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INFANTS AND CHILDREN: LOCAL AUTHORITY'S LIABILITY FOR NEGLIGENCE IN CONTROLLING PLAYGROUND.

THE liability of a local authority for an accident causing injury to a very young child using a playground in a recreation ground owned and controlled by the local authority, was the subject of a recent judgment of the English Court of Appeal, *Bates* v. *Stone Parish Council*, [1954] 3 All E.R. 38. The principles applied by their Lordships are applicable to a similar happening in this country, where chutes are a popular form of amusement in children's public playgrounds.

The judgment itself shows that there were special facts: a young child had fallen from the same chute in 1934, whereupon the local authority erected additional rails to prevent a similar happening in the future; these precautions had disappeared by 1950, when another young child fell from the chute suffering injuries which resulted in his total blindness for life. The judgment is of value to local authorities and their advisers as showing the extent of the duty of care ordinarily required of local authorities in charge of children's playgrounds, especially the condition generally supplied by the common law that there is no invitation to a young child to a children's playground unless he is taken care of by being placed in charge of a person capable of seeing and avoiding obvious perils. Whether or not the permission given to children to enter a public playground is to be regarded as being subject to the condition that they should be accompanied by some responsible person must be determined in accordance with the circumstances of each particular case.

As the judgment has caused widespread interest in local-body circles in this country, we propose to consider it in detail, and then to try and deduce the principles relating to the extent of a local authority's liability in respect of injuries to young children while using its public playgrounds.

I.

The defendant controlled and managed a recreation ground, known as the Stone Recreation Ground, for the use of the inhabitants of the parish and visitors. Access to the ground from the highway was uncontrolled. A part of the ground was made into a children's playground and contained a swing, a turntable and a chute. The chute, which was erected in or about 1928, comprised a small platform some twelve feet above the ground, a stairway leading up to the platform, and a sloping chute, or slide, descending from the platform on the side opposite to the stairway. On each of the other two sides of the platform were two horizontal rails attached to the middle of the side of the platform by a vertical bar. Between the lower horizontal rail, the vertical bar, the platform, and the boarded side of the descending slide, was a gap some thirteen and a half inches by thirteen and a half inches. Children of all ages were admitted to the ground. The groundsmen tried to prevent small children who were unaccompanied from using the chute, but there was no notice-board prohibiting the use of the chute by young children unless there were under competent supervision.

In 1934, a boy, named Donald Rixon, aged four years, fell from the platform, the circumstances of the fall being uncertain. As a result of the accident, the defendant erected additional rails which made the gap between the rails and the platform too small for a child to fall through. The fact of the accident and the steps taken by the defendant to prevent a similar accident were recorded in the minutes of the defendant council. At some time before May, 1950, the additional rails had rusted or been broken away; and, in May, 1950, the chute was in the same condition as it was when the accident occurred in 1934.

On May 4, 1950, the infant plaintiff, a boy of three and a half years, went on to the playground with his mother's permission and accompanied by a child aged six years. The infant plaintiff mounted the stairway of the chute to the platform and fell through the gap between the lower horizontal rail and the platform to the ground below. As a result of his injuries, he became permanently blind. Two persons who were members of the defendant council in May, 1950, had been members of the council when the accident to Donald Rixon occurred in 1934.

The infant plaintiff, suing through his father as his next friend, brought an action against the defendant for damages for personal injuries occasioned by the negligence or breach of duty by the defendant, its servants or agents. The father, the adult plaintiff, claimed damages, amounting to £27 13s. 9d., for consequential loss occasioned by the negligence.

At the trial of the action, issues, which had been

agreed upon by counsel for the parties, were put to the jury by Cassels, J., at the conclusion of his summing-up. The questions and answers were as follows :

1. Did the infant plaintiff fall from the platform and sustain injuries ? Yes.

2. Was the infant plaintiff in the children's section of the recreation ground with the permission of the defendants ? Yes.

3. Was the infant plaintiff a trespasser when he went on the slide ? No.

4. Was the slide by reason of the gap in its then state at the side of the platform a dangerous equipment for children's amusement ? Yes.

5. (*a*) Was the slide an allurement to the infant plaintiff ? Yes. (*b*) Was the infant plaintiff allured ? Yes.

6. If answers to 4 and 5 are " yes " was the slide a danger to the infant plaintiff which he would not appreciate ? Yes.

7. Did the defendants know that the slide was dangerous ? Yes.

8. If the answer to 7, is " no " ought they to have known ?

9. If the answer to 4 and 6 is " yes," had the defendants given sufficient warning of the danger ? No.

10. Had the defendants taken any steps to protect the infant plaintiff from danger ? No.

The jury, having found the defendant liable, assessed the damages at £17,527 13s. 9d., £17,500 being apportioned to the infant plaintiff and £27 13s. 9d. to the adult plaintiff, and Cassels, J., gave judgment for the plaintiffs for the sum of £17,527 13s. 9d., with costs. The defendant appealed on the issue of liability and, alternatively, they asked for a reduction of the damages awarded to the infant plaintiff.

In the Court of Appeal, Somervell, L.J., as he then was, dealt first with the alleged misdirection as to liability. Counsel for the defendant had submitted, first, that there was no proper direction with regard to questions 2 and 3 put to the jury, namely :

2. Was the infant plaintiff in the children's section of the recreation ground with the permission of the defendants ?
3. Was the infant plaintiff a trespasser when he went on the slide ?

By para. 5 of its defence the defendant alleged that the infant plaintiff was a trespasser in that he was not in the custody or under control of a competent person. The learned Lord Justice said :

> The principle on which this allegation is based was stated by Lindley, J., in *Burchell* v. *Hickisson*, (1880) 50 L.J.Q.B. 101. In that case the plaintiff, a boy of four years, fell through a gap in railings on the side of the steps leading up to the defendant's front door. He was accompanied by his sister, who was twelve, and to whom, of course, the gap was obvious. Lindley, J., at p. 102, said :
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> "There could be no duty on the part of the defendant towards the plaintiff further than that the defendant must take care no concealed danger exists. The plaintiff was, no doubt, too young to see or guard against any danger, but the logical way of considering the matter is to consider it alternatively in this way : the defendant never invited such a person as the plaintiff to come unless he was taken care of by being placed in charge of others, and if he was in charge of others then there was no concealed danger. In other words, there was no invitation to the plaintiff if he was not guarded, and if guarded, then there was no trap."

His Lordship then cited the judgment of Farwell, L.J., in *Latham* v. *R. Johnson and Nephew, Ltd.*, [1913] 1 K.B. 398, 407, where he said :

> I am not aware of any case that imposes any greater liability on the owner towards children than towards adults : the exceptions apply to all alike and the adult is as much entitled to protection as the child. If the child is too young to understend danger, the licence ought not to be held to extend to such a child unless accompanied by a competent guardian : see *Burchell* v. *Hickisson*, (1880), 50 L.J.Q.B. 101, *Schofield* v. *Bolton Corporation*, (1910), 26 T.L.R. 230, and *Stevenson* v. *Glasgow Corporation*, [1908] S.C. (Ct. Sess.) 1034.

Hamilton, L.J., at p. 414, said :

> The child must take the place as he finds it and take care of himself ; but how can he take care of himself ? If his injury is not to go without legal remedy altogether by reason of his failure to use a diligence which he could not possibly have possessed, the owner of the close might be practically bound to see that the wandering child is as safe as in a nursery. The way out of the dilemma was found in *Burchell* v. *Hickisson*, (1880) 50 L.J.Q.B. 101, by deciding that the circumstances may evidence the attachment of a condition to the licence or permission to enter, namely, that the child shall only enter if accompanied by a person in charge capable of seeing and avoiding obvious perils and thus of placing both himself and his charge in the position of an ordinary licensee both able and bound to look after himself.

His Lordship then cited the passage which has been quoted from *Burchell's* case (*supra*) and concluded, at p. 415 :

> Logically this principle is applicable to all cases of infirmity or disability and not to infants only.

Lord Justice Somervell then referred to *Coates* v. *Rawtenstall Borough Council*, [1937] 3 All E.R. 602, where a child aged three-and-a-quarter had an accident on a slide similar to that of the infant plaintiff in the case under consideration. The defendant's counsel contended that the recreation ground was provided for children of school age only, and the plaintiff was a trespasser. The Court of Appeal decided that, as the plaintiff was accompanied by a competent guardian, a boy of fourteen years, he was a licensee.

His Lordship went on to say that he had dealt with those cases because, in his view, the principle is an important one. A wholly undue burden would be placed on the provision of facilities for the young, whether by local authorities, institutions, or private individuals, if they were held liable in damages because some of those facilities were a danger to very small unattended children. He continued :

> If a man put up a diving board he is not, I think, by fact of oponing it to the public, " inviting " small unattended children who cannot swim to climb up it. It depends, of course, on the circumstances whether the defendant can or cannot rely on his limitation. Counsel for the defendants submitted that the matter had not been left to the jury. The difficulty in the defendants' way, however, arose from the evidence of the present chairman of the council, Mr. Roberts, and the action of the defendants' predecessors in 1934. Having read all Mr. Roberts's evidence, I think that the learned Judge was justified in treating it as negativing any limitation on the defendants' invitation. In other words, their policy was to admit all children, whether young and unattended or not. The groundsmen, if they saw very young, unattended children approaching or using the slide, prevented them and did their best to send them home. The groundsmen had other things to do, and, if the plaintiff was a licensee in the ground, it seems to me impossible to hold that he became a trespasser when he got on the slide. The other difficulty arises out of the policy pursued by the defendants in 1934. When the small boy fell off the slide in 1934, the defendants might, of course, have decided to exclude unattended children who were under the age of, say, five, or to make it clear that such children were not there with their permission. They pursued a different policy. By stopping up the hole through which only a very small child would be likely to fall, they provided some evidence for the policy as indicated in Mr. Roberts's evidence. In view of this evidence, although the learned Judge did not formally withdraw the issue from the jury he was, I think, justified in indicating, as he did, that substantially the defendants' own evidence and action precluded them from maintaining the limitation on which they sought to rely.

Counsel for the defendant further submitted that there was misdirection as to the answers to questions 4 and 7 which read as follows :

4. Was the slide by reason of the gap in its then state at the

side of the platform a dangerous equipment for children's amusement ?

7. Did the defendants know that the slide was dangerous ?

Lord Justice Somervell said that this point raised *inter alia*, the question of the defendant's knowledge or ignorance of the accident in 1934. The then clerk of the council had retired, the present clerk was not called. The then chairman was still a member of the council, and was not called. The accident and the action taken as a result of it were fully recorded in the minutes. In these circumstances, His Lordship said he would have thought that the defendants knew or must be taken to know of the accident of 1934. He did not think it would be right to lay down as a matter of principle that a council must be taken to know all the past contents of its minute book. Counsel for the defendant said that the learned Judge did not refer to the fact that there had been no accidents since the unknown date when the extra rail disappeared. It was not necessary for him to do so. Once the position was reached that very small and unattended children were permitted access to this slide, the learned Judge was justified in directing the jury as he did on those two questions, viz., 4 and 7, to each of which the jury answered " Yes."

Lord Justice Birkett, agreed with the judgment of Somervell, L.J., and observed that it was natural and inevitable that all the proceedings in the Court below should be coloured by the disaster which overtook the infant plaintiff. Because of the accident, he had lost his sight without hope of recovery, and the accident, with this lamentable consequence, was alleged to be the result of the negligence of the defendant, a local authority. Quite apart from any questions of fact or law by which the case was to be decided, it was easy to understand the instinctive sympathy for a small boy on whom such a grave calamity had fallen, and it was proper that all the proceedings in the Court below should be subjected to a critical examination at the hands of counsel for the defendant.

He recalled that the submission of the defendant's counsel was that the child, at the time of the accident, was not a licensee on the recreation ground but a trespasser, inasmuch as the licence granted by the defendant to young children was limited to young children who were in the care of a competent guardian at the time when they entered the recreation ground. He continued :

> That such a limited licence can exist is plain from the cases already cited by my Lord, but the important words for the decision of this point in the present case seem to me to be the words of Hamilton, L.J., in *Latham* v. *R. Johnson and Nephew, Ltd.*, [1913] 1 K.B. 398, 414, where he said :
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> " The child must take the place as he finds it and take care of himself ; but how can he take care of himself ? If his injury is not to go without legal remedy altogether by reason of his failure to use a diligence which he could not possibly have possessed, the owner of the close might be practically bound to see that the wandering child is as safe as in a nursery. The way out of the dilemma was found in *Burchell* v. *Hickisson*, (1880) 50 L.J.Q.B. 101, by deciding that the circumstance may evidence the attachment of a condition to the licence or permission to enter, namely, that the child shall only enter if accompanied by a person in charge capable of seeing and avoiding obvious perils and thus of placing both himself and his charge in the position of an ordinary licensee both able and bound to look after himself."

Birkett, L.J., added that the circumstances of each particular case must be examined to see if they do evidence the attachment of a condition or not.

His Lordship then said that was discussed before the jury in relation to the questions which had been formulated. The learned Judge had stated the point raised in the defendant's pleading and had discussed with some fulness the evidence given by Mr. Roberts, the chairman of the defendant council. Nobody, apparently, had suggested that this particular point should be incorporated in the two questions in any more specific way, and it seemed that the point was fairly before the jury when they made their answers. Indeed, it seemed that the jury on the evidence could not have answered otherwise. There did not appear to have been any printed regulations calling attention to this point ; there was no notice of any kind limiting the entry into the recreation ground, which was open to highway, and there was certainly no prohibition on the entry of young children ; no circular had ever been sent to parents limiting entry to the recreation ground to those young children who were in charge of a competent guardian ; and the jury was entitled to regard the evidence of Mr. Roberts, as indicating that the defendant had never sought to limit the entry of young children in the manner now suggested, although he did say that the defendant relied on the parents not to allow young children to come to the recreation ground. The jury was also entitled, however, to consider the events of 1934. In circumstances which are a little obscure, a small child had actually fallen through this very small gap at the top of the chute. Whether the child crawled through or was pushed through or fell through mattered little, but the fact remained that on this very chute at this very place a small child had fallen through the gap which then existed. And the jury was entitled to consider what the defendant did on that occasion. There was no circular, no notice, no prohibition, but a horizontal bar was fixed in position so that a child could no longer fall through the gap. To the jury this could only mean that the policy of the defendant at the time was to make provision for small children, and children so small that they might fall through the gap unless the horizontal bar prevented them. There was no evidence before the jury that that policy had ever been changed. In His Lordship's opinion, the evidence was all one way, and the jury, in its answers to questions 2 and 3, properly decided that on the day of the accident the plaintiff was a licensee and not a trespasser. I do not think that the submission by counsel for the defendant that the learned Judge misdirected the jury on this issue is well founded.

Counsel for the defendant that urged, however, that there had not been a proper direction to the jury on the important question of the knowledge of the defendant of the danger existing.

The learned Lord Justice said that it was a remarkable circumstance that a similar accident had taken place in 1934 and that a horizontal bar had been inserted to prevent a similar accident happening. That horizontal bar had vanished since 1941, at least, it had not been in its place ; and the gap through which the infant plaintiff in this case fell was the self-same gap through which the small boy fell in 1934. The complaint made by counsel for the defendant was that the learned Judge should have told the jury that there had been no accident since 1934, and no accident, therefore, after 1941 when the bar was missing, and it was for the jury to consider whether the defendant could reasonably have foreseen that an accident of this kind would take place after all those years of immunity. To this, counsel added the submission that the learned Judge should have told

the jury on the question of knowledge that actual knowledge of the danger must be proved and that knowledge was not to be taken as proved merely from the minutes of the council in 1934, but must be shown as knowledge of the clerk to the council or of the groundsmen or of some other responsible person. Although the point was not free from difficulty, Birkett, L.J., thought that the learned Judge was right on the facts of this case in directing the jury as he did when he said :

> And so far as one can attribute knowledge to a council, may we not say that one can ascertain the knowledge of the council by looking at their minutes ? Look at what they have recorded in their minutes with regard to the accident in 1934; and look what was the result of the action which was taken of improving the condition of the slide by putting on that extra horizontal bar on each side which was there to be seen by any member of the council who happened to pass by.

The learned Lord Justice went on to say :

> The knowledge of the council as recorded in its official minutes of twenty years ago must be regarded, I think, as the knowledge of the council when dealing with the same subject-matter today. It is also relevant that the then chairman of the council was still a member in 1950. In my opinion, the verdict of the jury and the judgment founded thereon ought not to be disturbed so far as the liability of the defendants is concerned.

In our next issue, we shall consider the judgment of Romer, L.J., and then draw some conclusions on the case as a whole.

SUMMARY OF RECENT LAW.

COMPANY LAW.

Resolutions When No Quorum Present. *99 Solicitors' Journal*, 21.

Winding-up—Liquidator nominated by Resolution of Members —Creditors' Meeting—Majority in Value but not in Number nominate Another Liquidator—Second Nomination ineffective. At a meeting of C., Ltd. a resolution was passed that the company be wound-up voluntarily and that B. be appointed liquidator. The company was insolvent. At a subsequent meeting of creditors of the company a resolution appointing L. liquidator of the company was proposed. Six creditors were present at the meeting of creditors, representing debts aggregating £7,627 odd, and of these creditors two, representing debts aggregating £4,795 odd, voted in favour of the resolution, and three, representing debts aggregating £2,336 odd, voted against the resolution. The chairman of the meeting, who was the sixth creditor, declared the resolution to be lost, and confirmed the appointment of B. as liquidator. One of the two creditors who voted in favour of the appointment of L. as liquidator having petitioned that the company be wound-up by the Court, *Held*, 1. B. was validly nominated as liquidator by the company but L. had not been validly so nominated by the creditors, because the creditors' resolution to nominate him had not been supported by a majority in number of the creditors present and voting at the meeting, although it had been supported by a majority in value of those creditors. (*Re Bloxwich Iron & Steel Co.*, [1894] W.N. 111, considered.) 2. The petitioning creditor was entitled to an order that the company be wound-up by the Court, and the liquidator, having been duly appointed and having appeared to protect himself and not to oppose the petition, was entited to his costs. *Re Caston Cushioning, Ltd.* [1955] 1 All E.R. 508 (Ch.)

CONTRACT.

Exception clause—" All Goods left at Customer's risk "—Fur Coat delivered for Storage—Failure to re-deliver—Coat lost—No satisfactory Explanation how Loss occurred. The plaintiff left her fur coat with the defendants for them to store it during the summer months. They failed to return it on demand and the plaintiff sued them for the return of the coat or for its value. The defendants alleged that they had re-delivered the coat to the plaintiff shortly after it had been left with them. This plea was rejected and the defendants could offer no other explanation how the coat had disappeared, but relied on a term in the contract which stated that all goods were left at customer's risk. *Held*, The defendants did not escape liability unless they established either that the loss occurred in some way not involving their negligence, or that the loss did occur by their negligence, in which case they would be protected by the term in the contract that all goods were left at the customer's risk ; as the defendants had failed to show how the loss had occurred, and as it might have been caused in a way not covered by the " customer's risk " clause, the clause did not protect them and the plaintiff was entitled to recover damages. *Woolmer* v. *Delmer Price, Ltd.* [1955] 1 All E.R. 377 (Q.B.D.)

DEATHS BY ACCIDENTS COMPENSATION.

Damages—Assessment—Husband and Wife Professional Dancing Partners—Joint Earnings shared—Death of Wife due to Negligence—Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), *s.* 2.—(*Deaths by Accidents Compensation Act, 1952, s. 5*). The plaintiff and his wife were professional dancers who, by the beginning of 1953, were nearing the peak of their professional status. In January, 1953, the wife was admitted to hospital for an operation. She died there owing to the negligence of the second defendant. The wife had been paying towards the joint living expenses of herself and the plaintiff out of her share of the joint income. She had also been paying towards the expenses of the infant child of her previous marriage and towards the expenses of her widowed mother. In an action by the plaintiff under the Fatal Accidents Act, 1846, in which the second defendant admitted liability, the plaintiff as personal representative of his wife claimed damages under various heads, *viz.*, for the loss of his wife as a wife, for the loss of his wife as a dancing partner, on behalf of the child of his wife's previous marriage for the loss to the child, and on behalf of his wife's mother, for her loss. *Held*, 1. Damages for injury to a husband resulting from the death of a wife were only recoverable under the Fatal Accidents Act, 1846, s. 2, if they were attributable to the relationship of husband and wife, and as no benefit arose from the dancing partnership of the plaintiff and his wife which could properly be attributed to their relationship as husband and wife, no damages were recoverable for the value of the wife to the plaintiff as his dancing partner. (*Sykes* v. *North Eastern Ry. Co.*, (1875) 44 L.J.C.P. 191, followed.) 2. Mutual dependence of husband and wife for living expenses where both the husband and wife earned could be the subject of a claim under the Fatal Accidents Act, 1846, s. 2, and, as the plaintiff and his wife by sharing their expenses had benefited each other, there was a benefit to the plaintiff that arose from the relationship of husband and wife for loss of which a claim was maintainable under the Fatal Accidents Act, 1846, and no higher burden of proof was required to maintain the assertion that the wife contributed towards the joint expenses than would be required to maintain an assertion that the husband so contributed ; accordingly, the plaintiff was entitled to recover damages on this ground for the loss of the wife's earning power and of her contribution to the joint living expenses. *Burgess* v. *Management Committee of the Florence Nightingale Hospital for Gentlewomen and Another*, [1955] 1 All E.R. 511 (Q.B.D.)

ELECTIONS AND POLLS.

Parliamentary Election—Election Petition—Security—Petitioner's Failure to Lodge Security within Prescribed Time—Chief Justice Deprived of Jurisdiction to constitute Electoral Court—Electoral Act, 1908, s. 200 (c). The requirement that the security specified by s. 200 (*c*) of the Electoral Act, 1908, must be given within three days of the presentation of an electoral petition, is a condition precedent to the right to have an Election Court, and non-fulfilment of that condition deprives the Chief Justice of New Zealand of jurisdiction to constitute such a Court. (*Wellington Election Petition*, (1894) 13 N.Z.L.R. 174, and *Wairarapa Election Petition*, (1897) 15 N.Z.L.R. 471, referred to.) *In re Lyttelton Election Petition.* (Wellington. February 21, 1955. Barrowclough, C.J.)

INFANTS AND CHILDREN.

Contract—Infant's Contract—Sale of Motor-car to Infant—Property not to pass to Infant until Completion of Payments—

LEGAL ANNOUNCEMENTS.

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On Default made in Payments, Demand for Return of Car to Vendor refused, and Liability repudiated on Ground of Infancy—Contract of Sale Void—Vendor's Claim resting on Ownership, and independently of Any Contract—Infant's Liability arising from Wrongful Detention of Car—Infants Act, 1908, s. 12. A motor-car was sold to an infant under an agreement, which bound him unconditionally to buy and pay the full price; it did not contain any element of hiring. The property in the car was not to pass until completion of the payments. The balance of the purchase (£300) was payable by monthly instalments, in respect of which £142 18s. had been paid. The vendor claimed possession of the car, but this was refused, and the purchaser's solicitors repudiated liability on the grounds of his infancy. He was sued for the return of the car, or, if possession could not be had, for the balance of instalments owing under the agreement. The Magistrate held that as the car was not a necessary, the contract was rendered void by s. 12 of the Infants Act, 1908, and that, in any event the infant could not be made liable as a bailee because an infant may not be sued for a tort arising directly from a contract. On appeal from that determination, *Held*, 1. That, as a conditional sale of goods, as here, is within s. 12 of the Infants Act, 1908, the contract was void; but it was not made unlawful or prohibited, and its terms could be proved for the purpose of determining any relevant question of fact. (*Pearce* v. *Brain*, [1929] 2 K.B. 310, applied.) (*Stocks* v. *Wilson*, [1913] 2 K.B. 235, and *Mercantile Union Guarantee Corporation* v. *Ball*, [1937] 2 K.B. 498; [1937] 3 All E.R. 1, distinguished.) 2. That the infant never became the owner of the car, which remained the property of the vendor, who was entitled to judgment accordingly unless such a judgment would amount to enforcement of the contract or the imposition of a liability in tort equivalent to an enforcement of the contract. 3. That the vendor's claim was completely independent of any contract as it rested on ownership, and nothing else; that it was irrelevant that the infant's possession sprang from a contract, which, on his insistence, had to be treated as void by statute; and that the liability so imposed, while being a liability in tort, was not one connected in any way with the contract as it arose from the wrongful detention of the car. (*Ballett* v. *Mingay*, [1943] K.B. 281; [1943] 1 All E.R. 143, applied). 4. That, accordingly, on the footing that the vendor was entitled to the car when demand was made and delivery refused, the vendor must have such judgment as is just. (The Court was not in the position to work out the proper judgment.) *Semble*, That, unless the car was worth more than the unpaid instalments, the claim for those instalments as the alternative to possession was misconceived, the appropriate alternative claim being for the value of the car at the date of judgment, the vendor being entitled also to such damages as were attributable to the wrongful detention after the refusal to deliver. (*Rosenthal* v. *Alderton*, [1946] 1 K.B. 374; [1946] 1 All E.R. 583, and *Sachs* v. *Miklos*, [1948] 2 K.B. 23; [1948] 1 All E.R. 67, followed.) The case was remitted to the Magistrate with a direction that the vendor was entitled to judgment for such relief as would be found to be appropriate (all proper amendments being made), on a further hearing limited to the question of relief. *Nelson Guarantee Corporation and Others* v. *Farrell*. (S.C. Westport. February 2, 1955. F. B. Adams, J.)

INTERNATIONAL LAW.

Jurisdiction on the High Seas: The Onassis Whaling Fleet. *105 Law Journal*, 23.

LICENCE.

Suspension of Rights and Revocation of Licence. *105 Law Journal*, 20.

LICENSING.

Register of Lodgers—Proof of Offence of Failing to Keep Such Register—Licensing Amendment Act, 1948, s. 109. Before there can be a conviction on a charge under s. 109 of the Licensing Amendment Act, 1948, of failing to keep a register of lodgers, there must be sufficient evidence that a lodger was in the hotel on the relevant date, and that his name, address, and room allocations were entered in the register as prescribed by the statute. (*King's Old Country, Ltd.* v. *Liquid Carbonic Canadian Corporation*, (1943) 1 W.W.R. 189, referred to.) *Police* v. *Fantham*. (Christchurch. December 2, 1954. Ritchie, S.M.)

LOCAL AUTHORITIES.

Guarantees by Local Authorities. *98 Solicitors' Journal*, 876.

MAGISTRATES' COURT.

Practice—Set-off—No Set-off of Claim unenforceable by separate Action—Magistrates' Courts Rules, 1948, r. 114. A defendant cannot set-off, under r. 114 of the Magistrates' Courts Rules, 1948, a claim or demand which he could not enforce by separate action in that Court. Thus, a plea of limitation, whether arising from statute or contract will prevent a defendant from obtaining the benefit of a set-off. *Donovan* v. *F.A.M.E. Insurance Co., Ltd.* (S.C. Auckland. February 14, 1955. Stanton, J.)

MAORIS AND MAORI LAND.

Mangatu Blocks—Management Committee—Appointment of Certain Members thereof—Effect of Repeal of Former Legislation—No Basis for Such Appointment—Maori Purposes Act, 1953, s. 23—Maori Affairs Act, 1953, s. 294. The effect of s. 23 of the Maori Purposes Act, 1953 (which deals with the Mangatu Blocks) is to repeal altogether Part III of the Maori Purposes Act, 1947, so as not to leave the definition of the constitution of the committee, and so as to continue in office those members of the committee and those alone who held office on April 1, 1954, until their successors are elected or appointed under regulations to be gazetted under s. 294 of the Maori Affairs Act, 1953. Until those regulations are gazetted, no successors to the continuing members may be appointed or elected; and no vacancies on the committee can be filled by election. (*Surtees* v. *Ellison*, (1829) 9 B. & C. 752; 109 E.R. 278, and *Kay* v. *Goodwin*, (1830) 6 Bing. 576; 130 E.R. 1403, referred to.) *Tawhiorangi and Others* v. *Proprietors of Mangatu Nos. 1, 3 and 4 Blocks (Inc.) and Others*. (S.C. Gisborne. December 6, 1954. Turner, J.)

Jurisdiction—Determination that Party is or is not a Maori, where Material to Jurisdiction—Part of Res Judicanda*—Record of Evidence in Minute Book of Maori Land Court not Part of the "Record" of that Court—Maori Land Act, 1931, ss. 27, 50, 106 (5)—Maori Purposes Act, 1939, s. 3.* Where certiorari is sought in respect of an order of the Maori Land Court the Supreme Court in terms of s. 50 of the Maori Land Act, 1931, must disregard all questions of mere form, practice or procedure, even though they might be such as, apart from the section, would go to the jurisdiction; and may interfere only if the order was one which, in its nature of substance, exceeds the jurisdiction. Unless the excess of jurisdiction appears on the face of the order, the burden of proving it must be discharged by the person who attacks the order. The record of the evidence in the minute book of the Maori Land Court does not constitute part of the "record" of that Court. (*Attorney-General* v. *Tipae*, (1887) 6 N.Z.L.R. 157, and *R.* v. *Northumberland Compensation Appeal Tribunal, Ex parte Shaw*, [1952] 1 All E.R. 122, applied.) The determination by the Maori Land Court in the course of a proceeding under s. 3 of the Native Purposes Act, 1939, as to whether a party is or is not a Maori, where that fact is material to the jurisdiction, is part of the *res judicanda* and not a collateral question of fact. Accordingly, the question whether the Supreme Court will issue a writ of certiorari where the decision of the Maori Land Court is dependent on such a determination, must be determined according to established principles. The Supreme Court cannot interfere merely because it may be of opinion that the Maori Land Court arrived at a wrong decision as to whether the defendant was or was not a Maori, or acted without any evidence or any sufficient evidence. (*R.* v. *Nat Bell Liquors, Ltd.*, [1922] 2 A.C. 128, followed.) (*Van de Water* v. *Bailey and Russell*, [1921] N.Z.L.R. 122; [1921] G.L.R. 83, applied.) *Hami Paihana* v. *Tokerau District Maori Land Board and Others*. (S.C. Auckland. October 7, 1954. F. B. Adams, J.)

NEGLIGENCE.

The Conduct of Accident Cases. *104 Law Journal*, 804.

NUISANCE.

Highway—Premises adjoining Highway—Public Nuisance—Right of Adjoining Owner—Obstruction by Small Hosepipe to supply Water—Reasonableness of User. A house abutting on a country lane, which was a public highway, had not in time of dry weather a sufficient supply of water for domestic purposes. During droughts the defendants, who were occupiers of the house, obtained water from a tank on the far side of the lane by way of a small hosepipe of half an inch internal diameter laid across the width of the lane. That process lasted for a few hours on each occasion and was carried out only during daylight. The first plaintiff, who was passing along the highway carrying bottles of milk for delivery, saw the hosepipe, but negligently did not step clear of it, and, as a result of treading on it, fell and sustained injuries. She and her husband sued the defendants for damages on the ground, among other grounds, that the presence of the pipe across the highway constituted a public nuisance from which they suffered special damage. It having been held in the county court that the defendants' user

of this highway was in the particular circumstances of the case reasonable and justifiable as ancillary to their enjoyment of the premises, the plaintiffs appealed. *Held*: the question whether a householder, whose house adjoins a highway and who uses the highway or part of it for purposes connected with his house, is or is not so obstructing the highway as to cause a public nuisance is to be judged by balancing, on standards of reasonableness, the claims and conduct of the householder on the one side and of the members of the public on the other side, having regard to all the circumstances of the case; in the present case, which was one where the facts were special, the finding of the county court judge that the defendants' user of the highway had been reasonable in all the circumstances was justified by the evidence and would not be disturbed, and accordingly the laying of the hosepipe across the highway did not constitute a public nuisance. (*Harper* v. *G. N. Haden and Sons*, [1933] Ch. 298, and *Farrell* v. *John Mowlem and Co., Ltd.*, [1954] 1 Lloyd's Rep. 437, applied.) Per Sir Raymond Evershed, M.R.: it does not necessarily follow that conduct, amounting to contributory negligence on the part of the plaintiffs, which was sufficient wholly to extinguish any liability of the defendants in negligence would similarly extinguish any liability of the defendants in nuisance. Appeal dismissed. *Trevett and Another* v. *Lee and Another*, [1955] 1 All E.R. 406 (A.C.)

PATENT.

Employee's Inventions—Patents registered in Name of Employer and Employee—Understanding as to Payment to Employee but No Agreement—Apportionment of Benefits of Inventions—Patents Act, 1949 (12, 13 & 14 Geo. 6 c. 87), *s.* 56 (2) (*Patents Act, 1953, s. 65* (2)). In January, 1942, the respondent entered the employment of the appellant company, who, at that time, was exclusively employed on armaments. In December, 1941, before any contract of service was made, there was an exchange of views between the parties in regard to any patentable inventions the respondent might make while in the appellant company's employment, but no arrangement was made, and the respondent took up his duties without any written service agreement. In 1942, after the respondent had designed a paragun in the course of his employment, an agreement was entered into whereby, where the respondent was primarily responsible for any inventions which were patentable, patents should be applied for in the names of the respondent and of the appellant company, and the appellant company would pay the respondent a royalty. In 1943, another agreement was made on terms more favourable to the respondent than those of the 1942 agreement. In 1944, the respondent having made more patentable inventions in respect of the paragun, a further agreement was made providing that these and any further inventions made by the respondent in relation to machine carbines should be comprised in the 1943 agreement, and cancelling the 1942 agreement. In 1947 the respondent took over the department concerned with the design and development of domestic electrical appliances. Between 1947 and 1950, in the course of his employment, he made six inventions in connection with domestic appliances, in respect of which patents were applied for in the joint names of the respondent and the appellant company. The respondent demanded some payment from the appellant company in respect of these inventions, but the company refused to make such payments. The respondent sued the company for a declaration of his title to a royalty for these inventions and, by his reply in that action, claimed alternatively that the benefit of the inventions should be apportioned under the Patents Act, 1949, s. 56 (2). *Held*, 1. The ordinary rule governing the relationship of master and servant, that, if an employee's invention was patented in the joint names of the employer and employee, the employee held his interest as trustee for the employer, could only be excluded by an express agreement that it should be varied and some other legal relationship should be created: and in the present case, the ordinary rule had not been displaced. 2. In the words in s. 56 (2) of the Patents Act, 1949, "unless satisfied that one or other of the parties is entitled, to the exclusion of the other," to the benefit of an employee's invention, the word "entitled" refers to legal right, and, as in the present case the Court was satisfied that the appellant company was legally entitled to the exclusion of the respondent, s. 56 (2) had no application. *Sterling Engineering Co., Ltd.* v. *Patchett*, [1955] 1 All E.R. 369 (H.L.)

POWER OF APPOINTMENT.

Uncertainty—Collateral Power—Executors directed to pay to "such Friend or Friends" as were nominated by Widow—Validity. A testator by his will provided that "If my wife feels that I have forgotton any friend I direct my executors to pay to such friend or friends as are nominated by my wife a sum not exceeding £25 per friend with a maximum aggregate payment of £250 so that such friends may buy a small memento of our friendship". In the margin the testator wrote that he had forgotten certain persons, whose names he gave, and added "*but my wife will put that right*". The testator's wife survived him. *Held*, A friend who could benefit under the power must be a friend of a considerable degree of intimacy at the testator's death and thus the widow would know, or the Court could determine, whether any particular friend was an object of the power; accordingly, the power was not void for uncertainty, because it was a collateral power not a power coupled with a duty and it was not essential to the validity of such a power that when exercising it in favour of one person the donee of the power should know how many other persons there might be who were objects of the power. (*Re Gestetner*, [1953] 1 All E.R. 1150, applied.) *Re Coates* (*deceased*). *Ramsden and Others* v. *Coates*, [1955] 1 All E.R. 26 (Ch.D.)

PRACTICE.

Appeals to Supreme Court—Evidence on Appeal—Appeal from Order for Possession of Tenement—Admission of Evidence as to Matters occurring since Order made in Magistrates' Court—Matters for Consideration in exercising Discretion—Magistrates' Courts Act, 1947, s. 76 (3)*—Magistrates' Courts Amendment Act, 1950, s. 2.* The Supreme Court, in exercising the discretion given to it by s. 76 (3) of the Magistrates' Courts Act, 1947 (as enacted by s. 2 of the Magistrates' Courts Amendment Act, 1950) may take into consideration s. 29 of the Tenancy Act, 1948, if the further evidence sought to be admitted relates to matters which have occurred subsequently to the making of the order for possession from which the appeal has been brought. (*Refrigeration and Electrical Service, Ltd.* v. *Britomart Service Station, Ltd.*, [1952] N.Z.L.R. 438; [1952] G.L.R. 357, referred to.) *J. R. Cunninghame, Ltd.* v. *Baudinet.* (S.C. Wellington. February 28, 1955. Hutchison, J.)

Pleading—Amendment—Conspiracy to Slander—No Nexus between Alleged Slander and Special Damage—Conspiracy—To commit Tort—Merger in tort when committed. The plaintiff, an osteopath, by his statement of claim alleged slander against four defendants and that as a result he had suffered damage. In reply to a request by the defendants for particulars of the alleged damage, he said that no special damage was alleged. By para. 8 of his statement of claim he alleged further that the defendants had conspired to make and publish defamatory statements, those statements being the slanders which he had previously alleged, but he made no allegation of damage. Paragraph 8 was ordered to be struck out since it contained no allegation of damage. The plaintiff then sought to amend para. 8 by alleging special damage. The proposed amendment contained particulars of special damage. He stated that "*as a result of the allegations*" his practice had suffered severely, that the value thereof had approximately halved, and he named some dozen persons who no longer attended him. On an application for leave so to amend his statement of claim, *Held*, Since in its amended form para. 8 would show no nexus between the alleged slanders and the special damage, the allegation of conspiracy failed and, in the circumstances, the Court would not give the plaintiff leave to amend his statement of claim. *Ward* v. *Lewis and Others*, [1955] 1 All E.R. 55 (C.A.)

PUBLIC REVENUE.

Death Duties (*Estate Duty*)*—Dutiable Estate—Deceased's Wife agreeing not to defend Divorce Petition if Future Maintenance secured—Deceased, in 1932, transferring Property to Sons in Consideration of Their Giving Mortgage securing Annuity to Deceased, and, after His Death, to His Wife—Sons' executing Mortgage accordingly—Deceased's submortgaging Same, in 1932, Pronouncement of Decree Absolute, to secure Payment of Agreed Annual Sum to Former Wife—Value of Property, at Deceased's Death in 1949, in Excess of Value at Date of Transfer—Commissioner of Inland Revenue entitled to include Value of Property at Deceased's Death in computing Final Balance of His Dutiable Estate—"Settlement, trust, or other disposition of property"—Death Duties Act, 1921, s. 5* (*1*) (j). In May 1932, the deceased petitioned for dissolution of his marriage. His wife agreed to allow the petition to proceed undefended, provided that she was properly secured as regards her future maintenance, and that her four sons were protected against the possibility of the deceased's property being disposed of or becoming charged in favour of any other person if he should remarry. The deceased was the owner of a property which was subject to mortgages of £3,000 and £2,000. On June 15, 1932, he transferred this property, subject to the two mortgages, to his sons as tenants-

(*Continued on p. 80.*)

MR. JUSTICE HENRY.

The appointment of Mr. Justice Henry to the Bench has been the source of great satisfaction to the legal profession in Auckland and, indeed, to all men who knew of his distinguished career at the Bar.

The new Judge's career in the law is one of which he may be justly proud. He was born in Thames, and received his early education at the Te Kuiti and Rotorua District High Schools. At the age of fifteen, before he had passed his matriculation examination, he entered the office of Mr. George Urquhart, at Rotorua, as an office boy. He passed his matriculation examination while still at work, and passed the Latin paper with only eight months' study. He then commenced his study of the law as an extra-mural student of the Auckland University College. He graduated LL.B. in 1925, and, in the following year, still as an extra-mural student, he took honours in Roman Law, Contracts and Torts, International Law, and Conflict of Laws—an achievement that has seldom been surpassed by a law student of our University. He became a clerk in the office of Mr. B. Beckerleg, and, later, commenced practice on his own account, being afterwards joined in partnership by Mr. F. McCarthy, now a Magistrate. The firm of Messrs. Henry and McCarthy amalgamated with that of Mr. Wilson in 1943, and became the firm of Wilson, Henry and McCarthy, and, later, Wilson, Henry, Sinclair and Mulvihill.

S. P. Andrew, photo.

Mr. Justice Henry.

The new Judge concentrated on the forensic side of the profession, and rapidly rose to eminence, especially in criminal cases, in which, for a young practitioner, he achieved phenomenal success. During three of the early years of his practice at the Bar, when he accepted all briefs offered to him, his forensic ability was such that in no case in which he appeared for an accused was a conviction entered. He appeared in several of our celebrated trials, in particular, the Mareo murder trial as junior to Mr. H. F. O'Leary, K.C., (afterwards Chief Justice) and as leader in the Cartman murder trial.

In 1938, Mr. Henry had the distinction of appearing in the Court of Appeal, when it sat for the first time in Auckland, in *Godwin* v. *Walker*, [1938] N.Z.L.R. 712, which is now a leading case on the law of extradition. It is difficult to recollect any *cause célèbre* during the past decade in which he was not engaged as counsel.

The new Judge took a lively interest in the affairs of the Council of the Auckland Law Society, of which he was a member for fifteen consecutive years. He was Vice-President at the time of his elevation to the Bench. It is no secret that, during the last five years, the office of President could have been his for the taking. He brought to the deliberations of the Society wise counsel and direction, and the sound judgment born of wide experience.

In the field of sport, the new Judge is principally interested in athletics. He was an outstanding athlete and represented Auckland on many occasions. At the height of his athletic career at an Inter-Faculty meeting of the Auckland University College, he, in one afternoon, equalled the College record for the 440-yards flat and 440-yards hurdles. He was on the Executive Council of the Auckland Athletic Centre, and on the Selection Committee for the 1936 Olympic Games.

There are at least three aspects of Mr. Justice Henry's appointment that give ground for satisfaction.

In the first place, the appointment of suitable men while they are comparatively young, as he is, enables Judges to familiarize themselves with their new duties and habituate themselves to their new life when they are in their mental and physical prime, and when a long career of judicial office is almost certain to follow. If young men are available, the appointment of older men, however suitable, should be avoided as that practice entails too brisk a circulation of judicial office.

In the second place, Mr. Justice Henry has shown himself as an outstanding advocate and student of the law. Banco and *nisi prius* work came equally to his hand, and his practice in both opinion and Court work was very wide. His forensic success, which has been remarkable, was the result of hard work, a subtle brain, natural eloquence, and deep sincerity.

The third reason why his appointment is acclaimed is the kindness of his temperament. As Cicero said of a great contemporary, he was *facilis*, a word that is difficult to translate, but it connotes grace of manner, dignity, and an ability to get on with everybody. This quality served him well at the Bar, and nothing could more adorn a member of the Bench.

Swearing-in Ceremony.

There was a record attendance of practitioners at the Supreme Court, Auckland, on February 24, on the occasion of the formal swearing-in of Mr. T. E. Henry, of the Auckland Bar, as a Justice of the Supreme Court.

When Mr. Justice Finlay and Mr. Justice Stanton took their seats on the Bench, the Judge-designate was in his place as a member of the practising Bar, beside Sir Alexander Johnstone, Q.C., and Sir Vincent Meredith, Q.C.

His Honour, Mr. Justice Finlay, addressing the assembly, said :

" I have had delivered to me an instrument bearing the name of *Dedimus*, and by it I am instructed by His Excellency the Governor-General, acting in the name of and for Her Majesty the Queen, to swear in Mr. Trevor Henry, of the Auckland Bar, as a Judge of the Supreme Court of New Zealand. Pursuant to the authority thus entrusted to me, I am in duty bound to inquire of Mr. Henry if he is willing to take and subscribe those oaths which are the essential preliminaries to the assumption of judicial office.

" I would be glad, Mr. Henry, if you would tell me if you are prepared to make and subscribe those oaths."

Mr Henry replied : " I am, if it please Your Honour."

Mr. Justice Finlay continued : " Then I would be glad if you would take from the Registrar the oaths he will hand you in typewritten form, and I would ask you, if you would, to read and subscribe them.

Mr. Henry read the oath of allegiance and judicial oath, then signed the forms and handed them to the Registrar, who in turn handed them to the presiding Judge.

Their Honours then retired to re-form.

The Court, comprising Mr. Justice Finlay, Mr. Justice Stanton, and Mr. Justice Henry returned.

The Bench's Welcome.

Mr. Justice Finlay, addressing the gathered practitioners, said :

" There are occasions so significant and so striking in the private and professional lives of men that they leave an imperishable memory. This, I apprehend, is such an occasion ; for in our brief ceremony we have transformed a beloved member of the Auckland Bar into what we are confident will be a bright and, we hope, enduring judicial figure.

" To win the respect and affection of his confrères is the guinea mark of any advocate's achievement. To win it, he must bring to bear upon his work—not for a day, but for years—industry, capacity and integrity. He must be inspired, too, by a spirit of brotherhood for his fellow-men and by a desire to show them kindness and consideration. To win such a position in any profession is not easy. In the legal profession it is, perhaps, more difficult than in any other. This is because the legal profession is concerned with the whole gamut of human affairs. It attracts to its ranks men of a wide diversity of talents. Its range is unlimited. Great as it is and great as its achievements may be, and friend of man that it certainly should be if properly practised, within its ranks competition is keen. To attain eminence and win affection a practitioner must have qualities, great qualities not only of mind but of heart.

" Mr. Justice Henry achieved all these things, and it is no secret that he achieved them by merit alone. He came to the profession with no influence, with no powerful forces behind him, and what he has won he has won by his own unaided efforts. And now he is going—has gone, perhaps I should say—under a new style and in a new character to a new field of endeavour. It is a field in which there is but one interest to serve. There are no distractions from one singular purpose, to do nought but justice. It can be an anxious and responsible task : it can at times rack the very soul of a man lest, by some insufficiency in himself, he may fail to see the true aspect of affairs.

" But we, from our knowledge of Mr. Justice Henry, know he brings to the task a wisdom, a sense of duty and an experience of men and affairs which will serve as a light to his feet to the end that justice shall by him be done. It is in that firm assurance, and because we are proud of his achievement and glad to welcome him amongst us, that I, as the mouthpiece of the Right Honourable the Chief Justice and every Judge on the Bench, say to him, welcome and live long."

The New Zealand Law Society.

Mr. H. R. Vialoux, addressing their Honours, said that, at the request of the President of the New Zealand Law Society, Mr. T. P. Cleary, he asked leave to express to the Court his regret that circumstances prevented his following his wish to be present at the swearing-in of His Honour Mr. Justice Henry. He continued :

" Mr. Cleary has asked me to convey to Mr. Justice Henry, on behalf of the members of the New Zealand Law Society, their respectful and sincere congratulations.

" The New Zealand Council also desires respectfully to record its deep appreciation of His Honour's contributions to the work of the Society over the years and to express to him the good wishes of its members in the work upon which he is about to engage. It gives me great personal pleasure so to do and so, with Your Honours' permission, I respectfully tender to His Honour the congratulations, appreciation and good wishes to which I have referred."

The Auckland Law Society.

The President of the Auckland District Law Society, Mr. F. J. Cox, was the next speaker. He said :

" Members of the Auckland District Law Society gathered here this afternoon welcome the opportunity that this ceremony affords for expressing their satisfaction and pleasure at the elevation of one of their distinguished brethren to the Supreme Court Bench. I crave Your Honours' leave to address the newly-appointed Judge.

" Mr. Justice Henry, may I tender to you on behalf of this large gathering of your former colleagues, our sincere congratulations and warm felicitations upon your appointment to your high office. May I also acknowledge the deep debt of gratitude that we owe Your Honour for your long and faithful service to our Society. The wise counsel and sound judgment that you brought to its deliberations will be greatly missed. But, above all, the general body of practitioners in this District will miss that kindly advice, that easy approach, that ready willingness to assist, that

camaraderie which has characterised your practice at the Bar.

"We have no doubt whatever that your judicial career will be a distinguished one and fruitful to the administration of justice. We express the hope that it will also be a long and happy one."

THE NEW JUDGE'S REPLY.

The new Judge then addressed the gathering. He said:

"At this moment, I have no feelings other than feelings of the greatest humility. I feel that the task I have undertaken is a great one, and it is bearing very heavily on me at this moment; and I do trust you will bear with me if I appear to be somewhat faltering in the statements I make; but I do find I cannot address myself on a function such as this as one may perhaps do to a jury or other judicial body.

"Your very kind words and good wishes will, however, be a source of inspiration and help to me in the discharge of the duties and responsibilities which I have just undertaken. As you know, for the proper administration of justice it is essential always that the Bench and Bar should have mutual confidence. I feel more than gratified to learn both from my judicial brethren here, and from you, that you have both reposed in me that confidence, and it will always be my endeavour to justify that confidence. I shall need, I am sure, all the help and co-operation of the Bar in the work which is now ahead of me, and I do know that that help and co-operation will be forthcoming from you all in good measure.

"I undertake my new sphere of activities deeply conscious of all it implies. I shall endeavour to perform my task according to the great traditions of this high office. Your comforting expressions of goodwill will ever be a source of strength to me in that endeavour.

"May I, in conclusion, say that I thank you all most sincerely for your attendance here and for the congratulations and good wishes which you have showered upon me. I hope that in some very small measure I can justify the very good things you have said. I thank you, one and all."

LAND TRANSFER: THE REGISTRATION OF LEASES.

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

FORM OF LEASE.

The registration of leases is provided for by Part VII of the Land Transfer Act, 1952.

A lease creates an estate in the land and is also a contract: *Garrow's Real Property in New Zealand*, 4th Ed. 541. A Land Transfer lease must be in the Form K in the Second Schedule to the Act. Thus, except as provided in s. 210 of the Land Transfer Act, 1952 (dealing with registration of deeds affecting land compulsorily brought under the Act), a lease in the "old system" form is not registrable under the Land Transfer Act: *Crowley* v. *Templeton*, (1914) 17 C.L.R. 457. That is to say there must be

(1) an operative clause:

> do hereby lease to E. F. of all the said land to be held by him the said E. F., as tenant for the space of years at the [yearly] [or other] rental of £ payable, subject to the following conditions and restrictions.

(2) The contractual portions—*i.e.*, the covenants, conditions, and restrictions to which the parties have agreed. [These may be omitted if the parties are prepared to rely entirely on the covenants implied by the Land Transfer Act, 1952, and the Property Law Act, 1952.]

(3) Acceptance by the lessee [*e.g.*, I, E.F. of do hereby accept this lease of the above-described land to be held by me as tenant and subject to the conditions, restrictions and covenants above set forth.]

The memorandum of lease must be dated and must be signed by both the lessor and the lessee and their signatures duly attested in accordance with ss. 157, 161 (in the case of a corporation), or s. 166 (if the instrument is executed overseas).

CONTENTS OF LEASE.

As in the case of a mortgage of land (*e.g.*, *In re Goldstone's Mortgage*: *Registrar-General of Land* v. *Dixon Investment Co., Ltd.*, [1916] N.Z.L.R. 489; [1916] G.L.R. 303, it may be stated as a general rule that, although the operative part of a lease must always be present, the Registrar is not very much concerned with the contractual portions.

There are, however, a few exceptions to this general rule.

(*a*) A right of purchase contained in a lease must not contravene the rule against remoteness of vesting, or, as it is more commonly called, the rule against perpetuities. This is because a right of purchase, when contained in a registered Land Transfer lease, is, indefeasible: *Fels* v. *Knowles*, (1906) 26 N.Z.L.R. 604; 8 G.L.R. 627. If the lessor is a corporation created by statute, it must appear that the lease and any right of purchase contained therein is *intra vires* (*i.e.*, within the statutory powers of the lessor). If it is executed by the attorney of the lessor, it must be clear that the contract or option of purchase is authorized by the power of attorney: *Rotorua and Bay of Plenty Hunt Club, Inc.* v. *Baker*, [1941] N.Z.L.R. 669; [1941] G.L.R. 419.

(*b*) As a renewal clause also upon registration of the lease obtains the benefit of indefeasibility of title (*Pearson* v. *Aotea District Maori Land Board*, [1945] N.Z.L.R. 542; [1945] G.L.R. 205) it must not be ambiguous: its meaning must be clear beyond all doubt; and, if the lessor is a corporation created by statute, or, if there is a statutory bar or limitation to the renewal clause (*e.g.*, s. 235 of the Maori Affairs Act, 1953), it must appear that the renewal clause is within the powers of the lessor.

(*c*) Any covenant or condition which does not make sense, is in manifest breach of statute law,

or is *contra bonos mores*, will probably be objected to by the Registrar. Such covenants, etc., however, are very rarely encountered in practice.

(*d*) The re-entry clause must be clear and unambiguous. The District Land Registrar is entitled to decline registration of a lease which contains an ambiguous re-entry clause: *Crowley* v. *Templeton*, (1914) 17 C.L.R. 457, 462.

Lease must be for a Definite Term.

As stated in *Garrow's Real Property in New Zealand*, 4th Ed. 555, 556:—

"A lease may be granted for any term, long or short, for example, a lease may be at will, for a week, for a month, for six months, for ten years, for twenty-one years, for ninety-nine years, for nine hundred and ninety-nine years, for two thousand years, subject of course to any statutory provision.

The term of a lease must be either expressed with certainty and specifically, or expressed by reference to something which can at the time when the lease takes effect, be looked to as a certain ascertainment of what the term is meant to be. There must be a definite time of commencement and a definite time of ending. In all these cases the maxim *id certum est quod certum reddi potest* applies. If the period is uncertain or the time or commencement or ending is uncertain the lease is void for uncertainty."

Thus it was held in *Lace* v. *Chantler*, [1944] K.B. 368; [1944] 1 All E.R. 305, that a lease could not be granted "for the duration of the War." Where it is desired to give a lease to A, for his life, it is usual to grant a lease for ninety-nine years "if A shall so long live." This is because a lease for life without more creates a freehold interest; if the lease is for the life of someone other than the lessee, the lessee's interest is an estate *pur autre vie*.

Date of Termination of Lease.

It is often material to know at what exact date a registered lease terminates. In the memorial of a lease on the Register Book the phraseology of the lease stating the term will be followed slavishly by the Registrar. For example, if the term is stated "as from and inclusive" of a certain date those precise words will be stated in the memorial. Persons searching the title are entitled to rely on the memorial as correctly stating the term: *Gallagher* v. *Thomson*, [1928] G.L.R. 373.

The general rule is that if a lease for years is expressed to commence "at" or "from" a named date it commences the following day and terminates on the anniversary of that date. A lease for five years commencing from March 25, 1913, begins on March 26, and the last day of the lease is March 25, 1918. If the wording, however, shows that the lease is actually to commence on a particular day expressed, as "to commence on the 25th of March," or "from and inclusive of the 25th of March," or "to commence on the date hereof," meaning the date of execution, the lease would be construed as taking effect on that day and in the example given the lease would then terminate at midnight on March 24, 1918. In *Raikes* v. *Ogle*, [1921] 1 K.B. 576, the date of commencement of the tenancy was particularly important because the amount of rent to be paid depended on it, on account of a statutory restriction on increase of rent after March 25, 1920, and the lease was for three years from March 25, 1920. It was held that the tenancy began on March 26 and therefore came within the statute: *Garrow's Real Property in New Zealand*, 4th Ed. 556.

Tenancies at will or Periodic Leases not Registrable under Land Transfer Act.

To be registrable under the Land Transfer Act a memorandum of lease must be for a definite term. A tenancy at will is not registrable; similarly what is called a periodic lease is also not registrable—*e.g.*, a lease of indefinite duration determinable by notice by either party, such as by one month's notice.

As to a tenancy at will, *Garrow's Real Property in New Zealand*, 4th Ed. 544, has the following note:

> A tenancy at will is created where the lessor lets land to the lessee to be held by the latter at the will of the lessor. "If two parties agree that the one shall let and the other shall hold, so long as both parties please, that is a holding at will, and there is nothing to hinder parties from makingsuch an agreement." Either party may determine the tenancy at any time, for the tenancy of the lessee is equally at the lessee's will. The lessor may determine the tenancy at any time by notice or demand of possession or by the exercise of any act of ownership. Similarly the tenant at will can terminate the tenancy at any time by notice to the landlord or by any act inconsistent with the tenancy, as by assignment of his interest with notice to the landlord, or by the commission of waste. Such a tenancy is also terminated by the death of either party, likewise if the lessor becomes bankrupt.

Examples of the rule that the term of a Land Transfer lease must be for a definite term: The operative clause in a sub-lease which was a sub-lease of the land in two leases in perpetuity reads as follows:—

> The Lessor doth hereby lease to A. B. C. D. and E. F. all of Hawera Farmers (hereinafter referred to as "the Lessees") all the said lands to be held by the Lessees as tenants for the space of five years (and thereafter from year to year until determined by three months notice in writing by either party expiring on the next 1st day of April) to be computed from the first day of April, 1951.

The District Land Registrar declined to register the sub-lease, unless the words enclosed in second set of parentheses were deleted from the sub-lease. These words were in fact extraneous matter within Reg. 14 of the Land Transfer Regulations, 1948 (Serial No. 1948/137).

But so long as the duration of the term is properly fixed, continuous possession on the part of the lessee is not necessary. A lease for a fixed period each year for a course of years would be good. In New South Wales (see *Baalman and Wells's Practice of Land Titles Office*, 3rd Ed. 235) no objection will be raised to the registration of a lease for a term consisting of non-continuous days or periods: as, *e.g.*, for every Saturday night for a term of 3 years: see *Smallwood* v. *Sheppards*, [1895] 2 Q.B. 627, and *Foa on Landlord and Tenant*, 6th Ed. 8.

But, where the term of a lease is for a term certain (say for 7 years) from a certain date upon and subject to certain covenants and conditions and one of the covenants shows that the commencement is most uncertain and in fact may not be operated at all, the lease will be refused registration. There must be a definite term of commencement and a definite term of ending. The District Land Registrar requires this for the purposes of his memorial of the term which is most important—*e.g.*, *Gallagher* v. *Thomson*, [1928] G.L.R. 373.

LEASE SHOULD NOT CONTRAVENE THE LAW AS TO SUBDIVISION OF LAND.

Reference must be made to the definition of "sale" in ss. 125 and 128 of the Public Works Act, 1928 ("sale" includes, *inter alia*, a lease for any term (*including renewals*) of not less than fourteen years), in s. 2 of the Land Subdivision in Counties Act, 1946 ("sale" includes, *inter alia*, a lease for any term (*including renewals under the lease*) of not less than three years), and to the fact that s. 350 of the Municipal Corporations Act, 1954, embraces *lease* for any term whatsoever.

A lease which *ex facie* contravenes the statute law restricting subdivision of land will of course be declined registration, for the relevant statutes expressly make the District Land Registrar the watch-dog in these respects.

IS A NEW SURVEY REQUIRED FOR A LEASE OF PART OF THE LAND ?

This is a matter for the District Land Registrar to decide after receiving a report from the Land Transfer Surveyor. It may be decided that a plan of a new survey must be deposited under s. 167 of the Land Transfer Act, 1952. If the lease is of rooms in a building, an architect's plan may be necessary. The parcels comprised in a lease should be described with particularity, except where a new survey is dispensed with, when a sketch-plan on the instrument will be accepted ; when the lease is for a short term only, a new survey is more likely to be waived by the Registrar.

LEASE MUST NOT PURPORT TO BE INALIENABLE.

A provision that a lessee shall not assign without the consent of the lessor is quite in order. Unless such a provision forms part of the statute law of New Zealand, it is merely a contractual part of the lease which does not concern the District Land Registrar. In *In re Duggan*, (1882) N.Z.L.R. 2 S.C. 144, the Supreme Court decided that the Registrar cannot refuse to register a transfer of a lease merely because it is in breach of a covenant not to assign, on the ground that, inasmuch as the lessor could exercise his right to determine the lease (as to which see s. 121 of the Land Transfer Act, 1952) the Registrar is free of liability. If, however, the prohibition is contained in a statute then the District Land Registrar will not register a transfer or other dealing which would be in contravention of the statute.

Sometimes, however, parties go further and attempt to make a lease absolutely inalienable. That is not permissible. In the first place, it appears to infringe s. 97 of the Land Transfer Act, 1952. In the second place, novel and unauthorized restrictions and prohibitions against alienation cannot be made to attach to estates registered under the Land Transfer Act. Any restriction against alienation can probably be made the subject of a *covenant inter partes*, and such a *covenant* could be included in the lease itself, but in such a case the lessor would have to register formal re-entry before the lease was in fact determined : *Suttie* v. *Te Winitana Tupotahi*, (1914) 33 N.Z.L.R. 1216 ; 17 G.L.R. 110, and the District Land Registrar on the strength of *In re Duggan* (*supra*) would be bound to register a transfer in breach of such a covenant, if the transfer were otherwise in order.

Thus a lease for a term expressed as follows has been refused registration :

> for a term commencing on the 8th day of July 1935 and expiring on the 30th day of September 1939 *or on such earlier date as the said C. D. shall die or the lessees shall assign transfer mortgage underlet or part with the possession of the said lands or any part thereof or shall attempt so to do.*

(*To be continued.*)

THE JUDICIAL MANAGEMENT OF COMPANIES IN SOUTH AFRICAN LAW.

By T. B. BARLOW, B.A., LL.D.

In a letter I recently received from the editor of the NEW ZEALAND LAW JOURNAL, he kindly invited a contribution from my pen. At the same time, he informed me that a new consolidated Companies Bill was in process of consideration by Parliament. It, therefore, seems to me that the New Zealand lawyer may be interested in a form of company procedure which seems to be unique to South Africa, but which can well be adopted by other Dominions, which, like ourselves, have taken over the main principles of British company law.

In one respect, the winding-up of a company is a far more serious event than the insolvency or bankruptcy of an individual. When a person is *made* insolvent, he suffers a certain *capitis diminutio*, but he knows he has the hope of eventual rehabilitation and the recovery of full legal powers. When a company is finally liquidated, it is dissolved and loses its corporate personality. Circumstances may, however, arise in which a company is in bad waters from the financial point of view, but where it is still possible that, if the company is carefully nursed during its financial illness and too many obligations are not placed upon it, it may survive and again enter into full business activity. This nursing is supplied by the South African system of judicial management.

A judicial management order may be made by the Supreme Court on the application of a shareholder or creditor on the grounds of mismanagement or some other cause. It may also be made where an application has been made to the Court for the liquidation of the company on the grounds that the company is unable to pay its debts, or is being mismanaged, or for some other cause, if the Court, upon considering the facts, comes to the conclusion that, despite its present difficulties, it may be able to weather the storm.

Before an application is made, a copy of the petition and of every supporting affidavit must be lodged with the Master of the Supreme Court, who must report on any circumstances that appear to him to justify the Court either in postponing the hearing or refusing the petition.

The granting of a judicial management order is regarded as a privilege, and the Court will not make

a final order unless satisfied that all interested parties have had an opportunity of being heard. The main question in the granting or refusing of an order is whether it will give the company a chance of overcoming its difficulties and retrieving its fortune. Thus, an order will not be made where the company has lost 75 per cent. of its capital, or where a deadlock exists among the members of a small company. In considering the application, the Court will bear the interests of both shareholders and creditors in mind.

The Court must direct that, from a specified date, the company will be under the control of a judicial manager. The Master may appoint a provisional judicial manager; and, later, a permanent one is appointed at meetings of creditors and contributories. If different persons are appointed, the Master decides the difference, and makes such appointment as he thinks fit. He may also disregard a person appointed by both meetings.

The person appointed must take over the management and control of the company and conduct it in a manner conducive to the interests of creditors and shareholders. He must comply with any directions given by the Court, and pay regard to the memorandum and articles of association, except in so far as these are in conflict with the Court order. It is his duty to guide the company through its difficulties, and to take such steps as are necessary to place it on its feet once more. Even if he was, prior to his appointment as judicial manager, an officer of the company, his responsibilities after appointment are to the Court alone; and he must act with strict impartiality as between the company, its creditors, and its shareholders. The directors cannot exercise their powers during the existence of the order.

The judicial manager must, within one month of undertaking his duties, report to the Master, to a meeting of the company, and to creditors on the assets and liabilities of the company, its debts and obligations as verified by its auditors, and all such further information as is necessary to enable the Master, shareholders, and creditors to become acquainted with the position of the company. The Master may extend the time in which his report must be presented, but it must not be later than three months after the appointment of the judicial manager. Thereafter, similar reports must be presented every six months.

The Court may direct that all legal processes against the company be stayed. This is a provision of the greatest importance, as the moratorium prevents the company from being rushed and enables the judicial manager to consider matters calmly and in the best interests of all concerned.

During the existence of the order, the judicial manager cannot sell or otherwise dispose of any of the assets of the company save in the ordinary course of business unless he obtains the leave of the Court. All available moneys must be used in paying the costs of the judicial management proceedings, and the payment of debts that were incurred before the making of the order.

The judicial manager or some other interested person may apply to the Court for the cancellation of the judicial management order. The cancellation is in the discretion of the Court; but that Court must be satisfied either that the order has served its purpose, or that there is no hope of saving the company. It sometimes happens that the financial position of the company is so bad that the judicial manager has been unable to save it, and liquidation sometimes follows judicial management. At other times, the company may have pulled through its difficulties and be able to go ahead again. In such cases, the Court must give such directions as are necessary for the management and control of the company, including the calling of a general meeting of shareholders for the election of directors.

Before concluding, I may mention one duty of the judicial manager. He must investigate whether an offence has been committed against the provisions of the Companies Act or of the common law and report them to the Attorney-General. The Attorney-General can then have the matter investigated, and institute a prosecution if this is called for. Among the provisions of the criminal law that apply in these circumstances, offences under the Insolvency Act are most important. Thus it is often found that a director has been incurring debts on behalf of the company without there being any reasonable prospects of these debts being paid. Such director is then liable to prosecution.

This survey of judicial management proceedings is necessarily brief; but it is written in the hope that it may be of interest to those considering the new legislation in New Zealand. As pointed out earlier, the procedure seems to be unique to South Africa, but it is one that can well be applied to other countries that have taken over the main principles of British company law. It is a procedure capable of giving protection to a company during a period of financial stress and eventually allowing it a new lease of life.

NINTH AUSTRALIAN LEGAL CONVENTION

The Ninth Legal Convention will be held at Brisbane commencing on Tuesday, July 19, 1955, and ending on Sunday, July 24, 1955.

The opening ceremony will be held at Brisbane's City Hall at 8.15 p.m. on July 19, when the Guest Speaker will be the Right Honourable Lord Reid, Lord of Appeal in Ordinary, who will be visiting Australia as the guest of the Law Council of Australia. Lord Reid will be accompanied by his wife, and he will remain in Brisbane throughout the Convention.

It is probable that Mr. and Mrs. Robert Storey will be present during the Convention. Mr. Storey is Dean of the Law School at the University in Dallas, Texas. He was Head of the President Hoover Commission on the Administration of Justice, and he was the First Executive Assistant to Mr. Justice Jackson, Chief Prosecuting Counsel for the United States of America at the Nuremberg War Trials.

The following papers will be discussed:—

1.—"THE INTERPRETATION OF STATUTES" by His Honour Sir Herbert Mayo, of the South Australian Supreme Court Bench.

2.—"THE RELATIONSHIP OF LAW TO COMMERCIAL PRACTICE" by Professor F. P. Donovan, Professor of Commercial Law at the University of Melbourne.

3.—" ROYAL COMMISSIONS " by Mr. J. D. Holmes, Q.C., of the Sydney Bar.

Copies of the papers will be distributed in advance to those attending the Convention.

Queensland lawyers are confident that the Brisbane Convention will not fall below the high standard of previous Conventions.

Apart from the more serious side of the Convention every endeavour will be made to entertain visitors and their wives. There will be a full programme of social activities which will finish with a visit to Queensland's South Coast (Surfers' Paradise and Coolangatta) on Sunday, July 24.

The maximum accommodation has been booked at Lennons Hotel and the Belle Vue Hotel. The Law Council will be happy to arrange accommodation for visitors. The Secretary's address is: Box No. 407F, G.P.O., Brisbane.

In Australia, travelling and hotel expenses connected with the Convention are deductable for taxation purposes, except to the extent that they are of a capital, private or domestic nature.

RESTORATION OF THE INNS OF COURT.

The Council of the New Zealand Law Society resolved that the sum of £700 collected on behalf of the Inns of Court Restoration Fund should be sent to the Master of the Rolls to be distributed at his discretion. Later, Sir Raymond Evershed informed the Council that he had decided to apportion the sum equally among the four Inns of Court. The letters of grateful acknowledgment from the Treasurers of the several Inns appeared in last year's JOURNAL, at pp. 213 and 214.

The Master of the Rolls, Sir Raymond Evershed, in a recent letter to Sir William Cunningham, said:

" On the subject of the generosity of the New Zealand lawyers to the Inns of Court, I delayed writing on behalf of Lincoln's Inn (my own Inn) until the final decision of the application had been made. We had almost reached a decision many weeks ago when a new and vicious blow fell upon us. Towards the end of the War one of Hitler's V-2 rockets fell near us and blew in all our windows; but we hadn't supposed that we had suffered any more than superficial damage. Unfortunately in the late autumn of last year we discovered for the first time that certain of the roof-timbers of our Hall had been seriously affected by the explosion, so that the Hall itself was eventually pronounced unsafe. This is, of course, a heavy blow to us—so much of our communal life at the Inn depends on the use and availability of the Hall. We now find that the Hall will be out of action for the best part of six months—and this is apart from the expense (much of which we hope, however, to recover from the War Damage Commission).

" In these new circumstances, my Council decided that the best thing we could, and should, do was to apply our one-fourth share of the precious gift of your colleagues and yourself towards this vital work, and to record this fact by means of a small tankard suitably inscribed. The actual resolution was as follows:

" ' That, notwithstanding the [earlier] resolution, the sum of £175 subscribed by members of the legal profession in New Zealand for restoration of the Inn be applied towards the cost of the restoration of the roof of the Great Hall, and that in order to make permanent record of this gift the Society will purchase out of its own funds a tankard to be suitably inscribed at a cost of approximately £25.' "

THE PROGRESS OF RESTORATION.

In his always interesting column, " Here and There " in the *Solicitors' Journal* (London), " Richard Roe " has something to say about the damage done in the Inns of Court; and his observations on their restorations are of particular interest to New Zealand lawyers. He writes, in part:

" All over London and the great cities there are still bomb sites in plenty, wild, overgrown and full of tumbled rubble, where ten-year-olds play adventurously, for whom bombs are a mere matter of hearsay, almost as remote as folklore. When rehabilitation has gone so slowly all over the country, no one need be much surprised that the law, proverbially so deliberate in its processes, should have gone no faster than anyone else. But now it rather looks as if it will have finished putting all its houses in order well before the practical, hard-headed, go-to-it business men of the City of London have put all theirs. So ten years after, come for a tour of inspection round the legal quarter to see how things are getting along. The Law Society building and the Record Office opposite escaped substantial damage. Surprisingly, considering its enormous sprawl, the Law Courts, to all intents and purposes, remained disappointingly immune. The Chancery Court, which had its corridor wall blown out, still remains patched pending complete restoration. The north end of the Divorce block still stands jaggedly incomplete. . . .

LINCOLN'S INN.

" Cheered by these heartening reflections, we cross Carey Street into Lincoln's Inn. A stranger who had not been here since August, 1939, would imagine that the air raids had literally passed it by. There is nothing very startling about the still apparent newness of the extensively renovated building at the north-west corner of New Square, and very soon it will tone in with its neighbours and be indistinguishable from them. Only a very careful scrutiny can now reveal where a piece was blown out of Stone Buildings on the garden side, nor does the passer-by guess at that other rather ecentric damage elsewhere in the Buildings when a small bomb scooped a large hole in the ground floor and first floor, leaving the second floor suspended above like a bridge. A good deal of the north-west part of Stone Buildings was burnt out, but the shell has been filled and the internal improvements are not perceptible from the outside. The grille gate into Chancery Lane was considerably shaken, largely, it is said, by the over-enthusiastic use of explosives in demolishing raid ruins opposite. It is now being repaired. The reconstructions in Old Buildings and the forthcoming re-roofing of the new Hall are to be attributed mainly to wear and tear in the normal processes of time, with a little shaking up by blast to help them on. So for posterity the principal monument to the disasters of war to be found in Lincoln's Inn will

still be that unobtrusive little plaque by the headquarters of the Inns of Court Regiment recording (rather primly, as it now seems to us) how two bombs fell in the roadway during the first World War, shattering windows and doing other material damage. There is reason to believe that Lincoln's Inn owes its relative immunity (as compared with the other Inns of Court) to the particularly efficient organisation of its fire-watchers. Elsewhere there was more courage and goodwill than method and organisation.

WHAT HITLER KNOCKED ABOUT.

"So the Temple and Gray's Inn were all but incinerated. We saw the Temple Church gutted, the Hall, Library and administrative buildings of the Inner Temple destroyed, along with the Master's House, Crown Office Row, Fig Tree Court, Elm Court, the Cloisters, half of Pump Court, Harcourt Buildings, Lamb Building, between the Church and the Hall, and two houses in King's Bench Walk. On the other side of Middle Temple Lane part of Plowden Buildings disappeared, along with the houses dividing Brick Court from Essex Court. Middle Temple Hall was heavily damaged by fire and high explosive, and the Library was blasted beyond repair. Not all of this damage was catastrophic. The Inner Temple Hall was Victorian Gothic almost at its worst. The Middle Temple Library, described as an unpleasant reminder that Lord Chancellor Westbury had a nephew who was an architect, followed the same idiom, but though pretentiously medieval was somehow not quite so undistinguished. The gaunt Victorian red brick of Elm Court, of a particularly unpleasing tone, was one of the first casualties of the war and a good riddance in every sense. If the eastern half of Crown Office Row was Charles Lamb's, the western half was typical Smirke. The hands of the Smirke brothers, fashionable and adulated in their day, still lie heavy on the Temple, heaviest of all on the ponderous workhouse gloom of Dr. Johnson's Buildings. Harcourt Buildings was another deep architectural depression which it is much to the credit of the enemy air force to have dissipated. Now the Temple is well on its way back to reconstruction. The gaps in King's Bench Walk have been filled in so long that people have almost forgotten them. Middle Temple Hall has outlived the first delighted wonder of its restoration. The main part of the Temple Church is complete, better than before the fire which purged it of the most terrible Victorian accretions, and work continues in the original round church of the Knights. The new Master's House reproduces in essentials its predecessor. The new Inner Temple Hall, externally finished, boldly shifts from Gothic to Georgian in inspiration. Only when it is open will we be able to judge of the rumours which have suggested that, owing to some misunderstanding, it is a size or two smaller than was intended. At the west end the vaulted chambers, relics of the medieval Temple, have been preserved and brought into a prominence hitherto denied them when they were masked by Fig Tree Court. The Cloisters have been reproduced substantially as they were before but higher, and, to that extent, less charmingly intimate. There is now a blank wall where once there were the windows of a little old shop; this also means a loss of interest for the eye. The new south side of Pump Court might be a lot worse, but it is heavy-handed in conception and a shade too pretentious for the intimacy of that narrow court. Also, quite needlessly, the pump (or, as it had become, the tap) has vanished. Harcourt Buildings is an enormous improvement on its predecessor, and the new buildings below Pump Court happily have nothing in common with pre-war Elm Court. The demolition of the ruins of the Middle Temple Library is far advanced. The temporary library is still in Brick Court, awaiting the new one which will go up in Middle Temple Lane below the Hall.

SQUARING-UP GRAY'S.

"Battered Gray's Inn most courageously restored its heart before it attended to anything else, and the rebuilding of its Tudor Hall almost in replica was an astonishing achievement, confirming the continuity of the life of the Society. The new bay window at the south end of the dais, facing, but not matching, the one at the north end, is (rightly, I think) not universally admired. The new Benchers' rooms are externally a tremendous improvement on those burnt in the war, though the ostentatiously exuberant heraldic decoration of one of them has caused some rather sardonic amusement. Since then building has been going on steadily in Gray's Inn Square, and very soon the two great gaps will be filled. Seven of the fourteen houses had vanished, four of them in a row on the garden side. It was decided to rebuild in harmony but not in replica, and, in order to have scope for modernisation, to reduce the four staircases to three. Some doubts were felt about the visual effect of the change, but now that the new buildings are up the result can be judged as very good indeed. Save for one building the east, south and west sides of South Square are still in ruins. The new library will be on the east, but the rest of the square will (or should) present a rather difficult problem. The sole survivor of the eighteenth-century buildings is the very pleasant house where Dickens worked as an office boy (though how he hated it!), and I suppose one can say that, of course, the guardians of the Inn's traditions will think several times to avoid adopting any final plan which would involve destroying a historic monument which Hitler spared. If they want to see how it could be done the rebuilding of Staple Inn provides a model."

CORRESPONDENCE.

Liability for Damage by Animals.

The Editor,
NEW ZEALAND LAW JOURNAL,
C.P.O. Box 472,
Wellington.

Dear Sir,

As an extempore footnote to the interesting article by Professor A. G. Davis on "Liability for Damage by Animals" (1954) 30 NEW ZEALAND LAW JOURNAL, 207), might I add a reference to s. 5 of the Impounding Act, 1908, and the reported cases dealing with this section? The legislative change recommended by your learned contributor might be suitable in England, where the fields are in general small and well-protected by stone walls, well-kept hedges, etc.; but, in New Zealand, the law seems to have evolved on the basis that he who raises a crop must see that it is legally fenced against stock. We in New Zealand are probably still in a stage of pastoral development where the interests of those who run stock must prevail. To amend the law as suggested might "Balkanise" the country.

I should like to see a further article from your learned contributor dealing with this aspect of the matter.

Yours, etc.,

A. C. BRASSINGTON.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Henriana.—Whatever may be its value to the Government or to the public at large, the modern swift method of transition from the role of leading barrister, to that of puisne Judge produces at least two marked results. It causes clients to reel under the impact of having to entrust their partly-completed cases to new, and often less sympathetic, hands; and it leads to some confusion as to the precise point of time when the ascension to the hierarchy of the Bench is attained. After the latest appointment was announced, but before the swearing-in, a radio-telegram (sent by a brother-Judge) reached the Auckland Post Office addressed: "Mr. Justice-designate Henry". It was duly delivered to the proper recipient; but with the minute, endorsed on the envelope, "Not known to the Post Office—Try Trevor Henry." Immediately after the swearing-in, a very junior and warm-hearted law clerk who had been filing some papers in the Court office came into the Court as the last of the Judges left the Bench. He said to one of the practitioners who was just leaving the Court: "What did he get?" The barrister, sensing that the law clerk had mistaken the function for the more usual one of the sentencing of felons, replied: "A life sentence." "Poor b————," observed the law clerk, turning away to the pressure of his more urgent affairs.

J. H. Stamp.—Mr. J. H. Stamp has retired from his office as junior counsel (on the Chancery side) to the Board of Inland Revenue. He is eighty-three and has spent fifty-six years at the Bar. In his Chambers, probably the largest in Chancery in England, the Master of the Rolls (Sir Raymond Evershed), Lord Justice Jenkins and Mr. Justice Harman have all been pupils; indeed, such has been his liking for the practice of the law, that when offered a Judgeship by Sankey, L.C., Stamp declined. British Industry claimed him over the years in many of its biggest problems, and in the 1920's he handled the intricacies of the formation of Imperial Chemical Industries, branches of which in the Southern Hemisphere add their quota to the wherewithal of lawyers' living.

Mischief in the Islands.—It is only occasionally that the Judicial Committee is concerned with judgments of the Court of Appeal in the Windward Islands, but it seems that one Ebenezer Theodore Joshua, a member of the Legislative and Executive Councils of St. Vincent was recently indicted on a charge of public mischief, alleging that he "did by means of certain false statements in a public speech to the effect that the Police were scheming politically and storing up a veritable arsenal at headquarters to shoot down the people when they decided to fight for their rights, agitate and excite certain sections of the public against the Police, to the prejudice and expense of the community." The trial Judge (Cools-Latigue, J.) in his charge to the jury said: "I direct you, as a matter of law, that, if you find that he did utter the words complained of, he is guilty of the offence of effecting a public mischief." On the offence of "effecting a public mischief contrary to the common law," he was found guilty and bound over for two years; and his appeal to the Court of Appeal was dismissed. Better fortune awaited him, however, in the Privy Council, which considered that the Judge in his direction had usurped the function of the jury—whether upon the facts the appellant was guilty—and the conviction was quashed.

Efficient Condition of Vehicles.—In *Brown* v. *Zurich General Accident and Liability Insurance Co., Ltd.*, [1954] 2 Lloyd's Rep. 243, an insured vehicle was damaged after a skid on an icy surface. The indemnifiers declined liability upon the ground that the policy contained a clause that "the insured shall take all reasonable steps to safeguard from loss or damage and maintain in efficient condition the vehicle . . . and the company shall have at all times free access to examine any such vehicle." It was found that the front wheel tyres were smooth and without tread. Upon these facts, the arbitrator considered that the insured, by neglecting to replace the smooth front tyres with new, retreaded, or other tyres with adequate tread, had failed to take reasonable steps to maintain it in efficient condition within the meaning of the clause. This finding was upheld by Sellars, J., who, although he thought that a skid might have occurred on ice even with new tyres, nevertheless was of the opinion that "efficient condition" of a vehicle really involved the taking of reasonable steps to make or keep the vehicle roadworthy. It will be remembered that in the New Zealand case of *Trickett* v. *Queensland Insurance Co., Ltd.*, [1936] N.Z.L.R. 116, the Judicial Committee of the Privy Council held that a vehicle that was driven without lights was being driven "in a damaged or unsafe condition" even though these may have been functioning when the vehicle commenced its journey and the driver was unaware of the change.

Of Good Intent.—The refusal the other day of a Magistrate to hold a young man guilty of attempted indecent assault when nothing more than an intention could be inferred, reminds Scriblex of the story of the girl who was stopped in the street by a young man who handed her a card on which he had written: "If you like the look of me, give me a ring sometime!" This example of an inverted Mae West attitude towards life led to the father of the girl telephoning the young man and asking him to call round and explain his conduct. This he did; and, what with one thing and another, the couple became engaged, were later married, and now have a young fellow to whom the proud grandfather constantly refers as "a regular little card!"

Company Memorandum.—"There are only two certain methods of ensuring a good attendance at a company meeting. The first is to pass a dividend, the second is to announce that free hospitality will be dispensed. Harrassed secretaries of prosperous, but temperate companies, the articles of which follow Table A of the Companies Act, 1948, will therefore welcome any small measure of relief that may be afforded to them by the decision in *Re Hartley Baird, Ltd.*, ([1954]3 All E.R. 435) They need only ensure that a quorum is present at the time the meeting begins; they do not have to keep an eagle eye throughout the proceedings in case a vital member slips away before the necessary votes are taken."—From an article on "Company Law and Practice," by H. N. B., in 99 *Solicitors' Journal*, 21.

SUMMARY OF RECENT LAW

(*Concluded from p. 80*)

in-common in equal shares. The transfer was expressed to be in consideration of the sons' executing a mortgage securing to the deceased an annuity of £650 per annum payable at £12 10s. per week, and, after his death, an annual payment to his widow of £6 per week so long as she should remain unmarried. By virtue of the mortgage, there was secured on the property the sons' covenant to pay to the deceased during the remainder of his life an annuity of £650 and upon, his death, if his then wife should have survived him and should at the time of his death be his wife or if divorced should not have remarried, to pay her during the remainder of her life so long as she should remain unmarried an annuity of £416 while the youngest son was a minor, and, thereafter an annuity of £312. There was no element of gift or bounty in the transaction. On November 7, 1932, the decree absolute dissolving the deceased's marriage was pronounced, and an order was made for permanent maintenance on the terms agreed upon. In accordance with that order, the deceased executed a memorandum of mortgage in favour of his former wife, whereby he mortgaged all his interest in and under the mortgage given by the sons, to secure the covenants contained in such submortgage for payment of the annuity of £416. The deceased died on April, 1949. The value of the property at the time of the transfer was £11,195 less the debt of £5,000 secured by the mortgages which remained on the property. The value of the annuities, as assessed at the time of the transfer, was £7,247. At the death of the deceased, the value of the property was £22,265, less the mortgage debt. The Commissioner of Inland Revenue claimed, under s. 5 (1) (*j*) of the Death Duties Act, 1921, to include in the dutiable estate of the deceased the sum of £17,265, being the value of the property at the death of the deceased, less the amount owing under the two mortgages, £5,000. On Case Stated by the Commissioner, *Gresson*, J., held that the transaction was not a "settlement, trust, or other disposition of property" within the meaning of s. 5 (1) (*j*) of the Death Duties Act, 1921, and that the amount of £17,265 was not to be included in the computation of the financial balance of the deceased's dutiable estate. On appeal from that judgment, *Held*, by the Court of Appeal (Barrowclough, C.J., dissenting), 1. That the transaction comprised in the contemporaneous transfer and mortgage of the property, was not strictly within meaning of the term "settlement" as used in s. 5 (1) (*j*) of the Death Duties Act, 1921; but it was, nevertheless, within the meaning of the expression "other disposition of property", as used therein, as it possessed the qualifications required by sub-para. (ii) thereof; and that, even on an application of the *ejusdem generis* rule to the expression "settlement, trust, or other disposition", the transaction would be within those words. (Dicta of *Lord Blackburn* in *Coltness Iron Co.* v. *Black*, (1881) 6 App. Cas. 315, 330, of *Lord Atkinson* in *Ormond Investment Co., Ltd.* v. *Betts*, [1928] A.C. 143, 162, and of *Viscount Simon*, L.C., in *Canadian Eagle Oil Co., Ltd.* v. *The King*, [1946] A.C. 119, 139; [1945] 2 All E.R. 499, 506, followed.) (*In re Deans*, (1910) 29 N.Z.L.R. 1089; 13 G.L.R. 17, and *Commissioner of Stamps* v. *Finch*, (1912) 32 N.Z.L.R. 51; 15 G.L.R. 316, applied.) (*Commissioner of Stamp Duties* v. *Russell*, [1948] N.Z.L.R. 520; [1948] G.L.R. 127, and *Craven* v. *Commissioner of Stamp Duties*, [1948] N.Z.L.R. 550; [1948] G.L.R. 357, referred to.) (*Lethbridge* v. *Attorney-General*, [1907] A.C. 19, explained and distinguished.) 2. That, accordingly, the Commissioner of Inland Revenue in computing the final balance of the estate of the deceased was entitled, pursuant to s. 5 (1) (*j*) of the Death Duties Act, 1921, to include the sum of £17,265, the value of the property at the date of the deceased's death. Appeal from the judgment of *Gresson*, J., allowed. *Ward and Others* v. *Commissioner of Inland Revenue*. (C.A. Wellington. October 29, 1954. Barrowclough, C.J.; Hutchison, McGregor, JJ.)

SALE OF GOODS.

Contract—"Subject to confirmation and payment" by confirming House—Confirmation by confirming House—Cancellation of original Orders—Whether confirming house liable as principal. By a document, described as indent No. 14, W. Ltd., an Australian company, ordered goods from the plaintiffs through their Australian agents, subject to confirmation and payment by S. & Co., Ltd., the defendants, a confirming house carrying on business in London. Subsequently the defendants confirmed to the plaintiffs in writing by a document described as Order No. . . . Letter . . . , which purported to be an order for the goods and contained the words "Purchase by [S. & Co., Ltd.], holders of Purchase Tax No. . . . , of goods as stock intended for exportation". The document set out the names and addresses of the plaintiffs and defendants and gave details of quality, quantity and price, and mentioned a time and place for delivery. The document contained nothing to show that it referred to any other transaction except the words at the botton "In confirmation of your agents' indent No. 14". There was a second contract in relation to which the documents were not materially different. The Australian company cancelled the orders. In an action by the plaintiffs against the defendants, who refused to accept the goods, for damages for breach of contract, *Held*: by their "confirmation" the defendants assumed the liability of a principal buyer as between themselves and the plaintiffs, and the indent was not the real contract; accordingly, the defendants were liable to the plaintiffs in damages for breach of contract. *Rusholme and Bolton and Roberts Hadfield, Ltd.* v. *S. G. Read & Co. (London), Ltd.*,[1955] 1 All E.R. 180 (Manchester Assizes).

TENANCY—DWELLINGHOUSE.

Possession—On Separation of Husband and Wife, Husband allowing Wife and Children occupation of Dwellinghouse, free of Charge—Maintenance fixed by Magistrate with Knowledge of Free Use of Dwellinghouse—Remarriage of Wife—Notice to Her and Her Husband to quit—Dwellinghouse occupied by Owner's Wife and Children under Licence—Original Licence revocable on Dissolution of Marriage. In December, 1950, S., after the making of a separation and maintenance order against him, and in pursuance of his obligation to his wife and six children whose custody was given to her, bought a dwellinghouse and allowed them to occupy it free of charge. In May, 1954, S. was divorced by his wife, the custody of the children was given to her, and a consent order for maintenance at £1 2s. 6d. per week for each child under sixteen years was included in the decree absolute. Mrs. S. remarried in June, 1954. Three days later, S. gave her and her husband notice requiring the property to be vacated. No rent was ever paid as between S. and his former wife, although she offered 30s. a week as rent. On a claim by S. against his former wife and her husband for possession of the dwellinghouse, *Held*. 1. That, on the evidence, S. and his wife contemplated a licence to the wife and children to occupy the dwellinghouse without payment of rent and with no period fixed, and did not contemplate a tenancy. *Bendall* v. *McWhirter*, [1952] 1 All E.R. 1307, and *Vaughan* v. *Vaughan*, [1953] 1 All E.R. 209, applied.) 2. That on the review of the maintenance order, the Magistrates' cognizance of the free use of S.'s dwellinghouse by the wife and children, and allowing for it when fixing the amount of maintenance payable by S., did not raise any implication as to whether S. had granted a mere licence to occupy or a tenancy. 3. That, upon the divorce being granted and maintenance of the children by S. being ordered, the original licence was not affected and, the right of occupancy being capable of revocation after the dissolution of the marriage, S. was entitled to possession in a reasonable time, and to mesne profits from the date of his revocation of the licence at 30s. per week. *Schick* v. *Neil and Another*. (Whangarei. October 6, 1954. Herd, S.M.)

Tenant in Hospital for Some Time before his Death—Married Daughter giving up Home, and, with Her Husband, living in Tenement to be near to Tenant, and to assist Him—Tenant spending Weekends from Hospital with Them—Daughter and Husband occupying Tenement after Tenant's Death—Claim for Possession—Daughter and Husband Members of Late Tenant's Family and Residing with Tenant—Tenancy Act, 1948, s. 41 (1). A tenancy of a dwellinghouse was granted by the State Advances Corporation to B. and his wife in March, 1950, when B. was a patient in hospital, where he remained until his death in April, 1954. His wife lived in the house until her death in April, 1953. Before her death she suffered periodically from bouts of illness. At these times, her married daughter used to come to assist her, and, at such times, she lived with her. After Mrs. B.'s death, the daughter and her husband, in order to be near her father and be in a position to help him, gave up their own house and went to live in B.'s home. This enabled B. to spend five weekends in his home, where his belongings and personal effects remained until his death, after which his daughter and her husband remained in occupation. The Corporation claimed possession from the daughter and her husband. *Held*, That, for the purposes of s. 41 (1) of the Tenancy Act, 1948, the defendants were members of the tenant's family, and they were residing with the tenant at the time of his death; and, consequently, they were entitled to the protection given by the statute. (*Hawkins et Ux.* v. *Sweetman et Ux.*, (1953) 8 M.C.D. 125, and *Sifton* v. *Sifton*, [1938] A.C. 656; (1938) 3 All E.R. 435, followed.) *Semble*, That the *bona fides* and intentions of parties as demonstrated by their actions are factors to be taken into account in deciding, as a matter of fact, where they were "residing" at any given time. *State Advances Corporation* v. *Martensen et Ux.* (Auckland. September 28, 1954. Kealy, S.M.)