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NUISANCE: WHAT IS A "PUBLIC" NUISANCE?

THERE is a reluctance on the part of the writers of text-books and, in general, on the part of Judges, to define what is meant by the expression "public" nuisance. The reason is that it is always a question of fact and degree whether, in any particular case, the existence of a public nuisance, has been established: and this must be determined by all the relevant circumstances. Those circumstances, of course, differ in each case; but the main difficulty in defining what constitutes a "public" nuisance has been to express the ambit or range of the consequences of a nuisance—or, to put it another way, the number of persons who have to be affected by the nuisance, before it can be held to be a "public" nuisance.

In *Attorney-General* v. *Abraham and Williams Ltd.* [1949] N.Z.L.R. 461, 478, Kennedy J. said: "A public nuisance is difficult of definition." He added that its nature was referred to in *Soltau* v. *De Held* (1851) 21 L.J. Ch. 153, 158, where Sir Richard Kindersley V.-C., said:

> I conceive that to constitute a public nuisance the thing complained of must be such as in its nature or its consequences is a nuisance, an injury, or a damage to all persons who come within the sphere of its operation, though it may be in a greater or less degree.

In the same case, in which an injunction was sought to restrain the defendants from continuing to operate saleyards in a residential area, Finlay J., at p. 481, said that the parties complaining of a public nuisance, in order to succeed, must prove that the detrimental consequences arising from the thing complained of, if they were a nuisance, were general and widespread, and not limited to any particular individual or any particular group of individuals. In other words, he said, the discomfort or inconvenience or other detrimental consequences of the nuisance must transcend the merely private, and affect the public. His Honour based his conclusion that a public nuisance existed on the facts proved by the evidence.

In his judgment in the same case, Gresson J., at p. 484, said:

> Though the same conduct may amount both to a private and to a public nuisance, they are in their nature very different. A private nuisance is a civil wrong, a public or common nuisance is a species of criminal offence: *Salmond on Torts*, 10th ed. 219. A public nuisance is an offence against the public, or, as it is defined by the Crimes Act 1908, s. 158:
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> > "an unlawful act or an omission to discharge a legal duty, such act or omission being one which endangers the lives safety, health, property, or comfort of the public, or by which the public are obstructed in the exercise or enjoyment of any right common to all His Majesty's subjects."
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> No definition is altogether satisfactory, but it would seem that a nuisance, to be a public nuisance, must seriously interfere with the health, convenience, or comfort of the public generally, and must, therefore, actually affect a not inconsiderable number of people, or interfere with rights which members of the community generally might otherwise enjoy.

His Honour, after citing authority, concluded:

> The inquiry in any case in which a public or common nuisance is alleged is, therefore, necessarily, first, whether the act, conduct, or state of affairs complained of is a nuisance at all, and, secondly, whether, if so, it amounts to a sufficient interference with the rights of members of the community to constitute a public nuisance. In *Bamford* v. *Turnley* (1862) 31 L.J. Q.B. 286, it was said by Pollock C.B.: "I do not think that the nuisance for which an action will lie is capable of any legal definition which will be applicable to all actions and useful in deciding them. The question so entirely depends on the surrounding circumstances,—the place, where,—the time, when,—the alleged nuisance, what,—the mode of committing it, how—and the duration of it, whether temporary or permanent, occasional or continual,—as to make it impossible to lay down any rule of law applicable to every case, and which will be also useful in assisting a jury to come to a satisfactory conclusion. It must at all times be a question of fact with reference to all the circumstances."
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> In the House of Lords in *Fleming* v. *Hislop* (1886) 11 App. Cas. 686, 691, it was said that *Walter* v. *Selfe* (1851) 15 Jur. 416, and all the cases which have followed it "have laid down this proposition, in substance, and very nearly in words . . . that what causes material discomfort and annoyance for the ordinary purposes of life to a man's house or to his property, is to be restrained, subject of course to any questions which the circumstances of the particular case may raise; and that, although the evidence does not go to the length of proving that health is in danger."

The question whether a nuisance is so widespread as to be a public nuisance is, as Hutchison J. put it, at p. 499, primarily a question of fact and of degree. The evidence, in the case under consideration, taken as a whole, established a public nuisance.

In this case, what constituted "the public" (a concept of varying meanings) was spelled out from the evidence before the Court. In other cases, as we shall see, the range of the effect of a nuisance in order to constitute it a "public" nuisance is described variously as "Her Majesty's subjects," or "mankind," or "the neighbourhood." But, recently, in *Attorney-General* v. *P.Y.A. Quarries Ltd.* [1957] 1 All E.R. 894, the question of the area affected to describe a nuisance as a "public" one received careful attention in the Court of Appeal (Denning, Romer, and Parker L.JJ.), and their Lordships make a new approach to the question. The majority relate a "public" nuisance to one which materially affects the reasonable comfort and convenience of a class of Her Majesty's subjects or a representative cross-section of that class.

Romer L.J., who delivered the first judgment, said that before considering the argument on the questions of law involved, he thought it convenient to consider the nature of a public nuisance as distinct from nuisance customarily described as " private."

As it may be useful to any who may be confronted with a need to consider the distinction, we cite from his judgment the authorities to which His Lordship referred.

In *Stephen's Digest of the Criminal Law*, 9th ed., 179, it is stated that

> A common nuisance is an act not warranted by law or an omission to discharge a legal duty, which act or omission obstructs or causes inconvenience or damage to the public in the exercise of rights common to all His Majesty's subjects.

The following definition of nuisance appears in *3 Blackstone's Commentaries* ch. 13, p. 262 :

> Nuisance, *nocumentum*, or annoyance, signifies any thing that works hurt, inconvenience, or damage. And nuisances are of two kinds : *public* and *common* nuisances, which affect the public, and are an annoyance to *all* the king's subjects ; for which reason we must refer them to the class of public wrongs, or crimes and misdemeanors ; and *private* nuisances, which are the objects of our present consideration, and may be defined as anything done to the hurt or annoyance of the lands, tenements or hereditaments of another.

This passage from *Blackstone* is cited in *Pearce & Meston's Law of Nuisances*, 1 ; and the learned authors point out that " anything that works hurt, inconvenience or damage " is too broad as including many things which are not nuisances, being *damna sine injuria*.

Finally, in a form of indictment for a public nuisance by smells given in *3 Chitty on Criminal Law*, 2nd ed. 652-654, the relevant allegation is that the air

> was corrupted and rendered wholly insalubrious to the great damage and common nuisance of all the liege subjects of our said Lord the King, not only there inhabiting and residing, but also going, returning, and passing through the said streets and highways, and against the peace, etc.

Romer L.J. said that it is difficult to ascertain with any precision from these citations how widely spread the effect of a nuisance must be for it to qualify as a public nuisance and to become the subject of a criminal prosecution or of a relator action by the Attorney-General. It is obvious, notwithstanding *Blackstone's* definition, that it is not a prerequisite of a public nuisance that all of Her Majesty's subjects should be affected by it ; for otherwise no public nuisance could ever be established at all.

In *Soltau* v. *De Held* (1851) 2 Sim. N.S. 133 ; 61 E.R. 291, Kindersley V.-C., said :

> I conceive that, to constitute a public nuisance, the thing must be such as, in its nature or its consequences, is a nuisance —an injury or a damage, to all persons who come within the sphere of its operation, though it may be so in a greater degree to some that it is to others (*ibid.*, 142, 295).

In *R.* v. *White and Ward* (1757) 1 Burr. 333 ; 97 E.R. 338, the defendants had been convicted of a public nuisance on an indictment which charged that

> at the parish of Twickenham, etc. near the king's common highway there, and near the dwelling-houses, of several of the inhabitants, the defendants erected twenty buildings for making noisome, stinking and offensive liquors.

Objection was made that the indictment was only laid generally " in the parish of Twickenham ". Lord Mansfield rejected the objection, saying :

> It is sufficiently laid, and in the accustomed manner. The very existence of the nuisance depends upon the number of houses and concourse of people ; and this is a matter of fact, to be judged of by the jury (*ibid.*, 337 ; 340).

In *R.* v. *Lloyd* (1802) 4 Esp. 200 ; 170 E.R. 691, an indictment for a nuisance by noise was preferred by the Society of Clifford's Inn. It appeared in evidence that the noise complained of affected only three houses in the Inn. Lord Ellenborough said that on that evidence the indictment could not be sustained ; and that it was, if anything, a private nuisance. It was confined to the inhabitants of three numbers of Clifford's Inn only ; it did not extend to the rest of the society and could be avoided by shutting the windows ; it was therefore not sufficiently general to support an indictment.

In *Attorney-General* v. *Sheffield Gas Consumers Co.* (1853) 3 De G.M. & G. 304 ; 43 E.R. 119, it was submitted in argument that it was the duty of the Court of Chancery to interfere by way of injunction in all cases of public nuisance whatever might be the position in the case of private nuisances. In the course of his judgment, Turner L.J. said :

> It is not on the ground of any criminal offence committed, or for the purpose of giving a better remedy in the case of a criminal offence, that this Court is or can be called on to interfere. It is on the ground of injury to property that the jurisdiction of this Court must rest ; and taking it to rest upon that ground, the only distinction which seems to me to exist between cases of public nuisance and private nuisance is this— that in cases of private nuisance the injury is to individual property, and in cases of public nuisance the injury is to the property of mankind (*ibid.*, 320 ; 125).

In *R.* v. *Price* (1884) 12 Q.B.D. 247, a question arose whether the burning of a dead body, instead of burying it, amounted to a public nuisance. In the course of his charge to the jury, Stephen J. said :

> The depositions in this case do not state very distinctly the nature and situation of the place where this act was done, but if you think upon inquiry that there is evidence of its having done in such a situation and manner as to be offensive to any considerable number of persons, you should find a true bill (*ibid.*, 256).

In *Attorney-General* v. *Keymer Brick & Tile Co. Ltd.* (1903) 67 J.P. 434, Joyce J., said :

> The only question I have to decide is purely one of fact— namely, whether or not what the defendants have done has created or occasioned a public nuisance within the neighbourhood of their brickfields. Now, in law, a public nuisance need not be injurious to health. It is not necessary to show that people have been made ill by what has been done. It is sufficient to show that there has been what is called injury to their comfort, a material interference with the comfort and convenience of life of the persons residing in or coming within the sphere of the influence of that which has been done by the defendants on their works . . . The conclusion I have arrived at is that . . . a serious and disgusting public nuisance has been occasioned by the defendants in the neighbourhood of their brickworks . . . (*ibid.*, 435).

The form of injunction granted in that case was (so far as relevant) to restrain the defendants from performing specified acts " so as by noxious or offensive odours or vapours arising therefrom or otherwise to be, or occasion a nuisance to the annoyance of persons in the neighbourhood of the defendants' brickfields and lands, or so as to be or become injurious to the public health."

Romer, L.J. added that the expression " the neighbourhood " has been regarded as sufficiently defining the area affected by a public nuisance in other cases also (see, for example, *Attorney-General* v. *Stone* (1895) 60 J.P. 168 ; *Attorney-General* v. *Cole & Son* [1901] 1 Ch. 205 ; and *Attorney General* v. *Corke* [1933] Ch. 89.

After citing the foregoing authorities His Lordship continued :

> I do not propose to attempt a more precise definition of a public nuisance than those that emerge from the text-

books and authorities to which I have referred. It is, however, clear, in my opinion, that any nuisance is "public" which materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects. The sphere of the nuisance may be described generally as "the neighbourhood"; but the question whether the local community within that sphere comprises a sufficient number of persons to constitute a class of the public is a question of fact in every case. It is not necessary, in my judgment, to prove that every member of the class has been injuriously affected; it is sufficient to show that a representative cross-section of the class has been so affected for an injunction to issue.

He then turned to the evidence which was called before the learned Judge as to the state of affairs with regard to vibration and to dust as it existed in the summer of 1952; and said that the criticisms of the judgment to which he had already referred must, of course, be considered, "but it is on the evidence, when related to the legal principles just mentioned, that this appeal falls to be determined."

The evidence, which is set out in great detail in His Lordship's judgment, may be summarized very briefly as follows:

Quarry owners so conducted their operations that householders living in groups of small houses around the quarry on both sides of it, were discomfited by vibration from explosions and by the dust emanating from the quarry in dry weather, which frequently resulted in a film of dust being deposited on their homes and gardens. The vibration caused personal discomfort, but structural damage to houses from it was not established. Since the issue of the writ, the quarry owners had taken steps which much reduced the causes of complaint, but did not entirely remove them. Expert evidence showed that nuisance from vibration and dust could be avoided by the exercise of proper care.

In an action by the Attorney-General on the relation of the local authority, Oliver J. granted an injunction restraining the quarry owners "from carrying on the business of quarrying . . . in such a manner as . . . to occasion a nuisance to Her Majesty's subjects by dust or by vibration." On the appeal by the defendants, they contended, inter alia, (*a*) that the nuisance, if any, caused by vibration was insufficiently widespread to constitute a public nuisance; and (*b*) that, in view of the steps taken by them since the issue of the writ, the injunction should not have been granted. We are concerned, in this article, only with the former of these contentions.

Counsel for the defendants' main submission with regard to vibration was that, even on the assumption (which he did not admit) that one or more of the individuals might have successfully instituted proceedings for private nuisance in 1952, the evidence did not show that a sufficient number of persons were affected by vibration to justify the nuisance (if any) being regarded as a public nuisance. He said that vibration differed fundamentally from such things as noise or the pollution of the atmosphere. In nuisances such as those, he said, the Court might well infer from the evidence of some of the affected class an injury to the class as a whole; but that no such inference could fairly be drawn in the case of vibration, which was largely a matter of individual susceptibility.

Romer L.J. said that he agreed with counsel for the defendants that vibration was in some respects to be approached on a different footing from noise and smell; and the fact that one person reasonably suffered discomfort from vibration did not necessarily establish that his neighbour had been similarly affected. In the present case, however, he was satisfied that a nuisance from vibration existed in 1952, and that it was sufficiently widespread to amount to a common, or public, nuisance. It was clear to His Lordship that Oliver J. was intending to find, and did find, that a public nuisance existed before action was brought in relation to vibration as well as to flying stones; and there was, in his judgment, no ground for disturbing that decision,

Counsel for the defendants suggested that, in a public nuisance action, evidence of individual experiences should not be received, although such evidence would be highly relevant in cases of alleged private nuisance. Romer L.J. said he could not for himself accept that contention. He added:

> Some public nuisances (for example, the pollution of rivers) can often be established without the necessity of calling a number of individual complainants as witnesses. In general, however, a public nuisance is proved by the cumulative effect which it is shown to have had on the people living within its sphere of influence. In other words, a normal and legitimate way of proving a public nuisance is to prove a sufficiently large collection of private nuisances.

Lord Justice Denning, as he then was, entirely agreed with the judgment of Romer L.J. He added:

> Counsel for the defendants raised at the outset this question: What is the difference between a public nuisance and a private nuisance? He is right to raise it because it affects his clients greatly. The order against them restrains them from committing a public nuisance, not a private one. The classic statement of the difference is that a public nuisance affects Her Majesty's subjects generally, whereas a private nuisance only affects particular individuals. But this does not help much. The question: when do a number of individuals become Her Majesty's subjects generally? is as difficult to answer as the question: when does a group of people become a crowd? Everyone has his own views. Even the answer "Two's company, three's a crowd" will not command the assent of those present unless they first agree on "which two". So here I decline to answer the question how many people are necessary to make up Her Majesty's subjects generally. I prefer to look to the reason of the thing and to say that a public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large.

His Lordship illustrated his definition by taking the blocking up of a public highway or the non-repair of it: it might be a footpath very little used except by one or two householders; nevertheless the obstruction affected everyone indiscriminately who might wish to walk along it. Again, a landowner might collect pestilential rubbish near a village or permit gypsies with filthy habits to encamp on the edge of a residential neighbourhood. The householders nearest to it suffer the most, but everyone in the neighbourhood suffers too. In such cases the Attorney-General can take proceedings for an injunction to restrain the nuisance: and when he does so he acts in defence of the public right, not for any sectional interest: see *Attorney-General* v. *Bastow* [1957] 1 All E.R. 497.

> When, however, the nuisance is so concentrated that only two or three property owners are affected by it, such as the three attornies in Clifford's Inn, then they ought to take proceedings on their own account to stop it and not expect the community to do it for them: see *R.* v. *Lloyd* (1802) 4 Esp. 200; 170 E.R. 691; and the precedent in *3 Chitty on Criminal Law* (1826) 664, 665.

> Applying this test, I am clearly of opinion that the nuisance by stones, vibration and dust in this case was at the date of the writ so widespread in its range and so indiscriminate in its effect that it was a public nuisance.

He concluded by saying:

The defendants, have however, now taken such good remedial measures that objectionable incidents take place only rarely and then by accident. So far as stones are concerned, the injunction is absolute: but so far as dust and vibration are concerned it is dependent on it being a nuisance " to Her Majesty's subjects ", that is, a public nuisance. The question then arises whether every rare incident is a public nuisance. Suppose six months went by without any excessive vibration and then there was by some mischance a violent explosion on an isolated occasion terrifying many people. Would that be a public nuisance ? Would it subject the defendants to proceedings for contempt ? I should have thought that it might, but the punishment would be measured according to the degree to which the defendants were at fault. I quite agree that a private nuisance always involves some degree of repetition or continuance.

An isolated act which is over and done with, once and for all, may give rise to an action for negligence or an action under the rule in *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330, but not an action for nuisance. A good example is an explosion in a factory which breaks windows for miles around. It gives rise to an action under *Rylands* v. *Fletcher*, but no other action if there was no negligence: see *Read* v. *J. Lyons and Co. Ltd.* [1946] 2 All E.R. 471. But an isolated act may amount to a public nuisance if it is done in such circumstances that the public right to condemn it should be vindicated. I referred to some authorities on this point in *Southport Corporation* v. *Esso Petroleum Co. Ltd.* [1954] 2 All E.R. 561, 571. In the present case, in view of the long history of stones, vibrations, and dust, I should think it incumbent on the defendants to see that nothing of the kind happens again such as to be injurious to the neighbourhood at large, even on an isolated occasion.

Lord Justice Parker entirely agreed with the judgments of Denning and Romer L.JJ., and the appeal was dismissed.

The judgment of the Court of Appeal in the *P.Y.A. Quarries* case will provide the writers of text-books with a more precise limitation of the range of a " public " nuisance, and will prove a useful guide in future cases, which in modern industrial conditions are bound to occur.

Applying their Lordships' judgments, a " public " nuisance may now be explained, but not defined, as follows:

> A nuisance is a public nuisance if, within its sphere, which is the neighbourhood, it materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects, and the question whether a local community within that sphere comprises a sufficient number of persons to constitute a class of the public is one of fact in every case. It is not necessary to prove that every member of the class has been injuriously affected: it is sufficient to show that a representative cross-section of the class has been so affected for an injunction to issue. The nuisance must, however, be so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken by the Attorney-General, on behalf of the community at large, for an injunction to restrain it.

SUMMARY OF RECENT LAW.

ADOPTION.

Payment to Nursing-home of Fees incurred by Natural Mother—No Details of Amount—Nursing-home profiting by Payment if authorized—Consent of Magistrate to Such Payment refused—" Payment or reward in consideration of the adoption "—Adoption Act 1955, s. 25. A proposed payment by adopting parents of the nursing-home fees incurred by the natural mother of the adopted child is " a payment or reward in consideration . . . of the making of arrangements for the adoption " within the meaning of s. 25 of the Adoption Act 1955, and the consent of the Court is necessary for any such payment or reward to be lawful. Each case is to be dealt with by the Court on its own circumstances. It is not a good ground for consent that a society conducting the nursing-home would profit by any such payment if authorized. As the adoption arrangements could be affected by the financial position of the proposed adopting parents, the Court's duty is to guard against the introduction of any element of financial competition among prospective adopting parents. Where there was an application for consent to payment of a sum of £20 as a " deposit " as " the nursing-home expenses " of the child's natural mother, with no specific sum stated in respect of the pediatrician's fee, or any mention of any purchases made for the child (such as clothing), there was no evidence that the society conducting the nursing-home was out of pocket in any way. The application was held to be contrary to public interest and to the intention of the Adoption Act 1955, and was refused. *In re H.* (Auckland. March 19, 1957. D. G. Sinclair, S.M.)

FAMILY PROTECTION.

Jurisdiction—Daughter—Daughter's Share in Father's Estate less than Son's—Daughter adequately provided for—Inadequacy of Provision for An Applicant rather than Amplitude of Provision for Competing Beneficiary founding Jurisdiction—" Adequate provision . . . for the proper maintenance and support "—Family Protection Act 1955, s. 4 (1). On applications for further provision under the Family Protection Act 1908 where the disparity between bequests is so great that the Court can hold that in all the circumstances there has been a breach of moral duty towards the recipient of the lesser sum, it is the inadequacy of the provision for the applicant rather than the amplitude of the provision for a competing beneficiary that founds the jurisdiction of the Court. (*In re Yarrell, Dickinson* v. *Yarrell* [1956] N.Z.L.R. 739, referred to. *In re Kallil, Kallil* v. *Koorey, ante*, p. 31, distinguished.) While the crucial time for considering claims under the Family Protection Act 1908 ss the date of the death of the testator, the Court must face realities and is entitled to look at any change for the better in an applicant's circumstances which may have taken place up to the time when the claim is dealt with by the Court. Thus, where the testator provided ample income for his daughter in the event of her mother's early death or remarriage, the Court was bound to regard the fact that, since the testator's death, the applicant's financial position had improved by reason of her acquiring a half-share in her deceased sister's estate and a half-share in her mother's estate, and her proportionate share in the increased value of the estate of the testator as at the date of his widow's death. *In re Shanahan, McCarthy and Others* v. *Shanahan.* (S.C. New Plymouth. May 27, 1957. T. A. Gresson J.)

GAMING.

Offences—Carrying-on Business of Bookmaker after Previous Conviction—Previous Conviction not Ingredient of Offence charged—Information in referring to Previous Conviction prejudicing Right to Fair Trial—Gaming Amendment Act 1920, s. 2. Where a person is charged under s. 2 (1) of the Gaming Amendmebt Act 1920 (as enacted by s. 3 of the Gaming Amendment Act 1953) with carrying on the business of a bookmaker, the fact of his having been convicted of a previous offence or offences is not an ingredient of the offence charged; but, after the Court has found the accused guilty of that offence, it is open to the prosecution to prove an earlier like conviction or convictions so that the Court may address itself to the appropriate penalty as set out in s. 2 (2). Accordingly, no reference to a previous conviction on a like charge should be included in an information charging the offence set out in s. 2 (1). Where an information makes known to the Court at the opening of the hearing the accused's previous convictions and thereby prejudices his right to a fair trial in respect of the offence in respect of which he is before the Court, the Court can dismiss the information without prejudice and not on the merits. *Police* v. *Winiata.* (Auckland. April 17, 1957. Grant S.M.)

Autrefois acquit—Carrying-on Business of a Bookmaker—Previous Information dismissed "without prejudice" on Account of Detective Information—Evidence heard on Merits but no Judgment on Merits pronounced—Such Dismissal not a Bar to Further Proceedings—Justice of the Peace Act 1927, s. 73. The provisions of s. 73 of the Justices of the Peace Act 1927 may be used to dismiss a defective information "without prejudice," without creating a bar to further Proceedings in any case where, although evidence may have been heard on the merits, no adjudication on the merits has been pronounced. (*Police* v. *Williams* (1917) 13 M.C.R. 26, not followed.) *Police* v. *Winiata.* (Auckland. June 28, 1957. L. G. H. Sinclair S.M.)

NUISANCE.

Adjoining Occupiers—Damage to Lower Property caused by Collapse of Retaining Wall securing Excavation—Wall on Lower Property Artificial Support of Face of Clay left by Excavation—Occupier of Higher Property not liable. B. was the owner and occupier of a property which she purchased in 1930 and had since occupied. It was bounded at the back by P.'s section, which was higher ground than B.'s. When B. bought her section, there already existed a perpendicular concrete retaining wall, some 11 ft. in height at one end, tapering down to 5 ft. at the other, erected substantially upon the boundary-line dividing her property from P.'s. There had been an excavation along that boundary on B.'s side and the concrete wall had been built against the face of clay and rotten soil left by such excavation. Most of the wall had been concreted against the face. The wall had been built for more than twenty-five years. P. acquired her property in 1946. No filling had since been brought on that property, and P. was wholly unaware that there was any filling on her property. On July 3, 1955, following heavy rain, the retaining wall collapsed. It had broken in various places, and there was a substantial subsidence of soil and rubbish into B.'s back yard. In an action by B. claiming damages, *Held*, 1. That the real and effective cause of the collapse of the wall was excavation on B.'s side of it and the wall's own inherent defects, the filling behind the wall on P.'s side of it being insubstantial. (*Byrne* v. *Judd* (1908) 27 N.Z.L.R. 1106; 11G.L.R. 45; 12 G.L.R. 205, referred to.) 2. That, accordingly, P. was not liable for the plaintiff's damage. (*Knight* v. *Bolton* [1924] N.Z.L.R. 806, 1043; [1924] G.L.R. 322, 602, distinguished.) *Bustin* v. *Petley.* (Wellington. April 3, 1957. Hanna S.M.)

PUBLIC REVENUE—INCOME TAX.

Income derived by Trustees—Deed of Settlement providing for Payment of Income of Trust Premises to Settlor "during her life"—Rent payable to Trustee in Advance on June 1 and December 1—Settlor assessable for Tax on Proportion of Such Rent to March 31 only—Trustee assessable to Balance of Such Rent in His Hands—Land and Income Tax Act 1954, s. 155 (a) (b). In 1910, the settlor settled certain lands to be held upon trust for her until her marriage (then in contemplation) and afterwards "upon trust to pay the net rent profits and income of the trust premises to the settlor during her life and after the death of the settlor in trust for such purposes estate or estates interest or interests . . . as the settlor shall by will or codicil appoint and in default of and subject to any such appointment as aforesaid in trust for all or any of the children or child of the settlor . . .". The Public Trustee was appointed trustee of the settlement. The settlor married shortly afterwards. She was still living on March 31, 1954. In 1953, the Public Trustee leased the settled land for a term of five years, commencing on June 1, 1953, at a yearly rental of £510, payable by equal half-yearly instalments in advance. During the income year ended March 31, 1954, the Public Trustee would accordingly have received two rental payments: one on June 1, 1953, and the other on December 1, 1953, the latter payment being for a period extending for two months beyond the "income year", which ended on March 31, 1954. The Public Trustee, in a return of income derived during the year ended March, 1954, disclosed two payments of rent received by him during that year. The Commissioner of Inland Revenue claimed that, in respect of the whole of the rent, the Public Trustee was deemed to be the agent of the settlor, and was assessable and liable for tax accordingly under s. 155 (*a*) of the Land and Income Tax Act 1954. The Public Trustee admitted that, in respect of so much of that income as represented the rent payable in respect of the period ending March 31, 1954, he was, under s. 155 (*a*), assessable and liable as such agent; but he contended that, in respect of so much of the income as represented the rent payable in respect of the two-month period after March 31, 1954, he was not assessable and liable under s. 155 (*a*) but under s. 155 (*b*). On Case Stated for the opinion of the Court under s. 42 of the Land and Income Tax Act 1954, *Held*, 1. That, on the true construction of the deed of settlement, there was no expressed intention that the settlor should be entitled to demand payment to her of rent received by the trustee in respect of a period which she had not then survived; and there was nothing in the deed to show that the settlor intended that, merely because the rent might have been paid in advance, she could demand it as soon as it was paid and so defeat the provisions of the Property Law Act 1908 (now 1954) as to apportionment which would otherwise become applicable if she were to die before May 31, 1954. 2. That on March 31, 1954, only four-sixths of the rent received by the trustee on December 1, 1953, was "income derived by the beneficiary [the settlor] entitled in possession to the receipt thereof under the trust during the . . . income year", and it was only as to that four-sixths that the trustee was "deemed to be the agent of the beneficiary and assessable for income accordingly" in terms of s. 155 (*a*) of the Land Income Tax Act 1954. 3. That, as to the remaining two-sixths of the rent received on December 1, 1953, which was "not also income derived by any beneficiary as aforesaid", the trustee was assessable and liable to tax under s. 155 (*b*) of the statute. *Public Trustee* v. *Commissioner of Inland Revenue.* (S.C. Wellington. May 2, 1957. Barrowclough C.J.)

TENANCY.

Possession—No Suitable Alternative Accommodation offered—Relative Hardship—Inference of Fact required of Court, not Exercise of Discretion—Such Finding allowing Appellate Court Wide Powers of Review—Tenancy Act 1955, s. 38 (1) (b). Section 38 of the Tenancy Act 1955, directs, in subs. (1) (*b*), the weighing of considerations of hardship only pro and contra, and an ascertainment of the balance of hardship. An inference of fact is required of the Court, and not the exercise of a discretion. Consequently, where the finding of a Magistrate under s. 38 (1) is an inference from undisputed primary facts, such a finding allows an appellate Court wide powers of review, and lays on it, in appropriate cases, a heavy duty of re-examination. (*Benmax* v. *Austin Motor Co. Ltd.* [1955] A.C. 370; [1955] 1 All E.R. 326, followed.) (*McKenna* v. *Porter Motors Ltd.* [1955] N.Z.L.R. 832, and *Jackson* v. *Huljich* [1955] N.Z.L.R. 1057, distinguished.) *Chinn* v. *Pascoe et Ux.* (S.C. Auckland. May 30, 1957. Turner J.)

TRADE MARKS.

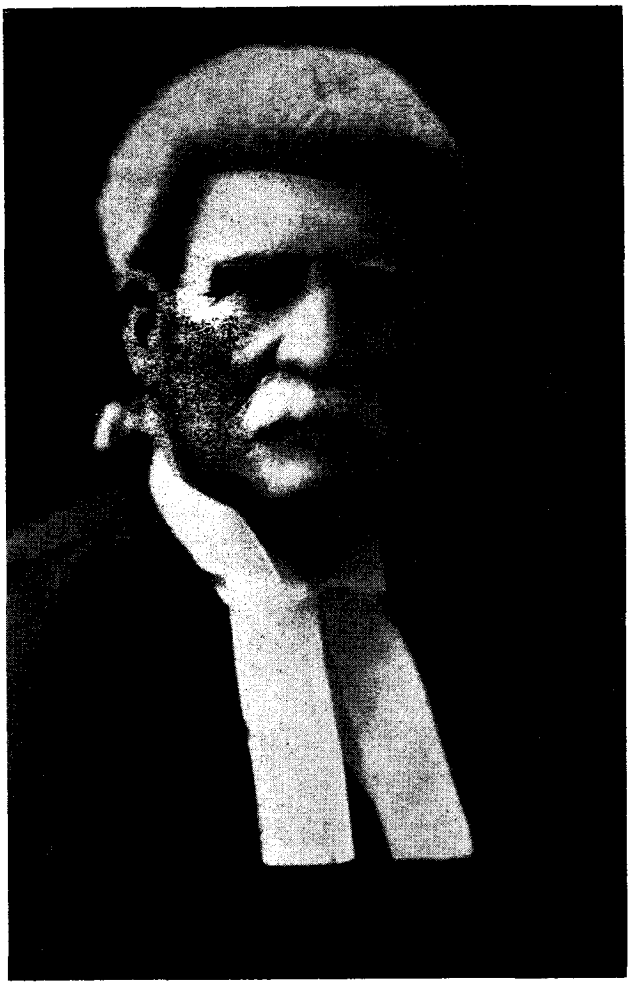
Test of Registrability—"Bestform"—Refusal of Registration in Part B of Register in Respect of Women's Foundation Garments—Words apt for Normal Description—Combined Words merely Descriptive in Laudatory Sense—Trade Marks Act 1953, s. 15. The test to be applied in determining if, under s. 15 (1) of the Trade Marks Act 1953, a trade mark can be registered in Part B of the register of trade marks is whether it is capable of distinguishing the goods of the proprietor of the trade mark from those of others. This is a question of fact to be determined substantially, if not wholly, having regard to the matters set out in s. 15 (2). The Commissioner of Trade Marks refused to register in Part B of the register of trade marks the word "Bestform" as a trade mark in respect of girdles, brassieres, and corselettes, Class 25. On appeal from that determination, *Held*, 1. That the words "best" and "form" were so apt for a normal description that no trade mark use and momentary distinctiveness could justify a permanent monopoly. (*In re Dunlop Rubber Co. Ltd.'s Application* (1942) 59 R.P.C. 134, applied. *In re Davis Trade Marks, Davis* v. *Sussex Rubber Co. Ltd.* [1927] 2 Ch. 345; *In re Hans Lauritzen's Application* (1931) 48 R.P.C. 392, and *Yorkshire Copper Works Ltd.'s Application* (1953) 70 R.P.C. 1, referred to.) 2. That the coined word "bestform" was merely descriptive of the goods in a laudatory sense, being intended to convey the thought that the goods in question were capable of producing the best form to a female figure. (*In re William Bailey's (Birmingham) Ltd.'s Application* (1935) 52 R.P.C. 136, followed.) *Semble*, Where the Court is in doubt, it should support the decision of the Commissioner of Trade Marks, and, while exercising its own discretion, it should be slow to differ from him. (*Re J. & P. Coats Ltd.'s Application* [1936] 2 All E.R. 975, and *Re Yorkshire Copper Works Ltd.'s Application* (1954) 1 W.L.R. 554; 1 All E.R. 570; 71 R.P.C. 150, followed.) *Bestform Foundations Inc.* v. *Commissioner of Trade Marks.* (S.C. Wellington. June 6, 1957. McCarthy J.)

LEGAL PORTRAITS.

V. Sir Frederick Chapman.

The subject of this "Portrait" was the fifth son of Mr Justice Henry Samuel Chapman, who was a Judge of the Supreme Court of New Zealand from 1843 to 1851, and after an interval spent as a barrister and in political life in Australia, for a second period beginning in 1864.

Frederick Revans Chapman was born in Wellington in 1849. He was educated at the Church of England Grammar School in Melbourne, and in France, Germany, and Italy. He studied with a special pleader in London and then with the great Charles Russell, afterwards Lord Chief Justice of England. He was called to the Bar at the Inner Temhle, practised at the Common Law Bar in London and on Circuit, and later read in the Chambers of a Chancery barrister.



Sir Frederick Chapman.

He returned to New Zealand and practised at Dunedin from 1872 to 1903. He was a member of the Dunedin City Council, a law lecturer at Otago University, and chairman of the Otago Board of Industrial Conciliation. In 1903, he was appointed a Judge of the Supreme Court and President of the Court of Arbitration. From 1906 to 1921 when he reached the retiring age, he presided in the Supreme Court, and after his retirement was for nearly three years a temporary Judge, acted as chairman of the War Pensions Appeal Board, and as Compiler of Statutes. He died in 1936.

The life experience of Sir Frederick Chapman over eighty-seven years was in several respects unique. He was the first New Zealand-born Judge of the Supreme Court. His recollection went back to the first years of our constitutional government. As a boy he enjoyed the friendship of our first Chief Justice, Sir William Martin, and throughout his long life he was keenly interested in all aspects of New Zealand history. Realizing that the specialization in the work of the Bar which obtains in England was not practicable in a newly-settled country, he gained experience in England both in the Common Law Courts and in Equity. In New Zealand, he was known as a leading counsel at the Bar and as a skilled conveyancing draftsman. On one occasion when a barrister had made a maladroit observation to Mr Justice Denniston to the effect that a certain involved Court order had been drafted by Mr Justice Chapman, and hinted that it might have been beyond the powers of other Judges, Denniston J. testily observed: "I am aware that Mr Justice Chapman is a skilled equity draftsman, but I would struggle with it—I would struggle with it."

His education in several countries of Europe was unusual. It gave him a wide knowledge of humanity and he became a fine linguist, reading and speaking easily in French, German, and Italian, and having a knowledge of Spanish and Portuguese. Throughout his life he read widely, particularly in the modern history of Europe, and he became well known as a scientist; he was one of New Zealand's leading botanists and studied astronomy, geology, mathematics, ethnology, and other sciences.

> "In short, no line of study was without interest to him and his quest for knowledge endured throughout his life. His was a philosophy of life more ample, more tolerant, more self-controlled than is found in our generation; and his passing has taken from us one of the giants of our profession and of the times to which he belonged." *

He was courteous and kindly to lawyers, whether in or out of Court, and followed the tradition of the English Bar of being helpful to the young and inexperienced. At his farewell to the Bar, he said he had always thought that young men of ability, ambition, and energy should receive due encouragement. I remember appearing before him in a case at Wellington on a Saturday morning. We asked the associate to take us to his room, and told him we were likely to come to an agreement, and desired time to consult and perhaps draft an order. It was not till 1.30 p.m. that we had done so. We sought him again in his room, where he sat placidly reading; and he made the order.

He was a great criminal Judge and presided over many important trials. On such occasions his easy

* S. A. Wiren in *New Zealand Law Journal.*

manner had disappeared: he was stern and serious, speaking little, absorbed in listening to the evidence. With his sturdy frame and piercing eyes he looked the embodiment of British justice. Juries felt that they could depend on him to be fair and just. His addresses to them were clear and plain and they had no difficulty in following him—and this they usually expressed by their verdicts.

One of the most important criminal trials over which he presided was that of Dennis Gunn at Auckland in 1920. The accused was charged with the murder of Augustus Edward Braithwaite, postmaster at Ponsonby, and the case was one of the earliest in which fingerprint evidence was tendered. The Hon. J. A. Tole K.C. was for the Crown, and J. R. Reed K.C. and E. J. Prendergast for the accused. In summing up the evidence, the Judge said:

> The Crown claims that the police have found in the building itself, on the cash boxes, unmistakable evidence left there by the accused, as certain in their effect as if he had left his signature . . . The case for the Crown presented to you by fingerprint evidence is that the marks of identification on prints—of which, at any rate, three are identified—are so numerous and so strong, and their general character and value are so great, that one inference only is left, and that the inference to be drawn is the same as if the man had left so many items of his own identifiable property in the room. It is for you to test the validity of that argument. I would ask you to consider it by the same tests that you are in the habit of applying to the ordinary affairs of life . . . Human experience has brought us to the point that these two circumstances are never disputed, because they cannot be successfully disputed—namely that neither race nor heredity governs the distribution of the ridges and points on the finger, and that their position is haphazard and never varies throughout the life of a man.

The verdict was "Guilty," and the Judge then said that the evidence was absolutely conclusive. "I wish further to say that this case has once and for all vindicated the system of fingerprint investigation and identification, if vindication were needed, . . . a vindication of a scientific system which, if properly applied, is infallible."

W. J. HUNTER.

DIVORCE, THE ROYAL COMMISSION, AND THE CONFLICT OF LAWS.

By J. W. DAVIES and B. D. INGLIS

(*Concluded from p. 221.*)

Before 1954 the jurisdiction of the Supreme Court to entertain proceedings for declaring a nullity any marriage alleged to be void was found in the common law.[28] On January 1, 1954, however, s. 3 of the Divorce and Matrimonial Causes Amendment Act 1953 came into force.[29] The position is now confused.[30] It is possible to read the new section as providing for certain specified cases in which the Court may exercise jurisdiction, while at the same time preserving the common law jurisdiction in cases not covered by the section. But the section can also be read as an exhaustive code providing for jurisdiction in nullity suits in a restricted class of cases which is by no means exhaustive of possible fact-situations likely to arise, especially in regard to foreign "marriages." In view of this doubt and difficulty it is necessary to consider the provisions of the Draft Code with particular care.

Section 4 provides that the Court shall have jurisdiction in respect of a marriage alleged to be void if the petitioner is domiciled in England at the commencement of the proceedings, or if the petitioner is in England at the commencement of the proceedings. It is not easy to say how far these recommendations would change the existing English law, because, as the Commission remarks,[31] the existing English law governing jurisdiction in nullity is not clearly defined. This is particularly so with respect to marriage alleged to be void,[32] and it is a major point in favour of s. 4 that it provides a comprehensive set of rules governing the question. The chief consideration in regard to void marriages, as distinct from those which are merely voidable, is that a declaration of nullity of such a marriage is in no sense a declaration of a change of status. It is, for instance, well settled that any member of the public in his dealings with the parties to a void marriage may rely on its nullity without the necessity of a judicial decree, and if the question whether a marriage is void arises incidentally in other proceedings, there are no jurisdictional limits on the power of the Court to make a declaration as to the nullity of the marriage.[33] For this reason, it has even been argued[34] that there are no limits under existing English law to the jurisdiction of the English Courts over void marriages. It is, therefore, difficult to see what objections could be taken to the liberal rules recommended by the Commission, or their suggested choice of law rules as a limiting factor on the exercise of

[28] See Dicey, Conflict of Laws, 6th ed., 245 ff; Sim's Divorce Law and Practice in New Zealand, 5th ed., 85.

[29] This is now s. 10*b* of the Divorce and Matrimonial Causes Act 1928.

[30] See Inglis, Annulment of Foreign Marriages and Recognition of Foreign Divorces, (1955) 31 N.Z.L.J. 343.

[31] Report, para. 880.

[32] Domicil of both parties is of course a sufficient ground of jurisdiction. A Northern Ireland decision, *Mason* v. *Mason* [1944] N. Ir. 134, recognized residence of both parties as sufficient, and in view of *Ramsay-Fairfax* v. *Ramsay-Fairfax* [1956] P. 115 (C.A.) this is presumably correct. Domicil of the petitioner has been held to be sufficient in *White* v. *White* (*supra*), but this was disapproved (*obiter*) by the Court of Appeal in *De Reneville* v. *De Reneville* [1948] P. 100, 117, per Lord Greene M.R. A number of old cases assumed jurisdiction on the ground that the marriage was celebrated in England: e.g., *Simonin* v. *Mallac*, (1860), 2 Sw. and Tr. 67; *Sottomayor* v. *de Barros* (1), (1877), 3 P.D. 1 (C.A.). See also Matrimonial Causes Act, 1950 (U.K.), s. 18.

[33] Report, para. 882

[34] J. H. C. Morris, Cases on Private International Law, 2nd ed., 141-142.

jurisdiction,[35] which are of interest, since there has been a tendency for our Courts to apply their own law in all nullity suits coming before them, without the jurisdictional justification which existed with respect to divorce.[36] The Commission draws a distinction between formal or "contractual" defects, governed by the law of the place where the marriage was celebrated,[37] and "personal" defects, which are to be referred to the personal law of the parties at the time of the marriage (so that the marriage shall be declared null and void if it is invalid by the personal law of one or other or both of the parties). The former rule should give little difficulty, but the latter, while an improvement on the complex simplicities of s. 10B of the Divorce and Matrimonial Causes Act 1928, is open to the same objections as those raised with respect to divorce, since the rules for determining the personal law of the parties are also applicable here. The difficulties are, if anything, even more formidable, since in many cases not one but two personal laws will have to be ascertained. However, the personal laws of the parties are only necessarily controlling in the case of a marriage alleged to be void where the marriage was celebrated in England or Scotland, since under the proviso to s. 4 (3), where the marriage was celebrated elsewhere, it is not to be declared void if it is valid according to the law of the country in which the parties intended at the time of the marriage to make their matrimonial home, and such intention has in fact been carried out.[38] This is a departure from the orthodox rule,[39] and it seems necessarily to involve the proposition that parties can confer capacity to marry on themselves by choosing an appropriate matrimonial home. It may be, however, that this is more a theoretical than a practical objection, and there is certainly something to be said for the view that the country with the greatest interest in the validity of a marriage is that in which the parties to it have set up their home.

But if this view is adopted, it is regrettable that the Commission should have found it necessary to confine it to marriages celebrated outside England and Scotland. Marriages celebrated in Great Britain will have to conform to stricter requirements in order to be upheld than those celebrated elsewhere, which implies an exclusive treatment of English marriages inappropriate in the conflict of laws.[40]

The main objection to the proviso, however, must be on the grounds of certainty. It has already been pointed out that the main advantage of s. 4 is that it provides certain rules for questions in which, on the present law, certainty is conspicuously lacking. This advantage will be largely nullified if the rules can only be applied after a prolonged investigation into the question of the situs of the matrimonial home and, especially, the intention of the parties at the time of the marriage. As to the former, presumably some sort of evidence as to habitual residence will be required, or perhaps there will be a presumption that the matrimonial home is the country of the husband's domicil.[41] But it is submitted that the latter question, which is likely to be the more important of the two, is practically insoluble. Concrete evidence of the parties' intentions at the time of marriage must be given, if the rule is not to become merely that the marriage is to be upheld if it is valid by the law of the country where the parties have their home at the time of the proceedings; but in the majority of cases likely to arise it is difficult to see what evidence could be produced.

It might perhaps be desirable in any future legislation to incorporate a statutory choice of law rule for determining the law by which the marriage is regarded as void or voidable. This has always been a major difficulty in nullity suits, and is not, it is submitted, avoided by the suggestion to be drawn from the wording of s. 4 (3) that the section applies only in cases of marriages "alleged" to be void, as this does not prevent the respondent raising the issue that according to the proper law the marriage is not void but voidable.

Section 5 of the Draft Code deals with voidable marriages, and the Court is given jurisdiction if the petitioner is domiciled in England at the commencement of the proceedings or the petitioner is in England at the commencement of the proceedings, and the place where the parties to the marriage last resided together was England, or where the parties to the marriage are both resident in England at the commencement of the proceedings. A proviso to the section states that the Court shall not grant a decree of nullity unless the personal law or laws of one or other or both of the parties at the time of the marriage recognized as sufficient ground for nullity of marriage or divorce a ground substantially similar to that on which annulment is sought in England.

It is not necessary to examine these recommendations in any great detail, because the Commission considered that, in its effect on the personal status of the spouses, the annulment of a voidable marriage has the same effect as divorce, and therefore assimilated the jurisdictional requirements under this heading to those laid down for divorce in s. 1.[42] It follows that, in general, the comments already made on s. 1 of the Draft Code apply also to s. 5. There are, however, a few differences which are worthy of mention.

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[35] The relevant portions of s. 4 read:

(2) If the marriage is alleged to be void on the ground of lack of formalities, that issue shall be determined in accordance with the law of the country in which the marriage ceremony took place.

(3) If the marriage is alleged to be void on a ground other than that of lack of formalities, that issue shall be determined in accordance with the personal law or laws of the parties at the time of the marriage (so that the marriage shall be declared null and void if it is invalid by the personal law of one or other or both of the parties); Provided that a marriage which was celebrated elsewhere than in England or Scotland shall not be declared void if it is valid according to the law of the country in which the parties intended at the time of the marriage to make their matrimonial home and such intention has in fact been carried out.

[36] *Supra*, p. 5.

[37] Draft Code, s. 4 (2).

[38] It is interesting to note that Dr. G. C. Cheshire was co-opted on to the sub-committee of the Royal Commission which considered problems in the conflict of laws.

[39] The only judicial recognition of the "intended matrimonial home" doctrine is contained in *De Reneville* v. *De Reneville* [1948] P. 100 (C.A.) per Lord Greene, M.R., at 114, and Bucknill, L.J., at 122; *Kenward* v. *Kenward* [1951] P. 124, 144, per Denning, L.J.; and certain inconclusive dicta in *Brook* v. *Brook* (1861), 9 H.L.C. 193, 207, per Lord Campbell.

[40] Compare *Sottomayor* v. *de Barros* (2), (1879), L.R. 5 P.D. 94, and *Doe d. Birtwhistle* v. *Vardill*, (1826), 5 B. and C. 438. The parties to such a marriage will perhaps be spoken of as "porphyromariti . . . married within the narrowest pale of English matrimony."

[41] See Cheshire, Private International Law, 3rd ed., p. 277: "The capacity of parties to a marriage is governed by the law of the intended matrimonial home, which shall *prima facie* be deemed to be the *lex domicilii* of the husband at the time of the marriage." 4th ed., p. 297: same rule.

[42] Report, para. 892.

As far as jurisdiction is concerned, it will be seen that s. 5 is less revolutionary in the law of nullity than is s. 1 in the law of divorce, since, if *Ramsay-Fairfax* v. *Ramsay-Fairfax* [43] is to be regarded as the last word of the common law on the subject, the residence of both parties is already a basis of jurisdiction for the annulment of a voidable marriage. Moreover, the Commission does not recommend the assumption of jurisdiction in nullity on the basis of British citizenship, as is recommended for divorce in s. 2, because most, if not all, countries are prepared to assume nullity jurisdiction, and the possibilities of hardship for British citizens domiciled abroad, which the Commission found to exist in the law of divorce, do not arise here. Insofar as the law of the domicil might differ from English law, the Commission was of the opinion that " an Englishman or Scotsman must be prepared to have his rights governed by the law of the country in which he has chosen to become domiciled." [44] With this we respectfully agree, and it has already been submitted that the same argument can be made with equal force on the question of divorce.

The annulment of voidable marriages is further assimilated to divorce in that under the proviso to s. 5 English law is to be applied to all proceedings in English Courts, provided that the personal law or laws of the parties at the time of the marriage recognized as sufficient ground for nullity of marriage or divorce a ground substantially similar to that on which annulment is sought in England. The relevant foreign law is, of course, foreign law at the time of the marriage, and not, as in divorce, foreign law at the time of the commencement of proceedings. It should be noted, firstly, that the Court is not required to consider under s. 5 whether the personal law or laws of the parties " would, in the circumstances of the case, permit the petitioner to obtain a [decree] on some other ground," [45] which considerably simplifies the problem of proof of foreign law; and, secondly, that there is no exception in the case of marriages not celebrated in England in which the law of the intended matrimonial home is to be applied. The reason given for this is that, while the defects which may make a marriage void are primarily of concern to the community, those which render a marriage voidable are primarily in the interests of the individual.[46] What is even more important, it is submitted, is that almost insuperable difficulties of proof are thus avoided.

This section appears to raise comparatively few difficulties, especially in view of the fact that the Commission has recommended elsewhere [47] that wilful refusal to consummate a marriage be made a ground for divorce. The equivalent provisions of the Divorce and Matrimonial Causes Act 1928 [48] raise, however, somewhat greater difficulties.

It should be mentioned that the provisions of the present s. 10B of the Divorce and Matrimonial Causes Act 1928 are unsatisfactory only in so far as they purport to affect conflict of laws situations. Where the issue is entirely domestic, it can be said with assurance that codification was desirable to bring nullity suits into line with the rest of the Act. But it is submitted, for reasons already stated elsewhere,[49] that whatever else any provisions dealing with jurisdictional bases in nullity and annulment suits contain, no attempt should be made to set out the circumstances in which a foreign marriage should be void ab initio, or on which a foreign marriage should be voidable. This is a matter best left to the personal laws of the parties to the marriage, and it is submitted that there is no reason for searching for another solution to the problems raised, when a feasible and workable solution is provided by the common law.[50]

The final recommendation of the Commission on jurisdictional issues concerns the position of the wife as petitioner. Section 6 (1) of the Draft Code provides that for the purposes of establishing jurisdiction under ss. 1, 3, 4 and 5, a wife who is living separate and apart from her husband is entitled to claim a separate English domicil notwithstanding that her husband is not domiciled in England at the commencement of the proceedings, provided that in the circumstances, had she been a single woman, the Court would regard her as having an English domicil. Subsection (2) of s. 6 provides that where a wife who is claiming a separate English domicil was domiciled in England immediately before her marriage or immediately before her separation from her husband, and is resident in England at the commencement of the proceedings, she is deemed to have acquired an English domicil unless there is evidence to the contrary.

It will be noted that there is no substantial difference between these provisions and the provisions of s. 12 of the Divorce and Matrimonial Causes Act 1928, apart from the important exception that the three year residence requirement in s. 12 (4) does not appear in the Commission's recommendations. This seems to have escaped the Commission's attention,[51] although the provision is substantially a re-enactment of s. 12 (3) of the 1928 Act,[52] and in as far as it provides the New Zealand Courts with some measure of protection against invasion by migratory wife-petitioners, its retention in its present form appears desirable.

Consideration of the acquisition of a separate domicil by a wife for the purposes of divorce jurisdiction leads to the difficult question of recognition of foreign decrees of divorce and nullity. When such decrees are granted by the Courts of the husband's domicil, no great difficulty arises, but when they are granted by the Courts of the wife's separate domicil, or acquired domicil, for the purposes of divorce jurisdiction, the problems which must now be considered are encountered.

At common law, a foreign divorce could not be recognized by a New Zealand Court as having effectively dissolved the marriage in question unless the marriage had been dissolved by the Courts of the husband's domicil,[53] or, if dissolved by the Courts of some other country, unless the Courts of the husband's domicil would recognize the marriage as having been effectively dissolved,[54] or (*semble*) if granted by the Courts of some other country on the wife's petition on the basis of her residence or " deemed " domicil in that country, her husband being at the relevant time domiciled in New

[43] [1956] P. 115 (C.A.)
[44] Report, para. 893.
[45] Draft Code, s. 1.
[46] Report, para. 897.
[47] *Ibid.*, para. 283.
[48] s. 10*b* (3).
[49] In (1955) 31 N.Z.L.J. 343.
[50] And consult Braybrooke, (1955) *4 International and Comparative Law Quarterly*, 209 et seq.
[51] Report, para. 823.
[52] Inserted by s. 3 of the Divorce and Matrimonial Causes Amendment Act 1930.
[53] *Le Mesurier* v. *Le Mesurier* [1895] A.C. 517.
[54] *Armitage* v. *The Attorney-General* [1906] P. 135.

Zealand, unless jurisdiction was assumed by the Courts of that country on substantially the same basis as that assumed by the New Zealand Courts.[55] The only difficulty lay in the fact that a New Zealand husband, by acquiring a domicil in a jurisdiction with much less rigid requirements of domicil, and much less stringent grounds for divorce, was quite capable of obtaining a decree in such a jurisdiction which the New Zealand Courts would be obliged to recognize as valid. On the other hand his wife, while her husband was domiciled in New Zealand, would not have the advantage of being able to obtain an easy divorce at the cost of transport to Nevada, six weeks' " domicil " there, and attorney's fees. But if at the time of her petition her husband was domiciled in a country where a Nevada decree based on the wife's domicil in Nevada would be recognized, then it is clear that in New Zealand the marriage would have to be regarded as effectively dissolved.

It must have been thought that this gap in the law resulted in undue hardship to wives who might be desirous of obtaining divorces with as short as possible delay on grounds such as extreme mental cruelty or incompatibility of temperament, because by the enactment of s. 12A of the Divorce and Matrimonial Causes Act 1928[56] this gap was effectively closed, as it also is by s. 7 of the Draft Code.[57]

It should at this stage be stressed that however desirable it may be to oblige New Zealand Courts to recognize divorce decrees of, e.g., Nevada, " so casually granted . . . to sojourners, tourists, and birds of passage,"[58] and the " bargain counter divorce mills which have been operating for local profit in a few states,"[59] the most serious difficulties can arise in certain cases. For example, W leaves her husband, H, who is domiciled in the State of New York, and obtains a divorce in Nevada. Both W and H come to New Zealand, presumably separately, and each remarried. In some way the question whether the Nevada decree is recognizable comes before the New Zealand Courts. Under s. 12A, as far as W at least is concerned, the Nevada decree must seemingly be recognized, as it was granted on the basis of W's deemed domicil in Nevada, and would certainly be recognized as valid by the Nevada Courts. But the question would also have to be considered, as far as H's position is concerned, whether the Courts of the State of New York would be obliged under the United States Constitution to give full faith and credit to the Nevada decree, and, if so, what effect this would have on the wife's position. It is regarded as an indispensable requirement for a decree to be entitled to full faith and credit in other States that at least one of the parties be a bona fide domiciliary of the State in which the decree was granted.[60] It is, however, clear that the divorce forum's finding of domicil is unassailable in any other State when the defendant participated in the divorce proceedings,[61] which, in the case of migratory or tourist divorces, is not often : as an eminent American authority on family law has pointed out.[62] " In cases of migratory divorce, it has thus been necessary for the plaintiff to swear that he is a resident of the forum state, i.e., a person who has established himself in the state with the intention to remain so established indefinitely. He, or more frequently she, who so swears with the return ticket to the home state in the wallet or handbag, commits perjury." A finding by the Court of one State in divorce proceedings that the petitioner is domiciled in that State is not necessarily conclusive upon the Courts of other States in collateral proceedings,[63] however, and from all this it follows that, in the hypothetical case we are considering, it is doubtful whether W's *ex parte* decree is entitled to full faith and credit, or recognition, in the Courts of the State in which her husband was domiciled. Presumably, were it found to be the case that New York would not recognize the Nevada decree, and it should be said that in a New Zealand Court the most acute and complex evidentiary problems would arise in establishing this to be so, the Court might well be obliged to recognize the decree *qua* the wife, but not *qua* the husband. The problems involved in recognizing divorces based on the wife's separate domicil, unless under principles similar to those stated in *Travers* v. *Holley*,[64] as well as those based on the husband's domicil, are not merely doubled : they are increased in geometrical progression.

It is submitted that there are none of these difficulties to be encountered in the common law rules. No one can object to a wife, whose husband is domiciled elsewhere, petitioning a New Zealand Court for a divorce on the basis that she has resided in New Zealand for three years and intends to reside in New Zealand permanently : while she remains, in the New Zealand view, domiciled in New Zealand, there is no harm done, and if she obtains her divorce purely on a migratory basis the fact that her divorce may not be recognized in another State need not overmuch concern the New Zealand Legislature. On the other hand, in cases where a wife is, by the law of her husband's domicil, capable of acquiring a separate domicil, as is the case in some of the States of the United States, a divorce obtained by her on the basis of such separate domicil should, it is submitted, be recognized by the New Zealand Courts, if it is recognized as valid by the Courts of the husband's domicil. This view is, indeed, in accord with the principle in *Armitage* v. *The Attorney-General*,[65] and it is suggested

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[55] *Travers* v. *Holley* [1953] P. 246 ; but see *Dunne* v. *Saban* [1955] P. 178.

[56] By s. 10 of the Divorce and Matrimonia Clauses Amendment Act 1953. This section has been fully discussed elsewhere : see (1955) 31 N.Z.L.J. 343, 344-346.

[57] The relevant part of the section reads :

> The Court shall recognize as valid a divorce, obtained by judicial process or otherwise,
>
> (a) which has been granted in accordance with the law of the country in which one spouse was, or both spouses were, domiciled at the time of the proceedings, or which would be given recognition by the law of that country ; or
>
> (b) which has been granted in accordance with the law of the country of which one spouse was a national, or both spouses were nationals, at the time of the proceedings, or which would be given recognition by the law of that country ; or
>
> (c) which has been granted in circumstances substantially similar to those in which the Court in England exercises divorce jurisdiction in respect of persons who are not domiciled in England . . . .

[58] Hitz, A. J., delivering the opinion of the U.S. Court of Appeals for the District of Columbia, in *Holt* v. *Holt*, 77 F. (2d) 538, 541.

[59] Joseph Dainow, *Policy Consideration in Divorce Jurisdiction and Recognition, 10 Louisiana L. Rev.* 54 (1949).

[60] *Williams* v. *North Carolina* II, 325 U.S. 226 (1945) ; *Rice* v. *Rice*, 336 U.S. 674 (1949).

[61] *Sherrer* v. *Sherrer*, 334 U.S. 343 (1948) ; *Coe* v. *Coe*, 334 U.S. 378 (1948) ; *Johnson* v. *Muelberger*, 340 U.S. 581 (1951).

[62] Professor Max Rheinstein, *22 University of Chicago L. Rev.* 775, 776.

[63] *Williams* v. *North Carolina* II, 325 U.S. 226 (1945).

[64] [1953] P. 246.

[65] [1906] P. 135.

that no sufficient reason exists, either on the ground of uniformity, reciprocity, or convenience, for extending the rule already available at common law.

In short, it is apparent that the provisions of ss. 7 and 8 of the Draft Code[66] and s. 12A of the Divorce and Matrimonial Causes Act 1928 go too far, and there is no reasonable basis for believing that any obvious injustices or cases of hardship are likely to arise under the common law rules. It should, however, be mentioned that a valuable recommendation by the Commission is that recognition be granted to divorces or decrees of nullity granted by the Courts of countries designated by Order in Council, and this is a recommendation which, if adopted, would save a great deal of difficulty.

It must be apparent from what has been said in this paper, that although a number of valuable recommendations are contained in the Royal Commission's Draft Code of Jurisdiction and Recognition, the Code as a whole is not, we submit, suitable for adoption in New Zealand. There are two reasons why this should be so. The first is that the New Zealand statutory law of divorce and matrimonial causes has developed over the years to meet the practical difficulties as they have arisen. The New Zealand legislation in this field has always been progressive (although, as we have suggested in relation to ss. 10B and 12A of the 1928 Act, it has progressed too far and in the wrong direction), and has already covered most of the points raised by the Royal Commission, although sometimes in a different manner and with a different result. The Draft Code, on the other hand, is more a manifestation of progressive academicism than a Code of practical measures to overcome practical problems. Indeed, many of the measures suggested appear to add practical difficulties to the present position without any real gain in clarity, uniformity, or practical benefit. The second reason is that while there is a good deal of emphasis both in the Report and in the Draft Code on uniformity and reciprocity with other countries, there is no indication of how the measures advocated are going to be received by other countries, or that the new bases of jurisdiction suggested are likely to be recognized by other Courts in other countries. Without some positive assurance that this is so, it is perhaps not an overstatement to say that the suggestion that the divorce Courts be thrown open to meet the new types of situation envisaged by the Commission shows an academic zeal for reform which has no relation to practical needs.

[66] Section 8 of the Draft Code (providing for recognition of foreign annulments of marriage) is in terms substantially similar to those of s. 7.

PRACTICE SUGGESTION: STATEMENTS OF DEFENCE.

By K. L. Sandford, LL.B.

Upon the issue of a Supreme Court writ the defendant is allowed a period within which to file his statement of defence, this period varying within the distance of his place of residence from the Court office. The number of days now prescribed have remained unaltered since 1882.

It is submitted that the realities of present-day common law practice demand that these periods be amended. Lawyers having frequent contact with common law actions will recognise these realities:

(a) That a high proportion of writs issued at the present time are for personal injuries arising from alleged negligence.

(b) The majority of such claims are insured against by defendants, often compulsorily.

(c) Insurance companies having the conduct of such cases often channel their work into the hands of comparatively few legal firms, the firms chosen naturally being those having experience of the type of case. The defence work for such claims therefore tends to fall into the hands of a comparatively small number of lawyers. Whether this is a good or bad thing is beside the point—it is a reality of present-day practice.

(d) All Court lawyers recognise "jury risk" in personal injury claims, which means, of course, that it is considered an injured plaintiff is more likely to receive a verdict for damages from a jury than from a Judge alone.

(e) Of all the personal injuries people suffer, only a small number result in one party holding the other liable for negligence, by some letter of demand or similar notice. In respect of such demands, a smaller number still result in writs being issued. Of such writs, only a small proportion come to trial. It is, therefore, quite impracticable and uneconomic for lawyers handling this type of claim to go to all the lengths to prepare for a defended Court action on receipt merely of a notice of claim. Neither insurance companies nor lawyers have the time to do so. Some enquiries are, of course, made, sufficient to enable an opinion on liability to be formed; but of necessity and from a practical point of view *detailed* investigation and preparation of such cases is not undertaken until either a writ has been issued or is imminent. Indeed, because so few writs result in actual trials, much final investigation is often left until writs are set down for hearing and a fixture obtained.

Under the present rules a writ against a local defendant can be issued and served only ten days before a session commences. This may be the first indication a defendant has that an injured person is seriously proceeding with a claim. Such a period of ten days is hopelessly inadequate for a lawyer who is likely to be then busily preparing other cases of a similar nature, who must then begin a detailed investigation of the accident, involving perhaps travelling many miles, locating and interviewing witnesses, and particularly arranging for medical information about the plaintiff. Customarily the plaintiff must first be asked to sign an authority to enable the defendant to obtain a report from a hospital. Days pass before the plaintiff's signature can be obtained. Days, often weeks, pass before that report can be obtained from the public hospital. In many cases it is essential to obtain that hospital

report before requiring the plaintiff to present himself for medical examination by a private doctor or specialist on behalf of the defendant. Furthermore, appointments with such private doctors cannot, in present times, be arranged at short notice. The result is frequently that it is physically impossible adequately to prepare for the hearing of a writ, which has only been issued ten days before the commencement of the sessions. In the largest cities there may be several weeks available for hearing of jury actions and, accordingly, time for preparation. In the smaller Supreme Court centres perhaps only the first two weeks of the session are available for jury matters, including criminal cases. The pressure is then so much greater.

The risk of the present situation is that a writ issued shortly before the sessions can act as an unfair lever to force from the defendant a settlement, without allowing adequate time for investigation and medical preparation, a settlement which the defence lawyer must always contemplate in view of existing jury risk.

Proceedings against the Crown must now be issued thirty-five days before a session date, and a statement of defence must be filed within twenty-eight days of service. These rules are operating successfully and defending counsel are able to comply with them. Under the other rules, it would be hard to find many instances of a statement of defence being filed within the seven days laid down by the rules. It is out of date, completely outmoded by the realities of present-day practice. There appears, furthermore, small justification for the period being extended by reason of distance from the Court office.

If the period for all Supreme Court writs were fixed at twenty-eight days for filing a statement of defence, and the next session to be thirty-five days distant, there would be the opportunity of more settlements in advance of sessions, and accordingly less cluttering up of fixture lists with writs issued just before the session. The unreasonable pressure put on defending lawyers would be removed, and claims, therefore, more justly disposed of. There could be provision for a short service of writs in special circumstances, as already provided for.

THE NEW COMPANIES ACT 1955.

Dissolution of a Company.

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

Statements by a Liquidator to the Registrar of Companies.

Rule 169 of the Winding-Up Rules provides as follows:

> The winding up of a company shall, for the purposes of section 329 of the Act, be deemed to be concluded—
>
> (a) In the case of a company wound up by order of the Court, at the date on which the order dissolving the company has been reported by the liquidator to the Registrar of Companies, or at the date of the order of the Court releasing the liquidator pursuant to section 246 of the Act:
>
> (b) In the case of a company wound up voluntarily or under the supervision of the Court, at the date of the dissolution of the company, unless at that date any funds or assets of the company remain unclaimed or undistributed in the hands or under the control of the liquidator or any person who has acted as liquidator, in which case the winding up shall not be deemed to be concluded until those funds or assets have either been distributed or paid into the Public Account pursuant to the Unclaimed Moneys Act 1908.

The Striking of Defunct Companies off the Register.

In practice, many companies are dissolved by the District Registrars of Companies, although all the formalities prescribed by the statute and the Winding-Up Rules have not been carried out, and it is quite common for a company which never has been in liquidation to be dissolved by a District Registrar of Companies. A dissolution by a District Registrar has the merit of saving liquidation expenses, and is perhaps the most respectable form of demise for a company. These administrative powers are contained in s. 336 of the Companies Act 1955. These important and very useful powers of the Registrars arise in two classes of cases:

(1) Where the Registrar has reasonable cause to believe that a company is not carrying on business.

(2) In any case where a company is being wound up, and the Registrar has reasonable cause to believe either that no liquidator is acting, or that the affairs of the company are fully wound up, and the returns required to be made by the liquidator have not been made for a period of six consecutive months.

Before a District Registrar can strike a company off the register under the authority of these provisions, he is bound by the statute to send certain notices to the company and liquidator and registered charges and publish certain notices in the *New Zealand Gazette*.

It goes without saying, of course, that the procedure prescribed by the Act should be strictly followed by the District Registrar.

Powers of Court to declare Dissolution Void.

The Supreme Court has power under two statutory provisions to declare a dissolution void.

The first provision is s. 335 (1) which provides that, where a company has been dissolved the Court may, at any time within two years of the date of the dissolution, on an application being made for the purpose by the liquidator of the company or by any other person who appears to the Court to be interested, make an order, upon such terms as the Court thinks fit, declaring the dissolution to have been void; and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved. Note well the very wide words, " or by any other person who appears to the Court *to be interested.*" For example, the Commissioner of Inland Revenue is an *interested person* within the meaning of the section: *Re M. Belmont & Co. Ltd.* [1951] 2 All E.R. 898. I am sure that that will be *interesting* news to most practitioners.

The second provision is s. 336 (7), which refers to the striking off of defunct companies by the Registrar

as previously outlined in this article. Section 336 (7) reads as follows :

> (7) If a company or any member or creditor thereof feels aggrieved by the company having been struck off the register, the Court, on an application made by the company or member or creditor before the expiration of twenty years from the publication in the *Gazette* of the notice aforesaid, may, if satisfied that the company was at the time of the striking off carrying on business or in operation, or otherwise that it is just that the company be restored to the register, order the name of the company to be restored to the register, and upon a sealed copy of the order being delivered to the Registrar for registration the company shall be deemed to have continued in existence as if its name had not been struck off ; and the Court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off.

There have been several recent cases in the United Kingdom on these two provisions ; and, in discussing them I shall for convenience refer to the corresponding provisions of our Companies Act 1955.

The Relation of the Two Provisions.—In *Re M. Belmont & Co. Ltd.*, the Inland Revenue Commissioners had to apply under s. 335 and not under s. 336 (7), because it was doubtful whether they were creditors of the company within the meaning of the later provision. Until July, 1948, the company carried on the business of furriers and manufacturers of ladies' outer wear. Some time before August 19, 1949, the Registrar of Companies, without the knowledge of the Inland Revenue Commissioners, struck the name of the company off the register. At the date of the dissolution, the company was assessed for various amounts of tax, including excess profits tax, income tax, and profits tax. These amounts were under appeal. The Commissioners could not proceed with those appeals unless the dissolution of the company were declared void.

Wynn-Parry J., relying greatly on para. (*b*) of the proviso to s. 336 (6), which provides that nothing in that subsection should affect the power of the Court to wind up a company the name of which has been struck off the register, held that the jurisdiction of the Court under s. 335 (1) to declare the dissolution of a company void was not affected by the power of the Court under s. 336 (7) to restore to the register the name of a company which has been struck off. Therefore the Inland Revenue Commissioners being *interested* persons obtained the order they sought under s. 335 (1) ; and I suppose that after that the taxation appeal was duly pursued.

This case also decides two important points of procedure. The presence of the Attorney-General by counsel at the hearing of an application under s. 335 (1) is not necessary in a simple case not requiring any argument by him, and his consent may be shown by a letter exhibited to the applicant's evidence. On the other hand, in cases under s. 336 (7) the Registrar of Companies should be represented in order that he may make clear to the Court what is the default for which the company was struck off, and what undertakings should be required by the Court as a condition of making an order under that subsection.

A Point of Procedure.—Another important point of procedure, arising out of a difference in wording of the relevant sections, was laid down by Wynn-Parry J. in *Re Cambridge Coffee Room Association Ltd.*, [1952] 1 All E.R. 112*n* ; [1951] 2 T.L.R. 1155 : that where a company has been struck off the register under s. 336 (6), and it is subsequently desired that the company be wound up under the Companies Act 1955, the application to the Court should ask :

(1) that the company's name be restored to the register ;

(2) that the company be wound up ; and

(3) that such other order be made as should be just and equitable.

A slightly different procedure appears to have been adopted in Scotland in the case *In re Beith Unionist Association* [1950] S.C. (Ct. Sess.) 1. The creditors of a company which was struck off the register as defunct in 1929 brought a petition for restoration of the company to the register. They averred that assets of the company existed which would be sufficient to meet their own and other debts due by the company. The Court granted the prayer of the petitioner, subject to an undertaking to proceed with the liquidation of the company.

Difference in Effect between Orders made.—In Re Lewis & Smart Ltd. [1954] 2 All E.R. 19, a misfeasance summons was taken out against certain alleged promoters of a company, which was wound up in a creditors' voluntary liquidation before process was served on the respondents. At a later date, an order was made under s. 335 (1) declaring the dissolution void. The summons then came on for hearing ; but it was held that the order declaring the dissolution to have been void did not have the effect of reviving the summons which had abated on the dissolution of the company. Observations of Lord Blanesburgh in *Morris* v. *Harris* [1927] A.C.2 52 were applied. These observations are worthy of note, coming from such a high source. They proceed on the difference in wording between s. 335 (1) and s. 336 (7). In s. 335 (1) the crucial words are,

> the Court . . . may make an order . . . declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved.

In s. 336 (7) the crucial words are :

> the Court . . . may . . . order the name of the company to be restored to the register, and upon a sealed copy of the order being delivred to the Registrar for registration the company shall be deemed to have continued in existence as if its name had not been struck off ; and the Court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off.

The difference in wording between the two subsections was further considered at considerable length by the English Court of Appeal in *Tymans Ltd.* v. *Craven*, [1952] 1 All E.R. 613 ; [1952] 1 T.L.R. 601. The gist of the decision in the House of Lords case *Morris* v. *Harris*, [1927] A.C. 252, is that s. 335 (1) does not validate proceedings during the interval between dissolution and avoidance under that subsection. On the other hand, the words of s. 336 (7) are clearly designed to produce an " as-you-were " position.

In the course of his judgment, Hodgson L.J. said :

> I think that the latter part of the subsection (*i.e.* s. 336 (7)) is complementary, and intended to provide for cases where provision is necessary to clarify an obscure position or to give back to the company an opportunity which it might otherwise have lost. An example of this would be a case where a company had lost an opportunity in obtaining a concession or renewing a lease during the interval between a dissolution and an order under the subsection. A provision in the order could deal with such a case. That the last four lines of the subsection do not cut down the retroactive effect of that which precedes them is, to my mind, indicated by the introductory words ' and the Court may by the order.' The directions and provisions to be made by the order would naturally

be supposed to make good what had previously been stated—namely, that the company should be deemed to have continued in existence as if the same had not been struck off. Finally there is in s. 336 (7) no language comparable with the words 'thereupon such proceedings may be taken,' etc. in s. 335.

The Restoration of a Company to the register when Statute-barred Debts intervene.—Another interesting case, dealing with the restoration of a company to the register pursuant to s. 336 (7), is *Re Donald Kenyon Ltd.* [1956] 1 W.L.R. 1397; [1956] 3 All E.R. 596. A petition for the restoration to the register of a company, which had not traded since 1940 and had been struck off pursuant to s. 336 and for its subsequent winding up contained a statement: "It is apprehended that all the debts of the company at the time of its dissolution have since become statute-barred." There was an interval of seven years between striking the company off the register and the presentation of the petition for (a) restoration to the register, and (b) the winding up of the company. In granting the petition the Court ordered that there should be inserted in the order for restoration to the register a proviso that, in the case of creditors who were not statute-barred at the date of the dissolution, the period between that date and the restoration of the company to the register should not be counted for the purposes of any Statute of Limitations. Roxburgh J. thought that, in the circumstances, it was necessary to put that proviso in the order so as to achieve the "as-you-were" position laid down by the majority of the Court of Appeal in *Tyman's Ltd.* v. *Craven*. Roxburgh J., in the course of his judgment, at p. 599, said:

> Common justice requires that some such provision as that which I have suggested should be inserted. It has been said that it has never been done before, but so far as I know, the point has never been considered or argued before. There is no record of it in the books. It is true to say that I am giving perhaps some slight benefit to the creditors as against the company, but it will be observed that s. 336 (7) says "as nearly as may be," contemplating that the precise equation may be unattainable. In my judgment, I am much nearer precise equation if I put some stipulation in the order than I should be if I did not.

PAGES FROM THE PAST.

I.—The Examinations for Admission in the Seventies.

When that kindly, guileless, and passionately Irish ornament of the Otago District Court, Judge Wilson Gray, in the seventies, made confusion worse confounded in the interminable wrangles within the legal profession over the admission of candidates for the Bar with the remark that he would admit every respectable man who could pass a decent examination, he was being less reckless and prodigal of professional privilege than would appear on the surface.

The Chief Justices of the time had their ideas of what constituted "a decent examination", and it is probable that Judge Gray was perfectly aware of how effectively the Biblical principle of "many are called, but few are chosen" would operate. The periodical intimations that emanated twice a year from the office of the Chief Justice in Wellington on the subject of general knowledge alone were enough to damp the ardour and temper the ambitions of the most optimistic pupils and articled clerks of the established legal firms.

Under s. 5 (4) of the Law Practitioners Act 1861, the Chief Justice and his brothers on the Bench were arbiters in such matters, and personally conducted the proving and testing of the general knowledge equipment of candidates for professional status and recognition. Pupils of barristers and articled clerks of solicitors had to conform to rigid and formidable standards, which appear almost incredible in these days, if only because their proper attainment might well involve a lifetime of study that would leave little or no time for the enjoyment of the pleasures and profits of practice.

In addition to written and oral examinations in the "Theory and Practice of the Civil and Criminal Law of England and New Zealand", grouped under twelve headings which began with "Property" and concluded with "A Knowledge of the Leading Decisions in the Court of Appeal in New Zealand", the Regulations demanded a wide general knowledge that covered Latin, Greek, International Law, History, Ancient and Modern, Euclid, Algebra, and Arithmetic. The examinations were spread over four days in March and September, and there was a peculiar refinement o frustration in the requirement that no candidate might present himself for examination in law until he had survived his ordeal by general knowledge. Moreover, should he succeed in satisfying his inquisitors concerning his general knowledge in March, a candidate was compelled to wait until September to enter the lists in the matter of the law.

That a wide net was cast by the learned authors of the examination papers is seen from a perusal of some of those that were presented in the seventies. In Latin, barrister candidates had to be prepared to face questioning on set books, the selection in this particular instance including Cicero, de Officione, the whole of the Orations against Cataline, the First and Second Books of Livy and the first four books of the Aeneid (solicitors excepted).

Another essential was Greek, and here the choice covered the first two books of the Iliad, the Antigone of Sophocles, and the Second Book of Herodotus. It all sounds simple enough, except for the fact that candidates were also expected to exhibit a competent knowledge of Greek and Latin grammar, and to be able to answer such questions on Greek and Roman history, geography, art, antiquities, and literature as might arise out of the various works in which they were examined.

There was one concession in respect of Greek. French or German could be substituted for it, provided two months' notice was given to the Registrar of the Supreme Court. No particular works were specified, but a knowledge of French or German grammar and literature was demanded, as well as a proficiency in two-way translation at sight.

So much for languages. Followed a simple outline of necessary mathematics—the first four books of Euclid, Algebra to quadratic equations inclusive, and, in the case of clerks seeking admission as solicitors, there was the addition of arithmetic, including vulgar and decimal fractions.

(Concluded on p. 244.)

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Dr. Adams.—The average lawyer who received £30,000 in legacies from various clients over a period of ten years would count himself lucky to have avoided an action for undue influence. This, however, was not one of the problems that worried Dr. John Bodkin Adams who pleaded guilty at the Sussex Assizes on July 26 to fourteen charges relating to forgery of National Health prescription forms for drugs and goods, to false cremation certificates and a failure to keep a record of dangerous drugs, together with police obstruction and attempting to conceal morphia. The fines imposed totalled £2,400; but it appears somewhat surprising—at least to our concept of penalties—that of these fines £500 should have been imposed on each of three charges which concerned a false representation that, as far as he was aware, he had no pecuniary interest in the death of the elderly persons to whom the charges related. Expressing the view that Adams knew perfectly well that these three patients were leaving him money, Pilcher J., said that he was impressed to some extent by the fact that it appeared almost unheard of for doctors in the Eastbourne area ever to answer the "pecuniary interest" question in the cremation form in any fashion other than the way Dr Adams had answered it. "It may be, of course," he added, "that doctors in this part of the world are never aware with sufficient certainty that they are being left any amount." The Court was advised that he was a bachelor owning an eighteen-roomed house and employing a receptionist, a housekeeper, a permanent chauffeur, and a secretary. Apart from legacies, his investments brought him in £2,700 annually. Amongst his possessions at the time of his arrest were a Rolls-Royce, two new M.G. Magnettes, and a new Morris Minor. His hobbies, it was said, possibly with a degree of understatement, were photography and shooting.

Dr Palmer.—Before leaving the topic of poisoners, Scriblex notices publication of a recent study of the trial and personality of Dr. William Palmer, executed 101 years ago before a record crowd of 50,000 people. It is aptly called "They Hanged My Saintly Billy" and is written by Robert Graves (Cassell, 1957). The title consists of the words used by his mother whom the evidence showed he had persistently robbed and defrauded, although such crimes pale into insignificance alongside the poisoning of some ten adults which included his wife, his brother, and four of his infant children. The more convivial of our profession might well remember that it was the frequency with which Dr Palmer was stated to have slipped strychnine into other people's brandy that gave rise to the expression: "What's your poison?" At his trial for the murder of John Parsons Cook, twenty-nine doctors gave evidence. Seven maintained that strychnine left no trace in the body and their argument, believe it or not, was that the absence of any trace of this poison in Cook's body was consistent with a verdict of "guilty." Eleven doctors gave evidence directly to the contrary, while the remaining eleven refused to commit themselves one way or another. "Yet somehow," says Mr Graves, "the Lord Chief Justice expected the atmosphere of science, murky from the vapours of twenty-nine discursive intellects, to be irradiated and resolved into the pure sky of truth by the miraculous intervention of twelve respectable traders."

Calling All Practitioners.—In E. J. Haughey's interesting article in a recent issue on the Legal Work of the Crown it was pointed out that in the past it was usual to appoint as Crown Solicitors in the Crown Law Office lawyers who were engaged in private practice, but that in recent years most of the Crown Solicitors have been recruited from the legal staffs of other Departments. An indication that the Crown Law Office is again anxious to make appointments from practitioners in private practice was given by the advertisement which appeared in the same issue of the Journal, and which is repeated in this issue. The scope of the work and the commencing salary (up to £1,840 with superannuation benefits) appears attractive; and it will be interesting to see how many practitioners join the "agglomeration of legal experts of the Crown" as Callan J. once called them.

The Art of Advocacy.—On advocacy, Lord Morton of Henryton, Lord of Appeal in the highest tribunal under the Crown, who is at present the guest of the New Zealand Law Society, has some positive, and, perhaps, rueful ideas. Speaking to the Canadian Bar Association, he cited advocacy as a vitally important subject which could not be taught by books or lectures. He even confessed that his view on that point was to some extent coloured by his own first attempt as an advocate, which, he admits, was less than successful. While he was at Cambridge, his Club stood in All Saints' Passage, down which it was forbidden to cycle. That prohibition, however, was only indifferently observed, and on one occasion, Fergus Morton, being in a peculiarly undergraduate hurry, jumped on a bicycle and sped down to the main street, where he was unfortunate enough to meet a policeman. The man in blue took his name and college, and, in due course, he was summoned before the Justices of Cambridge. The charge was "driving a certain carriage, to wit a bicycle, down a thoroughfare, known as All Saints' Passage, to the danger and detriment of the citizens of Cambridge." His Lordship had just started on the study of law and, in his own words, he thought he "could perceive a flaw in that charge and decided to appear in defence." On his arrival at Court, he found he had been preceded by a large number of other undergraduate defendants appearing on cycling offences. The others all pleaded guilty and were fined some small sum, with costs. "But when I was asked if I had anything to say," said Lord Morton, "I replied: 'Yes. This charge is that I *drove* this "carriage, to wit a bicycle", and the word *drive* implies the idea of propulsion in some shape or form. I in no way propelled the bicycle for, as you know, there is a slope down from my Club to the main street, and I merely sat on the seat and allowed the force of gravity to carry me along.'" His Lordship said he was quite certain that the Justices, who were laymen, had no answer to that argument, but they disposed of it in a very speedy and commonsense fashion. "They listened to me," he said, "in complete silence, and then fined me twice as much as any of the other undergraduates."

PAGES FROM THE PAST.

(*Concluded from p. 242.*)

But this was only a lull before the storm. "The Law of Nations" might well appal the most studious. "The Elements of Public and International Law" was only a pipe-opener. The British Constitution and Broom's *Constitutional Law* could represent a grim study in themselves; but the unfortunate examinee must also have a working knowledge of the four volumes of Blackstone's *Commentaries on the Laws of England*, and the even more voluminous *Constitutional History* of Henry Hallam. And, just to make assurance doubly sure, the history papers called for familiarity with Hallam's *View of the State of Europe in the Middle Ages* (chapters 5, 6, and 8), to say nothing of the ten volumes of the diffuse and prosy *History of Europe* of Sir Archibald Alison. Then came the history of England, Rome, and Greece.

In these subjects, the wind was tempered a little to the shorn lamb as far as articled clerks and would-be solicitors were concerned. Ancient history was reduced to the potted variety by the use of students' versions of Gibbon, Rome and Greece, compiled by the London lexicographer, Sir William Smith, and, in the realm of modern history, Dr Smith again came to the rescue with a gallant precis of the six volumes of David Hume's graceful and spirited, though not always completely accurate, *History of England*. After such a bill of fare, the still new *Imperial and Colonial Institutions of the British Empire* of Sir Edward Creasy was comparatively easy going, and there was consolation for the budding solicitor in the fact that he was permitted to limit his reading of Hallam's *Middle Ages* to chapter 8.

The etymology of English, and literature and composition, were compulsory studies for both barristers and solicitors, with the addition in the case of articled clerks of tests in reading aloud and writing from dictation.

By any criterion, the general picture was a frightening one, and the victims of the system were surely entitled to inquire how they were to find time for such mundane and unimportant topics as international law and the conflict of laws, contracts and torts, equity, evidence, pleading and practice, statute law, and the first two books of Saunders's *Justinian*.

Perfection is a thing to be aimed at and not achieved in this imperfect world, and the presentation of themselves for examination in those days must have been, even for the most generously endowed candidates, an act of faith. But after all, it could have been worse. There were still Grote, Finlay, Macaulay, Motley, and Prescott among the historians who could be ignored, and Tacitus, Thucydides, Caesar, and Socrates who could have been added to the ranks of the ancients.

The *New Zealand Jurist* ((1877) 2 N.Z. Jur. (N.S.) 128) was singularly unimpressed by the decisions of the Judges assembled in Wellington with respect to the examination rules. "The new Rules", it observed, "deserve attention from the fact that nobody appears empowered to act as Examiner at these ceremonies; although the old Rules [which were due to be discarded on January 1, 1878] provided that the Judge of each district should act in that capacity, and that he might 'associate with himself for that purpose any one literate person'—by way of balance to the illiterate person. Among the subjects fixed for the examination of candidates for admission as barristers, we notice 'International law and the conflict of laws'. As we are not aware that any member of the Bench has the slightest pretention to call himself an international lawyer, we should like to know how this examination is to be conducted; especially as candidates will not be examined in one author only, but in the whole range of the science—from Grotius and Puffendorff down to Wheaton and Dana. Considering that the examination in question includes eight other branches of law, each of which is enough to absorb the labours of a lifetime, their Honours might surely have foregone the pleasure of setting an examination paper in international law. The Rules, it will be seen, maintain a distinction between barristers and solicitors and, these branches of the profession being amalgamated, what is the meaning of this distinction? A barrister, it appears, must be able to read Greek, while a solicitor may content himself with Latin. Why? The moment a solicitor has been admitted, he can qualify himself to act as a barrister by paying an extra guinea on his certificate. So that the candidate who has been reading hard for twelve months about the well-greaved Achaioi gets no corresponding advantage as compared with the candidate who confines his classical studies to Caesar".

Examinations are less fashionable than they used to be, particularly the type that encourage a donnish capacity to absorb information—in law the memorizing of cases and statutes. The general view today would appear to be that they are right enough in their way, provided they are not taken too seriously. It is said that any fool can ask questions, and it could be added that almost any fool can answer them if he is industrious enough and properly coached. Lord Goddard, L.C.J., is on record (*101 Solicitors' Journal* 442) as saying: "I would not submit myself to a Bar Council examination now, for I am sure I would be ploughed." He obviously has a sneaking regard for the dictum that culture is the residuum that remains after one has forgotten all one has learnt. The *Solicitors' Journal* takes the view that no one would consider prescribing competitive examination as the yardstick of judicial appointment or promotion, and derides the thought of having Oxford or Cambridge dons examining candidates for the Woolsack. "Actually," it declares, "a present member of the Court of Appeal . . . never passed any Bar examinations at all, having been excused them on the grounds of military service. *The omission is not apparent.*"—R. J.

A Privilege to be Enjoyed.—I think you will agree that, indeed, the world today needs abundant sources of intellectual and moral energies. We must acquire a better appreciation of the dazzling possibilities for future generations when the practice of the fundamental principle of good human relations "love thy neighbour as thyself," will be regarded not only as a command to be obeyed but rather as a privilege to be enjoyed and to be treasured beyond the importance attached to the possession and control of mere material things, however useful those things may be to satisfy the needs of the material side of our human nature. If we diligently seek the development of the nobler side of our human nature, may we not hope, like he who really seeks the kingdom of his Sovereign Lord and His justice, that all those material things shall be added unto us. (Rt. Hon. Louis S. St. Laurent, Q.C.).