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CRIMINAL LAW: CORRECTIVE TRAINING.

THE idea that persons who are developing a tendency to a life of crime are in need of some kind of reformative training in order to terminate, once and for all, their anti-social trend, is inseparable from the purpose of punishment underlying our criminal law to-day.

The borstal system is intended for the training of young offenders from not less than seventeen (in the Court's discretion, fifteen) up to twenty-one years of age at the time of sentence. Corrective training, up to three years, is prescribed in s. 21 of the Criminal Justice Act, 1954, for offenders of not less than twenty-one or more than twenty-nine years of age (and, in special circumstances, in the Court's discretion, up to thirty-five years of age). This is a logical step for the individual reformation of those who are of more mature age than those committed to borstal training, and who are not beyond the scope of amending their lives. It is an extension of the principles on which borstal training has been prescribed.

Corrective training is the fruit of the Criminal Justice Act, 1948, of the United Kingdom, as it is designed to enable offenders of a certain type to profit by what is intended, in a general sense, to be an education and training in citizenship. Offenders sentenced to corrective training are carefully classified and allocated to the institutions best suited to their individual needs, particularly the re-adjustment of a standard of values and the provision of a practical groundwork for future rehabilitation in everyday life.

When a statute such as our Criminal Justice Act, 1954, seeks to place a person back in society in a frame of mind better able to cope with his problems than when he left it, there is need for some constructive guidance as to when, and in what general circumstances, corrective training might be beneficial, provided that the offender has reached his majority and has a criminal record within the limits set out in s. 21 (1), and as to the principles upon which the Court exercises the discretion given to it by s. 21, and, in particular, in respect of an offender who is not less than thirty and under thirty-five years of age (s. 21 (2)). This brings with it the need for an authoritative interpretation of the provisions of s. 21. A pronouncement by a full Bench of the Supreme Court on these topics is of great importance in the administration of justice in our criminal Courts.

Such guidance and interpretation were provided last week, when the Full Court (Finlay, Cooke, North, and Turner, JJ.) delivered its judgment in *Howe* v. *Roberts* (to be reported).

Section 21 of the Criminal Justice Act, 1954, is as follows:

> (1) Subject to the provisions of this section and of section twenty-two of this Act, where any person who is not less than twenty-one and is under thirty years of age—
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> (*a*) Is convicted of an offence punishable by imprisonment for a term of three years or more; or
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> (*b*) Having been previously convicted on at least two occasions on separate dates of offences punishable by imprisonment for terms exceeding three months, and having on at least one of those occasions been released on probation or sentenced to imprisonment or to detention in a detention centre or to borstal training or to corrective training, is convicted of an offence punishable by imprisonment for a term exceeding three months, being an offence committed after the last of those previous convictions,—
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> the Court, if it is satisfied that it is expedient for his reformation and the prevention of crime that he should receive training of a corrective character for a substantial period, may, instead of passing any other sentence, pass a sentence of corrective training.
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> (2) The power conferred by subsection one of this section may be exercised in respect of any person who is not less than thirty and is under thirty-five years of age, and who would be liable to corrective training if he were under thirty years of age, if in the opinion of the Court, having regard to any special circumstances, including his character and his personal history, corrective training would be more conducive to his reformation and the prevention of crime than any other sentence.
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> (3) The powers conferred by this section shall not be exercised in a Magistrate's Court, except by a Magistrate.

The Full Court had under consideration an appeal from a sentence of corrective training imposed by a Stipendiary Magistrate, under s. 21 (2) of the Criminal Justice Act, 1954. The appellant was just thirty-one years of age when the sentence was passed; and the grounds of appeal, shortly stated, were that the learned Magistrate had proceeded on a wrong principle in imposing the sentence, in that there were no "special circumstances" within the meaning of s. 21 (2) and, alternatively, that, if there were, they had not been stated.

As a prelude to discussing the contentions for the appellant as to the meaning of the expression "special circumstances" in subs. (2) of s. 21, the Court considered it to be necessary, or at least desirable, to refer shortly to the provisions of subs. (1) of that section. The statutory conditions that must be fulfilled before any sentence of corrective training can be passed are that the case must fall within either para. (*a*) or para. (*b*) of subs. (1) of s. 21, and that the Court must be satisfied that it is expedient for the reformation of the offender and the prevention of crime that he should

receive training of a corrective character for a substantial period. In its judgment, the Court said :

> The jurisdiction to pass the sentence is, however, a discretionary one, and it should not be passed merely because the foregoing conditions are satisfied.

Their Honours went on to say that a sentence of corrective training should not be passed in cases in which, owing to the nature or the gravity of the crime, nothing short of a substantial sentence of imprisonment is appropriate. It should not be passed in cases in which the offender's record is such as to disclose no real likelihood that he is capable of reformation. Again, a sentence of corrective training should not be passed in cases in which a substantial period of detention in an institution does not appear to be really necessary in order to effect the reformation of the offender. The judgment continued :

> In short, then, a sentence of corrective training should not, we think, be passed unless the case falls outside the three classes we have mentioned.
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> The keynote of the matter is that the Court must be satisfied that it is really likely to lead to the reform of the offender. It is true that s. 21 (2) refers both to the " reformation [of the offender] and to the prevention of crime " ; but, in our view, those last four words refer to the prevention of crime by the offender, because the deterrence of others from the commission of crime does not appear to be one of the purposes of corrective training.
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> A sentence of corrective training involves an extention of the principles underlying borstal treatment : *R.* v. *Apicella*, (1949) 34 Cr.App.R. 29, and is essentially and fundamentally reformative in character. From all this it follows, in our opinion, that considerable discrimination must be exercised in the sentencing of offenders to this new and valuable form of punishment and care taken to see that, so far as possible, the obtaining of the beneficial results that will no doubt be produced by it in appropriate cases is not retarded by mixing, with offenders who are suitable for it, other offenders upon whom it is unlikely to react satisfactorily.

The foregoing general considerations apply, in the Court's view, to all sentences of corrective training ; but in the case of offenders of thirty to thirty-five years of age there are further matters to which the Court must also have regard :

> The legislation shows on its face that corrective training is primarily intended for offenders under the age of thirty years. The reason for this, no doubt, is that the reformative effect that it is designed to have is much less likely to be produced when the offender is over that age. The provisions of s. 21 (2) thus show that the Legislature does not regard corrective training as appropriate for such an offender unless there are " special circumstances " that lead the Court to the view that, notwithstanding his age, it would be more conducive to his reformation and the prevention of crime than any other sentence.
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> It is useful in this connection to compare with s. 21 the provisions of the corresponding English legislation which contains no age restrictions, but in respect of which the Court of Criminal Appeal has expressed the view that corrective training should not, unless in exceptional circumstances, be imposed on an offender whose age exceeds thirty-five, and as a general rule should be imposed only on an offender whose age does not exceed thirty : *R.* v. *Boucher*, (1952) 36 Cr.App.R. 152.

The contention for the appellant was that the expression " special circumstances " in s. 21 (2) means circumstances special to the offence and not to the offender, and that even the introduction of the words " including his character and personal history " does not authorize the sentencing Court to take those matters into consideration, except in so far as they relate to the offence and not to the offender. The last part of this contention is not easy to follow. The contention as a whole was, however, advanced with the object of showing that there were no " special circumstances " in the present case. It was sought to support the contention by decisions such as *Schneideman and Sons, Ltd.* v. *H. E. Perry, Ltd.*, [1949] N.Z.L.R. 700 ; [1949] G.L.R. 335, and *Harold Hall and Co.* v. *Selwyn Buildings, Ltd.*, [1952] N.Z.L.R. 848 ; [1952] G.L.R. 526. The Full Court did not think that these decisions were of assistance ; indeed it appeared to it that, for present purposes, their relevance begins and ends with the emphasis they lay on the distinction between a circumstance that is " special " to a particular case or class of cases and a " circumstance " that is general. This is a distinction that must, no doubt, be drawn in every case in which the words " special circumstances " are used ; but it does not carry matters very far.

Then it was said that assistance could be derived from the decisions on the meaning of the expressions " special reasons " and " special circumstances " in ss. 7 and 11 of the Road Traffic Act, 1930 (U.K.). On this, the Court said :

> It is to be observed, however, that in those provisions, in which the expressions were held to be directed to reasons or circumstances special to the case or the offence as distinct from the offender, they were used to indicate circumstances of mitigation or extenuation : *Lines* v. *Hersom*, [1951] 2 K.B. 682. It is true that, in *R.* v. *Leit*, (1949) 33 Cr.App.R. 132, the Court of Criminal Appeal adopted a similar method of construing the expression " special circumstances " in Reg. 55 (1) (*d*) of the English Defence (General) Regulations, 1939 ; but that, too, was a provision in which the expression was directed to circumstances of mitigation.
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> On the other hand, the expression as used in s. 21 (2) of the Criminal Justice Act, 1954, is directed, not to circumstances of mitigation, but to circumstances relating to the conduciveness of a particular form of punishment to reformation of the offender and the prevention of crime. It may well be that this consideration is alone a sufficient reason for holding that the expression does not necessarily bear the same meaning in s. 21 (2) of the Criminal Justice Act, 1954, as it bears in the English provisions we have just mentioned.
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> We prefer, however, to look at the matter more broadly and to hold that it cannot be successfully suggested—nor, indeed, is it in fact suggested in any of the authorities—that, because the expression " special circumstances " in a particular legislative context has a certain meaning, it necessarily has the same meaning in a different legislative context.
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> Even if the words " including his character and personal history " were absent from subs. (2), we would not hesitate to hold that the expression " special circumstances " included every circumstance or consideration, whether relating to the offence or to the offender and whether relating to the offender's character and personal history or not, that is peculiar to the individual case and that tends to show that, notwithstanding his age, corrective training would be more conducive to his reformation and the prevention of crime than any other sentence. In our view, the presence in subs. (2) of the words " including his character and personal history " only emphasizes the fact that these matters are capable of constituting special circumstances within the meaning of the subsection.
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> To adopt any more precise definition of the expression " special circumstances " in subs. (2) of s. 21 or to attribute to it any narrower or more limited meaning would be not merely unnecessary, but, we think, positively undesirable. Indeed, to do so would be to put the Court in a strait-jacket in a situation in which it should, subject only to the general considerations we have already mentioned, have the greatest freedom of movement.

Before turning to the question whether there were " special circumstances " in the case under consideration, the Court considered the appellant's contention that, if there were, they should have been stated by the Magistrate, and that it was not sufficient merely to say (as the Magistrate said) that there were " special circumstances." This contention was put in a way that was designed to suggest that, even if special circumstances are properly held to exist, a failure to state them discloses an error in principle in a sentence of corrective training. The Court was unable to see how this can be so. Moreover, it did not doubt that, if a Magistrate rightly holds that there are " special circum-

stances," he has jurisdiction to act under s. 21 (2), even if he does not indicate what those special circumstances are. All that, however, is not to say that, as a matter of practice, they need not be stated. In *R.* v. *Recorder of Leicester*, [1946] 1 All E.R. 615, Lord Goddard, L.C.J., in dealing with s. 35 of the Road Traffic Act, 1930, said of the Magistrate, at p. 617 :

> It is most desirable, if they refrain from imposing a disqualification for special reasons, that they should state what the special reasons are.

And in *R.* v. *Keeler*, (1949) 34 Cr.App.R. 26, which related to s. 22 of the English Criminal Justice Act, 1948, the Lord Chief Justice said :—

> We have already in well-known authorities pointed out that, if Magistrates in such cases refrain from making an order for disqualification for special reasons, they must state what are their special reasons, so that this Court can have an opportunity of considering them in appeal.

So, the Court expressed the view that in cases under s. 21 (2) of the Criminal Justice Act, 1954, it is plainly desirable, both for reasons of justice and for reasons of convenience, that any "special circumstances" that are found to exist should in practice be stated.

The Full Court, in considering whether there were any "special circumstances" in the case under consideration—the learned Magistrate not having recorded those on which he relied—said that it was open to the Appellate Court and indeed obligatory upon it, to consider the facts and to discover for itself whether they disclosed any special circumstances. The appellant's list of convictions was a reprehensible but not a formidable one. The Court thought it safe to say that each offence in it was attributable either to drink or to his domestic troubles. It was, however, clear enough from his record that he was a man who is likely to steal when under the influence of liquor. It was true that he had not been sentenced to imprisonment, except that on one occasion over six years ago he received a sentence of one month for breach of the conditions of his probation. It was true, too, that, with the exception of two convictions for drunkenness in 1952 and 1955, for the former of which he was convicted and discharged and for the latter of which he was fined 10s., he had not been convicted of any offence for over six years. He was described as a good worker. On the other hand, it was to be observed that of his previous convictions the more serious were for thefts, although of a minor nature, and that his present conviction was for a serious theft and disclosed a bolder approach to this form of crime. It, too, was committed while under the influence of drink, and, in this respect, it conformed to the general pattern of the earlier offences. The Court went on to say :

> In our opinion, the causes of the appellant's offences and the general nature of his delinquency tend to show, on the one hand, that, unless he is dealt with firmly and constructively now, it is very probable that he will go from bad to worse, and, on the other hand, that corrective training now is really likely to effect his reformation.
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> We think, too, that the various circumstances and considerations we have mentioned are sufficient to constitute "special circumstances" within the meaning of subs. (2) of s. 21, and that, having regard to them, corrective training would be more conducive to the appellant's reformation and the prevention of crime than any other sentence. After all, it is essential to remember that a sentence of corrective training will not necessarily last for three years.
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> Corrective training is a form of instructional and educational detention, and the Legislature has decided that, although it is always subject to the maximum of three years, the actual period to be served shall be decided, not by the Court before its effect can be adequately estimated, but by the Parole Board in the light of its actual results. It is apparent, therefore, that the period for which the appellant will be detained for corrective purposes will depend very largely on the appellant himself.

On those grounds, the Court held that the result at which the learned Magistrate arrived was right. The appeal was dismissed.

Our Criminal Justice Act, 1954, in its broad implications follows the corresponding legislation in the United Kingdom in 1948, but with differences, some of which were indicated by the Full Court in *Howe* v. *Roberts*. But, no doubt, there are some grounds for improvement. The Court of Criminal Appeal in England, in *R.* v. *Griffin* (*The Times*, November 28, 1950) suggested an extension of corrective training to delinquents under twenty-one who have served a borstal sentence which has failed in its effect. This has been adopted in s. 21 (1) (*b*) of our own statute. Consideration, too, could be given to the widening of the conditions precedent to a sentence of corrective training (as now set out in s. 21 (1)), and leaving the propriety of such a sentence, in the case of offenders under thirty years of age, to the discretion of the Court. The limitations originally imposed on borstal sentences, as originally designed, have been widened thirty years later by the Criminal Justice Act, 1954, when borstal training has proved itself. If corrective training also proves of value, possibly the narrow limitation of the material on which the discretion of the Court may be exercised will also be removed.

The reformative purpose of punishment by corrective training, while valuable in itself, will necessarily have a proportion of failures. The ages of the offenders, their mentality, education, home environment, and past experience of crime make this inevitable. For them, imprisonment and reformative detention remain. For the remainder, the institution of corrective training, in the circumstances set out by the Court of Appeal in *Howe* v. *Roberts* recently, is a hopeful and constructive attempt to reclaim those who would otherwise and eventually cost the community a good deal more than the cost of this new approach to reformation.

No doubt, our Prison authorities will, to a great extent follow the course of corrective training which has been put into operation in the United Kingdom since the passing of the Criminal Justice Act, 1948. There, the prisoner begins his corrective training in closed conditions. He can earn the benefit of open-air institutions by his good conduct and response to training. Workshops of different kinds are provided, and there are vocational training courses with instruction in many trades. Where they are likely to be of benefit, educational evening classes are arranged and cultural pursuits are encouraged. There are facilities for sport and recreation. Attempts are made to eradicate illiteracy, which is more common among offenders than would be expected. Various chaplaincies attend to the prison-trainees' spiritual needs.

One man, twenty-nine years of age, who had been convicted of arson, house-breaking, and burglary, wished to make known the benefits he had received from corrective training. In an article in (1953) *116 Justice of the Peace and Local Government Review*, 3, he said, after his rehabilitation in civilian life : "I am well on the way to becoming a decent citizen, instead of being, as the Judge said, what I would be if I did not take advantage of the opportunity, 'a menace to any decent community and to society.'"

SUMMARY OF RECENT LAW.

DIVORCE AND MATRIMONIAL CAUSES.

Desertion — Constructive Desertion — Sluttishness of Wife — Whether justification for Husband leaving Matrimonial Home. On October 17, 1954, the husband left the matrimonial home and went to live in the house of a Mrs. B. On November 17, 1954, the wife caused a summons to be issued against the husband under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, on her complaints that he had deserted her and had committed adultery with Mrs. B. On December 8, 1954, the husband wrote a letter to the clerk to the justices in which he complained of the wife's dirty habits. On December 10, 1954, the wife's complaints were heard by the justices. The wife was legally represented, the husband was not. The wife gave evidence to the effect that the husband had been associating with Mrs. B. before he went to live at her house and that he had admitted to her, the wife, that he was sleeping with Mrs. B. The wife was not cross-examined on any of the matter set out in the husband's letter of December 8, 1954. The husband then gave evidence. He admitted that he left home on October 17, 1954; he said that he agreed with the wife's "evidence of association", but he denied that he had ever committed adultery with Mrs. B. He concluded his evidence in chief by saying that he would not have his wife back and that he felt he was justified in leaving her. His letter of December 8, 1954, was then produced to him and he was asked whether it was in his handwriting and was true, to which he replied that it was in his handwriting and was all true. The husband gave no other evidence in chief to rebut the charge of desertion. Until the moment when the letter was produced the wife's representative was unaware of its existence or of the nature of the husband's complaints against the wife. The justices having asked the wife's solicitor through their clerk whether he was going to call evidence in corroboration of the charge of adultery and having been told "No", dismissed the charge for want of corroboration. The husband was then cross-examined and stated that the wife was "dirty in every respect". The wife's solicitor applied for an adjournment in order to call witnesses to refute the husband's allegations. The justices refused the application but allowed the wife to be recalled. The wife's representative then sought to make a submission on a point of law, to the effect that the husband had failed to put forward a defence in law to the charge of desertion. The justices declined to hear the submission, and dismissed both complaints. On appeal by the wife, *Held*, The following irregularities in the conduct of the proceedings taken in conjunction made it impossible for the justices' decision to be supported: 1. In view of the husband's admission of the wife's evidence as to his association with Mrs. B., and of his failure to deny the wife's evidence that he admitted adultery with Mrs. B., it was impossible to say there was no corroboration of that charge; and the justices' intervention at the end of the husband's evidence in chief was unjustified both as regards the charge of adultery and as regards the charge of desertion; 2. The clerk to the justices should either have handed the husband's letter of December 8, 1954, to the wife's representative at the opening of the case, or have read out the letter in open Court; further, it was the duty of the Court under the Magistrates' Courts Act, 1952, s. 61, to see that the matters set out in the husband's letter were put to the wife in cross-examination; 3. It was wrong to elicit the husband's evidence on the charge of desertion by producing to him his letter of December 8, 1954, and asking him whether it was in his handwriting and was true and to deny the wife the opportunity to call witnesses to refute the husband's allegations; 4. It was also wrong to refuse to hear the submission of the wife's solicitor on a point of law after the conclusion of the evidence; accordingly, the case would be remitted for rehearing. (*Bartholomew* v. *Bartholomew*, [1952] 2 All E.R. 1035, and *Lang* v. *Lang*, [1954] 3 All E.R. 571, discussed.) Per Lord Merriman, P.: so far as the Court is aware, there is no decision in which "sluttishness" alone has been held to be a sufficient ground for a charge of constructive desertion. Appeal allowed. *Marjoram* v. *Marjoram*, [1955] 2 All E.R. 1. (P.D.A.).

FACTORY.

Dangerous Machinery—Duty to Fence—Grindstone—Grindstone fenced by "Hood"—Part of Grindstone exposed—Whether "securely fenced"—Factories Act, 1937 (Gt. Brit.), s. 14 (1); Factories Act, 1946 (N.Z.), s. 41 (4). The respondent, a maintenance fitter, was employed by the appellants in a steel works. While at work grinding the end of a bar of metal known as a "key" on a power-driven grinding machine, his thumb came into contact with the revolving grindstone and he was injured. The machine consisted of a horizontal shaft, mounted at a convenient height from the ground, driven by an electric motor which could be switched on when required, and carrying at each end of the shaft a circular grindstone or grinding wheel. When grinding a piece of metal the workman stood facing the edge of the grindstone which was moving downwards and he held the metal against the grindstone, resting it on a substantial rest which was about level with the shaft and adjusted so that there was a gap of about three-eighths of an inch between it and the revolving grindstone. The back and top of the grindstone were fenced by a guard in the shape of a hood, so that the only part of the revolving grindstone which was exposed was an arc about seven inches long between the hood and the rest. In an action for damages for breach of statutory duty under s. 14 (1) of the Factories Act, 1937, *Held*, 1. As the grinding wheel was a dangerous part of machinery within s. 14 (1) of the Factories Act, 1937, there was an absolute obligation under that subsection that the grinding wheel should be securely fenced; a dangerous part of machinery is securely fenced only if the presence of the fence makes it no longer dangerous in the sense that there is no longer a reasonably foreseeable risk of injury to the workman using the machine, even though he is careless or inattentive; on the facts the grinding wheel was not so fenced, and accordingly the appellants were in breach of statutory duty to the respondent, notwithstanding that the consequence of securely fencing the machine in accordance with the statutory obligation would be to render it commercially unusable. (*Davies* v. *Thomas Owen and Co.*, [1919] 2 K.B. 39, approved.) 2. (Lord Oaksey and Lord Morton of Henryton, dissenting) in all the circumstances the respondent was not guilty of contributory negligence. Per Lord Reid: in my judgment *Miller* v. *William Boothman and Sons, Ltd.*, [1944] 1 All E.R. 333, was rightly decided. In the recent case of *Richard Thomas and Baldwins, Ltd.* v. *Cummings* [1955] 1 All E.R. 285, I expressed the view that s. 60 of the Act of 1937 did not entitle the Minister to make a general amendment of a section: in that case, the argument was that regulations could be made, in effect, to alter the terms of s. 16 of the Act. In my view the Minister cannot alter the terms of the Act but he can, within a limited sphere, substitute other provisions for those of the Act. (Decision of the Court of Appeal, sub. nom. *Frost* v. *John Summers and Sons, Ltd.*, [1954] 1 All E.R. 901, affirmed.) *John Summers and Sons, Ltd.* v. *Frost*, [1955] 1 All E.R. 870. (H.L.)

——*Removal of Dust—"All practicable measures" to be taken—Masks provided, but Failure to take Reasonable Steps to induce Workmen to wear Them—Factories Act, 1937 (Gt. Brit.), s. 47 (1); Factories Act, 1946 (N.Z.), s. 56 (2).* From 1930 to March, 1951, the plaintiff was employed as a moulding machinist in the defendants' steel foundry. The sand used in the foundry was siliceous sand, but the risk of silicosis from the processes carried out in the foundry was not realized until about 1942. In 1939 the defendants provided a small number of masks for the use of the workmen when they were engaged on dusty jobs. From about 1942, when it began to be recognized that the processes carried out in the foundry might cause silicosis and that the use of masks might diminish the risk, the defendants provided, and kept in store, a sufficient number of masks for all their workmen, but, although the foundry manager spoke to the men from time to time about wearing the masks, very few of them did so. In March, 1951, the plaintiff was certified to be suffering from silicosis. According to the medical evidence, he had begun to suffer from the disease in or about 1939, and the disease was caused by his having inhaled, throughout the period of his employment, the silica particles arising from the work done in the foundry. The plaintiff claimed damages against the defendants for breach of their statutory duty under s. 47 (1) of the Factories Act, 1937, and of their duty at common law, as the plaintiff's employers, to take reasonable care of his health and safety. *Held*: 1. Once an employer knew, or ought to have known that his workmen were exposed to a material risk of contracting a serious disease, and that the risk could be diminished, if not eliminated, by the wearing of masks, it was his duty to take all reasonable steps, by clearly warning the men that they refrained at their own risk from wearing the masks, and, by encouragement and exhortation, to seek to persuade them to do so; on the facts the defendants should have appreciated in 1942-43 that workers on the foundry floor were exposed to risk of silicosis, and failed in their duty to endeavour to persuade the men to wear masks, and accordingly the defendants were in breach of their duty at common law to take

due care for the safety of the plaintiff. 2. " practical measures . . . to protect the persons employed against inhalation of the dust ", within s. 47 (1) of the Act of 1937, included the provision of masks and the taking of steps to induce the workmen to wear them, and accordingly, the defendants were also in breach of their statutory duty under the subsection. 3. The liability of the defendants in damages was limited to the damage attributable to their breach of duty, *viz.*, to the extent to which the plaintiff's condition, which had started before the defendants ought to have been aware of the danger to their workmen on the foundry floor and thus before they were in breach of duty to them, had worsened since the defendants' breach of duty began. *Crookall* v. *Vickers-Armstrong, Ltd.*, [1955] 2 All E.R. 12. (Liverpool Assizes.)

FAMILY PROTECTION.

Adoption of Child of Testator barring His Claim—Allegation that Adoption Order a Nullity—Necessity for Declaration, in Proper Proceedings whereof All Affected Parties have Notice, that Order void—Family Protection—Mental Defective—Defendant incurable and inaccessible—Impossibility of Spending His Military Pension usefully upon Him—No Need for Further Provision—Family Protection Act, 1908, s. 33. Where it is alleged by a person, otherwise entitled as a child of the testator to claim under the Family Protection Act, 1908, that his adoption by strangers was a nullity, the Court cannot in such proceedings treat as a nullity an order for adoption shown to have been made in due form by a Magistrate acting apparently within his jurisdiction. If that order is to be declared void, on the ground that, at the time of the adoption, the adopting parents were not man and wife, it must be so declared in proceedings which are properly directed to that end, and of which all persons affected must have proper notice. (*Tutua Teone* v. *Tipene*, [1936] N.Z.L.R. 642; [1936] G.L.R. 531, and *Skinner* v. *Carter*, [1948] Ch. 387, applied.) A mental defective, who has failed to respond to the most drastic treatment, whose chances of recovery are remote, who has become " inaccessible," and who has a military pension which it is impossible to spend usefully upon him and the savings from which are accumulating in the hands of his Committee, has no need of further provision under the Family Protection Act, 1908. *In re Wood (deceased), Robertson and Another* v. *Jones and Others.* (S.C. Palmerston North. March 16, 1955. Turner, J.)

FOOD AND DRUGS.

Milk—" Analysis " including Determination of Water Content of Milk Sample by Freezing-Point Test—Food and Drugs Act, 1947, s. 3 (5)—Statutes Amendment Act, 1949, s. 16 (2). The word" analysis " in s. 3 (5) of the Food and Drugs Act, 1947, (in the words added to that subsection by s. 16 (2) of the Statutes Amendment Act, 1949) is wide enough to cover the determination of the water content of a milk sample by the freezing-point test; and there is nothing in s. 12 (1) (*e*) or in s. 16 (6) (added by s. 12 of the Statutes Amendment Act, 1951) to justify placing a restriction on its ordinary meaning. (*Reed* v. *Jamieson*, [1949] N.Z.L.R. 880; [1949] G.L.R. 379, distinguished.) *Jamieson* v. *Sly.* (S.C. Palmerston North. March 7, 1955. Hutchison, J.)

GUARDIANSHIP OF INFANTS.

Jurisdiction—Statutory Right of Mother to be Guardian of Her Infant Children on Death of Father—Such Right subject to Exercise of Inherent Jurisdiction of Supreme Court to protect Infants, as Such—Presumption of Benefit to Child to be in Custody of Natural Parent—Presumption displaced by, inter alia, *Abdication by Parent of Parental Authority, Such as Court will not allow Parent to resume—Judicature Act, 1908, s. 17—Guardianship of Infants Act, 1926, s. 4 (1).* The inherent equitable jurisdiction vested in the Supreme Court by virtue of s. 17 of the Judicature Act, 1908, is unrestricted and unaffected by s. 4 of the Guardianship of Infants Act, 1926; and such jurisdiction, as distinct from the statutory jurisdiction conferred by the second paragraph of s. 4 of the Guardianship of Infants Act, 1926, enables the Supreme Court in appropriate circumstances to appoint a guardian or guardians of an infant to act alone, notwithstanding the fact that their mother, upon the death of their father, if he has not appointed a guardian, is still alive and possesses the statutory right of guardianship provided for in that section. (*The Queen* v. *Gyngall*, [1893] 2 Q.B. 232, applied.) The *prima facie* presumption that it is for the benefit of the child that he or she should be in the custody of the natural parent may be displaced by showing (i) that, under the circumstances which obtain, a serious reason is afforded why the parent's custody of his child would be in some important respect disadvantageous to the child; or (ii) by showing that the parent is by character or conduct unfit for the custody of his child; or (iii) by showing that the parent is lacking in affection for the child or has been unmindful of his parental duty towards it. (*Re Mills*, [1928] N.Z.L.R. 158; [1928] G.L.R. 157, followed.) There is, in addition the further ground upon which the presumption may be displaced—namely, there has been an abdiction by the parent of parental authority in such a way that the Court will not allow the parent to resume it. *Miller et Ux* v. *Pickens.* (S.C. Auckland. March 15, 1955. Shorland, J.)

HUSBAND AND WIFE.

Married Women's Property—Title to Matrimonial Home—Title in Wife's Name—Presumption of Gift to Wife rebuttable by Proof of Intention that Husband should own Property or have Some Interest therein—Nature of Such Proof—Every Circumstance properly bearing on Question of Ownership relevant—Once Possession by One Spouse of Legal Right Proved or inferred on Broad Considerations, Court free to exercise Discretion to do what is Fair between Parties—Such Discretion relevant to Nature of Relief to be granted—Court not bound to proceed with Strict Nicety in granting Such Relief—Nature of Order—Married Women's Property Act, 1952, s. 19—Statute of Frauds, 1677 (29 Car. 2, c. 3), s. 7. In proceedings for the determination of ownership under s. 19 of the Married Women's Property Act, 1952, every circumstance which properly bears on the question of ownership, or on the intention of the parties as determining ownership, is relevant; and further inquiry is not precluded by the fact that the legal title, in the narrow sense of that expression, is vested in one of the parties. (*Masters* v. *Masters*, [1954] N.Z.L.R. 82, applied.) (*Rimmer* v. *Rimmer*, [1953] 1 Q.B. 63; [1952] 2 All E.R. 863, explained.) The presumption of gift in favour of a wife arising from the fact that property is in her name throws upon the husband the onus of proving by circumstances other than the mere fact that he found the money, that there was, in fact, an intention that he should own the property or some interest in it. It is sufficient if he satisfies the mind of the Court: he is not bound to adduce compelling or demonstrative evidence. Once there are found to be circumstances capable of rebutting the presumption, the question of fact is to be determined in exactly the same way as if the position of the parties were reversed. (Dictum of *Vaisey*, J., in *Jones* v. *Maynard*, [1951] Ch. 572, 575; [1951] 1 All E.R. 802, 803, disagreed with.) Once it is ascertained from the proved or proposed intention of the parties, that one of the spouses possessed some beneficial interest in the eyes of the law, the Court will exercise the discretion given by s. 19, and do what is fair between the parties without going into long investigations: (*Barrow* v. *Barrow*, [1946] N.Z.L.R. 438; [1946] G.L.R. 245, referred to.) When the spouses, by their joint efforts, save money to buy a house which is intended as a continuing provision for them both, then, the proper presumption is whether or not the property was bought in the name of the husband alone, or in the name of the wife alone; if it was bought with money saved by their joint efforts, and it is impossible fairly to distinguish between the efforts of one and the other, the beneficial interest should be presumed to belong to them both jointly. (*Rimmer* v. *Rimmer*, [1953] 1 Q.B. 63; [1952] 2 All E.R. 863, followed.) Section 7 of the Statute of Frauds, which requires that a trust of land must be proved by writing, is not available as a defence in proceedings under s. 19 of the Married Women's Property Act, 1952. (*Rochefoucauld* v. *Boustead*, (1897) 1 Ch. 196, followed.) The husband's sworn testimony given in such a suit is not inadmissible as being in the nature of subsequent declarations by a donor, as the rule to the contrary applies only to declarations made out of Court. (*Warren* v. *Guerney*, [1944] 2 All E.R. 472, distinguished.) The discretion given by s. 19 of the Married Women's Property Act, 1952, to make such order as the Judge or Court thinks fit, is relevant to the nature of the relief that may be granted; and the Court is not bound to proceed with strict nicety in granting such relief. (*Tunstall* v. *Tunstall*, [1953] 2 All E.R. 310; [1953] 1 W.L.R. 770, and *Barrow* v. *Barrow*, [1946] N.Z.L.R. 438; [1946] G.L.R. 245, referred to.)

Shortly after the marriage of the parties in 1921, the husband bought a section of land with his own moneys, and took title in his wife's name. The building of the house was financed by borrowing on mortgage. The total cost of the property was about £1,000, and was paid for out of the husband's earnings. The repayment of the mortgage was not completed until 1953. The husband was a comparatively poor man, and the house had to be provided largely by the joint efforts and savings of the spouses in their wedded years. In 1949, the wife withdrew from cohabitation and had since resided with her sons, the husband continuing to live in the house and providing her with some maintenance. There was no separation agreement. On a summons by the husband under the Married Women's Property Act, 1952, claiming a beneficial interest in the matrimonial

home vested in the wife, *Held*, 1. That the fact that the husband, when he put the title in the name of his wife, though then free from financial difficulties, may have envisaged such difficulties in the future, was irrelevant; and that, in the absence of clear and considered expression as to ownership of the property, the intentions of the parties should be inferred on broad considerations, without too much attention to *minutiae*. (*Gascoigne* v. *Gascoigne*, [1918] 1 K.B. 223, distinguished.) 2. That the husband had rebutted the *prima facie* presumption in favour of the wife, and that it was the intention of the parties that he should have a beneficial interest in the property. 3. That the principle of equality should be applied, as there was nothing to qualify the interests of the parties; and equality seemed appropriate in all the circumstances. (*Thomson* v. *Thomson*, [1951] N.Z.L.R. 1047; [1951] G.L.R. 529, referred to.) 4. That there should be a declaration that the wife held the property in trust for herself and the husband as tenants-in-common in equal shares (if both desired it, they could seal the order substituting joint tenancy for tenancy in common); and that, until further order of the Court neither party should, by transfer or otherwise, create any right, title, or interest in any other person such as would entitle such other person to dispose of or enter into possession of the whole or any part of the property or any interest therein. (*Lee* v. *Lee*, [1952] 2 Q.B. 489; [1952] 1 All E.R. 1299, applied.) 5. That the wife should pay to her husband the costs of the proceedings, as fixed, and disbursements; that no execution should issue in respect of such costs except by leave of the Court or a Judge; and that the wife's liability for such costs should be an equitable charge on her right, title, and interest in and to the property, carrying interest as on a judgment. *Peychers* v. *Peychers*. (S.C. Nelson. In Chambers. February 25, 1955. F. B. Adams, J.)

LANDLORD AND TENANT.

Surrender of Tenancy — Agreement for six months' Lease *—Landlord on going abroad, informing Tenant to pay rent to named Agent—Tenant, at End of Two Months, asking for Account as he was vacating Property—Agent sending Account to Date mentioned by Tenant, and instructing Him where to leave Keys—Amount stated in Account as Balance of Rent paid, and Keys Left—Agent, General Agent of Landlord, with Implied Authority to Accept Notice as given—Delivery of Possession and Acceptance by Such Agent amounting to Surrender of Tenancy by Operation of Law.* L. and T. entered into a written agreement for a lease of L.'s property for six months, from March 23, 1954. The first month's rent was paid in advance to L. personally, and T. was instructed to pay the rent thereafter becoming due to F. The agreement remained with a firm of land agents. At the end of March, 1954, L. left New Zealand for abroad, and T. entered into possession of the premises. The rent was paid by T. to F. in April and May, and, on June 16, T. notified F. that he had to leave New Zealand at an early date and would be vacating the premises on June 27. He asked for an account but no mention was made of a surrender of the lease or of his giving any other notice. Next day, F. sent an account for rent to June 27, and told T. where to leave the keys. T. vacated the property, and handed over the keys as directed. On July 6, F. received a cable from L. that the tenancy was for a full six months and instructing F. to get the agreement from the land agents who had it, and collect the balance of the six months' rent. There was no evidence that T. had ever received a copy of the agreement. In an action by L. against T., claiming the unpaid balance of the six months' rent, for the period from June 28 to September 22, 1954, *Held*, 1. That the Court was bound to assume, in the absence of any finding of fraud (which was not alleged) that the notice by the defendant of his intention to determine the tenancy was given honestly and under a misunderstanding of the terms of the agreement. (*Gray* v. *Owen*, [1910] 1 K.B. 522, applied.) 2. That on the evidence F. was the general agent of the plaintiff, and as such general agent, had implied authority to accept the notice given by the defendant on June 16, 1954. (*Roe d. Rochester* v. *Pierce*, (1809) 2 Camp. 96; 170 E.R. 1093, and *Doe d. Earl Manvers* v. *Mizem*, (1837) 2 Mood. & R. 56; 174 E.R. 212, applied.) 3. That the tenancy had ended on June 27, 1954, in that on that date there had been a delivery of possession by the defendant to the plaintiff's general agent, and an acceptance of possession by such agent, which delivery and acceptance amounted to a surrender by operation of law. *Lander* v. *Testro*. (Wellington. March 4, 1955. Carson, S.M.)

MASTER AND SERVANT.

Duty of Master—Provision of Safe System of Working—Steel Foundry—Risk of Silicosis—Duty to provide Masks and to persuade Workmen to wear Them—Measure of Damages. (*Crookall* v. *Vickers-Armstrong, Ltd.*, [1955] 2 All E.R. 12. (Liverpool Assizes). (See under "Factory," *ante* p. 116.)

MORTGAGE.

Abandonment of Mortgaged Property—Mortgagors notifying Mortgagee that They had "abandoned the property" subject to Mortgage—Mortgagee entering into Possession—Document of "abandonment" not apt to make Mortgagee owner so as to empower Him to ask Mortgagors to transfer to Him, free of Encumbrances or at all—Court's Reluctance to presume Mortgage Converted into Sale resulting in Mortgagor's losing Equity of Redemption. D. and his wife were the registered proprietors of an estate in fee simple under the provisions of the Land Transfer Act, and B. was registered as the holder of a first mortgage of the property. There was, in addition, a second mortgage to L., and a third mortgage from D. to his wife. Up to June, 1935, D. and his wife were in occupation of the property. They became unable to meet the mortgage interest and outgoings on the property. They informed B. that they would have to leave the property. They left it on June 1, 1935. On June 4, they signed a document acknowledging, as mortgagors, to B. that they had abandoned the property subject to B.'s mortgage. B. took possession of the property, and he had since retained it and treated it in all respects as if it were his own. In August, 1946, D. bought L.'s second mortgage, and it was transferred to him. Since D and his wife left the property, they had not paid any interest to any of the mortgagees, or interested themselves in the property in any way. They refused to transfer the property to B. B., in an action against D. and his wife, claimed a declaration that he was entitled to have the legal estate in the property transferred to him free from encumbrances. *Held*, 1. That the Court will not readily presume that a transaction which was originally a mortgage only has subsequently been converted into a sale so that the mortgagor loses his equity of redemption. (*Johnson* v. *Commissioner of Stamp Duties*, [1941] G.L.R. 99, referred to.) 2. That the document of June 4, 1935, was an acknowledgment that the mortgagors "abandoned the property" on a specified date, and was not apt to make the mortgagee the owner of the property so that he could call upon the mortgagors to transfer it to him free from encumbrances, or at all. 3. That D. had not established anything which amounted to an undertaking or agreement by D. and his wife to transfer the property to him. *Bridge* v. *Denning et Ux.* (S.C. Auckland. March 24, 1955. Stanton, J.)

NUISANCE.

Trees—Encroaching Branches and Roots—Injunction restraining Owner of Trees from permitting Same to encroach on adjoining Land, and ordering Him to remove Same therefrom. A mandatory injunction may be granted to the owner of land suffering actual and sensible damage from the encroachment of branches and roots of a tree on an adjoining property, restraining the owner of the tree from permitting its branches and roots to encroach, and ordering him to remove all branches and roots so encroaching, if actionable injury to the owner of the land can be avoided without the removal of the offending tree. (*Mandeno* v. *Brown*: *Mandeno* v. *Wilkie*, [1952] N.Z.L.R. 447; [1952] G.L.R. 342, applied.) (*Butler* v. *Standard Telephones and Cables, Ltd.*, [1940] 1 K.B. 399, referred to.) General observations as to when nuisance, caused by trees on an adjoining property is or is not actionable. *Woodnorth* v. *Holdgate*. (S.C. Timaru. March 15, 1955. McGregor, J.)

POLICE OFFENCES.

Wilfully Damaging Property—Private Inquiry Agent forcing Door to Enter Premises occupied by Suspected Adulterer to obtain Evidence of a Wife's Adultery—Such Damage done "without colour of right"—Police Offences Act, 1927, s. 6 (1), (4)—Police Offences Amendment Act (No. 2), 1952, s. 2 (4). Any right, arising out of the right of *consortium*, a husband may have to enter property owned by his wife is not extended to a third person who is a stranger to her. (*Shipman* v. *Shipman*, [1942] 2 Ch. 140, referred to.) If a third person, such as a private inquiry agent, seeks such an entry to any building for the purpose of endeavouring to obtain evidence of a wife's adultery, and, in so doing, damages any property, he does so without "colour of right" within the meaning of those words as used in s. 6 (4) of the Police Offences Act, 1927, (as enacted by s. 2 (4) of the Police Offences Amendment Act (No. 2), 1952); and he is guilty of an offence under s. 2 (1) thereof. (*R.* v. *Fetzer*, (1900) 19 N.Z.L.R. 438; 3 G.L.R. 82, applied.) *Riley* v. *Police* (S.C. Auckland. April 4, 1955. Shorland, J.)

PROBATE AND ADMINISTRATION.

Intestacy—Rights of Surviving Spouse—"Personal Chattels"—Horses used for Racing—Administration of Estates Act, 1925 (15 Geo. 5 c. 23), s. 46 (1) (i), s. 55 (1) (x)—Administration Act, 1952, s. 56 (1) (a). The estate of an intestate who dies on

April 30, 1950, included twelve racehorses which, during the intestate's life, had been trained for him by his private trainers for flat-racing under the rules of the Jockey Club. The racing of the horses had been a recreation of the intestate. The intestate's widow claimed to be entitled to the horses by virtue of the Administration of Estates Act, 1925, s. 46 (1) (*i*). *Held*, The racehorses, not being used for business purposes, were horses within the meaning of that term as used in the definition of "personal chattels" in s. 55 (1) (*x*) of the Act of 1925, and, therefore, they formed part of the property to which the widow became absolutely entitled under s. 46 (1) (*i*). *Re Hutchinson (deceased), Holt* v. *Hutchinson and Others*, [1955] 1 All E.R. 689. (Ch.D.).

STOCK.

Offences—Prevention of Spread of Disease—Right to Prosecute for Offences not Restricted to Inspectors of Stock—"Other person interested"—Stock Act, 1908, s. 80. Section 80 of the Stock Act, 1908, is not to be interpreted as restricting to Inspectors of Stock the right to prosecute for a breach of s. 34 of that statute, as the Police may lay any information which a member of the public may lay, and it is not a necessary implication that such right is restricted to "other persons interested." (*Cole* v. *Coulton*, (1860) 29 L.J. M.C. 125, followed.) (*In re Lorie*, (1900) 19 N.Z.L.R. 400; 3 G.L.R. 99, referred to.) *Police* v. *Cuthbert*. Dargaville. January 27, 1955. Herd, S.M.

TENANCY.

Possession—Combined Shop and Dwelling—Tenant a Limited Liability Company—Company carrying on Grocery Business—Inquiry as to Purpose for which Premises occupied—Such Premises "Urban property," as Occupancy of Residential Portion Ancillary to Business User—Tenancy Act, 1948, ss. 2, 43 (1). The tenant of premises comprising a grocer's shop and dwelling was a limited liability company, and its primary object was assumed to be the carrying on of the business of a grocer and storekeeper. On the question whether the premises comprised "urban property" or a "dwellinghouse" within the meaning of s. 43 (1) of the Tenancy Act, 1948, *Held*, That the proper basis for determination whether the tenement was a 'dwelling-house" or "urban property," as those terms are defined respectively in s. 2 of the Tenancy Act, 1948, is the purpose for which the premises were occupied: and that, as the purpose for which the company entered into and occupied the premises was to carry on a business therein, and the occupancy of the residential portion was ancillary only to such business user, the tenement was "urban property." (*Chun Wah Trading Co.* v. *Guy On and Son Chung On*, [1954] N.Z.L.R. 670, applied.) *Park Grocery Co., Ltd.* v. *Andrews*. (Wellington. February 2, 1955. Carson, S.M.).

TRUST AND TRUSTEES.

Uncertainty as to the Objects of a Trust. *105 Law Journal*, 67.

A Gap in the Provisions of a Trust. *99 Solicitors' Journal*, 122.

VALUATION OF LAND.

Unimproved Value of City Properties—Valuation by Comparison with Normal Sales of Similar Land recently sold—Proper Method of Valuation—Capitalization of Net Annual Rentals Considered—Valuation of Land Act, 1951, s. 23. Seven owners of shop properties in Victoria Avenue, Wanganui, appealed against decisions of the Wanganui Land Valuation Committee, upon their objections to valuations made by the Valuer-General, on a revision of the Valuation Roll for the City of Wanganui. The general effect of the revision was to increase the aggregate capital value for the City by approximately 75 per cent., with similar increases in both the unimproved value and the aggregate of improvements. The respective increases in Victoria Avenue, which is the principal shopping street of Wanganui, varied somewhat from the general average. In this street, the average increase in capital value was about 60 per cent; in unimproved value, 44 per cent.; and in the value of improvements, 83 per cent. The appellants made no objection before the Court to certain increases in the capital value of their properties, which had been made by the Land Valuation Committee. The evidence showed that there had been a number of sales of shop properties in Victoria Avenue, both before and since the date of the revision, and that the prices paid had in general been higher than the capital values fixed on the revision. The appellants claimed, however, that in the apportionment of the capital values as between the land and the improvements, too much had been allowed for the land and too little for the improvements; and they contended that there should be a general reduction of 50 per cent. in the unimproved values of the properties concerned. In accordance with the prescribed form of objection, they had set out their estimates of the true values of their respective properties; and in the aggregate, they asked therein for unimproved values totalling £38,310 to be reduced to £29,712, or by about 23 per cent. The Land Valuation Committee made minor reductions in the unimproved value in six of the cases. The issue before the Court was whether the unimproved values in all the cases should be further reduced, on the ground that the Valuer-General had adopted a wrong method of valuation. H., the valuer principally concerned, said in evidence that he first fixed the unimproved value of each property by reference to six sales of comparable properties in Victoria Avenue. By an analysis of these sales, made with the advantage of long experience as a valuer in Wanganui and elsewhere, and taking into account all other relevant facts which were available, he had determined the unimproved values of the six properties sold. From these values, and with the assistance of a traffic-count taken at four suitable points, he had then drawn up a graded scale of unimproved values for Victoria Avenue. He said that he had done this without regard to the improvements on any individual property, save in the case of the six properties which had been sold. The improvements on all other properties had been valued by G.: and the capital values in each case had been arrived at by the addition to the unimproved value, which H. had found, of the value of the improvements which had been independently assessed by G. *Held*, 1. That the evidence did not warrant the conclusion that the Valuer-General had adopted a wrong principle of valuation. (*Thomas* v. *Valuer-General*, [1918] N.Z.L.R. 164; [1918] G.L.R. 64, followed). 2. That there was nothing in the evidence to justify the appellants' view that there had been a reduction in unimproved values in Victoria Avenue since 1947, when the previous valuation had been made; and that the acknowledged increases in capital values since that date had been reflected in the value of the land as well as in the value of the improvements thereon. (*In re Lismore Valuations*, (1953) *12 The Valuer*, 277, referred to.) 3. That the appellants had not discharged the onus of proof imposed on them by s. 23 of the Valuation of Land Act, 1923; and their claim for a general reduction of 50 per cent. in the unimproved values fixed by the revision of the Valuation Rolls in 1952 accordingly failed. *In re Wanganui City Valuations*. (L.V. Ct. Wanganui. November 18, 1954. Archer, J.).

WORKERS' COMPENSATION.

Accident arising out of and in the Course of the Employment—Hernia—Right to Compensation for Residual Partial Incapacity following Hernia Operation—Provision of "suitable employment"—Worker entitled to seek Other Employment if Employment provided or found by Employer not "suitable"—Worker entitled to Compensation for Loss of Earnings on that Other Employment—Information as to Time and Place of Operative Treatment required by Court—Workers' Compensation Act, 1922, s. 5 (6)—Workers' Compensation Amendment Act, 1943, s. 6 (2) (3)—Workers' Compensation Amendment Act, 1953, s. 4 (1). Once a worker, who claims compensation for incapacity resulting from hernia has established that his case comes within s. 6 of the Workers' Compensation Amendment Act, 1943, his rights to compensation, subject to subss. (2) and (3) of that section, are as set out in s. 5 of the Workers' Compensation Act, 1922. He is entitled to compensation for total incapacity; and, where there is a residual partial incapacity following a hernia operation, he is entitled to compensation as for partial incapacity. (*Bishop* v. *Fletcher Construction Co., Ltd.*, [1945] N.Z.L.R. 128; [1945] G.L.R. 5, followed.) (*Crosby* v. *Empire Rubber Mills, Ltd.*, [1952] N.Z.L.R. 332; [1952] G.L.R. 211, distinguished.) If, in terms of s. 5 (6) of the Workers' Compensation Act, 1922 (as enacted by s. 4 (1) of the Workers' Compensation Amendment Act, 1953) the employment provided by the employer was "suitable employment" (which is to be decided on the facts), the worker is not entitled to compensation for loss of earnings. But, if the employment found for him by his employer was not "suitable employment," the worker is entitled to seek other employment; and, having got that employment at a loss of earnings, he is entitled to compensation. It is open to the employer at any time to apply for an order under s. 6 (2) of the Workers' Compensation Amendment Act, 1943; but, if such an application be made, the Court requires information as to when and where the plaintiff could expect to get the appropriate operative treatment. *Boyle* v. *Petrous Tile Co. (Auckland), Ltd.* (Comp. Ct. Auckland. December 1, 1954. Dalglish, J.)

THE LATE SIR JOHN RANKEN REED.

Tributes by Bench and Bar.

There was a large gathering of practitioners in the Supreme Court, Wellington, on April 29, to honour the memory of the Hon. Sir John Reed, Kt., C.B.E., who gave a long and distinguished service as a Judge of the Supreme Court and as a member of the Court of Appeal. He died at Auckland on April 22.

The Chief Justice, Sir Harold Barrowclough, presided. With him on the Bench were Mr. Justice Fair, Mr. Justice Finlay, Mr. Justice Hutchison, Mr. Justice Cooke, Mr. Justice North, Mr. Justice Turner, and Mr. Justice McGregor.

THE BENCH.

His Honour the Chief Justice said :

" For many years much of the business of this Court was transacted before the Hon. Sir John Reed, and it is proper that we should interrupt, for a brief period, the business of to-day in order that we may make a fitting reference to his death, which occurred a few days ago, and pay our tribute to his work whilst he sat upon this Bench.

" Sir John was appointed as a Judge in 1921 and he retired from the Bench in 1936, but served again as a temporary Judge from 1936 to 1939.

" Because he retired so many years ago, he is unknown to some of those here present, except so far as a Judge may be known by such written records of his labours as are preserved in the *Law Reports*. To the layman, a reported judgment may be uninteresting reading ; but to the lawyer they portray the clearest possible picture of their author's scholarship and learning, his sense of impartiality and justice, his industry and devotion to his work, and, generally, what manner of man he was.

" Those of you whose call to the Bar postdated Sir John's retirement will therefore know how well and how ably he discharged the duties of his high office. Those of us who have had the privilege of appearing before him know that, and a great deal more, and it was with a real sense of loss that we learned of his death. Some of my brethren had the pleasure and the advantage of being associated with him on the Bench, and I know how highly they value that association.

" Sir John was a man who served well his day and generation. After a distinguished career at the Bar, he served with equal distinction on the Bench. He was prominent in the military sphere, and for a time actually commanded his regiment. For two important years in the earliest days of the New Zealand Territorial Army, he served as Judge Advocate-General of the Army. He was a former President of the Prisons Board, and onetime President of the Auckland District Law Society.

" It is gratifying to reflect that, notwithstanding the arduous nature of his judicial and other work, it was vouchsafed to him to enjoy for many years in his retirement the leisure which he had so richly deserved. He lived well beyond life's allotted span, and died in his ninety-first year. It was inevitable that the closing years of his life should be marked by the onset of the infirmities of age. These he bore with characteristic fortitude, and his friends will find comfort in the knowledge that from these infirmities of the flesh he is now happily released.

" Our thoughts at this time turn to the members of his family. To Lady Reed, to his son—himself a member of his father's and our profession—and to his daughter. I offer, on behalf of all the members of the Judiciary, the sincerest sympathy. We share their loss and grief ; but we find comfort, as we hope they will find comfort, in our fond memories of a wise and upright Judge who, for eighteen years, adorned this Bench and never once failed in the performance and discharge of the duties of the high office to which he was called.

" His life and work will stand as an example alike to those who practise in the law as to those who are called to adjudicate upon it. Of himself, Sir John could truly have said " *non omnis moriar* " : for of him there still lives in our minds the memory of one whom we were glad to know, and whom we would be proud to emulate.

" I am indeed gratified that circumstances have permitted so many of my brethren to be present here this morning and to join with you all in paying tribute to a distinguished Judge of this Court."

THE ATTORNEY-GENERAL.

The Attorney-General, the Hon. J. R. Marshall, said that members of the profession were gathered together that morning to remember the life and work of the Hon. Sir John Reed, who had died this week at Auckland at the age of ninety.

The Attorney-General continued : " Sir John Reed was admitted to the New Zealand Bar in 1887—sixty-eight years ago. He had a distinguished career at the Bar. He was appointed a King's Counsel in 1913, and was the Leader of the Bar in Auckland until his appointment as a Judge of the Supreme Court in 1921. Thereafter, he sat as a Judge in Wellington and in the circuit towns served from this centre.

" Mr. Cleary and Mr. Hogg will say more of Sir John as a Judge. I would only like to recall that I made my first appearance in this Court before him. I was then a newly-admitted member of the Bar and he on the point of retirement, but I remember very clearly and gratefully the calm dignity of his presence on the Bench, and his great courtesy and patient consideration shown to counsel.

" It is fitting also that I should refer to the public service which Sir John rendered, not only as a Judge of this Court, but before his elevation to the Bench. It is to the great credit of the profession that it attracts and develops men of quality who are prepared to devote their energies to voluntary service to the community.

" Sir John in his day and generation was typical of the best qualities of the profession. He gave, as the learned Chief Justice has mentioned, distinguished service in the Territorial Forces as Colonel of the Third Auckland Regiment, and later as Judge Advocate-General. He gave valuable service to education as a member of the Auckland Education Board. He served the profession and was President of the Auckland District Law Society. While on the Bench, he was for eight years President of the Prisons Board.

"When the members of the Bench and Bar assembled in this Courtroom on October 2, 1939, to mark the final retirement of Mr. Justice Reed from the Bench, Mr. H. F. O'Leary, then President of the New Zealand Law Society, and Mr. A. T. Young, President of the Wellington District Law Society, both expressed the wish that Sir John and Lady Reed would enjoy a long and happy retirement. It is good to know that that wish has been realized.

"To Lady Reed, who shared in his long, active, and distinguished career for sixty-five years, and to the members of the family, we offer our respectful sympathy."

THE NEW ZEALAND LAW SOCIETY.

Mr. T. P. Cleary, President of the New Zealand Law Society, said that the New Zealand Law Society wished to associate the members of the profession throughout New Zealand with the tributes to the memory of Sir John Reed which had been paid by His Honour the Chief Justice and the Attorney-General.

"Sir John's death has broken many links with the past and with names that are now becoming legendary in our legal history," Mr. Cleary said: "He was admitted to the Bar midway through the term of Sir James Prendergast's Chief-Justiceship. He was a pioneer practitioner in the Far North. He was called within the Bar some forty-two years ago, and became a Judge thirty-four years ago. He was the last survivor of the Judges who sat with Sir Robert Stout as Chief Justice.

"Those who remember him as an advocate are now dwindling in numbers. The *Reports* bear ample witness to the extent of his practice and the vigour of his powers during the years when he was at the forefront at the Bar. The wealth of experience then gained, as to men and affairs, allied with his wide knowledge in the law, served admirably to equip him for the Bench; and it is as a Judge that practitioners best remember him, although there is a generation now rising which little knew him as a Judge.

"We recall his courtesy to all; the urbanity with which the proceedings of his Court were conducted; the unpretentious dignity with which he bore his office; his quiet sense of humour; his deep understanding of human nature and of the springs of human conduct. These, and his other qualities that have been spoken of to-day, gave rise to a deep respect and enduring affection on the part of those who practised before him. But there was a further quality, which was referred to by the Attorney-General and which cannot be passed over with a mere phrase: his consideration and kindness towards juniors who appeared before him have left a deep impression on many who recall with gratitude the help and guidance and forbearance they experienced from him. The profession retains memories of an able and considerate Judge and of a kindly and charming man.

"I would like in a special way to associate the practitioners of Auckland with to-day's tributes. Sir John served as President of the Law Society of that district; and, after his retirement from the Bench he returned to Auckland and became once again a familiar figure in that city until accident and illness disabled him. The thought of all the profession, and particularly of Auckland members, have gone out to him in these late years.

"To his widow, who was his helpmate for so long and whom many will remember as accompanying her husband to the Courts in which he sat; to his son, who is an esteemed member of the profession which his father adorned, and to his daughter, we all extend our deep sympathy."

THE WELLINGTON LAW SOCIETY.

Mr. E. T. E. Hogg, President of the Wellington District Law Society, said that he desired to ask that Wellington practitioners should be especially associated with the tributes paid by His Honour the Chief Justice, the Attorney-General, and the President of the New Zealand Law Society.

"Sir John Reed spent his period of practice in Auckland and to Auckland he returned to spend his retirement, but Wellington was particularly fortunate in that during practically the whole period of his judicial career he was stationed here," Mr. Hogg proceeded: "For during that period he established himself in the warmest esteem and greatest affection with every member of the profession. His kindliness assisted the faltering words of many a young practitioner making his first appearance in Court. His consideration, courtesy, and urbanity made practice before him a pleasure to the whole Bar.

"When he finally retired in October, 1939, we held in this Court a farewell function to him, and no one who was there will easily forget that moving scene. On that occasion, as the Attorney-General has said, we expressed the hope that he would be fortunate enough to have a long life to enjoy a well-earned retirement; and, as the Attorney-General has said, we are also delighted that that hope to a great gentleman and able Judge was so generously fulfilled.

"Sir John leaves behind him one who has shared his earlier career at the Bar and who was standing at his side through a long period. To her and to their daughter and their son—who is himself an honoured member of our profession—we extend our deep sympathy in what is to them, as it is to us, a very sad bereavement."

AT AUCKLAND.

Tributes by Bench and Bar were paid to the memory of the late Sir John Reed at the Supreme Court, Auckland, on May 2.

On the Bench were Mr. Justice Finlay, Mr. Justice Stanton, Mr. Justice North, and Mr. Justice Shorland. There was a large gathering of Auckland practitioners.

Mr. Justice Finlay said: "We are met to mourn the passing of a great figure that was essentially of your order and our brotherhood—and of Auckland. Always surely competent, always courteous and urbane, and always understanding, he won easily and naturally the confidence and goodwill of all with whom his diverse activities—whether legal, civic, masonic, or military—brought him in contact. And he retained that confidence and goodwill, and the respect and affection which they engendered: for his outward qualities were but the manifestation of an inward uprightness and integrity of character, which, being of the very essence of the man, were rocklike in their immobility.

"It was more than for himself a fortunate circumstance when John Ranken Reed was called to the Bar in 1887. It was a fortunate circumstance for the legal profession, and a fortunate circumstance for the Country.

He came to the law singularly well equipped. His boyhood and youth were spent in an intellectual atmosphere, and to that advantage was added the privilege of a sound education, broadened and deepened by study at the law-school of a great English University.

"It was a fortunate circumstance, too, that his first years of practice were spent in the country. At Kawakawa, a territory then in the making, practice was diversified and truly general. It afforded any practitioner there with an education and with experience in the law in its every aspect, and with a knowledge of human nature, that were a sound assurance of success. After seven years he came to Auckland, an experienced practitioner, a man understanding and understood by men. And what a body of brilliant practitioners he joined. The traditions of great men still lived. There were great men still practising or but recently retired. The names of Theophilus Cooper, Edwin Hesketh, Frederick Earl, and the Hon. J. A. Tole are still fresh in memory: Robert McVeagh and Dean Bamford were giving that promise which came to complete fulfilment in McVeagh, but which was frustrated in Bamford by an untimely death that was the source of infinite regret. In the ranks of these men, J. R. Reed took his place; and, as they fell by the wayside, he became more and more pre-eminent. Memory thrills at the recollection of the contests in which he took a leading part. For many of us these old walls still echo that quiet cultured voice—dignified and unruffled, courteous but courageous, he went his winning way.

"Then came 1921 and his appointment to the Bench; and his embarkation upon the greatest achievement of his life. Again, he joined a body of great men, the greatest we have ever known. But Mr. Justice Reed took his equal place among them. To the Bar he was courteous, kindly, and helpful, ever ready to listen to any argument yet always firmly in charge of proceedings. His industry as a Judge was indefatigable: to the depth and range of his learning the *Reports* bear witness. He brought to his work qualities of mind and of heart that are given to few; and now he has gone: the lips of the great advocate are sealed, the voice of the great Judge is silenced; and in the hearts of those who knew and loved him there is a void that can never be filled.

"To his wife, his constant companion and helpmate through life, and to the members of his family we extend our deepest sympathy.

"In sorrow for his loss but with respectful admiration for his qualities, we say our last farewell."

The Auckland Law Society.

The President of the Auckland District Law Society, Mr. S. D. E. Weir, addressing the Bench, said that the members of his Law Society respectfully desired to associate themselves with the tribute which their Honours had just paid to the memory of Sir John Reed.

The speaker said that he had a telegram from the Hon. the Attorney-General, regretting that he was unable to be present. He had also been asked by the Taranaki District Law Society to say that that Society wished to be associated with the remarks which he should make, and that it should be represented at this gathering. Mr. Weir continued:

"We meet to-day to mark the passing of an outstanding figure of our profession and one of the best-loved of our Judges; and it is fitting that we should meet in this Court with which he was so long connected, in this city which knew him so well.

"It is true that he was not born here, but he had his early education at the Auckland Grammar School, and, after attending other colleges in New Zealand and abroad, including Clare College, Cambridge, he returned to New Zealand and was articled to Messrs. Devore and Cooper of this city, being admitted in 1887.

"Your Honour has referred to Mr. Reed, as he then was, practising at the Bay of Islands until 1896; and there are many stories of the long journeys on horseback which Mr. Reed then took in order to attend to the affairs of his practice in that district. He returned to Auckland at the instance of Mr. Baume, who thought his talents were being wasted in the North. After a very short partnership with the late Mr. William Thorne, he commenced practice here on his own account, and was subsequently in partnership until his appointment to the Bench in 1921.

"He received his Letters Patent as King's Counsel in 1913.

"The members of the profession who knew him at the Bar are becoming fewer, but it is agreed he was a most successful advocate and a leader of his profession. He was a very persuasive pleader before a jury and a most formidable opponent at all times. Yet, formidable though he was in legal argument and in forensic eloquence, he was always courteous, approachable, and of unruffled temper—qualities which he took with him on to the Bench, and which helped to make him so well respected as a Judge. His experience covered all kinds of Court proceedings, both civil and criminal; and few celebrated cases during his period at the Bar that did not include Mr. Reed, as he then was, as one of the counsel engaged.

"His activities before his appointment as a Judge were wide, embracing as they did matters of education, public and social affairs, and the realm of Freemasonry, in all of which he gave valuable service and held high office. In the military sphere, too, he was prominent, holding latterly the rank of Colonel and the office of Judge Advocate-General. For his services in that office, he was, in 1919, made a Companion of the Order of the British Empire.

"He served his fellow-practitioners well in the work of the District Law Society, and for three years held the office of President.

"He was appointed a Judge in 1921, was knighted in 1936 while senior puisne Judge—and in that year retired on reaching the age-limit. For a time he had served as Acting Chief Justice. From 1936 to 1939, he served as a temporary Judge during Mr. Justice Johnston's term as Judge of the Court of Review. His circuit duties required him to travel extensively, and he frequently presided over the Court at Auckland. He finally retired in 1939.

"Sir John Reed's career, before his appointment in 1921, fitted him eminently for the high office he was to assume. His experience as an advocate and as a public man had afforded him a wide knowledge of men and of human nature. He was learned in the law, and he had sagacity in the application of legal principles. He had patience and serenity of demeanour, and an unfailing courtesy to all with whom he came in touch. Above all, he was imbued with an earnest desire to do justice and did not spare himself in seeking to achieve that aim."

"It followed naturally that he should be a good Judge, in the best sense of those simple words; and he has always been held in the highest respect—indeed affection—by all who had the privilege to appear in his Court.

"His family life was always a happy one; and the devoted attention of Sir John Reed to his wife, and of Lady Reed to her husband, was a lovely thing right up to the end.

"Bacon says of Judges in his Essay, *Of Judicature*, that 'Integrity is their portion and proper virtue.'

"In simple truth, Sir John Reed was of the company of these men, and we are grateful for his memory and example.

"To Lady Reed and the members of her family we offer our respectful sympathy in their loss; but we share their pride in his life of true service and achievement.

CONSTITUTIONAL LAW: INVALIDITY OF GENERAL ELECTIONS.

Failure to Perform a Statutory Duty.

By J. F. Northey, B.A., LL.M, Dr. Jur. (Toronto)

In *Simpson* v. *Attorney-General*, [1955] N.Z.L.R. 271, the plaintiff sought a declaration that some hundreds of statutes passed by the General Assembly since 1946 were void and of no effect. Few would disagree with the remarks of the learned Chief Justice and the members of the Court of Appeal that the upholding of the plaintiff's submissions would cause "serious general inconvenience." One is tempted to question whether the plaintiff fully realised the consequences of a decision in his favour. He sought a declaration that, because of certain irregularities, the General Election of 1946 was destitute of legal effect and that, in consequence, all statutes enacted since 1946 were void. The immediate effect of the declaration sought would have been serious enough, but its likely consequences would have been even more far-reaching. Presumably, as there would have been no duly elected members of Parliament, there would not have been any validly appointed Ministers of the Crown,[1] or any valid appointments on the advice of such Ministers. Even the appointment of the present Governor-General would have been under suspicion because, by virtue of resolutions adopted at the Imperial Conference of 1930,[2] the Crown, in appointing a Governor-General of a Dominion, must act on the advice of the Ministers in the Dominion concerned. As all of the Judges involved in the proceedings were appointed since 1946, the Court was faced with a truly Gilbertian situation.[3] Only the passage of legislation by a Parliament comprising duly elected members and a validly appointed Governor-General could have validated what had been done since 1946, but if the provisions of the Electoral Act are treated as mandatory, valid elections under that Act could not be held save in terms of ss. 101 and 102.

These unusual, and perhaps unique, proceedings were brought by a private individual who had no financial or other interest in the matters before the Court. The plaintiff conducted his own case and it is interesting, but perhaps fruitless, to speculate whether the case would have been decided otherwise if the plaintiff had been assisted by counsel. Because the submissions of the plaintiff and counsel for the Crown have not been included in the *Reports*, it is not possible to gauge how fully the main issue—whether the provisions of the Electoral Act, 1927, ss. 101 and 102, are mandatory or directory—was argued by the parties.

As stated, the plaintiff sought a declaration that the General Election of 1946 was void,[4] and that all statutes passed since that date were also void. Though there were inconsistencies in the plaintiff's submissions,[5] it was conceded that there had been irregularities in relation to the 1946 election. The arguments of the plaintiff can perhaps be summarized as these:

(1) that there had not been compliance with the Electoral Act, 1927, ss. 101 and 102, in that the Warrant and writs called for by those sections had not been issued in accordance with those provisions; in consequence, the elections were void and the statutes passed by irregularly elected Parliament were also void;

(2) that the statutes assented to by the Governor-General on October 12, 1946, were null and void because the term of the House of Representatives expired on October 11, 1946, in terms of the Electoral Amendment Act, 1937, s. 2 (1).[6]

The first of the plaintiff's submissions, if upheld by the Court, would necessarily have struck down the

[1] Clauses V and VII of the Letters Patent constituting the Office of Governor-General (*1919 New Zealand Gazette*, 1213,1214) do not require members of the Executive Council or Ministers to be members of Parliament; but it is a constitutional convention, supported in part by the Civil List Act, 1920, and amendments, that they should be members of Parliament. But, by s. 6 of the Civil List Act, 1950 (one of the statutes falling within the declaration sought by the plaintiff), Minister and members of the Executive Council must be members of the House of Representatives.

[2] *Report of the Imperial Conference, 1930*, Cmd. 3717, (1930), p. 27.

[3] This was in part recognized by the Court of Appeal. The plaintiff is reported ([1955] N.Z.L.R. at p. 277) as having consented to the Court, the members of which were personally interested in the proceedings, hearing the case. The plaintiff's and the Court's dilemma was shown by the necessity for his consent to be given. Of course, if the Judges were not validly appointed, the plaintiff's consent would not have made him competent to hear the case.

[4] The plaintiff, in argument, also challenged the validity of the 1943, 1949, and 1951 General Elections. Both in the Supreme Court and the Court of Appeal, the plaintiff was permitted to make submissions on questions not raised in the originating summons. Because the proceedings were commenced before the 1954 General Election was held, the validity of that election was not in issue.

[5] In particular, he relied on the Crown Proceedings Act, 1950, one of the statutes which would have been deprived of validity had the proceedings been successful; see the judgment of Stanton and Hutchison, JJ., at p. 277.

[6] The proceedings were apparently prompted by a statement made by the Minister in Charge of the Electoral Department: see the judgment of Sir Harold Barrowclough, C.J., at p. 274.

statutes assented to on October 12, 1946. We shall deal with the first submission, which was rejected by Sir Harold Barrowclough, C.J., and all the members of the Court of Appeal, and then with the second submission which was left open by McGregor, J., it being a question which was dealt with *en passant* by the appellant and counsel for the Crown. Apparently, there was not full argument on this issue.

I. Non-compliance with the Electoral Act, 1927, ss. 101 and 102.

Before the learned Chief Justice, the plaintiff was apparently content to argue that the writs for the 1943 and 1946 General Elections ought to have been made returnable, as required by the Electoral Act, 1927, s. 102 (4),[7] earlier than was actually the case. On appeal, certain additional points were taken by both parties.

Under the Electoral Act, 1927, ss. 101 and 102, the Governor-General is required by Warrant to direct the Clerk of the Writs to proceed with the General Elections. The Warrant is to be issued not later than seven days after the dissolution or expiry of the last Parliament. The Clerk, on receiving the Warrant, must within three days issue the writs which shall be made returnable in forty days. In 1943, the writs were issued on August 31 and were made returnable on Monday, October 11. This was forty-two days after issue if the days of issue and return were included; he failed on this objection when the learned Chief Justice ruled that the writs were properly made returnable on Monday and not Sunday—a holiday within the meaning of the Acts Interpretation Act 1924, s. 25 (*a*). On appeal, he argued that the date of issue should be included in the computation and that the writs should have been made returnable on Saturday, October 9, 1943. This objection failed when the Court of Appeal held that the forty-day period was to be reckoned as exclusive of the day of issue.[8] Had the plaintiff succeeded, the General Elections of 1949 and 1951 and by-elections of 1953 would also have been affected.[9]

In 1946, another and more serious irregularity occurred. The term of the House of Representatives expired on October 11, but the Governor-General purported to dissolve it on November 4. The Governor-General's Warrant was issued on November 4, and the writs were issued on November 6. In fact, they should have been issued in terms of a Warrant to be signed within seven days of October 11. In consequence, the writs were made returnable on December 16, instead of a date some three weeks earlier. The learned Chief Justice was satisfied that the provisions of s. 101 were directory and not mandatory; and, in consequence, that the acts done were not invalid. An additional point was taken by the Crown in the Court of Appeal, where it was argued that the Governor-General, in setting in motion the electoral machinery, was exercising the Royal Prerogative.[10]

[7] This section was amended by the Electoral Amendment Act, 1953, s. 5.

[8] The Court relied on the Acts Interpretation Act, 1924, s. 25 (*b*). There would not have been any difference in the computation of time if s. 102 (4) had read: "Every writ shall be made returnable forty days after its issue": Stanton and Hutchison, JJ., at p. 278.

[9] See the judgment of Stanton and Hutchison, JJ., at p. 277.

[10] This argument is examined at p. 125, *infra*.

The learned Chief Justice relied, as did the Court of Appeal, on a statement of the Judicial Committee in *Montreal Street Railway Co.* v. *Normandin*, [1917] A.C. 170. The Judicial Committee is reported as stating at p. 175:

> When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done.[11]

That decision related to the effect on a judgment in an action for damages of non-compliance with a statutory provision for the revision of the civil jury list. To declare invalid decisions given on the basis of a list, which did not comply with the statute, would certainly have caused "serious general inconvenience." On appeal, the appellant sought to distinguish *Montreal Street Railway Co.* v. *Normandin*, and, indeed, the decision seems to rest on a knife-edge. If the provisions of ss. 101 and 102 are regarded merely as directory, non-compliance would not render the elections invalid, whereas to have treated them as mandatory would have invalidated the entire election proceedings. The decisions on the meaning of statutory provisions in which the word "shall" appears are difficult to reconcile.[12] Of the many decisions on this question, those dealing with the time and manner of making out lists of persons entitled to vote or the time within which such lists must be delivered to the returning officer.[13] approximate the facts of *Simpson* v. *Attorney-General*. In those cases, the provisions were construed as directory; but there is no reason for treating those cases as more compelling than many others in which the provision was treated as mandatory. However, the learned Chief Justice and the Court of Appeal referred not only to the serious general inconvenience that would result, but also to the fact that to declare the election invalid would not promote the main object of the Electoral Act which is to sustain, not to destroy, the House of Representatives.[14] Sir Harold Barrowclough, C.J., concluded, at p. 275, that "the election was conducted in accordance with the principles of the legislation, even if not strictly in accordance with the letter of it."

This ruling disposed of the major issue in the Supreme Court; but in the Court of Appeal the Crown put forward an alternative submission. The Crown argued

[11] Neglect of the duty imposed by s. 101 is not made punishable; on this ground the principle can be said to be inapplicable.

[12] *E.g.*, see *24 Halsbury's Statutes of England*, 2nd Ed., 152-4; *31 Halsbury's Laws of England*, 2nd Ed., 529-31; *4 Stroud's Judicial Dictionary*, 3rd Ed., 2748-2754.

[13] *Morgan* v. *Parry*, (1856) 25 L.J.C.P. 141, and *Brumfitt* v. *Bremner*, (1860) 30 L.J.C.P. 33; *cf. Wells* v. *Stanforth*, (1885) 16 Q.B.D. 244. See also *Springer* v. *Doorly* (unreported but see notes in (1950) *66 Law Quarterly Review*, 299 and (1950) *28 Canadian Bar Review*, 791, where the words, "All such regulations . . . shall as soon as possible . . . be submitted for the approval of both Houses . . ." were held to be directory. *Normandin's* case was relied upon in that case.

[14] Presumably the Courts are likely to hold that the power of dissolution also conferred by Clause X of the Letters Patent is unaffected by the New Zealand Constitution Act, 1852, s. 44. That section provides that the Governor-General may at his pleasure dissolve the General Assembly: *Cf.* Northey, *The Prerogative Power of Dissolution*, (1951) 27 N.Z.L.J. 204 and *The Dissolution of the Parliaments of Australia and New Zealand*, (1952) U.T.L.J. 294.

that, even if the Governor-General was late in setting the electoral machinery in motion, he was then exercising the Royal Prerogative and not a statutory power. In this capacity, he did not need to comply with the Electoral Act, s. 101. Clause X of the Letters Patent reads :

> The Governor-General may exercise all powers lawfully belonging to Us in respect of the summoning, proroguing, or dissolving any Legislative Body, which now is or hereafter may be established within the Dominion, and in respect of the appointment of Members thereto.

But before the Crown's submission that the Governor-General was acting under Clause X could be accepted, it was necessary to consider the effect on Clause X of the Electoral Act, s. 101 and the decision in *Attorney-General* v. *De Keyser's Royal Hotel, Ltd.*, [1920] A.C. 508. Under that decision, a statutory provision which covers what formerly fell within the prerogative abridges the prerogative. After the enactment of such a statutory provision, the prerogative can be exercised only subject to the limitations, restrictions, and conditions imposed in the statute. The Court of Appeal held, at p. 280, that s. 101 did not impose any limitations, restrictions or conditions upon the exercise of the prerogative.[14a] Hence, in issuing the Warrant after the expiration of the seven days fixed by s. 101, the Governor-General was exercising the prerogative power conferred by Clause X of the Letters Patent which was in no way affected by s. 101.[15] Stanton and Hutchison, JJ., stated at pp. 280-1 :

> It could not have been the intention of the Legislature that, if some calamity or even illness, or, as is doubtless the position here, some mistake on the part of some officer, resulted in the Governor-General's not issuing his Warrant within seven days after the expiry of a Parliament, that should affect the prerogative right to summon Parliament as occasion might require after the expiration of the seven days [16].

II. Assent to Bills on October 12, 1946.

This question was not raised in the originating summons,[17] but both the Supreme Court and Court of Appeal heard argument on the point. The *Journal of the House of Representatives, 1946*, p. 278 records that certain Bills were assented to on October 12, 1946, the day after the term of the House of Representatives expired under the Electoral Amendment Act, 1937, s. 2 (1). The learned Chief Justice considered that it was unnecessary for the assent to be notified while the House of Representatives continued in being. He referred to the period that elapsed in securing the Royal Assent to a Bill received for the signification of His Majesty's pleasure in 1935. Assent was not notified until April, 1936, when a different Parliament was in session.[18] A similar view was expressed by Stanton and Hutchison, JJ., at p. 283. The conclusion of the learned Judges was based on a consideration of practice in the United Kingdom, of the New Zealand Constitution Act, 1852, ss. 32, 53, 56, and 59, and of the Standing Orders of the House of Representatives.[19] Reference was also made to the Acts Interpretation Act, 1924, s. 17, and to the Evidence Act, 1908, ss. 28 and 29, which were considered to have some bearing on this issue.[20]

McGregor, J., preferred to leave this question open,[21] principally because the Court had not had the benefit of full argument. The learned Judge doubted the relevance of what had occurred in 1935 when a Bill was reserved for the signification of the Royal Assent. The granting of the Royal Assent by the sovereign is a prerogative act, whereas the granting of assent by the Governor-General of New Zealand is a legislative act. By virtue of the New Zealand Constitution Act, 1852, s. 32, the Governor-General is a part of the General Assembly.[22] It, therefore, appeared to the learned Judge that the valid exercise of the legislative act of assenting to Bills demanded the continued existence of the other parts of the General Assembly.[23]

With respect, the judgment of McGregor, J., who merely wished to enter a caveat on the narrow point now being discussed, appears to the writer to be more convincing that that of the other members of the Court. The distinction between the act of assent when given by the Sovereign and the Governor-General is vital. The latter is a part of the Legislature and is not exercising the Royal Prerogative when assenting to Bills. But the learned Judge concurred with the view expressed by the majority that the Acts Interpretation Act, 1924, s. 17, and the Evidence Act, 1908, ss. 28 and 29, rendered the Court incompetent to question the validity of the enactments assented to on October 12, 1946.

In the result, the Court of Appeal dismissed Simpson's appeal, and denied him the declarations sought. Though the decision may appear to be concerned solely with the sort of quibbles that delight a lawyer, this is not the case. The plaintiff's case was not without substance ; and, in fact, it is considered that on the

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[14a] It could be argued that the principal purpose of the Act is to secure regular elections.

[15] The contribution made by the Court of Appeal to the decisions dealing with prerogative powers will doubtless be examined with interest by constitutional lawyers abroad. With respect (and in the light of footnote 16, *infra*) it was probably the intention of the Legislature that, after the enactment of the Electoral Act, 1927, the prerogative powers should to that extent be displaced.

[16] But the possibility of the Governor-General's being unable to act is guarded against by the Dormant Commission (*1924 New Zealand Gazette*, 2841) appointing the Chief Justice as Administrator with power to exercise the functions of the Governor-General. Can it be contended that the Legislature intended the prerogative powers to continue in being in case a " mistake on the part of some officer " was made ?

[17] See Sir Harold Barrowclough, C.J., at p. 276 ; and Stanton and Hutchison, JJ., at p. 282.

[18] An even longer delay occurred in bringing the Sea Carriage of Goods Act, 1940, into force. That Act came into force in 1943, more than two years after it had been presented to the Governor-General for assent and reserved by him for the Royal Assent.

[19] Such Standing Orders may not control the meaning or interpretation of an Act of Parliament ; *loc. cit. supra*, p. 282.

[20] Those provisions require the Courts to take judicial notice of Acts of Parliament. The question is : what is an Act of Parliament ? It is extremely doubtful whether those provisions would be relevant to the question whether an Act had been passed in the " manner and form " prescribed : see Northey, *Can our Liberties be Safeguarded ?* (1951) 27 N.Z.L.J. 140 and *The Separate Representation of Voter's Case*, (1952) 28 N.Z.L.J. 134, and the numerous articles published in legal periodicals abroad since the decision in *Harris* v. *Donges*, [1952] 2 A.D. 428.

[21] This did not, of course, affect the decision of the Court. The majority dismissed the appeal ; McGregor, J., concurred with their decision in all respects save as to the effect of assent being given to Bills on October 12, 1946.

[22] In 1946, the General Assembly consisted of the Governor-General, the Legislative Council, and the House of Representatives. Since the enactment of the Legislative Council Abolition Act, 1950, s. 2, it consists of the Governor-General and the House of Representatives.

[23] The Standing Orders of the House of Representatives as in force in October, 1946, appeared to the learned Judge to recognize the existence of a House of Representatives when assent is given. Such Standing Orders do not, of course, possess legislative force.

major issue, the decision rests on a knife-edge. Important contributions have been made to several important branches of law, and in consequence the law is enriched by the proceedings. Perhaps the Court recognized this when it declined to make an order for costs against the appellant.

REDUCTION IN STAMP DUTY: SALES OF NEWLY-ERECTED DWELLINGHOUSES.

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

The Stamp Duties Act, 1923, and its amendments were consolidated by the Stamp Duties Act, 1954, which came into force on January 1, 1955. To implement the Government's present vigorous housing policy, Parliament recently passed the Stamp Duties Amendment Act, 1955, which is made retrospective to February 1, 1955.

Shortly put, the effect of the Amendment Act is to exempt *new* houses from the payment of *ad valorem* stamp duty when they are purchased for the *first* time before they have been lived in. In such circumstances *ad valorem* stamp duty will be payable only in respect of the unimproved value of the land which passes with the dwellinghouse. The same concession is extended in respect of such a house acquired pursuant to a lease. But, as is only to be expected, only one concession is granted in respect of any one house, for the amendment does not apply to the sale or lease of houses generally, but only to those dwellinghouses which come within its ambit.

Another necessary condition for exemption is that the house concerned must be a dwellinghouse intended for one family unit only, and that there are no other improvements on the land apart from the house and its appurtenances. Thus, the sale or lease of newly-built *flats* is not exempted.

It follows, therefore, that before granting partial exemption from conveyance duty on a sale or lease of a house, the District Commissioner of Stamp Duties must be reasonably satisfied that on the facts the exemption applies. Hereunder, there is set out a form of statutory declaration, which has been accepted by the Department. The declaration should be accompanied by a copy of the Valuation Roll, for the land, which copy may be obtained from the District Valuer for a few shillings.

In an oral judgment delivered on November 12, 1926, it was laid down by Adams, J., that one indivisible contract to sell a section of land together with a building to be erected thereon is liable to *ad valorem* conveyance duty calculated on the amount of the *total* consideration therefor. The case was *Coulstock* v. *Commissioner of Stamp Duties*, and it will be found in *Adams's Law of Stamp Duties*, 1st Ed., 245. Practitioners will be pleased to hear that the rule laid down in this rather awkward case has been abrogated with regard to contracts for the sale or lease of houses which come within the ambit of the Stamp Duties Amendment Act, 1955. The rule in *Coulstock's* case would still apply, for example, to an indivisible contract by an owner-vendor to sell a section and to erect a block of flats or a factory thereon, but such cases are rarely encountered in practice.

Precedent.

Declaration on the First Sale of a Family Unit to obtain Reduction of Stamp Duty.

In the Matter of the Stamp Duties Act 1954.

I, A. B. of Wellington Company Secretary do solemnly and sincerely declare as follows:

1. That under an agreement of sale* bearing date the 7th day of May 1955 I purchased from C. D. of Wellington Builder all that piece of land situate in the City of containing [*set out area*] more or less being [*set out official description of land*] and being the whole of the land comprised and described in Certificate of Title Volume Folio (Wellington Registry) Subject To: [*set out encumbrances, if any*]

2. That a single dwellinghouse intended solely as a residence for one family unit has been erected on the said land its erection being completed on or about the 1st day of May 1955. [*If the dwellinghouse was not built at date of agreement, modify clause accordingly*].

3. That the said dwellinghouse has not at any time prior to the sale been resided in by any person.

4. That the only improvements effected to the said land other than the said dwellinghouse are paths fences and a garage and that the unimproved value of the land as shown on the district valuation roll a copy of which is annexed hereto and marked with the letter "A" is £400. [*If no other improvements effected modify clause accordingly*].

And I make this solemn declaration conscientiously believing the same to be true under and by virtue of the Justices of the Peace Act 1927.

Declared at Wellington this day of May 1955 before me: } A. B.

E. F.,
A Solicitor of the Supreme Court of New Zealand.

* If there is no written agreement, substitute, "by memorandum of transfer."

The Imponderables of Life.—Deterrence and reformation may result from the same sentence. The public must assist in the prevention of crime by increasing the liability of the offender to arrest. Legal checks on law-breaking which are enforced from without may be less deterrent than the internal forces which are prompted from within as the result of upbringing, a high standard of religion, morals and citizenship. In some criminal, as in some psychiatric situations, improvement depends upon the sincerity of the expressed desire for rehabilitation. Many believe that there is little doubt that the present neglect of the imponderables of life is responsible for much crime to-day, and that our old-fashioned morality must be restored before we are in a position to solve some of our social problems, and among them the the prevention of crime. Others have apparently forgotten the lines in which Kipling contrasted the follies of the Gods of the Market Place with the verities of the Gods of the Copy Book Headings. It might be instructive to know how many parents and children living in "broken homes" could repeat the Ten Commandments. It is particularly sad that the amount of crime is so excessive at a time when social betterment is open to vast numbers from whom so much was previously denied. (Sir Norwood East, *The Roots of Crime* (1954), p. 9).

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Reed, J.—The passing of Sir John Reed, at the ripe age of ninety, recalls to an older generation memories of a charming Judge and a lovable man. Many, indeed, must be the number of young barristers whose entry into the Court arena has been eased by Sir John's wise tranquillity and infinite patience. He rarely interfered with, or even commented upon, counsel's conduct of his case, and yet the atmosphere of the trial before him almost invariably seemed placid, his appearance and manner that of some benign bishop presiding over his flock. If he felt angry at times, as he must have done, he concealed his feelings with remarkable facility; but he relished a jest or a quip, and his solid frame would appear to quiver with the bubbling of his inward mirth. On such social occasions as legal dinners, he would give vent to his quiet sense of humour in his descriptions of his early days of practice in the Winterless North, when the local lawyer was expected to be not only the fountain of knowledge, but also the adversary of any visiting boxer; and, above all, a man amongst men.

Shakespearian Note.—Professor C. J. Sisson, who, amongst many distinguished academic posts, has held the Lord Northcliffe Professorship of Modern English Literature at University College, London, is the author of a brochure on *Shakespeare* in the British Council's biographical series on "Writers and Their Work" (No. 58). In a remarkable essay, he surveys the whole history of the attitudes taken by scholars, critics, writers, and the play-going public from the Elizabethan age down to the twentieth century. He points out how contemporary students "worship sweet Mr. Shakespeare" for his poems as well as for his plays, and how one quotes from *Romeo and Juliet*, and proposes to get a portrait of Shakespeare and to keep it in his study when he goes up to London to study law in the Inns of Court—over four hundred years ago. Of interest to lawyers of to-day is Professor Sisson's contention that it is a common, and a false, notion that all Elizabethan actors were classed as "rogues and vagabonds" in general repute and in the eyes of the law. "It would have been manifestly impossible to affix such a label to men attached to the service of a high officer of State like the Lord Chamberlain or to that of the King himself." On great occasions, he says, Shakespeare's company wore the King's livery: on March 15, 1604, the playwright walked in the King's Coronation procession, wearing four and a half yards of red cloth, the gift of the King, as did the fellows of his company, led by him. "No company of actors was so honoured when Queen Elizabeth the Second went to her coronation in Westminster Abbey."

Writers to the Signet.—Two practitioners have written in to Scriblex about his note on this ancient Scottish Society of Solicitors (*ante*, p. 95). One speaks of his meeting a young Scot, recently qualified and employed at a wage at which our local office-boy would turn up his nose, who avers that he has been proud to find the £500 required to join the Society and place the letters "W.S." after his name. The other practitioner, disturbed years ago by the proposed advent of the Solicitors' Fidelity Fund Scheme, says he wrote to the Society to know how it handled matters of the kind. Well, the fact is that the Society just couldn't tell him. Down to that time, it hadn't occurred to any of its members to be dishonest.

A Female Passing.—In *99 Solicitors' Journal*, 129, in its "Notes of Cases," there is one headed:

Court of Appeal
Deserted Wife Left in Matrimonial Home: Purchasers for Value with Notice.

At first sight, this seems to raise the interesting question as to whether, where a deserted wife is so attached to her unhappy house that she refuses to be parted from it, she passes on sale with the freehold. Is she, *qua* purchaser, a *femme sole*, and a fixture? Here, indeed, is a problem for the alert author of *Real Property in New Zealand*.

A Check on the Ego.—One of Scriblex's most constant and helpful correspondents who keeps a close watch on the American scene writes from Suva to draw his attention to *From Gun to Gavel*, the recollections of an 80-odd-year-old attorney who practised law in the wild and woolly West. There is almost a parable in one of his stories. It seems that a Mississippi lawyer went to Oklahoma to see how laws were being administered there, and attended the trial of a man charged with carrying concealed weapons at a time when no male in that part of the West would have considered himself fully dressed without his six-shooter. The Judge who tried the case nonchalently wore a gun, as did every member of the jury. So did both counsel for the prosecution and for the defence, as well as the defendant charged with carrying a concealed weapon against the peace and dignity of the territory. The jury solemnly retired to consider their verdict and later returned with one of "Not guilty." This baffled the visitor. Why prefer the charge in the first place, and why the perverse verdict when the evidence was plain beyond dispute? The prosecutor then explained the local custom. When a man began to get a little too big for his breeches, they tried him for carrying a concealed weapon. The verdict of acquittal was a foregone conclusion, but it served as an effective warning that the community was beginning to get fed up with him.

Affidavit Note.—In [1940] W.N. 51, Chancery Judges draw attention to their earlier direction that dates and sums mentioned in affidavits, whether for use in Court or in chambers, should be in figures and not in words. Three sound reasons are provided by the *105 Law Journal* (London), 194, for the direction: (1) figures save space, (2) are easier to read, and (3) affidavits that follow the direction are more remunerative to the parties relying upon them since in *Kingston Plastics, Ltd.* v. *Winkworth*, heard in February last, Mr. Justice Dankwerts refused to allow plaintiffs any costs in respect of four affidavits filed by them which failed to comply. Scriblex recalls that Blair, J., on more than one occasion expressed the view that practitioners should include in any motion, by way of memorandum, a precis of affidavits filed in support. This was somewhat of a departure from his own mode of recording evidence. "I don't write down what the witnesses say," he used to declare. "I put down what they mean."

OBITUARY.

Mr. Douglas Ramsay (Dunedin).

The recent death in Dunedin of Mr. Douglas Ramsay, at the age of 74, brought to a close the long career of one of the best-known and most highly respected practitioners in that city. Son of Mr. Keith Ramsay, a former Mayor of Dunedin, Mr. Ramsay took Articles with the firm of Messrs. Mondy and Sim, being admitted as a solicitor early in 1904 and called to the Bar in March, 1909. Last year he became the fourth Dunedin practitioner, together with Mr. W. R. Brugh, Mr. B. S. Irwin, and Mr. W. L. Moore, to be then engaged in the practice of his profession after the lapse of fifty years, and he continued in active practice until his sudden death on April 14, during the Easter vacation.

After entering into practice on his own account, Mr. Ramsay was taken into partnership by Mr. W. C. MacGregor, K.C. (subsequently Mr. Justice MacGregor), and he was joined for a short period about 1919-1920 by Mr. C. G. White, now of Wellington. In 1920, the present Chief Justice, Sir Harold Barrowclough, together with Mr. A. N. Haggitt, joined the firm, which became Ramsay, Barrowclough, and Haggitt. At the time of his death, Mr. Ramsay was City Solicitor and senior partner in the firm of Messrs. Ramsay, Haggitt, and Robertson, in association with Messrs. A. N. Haggitt, J. C. Robertson, and J. I. Brent.

As a result of his long practice and wide experience, Mr. Ramsay gained a deep knowledge and rare understanding of the law, based on a firm grasp of fundamental legal principles. In earlier years, he appeared in the Courts, and especially in the Maori Land Court, in the work of which he soon became a recognized authority in the Otago District. Latterly, however, he devoted his time to his particular interests: conveyancing, company law, shipping law, local-body work, and, especially, banking law.

A retentive memory, an ability to discern immediately the essence of any problem requiring his consideration, and a deep appreciation of the intricacies of legal phraseology which made him a skilled conveyancer, were professional qualities which, together with his learning and a stern and practical regard for the best traditions of the profession, earned Mr. Ramsay, over the years, the respect of his fellow-practitioners not only in Dunedin, but also throughout New Zealand. To these professional qualities, Mr. Ramsay added a modest and unassuming personality combined with a lively sense of humour, and an innate and kindly courtesy. Although the practice and study of law occupied much of Mr. Ramsay's life, he was for many years a member of the Otago Golf Club and more recently played bowls at the Fernhill Club. In his younger days he was a keen yachtsman.

In 1912, Mr. Ramsay married Miss Sibella Haggitt, and to Mrs. Ramsay and her surviving children, Miss Cecily Ramsay and Mr. Hugh Ramsay, the profession extends its deep sympathy. A younger son, Lieutenant J. N. Ramsay, who had just completed the degree of Bachelor of Laws, was killed in action at the battle of El Alamein.

THE PRODIGIOUS TRAGEDY OF THE ROADS.

Suggestions for Extending List of Offences.

In a recent leading article, the *Southland Daily News*, said :

Whether the penalties imposed on motorists for offences which endanger the lives of others are sufficiently heavy is a question which has been frequently debated in New Zealand. It is a question which has now been raised by Britain's Lord Chancellor, Viscount Kilmuir. His views are interesting.

After pointing out that road casualties in Britain last year numbered some 238,000, an increase of five per cent. on 1953 and the highest figure since 1934, the Lord Chancellor says : " That brings home to us again the fact that the motorist is in control of a lethal instrument, and it must make everyone consider whether the penalties, which, in practice, are imposed on drivers who handle that instrument in a way or state which endangers other people, are sufficient to impress on the motorist the seriousness of the offence." This raises a point that the authorities in both Britain and New Zealand would do well to consider.

" Not so long ago, in an article in *The New Zealand Medical Journal*, Dr. Lindsay Brown, of Auckland, had some sound advice to offer. He wrote :

> A convicted driver's efficiency is not improved nor his recklessness diminished by a fine or a week's hard labour. He suggested that a convicted driver should be examined as to his fitness to drive and that his licence should be withheld until he " proves himself eligible, efficient in practice and knowledgeable in the road code."

Dr. Brown also made a sound point when he declared that " alcohol is the red herring and is likely to remain so until a better check is made of fitness to drive." He did not defend the drunken driver ; all the did was to point out that drink affects different people differently, and that if undue attention is paid to it as the cause of accidents, other causes are apt to be minimised in importance by comparison.

Invercargill's former Magistrate, Mr. A. E. Dobbie, a year or so ago expressed much the same views. He declared :

> Bad driving is as bad as driving while intoxicated, and offenders should be kept off the roads. The truth of this is obvious. It is just as necessary to keep the careless, reckless, dangerous driver off the road as it is to keep the drunken driver off the road. This point of view might commend itself to Britain's Lord Chancellor and his colleagues, for Britain's road problem—although on a vaster scale—is the same as New Zealand's.

Just over a year ago, Lord Elton posed this question in the House of Lords :

> What social scandal of our day will be remembered centuries hence, as the most flagrant ?

He gave this answer : " The prodigious annual tragedy of the roads." That is a sobering, shocking thought. It prompts another thought : Wouldn't it be worth while trying to remove one of the causes of this scandal by keeping erring motorists off the road, and keeping them off until such time as they prove themselves " eligible and efficient in practice ? "

Cancellation of licences is now compulsory in New Zealand for certain types of bad driving. Surely consideration should be given to extending the list of offences involving the loss of a driving licence—and surely the disqualification period in many cases could be extended. Disqualification from driving is a penalty that must hurt more than any fine, and, most likely, more than a short term of hard labour. This argument has yet to be disproved. Common sense suggests that an attempt should be made to prove it, and, by so doing, make a worthwhile attempt to cut down the " prodigious annual tragedy of the roads."