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CERTIORARI FOR ERROR.

IN his recent work, *The Changing Law*, Lord Justice Denning set out to draw a picture of the changes that are taking place in the field of law, especially Judge-made law. In dealing with the Rule of Law in the Welfare State, His Lordship gave particular emphasis to the judgment of the Court of Appeal in *The Queen* v. *Northumberland Compensation Appeal Tribunal, Ex parte Shaw*, [1952] 1 All E.R. 122. He said:

> The importance of that case cannot be over-stated. It means that all the departmental tribunals are subject to the rule of law; and when I say the law, I mean the law as declared by Her Majesty's Judges and not the law as declared by the Government Departments.

It may be as well to see what that case decided.

This was an appeal by the Northumberland Compensation Appeal Tribunal, constituted under the National Health Service (Transfer of Officers and Compensation) Regulations, 1948, from an order of the Divisional Court made on December 14, 1950, and reported [1951] 1 All E.R. 268, the principal judgment being that of Lord Goddard, L.C.J., with whom the other members of the Court concurred.

The facts were that under Reg. 10 of the Regulations the applicant had been awarded compensation for loss of employment as clerk to a joint hospital board by the Gosforth Urban District Council as compensating authority, and he had appealed against the award to the tribunal on the ground that the compensating authority had failed to take into account his service with the district council, as required by the regulations. The tribunal upheld the decision of the compensating authority. The applicant moved in the Divisional Court of the King's Bench Division for an order of *certiorari* to remove the decision of the tribunal into the High Court to be quashed on the ground that the decision was erroneous on the face thereof. In the Divisional Court both the tribunal and the compensating authority were respondents to the motion and both admitted that their decisions were wrong and that an error of law appeared on the face of the decision of the tribunal, but they contended that the Court had no power to make an order of *certiorari* since the tribunal had not acted without jurisdiction.

In a lengthy judgment, to which reference will be made later, Lord Goddard, L.C.J., delivered what was, in effect, the judgment of the Court (as the other members, Hilbery and Parker, JJ., briefly concurred), and held that the tribunal had stated on the face of the order the grounds on which they had made it, and, as it appeared that in law those grounds were not such as to warrant the decision to which they had come, *certiorari* would issue to remove the order into the High Court to be quashed.

The tribunal appealed. In the Court of Appeal, the tribunal repeated its contention that *certiorari* did not lie on the ground of an error of law appearing on the face of the decision of the tribunal. In addition, it contended that, although it was admitted that the tribunal had made an error of law, the error did not appear on the face of the record.

At the beginning of his own judgment, Denning, L.J., clearly showed what was in issue in this case. He said:

> The question in this case is whether the Court of King's Bench can intervene to correct the decision of a statutory tribunal which is erroneous in point of law. No one has ever doubted that the Court of King's Bench can intervene to prevent a statutory tribunal from exceeding the jurisdiction which Parliament has conferred on it, but it is quite another thing to say that the King's Bench can intervene when a tribunal makes a mistake of law. A tribunal may often decide a point of law wrongly while keeping well within its jurisdiction. If it does so, can the King's Bench intervene? There is a formidable argument against any intervention on the part of the King's Bench at all. The statutory tribunals, like the one in question here, are often made the judges both of fact and law, with no appeal to the High Court. If, then, the King's Bench should interfere when a tribunal makes a mistake of law, the King's Bench may well be said to be exceeding its own jurisdiction. It would be usurping to itself an appellate jurisdiction which has not been given to it. The answer to this argument, however, is that the Court of King's Bench has an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity, but in a supervisory capacity. This control extends not only to seeing that the inferior tribunals keep within their jurisdiction, but also to seeing that they observe the law. The control is exercised by means of a power to quash any determination by the tribunal which, on the face of it, offends against the law. The King's Bench does not substitute its own views for those of the tribunal, as a court of appeal would do. It leaves it to the tribunal to hear the case again, and in a proper case may command it to do so. When the King's Bench exercises its control over tribunals in this way, it is not usurping a jurisdiction which does not belong to it. It is only exercising a jurisdiction which it has always had.

His Lordship went on to say that the origin of this controlling power was the writ of *certiorari* by which the King commanded the Judges of any inferior Court of record to certify the record of any matter in their Court with all things touching the same and to send it to the King's Court to be examined. The wording of the writ was for many centuries as follows, being originally in Latin and afterwards in English:

> "We being willing for certain reasons that all and singular orders made by you (as is said) be sent by you before us, do command that you do send forthwith before us all and singular the said orders with all things touching the same, as fully and perfectly as they have been made by you and now remain in your custody or power, together with this our writ, that we may cause further to be done

thereon what of right and according to the law and custom of England we shall see fit to be done."

Lord Justice Denning then considered the amplitude of this writ. The record of the inferior Court is to be sent up so that the King's Bench may cause to be done thereon "what of right and according to the law and custom of England" ought to be done. The width of these words is only matched by the width of the words used by the great masters of the law in speaking of *certiorari*. Thus, Joseph Chitty, in *2 General Practice of the Law*, 3rd Ed., 353*a*, said:

"As an essential mode of exercising a control over all inferior courts, [the Court of Queen's Bench] has a most extensive power to bring before it their proceedings, and fully to inform itself upon *every subject essential to decide upon the propriety of the proceedings below*. This is effected by a writ called *certiorari* . . . The writ issues in civil as well as criminal cases. Thus, such a writ was ordered to be issued to the judge of an inferior jurisdiction, to return and certify the practice of his court: see *Williams* v. *Lord Bagot* (1824) 4 Dow. & Ry. 315."

Ninety years later, Lord Sumner used words of equal width in *R.* v. *Nat Bell Liquors, Ltd.*, [1922] 2 A.C. 156. The supervision by *certiorari*

". . . goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise."

The learned Lord Justice added:

Of recent years the scope of *certiorari* seems to have been somewhat forgotten. It has been supposed to be confined to the correction of excess of jurisdiction, and not to extend to the correction of errors of law, and several learned judges have said as much. But the Lord Chief Justice has, in the present case, restored *certiorari* to its rightful position and shown that it can be used to correct errors of law which appear on the face of the record, even though they do not go to jurisdiction. I have looked into the history of the matter and find that the old cases fully support all that the Lord Chief Justice says. Until about one hundred years ago, *certiorari* was regularly used to correct errors of law on the face of the record. It is only within the last century that it has fallen into disuse, and that is only because there has, until recently, been little occasion for its exercise. Now, with the advent of many new tribunals and the plain need for supervision over them, recourse must once again be had to this well-tried means of control. I will endeavour to show how the writ of *certiorari* was used in former times, so that we can take advantage of the experience of the past to help us in the problems of the present.

His Lordship then considered convictions by Magistrates in summary proceedings under statutes, and the orders of Justices in civil matters; and he showed that the fundamental principles remained untouched. Turning to the orders of statutory tribunals, he traced their history from 1531, when the Court of King's Bench used *certiorari* to quash the orders of the Commissioners of Sewers for errors on the face of them.

His Lordship concluded that throughout all the cases there is one governing rule—*certiorari* is available only to quash a decision for error of law if the error appears on the face of the record. What, then, is the record? It has been said to consist of all those documents which are kept by the tribunal for a permanent memorial and testimony of their proceedings: see *3 Blackstone's Commentaries*, 24 thereon. But it must be noted that, whenever there was any question as to what should, or should not, be included in the record of any tribunal, the Court of King's Bench used to determine it. It did it in this way. When the tribunal sent their record to the King's Bench in answer to the writ of *certiorari*, this return was examined, and, if it was defective or incomplete, it was quashed: see *Apsley's Case*, (1671) Sty. 85; 82 E.R. 549, *R.* v. *Levermore*, (1700) 1 Salk. 146; 91 E.R. 135, and *Ashley's Case*, (1697) 2 Salk. 479; 91 E.R. 412. Alternatively, the tribunal might be ordered to complete it: *Williams* v. *Lord Bagot*, (1824) 4 Dow. & R. 315, and *R.* v. *Warnford*, (1825) 5 Dow. & Ry. 489.

It appears that the Court of King's Bench always insisted that the record should contain, or recite, the document or information which initiated the prodeedings and thus gave the tribunal its jurisdiction and also the document which contained their adjudication. Thus in the old days the record sent up by the Justices had, in the case of a conviction, to recite the information in its precise terms, and in the case of an order which had been decided by quarter sessions by way of appeal, the record had to set out the order appealed from: see *Anon*, (1697) 2 Salk. 479; 91 E.R. 412. The record had also to set out the adjudication, but it was never necessary to set out the reasons: see *South Cadbury* (*Inhabitants*) v. *Braddon, Somerset* (*Inhabitants*), (1710) 2 Salk. 607; 91 E.R. 515, or the evidence, save in the case of convictions. Following these cases, it seems the record must contain at least the document which initiates the proceedings, the pleadings, if any, and the adjudication, but not the evidence, or the reasons, unless the tribunal chooses to incorporate them. If the tribunal does state its reasons, and those reasons are wrong in law, *certiorari* lies to quash the decision.

In the course of another lengthy judgment, Singleton, L.J., came to the same conclusion. He suggested a remedy and a great saving of time if legislation were framed to give a right of appeal from inferior tribunals. His Lordship said that, if the appeal had succeeded, the applicant would have been deprived of some part of the compensation for loss of office to which he was entitled under the regulations, and to which (His Lordship said) everyone now agreed that he was entitled. The learned Lord Justice concluded:

There was no way other than this by which the mistake could be rectified. The Attorney-General pointed out the undesirability of the court interfering with the decisions of tribunals set up by Parliament. I agree with him that the Divisional Court cannot extend its powers. It can only act according to the well-recognized rules. It is equally important that the court should not hesitate to act to prevent an injustice being done if the remedy sought is within the scope of its powers. Much time has been expended in recent years in considering whether in particular circumstances *certiorari*, or prohibition, will lie. A great deal of it could be saved. The regulations under the National Health Service Act, 1946, are of great complexity. The interpretation of them is left to the tribunal; there is no provision for an appeal to the courts. That position arises frequently nowadays. I most earnestly wish that in such cases, where difficult questions of law, and of interpretation, must arise, that there should be given some right of appeal. Perhaps the most convenient form is that adopted in s. 37 of the National Insurance (Industrial Injuries) Act, 1946, under which any question of law arising in connection with the determination of certain questions may, if the Minister thinks fit, be referred to the decision of the High Court, and any person aggrieved by the decision of the Minister on any question of law not so referred may appeal from that decision to the High Court. And there is provision in sub-s. (5) that the decision of the High Court shall be final, a provision which may be thought desirable in such cases. After all, it is the function of the courts to determine questions of law. Tribunals are sometimes given an unduly difficult task. There must be a feeling of dissatisfaction if it is recognized that a decision of a tribunal is wrong in law and yet there is no power to correct it—in other words, if there is no right to obtain the opinion of the court. I am satisfied that the course I have suggested would result in a saving of time, and of expense, and would be for the public good.

In our next article, we shall consider the implications of the judgments in the *Northumberland* case, and the manner in which, in a later decision, the Court of Appeal to some extent, has acted where the earlier decision could not, in the circumstances, be applied.

SUMMARY OF RECENT LAW.

BANKS AND BANKING.

Charge to secure Account—Legal Charge—Payment under Charge to be made on Demand—Limitation of Action on Charge—Accrual of Cause of Action—Limitation Act, 1939 (*c.* 21), *s.* 4 (3), *s.* 18 (4). On September 16, 1936, a bank took a legal charge (subject to a prior mortgage) secured on a farm owned by A as security for A's overdraft on current account. The charge provided that A "hereby covenants with the bank to pay to them on demand all money and liabilities which now are or at any time hereafter may be due owing or incurred from or by [A] to the bank or for which [A] may be or become liable to them on any current or other account or in any manner whatever . . . together with interest . . . (such interest being computed both before and after any such demand . . .)". A as beneficial owner thereby charged the farm with the payment to the bank of the money, liabilities and interest thereby covenanted to be paid by him. On September 19, 1936, the legal charge was registered as a land charge. On June 24, 1938, A contracted to sell the farm to B. On December 19, 1938, the bank gave notice in writing to A pursuant to the legal charge requiring repayment of the money due on his banking account. In 1944 by a vesting order the farm was vested in B subject to incumbrances. On November 29, 1950, the bank issued an originating summons to enforce its security on the farm by foreclosure or sale. It was objected that the claim was statute-barred because in the case of advances made before the date of the charge time ran from the date of the charge, and as regards subsequent advances time ran from the dates of the advances. *Held:* The true construction of the legal charge was that the making of a demand was a condition precedent to recovery of the money secured thereby, and, therefore, time ran from the date of the demand and the claim was not barred. *Held, further*: The legal charge was collateral security and, therefore, even if no demand was necessary to the bringing of an action on a direct present debt payable on demand, in the present case a demand would be necessary.

Rule stated by *Chitty*, J., in *Re Brown's Estate* ([1893] 2 Ch. 304), and dictum of *Denning*, L.J., in *Barclays Bank, Ltd.* v. *Beck* ([1952] 1 All E.R. 553), applied.

Lloyds Bank, Ltd. v. *Margolis and Others* [1954] 1 All E.R. 734 (Ch.D.)

CHARITY.

Charity—Education—British School of Egyptian Archaeology—Diffusion of, and Education of Students in, Special Branch of Knowledge—Contributors to be supplied with School's Publications—Discontinuance of School—Application of Surplus Assets. The British School of Egyptian Archaeology was an unincorporated body, founded in 1905 by Sir Flinders Petrie, its objects, as stated in Reg. 3 of its regulations, being "A. To conduct excavations and to pay all expenses incidental thereto. B. To discover and acquire antiquities and to present the same to public museums. To hold exhibitions, when practicable. C. To publish works. D. To promote the training and assistance of students. All of these objects shall be carried on in relation to Egypt and any part of the former kingdom of Egypt." By Reg. 4: "All money recived by contribution, bequest, or sales of books, shall be applicable to the above purposes only." Regulation 9, which was headed "Of Contributors" provided: "All contributors of one guinea or two guineas annually are members of the school and shall receive the corresponding publication of work free. Those who contribute a larger amount annually or at once shall receive a corresponding value of publications when such be issued, or antiquities may be allocated to such public museums as they desire." The list of contributions which accompanied the school's report and balance sheet for the year 1928-29 showed that individual contributions varied from one guinea to £500. At the end of the report there appeared: "Annual payments made by contributors to the British School of Egyptian Archaeology: Ordinary annual contribution to receive the volume or volumes, two guineas. Contribution to receive other volumes or in part payment of annual volume, one guinea." The outbreak of war in 1939 put an end to the school's main activities and after the death of Sir Flinders Petrie in 1942 it was never a going concern. After the war, owing to the uncertainty of the political situation in the Middle East, it was impossible to carry out most of the school's objects, and the committee wished to wind-up its affairs. The assets amounted to about £4,000. On a summons to determine, *inter alia*, (i) whether the funds were held on valid charitable trusts, and (ii) if not, whether they should be re-paid to the contributors in proportion to their respective contributions, *Held*: (i) The object of the school being the diffusion of a certain branch of knowledge, *viz.*, Egyptology, and the training of students in Egyptology, the school had a direct educational purpose, and, therefore, it was a charitable institution. *Beaumont* v. *Oliveira*, (1869) (4 Ch. App. 309), applied. (ii) Although the contributions were given on a contractual basis to the extent that a contributor was entitled, within the value of his contributions, to such works as the school decided to publish, he was entitled to nothing further and must be taken to have parted with his money once and for all when he gave his contributions, and, therefore, the contributions were held on valid charitable trusts, and, on the winding-up of the school's affairs, the surplus funds should be applied cy-pres. (*Re Welsh Hospital (Netley) Fund*, [1921] 1 Ch. 655, and *Re North Devon and West Somerset Relief Fund Trusts*, [1953] 2 All E.R. 1032, applied.) *Re British School of Egyptian Archaeology. Murray and Others* v. *Public Trustee and Others* [1954] 1 All E.R. 887 (Ch.D.)

As to Charitable Intention, see *Halsbury*, Simonds Edn. Vol. 4, p. 267, para. 562; and for Cases, see *Digest*, Vol. 8, pp. 291-297, Nos. 686-740.

Relief of Poverty—Gift "for the working classes and their families" in Certain Area—Reference by Testator to "my general charitable intention"—Effect of Localization of Gift. By cl. 2 (*a*) of a codicil to his will a testator gave his residuary estate to his trustee and directed that he should stand possessed of one third part thereof on trust to apply the same in any manner which his trustee in his absolute discretion should consider "to be in furtherance of my general charitable intention . . . namely to provide or to assist in providing dwellings for the working classes and their families resident in the area of Pembroke Dock . . . or within a radius of five miles therefrom (with preference to actual dock workers and their families employed at the said docks) . . . "On a summons to determine whether the trust contained in cl. 2 (*a*) was a valid charitable trust, *Held*: (i) A trust for the relief of poverty could not be inferred from the words of the clause because, although a man might be a member of the working class, it did not follow that he was poor. (*Re Glyn's Will Trusts* [1950] 2 All E.R. 1150 *n.*, distinguished.) (ii) The localisation of the gift to a particular area could not make the gift a valid charitable gift where its purpose was specified and was not charitable *per se*. *Williams' Trustees* v. *Inland Revenue Commissioners*, [1947] 1 All E.R. 513, followed. (iii) The use of the words "my general charitable intention" by the testator did not validate the particular intention specified by him which was not, in fact, a charitable intention, and, therefore, the gift failed. *Re Sanders' Will Trusts. Public Trustee* v. *McLaren and Another* [1954] 1 All E.R. 667 (Ch.D.)

As to Trusts for Relief of Poverty, see 4 *Halsbury's Laws of England*, 3rd Ed., pp. 213-218, paras. 492-495.

COMPANY LAW.

Company—Shares—Transfer—Disposition on Death—Article of Association providing for Sale to Directors at Price Certified by Auditor as Fair Value—Auditor Acting as Expert—Valuation on break-up Basis—Sale to Directors at Price Certified by Auditor as Fair Value—Grounds for Setting aside Valuation. The nominal capital of a small private company which carried on a light engineering business was £200, divided into two hundred shares of £1 each. The deceased was a director and the chief shareholder, holding one hundred and forty shares. The other two directors each held thirty shares. Article 9 (*g*) of the company's articles of association provided that, if a member died, "his shares shall be purchased and taken by the directors at such price as is certified in writing by the auditor to be in his opinion the fair value thereof at the date of death and in so certifying the auditor shall be considered to act as an expert and not as arbitrator . . . " One part of the factory premises of the company was held on a monthly tenancy, and the other part was vested in the plaintiff (who was also the personal representative of the deceased) for a term of eight hundred years. The plaintiff had contracted to sell that lease to the company for £5,000 payable by annual instalments of £200, a contract which the plaintiff was entitled to terminate in the event of the company's suffering any process of execution, being wound-up, or failing to observe the covenants contained in the contract. The company had no right to assign the contract. On November 6, 1951, the deceased died, and on December 6, 1951, the auditor certified that a fair value for his shares, for the purpose of art. 9 (*g*), was £7 a share. The

plaintiff being dissatisfied with the valuation, the auditor let her have the notes on which it was based. The notes showed that the auditor was of the opinion that, if the company was regarded as a going concern, the shares were merely of nominal value, and that he made his valuation on the basis that the company was wound-up immediately after the deceased's death and that the assets were sold as so many loose chattels at an auction as soon as possible thereafter. On this basis the machinery was valued at £1,785, whereas, according to the evidence, its value to anyone taking over the factory as a going concern would have been £4,800. The auditor disregarded the fact that the shares held by the deceased constituted a majority holding of the company, which would enable the holder to control the method and speed of the disposal of the company's assets, though it did not carry with it an absolute right to control the business, and that a sub-tenant of part of the premises was specially interested in acquiring the shares of the deceased. In an action by the plaintiff for, *inter alia*, a declaration that the auditor's certificate was not binding, *Held*, A valuation could be impeached, not only for fraud but also for mistake or miscarriage of justice, *e.g.*, if the expert made an arithmetical error or took something into account which he ought not to have taken into account or vice versa, or interpreted the agreement wrongly, or proceeded on some erroneous principle; even if the Court could not point to actual error, nevertheless, if the figure itself was so extravagantly large or so inadequately small that the only conclusion was that the expert must have made some error, the Court would interfere; but, on the facts, bearing in mind particularly the precarious nature of the company's tenure of its premises, it could not be said that the auditor had erred, and, therefore, his valuation ought not to be disturbed. (Dictum of Sir John Romilly, M.R., in *Collier* v. *Mason*, (1858) 25 Beav. 204, applied.) Decision of Harman, J. ([1953] 2 All E.R. 636), reversed. *Dean v. Prince and Others* [1954] 1 All E.R. 749 (C.A.)

CRIMINAL LAW.

Attempt and Preparation, *104 Law Journal*, 211.

Obscene Publications—Test of Obscenity—Comparison with Other Books. On the trial of an indictment for publishing an obscene libel the test of obscenity laid down in *R.* v. *Hicklin*, (1868) L.R. 3 Q.B. 371, is to be applied to-day. In determining whether or not a book is obscene regard must be had to that book alone. Other books, which have not been the subject of charges, cannot be referred to. Dicta of the Lord Justice-General (Lord Cooper) in *Galletly* v. *Laird*, (*M'Gown* v. *Robertson* (1953 S.C. (J.) 27), adopted.) *R.* v. *Reiter and Others* [1954] 1 All E.R. 741 (C.C.A.)

CURRENCY.

The Gold Clause and International Payments, *104 Law Journal*, 213.

DAMAGES.

Loss of Earnings and Deduction of Industrial Injury Benefits, *104 Law Journal*, 117.

DEATH DUTIES.

Gifts *Inter vivos*: Estate Duty. *217 Law Times*, 56.

DEFENCE.

Military Training—Enlistment Notice—Notification that Trainee "Enlisted for service in the Army"—Sufficiently exact to designate Territorial Force of Army in which alone Initial Military Training to be perfomed—"Regular Minister of any religious denomination"—Persons entitled to Exemption from Military Service under Such Description—Military Training Act, 1949, ss. 2 (1), 3 (4), 5 (b), 16. An enlistment notice, sent under s. 16 of the Military Training Act, 1949, to a person graded fit for service, advising him of his enlistment in "the army," specifies with sufficent exactitude that he is enlisted in that branch of the New Zealand Army in which, and in which alone, he is liable to perform his initial military service—namely, the Territorial Force of the Army. Persons not liable for military service include "a regular Minister of any religious denomination". That term connotes a position of acknowledged leadership in the affairs, and particularly the spiritual affairs, of a religious denomination, with a formal or official status, as, for example, a clergyman, priest, or pastor, regularly employed as such, and to the exclusion of any who, while otherwise qualified as ministers of religion, are engaged only incidentially or intermittently in ministerial work. In order to qualify for exemption, a minister must be accorded ministeral status, or be confirmed in a position of spiritual leadership in the denomination to which he belongs, and must, in fact, exercise functions of spiritual leadership within that denomination. (*Saltmarsh* v. *Adair*, [1942] S.C. (J.) 58; *R.* v. *Jagewsky*, [1945] 1 W.W.R. 95; and *R.* v. *Held*, [1947] 87 Can.C.C. 378, followed.) *James* v. *Smith* (S.C. Wanganui. March 15, 1954. Archer, J.)

DIVORCE AND MATRIMONIAL CAUSES.

Divorce—Practice—Particulars—Cruelty—No Particulars of General Allegation given or Requested—Admissibility of Evidence of Specific Act. The husband filed a petition for dissolution of the marriage on the ground of the wife's desertion. By her answer the wife denied the desertion and cross-prayed for a decree of dissolution on the ground of cruelty and desertion, alleging, *inter alia*: "That the [husband] who is a man of foul and abusive language has neglected the [wife] and treated her with cruelty". No particulars of this allegation were included in the petition, nor were any parti- ulars asked for by the husband. During the hearing the wife in evidence referred to a specific allegation of neglect. It was submitted on behalf of the wife that, as no particulars had been asked for, she might give evidence of specific occurrences under the general charge. *Barnard*, J., referred to *Jewell* v. *Jewell*, (1862) 2 Sw. & Tr. 573; 164 E.R. 1119, and rejected the submission, saying that the wife should have given notice of such an allegation. His Lordship, however, gave leave, no objection being taken on behalf of the husband, to give notice at the hearing of the allegation as follows: "That in or about the month of June, 1946, at a time when the [wife] was confined, the [husband] gave the maidservant presents to the distress of the [wife]." *Gunner* v. *Gunner* [1954] 1 All E.R. 695*n*.

Insanity as a Defence to Cruelty, *104 Law Journal*, 39.

EVIDENCE.

Evidence on Oath, *104 Law Journal*, 38.

EXECUTORS AND ADMINISTRATORS.

Administrators—Remuneration—Solicitor Sole Administrator—Insolvent Estate—Profit Costs of preparing Petition for Administration in Bankruptcy and of Preparing and Lodging Accounts. By his will the deceased, who died in September, 1947, appointed his widow to be his sole executrix and beneficiary. In November, 1947, the widow instructed a firm of solicitors, of which L. was partner, to act for her in the administration of the deceased's estate. Finding that the estate was insolvent, the solicitors tried to negotiate a compromise with the creditors in the hope of saving something for the widow. In 1949, when it appeared that a compromise might be possible, the widow, who was living abroad, appointed L. her attorney, and on May 10, 1950, letters of administration with the will annexed of the deceased's estate were granted to L. By 1952 it became clear that the creditors' claims could not be settled, and L. decided that, in the interests of all parties, the proper course would be to have the estate administered in bankruptcy. On a petition presented by him under the Bankruptcy Act, 1914, s. 130 (9), an order was made for the administration in bankruptcy of the estate and a trustee was appointed. The costs of preparing the petition and of preparing and lodging accounts pursuant to the Bankruptcy Rules, 1952, r. 304, were disallowed on taxation on the ground that, as L. was a partner in the firm of solicitors, no costs could be recovered. *Held*, The Court had an inherent jurisdiction to allow remuneration to an administrator in a proper case: (*Re Masters* ([1953] 1 All E.R. 19), applied); but the jurisdiction should be exercised sparingly and only in exceptional cases; notwithstanding that L. acted throughout solely in the interests of the widow and the creditors and that, as he was acquainted with the whole matter, the estate benefited by the fact that he prepared the petition and the accounts, there was nothing which could be described as exceptional, and, therefore, the Court could not allow him the costs for which he asked. (Observation of *Eve*, J., in *Re Salmen*, (1912) 107 L.T. 110, questioned.) *Re Worthington* (deceased). *Ex parte Leighton and Another* v. *MacLeod* [1954] 1 All E.R. 677 (Ch.D.)

FACTORIES.

Dangerous Machinery—Duty to Fence—Grindstone—Grindstone Fenced by "hood"—Part of Grindstone exposed—Factories Act, 1937 (c. 67), *s.* 14 (1), (*Factories Act*, 1946, (*N.Z.*) *s.* 41 (4)). The plaintiff, a maintenance fitter employed by the defendants, injured his thumb while grinding the ends of a piece of metal known as a key on a power-driven grinding machine. The machine consisted of the grindstone, a spindle running through its centre which allowed the power to be applied to rotate the grindstone, an adaptable tool rest on which the metal to be ground was rested by the workman as he applied it to the

grindstone, and a fixed guard or hood covering a portion of the grindstone. The uncovered portion of the grindstone between the "hood" and the "rest" was about seven inches long. In an action for damages for personal injuries based on negligence at common law and breach of s. 14 (1) of the Factories Act, 1937, *Held, (Somerwell, L.J., dissentiente)*; the grindstone was a dangerous part of a machine within s. 14 (1) of the Act and so must be securely fenced even though such fencing rendered it unusable; it was not securely fenced; and, accordingly, the plaintiff was entitled to recover damages for breach of statutory duty on the part of the defendants. (*Davies* v. *Owen (Thomas) and Co.*, [1919] 2 K.B. 39, applied.) *Frost* v. *John Summers and Sons, Ltd.* [1954] 1 All E.R. 901 (C.A.)

INFANTS.

Adoption—Jurisdiction—Adopting Parents Registered Aliens domiciled in New Zealand—Child New Zealand born—Jurisdiction unaffected by Nationality of Adopting Parents—Infants Act, 1908, s. 21 (2). The jurisdiction of the Magistrates' Court to make adoption orders under the Infants Act, 1908, is not affected by the nationality of the parties. Consequently, an adoption order may be made in favour of alien adopting parents in respect of a naturally born New Zealand infant when both the infant and the adopting parents are domiciled in New Zealand. *In re B. (An Infant)* (Hamilton. April 2, 1954. Paterson, S.M.)

INSURANCE.

Claims for Loss under a Policy of Insurance. *104 Law Journal*, 83.

LAND DRAINAGE.

Classification of Land—Land receiving Benefit from Maintenance of Drainage Works—Not Classifiable—"Benefit from the construction of the drainage works"—Land Drainage Act, 1908, s. 33. Section 33 of the Land Drainage Act, 1908, gives power to a Land Drainage Board to classify land only when such land is likely to receive benefit from construction of drainage-works. Consequently, a Board cannot classify land if it is likely to receive benefit from the maintenance, as opposed to the construction of such works. *Walters* v. *Thames Valley Drainage Board* (Te Aroha. November 26, 1952. Freeman, S.M.)

LIMITATION OF ACTION.

Limitation of Actions and the Air Corporations. *104 Law Journal*, 100.

Negligence—Injury caused by Acts outside Statutory Period—Injury First Discovered within Statutory Period—Limitation Act, 1939 (c. 21), s. 2 (1) (a), Limitation Act, 1950 ((N.Z.), s. 4 (1) (a)). In an action of negligence the cause of action accrues at the time of the negligence, because it is then that the damage is caused, even though its consequences may not be apparent until later. Between 1923 and 1940 A. was employed by the defendants on work which resulted in the casting-off of a great deal of fine dust. In October, 1943, for the first time he found himself to be suffering from a condition of the chest which he alleged had been caused by his subjection to the dust up to 1940. On September 27, 1949, he issued a writ against the defendants claiming damages for negligence and breach of statutory duty. In a preliminary issue on a plea by the defendants that the action was barred by s. 2 (1) (*a*) of the Limitation Act, 1939, *Held*, That the plaintiff's cause of action accrued during the period, ending in 1940, in which he was exposed to the dust, and, the writ not having been issued until more than six years after 1940, his claim must fail. *Howell* v. *Young*, (1826) (5 B. & C. 259, applied.) *Archer* v. *Catton and Co., Ltd.* [1954] 1 All E.R. 896.

As to Limitation of Action in Negligence, see *20 Halsbury's Laws of England*, 2nd Ed., p. 615, para. 773; and for Cases, see *32 E. & E. Digest*, pp. 342, 343, Nos. *249-256*.

NEGLIGENCE.

Building—Demolition—Collapse of Wall killing Workmen. Appeal by the defendants from an order of *Parker*, J., dated June 22, 1953, and reported [1953] 2 All E.R. 508. The defendants, a firm who specialized in demolition work, were engaged in demolishing three blocks of gas retorts on the premises of the South-Eastern Gas Board. The blocks consisted of nine arches, and the retorts, which were in two vertical columns of five each, were surrounded by brickwork. The method of demolition, as described by the learned Judge, was that a cable was inserted through one of the top retort tubes, the two ends of the cable being joined to a winch, situated at right angles to the end wall, the pull of which, when set in operation, caused the arch to collapse. The resultant debris would be piled against the wall of the next arch, and workmen were sent in to clear it away before the next arch was demolished. On April 4, 1951, the work had proceeded as far as the last two arches of the second block. The outer wall of the last arch but one was pulled down, and on April 6 two workmen were sent in to clear the debris and to demolish the transverse wall. The adjoining wall of the last arch collapsed killing the two workmen. In an action by their widows for damages for negligence and/or breach of statutory duty, *Parker*, J., held that there was on the part of the defendants a breach of duty at common law and a breach of the Building (Safety, Health and Welfare) Regulations, 1948, Reg. 79 (7). *The Court of Appeal*, affirming the decision of *Parker*, J., found that the removal of one arch automatically deprived the adjacent arch of its lateral support and caused instability. They held that the instability produced in the last arch when the other arch was removed and the potential danger it constituted were never appreciated by the defendants who had failed to take such precautions as an appreciation of the position would have shown to be desirable in the interests of their employees, and, therefore, they were guilty of a breach of their common-law duty of care. In view of the Court's decision on the issue of negligence the question of breach of statutory duty was not dealt with. *Knight and Another* v. *Demolition and Construction Co., Ltd.* [1954] 1 All E.R. 711*n* (C.A.)

Inherent Danger or Plain Negligence? *104 Law Journal*, 19.

Occupiers' Contractual Liability in England and Australia *104 Law Journal*, 22.

POLICE OFFENCES.

Sunday Trading—Sales of Fruit—Sale of Fruit, as Such, on Sundays by Growers only at Premises where Fruit grown—No Offence—Police Offences Act, 1927, s. 18 (3A), (3B).—Police Offences Amendment Act, 1952, s. 4 (1) (2). Subsections 3A and 3B of s. 18 of the Police Offences Act, 1927, (as added by s. 4 of the Police Offences Amendment Act, 1952) require that sales of fruit, as such and not as part of an actual meal or light repast or as a constituent of ice-cream or confectionery mixtures, may be made on Sundays by growers only, and, by them, only at the premises where the fruit has been grown. (*Binns* v. *Wardale*, [1946] K.B. 451; [1946] 2 All E.R. 100, distinguished.) (*London County Council* v. *Lees*, [1939] 1 All E.R. 191, referred to.) *Charman and Others* v. *Orchard* (S.C. Auckland. May 20, 1954. Stanton, J.)

PROBATE AND ADMINISTRATION.

Probate—Grant—Revocation of Grant—Allegations that Administrators swore False Inland Revenue Affidavit. On July 22, 1953, letters of administration of the estate of an intestate were granted to the respondents. On a motion by the applicant for revocation of the grant on the grounds that the respondents had failed to make a full disclosure of the intestate's assets in the Inland Revenue affidavit, and had shown as a liability a debt due to one of the respondents, which debt was disputed by the applicant, *Held*, Whatever remedy the applicant might have under s. 25 of the Administration of Estates Act, 1925, on an application for an order for an inventory, there was no suggestion of any defect in the title of the respondents or of any supervening incapacity, and, accordingly, there was no ground on which the Court could revoke the grant. *In the Estate of Cope* [1954] 1 All E.R. 698.

TRANSPORT.

Motor-driver's Licence—Suspension—Immediate Effect of Suspension of Licence—Order of Suspension from Date after Date of Conviction invalid—No Authority for ordering Convicted Person to surrender His Licence to Police—Transport Act, 1949, s. 31 (1). An order for suspension of a motor-driver's licence under s. 31 (1) (*a*) of the Transport Act, 1949, takes immediate effect; and a Magistrate, in making such an order, has no jurisdiction to make it take effect from a future date. (*R.* v. *Fowler*, [1937] 2 All E.R. 380, referred to.) *Semble*. That there is no power, statutory or otherwise, authorizing a Magistrate to order a convicted motor-driver to surrender his licence to the Police; and that the service on the convicted defendant of an order of suspension, while desirable as a matter of practice, does not appear to be necessary in law. (*Taylor* v. *Kenyon*, [1952] 2 All E.R. 726, referred to.) *Dryden* v. *Johnson* (S.C. New Plymouth. February 22, 1954. Archer, J.)

ORAL LEASES FOR LESS THAN THREE YEARS.

The Formal Requirements.

By I. D. CAMPBELL.

I.

" It is to be regretted that the attention of the Legislature has not been called to the doubtful state of the law with regard to leases and tenancies for not exceeding three years of land under the Land Transfer Acts. . . . It cannot be doubted that the law in this colony on [this] subject ought not to be left in such a very doubtful condition " : thus spoke Sir James Prendergast, C.J., in *Finnoran* v. *Weir*, (1887) N.Z.L.R. 5 S.C. 280, 282. With the enactment of the Property Law Act, 1952, it seems that a similar regret may again be voiced, for the formal requirements of leases of Land Transfer land for less than three years have once more been made obscure and doubtful.

The difficulty that confronted Sir James Prendergast, C.J., was that s. 86 of the Land Transfer Act, 1885, which required that a memorandum of lease be registered in order to create a legal term for any period not less than three years, contained no express provision dealing with leases for a shorter term. This omission was remedied very shortly afterwards. By s. 9 of the Land Transfer Amendment Act, 1888, it was enacted that a memorandum of lease executed in the prescribed form might be registered notwithstanding that the term was less than three years, " but no lease or agreement for lease for a less period than three years shall be void by reason only of such memorandum not having been executed or registered." This provision, with immaterial alteration, now appears in s. 115 (2) of the Land Transfer Act, 1952.

In *Domb* v. *Owler*, [1924] N.Z.L.R. 532, 536, Salmond, J., said that the effect of this provision (which was then contained in s. 93 (2) of the Land Transfer Act, 1915) was that a lease for less than three years may be validly created in the same manner as if the land was not under the Land Transfer Act. He accordingly held that such a lease must comply with the formal requirements of the Property Law Act, 1908, s. 34 (now s. 10 of the Property Law Act, 1952.) This section provides, *inter alia*, that no lease of any land shall be valid at law unless made by deed, except a lease for a term not exceeding a tenancy for one year, which lease may be made either by writing or by parol.

After this decision it was a simple matter to summarize the formal requirements of a valid legal demise of land under the Land Transfer Act. If the lease were for a term of three years or more, there must be a registered memorandum of lease. If the term were for more than a year but less than three years, there must be a registered memorandum of lease or a deed. If the term did not exceed one year, the lease might be by registered memorandum, by deed, by writing, or by parol.

In 1952, however, the situation was altered. The Property Law Act, 1952—incorporating a change which would have been introduced by s. 8 of the Property Law Amendment Act, 1951—provides, by s. 3 (3) and the First Schedule, that s. 10 of the Property Law Act, 1952, does not apply to land or instruments under the Land Transfer Act, 1952. It has been suggested* that " there is no harm done " in stating that s. 10 does not apply to land under the Land Transfer Act ; but this comment must have been made without considering the chaotic effect of this provision in regard to leases for less than three years.

If s. 10 does not apply, what formal requirements do exist in regard to leases for less than three years ? In *Domb* v. *Owler*, *supra*, Salmond, J., said that the lease must be created in the same manner as if the land were not under the Land Transfer Act. It is no longer possible to state the rule in this way, for that would directly contradict the statutory provision that s. 10 of the Property Law Act does not apply. It can only be said that the lease must comply with any other requirements which are applicable to short-term leases of land under the Land Transfer Act. Are there any such requirements ?

It may be that a lease for less than three years must comply with the requirements of s. 4 of the Statute of Frauds 1677 (29 Car. 2 c. 3), and that the lease is not enforceable unless the lease, or some note or memorandum thereof, is in writing signed by one or both of the parties or their authorized agents. Whether this is so must be regarded as extremely uncertain.

Little assistance is to be had from examining the exact words of s. 4, a section so ineptly drawn that the law reports teem with litigation which better drafting might have prevented. So far as relevant s. 4 provides :

> No action shall be brought whereby to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

There is no doubt that this section applies to an agreement to grant or to take a lease, for whatever term, and that such an agreement is unenforceable unless there be writing as required by the section or part performance by the party suing on the agreement : *O'Sullivan* v. *Brown*, (1897) 16 N.Z.L.R. 567. But this article is concerned with leases, not agreements to lease. Does the section apply to leases ?

By reason of the historical development of the legislation applicable to leases this question has never directly arisen for decision, and it is vain to search for an authoritative ruling. Sections 1 and 2 of the Statute of Frauds† made express provision for leases. These sections, and the provisions enacted in substitution for them in later statutes, have, until 1952, specifically prescribed the formal requirements of a legal lease. The existence of these provisions has hitherto made it unnecessary to decide whether, if they had not been in existence, s. 4 would have been applicable. Probably no more direct reference to the question will be found

* By Mr. E. C. Adams in (1953) 29 N.Z.L.J. 42.

† These sections appear to have been repealed in New Zealand by implication by s. 6 of the Conveyancing Ordinance 1842 (Sess. II, No. 10), the predecessor of s. 10 of the Property Law Act, 1952.

LEGAL ANNOUNCEMENTS.

Continued from cover i.

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than the statement of Lord Denman, C.J., delivering the judgment of the Court of King's Bench in *Bolton* v. *Tomlin*, (1836) 5 A. & E. 856, 864 ; 6 L.J.K.B. 45, 74 ; 111 E.R. 1391, 1394, where he said :

> Leases not exceeding three years have always been considered as excepted by the second section [of the Statute of Frauds] from the operation of the fourth.

This implies that but for s. 2 (and later enactments replacing it) s. 4 of the Statute of Frauds would have applied to a lease for less than three years. This, however, was a point the Court did not have to decide ; and the dictum quoted is but slight authority for the affirmative proposition that s. 4 of the Statute of Frauds does now apply to leases for less than three years in New Zealand, and there are considerable difficulties in supporting such a conclusion.

In the first place, a demise of land is a grant. It is commonly accompanied by contractual undertakings between the parties, but these are in no way essential. A person who confers on another the right to occupy land as his tenant for a defined term has created, or attempted to create, a leasehold estate, and the absence of additional contractual relations would not impair its validity as a grant. Section 4 of the Statute of Frauds is wholly inappropriate to deal with a transaction operating by way of grant. It is directed exclusively to agreements and the enforcement of agreements. A grant, if valid, is immediately executed. Rights of action may flow from the property rights thereby vested in the grantee, but need not be based on any pre-existing contractual relationship. It is precisely because of this characteristic of a lease that there is so much difficulty in holding that the doctrine of frustration could apply to leases : *Cricklewood Property and Investment Trust, Ltd.* v. *Leighton's Investment Trust, Ltd.*, [1945] A.C. 221.

If it be said that the Statute of Frauds does not apply to the lease as a grant, but only to the contractual elements in the lease, it may be replied that the consequences are strongly against such a view. In the case of an oral lease, the lessee would apparently be enabled to retain his estate in the land, but would be prevented from suing the lessor on any of the lessor's undertakings in the lease. On the other hand, the lessor would have parted with the leasehold estate but would be unable to sue the lessee on his undertakings. Action could be taken if there had been part performance, but it is difficult to see how the granting of the estate (or any other act of the lessor), or the entry into possession by the lessee, could constitute part performance of the undertaking sued upon. The grant and the acceptance of the leasehold estate may of course be part performance of a previous agreement to grant a lease, but are not in performance of undertakings in the lease itself. In an actual demise there is a grant of the estate, not an undertaking to grant it. If s. 4 applies to the contractual undertakings but not to the grant, there would be the wholly unsatisfactory anomaly of a valid legal lease under which the contractual undertakings were unenforceable.

Under the principle of *Parker* v. *Taswell*, (1858) 2 De G. & J. 559; 44 E.R. 1106, an unregistered lease for three years or more, or a lease which should have been by deed but is not by deed, may be construed *inter partes* as an agreement to lease, and to this agreement s. 4 of the Statute of Frauds applies. A claim against the lessee under an oral lease is in such a case founded on the part performance by the lessor in allowing the lessee into possession, and no action could be brought against the lessee if he had not taken possession. Similarly, in cases in which a lease, not being created by way of use, was incomplete until entry by the lessee, s. 4 prevented the lessor under an oral lease from suing on the agreement to take the lease : *Edge* v. *Strafford*, (1831) 1 C. & J. 391 ; 148 E.R. 1474. But these decisions relate to *agreements* to lease—either an agreement to lease made in express terms or an agreement raised by construction from a lease which is itself inoperative as a lease for want of some requirement for formal validity. They have no bearing on the question whether s. 4 applies to a lease which is in other respects valid and complete as a lease. Consequently, they afford no assistance or guidance on the question now under discussion.

A second difficulty arises from the terms of s. 4 itself. The section does not require an agreement to be in writing, but requires writing before action brought. If s. 4 applies to leases, an oral lease might yet become enforceable when a signed memorandum came into existence. In the meantime would the lessee have a legal estate ? It seems impossible to suppose that the subsequent reduction of the terms to writing, and signature of the memorandum, can operate to alter the quality of the lessee's estate. The subsequent memorandum could not itself be construed as a grant, for it is not appropriate in its terms to operate by way of grant, nor could it well be interpreted as retrospectively vesting a legal estate in the lessee.

There is a further difficulty to the fact that the memorandum need be signed only by the party to be charged or his authorized agent. If the memorandum be signed by the lessor but not by the lessee, has a legal estate of leasehold been created ? What if the memorandum be signed only by the lessee ?

Finally it may be observed that if s. 4 of the Statute of Frauds now applies to leases, it applies to all leases of Land Transfer land for less than three years, including leases for a term not exceeding one year. The provisions of s. 34 of the Property Law Act, 1908, expressly authorized oral leases for a period not exceeding a year. But as s. 10 of the Property Law Act, 1952 (replacing s. 34) does not apply to Land Transfer land, this exemption has now been removed ; and if s. 4 of the Statute of Frauds has any application to leases it must now apply to all short-term tenancies of land under the Land Transfer Act. Speculation on the intentions of the Legislature in this respect would be fruitless, but at least it may be said that there is a presumption against the conclusion that in this indirect manner the Legislature has imposed new restrictions on the validity or enforceability of short-term leases.

Not every promise which falls within the words of s. 4 of the Statute of Frauds is subject to the requirements of that section. The law relating to guarantees affords by analogy an argument for the view that the contractual aspects of a lease, being ancillary to the grant, may not be subject to the provisions of s. 4. Admittedly the case is much weaker than with guarantees. Where a guarantee is merely an ancillary term in some contract the main provisions of which are outside the Statute the Courts do not apply the statute to the term relating to the guarantee : *Salmond and Williams on Contracts*, 2nd Ed., 169 and cases there cited. It cannot be maintained that the contractual aspects of a lease are not part of the main or immediate object of

the transaction and are only indirect or incidental matters; but these cases do at least afford a precedent for the proposition that to bring a case within the words of s. 4 is not the end of the matter. The essential element in a lease is the grant, and it is but an extension of the principle applicable to guarantees to say that the accessory provisions by way of contract are not to be affected by the requirements of s. 4.

When originally enacted, s. 4 did not apply to leases. The section did not expressly exclude them because it was unnecessary to do so, in view of the provisions already contained in ss. 1 and 2. It is therefore plain that there was originally no legislative intention that s. 4 should be applicable to leases, and it is permissible to argue that the subsequent fate of ss. 1 and 2 should not expand the scope of s. 4 beyond the scope of the section when enacted. "In construing a statute it is always desirable to consider what meaning should be given to it when its language is left undisturbed": per Shearman, J., in *Carlton Hall Club* v. *Laurence*, [1929] 2 K.B. 153, 160. Adopting this canon of construction it may be said that s. 4 was not in its inception applicable to leases, and should not now be held to apply to leases.

If it should be held, for these or any other reasons, that s. 4 of the Statute of Frauds does not apply to leases, and that in the case of leases of Land Transfer land for less than three years there is no other restriction in regard to form, such leases may be oral or in writing. This involves a change in the law by extending from one year to any term less than three years the term for which a valid legal lease may be created orally. It is sufficiently remarkable that this change should have been effected in the circuitous manner adopted by the Legislature. In the obscurity surrounding the legislation as it now stands it is impossible to know whether this does in fact represent the will of the Legislature. But it is submitted, with hesitation, that it is the result of the existing statutes.

II.

The changes effected by the Property Law Act, 1952, have raised another problem of quite a different sort. So long as s. 34 of the Property Law Act, 1908, applied to unregistered leases of Land Transfer land for less than three years, it was generally accepted that a lease by deed, or an oral lease for a term not exceeding one year, created a valid legal lease immediately without the necessity for the introduction of uses and without entry into possession by the lessee. Under s. 38 of the Property Law Act 1908 (now s. 44 of the Act of 1952) a deed was effectual to pass any land and the possession thereof. If, as was held in *Domb* v. *Owler*, *supra*, an unregistered lease of Land Transfer land for less than three years had to comply with the requirements of s. 34, then by parity of reasoning s. 38 was also applicable. If the lease were by deed it could pass a legal interest in the land to the lessee without the intervention of uses and without entry by the lessee. Oral leases for a term not exceeding one year were not directly affected by s. 38, but it could readily be inferred from s. 34 that such a lease was to be as valid and effectual as a lease by deed, and that under such an oral lease neither the insertion of uses nor entry by the lessee was required to perfect the legal estate in the lessee.

But, now, ss. 10 and 44 of the Property Law Act, 1952 (which replace ss. 34 and 38 of the Act of 1908) have no application to Land Transfer land, and it is no longer possible to draw these conclusions. Section 115 (2) of the Land Transfer Act, 1952, does no more than remove the requirement of execution and registration of a memorandum of lease. The validity and effect of the transaction is still dependent on the law apart from the Land Transfer Act: *Domb* v. *Owler*, *supra*. It cannot be said, therefore, that s. 115 (2) *per se* makes an unregistered lease as effectual as a registered lease. Whether the unregistered lease is by deed, in writing, or oral there is now no statutory provision enabling the lease to have any greater operation than it would have had at common law. Consequently, an unregistered lease of Land Transfer land, whatever the form of the lease may be, is not a valid legal lease until the lessee enters into possession. Until then he has but *interesse termini*: he has no estate in the land, nor is he liable under the lease.

This difficulty cannot be met by using a deed because s. 44 of the Property Law Act, 1952, does not apply, and cannot be overcome by the insertion of uses, for the Statute of Uses ceased to be in force in New Zealand in 1906. It has to be remembered that that Statute did not abrogate the common-law rules about creation of legal estates in land. The Statute merely afforded an alternative conveyancing procedure. The repeal of a statute would not revive rules that the statute had repealed, but here the common-law rules were never touched, and can still apply in cases not covered by statutory provisions. Thus the ancient learning of the common-law comes once again into its own.

III.

The great practical importance of clear and definite rules relating to the formal requisites of a legal lease need not be stressed. When periodic tenancies are so common the need for definite and certain rules is more imperative still. Some amendment to the legislation is highly desirable to remove existing obscurity and doubt. It might well be enacted, by way of addition to s. 115 (2) of the Land Transfer Act, 1952, that a lease for less than three years may be oral or in writing, and that, though unregistered, it shall have the same effect in all respects as if it were registered at the time at which it was made. Such a provision would make clear that s. 4 of the Statute of Frauds does not apply, and would re-inter the exhumed body of *interesse termini*.

If any amendment is considered, the opportunity should also be taken to dispose of another doubt regarding such leases. In *Domb* v. *Owler* (*supra*) Salmond, J., at p. 536, said:

> The indefeasibility of a subsequently registered title acquired by some third person without fraud would presumably prevail against the estate of a tenant without a registered title.

Any uncertainty on this question should be removed; and, it is suggested, the rule enacted should be the opposite of that which Salmond, J., surmised to be the law. As between purchasers and tenants in possession it seems better to follow the English practice and place the onus on intending purchasers to ascertain whether the premises are occuied by a tenant and if so on what terms. *Cf.* Land Registration Act, 1925, s. 70 (1) (*g*); *Hunt* v. *Luck*, [1901] 1 Ch. 45. The amendment already suggested would achieve this result by giving the lessee an indefeasible estate as against all subsequent purchasers. Even if the amendment were for this purpose restricted to cases where the lessee is in posses-

sion it would bring our law into closer conformity with English law in a matter on which the existing English rule is to be preferred.

IV.

Lest this article convey the impression that the Property Law Act, 1952, and the Land Transfer Act, 1952, have not been well received in academic circles it must be added that University teachers are for ever indebted, especially to the Hon. H. G. R. Mason, for the labour devoted to the improvement of our property law. Lecturers and students have perhaps even more reason than practitioners to be profoundly grateful for the many changes introduced. Though some new difficulties have been created, those who undertook the task of amendment culminating in the Statutes of 1952 have rendered outstanding service in improving and clarifying the law of real property in this country.

THE TRIAL OF ALGER HISS.

By J. E. FARRELL, LL.B.

Alger Hiss was born in 1904 at Baltimore. He graduated at Johns Hopkins University in 1926, Phi Beta Kappa, and then entered the Harvard Law School. He graduated at Harvard Law School in 1929 "*cum laude, cum maxima laude* all the way". In his last two years at Harvard, he was a member of the *Harvard Law Review* staff, and he was then appointed secretary to Mr. Justice Oliver Wendell Holmes. He left his post with Mr. Justice Holmes in 1930, and was employed with well-known law firms until he entered the Government service in 1933. As an officer of the State Department, he "organized the Conferences at Dumbarton Oaks, San Francisco, and the United States side of the Yalta Conference." He accompanied President Roosevelt to Yalta, and he flew back from San Francisco to Washington with the signed United Nations Charter. In December, 1946, he was elected president of the Carnegie Endowment for International Peace, and he took office in 1947. His salary in that post was 20,000 dollars a year.

In August, 1948, a man named Whittaker Chambers, then a senior editor of *Time* magazine, accused Alger Hiss before the House Committee on Un-American Activities of having been a member of a Communist underground group. Hiss immediately appeared before the Committee and denied the accusation. On December 13, 1948, Hiss resigned his office as President of the Carnegie Endowment for International Peace; and, two days later, he was indicted for perjury by the Federal Grand Jury in New York City. The charges against Hiss were:—

(1) That he committed perjury by denying on oath that he turned over any documents of the State Department or any other Government organizatior to Whittaker Chambers.

(2) That he committed perjury by denying on oath that he had seen Chambers after January 1, 1937.

THE TRIALS.

The first trial of Hiss lasted from May 31, to July 8, 1949. The jury "hung". This means nothing more sinister than that the jury disagreed. Eight were for conviction and four against. The second trial commenced on November 17, 1949, and concluded on January 21, 1950, with a verdict of guilty on both counts. Hiss was sentenced to 5 years' imprisonment on each count, but the sentences were concurrent.

The trial of Alger Hiss is of particular interest to lawyers. The accused was a lawyer who had won some distinction in his profession, and in the public service; and he finally succeeded Elihu Root and Nicholas Murray Butler as the president of the Carnegie Endowment for International Peace. At the first trial, character evidence in favour of Hiss was given by Mr. Justice Frankfurter and Mr. Justice Reed of the United States Supreme Court. Other witnesses to character included Mr. John W. Davis, one time Ambassador to the Court of St. James; Mr. Phillip Jessop, Ambassador-at-Large of the United States; Admiral Hepburn; and a District Court Judge.

The trial affords a comparative study of American and British Court procedure and of the methods of advocacy employed by counsel; and it is of interest because of the part played by the House Committee on Un-American Activities. Lord Jowitt, former Lord Chancellor of England, undertook to deal with the case from the detached point of view of a lawyer; but his book, *The Strange Case of Alger Hiss*, aroused hostile criticism both in England and the United States.

THE CHIEF WITNESS.

The evidence of Whittaker Chambers as chief prosecution witness shows that, in 1934, Chambers made contact with an underground organization of the United States Communist Party of which he claimed Hiss was a member. Chambers related that he and his wife became friendly with Hiss and his wife, and that, in addition to their seditious activities, they had other things in common. In 1938, Chambers broke with the Communist party on conscientious grounds, and claimed that he endeavoured to persuade Hiss to do so at that time. When Chambers left the Communist party, he took with him certain photographic films of confidential and secret documents, and copies of documents made by Hiss in his own handwriting for the underground. It was the practice of the Communists to photograph the documents, and the films were then smuggled to the Soviet Union. It was some of this material that Chambers took as a defence or "life preserver" against reprisals that might have been taken by the Communists.

In 1939, Chambers secured a position with *Time* magazine; and in December, 1948, when he resigned, he was a senior editor earning in the vicinity of 30,000 dollars a year. On September 2, 1939, two days after Hitler and Stalin signed their pact, Chambers gave much information on the Communist party to Mr. Adolf A. Berle, the Assistant Secretary of State in charge of security. Mr. Berle was told that Hiss and others then employed by the United States Government had been members of the Communist underground. This information was taken to President Roosevelt; and he is reported to have told Berle to "go jump in a lake". Mr. Berle made notes of this conversation,

and his notes were an exhibit at the second trial at the request of the defence.

When Chambers appeared before the House Committee in August, 1948, he read a statement and again named Hiss and others as having been members of a Communist underground group. Next morning, the Committee had before it a telegram from Hiss denying all the charges and asking to be heard. He appeared before the Committee on August 5, and also read a statement denying " unqualifiedly " the statements made about him and stating that " to the best of his knowledge " he had never heard of Chambers until 1947.

Chambers was recalled two days later and made it quite clear that there was no mistake in his mind. Hiss again appeared before the Committee and was shown two pictures of Chambers and said they did not recall anyone. Eventually a " confrontation " was arranged, and Hiss admitted that he had known Chambers under the name of George Crosley ; and he invited Chambers to make the same statements out of the presence of the Committee " without their being privileged for suit for libel ". This Chambers did at a later date.

At subsequent sessions of the Committee, Hiss was interrogated at length on various aspects of his association with Chambers. Hiss was a wary subject, and he qualified his answers by such phrases as " according to my best recollection ". One hundred and ninety-eight times Hiss had so qualified his replies, and a Democrat committee man, Mr. Herbert of Louisiana, said to him : " You are a remarkable and agile young man, Mr. Hiss ". Republican Congressman (later Senator and now Vice-President Nixon) was a member of the Committee, and his tenacity and energy had much to do with the decision to prosecute Hiss.

Chambers responded to Hiss's invitation to make the charges against him " without privilege," and appeared on a national radio programme and said that Hiss " was a Communist and may be now ". Hiss commenced defamation proceedings. In a pre-trial examination, akin to our discovery procedure, Chambers was asked to turn over any letters or other communications from Hiss that Chambers might have had in his possession. Up to this time, Chambers had never disclosed that Hiss had been guilty of espionage. Furthermore, in 1948, he had stated on oath to a grand jury that he could not name anyone who was guilty of espionage against the United States. Chambers finally produced notes in the handwriting of Alger Hiss taken from State Department documents, typewritten notes taken mostly from incoming cables from American Embassies, consulates, and legations, and including accounts of diplomatic conversations together with photographs of State Department documents that Chambers claimed Hiss had given to him in 1938. When these were produced, Hiss's lawyers turned them over to the Department of Justice (which precluded Chambers making any statement about them). The Department of Justice immediately reconvened the Federal Grand Jury investigating espionage ; and, on December 15, Hiss was indicted for perjury and his first trial commenced five and a half months later.

Mr. Thomas Murphy, " a towering hulk of man weighing 230 pounds ", led for the Government. He relied upon the evidence of Chambers, upon the documents and photographs produced by Chambers in the libel action, upon the identifications of the type in the typewritten documents with the type of a Woodstock typewriter owned by Hiss, and upon a number of witnesses to corroborate the evidence of Chambers that there was a close association with Hiss.

After routine evidence, Mr. Murphy called Chambers. Chambers was permitted to " sketch " his association with Communism from the beginning and detail his association with Hiss and his wife. Cross-examination by Mr. Lloyd Stryker, for the defence, immediately established that Chambers had consistently lied and perjured himself ; and this was freely conceded by Chambers. The cross-examination covered Chambers' unhappy early life, most of which is detailed in Chambers' autobiography, *Witness*, which supplements much of the information in the trial. He admitted he had lied, and that as a Communist he was pledged if necessary " to lie, to steal, to rob or to go out into the streets and fight ". He finally admitted that he had committed perjury before the grand jury in New York, in October, 1948, by saying he had no recollection of any espionage. Re-examination could not possibly rehabilitate Chambers entirely ; but a key to the effect of his evidence is given in Alistair Cooke's book, *Generation on Trial* : " To the end this bulky pale man . . . had told what he knew in the manner of one long resigned to a life of profound error and dissillusion and the hope perhaps of a little peace and quiet before the end came ".

After the documents and some expert evidence, the prosecution called Henry Julian Wadleigh, a former United States Government economist, who had declined to answer questions before the House Committee upon the ground that they would incriminate him. He was the son of a minister, and, Lord Jowitt regrets to say, " though born in America was educated in England at Oxford and the London School of Economics."

Wadleigh is more interesting as a study than as a witness. His evidence said little more than that, while employed in the State Department in 1936, he had taken Government documents and given them to one Carpenter, and, when he was not around, to Whittaker Chambers. The evidence appears to be inadmissible under our rules. Wadleigh is, however, a familiar figure. He is described by Mr. Cooke in his book as a " walking symbol of the shattered gallantry of the idealistic left, a fugitive from the ruins of the Popular Front and the classless society, an earnest fellow traveller who had now to pay for the pride he felt, a dozen years ago, in trading in the loyalty of his oath of office for the true story of being in the advance guard of the resistance to Fascism ".

There is a noteworthy exchange in his cross-examination by Mr. Stryker. Pressed by Mr. Stryker to answer whether he was " sympathetic to the general tenets of the Communist party, one of which was lying," he replied : " I would hardly call that a tenet . . . I would call it a procedure ". Mr. Stryker rejoined : " I am not going into semantics. I didn't go to Oxford."

The Defence.

The case for the defence was that Hiss had not known Chambers as Chambers, and that, in any case, he had a very limited association with him and that he certainly had no Communistic association with him. The prosecution anticipated much of the defence by tendering evidence of the association between the men. Chambers had given evidence about motor-cars, a

valuable rug, the use of apartments, trips and visits, and much of this evidence was corroborated in some form or another.

Mrs. Chambers was one of the witnesses who corroborated her husband. Her memory of times and places was not at all good, and Mr. Stryker appears to have scored heavily; but, on the other hand, she appears to have established herself to the jury as entirely sincere. The documents produced at the trial included "accounts of diplomatic conversations, especially with the Germans, the Italians, and the Austrians (twelve of them were about Hitler's pressure on Schuschnigg); there were many from the Far East about Japanese troop movements . . . from London came a report of the British intention to purchase American aircraft, and reports of British policy in battleship and cruiser construction . . . ". Part of a document from Paris was kept from the Court at the first trial as being too secret to publish. It was, however, an exhibit at the second trial. The documents appear to have been important to an enemy apart from their contents as material for breaking a cipher. Moreover, leakages of this kind dry up sources of information.

The defence witnesses presented an interesting parade of American life. Apart from the distinguished character witnesses was Mrs. Claudie Catlett, a coloured woman and a former servant of Hiss and his wife, to speak as to household matters, as to a valuable rug and the typewriter, and as to a visit by Chambers; and she was followed by her sons, Mike and Pat, who gave further evidence about the typewriter in an attempt to establish that the machine had been in their possession at a material time. This evidence seems to have fallen rather short of what was required.

Hiss Gives Evidence.

Alger Hiss, in evidence, stated categorically that he did not "furnish, transmit, and deliver to Whittaker Chambers or any other unauthorized person any restricted, secret, or confidential documents of the State Department." He detailed his life in the public service to Yalta and San Francisco and to his presidency of the Carnegie Endowment.

He explained that he made handwritten memoranda for Mr. Francis Sayre, who was Hiss's superior in the State Department. He gave his version of the association of him and his family with Chambers and his wife. It would be difficult to imagine a sharper conflict of evidence on an association which lasted on Hiss's admission from December, 1934, or, January, 1935, until early June, 1936. Obviously, Chambers or Hiss was lying. Much of the evidence of Chambers and Hiss would, of necessity, contain errors due to lapse of time; but, making due allowance for the intervening period of years, either Hiss or Chambers lied substantially and grossly. Certainly Chambers admitted that he had been a perjurer, a liar, and a Communist agent; but Hiss, on the other hand, denied that he had in any way transgressed, and he withstood hours of cross-examination by Mr. Murphy in a most astute fashion. He was not able to secure any witness of standing who had known Chambers as George Crosley, although he said he had "made an effort personally through counsel and private investigators" to do so. Mrs. Hiss corroborated her husband's testimony. Mrs. Hiss had been educated at Bryn Mawr and had taken a graduate course at Yale. At one time, she was president of the Bryn Mawr Alumni. From what records are available, it is impossible to say that the evidence of Mrs. Hiss helped either the prosecution or the defence; but it would have been the subject of comment if she had not been called. Up to the completion of the evidence for the prosecution and the defence, the first trial had lasted into its fifth week. The prosecution now came forward with rebuttal evidence on three matters—regarding the typewriter and its disposal, the relations of Hiss with the Carnegie Endowment, and his whereabouts during his 1937 summer vacation. The evidence as to the typewriter may have been admissible in our Courts, but the other evidence would not be. Two of the witnesses called for the prosecution in rebuttal regarding the typewriter had been interviewed by the defence, and one had been subpoenaed by the defence, but neither of them had been called by the defence. From the records, their evidence appears to tell in favour of the prosecution.

Lord Jowitt's analysis of the typewriter evidence is that it is rather unsatisfactory, but the proper approach to the importance of the typewriter evidence seems to be this: The prosecution proves, and it is not disputed, that certain of the documents were typed on the typewriter which was owned by Hiss. The defence countered by attempting to prove that the typewriter was in such bad condition at the relevant time as not to be satisfactory for typing, and that it had been given away to a coloured family. It was traced by the defence, finally produced in Court at the second trial, and an F.B.I. typist typed a copy of one of the documents in two or three minutes without difficulty.

(To be concluded.)

ROAD SAFETY.

By Advocatus Ruralis.

Advocatus has passed the stage where he enjoys making money out of road collisions, though this must not be taken as a refusal to take this money out of a sense of duty. Advocatus believes that the most satisfactory road safety slogan would be: "Are you satisfied with your will?"

Advocatus has an epitaph in his office which has a nice double edge.

Road Safety Week.

"I've no time to sign my will
I'm running just a trifle late."
At least he saved a lawyer's bill!
'Twas paid by his Estate.

THE INTERNATIONAL BAR ASSOCIATION.

By GEORGE MAURICE MORRIS.

Speaker of the House of Deputies of the International Bar Association.*

Holding its Fifth International Conference of the Legal Profession, the International Bar Association will meet at Monte Carlo, Monaco, 19–25 July of this year. Judging by the past Conferences of this organization at New York, The Hague, London, and Madrid, several hundred individuals, representative of the fifty-odd national organizations of the legal profession, will be in attendance at this convention.

The programme and the discussion topics cover a broad field of interest to persons in attendance. Chief emphasis will be placed upon a discussion of the report of the Association's Committee upon possible amendments to the Charter of the United Nations. A draft of the initial report has been distributed to member organizations, but will not be publicly released until the Conference itself has discussed the report. The Ambassador of the United States to Australia, Hon. Amos J. Peaslee, who is Secretary-General of the International Bar Association, has been prominent (in his private capacity) as a member of this committee. Attention to the importance of the subject-matter has been directed by the principal address of the Conference scheduled to be delivered by President Sir Hartley Shawcross of the Bar Council, former Attorney-General of England. Sir Hartley spoke at the First Conference of the Association in New York.

The Officials of the Conference have spread a questionnaire among the members of the Association relating to the code of ethics for members of the legal profession on the respective countries of the member groups. This is part of the steady progress which the Association has been making in an effort to reach common denominators for terms of expression. It has been demonstrated that there is a firm current of similar thinking but the manners in which the practice is actually conducted raises problems difficult to resolve by exact statement. A community in which the profession is divided among barristers and solicitors, avocats, and avorells will differ from one where some members practise in partnership regardless of their functioning in the Courts or in their offices.

The movement to assist in the administration of justice by closer co operation in giving effect to the order, decrees, judgments and processes of foreign Courts will lead to discussions in Monte Carlo, with a hoped-for advance along several lines.

There are several eminent and satisfactory organizations of international character which persons engaged in the practice of international law, both public and private, find place for in their interests. The interest which the International Bar Association is designed to serve is that of the lawyer pursuing his profession in the domestic field but wishing to add not only to his own proficiency but also to the service which his profession may give to his home community. Making patterns for the pursuit of this objective is none too easy, but benefit is being taken from the trial-and-error process. As Thomas G. Lund, of the Law Society of England, has said: "We must learn to walk before we try to run". The Association keeps that admonition in mind.

The Officers of the Association have been delighted to learn that Messrs. G. C. Phillips and D. R. Richmond will serve as deputies of the New Zealand Law Society at the 1954 Conference. If they are similar in calibre to Sir David Smith and Sir Alexander Johnstone, who represented the Society at The Hague Conference—and we are advised that these gentlemen are all of the same school—we shall all cheer.

* Mr. Morris, while on a brief visit to Wellington last month, kindly favoured the Journal with this article.

THE FIFTH INTERNATIONAL CONFERENCE OF THE LEGAL PROFESSION.

The International Conference of the Legal Profession to be held in Monte Carlo, Monaco, from July 19 to 24, is under the auspices of the International Bar Association and all members of the legal profession, Judges, barristers, solicitors and others associated with the practice of law, are invited to attend the Conference.

The programme covers seven topics and seven official papers will be submitted. The topics are as follows:—

1. Taking Evidence Abroad by way of Documents or Testimony.
2. International Aspects of Nationalization.
3. Constitutional Structure of the United Nations in the Light of the Professed Amendatory Conference of 1955.
4. Economic Warfare, particularly the aspect relating to the restitution of private property which has been vested or blocked.
5. Extra-territorial Effects of Divorce and Separations.
6. Experience with Treaties to avoid Double Taxation.
7. International Code of Ethics for Lawyers.

The aggregate individual membership of the fifty-three member organizations and two associate members is approximately 150,000.

In addition to the conference programme, there is a very interesting social programme planned. Free entrance will be granted conferees for the Casino, the Monte Carlo Beach, and the Larvalto Beach.

Facilities will be available for conferees for the Musée Océanographique, the Jardin Exotique, and the Grotte.

There will be tennis and golf competitions and special excursions are arranged for the ladies.

There will be a reception by the Chief Justice of the Court of Appeal at the Palais de Justice, Monaco, an

official dinner at the Sporting d'Eté, a reception by the Deputy-Mayor of Nice at the villa Marsena and its gardens in Nice, and at the end of the Conference a cocktail party.

The social side of the conference is a very important aspect for it is here that international friendships are formed.

To those who may be leaving for overseas, or to those who are at present abroad, the information set out above should prove of great interest.

There is a registration fee payable, and, if possible, copies of Conference Papers will be mailed to those who pay their fees in advance.

Any further information can be obtained from thse Secretary of the New Zealand Law Society.

MISTAKES AS TO BOUNDARIES OR AS TO PARCELS.

Memoranda of Transfer to Correct Same.

By E. C. ADAMS, LL.M.

EXPLANATORY NOTE.

The leading article, (1953) 29 New Zealand Law Journal 257, entitled, "Vendor and Purchaser: Mistake in Description of Land," has created much interest. Since that article was written by the learned Editor of this Journal, a general revaluation of the City of Wellington has disclosed another case of "mistaken identity". A., occupying and thinking that he owns Blackacre, is informed to his astonishment that he is the registered proprietor of adjoining Whiteacre, and B., occupying and thinking that he owns Whiteacre, is equally astonished to learn that he is, in actual fact, the registered proprietor of Blackacre. This type of mistake usually occurs on an original subdivision when somebody has been careless. It is not often that in practice the original subdividing owner sells the same Lot twice: the Land Transfer Department sees to it that that does not happen: the mistake as to the particular Lot transferred, is usually made by the purchaser, his agent, solicitor or builder. To remedy this type of mistake, Precedent No. 2 may be used.

There is another type of mistake which resembles more *Zachariah* v. *Morrow*, (1915) 34 N.Z.L.R. 885, and which is discussed by the learned Editor in the article above-referred to. On a subdivision, the purchaser gets title substantially to what he bargained for, but by a mutual mistake the title boundaries of the land transferred do not coincide with the intention of the parties and the subsequent occupation boundaries. The purchaser intending to get the whole of Blackacre gets only part of it. To remedy this type of mistake, Precedent No. 1 may be used.

Usually, in these cases, the parties agree to rectify the mistake by the execution of a correcting memorandum of transfer: this often involves the re-adjustment of securities. The cases which have come to the Courts, and to which the learned Editor refers in his interesting and most informative article, have been the exceptional ones when the parties have got at arm's length and have been unable to agree. Where agreement cannot be obtained and the mistake is of the second type, and the part of the land included in the wrong certificate of title has been built upon, Cooper, J., suggests in *Zachariah* v. *Morrow* (*supra*) that s. 97 of the Judicature Act, 1908, could be availed of: this is now represented by s. 129 of the Property Law Act, 1952. However, the weakness of that section is that it cannot be availed of until the registered owner of the part built upon commences an action for ejectment.

There remains the question of stamp duty when the parties execute a transfer of their own accord to rectify the mistake, or when the Court orders a retransfer as it did in *Taitapu Gold Estates, Ltd.* v. *Prouse*, [1916] N.Z.L.R. 825. In that case, the agreement for sale and purchase reserved to the vendor the right to the minerals below the surface of the land. The transfer, however, which became registered did not except the minerals but was a transfer of the legal estate in all the land. The Supreme Court ordered the transferee to retransfer to the vendor the minerals below the surface of the land for an estate in fee simple and for that purpose to sign, execute and deliver to the vendors a proper instrument of transfer, etc. The reasoning in that case shows that the transferee of the fee simple had become a trustee of the minerals for the vendor. This gives us the clue as to the correct stamp duty payable. Each transfer (or if two operations are included in the one transfer) each operation is a transfer from a trustee to a beneficiary and thus exempt from *ad valorem* duty by s. 81 (*d*) of the Stamp Duties Act, 1923, but liable instead to a duty of 15s., as a deed not otherwise chargeable, under s. 168.

PRECEDENT NO. 1.

MEMORANDUM OF TRANSFER.

TO RECTIFY MUTUAL MISTAKE AS TO BOUNDARIES.

WHEREAS A.B. of Wanganui Married Woman (hereinafter called "the Transferor") being registered as the proprietor of an estate in fee simple subject however to such encumbrances liens and interests as are notified by memorandum underwritten or endorsed hereon in that piece of land situate in the Land Registration District of Wellington and City of containing [*Set out here area*] be the same a little more or less being part of Section and being also on deposited plan number and being further the balance of the land comprised and described in Certificate of Title volume folio AND WHEREAS by Memorandum of Transfer bearing date the twentyfifth day of August one thousand nine hundred and fifty and registered as number the Transferor transferred to C.D. of Wanganui Married Woman (hereinafter called "the Transferee") all that piece of land situate as aforesaid containing [*Set out here area*] be the same a little more or less being part of Section and being also part of Lot 1 on deposited plan number and being further all the land comprised and described in Certificate of Title Volume folio at and for the price of SEVEN HUNDRED AND SEVENTY-FIVE POUNDS (£775) AND WHEREAS it has now been ascertained that the land first above described which was intended to be included in the hereinbefore mentioned Memo-

randum of Transfer was inadvertently omitted from the said hereinbefore mentioned Memorandum of Transfer AND WHEREAS the Transferor has agreed with the Transferee in order to rectify such mistake to transfer the land first described to the Transferee NOW THEREFORE THESE PRESENTS WITNESS that IN PURSUANCE of the said Agreement and IN CONSIDERATION of the premises the Transferor DOTH HEREBY transfer unto the Transferee ALL HER estate and interest in the land first above described for the purpose of rectifying the error or omission hereinbefore mentioned or referred to IN WITNESS whereof these presents have been executed this day of September one thousand nine hundred and fifty-four.

SIGNED by the said A.B. as Transferor in the presence of:—

E.F. A.B.
Solicitor
Wanganui

PRECEDENT NO. 2.

MEMORANDUM OF TRANSFER.

TO RECTIFY MUTUAL MISTAKE AS TO PARCELS.

WHEREAS A.B. formerly of Foxton Flax-cutter and now of Levin, Farmer by virtue of Memorandum of Transfer No. became registered as the proprietor of an estate in fee simple subject however to such encumbrances liens and interests as are notified by memorandum underwritten or endorsed hereon in all that piece of land situated in the Land Registration District of Wellington containing [*Set out here area*] be the same a little more or less, being part of lot 21 on Deposited Plan Number and being now the whole of the land comprised in Certificate of Title Volume Folio Wellington Registry AND WHEREAS at the time of the execution of the said Memorandum of Transfer namely on the 1st day of August 1949 the intention was that the said A.B. should acquire not the land described in the said transfer but the adjoining land being the other part of the said lot 21 on Deposited Plan Number and being now the whole of the land comprised in Certificate of Title Volume folio Wellington Registry AND WHEREAS C.D. of Foxton Married Woman by Memorandum of Transfer dated the 1st day of December 1950 and registered on the 15th day of December 1950 became registered as the proprietor of an estate in fee simple subject as aforesaid in all that piece of land containing [*Set out here area*] more or less being the residue of the said Lot 21 on Deposited Plan Number and being now the whole of the land comprised in Certificate of Title Volume folio Wellington Registry AND WHEREAS at the time of the execution of the said last mentioned transfer the intention was that the said C.D. should acquire not the land described therein but the land firstly above described

AND WHEREAS it is desired by both the parties hereto that the errors disclosed by the foregoing recitals shall be rectified so that the true intentions of the parties shall be carried into effect by mutual transfers

NOW THIS INSTRUMENT WITNESSETH that in pursuance of the foregoing and in consideration of the mutual transfers hereby made he the said A.B. doth hereby transfer to the said C.D. all his estate and interest in the said piece of land firstly above described and the said C.D. doth hereby transfer to the said A.B. all her estate and interest in the said piece of land secondly above described

IN WITNESS WHEREOF this instrument has been executed the day of March 1954.

SIGNED by the said A.B. in the presence of:

E.F. A.B.
Solicitor
Levin.

SIGNED by the said C.D. in the presence of:

G.H. C.D.
Chief Postmaster
Palmerston North

RETIREMENT BENEFITS.

For Self-Employed Persons.

It has been recognized in Great Britain as well as in New Zealand that some steps should be taken to enable the self-employed person, which category includes the professional man in private practice, to obtain some tax allowance to enable him to make an appropriate provision for retirement and old age.

For the purpose of making a complete survey of the position, the Chancellor of the Exchequer, the late Sir Stafford Cripps, appointed in 1950 a committee for the purposes of the following:—

1. To review the income-tax law relating to superannuation funds and other arrangements, whether contractual or voluntary, for the provision, on retirement or death of persons holding an office or employment of pensions or other benefits for those persons or their dependants.

2. Generally, to review the law governing the treatment for income-tax purposes of payments made by, or for the benefit of, individuals with a view to providing for the individual in his retirement or old age, or for his dependants after his death, and the treatment for income-tax purposes of sums received by way of such provision.

3. To consider whether any amendment of the law in regard to these matters is necessary or desirable; and, in particular, to consider whether the scope of income-tax relief in respect of payments of that nature should be extended and, if so, in what circumstances and subject to what conditions, having special regard to the fact that contributory pensions schemes on the lines of those commonly adopted by industrial concerns are not at present available to all persons holding an office or employment, and are not applicable to an individual carrying on a profession or business.

The committee has become known as the Millard Tucker Committee.

A general invitation was issued through the Press in the United Kingdom to representative bodies and individuals to make written representations on any of the above matters, and, as a result, representations

(*Concluded on p. 184*)

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

A Barrister's Duty.—Solicitors wedded, for better or worse, to the conveyancing life have lately been heard to complain that they find it difficult to obtain barristers to take cases for them. Last year, Sir Hartley Shawcross, Q.C., Chairman of the General Council of the English Bar, said that amongst laymen on both sides of politics there were some foolish and shortsighted enough to think that a barrister may and should pick and choose the cases in which he is prepared to appear. He continued:

> I have recently heard it said, that certain members of the Bar in one of Her Majesty's Colonies refused to accept a brief to defend an African, accused of offences of a quasi-political nature against public order. The suggestion is that those barristers made excuses and declined to act, their true reason being that they thought that their popularity or reputation might be detrimentally affected by appearing for the defence in such a case. For the prosecution they might appear, but not for the defence.

If this report were true, he added, then it would disclose a wholly deplorable departure from the great traditions of our law, and one which, if substantiated, both the Attorney-General and the Bar Council, would have to deal with in the severest possible way. People ought to remember that a barrister must accept a brief on behalf of any client who wishes to retain him to appear before any Court in which he holds himself out to practise.

Proof in Adultery.—Adultery still continues to exercise an attraction for the Court, at least in its corroborative aspect. In *Galler* v. *Galler* a decision of the Court of Appeal, [1954] 1 All E.R. 536, in February, the only evidence tendered against the respondent husband was by a nurse who had lived in his house for two years after his wife's departure to look after the children. She said that adultery had constantly occurred during that period. The husband denied the allegation but the Commissioner held that, after the evidence was scrutinized carefully, he concluded that the nurse was a truthful witness and pronounced a decree. On appeal the Court (Singleton, Jenkins and Hodson, L.JJ.) held that an adulterer who gave evidence of his own adultery was in the same position as an accomplice in a criminal case and, as the Commissioner had given no indication that he had directed himself that the Court should be slow to act on such evidence in the absence of corroboration, his order must be set aside and a new trial granted. In the following month, the Court of Appeal had to consider a case where, following quarrels with his wife, the husband had left home and gone to live in the house of his cousin, a single woman who lived alone. After a period he returned to his wife, but later left and again went to his cousin's house. During the course of the argument, Singleton, L.J., observed that he did not like the idea that because two people of opposite sex were sharing a house adultery should be inferred, Jenkins, L.J, said that the Court must be satisfied beyond reasonable doubt, and the Commissioner had put the onus the wrong way round. It was for the petitioner to satisfy the Court that the parties were committing adultery and the evidence fell far short of that. Where a man left home after a violent difference with his wife and took refuge with a first cousin of the opposite sex, it was wrong to deduce from such facts that they should have committed adultery merely because they were in the house together and had the opportunity for so doing: *Storey* v. *Storey*.

A Legal Quibble.—*Greenwood*: But you said just now I couldn't be a British citizen because I was a ghost. If I'm not a ghost then I *can* be a British citizen, so I can stay here as long as I want to.

Sir Horace: No, sir. If you read the report carefully, you will see that an ectoplasn cannot under any circumstances be a British citizen.

Greenwood: I think that's just a legal quibble.

Sir Horace: You can call it what you like, but it's perfectly in order. Even if it were not, we have a very good alternative. We can pass an Act of Parliament under our Emergency Regulations, definitely placing every description of ghost under control of the legal and Police authorities of this country. We want to avoid that if possible because it would lead to questions from the Opposition and publicity in the Press that we hope to prevent for obvious reasons. Once the secret of your presence here became public property, there's no knowing where the thing would end.

—R. C. Sheriff: *The White Carnation.*

Car Comedy.—In *Macrae* v. *H. G. Swindells* (trading as West View Garage Co.), [1954] 2 All E.R. 260, the arrangement was for the defendant to repair the plaintiff's Standard motor-car, but owing to negligence the car was damaged by fire at the defendant's garage whereupon the plaintiff was lent by the defendant a Morris motor-car until the Standard should be available. A few weeks later, the Morris, driven by the plaintiff's agent, met with an accident and became a total wreck, and judgment was eventually entered for the defendant for the value of the car. Between the date of the accident to the Morris and the date when the Standard was repaired and returned, the plaintiff was obliged to hire another motor-car at a total cost of £80 and in the action he claimed this as damages. The defendant contended that the damages arose from the plaintiff's negligence in destroying the borrowed car, but Barry, J., held that *prima facie* the plaintiff was entitled to recover compensation for the loss of his car from the date of damage to the date of return. He had mitigated his damages by using the Morris as long as it was available, and had compensated the defendant for his own negligence in destroying the Morris. After that happened, no other car was offered by the defendant, and the plaintiff, as a result of the defendant's original negligence was compelled to hire one. The lending of the Morris did not put an end to the defendant's liability in respect of the plaintiff's loss; he could have provided another car, but did not; and the plaintiff was entitled to judgment for the cost of hire.

From My Notebook.—"A co-defendant in a conspiracy trial," said Justice Jackson in the United States Supreme Court in 1949, "occupies an uneasy seat. There generally will be evidence of wrong-doing by somebody. It is difficult for the individual to make his own case stand on its merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. It he is silent, he is taken to admit it; and if, as often happens, co-defendants can be prodded into accusing or contradicting each other, they convict each other."—*The New Statesman and Nation* on "The Police and the Montagu Case": April 10, 1954.

RETIREMENT BENEFITS.

(*Concluded from p. 182*)

were received from sixty representative bodies and from another hundred parties.

A general invitation was issued through the Press to representative bodies and individuals to make written representations on any of the above matters, and, as a result, representations were received from sixty representative bodies and from another hundred parties.

The general burden of the representations was that under present conditions the individuals concerned were no longer able, out of their current earnings, to set aside sufficient to provide an adequate income for themselves during their retirement years or for their dependants after their death. This inability was due mainly to the high rates of taxation obtaining since 1940.

It was emphasized that the great majority of them could not set aside sufficient to provide an adequate retirement income, at least without accepting such a reduction in their present standards of living as most people could not contemplate.

There were four different classes of individuals considered :

(*a*) Self-employed persons ;
(*b*) Controlling directors ;
(*c*) Other types of directors who are not eligible to join their company's pension scheme ; and
(*d*) Employees who are not members of an approved pensions scheme, and who have no contractual pension rights, whether absolute or contingent.

The committee was not able to reach unanimous conclusions but the views and opinions now set out in its report represent the views of the majority of the members. The reservations made by the minority are, however, also reported.

The scheme envisaged :

TYPE A benefit which includes :

(*a*) A deferred annuity beginning at the chosen retirement age.
(*b*) On premature retirement through incapacity, either a lump sum or a smaller annuity beginning forthwith, or partly one and partly the other.
(*c*) On death before retirement, either a lump sum or an equivalent annuity (not exceeding the amount of the late husband's deferred annuity) for the widow and smaller annuities for dependent children or partly the one or partly the other.

TYPE B benefit.

A deferred annuity beginning at the chosen retirement age, but with no surrender value, and carrying no other benefit, except that at retirement age the annuity can be reduced so as to provide further annuities for the widow and dependent children after death.

SELF-EMPLOYED PERSONS AND CONTROLLING DIRECTORS (IN CASES WHERE SCALING DOWN IS REQUIRED).

(*a*) *Contributions carrying full tax relief.*

(1) For a type A benefit :—

For instance, on first £5,000 earnings 12 per cent. with age increases of $^4/_{10}$ths per cent. per year—maximum 18 per cent. (The table covering earnings above this amount is set out in the Report.)

(2) For a type B benefit—

On the first £5,000 earnings 10 per cent. with age increases of $^4/_{12}$ths per cent per year—maximum 15 per cent. (The table covering earnings above this amount is set out in the Report.)

It would be permissible to split each year's contribution appropriately between a type A benefit and type B benefit : For example, if the year's income of a self-employed person is £8,000 and his basic rate is 12 per cent. ; he could, as to £4,000 of his earnings, apply 12 per cent. of £2,500 and 9 per cent. of £1,500 towards a type A benefit, and, as to the remaining £4,000 of his earnings, 10 per cent. of £2,500 and 7½ per cent. of £1,500 towards a type B benefit.

(*b*) *Contributions Carrying Life Assurance Relief Only* :—

For temporary life cover up to chosen retirement age, one quarter of the appropriate percentages, as shown above.

ORDINARY DIRECTORS, NON-PROVIDED FOR EMPLOYEES, SELF-EMPLOYED PERSONS AND CONTROLLING DIRECTORS.

(*a*) *Contributions carrying full tax relief.*

(1) For a type A benefit :

12 per cent. of all earnings with age increases of $^4/_{10}$ths per cent., per year maximum 18 per cent.

(2) For a type B Benefit :

10 per cent. of all earnings with age increases of $^4/_{12}$ths per year—maximum 15 per cent.

It would be permissible in these cases, also, to split each year's contribution appropriately between a type A and a type B benefit.

(*b*) *Contributions Carrying Life Assurance Relief Only.*

For temporary life cover up to retirement age, one-quarter of the appropriate percentages as shown above.

The Report of the committee was addressed to the Rt. Hon. R. A. Butler, M.P., Chancellor of the Exchequer, to be presented by him to Parliament in February of this year.

If adopted, the recommendations will undoubtedly place the self-employed man on retirement and his dependants in a more secure position.

The Report covered schemes which it was said would add to the annual volume of national savings for the time being since to get the resulting tax relief an individual would have to save.

To show the area covered by the Report the summary covers : (2) Life Assurance Relief. (4) Future Retirement Benefit Schemes for Employees. (5) Existing Retirement Benefit Schemes. (6) Self-Employed Persons, Controlling and other Directors and non-provided for Employers. (7) Employees with Existing but Inadequate Retirement Benefits. (8) Changes of Occupations. (9) Purchased Annuities.

Covered by the Report is a chapter dealing with changes which might occur owing to changes of occupation or from the status of employee to a self-employed person.

The summary of recommendations includes the treatment of employees with existing but inadequate retirement benefits.

As it is possible to give only very brief extracts from a Report of this nature, to those who may be interested, it will be time well spent in studying the survey of the representations made and the conclusions reached by the members of a very well-informed and representative committee.

If adopted in Great Britain, there is little doubt that the study of the schemes recommended would provide very valuable information in considering what relief can be given to similar classes in New Zealand where a self-employed man finds it necessary to continue working beyond the period where, with the assistance of appropriate retirement benefits, he might have been able to rest from his labours and enjoy a few years of leisure.