (always excluding goodwill—that is, profit-earning capacity) should be given their proper weight, so that the ultimate figure arrived at satisfies the Commission that it is a fair commercial value of the vessels. (*Hamilton Gas Co., Ltd.* v. *Hamilton Borough,* (1910) N.Z.P.C.C. 357, *International Railway Co.* v. *Niagara Parks Commission,* [1937] 3 All E.R. 181, *Royal Motor-bus Co., Ltd.* v. *Auckland City Council,* [1927] N.Z.L.R. 423, *Oldham, Ashton and Hyde Electric Tramways, Ltd.* v. *Ashton Corporation,* [1921] 1 K.B. 269, *National Telephone Co., Ltd.* v. *Postmaster-General,* (1913) 29 T.L.R. 190, *Toronto City Corporation* v. *Toronto Railway Corporation,* [1925] A.C. A.C. 177, and *Montreal* v. *Sun Life Assurance Co. of Canada,* [1952] 2 D.L.R. 81, applied.) (*Liesbosch (Dredge) (Owners)* v. *Edison (Steamship) (Owners),* [1933] A.C. 449, distinguished.) The Commission should proceed to its assessment of the value of the company's fleet as above indicated. Consideration of the meaning of the term "goodwill". (*In re An Arbitration between Hucknall-under-Huthwaite Urban District Council and South Normanton, Blackwell and Hucknall-under-Huthwaite Gas Co., Ltd.,* (1905) 69 J.P. 329, *In re An Arbitration between London County Council and London Street Tramways Co.,* [1894] 2 Q.B. 189, *Hamilton Gas Co., Ltd.* v. *Hamilton Borough,* (1910) N.Z.P.C.C. 357, *Royal Motor-bus Co., Ltd.* v. *Auckland City Council,* [1927] N.Z.L.R. 423, *Franklin Electric Supply and Trading Co., Ltd.* v. *Climie,* [1926] G.L.R. 164, *Re West Canadian Hydro Electric Corporation, Ltd.,* [1950] 3 D.L.R. 321, and *International Railway Co.* v. *Niagara Parks Commission,* [1937] 3 All E.R. 181, referred to.) *In re Auckland Harbour Bridge Commission.* (S.C. Auckland. October 3, 1952. Northcroft, J.; Finlay, J.; Stanton, J.; North, J.)

Effect of Validating Legislation. *214 Law Times,* 194.

TENANCY.

Dwellinghouse—Possession claimed on Ground that Owner Landlord for Three Years preceding Notice of Intention to apply for Possession—Mortgagee in Possession up to Fifteen Months preceding Landlord's Giving Such Notice—Owner not Landlord while Mortgagee in Possession—"Landlord"—Tenancy Act, 1948, s. 24(5)—Tenancy Amendment Act, 1950, s. 10—Land Transfer—Lease—Mortgagee in Possession—Power to exercise Rights as Reversioner—No Recognition of Mortgagee as always being Reversioner—Property Law Amendment Act, 1932, s. 2(12)—(Property Law Act, 1952, s. 91(11)). Section 2(12) of the Property Law Amendment Act, 1932 (now s. 91(11) of the Property Law Act, 1952), enables a mortgagee to exercise the rights of a reversioner notwithstanding the fact that the legal estate in the land charged is not vested in him; but it is not a statutory recognition that the mortgagor is always the reversioner. (*Municipal Permanent Investment Building Society* v. *Smith,* (1888) 22 Q.B.D. 70, referred to.) By mortgage dated December 1, 1923, S. mortgaged land subject to the Land Transfer Act, 1915, to the State Advances Superintendent. In 1934, the mortgagee, who had previously entered into possession, let the property to J. The mortgagee (and his successor in title, the State Advances Corporation) remained in possession as mortgagee until November 25, 1950, when S. redeemed the mortgage. J. had continued as tenant, and on February 10, 1951, S. served on J. a notice of intention to apply for possession, on the ground that he reasonably required the premises for his own occupation

as a dwellinghouse. Section 24(5) of the Tenancy Act, 1948 (as inserted by s. 10 of the Tenancy Amendment Act, 1950), requires, *inter alia*, that the landlord shall have served on the tenant not less than six months' notice of his intention to apply on the ground mentioned above; and it is further provided by s. 24(5)(*c*) that: "The landlord has been the landlord or, as the case may be, the landlords have been the landlords of the premises throughout the period of three years immediately preceding the date of service of the notice." In an action by S. for possession, the Magistrate refused to make an order, on the ground that S. had not been the landlord of the premises throughout the three years immediately preceding February 1, 1951, the date of the service of the notice of intention to apply for possession. The landlord appealed. *Held*, 1. That, if the tenancy bound the mortgagor as a valid exercise of the statutory power conferred by s. 2 of the Property Law Amendment Act, 1932, the reversion devolved eventually on the mortgagor when the mortgage was redeemed; and, if the mortgagor were not so bound, there would be no devolution of the tenancy, but a new tenancy would arise by implication if the mortgagor recognized and accepted the tenancy. (*Chapman* v. *Smith*, [1907] 2 Ch. 97, referred to.) 2. That the word "landlord", where used in s. 24(5) of the Tenancy Act, 1948, conveys its own meaning with sufficient clarity and precision for the purposes of that section. (*Domb* v. *Owler*, [1924] N.Z.L.R. 532, and *Jewellers' Chambers, Ltd.* v. *Thomson*, [1948] N.Z.L.R. 200, distinguished.) (*Burnett* v. *Smith*, [1950] N.Z.L.R. 454, referred to.) 3. That, whether the letting by the mortgagee was within the statutory power or took effect by estoppel only, the mortgagee was the landlord *ab initio* and until the mortgage was redeemed; and he was, in relation to the tenancy in question, at each relevant stage the person entitled to the immediate reversion. 4. That, consequently, the owner had not been the landlord of the premises "throughout the period of three years immediately preceding the date of service of the notice" within the meaning of s. 24(5)(*c*) of the Tenancy Act, 1948. *Smith* v. *Jordan*. (S.C. Auckland. November 25, 1952. F. B. Adams, J.)

Service Occupation or Service Tenancy. *96 Solicitors' Journal*, 743.

Subtenant—Acceptance by Head Lessor of Rent from Head Tenant—Breach by Subtenant of Covenant in assigning without Consent of Head Lessor—Acceptance of Rent Waiver of Right of Re-entry—Such Waiver binding on Head Lessor's Successor in Title—Effect of Waiver to make Assignee of Subtenant in Lawful Possession—Protection of Subtenant irrespective of Existence or otherwise of Covenant against Subletting—Tenancy Act, 1948, ss. 40, 47. The appellant company was the owner of a freehold city property, which included a shop, which formed part of the premises which a predecessor in title leased to S. for a term commencing on September 5, 1942, which expired on September 5, 1949. The lease provided that the lessee should not without the consent in writing of the lessor assign, sublet, or part with the possession of the demised premises or any part thereof, or suffer or permit any assignee, sublessee, or subtenant so to do; and, in the event of the lessor so consenting, the lease provided that the lessee was to procure the execution by the proposed assignee, sublessee, or subtenant of a deed of covenant with the lessor to pay the rent and observe and perform all the agreements and stipulations expressed or implied in the lease, but without discharging the head lessee from liability. S. remained in occupation as a statutory tenant until the tenancy was surrendered as from December 31, 1951. On March 1, 1946, S. had subleased to A. the greater part of the premises included in the head lease for three years less one day from March 21, 1945, with the consent of the head lessor. When the sublease was entered into, the head lessor agreed to the subdivision of the premises, under which the sublessee took the greater part, the head lessee retaining a small area for the purposes of its own businesss. On May 30, 1946, the sublessee, having disposed of her business to T. and G., executed in their favour an assignment of the sublease and this was again consented to by the head lessor. The freehold of the premises was purchased about October, 1949, by W., Ltd., and its solicitors wrote to S. on October 12, 1949, to the effect that the purchasing company would be pleased if S. could make arrangements to vacate the premises. After correspondence between the two parties, no further steps were taken by W., Ltd., in the direction of obtaining possession, and on June 7, 1951, it sold the property to a purchaser, who apparently bought on behalf of, or with the object of forming, the appellant company. In the meantime, on April 20, 1950, S. wrote to W., Ltd.'s solicitors informing them that it had received no reply to its letter of January 16, and adding that the subtenants T. and G. had formed themselves into a limited company and had asked S. to recognize them as such, and asking for W., Ltd.'s opinion on the matter. To that letter no reply was received. The respondent company was incorporated on April 5, 1950, the shareholders being T. and G., who, on April 6, 1950, executed a deed of assignment of their tenancy to the newly-formed company. No formal consent to that assignment was obtained from the head lessor. The rent under the sublease continued to be paid to S., the receipts in many instances being made out in favour oj the new company, the respondent in these proceedings. S. continued to pay the rent under the head lease, and, so long at least as W., Ltd., remained the head lessor, the rent was accepted by it without qualification. Early in September, 1950, the respondent company wrote to W., Ltd., reporting damage to a verandah post outside the shop. In reply, the respondent company was informed that instructiins had been given to a named firm to have repairs effected, and was invited to inform W., Ltd., if the work was not undertaken after a lapse of seven days. On October 9, G. wrote to W., Ltd., reporting that the repairs had not been done. The managing director of W., Ltd., replied on October 13 stating that repairs to the verandah post had been held up awaiting the decision of the City Council about replacement, but that the insurance company had been requested to proceed immediately with the repairs. The letter was addressed to G. at "Vogue Gowns, Ltd." On February 27, 1951, S. wrote to W., Ltd., to the effect that the subtenants, Vogue Gowns, Ltd., wished to sell its business and had asked permission to change the name. W., Ltd., replied on March 5, 1951, that it was not prepared to enter into any arrangement with tenants for any extended occupation of the premises, which had been purchased for its own use. On April 6, 1951, the respondent company wrote to W., Ltd., concerning a leak in the roof of the premises, and on April 10 a reply was sent (addressed "Messrs. Vogue Gowns, Ltd.") informing respondent that arrangements had been made to instruct a plumber "to repair the leak in your roof". In an action by the successor in title to W., Ltd., claiming possession of the shop premises from the respondent company, the Magistrate refused to make an order. On appeal from that determination, *Held*, 1. That, by continued acceptance of rent from the head tenant, without qualification and with knowledge of the relevant circumstances, there was a complete waiver by the original head lessor of its right of re-entry under the lease arising out of the breach by the subtenant in assigning the sublease, without obtaining the consent of the head lessor, to a company, and that that waiver was binding on the head lessor's successor in title, the appellant company. 2. That there was sufficient evidence to justify a finding of waiver in relation to the acts of the appellant company itself, which was the original head lessor's successor in title. (*Reeves* v. *Pope*, [1914] 2 K.B. 284, applied.) 3. That the effect of such waiver was to make the respondent company a subtenant in lawful possession as such. (*Wright and Bowers* v. *Arnold*, [1946] 2 All E.R. 616, followed.) (*Chaplin* v. *Smith*, [1926] 1 K.B. 198, distinguished.) 4. That the respondent was protected by s. 40 of the Tenancy Act, 1948, which applies to a tenancy irrespective of the existence or otherwise of a covenant against subletting. *Semble*, That it is necessarily implied in s. 40 that a lawful subletting is therein referred to. *Quaere*, Whether s. 47 of the Tenancy Act, 1948, applies to a covenant against subletting. *Tawa Investments, Ltd.* v. *Vogue Gowns, Ltd.* (S.C. Wellington. October 17, 1952. Hay, J.)

Urban Property—Possession claimed on Ground that Applicant Landlord for One Year preceding Service of Notice to apply for Possession—Property subject to Life Interest, vested in Applicant and Others—Death of Life Tenant on June 23, 1950—Property transferred to Applicant on May 29, 1951—Notice served on June 28, 1951—Landlord not Beneficial Owner before, at Earliest, June 23, 1950—Possession refused—Tenancy Act, 1948, ss. 24 (1) (h), 25 (1). Where an owner of urban property claims possession of it on the ground set out in s. 24 (1) (*h*) of the Tenancy Act, 1948 (that the premises are reasonably required by the landlord for his own occupation), an order in his favour should not be made if it is proved that he is in fact holding only as a bare trustee and not as a beneficial owner or one of the beneficial owners. (*Sharpe* v. *Nicholls* [1945] 2 All E.R. 55 followed.) Certain urban property was owned by the plaintiff's father who died on September 26, 1946. In terms of his will, his widow became entitled to a life interest in the property, and she and the plaintiff and his brother, the executors and trustees under the will, became registered proprietors on July 25, 1947. The widow died on June 23, 1950. Transmission vesting the property in the remaining trustees was registered on May 29, 1951. By transfer registered on May 29, 1951, the plaintiff became beneficial owner; and on June 28, 1951, he gave notice to the tenant of his intention to apply for possession; and in terms of the second proviso to s. 25 (1) of the Tenancy Act, 1948, (added by s. 12 of the Tenancy Amendment Act, 1950), such notice can be legally effective

only where the landlord " has been the landlord or one of the landlords of the premises throughout the period of two years immediately preceding the date of service of the notice ". The defendant had been the tenant for a number of years. In an action claiming possession from the tenant, *Held*, 1. That something more than the bare legal ownership of a trustee is required in order to make such trustee a landlord (in the sense of being the person entitled to the immediate reversion) for the purposes of s. 25 (1) of the Tenancy Act, 1948, claiming possession of a property on the ground set out in s. 24 (1) (*h*) of that Statute. (*Sharpe* v. *Nicholls* [1945] 2 All E.R. 55 followed.) (*Domb* v. *Owler* [1924] N.Z.L.R. 532); *Burnett* v. *Smith* ([1950] N.Z.L.R. 454), and *Stable Securities, Ltd.* v. *Cooper* ([1941] N.Z.L.R. 879) referred to.) 2. That the plaintiff did not acquire the status of beneficial owner (or one of the beneficial owners) of the property until, at the earliest, June 23, 1950, the date of the life-tenant's death; and consequently, on June 28, 1951, the date of service of the notice to the tenant, he had not been " the landlord of the premises throughout the period of two years immediately preceding the date of service of the notice." *Dudding* v. *Beale and Co., Ltd.* (Auckland. November 17, 1952. Kealy, S.M.).

TRANSPORT.

Arrest of the Drunken Driver. *96 Solicitors' Journal*, 703.

Heavy Motor-Vehicles — Offence — Operating Vehicle on Classified Road with Axle Weight in Excess of Weight indicated for Such Road—Proof of Public Notice and of Erection of Prescribed Signs necessary—Heavy Motor Vehicles Regulations, 1950 (Serial No. 1950/26), Regs. 3, 4, 7. Before the operator of a heavy motor-vehicle may be convicted of operating his vehicle on a road (classified in Reg. 4 (1) of the Heavy Motor Vehicles Regulations, 1950) with an axle weight in excess of that indicated for that class of road, the prosecution must prove publication by public notice of the approval of the Minister of Works of the classification of the road, and the erection, at or near each end of the classified road of the appropriate sign in accordance with the appropriate regulation prescribing road-signs. *Transport Department* (*R. B. Doggett*) v. *Capper and Son* (*1948*), *Ltd.* (Otaki. November 20, 1952. Grant, S.M.).

Right-hand Rule—Ambulance-driver exempted from Conviction for driving at Excessive Speed—No Exemption from Other Civil or Criminal Liability—Duty of Drivers of Other Motor-vehicles to stop or make way—Breach of Such Duty by Driver proceeding across Intersection from Right—Ambulance driver, in Consequence, not Guilty of Breach of Right-hand Rule—Transport Act, 1949, s. 37—Traffic Regulations, 1936 (Serial No. 1936t 86), Regs. 9 (4) (5), 16 (4). While drivers of fire brigade motor-vehicles, motor ambulances, and police and traffic officers' motor vehicles are exempt by virtue of s. 37 of the Transport Act, 1949, from a conviction for exceeding any speed limit while driving on urgent duty, on no occasion, urgent or ordinary, are they exempt from criminal liability should they drive without due care or attention, or reasonable consideration for other road users, or recklessly, or in a manner that is or might be dangerous to the public; and they are not exempt from any civil liability for any negligence in their driving. They are entitled upon urgent occasions to use speed that is not allowed to other drivers, but they do it at their peril, criminally, if their driving amounts to one of the above-mentioned traffic offences and, civilly, in any case. An information charged the driver of an ambulance with failing to give way at an uncontrolled intersection to a motor-cyclist on his right. The ambulance was travelling on an urgent mission, and the driver was sounding his siren from the moment when he left the hospital until he collided with the motor-cycle to the ambulance's left of and beyond the centre of the intersection. The cyclist said that he did not hear the siren before he reached the intersection. Just before the collision, the ambulance was travelling at about 35 to 40 miles per hour and the motor-cyclist at over 30 miles per hour. Regulation 9 (4) of the Traffic Regulations, 1936, is as follows: " Every driver of a motor vehicle who has reasonable cause to believe that he is being signalled to stop or make way by means of a siren equipped under the authority of the last preceding clause (i.e. for use only in urgent cases) shall do so as soon as may be possible with safety." *Held*, 1. That the defendant was not exempted from the duty of observing the right-hand rule imposed by Reg. 16 (4) of the Traffic Regulations, 1936. 2. That Reg. 9 (4) is merely a penal clause to facilitate the passage of " urgent " drivers within Reg. 9 (3) by clearing the road as far as possible; but it does not modify the right-hand rule, or interfere with the right or liability of any right-hand driver who, rightly or wrongly under Reg. 9 (4), proceeds across an intersection in the face of a siren. 3. That, as the motor-cyclist, because of his speeding across the intersection, was not entitled to the benefit of Reg. 16 (4); that regulation could not be enforced against the defendant notwithstanding his excessive speed; and, consequently, he could not be convicted of the offence of failing to give way to his right. *Townshend* v. *Wilson* (Christchurch. November 7, 1952. Abernethy, S.M.).

Transport Licensing " Before the Traffic Commissioner ". *96 Solicitors' Journal*, 687.

TRESPASS.

Is Damage Necessary for Trespass? *96 Solicitors' Journal*, 705.

TRUSTS AND TRUSTEES.

Appointed Interests: Creation and Acquisition. *102 Law Journal*, 621.

Corporate Trustees. *214 Law Times*, 237.

Court's Power to Vary Trusts. *214 Law Times*, 200.

Renewable Trust. *214 Law Times*, 200.

Trustee Abroad Removable Against His Will. *96 Solicitors' Journal*, 742.

VALUATION OF LAND.

Resumption Valuation (Ronald Collier). *5 Australian Conveyancer and Solicitors Journal*, 111.

VENDOR AND PURCHASER.

Compulsory Acquisition before Completion: Plea of Frustration. *96 Solicitors' Journal*, 690.

Contract for Sale of Land: Purchaser Bankrupt before Completion. *96 Solicitors' Journal*, 678.

Land Sales—Agreement for Sale and Purchase—Consent of Court not obtained—Purchaser in Possession under Such Agreement—No Right of Property or Equitable Ownership created in Favour of Purchaser—"Unlawful and shall have no effect"—Servicemen's Settlement and Land Sales Act, 1943, s. 46. Where an agreement for the sale and purchase of land is unlawful as being in contravention of Part III of the Servicemen's Settlement and Land Sales Act, 1943, it is, in term of s. 46, of no effect. Consequently, although possession is given under the agreement to the purchaser, no right of property is created which would entitle him to remain in possession under the agreement. Moreover, the contract of sale, followed by possession, cannot have the effect of creating an equitable ownership justifying the purchaser in remaining in possession, since, in order to assert an equitable interest, he is driven to rely on his unlawful contract. The vendor can accordingly recover possession of the land. (*Alexander* v. *Rayson*, [1936] 1 K.B. 169, *Bowmakers, Ltd.* v. *Barnet Instruments, Ltd.*, [1945] K.B. 65; [1944] 2 All E.R. 579, distinguished.) (*Taylor* v. *Bowers*, (1876) 1 Q.B.D. 291, *Symes* v. *Hughes*, (1870) 39 L.J.Ch. 304, and *In re A Proposed Sale, Lee to Taylor*, [1945] N.Z.L.R. 217, referred to.) *Miles* v. *Watson*. (S.C. Auckland. November 18, 1952. Stanton, J.)

Sale of Business—Restrictive Covenant—Consent by Purchaser to Covenantor's purchasing " a general store, selling all lines " in Specified Area—Purchaser estopped by Such Consent from making Claim for Breach of Covenant. P. sold a business to H., at the time when P. was engaged in converting it from a home-cookery business to a dairy and milk bar; but the only business P. was actually carrying on at the time of the sale was that of a milk vendor delivering milk on a round. The agreement for sale and purchase contained the following provision: " The vendor agrees not to be concerned with or interested in any business similar to that sold to the Purchaser in Whangamata for a period of 10 years from the date thereof." Later, P., in association with her daughter, wanted to buy from W. a general store business in Whangamata, with a buffet in a picture theatre which was open only when there was an entertainment or gathering therein. It was explained to H. that it was W.'s business which she wanted to buy. H. gave his consent in the following terms: " I here-bye agree that Mrs. R. M. Peterson, may go into partnership with her daughter, at Whangamata, and purchase a general store, selling all lines." H. sought an injunction preventing P. from selling ice-cream and the lines normally sold in a milk bar, on the ground that such consent did not authorize P. to sell such commodities, and he also claimed damages. *Held*, That the consent given by H. operated as an estoppel, and prevented H. from making any claim against P. for any actions of hers which were consented to or authorized by the document, as the words " selling all lines " suggested a wide liberty of choice. *Hooper* v. *Peterson*. (S.C. Auckland. October 30, 1952. Stanton, J.)

THE NEW PROPERTY LAW AND LAND TRANSFER ACTS.

Their Provisions Explained.

By E. C. ADAMS, LL.M.

I.

The learned Editor of this JOURNAL has requested me to write a few short articles on the Property Law Act, 1952, and the Land Transfer Act, 1952, both of which came into operation on January 1, 1953.

A consolidation or compilation of the Land Transfer Act, 1915, and the Property Law Act, 1908, became necessary before the coming into operation of the Property Law Amendment Act, 1951, for that amending statute, besides making important amendments to the general law of property—especially on the theoretical side—considerably amended the Land Transfer Act and transferred from that Act to the Property Law Act several most important provisions of a conveyancing nature.

REASONS FOR THE NEW STATUTES.

The Property Law Amendment Act, 1951, was expressed to come into effect on the first day of January, 1953, but as that Act is repealed by the Property Law Act, 1952, the result is that the 1951 Act has never become law. However, many of its provisions, which are of a far-reaching effect, are embodied in the Property Law Act, 1952. The Property Law Amendment Act, 1951, was drafted by the Hon. H. G. Mason, K.C., M.P., and introduced into Parliament by him in his capacity as a private member. The Hon. Mr. Mason's notable achievement in successfully steering his measure safely through all stages in Parliament is an example of the great public service rendered gratuitously and with but little publicity by men eminent in the law in New Zealand.

The general scheme of the Property Law Amendment Act, 1951, is very clearly explained by the Hon. Mr. Mason in his article in (1952) 28 NEW ZEALAND LAW JOURNAL, 24. In the course of these articles, I may conceivably go into greater detail with regard to certain sections; but every practitioner should certainly read carefully the Hon. Mr. Mason's article, if he is desirous of ascertaining, with very little trouble, exactly what the Property Law Amendment Act, 1951, sets out to achieve (and which, I think, the Property Law Act, 1952, does achieve). Whan all is said and done, there are many sections in the Property Law Act which are of a very dry and technical nature, and which are almost exclusively of theoretical importance only. They must be known by the law-student, who desires a pass in the troublesome and technical subject of the law of property; but they do not require to be looked up very frequently by those in practice.

THE NEW ACTS AMEND AS WELL AS CONSOLIDATE.

The Property Law Act, 1952, is recited in its Preamble as "An Act to consolidate and *amend* certain enactments relating to property", and the Land Transfer Act, 1952, is recited in its rather longer Preamble as "An Act to consolidate and *amend* certain enactments relating to the registration and transfer of *title* to land". Therefore, although the provisions of the Property Law Amendment Act, 1951, are embodied in the Property Law Act, 1952, the Legislature last session still further amended the law relating to property and to the registration and transfer of, and other dealings with, title to land. It may well be doubted whether the phrase "*transfer* of title to land", as used in the Preamble to the Land Transfer Act, 1952, is sufficiently comprehensive. To one not acquainted with our system of State-guarantee of title to land it might convey the impression that the Land Transfer Act deals only with the *transfer* of title to land.

AMENDMENTS TO THE LAND TRANSFER ACT.

It may be convenient at this stage, if I briefly set out, the recent amendments to the Land Transfer Act.

New Zealand Arms: To conform to modern constitutional usage, the Registrar's seal of office is to bear the impression of the New Zealand Arms and not, as hitherto, the Royal Arms: similarly the First Schedule provides for the use of the New Zealand Arms in certificates of title. However, there is a very useful saving provision in s. 9 (2) which reads as follows:—

> Nothing in this section shall affect the validity of any instrument (whether signed or issued before or after the commencement of this Act) bearing the imprint of the seal of the Registrar, notwithstanding that that seal bears the impression of the Royal Arms instead of the New Zealand Arms.

Special provisions as to Land in more than One District: Section 36 contains a very useful provision to meet the case where land in more than one registration district is dealt with in the same instrument: Section 36 (1) provides that every instrument presented for registration shall (except in the case of a memorandum of transfer) be in duplicate, or, if the preson presenting the same so requires, in triplicate, and shall be attested by a witness. All practitioners know that provision; but sometimes there is overlooked the necessity for an additional *executed* original when land in more than one registration district is being dealt with. In future, any failure to observe this necessity will not have any dire effect: a proviso to s. 36 (1) has now been inserted, and it reads as follows:—

> Provided that, where the instrument affects land in more than one district, the Registrar of each district to whom the instrument is presented for registration as to that part of the land that is situated in his district may require the presentation for filing in his office of either an additional executed copy of the instrument *or a copy of the instrument certified as a true copy by the Registrar in whose district an executed copy has already been filed.*

To cite from the Explanatory Note attached to the Land Transfer Bill when it was introduced:

> In future, where, for example, a mortgage affects land in two districts, it will be required to be executed in triplicate so as to allow for one copy to be retained in each Land Transfer Office, otherwise a certified copy must be presented when the mortgage, after being registered in one district, is presented for registration in the other.

It follows that if the lessor, as is usually the case, requires an executed copy of the lease for his own use, a lease affecting land in two registration districts should be executed in quadruplicate. Practitioners are aware of the Land Transfer regulation which prohibits the registration of *carbon* copies of instruments. Each

part of an instrument registered must be an *original* instrument.

Where different Parts of an Instrument conflict: It follows from the requirements of s. 36 (1) of the Land Transfer Act, 1952, above cited, that there is a possibility of the part of the instrument retained in the Land Registry differing from the part given out to the party. To meet this possible contingency, s. 38 (4) provides that, in the event of any conflict between the copy of an instrument that is filed in the Land Transfer Office and the copy returned to the person effecting registration, the copy retained in the Land Transfer Office is to prevail.

It is indeed rather curious that hitherto there has been no express statutory provision to meet a case of discrepancy between the different parts of the one Land Transfer instrument. I once encountered a case in practice where although the part of the mortgage filed in the Land Registry Office had the usual charging clause, the other part in the possession of the mortgagee was entirely destitute of any charging clause whatsoever. The solicitor for the mortgagor strenuously argued that the registration of the mortgage was void and ought to be cancelled. But, as at that time *Boyd* v. *Mayor, etc., of Wellington* ([1924] N.Z.L.R. 1174) had just been reported and was fresh in everyone's mind, I think that I convinced him that it would be quite wrong for the Registrar to cancel the registration of the mortgage.

Issues of Titles in favour of Overseas Governments: It was not until 1945 that any provision was made for the issue of a certificate of title in favour of a foreign Government; that was provided for by the Land Transfer (Foreign Governments) Act, 1945. Section 165 of the Land Transfer Act, 1952, extends this provision to the Government of any *oversea* country. Subsection 1 reads:

> The Government of any *oversea* county shall be deemed to be and to have always been capable of being registered as the proprietor of any estate or interest in land under this Act in the same manner as if it were a body corporate.

"Oversea country" is defined in subs. 4 as meaning *any* country other than New Zealand.

Land owned by the New Zealand Government in name of the Queen: It follows that land owned by the New Zealand Government will continue to be put in the name of Her Majesty the Queen. In passing, it may be mentioned that Parliament last Session also made provision for the issue of certificates of title in the name of Her Majesty the Queen in cases where no previous statutory authority existed for the issue, but without prejudice, however, to any such previously existing authority. I refer to s. 19 of the Public Works Amendment Act, 1952.

Verification of Instruments executed Abroad: Section 166 of the Land Transfer Act, 1952, contains detailed provisions as to the verification of Land Transfer instruments executed outside New Zealand. Summarized, they provide that a Land Transfer instrument executed outside New Zealand should be executed either before a Notary Public or verified by him in the customary manner, or before a Commonwealth representative or verified by such a representative in the customary manner.

The reference to a Notary Public is not restricted to a Notary Public of the British Commonwealth, as it was under the Land Transfer Act, 1915, but means a Notary Public exercising his functions in any particular country. For example, execution before or verification by a Notary Public of the United States of America is now permissible.

If an instrument is executed in a foreign country, it will no longer be necessary to seek the services of the British Consul. The Act defines a Commonwealth representative as follows:—

> "Commonwealth representative" means an Ambassador, High Commissioner, Minister, Chargé d'Affaires, Consular Officer, Trade Commissioner, or Tourist Commissioner of a Commonwealth Country (including New Zealand); and includes any person lawfully acting for any such officer; and also includes any diplomatic secretary on the staff of any such Ambassador, High Commissioner, Minister, or Chargé d'Affaires.

The definition of "Commonwealth country" is interesting:

> "Commonwealth country" means a country that is a member of the British Commonwealth of Nations; and includes every territory for whose international relations the Government of that country is responsible; and also includes the Republic of Ireland as if that country were a member of the British Commonwealth of Nations.

It was stated in the Explanatory Note to the Bill that the existing provisions as to the verification of instruments executed outside New Zealand had been re-written, so as to bring the provisions into line with the existing constitutional position of the British Commonwealth of Nations.

It may also be usefully added that instruments executed abroad may also be verified in the manner provided by s. 9 of the Evidence Amendment Act, 1945, in any case where the provisions of that section apply. That section applies to members of the Armed Forces of Her Majesty for the time being outside New Zealand.

Certificate of Correctness for purposes of Land Transfer Act: All practitioners were aware of the provisions of s. 175 of the Land Transfer Act, 1915, which required every instrument purporting to deal with or affect any estate or interest under the provisions of the Land Transfer Act, to be certified as correct for the purposes of the Act by the *party claiming under or in respect of the instrument*, or by a licensed landbroker *or a solicitor of the Supreme Court employed by that party.*

That provision has been repeated in s. 164 of the Land Transfer Act, 1952; but there has been added a very interesting proviso drafted after the Bill had been presented to Parliament, but designed to meet the difficulty where the party, in whose favour the instrument is, refuses to certify or to authorize his solicitor or landbroker to certify, and the other party to the instrument desires registration but cannot enforce registration, because there is no certificate of correctness. Thus, a discharge of mortgage should be signed correct by the mortgagor or by his solicitor or landbroker, a lease by the lessee or by his solicitor or landbroker.

Cases have occurred in practice where a first mortgagee desirous of ridding himself of his liability for rates has been unable to do so because the mortgagor has declined to sign the discharge correct, although the mortgage moneys have been repaid, and the mortgagee has executed a proper discharge. It is also conceivable that where a lease contains burdensome covenants by the lessee that party may attempt to hold up registration by not endorsing the necessary certificate of correctness. To meet such practical difficulty as this, the proviso to s. 164 enacts as follows:—

> Provided that where any instrument has not been certified as correct under the foregoing provisions of this subsection any other person who is a party to the instrument or claims

any interest thereunder or in respect thereof or his legal personal representative may apply to the Supreme Court for authority to certify that the instrument is correct for the purposes of this Act, and the Court may order accordingly if it is satisfied that it is just and expedient that the authority be granted; and upon production of a sealed copy of the order, the Registrar may register the instrument if it is certified as correct for the purposes of this Act by the person so authorized.

Registrar may require Evidence as to Possession where Title Limited: Since the first Land Transfer Act came into force on February 1, 1871, the public has gained great confidence in a Land Transfer title: the system of State-guarantee has proved a boon to the public. But a change came over the scene when the Land Transfer (Compulsory Registration of Titles), Act, 1924, came into operation on April 1, 1925.

As regards titles brought under the Land Transfer Act by operation of the Land Transfer (Compulsory Registration of Titles) Act, 1924, it was not safe in most instances to issue fully-guaranteed titles. Most titles issued by virtue of the "Compulsory" statute were, in the first instance, issued as limited titles—*i.e.*, limited as to title, or limited as to parcels, or limited both as to parcels and title. The limitations as to title automatically became extinguished on the expiration of twelve years after the issue of the certificate. Certificates of title limited as to parcels are not guaranteed as to the position, area, or boundaries of the land; and usually in practice the limitation as to parcels remains until there is deposited a plan of survey of the land, and notices have been sent to adjoining owners. Section 16 (1) (*d*) of the Land Transfer (Compulsory Registration of Titles Act, 1924 (now represented by s. 199 (1) (*d*) of the Land Transfer Act, 1952) expressly makes a limited certificate of title subject to the title, if any, of any person adversely in actual occupation of, and rightfully entitled to, any such land or any part thereof. Moreover, s. 199 (3) of the Land Transfer Act, 1952 (re-enacting a similar provision in the "Compulsory" statute) expressly provides that, notwithstanding the provisions of s. 64 of that Act, the issue of a limited certificate of title for any land shall not stop the running of time under the Limitation Act, 1950, in favour of any person *in adverse possession of that land at the time of the issue of the certificate*, or in favour of any person claiming through or under him.

Section 200 of the Land Transfer Act, 1952, authorizes the issue of ordinary certificates of title in favour of persons who establish title adverse to the registered proprietor of a *limited* title. If the Registrar issues such a title, he must at the same time cancel the limited title. There are thousands of *limited* titles in New Zealand in respect of which no evidence has been obtained as to whether or not the title of the registered proprietor has become extinguished by operation of the Limitation Act, 1950, by reason of the fact that, when the land was *first* brought under the Act by virtue of the "Compulsory" statute, there was some person in adverse occupation to the registered proprietor. Unless, therefore, dealings were to be permitted to be registered against defeasible Land Transfer titles, which would probably gradually undermine the public confidence in a Land Transfer title, an express provision authorizing the Registrar to call for evidence as to the facts of possession was advisable. When, a few years ago, South Australia (the home of the Torrens system) adopted our "Compulsory" statute, the authorities saw to it that the Registrar had this power expressly conferred on him: they thought that this was the only possible defect in our "Compulsory" Statute.

Accordingly, s. 197 of the Land Transfer Act, 1952, enables the District Land Registrar, before removing the limitations as to parcels or as to title *or before registering any dealing against a limited certificate*, to require proof that no other person has acquired title to the land by adverse possession. A precedent will be found in (1951) 27 NEW ZEALAND LAW JOURNAL, 210, in the form of a model statutory declaration to satisfy the District Land Registrar.

Registrar's Powers to require Surveys extended to Titles Limited as to Parcels: A District Land Registrar may require a plan of survey to be lodged, if part, or the residue, of the land included in a certificate of title is being dealt with, or if a separate or new certificate of title is applied therefor. Until January 1, 1953, the Registrar, however, could not exercise this power with respect to a certificate of title limited as to parcels.

It has now been found necessary to confer this power on the Registrar even in cases of titles limited as to parcels. Nevertheless, as the cost of surveys of land these days is often considerable, it may be pointed out that s. 196 of the Land Transfer Act, 1952 (reproducing s. 14 of the "Compulsory" statute) provides that except as otherwise provided in Part XII of the Act (which now represents the "Compulsory" statute) so long as a certificate of title continues to be limited, no new certificate of title other than a limited certificate of title may be issued in substitution therefor, or for *any part of the land comprised therein* unless in the latter case the matters in respect of which it is limited do not affect the part of the land for which the new certificate of title is issued.

A certificate of title issued on a subdivision of an area in a title limited as to parcels title would, therefore, also be limited as to parcels (and to that extent excepted from the State-guarantee) unless or until a plan of survey be lodged enabling the title to be guaranteed as to parcels.

With this safeguard, so far as the State is concerned, it may reasonably be supposed that in practice District Land Registrars will often waive a survey in connection with a dealing affecting a title limited as to parcels, where they would consider it their duty to require a survey, if the title were an ordinary one, carrying the State-guarantee as to parcels. In other words, the Land Transfer Office can, in the matter of surveys, afford to take more risks in connection with a title limited as to parcels than with a title not so limited.

Alterations in the Law of Procedure: Under the Land Transfer Act, 1915, several provisions required application to the Supreme Court or a Judge thereof to be by way of summons (*e.g.*, appeals from decisions of Registrars, and applications to extend caveats or to have caveats removed). Slightly altering the procedure, the Land Transfer Act, 1952, now provides that the application is to be made to the Court (*i.e.*, the Supreme Court) but it does not specify the manner in which the applications are to be made. As a result, the Code of Civil Procedure will apply to all proceedings in the Supreme Court under the Act. I understand that this means that, except where otherwise provided, the appropriate procedure will be by way of motion. It may be pointed out that an exception to the procedure as to appeals exists in s. 8 of the Joint Family Homes Act, 1950: appeals against a decision of the Registrar (which would include a Mining Registrar, if the title were a mining privilege) to cancel a Joint Family Home certificate are to be made to a Magistrate.

THE ANGLO-IRANIAN OIL COMPANY CASE.

In the International Court of Justice.

By F. HONIG, Barrister-at-Law.

The judgment of the International Court of Justice which was delivered on July 22, 1952, was solely concerned with the question of whether the Court had jurisdiction to adjudicate between the parties. A large number of arguments were put forward by both sides in support of their respective contentions, and it may be convenient, although the judgment of the Court did not deal with all the arguments, to set them out in some detail.

THE IRANIAN ARGUMENT.

The first argument put forward on behalf of the Iranian Government by Professor Rolin, of Brussels University, was that the Iranian Nationalization Laws of March 20 and May 1, 1951, concerned " matters essentially within the domestic jurisdiction " of Iran within the meaning of Art. 2 (7) of the Charter of the United Nations, and, as such, were incapable of being the subject of intervention by any organ of the United Nations, of whom the International Court was one. It was said further that the Court, in the absence of a special agreement between the parties, was entitled to exercise jurisdiction only to the extent that the parties had, by their declarations pursuant to Art. 36 (2) of the Statute of the Court, recognized the jurisdiction of the Court as compulsory, and that the Persian Declaration of October 2, 1930, had expressly limited that jurisdiction to " disputes arising after the ratification of the Declaration, with regard to situations or facts relating directly or indirectly to the application of treaties or conventions accepted by Persia, and subsequent to the ratification of the said Declaration "[1]. The Iranian Government contended that the Declaration could only refer to treaties concluded by Iran after September 19, 1932, and that no dispute arising out of a treaty concluded before that date could be submitted to the jurisdiction of the Court. Unless, therefore, Iran submitted, the oil concession granted in 1933 could be regarded as a " treaty " in the technical sense, the Court clearly lacked jurisdiction in this case.

In support of the contention that the concession was not a " treaty ", Iran advanced three arguments—namely, (i) that it had not been concluded between States; (ii) that it had not been registered with the Secretariat of the League of Nations in conformity with Art. 18 of the Covenant (now replaced by Art. 102 of the Charter); and (iii) that, if it was contended that there was an agreement between the two Governments—and not only between the Persian Government and the company—such agreement had never been put into writing.

A further argument, and one closely connected with the first—*viz.*, that under the Charter nationalization is " essentially within the domestic jurisdiction " of sovereign States—was to the effect that both the United Kingdom and Iran had, in their respective Declarations accepting the compulsory jurisdiction of the Court, reserved to themselves questions within the " exclusive " jurisdiction of States, and that this reservation now applied, under the wording of Art. 2 (7) of the Charter, to matters " essentially " within their domestic jurisdiction.

Next, it was contended that the United Kingdom, by refusing to submit the dispute to the Iranian Courts, had not exhausted the local remedies which had been available to it, or more especially to the Anglo-Iranian Oil Co., and that for this reason also the Court was not entitled to exercise jurisdiction. And, lastly, it was said that, as the dispute had been submitted to the Security Council as a result of the failure of the Iranian Government to comply with the interim measures of protection ordered by the International Court on July 5, 1951, the matter was still under examination by another organ of the United Nations, and that therefore the Iranian Government was entitled to insist that the present proceedings be suspended. This argument was based on the wording of the Persian Declaration of October 2, 1930, accepting the compulsory jurisdiction of the Court, which contained the following passage: The Persian Government reserves " its right to require that proceedings in the Court shall be suspended in respect of any dispute which has been submitted to and is under consideration by the Council of the League of Nations." Reliance was placed on the fact that on October 19, 1951, the President of the Security Council had stated expressly that the Council remained seised of the question, and, having regard to this statement, the Iranian Government claimed to be entitled to invoke the reservation contained in the Declaration of October 2, 1930.

THE UNITED KINGDOM ARGUMENT.

The United Kingdom Government put two alternatives before the ourt—namely, either to decide here and now that the Court was competent to deal with the merits of the case, or to postpone the decision relating to jurisdiction until the case was ready to be heard on the merits.

Iran's contention that Art. 2 (7) of the Charter precludes the Court from exercising jurisdiction over matters " essentially within the domestic jurisdiction " of States—and nationalization of industries was said to be one of these matters—was naturally the most important and far-reaching argument in the whole case. The United Kingdom countered it mainly by saying that the check which Art. 2 (7) placed upon the United Nations generally with regard to such matters did not apply to the International Court because Art. 2 (7) contained the words " Nothing contained in the present Charter shall authorize . . ." It did not, so it was argued, say that " nothing in the *Statute of the Court* shall authorize ", and, therefore, applied only to the Charter itself, and to no other instrument providing for the functioning of other organs of the United Nations. In support of this proposition the United Kingdom relied in particular upon Art. 36 (1) and (2) of the Statute, and argued that it would be incongruous, if Art. 2 (7) of

[1] The Iranian Declaration was ratified by the Iranian Parliament on September 19, 1932, and in what follows the two dates October 2, 1930, and September 19, 1932 (respectively), are used alternatively. For the purposes of the arguments and the judgment this is immaterial. It may be observed that Iran withdrew her Declaration on July 9, 1951.

the Charter had been intended to apply to the Court, for the Statute to provide that States could by consent (either by Special Agreement or by signing the optional clause) submit for decision even such disputes as were concerned with matters " essentially within their domestic jurisdiction ".

In the alternative, the United Kingdom submitted that, even if Art. 2 (7) of the Charter were to be held to be applicable to the Court, the present case was concerned with matters forming the subject of general rules of international law or of specific treaties which " *ex hypothesi* " could never be essentially within the domestic jurisdiction of States.

With regard to Iran's contention that, on its true interpretation, the Persian Declaration of October 2, 1930, had accepted the compulsory jurisdiction of the Court only in respect of treaties subsequent to the ratification of the Declaration, and not in respect of situations or facts subsequent thereto, the United Kingdom submitted that the text of the Declaration was capable of two meanings. The real meaning, it was contended, could be ascertained only by reference to the general circumstances in which the Declaration was made, and, as it was modelled on the common form of such declarations, which usually conferred jurisdiction upon the Court to deal with " all disputes which may arise after ratification . . . in relation to situations or facts subsequent to such ratification ", the Iranian Government could not now be heard to say that it had always intended to ascribe a different meaning to these words. Also, it was said, the words used were intended to provide for an exception to a specific grant of jurisdiction and therefore had to be interpreted restrictively. Accordingly, the United Kingdom submitted that the Court was competent to deal with the present case, on the ground that it related to " situations or facts " subsequent to the Persian declaration.

Alternatively, it was submitted that, if the Court were to hold that the declaration referred only to treaties concluded by Iran after 1930, the United Kingdom was entitled to rely on a treaty concluded between Iran and Denmark in 1934, the provisions of which could be invoked by the United Kingdom by virtue of the most-favoured-nation clause contained in the Anglo-Persian Treaties of 1857 and 1903, and that, by virtue of the Danish treaty, British nationals were entitled to be treated " in accordance with the principles and practice of international law ".

More important, however, than the argument based on the Danish treaty of 1934 was the contention that the oil concession of 1933 itself was a " treaty " within the strict meaning of that term. The United Kingdom drew attention to the circumstances in which that concession had been granted, and in particular to the fact that the dispute between Persia and the United Kingdom concerning the previous concession had previously been submitted to the Council of the League. This dispute had been removed from the agenda of the Council as a result of the conclusion of the new concession, and, therefore, so the United Kingdom argued, the concession was designed to bind both Governments, and in that sense constituted a treaty.

The United Kingdom contested what both parties agreed to be an " audacious " argument put forward on behalf of Iran—*viz.*, that the Persian Declaration which excluded from the acceptance of the Court's jurisdiction and reserved to Persia " questions which, according to international law, are within the exclusive jurisdiction of States " must now be read as if it contained the words of Art. 2 (7) of the Charter—*viz.*, " matters essentially within the domestic jurisdiction of any State ". Iran was constrained to put forward this argument of a new kind of *clausula rebus sic stantibus* in order to escape the consequences of the established jurisprudence of the Permanent Court that no matter could come within the sphere of exclusive domestic jurisdiction if it involved the application of a treaty.

As to the Iranian contention that the Anglo-Iranian Oil Co. had failed to " exhaust local remedies "—*viz.*, had failed to take proceedings before the Iranian Courts before applying to the International Court—the United Kingdom argued that this objection could not be classified as an objection to the jurisdiction of the Court. Similarly, with regard to the contention of the Iranian Government that the present proceedings should be suspended on the ground that the matter was under examination by the Security Council, the United Kingdom asked the Court to hold that this was not a question relating to the jurisdiction of the Court, and could not therefore be considered at this stage of the proceedings, and that, in any event, there was no identity of subject-matter between the two sets of proceedings: the Security Council had been seised of the subject-matter relating to Iran's failure to comply with the interim measures of protection ordered by the Court on July 5, 1951, while the Court was seised of the subject-matter relating to the actual merits of the case between the United Kingdom and Iran.

The Judgment of the Court.

The Court delivered its judgment on July 22, holding by nine votes to five that it lacked jurisdiction, and that, as a necessary consequence of that decision, the interim measures of protection ordered on July 5, 1951, must be held to have lapsed as from the day of delivery of the present judgment. The judgment dealt first with the interpretation of the Persian Declaration of October 2, 1930; next with the United Kingdom claim that, by virtue of the most-favoured-nation clause contained in the Anglo-Persian Treaties of 1857 and 1903, the United Kingdom was entitled, for the purpose of establishing the jurisdiction of the Court, to rely upon the treaty concluded between Iran and Denmark in 1934, and the further alternative claim of the United Kingdom that, in any event, the oil concession of 1933 was a " treaty " within the meaning of the Persian Declaration, and finally with the United Kingdom claim that Iran, by raising in the course of the proceedings certain matters relating to the merits of the case, had thereby voluntarily submitted to the jurisdiction of the Court.

The Court was of opinion that, from a grammatical point of view, the interpretation of the Persian Declaration for which Iran had contended was preferable to that put forward by the United Kingdom, and that, although both interpretations were compatible with the French text, a more reasonable way of reading that text would be to link the words " subsequent to the ratification " to the words " treaties or conventions ", and not to the words " situations or facts ".

The Court pointed out, however, that it was reluctant to rely solely on a grammatical interpretation of the text, and it therefore proceeded to inquire whether this interpretation was consonant with the

intentions of the Iranian Government at the time when the Declaration was ratified. It found that in or before 1928 Iran had denounced all treaties with States still enjoying privileges under the régime of capitulations, and that from then onwards she was in process of negotiating new treaties designed to put her on a footing of equality with other countries. In view of Iran's desire to rid herself of capitulatory restrictions, it was unlikely that she would have agreed in 1930 to submit disputes arising from these old capitulatory treaties to the jurisdiction of the Court. Her intention, therefore, must have been to accept the jurisdiction of the Permanent Court only in respect of disputes arising from treaties concluded after 1930.

Having accepted Iran's submission on the interpretation of her Declaration, the Court was left with the alternative submission of the United Kingdom that, if the Iranian Declaration were held to refer to disputes arising from treaties concluded after 1932, the United Kingdom was entitled to rely on the benefits of the Danish treaty of 1934 (and of identical treaties concluded by Iran with Switzerland in 1934 and with Turkey in 1937), and on the oil concession itself, which was signed in 1933.

The Court rejected this alternative subnission. It took the view that the Danish treaty could be invoked only by reason of the operation of the most-favoured-nation clause contained in treaties concluded before the ratification of the Iranian Declaration—*i.e.*, in the treaties of 1857 and 1903—and that the latter, for this reason, could not be relied upon for the purpose of establishing the jurisdiction of the Court.

As regards the submission that, in any event, the oil concession was a treaty, the Court held that it was no more than an agreement between the Iranian Government and a foreign company, and not an agreement designed to regulate the relations between the two countries.

Finally, the Court overruled the British submission that Iran, by adducing arguments which were concerned with the merits of the case, had thereby submitted to the jurisdiction of the Court. It was pointed out that Iran had, throughout the proceedings, made clear her intention of objecting to that jurisdiction.

Four Judges (Judges Alvarez, Hackworth, Read, and Carneiro) delivered dissenting opinions, and one Judge (Sir Arnold McNair, the President of the Court) delivered an individual opinion setting out his reasons for accepting the majority decision of the Court [2]. It is interesting to observe that none of the dissenting Judges accepted the view that the oil concession could be regarded as a " treaty " in the technical sense. Broadly speaking, they dissented from the majority judgment of the Court because they interpreted the most-favoured-nation clause contained in the old Anglo-Persian treaties of 1857 and 1903 as enabling the United Kingdom to rely, for the purpose of establishing the jurisdiction of the Court, on the treaties concluded by Iran in 1934 and 1937.

It is obviously too early to express any view on the wider implications of this important judgment, but there can be no doubt that its results will be far-reaching, both as regards the legal nature of oil and other mineral concessions and as regards the interpretation of the most-favoured-nation clause.

[2] Sir Arnold McNair did not, of course, exercise the functions of President in the present case.

THEIR LORDSHIPS CONSIDER.

By Colonus.

Insurance, Trivial Breach.—In *Provincial Insurance Co., Ltd.* v. *Morgan*, [1933] A.C. 240, coal merchants were covered under an insurance policy in respect of damage to and injury by a motor-lorry owned by them. There was a warranty that it was used for the delivery of coal. On a certain day, the lorry was used to deliver a load of timber and 5 cwt. of coal. After the timber was unloaded, 3 cwt. of coal was delivered. Whilst the lorry was on the way to deliver the last 2 cwt. of coal, it suffered a collision. The insurance company contended that it was relieved of liability, through breach of the warranty. Their Lordships held that the insurance cover held good. The gist of their reasoning is found at the end of Lord Wright's speech, where he said, at pp. 255, 256 : " It would have been easy for the appellants to set out in plain terms on their policy that it was a condition of the insurance that the user of the vehicle should be restricted to delivery of coal in the assured's business of coal merchants : they have not done so." The opposite case is found in *Pearson* v. *Commercial Union Assurance Co.*, (1876) 1 App. Cas. 498. Here, a steamer was insured whilst in dock, with liberty to go into dry dock (some distance up the river). The paddle-wheels were removed in dock, and the vessel was towed up to the dry dock. To save the extra charges of leaving the steamer in dry dock during the replacement of the paddles, the owners moored her in the river. Here she was burnt. Lord Penzance, at pp. 508, 509, gave the substance of the decision of the House against the owners :

> But what the vessel really did was to abandon, for the time, returning to the Victoria Docks, and to remain for some days in the river for the purpose of a certain repair, namely the putting on of the half paddle-wheels which had been taken off, a purpose which had no connection with returning to the Victoria Docks, and was in no way even ancillary to getting there. It is admitted that it is usual for shipowners to have this species of work done in the river, instead of a dock, because it is cheaper ; but it cannot be said that a delay for that purpose was within the usual course of vessels moving from one dock to the other.

Trifles.—In the headnote to *Brooker* v. *Thomas Borthwick and Sons (Australasia), Ltd.*, [1933] A.C. 669, the great Napier earthquake is recorded as taking place at Nelson. In *Charles Tennant, Sons and Co.* v. *Howatson*, (1888) 13 App. Cas. 189, at pp. 493, 494, Lord Hobhouse, delivering the judgment of their Lordships is credited with the following definition of " personal chattels " :

> " goods, furniture, other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures and crowing crops."

The latter case concerned sugar crops, so a psychopathological explanation of the slip may be suggested, on the lines that a chattels security given to the appellant was coming home to roost.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

"**F.E.**"—Viscount Simon in his recently-published *Retrospect* (Hutchison) makes a number of eulogistic references to F. E. Smith, afterwards Lord Birkenhead, his senior at Oxford by one year and his predécessor in the Presidential Chair of the Union. Stories about "F.E." (he says) are endless, some true and some (even told by himself) otherwise. "His audacity and high spirits, his command of withering satire and invective have surely never been exceeded by anyone." He refers to Smith's first speech in the House of Commons, which not only established his Parliamentary reputation but filled the older Conservatives (who applauded each pungent thrust) with hope and confidence. A good point about this outstanding figure is made by Charles Graves who, in *The Bad Old Days* (Faber and Faber), observes :

> Lord Birkenhead was a man of most vivid personality and even today it is safe to bet a politician that he does not know within five years when Lord Birkenhead died. "F.E." has such a green immortality that no one in a hundred would guess that, if he were alive today, he would be much older than Mr. Winston Churchill and that he died in 1931.

Scriblex recalls that one of his biographers contended that "F.E." 's keenest sense of pleasure lay, not in recalling his forensic triumphs or his judicial attainments, but in observing his fleet of Mercedes motor-cars, which, placed end to end, stimulated his possessory senses and made a most imposing spectacle.

Lawyers and Dancing.—A Terpsichorean expert has given public expression to her view that legal practitioners tend at an early age to become heavy and ponderous in their movements, and that a course of dancing would be much to their advantage. There may well be something in this belief. Proficiency in dancing is said to have been the chief qualification for the appointment of Hatton as Lord Chancellor by Queen Elizabeth. Indeed, he was so good-looking that the Virgin Queen would listen to "no damned nonsense about merit" when she appointed him and affectionately bestowed upon him the Great Seal in its silken bag. His only other claim to fame seems to have been that he left a rich young widow who was wooed both by the impoverished Francis Bacon and by the influential Edward Coke; but Lady Hatton, like the Attorney-Generalship, went to Coke.

Domestication Note.—Reference has recently been made in the New Zealand newspapers to the case before the Court of Appeal in England of the husband, who, not finding home conditions to his liking, warned his wife before he left her that the house was "no use to him" and that either she cleaned it up or he left. "One would have thought that the husband would have set about cleaning up his house properly," observed Singleton, L.J. "His wife had plenty to do bringing up six children." In the view of Denning, L.J., the proper course for the husband to adopt was to have "buckled in" and helped with the house-work. The Court disagreed with the finding of the Divorce Commissioner that the wife's conduct in not bringing house and children up to the husband's standard amounted to the expulsion of the husband and to constructive desertion; and it made a decree in favour of the wife based on the husband's desertion. It would have been very much better had he paid heed to the lines of the American writer, Christopher Morley :

> *The man who never in his life*
> *Has washed up dishes with his wife,*
> *Or polished up the silver plate—*
> *He still is largely celibate.*

Scriblex remembers an occasion when counsel, who was late for a social appointment, mentioned to Callan, J., that he had been doing the washing-up. "You are a graduate in house-work," said that whimsical Judge. "As yet I have not passed beyond the stage of being allowed to dry-up!"

The Fast Student.—The late Lord Macmillan in his autobiography, *A Man of Law's Tale* (Macmillan & Co., Ltd.. 1952), refers to the occasion on July 17, 1924, when the University of Edinburgh conferred upon him an honorary Doctorate of Laws. At the Graduation Ceremony, the honorary graduates were entirely eclipsed by Eric Liddell, a student of the University who was to receive the ordinary degree of B.Sc. Liddell had just won the 400 metres at the Olympic Games in Paris, and was greeted with acclamation as the hero of the day. The Vice-Chancellor, Sir Alfred Ewing, on capping him, addressed him in these words : "Mr. Liddell, you have shown that none can pass you—except the examiners."

That Snail Again.—Further light is shed upon *Donoghue* v. *Stevenson*, [1932] A.C. 562, the famous "snail-in-the-bottle" case, by Lord Macmillan in his autobiography. It seems that in the House of Lords, a former Lord Chancellor, Lord Buckmaster, presided and he urged those who differed from him "not to disturb with impious hands the settled law of the land". Lord Tomlin sided with him. On the other hand, Lord Atkin, who wrote the classic judgment on "foreseeability" (now, like public policy, an unruly horse to ride), was equally emphatic as to the contrary point of view, and he enlisted Lord Thankerton under his banner. It was left to Lord Macmillan to make up his mind with which of his seniors he agreed : the decision depended on his vote. His was a forthright Scots character, and he made no bones about it. In the course of his opinion, he said :

> He (the manufacturer) places himself in a relationship with all the potential consumers of his commodities and that relationship which he assumes and desires for his own ends imposes upon him a duty to take care to avoid injuring them. He owes them a duty not to convert by his own carelessness an article which he issues to them as wholesome and innocent into an article which is dangerous to life and health.

In accordance with Scottish practice, the facts alleged by the pursuer were, for the purpose of the argument, assumed to be true; and the case was debated on the point as to whether, on that assumption, she was entitled in law to the remedy she sought. After her narrow victory in the House of Lords, the papers were returned to the Court of Session so that the matter might be heard. Unhappily for the thousands of snails that have since suffered humiliation, the case was settled at this point, and the reputation of the alleged vagrant never cleared.

PRACTICAL POINTS.

This service is available free to all paid annual subscribers, but the number of questions accepted for reply from subscribers during each subscription year must necessarily be limited, such limit being entirely within the Publishers' discretion. Questions should be as brief as the circumstances will allow; the reply will be in similar form. The questions should be typewritten, and sent in duplicate, the name and address of the subscriber being stated, and a stamped addressed envelope enclosed for reply. They should be addressed to: "THE NEW ZEALAND LAW JOURNAL" (Practical Points), P.O. Box 472, Wellington.

1. Bankruptcy.—*Unregistered Mortgages to secure Debts—One Mortgage to Deceased Estate and Other to Tradesman—Mortgagor Beneficiary in Such Estate to Amount less than Secured Principal—Respective Positions of Executor and Tradesman.*

QUESTION: We act for the executor of the will of Y, deceased. X, who is a residuary beneficiary, owes the estate £800 under an unregistered mortgage given to Y during her lifetime, and the executor holds the mortgage (and counterpart) and the certificate of title. The assets in the estate have been realized except for X's debt, which is greater by approximately £400 than the value of his interest in the estate.

X, who owes a considerable number of debts, executed a second mortgage in favour of a tradesman to secure a debt of £150, and this mortgage also is unregistered. The house property over which the two mortgages are given would probably realize no more than £800 on a sale (the amount of the first mortgage).

If X should file a petition in bankruptcy:

(*a*) Would the executor and the tradesman be "secured creditors" (their mortgages being unregistered)?

(*b*) Could the executor apply, in part payment of X's debt to the estate, the amount of X's share in the estate, and remain a secured creditor for the balance, or must he account to the Official Assignee for an amount equal to X's interest in the residue? If the executor can exercise his right of retaining the legacy against the debt, then the second mortgagee can expect to receive payment of his debt in full on realization of the security.

We mention, in conclusion, that both mortgages are being lodged for registration.

ANSWER: (*a*) It is considered that the executor and the tradesman are "secured creditors". Although the unregistered mortgages do not at law bind the land until registration (Land Transfer Act, 1915, s. 38), this does not mean that they are meantime of no effect: see, as to rights acquired under unregistered instruments, *Barry* v. *Heider*, (1914) 19 C.L.R. 197, 208, approved by the Privy Council in *Great West Permanent Loan Co.* v. *Friesen*, [1925] A.C. 208, 223.

These cases dealt with unregistered transfers, but they recognized the validity of equitable interests notwithstanding statutory provisions equivalent to s. 38. (It is assumed that the priority of the unregistered mortgages has not been defeated by the *bona fide* registration of some other interest.) Furthermore, the Official Assignee will acquire his title by transmission, and, therefore, subject to equities: Land Transfer Act, 1915, s. 124 (2).

(*b*) It further seems that the executor is under a twofold duty to apply in part payment of X's debt to the estate the amount of X's share in the estate. First, this duty is owed to the estate, under the doctrine expounded by Kekewich, J., in *In re Akerman, Akerman* v. *Akerman*, [1891] 3 Ch. 212, 219.

The property in X's share in Y's estate does not pass to X or become part of X's assets: *In re Melton, Milk* v. *Towers*, [1918] 1 Ch. 37. The principle of this case is set out in *In re Lennard, Lennard's Trustee* v. *Lennard*, [1934] 1 Ch. 235, 242.

The executor should note that, if he proves in any bankruptcy, this may be held an abandonment of the right of retainer: *Stammers* v. *Elliott*, (1868) L.R. 3 Ch. 195. From this, it would follow that Y's executor should not account to the Official Assignee for an amount equal to X's interest in the residue.

In the second place, the duty mentioned above is owed also to the tradesman under the equitable doctrine of marshalling: see *Garrow's Law of Trusts and Trustees*, 266.

Q.2.

Gift—Promissory Note—Partial Forgiveness by Way of Gift—Necessity for Writing—Whether a Form of Deed—Bills of Exchange Act, 1908, s. 62—Death Duties Act, 1921, s. 38.

QUESTION: A client of ours sold and transferred a property to his son taking in settlement of the purchase money a promissory note for £3,000, payable upon demand with no interest mentioned. The father proposes to reduce the promissory note by a sum of £500 each year, and it is proposed to endorse on the promissory note the following: "I hereby acknowledge that I have this day reduced this promissory note by way of gift by the sum of £500." The father then proposes to sign the endorsement and date it, and of course retain the promissory note and file the usual gift statement.

Will that complete the gift or is it necessary to have a deed of gift signed by the father? See s. 62(2) of the Bills of Exchange Act, 1908, and *Byles on Bills*, 18th Ed., p. 233.

ANSWER: It would certainly be advisable to clothe the intended gift in the form of a deed, to put the matter beyond all doubt: *Chambers* v. *Commissioner of Stamp Duties* [1943] N.Z.L.R. 504, 521; *In re Gray, Gray* v. *Commissioner of Stamp Duties* [1939] N.Z.L.R. 23.

Although s. 62 of the Bills of Exchange Act, 1908, merely requires a renunciation to be in writing, that section appears to refer only to an intended complete renunciation, and not to a series of partial renunciation, as is contemplated in this case. In *Brown* v. *Adams* [1939] N.Z.L.R. 226, Sir Michael Myers, C.J., was dealing with an alleged complete renunciation.

It would also be advisable for the father to deliver the deed of partial forgiveness to the debtor son.

Perhaps the precedent in *18 New Zealand Law Journal* 249 could be adopted to meet the circumstances.

X.2.

2. Probate and Administration.—*Deceased Intestate killed while driving Motor-car—Relatives refusing to take out Administration—Indemnifier unable to sue Negligent Motorist for Moneys paid under Deceased's Comprehensive Policy—Procedure to be adopted by Deceased's Indemnifier.*

QUESTION: I act for an insurance company, which is the indemnifier of a motorist killed as the result of another motorist's negligence. The deceased had no estate, and relatives refuse to take out administration or assist in any way. The company wishes to claim from the negligent driver the repair bill which it paid under the terms of the deceased's comprehensive policy. The other driver also had a comprehensive cover. There seems no way in which my client company can recover, either under the Deaths by Accidents Act, 1908, or under the Administration Act, 1952, or otherwise. The indemnifying company might be a creditor for the repairs; can it take out administration of the deceased's estate?

ANSWER: It is not expressly stated in the question, but it is assumed, that the deceased left no will. Letters of administration cannot be granted unless the deceased had assets, however small in value, in New Zealand. The question says: "The deceased had no estate." Even assuming that his motor-car was of scrap value only at the time of his death, the mere right of indemnity which the deceased possessed against the insurance company would appear to be in itself an asset in the deceased's estate, even though it be merely a chose in action. It is suggested that the Public Trustee be approached and asked to apply for letters of administration pursuant to s. 14 of the Public Trust Office Act, 1908. Once the letters of administration have been granted, the insurance company can sue the negligent driver to recover its repairs. But, until someone is appointed the deceased's personal representative, there is no one whose rights can be subrogated to the insurer as indemnifier.

D.2.