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DEATH DUTIES: TWO RECENT PRIVY COUNCIL JUDGMENTS.

ON two successive days, last month, their Lordships of the Judicial Committee of Her Majesty's Privy Council delivered judgments relating to the interpretation and application of sections of the Death Duties Act 1921 (now contained in the Death and Gift Duties Act 1955), and in each of those judgments the judgment of our Court of Appeal was upheld.

The cases in question were *Commissioner of Stamp Duties* v. *New Zealand Insurance Co., Ltd.*, and *Ward* v. *Commissioner of Inland Revenue.*

I.

The first of those cases which we propose to consider here was *Commissioner of Stamp Duties* v. *New Zealand Insurance Co., Ltd.*, which was heard at the end of last November by a Board consisting of Viscount Simonds, Lord Oaksey, Lord Radcliffe, Lord Keith of Avonholm, and Lord Somervell of Harrow. New Zealand counsel, among the counsel appearing before their Lordships, were Mr J. Byrne, for the appellant, and Sir Wilfrid Sim Q.C. and Mr G. H. Gould, for the respondent.

The facts were that the deceased, the late Mr F. J Rolleston, with others entered into a deed, dated April 16, 1941, whereby he and they bound themselves and their personal representatives to make monthly payments to a relative during her lifetime. The payments were to be made on the first day of each calendar month. The obligation to make the annuity payments was acknowledged by the Commissioner of Stamp Duties as having been incurred for fully adequate consideration in money or money's worth.

At the death of the deceased, in September, 1946, the proportion of the monthly payment to be made by him was £1 16s. 5d., and the capitalized value of the portion of the annuity payable by him (calculated actuarially and having regard to the expectation of life of the annuitant) was £1,052 9s. This figure was accepted by the Commissioner, when assessing succession duties, in arriving at the value of the shares of the estate receivable by the deceased's successors.

In computing the final balance of the deceased's estate, the Commissioner of Stamp Duties: (*a*) pursuant to s. 9 (1) of the Death Duties Act 1921, made allowance for the sum of £1 16s. 5d.; (*b*) pursuant to s. 9 (2) of the Act made no allowance for the sum of £1,052 9s.; but (*c*) pursuant to s. 9 (3) of the Act, made allowance for the sum of £281 5s., which represented the deceased's share of the monthly payments of £31 5s. which became actually payable within three years after the date of death of the deceased; and the Commissioner assessed the estate duty accordingly.

The deceased's executor objected to the assessment of estate duty in so far as no allowance was made for the sum of £1,052 9s. other than the allowance of the sum of £281 5s.; and required the Commissioner to state a Case. The Commissioner was of opinion that the liability of the deceased under the deed as from his death was incapable of estimation.

The deceased's executor contended that the sum of £1,052 9s. was the allowance that should have been made under s. 9 (1) of the Act for the debt owing under the deed by the deceased at his death; and that such debt was not a contingent debt or other debt the amount of which was incapable of estimation.

The Commissioner contended: (*a*) that the sum of £1,052 9s. did not constitute a debt owing by the deceased at his death; (*b*) that an allowance in respect of the liability of the deceased under the deed as from his death was prohibited by s. 9 (2) (*d*) of the Act, except to the extent to which an allowance is authorized by s. 9 (3); and (*c*) that, in respect of the liability of the deceased under the deed as from his death, the appellant was not entitled to any allowance in excess of the £281 5s. allowed by the respondent under s. 9 (3).

The question for the determination of the Supreme Court was:

Whether in computing the final balance of the estate of the deceased the Commissioner of Stamp Duties was entitled to an allowance in excess of the sum of £281 5s. in respect of the liability of the deceased under the deed allowed pursuant to s. 9 (3) of the Act; and, if so, what was the allowance to which the deceased's executor was entitled?

In the Supreme Court, Northcroft J. upheld the Commissioner's rejection of the deduction claimed. The basis of his decision was that the liability under the annuity was a contingent debt within the meaning of s. 9 (2) (*d*); and that, since the period of the annuitant's life was not capable of determination in advance, an estimate of the quantum of the contingent indebtedness or pecuniary liability could not be made: [1953] N.Z.L.R. 438. This treatment of the matter seemed to their Lordships to assume that, as a matter of construction, the relative clause in subs. (2) (*d*) "the amount of which is in the opinion of the Commissioner incapable of estimation" qualifies both of the pre-

ceding phrases "contingent debts" and "any other debts." It should be added that the learned Judge found considerable support for the view that he had taken in the judgments of the High Court of Australia in *Commissioner of Stamp Duties* v. *Permanent Trustee Co. of New South Wales, Ltd.*, (1933) 49 C.L.R. 293.

In the Court of Appeal, the decision of the Supreme Court was reversed, and it was held that the deduction of £1,052 9s. ought to be allowed. All the three Judges in that Court (Fair, Stanton, and Hay JJ.) adopted the same line of reasoning. In their view, there was a material distinction between a liability which could be described as "a debt that may never become due", such as, for instance, a guarantee of a bank overdraft or an uncalled liability on shares, and a liability "where liability is certain but the ultimate amount that will be payable depends on a contingency". Only the first class were contingent debts for the purpose of subs. (2) (*d*). A life annuity belonged to the second class. Further, their Honours held that there could not be any doubt that the amount of the debt represented by the annuity was capable of estimation for the purposes of the same subsection, and that the opinion recorded by the appellant to the opposite effect must have been founded on some misapprehension of the relevant law, and could not be allowed to prevail: [1954] N.Z.L.R. 239.

From that judgment, the Commissioner of Stamp Duties appealed to Her Majesty in Council. His appeal was by special leave of the Judicial Committee on the terms that, in any event, the respondent would have its costs of the appeal on a solicitor-and-client basis.

The question in the appeal was whether the appellant, the Commissioner of Stamp Duties, ought to make an allowance in respect of the obligation to pay a life annuity when computing the final balance of the estate of a deceased person for the purposes of estate duty under the Death Duties Act 1921.

In their Lordships' view, in their judgment delivered by Lord Radcliffe, the issue depended almost entirely upon the effect of s. 9 of that Act.

Section 9 of the Death Duties Act 1921 (which now appears as s. 9 of the Death and Gift Duties Act 1955) was as follows:

> (1) In computing the final balance of the estate of the deceased, allowance shall, save so far as otherwise provided by this Act, be made for all debts owing by the deceased at his death.
>
> (2) No such allowance shall be made—
>
> (*a*) For debts incurred by the deceased otherwise than for full consideration in money or money's worth wholly for his own use and benefit; or
>
> (*b*) For debts in respect whereof there is a right of reimbursement from any other estate or person, except to the extent to which reimbursement cannot be obtained; or
>
> (*c*) More than once for the same debt charged upon different portions of the estate; or
>
> (*d*) For contingent debts or any other debts the amount of which is, in the opinion of the Commissioner, incapable of estimation.
>
> (3) If any debt for which by reason of the provisions of paragraph (*d*) of this section an allowance has not been made becomes at any time within three years after the death of the deceased actually payable or, in the opinion of the Commissioner, capable of estimation, an allowance shall be made therefor, and a refund of any estate or other duty paid in excess under this Act shall be made to the person entitled thereto, but no action for the recovery of any such refund shall be commenced except within three years after the payment of the duty so paid in excess.

In their Lordships' view the essential question in this case was not the bare question, Is the liability for an annuity for life a contingent debt? Indeed, they said, it is very difficult to answer such a question in isolation, since the nature of the answer will depend upon the context to which the existence of the contingency is relevant. They continued:

> No doubt any particular amount which is claimed to be due in respect of the liability at the date of death (except the small accrued sum due by apportionment) is only contingently due in the sense that it cannot be said with certainty that it or any part of it will have to be paid out of the estate. The sum that will have to be paid depends on the number of months that the annuitant survives. No doubt, too, the value of the annuity estimated on actuarial principles is not the same thing as the amount of the debt itself. On the other hand, it may be that there is a relevant distinction for this purpose between a liability for an annuity accruing *de die in diem* and only terminating with the death of the annuitant and a liability which, while not the less incurred by the date of death, will not result in a pecuniary debt except in a future event as yet uncertain. Their Lordships do not think it necessary to express an opinion on this point, which is admittedly a difficult one, since in their view the allowance or rejection of a life annuity as a debt to be allowed against the final balance of an estate can be decided more satisfactorily by reviewing the wording of s. 9 as a whole.

First, their Lordships asked: Is the annuity "a debt owing by the deceased at his death"? Having regard to the interpretation of "debt" in s. 2 as including "any pecuniary liability, charge or encumbrance," they consider it is clear that it is: and, if so, Is it to be allowed under s. 9 (1), "save so far as otherwise provided by this Act"? The main grounds of exclusion are set out in subs. (2) of the same section, and, of the four sub-headings, sub-heading (*d*) stands apart from the others. It is expressed in a form which is itself productive of some ambiguity:

> For contingent debts or any other debts the amount of which is in the opinion of the Commissioner incapable of estimation.

If, their Lordships continued, the relative clause qualifies both the preceding phrases a liability which is admissible under subs. (1) is not disallowed, even if contingent, so long as it is not incapable of estimation: while, if the relative clause qualifies only the phrase "any other debts", which immediately precedes it, any liability properly described as contingent is disallowed merely by that fact, even though it is readily capable of estimation. The judgment proceeded:

> Their Lordships do not think that the latter gives a reasonable construction of an ambiguous sentence. There is nothing in its favour except the grammatical argument that the word "debts" should not have been used twice if the relative clause was intended to cover contingent as well as other debts, and the point, in itself of little weight, that there was no need to refer to contingent debts at all if the sentence was intended to mean no more than that any debt which was incapable of estimation was to be disallowed. If it is said that a contingent debt was meant to be disallowed as such and without qualification because it was regarded by the Legislature as an obvious example of a liability which could be safely assumed to be incapable of estimation, the argument turns round upon itself, since then it becomes highly improbable that the phrase "contingent debt" was intended to cover a life annuity, the obligation under which is of all uncertainties the one most readily capable of estimation. And the explanation leaves unexplained how it could be fair or reasonable to provide that no debt that was not a contingent debt was to be disallowed, if capable of estimation, while a debt that was a contingent debt was not to be allowed, even if capable of estimation.

In the light of these considerations, their Lordships were of opinion that the meaning of subs. (2) (*d*) is that the only debts within the meaning of subs. (1) which are disallowed are those the amount of which

is in the Commissioner's opinion incapable of estimation. On this basis, it does not matter whether the annuity is to be thought of as a contingent debt or not. The section does not say, but it is necessarily to be assumed, that if there is a debt the amount of which is capable of estimation that amount is itself to be treated as the debt and allowed as such. Their Lordships were not unmindful that in the Case Stated the appellant recorded the opinion that " the liability of the deceased under the said deed as from his death is incapable of estimation". But, having regard to the known practice of the valuation of life annuities on actuarial principles for many purposes, including bankruptcy, administration and insurance business, they were content to accept the view of the Court of Appeal on this point, that he must have been acting under some misapprehension of the applicable law when he committed himself to this view.

The reading of the section which was adopted by their Lordships made it, in their view, unnecessary to consider the case of *Commissioner of Stamp Duties* v. *Permanent Trustee Co. of N.S.W., Ltd.*, (1933) 49 C.L.R. 293, to which Northcroft J. made detailed reference in his judgment in the Supreme Court. For, while it is true that the effect of that decision was to exclude a life annuity from allowance under the Death Duties Act of New South Wales, the ground of the decision was that, under that Act, the basic condition of allowance of any debt was that it must be " actually due and owing " at the date of death (see s. 107 (1) of the Act). If a debt was not capable of being so described—and, whatever else can be said about the liability to pay a life annuity it is hard to see how it can properly be described in those terms—the range of allowance was not impliedly extended by the presence of a subs. (2) (*d*) in the same terms as subs. (2) (*d*) of the New Zealand Act, from which circumstance it had been sought to draw the conclusion that any liability ought to be allowed against the dutiable estate if, though a contingent debt, it was capable of estimation. The High Court of Australia rejected that argument, holding that the prohibition contained in subs. (2) could not be construed as an implied enlargement of the phrase " actually due and owing " in subs. (1). Their Lordships considered that it is plain that there is a material difference between the words " actually due and owing " in the New South Wales Act and the words " owing by the deceased " (as interpreted by s. 2) in the New Zealand Act. Further, there was no definition of " debt " in the New South Wales Act, as there is in s. 2 of the New Zealand Act. Accordingly, the decision of the High Court of Australia did not therefore bear upon the issue of the present case.

For the above-stated reasons their Lordships advised Her Majesty that the appeal should be dismissed. The appellant was ordered to pay the respondent's costs of the appeal.

In the result, therefore, their Lordships held that the meaning of s. 9 (2) (*d*) is that the only " debts " within the meaning of s. 9 (1) which are to be disallowed by the Commissioner are those the amount of which is, in the Commissioner's opinion, incapable of estimation; and it must necessarily be assumed that, if there is a debt the amount of which is capable of estimation, that amount is itself to be treated as the debt, and allowed as such.

It followed that the annuity in question was a " debt due by the deceased at his death " for the purposes of s. 9 (1) and (2) of the Death Duties Act 1921, and it was immaterial whether or not it was to be thought of as a contingent debt. Consequently, having regard to the known practice of the valuation of life annuities on actuarial principles for many purposes, the Commissioner of Stamp Duties, as their Lordships held, was not correct when he committed himself to the view that the liability of the deceased, in respect of the annuity, as from his death was incapable of estimation, and the whole sum of £1,052 9s., should have been allowed as a deductible debt in computing the final balance of the deceased's estate.

SUMMARY OF RECENT LAW.

CRIMINAL LAW.

The Law and Criminology. *99 Justices of the Peace & Local Government Review*, 761.

DAMAGES.

Damages for Loss of Publicity, *105 Law Journal*, 739.

DIVORCE AND MATRIMONIAL CAUSES.

Maintenance of Wife—Small Maintenance Payments—Order should not refer to Income Tax—Income Tax Act 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 10), s. 206 (1). On a decree of divorce being made absolute, the Divorce Court made an order for maintenance of the wife " at and after the rate of £52 per annum free of tax the said sum to be payable weekly ". The husband paid £4 6s. 8d. each calendar month regularly but subsequently the wife claimed that the payment should have been at the rate of £1 a week grossed up so as to include tax at the standard rate, and issued a judgment summons on which the husband was ordered to pay £90 0s. 5d. for arrears and costs. *Held*, (Denning L.J. dissenting) on its true construction the order for maintenance, being for the payment of maintenance at the yearly rate of £52 " free of tax ", required the husband to pay annually such a gross sum as after deduction of tax at the standard rate would leave £52 (dictum of Sir Raymond Evershed M.R. in *Whiteside* v. *Whiteside*, [1949] 2 All E.R. at p. 915 citing *Burroughes* v. *Abbott*, [1922] 1 Ch. 86, and dictum of Upjohn J. in *Stokes* v. *Bennett*, [1953] 2 All E.R. at p. 315 citing also *Spilsbury* v. *Spofforth*, [1937] 4 All E.R. 487, applied), and the provisions of s. 205, s. 206 and s. 207 of the Income Tax Act 1952 did not alter the meaning and effect of the order, although the sums ordered to be paid were within the category of small maintenance payments which, by s. 206 (1), must be paid without deduction of tax; accordingly, the arrears were recoverable. Per curiam: orders for small maintenance payments should not be expressed as orders for payment of sums " free of tax " but should be made for sums stated without any reference to income tax. Tax should have been taken into consideration in assessing the stated sums. Appeal dismissed. *Jefferson* v. *Jefferson*. [1956] 1 All E.R. 31 (C.A.)

FAMILY PROTECTION.

Grandchild—Testator's Duty to Grandchild—Provision of Proper Maintenance and Support and, in Appropriate Cases, of Assistance to Grandchild towards becoming established in Life—Family Protection Act 1908, s. 33. In making provision for a grandchild, the testator's duty is to provide proper maintenance and support until the grandchild reaches an age when he or she might be expected to earn a living wage, and, in appropriate cases, the duty may extend to the provision of something to assist the grandchild towards becoming established in life. (*In re Wright, Willis* v. *Drinkwater*, [1954] N.Z.L.R. 630, applied.) *In re Partridge* (*deceased*), *Partridge* v. *Perpetual Trustees Estate and Agency Co. of New Zealand, Ltd., and Others.* (S.C. Christchurch. February 1, 1955. Cooke J.)

MENTAL DEFECTIVES.

Authority of Court asked for Sale of Patient's Interest in Land—Such Sale adeeming Specific Devise in Patient's Will—Sale in

Patient's Interest—Order made not preserving, as far as possible, Devolution of Patient's Estate—Nature of Order made—Mental Defectives—Disclosure to Court of Contents of Patient's Will—Such Disclosure to Necessary Extent Proper, where Court invited to authorize Transaction affecting Testamentary Dispositions. The Public Trustee, as statutory administrator of the estate of a mentally defective person, applied for an order that he be authorized to sell the patient's undivided one-fourth share in certain land. The Public Trustee, who held a document which he believed to be the last will of the patient, said that under it the patient's estate and interest in the land had been specifically devised, but did not say to whom it had been devised. The proposed sale would adeem that specific devise. *Held*, 1. That it is the policy of the Court to avoid conversion of realty into personalty when that would alter the devolution of the property when the patient dies, whether the devolution is in accordance with the provisions of a will or is the result of an intestacy. 2. That disclosure *to the necessary extent* of a patient's testamentary dispositions is proper in cases where the Court is invited to authorize a transaction which may affect those dispositions. (*In re W.*, [1954] N.Z.L.R. 183, followed.) 3. That disclosure by the Public Trustee as to the specific devise of the land proposed to be sold, without disclosing the name of the devisee, was proper. 4. That, as the sale was in the interests of the patient, as were the proposed selling price and the suggested arrangements for allowing portion of the sale price to remain outstanding on first mortgage of the land, the Court should endeavour to make an order which would not prejudice the devisee for whom the patient had made provision, and that such order should preserve as far as possible the devolution of the patient's estate, so that the proceeds of the sale of the patient's interest in the land should be deemed to represent the patient's share in the land to the intent that the beneficiaries under her will would take the same interest in such proceeds as they would have taken if the land had not been sold. (*In re W.*, [1954] N.Z.L.R. 183, applied.) *Semble*, That to force the patient's co-owners to bring a partition suit would involve the patient unnecessarily in an obligation to pay her share of the costs of those proceedings, and it was in the interest of the patient that she should not have to pay it. *In re P. (A Mental Patient).* (S.C. Wellington. December 12, 1955. Barrowclough C.J.)

NEGLIGENCE.

Accidents to Straying Children. *105 Law Journal*, 675.

High Voltage Electrical transmission Wire suspended over Lake—Mast of Yacht coming in Contact therewith, and Plaintiff injured—Presence of Wire and Its Position obvious—Plaintiff aware, from Previous Sailing under Wire of Power Lines and Their Situation—Error of Judgment on His Part as to Height of Wire not transforming Visible Source of Danger into Concealed Danger. The plaintiff sued the Crown for damages for personal injuries by electrical shock received as a result of the mast of a yacht in which he was sailing upon Karapiro Lake coming into contact with an electrical-transmission wire suspended across the Lake supported by pylons erected upon the banks and in the bed of the Lake. It was not disputed that the Crown was the occupier of the Lake, and that the electrical wiring and equipment relative to this action were the property of, and subject to the control of, the Crown, through the State Hydro-Electricity Department. *Held*, 1. That the duty owed by the Crown as occupier to the plaintiff as licensee was not to expose the plaintiff at the relevant place without warning to a hidden peril, concealed danger, or a trap known to the occupier. (*Fairman* v. *Perpetual Investment Building Society*, [1923] A.C. 74, *Mersey Docks and Harbour Board* v. *Procter*, [1923] A.C. 253, and *Latham* v. *Johnson and Nephew, Ltd.*, [1913] 1 K.B. 398, followed.) 2. That the presence of the wire and its exact position were obvious; the plaintiff was aware of the power-lines and their situation, and he had sailed under the wires on a previous occasion but this was at a point nearer to the pylon, where the wires were at a greater height; and there was no evidence that the state and situation of the wire on the day of the accident were different from what they had been on the previous occasion when plaintiff had sailed on the Lake. 3. That the fact that an error of judgment as to the height of the wire could readily be made did not impose a liability on the Crown or transform a source of danger which was clearly visible into a concealed danger. (*Mersey Docks and Harbour Board* v. *Procter*, [1923] A.C. 253, applied.) *Holland* v. *The Attorney-General.* (S.C. Hamilton. September 27, 1955. Shorland J.)

Res ipsa loquitur—Onus on Defendant to disprove Negligence—Workman employed by Defendant fatally injured by Explosion of Gas Apparatus on Defendant's Premises—Expert Evidence that Accident could have happened without Negligence of Defendant—Whether Onus discharged. The plaintiff's husband was employed by the defendants as a phosphater and in the course of his work it was his duty to immerse metal objects in a de-rusting tank which was filled with liquid chemicals maintained at a temperature of 140° F. by a thermostatically-controlled gas burner situated under the tank. The main gas supply of the burner passed through a thermostatically-controlled regulator, the supply being automatically cut off when the desired heat was attained and recommencing when the temperature fell below the required level. While the machine was in continuous operation the gas supply turned on and off once in about every twenty minutes. To ignite or re-ignite the burner when the supply was flowing, a pilot jet flame, which should have been about six inches in length, was provided near to the burner and supplied by a separate pipe. There was also a smaller pipe to burn away the small overflow of gas from the regulator. The machine had been supplied and fitted on the defendants' premises by the manufacturer and had been in constant use since November, 1952. On February 18, 1953, at about 4.30 p.m., while the plaintiff's husband was attending to the tank, an explosion occurred under the tank and he was fatally injured. The machine had worked satisfactorily from the beginning of that day until the time of the explosion. The plaintiff claimed damages against the defendants on the ground that her husband's death was attributable to the negligence of the defendants. It was proved at the trial that the explosion was caused by an accumulation of unignited gas due to a failure in the proper functioning of the pilot jet; that the explosion would not have occurred if the machine had been properly maintained; that there was no fault in the gas supply and that the mechanism was such as should not have required overhaul at or before the time of the accident. It was, however, the duty of the defendants' maintenance man to inspect the apparatus weekly and the duty of their foreman to supervise the plaintiff's husband and not to allow him to work the gas apparatus until the foreman was satisfied that he was competent to do so. Neither the foreman nor the maintenance man was called as a witness. It was not contended by the defendants that the plaintiff's husband had been responsible for the accident. *Held*, the plaintiff was entitled to recover damages from the defendants because: (*a*) (per Sir Raymond Evershed M.R. and Birkett L.J.) (i) the maxim of *res ipsa loquitur* applied as the plant was under the management of the defendants or their servants and the accident was such as in the ordinary course of things would not have happened if proper care had been taken (principle stated by Erle C.J. in *Scott* v. *London Dock Co.*, (1865) 3 H. & C. 596, 601, applied), and (ii) the defendants had failed so to explain the accident as to discharge the onus which was on them to show either that the explosion was due to a specific cause not connoting their negligence or that they used all reasonable care in and about the management of the plant, it being insufficient for the defendants merely to show that the accident could have happened without negligence on their part (principle stated by Asquith L.J. in *Barkway* v. *South Wales Transport Co., Ltd.*, [1948] 2 All E.R. 460, 471, adopted; observations of Lord Radcliffe in *Esso Petroleum Co., Ltd.* v. *Southport Corpn.*, [1955] 3 All E.R. 864, 872, applied; dicta of Langton J. in *The Kite*, [1933] P. 154, 168, and of Lord Dunedin in *Ballard* v. *North British Ry. Co.*, 1923 S.C. (H.L.) at p. 54, not followed) and (*b*) the plaintiff, on the alternative footing that the maxim *res ipsa loquitur* did not apply, had established negligence on the part of the defendants. Appeal allowed. *Moore* v. *R. Fox & Sons.* [1956] 1 All E.R. 182 (C.A.)

NUISANCE.

Escape of Water from Adjoining Premises. *99 Solicitors' Journal*, 882.

PRACTICE.

Declaration—Discretionary Remedy—Dock Worker's Irregular Dismissal—Damages a Sufficient Remedy. The plaintiff was a registered dock worker employed by the defendants, the National Dock Labour Board. The national board was set up under the Dock Workers (Regulation of Employment) Order 1947, to administer the scheme provided by the order with power to delegate to local boards constituted by the order certain disciplinary functions. By cl. 16 (2) (*c*) of the scheme the local boards were given power to give seven days' notice of termination of employment to any registered dock worker who failed to comply with any provision of the scheme. The plaintiff failed to comply with a provision of the scheme (in fact, to obey a valid order to report for work) and the local board instructed their disciplinary committee which consisted of only two members of the local board to consider his case. The dock labour scheme contained no provision for the delegation of a disciplinary matter by a local board. The disciplinary committee, having considered the case, decided that the plaintiff should be given seven days'

LEGAL ANNOUNCEMENTS.

Continued from page i.

Consequent upon the recent retirement of Mr C. M. Rout, the practice formerly carried on at Nelson under the style of GLASGOW, ROUT & CHEEK will be continued, as from the first day of April, 1956, by the remaining partners, Messrs J. Glasgow and W. J. Glasgow, under the style of GLASGOW & SON.

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Solicitors, PUKEKOHE.

notice of termination of employment and their decision was upheld by the appeal tribunal. The plaintiff, having been given seven days' notice under cl. 16 (2) (c), left the employment of the defendants as from about November 22, 1952. He brought an action against the defendants in February, 1953, in a County Court claiming £136 damages for wages lost; this having been transferred to the High Court he claimed by his statement of claim delivered on January 12, 1954 (i) a declaration that his purported dismissal was invalid, and (ii) damages; and pleaded that as from November 22, 1952, he ceased to be in the employment of the defendants. By amendment in May, 1954, the plaintiff pleaded in his statement of claim that he elected to treat the contract as discharged by repudiation by the defendants and "alternatively the plaintiff elected to treat the contract as subsisting". The plaintiff having been granted the declaration and damages, the defendants appealed. *Held*, (i) the local board had no power to delegate its disciplinary powers conferred by cl. 16 (2) (c) of the scheme to a disciplinary committee consisting of two of its members, and the purported dismissal of the plaintiff and the subsequent proceedings before the appeal tribunal were, therefore, illegal, ultra vires and invalid. *Barnard* v. *National Dock Labour Board*, [1953] 1 All E.R. 1113, followed. (ii) (Jenkins L.J. dissenting) the declaration should not have been granted because (*a*) the plaintiff by delivering his statement of claim in January, 1954, had elected to treat the contract between him and the defendants as repudiated and to claim damages for wrongful dismissal, and this election was final so that the plaintiff could not thereafter maintain that he was entitled to relief (i.e., the declaration) on the footing that the contract was subsisting, and (b) even if the plaintiff had not so elected, the granting of a declaration was discretionary and the present case was one in which damages were an adequate and the only proper remedy. *Barnard* v. *National Dock Labour Board*, [1953] 1 All E.R. 1113, distinguished on the question of the relief to be granted. Observations on putting the plaintiff to election between relief on the footing that the contract was repudiated and relief on the footing that it was subsisting. *Appeal dismissed, but declaration struck out.* *Vine* v. *National Dock Labour Board*. [1956] 1 All E.R. 1 (C.A.)

Discovery—Action for Damages for Negligence—Master and Servant—Application for Discovery of Documents concerning Accidents of the Same Type—R.S.C., Ord. 31, r. 12. (Code of Civil Procedure, R. 161). The plaintiff, who was employed by the defendants on the repair of locomotives, sustained injuries from falling from the top of a locomotive on which he was working in the course of his employment and brought an action against the defendants for damages for negligence. An order for discovery was made by which the defendants were ordered to make an affidavit of documents "limited to relevant documents since November 7, 1948". Having regard to the course of proceedings this order envisaged that the documents in question would be such as related to any accidents sustained by other workmen when required to work on the tops of locomotives. The defendants appealed against the order, offering in effect such discovery as was envisaged by it but limited to the region of British Railways in which the accident occurred and to locomotives of the type on which the plaintiff had been working when the accident occurred. Ultimately the appeal was dismissed by consent, the defendants withdrew their offer and filed an affidavit setting out certain documents and deposing that there was no other relevant document. The plaintiff applied for an order for a further affidavit of documents extending to all documents relating to accidents in which persons employed by the defendants or by the Railway Executive had since January 1, 1947, fallen from the tops of locomotives, and, in support, filed an affidavit in which the deponent, the plaintiff's solicitor, deposed that in his belief the defendants had or had had at some time in their possession or power documents such as those to which the application related. *Held*, the plaintiff was not entitled to the discovery for which he asked because (i) the evidence filed in support of the application for further discovery did not specify any document which was shown to be in the possession of the defendants and was not such as enabled the Court to go behind the affidavit filed pursuant to the order for discovery, and (ii) the field of inquiry over which discovery was asked was too wide; accordingly, no order for a further affidavit of documents would be made. Per Curiam: if there were good ground for saying that there were reports of cases of accidents which had occurred within a reasonable time and a reasonable distance of the accident to the plaintiff, a plaintiff might be able to obtain discovery concerning those accidents, as being relevant to the issue whether his employer had taken proper care to avoid unnecessary risk to his workmen. Appeal dismissed. *Edmiston* v. *British Transport Commission*. [1955] 3 All E.R. 823 (C.A.)

Striking out Pleadings and Proceedings—Action by Executors claiming Amount due to Testatrix—Denial of Allegation of Appointment of Executors, the Truth of which Defendant could have checked—Denial of Allegation as to Non-payment of Amount due—Such Denial Evasive and so Vexatious—Other Allegations by Plaintiffs admitted—Offending Paragraphs in Statement of Defence struck out—No Amendment asked for—Judgment for Plaintiffs—Code of Civil Procedure, R. 126. A statement of defence to an action by executors claimed an amount due by the defendant under an agreement made by him with the testatrix. In para. 1, the plaintiffs alleged they were executors of the deceased testatrix by virtue of probate granted to them by the Supreme Court at Wellington on September 13, 1954. In paras. 2 to 6, the plaintiffs alleged the agreement, the non-payment of the moneys payable by the defendant, and the service of a notice of intention to call up and demand all moneys owing under the agreement. In para. 7, the plaintiffs alleged that at the date of the expiry of the notice, the amount owing by the defendant under the agreement was £6,339 17s. particulars being given as to how that amount was arrived at. The defendant filed a statement of defence in which he admitted all the allegations contained in paras. 2 to 6 of the statement of claim. As to para 1, he said that he had no knowledge of the allegations contained therein, and accordingly denied the same. As to para. 7, he said merely that he denied these allegations. The plaintiffs moved to strike out the statement of claim and filed an affidavit in which they swore to the truth of the allegations contained in all the paragraphs of the statement of claim. No answering affidavit was filed by the defendant. The plaintiffs also asked for judgment. *Held*, 1. That the defendant, if he wished, could readily have checked the truth of the plaintiff's allegations in para. 1 of the statement of claim, but he had not done so, even after the truth of those allegations had been sworn to by the plaintiff. 2. That the defendant's denial of the allegations contained in para. 7 of the statement of claim did not conform with the requirements of R. 126 of the Code of Civil Procedure, and such denial was evasive, and, therefore, vexatious, and was an abuse of the Court's procedure. 3. That, accordingly, paras. 1 and 7 of the statement of claim should be struck out, the part remaining (paras. 2 to 6) being an admission of allegations made in the statement of facts, which were some of the facts which required to be proved to entitle the plaintiffs to judgment. 4. That, the net result being that none of the allegations in the statement of claim was denied, judgment should be given for the plaintiffs for the amount of their claim unless leave should be given to the plaintiffs to amend. (*Jack* v. *Stewart*, (1890) 8 N.Z.L.R. 376, and *Porter* v. *Southern Cross Petroleum Co.*, (1890) 8 N.Z.L.R., 384, followed.) 5. That, as no such amendment was sought, *judgment should be given to the plaintiffs for the amount claimed.* *Holden and Another* v. *Knight*. (S.C. (In Chambers). Wellington. December 14, 1955. Barrowclough C.J.)

PUBLIC REVENUE—DEATH DUTIES (ESTATE DUTY).

Allowance for Debts—Deceased's Liability for Payment of Annuity—Amount of Annuity capable of Estimation by Usual Actuarial Calculation—Such Amount allowable as "debt owing by the deceased at his death"—Death Duties Act 1921, s. 9 (2) (d), (3). The meaning of s. 9 (2) (*d*) of the Death Duties Act 1921 is that the only "debts" within the meaning of s. 9 (1) which are disallowed are those the amount of which is, in the Commissioner's opinion, incapable of estimation; and it must necessarily be assumed, that if there was a debt, the amount of which was capable of estimation, that amount was itself to be treated as the debt, and allowed as such. (*Commissioner of Stamp Duties (N.S.W.)* v. *Permanent Trustee of New South Wales, Ltd.*, (1933) 49 C.L.R. 293, distinguished.) The deceased with others entered into a deed, dated April 16, 1941, whereby he and they bound themselves and their personal representatives to make monthly payments to a relative during her lifetime. The payments were to be made on the first day of each calendar month. The obligation to make the annuity payments was acknowledged by the Commissioner of Stamp Duties as having been incurred for fully adequate consideration in money or money's worth. At the death of the deceased, in September, 1946, the proportion of the monthly payment to be made by him was £1 16s. 5d. and the capitalized value of the portion of the annuity payable by him (calculated actuarially and having regard to the expectation of life of the annuitant) was £1,052 9s. This figure was accepted by the Commissioner, when assessing succession duties, in arriving at the value of the shares of the estate receivable by the deceased's successors. In computing the final balance of the estate, the Commissioner, pursuant to s. 9 (1) of the Death Duties Act 1921, made allowance for the above-mentioned liability of £1 16s. 5d. In reliance on s. 9 (2) (*d*), he declined to make an allowance for the

sum of £1,052 9s.; but, pursuant to s. 9 (3), he made an allowance of £281 5s. for the monthly sums which would become payable within three years after the deceased's death. Estate duty was assessed accordingly. In a Case Stated under s. 62 of the Death Duties Act 1921, the Court was asked to determine whether an amount in excess of £281 5s. should have been allowed in respect of the deceased's liability under the deed; and, if so, what was the amount which should have been allowed. Northcroft J. upheld the appellant's rejection of the deduction claimed ([1953] N.Z.L.R. 438). That determination was reversed by the Court of Appeal, which held that the allowance to which the respondent was entitled for the liability of the deceased under the deed was the sum of £1,052 9s. as estimated on the proper actuarial basis in respect of the annuity ([1954] N.Z.L.R. 239). On appeal from the judgment of the Court of Appeal, pursuant to special leave of the Judicial Committee, *Held*, 1. That the annuity was a "debt due by the deceased at his death" for the purposes of s. 9 (1) and (2) of the Death Duties Act 1921; and it was immaterial whether or not it was to be thought of as a contingent debt. 2. That, having regard to the known practice of the valuation of life annuities on actuarial principles for many purposes, the appellant must have been acting under some misapprehension of the applicable law when he committed himself to the view that the liability of the deceased as from his death, in respect of the annuity, was incapable of estimation. Appeal from the judgment of the Court of Appeal, [1954] N.Z.L.R. 239, dismissed. *Commissioner of Stamp Duties* v. *New Zealand Insurance Co., Ltd.* (J.C. February 15, 1956. Viscount Simonds, Lord Oaksey, Lord Radcliffe, Lord Keith of Avonholm, Lord Somervell of Harrow)

RELIGIOUS, CHARITABLE, AND EDUCATIONAL TRUSTS.

Charitable Trust—Gifts of Land to Trust Board for Girls' Hostel, and of Residue for Like Purpose—Gifts refused by Board—Property held on Trust for "particular charitable purpose"—Application of Statute—General Charitable Purpose within Cy-près Principle not necessary before Submission of Scheme for Disposition of Property for Other Charitable Purpose—Exercise of Discretion—Cy-près Principle considered—Religious, Charitable, and Educational Trusts Act 1908, s. 15. Section 15 of the Religious, Charitable, and Educational Trusts Act 1908 applies in any case where property is held upon trust for a particular charitable purpose, and accordingly, to bring a case within that section, it is not necessary to show a general charitable intention within the rules laid down for the application of the cy-près principle under the general jurisdiction of the Court. *Semble*, That, even if a case should be under the statute alone, whether or not a general charitable intention was shown is an important matter for consideration on the exercise of discretion given by s. 15, if for no other purpose. (*In re Palmer, White* v. *Feltham Children's Home Trust, Inc.*, [1939] N.Z.L.R. 189; [1939] G.L.R. 138, and *In re Humphreys, Boulton* v. *Beckett*, [1936] N.Z.L.R. s. 38; [1936] G.L.R. 329, referred to.) The testatrix devised to the Wellington City Mission Trust Board a specific property for the erection thereon of a Girls' Hostel, with power to sell and employ the proceeds towards the establishment or maintenance of such an hostel elsewhere under the Board's control. The testatrix also gave the residue of her estate to the Board upon trust to apply the same for the establishment and maintenance of a Girls' Hostel on the named property or elsewhere as to the Board in its absolute discretion should seem fit. The Board refused the gifts declared in the testatrix's will, for the reasons stated in the judgment. The Court was asked to determine whether the devise to the Board of the specified property of the testatrix wholly failed by reason of the refusal of the Board to accept it upon the trusts concerning the same expressed in the will. *Held*, 1. That the will showed a guiding purpose to make provision for a girls' hostel of a charitable nature, and, dubitante, that the appointment by the testatrix of the Board as trustee of her gifts was not of the essence of the gifts. (*Reeve* v. *Attorney-General*, (1843) 3 Hare 191; 67 E.R. 351, and *Re Lawton, Gartside* v. *Attorney-General*, [1936] 3 All E.R. 378, referred to.) 2. That s. 15 of the Religious, Charitable, and Educational Trusts Act 1908 should be applied; and that the case was one in which a scheme should be prepared under the statute. *In re Strong (deceased), Guardian Trust and Executors Co. of New Zealand, Ltd.* v. *Wellington City Mission (Church of England) Trust Board.* (S.C. Wellington. February 1, 1956. Hutchison J.)

SHARE-MILKING AGREEMENTS.

Share-Milking Agreement not to be performed within One Year deemed Valid by Statute—Such Agreements, if not in Writing, Valid, or, if in Writing, may be modified by Oral Agreement or by Agreement implied from Course of Conduct—Share-milking Agreements Act 1937, s. 7—Statute of Frauds 1677 (29 Car. 2, c. 3), s. 4. The effect of s. 7 of the Share-milking Agreements Act 1937—which is as follows: "No share-milking agreement that is not to be performed within the space of one year shall be deemed invalid to support any action or other proceeding on the ground that the agreement or a memorandum or note thereof is not in writing signed by the parties to be charged therewith or by any person or persons lawfully authorized in that behalf"—is to exempt share-milking agreements from the provisions on the Statute of Frauds 1677, with the result that those agreements, although not to be performed within a year, need not be in writing; and that, if a share-milking agreement has been made in writing, it can be modified by an agreement which is not in writing, but which may be oral or implied from a course of conduct. A clause in a milking agreement was as follows: "18. (*b*) The Milker shall in each year at his cost in all things (except fencing materials) including the employment of such labour as shall be necessary cut, cart and completely harvest, stack and thatch hay, fence-in stacks and lay down ensilage sufficient for winter feed of that nature for the said stock and until so used such hay and ensilage shall be the sole property of the Owner. The Milker shall on the termination of this agreement leave on the said land all the hay and ensilage harvested from . . . thirty . . . acres and not meanwhile reasonably required for feeding of the stock. Should the quantity so left be in excess of the quantity which was on the said land at the commencement of this agreement an appropriate payment shall be made to the Milker as compensation for any additional costs incurred in harvesting such excess hay and ensilage, including payment for his own services." On interpretation of the clause for the purposes of an award by arbitrators, *Held*, That the clause was intended to define the duties of the share-milker rather than the rights of the parties in the produce of the farm, and it gave no warrant for the suggestion that he could appropriate any farm produce for such a purpose as selling it for his own benefit. *Allen* v. *Asby-Palmer.* (S.C. Hamilton. November 30, 1955. Stanton J.)

TRUSTS AND TRUSTEES.

Remuneration—Charging Clause in Will—Extent to which Trustee entitled thereunder to Remuneration without Order of Court—Criminal Law—Criminal Breach of Trust—Money taken by Accused—Trustee not authorized by Charging Clause in Will—Intent to defraud—Proof—Relevant Considerations—Crimes Act 1908, s. 254—Criminal Law—Evidence—Prosecution with Leave of Attorney-General—Evidence before Jury of Attorney-General's Consent, after Accused invited to make Explanations to Attorney-General—Leave to be proved by Crown Counsel handing in Document evidencing it—Evidence Amendment Act 1945, s. 11 (1) (e)—Crimes Act 1908, s. 362. The appellant and another were acting as trustees under a will, the codicil of which contained the following clause: "I declare that any trustee of my said will for the time being who shall be an accountant, sharebroker, solicitor, land agent, commission agent, or engaged in any other profession or vocation shall, notwithstanding his acceptance of the trusteeship be entitled to charge and be paid all such professional and other charges fees brokerage or commission for his time or trouble or for work done or services rendered by him or by any firm in which he may be a partner in and about the execution of the trusts of this my will as not being a trustee thereof he or they would be entitled to charge or make." After certain irregularities had occurred in the administration of the estate, the appellant was convicted on fourteen counts charging criminal breach of trust. On appeal, the Court of Appeal quashed the convictions, and ordered a new trial because of the wrongful admission of evidence. On the construction of the charging clause, as above set out, *Semble*, That, where the trustee is not a solicitor but is engaged in some other profession or vocation, the charging clause applies to charges for work which is strictly the work of the particular profession or other vocation in which an executor or trustee is engaged; and that the words "and other" and "for his time and trouble" show that the charging clause extends to charge for work for which it is proper and usual to employ a person engaged in a profession or other vocation, even though it is not strictly the work of the particular profession or other vocation, but is performed only by an executor or trustee personally. (*Dale* v. *Inland Revenue Commissioners*, [1954] A.C. 11; [1953] 2 All E.R. 671; *Harbin* v. *Darby*, (1860) 28 Beav. 325; 54 E.R. 391; *Clarkson* v. *Robinson*, [1900] 2 Ch. 722; *In re Chalinder*, [1907] 1 Ch. 58; *Guardian Trust* v. *Veale*, [1936] N.Z.L.R. 530; [1936] G.L.R. 448; *In re Fish, Bennett* v. *Bennett*, [1893] 2 Ch. 413, applied. *In re Gee*, [1948] Ch. 284; sub nom. *Re Gee, Wood* v. *Staples*, [1948] 1 All E.R. 498, referred to.) On the question of intent to defraud, *Semble*, That, if it be proved that an accused person took from the estate of which he was a trustee money that was not authorized by the charging clause, there remains the question of intent to defraud

or mens rea : if it were reasonably possible that the accused was justified in entertaining a genuine belief that the charging clause upon its true construction authorized the taking of the amount mentioned in any count, this would mean that the Crown had failed to prove that there was an intent to defraud on that count ; so also, if it were not reasonably possible that the accused was justified in entertaining such a belief, but if the Crown failed to prove that more was taken on any of the occasions than it was reasonably possible he could expect to receive on an application to the Court, this would be relevant to the question whether the accused had an intent to defraud on the particular occasion, although, of course, his whole conduct in connection with the taking of whatever was taken on such occasion would also be relevant to this question. The prosecution took place with the leave of the Attorney-General, as required by s. 362 of the Crimes Act 1908. Evidence that the Attorney-General had so consented was called before the jury. The trial Judge told the jury that the fact that such consent had been given did not tend to prove guilt and should be entirely disregarded, but he explained there had been an invitation to the accused to make an explanation or representations to the Attorney-General, and it might weigh the fact that he had made none. On appeal from the accused's convictions, *Semble*, 1. That the consents were each signed by the Solicitor-General, that, although they were necessary preliminaries, without which the Court did not acquire jurisdiction, they would, having regard to s. 11 (1) (*e*) of the Evidence Amendment Act 1945, have been sufficiently proved by the handing-in by counsel for the Crown of the document evidencing the consents ; and that it was unnecessary that they should be proved by calling a witness. 2. That the jury should not have been invited to take into account the fact that the accused had made no explanation or representation to the Attorney-General. Observations of the Court of Appeal, in allowing an appeal from the appellant's convictions. *The Queen* v. *Smillie*. (C.A. Wellington. October 28, 1955. Finlay J. Cooke J. Turner J.)

VALUATION OF LAND.

Building Section—Section originally Part Gully but filled-in with Spoil—Sufficient Allowance not made in Valuation for Instability and Insecurity of Section as Site for House—Whether Such Filling-in an " amenity "—" Improvements "—Valuation of Land Act 1951, s. 2. A Land Valuation Committee gave a decision reducing the unimproved values in the District Valuation Roll, 1955, of four adjoining sections, which consisted largely of a filled-in gully. The Committee upheld the Valuation Department in applying a different method of valuation to two of the sections from that applied to the others, on the ground that the filling-in of the gully in the two sections in question was, in terms of s. 2 of the Valuation Act 1953, an " amenity " in connection with the subdivision of the land for building purposes. In the result, those two sections were valued at a higher ratio than the other two. From that determination, the lessees of the two sections appealed. *Held*, 1. That the valuation virtually ignored the fact that the two sections were by no means as good as they would have been if composed of solid ground ; in other words, sufficient allowance had not been made in the valuation for the fact that the filling-in of the sections, even if it were deemed to be merged in the unimproved value, had been proved, in fact, unstable and unsatisfactory as a site for a house. 2. That the unimproved value should be fixed at a figure which recognized that the sections, even as filled-in, were much inferior to similar sections in the vicinity, which were composed of solid ground ; and, accordingly, the unimproved value of each of the sections should be reduced. *Quaere*, Whether the filling-in of a building section, if carried out in connection with a subdivision of land for building purposes, is to be treated as an " amenity " within the meaning of that term as used in the definition of " improvements " in s. 2 of the Valuation of Land Act 1951. *MacDermott and Anor.* v. *Valuer-General.* (L.V.Ct. Wellington. December 1, 1955. Archer J.)

VENDOR AND PURCHASER.

Land Settlement Promotion—Undue Aggregation—Evidence of Another Person's Willingness to purchase relevant only to establish that Land Saleable—Sale of Land to Adjoining Owners who could develop it more speedily, efficiently and economically than Independent Purchaser—Consent to Sale, subject to Conditions embodied in Deed of Covenant by Purchasers with Crown—Land Settlement Promotion Act 1952, ss. 29 (1), (5), 31. In considering whether a proposed purchase of land amounts to " undue aggregation " within the meaning of that term as used in s. 29 (1) (*a*) of the Land Settlement Promotion Act 1952, evidence that another person was willing to buy the land in question is relevant only to establish that the land is saleable ; and it is no part of the Court's duty to attempt to influence the vendor to sell to that alternative purchaser. (*In re a Proposed Sale, McGuinness to Mundy*, [1955] N.Z.L.R. 58, followed.) Consent may properly be given to a sale of land (an area of 157 ac.) to adjoining owners (farming in partnership a property of 686 ac.), who could develop it more speedily, efficiently, and economically than an independent purchaser, particularly if lacking capital resources, and it had been shown that it would never provide a sufficient living for an independent farmer, and it was doubtful whether it would be in the public interest to encourage anyone to attempt to farm it as a separate unit. The Court, however, imposed conditions in accordance with the powers conferred on it by s. 29 (5) of the Land Settlement Promotion Act 1952 (as added by s. 5 (2) of the Land Settlement Promotion Amendment Act 1955)—namely, that the purchasers must enter into a deed of covenant with the Crown, jointly and severally that they would not sell, lease, or otherwise dispose of the two areas otherwise than as two or more separate units of approximately similar area ; that neither purchaser would sell or transfer his interest in the two areas to the other ; and that they would partition the two areas between them in approximately equal parts within five years of the completion of the approved purchase. *In re a Proposed Sale, Spencer to Smaill Brothers.* (L.V.Ct. Dunedin. November 24, 1955. Archer J.)

Purchaser in Possession Pending Completion. *99 Solicitors' Journal*, 881.

WORKERS' COMPENSATION—ASSESSMENT OF COMPENSATION.

Dermatitis—Worker suffering from Dermatitis as Result of Employment and unemployed for Eight Weeks—Subsequent Employment as Storeman continuing—Calculation of Pre-Accident Earnings—Compensation calculated on Basis of Eighty per cent. of Difference between Pre-Accident Earnings and Average Weekly Earnings as Storeman—Lump-sum Payment based on Assumption of Diminishing Disability in Loss of Earning Capacity over Remaining Portion of Six-year Period—Workers' Compensation Amendment Act 1936, s. 7 (5). R. ceased work with the defendant company on February 24, 1954, because of dermatitis which was a result of his employment. Compensation was paid until he commenced work on November 15, 1954, with the Post and Telegraph Department where he remained until November 19 only, as there was a recurrence of the dermatitis. He was unemployed for eight weeks. On January 19, 1955, he obtained employment as a storeman, and had continued therein. *Held*, 1. That R.'s pre-accident earnings were to be calculated under s. 7 (5) of the Workers' Compensation Amendment Act 1936, in respect of the period during which he was employed by the defendant company, according to the rules laid down in *Blenkiron* v. *Westport-Stockton Coal Co., Ltd.*, [1934] N.Z.L.R. 474 ; [1934] G.L.R. 416 ; and the effect was that the average weekly wage was £16 14s. per week, which, as from the date of the last increase under the Minimum Wage Act 1945, should be treated as being £16 19s. 2. That R. was entitled to compensation during the eight-weeks period (November 19, 1954, to January 18, 1955) at the appropriate maximum rates. 3. That R. was entitled to compensation from January 18, 1955, calculated on the basis of 80 per cent. of the difference between £16 19s., his average weekly wage, and the amount of his average weekly earnings while employed by his present employer up to the date of judgment. 4. That R. was not entitled to a lump sum arrived at on the assumption that his loss of earnings would continue for the remaining portion of the six-year period ; but as his loss of earnings amounted to approximately £3 15s. per week, and the period, during which the plaintiff received compensation since he went off work up to the date of judgment, was approximately eighty-four weeks, he should be awarded the sum of £300 based on the assumption that there would be a diminishing disability from the point of view of loss of earning capacity over the remaining portion of the six-year period. *Rooney* v. *A. J. Hollander (N.Z.), Ltd.* (Comp. Ct. Wellington. October 7, 1955. Dalglish J.)

LAW REFORM IN NEW ZEALAND.

By B. J. CAMERON, B.A., LL.M.

This article is intended as a cursory survey of one aspect of the still unwritten history of New Zealand law. It embodies no very original conclusions, nor has any but readily accessible material been used. Law reform in New Zealand has not, to the writer's knowledge, been the subject of any special study ; however, it may be of interest to present a summary of its history and features. It is felt, too, that there is room for a somewhat more critical investigation of general legal principles and trends in New Zealand than has, perhaps, been usual in the past. Studies of the nature of the recent New Zealand volume in the British Commonwealth series under the general editorship of Professor Keeton have been all too rare.[1]

The history of the law in New Zealand has been marked by conservatism on the part of the Courts and alternate periods of apathy and energy on the part of the Legislature. As will be seen, the Courts have to a greater extent than in England abdicated any claim to be an agency of law reform. In consequence, the whole work of adapting the law to the needs of a rapidly developing and mobile society has been thrown on Parliament.[2] Although hampered by an excessive regard for English precedent Parliament has on the whole performed this task surprisingly well. Outside such traditional categories as tort and contract, where departure from English precedent has been slight and hesitant, New Zealand law is probably as advanced as any in the world. In the field of procedure and the organization of the Courts in particular, innovation and simplification have been common and at times far-reaching.[3]

INFLUENCE OF ENGLISH LAW.

One of the most immediately obvious features of our legal history is the weight of English influence and English precedent. This has affected legislators and their advisers almost as strongly as lawyers and the Courts. At all stages of our history when legislation has become necessary the instinct has been to look to the United Kingdom for a model. A hurdle which any would-be law reformer in New Zealand must face is the pointed query : " Has this been done in England ? ". The prevailing approach is well illustrated by a remark of Dr Grace during the second reading debate on the Infants Guardianship and Contracts Bill 1887 : " It should always be our aim as far as possible to assimilate the laws of New Zealand to those of England ". This statement could find an echo in many sessions of Parliament before and since, and would probably meet with the assent of a good many lawyers even today.

It may not be out of place to say something about the reasons for this attitude. They are not far to seek, and to a large extent are the same as those which have produced a similar outlook in other spheres. The British origin of almost the entire population, the growth of a conscious Imperialist sentiment at a formative period of our history, the extraordinary economic dependence on the United Kingdom after the development of refrigerated shipping, the ease and abundance of communications with England, the inferiority complex produced, at least among the professional classes, by the rawness and crudity of colonial society, all inhibited the growth of any feeling of separateness.

In addition, there are certain factors peculiar to the law which have made for a close imitation of England. There is the very traditionalism of the law which looked back from New Zealand to London as the fount of the revered common law. Again, the small population and the fact that our initial law was the law of England meant that English textbooks were always accepted as standard in most branches of law. This has indeed led to a vicious circle—an unwillingness to depart from English law because this would lessen the utility of English textbooks which are the only ones available, because, the law being the same, there is no point in writing separate New Zealand ones.

Another reason not without importance in our nursery years was the reform of the Privy Council in the 1830's. In the 18th century appeals to the Privy Council had been heard mainly by laymen, and its decisions were treated with scant respect by colonial Courts. The reforms of the 1830's meant, however, that appeals to England went to a Judicial Committee of the most eminent Judges in England, and hence the control of New Zealand Courts by the Privy Council was freely accepted.

The nature and quality of legal education in New Zealand may not be without significance. Originally, the qualification for admission as a barrister was by admission in England and as a solicitor by admission in England or by the serving of articles for five years. [4] For a number of years most of those who entered the legal profession would doubtless have qualified in England and would therefore bring to New Zealand a wholly English background. The requirement of an examination for New Zealand entrants was added in 1861. In 1882 the system of articles was abolished, and for those living in New Zealand the door to the legal profession was the passing of an examination prescribed by the Judges, or the Bachelor of Laws examination of the University of New Zealand. In fact, the examination prescribed by the Judges was the University examination. Examination papers were set and marked in England : a practice which in some cases continued until quite recent times.[5] The course (2 years without any pre-qualification beyond the University entrance examination) was astonishingly short. Standards of

[1] *The British Commonwealth : The Development of Its Laws and Constitutions.* Volume 4, New Zealand : Editor, J. L. Robson, 1954.

[2] Parliament, that is, in legal theory. In fact, during the last twenty or so years the real work of law-making has been shared between the Public Service and pressure groups on the one hand, and Cabinet and increasingly Caucus, on the other. It would be rash but not essentially false to say that at the present time Parliament is a registering machine which gives the seal of law to decisions taken elsewhere.

[3] And often highly successful. For example, the Magistrates' Courts Act 1947 and the Rules made under it have been described by a competent critic as " the finest code of civil procedure in the British Commonwealth ".

[4] It should be borne in mind, however, that at this time solicitors of the Court were entitled to practise as barristers.

[5] " I found [in 1940] that the prescriptions in no fewer than 4 LL.M. subjects required students to study English and not New Zealand law . . . . Change was opposed, because English examiners could not so conveniently examine New Zealand law." R. O. McGechan in (1947) 23 N.Z.L.J. 113.

teaching and the level of examinations were low. In 1906 a law school was established at Victoria University College, but even in 1925 it was described as a law school in name only.[6] Only since 1940 have law schools worthy to be called such existed in New Zealand.

It is easy to see how an education system of this sort would reinforce the tendency to keep to the cleared country of English law and not to stray more than absolutely necessary into the bush of original legislation or decision.

Up to the present in New Zealand the advantages of a policy of keeping in line with England have been habitually emphasized and the disadvantages largely ignored. "The benefit of English decisions" is a doubtful benefit if the decisions themselves are bad.[7] The policy has produced a climate unfriendly to original legal thought and a too uncritical attitude towards English statutes, decisions, and opinions. It has at times led to indifference to the experience and solutions of other countries. It has been a barrier against a number of beneficial changes which might otherwise have been made.

That is not to say that it may not at times be desirable to follow English precedent. One valuable consequence of our readiness to do this is to smooth the path for a great many reforms of the most far-reaching nature. The list of beneficial reforms adopted from England is a long and impressive one. In the nature of things in a small country, the proportion of original as compared with derived legislation must be fairly small.

What ought to be resisted firmly, however, is a tendency of going to one source only for reforms; of perpetuating mistakes and weaknesses in the legislation making these reforms, and, in particular, of refusing to take advantage of work done in England or any other country, unless that work happens to have received the blessing of the Legislature there. There are many reasons why England may not be in the forefront with a particular reform, of which the worth of the proposed reform is only one.[8]

Role of the Courts.

The role of the Courts in law reform in New Zealand has been timid and conservative. The New Zealand judicial approach stands at the opposite extreme to that followed in the United States. There, despite a genuine respect for precedents in all jurisdictions, judicial legislation is open and approved. On a novel point American Courts are on the whole ready to relate their decisions to social and economic factors, and time after time they have revised or refused to accept prior decisions which in New Zealand would be regarded as obstacles removable only by the dynamite of legislation.

Thus as long ago as the 1830's Courts in Indiana and Maine recognized the principle of the capacity of married women to possess a separate domicil. The reasons for these decisions have been summed up in the following words: "We were a young country, with rather numerous and relatively small States, and a considerable freedom and volume of moving about. We were also in the beginnings of a strong development towards the equality of women."[9] That is, the Courts recognized that married women could acquire a separate domicil primarily because a different decision would have caused inconvenience and hardship.

This is far from being an isolated example of judicial law-making in the United States. In the field of tort the Courts have in many States created an action for invasion of privacy, and have proceeded to work out the extent and limitations of that action.[10] In contract they have done directly what English law does exceptionally and indirectly in allowing a third party to enforce a contract made for his benefit.[11] In Iowa the whole system of estates and interests in land, including the statute *De Donis*, was held inapplicable.[12] A recent example of activity by the American Courts is the decision in *Durham* v. *U.S.*,[13] substituting a new test of criminal responsibility for the test laid down in the McNaghten Rules.

In the influence of the Courts on the development of the law New Zealand has lagged well behind, not only America, but also England and other Commonwealth countries. It is hard, for example, to find a single New Zealand decision which could be compared with *Fletcher* v. *Rylands*,[14] *Redgrave* v. *Hurd*,[15] *Hurst* v. *Picture Theatres, Ltd.*,[16] *In re Polemis and Furness, Withy & Coy., Ltd.*,[17] *Central London Property Trust, Ltd.* v. *High Trees House, Ltd.*,[18] *R.* v. *Northumberland Compensation Appeal Tribunal, Ex parte Shaw*,[19] *Bendall* v. *McWhirter*,[20] or *Travers* v. *Holley*.[21] To attribute this reluctance to break new ground entirely to the right of appeal to the Privy Council is to miss the point. Everyone of the English decisions just quoted was a decision either of the High Court or of the Court of Appeal and was as susceptible of reversal as any New Zealand decision would be. The truth is that the New Zealand bench and bar incline to a positivist Austinian concept of the function of the Courts. Their jurisprudence is the analytical jurisprudence of Salmond derived from Holland and ultimately from Austin, and some in the legal profession would probably still regard Cardozo's "The Nature of the Judicial Process" as akin to either indecent exposure or open heresy. New Zealand has never produced a Mansfield, a Wright, or a Denning; and, while the prevailing climate continues, is not likely to.

That is not to say that the Judiciary has shown itself less liberal than that of other countries in interpreting statutes which did make inroads into the common law. Such decisions as *In re Allardice*, *Allardice* v. *Allardice*[22] on the Family Protection Act, and *Nealon* v. *Public Trustee*[23] on the testamentary promises provisions of

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[6] Report of the Royal Commission on University Education 1925.

[7] "It is not . . . better that the Court should be persistently wrong than that it should be ultimately right." Isaacs J. in *Australian Agricultural Co.* v. *Federated Engine Drivers and Firemen's Association of Australasia*, (1913) 17 C.L.R. 261, 278.

[8] Cf. Gardiner: *The Machinery of Law Reform in England*, (1953) 69 L.Q.R. 46.

[9] Erwin N. Griswold, Professor of Law, Harvard Law School: *Divorce, Jurisdiction and Recognition of Divorce Decrees—A Comparative Study*, (1951) 25 Aust. L.J. 248, 255.

[10] See [1948] Columbia L.R. 713.

[11] *Lawrence* v. *Fox*, (1859) 6 N.Y. Ct. of App. 268.

[12] *Pierson* v. *Lane*, 60 Iowa 60.

[13] (1954) 214 F. (2nd) 862.

[14] [1866] 1 L.R. Ex. 265.

[15] (1881) 20 Ch. D. 1.

[16] [1915] 1 K.B. 1.

[17] [1921] 3 K.B. 560.

[18] [1947] K.B. 130.

[19] [1952] 1 K.B. 338; [1952] 1 All E.R. 122.

[20] [1952] 2 Q.B. 466; [1952] 1 All E.R. 1307.

[21] [1953] P. 256; [1953] 2 All E.R. 794.

[22] (1909) 29 N.Z.L.R. 959; 12 G.L.R. 753.

[23] [1949] N.Z.L.R. 148; [1949] G.L.R. 85.

the Law Reform Act 1944, show a sympathetic and sensible approach to radical legislation. Where the Courts can be faulted is for their failure to play a due part in the development of the common law in a New Zealand setting or even as a single whole, and for their excessive deference to English precedent.

There can be little dispute that New Zealand Judges have been faithful followers. Their primary concern has been and is to avoid any divergences from the common law as it develops in England. All English decisions in point are followed almost as a matter of course, and in practice our Courts regard themselves as bound by decisions even of co-ordinate Courts in England.

Professor P. B. Carter, Dean and Fellow of Wadham College, Oxford, writing in the *1954 Annual Law Review* of the University of Western Australia, referred to a similar phenomenon in Australia in these words :

> This leads to the second impression which I would record. It is the excessive respect paid to English authority. This may be loyal or it may be slavish ; it certainly gives the impression of being in many cases unquestioning. It is indeed a paradox that some English decisions, especially at first instance, should be more scrupulously followed in Australia than they are in England herself (ibid., 68).

Professor Carter's comments would have at least equal force in New Zealand.[24]

The classic statement of the New Zealand and Australian approach and of the arguments for it occurs in the judgment of Dixon J. in *Waghorn* v. *Waghorn*, [25] quoted with approval in New Zealand in *In re Rayner, Daniell* v. *Rayner* [26] :

> The question how far this Court should defer to the decisions of the Court of Appeal [i.e., the English Court of Appeal] is one to which an unqualified answer can hardly be given. But I think that if this Court is convinced that a particular view of the law has been taken in England from which there is unlikely to be any departure, wisdom is on the side of the Court's applying that view to Australian conditions, notwithstanding that the Court has already decided the question in the opposite sense . . . . The common law is administered in many jurisdictions, and unless each of them guards against needless divergences of decision its uniform development is imperilled. Statutes based upon a common policy and expressed in the same or similar forms ought not to be given different operations.

In re Rayner is itself a remarkable illustration of the lengths to which New Zealand Courts sometimes go in order to keep in line with English decisions. The judgment of Finlay J. on this point has several unsatisfactory features, and indeed his suggestion that the New Zealand Court of Appeal could reverse its own prior decision only in the circumstances laid down in *Young* v. *Bristol Aeroplane Co.*[27] could paradoxically hinder the policy of following English decisions.[28]

The principle of uniformity of law throughout the Commonwealth has its advantages, and, as long as the right of appeal to the Judicial Committee of the Privy Council is preserved, there must inevitably be an effort to keep New Zealand decisions reasonably in harmony with English ones. In application, however, the principle of uniformity has been very much a one-way street. Seldom, if ever, does an English Court follow a prior Commonwealth decision in the interests of uniformity. Moreover, unless the Courts of other Commonwealth countries consistently follow the policy of deferring to the latest English decision, much of the value of uniformity is lost. As far as New Zealand is concerned, the principle of Commonwealth uniformity is really reduced to one of uniformity with England, irrespective of what other Commonwealth Courts decide. Even in Australia the High Court has at times declined to alter its views despite conflicting authority in England, and there are signs that this practice may be growing. A writer in the (*1955*) *29 Australian Law Journal*, 429, claims :

> " The actions of the High Court in recent years justify the suggestion that, whatever they may say, it can no longer be confidently asserted that it is their general practice to follow decisions of the Court of Appeal."

One example of this concerns the question of the standard of proof in adultery cases. Another is the interpretation of the word " wrong " in the McNaghten Rules.[29] There is nothing to suggest that the New Zealand Courts have, in general, faced up to such challenges to the uniformity doctrine.

One persistent weakness in the technique of most Commonwealth Courts on most occasions has been a refusal to reason by analogy from legislation,[30] and to consider economic, social or constitutional developments in coming to a decision.[31] This weakness may be inherent in the common law but it has often kept the Courts from adopting an approach consistent with contemporary circumstances. In the present context, for instance, it does not appear that the Courts do take or propose to take into account the changes in the constitutional status of New Zealand and its relations with the United Kingdom. The adoption by New Zealand of the Statute of Westminster in 1947 was a clear indication that as a matter of policy the paramountcy of English legislation had been abandoned, and that in the last resort the principle of uniformity was expendable. There is no reason in the nature of things why the Courts should not accept this and allied constitutional developments as freeing them to a much greater extent than at present from the fetters of binding English precedents. To expect this to happen, however, is perhaps to cry for the moon.

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[24] See, for example, the cases quoted in *The British Commonwealth : The Development of Its Laws and Constitutions*. Volume 4, New Zealand : Editor, J. L. Robson, 327.

[25] (1942) 65 C.L.R. 289.

[26] [1948] N.Z.L.R. 455, 506 ; [1948] G.L.R. 51, 73.

[27] [1944] K.B. 718 ; [1944] 2 All E.R. 293.

[28] Cf. *Preston* v. *Preston*, [1955] N.Z.L.R. 1251, 1259.

[29] In *Stapleton* v. *R.*, (1952) 86 C.L.R. 358, the High Court of Australia refused to follow the English Court of Criminal Appeal in *R.* v. *Windle*, (1952) 36 Cr. App. R. 85. The question is discussed in *Res Judicatae*, Feb. 1954, 304.

[30] "English law is opposed to treating a statute as a source of public policy in a case not within its express terms " D. Lloyd in *Current Legal Problems 1955*, 57. And cf. *Re Noble and Wolf*, [1949] 4 D.L.R. 375.

[31] One New Zealand exception is *Woolworths (New Zealand), Ltd.* v. *Wynne*, [1952] N.Z.L.R. 496 ; [1952] G.L.R. 315. It is characteristic of New Zealand that this case concerned the validity of legislation conferring jurisdiction on the Privy Council, not taking it away.

(*To be continued.*)

SOME ADVANTAGES IN COLONIAL SERVICE.

By His Honour Mr Justice Lowe of the Supreme Court of Tanganyika.*

Too little is known in New Zealand about Colonial Service generally. I have heard it said that the Colonial Empire is being "given away" so rapidly that there is not much future for the Colonial servant. That is, in my view, very far from the truth. True, it is, that the policy of Her Majesty's Government in the United Kingdom is to help the Colonies along the road to eventual self-government and it would be a true sceptic who saw no sense in such a policy. Mainly for the purpose of safeguarding the position of those Colonial servants who are in a Colony at the granting of independence to that Colony, the name of the Service has now been changed to Her Majesty's Oversea Civil Service and shortly there will appear Her Majesty's Oversea Judicial Service, which latter, of course, is independent of any Colonial Administration.

The Secretary of State for the Colonies has shown that he is fully aware of the position which might arise on the grant of self-government, and arrangements are made in such cases for compensation and a comparative pension to be paid to Colonial servants, who would otherwise be adversely affected. I know some who have received such compensation and they are not only very happy at their treatment but also have found themselves suitable employment elsewhere, some within the Service and some in commercial or legal spheres outside the Service.

In any event, the tendency is for establishments to be increased as the various territories develop and require more personnel. I believe a good and most satisfying career is still open to many young lawyers; and I know that New Zealanders of the right experience and stability would be very acceptable. The posts which are now available could, of course, be filled from the United Kingdom, but New Zealanders have proved themselves to be so adaptable in the past that they have fitted excellently into the scheme of things colonial.

Salaries in the Service (which I will continue to call "Colonial Service", as I have no great liking for the new style and find it difficult to get used to) vary according to the Colony and are governed to a large extent by local conditions and cost of living. The lowest commencing salary for a junior Crown Counsel or Resident Magistrate is about £920 per annum (some Colonies start much higher) and the highest one gets to in those posts in some Colonies is £1,650. Then comes promotion for those who have proved their worth, to Legal Draftsman or Solicitor-General and eventually to Attorney-General. In some territories the Attorney is also the Member for Legal Affairs, which is the equivalent of New Zealand's Minister for Justice. The salary for that post reaches over £3,000.

Resident Magistrates and Crown Counsel are required to have about three years' experience in a legal office, and to have done a certain amount of Court work, before they are eligible for appointment. While in those posts they are entitled to fairly substantial annual increments which bring them to the top of the salary scale. Many Resident Magistrates of past years have been elevated to the Bench and are now in receipt of annual salaries of over £2,500.

Most Colonies pay a cost of living allowance which rises with a rising cost of necessities. I do not mention the allowance falling, as it has not been my experience that the cost of the necessities of life ever fall appreciably. However, the allowance is fixed accordingly. Pensions are earned on the salary paid, and are finally assessed on the last salary reached. The present rate of assessing pension is known as the 1/600th rate. That is 1/600th of the monthly salary received in the last year of service if in that post for 3 years or more, multiplied by the number of months of total service to arrive at the monthly pension. A man who gets up to, say, £3,000, would have built up a pension of £1,200 per annum after twenty years' service.

Most Governments provide living quarters and charge a rental which varies with the territories. Some charge 10 per cent. of salary as rental, but in my case I have a large house with the basic furniture provided by the Tanganyika Government and all I pay is £72 a year for house and furniture. Leave is granted every "so often". The period of service before leave can be taken is different in different places.

On the West Coast of Africa twelve months' service is completed before leave; in Tanganyika, two and a half years, and in Kenya I think it is three years. It is governed mainly by the climatic conditions of the territory. Leave can be taken to the United Kingdom or to one's home-country. However, all Colonial Governments I know are prepared to pay a fare equivalent to the cost of passages to the United Kingdom, even though the Colonial servant wants to go to the Continent or elsewhere for leave.

Some Governments will pay passages to New Zealand after every tour of service, and some after every two tours; but a New Zealander can get home every now and then, and generally prefers to take one leave in England and the next in New Zealand. The usual allowance for passages is three adult return fares. People often drop a grade or two in the cabins they book, and so make the three adult fares pay for themselves and three or four children. Salary, of course, carries on in full while one is on leave and can be drawn wherever leave is being spent.

Most Colonies have now got malaria very well under control, though most Colonial servants take paludrine daily "just in case". It has no effect whatsoever on the colour of one's skin or on anything else, except, I hope, on getting the blood-stream prepared to resist any odd effort by an anopheles mosquito. Medical attention for the whole family is free as is the normal dental service, but dentures, etc., are charged for at a reasonable rate.

I find life in the Colonies very pleasant and full of interest and have yet to meet the man who would willingly change his Colonial life for any other. That applies to the wives as well.

There is plenty of sport available in most places. In Tanganyika there seem to be tennis courts everywhere,

* Formerly a member of the New Zealand Bar, and in practice in Helensville.

golf courses in most centres, yachting at the coast, and rugby or soccer for those young and fit enough. Each town of any size has its own club and some of them are excellent and are the meeting-place for tennis or golf. In Africa, of course, there is wild game to be seen in most parts and it is commonplace to see lions or giraffe when travelling up country. Lions are a wonderful sight when met unexpectedly, and the more so as they take not the slightest interest in a motor-car. They may have different ideas if one got out of the car, however.

Space precludes me writing more about Colonial Service. It is a good Service, and one which offers an opportunity to young New Zealand lawyers and indeed others. At the moment, there are vacancies for Resident Magistrates in different territories and also for solicitors who prefer to stay on that side of the profession, in land offices and similar positions.

The Dominion Liaison Officer for the Colonial Office is Mr D. E. Fouhy, C.V.O., C.B.E., Private Secretary, Government House, Wellington. I know that he would be pleased to handle any inquiries about the Service. Climates vary in the different Colonial territories, and at some places the coastal areas are trying in the hot season; but everyone lives and dresses accordingly.

LANDLORD AND TENANT: COVENANT BY TENANT TO REPAIR.

Reasonable Wear and Tear Excepted.

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

A valued correspondent has written to me, pointing out what he conceives to be an error, in the Fourth Edition of *Garrow's Real Property in New Zealand*, of which I happen to be the Editor.

He specifically refers to p. 568, note (*s*). The main part of the text to which note (*s*) refers reads:

> Furthermore the distinction between renewing a part and renewing "substantially the whole" is somewhat elusive; for, if the whole building had come into such a state of disrepair that it cannot be restored except by rebuilding, may this not be the result of failure on the part of the tenant to carry out his obligation to keep in repair from time to time so as to prevent such a state of affairs from arising? It is not in accordance with experience that general disrepair arises suddenly, all parts of the building collapsing at the same time, "all at once, and nothing first".

This passage, which appears quite sound, then refers to footnote (*s*) to which my correspondent takes objection. Footnote (*s*) reads:

> (*s*) As to the exception of depreciation "from fair wear-and-tear" see *Terrell* v. *Murray*, (1901) 17 T.L.R. 570; *Baker* v. *Johnston and Co., Ltd.* [(1902) 21 N.Z.L.R. 268; 4 G.L.R. 270]; *Sim* v. *Mitchell*, [1917] G.L.R. 403; *Manchester Bonded Warehouse Co.* v. *Carr*, (1880) 5 C.P.D. 507; *Collins* v. *Winter*, [1924] N.Z.L.R. 449, [1924] G.L.R. 278. The exception of "fair wear-and-tear" is of such doubtful meaning that it is probably better avoided except in special cases: see *Key and Elphinstone's Precedents* Vol. I, p. 873.

The law is stated similarly in the Second Edition of *Garrow*, which is the last edition edited by *Garrow*, himself; and, at that time, it accurately stated the effect of decided cases, except that one is constrained to observe at this stage that later cases show the exception of "fair wear and tear" has a decided meaning and in the writer's opinion it is not true to say that it is better avoided except in special cases.

My correspondent points out that the footnote is mainly based on *Baker* v. *Johnston and Co., Ltd.*, (1902) 21 N.Z.L.R. 268; 4 G.L.R. 270. He points out with force that Mr H. J. Thompson S.M. declined to follow this New Zealand case in *Clark* v. *Moore Wilson & Co., Ltd.*, (1946) 5 M.C.D. 195, preferring instead the more recent English Court of Appeal case, *Taylor* v. *Webb*, [1937] 2 K.B. 283, [1937] 1 All E.R. 590.

Turning to *20 Halsbury's Laws of England*, 2nd Ed., p. 211, para. 230, we find the law stated as follows:

> If "reasonable wear and tear" are excepted, the tenant is not bound to make good dilapidations caused by the friction of the air, and by exposure and ordinary use; but it must be shown that such dilapidations were caused by normal human use or the normal action of the elements, and that they were reasonable in amount having regard to the contract to repair and the other circumstances of the case. If the passage of time and the operation of the elements has a more deteriorating effect than usual owing to the original unsoundness of the premises, the tenant will not be liable for the resulting dilapidations, *but he is liable for such repairs as become necessary through his failure to prevent the consequences of wear and tear from causing further damage.*

The authority cited by *Halsbury* for the words which I have put in italics is *Haskell* v. *Marlow*, [1928] 2 K.B. 45. But in *Taylor* v. *Webb*, *supra*, the English Court of Appeal made no bones about over-ruling *Haskell* v. *Marlow*. And the above-cited passage from *Halsbury* is corrected, under para. 230 in the *Supplement* to *Halsbury*:

> Overruled; he is under no such duty to prevent further damage.

And *Taylor* v. *Webb* is cited as the authority for that definite statement in the *Supplement*.

In *Taylor* v. *Webb*, a landlord covenanted in an underlease to keep the outside walls and roofs in tenantable repair, as he was required to do by the headlease. The covenant in the headlease contained an exception of damage by fair wear and tear. Owing solely to the effect of wind and rain, certain roofs and skylights became defective, and, as they were not repaired, certain rooms in due course became uninhabitable. The whole of the disrepair was due to the elements, coupled with the absence of any steps by anybody to prevent further progress of the decay. The Court held that the question whether wear and tear is reasonable is not affected by the amount of the dilapidations.

Now, shortly after *Taylor* v. *Webb* was reported in the Law Reports it was discussed in an article, (1938) 14 NEW ZEALAND LAW JOURNAL 76, by Mr C. N. Armstrong, who criticized the judgment of the English Court of Appeal; but he appears to have had no doubt

but that it applies to New Zealand : in this article, Mr Armstrong made certain suggestions for altering the covenant, but these suggestions do not appear to have been adopted in practice in New Zealand. It is also not without interest to note that, in (1943) 19 NEW ZEALAND LAW JOURNAL 118 of such a well-known and sound conveyancer as the late Mr C. Palmer Brown submitted that *Baker* v. *Johnston and Co., Ltd.*, was still the law in New Zealand and in any case was a far more commonsense judgment than *Taylor* v. *Webb*. Mr Brown wrote :

> It can be said at once that the decision of our Court of Appeal is based on authority and convenience, while that of the Court of Appeal in England is based on a critical analysis of the words of the covenant. It must also be said that the majority of the Judges in our Court of Appeal preferred to base their judgments on another covenant in the same lease, but they all concurred in the construction of the repairing covenant. Despite these objections to *Baker* v. *Johnston* as an authority, it is submitted that it should be preferred.

Shortly after this article was published, the case of *Clark* v. *Moore Wilson & Co. Ltd.*, (1946) 5 M.C.D. 195, fell to be decided by Mr H. J. Thompson S.M. The learned Magistrate takes a different view from that expressed by Mr Brown in his article. The learned Magistrate, at p. 199, said :

> Though it seems very desirable that a Supreme Court decision should be obtained on the point, I have come to the conclusion that I should adopt the decision in *Taylor* v. *Webb* for the reasons :
>
> (*a*) That this case was decided in 1937, some thirty-five years later than our Court of Appeal case of *Baker* v. *Johnston and Co., Ltd.*
>
> (*b*) That this is the first occasion on which the "fair wear and tear" exception has been before the Court of Appeal in England.
>
> (*c*) That the English Court of Appeal has reviewed all the relevant authorities, and has now settled the law in England.
>
> (*d*) That our own Supreme Court or Court of Appeal, in considering the question of "reasonable wear and tear," must inevitably take into account in any future case the decision in *Taylor* v. *Webb*.

It appears to the writer, however, on the authority of later cases as to the effect of a Court of Appeal decision, that our Court of Appeal would not necessarily follow *Taylor* v. *Webb*. The question, as it appears to me, is : Was the general concurrence of the majority of the Court of Appeal of the construction put on the repair clause by Sir Robert Stout C.J. a part of the ratio or merely obiter dicta ? If a Court gives two reasons for its decision, one reason is just as much a part of the ratio as the other, although we might agree with one reason and disagree with the other. And the powers of our Court of Appeal not to follow previous decisions of that Court appear to be somewhat limited. These powers were discussed by both divisions of the Court of Appeal in *In re Rayner, Daniell* v. *Rayner*, [1948] N.Z.L.R. 455 ; [1948] G.L.R. 51. There does not appear to be any decision on the point, as to the construction of "fair wear and tear" clauses, either by the House of Lords or the Privy Council. In *Rayner's* case there was a decision of the House of Lords in conflict with the decision of our Court of Appeal in *In re Houghton, McClurg* v. *New Zealand Insurance Co., Ltd.*, [1945] N.Z.L.R. 639; [1945] G.L.R. 297 ; and, consequently, in *Rayner's* case the Court of Appeal, in which both Divisions sat, overruled *Houghton's* case. But whether or not our Court of Appeal can refuse to follow the principle or principles it actually decided in *Baker* v. *Johnston*, it is certainly not compelled to follow *Taylor* v. *Webb* : *Robins* v. *National Trust Co.*, [1927] A.C. 519, for it is a Court of co-ordinate jurisdiction with the English Court of Appeal.

As to what was actually the ratio in *Baker* v. *Johnston and Co., Ltd.*, it is interesting to read that, at p. 308 ; 289, Cooper J. said :

> The covenant to repair is to keep the hotel and buildings in good and tenantable repair, and at the end or sooner determination of the term in like repair to yield and deliver them to the lessors, reasonable wear-and-tear and damage done by fire alone excepted. We are all agreed that the appellant is liable for these repairs, and I have nothing to add to the reasons already given by His Honour the Chief Justice and His Honour Mr Justice Williams.

It is rather curious that Cooper J. should have said, "we are all agreed". The opinion of Denniston J. on this particular point was tentative, and, therefore, no more than obiter. Conolly J. expressly dissented from this view, and, as to this point, agreed with Edward J., who had delivered the judgment in the Supreme Court. Probably what Cooper J. meant was that Sir Robert Stout C.J., Williams J., and he himself, were all agreed on this point ; and they constituted a majority of the Court of Appeal, in which five Judges sat. Therefore, was not their construction of the covenant to repair, a ratio and not mere obiter ?

There is much wit displayed in Mr C. Palmer Brown's article, *cit. supra*. First, at p. 118, he states and distinguishes the facts in both cases :

> The case of the Fallen Tile, discussed in *Taylor* v. *Webb*, [1937] 2 K.B. 283, and the case of the Rusty Roof, decided in *Baker* v. *Johnston and Co., Ltd.*, (1902) 21 N.Z.L.R. 268, are similar in their facts and in the terms of the covenant construed, but totally dissimilar in result, and, as might be expected, dissimilar in methods of approach. In both, a repairing covenant, excepting fair wear and tear, had to be construed. In the case first quoted the covenantor was held not liable though he had neglected the roof for years and parts of the building had become uninhabitable. In the second, it was admitted that the only way to repair the roof was to renew the whole of the iron and the tenant was held liable for this expense.

Later on in his article, Mr Brown went on to say :

> It has to be admitted that in logic there can be no precise point where fair wear and tear ceases, but the line has to be drawn somewhere. Scott L.J.'s question reminds one of the puzzle always presented to students of logic as to when a number of grains becomes a heap. Is it on the first addition of one grain to another ? Or on the second ? Or on the third ? The drawing of the line is a matter of practice, not of definition. In *Baker* v. *Johnston and Co., Ltd.*, our Court of Appeal drew it at the first leak. In *Haskell* v. *Marlow*, [1928] 2 K.B. 45, Salter L.J. drew the line when the amount became unreasonable. Talbot J. drew it when complications set in. In *Taylor* v. *Webb* the Court of Appeal refused to draw any line at all, because of the logical difficulty of fixing a line.

It is not without interest to note that in another rusty roof case the late Sir Humphrey O'Leary C.J. purported to apply *Baker* v. *Johnston* without any comment : *New Zealand Insurance Co., Ltd.* v. *Keesing*, [1953] N.Z.L.R. 7. But, as pointed out by counsel in argument in that case, although there was the usual covenant to repair, there was no exception of fair wear and tear. The recent judgment of F. B. Adams J. in *Sleeman* v. *Colonial Distributors* (to be reported) is also not an authority on the point discussed in this article, for in the repair clause in that case the only exception was "except in case of destruction or damage by fire". The exception, however, does appear in s. 106 (*b*) of the Property Law Act 1952, which reads :

> 106. In every lease of land there shall be implied the following covenants by the lessee, for himself, his executors, administrators, and assigns :— . . .

(b) That he or they will at all times during the continuance of the said lease, keep, and at the termination thereof yield up, the demised premises in good and tenantable repair, having regard to their condition at the commencement of the said lease, accidents and damage from fire, flood, lightning, storm, tempest, earthquake, and fair wear and tear (all without neglect or default of the lessee) excepted.

The above covenant applies to every lease of land in New Zealand except where expressly negatived, varied, or extended. It is not customary for the exception of fair wear and tear to be inserted in the covenant to repair in long-term leases. Therefore, it appears to the writer that the conveyancer in drawing leases of land should always ask himself this question: Shall I expressly negative or modify the covenants implied by the Property Law Act 1952, or is it safe to let them stand ?

RETIREMENT OF MR C. S. THOMAS.

A Long and Successful Career.

In December last, Mr C. S. Thomas retired from practice and terminated forty-one busy years as a member of the legal profession. His early training was served as an articled clerk to Messrs Garrick, Cowlishaw, Alpers and Nicholls. He opened his own office shortly after he qualified, and quickly established himself. To the public he was best known as counsel for the accused in a number of sensational criminal trials. As a young advocate, in about the year 1920, he appeared for Reginald Matthews on a charge of murdering a youth in Timaru. The chief issue in the trial was whether or not Matthews was criminally insane. Perhaps because of accused's shocking behaviour, the jury rejected Mr Thomas's plea; but a special inquiry instituted by the Executive Council found Matthews to be insane. He was reprieved, and committed to a mental institution.

In 1925, Mr Thomas defended Frederick Peter Mouatt, who was charged with the murder of his wife at St. Martins, a Christchurch suburb. The Crown alleged that Mouatt had disposed of his wife's remains by incineration in the domestic grate. At the second trial Mouatt was convicted of manslaughter, a verdict which may be regarded as unsatisfactory. The precise circumstances of his wife's disappearance will always remain a mystery. A few years later Mr Thomas successfully defended Boakes on a charge of murdering a girl at Burwood. More recently, he secured an acquittal for Mayo, who was alleged to have committed murder by sending poisoned chocolates to his victim through the post.

Nevertheless, Mr Thomas's large practice was by no means confined to criminal cases. He was in great demand as counsel in litigation of every type, and on many occasions appeared before the Court of Appeal. When the third-party insurance pool was formed in 1928, he was appointed the first solicitor in Christchurch to the insurance interests, and his retainer enured until his retirement. In all types of litigation, he early established a pre-eminence which gave him a unique position at the Christchurch Bar. Imposing in presence, he added to his natural gifts by care in the training and use of his voice. He had the rare combination of being meticulous in mastery of fact, with a capacity to improvise and exploit a sudden opportunity in the course of a case. In cross-examination he was particularly formidable. No counsel ever gave more wholehearted or disinterested attention to the interests of his client.

Although his interest was chiefly in the Courts, Mr Thomas was always a pioneer in the adoption of up-to-date methods of office management.

Throughout his career, Mr Thomas took an active interest in professional affairs; and, after serving on the Council of the Canterbury District Law Society, he became President of the Society. In the course of his practice he took a notable part in appearing before the Royal Commissions which sat on Gaming and Racing and Licensing Control. It was before the former Commission that he expounded the T.A.B. system which he played a large part in initiating.

In other fields he made a notable contribution to the public life of the community. In his youth he was an athlete of distinction; and, on retirement from active competition, he was for many years associated with the administration of the Canterbury Centre of the New Zealand Amateur Athletic Association. He was President of that body for a period, and for twenty years was starter at all official track meetings.

For forty years he has been President of the Canterbury Caledonian Society, and was the founder of the New Zealand Pipe Bands and Pipers and Dancers Association, of which he is still patron. For seven years he was President of the New Zealand Metropolitan Trotting Club, and at one time held a joint interest in two pacers, Scholarship and Oxford Scholar.

The firm which Mr Thomas founded will be carried on under its former name by his partners Messrs R. P. Thompson, E. M. Hay, F. J. Shaw, and his son, Hamish Thomas. Mr Thomas on his retirement will leave a notable gap in the ranks of the profession, but will carry with him the best wishes of his fellow-practitioners. He was recently entertained by his friends at the Bar at a private dinner at the Canterbury Club.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

A Permanent Court of Appeal.—Practitioners at the Napier Conference of 1954 will remember that the case for a permanent Court of Appeal was argued by L. P. Leary Q.C., and his able "junior" T. P. Cleary. In the course of their submissions, reference was made to a memorandum that they had received from Sir David Smith, prepared after his retirement from the Bench. In his view, held for a long period, a separate Court of Appeal was desirable, and his chief objections to the present system of appeal were the inefficiency of its method and the undue strain it tended to impose upon some Judges: indeed, in his observation, the present procedure has in fact placed such a strain upon the health of a number of them. He also expressed agreement with the cogent arguments set out in the editorial article appearing in this Journal, Vol. 23 (1947), p. 29. In the result, the Conference that was large and representative of the whole profession unanimously resolved:

> That the members of the Legal Profession present at this Conference express their complete endorsement of the proposal to be laid before the Government by the New Zealand Law Society for the establishment of a Court of Appeal composed of separate Judges permanently appointed of which the Chief Justice will be a member *ex officio*.

Actually, this matter was, of all those discussed at the Conference, that of the most general public importance; but two years have passed and, without the usual Governmental excuse of the high cost of war or the low price of butterfat, nothing tangible appears to have been done. Yet, the need still remains. At the sitting of the First Division on March 13, fixtures were made for the best part of thirty cases, civil and criminal, and extending from March 13 to the end of April, when the members of the Court are expected to resume their respective local Sessions. The majority of the cases involve points of difficulty and require intense concentration. Judgments have to be considered and written. In England, Court of Appeal Judges have no High Court sessions over which they are expected to preside: in Australia, the Full Bench of some particular State does not appear to disperse to circuit sittings as they do here. The plain fact of the matter is that too much pressure is placed upon our Judges under the existing system; and it is common knowledge that, during the past few years, it has produced a marked measure of strain and ill-health amongst the occupants of the Bench. Apart from the interest which the profession has in the welfare of its Judges, there is the interest of the litigant to be considered. He tells his tale and he pays his fees. And he is entitled to have a fresh untroubled mind brought to bear upon his problems.

Murder Note.—The delicate attitude that some of the members of the British Parliament have recently taken towards the crime of murder recalls some observations made by Gerald Sparrow, legal adviser appointed by the Ministry of Justice to the Siamese Government and the author of an excellent autobiography, *Land of the Moon Flower* (Elek Books, 1955). According to him, murder is seldom to be found in Siam, since the Siamese, he says, are almost one hundred per cent. Buddhist, the foreign missions having made practically no permanent disinterested converts in Siam. Murder is the antithesis of the gentle Buddhist creed and the Siamese are reluctant to admit it has ever occurred. Even the newspapers—as sensation-hungry as their western counterparts—avoid the word, which is regarded as gauche and rude. "Lady fatally shot." "Old woman passes away strangely. Heir expresses regret." Such are the head-lines. Occasionally a daring journalist will wrap up the dread deed as "homicide". But cold-blooded, calculated "murder"—no. That is the sort of thing that Europeans do in their insensitive, ill-mannered fashion. But there is another reason, he maintains, why murder seldom figures in the lists of the International Court there on which he sat with two Siamese Judges. The old Siamese medical theory, now largely superseded by modern medical practice, ascribed all illnesses to a disturbance of the elements that were supposed to make up the human body, which could remain in health only when they were perfectly balanced. The element that gave the most trouble, for it was always going wrong, was wind. The Siamese word for it is "lom". He adds that there was not, until recently, an up-to-date system of post-mortem, so a great many inconvenient, elderly persons passed away from "lom", often accompanied by vomiting and heart collapse. If there was a post-mortem, the doctor would expect to be paid by the surviving relatives and it would hardly show gratitude on his part to raise doubts that might cause a great deal of unpleasantness. After all, death was death and nothing could alter it.

Lawyers as Critics.—"When young Derek Blomfield was arrested for murder because he was the last person seen with the old woman (she had made a will in his favour) we knew at once that he was innocent. When he talks the case over with his lawyer the authoress still piles evidence against the young fellow. But we know the form. And when it turns out that there was blood on his sleeve our last doubts of his innocence disappear. . . . So we all proceed to the Old Bailey, and get down to business. David Horne and Clarke-Smith begin their fascinating duel as barristers. Actually, there were three barristers, although the name of the third does not appear on the programme. He was sitting behind me in the stalls, and kept telling his wife that the whole thing was ridiculous."—Beverley Baxter M.P. in a review of Agatha Christie's *Witness for the Prosecution*. (*First Nights and Footlights*, Hutchinson, 1955)

From the Licensing Control Commission.—

Participants: Mr T. A. Gresson for Canterbury Provincial Wholesale Merchants' Association and Mr Harold Pearce, head of Levin and Co., Ltd., who has produced his submissions, cyclostyled by a public typist in bright green.

Mr Gresson: Tell me, are your submissions made in chartreuse or crème-de-menthe?

Mr Pearce (producing his original draft for inspection): No, Sir, in black and white!

PRACTICAL POINTS.

Land Drainage—Common Private Drain forming Boundary of Four Separately-owned Farms—Whether Owner of One Farm can claim Damages from Another Owner neglecting to keep His Part of Drain Clean and Unobstructed—Drainage Act 1908, ss. 62, 63.

QUESTION: We act for a farmer who owns a farm along the back boundary of which a private drain is situated. This drain runs along the entire length of this boundary and also along the back boundaries of three other privately owned farms before flowing into a public drain. The whole drain is situate in these four farms. That is to say, both banks are situate in each respective farm. For some years two of the lower farm owners neglected to clean the section of this private drain which is situate in the farm properties they own. Recently our client was successful in forcing these owners to clean their portions by invoking the relevant provision of the Land Drainage Act 1908. He now complains that the non-cleaning of the drain over recent years has resulted in his land being flooded, pastures ruined and dairy production lost. He wishes to claim damages for this loss. We have been unable to find any authority for the proposition that such damage is recoverable. We are inclined to the view that our client's only remedy is to force his neighbours to clean their portions of the drain regularly. We would, however, appreciate it if you could let us have the benefit of your pionion.

ANSWER: From a practical point of view, the only effective remedies are those indirectly conferred on your client by ss. 62 and 63 of the Land Drainage Act 1908, which remedies your client appears to have effectively exercised.

It is beyond the scope of the Practical Points column to advise whether or not your client has a right of action in tort against his neighbour for neglect to keep his part of the drain in order: *cf.*, s. 227 of the Municipal Corporations Act 1954, which would suggest, however, that there is no right of action in tort, but on this particular point the opinion of the counsel should be taken.

It has been assumed that the lands are situated in a County, and that there are no registered relevant easements against the Land Transfer titles or any other relevant contractual provisions to be considered.

X2.

THEIR LORDSHIPS CONSIDER.

BY COLONUS.

Promissory Notes and Receipts.—"The instrument in question in this case is, according to the authorized translation, in the following terms:

May God protect us.

This (one) receipt is hereby executed by Bhai Hira Singh Attar Singh Kharbanda, residents of Hoti for Rs.43,900 (Forty three thousand and nine hundred rupees) half of which amount comes to twenty-one thousand nine hundred and fifty, received from the Firm of Lala Duni Chand Lala Hari Chand Sethi for and on behalf of Captain Mohammad Akbar Khan of Hoti. This amount to be payable after 2 (two) years. Interest at the rate of Rs.5-4-0 (Rs. five annas four) per cent per year to be charged.

Dated this 20th day of Chetar (first month of the Hindu Calendar year) Sambat 1974 corresponding to Apr. 1, 1917.

Stamp has been duly affixed.

(Sd.) Hira Singh, Kharbanda.

(Sd.) Attar Singh, Kharbanda.

"If this document is otherwise within the definition of a promissory note, it would seem that it must be negotiable, for there appear to be no words prohibiting transfer or indicating an intention that it should not be transferable. It must be admitted that it would be a somewhat unusual visitor in the accustomed circles of negotiable paper. It is indeed doubtful whether a document can properly be styled a promissory note which does not contain an undertaking to pay, not merely an undertaking which has to be inferred from the words used. It is plain that the implied promise to pay arising from an acknowledgment of a debt will not suffice, for the third illustration indicates that an IOU is not a promissory note, though of the implied promise to pay there can be no doubt. The second illustration, however, seems to show that the express words "I promise" or "I undertake" are unnecessary. The form of words is taken from an early English case: *Casborne* v. *Dutton*, (1727), *Sel. Nisi Prius*, 13th Ed., 329, where, according to the learned author, the Court stated that the words "to be paid" in the document there sued on amounted to a promise to pay; observing that the same words in a lease would amount to a covenant to pay rent. It does not appear to form a useful general illustration except in the case of a document in that particular form of words.

"Their Lordships prefer to decide this point on the broad ground that such a document as this is not, and could not be intended to be, brought within a definition relating to documents which are to be negotiable instruments. Such documents must come into existence for the purpose only of recording an agreement to pay money and nothing more, though of course they may state the consideration. Receipts and agreements generally are not intended to be negotiable, and serious embarrassment would be caused in commerce if the negotiable net were cast too wide. This document plainly is a receipt for money containing the terms on which it is to be repaid. It is not without significance that the defendants who drew it, and who were experienced moneylenders, did not draw it on paper with an impressed stamp as they would have to if the document were a promissory note, and that they affixed a stamp which is sufficient if the document is a simple receipt. Being primarily a receipt even if coupled with a promise to pay, it is not a promissory note." Lord Atkin, in *Nawab Major Sir Mohammad Akbar Khan* v. *Attar Singh*, [1936] 2 All E.R. 545, 549.

CANTERBURY LAW SOCIETY.

Annual Sports Day.

After a postponement on account of bad weather a successful Sports Day was held on March 6, at the United Tennis and Bowling Club grounds. The usual cricket match was held on South Hagley Park. There was a good attendance of practitioners throughout the day. Guests of the Society were Messrs Rex C. Abernethy S.M. and Leslie N. Ritchie S.M.

In the absence of the President (Mr T. A. Gresson) the Vice-President, Mr P. Wynn-Williams, presented the trophies.

The successful contestants were:

Tennis: Maurice Gresson Memorial Cup: W. G. P. Cuningham and N. McGillivray. Plate, M. J. Gresson Pewter: E. I. White and R. H. Bowron.

Bowls: Mr Raymond Ferner S.M.'s Trophies: E. B. E. Taylor, A. T. Bell, and G. A. G. Connal.

Cricket: Northcroft Memorial Cup: Common Law. R. W. Edgley (Captain).