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TENANCY: FAIR RENT, WHERE RENT, ON RENEWAL, TO BE SETTLED BY ARBITRATION.

IN a recent judgment, *McGregor Motors, Ltd.* v. *Barton and Thomson*, Mr. Justice Shorland construed s. 84 of the Tenancy Act, 1948, which is repeated as s. 20 (4) in the Tenancy Act, 1955, and which was (and is) as follows:

> (4) If the fair rent so fixed exceeds the rent for the time being payable under the tenancy, the rent payable in respect of any period during which the order is in force may be increased by the landlord to an amount not exceeding the fair rent.

As that subsection has not previously been the subject of judicial interpretation, the judgment is a useful one.

The lease of premises, in which the defendants carried on the business of motor-engineers, was for a term of three years from September 1, 1951, the rental being £25 per calendar month, payable in advance. It contained the following clause:

> If the lessees shall have paid the rent hereby reserved and observed and performed the covenants and provisions hereof then the lessees shall have the right or option (to be exercised by one calendar month's notice in writing to the lessor) to take and accept a renewal of the term hereby created for a further period of three years from the expiration of the term hereby created as a rental to be agreed upon between the parties for failing agreement to be settled by arbitration in accordance with the Arbitration Act 1908 (but not in any case to be lower than the rent hereby reserved) and upon and subject to the like covenants conditions and restrictions as are herein contained PROVIDED that this right or option of renewal shall enure to the benefit only of the lessees, the survivor of them on the death of the other of them or a company incorporated with them only as shareholders.

On July 12, 1954, the defendants gave a proper notice exercising their right or option to take a renewal for a further period of three years from the expiration of the term then existing (namely from September 1, 1954).

On October 26, 1954, the plaintiff gave the defendants one month's written notice of termination of the tenancy, and requiring the defendants to deliver up possession on the expiration of one month.

On February 7, 1955, the defendants filed an application in the Supreme Court for relief from forfeiture under ss. 118 to 120 of the Property Law Act, 1952. Three days later, the plaintiff brought an action against the defendants alleging breaches of covenant, and claiming possession of the premises, with alternative claims for a declaration that the defendants were tenants holding over after expiration of their lease at a rental of £30 per month, and an injunction restraining the defendants from committing further breaches. The plaintiff claimed, in any event, £1,000 for damages, and for alleged arrears of rent. The action and the defendants' application under the Property Law Act, 1952, for relief from forfeiture were heard together.

The plaintiff's claims for possession by reason of alleged breaches of covenant and for damages in respect thereof both failed. His Honour said that the circumstances were such that the matter was one in which the defendants were entitled to relief under s. 120 of the Property Law Act, 1952; and the Court decreed and ordered that the plaintiff grant to the defendants a renewal of the lease on the same terms and conditions in all respects as if all the covenants and conditions and agreements contained in the lease had been performed and fulfilled.

There was left for decision the plaintiff's further claim for arrears of rent. The plaintiff had applied to have the fair rent of the premises fixed under the Tenancy Act, 1948; and, pursuant to the provisions of that statute, a rental of £30 per month as from November 26, 1954, was duly fixed as the fair rent of the premises occupied by the defendants. The defendants continued to pay £25 a month for rent in terms of their lease. The plaintiff's claim was for the difference between £25 and £30 a month fixed as the fair rent.

The plaintiff founded its claim on s. 8 (4) of the Tenancy Act, 1948 (now s. 20 (4) of the Tenancy Act, 1955), which is as follows:

> (4) If the fair rent so fixed exceeds the rent for the time being payable under the tenancy, the rent payable in respect of any period during which the order is in force may be increased by the landlord to an amount not exceeding the fair rent.

The plaintiff's counsel contended that the subsection enabled the landlord, immediately a fair rent was fixed, to charge and enforce the same as rent. This argument was not supported by authority; but it was contended that the submission was supported by the clear words of the subsection.

His Honour observed that the words of the subsection are not to the effect that the rental payable by the tenant shall thenceforth be the fair rent so fixed. The subsection, in his view, merely empowers the landlord to take such steps as the law enables him to take to increase the rental payable by a tenant, to any amount which does not exceed the fair rent.

In the present case, the law, in terms of the contract subsisting between the parties, permitted the landlord to seek the tenant's agreement to the particular rent the landlord wished to obtain during the period of

renewal; but, if the landlord is unable to obtain agreement, then, disregarding the Tenancy Act, the only rental the landlord could enforce against the tenant was the rent fixed by arbitration.

His Honour said that the provisions of the Tenancy Act, 1948, imposed certain restrictions upon rents by providing that, notwithstanding any agreement, no rent in excess of the basic rent might be recovered; but s. 7 (2) [now, s. 19 (2)] lifted this prohibition in so far as any sum fixed as the fair rent under the provisions of the Act might be in excess of the basic rent. His Honour proceeded:

> In my view the short answer to the submission on behalf of the plaintiff is that s. 8 (4) [now, s. 20 (4)] does no more than lift the restriction imposed by the Act, whereby rent payable must not exceed the basic rent. It enables the landlord to take such steps as he might otherwise legally take to increase a rent which is below the fair rent so fixed.
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> In the case of an ordinary tenancy he may do this by appropriate notice, but in a case in which the rental for a period is fixed by the terms of an agreement (and in the case of a rental to be fixed by arbitration the amount determined on arbitration becomes the rental fixed by the agreement), a landlord has no legal right or power to increase the rent above the sum so fixed during the currency of the agreement. If subs. (4) of s. 8 of the Tenancy Act, 1948 [now, s. 20 (4) of the Tenancy Act, 1955], were intended to override the covenants or agreements in leases for a term fixing the rental to be paid for that term, then it would have said so in clear words.
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> I am of opinion that s. 8 (4) [now, s. 20 (4)] does not enable a landlord to increase a rent fixed for a term by agreement, to a higher amount than the amount so fixed, merely upon a higher amount being fixed by the Court or the appropriate authority as the fair rent of the premises.

In the result, as the rental of the premises had not been fixed by arbitration, the amount payable by the defendants was not yet ascertained, and the plaintiff had no cause of action for arrears of rent on the basis alleged. The plaintiff's claim in this respect failed accordingly.

SUMMARY OF RECENT LAW.

CRIMINAL LAW.

Sentence—Conviction and Sentence—Sentence imposed in Excess of Jurisdiction—Conviction as a Whole to be quashed. If, on a motion to quash, a conviction is shown to be bad because the sentence is one which is in excess of jurisdiction, then the whole conviction is bad; and the conviction as a whole must be quashed, and not merely that part of it which relates to the sentence. (*R.* v. *Willesden Justices, Ex parte Utley*, [1948] 1 K.B. 397, applied.) (*Re West*, [1934] N.Z.L.R. 893, distinguished.) (*Duncan* v. *Graham*, [1941] N.Z.L.R. 535, referred to.) *In re Beale.* (S.C. Wellington. October 3, 1955. Barrowclough, C.J.)

Trial on Indictment or Summarily. *99 Solicitors' Journal*, 667.

United Nations and the Prevention of Crime: The First Congress at Geneva. *220 Law Times*, 171.

FENCING.

Hedge planted away from Boundary—Strip of Land between Hedge and Boundary in Occupation of Owner thereof—No "give and take" Fence Line—Adjoining Owner trespassing on Such Strip—Invasion of Owner's Rights—No Need to prove Actual Damage. The parties owned and occupied adjoining properties. On S.'s land, but close to the common boundary, there was a privet hedge; and, between it and the boundary, there was a small strip of land belonging to S. and varying from 12 ins. to 18 ins. in width. S. complained that, against his protests, K.-S. had insisted on placing firewood and lumps of concrete on the strip, and nailing a board to the hedge-roots thereon. S. claimed damages for trespass, and an injunction to restrain the defendant from future trespass. The Magistrate held that S. was not in occupation of the strip, and, therefore, could not claim damages for trespass. On appeal from that decision, *Held*, 1. That there was no "give and take line" for the fence, and no agreement between the parties to treat the hedge as a boundary fence. 2. That S. was the owner in occupation of the strip, and he had not given his neighbour leave and licence to enter upon or use it; and that he was not bound to prove actual damage, but only an invasion of his legal rights. (*Lower Hutt Borough Council* v. *Loughnan*, [1937] G.L.R. 180, applied.) (*Easdale* v. *Bygate*, [1924] N.Z.L.R. 422; [1924] G.L.R. 198, distinguished.) (*York* v. *Vincent*, (1898) 17 N.Z.L.R. 292; 1 G.L.R. 222, referred to.) The case was referred back to the Magistrate to enable the defendant's evidence to be heard, and the matter to be determined in accordance with this judgment. *Sutherland* v. *Kay-Stratton.* (S.C. Auckland. September 14, 1955. Stanton J.)

HUSBAND AND WIFE.

Nullity Jurisdiction. *105 Law Journal*, 566.

INCOME TAX.

Compensation Moneys: Capital or Income? *105 Law Journal*, 563.

The Royal Commission on the Taxation of Profits and Income, *105 Law Journal*, 564.

LANDLORD AND TENANT.

Licence or Tenancy? *220 Law Times*, 157.

LICENSING.

Licensing Control Commission—Cancellation of Licence—Assessment of Compensation—Principles of Valuation to be applied—Allowance for Compulsory Loss of Licence permissible—Sum considered Fair and Equitable—Licensing Amendment Act, 1948, s. 38. In determining the value of an hotel, for the purpose of assessing the amount of compensation payable to the owner on the cancellation of the licence under s. 38 of the Licensing Amendment Act, 1948, the primary criterion of value should be the market if, and to the extent to which, the market gives reliable guidance. Even where arithmetical calculations are used, they must be related in some way to an actual or hypothetical market, for the purpose of ascertaining the prices that sellers may be expected to accept and buyers to pay, the end and object of such calculations being to arrive at such prices. (*In re Oriental Hotel*, [1944] N.Z.L.R. 512; [1944] G.L.R. 202, applied.) (*Duncan* v. *Mackie*, [1940] G.L.R. 226, explained.) (*In re Claims for Compensation, Hauraki Licensing District*, (1951) 7 M.C.D. 273, mentioned.) Thus, while market value may, in some cases, furnish an almost exact estimate of compensation, compensation may be either greater or less than the market value, as the true measure of compensation is the value of the land to the owner, taking into account the actual use he makes of it and all the potentialities. It is permissible and appropriate in assessing compensation under s. 38 of the Licensing Amendment Act, 1948, even apart from the express power contained in s. 39 (2) thereof, to increase the compensation by an allowance for compulsory cancellation of a licence of such a sum as may be considered fair and equitable. (*Russell* v. *Minister of Lands*, (1898) 17 N.Z.L.R. 241; 1 G.L.R. 15, referred to.) *Randall* v. *Licensing Control Commission.* (S.C. Greymouth. September 12, 1955. F. B. Adams J.)

MAGISTRATES' COURT.

Appeal—Rehearing of Evidence in Supreme Court—Principles to be applied in exercising Discretion to make Order for Rehearing of Evidence—Special Circumstances—Order made on Terms—Magistrates' Courts Act, 1947, s. 76 (3). On an appeal from the decision of a Magistrate, there must be good ground before an order for the rehearing of the evidence is made, and the discretion to rehear is one which must be exercised sparingly. (*Harper* v. *Hesketh*, [1954] N.Z.L.R. 622, followed.) Where a plaintiff deliberately chose the Magistrates' Court as his tribunal, even to the extent of abandoning a small excess of his claim in order to invoke the Magistrate's jurisdiction, public policy will disincline the Supreme Court from allowing the plaintiff to have a complete rehearing if, for any reason, he

finds himself dissatisfied with the result of the first trial; unless there are special circumstances which compel the making of the order sought. In the present case, an action for negligence arising out of the collision of two motor-cars, certain circumstances—namely the absence of a Police plan, which had been lost since the hearing in the Magistrates' Court, and which went to the root of the case; the length of time which elapsed between the accident and the trial, and the Magistrate's difficulty on that account, in evaluating the evidence; and, on the appeal, the need for the *viva voce* evidence of the constable who made the plan—made it a case where all the evidence should be brought again before the Court, but on terms. It was ordered that the appellant should pay, in any event, all the witnesses' expenses involved in the new trial. *Tetau* v. *McPherson*. (S.C. Wanganui. November 2, 1955. Turner J.)

and no objection has been taken to their admissibility. To supply a copy of the notes taken by the clerk to the justices is objectionable, though it may be necessary to refer to them in the course of the case. The police report on the accused's antecedents and record should not be given to the Court until the decision is announced. The applicant was convicted by a Court of summary jurisdiction of being found in an enclosed place for an unlawful purpose contrary to s. 4 of the Vagrancy Act, 1824, and was sentenced to three months' imprisonment. He appealed to quarter sessions against his conviction. During the cross-examination of the applicant at the hearing of the appeal the clerk of the peace, acting in the interests of the accused, handed to the Recorder the police report on the applicant's antecedents and record and drew the Recorder's attention to a passage which might provide the answer to a matter being put

Christmas Message to the Profession

From the ATTORNEY-GENERAL.

I gladly accept the invitation of the Editor to send, through the LAW JOURNAL, a Christmas Message to the profession.

In my message last year I expressed the hope that the New Year would be a happy and prosperous one for the profession. I think most will have found it so.

Recently Conveyancers may have been "squeezed" a little—I think, only temporarily—but in the Courts and in the commercial field, it has been a busy and therefore a prosperous year.

Legislatively, it has been busy, if not prosperous. There was much legislation which will be of interest and value to the profession. The Companies Act, the Family Protection Act, the Tenancy Act, the Adoption Act, to mention only a few, are all consolidations of the law on those subjects with amendments to meet modern conditions.

The general pattern of Consolidation was advanced, in anticipation of a Reprint of the Statutes which cannot be long delayed.

The work of law reform has gone on steadily, with valuable assistance from the Law Revision Committee.

I have greatly appreciated the co-operation of the New Zealand Law Society in those matters affecting the administration of the law, which have called for consideration during the year.

The Christmas vacation is now upon us. In these busy days it is well earned; and I hope that it will be well enjoyed by you all, as a festival of goodwill, as a time for family reunion, and as a period of rest and relaxation to fit you for another busy year.

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PHARMACY.

Limitation on Persons Owning or Controlling Pharmacy Business—Proprietor of Pharmacy or Wholesale Dealer in Drugs not to have or acquire Interest in Pharmacy of which Another is Proprietor—Pharmacy Amendment Act, 1954, s. 13. The words "(other than a pharmacy of which he is lawfully the proprietor)" in s. 13 of the Pharmacy Amendment Act, 1954, create an exception to the general disqualification provided by that section, which disqualifies the proprietor of a pharmacy or a wholesale dealer in drugs from having any direct or indirect interest in a business carried on in another pharmacy. Consequently, the limitation provided by s. 13 merely requires that the proprietor of a pharmacy business shall not have or acquire an interest in a second business of which another person is the nominal proprietor. Similarly, the section does not debar a wholesale dealer in drugs from being the proprietor of a retail pharmacy. *Semble*, That the question whether a person or company is "a wholesale dealer in drugs," within the meaning of those words as used in s. 13 of the Pharmacy Amendment Act, 1954, is a question of fact. *In re An Application by Boots the Chemists (N.Z.), Ltd.* (S.C. Wellington. October 12, 1955. McGregor J.)

PRACTICE.

Certiorari—Prejudice—Test is whether real Likelihood of Prejudice is Shown—Report of Appellant's History and Convictions placed before Quarter Sessions before Appeal decided. On an appeal against a summary conviction nothing should be placed before the appeal committee or the Recorder which could not be given to a jury (see *post*, p. 304). Accordingly on an appeal to quarter sessions against conviction no document should be placed before the Court except the conviction, the notice of appeal and copies of exhibits if they are going to be proved to the applicant in cross-examination. On the same page of the police report, immediately below the passage in question, came a list of the applicant's previous convictions. The applicant's character had not been put in issue. The Recorder read the passage to which his attention had been drawn, marked it and kept the document. A police constable, while giving evidence of the hearing of the appeal, stated that the applicant had made a written statement. The Recorder asked for a copy and was handed a copy of the proofs of the witnesses open at the page of the proof of the police constable's evidence where the applicant's written statement was set out. In the copy so provided the Recorder followed the witness's reading of the written statement and the Recorder then put the copy and proofs aside. The appeal having been dismissed, the applicant applied for an order of certiorari to quash the order dismissing the appeal. The grounds of the application were that the Recorder when hearing the appeal had before him a document setting out the applicant's previous convictions, although the applicant had not put his character in issue, and that the Recorder had been supplied with copies of the proofs of the respondent's witnesses. No evidence or explanation from the Recorder was before the Court. *Held*, 1. In the absence of any evidence from the Recorder the Court must conclude that the sight of the police report made him aware that the applicant had previous convictions; thus, having regard to the nature of the charge, a real likelihood of prejudice was shown and, even though the Recorder was not consciously prejudiced, the order for certiorari must be granted. (*R.* v. *Camborne* JJ., *Ex p. Pearce*, [1954] 2 All E.R. 850, applied.) 2. The handing to the Recorder of the bundle of proofs in order to give him a copy of the applicant's written statement showed no real likelihood of prejudice and an order of certiorari would not have been granted on this ground. *R.* v. *Grimsby Borough Quarter Sessions. Ex parte Fuller.* [1955] 3 All E.R. 300 (Q.B.D.)

Curiosities of Motion Procedure. *105 Law Journal*, 551.

Evidence of a Witness Abroad. *99 Solicitors' Journal*, 670.

Execution—Sheriffs' Fees—Poundage on Writ of Execution on Sum levied—Writ of Sale—Court's Power to fix lesser Fee on Sum Levied, when Work done less than usual—Sheriffs' Fees Notice, 1952 (S.R. 1952/124), Schedule. A Judge has jurisdiction, in a proper case, where the work done was less than usual to fix a fee less than the amount prescribed by the Sheriffs' Fees Notice, 1952, for "Poundage on the sum levied" under writs of sale in the same manner as he may fix a fee less than the amount prescribed for "Poundage on writs of possession." (*Mortimore* v. *Cragg*, (1878) 3 C.P.D. 216, referred to.) *Master Butchers (Wgtn.) Co-operative Society, Limited* v. *Clout.* (S.C. Wellington. Barrowclough C.J.)

Motion—Certificate on Ex parte Notice of Motion—When Motion intended to be moved by Applicant in Person, prescribed Certificate by Solicitor or Counsel not necessary; but Applicant must appear personally—If Personal Appearance of Applicant not intended, Certificate by Solicitor or Counsel must be subscribed—Code of Civil Procedure, R. 403. When it is intended that an *ex parte* notice of motion is to be "moved by the applicant in person" (as those words are used in R. 403 of the Code of Civil Procedure), the notice of motion is exempt from the requirements of a certificate under R. 403 signed personally in his own name by the solicitor engaged in the proceedings, or by counsel; but such an applicant cannot so move unless he appears personally before the Court or Judge having cognizance of the matter. If personal appearance in that sense is not intended, and if, in fact, the applicant does not so appear, then his *ex parte* notice of motion must be subscribed with a certificate duly signed as required by the Rule. *Semble*, The signing of a notice of motion that the applicant himself would move is not necessary. (*R.* v. *Cook*, (1888) 6 N.Z.L.R. 621, referred to.) *In re Amon (Deceased).* (S.C. (In Chambers) Wellington. October 20, 1955. Barrowclough C.J.)

Trial—Motion—Motion for Judgment for Defendant or Nonsuit at End of Plaintiff's Case, reserved—Jury discharged on Disagreement—Motion to be disposed of before New Trial ordered—Juries Act, 1908, ss. 153, 154. When the jury has disagreed and has been discharged, the Court will not think it fit to order a new trial until it has disposed of any motion for judgment for the defendant or for nonsuit reserved at the end of the plaintiff's case on the ground that there was no evidence to go to the jury, as ss. 153 and 154 of the Juries Act, 1908, must be read together. (*Stevens* v. *Florence and Harry Parkin*, [1924] N.Z.L.R. 619; [1924] G.L.R. 64, (on this point) followed.) *O'Callaghan* v. *Callinan.* (S.C. Wellington. October 28, 1955. Hutchison J.)

PROBATE AND ADMINISTRATION.

Probate—Mutilated Will—Proof in Solemn Form—Will on Single Sheet of Paper torn from Top to Bottom in Two Tears, and restored by pasting Paper over whole Back of Original Sheet—No Evidence of Circumstances of Mutilation—No Proof that Will was mutilated by Testatrix with Intention of Revocation—Probate granted—Wills Act, 1837 (7 Will. 4 & 1 Vict., c. 26), s. 20. The whole of the wording of a will of the deceased, including all signatures, was on one side of one sheet of what was originally a double sheet of heavy blue foolscap. The will was prepared by the deceased's solicitor, and was duly executed by her in the ordinary course of business on December 18, 1924. After execution, the document was filed away among the other wills in her solicitor's strongroom, in February 1925, and apparently remained there untouched for nine years. On May 8, 1934, the deceased uplifted the will, signing for it in the wills book. Three days afterwards it was re-entered and filed away in the strongroom under a new number, having apparently been returned in the meantime. Nothing was known as to the subsequent history of the will until it was taken out of the strongroom on April 18, 1955, shortly before the death of the testatrix. It was then found that it had been torn lengthwise in four separate pieces, the tears traversing the signatures of both testatrix and witnesses, and that the backing-sheet had been completely torn off and (except for a fragment) was missing. The whole of the effective page of the document had then been carefully put together again, being pasted on to a clean sheet of white foolscap, which, across one end, had been reinforced by a piece of the old backing-sheet of the will. There was no evidence as to when or how or by whom this mutilation was effected. In an action for proof in solemn form of the will propounded (as ordered by McGregor J. *sub nom. In re Mair (deceased)*, [1955] N.Z.L.R. 1144), *Held*, That it could not be found proved with any degree of probability that the will was mutilated by the testatrix with the necessary intention of revocation; and that, accordingly, an order should be made in its favour. *In re Mair (deceased), Mair and Another* v. *Mair.* (S.C. Wanganui. November 7, 1955. Turner J.)

TRANSPORT.

Duty to Report Accident. *220 Law Times*, 145, 161.

SALE OF GOODS.

Warranties on the Sale of a Motor-car. *99 Solicitors' Journal*, 607.

WILL.

Advantages of Will-Making. *220 Law Times*, 173.

PROFESSIONAL ETHICS.

II. The Solicitor.

As with the barrister, so with the solicitor—the ethical principles with which he is required to comply have been developed over the centuries.

For solicitors in England, they have been laid down since 1919 by the Disciplinary Committee, an independent tribunal appointed by the Master of the Rolls, now constituted under s. 4 of the Solicitors Act, 1932, as amended. Nowadays there are certain statutory rules of great importance. These are the Solicitors' Practice Rules, 1936, and the Solicitors' Accounts Rules, 1945—both made by the Council of the Law Society under the Solicitors Act, 1933, and approved by the Master of the Rolls. In addition, there are the Accountants' Certificate Rules, 1946, which were made by the Council of The Law Society under the Solicitors Act, 1941, and amended by the Accountants' Certificate (Amendment) Rules, 1954. The 1941 Act was, of course, the statute which required accountants' certificates as to compliance with the Solicitors' Accounts Rules and established a fund for relief in certain cases of losses due to dishonesty of solicitors.

Such is the basis of the paper which Mr. Thomas G. Lund, Secretary of The Law Society, submitted to the recent Commonwealth and Empire Law Conference on the subject of ethical principles governing practice as a solicitor.

Acceptance of Instructions.

Mr. Lund says that, broadly speaking, a solicitor is quite free to accept or refuse instructions from whomsoever he chooses. He points out that this was exemplified at the end of the last war when the Council of The Law Society decided that solicitors might, if they wished to do so, accept instructions for the defence of war criminals on trial at Nuremberg and elsewhere. But the solicitor is not bound to accept instructions unless

he has held himself out as being prepared to do so, for instance by having had his name included on one of the panels constituted under the Legal Aid and Advice Act, 1949, or under the Poor Prisoners' Defence Act, 1930. Mr. Lund says :

> Once the solicitor has accepted instructions, however, he owes a duty to the client to prosecute the matter to trial with due care and diligence. The price of wrongly refusing to continue to act is the loss of his remuneration for the services he has performed. It may be, however, that the solicitor can satisfy the Court that there were good grounds for his action and that he gave reasonable notice of discontinuing to act. " Good grounds " have been held by the Courts to be where the cause, properly begun, is found later to be unsustainable, or where the client refuses to put the solicitor in funds to meet necessary disbursements, or the behaviour of the client has been such that no self-respecting solicitor would continue to act for him.

Mr. Lund goes on to observe that there are certain cases in which a solicitor ought not to accept instructions :

> For example, it is clear that where a solicitor has acted for a client but is subsequently approached by another and the interests of the second client are or may be contrary to those of the first, the solicitor should not accept instructions from such second client if the first client would be injured by the use of confidential information acquired while the solicitor was acting for him or if the solicitor would be embarrassed in the conduct of the proceedings by having such information in his possession. And where a solicitor has acted for two clients in non-contentious business which might become contentious, the solicitor must see that one of his clients is separately represented, and, similarly, if he would be embarrassed by reason of the knowledge of the case he had acquired, he could decline to act for either.
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> Similarly, where a solicitor occupies a dual position as a solicitor in private practice and as the holder of some official office or appointment. Here his governing consideration flows from the well-known legal principle that not only should justice be done but that it should manifestly be seen to be done. It is obviously undesirable that by virtue of some office or appointment a solicitor should be in a position to influence a decision or to acquire knowledge which might affect the position of his client or prejudice an opposite party. With such considerations in mind, the Council of The Law Society have laid it down that if a solicitor might be embarrassed by having acted in some official capacity or even by reason of some member of his firm, a partner or clerk, having done so, then the solicitor should not accept instructions in his professional capacity. For example, a solicitor who had sat as clerk to Magistrates when the drivers of two cars were committed for trial on charges of manslaughter was told that he ought not to accept instructions from either of the drivers in connection with civil litigation arising out of the accident.

The Question of Privilege.

As Mr. Lund points out, nearly all information which comes to a solicitor in his professional capacity is the subject of privilege in favour of his client as against third parties. The privilege is that of the client, who can waive it at any time.

> There appears to be only one case in which, despite the existence of privilege, a solicitor is at liberty to disclose confidential information, and that is where, at a time of national emergency, the national interest demands disclosure. It was because of this principle that the council have advised a solicitor in wartime to disclose to the authorities information given to him by a client of enemy nationality and to reveal information which might unmask an enemy agent.

Duty to Clients in Litigation.

Mr. Lund considers under four headings " the variety of duties " which solicitors owe to " a variety of persons " —to clients in litigation, to clients generally, towards the Court, and to third parties.

As to the duty which a solicitor owes in litigation, he is, of course, bound to use his utmost skill for his client, but, as Mr. Lund says, he is not bound to degrade himself for the purpose of winning his client's case.

> He ought never to fight unfairly, though he is bound to use every proper and fair means to bring his client's cause to a successful issue. He ought never to forsake a client on mere suspicion of his own as to his case or on any view he might take as to his chances of success. It is not always easy to decide at the time how far a solicitor may go on behalf of his client. It is clear, however, that he must do for his client what is best for him to his own knowledge and in the way which is best as he sees it ; if he fails in either of those respects, he does not discharge his duty to his client. On the other hand a solicitor is under no duty to assist his adversary. If he knows that there is a witness who would assist the adversary and injure his client, he is under no duty to inform the adversary of this ; but, of course, if he knew that an affidavit had been made in a cause which he was conducting and that, if it were before the Court, it would affect the mind of the Judge, and if he knew the Judge was ignorant of the affidavit, he would fail in his duty to the Court if he concealed it from the Court ; in the same way as the making of any wilful mis-statement to the Court is dishonourable conduct.

Duty to Clients Generally.

Dealing with the duty of solicitors to clients generally, Mr. Lund gives the following examples of professional misconduct :—any form of fraud or dishonesty ; allowing fraud to be committed on one's own client ; making untrue representations or concealing material facts with a dishonest or improper motive ; taking advantage of youth, inexperience, want of education, lack of knowledge or unbusinesslike habits of a client ; advising or making unauthorized, rash or hazardous speculations or investments with clients' moneys ; failing to disclose the solicitor's personal interest in a transaction to his client ; and failure to apply clients' money for the specific purpose for which it has been paid.

Negligence or want of professional skill on the part of a solicitor is not in itself a ground for disciplinary action, as the proper remedy lies in a civil action for damages. The Disciplinary Committee has stated the principle as follows :

> While not holding that mere negligence of itself constitutes professional misconduct or conduct unbefitting a member of the solicitor's profession, negligence may be of such a character and so aggravated as to merit either of those descriptions.

Mr. Lund points out that, as with negligence, so with delay ; there must be gross or excessive delay to constitute a professional offence. It is a question of degree, depending on the facts of each individual case. It is also well settled that overcharging a client in a bill of costs may amount to professional misconduct ; once again, it is a question of degree. Failure to reply to letters may also be a professional offence, though usually this is not the subject of an isolated charge against the solicitor but is combined with other and more serious ones.

Duty towards the Court.

On the duty of a solicitor towards the Court, as Mr. Lund says, it is clear that he must not keep back from the Court any information which ought to be before it, and must not mislead the Court in any way.

It is more difficult, Mr. Lund thinks, to define the duty of a solicitor as regards the presentation to the Court of evidence the truth of which is suspect.

> Where the solicitor suspects the truth of a statement by a client or witness, he is under a duty to warn that person of the importance of telling the truth, but if, *prima facie*, the

evidence is false, the solicitor should take steps to verify the statement or otherwise before putting it in.

It may also be mentioned that a solicitor owes to the Disciplinary Committee the same duties as are owed to the Court. A solicitor who gave false evidence before that committee was held guilty of professional misconduct, and failure to honour an undertaking given to that committee is as much professional misconduct as if the undertaking had been given to the Court.

Duty to Third Parties.

On the duty of solicitors to third parties, Mr. Lund observes that conduct towards members of the public which is fraudulent or contains an element of fraud is a professional offence; so, too, is it for a solicitor to enable another person to perpetrate a fraud on a member of the public. "For example, if a solicitor fails to supervise his clerk adequately, thereby enabling him to defraud the public, he fails in his professional duty to the public."

The Press and Broadcasting.

As regards advertising, Mr. Lund says there have been many expressions of opinion by the council, but it should be remembered that views on what is permissible or otherwise are liable to change. The council has given the following opinion (among others) in connection with announcements in the press:

> It is objectionable for a solicitor to interview the press to enable an article to be written about him, but not if the interview is not inspired by the solicitor. If litigation in which a solicitor is concerned is the subject of press comment, the solicitor may, with the consent of his client, give information to the press about the action, care being taken to ensure that the resulting articles do not constitute an advertisement for the solicitor. If the matter is not the subject of press comment, the solicitor should ensure that his name is omitted from any article. Where terms of settlement are published in the press, there is no objection to the names of the legal advisers appearing.

On broadcasting, Mr. Lund says that the council has recently made a distinction between a solicitor giving broadcast talks who is not in private practice or intending to practise in the future and one who is:

> There is no objection to the non-practising solicitor broadcasting upon a legal subject under his own name, at the same time being described as a solicitor, and, if need be, to his photograph being published. The practising solicitor, on the other hand, must use a pseudonym without divulging his own identity.

THE LAW RELATING TO NAMES.

"He Who Steals My Good Name."

By R. M. Daniell, LL.B.

In another of his learned contributions on conveyancing, Mr. E. C. Adams offers the good advice that conveyancers should take care to ascertain the full and correct name of any person for whom they are acting, and who is about to become a "registered proprietor". He goes on to say that it is astonishing the number of people in our community who appear to dislike disclosing their full names. Many people might well have good reason for choosing carefully which of their names they disclose to the public. The writer knows of a lady who would need to be put to the rack before she disclosed that one of her names was Britannia. The question arises, do they need ever to disclose their full names?

Regarding surnames, the common law as stated in *23 Halsbury's Laws of England*, 2nd Ed., 556, is that there never was any doubt that as in the first instance they were arbitrarily assumed, so they could be changed at pleasure. An Act of Parliament, Royal Licence, or other such formality is not required for the purpose. At p. 557, it is stated that change of surname without any formality has in the past been constantly recognized by the Courts in regard to attorneys and solicitors.

The Court of Appeal in England has gone even further and held that a man may have several names, at one and the same time. Romer, L.J., held in *Goodman* v. *J. Eban, Ltd.*, [1954] 1 Q.B. 550; [1954] 1 All E.R. 763, that

> subject to certain irrelevant exceptions, a man may use whatever name he pleases and he may prefer one name for some particular purpose and a different name for another. Mr. Charles Goodman's name for professional purposes is Goodman, Monroe, and Co., and he is well entitled, in my opinion, to use that designation as his name when signing his bills of costs.

In this case, a bill of costs had been signed with the words "Goodman, Monroe, and Co." by means of a rubber stamp. The signature so affixed was a facsimile of the plaintiff's handwriting and had been affixed by the plaintiff himself. The County Court Judge gave judgment for the plaintiff, and the defendants appealed on the ground that the letter accompanying the bill of costs did not satisfy the Solicitor's Act, 1932, since a mark made by a rubber stamp was not capable of being the plaintiff's signature. The Court held that the bill of costs had been signed by the plaintiff for the purposes of the Act, and such signature, although in the plaintiff's business name, was a good signature by the plaintiff for the purposes of the section.

If, then, a man may use one name for one purpose and a different name for another, it seems to be more a matter of convenience than necessity for the Land Transfer Regulations to provide for endorsement of a memorial of change of name. Can he truthfully declare that A.B.C.D., and not A.B.D. is his "correct" name? The exception might be the case of an incorporated body; but otherwise there seems to be no reason why the registered proprietor should not use, for the purposes of the Land Transfer Act, the name which appears on the register. It is fortunate that s. 157 of the Land Transfer Act, 1952, protects District Land Registrars against the effect of the decision in *London County Council* v. *Agricultural Food Products, Ltd.*, [1955] 2 All E.R. 229, where the Court of Appeal

(*Concluded on p. 360.*)

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

"If you please!"—The repeated use by counsel of the expression "if you please" to the utterances of a lay member of a recent Commission remind Scriblex that it was as much as an officer's life was worth on *H.M.S. Pinafore* to give any order in the presence of the admiral, Sir Joseph Porter, K.C.B., without adding these particular words which were thought to stem from the fact that Sir Joseph had received his training with a firm of solicitors—first as an office-boy, then successively as junior clerk, articled clerk, and partner:

"And that junior partnership, I ween,
Was the only ship I ever had seen".

This was true enough since he "stuck close to his desk and never went to sea" and thus became in time "ruler of the Queen's navee". Parody though he was on the contenporary First Lord of the Admiralty, William H. Smith, Sir Joseph Porter has achieved a different type of fame to that achieved by the original whom Disraeli nominated for the post. Smith had few practical qualifications for his task, but to-day his bookshops play a considerable part in the cultural life of Great Britain.

Company Note.—Reference to the presence of one of the Law Lords at the last annual banquet of the Cloth-workers Company, one of London's ancient city guilds, reminds Scriblex of the custom of the Company at the end of the dinner to ask each guest: "Do you dine with Alderman or Lady Cooper?" The reply "The Alderman" will produce brandy, while that of "Lady Cooper" is Hollands gin. The custom has its origin in 1664 when Alderman Cooper died immediately following a Company banquet—a result that Lady Cooper ascribed to an over-imbibing of brandy and to avert a similar tragedy she left a bequest that substituted Hollands as a healthier alternative. In the records of the Worshipful Company of Drapers, there is preserved an apt observation of the late Queen Mary while lunching at Drapers Hall. After studying intently the graceful nudes which decorate the beautiful ceiling of the Hall, she turned to the Master and said: "Not a very good advertisement for your Company, I think."

Vacation Tidbit.—Readers of that excellent annual *The Saturday Book*, will recall in Volume 8 a well-written autobiographical article by Sir Norman Birkett on a turning-point in his life. ("It was not until my second year at Cambridge that I made the decision to go to the Bar . . . It has been my fate to devote myself to the law, to spend long years in the dust and heat of the Courts, alleviated (if that be the word) by the fiercer heat of five contested elections . . .") Now Lord Justice Birkett, he has attracted attention in legal circles by winning, during his Vacation, the large sum of £1 13s. 4d. in a literary competition in the *Spectator* for about a hundred words describing the battle in which David slew Goliath in the manner of John Arlott, the well-known radio commentator. "One moment," he wrote, "there was Goliath of Gath, a big burly man, standing about six cubits, wouldn't you say, Arthur?—with a sword as big as himself shouting swaggering challenges to Israel, and before you could say Gilbert Harding he was flat on his face with a stone in his forehead, whirled like lightning from the sling of a ruddy-cheeked lad called David." Whether Arlott will seek some retaliation in parody remains to be seen, but on one occasion Sir Norman, while appearing for a female plaintiff injured in an accident, reduced a jury to ribald merriment when he gravely asserted that his client could no longer touch her bottom with her upper lip.

Traffic Breach.—*Plaintiff*: After the collision I went over to the defendant in her car and asked her why she had not signalled that she was about to turn to her right.

Counsel: And what did she say?

Plaintiff: She appeared astonished at my question and said: "What—in the daytime!"

Porcine Memo.—An English firm of solicitors has drawn attention to its local authority (happily nameless) which has caused conditions to be attached to its consent to pig-sty development within its jurisdiction. No. 1 of these conditions is "That no injury is caused to the amenity of the area by the omission of smell."

A Parcel of Peppercorns.—Some of the evidence tendered to the Monetary Commission appears to indicate the closer approach of an economic millenium if a substitute in kind is found for rent payments. The past, however, reveals many strange tenures, as a writer in a recent *Law Times* points out—*e.g.*, Willielmus, filius Willielmi de Alesburg, for a manor in Buckinghamshire provided straw for the king's bed and rushes to strew his chamber, and also paid three eels in winter and two green geese three times a year for his majesty's use. Richard Stanford paid a pair of tongs yearly into the royal exchequer. Bartholomew Peyteryn brought every Christmas a sextary—about a pint and a half—of gillyflower wine. In Warwickshire Lord Stafford held a manor from Edward I upon paying annually a pair of scarlet hose, valued at three shillings. Eustache de Corson paid to the king for his lands in Norfolk "twenty-four herring-pies, upon their first coming in." Walter Truvell held a Cornish acre—equivalent to about 60 statute acres—on condition of finding a boat and tackle to fish for the king so long as he resided in Cornwall. Robert, son of a certain Aexander, was tenant of the manor of Wrencholm from King John for keeping the royal hogs during certain months of the year. Walter le Rus and his wife held twelve acres in Eggefield for repairing the ironwork of the king's ploughs. William the Conqueror gave to Simon St. Liz, a Norman noble, the town of Northampton and whole hundred of Fatheley, then together valued at £40 per annum, to provide shoes for his horses, while Henry I gave a manor in Shropshire to Sir Ralph de Pickford to hold by the service of providing dry wood for the great chamber in the royal castle of Bridgnorth "against the coming thither of his sovereign lord the king."

THE LAW RELATING TO NAMES.

(*Concluded from p. 358.*)

held that a person sufficiently signs a document if it is signed, in his name and with his authority, by somebody else. In that case, the Court held that a document which had to be "signed by the valuer to the Council" was in order, where it was signed by an assistant to the valuer even though there was nothing on the document to indicate it was signed by proxy.

The Births and Deaths Registration Amendment Act, 1953, gives statutory recognition to the common practice of recording a change of name by Deed Poll. The statute, however, does not purport to limit the ways by which a person may change his name. For instance, no mention is made of the common practice whereby a married woman takes her husband's name. The new Act, however, does make one unusual provision in that it provides for a change of Christian name. It had been previously held in *Re Parrott's Will Trusts*, [1946] 1 All E.R. 321, that there are only two or at most three ways by which a Christian name may be legally changed—namely, by special Act of Parliament, at confirmation by the Bishop, and possibly under the power to add a name when a child is adopted. In this case, a condition in a will that Tim Spencer Cox should assume the name of Walter Tim Spencer Parrott by Deed Poll was held to be impossible. "Nobody can alter or part with a Christian name by deed poll."

The judgment of Vaisey, J., refers to the various authorities on ecclesiastical law, and overlooks the statement in *Halsbury* that, in some few cases, authority to take a new first name has been given by Royal Licence. It might well be questioned whether in New Zealand, a country which is nominally Christian, but legally has no Established Church, and which, in fact, might or might not be regarded as Christian, the average citizen is bound by the ecclesiastical law of England. Today many children are not baptized, and only a handful are ever confirmed. Before 1953, if a New Zealander had not been baptized, it is submitted, he would not have had a christian name, and, therefore, there was nothing to stop him changing what the statute calls his first name. Apparently, under the statute, a man's second third and fourth names are included in the term "first name", which may be anything except a surname. In any event, *23 Halsbury's Laws of England*, 2nd Ed., p. 555, para. 811, says that, if a man has become generally known by a name which he has assumed in addition to, or in place of, his baptismal name, there is no doubt that the name so assumed is valid for purposes of legal identification.

What the Births and Deaths Registration Amendment Act, 1953, seems to achieve is this: first, statutory provision is made for a change of first name or Christian name; second, a simple system of recording evidence of change of name is provided, and, third, any Certificate of Date of Birth will in future refer to the person under his newest name and not one of his old names.

Many people seem to regard a Birth Certificate as conclusive evidence of a person's name. It is submitted that a Birth Certificate is no more than a copy of an entry in a book kept by a Government Department, and records the day on which a person, who at that time was given certain names, was born. If that person likes to assume other names later in life quite informally, it may be very confusing for Government Departments and Insurance Companies; but there is nothing which prevents him from either dispensing with one of these first names which he was given gratuitously, without his consent, other than the risk of impersonation referred to by your learned contributor. If he wishes to avoid this risk, he can always add such new first or Christian names as he may choose. The real risk falls on the solicitor to the purchaser from a registered proprietor. The responsibility for obtaining signature by the correct party rests upon the party taking title: see *Gibbs* v. *Messer*, [1891] A.C., 248, 255. The client passes this responsibility on to the solicitor, who accepts this responsibility when he signs the document correct for the purposes of the Land Transfer Act. In *District Land Registrar* v. *Thompson*, [1922] N.Z.L.R. 627, Hemi Tano Paiki, a son of the deceased registered proprietor named Hemi Paiki, received the purchase money and signed what purported to be a transfer of the land from Hemi Paiki. The Court held that the certificate endorsed on the transfer was false, and that registration was thus obtained wrongly. A summons was issued calling on the purchaser to deliver up the certificate of title that the transfer might be cancelled. The purchaser then became entitled to a return of his money from his own solicitor. If the purchaser's solicitor could not extract the money from the person who purported to be the transferor, then his accounts for the year might show a substantial loss. This is one of the risks which was no doubt taken into account by the Law Society when fixing the costs payable by the purchaser to the solicitor.

Of course, the purchaser's solicitor might well be able to recoup his loss from the vendor's solicitor. If the vendor's solicitor handed over a signed transfer, containing a receipt for the whole purchase money, then by virtue of s. 56 of the Property Law Act, 1952, that is sufficient authority to pay the money to the vendor's solicitor. If, as would normally be the case, this induced the purchaser's solicitor to hand over the balance of the purchase money, over and above the deposit, believing the vendor's solicitor to be the agent for the true registered proprietor, then the vendor's solicitor must answer for any damage resulting from his representation.

In *McLaren* v. *Horsley*, [1926] G.L.R. 44, the vendor's solicitors must have received little comfort from the remarks of Ostler, J., that it was a hard case for them, and that he regretted very much that he must hold them liable. Without any fault on their part, they had been the victims of a fraud. The man who had signed the transfer, and received the money from them was not the registered proprietor, and had deceived his solicitors. He by then was in prison, and their chances of recovery looked small. The house had been subject to a mortgage, so that the imposter did not have to bring the title with him.

This case, in which the solicitors to the so-called vendor were held liable to the would-be purchaser may at least be useful as an unhappy warning and as a justification for the costs charged to the vendor on sale.