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PRINCIPLES OF VALUATION: DEPRECIATION REPLACEMENT COST METHOD.

A VALUABLE pronouncement regarding the principles to be applied to the valuation of chattels on the depreciation replacement cost method appears in the Report given in June last by the Auckland Harbour Board Compensation Commission, Mr. S. L. Paterson, S.M. In the ordinary course, the reasons given by Mr. Paterson for the Commission's findings will not appear in any series of law reports. We feel that much assistance will be given to the profession by summarizing the portions of the Report which deal exclusively with matters of law.

Under the Auckland Harbour Bridge Act, 1950, provision was made for the constitution of the Auckland Harbour Bridge Authority, and for the construction, maintenance, management, and control by the Authority of a bridge across the Waitemata Harbour. By Part VII of the Act, provision was made for the appointment of a Commission or Commissions to assess, in accordance with the provisions of that part of the Act, the amount of compensation payable to the Devonport Steam Ferry Co., Ltd., in respect of any claim submitted to the Authority by the company under ss. 66, 68 and 70 of the Act in respect of loss incurred through the operation of the bridge. A claim pursuant to such provisions was duly made; and, in order to determine the questions arising and then ripe for determination, His Excellency the Governor-General by Order in Council dated August 29, 1951, appointed Mr. S. L. Paterson, S.M., to be a Commission under the Commissions of Inquiry Act, 1908, to inquire into and report upon the following matters:

1. The fair commercial value as at the first day of December, 1950, and as in actual operation at that date of the fleet of vessels owned by the said Company.

2. The amount of capital expenditure incurred by the said Company between the first day of December, 1950, and the 18th day of April, 1951 (being the date of the first meeting of the Authority), in maintaining or augmenting its fleet of vessels in such a manner as to ensure the continuance of an adequate harbour service.

3. The amount of any special depreciation reserve established by the said Company and existing on the first day of December, 1950, by way of provision for loss anticipated to arise in consequence of the operation of the said Bridge.

During the course of the hearing before the Commission, agreement was reached on Questions 2 and 3; and, in result, the evidence was directed principally to the first question. At the hearing, disputes arose between the parties as to the interpretation of Part VII of the Act and as to the relevancy of certain evidence tendered before the Commission; and, at the conclusion of the hearing, the Commission was requested by counsel for the Authority to refer such disputed points of law to the Supreme Court for decision. This the Commission agreed to do, and the inquiry was adjourned to await the decision of the Court. It was arranged that fresh evidence should be called if the decision of the Supreme Court made it necessary or desirable.

The Commission stated a Case for the opinion of the Supreme Court. The Case was considered, and argument was submitted to the Court (Northcroft, Finlay, Stanton, and North, JJ.), and its judgment was delivered by Stanton, J.: *In re Auckland Harbour Bridge Commission*, [1953] N.Z.L.R. 48. The effect of this judgment may be summarized by saying that the Court held that the proper construction to be placed on s. 68 (1) (*a*) of the Auckland Harbour Bridge Act, 1950, is: (*a*) The Compensation Assessment Commission is to determine the fair commercial value of the Devonport Steam Ferry Co., Ltd.'s fleet of vessels, but without any allowance for goodwill or loss of profits; (*b*) In making such valuation, every proper method of valuation is available to the Commission, provided it is not based on a capitalization of the profits from the operation of the vessels. The method of replacement cost less depreciation and obsolesence, while a proper method to use, does not necessarily mean, as a starting-point, replacement cost as at December 1, 1950 (the date of the passing of the statute), with an allowance for depreciation and obsolescence. The Commission should consider also original cost, and the question of averaging costs over a period, and it should determine the period. These and all other relevant circumstances (always excluding goodwill—that is, profit-earning capacity) should be given their proper weight, so that the ultimate figure arrived at satisfies the Commission that it is a fair commercial value of the vessels.

In an Appendix to the Commission's Report, Mr. Paterson, S.M., stated the principles upon which he had based his findings as to the value of the Ferry Company's fleet, and also his reasons for those findings.

During the hearing, it was admitted by both parties that there was no available market for the company's fleet. There being no available market, Sir Wilfrid Sim, Q.C., for the company, submitted that the principle to be applied in ascertaining the value was the "depreciated replacement cost". The Bridge Authority on the other hand submitted that the principle was "the

capitalized value of the fleet as a going concern and on a profit earning basis." It conceded that, in ascertaining the value of the fleet as a going concern, the Commission could take into consideration original construction cost and also depreciated replacement costs of the vessels, but only in conjunction with their profit-earning capacity.

Referring to the judgment of the Court, Mr. Paterson said:

> For present purposes, it is sufficient to quote the answers given by the Court, to the questions as to the principles to be applied by the Commission, in determining the value in issue.
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> 1. The proper construction to be placed on s. 68(1)(*a*) of the Auckland Harbour Bridge Act, 1950, is:
>
> (*a*) The Commission is to determine the fair commercial value of the Ferry Company's fleet of vessels but without any allowance for goodwill or loss of profits:
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> (*b*) In making such valuation every proper method of valuation is available to the Commission, provided it is not based on a capitalization of the profits from the operation of the vessels.
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> 2. Neither of the methods of assessing value submitted by the Company nor the Authority completely complies with the requirement of the Act. The method of replacement cost less depreciation and obsolescence, while a proper method to use does not necessarily mean as a starting point replacement cost as at December 1, 1950, with an allowance for depreciation and obsolescence. The Commission should consider also original cost, the question of averaging costs over a period, and, if so, what period. These and all other relevant circumstances (always excluding goodwill) should be given their proper weight so that the ultimate figure arrived at satisfies the Commission that it is a fair commercial value of the vessels.
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> After careful consideration of the judgment of the Court and the evidence before me, I am confirmed in my original opinion expressed during the hearing that the proper method of assessing the value of the Company's fleet in accordance with the Act is that of depreciated replacement cost as at the fixed date. I have accordingly made my finding upon this principle, for the following reasons:
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> (*a*) The Court has held that every proper method of valuation is open to the Commission provided it is not based upon a capitalization of the profits;
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> (*b*) The Court has held that such method is a proper method, subject to the qualifications mentioned;
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> (*c*) It is a method which has commonly been used for the valuation of ships over a long period of years in cases where there was no available market;
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> (*d*) It was the method used by all the witnesses as to value called by both parties other than accountancy witnesses.

By way of elaboration and illustration, Mr. Paterson cited *J. Patrick and Co., Ltd.* v. *Minister for the Navy*, [1944] A.L.R. 254, 258, where Williams, J., said:

> There is a close connection between the rise and fall of ship-building costs and the rise and fall of secondhand vessels . . . . The best commencing point in order to value the *Corrimal* on 10th November, 1942, is her replacement cost . . . less depreciation for her age.

The principal witness called for the Bridge Authority, Mr. Breeze, said:

> I have based my values on the cost to build the ships, and complete them ready for service, less an amount for depreciation in accordance with the age and condition of the ship. The value most commonly used in valuing ships is the market value. The market value may be greater or less than the value based on the cost of the building. It depends often upon the demand there is at the moment for ships, and on the opportunities there are for profitable trading. I believe it to be generally agreed, that, although market value fluctuates at times below and above the costs of building, it settles down sooner or later approximating costs to build.

Mr. Paterson said that he had given considerable thought to the qualifications of the depreciated replacement cost mentioned by the Supreme Court—namely, the consideration to be given to original or historic cost, and to averaging costs over a period and to other relevant circumstances. The learned Commissioner continued:

> It seems to me that whether or not the depreciated replacement cost be calculated from replacement cost as at the given date or from original cost, it is the former which is the dominating factor, because the original cost must be related, to the cost which would have been incurred, had the object of the valuation been erected at the given date. Whichever method of calculation is used, the result should be approximately the same provided the data are correct. I think this follows from the dictum of Lord Porter in *Montreal* v. *Sun Life Assurance Co. of Canada*, [1952] 2 D.L.R. 81, 91, 92:
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> If however a building has been erected over a number of years and its value has to be ascertained at a particular point of time allowance must be made for an increase or decrease in the cost of construction at the times at which it was built as compared with the cost which would have been incurred if it had been erected at the point of time as at which the value is to be ascertained, and this factor must admittedly be taken into account.
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> Where, as in the present case, there is a substantial lapse of time between the date of original construction and the date of valuation, it is manifest that the original cost can have little bearing upon the value as at the given date, and that it is simpler and more practical to start from the replacement cost as at that date than to start at the original cost and work up to the actual replacement cost following the fluctuations of ship-building costs through the years. In *The "Iron-master"*, (1859) Swab. 441; 166 E.R. 1206, it was said that, in the case of ships, the value of which is constantly changing, original cost, though it cannot altogether be disregarded, is of little weight. In the present case, where the ages of the ships range from 48 to 15 years, and several were acquired as second-hand vessels, it can have even less weight. Indeed, as will be seen, all the valuers giving evidence disregarded original costs except in the cases of the two ships taken as standards or controls.

The learned Commissioner said that he could not see any possibility, on the evidence, of averaging costs over a period. The averaging of costs in the *National Telephone Co., Ltd.* v. *Postmaster-General*, (1913) 29 T.L.R. 190, referred to by the Supreme Court, was done on account of the peculiar facts thereof. It was done by the claimant in formulating its claim, and was acquiesed in by the respondent and by the Arbitrators. It was, however, what was described by Lawrence, J., as "a perfectly unique experience" comprising, as it did, the valuation of a £12,000,000 undertaking constructed by the company's own employees continuously over a long period of years. "No contractor called before us," said Lawrence, J., "had had any experience extending beyond mere fragments of similar works" (*ibid.*, 193). Mr. Paterson continued:

> This is a very different thing from the valuation of the products of a well organized and established industry like the ship-building industry. If the fixed date for valuation had been a time of sudden slump or boom which could not have been expected to continue, then the question of averaging costs might well have arisen, because considerations of "Fair Commercial value" in themselves would eliminate the chance that the company should either be penalized by, or make an undue profit out of, a fortuitous circumstance. For example, one witness referred to an authority on costs which showed that the estimated price for a standard ship had risen steadily from £25.25 per ton d.w. in 1945 to £41.5 per ton at June 30, 1949, had dropped to £31.5, as at June 30, 1950, and had risen to £58 as at June 30, 1951. In this case had the fixed date for valuation been June 30, 1950, there would have been a case for averaging costs. It is significant that the cost of building such a ship as at June 30, 1950, was quoted at £42 per ton, and that the price for such a ship ready built had at December 31, 1950, risen from £31.5 in June to £47.5.

From the evidence before him, the learned Commissioner was satisfied that the fair commercial value of the Ferry Company's fleet as at December 1, 1950, could be arrived at by depreciating the replacement cost as at that date, because, although shipbuilding costs

were then high, they were rising and continued to rise, and there was no prospect of their coming down.

A table of ship-building costs from 1945 to 1951 quoted in an article in a weekly shipping journal, *Fairplay*, which the witnesses for both sides regarded as authoritative, showed that, while the increase in costs from 1945 to 1948 had been fairly constant, between June, 1949, and June, 1950, the cost was stable at £42 per ton d.w. Mr. Paterson inferred from other information to be gathered from that journal that, after this period of semi-stability, costs began to rise soon after June, 1950, due to increases in wages and costs of materials, particularly steel. The fact was that, between April, 1948, and April, 1950, the average weekly wage paid in the ship-building industry was constant at 151s.6d. although the standard wage increased from 104s. to 109s. The foregoing considerations, according to the evidence, were more or less reflected in New Zealand ship-building costs.

After considering the evidence given before the Commission, the learned Commissioner was impelled to the opinion that values based on costs as at December, 1950, might be considered fair commercial values. He proceeded:

> In arriving at the value of the company's fleet in accordance with the statute, I have given consideration to all matters I have considered relevant, and, in addition to those already mentioned, the following may be considered "other relevant circumstances" within the meaning of the Full Court's direction, *viz.*, other estimates of value, amount of insurance on the fleet, condition of vessels, tenders and estimates for the building of similar ships, depreciation and obsolescence. I have been largely guided by the judgment of the Privy Council in the case of *Montreal* v. *Sun Life Assurance Co. of Canada*, [1952] 2 D.L.R. 81, in which Lord Porter authoritatively reviewed the underlying principles for the ascertainment of the value at a given date of buildings for which there was no available market. These principles apply equally to the valuation of ships.
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> The first principle underlying the use of depreciated replacement cost as a measure of value, a principle which should never be lost sight of—is, that it is an indirect method of arriving at what the market value of the asset would be if such a market existed. "The ultimate aim is to find the exchange value of the property, *i.e.*, the price at which the property is saleable". In order to do so a market is, of necessity, assumed as suggested in *Royal Motor-bus Co., Ltd.* v. *Auckland City Council*, [1927] N.Z.L.R. 423. The process of assuming a market is thus described by Lord Porter in the *Sun Life Assurance Co.* case, [1952] 2 D.L.R. 81, 90:
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> > What that sum (*i.e.*, the sum at which the property is saleable) would be is, as the authorities have pointed out, best ascertained either by regarding him as one of the possible purchasers, or by estimating what he would be willing to expend on a building to replace that which is being valued. But the owner must be regarded like any other purchaser and the price he would give calculated not upon any subjective value to him but upon ordinary principles, *i.e.*, what he would be prepared to pay, if he was entering the market, for a building to meet his requirements, or would be willing to expend in erecting a building in place of that which is being assessed.
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> From this follows the subsidiary principle quoted by the Supreme Court.:
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> > The ultimate object being to find the amount which a willing buyer and seller would agree upon, it by no means follows that the owner, even regarded as a potential buyer, would pay the price originally expended or take up another line of approach, that if he had to re-erect the building at the time of the assessment he would erect one of the same form or incur the same expenditure.

The learned Commissioner thought that the case put forward for the Ferry Company tended to overlook these principles, and to be presented more as an actual appraisement of the replacement cost of the vessels if they were rebuilt in exactly the same form, although it was conceded that, to use the words of Lord Dunedin in *Melbourne Tramway and Omnibus Co.* v. *Tramway Board*, [1919] A.C. 667, the Commission was master of the situation, and its duty was, between the extremes, to fix such value as would effect an equitable settlement.

In the *Sun Life Assurance Co.* case, [1952] 2 D.L.R. 81, 91, three methods are described of arriving at replacement value: (*a*) by calculation from the actual cost; (*b*) by appraisal of the material and labour; and (*c*) by multiplication of the cubic content of the building by its cost per cubic foot according to the materials and method of construction, making, whichever method is used, a due allowance for cost variation where the value has to be ascertained at a particular point of time.

After saying that the valuation of the Ferry's Company's fleet presented a more difficult and complex problem than the valuation of a single building, and, reviewing the evidence generally, the Commissioner said that the methods adopted by the witnesses for the company, whose evidence he accepted as being correct, in assessing the replacement cost of the vessels comprising the fleet was as follows: In the case of the vehicular ferries other than the two steel vessels, the *Korea* was taken as the standard vessel. Her original cost was known, and details thereof were available. These costs were related to costs of materials and labour as at the fixed date. From the total estimated cost as at that date, the cost per ton was ascertained, and applied to the known tonnage of the other ferries, due variants and allowances being made to meet peculiarities of construction and design. In the case of the passenger ferries, the same method was adopted. The *Korea* was again taken, and to the cost of her hull was added the replacement cost of the superstructure of the *Takapuna*, and the cost per ton applied to the other passenger ferries. The *Takapuna* was taken as the standard for this purpose because of the similarity of her hull to that of the *Korea*. He proceeded:

> The method thus used resulted in the ascertainment of the replacement cost of the fleet in the same materials as those actually used in its construction with certain qualifications. The two steel ferries were not included. The *Korea* was the only vessel of the fleet without sheathing, and the cost of this had to be added in respect of the other ships. Most of the ships were of composite construction. Those of wooden frame construction, *e.g.*, *Albatross* and *Kestrel* were estimated as if they had been constructed with steel frames because the material for such wooden frames was no longer available at the fixed date, and if it were, its cost would put wooden frames out of the question. Then the *Pupuke* was built by a special form of construction known as "*Diagonal*", which was estimated to be ten per cent. more costly than composite construction. No addition was made in respect of this as I considered it to come within the extract from *Montreal* v. *Sun Life Assurance Co. of Canada*, [1952] 2 D.L.R. 81, quoted by the Supreme Court in its judgment.
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> The replacement costs of the *Alexander Allison* and the *Ewen Allison*, the two steel vehicular ferries, were ascertained separately. These two vessels were bought by the Ferry Company in 1946 from the Navy at a realization sale of surplus naval stores in Australia. They had been built in Sydney in 1930, but their original construction cost was not before the Commission. Their prices were £21,500 and £19,500 respectively and the sum of £20,500 was spent on each to adapt them to the company's requirements. No particulars of this expenditure were before the Commission, so that it is impossible to say how much of the expenditure was due to war damage, ordinary repair, deferred maintenance, alteration, and fitting for sailing across to Auckland. Their replacement cost was therefore based upon the estimate made by Seagar Bros., Limited, for the steel passenger ferry above referred to in 1947 with the necessary variants and allowances and related to 1950 costs.

Mr. Paterson said further:

> In the depreciated replacement cost method of valuation, the replacement cost is reduced in the ratio in which the age bears

to the life of the asset. When applied to ships, the practice is to ascertain the physical life of the ship. In doing so it is proved or assumed that it has at all times been properly maintained, and will be so maintained for the remainder of its life. The physical life of the ship is the period over which the vessel, if so maintained, will continue to maintain its particular service, and its age is the period over which it has already performed that service. Due allowance however must be made for all proved or known defects. This method disregards obsolescence except in so far as it may be considered as an allowance to be made for a defect other than a defect affecting the physical life of the ship.

Authorities on obsolescence are scarce. In its judgment, [1953] N.Z.L.R. 48, 61, the Supreme Court said with regard to obsolescence:

> In our opinion, obsolescence as such arises in the present case only if it be established on the evidence that particular vessels in the fleet are, by reason of age and other considerations, less efficient than the more modern vessels: see *Toronto City Corporation* v. *Toronto Railway Corporation*, [1925] A.C. 177, 184, 185.
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> Where obsolescence arises merely by reason of age, then it seems to me that it is sufficiently provided for by the ordinary depreciation according to age. The relative spheres of depreciation and obsolescence have been recently discussed in the case of *The Queen* v. *Sisters of Charity*, [1952] 3 D.L.R. 358, 370, where it was said:
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> > Depreciation means diminution in value, and the diminution may be due either to physical deterioration, commonly called depreciation by wear and tear, or simply depreciation, or to functional deterioration or reduced usability by reason of factors other than wear and tear, commonly referred to as obsolescence, or to both. Frequently obsolescence is more important than depreciation by wear and tear but both must be considered together in a proper appraisal of value.

The learned Commissioner said that he had given careful consideration to whether or not any allowance should be made for obsolescence, and he had come to the conclusion that in so far as there was any obsolescence it was of relatively little importance; and, so far as it did occur, it was included in the depreciation for age, being due rather to the passing of time, than to reduced usability for the purpose for which the vessels are used. It is a gradual process and coincident with the ageing of the vessel. The evidence showed that the usability of the vessels of the fleet had not been reduced by factors other than ordinary wear and tear. There had been no material alteration in the basic design of the vessels over the duration of their lives.

In depreciating the replacement cost of the vessels, the life of each was taken as 45 years. Four per centum was deducted from the total cost as being the residual or constant break-up value of the vessel at the end of its estimated life. This is in accordance with British income-tax practice. After deduction of this amount the balance was depreciated by one forty-fifth for each year of its age, and the amount of the residual value added. The result was the value of the vessel at the given date. The application of this method to the Ferry Company's fleet is set out fully in the schedule appended to the Report.

Forty-five years was the effective or economic life of each vessel upon which the Company based its claim, and there was ample evidence to support this. It was common ground that the economic life of each vessel depends upon the condition of that vessel, and upon the standard of its maintenance. Some reference was made to a suggested practice that, in ship-valuation practice, the lives of wooden vessels were taken as 40 years, and of steel vessels as 35 years. The learned Commissioner said that existence of such a practice was negatived by the evidence, which was in accord with the principle stated in the following quotation from *The Queen* v. *Sisters of Charity*, [1952] 3 D.L.R. 358, 370:

> It does not follow that the amount of depreciation can be ascertained merely from depreciation tables. While well recognized tables are of great assistance since they are based on recorded experience, they ought not to be used by themselves. It is always necessary to make a careful examination of the asset and consider the structural and functional condition so that consideration may be given, not only to the elapsed time of its expectancy of life, according to the table, but also to the remaining life that may be expected in the light of its actual condition.

This principle was followed as a matter of routine by the principal witnesses as to the condition and life expectancy of the vessels.

In its original claim, the Company made no claim to fleet value in addition to the aggregate value of the individual vessels comprising the fleet. At the last sitting of the Commission, it put forward a claim for £52,065 for fleet value based upon the work of its directors and executive staff in

> (*a*) Planning and organizing the finances of the Company to make the building of the individual vessels possible;
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> (*b*) Planning and organizing and supervising the construction of the vessels as required, and negotiating purchases of ships;
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> (*c*) Planning and organizing the arrangements with the Auckland Harbour Board for the building and extension of necessary landing stages.;
>
> (*d*) Overseeing and supervising of actual construction of vessels.

It estimated the added value of (*a*), (*b*) and (*c*) at £3,000 per year for 46 years, and of (*d*) at ½ per cent. on the estimated replacement cost. This claim was disallowed.

In *Royal Motor-bus Co., Ltd.* v. *Auckland City Council*, [1927] N.Z.L.R. 423, it was said by the Supreme Court that in most cases the value of a fleet of buses would be the aggregate value of each of them and that whether or not the components had an additional fleet value over and above their aggregate value was a question of fact particularly within the jurisdiction of the Compensation Court, and added that the Compensation Court could ascertain the fair commercial value of the asset *in globo* on the basis of an available market. In the present case, there was no available market for the Company's fleet. Their Honours went on to say that a proper test might be whether or not the circumstance that the buses involved were members of a combination or service added anything to the value of the individual buses. Mr. Paterson concluded:

> Applying these principles to the present case, there is no available market for the Company's fleet as a fleet, and I can see no reason why the general rule of aggregate value should be departed from. There is no evidence to show that the circumstances that the vessels are members of a fleet adds anything to the value of the individual vessels. I rather apprehend that any added value as a member of a fleet would accrue by virtue of an increased profit-earning potential, which, of course, is excluded from consideration. Also I inclined to the view that such an added value would be contrary to the policy of the Act, which is to protect the Company against loss incident to the maintaining of an adequate service during the construction of the Bridge, and not to enable it to realize a profit on its fleet out of the construction of the Bridge.

Mr. Paterson, in his Report, found that the fair commercial value as at December 1, 1950, and as in actual operation at that date of the fleet of vessels owned by the Devonport Steam Ferry Co., Ltd., was £368,758.

SUMMARY OF RECENT LAW.

ACTS PASSED.

No. 41. Dairy Board Act, 1953.
No. 42. Forests Amendment Act, 1953.
No. 43. Divorce and Matrimonial Causes Act, 1953.
No. 44. Imprest Supply Act (No. 5), 1953.
No. 45. Judicature Amendment Act, 1953.
No. 46. Local Authorities' Emergency Powers Act, 1953.
No. 47. Tenancy Amendment Act, (No. 2) 1953.
No. 48. Post and Telegraph Amendment Act, 1953.
No. 49. Cemeteries Amendment Act, 1953.
No. 50. Insurance Companies' Deposits Act, 1953.
No. 51. King George V Memorial Children's Health Camps Act, 1953.
No. 52. Samoa Amendment Act, 1953.
No. 53. Destitute Persons Amendment Act, 1953.
No. 54. Stamp Duties Amendment Act, 1953.
No. 55. Death Duties Amendment Act, 1953.
No. 56. Underground Water Act, 1953.
No. 57. Customs Acts Amendment Act, 1953.
No. 58. Government Life Insurance Act, 1953.
No. 59. Police Offences Amendment Act, 1953.
No. 60. Life Insurance Amendment Act, 1953.
No. 61. Superannuation Amendment Act, 1953.
No. 62. Friendly Societies Amendment Act, 1953.
No. 63. Government Railways Amendment Act, 1953.
No. 64. Patents Act, 1953.
No. 65. Designs Act, 1953.
No. 66. Trademarks Act, 1953.
No. 67. Land Amendment Act, 1953.
No. 68. Orchard Levy Act, 1953.
No. 69. Reserves and Domains Act, 1953.
No. 70. Education Amendment Act, 1953.
No. 71. Cinematograph Films Amendment Act, 1953.
No. 72. Rabbit Nuisance Amendment Act, 1953.
No. 73. Public Revenues Act, 1953.
No. 74. New Zealand Loans Act, 1953.
No. 75. Meat Amendment Act, 1953.
No. 76. State Advances Corporation Amendment Act, 1953.
No. 77. Factories Amendment Act, 1953.
No. 78. Milk Amendment Act, 1953.
No. 79. Chattels Transfer Amendment Act, 1953.
No. 80. Incorporated Societies Amendment Act, 1953.
No. 81. Births and Deaths Registration Amendment Act, 1953.
No. 82. Agricultural Emergency Regulations Confirmation Act, 1953.
No. 83. Law Practitioners Amendment Act, 1953.
No. 84. Law Reform (Testamentary Promises) Amendment Act, 1953.
No. 85. Plumbers Registration Act, 1953.
No. 86. Land Agents Act, 1953.
No. 87. Kawerau and Murupara Townships Act, 1953.
No. 88. Physiotherapy Amendment Act, 1953.
No. 89. Mining Amendment Act, 1953.
No. 90. Licensing Amendment Act (No. 2), 1953.
No. 91. Town and Country Planning Act, 1953.
No. 92. Municipal Corporations Amendment Act, 1953.
No. 93. Land Subdivision in Counties Amendment Act, 1953.
No. 94. Maori Affairs Act, 1953.
No. 95. Maori Trustee Act, 1953.
No. 96. Selwyn Plantation Board Act, 1953.
No. 97. Emergency Regulations Amendment Act, 1953.
No. 98. Fire Services Amendment Act, 1953.
No. 99. Building Emergency Regulations Act, 1953.
No. 100. Courts Martial Appeals Act, 1953.
No. 101. Electoral Amendment Act, 1953.
No. 102. Geothermal Energy Act, 1953.
No. 103. Licensing Trusts Amendment Act, 1953.
No. 104. Waters Pollution Act, 1953.
No. 105. Coal Mines Amendment Act, 1953.
No. 106. Local Legislation Act, 1953.
No. 107. Reserves and Other Lands Disposal Act, 1953.
No. 108. Motor Spirits Distribution Act, 1953.
No. 109. Gaming Amendment Act, 1953.
No. 110. Local Government Commission Act, 1953.
No. 111. Primary Products Marketing Regulations Confirmation Act, 1953.
No. 112. Maori Purposes Act, 1953.
No. 113. Land and Income Tax Amendment Act (No. 2), 1953.
No. 114. Social Security Amendment Act, 1953.
No. 115. Finance Act (No. 2), 1953.
No. 116. Transport Amendment Act (No. 2), 1953.
No. 117. Control of Prices Amendment Act, 1953.
No. 118. National Roads Act, 1953.
No. 119. Waterfront Industry Act, 1953.
No. 120. Offences at Sea Act, 1953.
No. 121. Industrial Conciliation and Arbitration Amendment Act, 1953.
No. 122. Appropriation Act, 1953.

ARBITRATION.

Evidence—Presumption of Validity of Submission—Ambiguity in Award raising Doubt as to Jurisdiction—Admissibility of Extrinsic Evidence as to Dispute—Right of Arbitrators to consider Questions as to their Jurisdiction. In an action to enforce an arbitration award, the defendants filed a defence and conducted interlocutory proceedings, but did not appear at the trial. The defence was substantially that the agreement in which the submission to arbitration was contained was not a binding contract between the parties. The award stated: "A dispute having arisen between [the parties] regarding the execution of the contract . . ." the arbitrators awarded the plaintiffs £1,650. *Held*, (1) The word "execution" in the award was ambiguous in that it could mean either the making of the contract or its performance, and evidence of the dispute entertained by the arbitrators was admissible (i) to resolve the ambiguity in the award and (ii) to prove the nature of the dispute independently of the award; the evidence showed that the word was used in the sense of performance, but, even if the arbitrators had inquired into the facts relating to their jurisdiction, not to determine their jurisdiction, but to ascertain whether they should proceed with the arbitration or whether they clearly lacked jurisdiction, that would not vitiate the award. (2) The plaintiffs in proving the contract between the parties, that it contained a submission, and that the document was duly signed, had tendered *prima facie* proof that a valid submission, binding on the parties, had been made, and they were not obliged to go into matters which might have been raised by the defence if it had been heard and might have rebutted the *prima facie* presumption to be drawn from the execution of the document that the document was binding on the parties. (*R.* v. *Fulham, Hammersmith and Kensington Rent Tribunal, Ex parte Zerek*, [1951] 1 All E.R. 482, applied.) *Christopher Brown, Ltd.* v. *Genossenschaft Oesterreichischer Waldbesitzer Holzwirtschaftsbertriebe Registrierte Genossenschaft Mit Beschrankter Haftung*, [1953] 2 All E.R. 1039 (Q.B.D.).

COURT OF APPEAL.

Extension of Time for Appeal—Fresh Evidence—Evidence discrediting Witnesses—R.S.C., Ord. 58, r. 15, Ord. 64, r. 7. The plaintiff brought an action for damages for wrongful imprisonment and malicious prosecution, and for conspiracy in agreeing to give false evidence in order to secure the plaintiff's conviction on a criminal charge, against a Police superintendent and three other Police officers. All four defendants gave evidence and were presented as men of high character by the prosecution to the jury, the issue of their integrity being left clearly to the jury, on whose answers judgment was entered for the defendants. Three months afterwards, the chief constable of the city Police force announced in the Press an investigation into the conduct of certain of his Police officers and two months later the Police superintendent and one of the other defendants were found guilty of breaches of the Police disciplinary code in wrongfully receiving moneys from bookmakers, the second officer also being found to have divulged Police secrets. After the time for appealing had expired the plaintiff applied for leave to appeal against the judgment given against him on the ground that fresh evidence had come to light which was not available at the trial, but was now available for him to use in cross-examination of the defendants on a re-trial. *Held*, As the new evidence went only to the credit of two defendants who were witnesses in the case, and did not go directly to any issue in the case, and as an appeal or new trial was unlikely to serve any public good or to be of great advantage to the plaintiff, in the interests of finality leave to appeal out of time must be refused. (*Braddock* v. *Tillotson's Newspapers, Ltd.*, ([1949] 2 All E.R. 306, applied.) *Mohahir Ali* v. *Ellmore and Others*, [1953] 2 All E.R. 1044 (C.A.).

DENTIST.

Practice of Dentistry by Unregistered Person—"Treatment . . . or attendance . . . in connection with the fitting . . . of artificial teeth"—Repair of Denture—Impression of Mouth taken—Dentists Act, 1921 (c. 21), s. 1(1), s. 14(2). The respondent, who was not a registered dentist, undertook to repair the denture of a customer. This necessitated re-lining the denture, and, to effect this he coated the denture with paste and asked the

customer to replace it in her mouth, bite hard on it, and retain it for some minutes to allow the paste to set in conformity with the shape of her mouth. The customer did so and returned the plate to the respondent who later re-lined the plate. *Held*, The respondent had given to the customer "treatment . . . or attendance . . . in connection with the fitting . . . of artificial teeth" within s. 14(2) of the Dentists Act, 1921, and, therefore, he had practised dentistry within s. 1(1) of the Act, and, not being registered in the dentists' register, had been guilty of an offence under that subsection. Per *Havers*, J.: If the respondent could have re-lined the denture without asking the customer to replace it in her mouth and allow it to remain there to produce an impression, there would have been no offence. (*Twyford* v. *Puntschart*, [1947] 1 All E.R. 773, distinguished.) *Almy* v. *Thomas*, [1953] 2 All E.R. 1050 (Q.B.D.)

For the Dentists Act, 1921, s. 14(2), see *15 Halsbury's Statutes of England*, 2nd Ed., p. 172.

DIVORCE AND MATRIMONIAL CAUSES.

Cruelty and Constructive Desertion, *97 Solicitors' Journal*, 647.

Custody of Children—Divorce on Ground of Wife's Failure to comply with Decree for Restitution of Conjugal Rights—Wife's Action depriving Infant Girl Child of Benefit of Parents' Joint Custody—Not necessarily Determining Factor in relation to Custody of Child—Custody of Child given to Mother—Divorce and Matrimonial Causes Act, 1928, s. 28. The fact that the mother of an infant girl child was divorced for failure to comply with a decree for restitution of conjugal rights, and had thereby deprived the child of the benefit of the joint custody of her two parents, need not be a determining factor to influence the Court as to which parent is to have custody of the child. (*Norton* v. *Norton*, [1951] N.Z.L.R. 678, followed.) (*Re Elderton*, (1883) 25 Ch. D. 220, mentioned.) The parties were married in April, 1945, and the daughter, the only child of the marriage, was born on February 15, 1947. Husband and wife lived together until July, 1950, when the wife left the matrimonial home, taking her daughter, then aged 3½ years. She subsequently brought proceedings against her husband in the Magistrates' Court asking for separation, guardianship, and maintenance orders, alleging cruelty and failure to maintain; but these applications were dismissed. After an interval of nine months, the husband wrote to her in properly affectionate terms, asking her to return with the child and make a home together again. She wrote refusing to do so. After a further interval, the husband wrote again in a reconciliatory and affectionate manner, asking her to reconsider her decision and return. No reply was received to this letter, and the husband then petitioned for a decree of restitution. The petition came before the Court on December 3, 1952. The wife did not defend, or even file an address for service. A decree was granted, and it was duly served; and the wife having failed to comply, proceedings for divorce followed. The wife took no step in answer to this petition, and a decree *nisi* in divorce was granted to the husband on May 22, 1953. When the decree was made absolute, the wife filed the present motion for ancillary relief, in which the custody of the child was disputed between her parents following their divorce. The petitoner had re-married, and the respondent was about to re-marry. The learned Judge heard the evidence of the parties and the petitioner's present wife and the respondent's prospective husband. After finding that the merits of the two applications were in fairly even balance, *Held*, That, having regard to the evidence, and to the fact that the child was a girl aged six years, she should be left in the custody of her mother; and her father should have reasonably generous access, without unsettlement of the child or interruption in the secure daily and weekly routine which is necessary to a child's stable existence and education. (*Norton* v. *Norton*, [1915] N.Z.L.R. 678, applied.) (*Morton* v. *Morton*, (1911) 31 N.Z.L.R. 77; 14 G.L.R. 271; *In re McKay*, [1937] G.L.R. 605; *Howell* v. *Howell*, [1942] N.Z.L.R. 311; [1942] G.L.R. 210, and *Bowles* v. *Bowles*, [1940] G.L.R. 53, referred to.) *Svendsen* v. *Svendsen*. (S.C. Palmerston North. October 2, 1953. Turner, J.)

Domicil and Divorce, *103 Law Journal*, 602.

Restitution of Conjugal Rights—Exercise of Discretion—Refusal of Decree where Grant would leave Respondent Wife with Alternatives of Returning to Impossible Conditions brought about by Petitioner or being convicted of Desertion and liable to Early Divorce—Divorce and Matrimonial Causes Act, 1928, s. 8. The Court has power to refuse a decree for restitution of conjugal rights whenever the result of such a decree would be to compel the Court to treat one of the spouses as deserting the other without reasonable cause contrary to the real truth of the case. (*Russell* v. *Russell*, [1895] P. 315, and *Oldroyd* v. *Oldroyd*, [1896] P. 175, followed.) (*Greene* v. *Greene*, [1916] P. 188, and *Fisk* v. *Fisk*, (1920) 122 L.T. 803, referred to.) A decree for restitution of conjugal rights should be refused if a grant of the decree would leave the respondent wife with the alternatives of either having to comply with the decree and return to conditions which any high-spirited or sensitive woman must view with complete revulsion, or having to be treated by the law as a wife convicted on the matrimonial offence of desertion and liable to divorce in the immediate future at her husband's suit. (*Quinn* v. *Quinn*, [1947] N.Z.L.R. 902; [1947] G.L.R. 432; *Kemp* v. *Kemp*, [1949] N.Z.L.R. 648; [1949] G.L.R. 503; *Picard* v. *Picard*, [1949] N.Z.L.R. 945; [1949] G.L.R. 618; *Carswell* v. *Carswell*, [1950] N.Z.L.R. 212; [1950] G.L.R. 75; *Avery* v. *Avery*, [1923] N.Z.L.R. 47; [1922] G.L.R. 455; *Franklin* v. *Franklin*, [1934] N.Z.L.R. 900; [1934] G.L.R. 762, and *Sadler* v. *Sadler*, [1951] N.Z.L.R. 23, referred to.) Observations on the tendency shown in England in recent years towards the refusal of a decree in a case where the petitioner had brought about such conditions that a reasonable wife being so treated by an unreasonable husband could not be expected to proceed with the conjugal life. (*Jackson* v. *Jackson*, [1932] 146 L.T. 406; *Holborn* v. *Holborn*, [1947] 1 All E.R. 32, and *Timmins* v. *Timmins*, [1953] 2 All E.R. 187, referred to.) *Barlow* v. *Barlow*. (S.C. Palmerston North. October 23, 1953. Turner, J.)

EXECUTORS AND ADMINISTRATORS.

The Executor's Year, *216 Law Times*, 453.

FAMILY PROTECTION.

"Widow"—Presumption of Death of First Husband—Absence for Twenty-six Years. In 1913 the plaintiff, who was then aged twenty-two years, married E., a coalminer, then aged twenty-five years. There were two children of the marriage. E. deserted her in 1921. In 1922 E. returned and asked the plaintiff to receive him back, but she refused and she had not seen or heard from or of him since. The plaintiff remained in touch with E.'s father until his (the father's) death in 1927, and with E.'s sister, who died in 1937, but no mention was made between them of E. In 1948 the plaintiff, being under the impression that E. had died in 1942, went through a form of marriage with W., and was described on the certificate of marriage as a widow. In 1951 W. died, and the plaintiff applied under the Inheritance (Family Provision) Act, 1938, s. 1(1), for reasonable provision to be made for her out of W.'s estate. On the question whether, in the absence of direct evidence of E.'s death, the plaintiff could properly be described as the widow and a dependant of W., *Held*, Although the plaintiff had made no inquiries to trace E., having regard to the fact that it appeared that his father, his sister, the plaintiff, and her children, who were the persons most likely to hear of him, had had no word of him since 1922, the plaintiff was entitled, in 1948, to assume that E. was dead, and, therefore, she was free to marry W., whose widow she must now be presumed to be. (Observation of *Roxburgh*, J., in *Re Peete*, [1952] 2 All E.R. 602, applied.) *Re Watkins, Watkins* v. *Watkins and Others*, [1953] 2 All E.R. 1113 (Ch.D.).

As to Presumption of Death, see *13 Halsbury's Laws of England*, pp. 630-634, para. 701; and for Cases, see *22 E. and E. Digest*, pp. 159-166, Nos. 1444-1516.

GIFT.

Payment of Money or Transfer of Goods—Father-in-law to Son-in-law—No Presumption of Gift—Onus on Son-in-law to prove Gift—Evidence of Alleged Donor admissible as to His Intention at Time of Alleged Gift—Declaration by Alleged Donor made subsequently to Gift inadmissible. In so far as transactions amount to payments of money or delivery of goods as between father and daughter, there is a presumption that a gift was intended; and the onus is on the person making the payment or transfer of goods to rebut the presumption. There is no presumption of law in favour of a gift where the transaction amounts to a payment of money or a transfer of goods as between father and son-in-law; and the onus is upon the son-in-law to prove that the transaction is a gift, unless the donor has placed himself in *loco parentis* to the donee. (*Pickens* v. *Metcalf and Marr*, [1932] N.Z.L.R. 1278; [1932] G.L.R. 551, referred to.) (*Cox* v. *Bennett*, (1870) 18 W.R. 519, distinguished.) Evidence by the donor himself is admissible on the question of his intention at the time of the alleged gift. (*Devoy* v. *Devoy*, (1857) 3 Sm. & G. 403; 65 E.R. 173; *Forrest* v. *Forrest*, (1865) 11 L.T. 763; and *Pickens* v. *Metcalf and Marr*, [1932] N.Z.L.R. 1278; [1932] G.L.R. 551, followed.) While a declaration by the donor subsequent to the gift cannot be given in evidence, he can be called (if still alive), to say as a witness, what his intention was at the time of the transaction. Evidence which he gives in his own interest subsequently to the transaction itself ought to be very

carefully scrutinized and weighed before it is accepted by the Court (especially if uncorroborated) to rebut a presumption that would otherwise operate in favour of a donee. *Knight* v. *Biss*. (S.C. Auckland. October 8, 1953. Turner, J.)

HUSBAND AND WIFE.

Married Women's Property—Question of Title or Ownership—Determinable in Accordance with Parties' Legal or Equitable Rights—Question of Occupation—Court's Discretion to make Order irrespective of Parties' Rights at Law or in Equity—Married Women's Property Act, 1952, s. 19. On an application under s. 19 of the Married Women's Property Act, 1952, the question of the title or ownership of property cannot be determined otherwise than in accordance with the legal or equitable rights of the parties. The Court has no discretion to interfere with those rights on the ground of fairness or justice. (*Barrow* v. *Barrow*, [1946] N.Z.L.R. 438; [1946] G.L.R. 245, explained and followed.) (*Simpson* v. *Simpson*, [1952] N.Z.L.R. 278; [1952] G.L.R. 167, and *Watson* v. *Watson*, [1952] N.Z.L.R. 892; [1952] G.L.R. 486, applied.) The Court, in dealing with a question of possession or occupation, as distinct from questions of title or ownership, has a discretion to make an order otherwise than in accordance with the rights of the parties at law or in equity. *Masters* v. *Masters*. (S.C. Wellington. October 19, 1953. Cooke, J.)

INFANTS AND CHILDREN.

Girl aged Twelve Years—On Father's Remarriage, Child going to live with Married Sister—Father's Application for Writ of Habeas Corpus—Judge's Interview with Child in Chambers—Interview assisting Court—Child's Personality and Present Conditions Matters to be taken into Consideration—Father's Natural Right to Custody—Welfare of Child Paramount, but not Sole Consideration—Considerations making Removal of Child from Father's Custody Desirable—"Welfare"—Guardianship of Infants Act, 1926, s. 2. In terms of s. 2 of the Guardianship of Infants Act, 1926, the welfare of the child is the first and paramount consideration; but it is not the sole consideration. (*Re Thain*, [1926] 1 Ch. 676, followed.) (*Re Collins, (An Infant)*, [1950] 1 All E.R. 1057, applied.) In considering the "welfare" of the child, physical comfort and well-being, religious and moral welfare, financial provision, and the desirability of giving the child the opportunity of winning the affection of its father, are all elements which should be taken into account. (*Re McGrath*, [1893] 1 Ch. 143; *Re Mills*, [1928] N.Z.L.R. 158; [1928] G.L.R. 157; and *Re Nicholl*, [1928] G.L.R. 82, followed.) There is a *prima facie* presumption that it is for the benefit of a child that it should be in the custody of its parent, and a father has the natural right to the custody of his infant daughter; and only in an exceptional case will the welfare of the child require it to be taken from the custody of a father. (*R.* v. *Gyngall*, [1893] 2 Q.B. 232; *Re Thain*, [1926] 1 Ch. 676; *Re Mills*, [1928] N.Z.L.R. 158; [1928] G.L.R. 157, and *Re Butler*, [1931] N.Z.L.R. 131; [1930] G.L.R. 627, followed.) Where a father's character is not such as to disentitle him to custody, his conduct in conjunction with proof that he is lacking in affection for the child or has been unmindful of his parental duty influence the Court in considering his claim to custody, and can amount to such a lack of parental affection and responsibility as to unfit him for the custody of his child. (*Re Mills*, [1928] N.Z.L.R. 158; [1928] G.L.R. 157, applied.) (*Re Butler*, [1931] N.Z.L.R. 131; [1930] G.L.R. 627, referred to.) Although the trial Judge should not allow the matter of the custody of a child of twelve years to be finally determined by the expressed wishes of so young a child, he is justified in interviewing the child privately in his Chambers, in order, at least, to form an impression for himself as to the personality of the child, as to whether the child has any firm views or wishes, and if so, how strong they were, and as to whether the child appeared to be happy and well cared for in its existing surroundings; and he may take such matters into consideration. (*Ward* v. *Laverty*, [1925] A.C. 1; *Re Gilberd (An Infant)*, (1913) 15 G.L.R. 631; *Re Hylton*, [1928] N.Z.L.R. 145; [1927] G.L.R. 492, and *Re H.*, [1940] G.L.R. 165, referred to.) On a rule *nisi* for a writ of *habeas corpus*, on the father's application to determine the custody of his child, aged twelve years, *Held*, That, it was right for the welfare of the child in several serious and important respects that her father's rights should be suspended and that her interests required that she should not return to her father's house and that she should stay with her married sister, subject to the latter's obligation to allow reasonable access to the father. *In re P. (An Infant)*. (S.C. Palmerston North. September 25, 1953. Turner, J.)

JUDICIARY.

Mr. H. E. Barrowclough, of Auckland, barrister, has been appointed Chief Justice of New Zealand, and, on November 17, he took the prescribed oaths of office.

Mr. G. I. McGregor, of Palmerston North, barrister, has been appointed a Justice of the Supreme Court, and, on November 16, he took the prescribed oaths of office.

LAND AGENT.

Commission—Authority to Sell—Construction—Authority providing for Payment of Commission on the Sale of the Property to Anyone introduced by the Land Agent—Agent introducing Prospective Purchaser to Owner—Sale of Property to Such Purchaser through Another Agent—On True Construction of Authority, Owner liable to First-named Agent for Commission on Sale—Owner's Liability to pay Two Commissions immaterial. On June 16, 1953, the defendant executed an authority to sell to the plaintiff, a land agent, and thus appointed the plaintiff her agent for the sale of her property. The authority contained the following relevant clauses: "I agree that if the property is sold by you or through your instrumentality or to anyone introduced through your agency, I will pay commission to you on such sale based on the undermentioned price, or any variation of same agreed to by me." The plaintiff advertised the property for sale at the agreed price of £4,250 and on July 8, 1953, the wife of P., the eventual purchaser, visited the property with the plaintiff, was introduced by him to the defendant personally, and was shown over the property. She asked the plaintiff to await further word from either her or her husband. The plaintiff did not receive any further message from P., and he later found that the property had been sold to P. through another agency. The evidence showed that, a few days after P.'s wife was shown over the property, P. saw a similar property advertised by an agent, B., and by arrangement visited it with B. P. was introduced to the owner, the defendant, and recognized the property immediately as the one to which the plaintiff had introduced him. P. made an offer to purchase the defendant's property for £3,850, conditionally upon B.'s obtaining a purchaser of his own property at his price. B. was able to do this, and, on July 18, 1953, an agreement of sale and purchase was executed between the defendant and P. through B.'s agency; and the transaction was later completed. The plaintiff claimed commission from the defendant owner upon the sale of her property, based upon the fact that the plaintiff had introduced the eventual purchaser, P., to the defendant and to the property. *Held*, 1. That, on the true construction of the terms of the contract, the defendant promised to pay the plaintiff a sum of money, being a percentage of the sale price, upon the happening of any one of the following three events: (*a*) the sale of the property by the plaintiff, (*b*) the sale of the property through the instrumentality of the plaintiff, or (c) the sale of the property to anyone introduced by the plaintiff; that, in fact, the last-mentioned event happened; and that the plaintiff was entitled to the amount of commission claimed. (*Souter and Co.* v. *Barr*, (1944) 3 M.C.D. 413 aff. on app., Callan, J. (unreported), followed.) (*Luxor (Eastbourne), Ltd.* v. *Cooper*, [1941] 1 All E.R. 33, applied.) (*Weir* v. *Rush*, (1952) 7 M.C.D. 639, distinguished.) 2. That the fact that the defendant, as the result of the judgment against her, might have to pay two commissions on the sale of her property was immaterial. (*Jackson* v. *Cook*, [1934] G.L.R. 104, followed.) *Beach* v. *Eckett*. (Auckland. October 30, 1953. Astley, S.M.)

LAND TRANSFER.

Overriding Interests, *103 Law Journal*, 599.

LANDLORD AND TENANT.

Express Surrenders of Leases, *103 Law Journal*, 616.
Quiet Enjoyment, *216 Law Times*, 492.

LIMITATION OF ACTION.

Local Authority—Application for Leave to bring Action against Local Authority—Action for Negligence not commenced within One Year from Accrual of Right of Action—Delay not due to "mistake or other reasonable cause"—Onus of Proof that Defendant not materially prejudiced in Its Defence—"Or otherwise"—Local Authority's Annual Estimates not providing for Payment of Claim—Power to adjust on Subsequent Year's Estimates—Leave given on Conditions—Limitation Act, 1950, s. 23(2)—Auckland Transport Board Act, 1928, ss. 45, 46(2). On an application under s. 23(2) of the Limitation Act, 1950, for leave to proceed with a proposed action, the onus of proof that the respondent is not prejudiced rests, in the first instance, on the applicant and, if the Court is not satisfied that the respondent is not prejudiced, the application fails. If, however, evidence is given from which it may reasonably be inferred that the respondent has not been prejudiced, then the burden of proof is shifted; and, if the respondent is in a position to prove that, notwithstanding that evidence, he is prejudiced, he is bound to do so. (*Taylor* v.

Gardiner, [1917] G.L.R. 154, applied.) The phrase " or otherwise " as used in s. 23(2) of the Limitation Act, 1950, must be regarded as disjunctive, and the matters to be considered are matters separated from those directly relating to a defence; but it is not desirable to attempt to define the limits of what may be comprehended in the phrase, even if definition were feasible. (*White and Collins* v. *Minister of Health*, [1939] 2 K.B. 838.) The applicant alleged that on December 14, 1951, one of the respondent's tramcars collided with and damaged his motor-vehicle. He desired to bring an action for damages against the respondent, but, having failed to do so within one year from the accrual of the right of action, he was barred by the provisions of s. 23(1) of the Limitation Act, 1940. On an application for leave under s. 23(2) to bring such action, it was conceded that the applicant could not set up " mistake " or " any other reasonable cause " as a ground on which an order could be made on the application, but reliance was placed on the ground that " the intended defendant was not materially prejudiced in its defence or otherwise by the delay ", as it had investigated the accident in May, 1950. For the respondent, it was contended that the respondent would be prejudiced " otherwise " since the amount of the claim had not been included in the respondent's estimate of expenditure for the forthcoming year, and reference was made to the obligation placed on the respondent by s. 45 of the Auckland Transport Board Act, 1928, to prepare estimates of expenditure and income each year with the object of making a levy of the amount of any deficiency upon the local authorities in the district. *Held*, 1. That, while a duty is imposed on the respondent by s. 45 of the Auckland Transport Board Act, 1928, to prepare estimates of income and expenditure for the year, and no provision had been made in the year's estimates for meeting the plaintiff's claim, s. 46(2) of that statute permitted an adjustment in respect to such an amount in the next year's estimates; and that, on this ground, the respondent was not prejudiced by the delay in bringing the action. 2. That, on the evidence, the applicant's delay had not materially prejudiced the respondent Board, and some regard must be had to the fact that the Legislature, in enacting s. 23(2) of the Limitation Act, 1950, had provided that leave may be granted in proper cases in the six years following the accrual of the cause of action; and that leave should be granted on terms. Leave was given to the applicant to bring the action, subject to the conditions that it had to be commenced within seven days from the date of this judgment, and that, before the applicant files his plaint, he pay the sum of £5 5s. to the respondent as the costs of his application. *Phillips* v. *Auckland Transport Board*. (1953. July 14. Spence, S.M.)

PRACTICE—APPEALS TO COURT OF APPEAL.

See p. 341, *ante*.

PRACTICE—APPEALS TO PRIVY COUNCIL.

Appeals to Privy Council—Canada—Supreme Court of Canada—Appeal from "final judgment"—Judgment granting Probate, of Will—Supreme Court Act (Revised Statutes of Canada, 1927, c. 35), s. 2(b), s. 36. By s. 2 of the Supreme Court [of Canada] Act: " In this Act, unless the context otherwise requires . . (b) ' final judgment ' means any judgment, rule, order or decision which determines in whole or in part any substantive right of any of the parties in controversy in any judicial proceeding . . .", and by s. 36: ". . . an appeal shall lie to the Supreme Court from any judgment of the highest court of final resort now or hereafter established in any province of Canada pronounced in a judicial proceeding, whether such court is a court of appeal or of original jurisdiction . . . where such judgment is, (a) a final judgment . . ." In September, 1946, probate of a will dated March 14, 1935, of a testator who died on August 31, 1946, was granted to the appellant, D., by the Superior Court of Quebec. In March, 1948, that Court dismissed a petition by the first respondent that a letter dated August 21, 1946, be admitted to probate as the last will and testament of the testator, and that the judgment of September, 1946, admitting to probate the will of March 14, 1935, be set aside. In April, 1950, the Court of King's Bench of Quebec reversed this decision and granted probate of the will dated August 21, 1946. In October, 1951, the Supreme Court of Canada dismissed an appeal from the judgment of the Court of King's Bench. *Held*, (1) According to the law of the province of Quebec, a grant of probate of a will was not, as in England, conclusive and did not create *res judicata*, even between parties who had contested its validity, and, therefore, probate could be cancelled on proof of a later will. (*Mignault* v. *Malo*, (1872) L.R. 4 P.C. 123, applied.) (2) Since the grant of probate was not conclusive, it could not be said to have determined a substantive right in a judicial proceeding; accordingly, the judgment of the Court of King's Bench of Quebec of April, 1950, was not a final judgment within the meaning of s. 2(*b*) of the Supreme Court Act; and, therefore, the Supreme Court of Canada had no jurisdiction to entertain the appeal from that judgment. *Dansereau* v. *Berget*: *Colin v. Berget*, [1953] 2 All E.R. 1058 (P.C.)

PUBLIC REVENUE.

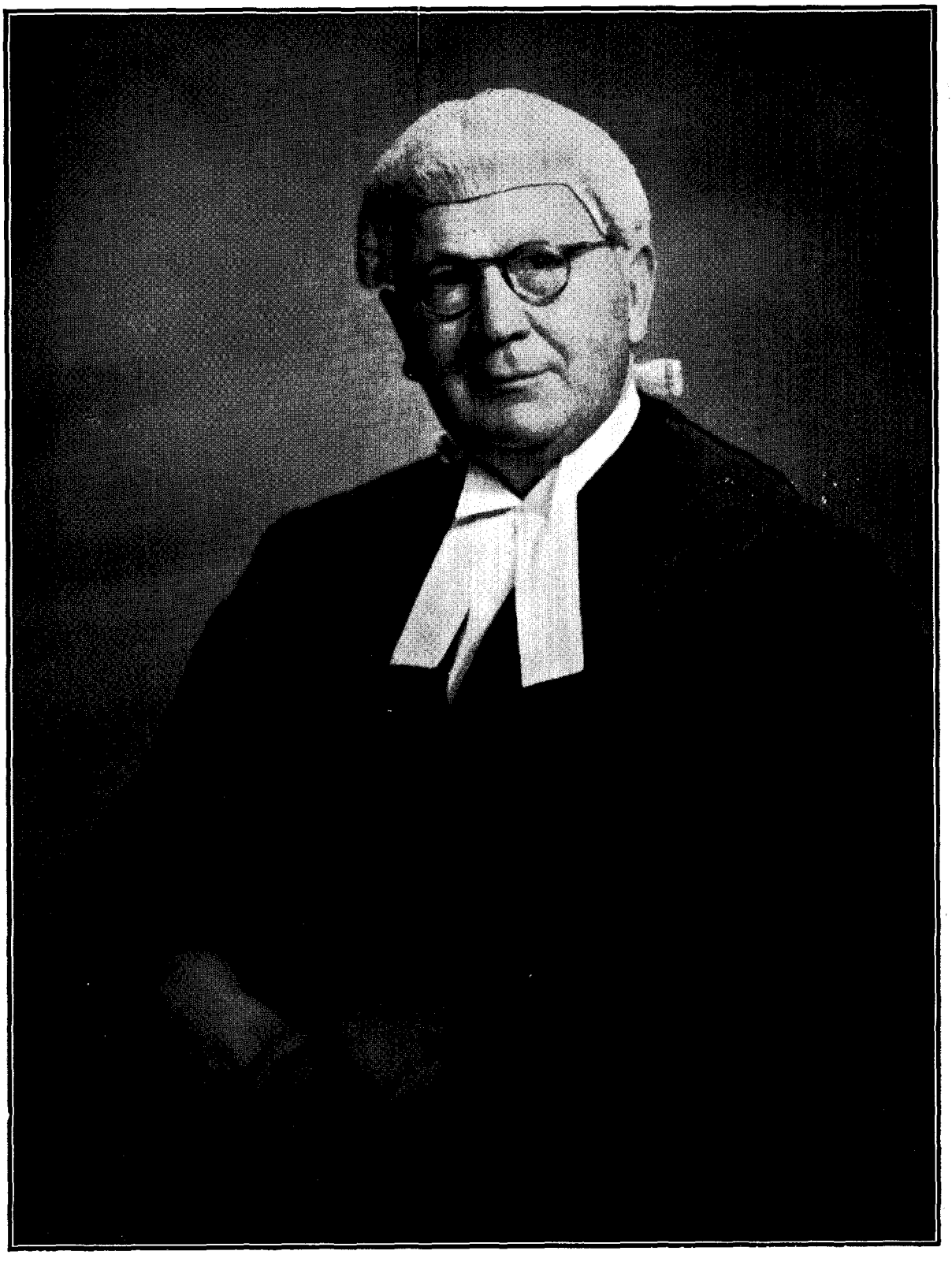
Stamp Duties—Transfer of Shares—Exemption from Conveyance Duty if Commissioner Satisfied Conveyance " merely a necessary incident in a scheme for the reconstruction of a company " —Powers of Commissioner—Extent to which Court can interfere with His Decision not to exempt Instrument—No Exemption if Scheme for Reorganization of Company or for Rearrangement of Its Assets or if Shareholders in New Company not Identical with Shareholders under Former Management—" Satisfied "—" Necessary "—Stamp Duties Act, 1923, s. 106.

Public Revenue—Stamp Duties—Conveyance by Direction—Transfer of Shares from One Company to Another—Consideration therefor provided by Third Company—Third Company having no Right to have Shares transferred to Itself or Its Nominee, and not being Intermediary—Double Duty on Transfer not payable—Stamp Duties Act, 1923, s. 79(c), *85(1)*(a). A foreign company, S., incorporated under the law of the Argentine Republic with an issued capital of $30,000,000 (Argentine gold) divided into 2,000,000 shares of $15 each, carried on directly and through subsidiary companies a large meat and canning business in the Argentine Republic. In 1950, the directors obtained the consent of the Argentine Government to a plan for the reorganization of the company. This plan proposed that two new companies should be incorporated in the United States. The first company was to be known as P. which was to be incorporated with an authorized capital of 2,000,000 shares. P. was to become the new parent company and the shareholders of S. were to be invited to exchange their shares in that company for an equivalent number of shares in P. The second company was to be known as D., all the shares in which were to be owned by P. S. was to transfer to D. the shares it held in the various subsidiary companies carrying on business outside the Argentine Republic in exchange for a transfer or surrender by P. of 1,300,000 shares in S. to be retired by S. by way of reduction of capital. Thus, in final result, S. ceased to be the parent company, its place being taken by P. S. became a principal subsidiary of P. still in control of the businesses carried on in the Argentine Republic, both directly and through other subsidiary companies. Likewise, D. became a principal subsidiary of P. controlling the businesses carried on outside the Argentine Republic. The shareholders in P. were substantially identical with the shareholders in S. immediately before the carrying into effect of the arrangement, and that the shareholders held the capital in P. in substantially the same proportions as they previously held the capital in S. Pursuant to this plan, a transfer of the shares in the New Zealand subsidiary (Swift (New Zealand) Co., Ltd.) from S. to D. was presented to the Commissioner of Stamp Duties for assessment of duty. The Commissioner, pursuant to s. 85 of the Stamp Duties Act, 1923, assessed the transfer with £4,783 9s. conveyance duty as if it was a conveyance of the shares by S. to P., and, therefore, pursuant to s. 79(*c*) of the statute liable to conveyance duty amounting to £2,391 14s. 6d., and as if it was also a conveyance of such shares by P. to D., and, therefore, again pursuant to s. 79(*c*), liable to conveyance duty amounting to £2,391 14s. 6d. On appeal from that assessment on the ground *inter alia*, that the transfer of shares from S. to D. was exempt from conveyance duty by virtue of s. 106 of the Stamp Duties Act, 1923, it was held by *Northcroft*, J., that the transfer of shares was a necessary incident in a scheme which involved substantially the same persons carrying on the same business, and it was, accordingly, " a scheme for the reconstruction of a company ", and that the transfer of the shares in question was exempt from stamp duty pursuant to s. 106 of the Stamp Duties Act, 1923. On appeal by the Commissioner of Stamp Duties from that determination, *Held*, *per totam curiam*, That the transfer of shares was not exempt from stamp duty under s. 106 of the Stamp Duties Act, 1923, as being " merely a necessary incident in a scheme for the reconstruction of a company ", as the scheme was not a reconstruction of the S. corporation but one of reorganization of that corporation or a scheme for a re-arrangement of its assets. *Held further*, by *Gresson* and *North, JJ.* (*Stanton*, J., dissenting), That the transfer of shares was liable under s. 79(*c*) to stamp duty amounting to £2,391 14s. 6d. only; and it was not liable for assessment for double duty, as on a transfer by way of direction by P., pursuant to s. 85(1)(*a*). *Commissioner of Stamp Duties* v. *International Packers, Ltd., and Delsinteo, Ltd.* (S.C. Christchurch. 1952. August 26, 29. Northcroft, J. C.A. Wellington. 1953. March 16, 17; September 9. Gresson, Stanton, North, JJ.)

TENANCY.

Alternative Accommodation: Security of Tenure, *97 Solicitors' Journal*, 654.

"They all Lived Together as a Family", *97 Solicitors' Journal*, 667.



Spencer Digby, photo

The Late Rt. Hon. Sir Humphrey O'Leary, K.C.M.G.
Chief Justice of New Zealand.
(1946 1953)

THE NEW CHIEF JUSTICE.

His Notable Career as Lawyer and Soldier.

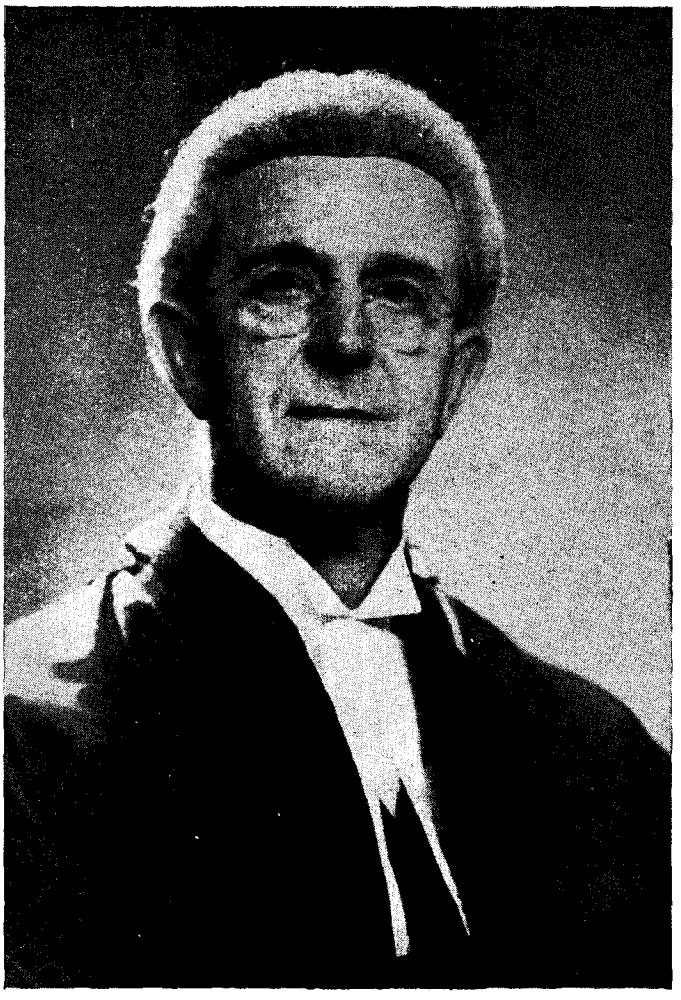
THE Hon. Harold Eric Barrowclough, C.B., D.S.O. M.C., brings to the office of Chief Justice of the Dominion a wealth of experience that renders him a suitable choice for that most important position. Many distinguished lawyers have made good soldiers and many distinguished soldiers have been good lawyers, but it is rare to find a soldier of distinction who is also a lawyer of distinction.

The new Chief Justice was born in Masterton in 1894, and was educated at the Palmerston North Boys' High School. He continued his education at Otago University reading Arts, and was President of the Otago University Students' Association.

Upon the outbreak of World War I, he enlisted, was commissioned in 1915, and rose to command the Fourth Battalion of the Rifle Brigade when the famous walled fortress of Les Quesnoy was captured. He was awarded the D.S.O., M.C., and the Croix de Guerre.

On demobilisation, he decided to abandon Arts and embrace the Law; and, availing himself of the dispensation for soldiers, passed all his subjects in fifteen months and entered the office of Messrs. Gilkinson and White of Dunedin as a clerk.

When, in 1921, Mr. MacGregor, K.C., went to Wellington to become Solicitor-General, the former firm of Messrs. MacGregor and Ramsay amalgamated with Messrs. Gilkinson and White to become the firm of White, Ramsay, and Barrowclough. Six months later upon Mr. White's departure to Wellington, the firm became Ramsay, Barrowclough, and Haggitt. Mr. Barrowclough, as he was then, decided on the forensic side of the profession, and did most of that work for his firm.



Spencer Digby, Photo.

The Hon. H. E. Barrowclough, C.B., Chief Justice of New Zealand.

He rose rapidly and became noted for the determination with which he pressed his views in all Courts. A quick list of appellate successes brought him wide recognition. His first, *Haggitt* v. *Watson*, [1927] N.Z.L.R. 209, was connected with his firm. He was for the plaintiff, and failed before Mr. Justice Sim. On appeal, the majority of the Court adopted his view and reversed the judgment, Sir Charles Skerrett, C.J., dissenting. The Privy Council upheld the Court of Appeal: (1927) N.Z.P.C.C. 474.

Another reported appeal took place shortly afterwards, *Stewart* v. *Briggs*, [1928] N.Z.L.R. 28, 673. Here, again Mr. Barrowclough was unsuccessful before Mr. Justice Sim, but, on appeal, he succeeded.

He had other interests in Dunedin, notably, the Overseas League and the Otago Aero Club. He became President of the latter Club, and was responsible for acquiring the site of the Taieri Airport near Dunedin.

His rapid rise as a barrister attracted the attention of a distinguished Auckland firm, and, in 1931, Mr. Barrowclough was invited to join them under the style of Messrs. Russell, McVeagh, Macky, and Barrowclough.

His practice in Auckland was interrupted by the Second World War. His interest in military matters had not abated, and he not only retained his connection with the forces, but founded and organized a Defence League which was active in bringing to the notice of the Government and the public the urgency of the situation created by the Japanese menace.

He was appointed to the command of the Sixth Infantry Brigade. In the Middle East, he served in Greece, Crete, and Libya, and was awarded a bar to his D.S.O. "for conspicuous bravery and brilliant leadership in Sidi Rezegh."

In 1942, he was brought back to New Zealand to train and lead to the Pacific the Third Division which served with the American forces in the Solomons and Nissan Island. He received the United States award of the Legion of Merit with the degree of Commander.

His military career reached its zenith when, as Major-General, he was made a Companion of the Most Honourable Order of the Bath in recognition of his outstanding leadership while commanding in the Pacific.

After the War, he resumed practice with his firm in Auckland where he had attracted a large connection in shipping and insurance, and was counsel for the Auckland Harbour Board. He conducted many cases in these branches of the law, and had an extensive advisory practice in local authority and equity matters.

In May of this year, he was appointed Chairman of the Consultative Committee on Hospital Reform.

The Report has been prepared but it is not yet published. He became Vice-President of the Auckland Branch of the Royal Empire Society, and was a member of the Auckland War Memorial Campaign committee.

His elevation to the chief citizenship of New Zealand brings great satisfaction to those who know him as a soldier or as a barrister.

The outstanding directness, simplicity, and kindliness of his character, coupled with a native steadfastness of purpose, have been apparent throughout his life and give the keynote to his remarkable success. Many a soldier of humble rank bears in mind that his General was prepared to see him and redress his grievance. Many an officer remembers the speed with which an injustice was remedied. None ever complained that there was ambiguity or tardiness in his orders.

At the Bar, his consideration for the Bench and his professional brethren has been proverbial. His arguments have been clear, forceful, moderate, and eloquently expressed. No one who knows him doubts that, both in the administrative and judicial functions that he is now called upon to perform, he will worthily fill the office that has been so well maintained by his distinguished predecessors.

Swearing-in in Open Court.

For the first time in New Zealand—at least in living memory—a Chief Justice of New Zealand, on November 17, took the prescribed oaths of office in open Court. For some years, the ceremony has been carried out in the Australian Courts.

On the Bench, with the new Chief Justice, were Mr. Justice Fair, A.C.J., Mr. Justice Cooke, and the Hon. Sir David Smith and the Hon. Sir Robert Kennedy. Mrs. Barrowclough, Mrs. P. B. Cooke, and Miss Fair were present.

There was a remarkably complete attendance of members of the profession, who filled all available space in the large Court-room.

Taking The Oaths.

Mr. Justice Fair, addressing the gathering, said :

" I have received from the Right Honourable the Prime Minister an Instrument under the hand of His Excellency the Governor-General and the seal of New Zealand, and signed by the Prime Minister directing that the oath of allegiance and of judicial office should be taken by His Honour the Chief Justice before me, and authorizing and requiring me to tender them to him on the production of the commission appointing him Chief Justice. I have accordingly to tender such oaths to Your Honour."

The new Chief Justice then took the oath of allegiance and the prescribed judicial oath.

Turning to the Chief Justice, Mr. Justice Fair continued :

" May I be allowed, Chief Justice, to offer you the sincere congratulations of all the Judges on your assumption of this high office, and to assure you of the confidence that they feel that you will bring to the administration of justice the great ability and distinguished service that you have given to your country in our Army in times of peace and war. We are confident that under your guidance our Courts will maintain the high standards and traditions that we are happy to think have characterized British justice in the past."

The Attorney-General.

The Attorney-General, the Hon. T. Clifton Webb, was the next speaker. He said :

" When I first met the new Chief Justice some twenty years ago, it was by no means a remote possibility that some day he would be elevated to the Bench, but it would never have occurred to me that it would be my happy lot to have the privilege of recommending him to the Prime Minister for appointment as Chief Justice. It has been a source of great satisfaction to me, not only because I myself am able to speak from personal knowledge of his capability and general fitness for this high office to which he has been called, but also because I know that the appointment has given general satisfaction to both Bench and Bar.

" Harold Barrowclough—if I may be permitted to call him that, though for the last time in open Court—has rendered conspicuous service to his country in two world wars. That in itself, of course, is not sufficient to entitle him to this appointment, but, when it is coupled, as it is in this case, with wide experience and proficiency in the law, high moral character, a courteous manner and dignified bearing—and all that can be said with perfect sincerity—it justifies an appointment that marks the climax to the career of a man who has deserved well of his country ; and it is good that a grateful country is able to offer him the highest judicial post in the land.

" On behalf of the Government and on behalf of the profession for which I have the honour to speak, I tender my congratulations to the new Chief Justice, and I say of him, as I said of Mr. Justice McGregor yesterday, that I am sure that the administration of justice is safe in his keeping.

" I am particularly pleased that I am able to be present here as he takes the oaths of allegiance and of service and enters upon his new duties, and I trust that he will long be spared to render the service of which I know he is capable.

" May I at this stage be permitted to say that I respectfully commend the decision to hold this ceremony in open Court. It is an important function, and I think it is fitting that members of the Bench and Bar, other judicial officers, and the members of the public should assemble in open Court to give the ceremony that degree of importance—not just mere publicity, but that degree of importance that I think it deserves.

" Finally, I should like to take this opportunity of thanking His Honour Mr. Justice Fair for the capable and helpful way in which he has filled the office of Acting Chief Justice for the last nine months or so."

The New Zealand Law Society.

Mr. W. H. Cunningham, President of the New Zealand Law Society, addressing the Chief Justice, said :

" As President of the New Zealand Law Society, I, and I am sure the members of the profession here this morning, esteem it a great privilege to have had this opportunity of witnessing Your Honour's swearing-in as Chief Justice of New Zealand.

Continued from cover i.

VACANCY

CROWN SOLICITOR IN NORTH ISLAND provincial centre has vacancy for qualified man or advanced student. Commence January or before. Position offers mixed conveyancing — common law, own clients and cases, salary £800 to suitable applicant. Write:

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I, HOWARD COLMORE-WILLIAMS, of Auckland, being a registered Valuer, wish to announce that I have commenced practice as an Urban Valuer at Room 70, Auckland Power Board Bldg., Queen St. Phone 42-033.
Signed: H. COLMORE-WILLIAMS, A.N.Z.I.V.

QUALIFIED BARRISTER AND SOLICITOR—three years qualified—six years experience in common law, trusts and estate work and general conveyancing requires position with common law firm in Auckland City.

Reply to: "POSITION",
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ANNOUNCEMENT.

MR. J. BRUCE WEIR, LL.B., BARRISTER AND SOLICITOR, announces that he has commenced practice on his own account in the PRUDENTIAL BUILDING, LAMBTON QUAY, WELLINGTON: Telephone 42-353; P.O. Box 2250.

" On behalf of the members of the profession I desire to tender to Your Honour their respectful and sincere congratulations on this great occasion in your life. Your Honour has demonstrated that soldiering and the law can go successfully hand in hand. On service, you achieved the highest rank open to a New Zealand soldier, and you have today crowned your long and successful career at the Bar by reaching the highest judicial office open to a practising lawyer in New Zealand.

" Your very numerous soldier and legal friends throughout the country rejoice today at your elevation, and I am sure join with me in wishing you a full and successful term of office. "

THE WELLINGTON LAW SOCIETY.

Mr. E. F. Rothwell, President of the Wellington District Law Society, then said :

" The members of the Wellington District Law Society wish to add to what has already been said their congratulations to His Honour the Chief Justice on having been elevated to the position he now holds. I do not wish to add much to what has been said ; but, on behalf of the practitioners, we welcome you here and express the hope that your tenure of this high office will be happy to you and fruitful to the administration of justice."

THE CHIEF JUSTICE REPLIES.

The Chief Justice, the Hon. H. E. Barrowclough, in a moving reply, said :

" As all of you will realize, this impressive ceremony is for me the most moving and momentous event of my life. I cannot banish from my mind the sad reflection that the occasion of it is the untimely and much lamented death of the distinguished and lovable Judge who preceded me in this office. The exemplary manner in which he discharged his duties will ever be an inspiration and a challenge to me ; but I am saddened by the thought that I am called to follow him too soon. With all of you I deeply regret that it was not vouchsafed to him to serve his full term in the high office which he adorned and to enjoy a measure of restful retirement at its end.

" I have been deeply touched and immensely encouraged by the kindly welcome which has been extended to me by my brother Judges, by Mr. Attorney, and by the Presidents of the New Zealand Law Society and the Wellington Law Society. No one realizes more than I do the important role of the members of the Bar and the solicitors who instruct them. Bench, Bar, and the profession are all members of a team working for the cause of justice. Each component of that team is as essential as any other component. All of us are bound by similar oaths to demean ourselves honourably in our respective spheres. The sentiments which you have just expressed have assured me and, more importantly, will assure the public—for this ceremony has been enacted in public in an open Court—that the members of the Bar and the solicitors practising in this Court will continue to discharge impartially and fearlessly the important duties that are their responsibility in the administration of justice throughout this Dominion.

" As my first pronouncement from this Bench, I publicly and gladly acknowledge the vital importance of your role ; and I thank you for your ready recognition of it. It remains only for me to say that, conformably with the oath I have just taken, I shall do my utmost to preserve the happy relations which have always existed here between Bench and Bar ; and that, so far as in me lies, I will do right to all manner of persons after the laws and usages of New Zealand."

TRANSFER OF LEASES AND TRANSFER OF LAND SUBJECT TO A LEASE.

Land under the Land Transfer Act, 1952.

BY E. C. ADAMS, LL.M.

EXPLANATORY NOTE.

A. Transfer of Leases under the Land Transfer Act.

Hereunder I submit two covenants to be embodied in transfers of Land Transfer leases—one where the whole of the lease is being transferred, and the other where only part of the lease is being transferred.

Section 52(*b*)(*v*) of the Property Law Act, 1952 (which applies to land subject to the Land Transfer Act, 1952) provides that where the land sold is held by lease (including underlease), the purchaser shall, on production of the receipt for the last payment due for rent under the lease before the actual completion of the purchase, assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to the date of actual completion, and also, if the land is held by under lease, that all rent due under and all covenants and provisions of every superior lease have been duly paid, performed and observed up to that date. This applies only to titles and purchasers on *sales* properly so called.

By virtue of s. 74 of the Property Law Act, 1952 (which also applies to land subject to the Land Transfer Act, 1952), there is implied on the part of the transferor (except a trustee transferor or one acting in a fiduciary capacity) a covenant that the rent reserved by the lease under which the land is held, and the covenants and conditions expressed or implied in the lease and to be performed and observed by the lessee, have been respectively paid, performed, and observed up to the date of the transfer.

Sometimes a lease is contracted to be sold expressly or impliedly without any warranty that the covenants in the lease have been duly performed. In such a case, this implied covenant ought to be modified so as to carry out the intentions of the parties. The form which the modification should take is suggested in *Butler* v. *Mountview Estates, Ltd.*, [1951] 1 All E.R. 693. The covenant could read as follows :

Provided always, and it is hereby agreed, that the covenants which are implied by reason of the said "A" hereby assigning as beneficial owner shall not be deemed to imply that either of the covenants on the part of the lessee contained in the said lease for painting or repairs to be executed upon the premises has been performed—with such necessary alterations or additions as may be necessary in order to cover the provisions of a lease in any particular case.

Where a person transfers a lease as trustee, mortgagee, executor, administrator, or in a fiduciary capacity, the implied covenant is that he had not executed or done, or knowingly suffered, or been party to or privy to, any deed or thing whereby or by means whereof the subject matter of the transfer or any part thereof is or may be impeached, charged, affected, or encumbered in title estate, or otherwise, or whereby or by means whereof he is in any wise hindered from conveying the subject matter of the transfer or any part thereof in the manner in which it is expressed to be transferred : Property Law Act, 1952, s. 75.

Section 97 of the Land Transfer Act, 1952, provides that a registered mortgage or lease may be transferred by memorandum of transfer, and that upon registration of the transfer the estate or interest of the transferor as set forth in the instrument, with all rights, powers, and privileges thereto belonging or appertaining, shall pass to the transferee. The section then goes on to say that the transferee shall thereupon become subject to and liable for all and every the same requirements and liabilities to which he would have been subject and liable, *if named in the instrument originally as mortgagee or lessee* of the land, estate, or interest. But the effect of this last provision is not to make the transferee of a lease liable to indemnify the original lessee against rent accrued due, nor against breaches of covenants occurring *after* the transferee has transferred to some one else : *Wilson and King* v. *Brightling*, (1885) 4 N.Z.L.R. C.A. 4.

Section 98 of the Land Transfer Act, 1952, provides that in every transfer of a lease there shall be implied a covenant by and on the part of the transferee with the transferor that the transferee will thenceforth pay the rent by the lease reserved, and observe and perform all the covenants in the lease expressed or implied on the part of the lessee to be observed and performed, and will indemnify and keep harmless the transferor and his representatives from and against all actions, suits, claims, and expenses in respect of the non-payment of the said rent, or the breach or non-observance of the covenants or any of them.

It will be observed that the covenants by the transferee in Precedents Nos. 1 and 2 hereunder follow very closely the covenants implied by s. 74 of the Property Law Act, 1952, and s. 98 of the Land Transfer Act, 1952, above set out.

It may be mentioned here that, contrary to the general law of landlord and tenant, s. 89(4) of the Land Act, 1948, provides that on the transfer of a Crown lease or licence held under that Act or any former Land Act, the transferor shall cease to be liable for any future default in the performance of the covenants and conditions of the lease or licence.

The transferee of a lease which is mortgaged becomes personally liable to the mortgagee, and also impliedly covenants to indemnify the transferor with respect to the mortgage : s. 104 of the Property Law Act, 1952, s. 96 of the Land Transfer Act, 1952.

B. *Transfer of Land under the Land Transfer Act, subject to a Lease.*

By virtue of s. 112 of the Property Law Act, 1952, rent and the benefit of the lessee's covenants run with the reversion or in any part thereof immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and may be recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased.

Similarly by virtue of s. 113 of the Property Law Act, 1952, the obligation of the lessor's covenants also run with the reversion notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by any person in whom the term is from time to time vested, in so far as the lessor has power to bind the person from time to time entitled to the reversionary estate.

Section 114 of the Property Law Act, 1952, provides for the apportionment of conditions notwithstanding severance, etc., of the reversionary estate : every condition or right of re-entry and every other condition in the lease shall be apportioned and shall remain annexed to the several parts of the reversionary estate so severed.

Sections 112, 113, and 114 of the Property Law Act, 1952, apply to the transfer of leased land subject to the Land Transfer Act.

PRECEDENT No. 1.

USUAL COVENANTS CONTAINED IN A TRANSFER UNDER THE LAND TRANSFER ACT OF ALL THE LAND IN LEASE.

AND the Transferor DOTH HEREBY COVENANT that the said Memorandum of Lease No. is now a good valid and subsisting lease and in nowise void or voidable and that the rental reserved therein and the covenants and conditions in the said lease contained and/or implied have been respectively paid performed and/or observed down to the date hereof AND the Transferee DOTH HEREBY COVENANT that he will henceforth pay the rent and will observe and perform the covenants and conditions on the Lessee's part herein contained and implied and will indemnify and save harmless and indemnified the Transferor from and against all losses suits costs (including costs as between solicitor and client) charges and expenses had sustained and incurred through any non-payment non-observance or non-performance thereof.

PRECEDENT No. 2.

USUAL COVENANTS CONTAINED IN A TRANSFER, UNDER THE LAND TRANSFER ACT, OF PART OF THE LAND IN LEASE.

AND the Transferors DO HEREBY COVENANT that the said Memorandum of Lease is now a good valid and subsisting Lease and in nowise void or voidable and that the rental reserved therein and the covenants and conditions in the said lease contained and/or implied have been respectively paid performed and/or observed down to the date hereof AND the Transferee DOTH HEREBY COVENANT that it will henceforth pay a proportion namely the sum of pounds (£) per annum of the rent and will observe and perform the covenants and conditions on the Lessee's part therein contained and implied and will indemnify and save harmless and indemnified the Transferors from and against all losses suits costs (including costs as between solicitor and client) charges and expenses had sustained and incurred through any non-payment non-observance or non-performance thereof.

N.B. *The execution of a transfer of part of a lease by the lessor, as well as by the transferor and transferee, is advisable.*

PRECEDENT No. 3.

MEMORANDUM OF TRANSFER OF LAND UNDER THE LAND TRANSFER ACT, SUBJECT TO MEMORANDUM OF LEASE. PROVISION FOR APPORTIONMENT OF RENT ON SEVERANCE OF REVERSION.

I, A.B. of Palmerston North, Builder (herein called the transferor), being registered as the proprietor of an estate in fee simple, sub-

(*Concluded on page 352*)

MR. JUSTICE McGREGOR.

FEW appointments to the Supreme Court Bench have met with more general approval than that of His Honour Mr. Justice McGregor, lately Crown Solicitor at Palmerston North. This approval is primarily a tribute to the sterling qualities of the new Judge, whose popularity at the Bar as been as widespread as it was well deserved, and, secondly, it is an endorsement of the innovation created by the preferment of a provincial barrister.

Mr. George Innes McGregor was born at Akaroa in 1889, and is the son of Mr. A. E. McGregor, later Chief Postmaster at Dunedin. The Judge's paternal grandfather, Mr. A. I. McGregor, M.H.R., represented Banks Peninsula in the House of Representatives for a number of years, and for some time was Government Whip in Sir Harry Atkinson's administration. All the new Judge's education and early training was in the South Island, while all his practising career was in Palmerston North.

He was at school at Waitaki where he gained a Junior University Scholarship, and was Dux in 1916. He attended Otago University and obtained his Bachelor's Degrees in Arts and Law in 1920. He was then employed in the office of the well-known Dunedin firm, Messrs. Reid, Bundle, and Lemon. He continued his studies and obtained his Master's Degree in Law in 1922.

It was in that year, 1922, that Mr. McGregor went to Palmerston North and commenced practice on his own account. In 1924, he joined Mr. M. H. Oram, (now the Hon. Sir Matthew Oram, Speaker of the House of Representatives) in a partnership which carried on till 1929. From 1929, Mr. McGregor was again in practice on his own account until 1945, when he was joined in partnership by Mr. J. A. McBride, and so continued until his appointment to the Bench.

After going to Palmerston North, Mr. McGregor retained his interest in academic matters and was an examiner for the University of New Zealand for some years in Trustee Law and Company Law. He has taken throughout his sojourn in Palmerston North a very keen interest in the affairs of the Palmerston North Law Society, and has served two terms as its President. For over nine years, he has been the representative of the Palmerston North practitioners on the Council of the Wellington District Law Society.

Mr. McGregor took over the office of secretary of the Palmerston North Law Society just before the first Devil's Own Tournament. He was the Tournament's first secretary and organizer, and he retained that position for fifteen of these gatherings. It has been largely due to his organization and enthusiasm over many years that this annual function has become probably the most popular legal event in the Dominion.

Spencer Digby, Photo.

Mr. Justice McGregor.

For the last five years, the new Judge was Crown Solicitor in Palmerston North, having succeeded another distinguished barrister in that position, the late Mr. Harold Cooper. Mr. Cooper, whose health was failing towards the end of his life, leaned heavily on the services of Mr. McGregor; and the association with so eminent a lawyer has contributed in no small measure to the success of Mr. McGregor's career.

The new Judge has unbounded energy and industry. There is little room for specialization in provincial practices, and a barrister in the provinces is thrown very much on his own resources. Mr. McGregor had an extensive Court practice even before he became Crown Solicitor. The responsibilities of that appointment, rapidly increasing as they are with the decentralization of Government Departments, when added to the demands of a wide and varied private practice, have fully proved Mr. McGregor's capacity for work and judgment.

A number of Palmerston North organizations will greatly miss the departure of Mr. and Mrs. McGregor, in particular the Manawatu Racing Club, of which at the time of his appointment Mr. McGregor was still a steward; the Manawatu Club, in the administration of which he has shared; and the Plunket Society, of which Mrs. McGregor has been president for some years. They and their two daughters are a loss to the city.

The new Judge will bring to his high office a very wide legal experience, an innate sense of fairness, a sound and balanced judgment, and deep scholarship.

Oaths of Office.

On November 16, the profession gathered in the Supreme Court, Wellington, to welcome the new Judge and to witness his being sworn in by Mr. Justice Fair, A.C.J. This was the first time, so far as anyone remembered, that a Judge had been sworn in in open Court.

After Mr. Justice Fair had administered the oaths of office, he welcomed Mr. Justice McGregor to the Bench. His Honour was congratulated by the Attorney-General, Mr. T. Clifton Webb, by the President of the New Zealand Law Society, Mr. W. H. Cunningham, and by Mr. E. F. Rothwell, President of the Wellington Law Society, who expressed the good wishes of the profession.

SOME THOUGHTS ON PRESENT DISCONTENTS.

Supported by A Recent Judgment.*

By Advocatus Ruralis.

Advocatus Ruralis recently had a visit from the directors of a Dairy Company which company had established its factory on the banks of a stream. For the simpler working of the factory it was customary for the lorries supplying milk and cream to make the circuit of the factory. Unfortunately, the directors in establishing their factory neglected the warning conveyed to them in their Sunday School days and they builded their house upon sand, so that, when the winds rose and the rains came, the track which went round the factory was washed away and violent steps had to be taken to save the building.

The directors now wished to purchase a half acre from Farmer Giles whose well-known farm, Snake Gully, lay next door. Both properties were within the Borough although possibly part of Farmer Giles's title was without the Borough. It was alleged that Mr. Giles was willing to sell at a price satisfactory to Mr. Giles. Advocatus explained that, if the directors negotiated to purchase, then they were committing an offence making them liable to a fine of £100. They could not begin to negotiate until a plan had been deposited in the Land Transfer Office, and this could not be done until the consent of the Borough had been obtained, and this could not be done until a scheme plan had been approved, and this meant finding out the exact boundaries the directors would require and then negotiating with Farmer Giles as to this area and the price. It would be probable that Farmer Giles would be averse to spending £50 on a survey only to find that the directors, being bound by no contract, had decided to buy on the other side of their factory. At any rate, a survey would take six months, and, if by any chance part of the land went over the County boundary, this period would be doubled. The directors pointed out that the matter was urgent as the lorries had to bring in the milk, and asked what they could do. Advocatus said that, if by any chance Mr. and Mrs. Giles owned the land jointly, they could each apply for a title for their undivided interests and as the land would then be in two titles s. 332(1) (a) of the Municipal Corporations Act, 1933, would no longer apply and Advocatus thought that it would be possible to negotiate with Mr. and Mrs. Giles. This suggestion merely seemed to irritate the directors and they asked again what they could do.

Advocatus explained that legally they had the choice between closing the factory and buying the farm; but, if they had faith in Mr. Giles and negotiated with Mr. Giles, then the Magistrate would probably extend the same leniency to them as, to say, a first offending bookmaker who was merely obliging his friends.

The Chairman said that the whole thing was unreasonable but Advocatus explained that most Legislatures were now under the control of their Civil Service, and the New Zealand Legislature probably led the world by placing in its Statute Book a law which stated that regulations made under the Act (? by Civil Servants) shall not be void just because they were unreasonable (See s. 167(6) of Transport Act, 1949).

Later in the month, Advocatus saw that the cream lorries were travelling over a newly gravelled track in Farmer Giles's paddock but wisely made no comment.

Since then Advocatus attended a meeting of trustees who contemplated spending £100,000 on a building of shops and offices.

Negotiations were proceeding with a corporation who wished to obtain a fifteen-year lease of part of the upstairs floor for £2,000 per annum. It was pointed out that a lease of premises even on the first floor was a subdivision of land, and, that, therefore, the approval of the Borough Council would have to be obtained and a plan deposited.

Advocatus saw some difficulty in convincing a District Land Registrar that he should accept for deposit an architect's plan of a proposed building, and, if this were not done, any negotiations which might be undertaken would not be binding. The trustees' remarks were similar in many respects to the remarks of the Dairy Company directors—although those of the directors were possibly more pungent.

* *Concrete Buildings of New Zealand, Ltd. (In Liquidation)* v. *Swaysland*, [1953] N.Z.L.R. 997.

HAMILTON DISTRICT LAW SOCIETY.

Coronation Dinner.

There is no regularity as to the intervals between the dinners of the Hamilton District Law Society. A Peace dinner after the recent war had seemed appropriate. The one to succeed that was, although a trifle belated, called a Coronation dinner. The practitioners who attended this function at which Mr. McCaw presided obviously enjoyed the celebration.

It was the first occasion in history when three Judges were in Hamilton at the same time, Mr. Justice Stanton, Mr. Justice F. B. Adams, and Mr. Justice Turner. They all came from Auckland for the occasion. Other guests were Messrs. S. L. Paterson, S.M., G. Wallace, President of the Auckland Law Society, Dr. S. Douglas, President of the local branch of the British Medical Association, Mr. W. Metherall, President of the Accountants Society; and Mr. A. J. Bennett, Registrar.

The toast to the Bench was proposed by Mr A. L. Tompkins, and responded to by Mr. Justice F.B. Adams. He is to be stationed in future at Christchurch, and Mr. Tompkins for the local Bar expressed regret at his departure, and appreciation of his courtesy and patience with practitioners.

The toast of the Bar proposed by Mr. Metherall and the reply by Mr. Allan Hill were dealt with, with pleasing lightness.

Practitioners were appreciative of the excellent after-dinner standard of all the speakers.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

A Graceful Tribute.—"The secret of happiness is Liberty and the secret of Liberty is Courage." With these powerful words of Pericles, the Earl of Rothes, a Scottish peer, concludes his Speech in moving Address in Reply in the House of Lords on November 3 to Her Majesty's speech on the Opening of Parliament. The mover who claims that his assignment in the House of the Address is a compliment to Scotland deals with a number of topics. Of the reference in Her Majesty's speech to the improvement of road safety, he says:

> "It is horrifying to contemplate that during last September there was one casualty every two minutes and one person killed or seriously injured every eight minutes in road accidents. The increase in the total was the largest so far recorded in any month this year. This is by no means a new problem, nor is there any easy solution, but I am inclined to the view that if all road users, be they drivers of vehicles, cyclists or pedestrians, co-operated closely together, each being willing to sacrifice something for the good of all, we should make some progress; and if, in addition, careful schemes of road improvement could be carried out, I think a marked reduction in the number of road accidents would result."

The mover, Lord Rothes, is the Chairman of the Butterworth group of companies and, in referring to his speech, a later speaker in the Debate, Earl Jowitt, pays a graceful tribute to him. "When I add," he says, "that I believe he is closely identified with a great publishing house which deals with law books, and that no lawyer can be really learned unless he reads the books for which the noble Lord is responsible, I must pay him a great debt of gratitude. I can assure him that there is nothing in the books which he produces which can arouse any misgivings on the part of the strictest Mrs. Grundy."

"**13**"—At the making of fixtures for the last Wellington sessions, civil jury cases were scheduled to commence on November 9: and a marked reluctance was shown by plaintiffs' solicitors to accept Friday 13 as a suitable date for a hearing. This may have been due to unfortunate experiences on Friday, February 13, or Friday, March 13, earlier in the year, or merely to a superstitious distrust of the wisdom of juries generally on such dates. According to Jonathan Curling in an article in *The Saturday Book No.* 13, Mr. Justice Luxmoore, when a barrister, never accepted thirteen guineas for a brief; and where a solicitor who knew him well sent him a brief marked "twelve and another" it was returned to him. He also cites the strange case of a Miss Sarah Pringle, who, in 1843, went to the High Court when the official renumbering of a street in Chorlton-cum-Hardy caused her house to become No. 13. Evidence was given by three estate agents that the new number was definitely damaging to the value of the property and that it was impossible to let it. She won her case, but died of a heart attack next day. Scriblex hopes that these jottings will not have the effect of adding "triskidekaphobia," or "fear-of-thirteen," to the better-known hazards of litigation. In many a case, the Judge has made a thirteenth member of the jury without any visible harm to the plaintiff. And, as for Fridays, did not the blonde Vikings regard Friday as the luckiest day of the week?

A Matter of Selection.—The *Law Society's Gazette* publish a report in the *Star* of a High Court Judge who said that he "found force in the argument that a higher degree of mental capacity is required for making a will than for getting married." But a very good Judge on this topic has also said that getting married affords strong evidence of a lack of mental capacity.

Proof of Adultery.—Sir John Pollock in *Time's Chariot* (John Murray) relates a curious story told to his grandfather by Dr. Lushington, counsel for the respondent in the famous Norton divorce case. The petitioner alleged that his wife was Lord Melbourne's mistress. After proceedings were started, a former footman of the Nortons called on the husband's solicitors with the information that one day when Lord Melbourne was calling he had looked through the keyhole and had seen Mrs. Norton lying on the floor and Lord Melbourne bending over her. The opinion of the petitioner's advisers was that they couldn't use this evidence since, if it were produced in Court, it would seem like a concoction. They thought that it was highly improbable that, if adultery had taken place, it would have happened in such circumstances. At a later stage, Dr. Lushington decided to mention the matter to Mrs. Norton, who said, with a laugh, "Why, yes, I remember perfectly. I told Lord Melbourne that I would put one leg around my neck. He bet me that I couldn't, so I lay down on the floor and did it straight away." Mrs. Norton, immortalised by George Meredith in *Diana of the Crossways* was a grand-daughter of the playwright, Richard Brinsley Sheridan.

From My Notebook (Judicial Irony Division).—"I cannot call the matters that were discussed by Mr. Haldane small or insignificant. They are mysteries into which I do not think it is our province to intrude. And, indeed, I am not quite sure that at the conclusion of Mr. Haldane's argument I had gained a clearer insight into these hidden things than I had before." Lord Macnaghten in *Free Church of Scotland* v. *Lord Evertown*, [1904] A.C. 515.

"If the argument of the case by the respective counsel suffered somewhat from the fact that they were quite unable to agree as to the point to be argued, and therefore dealt each with their own contention rather than that of the other side, several arguments at least lacked nothing in incisiveness; but, in spite of this, it is pleasant to be able to record that an agreement was reached concerning one minor item"—Langton, J., in "*The Edison*", [1931] P. 239.

"Suppose I clean your property without your knowledge, have I then a claim on you for payment? One cleans another's shoes; what can the other do but put them on? Is that evidence of a contract to pay for the cleaning?"—Pollock, C.B., in *Taylor* v. *Laird*, (1856) 2 L.J. Ex. 332.

TRANSFER OF LEASES AND TRANSFER OF LAND SUBJECT TO A LEASE.

(*Concluded from p. 348.*)

ject , however, to such encumbrances liens and interests as are noted hereon, in all that parcel of land situated in the Borough of containing [*set out here area*] being the same a little more or less, being [*set out here official description of land*] and being part of Lot One (1) [*complete here official description of land*] and being part of the land comprised and described in certificate of title vol. folio SUBJECT to Memorandum of Lease No. now vested in E.F., of Palmerston North, Fruiterer, In Consideration of the sum of (£) (the receipt whereof is hereby acknowledged) paid to me by C.D., of Palmerston North, Stationer (herein called the transferee), Do Hereby Transfer to the said transferee All my estate and interest in the said parcel of land

And the transferor and the transferee hereby mutually agree (with the concurrence of the said E.F. testified by his execution of this instrument) that the quarterly rent of £ reserved by the said Memorandum of Lease No. shall be henceforth apportioned as follows: The quarterly rent of £ being part of the said quarterly rent of £ shall be payable exclusively in respect of the land hereby transferred and the quarterly rent of £ being the balance of the said quarterly rent of £ shall be payable exclusively in respect of the residue of the land comprised in the said Memorandum of Lease.

IN WITNESS WHEREOF the parties have hereunto subscribed their names this day of 1953.

SIGNED by the said A.B. } A.B.
in the presence of }
G.H.
Solicitor,
Palmerston North.

SIGNED by the said C.D. } C.D.
in the presence of }
I.J.
Solicitor,
Palmerston North.

SIGNED by the said E.F. } E.F.
in the presence of }
K.L.
Solicitor,
Palmerston North.

Correct for the purposes of the Land Transfer Act.
I.J.
Solicitor for the Transferee.

N.B. *If the transfer has not been preceded by an agreement in writing, insert the following in the transfer: And it is hereby declared for the purposes of the Stamp Duties Act*, 1923, *that no agreement in writing was entered into between the parties in respect of this transfer by sale.*

THE WANGANUI DISTRICT LAW SOCIETY.

Fortieth Anniversary Dinner.

The fortieth anniversary of the formation of the Wanganui District Law Society was celebrated by a dinner held at the Rutland Hotel, Wanganui, on October 22.

There was a large attendance of members of the Society from Wanganui and outlying towns, including Marton, Taihape, and Raetihi.

The guests included Judge G. M. O'Malley, of the Maori Land Court; Dr. W. J. Boyd, representing the Medical profession, and Mr. R. J. Sewell, representing the Accountants Society; the President of the New Zealand Law Society, Mr. W. H. Cunningham, and its Secretary, Mrs. D. I. Gledhill.

The toast of the New Zealand Law Society was proposed by Mr. A. G. Horsley and replied to by Mr. W. H. Cunningham, who, incidentally, was a foundation member of the Wanganui Society.

The toast of the Wanganui District Law Society was proposed by Mrs. D. I. Gledhill, who referred to the formation of the Society in 1913, its members having previously been members of the Wellington District Law Society. The first President was Mr. James Watt, and the Hon. Secretary, Mr. W. H. Cunningham. The President, Mr. A. A. Barton, replied.

The toast of the Bench was proposed by Mr. W. G. Clayton, and the response was made by Judge O'Malley, of the Maori Land Court.

Mr. C. N. Armstrong proposed the toast of the visitors, and Mr. R. I. Sewell replied.

Following the toasts, a silver tea service and silver salver, suitably engraved, were presented by the President, Mr. Barton, to Mr. G. M. Currie, who was retiring from the office of Secretary. which he had held for the greater part of the Society's lifetime. Mr. Barton said the gift carried with it the appreciation and good wishes of every member of the Society.

Mr. Currie expressed his thanks to the members.

LEGAL LITERATURE.

Tenancy.

Wily's Tenancy Act, Third Edition: By H. JENNER WILY, S.M. Pp. xviii + 153. Wellington: Butterworth and Co. (Australia), Ltd. Price 30s. post free.

Amendments to the Tenancy Act, 1948, have in recent months been many and various. They have made a new edition of this well-known work imperative. In his new work, the author has given special attention to the two Tenancy Amendment Acts passed in 1953, with their far-reaching changes in the existing law. Moreover, he has included all the relevant case-law reported up to September 30 of this year.

As the result of his research, the author can say in his introduction that he has dealt with the Tenancy Act, 1948, and its amendments, as a composite whole. He has interpreted each section in that legislation with full explanatory notes, backed, wherever possible or useful, by reference to the more important English decisions relating to correspondingly-worded sections.

The number of New Zealand cases dealing with various aspects of the local tenancy legislation has increased greatly since the last edition of this work was published. This is due, of course, to what Bankes, L.J., termed "all the practically endless variety and circumstances which may and do arise out of agreements between landlords and tenants": *Barett* v. *Hardy Bros. (Alnwick), Ltd.*, [1925] 2 K.B. 220, 222. The profession is indebted to Mr. Wily for showing, in his text, how subsequent amending legislation has rendered a number of those decisions obsolete.

There is a completeness about this edition which is refreshing to the busy practitioner to whom "tenancy cases" are an everyday worry. Lord Hewart, L.C.J., many years ago, said: "It is deplorable that a Court, and still more a private individual who lives in a small tenement should have to make some sort of a path through the labyrinth and jungle" of the corresponding English tenancy legislation: *Parry* v. *Harding*, [1925] 1 K.B. 111, 114. Mr. Wily has not merely provided a path through the jungle: he has given us a tar-sealed highway. His main concern is to fix the legislation as it is today, to simplify the effect of the miscellaneous amendments it contains, and to include everything relevant in the nature of reported decisions upon it. Thus, the busy practitioner can safely rely on Mr. Wily's carefully compiled annotations and save a considerable amount of valuable time by following them up with the cross-references to interlocking and complementary sections elsewhere to be found.

Wily's Tenancy Act, in its earlier editions, is too well known to the profession to need any elaboration of its merits. It has long been an essential tool of trade. The latest edition will be found no less useful, but with the added value of being completely up-to-date in its comprehensiveness.

P.B.E.