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LAND TRANSFER: EQUITABLE INTERESTS AND THE LIMITATION ACT, 1950.

A recent judgment of Mr. Justice Hay, *Beeby* v. *Official Assignee of Pickering*, [1953] N.Z.L.R. 832, once again shows the strong position of a registered proprietor of land under the Land Transfer system, and extends the principle by establishing the preservation of the rights of persons claiming through him in respect of an equitable interest in such land, notwithstanding a long lapse of time to which, the land being Land Transfer land, the Limitation Act, 1950, has no application. Section 60 of the Land Transfer Act, 1915 (now s. 64 of the Land Transfer Act, 1952) which operated during most of the material time, prevented the Real Property Limitation Act, 1933 (3 & 4 Will. 4, c. 27), from adversely affecting the estate or interest of a registered proprietor, and for the remainder of the period from January 1, 1952, s. 6 (2) and s. 16 (2) of the Limitation Act, 1950, applied.

The judgment is also of interest with regard to the question of property passing to the Official Assignee on the bankruptcy of the registered proprietor, as it shows that a person who has an equitable interest in land derived from the latter, is a secured creditor in the bankruptcy.

In other words, the Land Transfer title is not only indefeasible in respect of the interest of a registered proprietor (and, for that matter, as it has been held, the interest of a mortgagee of Land Transfer land), but it also renders unassailable an equitable interest in Land Transfer land derived from the estate and interest therein of the registered proprietor; in this latter respect, the judgment appears to make new law. Both the legal interest and the equitable interest are protected from the consequences of time running against them, as both are protected from the effect of the Limitation Act, 1950, by s. 16 (2) of that statute.

Earlier this year, *ante* p. 49, we discussed the judgment of Mr. Justice Fair in *Dalton* v. *State Advances Corporation*, [1953] N.Z.L.R. 167, in which, for the first time, the Limitation Act, 1950, was judicially considered with reference to estates and interests in land under the Land Transfer system. The judgment of Mr. Justice Hay in *Beeby's* case, to which we are now directing attention, like that in *Dalton's* case, emphasizes the fundamental principle of the Land Transfer legislation, namely, certainty and indefeasibility of title, but applied in a different setting.

So far as indefeasibility and certainty are concerned, we have the classic judgment of the late Sir Joshua Williams, J., in *Campbell* v. *District Land Registrar*, (1910) 29 N.Z.L.R. 332, in which he showed that a mortgagee under the Land Transfer Act has his title preserved, as well as the rights which accompany it, notwithstanding there has been long adverse possession in derogation of it. In the course of his judgment in the Court of Appeal, the learned Judge, at p. 338, said:

> No doubt if it were the case that the effect of the Statute of Limitations is to extinguish the debt secured by the mortgage, the effect would be the same as if the mortgage had been paid off; and s. 61 would not help the mortgagee. I agree with the learned Judge in the Court below [Edwards, J.] that this is not the effect of the statute. The debt remains an existing debt notwithstanding the lapse of twenty years. If the mortgagee brought an action to recover the debt, he would be entitled to judgment unless the mortgagee pleaded the statute.

Earlier on the same page, the same learned Judge said:

> But if default has been made, and any sum remains due, the mortgagee, so long as it remains due, by virtue of his being registered proprietor of the mortgage, has an indefeasible title to the possession of the land mortgaged, *and to the other rights and remedies given him by the statute* or the particular instrument. *This title and the rights which accompany it* seem to me to be preserved by s. 61, notwithstanding possession in derogation of it." (*Ibid.*, 338).

Bringing the matter nearer our own day, Mr. Justice Fair, in *Dalton's* case, [1953] N.Z.L.R. 169, in commenting on *Campbell's* case, said:

> It is well settled that lapse of time under the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), ss. 2 and 34 (which sections correspond in their terms with the similar provisions of the Limitation Act) did not extinguish the title of a mortgagee under the Land Transfer Act, 1915, as a result of the terms of s. 61 of the Land Transfer Act, 1908, afterwards s. 60 of the Land Transfer Act, 1915 (now s. 64 of the Land Transfer Act, 1952). He was left with his rights, although his remedies were extinguished: *Campbell* v. *District Land Registrar, Auckland* ((1909) 28 N.Z.L.R. 816; rev. on app., ((1910) 29 N.Z.L.R. 332).

And now, in *Beeby's* case, Mr. Justice Hay has further developed the general principle by extending it to the case of the owner of an equitable interest derived from the registered proprietor of Land Transfer land, in holding that, while her personal remedy to sue for moneys due under the security had gone by effluxion of time, her rights against the land were such that the Limitation Act, 1950, did not prevail against them since the passing of that enactment, any more than the provisions of the Real Property Limitation Act, 1833, could have barred those rights in the material period before the Limitation Act, 1950, replaced it.

The facts in *Beeby's* case, briefly as they can be summarized, were as follows :

> On April 10, 1929, a deed of separation was entered into between the defendant second-named and the plaintiff who was then his wife, whereby it was covenanted and agreed, *inter alia*, as follows :
>
> 2. The [the wife] shall be entitled to receive in reduction or extinction of the indebtedness for the time being of [the husband] to [the wife] the net purchase money arising from the sale of the parcels of land comprised in Certificates of Title Volume 72 folio 238 and Volume 95 folio 298 aforesaid or so much thereof as shall be required to extinguish such indebtedness whenever the said parcels of land shall be sold after payment out of such purchase moneys of the principal moneys then owing under and by virtue of the Memoranda of Mortgage to which the said parcels of land are now subject as aforesaid and in the meantime [the wife] shall be entitled to receive for her own use the net rents and profits of the said parcels of land after payment out of such rents and profits of the interest rates taxes and other outgoings payable in respect of the said parcels of land and [the husband] shall forthwith and at all times hereafter deliver to [the wife] such instruments and authorities as shall be requisite to enable her to receive the said purchase moneys rents and profits.
>
> 6. The [husband] doth hereby acknowledge that he is indebted to [the wife] in the sum of Five hundred pounds (£500) for moneys lent and advanced and [the husband] doth agree to pay to [the wife] in reduction of such indebtedness the sum of Two hundred pounds (£200) out of moneys to be received by him from England. . . .
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> At all material times, there was a first mortgage securing £500 on the husband's land. The mortgagee was in possession when the deed of separation was executed. Two payments were made in terms of the deed : £100 on July 27, 1929 (in part performance of the covenant to pay her £200 out of the moneys receivable by her husband from England) ; and the sums of £8 19s. 6d. and £9 19s. 6d., on September 30, 1929, and June 25, 1930, respectively (received from the mortgagee as the net rents and profits of the mortgaged land).
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> The husband was adjudicated bankrupt on January 30, 1931. The only asset in the bankruptcy, apart from the husband's interest in the land, was stock-in-trade valued at £25. The plaintiff's marriage was dissolved on November 22, 1934 ; and she married again on December 7, 1934.
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> On February 13, 1931, the plaintiff registered a caveat against the title to the land to protect her rights under the deed of separation. On November 30, 1951, the mortgagee, having continuously remained in possession received an offer for the purchase of the land for £2,000. With the approval of the Official Assignee and the plaintiff, the offer was accepted, it being agreed that the plaintiff's rights were not to be prejudiced by her withdrawal of the caveat to enable the sale to be completed. After satisfying the mortgagee debt, the surplus money from the sale was £722 5s. 11d. ; and this sum was paid into Court pending the bringing of this action for a declaration that the moneys in Court, less party-and-party costs, were the property of the plaintiff pursuant to the rights conferred on her by the deed of separation.

As the learned Judge held, the crucial matter for determination was the true construction to be placed on the provisions of the deed of separation. On this point, he said :

> In my opinion, it is beyond doubt that the effect of cl. 2 of the deed is to create an equitable assignment or charge in favour of the plaintiff over the purchase moneys of the lands when sold, and over the net rents and profits accruing in the meantime. It follows that the plaintiff is a secured creditor for the purposes of the Bankruptcy Act, 1908, and that, in particular, her security is protected by ss. 82 and 102 (11), and is not adversely affected by s. 53. The circumstances make the case distinguishable from *Re Irvine and Roulston* ([1919] N.Z.L.R. 351 ; [1919] G.L.R. 116) and *Official Assignee of Bredow* v. *Newton King, Ltd.* ([1926] N.Z.L.R. 198 ; [1925] G.L.R. 172), because here there was not the assignment of a future chose in action, but an assignment for valuable consideration of moneys arising from lands already in existence. The case rather falls within the principle of *Official Assignee of Palmer* v. *Sharpe* ([1921] N.Z.L.R. 460 ; [1921] G.L.R. 328).

His Honour further held that the amount for which the plaintiff was a secured creditor was the sum of £400, which was the indebtedness for the time being, since £100 had been received by the plaintiff in terms of the deed of separation from moneys payable to the husband, and paid to her in terms of the deed in reduction of the husband's indebtedness.

To take the rights of the husband first : At all material times he was, and remained, the registered proprietor of the land. His mortgagee had entered into possession in February, 1929. The Limitation Act, 1950, came into force on January 1, 1952, and up to that date at all material times, the Real Property Limitation Act, 1833, was in force. Section 24 of the last-mentioned statute, provided :

> No person claiming any land or rent in equity shall bring any suit to recover the same but within the period during which by virtue of the provisions hereinbefore contained he might have made an entry or distress or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest or right in or to the same, as he shall claim therein in equity.

However, s. 64 of the Land Transfer Act, 1952 (which as s. 60 of the Land Transfer Act, 1915, was in force during most of the material period) provides :

> 64. After land has become subject to this Act, no title thereto, or to any right, title, privilege, or easement in, upon, or over the same, shall be acquired by possession or user adversely to or in derogation of the title of the registered proprietor.

Section 81 (6) of the Property Law Act, 1952, is as follows :

> Nothing in this section shall affect the operation of section sixteen of the Limitation Act, 1950.

Section 16 (1) of the Limitation Act, 1950, provides that, notwithstanding anything contained in s. 70 of the Property Law Act, 1908, (now s. 81 of the Property Law Act, 1952) or in any other enactment, when a mortgagee of land has been in possession of any of the mortgaged land for a period of twelve years, no action to redeem the land of which the mortgagee has been so in possession can thereafter be brought by the mortgagor or any person claiming through him.

Section 16 (2), however, provides :

> (2) *This section shall not apply in respect of any land that is subject to the Land Transfer Act*, 1915.

And, consequently, time did not run against the husband as the registered proprietor of the land of which he was the registered proprietor ; and Hay, J., held that, accordingly, the plaintiff's rights derived from him under her equitable security remained unimpaired.

His Honour said that there was no evidence sufficient to justify the assertion that her rights were affected by delay or neglect on her part. She was entitled to rely on her security and not to prove in bankruptcy, and, there was, in reality, nothing she could do but await the sale of the property.

An interesting part of the judgment is devoted to the effect upon the plaintiff's rights of s. 20 (1) of the Limitation Act, 1950, and the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27).

Section 20 (1) of the Limitation Act, 1950, is as follows :

> (1) No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on property, whether real or personal, or to recover proceeds of the sale of land (not being the proceeds of the sale of land held upon trust for sale) after the expiration of twelve years from the date when the right to receive the money accrued.

It will be remembered that the charge created by the deed of separation was made on April 10, 1929; the land was then subject to mortgage, and the mortgagee had entered into possession of the land at the beginning of February, 1929. After continuously remaining in possession in the interim, the mortgagee sold the mortgaged land on February 4, 1952. The learned Judge said he was inclined to agree with counsel for the plaintiff that the mortgagee's possession did not terminate in law until February 27, 1952, which was the date of the settlement of the sale transaction.

The learned Judge considered that the plaintiff's rights were not barred by s. 20 (1) of the Limitation Act, 1950, or by the Real Property Limitation Act, 1833. This situation was due to the fact that the date of the sale of the land was the date on which the plaintiff became entitled to payment in terms of her security. That was the date from which time would begin to run against her under s. 20 (1) of the Limitation Act, 1950.

Mr. Justice Hay said that the plaintiff's remedy against the land itself, pursuant to s. 3 of the Real Property Limitation Act, 1833, was one that was independent of her personal remedy to recover the principal moneys; and any period in respect of the latter was not applicable where it was a case of the enforcement of her security; and he cited, in support, *20 Halsbury's Laws of England*, 2nd Ed., p. 729, 730, para. 979. His Honour added:

> In the present instance, although the security is enforceable only against the proceeds of the sale of the land, the remedy is, in effect, against the land itself: *In re Witham, Chaburn* v. *Winfield*, [1922] 2 Ch. 413, 422. Equitable rights are, for the purposes of the Real Property Limitation Act, 1833, the same as legal rights: *20 Halsbury's Laws of England*, 2nd Ed., p. 720, para. 961.

We may add that s. 4 (9) of the Limitation Act, 1950, applies the statute to equitable relief in so far as it may be applied by the Court by analogy in like manner as the now-repealed Real Property Limitation Act, 1833, s. 24 of which assimilated, in respect of the limitation of time, suits in equity to actions at law; and see *Moody* v. *Borough of Poole*, [1945] 1 All E.R. 536.

Consequently, the plaintiff's remedy in respect of the enforcement of her equitable security against the land of which her husband was the registered proprietor, was enforceable against the balance of the moneys arising from the mortgagee's sale of that land. It became enforceable on February 27, 1952, and, until then, s. 20 (1) of the Limitation Act, 1950, did not apply to the fund in Court.

In the result, that fund being the surplus arising from the sale by the mortgagee of the mortgaged lands, and, in terms of s. 104 of the Land Transfer Act, 1952, payable to the mortgagor, was payable to the Official Assignee as property passing to him in the bankruptcy of the mortgagor, subject to a charge in favour of the plaintiff for £400, being the balance of the principal sum of £500 secured to the plaintiff by virtue of her equitable assignment.

There was accordingly a declaration that the fund of £722 5s. 11d. after payment thereout of the party-and-party costs in the action was to be held as to £400 thereof for the plaintiff, and as to the balance for the Official Assignee for the benefit of the general body of creditors in the bankrupt estate.

SUMMARY OF RECENT LAW.

ARBITRATION.

Jurisdiction of the Arbitrator. *103 Law Journal*, 503.

COMPANY LAW.

Company Names. *103 Law Journal*, 520.

CONTRACT.

Waiver—Land Agent selling Property but Purchaser defaulting on Payment of Deposit—Delay by Agent in informing Vendor of Such Default—Vendor meanwhile purchasing Another Property—Agent later instrumental in selling Vendor's Property to Another Purchaser—Agreed Commission payable on that Sale less than Full Scale Commission—Action by Vendor against Land Agent for Damages for Breach of Duty in Delaying Disclosure of Intending Purchaser's Default on First Sale—Conduct of Parties amounting to Waiver—Consideration for Vendor's Waiver—Claim for Damages untenable. A party will not be allowed to go back on a promise or assurance made for the purpose of affecting legal relations if that promise or assurance has been accepted and acted upon by the other side. (*Central London Property Trust, Ltd.* v. *High Trees House, Ltd.*, [1947] K.B. 130, followed.) (*Combe* v. *Combe*, [1951] 1 All E.R. 767; and *Charles Rickards, Ltd.* v. *Oppenhaim*, [1950] 1 K.B. 616; [1950] 1 All E.R. 420, referred to.) S. placed his property in the hands of D., a land agent, who negotiated a sale to P. for £20,000, payable as to £1,000 as a deposit and the balance in cash on settlement. P.'s cheque for the deposit was dishonoured. D., while pressing P. to provide for his cheque, did not inform S. or his solicitors of this, although S., to D.'s knowledge, had called at the office of D. (in D.'s absence) and was led to believe that the cheque was in order. Subsequently, the agreement with P. was cancelled. Meantime, S. had purchased other properties, and contracted liabilities which he would not have done if he had known that P.'s deposit had not been paid. When S. knew the actual position, he wrote to D. to get in touch with another possible buyer, B., of whom D. had previously told him. The property was sold to B., and commission of £400 was agreed upon, although the full scale commission on that sale was £512 10s. In an action by D. to recover the sum of £400 as the agreed commission payable to him on the sale to B., and on a counterclaim by S. for damages for losses allegedly due as the result of a breach of duty on the part of D. in connection with the intended sale to P. (namely, D.'s failure to notify him promptly of the dishonour of P.'s cheque). *Held*, 1. That the plaintiff was entitled to the amount of £400 as claimed. 2. That the agreement whereby S. agreed to pay D. £400 as commission on the sale to B. implied a waiver by D. of any claim for a commission on the sale to P. and of any right to full commission on the sale to B., and a waiver by S. of any claim for damages against D. for his procrastination in informing S. of the dishonour of P.'s cheque. 3. That, in the transactions between the parties, there was an intention to affect their legal rights; that there was consideration for S.'s waiver; that S. was then aware of his rights and of all relevant facts; and that he could not later assert a right to claim damages from D. (*Central London Property Trust, Ltd.* v. *High Trees House, Ltd.*, [1947] K.B. 130, applied.) (*Charles Richards, Ltd.* v. *Oppenhaim*, [1950] 1 K.B. 616; [1950] 1 All E.R. 420, referred to.) *Davies* v. *Snow*. (S.C. Auckland. August 11, 1953. Stanton, J.)

CONVEYANCING.

Declaration of Trust of Site for Erection of Village Hall, Purchase-money and Cost of Erection raised by Voluntary Subscription. *16 Conveyancer and Property Lawyer*, 540.

FAMILY PROTECTION.

Time for Determining Reasonableness of Provision. *97 Solicitors' Journal*, 548.

INVITEES.

History and Comparative Law of Invitees, Licensees, and Trespassers. *69 Law Quarterly Review*, 182, 359.

LANDLORD AND TENANT.

Forms of Notice to Quit. *6 Australian Conveyancer and Solicitors' Journal*, 103.

Implied Surrender of Leases. *16 Conveyancer and Property Lawyer*, 160.

MAGISTRATES' COURTS.

Practice—Appeal—Magistrate's Finding on Credibility of Witnesses—Not Exceptional Case for Exercise of Discretion to order Rehearing of Evidence on Appeal—Magistrates' Courts Act, 1947, s. 76(1)—Magistrates' Courts Amendment Act, 1950, s. 2(1). Where a Magistrate has found on the credibility of witnesses, exceptional circumstances do not exist for the exercise of the Court's discretion to order that the appeal should be by way of a rehearing of the evidence. (*Seagar* v. *Wellington City Corporation*, [1951] N.Z.L.R. 1060; [1952] G.L.R. 45, applied.) (*Parsons* v. *Parsons Engineering Co., Ltd.*, [1933] G.L.R. 347, distinguished.) (*Carruth* v. *Kinney*, [1931] N.Z.L.R. 1195; [1931] G.L.R. 574; and *Norton* v. *Acme Engineering Co., Ltd.*, [1934] G.L.R. 305, referred to.) *Wilson* v. *Nisbett*. (S.C. Nelson. July 28, 1953. Turner, J.)

Practice—Appeal—Magistrate's Obscure Notes—No Written Judgment—Credibility of Witnesses—Supreme Court unable to say Magistrate wrong—Position different if Evidence completely Reheard—Advantage of having Full Notes and Expressed Findings—Magistrates' Courts Act, 1947, s. 76—Magistrates' Courts Amendment Act, 1950, s. 2(1). On an appeal from a judgment of the Magistrates' Court, the evidence was brought before the Supreme Court on the Magistrate's notes. No application was made for a rehearing of the witnesses who gave evidence in the lower Court, or for the hearing of further evidence. There was no judgment and the Magistrate's notes were abbreviated to the point of obscurity. It was contended for the appellant that, as the appeal was by way of rehearing, the Supreme Court was not bound by the Magistrate's decision in any way. *Held*, That, in the circumstances of the case, the all-important matter was the credibility of the witnesses; and, in such a matter, the appellate Court could not say that the Magistrate was wrong. (*Powell* v. *Streatham Manor Nursing Home*, [1935] A.C. 243, followed.) *Aliter*, if the evidence had been completely reheard in the Supreme Court. *Semble*, That it would be a help to the Supreme Court and a service to litigants if Magistrates' notes could be made fuller and their findings and reasons expressed. The case is reported on the above point only. *Gillard* v. *Cleaver Motors, Ltd.* (S.C. Hamilton. August 19, 1953. Stanton, J.)

Practice—Appeal—Notice of Motion on Appeal referring to the Appeal as being "from the whole of the judgment except findings of fact therein contained"—Motion framed in Error—No intention to limit Appeal to Questions of Law. Error not to be treated as Fatal to Appellant—Respondent given Opportunity of taking Adjournment if placed at Disadvantage—"Final Determination"—Magistrates' Courts Act, 1947, ss. 72(2), 77(2). The notice of motion on appeal from the Magistrate's judgment referred to the appeal as being "from the whole of the judgment except findings of fact therein contained." On preliminary objection by counsel for the respondent, on the ground that the notice of motion limited the appellant to any argument open to him that the Magistrate had mis-applied the law, so that the facts and the true inferences to be drawn from the facts, which were in themselves questions of fact, were not within the scope of the motion on appeal. Counsel in support of the motion explained that what he had intended to convey by his motion was that he was not disputing the actual findings of fact, but he was disputing only the inferences from the facts; and that, in the result, no question could arise as to the necessity for the Supreme Court to rehear the whole or any part of the evidence. *Held*, 1. That, while the motion was framed in error, there was no intention to limit the appeal to questions of law, and that there was no express provision in the Magistrates' Courts Act, 1947, enabling the Court to amend it; but, as the motion did not limit the appeal to a part of the "final determination", as those words are used in s. 72(2) of the Magistrates' Courts Act, 1947 (as there was only one final determination—namely, that the appellant had failed in his action) in the interests of justice, the error should not be treated as being fatal to the appellant, as, on an appeal as to part only of a decision, it was within the power of the Court to make a final order on the whole of the case; and counsel for the respondent should be given the opportunity of taking an adjournment if he felt that he had been placed at any disadvantage. 2. That, as all the primary facts had been found by the Magistrate, the only question really in issue was the true inference to be drawn from those facts and the application of the relevant principles. (*Harvey* v. *Road Haulage Executive*, [1952] K.B. 120, referred to.) *Ritchie* v. *Dunedin City Corporation and Another*. (S.C. Dunedin. July 6, 1953. North, J.)

NEGLIGENCE.

Road Collision—Contributory Negligence—Truck-driver giving no Warning Signal indicating Intention to make Right-hand Turn—Following Motor-car Driver colliding with Rear of Truck—Change in Approach to Problem of Responsibility—Doctrine of Last Opportunity Obsolete—Both Acts of Negligence too closely connected to be severable—Both Drivers to blame—Damages apportionable—Contributory Negligence Act, 1947, s. 3(1). Transport—Breach of Traffic Regulations—Driver failing to Signal Intention to Change Direction and Crossing Track of following Vehicle—Driver of following Vehicle in Breach of Duty as to Speed and Lookout—Breach of Regulation by That Driver not decisive on Question of Responsibility for Collision—Driver of First Vehicle not necessarily relieved by such Breach of Responsibility for His Conduct, in failing to Signal Change of Direction, precipitating Collision—Traffic Regulations, 1936 (Serial No. 1936/86), Regs. 15, 17(1). A motor collision occurred while the appellant was driving his motor-car along a road. The respondent, L., in the course of his duties as an employee of the respondent Corporation, was driving a truck in the same direction ahead of the appellant. The road was a wide highway with a grass plot in the centre dividing the lines of traffic. At an intersection with two streets, there was a gap in the centre grass plot permitting both lines of traffic to turn into those streets. It was L.'s intention to turn to his right into C. St., where there was a Corporation depot, and he had partly negotiated this turn when the appellant's car collided with the rear of his truck. The truck was not damaged, but the car was damaged, resulting in a claim for £300 special damages and £50 general damages. The Magistrate found that L. had given no warning signal indicating his intention to turn to the right, and it was common ground that L., right up to the moment of his turning, maintained his position on the road and thus gave no other earlier indication that he was proposing to turn to the right, being thus in breach of Reg. 15 of the Traffic Regulations, 1936. The appellant said that he was travelling at approximately 25 miles per hour in the centre of the road (which was 36 ft. wide) and about 50 ft. behind the truck. He said that he was gradually overtaking the truck at the rate of about 5 miles per hour, and he claimed that he had taken all reasonable steps to avoid the impact. The Magistrate found that L. had given no warning signal indicating his intention to turn to the right; but he held that the real or effective cause of the collision was the negligence of the appellant in failing to stop or steer clear of the truck. On appeal from determination, *Held*, 1. That, although the law as to what constitutes contributory negligence has not been changed by the passing of the Contributory Negligence Act, 1947, nevertheless, the whole approach to the problem of responsibility has undergone a practical change, which renders the doctrine of last opportunity obsolete. (*Davies* v. *Swan Motor Co. (Swansea), Ltd., James, Third Party*, [1949] 2 K.B. 291, followed.) (*Holling* v. *Yorkshire Traction Co., Ltd.*, [1948] 2 All E.R. 662, referred to.) 2. That the guiding principle in determining the responsibility of one or both parties for an accident is to be found in the statement of *Viscount Birkenhead*, L.C., in *The Volute* ([1922] A.C. 129, 144): "While no doubt, where a clear line can be drawn, the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party secondly negligent, while not held free from blame under the *Bywell Castle* rule, might, on the other hand, invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution." *Sigurdson* v. *British Columbia Electric Railway Co., Ltd.*, [1952] 2 Weekly Notes 411, followed.) 3. That, assuming that the appellant was negligent, this was not the kind of accident in which a clear line could be drawn between the acts of negligence on the part of the appellant and the act of negligence on L.'s part, which continued up to the moment of the collision as the acts of negligence on the part of the two drivers were too closely connected to be severable; and, as L. was at least in part to blame for the collision, the judgment in favour of the respondents should not stand. 4. That, subject to the possibility that a driver of a following motor-vehicle has committed a breach of Reg. 14 (10) of the Traffic Regulations, 1936, in overtaking on an intersection, if the motorist in front suddenly changes his direction and crosses the track of another motorist travelling behind him, the following motorist, if he is unable to avoid a collision, cannot be held to have committed a breach of Reg. 17 (1) of those Regulations. (*Johnston* v. *Griffin*, [1942] N.Z.L.R. 554, mentioned.) 5. That proof of a breach of Reg. 17 (1) of the Traffic Regulations, 1936, is not decisive on the question of responsibility: it merely provides evidence that the following vehicle was either travelling at an excessive speed or else that the driver was not keeping a proper lookout; and, in either event, it would only provide a ground for holding

that the following vehicle had been guilty of negligence, and it would not necessarily relieve the driver of the first vehicle of responsibility for conduct which precipitated the collision. (*Duncan* v. *Wakeford*, [1941] N.Z.L.R. 25, applied.) 6. That the true inference to be drawn from the established facts was that the collision was caused and occasioned by the negligence of both drivers, and the damages should be assessed by the Magistrate and apportioned by him under the provisions of the Contributory Negligence Act, 1947. (*Tart* v. *G. W. Chitty and Co., Ltd.*, [1933] 2 K.B. 453, and *Baker* v. *E. Longhurst and Sons, Ltd.*, [1933] 2 K.B. 461, distinguished.) (*Davies* v. *Swan Motor Co. (Swansea), Ltd.*, [1949] 2 K.B. 291; [1949] 1 All E.R. 620, referred to.) The appeal was accordingly allowed, and the case was remitted to the Magistrate for the damages to be assessed, and for determination of the amount by which they should be reduced, having regard to the appellant's share in the responsibility for the damage. *Ritchie* v. *Dunedin City Corporation* (S.C. Dunedin. July 6, 1953. North, J.)

Emotional Shock and the Unimaginative Taxicab Driver. *69 Law Quarterly Review*, 347.

POST AND TELEGRAPH.

Post and Telegraph Staff Regulations—Position of Accountant, Engineers Branch—Accountancy Professional Examination not a Prerequisite for Appointment—Such Examination not "a technical examination"—Post and Telegraph Staff Regulations, 1951 (Serial No. 1951/158) Reg. 131 (4). The words "a technical examination or examinations," as used in Reg. 131 (4) of the Post and Telegraph Staff Regulations, 1951, point to an examination relating to the mechanical arts and applied sciences, as touching some branch or branches of the work carried on by the Post and Telegraph Department; they are not appropriate to describe the Accountancy Professional Examination, which would be regarded as a professional qualification. Furthermore, as a matter of construction, the reference in Reg. 131 (4) to "a technical examination or examinations" is to an examination conducted within the Department and relating to technical matters. (*Lord Advocate for Scotland* v. *Hamilton*, (1852), Macq. 46, and *In re Cambrian Railways Company's Scheme*, (1868) L.R. 3 Ch. 278, applied.) Regulation 133 (2), being by way of exception to Reg. 133 (1), should have limited application and should not be deemed to have created a substantive right enabling the Director-General at his discretion to name a particular examination qualification required of employees who desire promotion to positions in different branches of the Service; and, further, the words "the particular examination qualifications required of employees for promotion" also refer to Departmental examinations. Consequently, the Director-General of the Post and Telegraph Department was not entitled to invoke Reg. 131 (4) or Reg. 133 (2) as giving him the necessary power to stipulate the Accountancy Professional Examination for the position of Accountant, Engineers Branch, Post and Telegraph Department. *So held* by *North*, J., on originating summons for determination of the question answered above, the judgment being confined to the interpretation of the relevant Regulations, and not being concerned with any question that might arise as to the inherent powers of the Director-General, or with the question whether the Post and Telegraph Staff Regulations 1951, were *ultra vires*. *Thomas* v. *Attorney-General*. (S.C. Dunedin. August 3, 1953. North, J.)

PRACTICE.

The Courts and Domestic Tribunals (Lord Justice Morris). *69 Law Quarterly Review*, 318.

Costs—Plaintiffs Seeking Declaration to Vindicate Right—Right to have Names Submitted to Members for Election to Club Committee—Plaintiffs, although they had suffered a Wrong, not Entitled to Declaration that they had been Elected—Judgment in favour of Each Plaintiff for £1 Damages—Litigation brought about by Defendant—Plaintiffs not wholly failing in Their Actions—Plaintiffs allowed Costs. On three actions, with substantially the same facts, each plaintiff, in his statement of claim, sought a declaration that from September 20, 1951, he had been a member of the Committee of the defendant Club, and, alternatively, in case such an order could not be made, he claimed an order that his name be submitted to all the members of the defendant Club for election by postal ballot; the costs of and incidental to the action; and such further or other relief as in the premises might seem just. The trial Judge dismissed the action, but he did not award any costs. Each plaintiff appealed from such judgment on the ground that it was erroneous on fact and in law. The Court of Appeal held that, although the appellants had been properly nominated, it was not competent for the Court to declare that they had been validly elected, but they had suffered the deprivation of a right, and, under the prayer for other relief, it was competent for the Court to award damages, though, in the absence of any evidence as to what amount in money would be proper, nominal damages only could be awarded. The appeal was allowed to the extent of vacating the judgment, dismissing the actions, and substituting judgments in favour of each plaintiff for £1. On the question of costs. *Held*, by the Court of Appeal, 1. That, although on the main issue the defendant Club was successful, its conduct had brought about the litigation; that the plaintiffs had not wholly failed in their action, which they had brought to vindicate their rights; and that, although the particular remedy they sought was not available, they were successful in establishing a right to damages. (*Donald Campbell and Co., Ltd.* v. *Pollak*, [1927] A.C. 732, applied.) 2. That the plaintiffs were entitled to thirty guineas and disbursements for costs of the proceedings in the Supreme Court, and the costs of the appeal on the lower scale as on a case from a distance. The judgment of the Court of Appeal is reported on this point only. *King and Others* v. *Foxton Racing Club* (C.A. Wellington. May 1, 1953. Gresson, Stanton, Hay, JJ.)

SHARE-MILKING AGREEMENTS.

Person engaged to milk Cows on Dairy-Farm—Remuneration to be at Rate of 4d. per Gallon on All Milk produced by Herd—Payment to be made "out of the proceeds of milk sold"—Such Remuneration not "a share of the returns or profits derived from the dairy-farming operations"—Such Person not a "Share-milker"—Share-milking Agreements Act, 1937, s. 2. The plaintiff claimed the sum of £1,535 on the grounds (*inter alia*) that he was engaged by the defendant to milk cows and to do certain work on the defendant's dairy-farm for which the agreed remuneration was that the plaintiff was to be entitled to receive as his share of the milk returns the sum of 4d. out of the proceeds of every gallon of milk produced by the herd and sold for town supply, and that he was entitled to payment as a "share-milker." The jury found that the plaintiff was employed as an independent contractor; and that it was a term of the contract between the parties that the plaintiff should be paid 4d. per gallon on all milk produced by the herd, and that "the sum of 4d. per gallon was to be paid out of the proceeds of milk sold." On motion by the defendant for judgment on the jury's findings, and, alternatively, for a new trial, the defendant contended that, even accepting the jury's findings, the plaintiff was not a "share-milker" within the definition of that term in s. 2 of the Share-milking Agreements Act, 1937. It was contended by the plaintiff that, as the agreed remuneration (4d. per gallon on the milk produced and sold for town supply) was (as the jury had held) "to be paid out of the proceeds of milk sold", the contract between the parties constituted an agreement whereby the plaintiff was to receive "a share of the returns or profits derived from the dairy-farming operations" as those words are used in the definition of "share-milker" in s. 2 of the Share-milking Agreements Act, 1937. It was held by *Stanton*, J., [1952] N.Z.L.R. 432; [1952] G.L.R. 340, that, as the plaintiff's remuneration was to be measured, not by the amount of the returns, but by the number of gallons in the returns, whatever might be the price per gallon that was received, he was not entitled to payment as a "share-milker", within the meaning of the Share-milking Agreements Act, 1937, and that the defendant was accordingly entitled to judgment. On appeal by the plaintiff from that judgment, *Held*, by the Court of Appeal, 1. That the amount receivable by the appellant was measured by the output (the number of gallons of milk produced), and payment to him at the rate of 4d. per gallon was to be made "out of the proceeds of the milk sold, *i.e.*, the funds produced by the sale; and that he had no interest in the "returns or profits of the dairy-farming operations" other than as the fund out of which payment was to be made to him. (*Reigate* v. *Union Manufacturing Co.*, [1918] 1 K.B. 592, applied.) 2. That the appellant had a double right: to a sum measured according to output, and to recourse being made to the moneys derived from the marketing of the milk to satisfy that sum; and, since the amount he was to receive did not fluctuate according to "the returns or profits of the dairy-farming operations" and it was not dependent upon there being any such returns or profits, it was no more than a payment "*out of*" the returns or profits if these were sufficient to meet it; if they were not, the balance would have to come from another source. (*Keighley* v. *Peacocke*, [1951] N.Z.L.R. 554; [1951] G.L.R. 251, overruled on this point.) 3. That, as the payment to the appellant out of the returns or profits was a contractual liability which the respondent had to meet, and the proceeds were constituted merely the primary fund to which resort

was to be had, the appellant was not a "share-milker" within the meaning of that term as defined by s. 2 of the Share-milking Agreements Act, 1937, as he was not "entitled to receive a share of the returns or profits derived from the dairy-farming operations" of the respondent. (*In re Young, Ex Parte Jones*, [1896] 2 Q.B. 484, distinguished.) Judgment of *Stanton*, J., [1952] N.Z.L.R. 432; [1952] G.L.R. 340, affirmed.) *Keighley* v. *Peacocke*. (C.A. Wellington. April 30, 1953. Gresson, Hay, North, JJ.)

STATUTE.

Board of Trade Act, 1919—Power to make Regulation—Such Power including Power to create Corporation by Regulation when such Power falls within Ambit of Statutory Power—Such Power not substituted for Prerogative Power to create Corporation by Grant of Royal Charter—Regulations not Repugnant to Statute of Monopolies or to Commercial Trusts Act, 1908—"Industry"—Board of Trade Act, 1919, s. 26 (1) (e)—Statutes Amendment Act, 1936, s. 14 (1)—Statute of Monopolies, 1623 (21 Jac. I, c. 3), ss. 1, 2—English Laws Act, 1908, s. 2—Board of Trade (Wheat and Flour) Regulations, 1944 (Serial No. 1944/94), Pt. II, Reg. 8. A statutory power to make regulations includes a power to create a corporation by regulation whenever such a power falls within the ambit of the statutory power; and the determination of that ambit depends upon the construction of the language used in the circumstances in which it was used, and on any reasonable implication that is fairly contained in that language. (*R.* v. *Comptroller-General of Patents*, [1941] 2 K.B. 306; [1941] 2 All E.R. 677; and *Hewett* v. *Fielder* [1951] N.Z.L.R. 755; [1952] G.L.R. 39, followed.) The language of s. 26 (1) (*e*) of the Board of Trade Act, 1919, read together with the language of the opening words of the section, is *prima facie* wide enough to include power to create a corporation, if such a step is deemed necessary in the public interest as part of a method of regulation and control of industries which is deemed necessary for the purposes mentioned in s. 26 (1) (*e*). (*Kerridge* v. *Girling-Butcher*, [1933] N.Z.L.R. 646; [1933] G.L.R. 491; and *Arthur Yates and Co., Ltd.* v. *Vegetable Seeds Committee*, (1945) 72 C.L.R. 37, referred to.) The power so conferred by s. 26 exists side by side with, and is not substituted for, the power to create a corporation, which is part of the royal prerogative; and the conferring of such power to create a corporation by regulation does not affect the rights of Her Majesty within the meaning of s. 5 (*k*) of the Acts Interpretation Act, 1924. Section 26 contains authority to create a corporation in a way which is additional to that contemplated by the royal prerogative (the grant of a royal charter); but it does not contain authority to do the same thing as can be done under the prerogative but subject to protective conditions or restriction. (*Attorney-General* v. *de Keyser's Royal Hotel*, [1920] A.C. 508, referred to.) The Board of Trade (Wheat and Flour) Regulations, 1944, are not repugnant to the Statute of Monopolies, 1623, because the expression "no regulations made" in the latter part of s. 14 (1) of the Statutes Amendment Act, 1936, refers to regulations thereafter made; and, also, they are saved from invalidity by the expression in s. 14 (1) of that statute, "deemed to be invalid . . . because of repugnancy to any such Act"; because repugnancy to the Statute of Monopolies is, in reality and in substance, repugnancy to the English Laws Act, 1908, which falls within the words "such Act" in that phrase. Similarly, if the Board of Trade (Wheat and Flour) Regulations, 1944, are repugnant to the Commercial Trusts Act, 1908, they are preserved from invalidity by the concluding part of s. 14 (1) of the Statutes Amendment Act, 1936. *Quaere*, The extent to which, by virtue of the English Laws Act, 1908, the Statute of Monopolies, 1623, is still in force in New Zealand. Throughout the Board of Trade Act, 1919, the word "industry" is used to denote some particular industry; and it is not used in the general sense as meant in the expression "New Zealand industry." There was little information before the Court as to the operations that were conducted by the Merchants in connection with wheat and flour before there was any interference by regulation, from December, 1935, in the case of wheat, and from April, 1936, in the case of flour; and, if a material part of the merchants' previous operations in connection with wheat and flour took place on an agency or brokerage basis, and if, to a material extent, such part of those operations related to wheat, the Court, on the information before it, could not go so far as to hold that the Regulations completely prohibited such operations or did more than provide for their regulation and control. Assuming in favour of the plaintiff that the operations in wheat and flour conducted by merchants before the making of the Board of Trade (Wheat and Flour) Regulations, 1944, in themselves constituted an industry within the meaning of Board of Trade Act, 1919, and were not merely part of another industry, there was no justification, on the information before the Court as to the nature of such operations, for the view that what the Regulations had done went beyond regulation or control. It was, accordingly, held that, on the information before the Court, the Board of Trade (Wheat and Flour) Regulations, 1944, are not invalid. *Peerless Bakery, Ltd.* v. *Clinkard*. (S.C. Wellington. June 8, 1953. Cooke, J.)

TRANSPORT.

Offences—Exceeding Speed Limit as Driver of Motor-Vehicle—Increased Penalty on Conviction for Third Offence—Procedure to be adopted when Defendant charged with Such Third Offence—Notice to Defendant of Intention to prove Previous Convictions—Transport Act, 1949, s. 31. A defendant was charged with driving a motor-vehicle on a road at a speed exceeding 50 miles per hour, in breach of Reg. 17 of the Traffic Regulations, 1936 (Serial No. 86/1936). He did not appear, but he was represented by counsel who pleaded guilty on his behalf. The informant produced certified copies of three previous convictions for driving a motor-vehicle on a road at a speed exceeding 30 miles per hour, contrary to s. 36 of the Transport Act, 1949. These previous convictions rendered the defendant liable to an increased penalty by virtue of s. 31 of that statute, which gives the Court power to endorse, suspend or cancel the driving licence of any offender convicted of an offence in connection with the driving of a motor-vehicle, "other than the first or second offence consisting solely of exceeding any limit of speed." On the question as to the procedure to be adopted in this and similar cases. *Held*, That the best procedure was the giving of a separate notice by the informant to the defendant that he intended to prove the earlier convictions, thus obviating the necessity for the granting of an adjournment where the defendant might be taken by surprise, and enabling the prosecution to proceed at once to proof of the convictions if the defendant did not appear. (*R.* v. *Hankey*, (1910) 55 Sol. Jo. 77, and *Rowe* v. *Butcher*, [1936] V.L.R. 103, applied.) (*Curran* v. *O'Connor*, (1894) 12 N.Z.L.R. 442; and *Ames* v. *Nicholson*, [1921] S.A.S.R. 224, referred to.) *Young* v. *Brownson*. (Te Awamutu. March 3, 1953. Paterson, S.M.)

WILL.

Condition—Condition or Limitation—Alternative Limitation—Performance of Condition Precedent Sole Object of Bequest—Impossibility of Condition—Gift of Fund "on marriage to a person of the Jewish faith and the child of Jewish parents"—Failure of Gift. By her will dated October 12, 1923, a testatrix, who died on September 23, 1924, gave her residuary estate to her trustees on trust for sale and directed them to hold in trust the sum of £600 to be invested and to pay the income thereof to her daughter A.C. for life and on her death to pay the income to her grand-daughter R.C. during her spinsterhood and on her marriage "to a person of the Jewish faith and the child of Jewish parents to transfer to her" the investments representing the £600. Subject thereto, she gave her residuary estate to the trustees to divide the same equally between her three children, naming them, absolutely, "Provided always that if my granddaughter [R.C.] shall marry a person not of the Jewish faith and not the son of parents of the Jewish faith then . . . my trustees . . . shall not transfer to her the investments . . . representing the said sum of £600 but shall transfer to her one-sixth of such investments . . . only . . . " The trustees were further directed in that event to sell the remaining five-sixths and divide the proceeds equally between two of the children of the testatrix. On October 1, 1927, R.C. married a man neither of the Jewish faith nor of Jewish parentage, and in January, 1948, during the lifetime of A.C., and with her consent, the investments representing the £600 were transferred to R.C. absolutely. On a summons to determine whether that payment had been rightly made. *Held:* the gift of the capital of the fund to R.C. on "her marriage to a person of the Jewish faith and the child of Jewish parents" was a limitation which had not taken effect and did not constitute a condition, and the proviso was an alternative limitation which had taken effect; but, even if the terms of the gift of the capital of the fund to R.C. constituted a condition precedent, the condition was void for uncertainty because it was impossible of performance, and as the performance of the condition was the sole motive of the bequest, and its impossibility was unknown to the testatrix, the invalidity of the condition caused the failure of the gift; and, therefore, whether the terms of the gift of capital to R.C. constituted a limitation or a condition precedent, the gift was not effective, and the fund passed under the proviso, and, accordingly, the payment had been made to R.C. in error, she being entitled only to one-sixth thereof. (*Clayton* v. *Ramsden*, [1943] 1 All E.R. 16, followed.) (*Re Wilkinson*, [1926] Ch. 842, applied.) (Principle stated in *2 Jarman on Wills*, 4th Ed., p. 12, applied.) *Re Wolffe's Will Trusts, Shapley* v. *Wolffe and Another* [1953] 2 All E.R. 697 (Ch.D.).

Delegation of Will-making Power. *69 Law Quarterly Review*, 334.

Statutory Exception from Lapse. *6 Australian Conveyancer and Solicitors' Journal*, 97.

WORKERS' COMPENSATION.

Accident arising out of and in the Course of the Employment—Suicide of Worker—Necessary Facts to be proved—Intra-cranial injury resulting from Accident causing Mental Derangement—Suicide resulting from Accident—Compensation payable to Dependants—Workers' Compensation Act, 1922, s. 3. Where a deceased worker has committed suicide, the dependant claiming compensation must establish the following facts before she can succeed in her action: (*a*) that the deceased committed suicide; (*b*) that, at the time when the deceased committed suicide, he was insane; (*c*) that the suicide was the result of the insanity; and (*d*) that the insanity resulted from the accident. What may be called "medical insanity" or mental derangement (as opposed to "legal insanity") if sufficient, the question in each case being whether the deceased's condition was such that his mind had become unhinged so as to dethrone his power of volition. (*Church* v. *Dugdale and Adams, Ltd.*, (1929) 22 B.W.C.C. 444; *Dixon* v. *Sutton Heath Colliery, Ltd.*, (1930) 23 B.W.C.C. 135; and *Parry* v. *English Steel Corporation, Ltd.*, (1939) 32 B.W.C.C. 272, followed.) On September 29, 1952, the deceased who was a bushman in the employ of defendant, suffered an accident which arose out of and in the course of his employment. He was struck across the neck and jaw by a wire rope which was being use to haul logs. When struck by the rope, he was thrown several feet and was unconscious for about twenty-five minutes. He was taken to Doctor L. and had the cut on his jaw attended to. He stayed away from work the following day under the doctor's orders and, on October 1, he returned to work though still obviously not recovered from the effects of the accident. Thereafter he worked the normal hours until October 9, when he suffered an injury to a finger of his left hand. He was attended for this injury by Doctor J., who put him off work for a week and told him to return on October 16. Before the second accident, as well as after it, the deceased complained that his head did not seem to be right and he was taking dizzy turns and suffering from sleeplessness. On October 15, his complaints to his wife became so urgent that she arranged for him to go back to Doctor J. a day earlier than he had been told to go. The doctor gave him a tonic and sleeping tablets, and told him to return on October 20. On the following day, October 16, the deceased left his home, taking his rifle with him, went into the bush, and committed suicide. The circumstances in which his body was found were such as to establish beyond any doubt that deceased had committed suicide. In an action by the deceased's wife claiming compensation for herself and her four dependent children. *Held*, 1. That, as the result of the accident, the deceased suffered from either a subdural haemorrhage or small scattered haemorrhages; in the whole of the circumstances, the fact of suicide, taken as the culminating point of the march of events which led up to it, indicated that he was suffering from a mental derangement which so altered his mentality as to make him take his life; and, accordingly, in fact, the deceased, at the time when he committed suicide, was insane. 2. That the suicide was the result of the insanity, which was caused by the intra-cranial damage which resulted from the accident. 3. That the plaintiff had accordingly established all the facts which had to be established to entitle her to judgment. *Crengle* v. *Lake Brunner Sawmilling Co.* (Comp. Ct. Greymouth. July 31, 1953. Dalglish, J.)

Accident arising out of and in the Course of the Employment—Rabbiter—Worker Employed under Award to poison Rabbits and not required to supply Dogs—Worker dismissed, but remaining over Week-end—Next day Worker killed while Shooting Rabbits for Food for His Dogs—Obtaining of Dog Food not incidental to Deceased Worker's Employment—Workers' Compensation Act, 1922, s. 3. For about three weeks before February 27, 1953, the deceased worker was employed by the defendant Board as a rabbiter at B. Station, where he was living in a hut and was working with C., another rabbiter employed by the defendant Board. Between 5 p.m. and 6 p.m. on the afternoon of Friday, February 27, 1953, the defendant Board's inspector dismissed both the deceased worker and the other rabbiter. He told them to finish up immediately and informed them that they would receive a week's pay in lieu of notice. He told them that they could leave immediately, or, if they wished, they could pack their gear by Monday or early Tuesday morning and he would call in and take them to Blenheim where they would receive their pay. Late in the afternoon of the following day, Saturday, February 28, the deceased went out with his rifle seeking rabbits for dog food, leaving C. at the hut preparing the evening meal. Later, his body was found in circumstances which indicated that, after shooting one rabbit, he had accidentally shot himself. The deceased was employed as a rabbiter on wages under the New Zealand (except Otago and Northern Industrial District, other than Gisborne Judicial District) Rabbit Destruction Workers' Award, 1951. Under this award, provision was made for the payment of a camping allowance, and, where a worker is required to supply his own dogs or saddle horse, for the payment of certain allowances. The deceased and C. were receiving a camping allowance and a horse allowance, but no dog allowance. The deceased had two dogs of his own at the hut and C. also had several dogs there. The dog food, which the deceased was seeking when he met his death, was for all these dogs. During the whole of the time the deceased was on B. Station, the rabbiting was a poison job. This would later be followed by trapping. The defendant Board's inspector, who laid down the procedure to be followed by the rabbiters, stated that dogs were not required on B. Station; they were of no use whatever while the rabbiters were poisoning or trapping, and, furthermore, no rabbiters in the defendant Board's employ received any dog allowance. The deceased's widow claimed compensation from the defendant Board on the basis that, notwithstanding his prior dismissal, the deceased at the time of his death was doing something reasonably incidental to his employment and that his death arose out of what he was then doing. *Held*, That the dogs belonging to the deceased were not at B. Station for any purposes connected with his employment there by the defendant Board; and, consequently, the obtaining of dog food was not incidental to the deceased's employment. (*Brophy* v. *The King*, [1940] N.Z.L.R. 265; [1940] G.L.R. 194, distinguished.) *Vallance* v. *Awatere Rabbit Board* (Comp.Ct. Blenheim. July 15, 1953. Dalglish, J.)

Accident arising out of and in the Course of the Employment—Tuberculosis—Mental Hospital Attendant—Date of Happening of Accident—Day on which Worker first went on Sick Leave—Quantum of Compensation determined by Statutory Provision in Force on that Day—Increased Rates of Compensation to Public Servants not applicable to Accidents happening before April 1, 1948—Amounts deductible in Ascertaining Full Amount of Compensation payable—"Any payment, allowance, or benefit"—Tuberculosis Act, 1948, s. 23 (4). The deceased was employed as an attendant at the Kingseat Mental Hospital until May 25, 1946, when he ceased work as he had contracted tuberculosis. He died of tuberculosis on April 8, 1951. From May 25, 1946, until August 24, 1946 (a period of 92 days), and from October 1, 1947, until November 15, 1947—a period of 46 days—the deceased was on sick leave on full pay. From November 1, 1948, the deceased was paid an allowance according to the scale laid down by the Workers' Compensation Act, 1922, this allowance being paid in view of the provisions of s. 23 of the Tuberculosis Act, 1948, which came into force on April 1, 1949. During the remaining periods between August 24, 1946, and November 1, 1948, the deceased was granted an allowance, owing to the nature of his illness, of £1 per week, and, later, of £1 5s. per week. These amounts were fixed by reference to the maximum which the deceased was entitled to receive by way of income without bringing about a reduction of the social security benefit which he was receiving during these periods. The total of the amounts received by the deceased from his employer between May 25, 1946, and the date of his death was £1,005 7s. 10d. On a claim for compensation by the deceased's widow, on behalf of herself and her children. *Held*, 1. That under s. 23 (4) of the Tuberculosis Act, 1948, and s. 10 (4) of the Workers' Compensation Act, 1922, May 25, 1946, was to be deemed the date of the happening of the accident for the purposes of the Workers' Compensation Act, 1922. 2. That the maximum amount of compensation payable in respect of the incapacity and death of the deceased, which was to be determined by s. 4 (1) (*a*) (*d*) of the Workers' Compensation Act, 1922 (as in force at the date of the happening of the accident, and as para. (*d*) was then substituted by s. 5 of the Workers' Compensation Act, 1936), was accordingly £1,000. 3. That s. 11 of the Finance Act, 1949 (which provides for payment of workers' compensation at increased rates in all cases where the employer is the Crown), although expressed as applying to compensation in respect of accidents which happened before the date of the commencement of that section (September 1, 1949), has no application to compensation in respect of accidents which happened before April 1, 1948. 4. That, under s. 23 (4) of the Tuberculosis Act, 1948, "any payment, allowance, or benefit" received from an employer, which is to be taken into account in assessing the aggregate amount of compensation payable, must be not merely in respect of the period of incapacity before April 1, 1949, but it must also be in respect of the incapacity before it should be taken into

account and deducted from the total amount of compensation paid; and, consequently, the allowance to the deceased of £1 per week, and, later, the allowance of £1 5s. per week, and payments as for compensation from November 1, 1948, came into that category. 5. That the payment made to the deceased during the forty-six-day period of sick leave on full pay, (from October 1, to November 15, 1947) under Reg. 55 of the Public Service Regulations, 1913 (as substituted by Reg. 4 of the Public Service Amending Regulations, 1945) was made because the cause of the deceased's illness was tuberculosis contracted while the deceased was employed in the Kingseat Mental Hospital: and the whole of that amount should be deducted in ascertaining the full amount of compensation to be paid. 6. That the payment made to the deceased during the ninety-two-day period of sick leave on full pay (from May 25, 1946, to August 24, 1946) was £7 per week, but if the Tuberculosis Act, 1948, had then been in force he would, under the regulation, have received £4 10s. per week, the then maximum weekly rate of workers' compensation; and it was reasonable to regard £4 10s. per week as the amount which was paid in respect of tuberculosis during that period; and that amount should be also deducted in ascertaining the amount of compensation to be paid. *Hunter* v. *Attorney-General.* (Comp. Ct. Wellington. June 9, 1953. Dalglish, J.)

Liability for Compensation—Tuberculosis—Worker infected with Tubercle Bacilli Earlier in Life, but with Established Resistence—Disease contracted or reactivated within Twelve Months before Disablement—Medical Evidence showing Contraction or Reactivation of Disease not due to Nature of Employment—Onus on Worker to show Work had Bearing in Fact on Reactivation or Contraction of Disease—Onus not discharged—Workers' Compensation Act, 1922, s. 10—Workers' Compensation Amendment Act, 1947, s. 42 (1). The suppliant, who had contracted tuberculosis while in the employment of the Ministry of Works at Roxburgh Hydro as a wagon driller in the diversion cut, claimed compensation on the ground that the disease was due to the nature of the employment, in that, while using wagon drills, he was constantly chilled as a result of being wetted with water spray from the drills, and of working in water and on wet ground for a large part of the time in cold conditions. In consequence of the disease, he was totally incapacitated for work from December 20, 1950. The suppliant, who was 39 years of age, commenced working at Roxburgh Hydro in 1946. At the end of 1949, he commenced work as a wagon driller on the diversion cut; and was a member of a gang which was working on shift work. This involved working nine hours a day for six days a week, two weeks out of three, and for five days a week in the third week. At the commencement of this work, he was in good health; but, in the middle of the year, he began to develop what appeared to be common colds, and between May and November, 1950, he had fourteen days' sick leave, mostly from August onwards. In the same period, the average absence through sickness of most of the rest of the gang was only two days. About the end of August, the suppliant's absences from work were such that it was suggested that, if he continued to need time off on account of sickness, he would have to be replaced as a member of the gang. In December, when the work shut down for the Christmas holidays, the suppliant was examined by the local doctor; and it was discovered that he was suffering from active tuberculosis. He was thereupon sent to hospital, and was in hospital for a year; and, at the time of the hearing, he was still unfit to resume work. It was not suggested that the suppliant was infected by tuberculosis from any outside source. It was claimed that the conditions under which the suppliant was working caused him to be constantly wet and chilled, and that, as a result, his resistance was lowered enabling tubercle bacilli already in his system to become active. *Held*, 1. That, on the medical evidence, the suppliant was infected with tubercle bacilli earlier in life, but had established a resistence to it; and that the tubercle bacilli were reactivated, thus leading to the development of the disease. 2. That the disease was contracted after December 20, 1949, *i.e.*, within twelve months before the suppliant was disabled by it; and while he was in an employment to which the Workers' Compensation Act, 1922, applied. 3. That, as the disease was not contracted as a result of an accident arising out of and in the course of the suppliant's employment, he had to establish that his case came within s. 10 of the Workers' Compensation Act, 1922 (as amended by s. 42 (1) of the Workers' Compensation Act, 1947)—namely, that his disease was due to the nature of his employment. 4. That the medical evidence was to the effect that, even if it were assumed that the conditions of working were such as described by the suppliant and his workmates, it was unlikely that those conditions had led to the reactivation of the suppliant's disease. 5. That the suppliant had not discharged the onus upon him to establish that the work on which he was engaged had any bearing in fact on the reactivation or contracting of the disease. *Semble*, The disease was reactivated before the winter had set in, but, in view of the medical evidence, the decision of the Court would have been the same if it had found that the disease had not become reactivated until late in the winter. Observations by medical witnesses on causes leading to reactivation of latent tuberculosis through the lowering or break-down of natural resistance and to development of the disease. *Clements* v. *The Queen* (Comp. Ct. Dunedin. August 25, 1953. Dalglish, J.)

Practice—Commencement of Action—Penal Compensation—Claim to be brought within Six Months after Date of Accident—Unlawful Stoppage of Weekly Payments not "reasonable cause" for Delay in commencing Action within Statutory Period—Workers' Compensation Act, 1922, s. 27 (4)—Workers' Compensation Amendment Act, 1945, s. 6 (4). The time within which action must be taken for the recovery of penal compensation under s. 6 (4) of the Workers' Compensation Amendment Act, 1945, is the same as for the recovery under s. 27 of the Workers' Compensation Act, 1922, of the compensation which should still be being paid. The unlawful ending of weekly payments is not a "reasonable cause," within the meaning of s. 27 (4) of the Workers' Compensation Act, 1922, for delay in commencing an action for compensation. On May 6, 1951, the plaintiff suffered injury to his right wrist by an accident which arose out of and in the course of his employment. He was paid compensation for some time and the last of those payments was made by the defendant's insurers on September 3, 1951. Two days later, the plaintiff saw the insurer's claims clerk who had before him a medical certificate certifying that plaintiff was fit to resume work on September 7, 1951. In response to a direct question on the subject, the plaintiff said that he would be starting work on the following Monday. The plaintiff was asked to sign a receipt in a form which acknowledged that the compensation then paid was in final settlement. This receipt and acknowledgment which was signed by the plaintiff did not, however, comply with s. 18 (2), and therefore was not binding on him. Plaintiff did not resume work, but the defendant's insurers knew nothing of this. Six weeks later the plaintiff again saw the claims clerk of the defendant's insurers. He brought a certificate from his local doctor, and said he was not fit for work. He was sent to the insurer's medical advisers. He was examined by three doctors, none of whom could find anything wrong with his wrist. The report from the third doctor was received early in December, and, on or about December 10, 1951, just after this report had been received the plaintiff was finally told that the insurers would pay no more compensation. The plaintiff still complained of pain in his wrist; and he consulted another doctor. He was first medically examined on February 12, 1951. An X-ray was obtained, and a few days later that doctor gave plaintiff a letter for the insurers. Plaintiff then, on February 18, 1951, again saw the claims clerk of the insurers, and he was referred to the defendant's solicitor, who told the plaintiff that, on the medical certificates which the insurers had, the defendant would not admit any liability, and he was told to consult a solicitor of his own. The plaintiff did not immediately take this advice, but he went to see the secretary of his union. He went to a solicitor of his own for the first time on March 14, 1952, a Friday. The writ was issued on March 17, the following Monday, the defendant's solicitor treating it as issued on March 14. On the basis that the writ was filed on March 14, 1952, it was issued six months and eleven days after the last payment of compensation, and some twenty-four days after it had been made clear to plaintiff that he would be paid no further payments.

After the writ was issued, the plaintiff underwent two operations to his wrist, and he claimed that, as a result of his accident, he suffered a permanent partial incapacity or an aggravation or acceleration of a condition in the wrist leading to a partial incapacity. *Held*, 1. That the fact that the weekly payments of compensation had been unlawfully ended was not a "reasonable cause," within the meaning of s. 27 (4) of the Workers' Compensation Act, 1922, for the delay until March 14, 1952, in the commencement of the proceedings; and no other reasonable cause for that delay had been shown. 2. That there were no grounds for the submission on the plaintiff's behalf that the Court should not allow a defendant to take advantage of his own wrong, so as to allow the plaintiff to commence his action at any time after the expiration of six months from the date of the last payment. *Colcord* v. *Neuchatel Asphalte Co. (Australasia) Proprietary, Ltd.* (Comp. Ct. Auckland. August 13, 1953. Dalglish, J.)

"IN CHARGE" OF A MOTOR-VEHICLE WHILE INTOXICATED.

Power to Cancel, etc., Driver's Licence.

By R. T. Dixon.

In a reserved judgment, *Police* v. *Yates*, Mr. S. S. Preston, S.M., has recently held that s. 40(*A*) of the Transport Act, 1949, (as inserted by s. 8(1) of the Transport Amendment Act, 1953), does not give the Court power of suspension, disqualification or endorsement in respect of the licence of a motorist who is convicted under that section.

Section 40(*A*) contains the newly-separated provisions relating to a person who is intoxicated while "in charge" of a motor-vehicle, but is not driving or attempting to drive the vehicle. This offence does not now involve imprisonment or obligatory cancellation of the driver's licence, and the monetary penalty is reduced.

The learned Magistrate's argument that there is also no optional power to deal with the driving licence may be summarized by the following extract from his judgment:

> Section 31(1) reads as follows:
>
> Subject to subsections two and three of section forty-six of this Act, the Court before which any person is convicted of an offence against this Part or Part III of this Act or of any other offence *in connection with the driving of a motor-vehicle* (other than a first or second offence consisting solely of exceeding any limit of speed)—
>
> (a) May . . . [Here follow the operative powers of suspension, disqualification, and endorsement].
>
> The vital words are "in connection with the driving of a motor-vehicle" and this expression must be taken to qualify not merely the preceding words "of any other offence", but the whole expression "an offence against this Part or Part III of this Act or of any other offence".
>
> This question seems only once to have been considered by the Courts in New Zealand, probably for the reason that the exercise of the discretionary power to cancel a licence would rarely, if ever, be used as a penalty for other than offences in connection with the driving of a motor-vehicle. The power has, however, been exercised in respect of an offence against s. 49 (refusing to give information as to identity of driver), but, on appeal, the disqualification was removed as an inappropriate penalty: *Willis* v. *MacLennan*, [1952] N.Z.L.R. 436.
>
> In that case, counsel for the appellant directed argument to show that, apart from the penalty of disqualification being appropriate, the Court had no power to disqualify under s. 31 for the particular offence. While, in the circumstances, the Court found it unnecessary to decide that legal point, doubt was nevertheless expressed that such power existed (*ibid.*, 437, per Sir Humphrey O'Leary, C.J.).

As there is no right of appeal in respect of failure by a Magistrate to exercise his power to cancel a driver's licence, and in view of the evident concern of the learned Magistrate that he found himself thus limited in his powers, the writer with the greatest respect advances two main arguments indicating that possibly a wrong conclusion has been arrived at in this case. The writer does so with less temerity in the knowledge that, as so often happens in traffic cases, the learned Magistrate was assisted by professional legal argument from the defence, but did not have this advantage in regard to the prosecution.

The first point to consider is the wording of s. 31(1) as quoted above, and particularly the words

> of an offence against this Part [Part II] or Part III of this Act or of any other offence in connection with the driving of a motor-vehicle.

It will be noted that the word "of" is repeated before the words "any other offence in connection with the driving of a motor-vehicle", and that the word can relate back only to the word "convicted".

Therefore, it can be argued with some assurance that the Legislature intended to apply the driver's-licence powers to deal with two types of offence: first, "an offence against this Part or Part III of this Act"; and, secondly, "any other offence in connection with the driving of a motor-vehicle". The word "other" in the last quotation could then be necessary as showing the intention to apply the driver's-licence powers to offences other than those described in Parts II and III, but only if those offences are "in connection with the driving of a motor-vehicle".

The argument that this is the correct interpretation is strengthened on consideration of the fact that the insertion of the words "this Part or Part III" would, on any other construction, be unnecessary.

It may be asked what offences connected with the driving of a motor-vehicle are to be found outside of Parts II and III of the Act. The answer is offences *inter alia*, in the Traffic Regulations, 1936. While regulations for purposes of interpretation are deemed to be part of the Act by which they are authorized, it is possible that the Legislature did not wish to leave the argument available that they cannot in general be deemed to be particular parts of an Act.

The second main argument has its basis in s. 46 of the Transport Act, 1949. This section makes it an offence

> If any person *uses* a motor-vehicle on any road without due care and attention or without reasonable consideration for other persons using the road . . .

The word "use" is defined in s. 2 as including not only driving but also includes (in relation to a vehicle) "permitting to be on any road"; and, to the writer's knowledge, the section is sometimes used for prosecution in such cases as parking without care where actual driving is not involved.

Subsection (2) of s. 46 enacts that:

> A first or second conviction for an offence under this section shall not render the offender liable to be disqualified under section thirty-one of this Act.—

with, of course, the necessary conclusion that offences after the second conviction will involve this liability.

In other words, "use" (which does not necessarily involve driving) of a motor-vehicle without due care and attention or without reasonable consideration for other road users does, after the second offence, bring in the application of s. 31.

Finally, it may be considered that, for many offences under Part II and Part III of the Act (e.g., failure to notify change of ownership, failure to produce a licence for inspection, permitting over-weight vehicle to be driven), cancellation etc. of a driver's licence would

be inapt. This view was indirectly alluded to by the learned Magistrate in his judgment.

The answer, of course, is that the powers under s. 13 are discretionary, and, on the basis of *Willis* v. *MacLennan* (*supra*), should be confined to cases which at least have some bearing on the driving or control of a motor-vehicle. It seems to the writer that a case may come under this category when a person, while in control of a motor-vehicle, renders himself unfit to drive it and sits in it, with a possibility that he may drive before he becomes able safely to do so.

THE RULE AGAINST PERPETUITIES.

I.—The Conveyancing Background of the Rule.

By Malcolm Buist, LL.M.

How far can a testator's hand reach into the future to control the destination of his property ? The answer of the law to this question is the well-known Rule against Perpetuities. The Courts have consistently set their face against the long-term or indefinite tying-up of assets, though the reasons behind their policy have varied from time to time as the social background of the nation has changed. In earlier days it would be said that land should not be rendered inalienable ; today we would say it is uneconomic for profit to be hoarded out of circulation indefinitely.

It may be suggested, without attempting a precise formulation, that the Rule inquires :

> " Is it certain that this estate or interest will vest in the donee, free from the settlor's control, within a period made up of not more than (i) the lifespan of some living person selected by the creator of the estate or interest, and (ii) an additional period of 21 years ? "

This precis does not mention the inclusion of a period of gestation where relevant, nor the fact that where there is no " life in being " the mere period of 21 years will be allowed, nor that the stated period commences when the instrument becomes operative, according as it is a will or a deed. However, it suggests a perspective from which to approach the Rule.

The Rule can be looked at from either end. The present owner will be restrained from controlling the property for an indefinite or unreasonable period, and, as a corollary, the succeeding owner must take within the time-limit allowed. In the first sense, the Rule may properly be thought of as a Rule against Perpetuities ; in the second sense, it is sometimes clearer to speak of it as the Rule against Remoteness of Vesting.

Whether dealing with attempts to reach out into the distant future, or with attempts to lay down some condition precedent (*e.g.* " to X. if he marries "), the Rule involves two main requirements, and both need to be kept in mind. We have already noted broadly what the Rule seeks to ascertain ; now we may consider its method. It asks two questions, first, " Does the period of time selected in this deed fall within the maximum limit allowed by law ? " and, secondly, " Must this gift vest, if at all, within the period lawfully chosen by the settlor ? "

Two classes of gift will be tested against these two questions, in turn. The first is a precedent clause from *Hayes and Jarman's Concise Forms of Wills*, 17th Ed. (1947), 234 :

> . . . In trust for the child if only one or all the children equally if more than one of my same daughter so that the interest or interests of such child or children shall be absolutely vested at the age of 25 years or such earlier age as such child or children respectively shall happen to have attained at the death of the survivor of my children and grandchildren who shall be living at the time of my death and the expiration of the term of 21 years afterwards.

Here the aim is to extend the vesting over a long period of time. The second class of gift to be tested arose in the case of *In re Stratheden, Alt* v. *Stratheden*, [1894] 3 Ch. 265, where an annuity of £100 was " to be provided to the Central London Rangers on the appointment of the next lieutenant-colonel ". Here the aim is to postpone the vesting pending the fulfilment of a condition. The Rule will be applied to prevent too long a suspension of the vesting.

Choice of Period.

First, then, " Does the period of time selected in this deed fall within the maximum limit allowed by law ? " In the above precedent clause, the first part of the period of time is marked out by the words, " . . . at the death of the survivor of my children and grandchildren who shall be living at the time of my death." Here the testator has selected those children and grandchildren born before his death who survive him. At the time his will comes into force, these will all be " lives in being ". Then he has stretched out to the limit by saying, in effect, " Out of this eligible group I select the one who longest outlives me." After thus choosing the most advantageous life in being, he adds the further period of twenty-one years, and so achieves his object.

It is of interest to see how this may work out. If what we may call the " marker "—the child or grandchild who, having been born during the testator's lifetime, longest outlives him—happens to have been born just before the testator dies, and lives to the age of 80 years, then the date of vesting is 101 years after the date of the testator's death. On the other hand, the lives in being may all be exhausted within say five years of the date of testator's death, and in that event the total period achieved is twenty-six years.

In *Scatterwood* v. *Edge*, (1697) 1 Salk. 229 ; 91 E.R. 203, *Powell*, J., said: " For let the lives be never so many, there must be a survivor, and so it is but the length of that life." This statement helps to make clear the real effect of setting aside a class of persons as lives in being.

In the other class of gift being investigated, *viz.* *In re Stratheden* (*supra*), no period of time has been mentioned by the creator of the trust. He has left it

Continued from cover i.

to the law to state the period, and, in the absence of a selected life in being, the mere period of 21 years from the commencement of the trust is permitted. The reason for this will be shown in a subsequent article, "The Conveyancing Origins of the Rule."

Periods That Failed.

Candy v. *Campbell*, (1834) 2 Cl. & Fin. 421 ; 6 E.R. 1213, illustrates a choice of period where the lives selected infringed the Rule because they included lives not "in being" at the date of the testator's death. The House of Lords considered the estate of John Harding, of Culworth, in the County of Northampton, who, by his last will dated January 3, 1826, gave and bequeathed *inter alia* as follows :

> "To my adopted daughter, commonly called Caroline Harding, the sum of £20,000 three per cent consols, and my house and landed property at Culworth, also that at Morton Pinkey ; but in case of her death without lawful issue, I then will the money so left to her to be equally divided betwixt my nephews and nieces who may be living at the time ; and the land etc. at Culworth to. . . .

Upon the testator's death, a few days later, Caroline Harding, who was an infant, claimed by her next friend an absolute interest in the legacy. She died in 1830, still an infant and unmarried. Their Lordships affirmed decisions of the lower Courts that the gifts over were too remote, so that Caroline took absolutely.

In effect, the words, "in case of her death without lawful issue" were construed in the sense of, "when both she and all her lawful issue shall have died". (It appears that this construction was exceptional : see *Jarman on Wills*, 8th Ed. (1951), 1845, and s. 29 of the Wills Act, 1837, and see also *Gray on Perpetuities*, 4th Ed. (1942), 207.) The gift over was not expressed to be "in case of her death without lawful issue *who shall have been living at the time of my death*", which would have restricted the "issue" to lives in being and so would have been valid. As expressed in the will, the nephews and nieces were to be kept out not only by issue of Caroline who were lives in being at the time of the testator's death but also by issue who were not lives in being because born after the testator's death and whose deaths might not take place till long after the expiration of 21 years from the deaths of the lives in being.

In *In re Stratheden* (*supra*) the period selected was, of course, indefinite, as no lieutenant-colonel might be appointed for many years, if indeed at all. It was therefore not "certain that the estate or interest would vest in the donee, free from the settlor's control", within the lawful period (here twenty-one years), and the gift was in breach of the Rule. In *Palmer* v. *Holford*, (1828) 4 Russ. 403, 406 ; 38 E.R. 857, 858, *Sir John Leach*, M.R., examining a case where no life in being had been designated, but a definite period of more than 21 years had been selected, said :

"The expressed intention of the testator is that all the children of his son Charles Thomas Hudson, other than an eldest son, should take, who were living at the expiration of 28 years, and that no person should take before that period. If Charles Thomas Hudson had such children born to him at any time within 7 years from the testator's death, then the vesting of the interests of such children, who were unborn at the death of the testator, would have been suspended for more than 21 years, and the gift therefore is too remote and void ; and the gifts over, not being to take effect until after the same period, are necessarily void also."

Much can be learned from the judgment of *Sir G. J. Turner*, V-C., in *Lachlan* v. *Reynolds*, (1852) 9 Hare 796, 798 ; 68 E.R. 738, 739, regarding the importance of selecting the correct period. The Vice-Chancellor said :

> Several questions of construction have been raised on this very obscure will. It is contended first that the testator having directed his property to be sold at the end of 30 years, and two thirds of it to be divided amongst his children living at that period, or their heirs, the gift is void for remoteness. It appears to me that this amounts to no more ["no" is omitted in the E.R. reprint] than a gift to such of several persons who may be living at the death of the testator as shall be living at the end of 30 years. The legacies are vested at the termination of a life in being at the death of the testator, and they are not therefore liable to any objection on the ground of remoteness.

Although the number of years referred to in *Palmer* v. *Holford* and in *Lachlan* v. *Reynolds* was in each case more than 21, the beneficiaries in the latter case were children of the testator and would thus inevitably be lives in being. This took the gift out of the class of *In re Stratheden*. By contrast, the beneficiaries in the former case were children of the testator's son, and some of these, not being lives in being, might not have been able to take within 21 years.

Choice of Vesting.

The second test question proposed was, "Must this gift vest, if at all, within the period lawfully chosen by the settlor ?" The draftsman, having laid down a period of time acceptable to the law, has to ensure that all vesting must take place within that period. Under the first test he has chosen his limit, now he must keep to it. For, as *Cresswell*, J., pointed out in *Dungannon* v. *Smith*, (1846) 12 Cl. & Fin. 546, 563 ; 8 E.R. 1523, 1530 :

> It is not sufficient that it may vest within that period ; it must be good in its creation ; and unless it is created in such terms that it cannot vest after the expiration of a life or lives in being, and 21 years, and the period allowed for gestation, it is not valid, and subsequent events cannot make it so.

In the precedent clause being used as an illustration, the words of vesting run, "so that the interest or interests of such child or children shall be absolutely vested at the age of twenty-five years". But some grandchildren might be born too late to attain the age of twenty-five years before the expiration of the period of time selected as the limit, viz. "at the death of the survivor of my children and grandchildren who shall be living at the time of my death and the expiration of the term of twenty-one years afterwards". An example of failure for this reason is *Leake* v. *Robinson*, (1817) 2 Mer. 363 ; 35 E.R. 979, and this case, together with the provisions of s. 6 of the Law Reform Act, 1944, by which such gifts are now modified, will be considered later. To avoid such failure the draftsman has, in the precedent, added the words, "or such earlier age as such child or children shall happen to have attained" etc., to enable such grandchildren to take under the age of twenty-five years when the permitted period runs out.

The choice of vesting in cases of the type of *In re Stratheden* was sufficiently discussed above, under the heading, "Periods that Failed". Although these cases should more logically have been held over until now, it was considered of practical value to use them to lead up to *Lachlan* v. *Reynolds*. This heading is therefore concluded with an interim summary of the position in respect of the precedent clause, as so far

examined: (*a*) In relation to the first requirement (that a lawful period be selected as the limit within which vesting may take place) there are grandchildren born *before* the testator dies, and the draftsman must be careful to use only these, out of all possible grandchildren, amongst the "markers" who measure out the life in being; (*b*) In relation to the second requirement (that all vesting that takes place must take place within that lawful period selected) there are grandchildren born *after* the testator dies, and the draftsman must be mindful that some of this second group may not reach the appointed age until after the selected limit of time has run out.

Vesting that Failed.

In *Leake* v. *Robinson* (*supra*) the will contained the following clause, which should be compared with the precedent clause above:

> For life to a grandson, William Rowe Robinson, and thereafter "to such child or children" [of the said grandson] "being a son or sons, who shall attain such age or ages of twenty-five years as aforesaid, and to such child or children, being a daughter or daughters, who shall attain such age or ages, or be married as aforesaid, his, her, or their heirs, executors, or administrators; if only one such child, or, having been more, if all but one should die before their shares should become payable as aforesaid, then the whole to such only, or surviving child."

After commenting that "wherever a testator gives to a parent for life, with remainder to his children, he does intend to include all the children such parent may have at any time", *Sir William Grant*, M.R., answered three questions: Who is to take? At what time do the interests vest? Is this within the law? On page 388 (988) he explained:

> Then assuming that after-born grandchildren [i.e. those born after the decease of William Rowe Robinson, the tenant for life] were to be let in, and that the vesting was not to take place till after 25, the consequence is that it might not take place till more than 21 years after a life or lives in being at the death of the testator. It was not at all disputed that the bequests must for that reason be wholly void, unless the Court can distinguish between the children born before and those born after, the testator's death. Upon what ground can that distinction rest? Not upon the intention of the testator; for we have already ascertained that all are included in the description he has given of the objects of his bounty. And all who were included in it were equally capable of taking. It is the period of vesting, and not the description of the legatees, that produces the incapacity. Now, how am I to ascertain in which part of the will it is that the testator has made the blunder which vitiates his bequests? He supposed that he could do legally all that he has done — that is, include after-born grandchildren, and also postpone the vesting till 25. But if he had been informed that he could not do both, can I say that the alteration he would have made would have been to leave out the after-born grandchildren, rather than to abridge the period of vesting? I should think quite the contrary . . . Perhaps it might have been as well if the Courts had originally held an executory devise transgressing the allowed limits to be void only for the excess, where that excess could, as in this case it can, be clearly ascertained. But the law is otherwise settled.

And so the law remained until the passing of s. 6 of the Law Reform Act, 1944 (corresponding to s. 163 of the Law of Property Act, 1925 (U.K.)), partly followed this suggestion.

(*To be concluded.*)

HALF PRICE DAY AT THE INNS OF COURT.

> The new President of The Law Society (England) suggested at the recent annual conference of the Society that national advertising should be employed as a method of selling the services of solicitors to the public. He added that the word "lawyer" used to suggest grimy offices choked with dust, old papers, and cobwebs, etc.
>
> News Item.

We think it quite fair
We should talk on the air
On the eve of the quarterly sittings,
To give 'em the wheeze
Of ridiculous fees
And our rooms with the chromium fittings.

Remorselessly hard
We have printed our card
And exhorted each litigant feller
To carefully choose
Or the chances he'll lose
And of *ex abundanti cautela.*

The paramount sin
Of the surfeit of gin
And the following motoring frolics—
Commit it with ease,
For our "pay as you please"
Is a blessing to all alcoholics.

We relish that claim
Of indelicate name—
I mean when the question is rather
Not "Which is the spouse
Who has ruined the house?"
But "Who is the putative father?".

A client will tell
How our methods excel
And how our opponent had quivered,
When in less than a week
From her talk to the "beak"
She was signed and was sealed and delivered.

Thus now you will know
Of our *status in quo*
And we trust you admire our discernment
So we think it is best
And we beg to suggest
It is time that we took the adjournment.

B.C.H.

CONSENTS OF LANDLORDS TO DEALINGS WITH LEASEES.

Statutory Restrictions on Landlord's Rights Binding on the Crown.

By E. C. Adams, LL.M.

As New Zealand conveyancers know, s. 19 of the Law Reform Act, 1936, provided that in all leases, whether made before or after the passing of that Act, containing a covenant condition or agreement against assigning, underletting, charging or parting with the possession of demised premises without licence or consent, such covenant, etc., should be deemed to be a subject to a proviso to the effect that such licence or consent was not to be unreasonably withheld. This proviso did not preclude the right of the landlord to require payment of a reasonable sum in respect of legal or other expenses incurred in connection with such licence or consent.

As pointed out in Mr. Willis's Supplement to the third edition of *Garrow's Real Property in New Zealand*, at p. 18, that section had no application to leases containing an *absolute* covenant not to assign. And, as Romer, L.J., observed in *F. W. Woolworth and Co., Ltd.* v. *Lambert*, [1936] 2 All E.R. 1523, 1540, the corresponding English section

> deals with covenants against assignment, and long before this Act ever came into force the difference between an absolute assignment not to assign and a covenant not to assign without the license or consent of the landlord was well recognized . . . Indeed, to hold otherwise, to accede to the argument addressed to us on this point, would be to disregard the words of the section altogether, namely, the words: "without license or consent". If every covenant not to assign is to be treated as a covenant not to assign without license and consent, then the words "without license and consent" in the subsection would be otiose and useless.

As pointed out in a leading article in this Journal, (1936) 12 New Zealand Law Journal, 274, this section probably did not apply to certain leases by a Maori Land Board under the Maori Land Acts.

There appears to be little doubt also that, as a general rule, it did not bind the Crown as lessor: see *Bombay Province* v. *Bombay Municipal Corporation*, [1947] A.C. 58; 62 T.L.R. 643, and see s. 5(*k*) of the Acts Interpretation Act, 1924. The general principle applicable in England, that for the Crown to be bound by a statute it must be expressly named therein or be bound by necessary implication, applies also to New Zealand legislation. Furthermore, to hold that the Crown is bound "by necessary implication", if it can be shown that the legislation cannot operate with reasonable efficiency unless the Crown is bound, is to whittle down the general principle, and is not supported by authority.

In 1950, the New Zealand Legislature apparently considered that it was wrong that the Crown should not be bound, for by s. 5(2) and the first Schedule to the Crown Proceedings Act, 1950, it was provided that Part VII of the Law Reform Act, 1936 (which comprised s. 19 of the Law Reform Act, 1936) should bind the Crown. The Legislature in 1950 must have considered that s. 19 of the Law Reform Act, 1936, was passed for the public good, and that it would be robbed of much of its beneficient effect, if it was not made to apply to the Crown as lessor or landlord.

The Crown Proceedings Act, 1950, came into force on January 1, 1952. A correspondent has quite rightly pointed out that s. 19 of the Law Reform Act, 1936, was repealed by the Property Law Act, 1952: see the Seventh Schedule to that Act. Section 19 of the Law Reform Act, 1936, is now s. 110 of the Property Law Act, 1952. The wording of s. 110 is precisely the same as that of s. 19 of the Law Reform Act, 1936, except that in subs. 2 there is a reference to s. 117 of the Property Law Act, 1952, instead of s. 93 of the Property Law Act, 1908. But the correspondent points out that it is not expressly stated in s. 110 of the Property Law Act, 1952, or in any other part of that statute that s. 110 is to bind the Crown; and he expresses the fear that s. 110 does not now bind the Crown. If that fear is justified, then the beneficient legislation introduced by s. 19 of the Law Reform Act, 1936, bound the Crown for only one year; for the Property Law Act, 1952, came into force on January 1, 1953.

It is clear, however, that the correspondent's fear is not justified. In considering the repeal of Part VII of the Law Reform Act, 1946, by the Property Law Act, 1952, we must take into consideration the provisions of the Acts Interpretation Act, 1924, especially ss. 18 and 21. Section 18 provides that a reference to or citation of any Act includes therein the citation of all subsequent enactments passed in amendment or substitution of the Act so referred to or cited, unless it is otherwise manifested in the context.

The Property Law Act, 1952, is in substitution, *inter alia*, for Part VII of the Law Reform Act, 1936, and there is nothing in the 1952 Act to suggest that there is a context to the contrary so as to bring into play the last words of s. 18 of the Acts Interpretation Act, 1924, "unless it is otherwise manifested to the contrary". Section 5(2) and the First Schedule to the Crown Proceedings Act, 1950, have not been repealed; and the reference therein to Part VII of the Law Reform Act, 1936, must therefore now be read as a reference to s. 110 of the Property Law Act, 1952. The position would be different, of course, if the Crown Proceedings Act, 1950, were repealed, and in the substituted Act there was no provision—similar to s. 5(2) of that Act and to the First Schedule thereto—containing an express reference to s. 110 of the Property Law Act, 1952.

The same reasoning must be applied to s. 21 of the Acts Interpretation Act, 1924. That section provides that *in every unrepealed Act* (which would include the Crown Proceedings Act, 1950) in which reference is made to any repealed Act such reference shall be construed as referring to any subsequent enactment passed in substitution for such repealed Act, unless it is otherwise manifested by the consent. All the provisions of such subsequent enactment (which in this case would be s. 110 of the Property Law Act, 1952), and of any enactment amending the same, shall as regards any subsequent transaction, matter, or thing, be deemed to have been applied, incorporated or referred to in the unrepealed Act. The words "in which reference to any repealed *Act*" in s. 21(1) of the Acts Interpretation Act, 1936, must include a section or any part of a repealed Act.

Therefore, it can be confidently asserted that the Crown is bound by s. 110 of the Property Law Act, 1952. Just as in the case of a private landlord, the Crown, as landlord, cannot unreasonably withhold its consent to an assignment, underletting, charging or parting with the possession of demised premises, if there is an express covenant or agreement to the effect that there shall be no such dealings with the lease without the license or consent of the landlord.

In these days when the Crown has entered into dealings with land to the same great extent as it has done in New Zealand, it appears only right that the Crown should be bound by the same rules as the subject is, especially in such matters as leases, mortgages, and sales of land. It will be recollected that, last year, the Crown was made to be bound by the provisions of the Industrial and Provident Societies Amendment Act, 1952, making compulsory registration of charges given by Societies registered under the Industrial and Provident Societies Act, 1908. It is also not without interest to observe that in the new Companies Bill introduced into Parliament last year (and referred to a special Parliamentary committee) there was cl. 113 which read: "This Act shall bind the Crown in respect of all charges to which the Crown is entitled, created or acquired by or on behalf of the Crown after the commencement of this Act."

LATIN.

A Reply to Mr. Parcell.

By E. M. Blaiklock, Litt.D., Professor of Classics,
Auckland University College.

Latin, as Mr. J. C. Parcell remarks, *ante*, p. 224, has been eliminated as an essential subject in the law course, and "those without have heaved a sigh of relief." One hurdle, in fact, between mediocrity and a cap and gown has been removed, and who shall grudge the less generously endowed their heartfelt echo of Mr. Parcell's sigh?

It is, of course, to be remembered that those who found a modest competence in an ancient language beyond achievement, also make heavy weather of Roman Law and Jurisprudence. Perhaps, pressure having thus far succeeded with authority, both useless subjects may be cleared from the country law clerk's laboured path. But, of what avail, when statistics prove that the same group seldom shines in the more formal subjects of the law degree? The suspicion, indeed, haunts the academic mind that we have among them those to whom discerning clients in later years would hesitate to entrust tasks of law which make demands upon quick intelligence and wit.

It is not, however, to stifle or to echo Mr. Parcell's sigh that I write. I find the more intelligent law students still in my class-room, and I am spared the pain of the enduring faces which once lined the back bench. I am prompted to write by Mr. Parcell's naive (or should I say shocking?) discipleship of Spengler.

Mr. Parcell, I imagine, intended his article to be a statement of personal faith, rather than the presentation of an opinion on a highly controversial issue. Otherwise, I am sure, he would have been more careful to avoid the invalidation of a whole argument by an unsupported and easily refuted assertion. "Spengler," he writes, "and his authority in this regard is uncontradicted . . . ". Mr. Parcell may have read Spengler, but he has obviously read nothing of what Spengler's critics have to say of the arch-prophet of Prussianism. There are, no doubt, ex-Nazis who retain a smouldering faith in Spengler's Dionysism, who still "think with the blood," and see, as Spengler saw, the future in the hands of the Genghis Khans and Napoleons, those "beings of a higher order," and their "inspired mass units," such as those which flung out hand and chest under the swastikas at Nuremberg. There may be such, but, in the minds of many, a less crowded scene at Nuremberg blots out the memory of Spengler's crowds, "sensitive like human and animal thoroughbreds to the effect of bright colours, decorations, costume and uniform." And with the refutation of the doctrine goes the destruction of its author's authority. If Mr. Parcell read as far as Volume II, he would have found as early as page 17 the astounding remark of his hero: "In the history of actuality Archimedes, for all his scientific discoveries, was probably less effective than the soldier who killed him in the storming of Syracuse."

As one of the authorities whom Mr. Parcell has so hastily overlooked remarks: "Perhaps after this the appropriate comment is the first line of Ophelia's lament: 'Oh, what a noble mind is here o'erthrown.' In Spengler the Renaissance confidence in man and the resourcefulness of the human intellect sickens into something cynical and sinister. Intellect surrenders to Instinct, Will to Necessity, and the proud pageant of human progress becomes a circuitous route-march 'to dusty death'".

A doubtful champion, to be sure, for the opponents of Latin, unless, accepting glassy-eyed their prophet's command to self-immolation, they see in the uprooting of yet another foundation of our culture a further step in the pre-ordained "decline of the West".

It seems scarcely worth while, after this exposure of the bases of Mr. Parcell's argument, to deal with the super-structure, but for completeness a few words may be added. No one with any knowledge at all of history would accept his odd doctrine of the incommunicability of culture. Consider the heritage of Palestine. From Hebraism emerged Christianity which, interpreted in the terms of Greek thought by that heir to two cultures, Paul of Tarsus, became a conquering and a transforming force in history. That much must be admitted alike by those who deplore and those who applaud the influence of the Christian Church.

Nor would the fruitful union of Greece and Palestine have been possible had it not been for the astonishing phenomenon of Hellenism. Greek thought, and Greek speech, following in the wake of Alexander, transformed the Mediterranean world. The same influence, both for good and ill, conditioned and determined what Rome was to contribute to European history. Old Cato, battling in the second century before Christ against the

(*Continued on p. 304*)

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

3-D Films.—New Zealand is probably the first country in the Commonwealth to give judicial attention to those three-dimensional films known in the trade as 3-D's or "depthies". The judgment of Astley, S. M., delivered at Auckland, in *Director of Price Control* v. *Amalgamated Theatres, Ltd.*, deals with one of the defences raised—namely, that 3-D's cannot properly be called motion pictures. They consist of two similar films projected upon the screen together, one being slightly off-set to and superimposed upon the other so that when viewed without additional aid the resultant picture on the screen is blurred and indistinct. Patrons are therefore supplied with polaroid glass spectacles which have the effect of serving to accept the correct image intended for each eye while rejecting the other. The result is the well-known stereoscope effect or depth in the single image viewed by the beholder. The force of the defence seems to have been diminished or lost altogether by the action of the makers of the films in their instructions to exhibitors, and by the exhibitors themselves, in their newspaper advertisements (colossal, stupendous, and exciting as they otherwise were) by describing the "depthies" as "full length 3-Dimensional Motion Pictures". It had been shown to the Price Tribunal that of some 70,000 spectacles lent to the public about one half had disappeared, but this fact had failed altogether to touch the Tribunal's tender heart.

Feves or Feveroles.—In Morocco, Algeria, and Tunisia, horsebeans are grown and they are grouped into "feves" which are of large size, "feveroles" which are of medium size, and "fevettes" which are very small. The English word "horsebeans" covers all three varieties; and in *F. E. Rose, Ltd.* v. *Wm. H. Penn, Ltd.*, [1953] 2 All E.R. 739, trouble arose because businessmen in England did not realise that there was any difference between the three. The medium and small size were more valuable than the large ones. Unaware that feveroles were a special medium size of horsebeans, the buyers asked the sellers what they were and were informed that feveroles and horsebeans were the same thing as, indeed, in a loose sense, they are. Under this misapprehension shared by both parties, the buyers entered into an oral agreement for the purchase from the sellers of five hundred tons of Tunisian horsebeans, the agreement being incorporated in a written contract. Subsequently, the buyers brought an action for the rectification of the written contract by the addition of the word "feveroles" after the word "Tunisian horsebeans". Pilcher, J. made an order granting the rectification, but the Court of Appeal (Singleton, Denning and Morris, L. JJ.) reversed the order, holding that the oral agreement was for the sale of horsebeans and, notwithstanding the mutual mistake as to the meaning of "feveroles" and "horsebeans", as the written contract correctly expressed that oral agreement, it could not be rectified. It is not clear from the judgment that "feves", or big fellows, which in the beans supplied were "more than somewhat" are what we call "broad beans" or "broads," which again in the language of Damon Runyon means "dolls that pass in the night".

The Uses of Advertisement.—The newly-elected President of The Law Society (England), Mr. William Charles Crocker, is widely known not only as an expert in insurance law but as a powerful factor in the bringing to justice of a number of criminals who sought to defraud insurance companies. "It is a most defamatory statement to say that as a lawyer I am a good detective," he is quoted as saying when a newspaper eulogistically referred to his work in the field of detection of insurance fraud. In face of the strongly-worded warnings to the Bar by Sir Hartley Shawcross, President of the Council, against the sin of advertising, Mr. Crocker startled the more conservative members when, at the Annual Meeting of his Society, he suggested that national advertising be employed as a means of selling the services of solicitors to the public.

> "I make no excuse for using so commercial an expression about our profession. We do, in fact, make a living by selling our services to the community. John Citizen with a toothache turns quite naturally to his dentist for relief. If he could be taught just as naturally to submit to a solicitor all those business, social and domestic conumdrums to which we hold the answers, how enormously would our profession expand and how enormously would the public benefit."

The idea which he invited his fellow-lawyers to consider is not devoid of merit. While it is true enough that a solicitor's best advertisement is his energy and efficiency, solicitors as a class are still identified in the mind of a large section of the public with ancient tomes and precedents, and their value in a modern world could be more greatly stressed without detriment to their ethical code.

Beer Note.—The Government Statistician (G. E. F. Wood) has informed the president of the Court of Arbitration that beer is not a food, at all events statistically. If the figures produced the other day at Dunedin are to be accepted, beer in this country is certainly big business, with the Government as senior partner in the enterprise. A swallow does not make a summer, but it adds appreciably to taxation. Counsel: "Do you drink?" Witness of beer-sodden appearance: "That is my business." Counsel: "Have you any other?" This is an old joke, still capable, however, of standing on its own feet, and ascribed *inter alia* to Lord Carson when at the Bar. In delivering the judgment of the Court this month in *Reg.* v. *Cornelius Bartholomew Bryan*, Hay, J. refers to the inhabitants of two proximate cottages at Huia as living "on neighbourly terms, their chief preoccupation in life apparently being the consumption of liquor". This seems to have been beer, and its effect upon the prisoner during his constant orgies at his isolated seaside locality was to cause him to bump his lady friends' head on the floor. Upon being acquitted of murder but convicted of manslaughter, the trial Judge imposed a sentence of life imprisonment, stating that a term of imprisonment appropriate to the crime would probably exceed the number of years the prisoner, aged 69, had to live. The Court of Appeal considered a definite term should have been imposed and fixed it at seven years' imprisonment with hard labour.

Latin: A Reply to Mr. Parcell.

(*Concluded from p. 302.*)

infiltration of Greece, had no doubts at all about the potency of one way of life to influence another. From the narrower point of view the dour conservative was right, for the decay of Rome's peculiar ethos dates precisely from that point of time.

Rome, on the other hand, could not escape her destiny. When, as a Roman put it, " captive Greece took captive her fierce conqueror," the contact was fertile. Roman literature, expressive though it is of an Italian spirit, found form and utterance through the influence of Greece. Under the spell from the Aegean, Rome in more than one way became articulate. It is no accident that a cultural watershed to-day divides Europe along the line of the Rhine and the Danube. The message first of Greece then of Palestine, modified and ministered by Rome, formed life and thought west and south of that dividing line for significant centuries. Through those lands, too, ran the mighty influence of the Renaissance, when dead Greece, springing to life again, changed the face of Europe and initiated the modern age. What deplorable nonsense it is to deny the might and power of the world's dynamic cultures.

One more misleading statement must be mentioned. I know of no authority who would subscribe to Mr. Parcell's pessimistic theory of language. Of course, the speech of men is saturated with the history and experience of peoples and of centuries. Therein lies the fascination of linguistic studies. It is this fact which makes Latin and Greek such superb educational instruments. But, if Mr. Parcell's notion of semantics is true, all communication is suspect, the past is dumb, and the nations of the world forever divided. Literature will be gravely menaced, for Chaucer will be as incomprehensible as Cicero. Chaucer, in fact, is more widely separated from us in culture and the pattern of his thought than Marcus Tullius.

The chief value of the study of Latin in the law course is, indeed, found precisely here. Translation demands the minute examination of words. Syntax often reflects an attitude towards truth. Even a little acquaintance with the difficulty of transferring thought from a modern to an ancient medium involves the cultivation of that salutary awareness of the nature of language which is an invaluable part of a lawyer's equipment.

Mr. Parcell may be left to deal with his own straw man of his last major paragraph. Who has ever maintained that English Law derives from Roman Law, and that the study of Latin follows as a necessity ? In spite of the odd limitations Mr. Parcell places upon the modern intelligence, there are none the less modern legal scholars who could quite confidently administer Roman and Greek law, just as there are linguists who have some knowledge of the meaning, etymology and semantics of *lex*, *iustitia* and *iurisprudentia*.

A FURTHER COMMENTARY.

LETTER FROM PROFESSOR H. A. MURRAY, M.A.,
PROFESSOR OF CLASSICS, VICTORIA UNIVERSITY COLLEGE.

The Editor,
New Zealand Law Journal,
P.O. Box 472,
WELLINGTON.

Sir,

I have read with great interest the article " Latin " in your issue of 4th August, in which, apart perhaps from Roman Art and Architecture an argument against the study of Roman civilisation, is based on Spengler's theory of the isolation of cultures.

It is a pity perhaps that your contributor did not attempt to evaluate this particular thesis as a preface to his argument. Spengler's massive book is packed full of ideas, but your contributor has selected one which I think it fair to say is far from having received general acceptance, at least among historians. One could quote against Spengler, Eduard Meyer, for whom Spengler had a profound respect, Toynbee, and Collingwood.

Spengler's theory would be very difficult to prove. An interesting discussion of it will be found in " Oswald Spengler : A Critical Estimate " by H. Stuart Hughes (Scribners, 1952). It would not be unjust to say that Spengler himself feels that a rigid adherence to the theory would make it impossible for anyone to make any significant statement about a culture other than his own, and at the same time he does allow comparable phenomena in the development of civilisations, and in Volume I, pp. 40-41 of the English translation draws a parallel with Caesar's Rome.

One important point made by your contributor was well worthy of recall, the colour and associations which the speakers of ancient tongues felt behind words and phrases, and those which we feel in reading the literature of these tongues. But it is not impossible to argue, in spite of Spengler, that a discriminating study of this kind can widen mental horizons, by the disciplined use of the imagination. I should have thought that the same difficulty arose in studying the various tongues used by Faustian man. Professor Gilbert Murray's introductory essay to Bywater's translation of "Aristotle, On the Art of Poetry " seems to me to have much that is interesting and useful on this very topic.

Yours faithfully,
H. A. MURRAY.

95 Northland Road,
Wellington,
September, 1953.