New Zealand
Law Journal

Incorporating "Butterworth's Fortnightly Notes"

VOL. XXXI TUESDAY, SEPTEMBER 6, 1955 No. 16

THE WIFE'S RIGHTS IN THE MATRIMONIAL HOME.

IN our last issue, we considered the progress of the development of the law relating to the rights of a deserted wife to remain in the matrimonial home. In doing so, we drew heavily upon the recent judgment of Mr. Justice Finlay in *Shakespear* v. *Atkinson* (to be reported), in which he reviewed the authorities. We were then able to consider the judgment in so far as it related to the views of the Courts down to the end of the year 1952. We continue with His Honour's examination of the cases heard and determined in the years 1953 and onwards.

III.

The next case calling for notice was *Vaughan* v. *Vaughan*, [1953] 1 Q.B. 762; [1953] 1 All E.R. 209. The learned Judge said that case was mainly of importance for the purposes of his judgment because the Master of the Rolls, in the course of his judgment, expressed himself as not having intended to lay it down in *Foster* v. *Robinson* that when a promise is made which is not contractual in form or effect and the promise has been acted upon, then—and without more—a right is given to the promisee to go on enjoying the subject-matter of the promise indefinitely. Clearly, by that explanation, His Honour thought the Master of the Rolls was merely emphasizing that, in his words, there must be something contractual, that is, a promise made, intended to have and having contractual effect. In the circumstances, the marriage having been dissolved, the wife was required to deliver up possession.

Mr. Justice Finlay said:

> Even at this stage it can, I think, be said that, apart from rights derived from contract, there was no express authority that went so far as to say that a deserted wife, remaining in the matrimonial home, had any right to possession as against a genuine purchaser—for value or otherwise.

The next case, in order of date, which had any reference to the subject was *Silverstone* v. *Silverstone*, [1953] P. 174; [1953] 1 All E.R. 556. In that case, by a judgment of Pearce, J., it was held that the Divorce Court had power to restrain a husband from entering the matrimonial home pending the hearing of a petition for judicial separation, although he was the owner of the property. Pearce, J., expressly disclaimed any need upon his part to decide the exact nature of a wife's rights. It was, he said, enough that she had the rights defined in *Bendall* v. *McWhirter*. For the rest, the rights of the wife being as defined in the latter case, the judgment was expressed to be founded upon the fact that the Divorce Division of the High Court deals with problems somewhat different from those dealt with by other Divisions, and that the position as between the spouses pending trial was one of the Divorce Division's particular problems. It would, if it could, prevent a wife's being "bullied out of her remedy or deterred by pressure from seeking the help of the Court." This case takes the rights of a wife in relation to a purchaser no further.

Then, in 1953, came the decision of Lynskey, J., in *Street* v. *Denham*, [1954] 1 All E.R. 532. In that case, it was held, following *Bendall* v. *McWhirter* and *Ferris* v. *Weaven*, that a deserted wife has an irrevocable licence to remain in occupation of the matrimonial home, which is enforceable not only against her husband, but also against his successor in title with notice, even against a purchaser for value if he buys with knowledge of the facts. This was a case in which the husband had sold the premises to his long-term mistress who was endeavouring to dispossess the wife. The source of authority for the judgment was the judgment of Denning, L.J., in *Errington* v. *Errington* and the judgment of the same learned Lord Justice and of Romer, L.J., in *Bendall* v. *McWhirter*. But for those judgments, Lynskey, J., would, he said, have taken the same view as Roxburgh, J., took in *Thompson* v. *Earthy*. His Honour said that it was not without interest to notice that the reason given by Denning, L.J., for concluding that a purchaser was subject to the wife's rights was limited to the consideration that, if a contrary position pertained, then a guilty husband could transfer a house into the name of his mistress and get her to evict the innocent lawful wife from the matrimonial home. Lynskey, J., also relied on the judgment of Jones, J., in *Ferris* v. *Weaven*; but *Ferris* v. *Weaven* was itself founded on *Errington* v. *Errington* and *Bendall* v. *McWhirter*, so that the basic authority was clearly ascertainable.

In *Webb* v. *Diethe*, (1953) 53 N.S.W.S.R. 190, a New South Wales Court, (Street, C.J., Owen and Herron, JJ.) following English authority, held that a husband, who was lessee of the matrimonial home but had left it, could not surrender his lease in derogation of the right of occupancy of the wife. That judgment seemed to the learned Judge to have broken no new ground, and certainly no new ground of moment in the proceeding before him.

The next case that called for reference is *Barclays Bank, Ltd.* v. *Bird*, [1954] Ch.D. 274; [1954] 1 All E.R. 449. It was there held by Harman, J., that any equity which a wife might have by virtue of her right to remain in the matrimonial home after desertion by her

husband was an equity which arose at a time subsequent to the equity vesting in the bank as mortgagee by virtue of an equitable charge; and that, in consequence, the rights of the wife ranked after the rights of the bank. That case was founded upon the judgment of Jones, J., in *Ferris* v. *Weaven* in that, as it was put, "the wife's status of irremovability extends to a purchaser from the husband but not to a purchaser in good faith". Then, having recited the facts in *Ferris* v. *Weaven*, Harman, J., commented, "It was not unnatural that the Judge should hold that such a person could not be in a better position than the husband. I do not think that the law has yet gone further than that". For the rest, holding that a claimant under an equitable mortgage was in as good a position as a claimant under a legal mortgage, the judgment was founded on *Lloyds Bank, Ltd.* v. *Oliver's Trustee*, [1953] 2 All E.R. 1443, in which Upjohn, J., decided that a wife's right or privilege did not hold good against a person having a legal mortgage created before the date when the desertion occurred.

Mr. Justice Finlay then summed up the position of the law as it stood at the end of 1953. He said:

> Up to that point of time there was no authority, apart from *Street* v. *Denham*, that what Harman, J., called "the wife's status of irremovability" extended to any *bona fide* purchase with or without notice. Indeed, there was some authority in *Doe* d. *Merigan* v. *Daly*, (1846), 8 Q.B. 934; 115 E.R. 1126, to which Mr. R. E. Megarry refers in his article in *68 Law Quarterly Review*, 379, 385, to the contrary, whilst as Mr. Megarry pointed out, at p. 381, it is difficult to see how the doctrine of a deserted wife's irrevocable licence could be brought into being in any form which affected third parties having regard to the decision of the Court of Appeal itself in *Taylor* v. *McHale*, [1948] Estates Gazette Digest, 299.
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> Mr. Megarry, at pp. 381, 382 continued:
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> In that case a husband left the premises of which he was tenant, taking his furniture and giving up the keys to the landlords, but leaving his wife in occupation. The landlords sued the couple for possession, but the county court Judge refused to make any order. The Court of Appeal (Scott and Asquith, L.JJ. and Jenkins, J.) reversed this decision, and made an order for possession, expressly on the footing that the wife was a trespasser. Scott, L.J., said that "the law was that a protected tenant could not give up his rights except by giving up complete possession or taking a judgment against himself. If a man left his wife in possession without definitely giving up possession of the premises the presumption was that she continued there on his behalf and he continued in possession. But that had no application if he said he was giving up possession. In this case the tenant did exactly what the Master of the Rolls had said in the case of *Brown* v. *Draper*, [1944] K.B. 309, 314, 315, was necessary to bring his possession to an end. He made it clear that his wife did not remain as his licensee and to prevent misconception he removed his furniture and gave up possession completely.
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> As Mr. Megarry comments (at p. 382), "If the wife had a licence which the husband was powerless to revoke, the decision is hard to understand."
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> However far, therefore, Denning, L.J., in particular and the other members of the Court of Appeal should or should not have held themselves bound by the judgments in the latter case the fact remains that there was—excluding *Street* v. *Denham* which related to exceptional facts—no express authority that a *bona fide* purchaser for value with notice could not enforce a claim for possession against a deserted wife in occupation. The authority to the contrary, *Thompson* v. *Earthy*, [1951] 2 K.B. 596; [1951] 2 All E.R. 235, was supported, in some measure, by the judgments of Somervell and Romer, L.JJ., in *Bendall* v. *McWhirter* where *Thompson* v. *Earthy* is referred to without disapproval, and by an incidental statement of Jenkins, L.J., in *Bradley-Hole* v. *Cusen*, [1953] 1 Q.B. 309, 306, *sub nom. Hole* v. *Cusen*, [1953] 1 All E.R. 87, 91.

The learned Judge went on to say that there is now the judgment of *Jess B. Woodcock and Sons, Ltd.* v. *Hobbs*, [1955] 1 All E.R. 445, expressly to the contrary of *Thompson* v. *Earthy*. He went on to say that he had at some length considered the state of the law when that judgment was given in order to demonstrate the effect of its impact upon the previously-existing authorities and the extent to which it is in conformity with or conflicts with them. It has now been held by Denning and Birkett, L.JJ., that a *bona fide* purchaser for value, with notice that a deserted wife is in occupation, and, therefore, in the circumstances, with constructive notice of her right to remain so, takes subject to the wife's right of occupancy. It attributes to a deserted wife a right the nature of which has been far from the subject of judicial agreement and assumes that that right passes with the land and so binds a purchaser—a topic also hitherto much disputed. With the judgment of the majority Parker, L.J., did not agree. At p. 451, he said:

> At one time it looked as if we should have to decide, there being no decision of this Court as yet on the matter, whether the protection afforded to a deserted wife in *Bendall* v. *McWhirter* could be extended to a case where the property in which the wife continued to reside had been purchased by a purchaser for value with constructive notice of the wife's possession. Speaking for myself, I should on that matter have required considerable further argument, since, as at present advised, I see great difficulty in extending the wife's protection so as to give her any rights against a *bona fide* purchaser, whether with or without notice. I do not, however, in any way suggest that *Street* v. *Denham* and *Ferris* v. *Weaven*, to which my Lord has referred, were wrongly decided, since they could in any event be justified on their special facts. In both those cases the purchases were not made by purchasers treating at arm's length, but they were purchases made at the instigation of the husband so as to enable him to have a benefit therefrom; in other words, the transaction in each case was a device to get the wife out for the husband's benefit.

The learned Judge continued:

> I quote those words particularly because they indicate that the judgment in *Jess B. Woodcock and Sons, Ltd.* v. *Hobbs* may not be the last word on the subject, and that there are weighty considerations which might well induce a higher authority to hold to the contrary of the majority. But, for the moment, the fact remains that the Court of Appeal in England has now definitely decided that a *bona fide* purchaser for value with knowledge of a deserted wife's occupancy, and, in the circumstances, with notice of her right to remain so, takes subject to the rights of the wife. That is, and will remain until higher authority intervenes, the law of England on a subject upon which there can be no justification for any suggestion that the law could be different in New Zealand.
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> That judgment may or may not be accepted as conclusive by the Court of Appeal in New Zealand. Whether it will be or not will no doubt be decided having regard to well-known principles which are clearly enunciated by Dixon, J. (as he then was) in *Waghorn* v. *Waghorn*, (1942) 65 C.L.R. 289; but the most anxious consideration has failed to satisfy me that the judgment of the English Court of Appeal is not binding upon me as a single Judge. In other words, I have been driven to the conclusion that I must determine this appeal in accordance with the judgment of the majority in *Jess B. Woodcock and Sons, Ltd.* v. *Hobbs*.

His Honour said that was not a contingency he had had in mind when he had suggested that this appeal be removed into the Court of Appeal. But it added a new and cogent reason why that course could, with advantage, have been adopted. However, the parties were not willing. The learned Judge observed:

> In the result, I am constrained to accept as binding upon me a judgment enunciating a law which will, I fear, prove, to say the least of it, unsettling and burdensome and productive of complications where none now exist; and without any injustice being involved, for the rights of a deserted wife are the subject of monetary adjustment—with a free home she gets less maintenance: without it she gets more.

Jess B. Woodcock and Sons, Ltd. v. *Hobbs* raised in an acute form the question whether the appellant in this case was a purchaser with or without notice.

That the question was *bona fide* was never questioned. It had not been suggested that, when the purchase was made, the appellant had any idea or any cause to think that respondent would be in any way prejudiced. Any contrary suggestion would be untenable, for, until the appellant's solicitors searched the title and discovered the caveat, neither the appellant nor his solicitors had any reason to suspect that the transaction was other than a normal transaction or that the interest of the respondent's husband, as owner, was other than absolute save for the registered mortgage. But it was equally clear that by the letter of November 18, 1953, from the respondent's solicitors to the appellant's solicitors, the latter and the appellant were given express notice that the respondent claimed the right to continue to occupy the premises sold in virtue of her rights as a deserted wife. It was after this date that the transfer was registered, the caveat removed, and the purchase money paid. That, His Honour held, made the appellant a purchaser with notice. He proceeded :

> I was given no argument on the point but the legal position seems clear. It was established in *Tourville* v. *Naish*, (1734) 3 P. Wms. 307; 24 E.R.1077, and has remained unaltered since. In that case, it was held by the Lord Chancellor that, where a man purchases an estate, pays part, and gives a bond to pay the residue of the money, notice of an equitable encumbrance before payment of the money, though after the bond, is sufficient. This and other cases are quoted as the authority for the statement in *13 Halsbury's Laws of England*, 2nd Ed., 93, that, to qualify a purchaser as a purchaser for value without notice, it is necessary that the purchase money should have been actually paid before notice and not merely secured. The present case is an *a fortiori* example of the principle of *Tourville* v. *Naish*.

It was contended that, by allowing her caveat to lapse, the respondent had lost her rights. His Honour said that she undoubtedly lost her rights in respect of the interest she sought to protect by the caveat, that is, her interest under an implied trust. But he could not think that, by the lapse of the caveat, she lost rights of a different and independent character arising from a different source ; and he was unable, in consequence, to accept the appellant's contention in this respect.

His Honour, finally, considered whether he should make an order for possession of the house under the Married Women's Property Act, 1952 :

> In the circumstances, I cannot say that the judgment of the Magistrate, although it did not range over all the circumstances or the authorities I have dealt with, was, as the law is now ascertained, erroneous in its result. The question has been raised—there has been no argument upon it—as to whether, on the present appeal, I can make an order for possession under the Married Women's Property Act, 1952, on the authority of *Woodcock's* case (*supra*). It may be that I can do so having regard to the fact that by reason of s. 2 of the Magistrates' Courts Amendment Act, 1950, every appeal is to be by way of rehearing, and that, on the hearing of an appeal, the Supreme Court may make such final or other order as it thinks proper to ensure the determination on the merits of the real question in dispute between the parties.
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> There is something anomalous about an application of that kind in such a case as this, but the Lords Justices in *Woodcock's* case say it can be made to and entertained by the Court, and that authority is authority enough. I am not disposed, however, to deal with any question under the Married Women's Property Act at this stage. It is an issue that no one had in mind when the case was heard and the judgment given. In point of fact, no one thought of the possibility of such an issue until the report of *Woodcock's* case became available after the appeal was heard. In consequence, no evidence or argument has ever been heard on the subject and there must certainly be evidentiary facts which would influence a decision on the question.

His Honour concluded by saying that it was certainly desirable that the question of an order for possession should be dealt with in order that a final determination of all the questions in dispute should be reached. For that reason, on the authority of s. 77 of the Magistrates' Courts Act, 1947, he referred the case back to the Magistrates' Court to deal with the question of whether an order for possession should be made, and, if so, upon what terms. Otherwise, the appeal was dismissed.

It is clear that the limits of a deserted wife's right to remain in the matrimonial home have not been finally delineated. The law in this regard is in a state of development. It may be that a pronouncement of our Court of Appeal in an appropriate case will lead to a condition of the law that will be more settled, so far as this country is concerned, than that prevailing at the present time.

SUMMARY OF RECENT LAW.

CHARTERPARTIES.

Some Standard Clauses, *219 Law Times*, 270.

COMPANY LAW.

Company Quorum, *105 Law Journal*, 326.

CONTRACT.

Trade Custom and Usage, *105 Law Journal*, 373.

CONVEYANCING.

Mortgages of Renewable Leasehold, *105 Law Journal*, 358.

CRIMINAL LAW.

"Beyond Reasonable Doubt," *219 Law Times*, 218.

Provocation Reducing Murder to Manslaughter, *105 Law Journal*, 404.

DAMAGES.

Loss of Services of Holder of Public Office, *99 Solicitors' Journal*, 361.

DESTITUTE PERSONS.

Maintenance—Wife—No Evidence of Wilful Failure to provide Maintenance—Proof of Life of Disharmony, Unhappiness, and Distress owing to Husband's Conduct—Reasonable Cause for Wife's not Returning to Husband—Maintenance Order Made—Destitute Persons Act, 1910, s. 17 (7). Where the refusal of a maintenance order to a wife would be tantamount to compelling her to return to a life of disharmony, unhappiness, and distress, she has "reasonable cause for refusing or failing to live with her husband" within the meaning of s. 17 (7) of the Destitute Persons Act, 1910. (*Watkins* v. *Watkins*, (1914) 33 N.Z.L.R. 1497; 17 G.L.R. 177, followed.) (*Robottom* v. *Robottom*, [1922] N.Z.L.R. 1038, and *The Queen* v. *Fordham*, (1888) 5 T.L.R. 27, referred to.) *Hatton* v. *Hatton*. (S.C. Auckland. August 5, 1954. Finlay, J.)

DIVORCE AND MATRIMONIAL CAUSES—CONDONATION.

Petitioner's Decree Nisi, on Ground of Adultery, followed by Condonation and Resumption of Cohabitation—Respondent later admitting Another Act of Adultery—Parties executing Separation Agreement and Petitioner withdrawing finally from Cohabitation—Agreement not providing expressly or impliedly for Condonation or Withholding of Proceedings—Surrounding Circumstances showing Condonation not intended—Revival of Condoned Adultery—Decree Absolute. On May 16, 1952, the petitioner obtained a decree *nisi* on the ground of adultery committed on December 15, 1951. The decree was followed by condonation and a resumption of normal cohabitation.

On November 23, 1953, following on an admission by the respondent of another act of adultery earlier in that month,

the parties executed a separation agreement (which merely recited "unhappy differences") and the petitioner withdrew finally from cohabitation. She moved to make absolute the decree *nisi* of May 16, 1952.

On the question whether the petitioner, by entering into the separation agreement, had condoned the first act of adultery, *Held*, 1. That the agreement could not be construed as providing expressly or impliedly for condonation or for the withholding of proceedings; and that, from all the surrounding circumstances, it could be concluded that condonation was not intended. (*Letbe* v. *Letbe*, (1928) 140 L.T. 199; 45 T.L.R. 6, explained.) (*Rose* v. *Rose*, (1883) 8 P.D. 98, and *L.* v. *L.*, (1931) P. 63, distinguished.) 2. That there had been a revival of the condoned adultery on which the petition was founded, and the petitioner was entitled to a decree absolute. (*Masters* v. *Masters*, [1954] N.Z.L.R. 260, followed.) (*Goldblum* v. *Goldblum*, [1939] P. 107; [1938] 4 All E.R. 477, referred to.) *Creedon* v. *Creedon*. (S.C. Christchurch, June 30, 1955. F. B. Adams, J.)

DIVORCE AND MATRIMONIAL CAUSES—PETITION.

Answer to Petition—Allegation of Seven Years' Living Apart—Wife's Answer alleging Petitioner's Desertion, and praying that Prayer of Petition "being opposed by her be rejected"—Sufficient Plea to set up Separation due to Wrongful Conduct of Petitioner in deserting Respondent—Divorce and Matrimonial Causes Act, 1928, ss. 10 (jj), *18.* A petition alleged that the parties were living apart and were unlikely to be reconciled, and that they had been living apart for not less than seven years. The petitioner proved those allegations. The answer filed by the respondent denied the basic allegation of the petition and alleged that the petitioner had been guilty of desertion, and prayed that the prayer of the petition "being opposed by her be rejected." The answer did not otherwise plead specifically that the separation was due to the wrongful act or conduct of the petitioner. *Held*, That the answer was a sufficient plea to enable the respondent to set up that the separation was due to the wrongful act or conduct of the petitioner in wilfully and without just cause deserting the respondent, and to invoke s. 18 of the Divorce and Matrimonial Causes Act, 1928, accordingly; and that the Court was bound to consider the plea, and if it was satisfied that it had been made out, to dismiss the petition. *Freeman* v. *Freeman*. (S.C. Auckland. April 21, 1955. Shorland, J.)

ELECTRIC-POWER BOARD.

Supply of Electricity to Borough within Board's Outer Area—Annual Charge to Borough—Reasonableness of Charge—Borough a "consumer" and entitled to Continuity of Supply—Electricity Merchantable and Prime Necessity—Board having no Monopoly of Right to Supply in Borough's Area—Electric-power Boards Act, 1925, ss. 2. 76—Public Works Act, 1928, s. 319—Electrical Supply Regulations, 1935 (1935 New Zealand Gazette, 2496) Reg. 21-42. The defendant corporation (herein referred to as "the Borough") had for many years been taking electric-power, in latter years the whole of its requirements, from the plaintiff Board (herein referred to as "the Board"). As a result of a disagreement between the Board and the Borough as to the price which should be paid for the power so taken, the Board sought certain declarations. *Held*, 1. That the Borough, which was in the Board's "outer area" was a "consumer" within the meaning of the Electrical Supply Regulations, 1935; and that the Borough, being already supplied by the Board, was entitled to continuity of supply by the Board pursuant to Reg. 21-42 (which was not *ultra vires* the Governor-General in Council). 2. That, alternatively, if the Electrical Supply Regulations, 1935, did not apply, then, following and applying the decision in *Minister of Justice for the Dominion of Canada* v. *City of Levis*, [1919] A.C. 505, there was an implied obligation on the Board to supply electricity to the Borough if and so long as the Borough was willing to pay a fair and reasonable sum for it, for the reasons: (*a*) That electricity, even if not a commodity, is merchantable, and is a matter of prime necessity. (*Mayor, &c. of Auckland* v. *The King*, [1924] G.L.R. 415, and *Wairoa Electric Power Board* v. *Wairoa Borough Council*, [1937] N.Z.L.R. 211, referred to.) (*b*) That the application of the principle of the *Levis* case was not limited to ultimate consumers of the Borough, and it was in accord with the words and spirit of that judgment to apply it to the relations between the Board and the Borough, even though the latter was, as to part of its supply, a middleman; and (*c*) That the Board had no monopoly of the right to supply electricity in the area containing the Borough; but it was in a position of great and special advantage for the reason that the Borough had no available alternative supply. The question of the reasonableness of charge was referred by the Court to the Registrar and an accountant or to some other referee. *South Taranaki Electric Power Board* v. *Patea Borough*. (S.C. Wellington. April 5, June 7, 1955. Hutchison, J.)

INFANTS AND CHILDREN.

The Welfare of the Infant. *99 Solicitors' Journal*, 409.

LANDLORD AND TENANT.

Agent Signing a Notice to Quit. *99 Solicitors' Journal*, 363.

NEGLIGENCE.

Children, Occupiers, and Negligence. *105 Law Journal*, 356.

NUISANCE.

Liability for Encroachment by Trees. *99 Solicitors' Journal*, 425.

PRACTICE.

Judgment—Order—Construction — Unambiguous Judgment — Pleadings and History of Action not regarded for Purpose of Construing Judgment—Partners—Fiduciary Relationship—When Partner a Trustee. In 1938, the plaintiff and the defendant entered into partnership to exploit certain inventions of the defendant. In 1940, the defendant agreed to transfer the rights in the partnership inventions to A., Ltd. (a company formed by a syndicate to exploit the inventions) and one hundred shares of that company were allotted to the defendant in exchange for such rights. In 1941, the trading with the enemy legislation was extended to Hungary where the plaintiff was living, and accordingly the partnership was brought to an end. In 1943, the defendant transferred the one hundred shares in A., Ltd. to H., Ltd. and received in exchange 13,333 shares of H., Ltd., of which he forthwith sold 6,667 for £6,667 using the proceeds for his own purposes. This sale of 6,667 shares and conversion of the proceeds did not become known to the plaintiff until the master gave his certificate hereinafter mentioned. The plaintiff brought an action against the defendant, relying on the partnership agreement and claiming a declaration as to the beneficial entitlement to shares or property received by the defendant on the transfer of partnership assets, and dissolution of the partnership and accounts and inquiries. The judgment of the Court in the action contained a declaration that "the plaintiff was upon the allotment to the defendant of one hundred shares of £1 each in [A., Ltd.] . . . beneficially entitled to one moiety of the said one hundred shares and that the defendant is accountable to the plaintiff for one moiety of the consideration which was payable to or receivable by the defendant upon the sale by him of the said one hundred shares to [H., Ltd.] . . .". The Court ordered inquiries what was the said consideration payable to or receivable by the defendant, and what had become of it, and also an inquiry what payment of interest dividends or bonus had been made on the property comprised in the said consideration. The master having certified the result of the inquiries, the plaintiff issued a summons for (among other things) payment to him of £3,333 10s., and also interest on that sum at five per cent. per annum from the date on which the defendant had received it. On appeal on the question what interest, if any, the defendant was liable to pay, *Held*, 1. The defendant was declared by the judgment in effect to have been a trustee for the plaintiff as to one-half of the one hundred shares in A., Ltd. and, although the substance of the statement of claim was that a partnership had existed between the parties and such a declaration was unusual in such an action, the declaration was unambiguous, and therefore regard could not be had to the pleadings in the action and the history of the case for the purpose of attributing another meaning to the declaration. 2. As the defendant had converted trust money to his own use, and as the appropriate rate of interest chargeable against a trustee for breach of trust was five per cent., the subsequent order, after the inquiries had been made, charging him with interest at that rate, was rightly made, notwithstanding that the judgment directing the inquiries contained no reference to such interest. *Gordon* v. *Gonda*. [1955] 2 All E.R. 762. [C.A.]

PRACTICE—TRIAL.

Cross-actions—Mode of Trial—Negligence—Plaintiff claiming £325 in Action for Hearing before Judge and Jury of Four—Action by Defendant against such Plaintiff claiming £9,353 for Hearing before Judge and Jury of Twelve—Actions set down for Hearing at Same Sessions—Judgment in First Action likely to operate as Estoppel in Second Action—Proportion of Fault to be fixed therein without Knowledge of Second Action—Defendant to discontinue Second Action and file Counterclaim in First Action—Claim and Counterclaim to be heard together. The two parties

of these actions, W. and M., were the respective drivers of two motor-vehicles which collided. W. escaped personal injury, M. was seriously injured. On February 9, 1955, W. issued a summons in the Magistrates' Court, claiming £325 for damaged cargo, loss of use of his vehicle, and loss of profits. On March 15, 1955, on the application of M.'s solicitors, this action was removed into the Supreme Court. On March 29, a statement of defence was filed on M.'s behalf. It did not contain any counterclaim. On the same day, March 29, a separate writ was issued on behalf of M., claiming against W. a total sum of £9,353 10s., nearly all for personal injury. The solicitor for W.'s insurers, who were indemnifying him on the personal injury claim, filed a statement of defence. The two actions were set down for hearing at the same Sittings, the first, in accordance with s. 2 (2) of the Judicature Amendment Act, 1936, before a Judge and a jury of four; and the second in accordance with s. 2 (3) of the same statute, before a Judge and a jury of twelve. On an application, on behalf of M., for the two actions to be heard together before a jury of twelve, *Held*, 1. That the trial of the claims separately could result in injustice: if the two claims were heard separately, judgment in the first action could operate as an estoppel on the second action; and, in view of the fact that under the Contributory Negligence Act, 1947, the jury fixes the proportions of negligence, it would be unjust that the jury of four which had deliberated on W.'s claim for £325 should be left to decide the facts in both claims, including the proportions of negligence, without even having been informed of the existence of M.'s claim for £9,353. (*Marginson* v. *Blackburn Borough Council*, [1939] 2 K.B. 426; [1939] 1 All E.R. 273, applied.) (*Priest* v. *Mouat*, [1937] N.Z.L.R. 431; [1937] G.L.R. 261, referred to.) (*National Insurance Company of New Zealand, Ltd.* v. *Geddes*, [1936] N.Z.L.R. 1004; [1936] G.L.R. 716, not followed.) 2. That, as procedure by counterclaim is provided for in such a position as here, M. should take advantage of that procedure if he desired, so that his own claim could be considered by the one tribunal at the same time as that of W. (*Piercy* v. *Young*, (1880) 15 Ch.D. 475, applied.) (*Rabone* v. *Schiessel*, [1954] N.Z.L.R. 697, referred to.) 3. That an order would be made for an enlargement of time for fourteen days to enable a counterclaim to be filed, such order being conditional upon the second action's being discontinued. *Wilson* v. *Matheson*: *Matheson* v. *Wilson*. (S.C. Gisborne. May 23, 1955. **Turner, J.**)

PUBLIC REVENUE.

Income Tax—Funds made Available to Borrower in New Zealand by Lender in Netherlands—Moneys applied in Discharge of Debt in that Country—Interest paid in New Zealand on Such Loan not "income derived from money lent in New Zealand"—Loan Transaction, not taking place in New Zealand, but in Netherlands—Credit made available by Way of Loan in that Country in Course of Lender's Business there—Interest on Such Loan not "income derived directly or indirectly from any . . . source in New Zealand"—Land and Income Tax Act, 1923, s. 87 (j), (n). The provisions of s. 87 (*j*) of the Land and Income Tax Act, 1923, apply to loan transactions entered into in New Zealand. In order to render assessable for income-tax interest received in the Netherlands from a company in New Zealand, as "income derived from money lent in New Zealand" within s. 87 (*j*), it was insufficient to establish that a lender in the Netherlands had made available on loan to the New Zealand company, funds which the borrower applied in discharge of a debt to a creditor in the Netherlands under a contract made there, and under which the arrangements were concluded there. (*Canadian Eagle Oil Co.*, v. *The King*, [1946] A.C. 119; [1945] 2 All E.R. 499, and *In re Harmony and Montague Tin and Copper Mining Co., Spargo's Case*, (1873) L.R. 8 Ch. 407, applied.) (*Commissioner of Inland Revenue* v. *Lever Brothers and Unilever, Ltd.*, ((1946) 14 S. Af. Tax Cas. 1, referred to.) The interest which the lender received from the New Zealand company was not "income derived directly or indirectly from any other source in New Zealand", within the meaning of s. 87 (*n*) of the Land and Income Tax Act, 1923, as the actual source of the income was a business transaction, which did not take place in New Zealand but was carried out in the Netherlands, whereby the credit was made available by way of a loan in the Netherlands in the course of the lender's business in that country. So held by the Court of Appeal, dismissing an appeal from the judgment of Barrowclough, C. J. *Commissioner of Inland Revenue* v. *N.V. Philips' Gloeilampenfabrieken*. (S.C. & C.A. Wellington. November 25, 1954, Gresson, Hay, North, Turner, JJ.)

Income Tax—Profits from Land—Assessment of Tax—Company formed to purchase Land, subdivide, sell Several Sections, and retain One as "a cheap permanent investment"—Company selling Such Sections, and retaining One—Company deriving "profits . . . from the sale of land"—Such Profit assessable—Sold Sections "trading stock"—Assessment based on "information in his [the Commissioner's] possession"—Ascertainment of Profit on Sold Sections—Quantum of Profit a Matter of Fact—Objection to Commissioner's Finding as to Cost Price of Lots Sold determinable in Magistrates' Court—Land and Income Tax Act, 1923, ss. 13 (*1*), *23, 79* (*1*) (c)—*Land and Income Tax Amendment Act, 1926, s. 5* (2A)—(*Land and Income Tax Act, 1954, ss. 17* (*1*), *30, 88* (c), *101* (*4*)). On January 19, 1953, the appellant, a private company, was incorporated to purchase a property for £32,500, possession of which was given on April 1, 1953. On the date of the Company's incorporation, a minute was recorded in the books of the company, stating that the purchase was "with the intention that the company subdivide the land and sell several of the allotments and raise sufficient finance to enable it to retain at least one allotment as a cheap permanent investment." In carrying out this intention, the appellant subdivided the property into nine lots. On April 1, 1953, it completed the sale of seven lots, and, on May 21, 1953, the sale of a further lot. The total selling price of these eight lots amounted to £34,280. The remaining lot was retained by the company, and was leased for a period of five years with a right of renewal. The financial result of the transaction was that the total cost of the land to the company, including stamp duties, survey fees, and legal expenses, amounted to £33,112 15s. 2d. Expenditure in connection with the eight lots sold amounted to £1,185 6s., making a total expenditure of £34,298 1s. 2d. As the eight lots realized £34,280, the company was the owner of the remaining lot for the net expenditure of £18 1s. 2d. The Commissioner of Inland Revenue claimed that the company had derived a profit of £2,682 19s. 4d. from the transactions. He arrived at the figure by multiplying the total cost of the whole of the land by a fraction, of which the numerator was the Government value of the eight lots sold and the denominator was the Government value of the total nine lots. He claimed that the profit of £2,682 19s. 4d. should be included in the appellant's assessable income for the year ended March 31, 1954, on the basis that such profit was assessable under s. 79 (1) (c) of the Land and Income Tax Act, 1923 (as enacted by s. 10 of the Land and Income Tax Amendment Act, 1951). On appeal from that assessment by way of Case Stated under s. 35 of the Land and Income Tax Act, 1923, *Held*, 1. That the appellant company had derived a "profit . . . from the sale . . . of any real . . . property", and that such profit was "derived from the . . . carrying out of . . . [a] scheme entered into or devised for the purpose of making a profit", within the meaning of s. 79 (1) (c) of the Land and Income Tax Act, 1923 (which paragraph was enacted by s. 10 of the Land and Income Tax Amendment Act, 1951); and, therefore, the business of the appellant company, as contemplated on its formation and carried into effect, was that of buying and selling land, and the eight lots were "acquired for the purpose of selling or otherwise disposing" of them, within the meaning of s. 79 (1) (c). (*Commissioner of Taxes* v. *Melbourne Trust, Ltd.*, [1914] A.C. 1001, applied.) 2. That the company was assessable, by virtue of s. 79 (1) (c) for the "profits or gains derived from the sale . . . of any real . . . property" (here, lots 1 to 8, inclusive), since the property (again, lots 1 to 8, inclusive) "was acquired for the purpose of selling or otherwise disposing of it". 3. That, as the intended purpose of the appellant company in its acquisition of lots 1 to 8 was the sale or disposal, those lots comprised "trading stock" within the meaning of s. 5 (2A) of the Land and Income Tax Amendment Act, 1926 (as enacted by s. 11 (1) of the Land and Income Tax Amendment Act, 1951); and that the Commissioner had authority to determine the cost of the land, provided such determination was based on reasonable grounds or was arrived at by reasonable methods, and, by virtue of s. 13 (1) of the Land and Income Tax Act, 1923, to make an assessment on such grounds. 4. That the original cost price of the whole block of land and the Government valuation thereof were both facts or matters of "information in his [the Commissioner's] possession", within the meaning of s. 13 (1) of the Land and Income Tax Act, 1923, and were matters for the Commissioner's consideration as relevant circumstances; and that his assessment was not an arbitrary one, but was based on substantial foundations of fact and was more than a matter merely of his opinion. (*The King* v. *Deputy Federal Commissioner of Taxation for South Australia*, (1926) 37 C.L.R. 368, applied.) 5. That, alternatively, as a "profit or gain" had been derived by the appellant company from the sale or disposition of land, and was assessable income, the matter in dispute was the quantum of such "gain or profit", which was a question of fact, and no question of law was involved; and that any objection to the Commissioner's finding as to the cost price of the eight lots sold, which was a finding of fact, must be determined as such by a Magistrate under the procedure set out in s. 23 of the Land and Income Tax Act, 1923, in re-

spect of such an objection. (*Osborne* v. *Steel Barrel Co., Ltd.*, [1942] 1 All E.R. 634; 24 Tax Cas. 293, applied.) The appeal was accordingly dismissed. *Bedford Investments, Ltd.* v. *Commissioner of Inland Revenue.* (S.C. Dunedin. June 1, 1955. McGregor, J.)

TENANCY.

Dwellinghouse—Rent—Tenancy Agreement approved by Rents Officer—Rent accepted by Landlord after Expiry of Term thereof—Presumption of Intention to create New Tenancy—Landlord unable to show Receipt of Rent on Any Other Footing—Provisions of Part III of Tenancy Act, 1948, applicable to Such New Tenancy—"Effect according to its tenor"—Tenancy Act, 1948, s. 48 (1)—Tenancy Amendment Act, 1950, s. 2. When a landlord accepts rent after the expiry of the terms of a tenancy agreement, he will be presumed to have intended to create a new tenancy unless he is able to show that the rent was received on some other footing. (*Marcroft Wagons, Ltd.* v. *Smith*, [1951] 2 K.B. 496; [1951] 2 All E.R. 271, followed.) (*Errington* v. *Errington and Woods*, [1952] 1 K.B. 29; [1952] 1 All E.R. 149, and *Donald* v. *Baldwyn*, [1953] N.Z.L.R. 313, referred to.) Thus, where the term of a tenancy agreement respecting a dwellinghouse, which had been approved by a Rents Officer in accordance with s. 48 (1) of the Tenancy Act, 1948 (as re-enacted by s. 2 of the Tenancy Amendment Act, 1950), and the landlord had subsequently accepted rent but he had failed to explain the acceptance of rent on any other footing than that a new contractual tenancy was created, the provisions of Part III of the Fair Rents Act, 1948, were held to apply to that tenancy. *Samson Trading Co., Ltd.* v. *Did-dell and Another.* (S.C. Auckland. July 25, 1955. North, J.)

Urban Property—Possession—Landlord seeking Possession on Ground of Requirement of Premises for His Own Occupation—Landlord's Intention to demolish Buildings not Bar to His obtaining Possession on Such Ground—Different Meanings of "premises"—Tenancy Act, 1948, s. 24 (1) (h)*—Tenancy—Possession—Court's Discretion in making Order—Tenants giving Court Assurance of vacating Demised Premises if Landlord obtained Building Permit—Assurance withdrawn when Permit obtained—Exercise of Discretion against Tenants in Later Possession Action owing to Fact of Retractation of Assurance deliberately given to Court—Discretion not exercised on Wrong Principle—Tenancy Act, 1948, s. 24 (2).* The word "premises" as used in s. 24 (1) (*h*) of the Tenancy Act, 1948, means the land with any buildings upon it, and, *semble*, as it is used in s. 24 (1) (*m*), it means the buildings situate upon the land. (*Doe* v. *Angell*, (1846) 9 Q.B. 328; 115 E.R. 1299, and the judgment of Williams, J., in *Burling* v. *Chas. Steele and Co. Pty., Ltd.*, (1948) 76 C.L.R. 485, 490, referred to.) (Judgment of Hutchison, J., on this point, in *Porter Motors, Ltd.*, v. *McKenna*, [1950] N.Z.L.R. 8; [1950] G.L.R. 207, overruled.) Consequently, a landlord may obtain an order for possession under s. 24 (1) (*h*) so as to enter into occupation of the premises, intending as part of his enjoyment thereof to demolish the buildings, and substitute therefor others, which he in turn will occupy: he will be occupying the "premises" if he occupies the land and such buildings as from time to time are situate thereon. So held by the Court of Appeal, dismissing an appeal from the judgment of Cooke, J. The appellants gave an assurance to the Court in the action between the same parties heard by Hutchison, J., [1950] N.Z.L.R. 8; [1950] G.L.R. 207, that they had been, and in the future still would be, prepared to vacate the premises if the respondent obtained a building permit. At the hearing of the action heard before Cooke, J., in 1953, after the permit had in fact been granted, they withdrew that assurance. *Held*, by the Court of Appeal, That the learned Judge had not misdirected himself in exercising against the appellants the discretion given him by s. 24 (2) of the Tenancy Act, 1948, as it had not been shown that he had acted on a wrong principle in allowing himself to be influenced by the fact of retractation of the assurance deliberately given by them to the Court, the two actions, though separate in form and divided by an interval of four years, being only two successive stages of the same litigation. *McKenna and Anor.* v. *Porter Motors, Ltd.* (S.C. & C.A. Wellington. December 8, 1954, Gresson, Hay, Turner, JJ.)

VENDOR AND PURCHASER.

*Sale of Matrimonial Home by Husband—Deserted Wife in Occupation thereof—*Bona fide *Purchaser for Value with Notice of Deserted Wife's Right to continue to occupy Premises—Purchaser taking subject to Wife's Rights.* A *bona fide* purchaser for value of a property which was the matrimonial home, with knowledge that a deserted wife is in occupation of it, and, therefore, in the circumstances with constructive notice of her right to continue to occupy the property in virtue of her rights as a deserted wife, take subject to the wife's right of occupancy. (*Jess B. Woodcock and Sons, Ltd.* v. *Hobbs*, [1955] 1 W.L.R. 152; [1955] 1 All E.R. 445, followed.) (*Tourville* v. *Nash*, (1734) 3 P. Wms. 307; 24 E.R. 1077, applied.) *Shakespear* v. *Atkinson.* (S.C. Auckland. August 5, 1955. Finlay, J.)

WILL.

Devisees and Legatees—Child-bearing—Presumption of Impossibility of Issue—Annual Income of Residue bequeathed to Daughter of Testatrix for Life, and thereafter, as to Capital and Income, to Daughter's Children—Daughter, at Age of Fifty-one Years with One Child, asking for Order declaring Her incapable of Bearing Further Children—Jurisdiction to make Such Order. A testatrix, by her will made in September, 1937, devised and bequeathed a share in the residue of her estate to her trustee upon trust for investment and to pay the annual income to her daughter, J., during her life and, upon J.'s death, to stand possessed of the capital and further income of such share upon trust for J.'s child, if only one, or for her children, if more than one, who, if born in the lifetime of the testatrix, would survive the testatrix, and, whether born in her lifetime or after her death, should attain the age of twenty-one years, and, if more than one, in equal shares. J., who was fifty-one years of age, had been twice married. She had one child (a daughter) of her first marriage. J. and her daughter applied for an order declaring that J. be presumed incapable of bearing further children by reason of her age, and for a consequential order declaring J. and her daughter to be solely entitled under the trusts created by the will. *Held*, 1. That, in view of the medical evidence, and the fact that there was no further issue of J.'s first marriage, and her present marriage had subsisted for ten years without issue, it had been established that her capacity for child-bearing had ceased; and that the only persons concerned with the making of the order were J. and her daughter. (*In re White, White* v. *Edmond*, [1901] 1 Ch. 570, referred to.) 2. That the Court had the jurisdiction of the Chancery Division of the High Court of Justice in England to make the order asked for; and the order should be made. *In re Strachan (deceased), Grover and Another* v. *Guardian Trust and Executors Co. of New Zealand, Ltd.* (S.C. Wanganui. May 13, 1955. McGregor, J.)

Devisees and Legatees—Substitutionary Gift of "any pecuniary legacy" to Legatees predeceasing Testator or His Wife to Their Children if Legatee "had not predeceased me"—Words "or my wife" added—Shares in Residue "pecuniary legacies"—Legacies of Beneficiaries predeceasing Testator's Wife payable to Their Respective Children entitled thereto—Shares of Beneficiaries in Residue absolutely vested and not passing under Will to Their Children—Children surviving Testator's Wife to take Share of Deceased Parent. The testator, who died on July 7, 1927, by his will gave all his property to his trustees upon trust to carry out the following dispositions: Three small pecuniary legacies for present payment; a life estate to his wife while unmarried, and, from and after her death or re-marriage, in trust for sale and conversion to pay out of the estate—(*a*) a number of pecuniary legacies and (*b*) out of the residue to pay one specified legacy and to divide the final balance between certain named persons all of whom had already been given pecuniary legacies. The will contained the following clauses: "3. ALL the rest residue and remainder of my trust estate (hereinafter termed my residuary trust estate) I direct my Trustees to hold UPON TRUST out of the same to pay to my sister SARAH ANN STRANGE of Greenlane Auckland the sum of ONE THOUSAND FIVE HUNDRED POUNDS and to pay the balance of such residuary trust estate to the said Sarah Ann Strange—Richard William Jones Ellen Fanny Seabrook and the children of the said Annie M. Jones . . ." "4. I DIRECT that in case any legatee of any pecuniary legacy under this my will shall predecease me or my wife leaving a child or children living at the time of my death or the death of my wife shall attain the age of twenty one years then such a child or children shall take and if more than one equally between them the share which his her or their deceased parent would have taken had such legatee not predeceased me. I DIRECT that any succession duty payable in respect of gifts or bequests under this my will shall be payable out of and deducted from the respective bequests to the respective legatees or devisees on whose share in my trust or residuary trust estate such succession duty is payable." The testator's widow survived him for twenty-four years and, in the interval between the death of the testator and that of his wife some beneficiaries died: Sarah Ann Strange, died on July 13, 1938, leaving three children two of whom, John Richard Strange and Ethel Mary Clark, died before the testator's widow, and one George Herbert Strange survived her, all having attained the age of twenty-one: Richard William Jones died on July 8, 1950, leaving three

children all of whom attained the age of twenty-one and survived the testator's widow; of the children of Annie M. Jones, three were living at the date of the will, two survived the testator's widow, and one, Walter Richard Jones, predeceased her leaving five children of whom one, Kathleen Elizabeth Jones, predeceased the testator's widow and the remaining four survived her; and, all attained the age of twenty-one. On originating summons to determine the questions (*a*) whether the interest of Walter Richard Jones, Richard William Jones, and Sarah Ann Strange (all now deceased) created by cls. 1 and 3 of the testator's will vest indefeasibly upon the death of the testator; and, if the answer to that question is "No," then whether the estates of Kathleen Elizabeth Jones (deceased), John Richard Strange (deceased), and Ethel Mary Clark (deceased) had any interest in the estate of the testator. It was common ground that although the period for distribution was the date of the death of the testator's widow, all the legacies and shares of the various beneficiaries vested as from the death of the testator, but subject to the possibility of their being divested under the provisions of cl. 4 of the will. *Held*, 1. That cl. 4 of the will, even though it was a divesting clause, should be read as if the words "or my wife" had been added after the words "not predeceased me" at the end of the clause. (*In re Haygarth, Wickham* v. *Haygarth*, [1913] 2 Ch. 9, followed.) (*In re Horne, Guardian Trust and Executors Co. of N.Z., Ltd.* v. *Horne*, [1935] N.Z.L.R. 648; [1935] G.L.R. 573, referred to.) 2. That the legacy of £1,500 to Mrs. Strange was a "pecuniary legacy" as was each legacy given to R. W. Jones and the children of Annie M. Jones; and the shares in the final residue given to such legatees were also "pecuniary legacies." (*In re Elcom*, [1894] 1 Ch. 303, *In re Smith*, [1916] 1 Ch. 523, and *In re O'Connor*, [1948] Ch. 628; [1948] 2 All E.R. 270, referred to.) 3. That, accordingly, the legacies of the three beneficiaries who had died were divested under cl. 4, and would be payable to such of their respective children as would be found to be entitled; but their respective shares of residue were absolutely vested and would not pass by virtue of the will of the testator to their children. 4. That only those children who survived the testator's wife should take the share of a deceased parent. *In re Jones (deceased). Dunningham* v. *Public Trustee and Others.* (S.C. Auckland. April 6, 1955. Stanton, J.)

WORKERS' COMPENSATION—ACCIDENT ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT.

Crane-driver with General Control and Supervision of Motor-driven Crane—Remark to his Young Son in Employer's Yard "bring the crane round to the back of the yard"—Son starting Crane—Crane-driver injured in stopping it—Careless or Negligent Remark to Son made within Scope of Crane-driver's Employment—Employer liable for Compensation—Workers' Compensation Act, 1922, s. 3. The plaintiff, who had been employed as a crane driver by the defendant for some years, was the senior crane-driver, and he had general control and supervision of the use of the defendant's twelve-ton mobile crane. After working with the crane at a job, the plaintiff then drove it to his employer's premises. With him in the driver's cab were the assistant crane-driver, and the plaintiff's son, who, at that time, was aged ten years and nine months. Later, when the plaintiff was talking to a group in the yard, the crane was standing at the entrance to the yard some twenty to thirty yards away from the group and was facing in the direction of a workshop in which a number of employees had been working. At this stage, the plaintiff commented that it was time to get on with the job, and, addressing his son in a jocular fashion, he said: "O.K., son, bring the crane round to the back of the yard". The boy, who had ridden in the crane on a number of occasions as a passenger to the knowledge of the employer, and without any objection, had always been told that he must never touch the controls; and he had never previously touched the controls of the crane. The boy apparently took his father's remark as meant seriously, and walked over to the crane. The men in the group saw him go, and did not think anything of it until they saw the boy climbing up the driver's side of the cab of the crane and getting into the cab. The plaintiff suddenly realized that his son might try to move the crane, and he rushed over with the idea of stopping the boy from doing this. Before he got there the engine started, and the crane leapt forward before he reached it. He climbed up the driver's side of the cab with the intention of getting in and stopping the motor, but he realized that he would not have time to do this before the crane collided with the building in which, he knew, men had been working only a few minutes earlier. He therefore leaned into the cab and grasped the steering wheel, and steered the crane clear of the building and down an opening between the two buildings towards the yard at the rear. He called to his son to get off the accelerator pedal, but his son either did not understand or was "frozen" where he stood. When the crane approached the yard at the rear, where the plaintiff expected to have space and time to get into the cab and turn off the motor, he found his entrance to the yard blocked by a parked truck. He tried to avoid this truck, but the crane collided with it. The plaintiff's right lower leg was crushed between the cab of the crane and the tray of the parked truck. In an action claiming compensation for his injury, the evidence and argument were directed to the question whether there was any liability on the defendant's part to pay compensation. *Held*, That in carrying out his work of supervising the crane, the plaintiff did a careless and negligent act in making the remark to his son, "bring the crane round to the back of the yard"; but the consequence of that act came within the scope of the employment of the plaintiff, who was entitled to recover compensation for the injury suffered by him when he endeavoured to stop the crane. *Mathews* v. *N. P. Croft and Co., Ltd.* (Comp. Ct. Wellington. May 19, 1955. Dalglish, J.)

Hernia—Condition not reported by Worker to Employer until Five Days after Onset of Hernia—Doubt whether Hernia caused at Work, or spontaneously, or due to Other Cause—Worker not excused from Failure to fulfil Condition of making Report to Employer—Workers' Compensation Amendment Act, 1943, s. 6 (1), (4). About 3 p.m. on a Wednesday, when the plaintiff, a moulder, was assisting in the pouring of metal into moulds, he felt a sensation in the right groin and said he had "got a bit of a rick". He did not suffer any severe pain and carried on with his work in a normal fashion for the remainder of the afternoon and for several hours of overtime in the evening. On the Thursday morning, he went to work as usual; but, after lunch, he became conscious of a swelling in his groin which, by the late afternoon, had grown substantially. On the Friday morning, he saw a doctor, and was advised that he had a hernia and should have an operation. On the Monday, he attended the hospital to make arrangements for an operation, and subsequently filled in an accident report form at his place of employment. *Held*, 1. That, on the evidence, it was doubtful whether the incident of the Wednesday afternoon had brought about the onset of the hernia which was seen the next day and confirmed by a doctor two days after the incident, as the hernia may have occurred spontaneously or may have been due to some other incident; and that, in such circumstances, it was doubtful whether the conditions set out in s. 6 (1) (*b*) of the Workers' Compensation Amendment Act, 1943, had been fulfilled. (*Crosby* v. *Empire Rubber Mills, Ltd.*, [1952] N.Z.L.R. 332; [1952] G.L.R. 211, referred to.) 2. That, as the condition set out in s. 6 (1) (c) had not been fulfilled, and having regard to the doubt whether the condition under s. 6 (1) (*b*) was fulfilled, the plaintiff's failure to give the notice required by s. 6 (1) (c) could not be excused. *Donnelly* v. *William Cable, Ltd.* (Comp. Ct. Wellington. July 5, 1955. Dalglish, J.)

WORKERS' COMPENSATION—LIABILITY FOR COMPENSATION.

Liability for Compensation—Seaman injured on Ship at Penang, Malay States, on March 13—Ship reaching New Zealand on June 4—Action claiming Compensation commenced on November 25 following—Delay not occasioned "by absence from New Zealand"—Workers' Compensation Act, 1922, s. 27 (4). The plaintiff claimed compensation for injuries received in an accident, which arose out of and in the course of his employment by the defendant, as a motorman in m.v. *Wairata*, at Penang, in the Malay States, on March 13, 1954. The vessel on which he was employed did not return to New Zealand until June 4, 1954. Between that date and the middle of October, the plaintiff had a period of approximately five weeks in hospital having treatment. The writ claiming compensation was issued on November 25, 1954, over eight months after the occurrence of the accident. On the question whether or not the failure to commence the action within six months after the accident should be excused under s. 27 (4) of the Workers' Compensation Act, 1922. *Held*, That the delay, until November 25, 1954, in commencing the action was not occasioned "by absence from New Zealand" within the meaning of s. 27 (4) of the Workers' Compensation Act, 1922. (*Morrison* v. *Liddle Construction, Ltd.*, [1951] N.Z.L.R. 1079; [1952] G.L.R. 24, and *Gill* v. *Owners of Ship "Boniface,"* (1932) 25 B.W.C.C. 346, applied.) *Semble*, That, if the date of an injured worker's return to New Zealand is close to the expiration of the period of six months from the date of the accident, a reasonable period should be allowed after his return for the necessary steps to be taken; but what would be reasonable, in such circumstances, would be for the Court to decide on the particular facts of each case. *Bueno* v. *Union Steam Ship Co. of New Zealand, Ltd.* (Comp. Ct. Auckland. July 8, 1955. Dalglish, J.)

INTERPRETATION OF STATUTES.

The Effect of A Repeal.

By D.A.S. Ward.

" When an Act or part of an Act is repealed, to use the words of Lord Tenterden in *Surtees* v. *Ellison* ((1829) 9 B. & C. 750 ; 109 E.R. 278), ' it must be considered (except as to transactions past and closed) as if it had never existed ' (*ibid.*, 752 ; 279). So Tindal, C.J., in *Kay* v. *Goodwin* ((1830) Bing. 576 ; 130 E.R. 1403) says : ' The effect of repealing a statute to be, is to obliterate it as completely from the records of the Parliament as if it has never been passed ; and it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted, and concluded whilst it was an existing law ' (*ibid.*, 583 ; 1405) : see, too, *Craies on Statute Law*, 5th Ed., 380, for further authorities to the same effect."

Turner, J., in *Tawhiorangi* v. *Proprietors of Mangatu Nos. 1, 3, and 4 Blocks (Incorporated)*, [1955] N.Z.L.R. 324, 329.

" These are strong words ", said Turner, J.; and His Honour applied them to the facts in the *Tawhiorangi* case, without qualification, as if they stated a general rule existing today. It is submitted, with respect, that although there used to be such a general rule, it became merely an exception seventy-seven years ago in New Zealand, when Parliament took pains, in the Interpretation Act, 1878, to make it practically harmless.

It is not suggested that the actual decision in the *Tawhiorangi* case was wrong ; but the application of the rule stated in *Surtees* v. *Ellison* and *Kay* v. *Goodwin* was unnecessary for the decision, and creates a wrong impression as to the effect of a repeal. The facts of the case were complicated, and a summary of them fills more than two pages of the judgment. For the purposes of this note, it is sufficient to say that s. 23 of the Maori Purposes Act, 1953, reconstitutes a certain corporation of owners of some Maori land (together with its committee of management) previously constituted under Part III of the Maori Purposes Act, 1947, and repeals Part III of the 1947 Act. The 1953 section provides (*inter alia*) that the committee of management established under the 1947 Act

> shall be deemed to be the first committee of management of the body corporate established by this section, and each member of that committee in office on the commencement of this section shall remain in office until his successor is elected or appointed in accordance with regulations made under section two hundred and ninety-four of the Maori Affairs Act, 1953.

At the commencement of the 1953 section, there were four vacancies in the membership of the committee of management, and three members in office. The issue was whether the three members in office were continuing members of a committee of seven on which, at the date of commencement of the 1953 section, there were four vacancies that could be filled by election under the machinery provisions of the 1947 Act, notwithstanding the repeal of those provisions. The four second defendants had in fact been elected under those provisions to fill the vacancies on July 30, 1954, whereas the 1953 section, including the repeal, was expressed to come into force on April, 1, 1954.

It is, therefore, clear from the facts, and it is clear from the judgment, that the real question was not whether Part III of the 1947 Act was to be treated, by reason of its repeal, " as if it had never existed ", but whether the effect of the 1953 section was to *preserve after the date of the repeal*, the operation of Part III for the purpose of filling the vacancies existing at the date of the repeal. The crucial words were " each member of that committee in office on the commencement of this section".

Unfortunately, however, after stating the question, Turner, J., made the statement quoted at the head of this note, and purported to apply the rule stated in *Surtees* v. *Ellison* and *Kay* v. *Goodwin* ; and those cases are therefore cited in the headnote to the report of the *Tawhiorangi* case as having been applied.

As a matter of interest, an examination of the lists of cases cited in the New Zealand Reports from 1861 to 1954 shows no mention of the *Surtees* case, and only one reference to *Kay* v. *Goodwin*. The latter case was cited by counsel in *Canterbury University College* v. *Wairewa County*, [1936] N.Z.L.R. 304, and was briefly mentioned by Northcroft, J.; but it was clear that s. 20 of the Acts Interpretation Act, 1924, applied, and the Court applied that section.

There can be few cases to which the former general rule can now apply. Even before Parliament intervened, the Courts had created exceptions to it, because of the obvious inconveniences following from it. Examples are cited in *Craies on Statute Law*, 5th Ed., pp. 382, 383. The first legislative modification in New Zealand was by Ordinance No. 3 of 1851, which provided that the repeal of an Ordinance was not to revive any previous provision that had been repealed by it. That rule was applied to Acts by the Interpretation Act, 1858, and was extended in relation to Acts and Ordinances by the Interpretation Act, 1868. The Interpretation Act, 1878, almost completed the work of avoiding the inconvenient consequences of the general rule. Section 16 of that Act, and s. 21 of the Interpretation Act, 1888, contained most of the provisions now found in ss. 20 and 21 of the Acts Interpretation Act, 1924.

If the rule were not largely qualified, the results would be far-reaching and could create injustice, even with a liberal interpretation of Lord Tenterden's exception " as to transactions past and closed ". The effect of that exception would depend on the facts of any given case. There would be doubt as to its application to transactions having a continuing effect. Subject to those considerations, the repeal of an enactment would revive a previous enactment that had been repealed by it ; things done that were lawful only because of some enactment would become unlawful on its repeal ; status or capacity or a right, interest, or title acquired, or an indemnity given, under the repealed enactment would cease to exist ; and a fine or penalty incurred under it could not be recovered. A contract made pursuant to the repealed enactment could not be enforced. Proceedings begun under the repealed enact-

ment could not be continued. All these consequences, and others, are now avoided by s. 20 of the Acts Interpretation Act, 1924. Moreover, it is important to note that s. 20 creates a statutory presumption that the section applies to every repeal; and that presumption is only rebutted "where the context manifests that a different construction is intended".

If there were no such provisions in the Acts Interpretation Act, and no judicial qualifications of the rule stated in the *Surtees* case, it is submitted that the Courts would soon set about the task of qualifying it to avoid the injustices, hardships, and inconveniences that would arise. In reconciling the administration of justice with enacted law, the Courts have developed so many rules of construction that it is difficult to find one that is not largely qualified or almost contradicted by another or others; and the rule to be applied in any particular case depends on the approach made by the Court to the facts. For example, there is the well-established rule that no enactment is to be given a retrospective effect unless there is in the enactment a clear indication that it is to have that effect. On principle, this rule is just as applicable to a repeal as to any other enactment.

Of course, the exceptional case can still arise, as it did in *Boddington* v. *Wisson*, [1951] 1 K.B. 606. In that case the question to be decided was the effect on a notice to quit of the revocation of a defence regulation. The regulation provided that in certain cases a notice to quit was to be "null and void"; but there was a proviso to the effect that it would not be null and void if it were consented to by the Minister of Agriculture and Fisheries, whether before or after the notice to quit was given. The regulation and proviso were revoked on March 1, 1948. A notice to quit, expiring in October, 1948, was given before March 1, 1948, without the prior consent of the Minister. If the regulation had not been revoked, the Minister could have consented to the notice at any time before its expiry. It was held by the Court of Appeal that s. 38 (2) of the Interpretation Act, 1889 (which preserves certain rights, obligations, and proceedings under a repealed enactment), was not appropriate to preserve the procedure for the consent of the Minister under the revoked regulation, and that the revoked regulation must be treated, in relation to the notice to quit, as if it had never existed. Therefore the notice to quit was held to be valid. Such a case is quite different from the *Tawhiorangi* case, where the repealing section expressly preserved the existence of the corporation of owners, continued certain members of its committee of management in office, and substituted new procedure for the election of the committee.

There is no doubt that the Courts and counsel can be misled by the treatment of the former general rule in the text-books on statutory interpretation, with their bias towards the citation of rules made in older cases and their failure to state clearly the effect of the Interpretation Act on those rules. The treatment in *Craies* is not good. After stating (at p. 380) the rule as quoted by Turner, J., *Craies* says "This rule is recognised in s. 38 (2) of the Interpretation Act 1889"; which is an ambiguous statement. Admittedly there is a footnote referring the reader to Appendix B, where the Interpretation Act, 1889, is printed; but the words quoted are immediately followed by a discussion of a number of cases illustrating the general rule and the exceptions created by the Courts, with an occasional brief reference to the Interpretation Act. The emphasis is in the wrong place, and the effect of the Act is not considered. The treatment in *Maxwell on Interpretation of Statutes*, 10th Ed., is better. There the reader (at p. 403) is warned that, where an Act was repealed, it was *formerly* regarded as having never existed, and the effect on the former rule of section 38 (2) of the Interpretation Act, 1889, is briefly stated.

Finally, it is worthwhile emphasizing that in other respects it is not always safe to rely on the English text-books. Our Acts Interpretation Act, 1924, contains a good deal more, and is more specific, than the United Kingdom Act. The general rules of construction in s. 5 apply "except in cases where it is otherwise *specially* provided". The "fair, large, and liberal construction" required by s. 5 (*j*) to be given to all Acts, whether penal or beneficial, is not required by the United Kingdom Act. Though some of the provisions of our Act are declaratory, some of them directly reverse judicial *dicta*. It is often forgotten that s. 2 of the Act creates a statutory presumption that, in all matters to which to which the Act is capable of being applied, it does apply. The operation of that presumption can be avoided only by showing that a construction different from the statutory one is required by the intent and object of the enactment being construed, or by its context.

The Clarity of Omission.—There is an accuracy that defeats itself by the over-emphasis of details. I often say that one must permit oneself, and that quite advisedly and deliberately, a certain margin of misstatement. Of course, one must take heed that the margin is not exceeded, just as the physician must be cautious in administering the poisonous ingredient which magnified will kill, but in tiny quantities will cure. On the other hand, the sentence may be so overloaded with all its possible qualifications that it will tumble down of its own weight. "To philosophize," says Holmes in one of his opinions—I am quoting him from uncertain and perhaps inaccurate recollection—"to philosophize is to generalize but to generalize is to omit." The picture cannot be painted if the significant and the insignificant are given equal prominence. One must know how to select. (Benjamin N. Cardozo, "Law and Literature," from *Law and Literature and Other Essays and Addresses, 1931*).

AUTHORITY AND FREEDOM IN MEDIEVAL EUROPE.

By M. C. D'Arcy, S.J., M.A., *formerly Master of Campion Hall, Oxford.*

Mention the Middle Ages, and the words Magna Carta come straightway to the lips. "To no one will we sell, deny, or delay rights and justice." These are fine words, and in the seventeenth century the Commons of England liked to refer to them and Magna Carta against the supposed royal usurpations of liberty. But most of the provisions of Magna Carta have little bearing on what we now call rights and liberties, so little in fact that more than one school of historians have discounted it as just another feudal document. A wiser opinion is, I think, that it shows that attachment to freedom which has produced our present liberties. (I suggest that the ideas of freedom current in the Middle Ages differ from those now in vogue; nevertheless, the ideal of liberty was struggling for expression and contained in essence what we should now prize.)

The trouble with such words as liberty and authority is that they have so many shades of meaning, and the use of them can lead to much misunderstanding. Those behind the iron curtain bandy the words "freedom" and "democracy", and the Western powers dislike "authority" or "authoritarianism" as signifying to them brute power and fascism. We must start from a basic sense of the terms, if there be one. Freedom in the last resort finds its meaning in the existence in ourselves of free will. Because of free will, the individual is self-determining, self-reliant, a person with rights and duties. The Greeks underscored its importance in community life, and the Christian Church developed the ideal contained in it and made it the lynchpin of Western civilization.

This then is the basic meaning, but, with the growth of human experience and human knowledge, all kinds of tunes came to be played on the underlying motif, and the variations have at times obscured the fundamental meaning. History shows that we think of liberty more or less in terms of the danger threatening it, and these dangers have been very varied. At the beginning of the last war we proclaimed four freedoms, and nowadays we have almost always in mind freedom from totalitarian governments and freedom of conscience and thought. So soaked are we in contemporary problems that we forget that in other times there were other habits and manners. The situation in the Middle Ages at its beginning was very different from ours. Europe had no common background: most of it was occupied by turbulent and barbaric tribes. The one force capable of civilizing them and uniting them was the Church, and the Church had two weapons—the wisdom of the Greek and Roman culture and the Christian ideal. The Roman culture had known tyranny, slavery, and persecution, but it joined the notion of freedom with law, and this conjunction of ideas, law, and freedom lasted for a long while. The excellency of freedom too was acknowledged. As Cicero wrote: "Freedom dwells in no state where the people do not possess supreme authority; nothing is to be more prized than freedom, but when it is not the same for all, then it is not freedom." This is high sounding, but not put into practice in Rome; and when the Church had to struggle with the violent barbarians and work through long traditions of slavery and serfdom, the idea of full self-government had to rust for a long time. The idea did not lack statement, but it was more or less inoperative.

The Church laid its emphasis on the worth of every individual as equal in the sight of God. This idea is in the forefront of its teaching and beautifully taught in one of the letters of St. Paul. The slave of one of his converts, Philemon, had run away to Paul, and the saint passionately insists that Philemon must treat the slave as his brother. The time was not, however, ripe for the social revolution which the Christian ideal implied. Moreover, in the first centuries the Church existed alongside Roman civil society without any voice in its running. It was content to accept the demands of Caesar where possible. Not until the early Middle Ages did the Church have to combine its unwordly teaching with a large responsibility for the peace and welfare of the newly arising communities. The realm of the temporal city with its moral obligations and its proper authority and government was acknowledged to belong to the civil power, but Church and state had now to form a partnership—a quarrelsome one as it proved—and the common aim was to produce a united Christendom bound by law and justice and the spirit of Christian service. It is within this conception that we must view the growth of freedom and the place of authority. In the religious sphere the idea of authority was paramount for the simple reason that the Christian religion rested on the belief in God's revelation, given with full divine authority and to be voluntarily obeyed as the way of life and perfection. The very purpose of the divine gift of freedom was brought to light when the Gospel showed what man could become with the light and help of grace and his free will. The ideas of authority and freedom went together; and the Middle Ages lived on this idea, so well expressed by St. Augustine, that morals rest on the eternal law: "This teaching is the very law of God, which remaineth fixed and unshaken in Him, and is, as it were, transcribed in the minds of the wise"; and again: "What soul hungering for eternity . . . would resist the splendour and the majesty of the authority of God?" True freedom, therefore, is one with submission to the living truth, as the supreme spokesman of the Middle Ages, Dante, declared, "In His will is our peace".

Consequent on this theory of life is another use of the word freedom which is conspicuous in the Middle Ages. By bad choices we follow the line of least resistance and lessen our freedom. Full and proper freedom, then, consists in the emancipation of the spirit from the slavery of the lower passions. The self is most truly free when it can carry out what it knows to be best for itself. Like a sword flashing from the scabbard, the will, free from enslaving attachments, can be exercised swiftly and fully. This conception of freedom is responsible by a good or bad logic for the most notable features of the Middle Ages—their interest in law, the love of systemization, the emphasis on personal responsibility, the hatred for heresy, the intolerance, and the inquisition.

This is the text of a broadcast address, prepared and delivered as part of the recent centenary celebrations of Columbia University, New York, at the University Centennial Committee's request. It was re-broadcast by the New Zealand Broadcasting Service. By the courtesy of the author, the address is reproduced from his script.

It explains, too, the end they had in mind in education and the place they gave to law and regulations in life. Evil must be eradicated and the passions trained that the self may be master in its own house and the soul enabled to soar. In this respect the medieval teaching departs both from the liberal and the Communist. The old liberal believed in the goodness of human nature; all restrictions were chains; and, if thrown off, society was bound to progress and be happy. So different, however, was the result of unbridled liberty and competition that the Communist reverses the policy, takes all power out of the hands of the individual, and puts it into the supposed safekeeping of the state. The medieval view lies in the mean between these two. Man is made to be independent and responsible; but, because he is half angel and half devil, he must be first trained to good habits and fed, as Plato said, on good pastures, if he is to be a good shepherd or steward of his property and of others.

Much, therefore, that we cherish in freedom would have been a closed book to the medieval, and he would have been very suspicious of liberty uncharted and under no flag. To him liberty meant something as definite as a coat or a house, or the freedom of the saint who is completely dedicated. The social order was coming into being after the period of chaos. Many men were still in a servile condition. They took for granted much that to us would seem intolerable and fought for an immediate right. Liberty was almost equivalent to that right, for in the language of the day they asked for *libertates*, in the plural, the right to do this or hold this and that, the privilege—for right and privilege meant much the same—to keep a horse and ride on it or to be exempt from certain demands of the lord or overlord. A rebel forfeited his rights, liberty (that is, his rights), if he waged war against his lord unjustly; and these same rights belonged equally to the villein and the free man. The difference between these two latter was that the free man had more of these liberties than the serf. All at the same time believed firmly that the pagan idea of the serf as slave without any rights was wrong. That was Christian teaching. If a man had few actual liberties and was born in a servile state, he nevertheless was human and an image of God and in practice must be treated as such. The stigma of servitude which custom imposed should be removed by the charities of Christian men. "Whoever in the name of the holy and undivided Trinity, moved by charity, permits anyone of his servile dependants to rise from the yoke of servitude to the love of liberty, must surely trust that in the Last Day he himself will be endued with everlasting life!" There is a quotation packed full of medieval ideas and sentiment. Giraldus Cambrensis speaks too about the *hilaritas libertatis*, the joy of liberty, which stirs the heart of man, because serfdom is unnatural and all are free in Christ. It is unnatural because it is against the law of reason and justice, two of the most operative medieval words. To the medieval thinkers the cosmos, as the word signifies, was penetrated with reason. Where will, not reason, ruled, there, there is lawlessness and injustice. The tyrant is the embodiment of will without reason, and servitude is against reason because the serf lives his life dependent on the will of another. Bracton, for instance, said that the evil in serfdom lay in the serf's not knowing what he would have to do on the morrow. The whim of the lord held him captive; there was no rule, and without rule there is no reason or justice. Women, serfs, fools, boys, and enemies, beware of them, Salimbene said, because they are all alike in the common lack of law or reason.

Justice played such an important role in medieval thought because it was axiomatic that God was the fountain of justice; from Him comes the moral law, obedience to which spells freedom and victory. The moral law was, therefore, absolute and binding. Bad law was no law and, as unjust, must be ignored or defied. We now tend to think of law as a matter of expediency, as a code of regulations suited for present emergencies and as relative as traffic control or the heating of a room. In the Middle Ages law is applied justice, and justice is eternal, a part of the divine order like the Ten Commandments. Original sin has darkened the mind and weakened the will, and so, by learning in the hard school of justice, man has to strive his best to make the earthly order conform with the divine. The more a man moved into right order, the more was he free to perform his allotted task on earth. I say allotted, because to the medieval mind equality of nature did not carry with it equality of function. Everyone is to be wise in his own art and perfect himself in it and not envy those with other functions. In such a multiform system different men have different *libertates*, rights, and duties to carry out. A king had more duties, more laws to obey than a knight or freeman, and at the top of the pyramid the pope ruled as the servant of the servants of God, with more duties and responsibilities than anyone else. To catch the spirit of the time, read what St. Anselm wrote to another monk: "Does not almost every man serve either under the name of lord or serf? And is not he called a serf, in the Lord, the Lord's freeman; and he who is called free, is he not Christ's serf?" Freedom in other words is a kind of higher dedication, a voluntary ministering to God and others. This view of life is exactly summed up by G. Tellenbach, a leading writer on the Middle Ages, in a description of Hildebrand's struggle for the freedom of the Church: "For him the age-old Catholic ideas of righteousness (*justitia*), a Christian hierarchy (*ordo*), and a proper standing of everyone before God and man (*libertas*) were the core of religious experience, and their realization the purpose of life upon earth." Fitting words, which throw light too upon that beautiful but strange prayer of Cardinal Humbert in the eleventh century: "Protect, O freest of all, God and Lord, Thine incomparable freedom!" The serf as well as the cardinal has part in that incomparable freedom.

So far I have been talking of the early Middle Ages, when a new civilization was coming into being. In the latter half of this period generalizations are less safe. The various countries of Christendom began to develop along individual lines. There is nothing, for instance, quite corresponding in England to the growth of the city communes in Italy, the Cortes of Aragon and Catalonia, which had full legislative rights, or, most remarkable of all, the University of Bologna, where the corporations of students managed the university and used the professors and masters as their employees. The growing royal power in England and France checked the growth of city communes, which, in the view of Troeltsch, are the most complete embodiment of the social ideals of the Middle Ages. "From the political and economic point of view, the period of civic culture which begins in the eleventh century may be regarded as a preparation and foundation of the modern world." If the North lacked the strong city-states, it made up for that by the development of the guilds, which protected their members and gave them status and an opportunity to work as free men. Serfdom tended to disappear as the years passed; town life sprang up; and the thirteenth century was a prosperous one for the peasant. In Bavaria and

Austria we have examples of peasants aping the gentry, of village dandies with spices in their pockets for scent and pomade for their long curling locks. Brueghel's pictures belong in a way to the Middle Ages, and in England the peasants' lot, as described in *Piers Plowman*, shows the changes which had come about.

The various changes make generalizations more difficult, but they do not represent any essential change in the concept of freedom and authority. They mark a development of the theme, the city life showing, for instance, a more highly organized unity, with rights and status more securely established, and these rights extending even to the claim of self-government. But the sense of order and hierarchy of privilege continued. When, however, the monarch, for example, tried to extend his power or keep obsolete privileges, the people began to range themselves against a new absolutism and so acquire new freedoms. The Seneschal of Burgundy, for instance, said to the States General of France after the death of Louis XI, one of the new Machiavellian type of rulers: "I wish to tell you . . . what I have learned from great and wise men on the authority and liberty of states. It is certain that the royal power is a dignity and not the property of the princes. History relates that at first the sovereign people created kings by their votes. It is in its own interest that each nation gives itself a master. The whole world repeats that the state is the creation of the people." So emphatic a declaration is perhaps unusual, but the theory is contained in the classical tradition and in the Christian philosophy. We can see the remnant of it even today in the English Coronation service. Already in 1189 at the accession of King John, Hubert Walter asserted that "no man hath a right to succession to this crown, except that by unanimous consent of the kingdom he be elected for his own deserts". We were reminded of this principle recently when the Archbishop of Canterbury presented the new sovereign, Queen Elizabeth II, to the bishops, peers, and people in turn as "your *undoubted* queen". Edward II, as we know, was compelled by his barons to add to the three promises made to the people a fourth oath that he would maintain the laws which were to be chosen by his subjects. When, however, absolutism arose, with its intimation of the divine right of kings, at the end of the Middle Ages, the Tudor King Henry VIII tried to change this oath, and his successors did manage to remove the limitations to their powers.

The divine right of kings was not a medieval idea, nor was that of unlimited power. The king was king *secundum legem*, according to the law, and the law was for the benefit of the people. The claim to absolute power came later with nationalism and the break-up of a united Christendom. Once the state sovereign declared his independence of the spiritual authority, he tended to assume spiritual authority himself. This change may have helped to produce the modern state and nationalism, but it did not help democracy or freedom. This is not to say that the Middle Ages had our idea of democracy. The power might lie with the people in choosing their sovereign. That, as we have seen, was claimed; but, once the king was crowned, he became the embodiment of justice and exercised his authority from God, the one final source of justice and authority. "The people's welfare streameth from their Kings", as Drummond of Hawthornden said. The choice of the people was not revocable at their whim. So long as the sovereign kept the law of God and the law of the land, he was the Lord's anointed, and obedience was his due. Only if he showed himself unjust and broke his oath, had the people a right to resistance. In other words, law, as already explained, was looked on as equivalent to justice and a charter of liberties. Freedom as part of this pattern was sought for in responsibility and in the exercise of rights and duties according to the law. The individual living in an accepted cosmos, with all his comrades around him committed to a common faith, was, like the soldier in the ranks, to some extent hidden in the idea of status, be it that of the peasant or burgher or knight. Parliament or representation was in terms of groups, which might be called communes rather than a community. As the royal power increased and the lives of the townsmen and guilds and merchants were made to smart under it, the need for representative assemblies of these groups was felt, thereby to insure that government and taxation should be controlled. But there was no question of universal suffrage, nor of a House of Congress or Commons, and these assemblies were spasmodic and no part of the regular government of the realm. Nevertheless, out of the ideas implicit in the medieval political theory and out of the practice which gradually developed in England came our modern democracy. Erasmus, for instance, saw Plato's perfect republic at work in Strasbourg. He saw in his visits to England no such happy state. Liberty was checked for a time by the Star Chamber and the absolutism of the Tudor monarchs and their successors; and out of this struggle came the sense of freedom which passed across the Atlantic and, emerging fully in the American Revolution, passed thence to France. One element, however, of the theory had been lost or displaced: the view of law as the expression of everlasting justice and the framework of duty and freedom.

From what I have said about the medieval ideas of social and political freedom it is easy to gather their views on tolerance, the freedom to think and do what one likes. Medieval men passionately believed that they had the truth, that it was obvious and vital to follow it, and that if a man denied it, he must be wrongheaded. Freedom was a chartered liberty, one which permits a man to choose his route within the map of life. The map is drawn by God and is clearly seen in the moral law, in justice and charity, and in the doctrines which God has revealed in the Christian faith. To forsake the true way is not only foolish; it is self-destructive morally and pernicious to one's neighbour. This view appeared almost self-evident in the medieval atmosphere of passionate belief, as evident as the wickedness of offering salt instead of fresh water to one's neighbour to drink. Conscientious hesitations and self-analysis were not a medieval habit. As the old hermit of Prague said to the niece of King Gorboduc, "That that is, is". Self-analysis and psychology become interesting only after mature experience, and the words expressing the feelings and moods of the self are generally later in a language than words descriptive of things and events. Proust comes long after the *Song of Roland*. Conscience in our sense of the word, with its individual claims and reasons and rationalization, was not so familiar to the medieval mind and, when separated from the known truth, was given short shrift. For the medieval sense, take St. Bernard's remark to a youth: "A good conscience fears no material loss, and no invective can touch it, no physical pain can hurt it." Our world is full of uncertainty; not so the medieval. The world outside was obvious; the moral law of right and wrong was obvious; so too it was certain that God was in His heaven

and one day to judge the living and the dead. If a man did wrong, he offended against God and man and was punishable; if he taught untruth, there must be some fault in him. It was only too easy to justify the persecution of sects and heresies on these premises. The other side of the picture is that within orthodoxy—and orthodoxy was at times very generously interpreted—much liberty was allowed. Love songs, drinking songs, lampoons were uproariously free; and so too the discussions of the students in the universities and the arguments of the professors. Theories were then freely propagated which in these days of censorship would be quickly banned. Pierre Dubois proposed the decentralization of the Church, St. Catherine of Siena chided popes, and Marsiglio of Padua was a thorough anti-clerical. The scholastic thinkers, men like Grosseteste, Roger Bacon, and Thomas Aquinas, did not feel themselves shackled. They had the courage of their convictions. Indeed, our medieval ancestors seemed to have loved both speculation and litigation, fighting furiously and continuously for their rights and customs. It is computed that one-third of the canon law was compiled from appeals made by Englishmen to Rome, and the history of the period is noisy with legal and intellectual battles.

Our modern conception of liberty and our devotion to it is a growth out of the Middle Ages. The basis of it lies in the old philosophy of man, his right to self-determination, and consequent rights and responsibilities. The Christian teaching added a new story and wings to the building. "For we are all Christ's creatures", in the vision of Piers Plowman, "and of his coffers rich,

> And brethren as of one blood—as well beggars as earls.
> For on Calvary of Christ's blood—Christendom gan spring,
> And blood brethren we became there—of one body won,
> As *quasi modo geniti*— and gentlemen each one.
> No beggar or serving boy among us—save sin made him so."

Time was needed for this rich view of man to be understood in all its implications.

The period which followed the Middle Ages was one of strife and absolutism, and the very strife quickened the sense of conscience. In a united Christendom where law, morality, and faith sang the same song, private conscience did not protrude itself. The break is exemplified in the famous words of Thomas More, the Magna Carta of conscience, "The King's faithful servant, but God's first", words which meant prison and the scaffold for him. Freedom became more confined during the wars of religion and under the rule of such autocrats as Louis XIV and Frederick the Great. But the common law survived and waxed strong. Here was a writ of freedom which became universal in the English-speaking world; and this common law was the creation of medieval clerics, such as Bracton and Fortescue. It made the people conscious of their liberties in times of stress. The world, too, was changing before their eyes. Before the new discoveries, physical and geographical, the *mappa mundi* of the Middle Ages had to be scrapped; the old science split up into new disciplines, each with its own principles and hypotheses. This new autonomy brought with it greater freedom of speculation. Society, too, as it grew more divided into nations and races, began to exhibit a wider variety of human experience and manners. No longer was there a universally accepted opinion on what was right and wrong. Such changes in human knowledge led inevitably in time to a greater tolerance.

But perhaps the most notable cause favouring liberty lay in the individual's increasing consciousness of his own importance and personality. Medieval man was corporate more than individualist, objective more than subjective. Modern man, partly because of changed economic conditions and a struggle for existence, is more conscious of his rights and of himself. Living on the principles inculcated in the Middle Ages, the individual has grown up. He demands the right to think and speak for himself. He must also in consequence, though he is at times slow to recognize this, grant the same demand to others, however irritating their opinions may be. Out of the old has developed this modern sense of freedom. But the medieval idea is not dead; indeed, it cannot die; and we feel it, for example, in the problem of how to deal with the saboteur, the infiltrating enemy of the state, the quisling. One advantage the Middle Ages had. They were quite clear about the end of education, the purpose of freedom, and what a human person, despite all his faults, was meant to be—and that ideal was no mean one.

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The Editor,
N.Z. LAW JOURNAL,
Wellington.
Dear Sir,

The article in your issue of the 26th July on the subject of death duties invites suggestions from practitioners for improvements in the law on this subject.

There is one matter which, although of relatively minor importance, is, I believe, worthy of consideration for the purpose of removing a source of friction between the Duties Division of the Inland Revenue Department and beneficiaries in estates.

I believe most practitioners would agree that there is no other single item in the assets of a deceased estate which causes relatives and, particularly, widows more heart-burning when the Stamp Accounts are being prepared than household furniture and personal effects. Widows almost invariably regard the furniture in the matrimonial home as their own, and resent very much the intrusion of a valuer and the suggestion that the furniture forms part of the deceased husband's assets.

Practitioners would also probably agree as to the difficulty of persuading a widow that a fire insurance policy in her name is not conclusive proof that the furniture is her own property, and also of explaining to her that items purchased by her with savings out of her household allowance are not necessarily her own separate property.

Endeavours to satisfy the views of one's clients on these details lead the practitioner into many arguments with the Stamp Office.

The proportion of the total death duty collected which is chargeable in respect of household furniture and personal effects cannot, it is thought, be very great. It is suggested that any loss of revenue through the exemption of these items would be well worth while on account of the removal of a source of irritation and delay.

It may be feared that the adoption of this proposal would lead to evasion by people astute enough to convert their savings into the "portable property" which Wemmick thought it so desirable to acquire. I feel however that, under the conditions in this country, there is little likelihood of any extensive attempt to do so; and that such an exemption as I have suggested would be welcomed by all concerned in paying or collecting death duty as a real relief.

Yours, etc.,
Martinborough. D. W. NEILD.

The position would appear to be that the Department is opposed to the creation of any privileged class of property. Death-duty exemptions should be associated with status and not with property, e.g., widows' and joint-family-home exemptions. There are difficulties connected with the valuation and inclusion of almost every kind of property which falls to be assessed for duty in an estate, and equally persuasive arguments to those set out in the above letter can be advanced against the inclusion of a number of other assets. To be quite fair, it is necessary that no class of property should be excepted from the duty liability.—Ed.

MONTHLY TENANCY OF DWELLINGHOUSE AND BAILMENT OF FURNITURE.

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

The purpose of this precedent is to restore to the landlord his common-law rights of resuming possession of the land on giving a month's notice to the tenant, if he should at any time so desire.

Particular attention may be called to cl. 10, which provides that the agreement is subject to the approval in writing being given by a Rents Officer within the meaning of the Tenancy Act, 1948, to the agreement contained in the preceding cl. 9, before the date of the commencement of the tenancy. If no such approval is given, then the whole agreement will be void and of no effect.

Section 48 (1) of the Tenancy Act, 1948, provides that, where in the case of the letting of any dwellinghouse or urban property, the landlord and tenant, by agreement in writing incorporating the terms and conditions of the tenancy, have agreed that Part III and ss. 41, 42 and 43 of the Act shall not apply to the premises so let or to any part thereof in respect of that tenancy, and a copy of the agreement has been deposited with a Rents Officer before the date of the commencement of the tenancy, and the agreement has been approved in writing before or after that date by a Rents Officer, the agreement shall have effect *according to its tenor*.

Part III of the Tenancy Act, 1948, is the part which limits the landlord's common-law rights to recover possession of the premises. Section 41 is the provision which protects the wife or husband or family of the tenant in case of the death of the tenant or separation of the spouses, or the tenant deserting his spouse. It is a section of wide import and secures, independent of contract, continuity and security of tenure to the tenant, his spouse, and family. Section 42 considerably limits the rights of mortgagees.

Section 42 provides that notwithstanding to the contrary in any Act or rule of law, every tenancy of a dwellinghouse or urban property shall, subject to the provisions of the Tenancy Act, 1948, be binding on every mortgagee of the dwellinghouse or urban property and on every person claiming under or through any such mortgagee whether the tenancy has commenced before or after the creation of the mortgage, and whether or not the mortgagee has consented to the tenancy. This section may be compared with s. 119 of the Land Transfer Act, 1952, which provides that no lease of mortgaged or encumbered land shall be binding upon the mortgagee except so far as the mortgagee has consented thereto. There is no doubt that when s. 42 of the Tenancy Act applies, it overrides s. 119 of the Land Transfer Act, 1952.

Section 43 of the Tenancy Act, 1948, provides that certain conditions are to be implied in tenancies of dwellinghouses, in the absence of express agreement in writing to the contrary. Subsection 2 thereof, for example, provides that where the tenancy of the tenant of any dwellinghouse or property has expired or been lawfully terminated, the tenant shall, so long as he has lawful possession of the premises, be deemed to continue to be the tenant thereof, upon and subject to the same conditions as under the first-mentioned tenancy, subject to any conditions that may be imposed by the Court under s. 29 of the Act. Obviously s. 43 of the Act has to be negatived by any landlord whose dominant motive at date of commencement of tenancy is to be able to recover possession and determine the tenancy at short notice, whenever he so desires. The precedent hereunder appears to achieve that object.

PRECEDENT.

MEMORANDUM OF AGREEMENT made this day of , One thousand nine hundred and fifty-five (1955) BETWEEN A.B. of Wellington, Solicitor and C. D. of Wellington, Public Accountant (hereinafter together with their executors administrators and assigns referred to as "the Landlords") of the first part E. F. of Wellington, Widow (hereinafter together with her executors administrators and assigns referred to as "the Bailor") of the second part AND G. H. of Wellington, Plumber (hereinafter together with his executors and administrators referred to as "the Tenant") of the third part WHEREBY it is agreed as follows:

1. Subject to Clause 10 hereof the tenant hereby agrees to take a monthly tenancy of the Landlords' premises situate at Road, (hereinafter referred to as the premises) together with a bailment of the furniture and effects owned by the Bailor and more particularly described in the Schedule annexed hereto, commencing on the day of , 1955.

2. The Tenant shall pay to the Landlords a rental of £3 13s. 6d. per week payable in advance by four-weekly payments of £14 14s. 10d.

3. The Tenant shall pay to the Bailor a rental of Ten shillings (10/-) per week payable in advance by four-weekly payments of £2 0s. 0d.

4. The Tenant shall pay all charges demanded or assessed for electric light or power consumed on the premises.

5. The Tenant shall not do or permit to be done upon the premises anything which may be a nuisance or annoyance or in any way interfere with the quiet and comfort of the occupiers or owners of adjoining properties.

6. The Tenant shall not assign sublet or part with the possession of the premises or any part thereof.

7. The Tenant shall maintain the interior of the premises in good order and repair (fair wear and tear and damage by fire earthquake or other inevitable accident excepted) and at the determination of the said tenancy shall deliver up the premises in the aforesaid good order and repair.

8. The cost of preparing and stamping these presents shall be borne by the Tenant.

9. The Tenant hereby expressly agrees that Part III and Sections 41, 42, and 43 of the Tenancy Act, 1948 shall not apply to the premises or any part thereof in respect of the tenancy hereby created.

10. This agreement is subject to the approval in writing being given by a Rents Officer within the meaning of the Tenancy Act, 1948 pursuant to Section 48 thereof to the agreement contained in the preceding clause 9 hereof before the date of commencement of the tenancy and if no such approval be given then the whole of this agreement shall be void and of no effect.

11. The powers provisos and conditions implied in Leases under the Property Law Act, 1952 and the Land Transfer Act, 1952 shall be implied herein except where expressly negatived or modified.

IN WITNESS whereof these presents have been executed the day and year first hereinbefore written.

SCHEDULE.

SIGNED by the said, etc.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

The Value of Imperturbability.—The Hon. Sir David Smith, a member of the Supreme Court Bench (1928 to 1949) and latterly Chancellor of the University, in his address to the Senate, at its meeting at Canterbury Agricultural College on August 23, discusses university education and specialization, and urges the student to get some practice in "that apparently phlegmatic aspect of courage which we so admire in the armed forces and which is also so greatly to be desired in statesmen". He refers to the observation of Mr. Stanley Baldwin when stating the test for choosing his successor as Prime Minister of Great Britain, "What is chiefly wanted is someone who will not get rattled when there's *trouble about*". (*A Diary with Letters, 1931-1950*, by Thomas Jones, p. 58.) Sir David's allusion is equally apt in the case of the young practitioner of law who should not allow his client to be affected by the tremors he must often feel. Such situations are by no means the prerogative of the Court lawyer. The frustrations of delay, the missing or mislaid document, the awkward last-minute question raised on settlement, should impress upon the conveyancer the value of a calm and placid temperament. He must teach himself to chip out of his own occupational hazards, even if he is deprived of some "Beak's Court" to practise in.

Moments of Folly.—Richard Gordon in *Doctor at Large* (Michael Joseph, 1955), the latest contribution to his humorous books on doctors and sea-captains, shows a subtle understanding of the ways of the law. After the re-union dinner of St. Swithin's Hospital, one of the house surgeons proceeds home in a manner that lands him at Bow Street, where, after contending that his *blood-alcohol isn't even point one per cent*, demands his own doctor at once, and insists that the police send for "John Harcourt Bottle, Master of Arts at the University of Cambridge, Licentiate of the Royal College of Physicians of London, Member of the Royal College of Surgeons —the Assistant Junior Resident Anaesthetist". "John Bottle, who had been continuing the party with the other residents in his room on the top floor of the Staff Quarters, expressed himself indignant over the telephone that the police should have submitted a member of the medical profession to such shame. He spoke at some length, giving the sergeant his opinion on his conduct, demanding an immediate apology, hinting at substantial compensation, and threatening to write to his M.P. He then declared that he would summon a taxi and appear immediately to put this regrettable matter to rights. *The result of his intervention was not one doctor being* charged with being drunk and disorderly in Bow Street that night, but two." The book is strongly recommended to practitioners who enjoy laughing at the foibles of the medical profession.

A Slip in the Type.—"Colonus" has kindly passed on to Scriblex the following extracts from a separation agreement recently perused by him:

> "1. The wife may at all times hereafter live separate and apart from the husband and free from his *marital* control and authority . . ."
>
> "2. The husband may at all times hereafter live separate and apart from the wife and free from her *martial* control and authority . . ."

The italics are those of Scriblex, but the thought which the draftsman wishes to convey provides a footnote to the inimitable drawings of James Thurber known as "the war of the sexes."

My Neighbour's Love.—"These women will never reach any conclusion, said the Rev. Sydney Smith on one occasion when listening to an interminable slanging match between two women across a street. They are arguing from opposite premises." The same thought must have passed through the mind of Mr. R. M. Grant, S.M. (Auckland), when, in his judgment in *Walker* v. *Topliss* (26.7.55), he concluded: "It is indeed regrettable that these protagonists cannot realize that the continuance of ill-feeling is detrimental to the well-being of each of them: *neither can claim any credit for* her own conduct in this female feud: neither of them enjoys good health: they are allergic to each other: a permanent change of heart (or of residence) seems an indispensable necessity to the restoration of peace." As the plaintiff lost her case, and the defendant lost her costs, the permanent change of residence seems the best bet of the two.

From My Notebook.—"The difference between a good lawyer and a poor one, between a great jurist and a lesser one, lies in the accuracy and completeness and clarity of his understanding of past human transactions and in his ability to make sound and useful generalizations from them. Of course, these human transactions include much more than merely litigated cases."—Arthur Linton Corbin, "Principles of Law and Their Evolution." (*1954*) *64 Yale Law Journal*, 161, at p. 162.)

"So far as this country is concerned, it may then be taken to be now settled that there is no rule of law that no person shall be convicted of murder unless the body of the murdered person has been found. When the circumstances are such as to make it morally certain that a crime has been committed the inference that it was so committed is as safe as any other such inference."—From *The Penal Law of India*, by Sir Hari Singh Gour, p. 1582.

"I stopped learned counsel for the plaintiff in his opening address when he was proposing to read to the jury certain passages from reported decisions as bearing on the question of what particular precautions ought to be taken by a motorist in the course of performing the manoeuvre in question. Once again, there is no general rule. It is sometimes convenient that counsel should be allowed to quote the words of a Court as enunciating an established principle, which can be most conveniently stated by adopting that course. But this may not be done with reference to the views of Judges on the facts of particular cases, as this would necessitate a close examination of the particular facts of those cases."—per F. B. Adams, J., in *Kane* v. *Rendle and Simmons* (23.6.55).

THEIR LORDSHIPS CONSIDER.

By Colonus.

Sale of Patented Chattels.—"In the opinion of their Lordships it is perfectly possible to adjust the incidence of ownership of ordinary goods with the ownership of patented goods in such a manner as to avoid any collision of principle . . . In their Lordships' opinion it is thus demonstrated by a clear course of authority, first, that it is open to a licensee, by virtue of his statutory monopoly, to make a sale *sub modo* or accompanied by restrictive conditions which would not apply in the case of ordinary chattels; secondly, that the imposition of these conditions in the case of a sale is not presumed, but, on the contrary, a sale having occurred, the presumption is that the full right of ownership was meant to be vested in the purchaser; and thirdly, the owner's rights in a patented chattel will be limited if there is brought home to him the knowledge of conditions imposed, by the patentee or those representing the patentee, upon him at the time of sale. It will be observed that these propositions do not support the principles relied upon in their absolute sense by any of the Judges in the Court below. On the one hand, the patented goods are not, simply because of their nature as chattels, sold free from restriction. Whether that restriction affects the purchaser is in most cases assumed in the negative from the fact of sale, but depends upon whether it entered the conditions upon which the owner acquired the goods. On the other hand, restrictive conditions do not, in the extreme sense put, run with the goods, because the goods are patented." Lord Shaw of Dunfermline in *National Phonograph Co. of Australia, Ltd.* v. *Menck*, [1911] A.C. 336, 353.

Common Illegal Purpose.—"The appellants relied on the maxim '*Ex turpi causa non oritur actio*' as absolving them of liability. The short answer to this contention has, no doubt, been found by those of your Lordships who pointed out the definition of 'fault' in the Law Reform (Contributory Negligence) Act, 1945. But, for myself, I should have decided in the same sense in the absence of any such definition. The vast majority of cases in which the maxim has been applied have been cases where, there being an illegal agreement between A and B, either seeks to sue the other for its enforcement or for damages for its breach. That, of course, is not this case. Cases where an action in tort has been defeated by the maxim are exceedingly rare. Possibly a party to an illegal prize fight who is damaged in the conflict cannot sue for assault: *Boulter* v. *Clark*, (1747) Bull. N.P. 16. But it seems to me in principle that the plaintiff cannot be precluded from suing simply because the wrongful act is committed after the illegal agreement is made and during the period involved in its execution. The act must, I should have supposed, at least be a step in the execution of the common illegal purpose. If two burglars, A and B, agree to open a safe by means of explosives, and A so negligently handles the explosive charge as to injure B, B might find some difficulty in maintaining an action for negligence against A. But if A and B are proceeding to the premises which they intend burglariously to enter, and before they enter them B picks A's pocket and steals his watch, I cannot prevail on myself to believe that A could not sue in tort (provided he had first prosecuted B for larceny). The theft is totally unconnected with the burglary. There is, however, a surprising dearth of authority on this point. Certain cases were cited to us decided under the Factory Acts, but none of them was, to my mind, really in point." Lord Asquith in *National Coal Board* v. *England*, [1954] A.C. 403, 428; [1954] 1 All E.R. 546, 558.

Habeas Corpus.—"It is clear that the writ of *habeas corpus* deals with the machinery of justice, not the substantive law, except in so far as it can be said that the right to have the writ is itself part of substantive law. It is essentially a procedural writ, the object of which is to enforce a legal right. The writ is described as being a writ of right, not a writ of course. The applicant must show a *prima facie* case that he is unlawfully detained. He cannot get it as he would get an original writ for initiating an action, but, if he shows a *prima facie* case, he is entitled to it as of right. The first question, therefore, in any *habeas corpus* proceeding is whether a *prima facie* case is shown by the applicant that his freedom is unlawfully interfered with, and the next step is to determine if the return is good and sufficient. A person unlawfully detained is entitled as of course to obtain a writ of trespass. An action of trespass or false imprisonment, however, does not by itself secure the immediate or speedy release of the plaintiff, if he is still detained when he commences his action. As Littledale, J., said in *Watson's Case*, (1839) 9 Ad. & E. 731, 795; 112 E.R. 1389, 1415:

> A party imprisoned has two modes of proceeding, either by action for false imprisonment or by application for an *habeas corpus*. In an action for false imprisonment the defendant must prove his justification (if any); and (except where allowed by express provision to give it under the general issue) he must also set forth the justification specially on the record. In the return to an *habeas corpus* no such minuteness of detail is necessary; nor in any instance that I can find has it been considered necessary to support the return by affidavit.

The incalculable value of *habeas corpus* is that it enables the immediate determination of the right to the applicant's freedom. Lord Wright in *Greene* v. *Home Secretary*, [1942] A.C. 284, 302; [1941] 3 All E.R. 388, 399.

Criticism of Justice.—The following hint given by the late Lord Atkin in *Ambard* v. *Attorney-General for Trinidad and Tobago*, [1936] A.C. 322, 335; [1936] 1 All E.R. 704, 709, may supply a sufficient guide for counsel contemplating appeal, advising clients why a decision was adverse, or even foregathering round the fire in the Supreme Court library:

> Whether the authority and position of an individual Judge or the due administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticizing in good faith the public act done in the seat of justice. The path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.

Actually, the right here explained may well be the soil in which is preserved the root of corrective legislation.