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FAMILY PROTECTION: SOME RECENT CASES.

WE continue, from p. 248, *ante*, a consideration of some of the applications for further provisions under the Family Protection Act 1955.

SONS' APPLICATIONS.

In *In re Berry*. (Auckland, March 26, 1957, North J., aff. on app. Court of Appeal, June 10, 1957, Gresson, McGregor and Shorland JJ.), an adult son sought provision out of his father's estate. The testator died on December 4, 1955, at the age of 72 years. He had been married on three occasions. He was first married on March 20, 1905, and the plaintiff, who was born on October 20, 1907, is the only child of this marriage. The testator's first marriage was dissolved by a decree of divorce on November 22, 1919, founded on his wife's adultery, and the testator was given custody of the plaintiff. The testator remarried on November 13, 1920, and there was also one child of this marriage—namely, the defendant, Mrs. Zelma Wilson, who was born on October 29, 1921. The second wife died, and the testator again remarried on November 21, 1928. There were two children of this marriage—namely, the defendant, Mrs. Janet Anderton, who was born on November 4, 1930, and the defendant, Bruce Berry, who was born at some time in the year 1933. According to the plaintiff's evidence he lived for a time with the testator, but apparently was not very happy with his step-mother and, in the result, on one of his visits to his own mother, he determined to stay with her. The plaintiff claimed that, after his mother left New Zealand about 1922, he made inquiries from various people in an endeavour to find his father, but was unable to locate him.

In 1932 he married, and later he obtained employment in the Government Printing Office, where he had worked ever since, except for a period in the Army, and a short time in 1952 in Australia. On his father's death, the plaintiff made inquiries, and found that no provision had been made for him under his father's will.

The plaintiff was 49 years of age, earning £805 a year, and the last time he saw his father was about 35 years ago. His first marriage failed and he had since remarried and had one son, now aged eighteen years, by his first marriage. This son was also working in a Government Department, and was attending part-time courses at the University. The plaintiff's appointment did not carry any pension rights, and he had no assets other than his furniture. His second wife had worked in an endeavour to assist in the education of his son. The plaintiff's health was not very satisfactory. Apparently when he was in Australia he suffered a heart attack and, according to the medical evidence, now suffered a fairly great degree of hypertension and there was evidence of progressive heart trouble.

For a long time after the plaintiff left his father's home the testator's circumstances were very modest indeed. When the depression occurred some two years after his third marriage he was in serious financial difficulties. At this time the testator was encouraged by his father-in-law to go to the Waikato and endeavour to purchase an undeveloped farm which could be improved and provide a living for himself and family. A farm of 104 acres situated at Pokuru, near Te Awamutu, was purchased for the sum of £1,600, with a cash deposit of £200. This farm was virtually undeveloped and covered with blackberry and gorse. For several years the family suffered very considerable hardships for the land required to be brought into production, and the testator had little or no money to assist him in developing the property.

Eventually, with the passing of the years, the farm was improved so that at the time of the testator's death it was valued for death duty purposes at £8,900. This satisfactory result was entirely due to the efforts of the testator, his wife and two daughters, and his son Bruce. In June, 1955, the testator and his wife both suffered ill-health and it was decided that their son Bruce should sharemilk the farm on a 50:50 basis. The testator accordingly bought a section in Te Awamutu and there built a small home for himself and his wife.

Six months later he died and his will dated September 23, 1954, made the following provisions for his widow and family: (a) the testator's furniture and household and personal effects were given to his widow absolute; (b) his widow during her widowhood was to be permitted to reside in any farm dwelling occupied by him at the date of his death; (c) each of the testator's two daughters was given a pecuniary legacy of £500; (d) subject thereto, the testator directed his trustees to hold his residuary estate upon trust as to his farm lands, livestock and implements, to carry on his business of farming during his wife's widowhood and to pay the net profits as to 75 per cent. to his son Bruce and as to 25 per cent. to his wife for her own use and benefit, with the further provision that if his wife's proportion of the income in any year was less than £6 per week, then her share was to be increased to £6 per week and his son's share should abate accordingly; (e) after the death or remarriage of his wife the residue of the estate was bequeathed to his son Bruce absolutely.

The net estate amounted to £11,600 and consisted largely of the farm, which was subject to a mortgage of £3,000, the Te Awamutu house, valued at £3,350, and a debt of £1,885 owing by the son Bruce who, in the meantime, had purchased from his father the stock and plant on the farm. The two daughters were both married and each had three young children. Their husbands were employed on wages and neither of them had any substantial assets. Both lived in rented houses. The son Bruce was 23 years of age and had married since his father's death. He had spent the whole of his working life on the farm. He owned a motor car valued at £225 ; had £25 in the Post Office ; owned his own furniture and and had a small equity of some £72 in the stock and plant on the farm.

Mr Rose for the plaintiff made three submissions. First, he argued that the testator as the father of the plaintiff originally was under a moral duty to educate and bring up his son. He submitted that the testator had failed in that duty though he conceded that at the relevant time he was himself so impoverished that he could not then have done very much for his son had he retained custody. He next submitted that the present case came within the second class referred to by Salmond J. in *In re Allen, Allen* v. *Manchester* [1922] N.Z.L.R. 218, 221 ; [1921] G.L.R. 613, 614. Finally, he submitted that in any event the state of the plaintiff's health made it necessary for the testator as a just and wise father to make provision for his future maintenance.

The further facts sufficiently appear from the judgment.

Mr. Justice North said :

> I have carefully considered each of these submissions but find it impossible to accept them either severally or together as providing sufficient justification for the making of an order in favour of the plaintiff. As to the first point, it must be recognised that the plaintiff, although he was only a lad at the time, voluntarily left the home which the testator was willing to provide for him. Had the plaintiff remained with his father no doubt he would have been maintained and educated within the very narrow limits of his father's purse. But it seems to me that the common sense of the matter is that the plaintiff received the same benefits at the hands of his mother, so in result was no worse off. I do not think that it can fairly be said that the testator neglected his son simply because he did not take any steps to enforce (against the will of the plaintiff) his legal right to custody. The position may have been different if the testator had at the time been a man possessed of considerable assets for had that been the case then I can conceive that a father might owe a duty to his son to protect him from the results of his impulsive act in leaving home. But so far as I can ascertain both parents were in humble circumstances and even if the plaintiff had remained with his father all that he would have been likely to have received would have been a primary school education,at the conclusion of which he would have been placed in sutiable employment. These benefits he in fact received.
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> Next, I think the present case falls within the first class of case and not the second class mentioned by Salmond J. in *In re Allen, Allen* v. *Manchester* [1922] N.Z.L.R. 218, 221 ; [1921] G.L.R. 613, 614 for, although the estate is not a small one, it is on the other hand by no means a large estate. It seems to be manifest from the terms of the will that the testator appreciated that he was faced with a difficult task in making suitable provision for his widow and two daughters without placing an unfair burden on his younger son, who had made a very considerable contribution to the building up of the estate. In all the circumstances, I do not think that the testator could be expected to do more than to " distribute his available resources with justice between his dependents in proportion to their deserts and necessities." Even in this task, counsel are agreed that the testator, in fact had not sufficiently provided either for his widow or for his daughters. I do not think this failure was due to any lack of appreciation on the testator's part of the value of their services or of the duty he owed to his wife in particular, but I agree with counsel that he underestimated their needs and the extent of their respective claims on his bounty. So far as the widow was concerned, it must be remembered that the will was executed before the acquisition of the Te Awamutu home in which the testator and his wife resided at the date of his death. All counsel were agreed that the widow was entitled to continue to reside in and enjoy the Te Awamutu home during her widowhood, free from all outgoings, and they were also agreed that when regard is had to the present value of money her minimum annuity should be increased from £6 per week to £10 per week. This burden, of course, falls exclusively on the younger son Bruce, who is willing to undertake the additional burden.
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> Likewise, counsel were also in agreement that the daughters should inherit the Te Awamutu house on their mother's death or earlier remarriage, and their counsel expressed himself as content with this provision in lieu of the immediate legacies of £500 each to which the daughters were entitled under the will, and the finding of which at the present moment presented some difficulty. If the true position be, as I think is the case, that the testator, although anxious to do justice, in fact failed to perform his moral duty in respect of those persons who had paramount claims to consideration, then it seems to me that when these shortcomings are rectified it becomes increasingly difficult to find that the testator, in addition, was under a moral duty to make provision for the plaintiff from his estate.
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> Finally, while I agree that the plaintiff is not in very robust health, and is suffering from complaints not uncommon with persons in his age group, he certainly cannot be regarded as an invalid. If the testator had thought it right to make inquiry about his eldest son's situation when he came to make his will (which is very unlikely), then I do not agree that the testator if he was a just father would have regarded himself, in the light of all the circumstances, as being under an obligation to provide for the plaintiff on the score of his physical condition. The testator would have found his son to be in regular employment and earning over £800 per annum, and with only one child who had reached an age when he could be expected very shortly to become self-supporting. In a small country like New Zealand, and with his father's brother living in Lower Hutt, I cannot believe that, if the plaintiff had really desired to resume an association with the testator, it was not in his power to have achieved his purpose. Thirty-five years is a long period of separation, and I would think it would require a very special case before a Court would be justified in making an award in favour of an adult on who had made his own way in life for over a quarter of a century and was in receipt of a regular salary.

His Honour concluded by saying that for the reasons mentioned, he did not consider that this was in any way a special case ; and, on the contrary, he thought that the testator, from a relatively modest estate, already had very considerable claims on his bounty which required to be recognized. His Honour accordingly dismissed the plaintiff's application, but did so without awarding costs against him. Counsel for the other parties were to submit a draft order making the proposed further provisions in favour of the widow and two daughters. The question of costs was reserved.

The applicant appealed. The Court of Appeal (Gresson, McGregor, and Shorland JJ.) in an oral judgment, delivered by Gresson J. said :

> We do not think that, in the circumstances of this case, there was on the part of the testator any failure of moral obligation towards the appellant. In the absence of such a failure there is no jurisdiction to make an order, and, in our opinion, the application was rightly dismissed by North J. The appeal is accordingly dismissed. There will be no order as to costs.

In re Goodwin (Court of Appeal, July 1, 1957) was an appeal by sons of the testator from part of the judgment of Turner J., and was unsuccessful. There is no advantage in setting out the detailed and complicated facts. The judgment of the Court of Appeal (North, Henry, and McCarthy JJ.) is recorded here in respect of the enunciation of principles and their application

appearing in the judgment of the Court (delivered by Henry J.)

On that aspect of the case, the judgment said:

The question accordingly arises whether or not the testator failed in his moral duty towards these two able-bodied sons now of adult age. We think it desirable to repeat the principles which were referred to and applied by Smith J. in giving the judgment of this Court in *Mudford* v. *Mudford* [1947] N.Z.L.R. 837, 839, where the following appears:

> The most authoritative general summary of the duty of the Court is that made by the Privy Council in *Bosch* v. *Perpetual Trustee Co. Ltd.* ([1938] A.C. 463; 2 All E. R. 14) where their Lordships said:
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> > Their Lordships agree that in every case the Court must place itself in the position of the testator and consider what he ought to have done in all the circumstances of the case, treating the testator for that purpose as a wise and just, rather than a fond and foolish, husband or father (ibid. 478, 479; 21).
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> Their Lordships also approved of the view of Salmond J. in *In re Allen, Allen* v. *Manchester* ([1922] N.Z.L.R. 218), saying:
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> > As was truly said by Salmond J., in *In re Allen (deceased), Allen* v. *Manchester*: "The Act is . . . designed to enforce the moral obligation of a testator to use his testamentary powers for the purpose of making proper and adequate provision after his death for the support of his wife and children, having regard to his means, to the means and deserts of the several claimants, and to the relative urgency of the various moral claims upon his bounty. The provision which the Court may properly make in default of testamentary provision is that which a just and wise father would have thought it his moral duty to make in the interests of his widow and children had he been fully aware of all the relevant circumstances: [1938] A.C. 463, 479; 2 All E.R. 14.
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> But the wisdom and the justice of the father whose function the Court is to exercise are confined within certain limits by the statute itself. These limits were specified by our Court of Appeal in *In re Allardice, Allardice* v. *Allardice*, ((1910) 29 N.Z.L.R. 959; aff. on app. N.Z.P.C.C. 156), and approved by the Privy Council in *Bosch's* case [1938] A.C. 463; [1938] 2 All E.R. 14, where their Lordships said:
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> > Of the cases cited their Lordships desire particularly to refer to *In re Allardice, Allardice* v. *Allardice* ((1910) 29 N.Z.L.R. 959, 969, 970), a decision of the Court of Appeal of New Zealand that ultimately came before this Board. In that case Sir Robert Stout C.J. stated the principles to be followed by the Court in administering s. 33 (1) of the Family Protection Act 1908. They could, he said, be summarized as follows: (1) That the Act is something more than a statute to extend the provisions in the Destitute Persons Act; (2) that the Act is not a statute to empower the Court to make a new will for a testator; (3) that the Act allows the Court to alter a testator's disposition of his property only so far as it is necessary to provide for the proper maintenance and support of wife, husband, or children where adequate provision has not been made for this purpose; (4) that in the case of a widow the Court will make more ample provision than in the case of children, if the children are physically and mentally able to maintain and support hemselves. Later on he said:
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> > > The whole circumstances have to be considered. Even in many cases where the Court comes to a decision that the will is most unjust from a moral point of view, that it not enough to make the Court alter the testator's disposition of his property. The first inquiry in every case must be what is the need of maintenance and support; and the second, what property has the testator left.
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> > With these observations of the Chief Justice their Lordships are in agreement. The amount to be provided is not to be measured solely by the need of maintenance. It would be so if the Court were concerned merely with adequacy. But the Court has to consider what is proper maintenance, and therefore the property left by the testator has to be taken into consideration. So, too, in the case of children, a material consideration is their age. If a son is of mature, or nearly mature age, his needs both for the present and the future can be estimated without much difficulty.
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> The "needs" (to use the expression of their Lordships in *Bosch* v. *Perpetual Trustee Co. Ltd.* [1938] A.C. 463, of the appellants, who are able-bodied adults, have to be measured by this Court. The property left by the testator has to be taken into consideration. The other relevant factors in this case, apart from the general family history and circumstances, are that neither appellant contributed to the building up of the estate, but neither received any gift or advantage, educational or otherwise, during their father's lifetime. The family history and circumstances have already been fully outlined and the only further topic requiring discussion is the property left by the testator.

There was considerable evidence as to valuations, and in the Court below the parties discussed the various aspects of the figures disclosed, but a reasonable statement of the position showed a net value of £31,726 10s. 11d., after payment of death duties. The value of the residuary estate was approximately £22,000.

The judgment continued:

From this estate the testator gave to each of the appellants the sum of £4,000, payable upon the death of the widow. As we have earlier mentioned, these legacies attracted duty, and their present net value was worth no more than approximately £650. In our opinion, the learned Judge in the Court below was fully justified in holding, as he did, that the testator had failed in the moral duty he owed to the appellants to make adequate provision for their proper maintenance and support. The Judge, having found that he had jurisdiction to alter the provisions of the will, was of opinion that the needs of the appellants would be sufficiently met by an award to each of them of £4,000 clear of duty in lieu of the provisions contained in the will, and he further provided (as the result of discussions with counsel) that payment of these amounts in each case should be made at the rate of £1,000 per annum commencing from April 1, 1958, together with interest at the rate of 5 per cent. per annum calculated from April 1, 1957.

In this Court, counsel for the appellants submitted that the provisions made in the Court below were less generous than the circumstances warranted. Counsel for the respondents, on the other hand, did not challenge the propriety of the order made in the Court below, and, indeed, as the result of a further discussion in this Court, counsel for the trustees (after conferring with counsel representing the other respondents) stated that he was satisfied that the payments to the appellants could be further accelerated by refinancing the estate, and that in result the appellants could be paid in full within six months.

Mr Woodhouse, for the appellants, of course strongly relied on the opinion expressed by this Court in *Rose* v. *Rose* [1922] N.Z.L.R. 809, 815—namely, that on an appeal under the Family Protection Act the discretion of this Court is substituted for that of the Supreme Court, so that this Court is free to deal with the whole matter as the interests of justice demand. This no doubt is true, but we think that it should nevertheless not be overlooked that it was also said that "due weight" should be given to the opinion of the Court below. We have carefully considered the argument submitted by Mr Woodhouse, but he has not satisfied us that the view which commended itself to the learned Judge in the Court below was wrong, and, this being the case, we do not consider that it would be right to interfere with his judgment simply because it is possible (as nearly always must be the position) that if the case was being heard at first instance a slightly larger amount might reasonably have been justified.

In elaboration of the general view we have just expressed, we desire to add this. We agree that this case came under the second class of case referred to by Salmond J. in *In re Allen, Allen* v. *Manchester* [1922] N.Z.L.R. 218, 222, which comprises that class where there is a failure of the testator out of the abundance of his resources to make a provision sufficient for the proper maintenance of the claimant.

This estate can be described as a substantial estate, which is able to earn, at least until the lease runs out in 1962, a very high rate of profit, and that, so long as it is administered so as not to incur the contingent liability for taxation, the assets can be kept intact for the benefit of the residuary beneficiaries. The high rate of earning has enabled the trustees to avoid a realization of assets for the payment of duties which again is of great benefit to the residuary beneficiaries. Mr Woodhouse stressed what he called the "high income potential", and pressed this as well as the size of the estate as being a reason why a higher award should be

made, and he also invited this Court to take into account the relative lack of material progress made in life by the appellants, and the striking discrepancy in the treatment accorded to the appellants when contrasted with the beneficence exhibited towards the residuary beneficiaries. We do not overlook any of the factors referred to by Mr Woodhouse, but we are of opinion that it cannot be said that the testator's moral duty to able-bodied sons of adult age was not adequately met by the order made for them in the Court below. The appellants will therefore fail in their appeal for greater provision than that awarded in the Court below.

In view of the statement at the Bar that the estate can now be administered so as to pay each appellant the sum of £4,000 within six months, and in view of the probable advantages which might accrue to the appellants by adopting such course, this Court will vary the order made by providing for payment of the sums awarded within six months from the date of this judgment. The provision that interest shall be payable thereon from April 1, 1957, down to the date of payment will stand. In all other respects the order in the Court below is approved.

In *In re Neayle* (Napier, May 29, 1957, McCarthy J.), a son of the testator sought further provision from the estate of the testator, who died at Napier on November 27, 1955, leaving a last will bearing date May 14, 1955, whereby he appointed the defendants his executors.

These proceedings having been taken by the plaintiff, Thomas Frederick Neagle, his brother, Bernard Archibald Neagle, filed affidavits and made application for provision. The widow, Mrs Margaret Neagle, also filed an affidavit. When the hearing commenced His Honour approved an agreement made amongst themselves that provision should be made for Bernard Archibald Neagle by a payment forthwith of £250 in cash, and the setting aside of a fund of £750, of which £250 had to be paid at the rate of £10 a calendar month without interest, any balance remaining on his death to fall back into the residue in the testator's estate, and by investing the remaining £500, the income to be paid to Bernard Archibald Neagle during his life. On his death the capital would fall back in to residue in the testator's estate. His Honour made an order in terms of the arrangement, and also an arrangement that had been arrived at between the parties that the widow's annuity should be increased to the sum of £624 per annum. The deceased left an estate valued for death duty purposes at £46,058. After the payment of duty and making allowance for the costs of administration, the estate was reduced to £34,000 approximately. The pecuniary legacies totalled £4,584 and the estimated present value of the annuity left to the widow by the will is in the vicinity of £4,000. The present value, therefore, of the residue after allowing for the pecuniary legacies and widow's annuity as given by the will, was £26,000, approximately. This calculation, however, had to be amended in view of the orders which His Honour had already made. Taking those into account, particularly the present value of the widow's increased annuity, the present value of the remaining residue was £21,000. The estimated annual income of the estate before payment of the annuity was in the vicinity of £1,500.

The plaintiff was aged 58 years, and a widower, his wife having died some years ago. His children were of adult age and married. The medical evidence showed that by 1949 he was receiving treatment for hypertension with cardiac failure, though he might have had this condition for some time previously. His present condition was that he was not and never would be fit for full normal employment, but provided that he was able to go on at his own pace, he was fit for work of a light nature, and should be able to do that class of work for some three or four years. He earned approximately £12 a week in light employment, and he had the sum of approximately £1,000 in the Post Office Savings Bank.

His Honour said :

It was argued by counsel for the residuary beneficiaries that the testator owed no moral duty towards the plaintiff to make provision for him inview of the fact that the plaintiff is a mature man with no dependents and with some capital. I do not agree with this submission. I do not overlook the principles enunciated in *Bosch* v *Perpetual Trustee Co. Ltd.* [1938] A.C. 463 ; [1938] 2 All E.R. 14, and *Mudford* v. *Mudford* [1947] N.Z.L.R. 837, relative to applications by able-bodied sons, but as I view the plaintiff he was far from being able-bodied at the date of the testator's death. In my view, the condition of the plaintiff's health, his lack of opportunities in life, including the fact that he received no assistance from his father, whereas other children, including Stanley Herbert Neagle, a son of the first marriage, had received such assistance, and the size of the testator's estate, combined to create a " need " in the plaintiff and a moral duty in the testator to make some provision for his son.

His Honour then considered the alternative argument of counsel for the residuary beneficiaries—namely, that the conduct of the plaintiff towards his father disentitled him in terms of s. 5 (1) of the Family Protection Act 1955, and continued :

In approaching the issue of disentitling conduct, I must apply the principles stated in the judgment of the Court of Appeal in *In re Green, Zukerman* v. *Public Trustee* [1951] N.Z.L.R. 135, p. 140, l. 52 to p. 141, l. 32.

In my view, applying these principles, the residuary beneficiaries have failed to establish conduct disentitling the plaintiff to provision. I have no doubt that there were scenes and arguments between the son and the father, and I consider that the son was, in part, to blame. He seems to have made, at least over the last years before the father's death, little effort to establish good relations with the testator. On the other hand, as I see it, much of the difficulty lay in the early treatment of the plaintiff by his father, and the father's somewhat harsh and intolerant character. It appears that it was thought by some that the plaintiff was relying too much on his heart condition, and that the disease did not justify the plaintiff's lack of progress. The medical evidence before me, however, seems to establish a condition of some severity. I have no doubt that the testator felt that his son was not sufficiently progressive and self-reliant, and I take the view that that estimate formed by the testator of his son's character became firmer in later years, and contributed to the worsening of relations between them. It should not be forgotten that up till 1950 the testator evidently thought sufficient of the plaintiff to make him an executor of his will and to leave him a share in the residue of his estate. Even by the 1950 will the plaintiff was left a legacy of £500.

Although I hold that the plaintiff's conduct does not disentitle him to relief, I do consider that it is to be taken into account in fixing the quantum of the provision which should be allowed him : *In re Sinnott* [1948] V.L.R. 279, and *In re Williams, Williams* v. *Cotton* [1953] N.Z.L.R. 151. Taking all these matters into account I consider that had the testator recognized his obligation towards the plaintiff by a legacy of £1,500 it could not be said that there had been such a failure on his part as to justify the Court's interference, and I think that that is the sum which I should allow now. The order which I make is, then, that the plaintiff should receive the sum of £1,500 as a pecuniary legacy. Interest will run as from the date of this order, and not from the date of death.

A son and a daughter of the testatrix applied for further provision out of their mother's estate in *In re Bird* (Auckland, May 23, 1957, Stanton J.) The testatrix by her will and codicil disposed of her estate among her six children in a manner which would produce approximately the following net payments :— Joseph, £2,100 ; George, £900 ; Ada, £345 ; William £345 ; Emily, £345 ; and Ivy, £345.

Ada and William applied for further provision out of the estate, the additional amounts that may be awarded to them to come out of Joseph's share. George had died since the testatrix, and his administra-

trix did not ask for any additional provision provided her share is not affected by any additional award. Emily suggested that the incidence of death duty should be adjusted, so as to throw a greater burden on Joseph and George. Ivy did not appear or file any affidavit. There was general agreement that George's share should not be diminished in any event. His Honour said he did not think it practicable to deal with the matter by a readjustment of the incidence of duty, or that Emily's position was such that any alteration should be made for her benefit.

Mr. Justice Stanton said:

> Ada's financial position, though not desperate, is precarious, and I think she is fairly entitled to some consideration. Most of the controversy revolved around William's claim, Joseph contending that he (William) had received substantial advances from the testatrix or her husband, and William contending that such assistance amounted to only £100 which was actually provided by Joseph in 1932. It was, I think, established—if not admitted—that William's account of the financial transactions between himself and his parents is substantially correct, and William must be regarded as having received only £100. It appears that the testatrix made seven or eight wills which contained varying provisions for her children; and, in one at least of these, she left a legacy of £100 to William in addition to the provision made in the present will. It also appears that at one time she had cut Joseph out altogether, because she was displeased with him, and at another time had left him substantially less than she has now done. It would seem, therefore, that the testatrix was somewhat erratic in her testamentary dispositions, and also that she regarded William as having received considerably more than he actually did.

It was admitted that Joseph had a special claim for consideration because he had lived with his mother right up to the time of her death and had given her much personal care and attention. It did seem, however, that this did not involve any large financial contribution, unless it be accepted that he lost a good deal of time from his work in order to attend to his mother. His Honour thought that Joseph's claims on this head must be accepted with some reservations. There was a housekeeper who lived with the testatrix for many years, and was now housekeeping for Joseph. William's financial position, like Ada's was not desperate, but his health was precarious. His Honour thought that he was entitled to some further provision.

The learned Judge continued:

> Giving to the matter the best consideration that I can, I think that both Ada and William should each be given an additional legacy of £200 free of duties, and this is to be met by increasing the price at which the Marlborough Street property is to be offered to Joseph, from £1,000 to £1,400. Should Joseph elect not to purchase this property at £1,400 so that it falls into residue, then these two additional sums will not be payable. In all other respects the provisions of the will must stand.

SUMMARY OF RECENT LAW.

ADMINISTRATIVE LAW.

Civil Aviation—Regulations empowering Governor-General to make Regulations securing "the safety of aircraft and persons and property carried therein"—Regulation prohibiting Use of Aircraft in Towing Other Aircraft "except with prior permission of the Director [of Civil Aviation] in accordance with such conditions as he may specify"—Prohibition in Limited Area—Restricted Sub-delegation—Such Regulation Intra Vires and not Invalid for Sub-delegation—Civil Aviation Act 1948, s. 3—Civil Aviation Regulations 1953 (S.R. 1953-108), Regs. 8, 43.—See STATUTE.

FAMILY PROTECTION.

Jurisdiction—Applications for Further Relief—Principle to be applied—Costs of Applicants—Family Protection Act 1955, s. 4 (1). The Court has no jurisdiction under the Family Protection Act 1955 to alter the will of a testator unless it is first satisfied (whatever its views as to the wisdom or otherwise of the testator's provisions) that there is a need of maintenance. (*In re Allardice* (1910) 29 N.Z.L.R. 959; 12 G.L.R. 753, and *Dillon* v. *Public Trustee* [1941] N.Z.L.R. 557; [1941] G.L.R. 227, followed.) *Semble*, It cannot be assumed that those who make applications under the Family Protection Act 1955 can do so in the confident hope that, even if they do not succeed, at least they will get their costs. *In re Blakey (dec'd), Blakey and Another* v. *Public Trustee.* S.C. Auckland. July 15, 1957. North J.)

MASTER AND SERVANT.

Servant Pro Hac Vice *223 Law Times*, 333.

PUBLIC REVENUE.

Income-tax—"Assets method" a Valid Method of Assessment—Alteration of Commissioner's Assessment—Onus on Taxpayer to establish Objection that Assessment Excessive—Limitation of Time for Assessment—Ten-year Period—Application of Maxim, de minimis non curat lex, in Proper Cases, to Amounts omitted from Taxpayer's Return during Such Period—Land and Income Tax Act 1954, ss. 14, 15, 24: Land & Income Tax Act 1954, s. 24. The Inland Revenue Commissioner, after deciding he is not satisfied with a taxpayer's returns of income, is entitled to make an assessment of the amount on which, in his judgment, tax ought to be levied, and to make such alterations thereto as he later thinks necessary. He is not limited to any particular method of assessment, and he may use the "assets method". If he proceeded bona fide to assess the amount on which, in his judgment, tax ought to be levied, his assessment must stand, save only in so far as the taxpayer can establish his objection that the amount is excessive. (*Trautwein* v. *Federal Commissioner of Taxation* (1936) 56 C.L.R. 63, followed.) Where the Commissioner, having properly used his power of assessment under s. 14 of the Land and Income Tax Act 1954, proceeds later to alter this assessment, using his power under s. 16, the burden lies on the taxpayer in the case of such re-assessment to establish an objection that the re-assessment is excessive. The maxim, *de minimis non curat lex*, is applicable, in proper cases, to individual amounts of a particular nature or from a particular source mention of which has been omitted from a taxpayer's returns during the ten-year period mentioned in s. 24 of the Land and Income Tax Act 1954 (as amended by s. 4 (1) of the Land and Income Tax Amendment Act 1955), as it would be too harsh an application of the severe penal provisions of the statute to allow comparatively small omissions to authorize the Court to reopen the whole accounts of the taxpayer over a period of ten years, throwing the onus upon him to demonstrate the validity of any objection which he might make. (*The Reward* (1818) 2 Dods. 265; 165 E.R. 1482, applied.) A taxpayer, during the period which ended on March 31, in the years 1941-1951, omitted to return payments of interest received by him in each of those years. The Commissioner of Inland Revenue, in 1953, re-assessed the amounts on which he considered the taxpayer should have paid tax in the ten-year period. In the years ended March 31 in 1941 to 1946 inclusive, the subsequent years being within the four-years period (mentioned in s. 24 of the Land and Income Tax Act 1954 as amended), the respective totals of the payments of interest omitted from the returns were (1941) £5 10s. 1d., (1942) £11 11s. 1d., (1943) £9 19s. 2d., (1944) £16 19s. 6d., (1945) £26 1s. 1d., and (1946) £79 8s. 10d. (including a payment of £54 4s. 7d. to one person). *Held*, That the maxim, *de minimis non curat lex*, was applicable to the omissions from the returns of the years ended March 31, 1941, 1942, 1943, and 1944, but not to the omissions in the other years of the ten-year period. *Semble*, It was still open to the Commissioner to take advantage of the ten-year period to prove that the returns made by the taxpayer in the years 1941-1944 were fraudulent or wilfully misleading. *Babington* v. *Commissioner of Inland Revenue.* (S.C. New Plymouth. 1957. July 15, 1957. Turner J.)

SHOPS AND OFFICES.

Shops—Exemption from Closing Provisions—No Right of Appeal from Magistrate's Judgment granting or refusing Exemption—Shops and Offices Act 1955, s. 10. There is no right of appeal from a decision of the Magistrates' Court under s. 10 of the Shops and Offices Act 1955 granting or refusing exemption from the closing provisions in relation to shops in that statute. *New Zealand Federated Shop Assistants Industrial Association of Workers and Others* v. *Lake Alice Stores Ltd. and Others.* (S.C. Wanganui. July 18, 1957. Hutchison J.)

STATUTE.

Statutory Regulations—Exercise of Power to make Regulations—Total Prohibition of Thing to be regulated, Ultra Vires—Prohibition over Small Part of Field of Regulation, the better to regulate that Part to make Safe the Whole, Intra Vires—Sub-delegation—Sub-delegation of Legislative Function, Ultra Vires—Sub-delegation of Mere Administration of Valid Regulations, Valid and Intra Vires. A power conferred by statute to make regulations is ultra vires if it authorizes the total prohibition of the thing which is to be regulated, or a substantial part thereof. (*F. E. Jackson & Co. Ltd.* v. *Collector of Customs* [1939] N.Z.L.R. 682; [1939] G.L.R. 229, and *Municipal Corporation of Toronto* v. *Virgo* [1896] A.C. 88, followed.) A statutory regulation which does not extend to a prohibition over the whole field of regulation but is effective only in a small part of that field, subject to certain conditions, and goes no further than to "regulate" that part so as to make safe the whole, is within the regulation-making power conferred by the particular statute. (*Slattery* v. *Naylor* (1888) 13 App. Cas. 446, followed. *Melbourne Corporation* v. *Barry* (1922) 31 C.L.R. 174, referred to.) A delegated power of legislation by statutory regulation must be exercised strictly in accordance with the powers creating it; and, in the absence of express authority to do so, delegated power to legislate cannot be delegated to any other person or body. (*Geraghty* v. *Porter* [1917] N.Z.L.R. 554; [1917] G.L.R. 181, followed.) A regulation is intra vires and valid if it authorizes a sub-delegation of the mere administration of regulations validly made (as distinct from the leaving of legislative functions within a substantial area to the discretion of a sub-delegate) or if it does no more than empower the sub-delegate to dispense in certain cases with a prohibition prescribed in a limited area. (*Mackay* v. *Adams* [1926] N.Z.L.R. 518; [1926] G.L.R. 372, followed.) Section 3 of the Civil Aviation Act 1948 is, so far as is relevant, as follows: (1) The Governor-General may from time to time, by Order in Council, make such regulations as appear to him to be necessary or expedient . . . (b) Generally for regulating civil aviation. (2) Without limiting the general powers hereinbefore conferred, it is hereby declared that regulations may be made under this section making provision . . . (d) Generally for securing the safety, efficiency, and regularity of air traffic and the safety of aircraft and of persons and property carried therein, for preventing aircraft endangering other persons and property . . . Regulation 43 of the Civil Aviation Regulations 1953, made pursuant to the powers given by s. 3 of the statute, provides (under the general heading of "Towing and Picking up Objects"): Except with the prior permission of the director [of Civil Aviation] and in accordance with such conditions as he may specify, an aircraft shall not be used for the purpose of: (a) Towing any other aircraft or any drogue, banner, flag, or similar article; or (b) Picking up from the ground while in flight another aircraft, or any person, livestock, or articles of any description. On an appeal from a conviction on a charge of using an aircraft (to wit, a glider) without the prior permission of the Director of Civil Aviation in contravention of Reg. 43, it was contended (*a*) the Governor-General has not "made regulations for securing the safety of aircraft and of persons . . . carried therein" but has merely left the matter to the unfettered discretion of the Director; and (*b*) the Governor-General has, by Reg. 43, purported to sub-delegate his delegated power of legislation, and that, applying the maxim *delegatus non potest delegare*, the Court will find his action in sub-delegating to ultra vires of his own delegated powers. *Held*, 1. That Reg. 43 of the Civil Aviation Regulations 1953 is not ultra vires s. 3 (2) (*d*) of the Civil Aviation Act 1948 (which empowers the Governor-General to make regulations securing "the safety of aircraft and of persons and property carried therein"), as it goes no further than to "regulate" the use of aircraft. The Governor-General, does not prohibit all air traffic or even a substantial part of it, but only a small part (the use of aircraft in towing other aircraft, an obviously dangerous operation) in order the better to regulate and make safe the whole. (*F. E. Jackson & Co. Ltd.* v. *Collector of Customs* [1939] N.Z.L.R. 682; [1939] G.L.R. 229, distinguished.) 2. That Reg. 43 is not invalid, since it does not purport completely to sub-delegate the legislative power given to the Governor-General or even any substantial part thereof. The Director is empowered by Reg. 43 to grant or withhold permission in certain cases in order the more efficiently to carry out the true purposes of the Civil Aviation Regulations 1953—namely, "the safety of aircraft and of persons . . . carried therein"; and this is merely a sub-delegation of the administration of the validly-made regulations. (*Mackay* v. *Adams* [1926] N.Z.L.R. 518; [1926] G.L.R. 372, followed. *Geraghty* v. *Porter* [1917] N.Z.L.R. 554, distinguished.) *Quaere*, As to how far the considerable volume of Civil Aviation Safety Orders and other Airworthiness Requirements and publications issued under Reg. 8 have any legal effect, and how far they are bad for sub-delegation of the legislative function reposed in the Governor-General by the Act. ((*Jackson Stansfield & Sons* v. *Butterworth* [1948] 2 All E.R. 558, and *Blackpool Corporation* v. *Locker* [1948] 1 K.B. 349, referred to.) *Hookings* v. *Director of Civil Aviation.* (S.C. Auckland. June 20, 1957. Turner J.)

TENANCY.

Possession—Premises comprising Shop and Dwellinghouse—Lease containing Covenant by Tenant to build Additional Shop—Premises a "dwellinghouse"—Covenant illegal as being "consideration other than rent"—Tenancy Act 1948, s. 19 (Tenancy Act 1955, s. 32). The plaintiff owned a property having thereon a main building used as a dairy and milk bar, beauty salon, and dwelling, and also a garage and storeroom. In November, 1950, she gave the defendant a lease which was signed by the parties, whereby the defendant obtained a five-year term from November 13, 1950, at the clear weekly rental of £4, the lessor paying rates and insurance. Clause 5 of the lease contemplated "use of the demised premises for the purposes of residential quarters and the business of a milk bar and dairy". Clause 11 of the lease provided: "THAT the Lessee will within three years from the date hereof at his own expense and cost in all things erect build finish and complete in a proper and workmanlike manner an additional shop building on the said land suitable for the business of a beauty salon the dimensions whereof shall be approximately 12 feet by 20 feet such additional building to be in keeping with the existing buildings and in accordance with plans and specifications to be submitted by the Lessee to and approved by the Lessor or her representative duly appointed for that purpose and to be approved by the local and health authorities having jurisdiction in that behalf." On a claim for possession, *Held*, That the premises constituted a "dwellinghouse", and, the building covenant (which was in the nature of a premium or condition precedent to the granting of the lease) was a "consideration other than the rent", and was illegal by reason of s. 19 of the Tenancy Act 1948 (s. 32 of the Tenancy Act 1955). (*Hutt Valley Properties Ltd.* v. *Gamages (N.Z.) Ltd.* [1952] N.Z.L.R. 296; [1952] G.L.R. 172, and *Mi-Land Ltd.* v. *Gordon et Ux.* [1956] N.Z.L.R. 889, followed.) *Martin* v. *Gannaway.* (S.C. Auckland. July 23, 1957. T. A. Gresson J.)

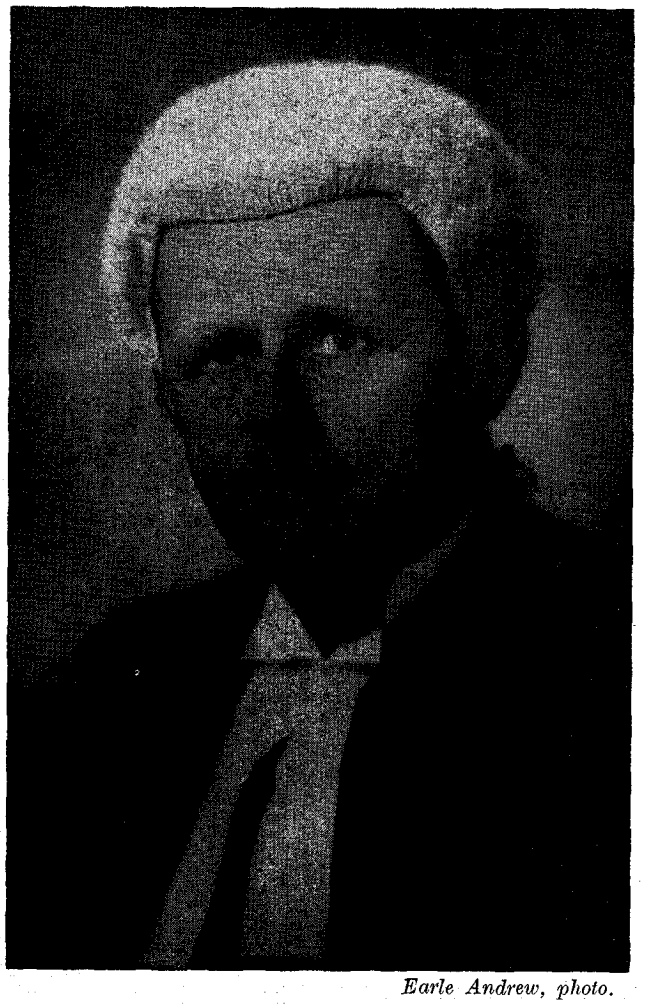
WORKERS' COMPENSATION.

Dependency—Infant Daughter receiving Payments from Deceased Father under Maintenance Order—At Time of Father's Death, Such Maintenance inadequate for Child's Support—Proceedings for Increased Payments then in Prospect—Child a Total Dependent—Workers' Compensaiion Act 1955, s. 2 (2). The plaintiff was an infant daughter of Taputoro who, at the time of his death was employed by the New Zealand Railways Department. His death occurred in circumstances rendering the Department liable to pay compensation to his dependants. Taputoro was making payments under a maintenance order, which, until six months before his death, were adequate, in conjunction with the family benefit, for the support of the child. Obedience to the maintenance order had been enforced on numerous occasions by the issue of warrants of committal. At the time of his death, there was a warrant outstanding for his committal to prison for disobedience of the order. In the course of time, further proceedings would have been taken for an increase of the payments under the maintenance order. The evidence of the Maintenance Officer showed that, if the plaintiff's rights had been enforced, the Magistrate would have increased the payments to a figure adequate for her maintenance. *Held*, 1. That the fact that, as at the date of Taputoro's death, moneys insufficient for the total maintenance of the child were being received from him did not derogate from the fact that he was liable to make such payments, and that appropriate steps to enforce those payments were available, and would, in due course, have been taken. 2. That the plaintiff was a total dependant, and not a partial dependant. *Milia Tapuioro* v. *Attorney-General.* (Comp. Ct. Wellington. July 10, 1957. Dalglish J.)

(*Concluded on p. 292.*)

MR JUSTICE HASLAM.

The new Judge, Mr Justice Haslam, who is 53, was born in Carterton, and was educated at Wellington College, Waitaki Boys' High School, and Canterbury University College, from which he graduated LL.B. in 1924 and LL.M. with first-class honours in 1925. In the same year he was admitted as a barrister and solicitor. His practical experience was acquired in the offices of Mr R. H. Livingstone, Mr O. T. J. Alpers, and Mr C. S. Thomas, until in 1927 he gained a Rhodes Scholarship which took him to Oriel College, Oxford, where in 1930 he graduated B.C.L. and also gained a Doctorate in Philosophy, with a thesis later published as "The Law Relating to Trade Combinations". While at Oriel, the Judge represented his College on the track, and for three years rowed in the College eight.



Earle Andrew, photo.

Mr Justice Haslam.

On his return to Christchurch, the Judge continued his active participation in athletics. He represented Canterbury College in the tournaments of 1925 and 1926 as a distance runner and also as a debater. He helped to found the College's cross-country club, and both before and after his period at Oxford, was one of the leading members of the Christchurch Harriers, of which he was president from 1932 to 1938. He also took an active part in the provincial administration of athletics and cross-country running, and continued to turn out with his club until he went overseas in 1943. His love of the open air attracted him to the mountains and he covered much of the snow country around the passes and glaciers of the South Island.

He commenced practice on his own account in 1936, and from then until 1950 lectured at Canterbury College in torts, evidence, and criminal law, with the exception of the years 1943 to 1946 when he served overseas with the 2nd N.Z.E.F. as a legal staff officer and a Judge Advocate in Egypt and Italy.

On his return to Christchurch, he resumed his practice. He was president of the Canterbury District Law Society in 1952-1953, and was the first South Island practitioner to become (1954-1957) a vice-president of the New Zealand Law Society. Since 1952 he has been a member of the Council of Legal Education, and in December, 1956, was elected by the General Council of Convocation to the New Zealand University Senate. He has been a member of the Rhodes Scholarship Selection Committee since 1936, and was a member of the Waimairi County Council from 1950 to 1956.

His Honour has had a wide general experience, ranging from murder trials to testamentary and other cases in the Court of Appeal. But these cases, heard in public, represent only part of his work in the law. Another part, the writing of opinions, has prepared him for the exacting duty of delivering a well-reasoned judgment. It is predicted that His Honour will continue to find refreshment in the domain of Equity, in places where many lawyers would perish from drought. The young practitioner, timidly entering this mysterious domain, will find encouragement from the Judge's understanding of his difficulties—an understanding gained as a university teacher over a long period.

He is notable among his friends and contemporaries for his unusual combination of mental and physical vigour, enlivened by frankness in speech, and governed by courtesy in behaviour. If in one aspect he is still youthfully cheerful, open, and sincere, in another he is scholarly and thorough beyond the measure of ordinary men. It was doubtless this blend of qualities which gained him his Rhodes Scholarship, and enabled him to cope with the daily cares of a solicitor's practice, while at the same time maintaining his reputation for sound learning. Some of his friends in Christchurch will always remember him striding rapidly through Hagley Park, usually alone (for who could keep pace with him) with brow fixed in thought, but suddenly enlivened by a spontaneous greeting as some plodding acquaintance or passing motorist hailed him.

Mr Justice Haslam is a son of the late Mr C. N. Haslam, a former inspector of schools in Canterbury, and Mrs A. E. Haslam. He married Miss Valerie Tennent in 1933, and they have two sons and two daughters.

THE SWEARING-IN OF THE NEW JUDGE.

For the second time in forty-three years the Gothic precincts of the Christchurch Supreme Court which have served the ends of justice in Canterbury for nearly ninety years since they were opened in December 1869 were the scene of the austere ceremonial which marks the swearing-in of a new Judge. The occasion was the taking of the traditional Oath of Allegiance and Judicial Oath by Mr Justice Haslam whose Commission of appointment to the Judiciary was issued earlier in the month.

The significance which Bench and Bar attached to the ceremony may possibly be explained by a combination of circumstances which, while not actually putting the clock back, left a suggestion of time moving full circle. For instance, it was nearly half a century since the last swearing-in ceremony in Christchurch—1914, when the relevant oaths were taken by Mr. Justice Stringer, the first Christchurch-born barrister to be appointed to the Supreme Court Bench. Then there was the consideration of the judicial centenary of Canterbury. The first Session of the Supreme Court of New Zealand was held in Christchurch in 1857.

And, finally, there may be mentioned the matter of the Court buildings themselves. Canterbury's aspirations in the direction of a new setting for the administration of justice could make the frame for the function at which a local barrister achieved his translation to the Judiciary almost as interesting as the picture, which, in this instance, was embellished not alone by the full-bottomed wig and scarlet and grey robe of the Hon. Mr Justice F. B. Adams, but equally by a formidable array of feminine spectators and a colourful back-drop, unusual in such august surroundings, of spring blooms and foliage.

The new Judge had himself spent practically the whole of his professional life in the shadow of the now ancient and venerable premises whose replacement was foreshadowed by the laying of the foundation stone of a new building as long ago as 1938. Both Bench and Bar may well look back on the occasion with the thought that the old Supreme Court may never be used in a like manner again. Yet obsolete and inadequate though it may be, the setting must have impressed many besides the "most potent, grave and reverend signiors", eight of whom had witnessed the swearing-in of Sir Walter Stringer more than forty years before. Criminals come and criminals go, delivered or not delivered from gaol as the case may be; actions are heard and determined and forgotten; but the Court with its customs, ceremonials, and jurisdictions embodies the whole conception of what Mr Justice Adams called affording "to all men the justice which is their due."

In addressing the new Judge, the Hon. Mr Justice Adams, said:

"I have before me a Commission from the Right Honourable the Chief Justice, as Administrator of the Government of New Zealand, authorizing and requiring me to tender the Oath of Allegiance and the Judicial Oath to the Hon. Mr Justice Haslam."

Mr Justice Adams called upon the Registrar to read aloud the Commission, and called upon Mr Justice Haslam to produce his Commission, which in its turn was read by the Registrar.

The oaths were then administered in due form, all present in Court standing while this was done. His Honour then addressed Mr Justice Haslam as follows:

"My brother Haslam: It is my privilege now, and a very great pleasure, to welcome you to our brotherhood of the Bench and in that welcome His Honour the Chief Justice and all other members of the Judiciary desire to be joined. Unhappily, Mr Justice T. A. Gresson, who had planned to be present with us on the Bench on this occasion, has fallen ill and was unable to come. We all extend to you our warmest congratulations and good wishes, and trust that your career in the high office to which you have been called may be a long and distinguished one. Your fellow Judges welcome you as a friend and as a colleague in their labours, and for my part I am happy to recall that the association is not new but old, and that my friendship and respect for you date back for many years. The task that now lies before you is one that will demand much of you, and will call for the exercise to the fullest extent of your learning and abilities, and of the high principles which have characterized you in your career at the Bar.

"Henceforth you are as one devoted to a cause—the supreme cause of justice—one chosen by your fellow men to maintain that cause. I feel sure that you will never lower the standard, but will to the utmost of your powers, and with industry and every care, strive to accord to all men the justice which is their due. A Judge cannot fail to err at times, but there should be in his breast—and I am confident it will be so with you—a passion for justice which will not permit him to deviate therefrom, but will drive him to the limits of his capacity in the endeavour to administer our laws justly, and with humanity, mercy, and wise understanding.

"I assure you again, sir, of the warmth of the welcome with which your brethren of the Bench receive you."

The President of the Canterbury District Law Society (Mr R. A. Young), addressing their Honours, said:

"The members of the profession in Christchurch, and the relatives and friends of Mr Justice Haslam, have gathered here today to witness this impressive ceremony. We are grateful to His Honour Mr Justice Adams for the privilege he has accorded us, not only to attend at Court, but to pay a tribute to his new brother.

"This year of 1957 marks our judicial centenary in Christchurch, and it is indeed fitting that one of our city's most distinguished legal men should embark upon his judicial career in this old Court that he knows so well, and in the presence of his family and his friends.

"Thirty years ago, His Honour was selected as a Rhodes Scholar. At Oxford, he developed his learning and his knowledge of men and affairs, and he returned to New Zealand a brilliant and able lawyer. In the years that have passed, he has served his profession and his country well. He has filled every office in our District Council, and was the first South Island Vice-President of the New Zealand Law Society.

"The establishment of a Chair of Law at Canterbury College was one of his cherished dreams. He has been a member of the Rhodes Scholarship Selection Committee for many years, and in the sphere of learning he has served with the Council of Legal Education and more, recently, on the Senate of the University of New Zealand.

"In the Second World War he left this country as a corporal, went to the Middle East, and rose to the rank of Captain. Back in civilian life, he found time

to maintain his interest in the sport of athletics and to serve two terms as a member of a County Council.

"In his professional career, the new Judge has always impressed his colleagues with his brilliance, his capacity for work, and his complete integrity. Many close friends will always be deeply grateful to him for his kindness and his humanity. As a friend—in law or socially—he has been loyal and sincere.

"This packed Courtroom, your Honours, is in itself an eloquent tribute to the esteem in which Mr Justice Haslam is held in this city. Mr T. P. Cleary (President of the New Zealand Law Society) is not able to attend today because of other duties, but he has asked me to express on his behalf to Mr Justice Haslam the goodwill and best wishes of the members of the profession throughout New Zealand.

"The last occasion on which a similar ceremony was held in this Court was in February, 1914. In the forty-three years that have passed many social changes have occurred. But the great traditions of the law have been maintained by the quality of the men who have administered justice within these walls. It may interest your Honours to know that present in this Court today to pay their tribute to Mr Justice Haslam are no fewer than eight practitioners who attended at the swearing-in of Mr Justice Stringer just before World War I.

"There are many of us who have derived great enjoyment from the company of the new Judge in walking hills and vales with him (often some paces behind and frequently out of breath), or in his home in the company of his delightful wife and family. We shall miss them all when they go to Wellington. But we are all delighted at the appointment because of His Honour's great qualities of integrity, learning, ability, and wisdom. He embarks upon this new phase of life with our best wishes for a long and successful career as one of Her Majesty's Judges.

"This afternoon, may it please your Honour, I have received a message from the South Canterbury practitioners who join with us in wishing His Honour good fortune for the future."

Mr Justice Haslam, in his reply, said:

"May I be permitted, very respectfully, to add my thanks to you, sir, for so graciously permitting this ceremony to take place here in Christchurch in your Court, and also for the very warm words of welcome to the Bench.

"I want to express my gratitude to you, Mr President, for those encouraging words which you have just spoken and addressed to me. I am unhappily conscious of the duties attached to the office which I have now assumed, but I feel fortified today by this large attendance of my practising friends in Christchurch. With the assistance of the Bar, which I know shall be given, I shall do my humble best to perform my duties in accordance with the oaths I have taken."

Photographs were taken in the grounds, and practitioners, their wives and friends took tea in the ambulatory, as the guests of the Canterbury District Law Society.

"THE DEVIL'S OWN."

One of the pleasanter and more kindly affectations of the legal profession is the habit of meeting on the golf course in friendly combat, an occasion that is known at Hokowhitu (Palmerston North) as the Devil's Own Tournament. There are still those who wonder at the designation, but then, they are mostly lesser breeds who have never heard of the Sussex man's tale of the encounter between a Devil much learned in the law and St. Dunstan, the patron saint of Sussex. We have Hillaire Belloc's word for it that the men of Sussex, and the children, too, still talk of the time when the Devil sat down to put his case to St. Dunstan, while the holy man worked at his smithying and ornamenting with bellows and tongs. Quietly St. Dunstan listened to arguments so cogent, precedents so numerous, statutes so clear, and order so lucid, as never yet were heard in any Court. And all the while the man of God nodded gravely and said: "Yes! Yes! Proceed! . . . But I have an argument against all this!" Until at last the Devil, stung by such simple confidence, demanded: "Why, then, let us see your argument! For there is no argument or plea, known or possible, that can defeat my claim, or make me abandon it, or compromise in ever so little." And in a flash St. Dunstan, pulling his tongs red-hot from the forge, said quickly and loudly: "Here is my argument!" and clapped the pincers on the Devil's nose, so that he danced and howled and cursed in the most unbridled fashion. Here was no set order of demurrer, replevin, quo warranto, nisi prius, habeas corpus, and the rest, but plain yowling and blank ribaldry. "Argue, brother!" cried St. Dunstan. "Argue, learned counsel! Plead! All this is not to the issue before the Court! Let it be yes or no! We must have particulars," until at last St. Dunstan "unclappered the clippers" and the Devil flew away. To this day he has never been seen again in Sussex; and in proof of the whole story (if proof were needed) it should be emphasized that lawyers walk carefully and quietly in Sussex still.

Bar and Church.

It could be that in some degree the above tale explains why the Law is not always happy in its contacts with religion and the Church. One of Coke's theories which barely outlived him was: "All infidels are in law *perpetui inimici*, perpetual enemies (for the law presumes not that they will be converted, that being *remota potentia*) for between them, as with the devil whose subjects they be, and the Christian, there is perpetual hostility, and can be no peace . . .": *Calvin's Case* (1608) 7 Co. Rep. 1a, 17a. One of the less happy contacts with religion was the celebrated case in which the House of Lords, by a majority of five to two, held that the Free Church of Scotland was not entitled to change certain fundamental doctrines, so that the very small dissident minority of the Free Church (the "Wee Frees") was entitled to the Church's substantial assets: *General Assembly of the Free Church of Scotland* v. *Lord Overtoun* [1904] A.C. 515. (The case was argued twice, and the report is two hundred and fifty pages long.) Of this, Maitland said: "I cannot think . . . it was a brilliant day in our legal annals when the affairs of the Free Church of Scotland were brought before the House of Lords, and the dead hand fell with a resounding slap on the living body": *Selected Essays* (1936) p. 237.

THE CITATION OF REPORTS.

A Guide to Counsel.

By J. P. KAVANAGH, Editor of *The New Zealand Law Reports.*

An American librarian, in referring to the *Law Reports* of England, said that his experience has been that more mistakes are made in citing that series than in citing any other English Reports. This gentleman, who is the Minnesota Law Librarian, would have possibly spoken even more feelingly if he had experienced the too-frequent manner in which Law Reports generally are mis-cited in the Courts in this country.

Apart from the precision with which any expert is expected to handle his tools of trade, there is, in the profession of the Law, a courtesy due to the Bench and to one's fellow practitioners in correctly citing authorities. It is only when references given in Court have to be checked, that the seriousness of the sins of commission and omission in citation are realized in the resultant loss of time and in trouble which could have been obviated. And it must not be overlooked that mis-citation in Court gives the appearance of inefficiency.

There is, therefore, nothing pedantic (as is sometimes felt) in an insistence on the proper citation of authorities. Quite the reverse: it is a workmanlike practice enabling technical material to be used to the best advantage. In addition, correct citation saves time and vexation to others—not only to the Judges, but also to all, who, in one way or another, are concerned to follow up the cited references.

I. CITATIONS IN COURT.

In England, when the Incorporated Council of Law Reporting undertook the publication of authorized Reports in 1865, there were current fourteen sets of accepted Reports, besides a number which were unacceptable or irregular. On the inception of the *Law Reports*, thirteen sets of hitherto-acceptable reports went out of existence. Those of Best and Smith remained; the short-lived *New Reports* were abandoned in 1866, and the *Jurist* in 1867. *The Reports* lasted from 1893 to 1895, when they became embodied in the *Law Reports.*

Before considering the *Law Reports*, attention may be drawn to the various Reports which ante-dated the official series. These, when cited, should be referred to by their proper names, not by initials. Thus, for example, "*Barnewall and Adolphus Reports*" will not be confused with "*Barnewall and Alderson Reports*," as they might be if "B. and A." were given, or the permissible *written* abbreviations of "B. and Ad." or "B. and Ald." (Strange as it may seem, the latter references have been heard *coram Judice.*) An example of the proper oral citation of a case in one of these pre-1865 Reports is, "*Draper* and *Thompson*, 4 Carrington and Payne, 84, at page 86."

In some of the circuit towns, and in the majority of office libraries in the Dominion, the old Reports are not to be found. It is accordingly a courtesy leading to facility of reference, to *add* the parallel reference to the *English Reports* reprint of the old Reports. Thus, to the *Carrington and Payne* reference already given, may be added "172 English Reports, 618, at page 619." (The *New Zealand Reports*, as may have been noticed, invariably provide this convenience for their users.) Among the things "not done by the best counsel" is the giving of the *English Reports'* reference only, and the omission of the source whence that reprint is derived.

Now we come to the English *Law Reports*, which, in their mis-citation, bring down adverse comment at times indiscriminately upon the heads of the just and the unjust alike. How often we hear counsel quoting "Q.B.," "Q.B.D.," quite oblivious of the several series which are so distinct, and of a citation that may indicate any one or more of them. To what does "1 Q.B." refer? The Judge, used to correct references, will go at once to *Adolphus and Ellis's Queen's Bench Reports*, New Series, which in eighteen volumes cover the years 1841 to 1852. But, if the case cited were of an 1865 vintage, the former reference would be as misleading as would be a reference to "Q.B.D." which, preceded by the same "1," would most likely be a case decided in 1875. A reference to "1 Q.B.," actually given in Court, sent a harassed reporter to Adolphus and Ellis's *Queen's Bench Reports*, whereas, after a protracted search through "L.R. 1 Q.B." and "1 Q.B.D." the correct reference was found to be "[1891] 1 Q.B.," where the parties' names were found to be the reverse of those given in Court. He felt with the learned Master of the Rolls at whom counsel had quoted "Q.B.D.," "Q.B.D.," after being gently corrected from the Bench: "'[1892] 2 Queen's Bench,' please." His Lordship, on counsel's persistence in error, leaned over and said: "You seem determined to stick to your 'Q.B.D.'; but, if you won't cite correctly, I say 'U Be D.' Give the book its proper name."

Furthermore, the abbreviations "L.R. 1 Q.B.," or "Ch.D." or "A.C." *simpliciter*, should be avoided: the name should be given in full: "Law Reports one Queen's Bench," "Chancery Division," or "Appeal Cases."

THE RULE OF PRIMARY CITATION.

The Courts insist that counsel should cite the best report of a case that is available. This, in practice, has given authority to "the rule of primary citation," which requires that the first citation of a case must always be the one in the accepted "Official" *Reports*: the series of law reports published in each jurisdiction with the authority of a Council of Law Reporting, as this is always representative of the profession itself (and, in some instances, also of the Bench), and, as such, the most likely report to be correct.

Thus, when citing a judgment of an English Court since 1865, and reported in two or more series of reports, always give a reference to the English *Law Reports* in preference to any series of reports produced by commercial enterprise only.

This rule applies universally. Thus, when citing a case from Victoria, always cite the *Victorian Law Reports* (from this year, called the *Victoria Reports*) in preference to the *Argus Law Reports*, and, for New Zealand cases, the *New Zealand Law Reports* reference to a case, and not the *Gazette Law Reports.*

Of course, if a case is *not* reported in the " Official " *Reports*, then the best reference available should be given.

If there should be some difference in the reporting of a case in two or more " non-official " Reports, then the Court should be referred to all the " non-official " Reports containing the case.

Mode of Citation.

In the best-regulated Reports the " mode of citation " usually appears at the head of the Table of Cases, as in the *Law Reports* series since 1885, or the *Commonwealth Law Reports*, the *Queensland State Reports*, and, in the present series, the *New Zealand Law Reports*, and in many others. In other series, the method of citation appears in bold type at the head of the title page, such as 1933 Session Cases, or on an early, otherwise blank, page, as in the *Irish Reports*. But, if there is any doubt as to citation, open up any modern Reports where two printed pages face one another, and, at the top of the facing pages, and usually carried across the inner margins, the proper method of citation will appear.

A cardinal rule in citing references from a judgment is to give, correctly, the name of the case, the reference to the report *with the first page of that report*, and *then* the page from which the citation is taken.

This is another general rule in citation: Where the year appears in brackets—[ ]—that *year* is cited: [1934] 1 Ch. is " 1934 one Chancery." But where, as in a reported case a year in parentheses—( )— precedes, that is the year in which the case was decided, and in general it is not orally cited; but the *number* which follows *must* be cited: For example, *Pearks* v. *Moseley*, (1880) 5 App. Cas. 714 is sufficiently cited as: "*Pearks* and *Moseley*, five Appeal Cases, 714." These two rules emerge:

(*a*) Where [ ] (brackets) appear always quote the year; if followed by a number (such as, [1932] 2 Ch.), quote both year and volume number, as the citation indicates more than one volume in the year.

(*b*) Where a numeral precedes the name of a *Reports* series, such as 5 App. Cas. or 18 Ch.D., quote the numeral. (In these circumstances, when, in a written Report or a Digest, the year of the decision (the actual year of the delivery of the judgment) appears in parentheses: this is so printed for the convenience of the reader to enable him to follow the sequence of decisions; the year, when so appearing in parentheses, need not be quoted orally, unless asked for from the Bench.)

Some Special Series of Reports.

Having made these general observations, we come to the citation of particular reports. There is no difficulty as to the *Reports* of the several overseas Dominions, if the foregoing suggestions are kept in mind. But trouble seems to centre in cases decided in the English Divisional Courts, and in Scottish decisions, and in some Australian series.

English Reports: In the *Law Reports*, there are certain series to be borne in mind. The pre-official Reports years—namely, before 1865—are remarkable for a number of private Reports to which reference has been made, but they may be eliminated for the present. The *Law Reports* fall into periods:—

(*1865—1875*): These are always preceded, in citation, by the words " Law Reports " and the volume number: Cite them as follows:

L.R.C.C.R. (2 vols.): " Law Reports, (*number*) Crown Cases Reserved."
L.R.C.P. (10 vols.): " Law Reports (*number*) Common Pleas."
L.R.Ch. App. (10 vols.): " Law Reports, (*number*) Chancery."
L.R. Eq. (20 vols.): " Law Reports (*number*) Equity."
L.R Exch. (10 vols): " Law Reports, (*number*) Exchequer."
L.R. P. & D. (3 vols.): " Law Reports, (*number*) Probate and Divorce."
L.R. English and Irish Appeals (7 vols.): " Law Reports, (*number*) House of Lords."
L.R.P.C. (6 vols.): " Law Reports, (*number*) Privy Council."
L.R.Q.B. (10 vols.): " Law Reports, (*number*) Queen's Bench " (*not* Queen's Bench Cases or Queen's Bench Division).
L.R. Sc. & Div. (2 vols.): " Law Reports, (*number*) Scottish and Divorce Appeals."

(*1875—1890*): These are quoted according to the Court, and preceded by the volume number:

(1–15): App. Cas. or A.C.: " (*number*) Appeal Cases."
(1–45): Ch.D.: " (*number*) Chancery Division."
(1–5): C.P.D.: " (*number*) Common Pleas Division."
(1–5): Ex. D.: " (*number*) Exchequer Division."
(1–25): Q.B.D.: " (*number*) Queen's Bench Division."
(1–15): P.D.: " (*number*) Probate Division."

(*1891 to present time*): These are preceded by the year alone in brackets, with or without a low number (1, 2, or 3) for that year's volumes. They are cited as follows:

[1933] A.C.: " Nineteen thirty three Appeal Cases."
[1933] 1 Ch.: " Nineteen thirty three, one Chancery."
[1933] 2 K.B.: " Nineteen thirty three, two King's Bench."
From [1952] 2 Q.B.: " Nineteen fifty two, two Queen's Bench."
[1933] P.: " Nineteen thirty three, Probate."

Weekly Law Reports.—These are part of the English *Law Reports* series.

Volume 1 in each year is a permanent record of the cases therein reported, and, as such, is the primary reference for those cases. This is cited as [volume year] One Weekly Law Reports, page.

Volumes 2 and 3 contain " weekly reports " of cases, which after revision by the Judges and addition of counsels' argument, will appear in the permanent *Law Reports* (Queen's Bench, Chancery, Probate, and Appeal Cases). These two volumes are not of primary reference. The primary reference is available only when the cases in Vol. 2 or Vol. 3 appear in the *Law Reports*. At the most, the reference to those volumes is merely a temporary expedient. (Each Part of the *Weekly Law Reports* contains a Table showing where the cases previously appearing in Volumes 2 and 3 are authoritatively reported.)

The All England Reports (1936—Current): These *Reports* present no difficulty. They have all appeared with a year designation, with one, two, or three volumes in the same year. They should be cited: [Year of volume] (number of volume) page, as [1936] 3 All England Reports, page 215.

Irish Reports: The Irish Law Reports do not present any difficulty. The correct citation is generally found centred on an otherwise blank leaf backing the title-page such as: " 8 L.R. Ir.," or " [1898] 2 I. R."

Now for some occasional difficulties:

Scottish Reports: In Scotland the name of the reporter persists until 1907 for citation purposes—*e.g.*, Rettie, Fraser, Macpherson—and so provides a

trap for the unwary. These Reports should be cited according to the name of the first reporter on the title-page of the particular volume :

First series of Session Cases : " (Volume number) Shaw (page)."

Second series of Session Cases : " (Volume number) Dunlop (page)."

Third series of Session Cases : " (Volume number) Macpherson (page).

Fourth series of Session Cases : " (Volume number) Rettie (page)."

Fifth series of Session Cases : " (Volume number) Fraser (page)."

New series (since 1907) : " (Year) Session Cases (page)."

In the News Series, " Session Cases " since 1907, each volume contains, separately paged, three parts : House of Lords, Court of Judiciary, and Court of Sessions. These should be cited as follows :

" (Year) Session Cases (House of Lords), page."
" (Year) Session Cases (Court of Judiciary), page."
" (Year) Session Cases (Court of Session), page."

NEW ZEALAND REPORTS : The *first five volumes* of the *New Zealand Law Reports* are each in two separately numbered and separately paged parts : Court of Appeal cases, and Supreme Court cases. Citation of cases in these five volumes is as follows :—

(*Vols.* 1–5) : For Court of Appeal cases, cite : " New Zealand Law Reports (volume number) Court of Appeal (page)."

For Supreme Court cases, cite : " New Zealand Law Reports (volume number) Supreme Court (page)."

The *New Zealand Law Reports* fall into two other series :

(*Vols. 6–34*) N.Z.L.R. : " (*number*) New Zealand Law Reports (page)."

1916–current : [Year] N.Z.L.R. : " (Year of volume) New Zealand Law Reports (page)."

New Zealand Privy Council Cases (1840-1932).—This volume contains reports of all appeals from New Zealand Courts to the Judicial Committee of the Privy Council up to and including the year 1932. The reference is : New Zealand Privy Council Cases (page).

(Since 1932, all Privy Council cases from New Zealand Courts are reported in the *New Zealand Law Reports*. Some are reported in Appeal Cases of the English *Law Reports* ; but, *in New Zealand*, the primary citation must be the report in the *New Zealand Law Reports*.)

Macassey Reports (1861-1872).—This volume contains reports of cases in the Supreme Court in the Otago and Southland District and on appeal to the Court of Appeal. These are referred to as : " Macassey " simpliciter : thus, Macassey (page).

Colonial Law Journal (1865-1875).—This contains reports of cases in the Supreme Court and in the Court of Appeal. It is cited as Colonial Law Journal (page).

New Zealand Court of Appeal Reports (1867-1877).—Three volumes contain reports of cases determined in the Court of Appeal. (They were edited by Mr Justice Alexander Johnston.) The reference is : Volume number, New Zealand Court of Appeal (page).

New Zealand Jurist Reports : In citing these reports special care should be taken. They are in two series :

(1) *Jurist Reports* (1873-1875) : Both volumes are straightforward as they are paged consecutively : cited as " one (two) New Zealand Jurist, page."

(2) *Jurist Reports (New Series)* (1875-1878). Volume 1 contains three sections separately paged : Court of Appeal, Supreme Court, and Cases in Mining Law. These cases are cited : One New Zealand Jurist, New Series, Court of Appeal (*or* Supreme Court *or* Mining Cases), page.

Volumes 2-4 contain two sections separately paged : Court of Appeal and Supreme Court. These cases are cited : (Vol. No.) New Zealand Jurist, New Series, Court of Appeal (*or* Supreme Court), page.

In *Ollivier, Bell and Fitzgerald Reports*, (1878-1880) the Court of Appeal and Supreme Court cases are in separate sections. The citation is : " Ollivier, Bell, and Fitzgerald, Court of Appeal (*or* Supreme Court), page.

CANADIAN REPORTS : The series of the *Dominion Law Reports* (D.L.R.) and that of the *Supreme Court Reports* (S.C.R.) present no difficulties. The Ontario Reports are not so simple. A reference to " 9 O.R.," a case which could have been decided in 1885, might be a mis-citation for one decided in 1905, so care must be taken in references. Several series are cited as follows :

(1882–1900) O.R. (32 vols.) : " (*Number*) Ontario Reports."

(1901–1931) O.L.R. (66 vols.) : " (*Number*) Ontario Law Reports."

(1932–current) [Year] O.R. : As " Nineteen forty-four Ontario Reports."

NEW SOUTH WALES : This is a series that requires special care in citation. It is sometimes a matter for regret that in citing some Australian series, here mentioned, counsel do not learn the hard way ; but their carelessness is a source of much illumination to those who have to check their references. In the following series, a reference to " 10 N.S.W. page 11 " initiated a search into five Reports before the right one was found. A faulty Victorian reference entailed a search into ten different Reports or Parts of a volume, before the proper one was the last to be discovered. Then, it was clear why no Digest was of assistance : the name of the case was mis-cited, too.

The New South Wales series are as follows :

(1863–1893) N.S.W.S.C.R. : " (*Number*) New South Wales Supreme Court Reports " (add : " Law " or " Equity," as indicated below).

(1880–1900) N.S.W.L.R. : " (*Number*) New South Wales Law Reports " (add " Law " or " Equity," as indicated below.

Both these series contain " Cases at Law " and " Cases in Equity," separately numbered in each volume. Consequently, the citations respectively given above should contain the added words " Law (page) " or " Equity (page)," as the case may require.

(1901–*current*) St. R. (N.S.W.) : " (*Number*) New South Wales State Reports (or, optionally, State Reports, New South Wales)."

There is no official mode of citation, and no indication is given in the Reports as to a uniform citation. The pages run consecutively irrespective of the jurisdictions.

As each of the above series contains volumes numbered from " 1 " onwards, the correct citation of the particular series indicated is most necessary.

VICTORIA : There are three series of Reports, respectively cited as follows :

(*1870–1874*) V.L.R. (3 vols.) : V.L.R. (Eq.) : " (*Number*) Victorian Law Reports, Equity Cases."

V.L.R. (L.) : " (*Number*) Victorian Law Reports, Law."

V.L.R. (I. and M.) : " (*Number*) Victorian Law Reports, Insolvency."

V.L.R. (M.) : " (*Number*) Victorian Law Reports, Mining."

V.L.R. (V.-A.) : (*Number*) Victorian Law Reports, Admiralty."

(*1875–1884*) V.L.R. (10 vols., numbered 1 to 10) : V.L.R. : " (*Number*) Victorian Law Reports " (with additions as above).

Each of the volumes in the two above series is subdivided, as indicated, with separate paging for each part respectively from p. 1 onwards. Careful citation, with the addition of the part from which the citation is taken, is, therefore, of importance.

(*1885–1904*) V.L.R. (19 vols., numbered 11 to 20) : " (*Number*) Victorian Law Reports " *only*, without additions.

These volumes are paged consecutively throughout, without any divisions for jurisdictions.

(*1904–1956*): [Year] V.L.R.: As "Nineteen forty-four Victorian Law Reports."

(*1957–current*) [Year] V.R.: as Nineteen fifty-seven Victorian Reports."

Each volume of the last two series is cited by the Year name, and not by the volume number.

SOUTH AUSTRALIA: There are three series of these Reports:

(*1867–1898*) S.A.L.R.: "(*Number*) South Australian Law Reports."

(*1899–1900*) [Year] S.A.L.R.: "(Year of volume) South Australian Law Reports."

(*1901-current*) [Year] S.A.S.R.: As "Nineteen forty-four South Australian State Reports."

The Reports of the other States give little difficulty.

Sometimes there is difficulty in remembering the full names of Reports abbreviated in a reported judgment; and this is frequent in relation to the full names of Reports published in England before 1865, as their names are becoming less familiar as the years go by. Well, the *English and Empire Digest* contains a full and very useful list of abbreviations of the names of all Reports, at the beginning of each of the first forty-four volumes, and thus supplies an easily-available guide. Moreover, if, in writing opinions and the like, there is difficulty in remembering the correct abbreviations, the same list will be found to be an ever-ready help.

SOME POPULAR PITFALLS.

In cases in which the Crown is a party, the terms "The King," or "The Queen," should always be used in oral citation, and none other. The terms "Rex" and "Regina" are never heard to fall from the lips of "the best counsel." Nevertheless, one has heard cases cited in Court as "R." or even "Reg."—just like that! On occasion, one has heard "So-and-so versus Reginam" from counsel manfully striving to observe the niceties. But there is only one permissible reference, whether the Crown is plaintiff or respondent—namely, "The King" or "The Queen," as the case may require.

When counsel is quoting from a judgment, and he comes to a reference to a Judge in the course of the extract, it is not correct, and is, indeed considered discourteous, to refer to him as "J." or "M.R.," or the like, *tout court*, as printed. The abbreviation should be expanded, when reading the citation in Court, to "Justice," or "Master of the Rolls," and so forth.

In citing cases *in Court*, it is not considered proper to refer to them as X. *v.* Y., or X. *versus* Y. (In this connection, New Zealand counsel have often learned from the Bench that this "*V.*" sign is not a sign of victory.) The accepted usage in quotation in all British Courts is X. *and* Y. All pleadings commence with the word "Between" before the plaintiff, or appellant; and the word "And" is interposed before the name of the defendant or respondent. Even in the criminal jurisdiction, cases are "Between Our Sovereign Lady the Queen *and*" the accused. The "*v.*" is simply a reporter's abbreviation, and usage has confirmed its convenience in written reference. In oral reference in Court, however, the word "*and*" should replace the printed "*v.*", always.†

† In good reporting, for this reason, where a case is cited in argument or in a judgment, and in it there are several plaintiffs or defendants, &c., the words "and Others" are eliminated, so that a superfluous "and" never appears. By this means a convenient reference is provided, and in proper citation the replacement of the written "*v.*" by the spoken "and" sufficiently indicates the individuality of the parties.

Then there is the year of the case, which, owing to later statutory repeal or amendment, or to the effect of subsequent judgments, is so often of considerable importance. But, when asked from the Bench for the year of a cited judgment, counsel are frequently seen to turn to the back of the volume and give the year that there appears. This is not only incorrect, but is also often very misleading. The year of the case is *the year in which the judgment was delivered*. It is *not* the year in which the volume was published, or the two years over which, sometimes, the hearing and judgment extended. For simple illustration, we take down at random a volume of the *New Zealand Law Reports*—Volume 10. On its back appears, as the year, "1892." It contains 768 pages. It will be observed, however, that cases decided in *1891* do not end until page 640. And it is the same with practically all Reports. The correct year always appears in the shoulder note to the case, or, in Reports that dispense with shoulder notes, at the beginning of the reported judgment.

The citation of Scottish cases sometimes involves counsel in a difficulty. The case will be headed, for example, "*M'Alister* (*or Donoghue*) and *Stevenson* ([1932] A.C. 562) or *Hay or Bourhill* and *Young* ([1943] A.C. 92). (Curiously enough, and seemingly to add further difficulty, the former case, in the shoulder reference is given as "*Donoghue* v. *Stevenson*," but, in the latter case, the shoulder reference is "*Hay or Bourhill* v. *Young*.)" The proper cited references are respectively: *Donoghue* and *Stevenson*, and *Bourhill* and *Young*. Shortly after the final judgment in the former case, Lord Macmillan enlightened the learned readers of the *Law Quarterly Review* (Vol. 49, pp. 1, 2) as to the proper citation of Scottish cases, in a note which was as follows:

> Some confusion is apt to arise in the citation of Scottish decisions in consequence of the practice in Scotland of naming a married woman in legal documents and proceedings by her maiden as well as by her married surname with the (infelicitous) disjunctive "or" interposed. If Miss Mary Wilson married Mr. Scott her legal appellation thenceforth becomes Mrs. Mary Wilson or Scott, and if Mr. Scott should die and she marries Mr. Thomson as her second husband, the formula becomes Mrs. Mary Wilson or Scott or Thomson —and so on. Consequently when a married woman in Scotland is the pursuer or defender of an action her name appears in the proceedings in this composite form, which suggests to the English reader that the lady has adopted an alias.
>
> In the Session Cases, the official Scottish Law Reports, a married woman is given both her maiden and her married name in the full title of the case, but in the shoulder note and in the index her married surname alone is used, and this surname alone is used in citing the case. If the case goes to the House of Lords both the maiden and the married name appear on the printed papers, and should it come to be reported in any of the English series of law reports the maiden name is apt to be retained in the name of the case and confusion ensues. Thus in the recent Scottish case of *Donoghue* v. *Stevenson* in the House of Lords, on which Sir Frederick Pollock writes in this number, the appellant appears on the House of Lords papers as "Mrs. May M'Alister or Donoghue." In the *Law Reports* [1932] A.C. 562, the case is titled "*M'Alister* (*or Donoghue*) v. *Stevenson*," and it so appears in the index, but in the shoulder note it is named "*Donoghue* v. *Stevenson*." Not unnaturally the case is liable to be cited by the first name in the full title, and it has already been mentioned in the Court of Appeal as "*M'Alister's Case*," although its proper designation is "*Donoghue* v. *Stevenson*." It is very desirable that this source of confusion should be removed and that when a married woman is appellant or respondent in a Scottish appeal her married name alone should be used in the name of the case when reported, so that the identity of the case in the Scottish and the English Reports may be preserved, and uniformity of citation ensured.

The opportunity may be taken of drawing attention to the error frequently perpetrated of describing the Scottish official reports as "Sessions Cases," whereas their proper title is 'Session Cases,'—*i.e.*, cases decided in the Court of Session.

Although it is outside the scope of this article, the correct pronunciation in Court of Latin terms used in the law is another pitfall for counsel and requires careful study to avoid solecisms. This matter has been comprehensively dealt with in this JOURNAL by Professor R. M. Algie, in an article appearing under the title "Forensic Pronunciation of Latin," 14 NEW ZEALAND LAW JOURNAL 281.

Finally, readers will not take it amiss to be reminded that it is a matter of inconvenience to the Judges, and of possible loss to counsel, if, in making quotations from Reports or text-books, counsel reads the extract in Court as if he were doing so in the ordinary way when reading for his own information. So that full value may be given to the quotation, the book should be held at a higher level to the intent that the voice be directed towards the Bench, and not towards the printed page.

II. CITATION OF CASES IN WRITING.

The main difficulty confronting lawyers in citing cases in written work (as distinct from citation orally in Court) is the correct distinction between the use of brackets ([ ]) and parentheses (( )), or, to use popular terms "square brackets" and "round brackets." The distinction is set out above, and should present no trouble, as it is there explained. Those who do a fair amount of opinion work, and the like, will find it convenient to replace the typewriter key ⅛ / ⅜ with [/], a simple and inexpensive operation which gives a "finish" to written citations.

Again, in written work cases are cited with the "v." as *Smith* v. *Brown*, *not*, as in oral citation, as *Smith* and *Brown*.

There is an exception to the use of brackets in the current *Session Cases* series: no brackets or parentheses are used; thus, 1956 S.C. (with an indication of the appropriate Court following in parentheses, as the pagination begins with p. 1 for each Court): thus, 1956 S.C. (J.) 25.

In writing, the following are the correct abbreviations of the several series of reports of New Zealand cases:

New Zealand Law Reports:
First five volumes: (Year of judgment) N.Z.L.R. 1 C.A. page.
(Year of judgment) N.Z.L.R. 1 S.C. page.
Volumes 6-34: (Year of judgment) 6 N.Z.L.R. page.
1916 to date: [Year of volume] [1916] N.Z.L.R. page.

Gazette Law Reports:
Volumes 1-17: (Year of judgment) 1 G.L.R. page.
1916-1952: [Year of volume] [1916] G.L.R. page.

New Zealand Privy Council Cases: (Year of judgment) N.Z. P.C.C. page.

Other abbreviations are:

Macassey's Reports: (Year of judgment) Mac. page.
Colonial Law Journal: (Year of judgment) Col. L.J. page.
New Zealand Jurist Reports:
First Series:
Volume 1: (Year of judgment) 1 N.Z. Jur. page.
Volume 2: (Year of judgment) 2 N.Z. Jur. page.
New Series:
1 N.Z. Jur. (N.S.) C.A. page.
Volume 1: (Year of judgment) 1 N.Z. Jur. (N.S.) S.C. page.
Volumes 2-4 (Year of judgment) Vol. No. N.Z. Jur. (N.S.) C.A. page.
1 N.Z. Jur. (N.S.) M.L. page.
(Year of judgment) Vol. No. N.Z. Jur. (N.S.) S.C. page.

New Zealand Court of Appeal Reports: (Year of judgment) (vol. no.) N.Z.C.A. page.

Ollivier, Bell, and Fitzgerald: (Year of judgment) O.B. & F. (S.C.) page. O.B. & F. (C.A.) page.

In writing, the current Australian State Reports show a great variety in their respective citation:

New South Wales: (Year of Judgment) (*Vol. number*) S.R. (N.S.W.), as in (1954) 55 S.R. (N.S.W.) 5.

Queensland: [*Year Volume number*] St. R. Qd., as in [1956] St. R. Qd.

Victoria: [*Year Volume number*] V.R. 26; in the previous series, up to the end of 1956, [1956] V.L.R. 10.

South Australia: [*Year Volume number*] S.A.S.R., as in [1956] S.A.S.R. 5.

Tasmania: [*Year Volume number*] Tas. S.R., as in [1955] Tas. S.R. 26.

Western Australia: (Year of Judgment) (*Volume number*) W.A.L.R., as in (1955) 56 W.A.L.R. 25.

If in doubt as to the proper reference to a case to be cited, acquire the habit of looking at the commencement of any modern law reports volume, where, in almost every instance, the proper mode of citation is set forth for guidance: see, for example, at the head of the table of "Cases Reported," in any volume of the *Law Reports* (England), in any volume of the *All England Reports*, and in any volume, since 1933, of the *New Zealand Law Reports*. The place to look in reports wherein the proper mode of citation is not so indicated, is on the title page, as in *Session Cases*, or on the blank page opposite "Cases Reported" in the *Irish Reports*. If a series of reports does not give this assistance—none does before 1891—then look at the top of any opened-out pages and the correct citation appears at the top of the adjoining inner margins: see [1928] (on the left-hand page) and "N.Z.L.R." (on the right-hand page); or, to go back further, "L.R." (on the left-hand page) and 5 Q.B. (on the right-hand page).

* * * *

Lord Chancellor Westbury said that reporting is a privilege of the Bar. Consequently, only a *Law Report* taken or vouched for by a practising or qualified barrister may be taken into Court. This accords with the long practice of reporting, which, at first, according to Maitland, was identified with the law-apprentices, in their note-books, and followed by the reports of Plowden, Coke, Dyer, etc., in the sixteenth century, and Ventris, Shower, Holt, Salkeld, Beaven, East, and others, later. The *Reports* are thus provided by counsel for counsel.

It remains to say that it is well for the members of the Bar who use *Reports* as their tools of trade, to handle them with dexterity; but, as officers of the Court, it is incumbent on them to assist the Bench. It is a hindering, or a doubtful assistance, to mis-cite cases. This does not accord with the duty of courtesy owed to the Bench and to fellow-counsel.

While the foregoing suggestions as to correct citation do not pretend to be exhaustive, it is hoped they may be of assistance as a working guide to promote fulfilment of that duty.*

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* This article appeared originally in 10 NEW ZEALAND LAW JOURNAL 129. In response to several requests, it is now reproduced. Advantage has been taken of the opportunity to add some further matter that may be of assistance to counsel.—ED.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Jowitt L.C.—The death at 72 of Viscount Jowitt will recall to many practitioners the tall, somewhat austere, but impressively judicial, figure who visited us in 1951. The youngest of ten children of a former Rector of Stevenage, he was called to the Bar in 1909 after an education at Marlborough and Oxford, and he quickly established a reputation, particularly in commercial cases, that was estimated to have enabled him to earn £25,000 a year. As Sir William Jowitt, he was Attorney-General, 1929-32; Solicitor-General, 1940-42; Minister without Portfolio, 1942-44; and Minister of National Insurance, 1944-45. Between 1945 and 1951, he was Lord Chancellor in the Socialist Government. In this office, his political beliefs were guided less by Socialist principles than by Liberal instincts: indeed, he held safe Liberal seats for a number of years until he joined the Socialists upon the invitation to become Attorney-General. He was probably one of the busiest Lord Chancellors of all times, since, in addition to his responsibility for British action in connection with war crimes, he had to sponsor a large number of Socialist measures through the House of Lords and many of these were personally distasteful as, for example, the Criminal Justice Bill which experimentally abolished capital punishment for a period of five years, and with which he openly stated his disagreement. At times, he could be as witty as he was eloquent. It seems that he aided his speaking, if not his processes of thought, by his habit of sucking jujubes. At a reception held for him by the Wellington Law Society, one of our Judges asked him if he found it difficult when sitting in the Privy Council to deal with the variegated and often complex systems of overseas components of the British Empire. "We have no real difficulty", he said, "We simply apply the Law as it is!".

Crime and Television.—One of the criminal cases awaiting trial in England is a charge against one Horace Edwards, aged 36, a bench hand, of murdering Allan Warren, aged 7, who was found dead at a building site in Essex after disappearing from a hotel car park where his parents left him while they sampled the local inn. Following the discovery of the body, suspicion fell on Colin Warren, an uncle of the deceased boy, who was able to satisfy the authorities that he had a complete alibi, and who drew further attention to himself by making a public appeal to the strangler to give himself up before he killed someone else. The talks and features producer for the B.B.C. (incidentally an Oxford graduate in history) decided that Colin Warren should be interviewed upon television, and his views ascertained upon the case at that stage, and upon his feelings of being under suspicion upon so grave a matter. Strong comment on the part of a number of viewers followed. The Chief Publicity Officer for the Corporation replied by saying it felt justified in its action, but twenty-four hours later it broadcast in Home, Light Programme, and Television New Bulletin, a statement that the item in question should not have been broadcast and the failure of the producer to have referred to a more senior official before permitting the broadcast was a serious error of judgment on his part. Lack of good taste on the part of the producer himself seemed (so far as the Press was concerned) to be balanced by the fact that the unfortunate B.B.C. incident coincided in point of time with his marriage with the daughter of Enid Blyton, the well-known writer of charming children's stories and her "Noddy" series, almost as famous as the B.B.C. itself. But, good taste or bad taste, good or bad judgment, little appears to have been said as to the effect on the administration of justice of the public dissemination of interviews with prospective witnesses or suspects in criminal cases who may consciously or inadvertently make comments upon the guilt or innocence of some other person against whom no charge has then been made. Because we have as yet no television in this country is no ground for complaceny that "it can't happen here." We have already seen that the demands of newspaper readers for news of a more sensational character has on occasions been criticized in Courts as prejudicial to the fair trial of accused persons. Such tendencies should be carefully watched and rigorously checked.

Lord Cohen.—Satisfaction is expressed in England at the appointment of Lord Cohen (who, incidentally, presided in the Privy Council on the hearing of the *Perkowski* v. *Wellington City Corporation* application for special leave) as Chairman of the independent Council on Prices, Productivity, and Incomes. During the past fourteen years he has in all probability been Chairman of more Commissions than any other English Judge, and has shown on every occasion an extraordinary ability to absorb and analyze the most complex subjects. Quietness and unfailing courtesy to Bench and Bar have characterized his work throughout; and, while in practice, qualities of intellectual accuracy and sound judgment made him a recognized authority in company law. He was appointed a Chancery Judge in 1943, a Lord Justice of Appeal in 1946, and a Lord of Appeal in Ordinary in 1951. Some years ago he won the Bar Golf Tournament, being the only Lord Justice, and the oldest barrister, to gain that distinction. Away from his judicial duties, however, he is held in awe for his brilliant and perceptive proficiency at the game of bridge. This is noteworthy since Judges, as a general rule, do not shine at card-playing. Sir Charles Skerrett and Sir Michael Myers played bridge of a very inferior order, while Sir Humphrey O'Leary had no card sense whatever.

Indecency on the Golf Course.—Crack golfers, although at times inclined to be boring, keep themselves reasonably well within the law. The attention of the Justice Department (so vigilant to protect the public from the sadistic influence of children's comics) is directed to the description given by the special correspondent of the *Daily Telegraph* of a match between Britain and the United States in the recent Walker Cup series held at Minneapolis:

> Campbell and Taylor, in an inspired mood and ignoring the storm, went out in 32, having four 3's. in a row and a fifth to make their performance quite indecent against Scrutton and Bussell.

Whatever the conduct (in a public place) of Campbell and Taylor, the American pair, the correspondent's phraseology is certainly loose.

SUMMARY OF RECENT LAW.

(*Concluded from p. 282.*)

TENANCY.

Possession—Possession of Hall let to Tenant—Owner seeking Possession for Purpose of Himself hiring out Hall to Different Hirers from Night to Night—Letting of Hall Normal and Usual Way of Carrying-on on Owner's Business—Hall required for Owner's "own occupation"—What constitutes "Occupation" a Question of Fact—Tenancy Act 1955, ss. 30 (e), 42. The word "occupation" as used in s. 36 (*e*) of the Tenancy Act 1955 and the words "to occupy" as used in s. 42, are used in a physical or personal sense, and should not be given any technical meaning: they must be construed with due regard to the nature of the property. What constitutes "occupation" in relation to property, is, therefore, to some extent a question of fact. (Dictum of McGregor J. (in which Gresson J. concurred) in *J. R. McKenzie Ltd.* v. *Gianoutsos and Booleris* [1957] N.Z.L.R. 309, 329, and dictum of Turner J. in *McKenna* v. *Porter Motors Ltd.* [1955] N.Z.L.R. 829, 847, applied. *Armagh Apartments Ltd.* v. *Friedlander* [1954] N.Z.L.R. 1180, mentioned.) In 1954, H. purchased a property, which included a hall and some additional rooms let to the tenant organization. The tenant used the hall for only one or two nights a week, and for other nights sublet it to others. H., in seeking possession, did not desire to oust the tenant on those nights on which it desired to use the hall, or to deprive it of the use of the subsidiary rooms. He desired to obtain possession of the premises let to the tenant so that he himself could hire out the hall to different hirers from night to night. On appeal from the judgment of Stanton J. [1956] N.Z.L.R. 1180, givin H. possession of the hall, *Held*, That, on the basis of the facts, the purpose for which H. required possession was the normal and usual way for a hall-owner to carry on his business and was a use appropriate to the nature and construction of the premises; and, consequently, he required possession of the hall for "his own occupation" within the meaning of s. 30 (*e*) of the Tenancy Act 1955, and, further, while possession in law is single and exclusive, possession may be shared with others. (*Hills (Patents) Ltd.* v. *Board of Governors of University College Hospital* [1955] 3 All E.R. 365, applied.) Judgment of Stanton J. [1956] N.Z.L.R. 1180, affirmed. *Kerry* v. *Hughes.* (C.A. Wellington. July 15, 1957. Finlay A.C.J. North J. McCarthy J.)

TRUSTS AND TRUSTEES.

Trustee managing Business for Persons entitled in Succession—Incidence of Expenditure for Repairs and Improvements—Depreciation—Discretion of Trustee. Where a trustee is carrying on a farming or other business, the paramount principle is that he must hold the scales evenly between the beneficiaries however extensive his powers. Consequently, expenditure (other than that payable out of income in respect of ordinary repairs necessary from time to time) must be borne by capita or apportioned equitably between capital and income depending on its nature, the trustee deciding the matters of fact, subject to the rules of law. The principle is unaffected by a power at discretion "to settle and determine . . . what expenses ought to be paid out of capital and income respectively". Observations as to incidence of expenditure and methods of apportioning between capital and income, as to recouping from income payments made in the first instance out of capital. (*Knox* v. *Roberts* (1900) 21 N.S.W.L.R. (Eq.) 231; *In re Walker, Walker* v. *Walker* (1901) 1 S.R. (N.S.W.) Eq. 237; *In re McGaw* (1904) 4 S.R. (N.S.W.) 591; *In re Moore, Fanning* v. *Fanning* [1907] V.L.R. 639; *In re Tong, Tong* v. *Trustees & Executors Agency Co. Ltd.* [1907] V.L.R. 338; *Wilkie* v. *Equity Trustees Executors & Agency Co. Ltd.* [1909] V.L.R. 277; *McIntyre* v. *McIntyre* (1914) 15 S.R. (N.S.W.) 45; *Littlejohn* v. *Davies* (1916) 15 S.R. (N.S.W.) 183; *Campbell* v. *Campbell* (1917) 17 S.R. (N.S.W.) 229; *Union Trustee Co. of Australia Ltd.* v. *Eckford* (1930) 31 S.R. (N.S.W.) 92 and *In re Porter, Porter* v. *Porter* (1930) 31 S.R. (N.S.W.) 115, considered.) A trustee empowered to carry on a business is entitled to charge depreciation on buildings, as well as on plant and equipment or any other assets, to offset wastage of capital. Observations as to the nature of depreciation and the effect of the burden so cast on income. (*Re Crabtree, Thomas* v. *Crabtree* (1911) 106 L.T. 49; *Re Rose* [1904] 1 D.L.R. 139, and *Re Robertson* [1952] 2 D.L.R. 594; aff. on app. [1953] 4 D.L.R. 225, followed. *In re Leicester* [1947] N.Z.L.R. 420; [1947] G.L.R. 163, not followed.) In deciding whether to charge depreciation or to recoup by periodical instalments out of income, the trustee may, in his discretion, have regard to which method produces the most advantageous result from the point of view of taxation; but, if he elects to debit depreciation to income, he should be guided, in fixing the rate, by what is proper to maintain the value of the asset, quite independently of the question whether or not the Commissioner of Taxes would approve such rate for income-tax purposes. The provisions of s. 15 of the Trustee Act 1956 do not resolve the question of how expenditure is to be charged as between life tenant and remainderman. *Semble*, The provisions of the Third Schedule to the Settled Land Act 1925 (15 & 16 Geo. 5, c. 18) (Eng.) and of ss. 81 (1), 96 (1) and the Schedules to the Agricultural Holdings Act 1948 (11 & 12 Geo. 6, c. 63) (Eng.) may fairly be resorted to by a trustee in New Zealand as affording some guidance as to how expenditure on improvements should be treated. *In re Patterson (dec'd), Guardian Trust and Executors Co. of N.Z. Ltd.* v. *Waddell and Others.* (S.C. Wellington. July 25, 1957. Gresson J.)

WORKERS' COMPENSATION.

Accident arising out of and in the Course of Employment—Tuberculosis—Notional Date of "Accident"—Nurse contracting Tuberculosis in 1942 and temporarily incapacitated thereafter until January, 1949—Further Flare-up of Disease from which, in October, 1949, She became totally incapacitated—Nurse entitled to Compensation from October, 1949, being First Incapacity after Commencement of Tuberculosis Act 1948—Workers' Compensation Act 1922, s. 10 (4)—Tuberculosis Act 1948, s. 23 (4) (a), (b). The effect of s. 23 (4) of the Tuberculosis Act 1942 is that a worker, who is not incapacitated at the commencement of that Act, but who has contracted tuberculosis before that time, may have had periods of incapacity before the commencement of the Act. The incapacity referred to in s. 10 (4) of the Workers' Compensation Act 1922 is the same incapacity referred to in s. 23 (4) (*a*) and (*b*) of the Tuberculosis Act 1948; and, in the case of persons, who, not being incapacited on the date of the commencement of the Tuberculosis Act 1948 (April, 1949), become incapacitated after that date, the incapacity referred to in s. 10 (4) of that Act is the first incapacity after that date. A worker employed in nursing duties by the defendant Board originally contracted tuberculosis in 1942, and, on various occasions thereafter, she was incapacitated for work by the disease and received certain payments from the Board in respect of those periods of incapacity. Early in January, 1949, she was again fit for work and was no longer incapacitated by tuberculosis. On April 1, 1949, the Tuberculosis Act 1948 came into force. On September 7, 1949, the plaintiff suffered a further flare-up of the disease which could not be regarded as a new contracting of the disease; and, as from October, 1949, she became totaly incapacitated again. She had remained totally incapacitated by tuberculosis since that date. On a claim for compensation in respect of incapacity contracted by the plaintiff while employed in nursing duties by the defendant Board, *Held*, That the notional date of the accident was a date in October, 1949, when the plaintiff first became incapacitated after the commencement of the Tuberculosis Act 1948 (April 1, 1949); and she was entitled to receive total payments according to the provisions of the workers' compensation legislation then in force. *Cunningham* v. *Auckland Hospital Board.* (Comp. Ct. Auckland. July 10, 1957. Dalglish J.)

Assessment—Worker on Receipt of Wages and Make-up Compensation for Partial Incapacity as Result of Accident—Such Worker incapacitated as Result of Second Accident—Worker entitled to compensation for Loss of Earning Capacity resulting from Second Accident, in Addition to Compensation being paid for Partial Incapacity when Second Accident occurred—Workers' Compensation Act 1922, s. 5. A worker incapacitated as a result of an industrial accident and receiving compensation in respect thereof and also in receipt of wages is entitled on the occurrence of a second accident to compensation for the loss of earning capacity resulting from the second accident, in addition to the compensation being paid for the partial incapacity from which the worker was suffering when the second accident occurred. In other words, a partial incapacity from an industrial accident does not merge in total incapacity resulting from a second accident. The provisions of s. 5 of the Workers' Compensation Act 1922 must be applied in respect of the incapacity arising out of each separate accident, and subss. (5) and (6) of s. 5 do not lay down a maximum amount of compensation to be received by a worker who has suffered from a series of accidents. (*Thompson* v. *London and North Eastern Railway Co.* [1935] 2 K.B. 90; 28 B.W.C.C. 95, and *Doudie* v. *Kinneil Cannel and Coking Coal Co. Ltd.* [1947] 1 All E.R. 6; 39 B.W.C.C. 111, applied.) *Raumati* v. *Pukemiro Collieries Ltd.* (Comp. Ct. Hamilton. July 19, 1957. Dalglish J.)