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THE DEFAMATION ACT, 1954.

VI.—The Defence of "Fair Comment."

SECTION 8 of the Defamation Act, 1954, is as follows:

6. In an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.

This section reproduces s. 6 of the Defamation Act, 1952 (U.K.).

The Porter Committee, on a general consideration of the defence of "fair comment," made the following observations:

It is in relation to the defence of "fair comment" that the common criticism that the law of defamation is unduly technical appears to us to be based upon the firmest ground. That it should be a defence in an action for libel that the words complained of were "fair comment upon a matter of public interest" is an important practical safeguard of freedom of speech; and it is, in our view, in the public interest that this defence should be maintained in its original force.

While the defence of "justification" is available in respect of both statements of fact and expressions of opinion, the defence of "fair comment" is available in respect of expressions of opinion only. If "justification" is pleaded in respect of expressions of opinion, the defendant takes upon himself the burden of satisfying the tribunal, not merely that the expressions of opinion are such as might be fairly and honestly held, but that they are correct. Thus, if it were stated of a politician "X's speech on the current situation was a piece of political chicanery," the defendant, if he pleaded justification, would have to satisfy the tribunal that the speech referred to was in fact a piece of chicanery. But if "fair comment" is pleaded, the defendant is entitled to succeed if he satisfies the Court that the opinion which he expressed, although it may be exaggerated, obstinate or prejudiced, was in fact honestly held by him. In the above example, the defendant would thus only have to satisfy the tribunal that he himself honestly thought the speech to be a piece of chicanery, although the Court might itself have taken a different view of the character of the speech referred to.

To this rule, there is a minor exception where the comment is not objective criticism but imputes corrupt or dishonourable motives to the plaintiff. In such a case, it is not sufficient for the defendant to establish that the comment expresses an opinion honestly held by him; he must show that it was also reasonably warranted by the facts. This exception does not appear to us to detract from the general value of the defence of "fair comment." It maintains a just balance between liberty of speech and licence to defame.

It is extremely rare for defamatory matter to consist solely of expressions of opinion. Normally, where the defence of fair comment should be available, the matter complained of consists partly of statements of fact and partly of expressions of opinion (*i.e.*, comment) based either upon those facts alone or upon those facts in conjunction with other facts not necessarily expressed in the subject matter complained of. In this, which is the most common case, we think it is plain that, provided the matters dealt with are of public interest, the defendant ought to succeed in his defence if the gist or sting of the facts stated is true and the expressions of opinion are fair comment in the sense mentioned above, *i.e.*, opinions which are honestly held by the defendant. If, however, they impute dishonourable or corrupt motives to the plaintiff, the defence should only be successful if the opinions expressed are also reasonably warranted by the facts.

The defence of "fair comment" has, however, in the course of judicial decisions during the last half-century, suffered greatly from what we may describe as over-refinement. It has been held that comment, in order to be "fair comment," must be based upon facts truly stated—a proposition with which, if taken broadly, no one would quarrel. But in practice, the rule has been applied with a continually growing rigidity, with the result that, where the libel complained of consists in part of statements of fact and in part of expressions of opinion, the defence of "fair comment" may fail *in limine* if one of the defamatory statements of fact contained in the alleged libel is incorrect in some minor and apparently unimportant detail.

The technical difficulties in the way of a defendant desiring to rely upon this plea do not end here. It is not always easy to distinguish between fact and comment. A particular statement may be regarded by some as fact, and by others as comment. It is, of course, for the Judge to rule whether a particular statement is capable of being regarded as fact or not, but, subject to that ruling, the ultimate decision as to what is fact and what is comment lies with the jury. This presents an additional element of uncertainty for a defendant relying upon the defence of "fair comment." This aspect of the matter is, however, more closely bound up with questions of practice and procedure, with which we deal in a later section of our Report. For the moment, we are concerned only with proposed changes in the substantive law.

In our view, the primary defect in the existing substantive law lies in the rigidity with which the rule is applied that the plea of "fair comment" must fail unless *all* the defamatory facts contained in the matter complained of and on which the comment is based are truly stated. So long as the gist or sting of any defamatory facts stated is true, and the comment is "fair" on the true facts, we think that the defence ought to succeed.

We accordingly recommend an amendment of the existing law analogous to that which we have recommended in relation to the defence of "justification," namely, that a defence of "fair comment upon a matter of public interest" should be entitled to succeed if (*a*) the defendant proves that so much of the defamatory statements of fact contained in the alleged libel is true as to justify the Court in thinking that any remaining statement which has not been proved to be true does not add materially to the injury to the plaintiff's reputation, and (*b*) the Court is also of opinion that the facts upon which the comment is based are matters of public interest and the comment contained in the alleged libel was honestly made by the defendant.

If the comment imputes corrupt or dishonourable motives to the plaintiff, the defendant should be obliged to satisfy the Court, as under the existing law, that the comment was not

only honestly made, but was also reasonably warranted by the facts.

The Purpose of the Section.

Both ss. 7 and 8 of the Defamation Act, 1954, deal with those actions for defamation where the defence depends, in some way, on the truth of the matters alleged. That issue may arise in two different ways. Either the alleged defamation may consist of statements of fact which, the defence pleads, are true, or it may consist of expressions of opinion which, says the defence, are fair comment on true facts. Or indeed, as quite often happens, expressions of opinion and matters of fact may be inextricably involved with each other. In any event, the onus of proving the truth of facts relied on rests upon the defendant: Reference may again be made to *Gooch* v. *N.Z. Financial Times, Ltd. (No. 2)*, [1933] N.Z.L.R. 257, where that position actually arose.

Here, however, a problem often arises: the facts may be largely but not wholly true. Defendants of graver years are often like Huckleberry Finn: "There was things which he stretched, but mainly he told the truth." In that case, other things being equal, the Judge was obliged to direct the jury to award damages to the plaintiff. These might, indeed, be only nominal; but the question of costs, if not of honour, arose. And meanwhile, many impudent scamps, who had been properly chastised, recovered quite large sums from persons who had performed that public service.

Both s. 7 and s. 8 seek to amend this position. The decision is left to the jury; but in such a way that a merely technical defamation which is devoid of actual sting does not entitle the undeserving litigant to recover even nominal damages.

The Section Examined.

It is a defence in an action for defamation that the words complained of were fair comment upon a matter of public interest. This defence is available only in respect of expressions of opinion and, when it is applicable, imposes a far lighter burden upon the defendant in respect of the defamatory words than a defence of truth or justification. It is, however, very seldom that defamatory matter consists solely of expression of opinion. Usually, the matter complained of consists partly of statement of fact and partly of expression of opinion, *i.e.*, comment upon those facts, or upon those facts and other facts, not necessarily expressed or referred to in the subject-matter complained of.

The general rule applicable to this defence is that in order to be "fair comment," the comment must be based upon true facts. No one would question this salutary general principle. It often happened, however, that the defendant, though he could provide a substantial basis of fact on which to rest the opinions expressed, could not prove the truth of each and every allegation of fact offered in the publication: *Gooch* v. *N.Z. Financial Times, Ltd. (No. 2)* (*supra*). In that event, however, though the allegation of fact not proved was a relatively trivial matter, while those which were proved fully justified the opinion expressed, the defence of "fair comment" often failed. In the recent case of *Kemsley* v. *Foot*, [1951] 2 K.B. 34; [1952] A.C. 345, it was held that, where the defendant based his comment upon facts not expressed in the subject-matter complained of, and gave particulars in his pleading of the facts upon which the comment was based, it was not necessary, in order that the defence should succeed, for every one of the facts alleged to be proved. If the jury found certain of the facts proved, and considered that the opinions expressed were "fair comment" upon those facts, the defence would not fail merely because the defendants had not proved many other facts set out in their pleading as a basis of their comment.

Section 8 brings the law, in cases where the facts upon which the opinion is based are set out in the subject-matter complained of, into line with the principle laid down in *Kemsley* v. *Foot* in those cases where the facts relied upon first appear in the particulars of defence. If the defendant in an action for defamation in respect of words consisting partly of allegations of fact and partly of expression of opinion proves facts which support his expression of opinion as "fair comment," he will succeed in that defence, although he has failed to prove other allegations contained in the same statement. Thus, in the future, it will make no difference whether the facts upon which comment is based are contained in the offending subject-matter or elsewhere: the only question will be whether the comment is "fair comment" on the facts found proved at the trial. Fears were expressed that the provisions of this section could be misused so as to encourage reckless misstatement of fact, but juries' power to have regard to these unproven allegations in assessing the defendant's good faith should prove an ample safeguard. Moreover, if the allegations of fact which the defendant has failed to prove are in themselves defamatory, then they are in themselves actionable. However, in such a case, s. 7 might well apply.

Section 8 applies the same reasoning to the defence of fair comment; it lays down that "in an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expressions of opinion a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved."

The practice hitherto has been to hold with one exception, which is referred to later, that the plea of fair comment failed if *any* of the facts were falsely stated for "if the facts as a comment upon which the publication is sought to be excused do not exist, the plea fails," and "the comment must not mis-state facts because a comment cannot be fair which is built upon facts which are not truly stated." It is submitted that all that this section does is to apply to the defence of fair comment the same principle as is now to affect the plea of justification. The result will be that the Court will be entitled to find for the defendant where the defamation is: "he is a menace to society because he has a record of arson, fraud, and careless driving," and, there is proof of many convictions for arson and fraud, but none for careless driving. But the matter is still one for the decision of the Court, which must not necessarily find for the plaintiff but may do so if it so desires, and, in cases of justification, juries in the future will have to be asked whether in their view the falsity of such and such a charge, if not proved to be true, materially injures the plaintiff's reputation having regard to the truth of the remaining charges if proved to be true.

These provisions are obviously fair and desirable and, although they help defendants, it must not be

thought that the changes in the law have been entirely in that direction. In the old days, particulars of the rolled-up plea, which had been held by the House of Lords to be a plea of fair comment only, would not be ordered so that the unfortunate plaintiff had no idea which of the words complained of he was to meet as expressions of opinion and which as allegations of fact. Now at least he knows where he is, for in England, R.S.C., O. 19, r. 22A embodies the recommendations of the Porter Committee and provides that where in an action for libel or slander the defendant alleges that in so far as the words complained of consist of statements of fact they are true in substance and in fact, and in so far as they consist of expressions of opinion they are fair comment on a matter of public interest, or pleads to the like effect, he shall give particulars stating which of the words complained of he alleges are statements of fact and of the facts and matters he relies on in support of the allegation that the words are true.

We await the Rules Committee's inclusion of a similar rule in the Code of Civil Procedure.

The exception to the general rule that fair comment must be founded on facts truly stated was that stated by Phillimore, J., in *Mangena* v. *Wright*, [1909] 2 K.B. 958, and followed by *MacNaghten*, J., in an unreported case in 1937. This exception is again founded on common sense and presumably still survives. It was expressed in the first-named case, at p. 976, as follows :

> If by some unfortunate error a vote in Parliament recites or a Judge in giving the reasons of his judgment states that which is derogatory to some person and the charge is mistaken and ill-founded and a newspaper reports such vote or judgment and proceeds in another part of its issue to comment on the character of the person affected in terms which would be fair if the charge were well founded, the newspaper which so reports and comments should be entitled to the protection of fair comment.

VII.—The Defence of "Qualified Privilege."

Section 7 of the Defamation Act, 1954, is an important section, as it greatly extends the statutory defence of qualified privilege conferred on certain newspaper reports : see s. 4 of the Law of Libel Act, 1888 (Gt. Brit.), and s. 2 of the Law of Libel Amendment Act, 1910 (N.Z.) (now repealed and, with s. 3 of that statute replaced by s. 17 of the new statute, now under consideration). The new section is as follows :

17. (1) Subject to the provisions of this section, the publication of any such report or other matter as is mentioned in the First Schedule to this Act shall be privileged in any civil or criminal proceeding unless the publication is proved to be made with malice.

(2) In an action for defamation in respect of the publication in a newspaper, or as part of any programme or service provided by means of a broadcating station, of any such report or matter as is mentioned in Part II of the First Schedule to this Act, the provisions of this section shall not be a defence if it is proved that the defendant has been requested by the plaintiff to publish in the manner in which the original publication was made a reasonable letter or statement by way of explanation or contradiction, and has refused or neglected to do so, or has done so in a manner not adequate or not reasonable having regard to all the circumstances.

(3) Nothing in this section shall be construed as protecting the publication—

(a) Of any report or other matter the publication of which is prohibited by law, or by any lawful order, in New Zealand or in the other territory (if any) in which the subject-matter of the report or other matter arose :

(b) Of any such report or other matter as is mentioned in Part II of the First Schedule to this Act unless it is of public concern and the publication of it is for the public benefit.

(4) Nothing in this section shall be construed as limiting or abridging any privilege subsisting (otherwise than by virtue of section two of the Law of Libel Amendment Act 1910) immediately before the commencement of this Act.

[This section substantially reproduces s. 7 of the Defamation Act, 1952 (U.K.), the differences in language being due mainly to the assimilation of libel and slander in the term " defamation " in s. 4 (1) of the new Act.]

The terms " newspaper " and " broadcasting station," as used in s. 17, are defined in s. 2 (1) as follows :

" Broadcasting station " means any station operated by the Minister under the Broadcasting Act 1936 or licensed as a broadcasting station under the Post and Telegraph Act 1928 :

" Newspaper " means any paper containing public news or observations thereon, or consisting wholly or mainly of advertisements, which is printed for sale and is published, in New Zealand or elsewhere, periodically at intervals not exceeding three months :

References to words shall be construed as including references to pictures, visual images, gestures, and other methods of signifying meaning.

[*Cf.* Ss. 7 (5), 9 (2) (3), and 16 (1) (2) of the Defamation Act, 1952 (U.K.)].

In its Report, the Porter Committee on Defamation did not recommend any extension of the categories of cases in which " absolute privilege " subsists. The defence of " absolute privilege " which is not liable to be defeated by proof that the defendant in publishing the defamatory matter complained of was actuated by malice, is available only in a strictly limited number of cases in connection mainly with Parliamentary and judicial proceedings. The actual statements made in the course of such proceedings are absolutely privileged, but the reports of such proceedings are not, except in the case of reports published by order of either House of Parliament and in the case of fair and accurate reports of judicial proceedings published contemporaneously in a newspaper. With the exceptions mentioned above, reports of such proceedings are the subject of qualified privilege, *i.e.*, the defence is liable to be defeated by actual malice on the part of the defendant.

It did not appear to the Porter Committee that any extension of the categories of cases in which " absolute privilege " subsists would be justified, and the evidence tendered to it had not disclosed any representative body of opinion in favour of such extension.

The Porter Committee, however, made this observation, which is applicable to New Zealand conditions :

> There is one aspect of the matter to which, however, we consider that attention should be drawn. Absolute privilege,

in addition to attaching to statements made in the course of judicial proceedings before the ordinary Courts of Justice, also attaches to statements made in the course of proceedings before such other tribunals as have attributes similar to the attributes of Courts of Justice, when such tribunals are acting in a manner similar to that in which Courts of Justice act but not otherwise. The creation in growing numbers of administrative tribunals tends to blur the distinction between those tribunals which have attributes similar to those of Courts of Justice and follow principles similar to those upon which Courts of Justice act, and those tribunals whose functions are primarily administrative. We respectfully draw attention to the importance, when fresh tribunals are set up by Act of Parliament, of defining their functions and methods of procedure with sufficient particularity so as to indicate clearly whether they are performing judicial or administrative functions, and thus make it easier to determine whether the privilege is absolute or not. We see no reason why the Acts creating them should not deal specifically with this matter.

In dealing with the defence of "qualified privilege," the Porter Committee discussed the existing position under the statute-law of the United Kingdom, and made certain recommendations which have been adopted in the terms of s. 17 (above) and in the First Schedule to the Defamation Act, 1954 (N.Z.), as in the United Kingdom statute. The Committee said:

> The defence of "qualified privilege" which is liable to be defeated by proof that the defendant in publishing the defamatory matter complained of was actuated by malice, exists partly at common law and partly as a result of statutory provisions.
>
> Speaking very broadly "qualified privilege" at common law exists wherever the person publishing the defamatory statement (whether libel or slander) is under a duty to, or has an interest in, publishing it, and each person to whom it is published has a corresponding duty or interest in receiving it. In the course of the evidence submitted to us, little or no criticism has been directed towards this branch of the law of defamation—which is of vital everyday importance to all members of the community—and we do not recommend any change.
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> "Qualified Privilege" as a creation of Statute exists by virtue of Section 3 of the Parliamentary Papers Act, 1840,* and the Law of Libel Amendment Act, 1888.† Section 3 of the Act of 1840,* which extends its protection to all members of the public and is not limited to "newspapers" deals primarily with Parliamentary proceedings and Parliamentary papers. It appears to work satisfactorily in practice; it has not been the subject of any criticism in the evidence tendered to us, and we do not recommend any alteration.
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> The Law of Libel Amendment Act, 1888,† applies only to "newspapers" as defined in that Act, and has been the subject of a considerable amount of comment and criticism. The criticism, however, has been directed not to the actual operation of the Act in those cases to which it applies, but to its limitations. The consensus of opinion is that the principles and procedure laid down are satisfactory. All the proposals which have been made relate to an extension of the provisions of the Act to classes of periodicals and to categories of reports which do not at present fall within its scope. . . .

After stating the nature of newspaper reports entitled to qualified privilege in the United Kingdom when the Committee sat, substantially the same as in New Zealand, the Report continued:

> The list of reports entitled to privilege which has been set out above reflects the matters which were of interest to the public at the close of the Nineteenth Century when the Law of Libel Amendment Act, 1888, was passed. It has been urged upon us on behalf of the Press that changes in social and administrative conditions since that date, and the increasing interest in foreign affairs, have rendered inadequate the categories of reports entitled to privilege, and that the time is now ripe for a considerable extension.

We agree with this suggestion. Moreover, we consider that the right to the insertion of a statement in contradiction or explanation—which corresponds to the *droit de reponse* existing under many Continental systems of law—is one which, though valuable in the case of reports of meetings of a local or limited character, is unsuitable and liable to abuse in the case of reports of such bodies as the United Nations or a foreign Parliament.

Had not the practical difficulties proved insuperable, we should have desired to add to the list of reports entitled to qualified privilege, reports of proceedings in some foreign courts. But the legal systems of the different countries of the world vary considerably and drastic changes in the character of their judicial tribunals may occur with little previous warning. Legal proceedings may be of a political character, and may take place *in absentia*. We have found it impossible to put forward any criterion of general application which could be adopted to limit and define such foreign courts as maintain a standard of justice and a method of procedure which would justify our recommending that reports of their proceedings should be entitled to qualified privilege without any *droit de reponse* on the part of the person defamed. Equally, we feel that it would be objectionable to grant a *droit de reponse* in such cases since, in effect, this could lead to a "re-trial" of foreign legal proceedings in an English newspaper upon necessarily inadequate material and without any of the safeguards which legal proceedings should ensure. We have accordingly felt reluctantly compelled to omit reports of foreign legal proceedings from our recommendations for the extension of the classes of reports entitled to qualified privilege.

(3) *Recommendations.*

We recommend that the classes of reports subject to qualified privilege should be extended, and that they should be re-classified into two categories, namely, those in which there should be no obligation upon the newspaper to publish at the request of the person defamed, a letter or statement in contradiction or explanation, and those in which this *droit de reponse* should be a condition to be fulfilled by a newspaper relying on the defence of qualified privilege.

(A) The reports which, in our view, should be entitled to qualified privilege *without* placing upon the newspaper the obligation to insert, at the request of the plaintiff, any letter or statement by way of explanation or contradiction, are the following:—

(*a*) Any fair and accurate reports of any debate or proceedings in public—

(i) of a house of any legislature in the British Commonwealth and Empire;

(ii) of any body which is part of the legislature of a foreign Sovereign State or any federal unit of such Sovereign State, or of any body duly appointed by the legislature or executive of such Sovereign State to hold a public inquiry on a matter of public importance;

(*b*) Any fair and accurate reports of the proceedings held in public of any international body of which the Government of the United Kingdom is a member or to which it sends a representative, or of any Committee or Sub-Committee of any such body;

(*c*) Any fair and accurate report of the proceedings held in public of any international Court;

(*d*) Any fair and accurate report of the proceedings of any Court exercising jurisdiction over the whole territory of a member of the British Commonwealth or of any federal unit therein and of the High Court of a Colony;

(*e*) Any fair and accurate copy of or extract from—

(i) any register kept pursuant to Statute and which the public are entitled to inspect; or

(ii) any document which is, by law, required to be open to public inspection;

(*f*) any notice or advertisement published by or on the authority of a Judge or Master of the High Court of Justice.

(B) The reports which, in our view, should be entitled to qualified privilege, but only upon the condition that the defendant, if requested by the plaintiff, shall insert in the newspaper in which the report or other publication appeared, a reasonable letter or statement by way of explanation or contradiction of such Report, are:—

(*a*) Any fair and accurate report of the findings or decision of any Association as hereinafter defined in re-

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* Parliamentary Papers Act, 1840 (Gt. Brit.), reproduced in s. 254 of the Legislature Act, 1908 (now extended and re-enacted as s. 18 of the Defamation Act, 1952).

† *Cf.* s. 2 of the Law of Libel Amendment Act, 1910 (N.Z.).

LEGAL ANNOUNCEMENTS.

Continued from cover i.

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lation to any member of the Association over which it exercises control. . . . .

(*b*) Any fair and accurate report of the proceedings at a public meeting, namely, a meeting *bona fide* and lawfully held for a lawful purpose and for the furtherance of discussions on any matter of public concern, whether the admission thereto be general or restricted;

(c) Any fair and accurate report of the proceedings at a meeting not being a meeting to which both public and newspaper reporters were denied admission.

In our next issue, we shall conclude our consideration of s. 17, with special reference to its application to statements to which absolute privilege is given, and to those which have qualified privilege—namely, statements subject, in the case of a newspaper or a broadcasting station, to explanation or contradiction.

SUMMARY OF RECENT LAW.

COPYRIGHT.

Assignment—Partial Assignment—Author agreeing to grant to Plaintiffs exclusive right to print and publish Original Work in Volume Form—Publication by Defendants of Same Work in Weekly Magazine—Infringement—Right of plaintiffs to sue alone. By an agreement in writing, dated April 16, 1951, and made between an author, of the one part, and the plaintiffs of the other part, the author agreed to grant to the plaintiffs, their successors and assigns "the exclusive right to print and publish an original work, or any part or abridgment thereof, provisionally entitled 'A Mouse is Born' in volume form", during the legal term of unrestricted copyright throughout a specified area which included Australia. The defendants, without the plaintiffs' consent, published substantially the same work in the issue of "The Australian Women's Weekly" dated July 2, 1952. The publication consisted of a number of sheets of paper fastened together in a paper cover on which the name of the work appeared. In an action for damages for breach of copyright, *Held*: (i) the publication of the work by the defendants was "in volume form" within the meaning of the agreement of April 16, 1951, and was an infringement of the rights conferred on the plaintiffs by the agreement. (ii) the plaintiffs were entitled, under the Copyright Act, 1911, s. 5 (3), to bring the action without joining the author, because, on the true construction of the agreement, there was a partial assignment of the copyright by the author to the plaintiffs under s. 5 (2) of the Act; and, accordingly, the plaintiffs were entitled to damages. *Jonathan Cape, Ltd.* v. *Consolidated Press, Ltd.*, [1954] 3 All E.R. 253 (Q.B.D.).

DIVORCE AND MATRIMONIAL CAUSES.

Cruelty—Criminal Conduct—Husband's Convictions for Crime—Justifiable Remonstrances by Wife—Unjust Resentment by Husband—Injury to Wife's Health. The parties were married in 1934 and there were no children of the marriage. On January 16, 1939, the husband was convicted of fraudulently converting a cheque and was placed on probation. In about March, 1939, the husband was adjudicated bankrupt. On July 1, 1941, the husband was convicted of larceny as a bailee of furniture and sentenced to six months' imprisonment. On the husband's release from prison the wife told him she could not go back to him, and when they met one evening in the street he told her that she would not get away from him, put his hands round her throat, shook her, and then followed her to her mother's house. The wife called for the police and the husband left. In 1942 the wife agreed to the husband's request for a reconciliation on condition that he "turned over a new leaf." In 1947 the husband was convicted of larceny of a film projector but the conviction was quashed on appeal. In June, 1949, at the husband's instigation, he being still an undischarged bankrupt, the wife opened a banking account in her own name at the bank of which her employer was a customer. She paid in money which the husband gave her and withdrew money as instructed by him. On July 17, 1951, the husband was convicted at the Central Criminal Court of obtaining money by false pretences and sentenced to three and a half years' imprisonment. At least one sum paid into the banking account was shown at the trial to have been fraudulently obtained by the husband. The police questioned the wife, but came to the conclusion that she had taken no part in the husband's fraudulent transactions. While the husband was in prison the wife received numerous telephone calls from persons who stated that the husband had told them that she was receiving money on his, the husband's, behalf, out of which their debts would be satisfied. The husband did not deny to the wife the falsity of the statements which he had made to these persons, and merely told her not to worry. The wife visited and wrote to the husband while he was in prison. The letters were at first affectionate but in April, 1952, she blamed the husband for her bad state of health and in July, 1952, she made it clear that she would not return to him because she could not face any more trouble. In about August, 1952, she ceased to visit him in prison and early in 1953 told him that she was considering a divorce. The husband thereupon wrote several bitter and resentful letters to the wife. The wife petitioned for divorce on the ground that the husband had treated her with cruelty. *Held*, the husband was guilty of cruelty by reason of the following circumstances, viz., his activities since the marriage which resulted in his being thrice convicted for crime, the wife's justifiable remonstrances in 1941 and his unjust resentment then and subsequently, his failure to keep his promise to reform, and the injury to her health in 1951 and 1952 as the result of his conduct; he was to be held responsible for the consequences of his actions on the wife's well-being, and, accordingly, she would be granted a decree *nisi*. Observations of Denning, L.J., in *Westall* v. *Westall* (1949) 65 T.L.R. 337, applied.) *Woollard* v. *Woollard*, [1954] 3 All E.R. 351 (P.D.A.).

Judicial Separation—Power of Court to set aside decree of Judicial Separation and discharge Alimony Order on resumption of Cohabitation—What amounts to Resumption of Cohabitation. The Court has power to set aside a decree of judicial separation and discharge an order for alimony made pursuant to such decree, upon a resumption of cohabitation by the parties. Casual acts of intercourse without any mutual intention of re-establishing the matrimonial relationship do not constitute a resumption of cohabitation. *Mussell* v. *Mussell*, [1954] V.L.R. 581.

ESTOPPEL.

Assignment for Benefit of Creditors—Creditors' Meeting Agreeing to Assignment—Representative elected an acting as Member of Committee assisting Assignee—Creditor later refusing to Sign Deed executed by large Majority of Creditors—Debtor doing all required of him within Arrangement—Creditor suing Debtor and claiming Full Amount of Debt—Creditor Estopped from obtaining Judgment. On December 1, 1953, a meeting of the defendant's creditors was held at which twenty-three creditors, including R., a director of the plaintiff company, were present or represented. The meeting passed a motion, with no dissentient vote, that the defendant's estate be assigned. R. accepted nomination for, and election to a committee of three "to work with the assignee." A deed of assignment was signed by the defendant and by a large majority of the creditors, but the plaintiff company refused to sign it. Sufficient moneys were lodged by the defendant for payment of an interim dividend in terms of the deed, but as the plaintiff company had refused to sign the deed and had requested the calling of a further meeting of creditors to which it desired to make certain allegations, the dividend was not paid. The second meeting was held, but, although R. then resigned from the committee, he did not make the threatened allegations; and no further resolution was passed. The plaintiff company then claimed against the defendant for goods supplied. The defendant, while admitting the amount of the claim as originally due and owing by him, alleged that the amount so due was subject to an assignment made by him to his creditors to which the plaintiff company was a party. *Held*, 1. That, as the plaintiff company, by its conduct had assented to the deed of assignment, and the defendant had done all he was required to do within the arrangement formally made at the meeting, the plaintiff company was bound by the terms of that arrangement and could not succeed in its claim in the original debt. (*In re Aburn*, [1908] 27 N.Z.L.R. 442; 10 G.L.R. 306, applied.) 2. That, alternatively, the plaintiff company, having accepted with the other members of the committee through its accredited representative, R., the resultant responsibility of having bound by that deed some forty of the creditors to abide by the terms of the assignment, was estopped from obtaining a judgment for its full debt which would place it on preferential terms to those other creditors whose rights had been restricted by the terms of the deed.

G. & T. Ross Ltd. v. *Mathers.* (Auckland. July 27, 1954. Wily, S.M.)

EVIDENCE.

Privilege—Solicitor and Client—Preparation of Document—Whether Solicitor may be questioned as to the Person for whom he was acting when he prepared the Document. A solicitor may be required to give evidence as to the identity of the client for whom he was acting in the preparation of a document. (*Bursill* v. *Tanner* (1885) 16 Q.B.D. 1, followed.) *Cook* v. *Leonard*, [1954] V.L.R. 591.

LAND TRANSFER.

Discharge of Mortgage where Remedies Statute-barred—Onus on Applicant to make out Case to satisfy Court that Proper and Sufficient Grounds for Exercise of Discretion in His Favour—Statutes Amendment Act, 1936, s. 43 (Land Transfer Act, 1952, s. 112). An application for an order under s. 43 of the Statutes Amendment Act, 1936 (now s. 112 of the Land Transfer Act, 1952), must first establish those conditions which must exist before the Court has any power to make an order, and he then must make out a case to satisfy the Court that there are proper and sufficient grounds for the exercise of its discretion in his favour; in other words, he must satisfy the Judge, upon proper material, that the order is one which in all the circumstances, ought to be made. (*In re Dalton* [1953] N.Z.L.R. 167, and *In re A Mortgage, Presland to Death*, [1954] N.Z.L.R. 933, followed). (*In re A Mortgage, Pearce to Sanson*, [1951] N.Z.L.R. 331; [1951] G.L.R. 183, not followed.) *So held* by the Supreme Court. (*Barrowclough*, C.J., *Hutchison*, *F. B. Adams*, and *McGregor*, JJ.). By memorandum of mortgage dated September 19, 1914, one H. mortgaged certain land to secure to one M. repayment on August 20, 1919, of £1,800 and interest thereon. By memorandum of mortgage dated October 21, 1914, H. mortgaged certain other land to secure to one McB. repayment on June 29, 1919, of £1,200 and interest thereon. On June 26, 1915, H. transferred both pieces of land—subject, *inter alia*, to those two mortgages—to S., a daughter of A. (referred to herein as "the deceased"). Both mortgages were transferred to the deceased in July, 1919. After the transfer of the mortgages to the deceased, no payments were made under the mortgages, and the deceased made no request or demand for any such payments. The deceased died on May 16, 1948, without discharging either mortgage. The personal covenants in the mortgages became statute-barred on August 20, 1939, and June 9, 1939, respectively. But for the fact that the mortgages were under the Land Transfer Act, 1915, the charges against the land would have been extinguished on those dates. After the death of the deceased, on the application of S., an order was made by the Supreme Court under s. 43 of the Statutes Amendment Act, 1936, directing the discharge of both mortgages; and a memorandum of that order was entered by the District Land Registrar on October 11, 1948. The Commissioner of Stamp Duties was not a party to those proceedings. When the deceased died, the total amounts of principal and interest secured by the two mortgages were £4,613 12s. 6d. and £3,085 12s. 2d. respectively. H., the original mortgagor, died before the deceased, leaving an estate of small value. The Commissioner of Stamp Duties admitted that the true value of the mortgages was the value at the deceased's death of the land to which they related—namely, £2,493 13s. 9d. and £1,315 16s. 6d.—and he included those amounts in computing the final balance of the deceased's estate. The deceased's executors objected to such inclusion, as they denied that the mortgages were of any value. In (*Thomson* v. *Commissioner of Inland Revenue*, [1952] N.Z.L.R. 39; [1952] G.L.R. 96) upon a Case Stated by the Commission under s. 62 of the Death Duties Act, 1921) *Cooke*, J., held that in computing the final balance of the deceased, the Commissioner was entitled to include therein such sums (if any) as he ascertained to be the respective values of the mortgages as at the date of the deceased's death, after having had regard to the possibility or probability as at such date of an order being thereafter made upon a contested application under s. 43 of the Statutes Amendment Act, 1936, directing them or either of them to be discharged (That decision was not appealed from.) The Commissioner thereupon had evidence taken before a Magistrate pursuant to s. 15 of the Inland Revenue Department Act, 1952. After reviewing the evidence, he came to the conclusion that there was not established such an equity as would render it even probable that an order would have been made under s. 43 on a contested application; but, that, because of the danger that such an order would be sought, he discounted the value of the mortgages by 25 per cent., and made a new assessment accordingly. On objection by the appellants to the inclusion of the sums of £1,870 5s. 3d. and £986 17s. 4d. (in lieu of £2,493 13s. 9d. and £1,315 16s. 6d. as previously assessed) in the final balance of the deceased's estate, the Commissioner stated a case for the opinion of the Supreme Court. The Court was asked to determine: (*a*) Was any sum properly to be included in the final balance of the estate of the deceased as representing the value of the mortgages as at the date of the death of the deceased? (*b*) If the answer to that question were in the affirmative, what was the sum so to be included? *Held*, by the Supreme Court (Hutchison, F. B. Adams, and McGregor, JJ., Barrowclough, C.J., dissenting). 1. That the order made on September 15, 1948, under s. 43 of the Statutes Amendment Act, 1936, after proceedings which were not contested and in which the Commissioner was not a party, was not conclusive or even relevant in the present proceedings. (*Commissioner of Stamp Duties* v. *Shrimpton*, [1941] N.Z.L.R. 761, followed.) 2. That, the evidence did not show that the intimations by the deceased that he did not intend to claim payment of the principal or interest secured by the mortgage and moneys secured by them, and that he would forgive the mortgages by his will were intended, so far as concerned the principal moneys secured by the mortgages, to create legal relations or be binding in equity on the deceased, and the evidence did not show that S. or her husband acted to their detriment on those intimations; and that accordingly, there was no room for application of the doctrine of equitable estoppel. (*Central London Property Trust, Ltd.* v. *High Trees, Ltd.*, [1947] 1 K.B. 130), *Combe* v. *Combe*, [1951] 2 K.B. 215, [1951] 1 All E.R. 767, and *Davies* v. *Snow*, [1953] N.Z.L.R. 887, distinguished.) 3. That the proper basis for deciding the value of the mortgages (and the basis adopted by the Commissioner) was the amount at which the mortgages would sell on the open market, taking into consideration the possibility but not the probability, of a successful application under s. 43 of the Statutes Amendment Act, 1936, which would be borne in mind by a hypothetical purchaser of the mortgages. 4. That on an hypothetical application under s. 43, the provisions of the deceased's will were matters which might be taken into account, the hypothetical application contemplated by the judgment of *Cooke*, J., ([1952] N.Z.L.R. 39) being one to be made after the death of the deceased. 5. That, on the hypothetical application under s. 43 (for which there was a foundation at the date of the deceased's death in that, though the debts secured by the mortgages were statute-barred, the rights of the mortgagee in respect of the securities remained in existence), the appellant, on the evidence available to the Court, had not discharged the onus of satisfying the Court that equity and good conscience required that the Court should exercise its discretion in S.'s favour in respect of the principal sums secured by the mortgages. (*Campbell* v. *District Law Registrar*, (1910) 29 N.Z.L.R. 332, followed.) (*In re A Mortgage: Presland to Death*, [1954] N.Z.L.R. 993, applied.) 6. That, as the deceased had at all times waived payment of interest in respect of the mortgages as it from time to time fell due, such interest was not recoverable and should not be included in the amount secured by the mortgages as at the date of the death of the deceased; and that the valuation placed on the mortgages should be based on the assumption that no arrears of income were legally recoverable, or, if recoverable, would be discharged by an order under s. 43. 7. That an application under s. 43, so far as it might be related to the principal moneys secured by the mortgages, would have only a most remote possibility of success; that a valuation should be placed on the mortgages at the date of the deceased's death as equivalent to the principal sums thereby secured less a discount to be assessed in relation to the possibility of such an application being made, and to the remote likelihood only of such an application being successful; and that the decrease in value of the mortgages on that basis should be assessed as equivalent to 10 per cent. 8. That, accordingly, the value of the mortgages at the date of the deceased's death would respectively be £1,620 and £1,080, or £2,700 in all. The appeal from the Commissioner's assessment succeeded as to a reduction of £157 2s. 7d. *Thomson and Another* v. *The Commissioner of Inland Revenue.* (Supreme Court. Wellington. July 14, 1954. Barrowclough, C.J., Hutchison, F. B. Adams, McGregor, JJ.)

LAND VALUATION.

Crown Representative—Costs—Duty of Crown Representative before Court and Committee—Committee entitled, though not obliged, to hold Facts stated or accepted by Crown Representative to be binding on Crown and Sufficiently Established—Not Competent for Crown, on appeal, to disclaim Statements made by Crown Representative before Committee, or attempt to discredit him—Award of Costs against Crown justified in Such Circumstances—Land Valuation Court Act, 1948, ss. 29, 36. An appeal from a decision of a Valuation Committee should be decided by reference to the state of facts existing at the time of the Committee's

hearing, if not at the date of the contract to which consent is sought. This principle does not necessarily exclude evidence secured since that hearing, which relates to the facts then existing, but it precludes the Court from admitting evidence as to happenings subsequent to the hearing. The right of the Crown to representation before a Land Valuation Committee or Land Valuation Court is conferred by s. 36 of the Land Valuation Court Act, 1948, and the duty of the person appointed a Crown Representative, by the Minister of the Crown charged with the administration of the Act under which the proceedings are commenced, is to represent the Crown in the proceedings. Where the interest of the Crown is to see that the purposes of the Land Settlement Promotion Act, 1952, are carried out, and, *inter alia*, to provide for the closer settlement of farm land and to prevent undue aggregation, the duty of the Crown Representative is to inquire whether the application should be opposed before the Committee because of its conflict with one or both of these purposes, including the obligation to present faithfully the facts which are relevant in relation to the public interest. Where, therefore, statements of fact are made by the Crown Representative, or he has indicated his acceptance of the facts as presented by parties to the transaction, the Committee is entitled, though not necessarily obliged, to hold the facts as stated or accepted to be binding upon the Crown and to be sufficiently established. It is not competent for the Crown, upon appeal, to disclaim the statements, admissions, and representations made by the Crown representative to the Committee, or to attempt to discredit its own representative in the earlier proceedings by presenting an entirely new case on appeal. An award of costs against the Crown was held to be justified where a Land Valuation Committee, on the evidence before it, had decided that a proposed purchase would not amount to "undue aggregation" and, under s. 29 of the Land Valuation Court Act, 1948, had consented to the transaction, and the Crown had attempted to base an appeal against that decision upon grounds inconsistent with the case presented on behalf of the Crown before the Committee, and in substance it had sought to discredit the submissions of the Crown representative before the Committee; and by reason of the appeal the respondents suffered delay and had been put to expense by way of costs. *In re A Proposed Sale, Hodder to Heays.* (L.V. Ct. Gisborne. August 25, 1954. Archer, J.)

LANDLORD AND TENANT.

Receipt of Rent and Ownership. *98 Solicitors' Journal*, 659.

LICENSING.

Offences—Restaurant—Premises, not open to General Public, let for Social Gathering at which Liquor Drunk at Time when Licensed Premises required to be Closed—Food and Refreshments not sold to General Public—Premises not a "restaurant"—Sale of Liquor Restriction Act, 1917, ss. 2, 11 (2). H. was the proprietor of premises known as the "Wintergarden," situate within the Waikato Winter Show buildings. G. was the secretary of a regimental association, which held an evening reunion at the restaurant, at which liquor supplied by the association out of its funds was consumed. H.'s business was that of a general caterer, but he let the rooms comprising his premises, including a large room with a dance floor, for parties, dances, dinners, etc., for which he did the catering. He did not supply or serve meals for the general public, except during the Winter Show week, when the rooms were used as diningrooms in connection with the Show and meals were provided and sold to persons attending the Show. The entrance was then from inside the Show building. For the reunion gathering, one room was let to G. H. did the catering, but he had nothing to do with the supply of liquor. H. and G. were each charged, pursuant to s. 11 (2) of the Sale of Liquor Restriction Act, 1917, with allowing liquor to be drunk by persons in the restaurant known as the "Wintergarden" at a time when licensed premises were required to be closed. *Held*, 1. That the "Wintergarden" premises were not premises at which food and refreshments were sold to the general public for consumption on the premises; and, consequently, the "Wintergarden" was not a "restaurant" within the definition of that term in s. 2 of the Sale of Liquor Restriction Act, 1917. (*Howman* v. *Doyle*, [1921] S.C. (J.) 49, applied.) (*Brett* v. *Till*, [1921] N.Z.L.R. 788, and *Lake* v. *Harvey*, [1935] N.Z.L.R. s. 136, distinguished.) 2. That the use of the premises for the sale of food and refreshments to the general public during the Show week would not make the "Wintergarden" a "restaurant" for the rest of the year; and that, furthermore, it was not a "restaurant" during the Show week because food and refreshments were not then sold to the public, but to a limited and restricted class of the public who paid for admission to the Show and were upon the Show premises in pursuance of legitimate business. (*Muir* v. *Keay*, (1875) L.R. 10 Q.B. 594, applied.) *Police* v. *Gillespie*: *Police* v. *Holmes.* (Hamilton. October 1, 1954. Paterson, S.M.)

PRINCIPAL AND AGENT.

Agent's Liability as Principal—Undisclosed Principal Action for Return of Purchase Money—Principal named in Defence—Rejection of Evidence as to Identity of Principal. A purchased goods for £824 7s. 6d. from B, on the footing that B was an agent for a principal whose name was not disclosed. A paid the purchase price and took delivery, but the goods were stolen goods and the plaintiff had to surrender them to the true owner. A sued B for the amount of the purchase money, and B pleaded that he had been acting as agent for C. The Court, having rejected B's evidence and found that C was not his principal, *Held*: B could not be heard to say that someone other than C was his principal, and, therefore, as his evidence with regard to C had been rejected as false, B must himself be treated as principal; accordingly the plaintiff was entitled to recover £824 7s. 6d. from the defendant. *Hersom* v. *Bernett*, [1954] 3 All E.R. 370 (Q.B.D.).

As to Liabilities of Agent, see *1 Halsbury's Laws of England*, 3rd Ed., p. 228, para. 517; and for Cases, see *1 English and Empire Digest*, pp. 624, 625, Nos. *2494-2496*.

PUBLIC REVENUE—DEATH DUTIES.

Mortgages at Date of Mortgagee's Death—Debts then Statute-barred but Mortgagee's Rights in Respect of Securities Existing—Basis for Valuation of Such Mortgages, with Possibility of Successful Application to Court by Mortgagor to discharge them—Interest Payments waived by Mortgagee not to be included in Amounts secured—Remote Possibility of Successful Application to discharge Principal Moneys—Valuation of Mortgages as Equivalent to Principal Sums thereby secured, less Discount assessed in Relation to Possibility of Application for Discharge of Principal Moneys and to Remote Possibility of Success thereof—Statutes Amendment Act, 1936, s. 43 (Land Transfer Act, 1952, s. 112). *See* LAND TRANSFER, *supra.*

SHIPPING.

Charterparty—Lay days—Loading—"Weather working days"—Regard to be had to working hours. By a charterparty a ship was chartered to load sugar in Cuba. Lay days for loading were to be allowed to the charterers at an average rate "per weather working day", Sundays and holidays and Saturday afternoons excepted. Demurrage was payable for detention longer than the permitted time for loading. Time lost was to be calculated in accordance with the custom of the port. At the ports of loading there were customary normal working periods amounting to eight hours daily on weekdays, other than Saturdays, and to four hours on Saturdays. Disputes having arisen as to the computation of lay time and an umpire having stated his award in the form of a Special Case: *Held*, in construing the phrase "weather working day" regard is to be had to working hours rather than to non-working hours, and thus, if by the custom of a port eight hours are worked on weekdays (other than Saturdays) and four hours on Saturdays, it is the operation of weather during those working hours that must be considered in determining whether a day was wholly or in part a weather working day. (*Branckelow S.S. Co.* v. *Lamport and Holt*, [1897] 1 Q.B. 570, and "*Z*" *S.S. Co., Ltd.* v. *Amtorg, New York*, (1933) (61 Lloyd's Rep. 97), applied.) Per *McNair*, J.: it seems to me quite impossible that *Bennetts and Co.* v. *Brown*, [1908] 1 K.B. 490, and *British Mexican Shipping Co., Ltd.* v. *Lockett Brothers and Co., Ltd.*, [1911] 1 K.B. 264, can stand together. If it had been necessary, I should have felt myself bound to follow the later decision and to disregard the decision in *Bennetts and Co.* v. *Brown*, [1908] 1 K.B. 490). *Alvion Steamship Corporation Panama* v. *Galban Lobo Trading Company S.A. of Havana*, [1954] 3 All E.R. 324 (Q.B.D.).

As to Weather Working Days, see *30 Halsbury's Laws of England*, 2nd Ed., pp. 342, 343, para. 523, text and notes (t), (u); and for Cases, see *41 English and Empire Digest*, pp. 573, 574, Nos. *3975, 3976*.

TRANSPORT.

Offences—Goods-service—Licence—Orchardist carrying Fruit from His Orchard to Market—Orchardist not a "Farmer"—Transport Act, 1949, s. 96 (2) (b). The term "farmer" as used in s. 96 (2) (b) of the Transport Act, 1949, does not include an orchardist or fruit-grower, even if he describes himself as a fruit farmer, as he is a horticulturist rather than an agriculturist. (*Gilchrist* v. *Lanarkshire Assessor*, (1898) 35 Sc.L.R. 663, applied.) (Judgment *sub. nom. Transport Department* v. *Napier*, (1954) 8

M.C.D. 331, reversed.) *Hornilow* v. *Napier*. (S.C. Wellington. November 4, 1954. Barrowclough, C.J.)

Offences—Negligent Driving—Summons issued out of Court at Taupo for Hearing there—Defendant living at Lower Hutt—Defendant writing to Court pleading Guilty of Offence and asking for Opportunity to be heard "if consideration should be given to cancellation or suspension of licence"—Court, in Absence of Defendant, convicting and fining Him and Suspending Licence—Magistrate not bound to grant Adjournment—Defendant not deprived of Reasonable Opportunity of being heard in Mitigation of Penalty. The defendant, who resided at Lower Hutt, was charged with negligently driving a motor-car on the Taupo-Rotorua Main Highway on April 18, 1954. The summons called on him to appear at Taupo on September 24. On August 3, after the summons had been served, the appellant's solicitors wrote from Wellington to the Registrar of the Magistrates' Court at Taupo. After stating that the defendant wished to avoid the expense of attendance at Taupo, it said that he "desired to enter a plea of guilty to the charge, and mentioned some facts in relation to the happening in mitigation of penalty . . . If consideration should be given to cancellation or suspension of the licence, we would respectfully ask that opportunity be given to Robinson to make representations to the Court in avoidance of such a penalty." No reply to this letter was received. The Court sits at Taupo at long intervals only. There was no appearance of the appellant on September 24, either personally or by counsel. The letter was, however, placed before the Court and was treated as a plea of guilty to the offence charged, and a conviction was entered. The Magistrate then heard a statement on behalf of the prosecution as to the circumstances of the offence, and thereupon fined the defendant £5 and ordered him to pay £1 for costs. He also ordered that the defendant's current motor-driver's licence be suspended for two months, and that particulars of the conviction be endorsed on the licence. On a motion to quash that part of the sentence which related to the suspension of the defendant's motor-driver's licence, *Held*, 1. That, assuming in the defendant's favour that the letter to the Registrar impliedly asked for an adjournment in the event of the Magistrate's coming to the conclusion that "consideration should be given to the cancellation or suspension of the licence," the Magistrate was not bound to grant an adjournment. (*Woodley* v. *Woodley and Meldrum*, [1928] N.Z.L.R. 465; [1928] G.L.R. 405, distinguished.) 2. That the defendant had not been deprived of a reasonable opportunity of being heard in mitigation of penalty; he had failed to attend without proper excuse; and he, himself, had forfeited that opportunity. The motion was accordingly dismissed.

Traffic Signs—Parking Signs—When Supplementary Notice required in Addition to Certain Class D Signs—Traffic Sign Regulations, 1939 (Serial No. 1937/159), Reg. 2 (5D), (5E), (5F)—*Amendment No. 6 (Serial No. 1953/185), Reg. 3.* Regulation 2 (5F) of the Traffic Sign Regulations, 1937 (as added by Reg. 3 of Amendment No. 6 (Serial No. 1953/185) relates only to the matter that is to be displayed on the signs in accordance with their method of erection; it does not relate to the site or to the method of erection. If Class D signs in the forms of Diagrams Nos. 4B or 5B which define the area of the limits of parking as the area within the directional heading of the arrows, under Reg. 2 (5E) are erected parallel to the roadway, they are a sufficient indication of the limits of parking. If signs in the forms of Diagrams Nos. 4A, 4C, or 5A are used, then they must have placed immediately below them, whether parallel to the roadway or not, a further supplementary notice as required by Reg. 2 (5F), and they must be sited as required by Reg. 2 (5D) (*a*), *i.e.*, at each end of the length of roadway affected. *Bland* v. *Morton*. (Auckland. November 1, 1954. Wily, S.M.)

WILL.

Construction—Income from Residuary Trust Estate to Widow—Such Estate consisting of Farming Business, Company Shares, Garage Business and Royalties from Quarries—Trust for Sale and Conversion and Power of Postponement in Trustee's Discretion—No Express Gift of Intermediate Income or of Income of Unconverted Estate—Implied Gift of Income—Wide Powers given to Trustees including Powers of Management as if Absolute Owners—Evidence of Contrary Intention—Widow entitled to Full Net Income In Specie *pending Sale and Conversion—Debts deemed to have been paid from Capital and Income.* The testator, after bequeathing his household furniture and personal effects to his wife devised and bequeathed the residue of his property, both real and personal, to his trustees upon trust to sell, call in, and convert the same into money, with power to postpone the sale calling in and conversion of the same or any part thereof for so long as they in their absolute discretion should think fit and out of the proceeds of such conversion and all other moneys forming part of his personal estate thereout of to pay his debts, funeral and testamentary expenses and all succession duties, and to invest the net balance thereof (hereinafter called "the residuary trust fund") in such investments as are authorized by law. He then directed his trustees to pay the income arising from the residuary trust fund to his wife during her widowhood and until his youngest child attained the age of twenty-one years, subject to the obligation on her part of maintaining and educating his infant children; and he further directed that, from and after the date when his youngest child should attain the age of twenty-one years and during the lifetime of his wife, so long as she should remain his widow and unmarried, his trustees should pay to his wife £260 per annum or the net annual income from the residuary trust fund whichever should be the less and should divide any surplus income between his children in such proportions that each son should receive three shares and each daughter one share. Upon the death or remarriage of his wife, the trustees were directed to hold the whole of the residuary trust fund in trust for all his children living at his death who should survive him and attain the age of twenty-one years in the like shares provided for distribution of surplus income.

The testator left him surviving his widow and five infant children. His estate, of a net value of approximately £30,000, consisted *inter alia* of a freehold property on which the testator carried on a farming business, shares in a quarry company, a garage business, and a metal quarry in respect of which royalties were payable to him. The debts and testamentary expenses amounted to the sum of nearly £19,500; and, while many of the debts were discharged within a period of twelve months after the testator's death, some debts (principally for duty and income-tax) remained to be paid. The questions for determination were: Whether the testator's widow was entitled to the full net income from time to time from (*a*) the farm property and stock owned by the testator, (*b*) the garage business, (*c*) the shares in Papamoa Quarries, Ltd., and (*d*) the royalties paid by Papamoa Quarries, Ltd.; and also, whether the debts of the estate were to be apportioned as between the life tenant and the remainder in accordance with the rule in *Allhusen* v. *Whittell*, (1867) L.R. 4 Eq. 295, and if so in what manner or upon what basis. *Held*, 1. That, although the will, if it be read literally, contained no express gift of the intermediate income, and the income of the unconverted estate had not been disposed of, there was an implied gift of that income; but it did not follow that the income payable to the widow was to be the actual income derived from the unconverted estate *in specie*, as the general rule, unless sufficient evidence of a contrary intention be found in the will itself, was that, as regards personalty, the gift related only to the income which would have been derived had the property been converted and the proceeds invested on authorized securities. (*Dimes* v. *Scott*, (1828) 4 Russ. 195; 38 E.R. 778. *Brown* v. *Gellatly*, (1867) L.R. 2 Ch. 751; and *In re Owen*, [1912] 1 Ch. 519, followed.) *Public Trustee* v. *Roskell*, [1923] N.Z.L.R. 393; [1923] G.L.R. 102, applied.) 2. That the wide powers given under cl. 10 of the will, being a guide to an intention by the testator that he intended his trustees to act in any way they thought best in the interests of the estate, not only in employing further capital in any of his business ventures but in doing other things as well that might adversely affect the widow's income from the residuary trust fund, were evidence of a contrary intention sufficient to displace the general rules of construction. (*In re Slater*, (1915) 113 L.T. 691, followed.) (*In re Hartigan*, (1915) 17 G.L.R. 703, distinguished.) (*In re Mountain*, [1934] N.Z.L.R. 399; [1934] G.L.R. 490, considered.) 3. That accordingly, the widow was entitled to the full net income *in specie* from time to time from the farm property and stock, the garage business, the shares and the royalties, while the trustees, in whole or in part, exercised their discretion against sale and conversion of the estate. 4. That, as such contrary intention was established, there was no ground for distinguishing between unauthorized investments and wasting assets; but the trustees owed a duty to act impartially as between life tenant and remaindermen. 5. That the debts due in the estate, whether paid within the executor's year or later, were to be deemed to have been paid from capital and income in accordance with the general rule laid down in *Allhusen* v. *Whittell*, (1867) L.R. 4 Eq. 295, as explained by *In re McEuen*, [1917] 2 Ch. 704, and *In re Wills*, *Wills* v. *Hamilton*, [1915] 1 Ch. 769. *In re McNaughton* (*Decd.*) (S.C. Auckland. August 30, 1954. North, J.)

MR. JUSTICE SHORLAND.

The universal acclaim with which the appointment of Mr. Justice Shorland was received throughout the profession and, we believe, the public generally in this country was well exemplified by the large and representative gathering which assembled at the Supreme Court when the new Judge was sworn in.

Mr. William Perry Shorland was born in Wellington in 1899, the son of the late Mr. J. O. Shorland and Mrs. Shorland. He was educated at Wellington College and subsequently at Victoria University College where he graduated Bachelor of Laws. After leaving Wellington College, he entered the Public Service for a short period and in 1917 entered the employ of the firm of which he was a member at the time of his appointment. He remained with that firm, Messrs. Chapman Tripp and Co., until 1921, when he took a position as Managing Clerk to an Auckland firm practising in Auckland and Whangarei, but returned to Wellington at the end of 1922, when he became personal assistant to Mr. G. G. Gibbes Watson until admitted to partnership in the firm then known as Chapman, Tripp, Watson, James, and Co., in 1936. Continuing his close association with Mr. Watson until the latter's retirement from the firm in 1949, the new Judge over the years was concerned in an increasingly large number of intricate and difficult common law matters, until in his recent years he has been almost continuously engaged in the Courts.

Douglas Elliott, New Plymouth, Photo.

Mr. Justice Shorland.

To such a burden of responsibility, the new Judge when at the Bar brought an immense capacity for work, coupled with an intense devotion to his clients' interest, subordinating, without reserve, his own comfort, pleasure and, at times, his health to the necessity for completing the task in hand. To his wide background of experience in the Courts, there was always added a sound judgment of facts and a deep knowledge of men and their ways in all walks of life. Always unruffled in Court, he maintained a calm and courteous attitude in the most strenuous and acrimonious of situations: modest in success and graceful in defeat, he gained the unstinting regard of all his colleagues.

His success throughout a wide and varied experience of Court appearances was gained not by flights of oratory or emotional appeal but by a sincere, calm, and logical presentation directed towards the essentials of the matter.

The demands of a busy practice left little time for devotion to outside interests; but, nevertheless, Mr. Justice Shorland served his brethren for many years in legal activities. He was a member of the Council of the Wellington District Law Society, and subsequently its President, while at the time of his appointment he was a member of the Rules Committee, the Council of Legal Education, and the Council of Law Reporting. A few months ago he was appointed a Vice-President of the New Zealand Law Society. The younger members of the profession will recall with pleasure the lectures delivered by Mr. W. P. Shorland (as he then was) at Victoria University College, when he lectured during the years 1945-46-47 in the Law of Practice and Procedure: his interest in, and concern for, younger members was well known, and no one sought his cheerfully-given guidance in vain.

In the sporting world, apart from a mild interest latterly in bowls, the new Judge was principally interested in matters aquatic: both rowing and yachting claimed his interest, and, as a Vice-Commodore of the Royal Port Nicholson Yacht Club, he maintained that interest for the "little ships" and those who sail in them.

His Honour brings to his new Office an innate sense of fairness and courtesy, which has already earned him the respect of all who know him. He follows in the path of three former partners of his old firm, namely, Sir Charles Skerrett, Sir Archibald Blair, and Mr. Justice Cooke, and will undoubtedly maintain the high traditions of those from whom he learned much of his calling.

The Swearing-in of the New Judge.

On October 29, at the Supreme Court, Wellington, there was an exceptionally large gathering of the profession to witness the swearing-in of the new Judge.

On the Bench, in addition to the Rt. Hon. the Chief Justice, Sir Harold Barrowclough, were Mr. Justice Gresson, Mr. Justice Hutchison, Mr. Justice Hay, Mr. Justice Cooke, and Mr. Justice Turner.

The Chief Justice.

His Honour the Chief Justice commenced the proceedings by saying:

" Mr. Justice Shorland has produced to me a commission signed by His Excellency the Governor-General appointing him to be a Judge of the Supreme Court of New Zealand. I myself have received instructions by the hand of His Excellency directing that the Oath of Allegiance and the Judicial Oath shall be taken before me. I therefore tender these Oaths and call upon you, Mr. Justice Shorland, to take the Oaths."

After His Honour had taken the Oaths, the Chief Justice continued :

" Your Honour, a moment ago it was my duty to administer to you the Oaths of your Office. It is now my very great pleasure to extend to you, on behalf of my colleagues as well as for myself, a very warm welcome to this Bench. When I speak of my colleagues, I refer not only to those Judges who are now here present, but also to those whose duties have prevented them from attending this ceremony. On behalf of all my brethren, I congratulate you on your appointment, and I express the hope that you may be long spared to exercise the functions of your high Office. You are no stranger to any of us. Your distinguished career at the Bar has made us familiar with your learning and your judgment, and we all welcome the help we know you will give us and the community which you will continue to serve ".

The Attorney-General.

The Attorney-General, the Hon. T. Clifton Webb, then said :

" I am particularly pleased to be present here today, not only because of the fact that it is a solemn occasion, but also because it happens to be the last occasion on which I shall have the privilege of attending a function such as this—at any rate in my present capacity—and I would like to associate the Government and myself with the tributes that the Chief Justice has just paid to our new Judge.

" My mind goes back to a time, now over thirty years ago, when Mr. Justice Shorland and I were pitted against one another in a debating contest between teams from Whangarei and Dargaville ; and I doubt if either of us in our wildest dreams would have imagined that one of us would be elevated to the Supreme Court Bench and the other should have the privilege and the pleasure of recommending his appointment.

" Mr. Justice Shorland, we remind ourselves, comes from a firm that might almost be said to have Letters Patent in the creation of Judges. I am not sure of the number—I think it is round about five—Mr. Justice Shorland is, I think, about the fifth to come from that firm, and we know he will bring to bear upon his work not only sound knowledge of the law but also that knowledge of men and affairs so necessary if a Judge is to completely fill the highly-important position that he occupies in the community. I join with the Chief Justice in wishing Mr. Justice Shorland a long, and, we know it will be, successful term of Office. I congratulate him on his appointment, and at the same time I thank him for accepting it. He may know that his appointment has given the greatest satisfaction to the Government for which I have the privilege of speaking, and I know the same can be said of the Bench, the Bar, and the public generally."

The New Zealand Law Society.

Mr. T. P. Cleary, President of the New Zealand Law Society, said that the members of the profession throughout New Zealand received with special pleasure the announcement of the appointment of Mr. Justice Shorland. It was the speaker's glad duty on behalf of all his former colleagues in the profession to offer him their warmest felicitations. They shall be sorry to lose him ; to lose his knowledge, guidance, and his solid counsel in the affairs of the New Zealand Law Society ; but these regrets are far outweighed by the great pleasure all feel in seeing him take his seat on the Bench. They all trusted that his judicial career would be long in years. They knew that it would be fruitful in accomplishment.

The Wellington Law Society.

Mr. R. Hardie Boys, President of the Wellington Law Society, was the last speaker. He said :

" The practitioners of the Wellington District welcome this opportunity of expressing publicly their profound satisfaction with the latest appointment to your Bench, and ask leave to express a sentence or two directly to him who has just been sworn in.

" Mr. Justice Shorland : We who were until a few minutes ago your brethren of the Wellington Bar offer our wholehearted congratulations to you upon your elevation to the Supreme Court Bench ; and, in doing so, we express our unreserved confidence in the future you will experience in this new field. We offer to you our pledge of loyalty and trust so often expressed to you before, for you have been our President and you have served your fellows in the Wellington District Law Society for many years. But also you have been one whose soundness of judgment and wide knowledge of the law were available both as counsel, and, what is perhaps more particularly appreciated, as umpire or arbitrator in many matters that never came to the Court. We know yours will be a judicial career of outstanding worth, and although your modesty may cause you to approach your new task with trepidation, there is not one of us who does not hope that you will enjoy many years of good health wherein you may serve in this high office in the administration of justice ; and we hope that, before long, you will be permitted to preside here, in the Courts you know so well.

" Your Honours : May we, without being misunderstood, say that we believe this is a sound appointment, which will strengthen Your Honours' hands in the manifold tasks you are called on to perform".

Mr. Justice Shorland.

In reply, the new Judge said :

" May I thank you most sincerely for your kind words and words of encouragement. I am deeply conscious of the responsibilities of the office to which I have just been admitted, but I am fortified both by your words and your presence at this ceremony. With your assistance, which I know will be forthcoming, I shall endeavour to discharge my duties in accordance with the Oath which I took a few moments ago.

" I say no more than ' Thank you very much.' "

THE CRIMINAL JUSTICE ACT, 1954.

Corrective Training.

In an appeal recently heard by Mr. Justice Hutchison, the appellant appealed against a sentence of two years' reformative detention imposed on him by the Magistrate on a charge of obtaining £21 by a false pretence, the passing of a valueless cheque.

The appellant was twenty-five years of age. He had had a number of convictions on charges involving dishonesty since 1949, when he was nearly twenty years of age. He had been on probation; he had had two sentences of twelve months each of reformative detention, and sentences of imprisonment with hard labour of one month and six months respectively. For about twelve months before this conviction, he had no other convictions, as he points out in his Notice of Appeal.

He quoted the case of another man who, with more convictions than he had, was sentenced to six months' imprisonment with hard labour on four charges of false pretences, the amount involved being £60, though, as he pointed out, £15 of that was recovered, and he said that the sentence imposed on him on his one offence involving £21 was, relatively speaking, excessive.

In an oral judgment, the learned Judge said that, on the face of that, it might appear, at first sight, to be so, but there was little to be gained in comparing sentences because conditions may be so different. His Honour was of the opinion that he must dismiss the appeal, but, in doing so, he proposed to make certain remarks which might possibly be helpful to the appellant.

Two Forms of Confinement.

Mr. Justice Hutchison continued:

"There are two different sentences of confinement—to use a neutral word—nominally imposed, imprisonment with hard labour and reformative detention. I would, myself, think that, if the sentence to be imposed on the appellant had to be considered purely from the punitive or deterrent point of view, a sentence of imprisonment with hard labour for something in the neighbourhood of six months would have met the circumstances of the case. That, however, would have been expressing a defeatist view; it would, I think, have meant that, in the view of the Court, the appellant was beyond reformation. The learned Magistrate, on a consideration of the matters that have to be considered before a reformative detention sentence may be imposed, must have come to the conclusion that appellant is not beyond redemption but is capable of reformation. Notwithstanding the fact that appellant has already had two shorter sentences of reformative detention, I am in agreement with the view that appellant is not to be thought to be beyond reformation. He says in his statement that he sees the futility of what he has been doing and intends to go straight in the future. Whether that is a view he is likely to continue to hold in the future, I am, of course, not in a position to say; but it does seem to me that, at twenty-five years of age and when twelve months went by without a conviction, he is not beyond reformation; and I think that reformative detention is the proper sentence.

"It is well recognized that sentences for periods in the neighbourhood of six months or anything like that are not conducive to reformation, and that the period should be longer than that, the authorities being in a position to release the prisoner on licence when they think that there are solid grounds for believing that he may be so released with a reasonable prospect of his going straight in the future.

Reformative Detention and Corrective Training.

"It may seem illogical that a man who is capable of reformation should be sentenced to a longer term than a man who is not capable of reformation, but it must be remembered that the two sentences of confinement are different in their primary purposes. The difficulty in the past has been, no doubt, on account of the fact that we are a small community, that from a practical point of view, it has been impossible for the authorities to provide different institutions and different courses for the two classes of prisoners. Theoretically, however, the two sentences are different. The main practical difference in the past has been that the Prisons Board or, as it is in the future to be called, the Parole Board, has exercised a wider and earlier discretion in recommending the release of reformative detention prisoners than it has with hard labour prisoners.

"The Criminal Justice Act, 1954, to come into force on January 1, 1955, marks an advance in the treatment of offenders. What will in the future correspond to what in the past has been called reformative detention is called corrective training. The Parole Board will still exercise its function of recommending the release of offenders subject to corrective training when it feels that there are solid grounds for believing that the person is likely to go straight in the future, while the case of men subject to imprisonment, not being imprisonment for life, will not come under the jurisdiction of the Board."

His Honour said this because he wished it to be clear that his dismissal of the appeal was not to be taken as an indication that he thought that the appellant should be confined for a period approximating two years. From a purely punitive or deterrent aspect, no such sentence as that would, in His Honour's view, be warranted. He dismissed the appeal so that the Parole Board might have the fullest discretion in recommending the release of the appellant when it thinks that to be proper, while, at the same time, leaving the limit of his permissible period of confinement far enough away to afford ample time for the process of reformation to proceed.

Those Chancery Men!

In *Brown* v. *Brown*, [1937] P. 7, 15, we find Langton, J., expressing the time-honoured view of the common lawyer about the men of the Chancery Bar: "It is true, of course, as pointed out by Romer, L.J., that in order to discover the meaning of the word 'settlement' in this conjunction one has not to look at *Davidson on Conveyancing*, or any other of the enchanting volumes which occupy the working and no doubt the leisure hours of the inhabitants of Lincoln's Inn, but only to the words and the intention of the statute itself." In *The Stranna*, [1937] P. 130, 140, he said: "Where Lord Macnaghten has forborne to tread, lesser men may be excused from the adventure." But they may be permitted to quote Lord Macnaghten, to show with what delicate irony he could tread, as in *Free Church of Scotland* v. *Lord Overtown*, [1904] A.C. 515, 641: "My Lords, I cannot call the matters that were discussed by Mr. Haldane small or insignificant. They are mysteries into which I do not think it is our province to intrude. And, indeed, I am not quite sure that at the conclusion of Mr. Haldane's argument I had gained a clearer insight into these hidden things than I had before."

GLASGOW LEASES.

Leases by Local Authorities and Other Public Bodies.

By E. C. ADAMS, I.S.O., LL.M.

A correspondent has written stating that his client is proposing to take a lease from a Borough Corporation and asking for advice as to the usual covenants which it is customary to include in such a lease. He is particularly anxious that the proposed lessee should not be burdened with any unusual covenants or conditions.

This inquiry opens up an interesting and important topic. A short precedent will be found in *Goodall's Conveyancing in New Zealand*, 2nd Ed. 397-399. But, as I pointed out in my editorial capacity in footnote (*f*), the covenant for renewal in that precedent is rather unusual, inasmuch as it is not made perpetual; the more usual practice in New Zealand, I think, is to make such a covenant perpetual.

Land leased by local authorities or other public bodies under the Glasgow type of lease is usually held as an *endowment* for the purpose of obtaining revenue. Although the estate held by the lessor is an estate in fee-simple, it is nevertheless a *qualified* estate. The nature of this *qualified* estate is explained by Fair, J., in *Re Auckland Grammar School Board, In re Auckland City Corporation*, [1941] N.Z.L.R. 646; [1941] G.L.R. 425, as follows:

> The estate of the Board in this land was less than an estate in fee-simple in several respects, inasmuch as it did not have power to sell the land nor to mortgage it except for certain limited purposes, and it could not lease it except on special terms. I think, therefore, that the limitations upon the right of the Board to deal with the land may be described as making the interest a qualified one, which resembles an estate in fee-simple, but with restrictions foreign to the estate of the owner of an absolute estate." (*ibid.*, 654; 427).

The reasoning in this case appears to be consistent with *ratio decidendi* of the Australian case, *R.* v. *Registrar of Titles, Ex parte The Commonwealth*, (1917) [1917] V.L.R. 576.

As to the powers of a corporation created by statute, the rule appears to be that what the statute does not expressly or impliedly authorize is to be taken as prohibited: *Attorney-General Ex rel. United Theatres Ltd.* v. *Levin Borough*, [1945] N.Z.L.R. 279; [1945] G.L.R. 81.

For this reason, and because of s. 129 of the Land Transfer Act, 1952, and s. 99 of the Reserves and Domains Act, 1953 (both in protection of *public* reserves), it is the practice of the Land Transfer Department before accepting leases of this type for registration to be satisfied that the terms covenants and conditions thereof are on their face *intra vires* the lessor.

When a lease is registered under the Land Transfer Act, the lessee gets an indefeasible title, and the State guarantee conferred by registration extends, for example, to a covenant for renewal, even if such covenant is *ultra vires* the lessor: *Pearson* v. *Aotea District Maori Land Boards* [1945] N.Z.L.R. 542; [1945] G.L.R. 205. A right of renewal in a lease is specifically enforceable by a transferee of the lease: *Whangarei Harbour Board* v. *Nelson*, [1930] N.Z.L.R. 554; [1930] G.L.R. 469. This case shows that in such a lease certain rights may be reserved in favour of the lessor or of the public or of third parties provided that the right of the lessee to exclusive possession is paramount. For example, the lease may purport to vest in the public the right to enter upon the land at all reasonable times and to remain there for the purpose of picnics and excursions.

Leases by a city or a borough may be authorized by the Municipal Corporations Act, 1933. Reference may be made to s. 158 of that Act.

Most local authorities and public bodies have, however, been created leasing authorities under the Public Bodies Leases Act, 1908. Although no complete list ever appears to have been published, inquiries may always be made of the Internal Affairs Department at Wellington as to whether any particular local authority or public body has been made a leasing authority under the Public Bodies Leases Act, 1908. That Act is mutually advantageous to the lessor and to the lessee: it enables a much better tenure to be created. Most lending institutions, for example, will advance money on the security of a lease granted under the Public Bodies Leases Act, 1908, especially if the lease confers a perpetual right of renewal on the lessee.

If a city or borough corporation has been declared a leasing authority under the Public Bodies Leases Act, 1908, its lands as a general rule may be leased either under the Municipal Corporations Act, 1933, or the Public Bodies Leases Act, 1908. I say as a *general rule* advisedly, for if, for example, the land is a public reserve within the meaning of the Reserves and Domains Act, 1953, and its leasing would be inconsistent with the specific purposes for which it is held, it may be leased only under s. 27 of that last-named Act.

The object and scope of the Public Bodies Leases Act, 1908, may, perhaps, best be gleaned by an examination of *Otago Boys' and Girls' High School Board* v. *Murray*, (1911) 30 N.Z.L.R. 799; 13 G.L.R. 624, a decision of the late Mr. Justice Williams. The effect of that Act is to give to a local authority or a public body which has been created a leasing authority under that Act more extensive powers of leasing than it had before, and any such leasing authority has power under s. 5 to accept a surrender of an existing lease for the residue of the term and grant a new lease under the Public Bodies Leases Act, 1908. The practical point involved is that the new lease may be granted without offering first to the public by auction or tender: in other words, it may be entered into by private treaty. The mere fact that more extended powers of leasing are given by the Public Bodies Leases Act than by the Act creating the leasing authority is not of itself sufficient to bring the exercise of such a power within the saving words of s. 3, which read as follows:

> save that no power conferred by this Act shall be exercised by any leasing authority if the exercise of that power would be contrary to the provisions of any such Act or trust.

Auckland Harbour Board v. *Auckland Farmers' Freezing Co., Ltd.*, [1938] N.Z.L.R. 71; [1938] G.L.R. 34, logically follows on from that case. In the *Auckland Harbour Board* case, the late Mr. Justice Ostler held that a leasing authority under the Public Bodies'

Leases Act, 1908, upon the surrender of a lease, has power under s. 12 of that Act to grant a new lease of the premises to the same lessee for the remainder of the term, whether that remainder exceeds twenty-one years or not; and to include in the new lease any such right of renewal as it is authorized to grant by s. 5 of the same statute.

The rent payable by the lessee in leases of this nature is commonly termed a ground rent. The lessor, as a general rule, has but little interest in the buildings erected or to be erected on the land. Thus, it is pointed out by the Court in *In re a Lease, Blenheim Borough Council to Gibson*, [1939] N.Z.L.R. 184; [1939] G.L.R. 121, that the following covenant was in common form:

> In ascertaining such new rental the valuers shall not take into consideration the value of any buildings or improvements then existing upon the said demised premises but they shall value the full and improved ground rental of the said premises that ought to be payable during the said term: (*ibid.*, 185; 122).

In that case, the lease was for a term of twenty-one years.

A very qualified right of renewal was contained in the lease referred to in *Dunedin City Corporation* v. *Commissioner of Stamp Duties*, [1944] N.Z.L.R. 851; [1944] G.L.R. 349. The lease was of the Glasgow type, and the covenant for renewal read as follows:

> AND also that three calendar months previous to the expiration of the said term hereby granted two separate valuations shall be made by three different persons to be appointed in writing as follows: One by the Corporation one by the lessee and the third by the two valuators so to be appointed and the decision of such three valuators or any two of them shall be binding on all parties one of such valuations to be made of all the buildings and improvements then on the said land and the other of the fair annual ground rent of the said land only without any buildings or improvements for a further term of twenty-one years from the expiration of the term hereby granted and before the expiration of the term hereby granted a new lease of the said land and premises for such further term of twenty-one years and containing the same covenants and provisions as are herein contained (including this present provision) shall be put up to public auction at the upset price of the annual rent of the said land so valued without buildings and improvements as aforesaid subject to the payment by the purchaser of the value of the said buildings and improvements as fixed by the valuators as aforesaid and in the event of any person or persons other than the lessee becoming entitled to such new lease of the said land such person or persons shall forthwith pay in cash to the Corporation for the benefit of the lessee the value of the said building and improvements so fixed as aforesaid and the Corporation (all rent and other charges having been previously paid) shall pay over to the lessee the value of the said buildings and improvements paid to it by such purchaser without any deduction whatsoever Provided always that if either of them the Corporation or the lessee shall for seven days refuse or neglect to appoint a valuator as aforesaid after having been required so to do by the other of them or shall appoint a valuator who shall for seven days after his appointment refuse or neglect to join in appointing a third valuator as aforesaid then and in any such case the aforesaid valuations shall be made by the valuator appointed by such other of them and shall be binding on all parties Provided also that nothing herein contained shall be construed so as to render the Corporation liable to pay to the lessee the value of the aforesaid buildings and improvements or any part thereof unless and until the same shall have been received by the Corporation from such purchaser thereof as aforesaid and it shall not be obligatory or in any way incumbent upon the Corporation to take any proceedings whatever to compel such purchaser to pay the said value or any part thereof in case such purchaser shall make default in payment thereof or any part thereof Provided also that if neither a stranger nor the lessee shall purchase such new lease at auction as aforesaid the lessee shall upon the expiration of the term hereby granted cease to have any interest whatsoever in the said buildings and improvements or any part thereof respectively and from and immediately after the time of holding such auction as aforesaid shall cease to have any right title or claim whatsoever in the said land or to have or receive from the Corporation or any person or persons whomsoever any compensation or payment for or in respect of the said buildings and improvements or any part thereof respectively.

I do not think that such a qualified right of renewal in Glasgow leases is common throughout the Dominion. It scarcely appears fair to the lessee, who has to run the gauntlet of public competition when the new lease is put up for auction. The practical importance of that case is that, although the right of renewal is so limited, if the lessee does become the new lessee, the new lease (even though it may comprise farm land) is not subject to Part Two of the Land Settlement Protection Act, 1952.

TYPICAL CLAUSES IN GLASGOW LEASES.

PRECEDENT NO. 1.

1. That the lessee will not carry on or permit to be carried on on the land hereby leased the trade of a licensed victualler or retailer of wines spirits or fermented liquors. And it is hereby agreed and declared:

2. On the expiration by effluxion of time of the term hereby granted, the lessee shall have a right to obtain, in accordance with the provisions hereinafter contained, a renewal lease of the land hereby demised, at a rent to be determined by valuation in accordance with the said provisions for the term of Twenty-one (21) years, computed from the expiration of the lease hereby granted, and subject to the same covenants and provisions as this lease, including this present provision for the renewal thereof, and all provisions ancillary or in relation thereto.

3. Within six calendar months previous to the expiry by effluxion of time of the lease hereby granted, or so soon thereafter as may be, a valuation shall be made of the fair annual rental of the land hereby demised, so that the rent so valued shall be uniform throughout the whole term of the renewed lease.

4. In making the said valuation, no account shall be taken of the value of the improvements on the said land.

5. The said valuation shall be made by two indifferent persons as arbitrators, one of whom shall be appointed by the lessors and the other by the lessee.

6. The arbitrators before commencing to make the said valuation shall together appoint a third person who shall be an umpire as between them.

7. The decision of the two arbitrators if they agree or in such respects as they agree or of the umpire if they do not agree or in such respects as they do not agree shall be binding on all parties.

8. The duty of the umpire on reference to him of any question shall be to consider the respective valuations of the two arbitrators in the matters in which their valuations do not agree, and then to make an independent and substantive valuation, and the last-mentioned valuation shall be the decision of the umpire, but in giving his decision on any question so referred to him the umpire shall in every case be bound to make a valuation not more than the higher and not less than the lower of the valuations made by the arbitrators respectively.

9. The provisions herein contained for the making of a valuation shall be deemed to be a submission to arbitration under and within the meaning of "The Arbitration Act, 1908," or any enactment for the time being in force in substitution therefor or amendment thereof, and all the provisions of any such enactment shall so far as applicable apply accordingly.

10. Within two calendar months after the making of the said valuation and the giving of notice thereof to the lessee, the lessee shall give notice in writing signed by him or his agent duly authorized in that behalf and delivered to the lessors stating whether the lessee desires to have a renewed lease of the said land.

11. Any such notice may be given by the lessee within the time aforesaid, although the term hereby granted has already expired by effluxion of time or although the said valuation has not been made or notice thereof has not been given to the lessee until after the expiration of the said term by effluxion of time unless before the giving of such notice by the lessee he has given up to the lessors the possession of the land hereby demised or has duly been ejected therefrom in pursuance of the judgment or order of any Court of competent jurisdiction.

12. Any such notice by the lessee of his desire to have a renewed lease shall be deemed to constitute a contract between the lessors and the lessee for the granting and acceptance of a renewed lease at the rent so valued and for the term and subject to the covenants and provisions referred to in Clause 2 of these presents.

13. If the lessee fails within the time aforesaid to give any notice as to whether he desires a renewed lease or not, or if he gives notice in writing signed by himself or by his agent duly authorized in that behalf that he does not desire a renewed lease, his right to a renewed lease shall cease on the expiry of the time aforesaid or on the date at which such notice is received by the lessors as the case may be.

14. The term of any such renewed lease shall run from the date of the expiration of the prior lease, and the rent as so valued shall accrue as from the said date in lieu of the rent reserved in this prior lease notwithstanding the fact that the renewed lease may not be executed until after that date.

15. The reasonable cost of any such valuation as aforesaid shall be borne by the lessee.

16. If the lease hereby granted is not renewed in accordance with the foregoing provisions, or if it is determined by forfeiture, re-entry or otherwise, all buildings and improvements on the land demised shall absolutely revert to the lessors free from any payment or compensation whatever.

PRECEDENT NO. 2.

1. THAT the Lessee will repair amend and at all times during the continuance of the term hereby granted or any renewal thereof keep in good substantial and tenantable repair all buildings erections and fences now erected or at any time during the term hereby granted to be erected upon or around the hereby demised premises or any part thereof and at the expiration or sooner determination of the said term yield and deliver up the same to the lessors in such good substantial and tenantable repair and condition as aforesaid reasonable wear and tear excepted.

2. THAT the Lessee will during the said term and any renewal thereof comply with the provisions of "The Noxious Weeds Act 1950" and any Amendment thereto and will at all times indemnify the Lessors against all costs charges and liabilities under the said Act or Acts in respect of the said parcel of land.

PRECEDENT NO. 3.

1. The tenant shall and will at all times during the continuance of his demise insure and keep insured from loss or damage by fire in some insurance company carrying on business in New Zealand to be approved by the Trustees all buildings and erections which may at any time during the said term be erected on the demised premises to the amount of the full insurable value thereof in the joint names of the Trustees and the tenant and will deliver the policy of insurance to the Trustees and will punctually pay all premiums and sums of money necessary for such purposes and will at least three days before each premium as aforesaid shall become due produce and show to the Trustees the receipt for every such premium. And it is hereby agreed and declared that all moneys to be received under or by virtue of any such insurance shall be forthwith laid out and expended in making good the loss or damage in respect of which the same moneys shall have become payable.

PRECEDENT NO. 4.

AND IT IS HEREBY AGREED AND DECLARED:

1. On the expiration by effluxion of time of the term hereby granted the Lessee shall have the right to obtain in accordance with the provisions referred to in the next succeeding paragraph hereof a renewed lease of the land hereby demised at a rent to be determined by valuation in accordance with the said provisions for the term of fourteen years computed from the expiration of the lease hereby granted and subject to the same covenants and provisions as this lease including this present provisions for the renewal thereof and all provisions ancillary or in relation thereto.

2. The procedure to be followed in connection with and all other matters governing the granting of a renewed lease under the covenant contained in the last preceding paragraph hereof shall be those contained in Clauses 2 to 18 inclusive of the First Schedule to the Public Bodies Leases Act 1908 which clauses shall be deemed to be incorporated herein as if they were set out herein at length PROVIDED that in making the valuation referred to in Clause 3 of the said First Schedule no account shall be taken of the value of improvements on the said land and the said clause shall be deemed to be modified accordingly AND PROVIDED HOWEVER that in Clause 11 of the said First Schedule the reference to Clause 1 thereof shall be deemed to be a reference to the last preceding paragraph hereof.

PRECEDENT NO. 5.

1. THE LESSEE faithfully observing and performing all the covenants conditions and agreements on the Lessee's part herein contained or implied shall on the expiration by effluxion of time of the term hereby granted if he so desire have a right to a renewal of this lease for a further period of twenty-one years on giving three months' prior notice in writing of such desire to the Board before the expiration of the term hereby granted at a rent to be determined by valuation as the then fair annual ground rent of the land and premises hereby demised only without taking into consideration any buildings or improvements such valuation to be made in manner provided by the First Schedule to "The Public Bodies Leases Act 1908" AND if such further lease be granted as aforesaid then at the expiration of the second period of twenty-one years and at the expiration of every subsequent period of twenty-one years thereafter the Lessee (provided always that the Lessee shall in each and every case have faithfully observed all the covenants conditions and agreements on the Lessee's part herein or in any such extended lease or leases contained or implied) shall on giving such notice as aforesaid in a similar manner be entitled to a further extended lease not exceeding twenty-one years at any one time at a rent to be determined by valuation as aforesaid at the time or times of such several extensions being granted AND IT IS HEREBY AGREED AND DECLARED that each such extended lease shall be subject to and contain similar covenants conditions and restrictions in all respects to those herein contained or implied save and except in respect of the annual rent to become payable in respect of each such extended lease. And each such extended lease shall be prepared in triplicate by the solicitors for the time being to the Board and all expenses of preparation execution stamping and registration of each such extended lease shall be borne by the Lessee.

Nautical Misadventures.

In *The City of Lancaster*, (1929) 34 Ll. L. Rep. 381, 382, Scrutton, L.J., said: "This was a case of a steamship in collision at the mouth of the River Thames. If there is any place where anybody in distress can be sure of any number of Good Samaritans ready to assist him for a consideration, the mouth of the Thames is that place. Within a comparatively short period there were seven tugs available to assist this steamship. The *Kenia* arrived second and she was there for sixteen hours. The *Kenia* was asked to pump out the engine-room and could not. She was then told to pump out hold No. 5. That she did, until everybody became aware that she was pumping the Thames through hold No. 5 and it was realized that that was not much use. She was told to stand by and afterwards told to go away, and she got back to Gravesend sixteen hours after she had started out. The Judge has awarded her £400. That would strike some people as rather good remuneration for sixteen hours' work." And, in *The Otranto*, [1930] P. 110, 113, the same learned Lord Justice said: "This appeal raises again the perplexing problem of the give-way ship which seems likely not to give way, but in fact does give way, and the stand-on ship which in consequence does not stand-on, with the resultant collision."

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Holiday Tale.—The ebullient President of the Wellington District Law Society (R. Hardie Boys) enlivened the December monthly luncheon of the Society by a story that deserves a wider audience. It seems that when the C.J. was sitting at Palmerston North one of the undefended divorces was conducted by counsel from a truly rural area. At the conclusion of the evidence, the C.J. said that the case could stand over until the further sessions of the Court. What for, enquired counsel. "There is no corroboration," replied the C.J. in the gentlest of tones. "Good gracious," observed counsel to his fellow counsel in an audible tone, as he resumed his seat, "what *will* they think of next?"

The Decameron.—Delivering the judgment of the Court of Appeal in *R.* v. *Reiter*, [1954] 1 All E.R. 741, Goddard, L.C.J., pointed out that the law as to obscenity is the same now as it was in 1868 when Cockburn, C.J., laid it down in *Hicklin's* case (L.R. 3 Q.B. 360):

> "I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."

Indeed, this is the basis of our own Indecent Publications Act, even if we take a much larger number of words to say the same thing. But as a profession consisting, at least in part, of the higher vertebrates we should take heed of the summing up of Stable, J., in the recent *Secker and Warburg Ltd.* prosecution, [1954] 2 All E.R. 683, and vigorously resist any tendency to have our contemporary literature measured by what is suitable for a 14-year old girl to read, a reduction to the sort of books read to children in the nursery. "A mass of great literature," he says, "is wholly unsuitable for reading by the adolescent, but that does not mean that publishers are guilty of a criminal offence for making those works available to the general public." Now, the issue is again raised by the successful appeal to the Wiltshire Quarter Sessions against the decision of the Magistrates at Swindon ordering copies of the two-volume edition of *The Decameron* of Giovanni Boccaccio (1313-1375) to be destroyed along with a number of other books on the ground of obscenity. One of the most famous books in all literature, this collection of stories supposedly told by a collection of ten people in 1348, at the time when the plague known as the Black Death struck Florence, has been described as "that great human comedy which has given him immortality." From these stories have come several of the Canterbury Tales of Chaucer; Shakespeare used them for his *All's Well That Ends Well*, Keats for his *Isabella*, and *Tennyson* for his *Tancred*. Upholding an appeal from a conviction for hiring out this book (*Sumpter* v. *Stevenson*, [1939] N.Z.L.R. 446), Blair, J., at p. 451, draws attention to the frequency with which one finds phrases in Boccaccio that have been "embalmed in common expressions in everyday speech and literature." In cases of this kind, a great deal depends upon the vendor or hirer of a book and, as Blair, J., points out, an exposure of the Bible that was designed to attract attention to particular passages might well be within the mischief aimed at by the statute. One curious fact that has never emerged clearly in any prosecution against *The Decameron* is that Boccaccio himself in his old age sought to repudiate it as immoral. This is, however, pure hearsay, and perhaps the less said about this aspect of the matter the better for all.

Birkenhead Note.—Scriblex has been reading an article by Tallulah Bankhead in *Theatre Arts* (September, 1954). It is entitled "Caught with My Facts Down," and in it she proceeds to correct, with considerable belligerence and lack of contrition, various erroneous statements of fact made by her in her recent autobiography, *Tallulah*. One of these for which she has been severely taken to task by "enthusiasts all the way from Soho to San Francisco" is a reference to a meeting on Lord Beaverbrook's yacht with Lord Birkenhead whom she describes as "Chancellor of the Exchequer." She need not have worried greatly over this slip. The former F. E. Smith was a man of unrestrained extravagancies as is evidenced by a whole fleet of Mercedes cars that he possessed. On one occasion when he was complaining to a friend of his inability to exist upon the substantial remuneration of a Law Lord, the friend said: "They should have made you Chancellor of the Exchequer, with no restriction on your personal expenditure." "Then," replied Lord Birkenhead, "they would never be able to repay the National Debt."

The Adventurous Motorist.—The Court of Criminal Appeal has just reduced to twelve months' imprisonment a sentence of four years imposed upon a young man of twenty-seven who described himself as a fanatical devotee of "Western" films. "This adolescent malady, harmless in itself," writes A.L.P. in the *Justice of the Peace and Local Government Review* (September 25, 1954), "had caused his imagination to get the better of him; he had indulged a fantasy that he was 'the cops' chasing the robbers, or *vice versa*, and had 'stalked' the car ahead of him, eventually firing at it with an air-pistol at short range. Lancashire Quarter Sessions had taken an unsympathetic view of his delusion and sent him down for four years. If this adventurous gentleman thinks the roads are not dangerous enough already, without drivers enlivening the scene by shooting at one another, he should try being a pedestrian for a few months when he comes out." Some years ago, Scriblex had to say a few words for a motorist whose peculiar weakness consisted in potting sheep from his moving car. *He*, however, was an Ernest Hemingway fan and thought that he was in the depths of darkest Africa, out on Safari, and the white-capped Tararuas were the Snows of Kilimanjaro.

From My Notebook.—"If I correctly understand the question this appeal is intended to raise, it is one of some general importance, but it is not quite clear what the question is . . ." *Job Edwards Ltd.* v. *Birmingham Navigations*, [1924] 1 K.B. 341, 353 . . .

"In this regulation the expression 'illuminated area' means, in relation to a lamp, the area of the orthogonal projection on a vertical plane at right angles to the longitudinal axis of the vehicle of that part of the lamp through which light is emitted."—From a letter in *The Times* (London) on recent regulations about rear lights and reflectors. In so far as clarity is concerned, this seems to be one of the lights that have failed.

THEIR LORDSHIPS CONSIDER.

By Colonus.

Donatio Mortis Causa.—Mr. Elwes had been offended by his daughter, but towards the close of his life was desirous to make a larger provision for her than he had before done. While languishing in the sickness of which he died, and " in contemplation of his approaching dissolution ", he expressed a wish before witnesses to give his daughter all his right and interest in certain mortgages, and the witnesses made a memorandum of that fact. It afterwards occurred to the witnesses that the gift would not be complete without the actual delivery of the instruments to the daughter. They were accordingly delivered by one of the witnesses to the daughter in the presence of the father, who, though so near his death that he could hardly utter the word, " visibly manifested his satisfaction at what had been done," and pressed the hands of his daughter whilst she held the papers. In his speech, Lord Eldon began with some remarks every student will endorse :

> " It would be a much better improvement of the law than many of these improvements which have been lately talked of, if the *donatio mortis causa* were struck out altogether ; but, as it is, we must deal with it the best way we can. The question here is not one as between the donor and donee, but whether the donor has given that which will bind his executor or heir-at-law ; and whether, although the interest is not considered as vested by the gift itself, the donee has not a right in equity to call upon the heir-at-law or executor to give effect to the intent of the deceased."

His Lordship then reviewed the development of the law relating to gifts of this nature and concluded that " if the debt is well given, the person holding the land is in equity a trustee for the person to whom the debt is given . . . I am of opinion that the delivery of these securities is a good *donatio mortis causa* as raising a trust by operation of law ; and that, as so raising a trust by operation of law, they are not within the provisions of the Statute of Frauds." *Duffield* v. *Hicks*, (1827) 1 Dow & Clark, 1 ; 6 E.R. 428.

Jurisdiction.—" My Lords, if it were not for the very sincere respect which I entertain for the unanimous opinion of the learned Judges of the Court of Exchequer Chamber, I should have thought that this case was an extremely simple one, and that if it had fallen to be decided in one of the Courts of Equity, to whose administration the subject-matter more properly belongs, it could hardly have admitted of any serious argument." Lord Cairns, L.C., in *Shropshire Union Railways and Canal Company* v. *The Queen*, (1875) L.R. 7 H.L. 496, 504.

Guarantor.—Subs. 1 of s. 36 of the Income Tax Act, 1918 (U.K.), provided : " Where interest payable in the United Kingdom on an advance from a bank carrying on a *bona fide* banking business in the United Kingdom is paid to the bank without deduction of tax out of profits or gains brought into charge to tax, the person by whom the interest is paid shall be entitled, on proof of the facts to the satisfaction of the special commissioners, to repayment of tax on the amount of the interest.'. The appellants had given certain guarantees to a bank to secure a company's indebtedness. In due course they paid to the bank under these guarantees a sum of £64,482 16s. 8d., and then claimed a refund of tax to the extent of that sum. In holding, with the rest of the House, that the right did not extend to guarantors, Lord Thankerton, in *Holer* v. *Inland Revenue Commissioners*, [1932] A.C. 624, said :

> Interest is the return given for the use of the advances, and is due by the person who obtains the advances ; the liability of the guarantor is direct to the creditor, and is an undertaking to indemnify him against loss. The creditor computes his loss by the amount of the failure of the principal debtor to pay him principal and interest. In paying the amount of the indemnity, whether limited or otherwise, I am of opinion that the guarantor cannot be said to be paying interest to the creditor, though he is making good the loss of interest (*ibid.*, 631).

Lord Macmillan summed up neatly by saying that in his opinion the appellants received no advance from the bank and owed no interest to the bank. Their relationship to the bank was not that of borrower and lender, and their liability to the bank was solely that of guarantors of a third party's indebtedness to the bank (*ibid.*, 634).

Quasi-contract : statutory purchase.—In exercise of its statutory powers, a railway company served on a landowner a notice to treat for the purchase of a slip of land. There was a dispute, but, before the time-limit of five years allowed by its statute ran out, the company took possession of the land, changed the whole character and formation of the ground, adapted it to their own purpose, and destroyed its suitability for its former use.

> In my opinion, said Earl Cairns, where there has been a notice to treat, and where, before the price has been ascertained the company has, under the statute, regularly obtained possession of the land, and proceeded to use it for making a railway, nothing more remaining to be done but the ascertainment of the price, the transaction is one that must go forward and not backward ; the landowner has a continuing right under the statute to have the price fixed and paid, and that right he must pursue. To hold otherwise would, in many cases work the greatest injustice not only to the company but even to the landowner himself, although in this particular case, for some reason not apparent, the respondent would prefer to get back his land : *Tiverton and North Devon Railway Company* v. *Loosemore*, (1884) 9 App. Cas. 480, 491.

Lord Blackburn was not fully of the same opinion, but did not actively dissent. His comments are, however, of considerable interest. He said, *inter alia*,

> I do not think that the analogy between an actual contract and a quasi contract is complete ; but I think it is so thus far, that neither side can by its laches or misconduct take away from the other its right to enforce the performance of the contract or quasi contract, or claim compensation for its non-fulfilment ; but either side may by its laches or misconduct deprive itself of all right to enforce the contract or quasi-contract against the other. And I do not see anything unjust or contrary to principle in holding that if a company delays completing a compulsory quasi-contract for purchase, till it can no longer exercise the powers for the sake of which it was entrusted with the power of compulsory purchase, that quasi-contract should, at least at the option of the landowner, be at an end " (*ibid.*, 496).

Licence or Grant.—" The distinction between a licence and a grant is clearly stated by Romer, L.J., in *Frank Warr and Company* v. *London County Council* [1904] 1 K.B. 713, 721, where, citing *Thomas* v. *Sorrell* (1674) Vaugh. 330, 351 ; 164 E.R. 1098, 1109, he distinguishes 'a licence properly so called' from 'a right in the nature of a profit à pendre [*sic*], *i.e.*, to take something out of the soil,' which is matter of grant : the latter case he illustrates by the instance of a permission not merely to cut down a tree on a man's ground, but to carry (or have it carried) away." Lord Wright in *In re Refund of dues under Timber Regulations*, [1935] A.C. 184, 193 ; *sub. nom. Attorney-General for Manitoba* v. *Attorney-General for Canada*, (1935) 51 T.L.R. 242.