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TENANCY: AVAILABILITY OF ALTERNATIVE ACCOMMODATION AT TIME OF APPEAL.

A RECENT judgment of Mr Justice F. B. Adams, *Woodbury* v. *Attorney-General* (Christchurch. April 18, 1958) is noteworthy for His Honour's observations on the effect of the requirement contained in s. 38 (2) of the Tenancy Act 1955 as to the provision by the landlord of alternative accommodation, and the not infrequent expense in which the landlord is involved in obtaining and holding such accommodation for the tenant of premises in respect of which the landlord is seeking possession.

His Honour also dealt with the possibility of imposing a condition, where a stay of execution is granted pending an appeal, to the effect that the landlord need no longer hold the alternative accommodation available and binding the tenant-appellant not to rely at the hearing of the appeal on the landlord's failing to do so. This would serve as a reasonable precaution against abuse of the tenant's right of appeal in possession cases.

To put His Honour's observations in their proper setting, it is necessary to relate the facts of the case before him.

The appeal was against a Magistrate's order for immediate possession of a dwellinghouse, the order being directed to lie in the Court for one week to enable respondent to clean up another dwelling, which had been offered as alternative accommodation.

The premises occupied by the appellant were at No. 23 Bath Street, Christchurch, and were acquired by the Ministry of Works in March, 1956, the appellant having then been in possession as tenant since 1935, and the rental being 30s. per week. It was common ground that his tenancy was terminated by notice to quit in or about the month of July 1957, and that he has since been what is known as a statutory tenant. Section 36 of the Tenancy Act 1955 being applicable, the statement of claim alleged, as a ground on which an order might be made—in addition to another ground to which reference is made later—that the premises were "reasonably required by the landlord for the purpose of demolition." His Honour said:

> Section 36 (p) of the Act refers to "demolition or reconstruction," and the evidence shows that both demolition and reconstruction are contemplated, the land having been acquired for the purpose of erecting buildings for the purposes of the Departments of Agriculture and Labour. The estimated cost of the proposed buildings is £16,500.
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> Section 38 (2) of the Act prohibits the making of an order on this ground
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> > unless the Court is satisfied that suitable alternative accommodation is available for the tenant or will be available for him when the order takes effect.
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> The onus of proving the availability of alternative accommodation rests on the landlord, but, under s. 38 (4), if alternative accommodation is proved to be available, the accommodation
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> > shall be deemed to be suitable unless the Court is satisfied that it is inadequate for the needs of the tenant or is of an unreasonably low standard or is for any special reason unsuitable for the tenant.
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> The onus as to unsuitability is thus on the tenant. If he dicharges that onus, no order can be made. If, on the other hand, he fails to do so, it does not necessarily follow that an order will be made, as the Court is still bound under s. 37 (1) to take into consideration questions of hardship on either side and all other relevant matters, and may in its discretion refuse the application.

At the time of the hearing in the Lower Court, the respondent was holding two dwellings available for the appellant, one in Russley Road, Harewood, and the other in Carmen Road, Hornby. The Carmen Road property was still so held. According to the learned Magistrate's judgment, it was not disputed before him that each of the two properties was adequate for the needs of the appellant and his sister, who were the only persons requiring to be accommodated, and he held that each dwelling was proved affirmatively to be of good standard. This left open, on the issue in regard to suitability, only the question whether the premises were unsuitable for any special reason. The special reasons advanced were the amounts of the rentals and the distances of the properties from the City of Christchurch, and in particular from the appellant's place of work, the Railways Department, only some few hundred yards from his present place of residence. The case was conducted on the same footing on the appeal.

The learned Magistrate had focused his attention on the Hornby house, apparently regarding it as the more suitable of the two, and held that it was "suitable." He made no reference to s. 37 (1). The learned Judge did not imagine that the learned Magistrate had overlooked that subsection—it had been referred to by counsel in opening the case—and thought it more likely that he intended his judgment to be read as implying that there was no ground for the exercise of the discretion to refuse the application in pursuance of that provision. Such an assumption in regard to his decision was warranted by *Tendler* v. *Sproule* [1947] 1 All E.R. 193. But His Honour was bound to consider the question whether the learned Magistrate did so or not.

The appellant's counsel's attack on the judgment was directed: (a) to the question of suitability, and (b)

to the exercise of the discretion under s. 37 (1). His Honour said:

> The onus being on him, the appellant has not satisfied me that the Hornby house is "unsuitable." His grounds of objection are (*a*) that it is six miles from his place of work and from his present home, and (*b*) that it will involve him in the payment of additional rent to the extent of 15s. per week, and of bus fares to and from his work amounting to 7s. per week. The learned Magistrate came to the conclusion—and, on a careful examination of the figures, I agree—that the additional expense, when considered from a reasonable point of view, is not beyond the appellant's means. By living in an old house in a locality which is not very satisfactory for residential purposes, the appellant has hitherto paid what seems to be a comparatively low rent and has incurred no transport charges.
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> I regard these matters of distance and expense as relevant to suitability; but a landlord who is compelled to find alternative accommodation cannot be expected to reproduce exactly the conditions to which his tenant has become accustomed. The matter has to be viewed in a broad and reasonable way, and the question is not whether the alternative accommodation is entirely satisfactory to the tenant. Some detriment to him is almost to be expected, and must be accepted by him if the accommodation offered conforms in a reasonable sense with the requirements of the statute. If, for instance, the new home is suitable for his needs as a home, and is reasonably convenient as regards access to his work, he must, within reasonable limits and having regard to his financial ability, be prepared to pay the appropriate rent for the new home he is to get, together with any necessary transport expense to and from his work.
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> The obligation imposed on the landlord must of course be fulfilled, but it should nevertheless be kept within reasonable limits, particularly where, as in this case, the performance of the obligation involves the renting of houses kept vacant so as to be available for the tenant. After all, the purpose of the statutory provision is only to ensure that the tenant, when ejected, shall not be left without a home that is suitable to his means and needs.
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> I think it not irrelevant to point out that, if the tenant desires to have any special amenities (such as residence in the heart of a large city), or desires to keep his expenditure at a particularly low level, it is as much open to him as to his landlord to search for the home of his desire. If he does not do so, or cannot satisfy his own especial requirements, he must be prepared to accept any home found by his landlord which sufficiently meets the requirements of the statute. After all, he is not bound to stay there indefinitely if he can find premises that suit him better; and, if he cannot find such, the presumption is that the landlord cannot do so either. A tenant cannot expect "to remain unscathed by the move.": *Goodman* v. *Furniture Fashions Ltd.* [1953] N.Z.L.R. 547, 548.

In regard to the discretion under s. 37 (1), the learned Judge went on to say that it almost followed from what he had already said that he saw no sufficient reason, on grounds of hardship or otherwise, for refusing the application in the exercise of that discretion. In this connection, the facts that possession was urgently required for the erection of an expensive building intended for the use of Government Departments, and that suitable sites for such buildings were not easy to acquire, were, His Honour thought, relevant. It was also relevant, he said, that the appellant appeared to have made no effort whatever to secure alternative accommodation for himself during the period of two years since he was first notified that possession was required: *Jackson* v. *Huljich* [1955] N.Z.L.R. 1057, 1070.

In the Lower Court, and in the argument in the Supreme Court, the case proceeded on the footing that the relevant ground for an order for possession was that the premises were reasonably required by the landlord for demolition: see s. 36 (p); and the case was so dealt with in the learned Magistrate's judgment. The decision of the Privy Council in *McKenna* v. *Porter Motors Ltd.* [1956] N.Z.L.R. 845 was brought to His Honour's notice by counsel, but no material argument was founded thereon. It appeared to His Honour that the effect of that decision is to limit s. 36 (p)— which corresponds with s. 24 (m) of the earlier statute with which the Privy Council was there concerned—to cases in which the proposed demolition is for some purpose other than the landlord's own occupation of the premises. In the present case, it was the Attorney-General who was named as plaintiff, and the land was for the time being under administration by the Ministry of Works, and was intended for use by other Ministries. But the Crown was, of course, the real plaintiff and the real owner, and possession was desired for occupation by the Crown; and, in His Honour's view, the case seemed accordingly to be one in which, in view of the Privy Council decision, s. 36 (p) could not be relied on. He continued:

> The Crown cannot rely on s. 36 (d), for the reason that possession is not required for the landlord's occupation as a dwellinghouse; and it cannot rely on s. 36 (e), for the reason that a dwellinghouse is not a "property" within the meaning of the statutory definition. But s. 36 (r) permits an order to be made if "suitable alternative accommodation is available for the tenant or will be available for him when the order takes effect." This particular allegation was made in the statement of claim, though whether it was there put forward as an independent ground, or merely as ancillary to the "demolition" ground, it is impossible to say. In either event, it was pleaded—if pleading of grounds be necessary—and is certainly open now to the Crown unless non-reliance on it in the Court below precludes such reliance here. In my opinion it does not, as the question of the availability of suitable alternative accommodation was fully gone into in the Lower Court, though treated there as merely ancillary to the "demolition" ground, and the minds of counsel and the learned Magistrate's mind were in fact directed throughout to that question as the one requiring to be decided. The only difference is that, in respect of s. 36 (r), the onus of proof in regard to suitability does not rest on the tenant, but is cast on the landlord by the proviso to s. 38 (4).

His Honour had already expressed his opinion that, in respect of s. 36 (m), the appellant had failed, as the learned Magistrate held, to discharge the onus of negativing suitability. In respect of s. 36 (r), he said it was necessary to go further. He held that the respondent had discharged the onus of proving suitability. The Supreme Court was entitled to draw its own inferences of fact from the evidence, and the finding of the learned Judge did not rest on any question as to credibility of witnesses. His view as to the exercise of the discretion under s. 37 (1) was the same in regard to s. 36 (r) as in regard to s. 36 (m).

The result was that His Honour affirmed the learned Magistrate's judgment, though on a different statutory ground. Mr. Justice Adams then made the observations to which we have already referred.

> I observe that in this case—and I suppose it happens not infrequently—the requirement as to alternative accommodation contained in s. 38 (2) has involved the landlord in substantial expense. Up to the date of the learned Magistrate's judgment, the rentals paid in respect of the two properties that were kept available must have amounted to nearly £40, and the rental of the Hornby property since the date of that judgment would come to about £30, making a total expense of about £70 incurred in keeping properties vacant.
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> I have recently known similar expenditure to be incurred to a much greater extent. It is rendered necessary by the words "*is* available," it being seldom possible, under present conditions, for a landlord to be able to rely on proving that accommodation "*will* be available." The words "is available" require that the accommodation be available at the date of the making of the order (*Kimpson* v. *Markham* [1921] 2 K.B. 157), and "lost opportunities" (e.g., between the service of the notice to quit and the hearing) "are immaterial on this point" (*Megarry on the Rent Acts*, 8th ed., 277).

I have nothing to say on the question of policy, but an alternative provision as to unreasonable refusals to accept suitable alternative accommodation would seem to be appropriate if the Legislature were to deem it desirable to prevent tenants who choose to act unreasonably from putting landlords to unnecessary expense and inconvenience. As the law stands, an unreasonable tenant can abuse the statutory protection for the sole purpose of delay, and the landlord has no redress in respect of the moneys thrown away.

His Honour said that the foregoing remarks were, of course, not intended as a reflection on the present appellant, there being no reason for the Court to consider whether they might fairly be applied to him.He concluded his judgment by saying :

It may perhaps be desirable to add that, where (as here) a stay of execution is granted pending an appeal, there might well be a condition imposed to the effect that the landlord need no longer hold the alternative accommodation available, and binding the appellant not to rely at the hearing of the appeal on any failure to do so. (I am of course assuming, and believe it to be correct, that the question, on an appeal of this kind, is whether the Magistrate's order was right when he made it, and that accordingly the relevant date, in regard to alternative accommodation, is the date of the order, and not the date of the hearing of the appeal.) It may be that such a condition is unnecessary—a point on which I express no opinion—but it would in any case be a reasonable precaution against abuse of the right of appeal.

The appeal was accordingly dismissed with costs, fixed at twelve guineas, to be paid by the appellant.

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A notice of appeal against an order for possession does not, in terms of s. 84 of the Magistrates' Court Act 1947, operate as a stay of proceedings where an absolute order for possession has been made, unless the Court so orders. If the appellant tenant has not been granted, under s. 41 of the Tenancy Act 1955, a stay or suspension of execution or a postponement of the date of possession specified in the order of the Magistrates' Court, the relationship of landlord and tenant ceases on the effective date for possession, as thereafter, in terms of s. 47 (2), he no longer has "lawful possession of the premises". "The mere fact that he had the right to apply under s. 41 cannot make lawful his possession that otherwise was under the order of the Court unlawful" : per Hutchison J. in *Ranchod Bhika* v. *Cooper* (Wellington : April 24, 1958).

Consequently, since, under s. 41 of the Tenancy Act 1955, the Magistrate, in granting a stay or suspension of execution or postponement of the date of possession may make an order in the tenant's favour "subject to such conditions (if any) as it thinks fit," the observations of F. B. Adams J., set out above, will be useful to a landlord when resisting an application under s. 41 by an intending appellant, who, as tenant still has lawful possession of the premises. If suitable alternative accommodation is in issue in the proceedings, the Magistrate can be asked to impose the conditions indicated in His Honour's judgment.

SUMMARY OF RECENT LAW.

CRIMINAL LAW.

Jurisdiction—Appeal—Successive Notices of Appeal—Second Appeal available, where Special Reasons justify Same, if Earlier Appeal not disposed of on Merits—Justices of the Peace Act 1927, s. 315—Summary Proceedings Act 1957, s. 115. A second appeal against sentence may lie, if there are special reasons to justify that course, where an appeal under s. 315 of the Justices of the Peace Act 1927 (or under s. 115 of the Summary Proceedings Act 1957, which replaced that section) has not been disposed of on the merits. The jurisdiction is not limited to cases of misapprehension or of mistake of fact. (*R.* v. *Neiling* [1944] N.Z.L.R. 426 ; [1944] G.L.R. 153, and *Grierson* v. *The King* (1938) 60 C.L.R. 431, referred to.) *Semble,* If the procedure is by way of a fresh notice of appeal served out of time, the appellant must show a proper case for the grant of an extension. *Quaere,* As to the propriety of a second notice of appeal. (It is, however, permissible to treat a second notice of appeal as an application to withdraw the abandonment of the earlier appeal.) *Sherlock* v. *Police.* (S.C. Christchurch. 1958. April 3. F. B. Adams J.)

Recognizance—Test to determine whether Recognizance should be estreated—Jurisdiction to vacate Judgment against Surety in Whole or in Part—Crown Proceedings Act 1950, s. 23. The test to be applied for determining whether a recognizance should be estreated is whether or not the surety had taken all reasonable steps to secure the attendance of the principal party to the recognizance. This test must be governed by the considerations set forth in the proviso to s. 23 of the Crown Proceedings Act 1950. (*In re Fox and Fox* [1949] N.Z.L.R. 722 and *R.* v. *Michael* [1949] N.Z.L.R. 1020, followed.) The test requires that a surety must take some positive action, and that it is insufficient if he merely relies on a belief, however well-founded, that the accused will in fact answer his bail If he has not, then the judgment signed in the Supreme Court in terms of s. 21 should not be vacated—at all events, in its entirety. If he has, the Court must further in terms of s. 23, consider "the equity and good conscience and the real merits and justice of the case". The Court is precluded from vacating the judgment in whole unless "the equity and good conscience and the real merits and justices of the case" are entirely in favour of the surety ; and it is justified in vacating it in part only to the extent that "the equity and good conscience and the real merits and justice of the case" are in his favour. *R.* v. *Hopewell, In re Langford.* (S.C. Wellington. 1958. April 15. Barrowclough C.J.)

DESTITUTE PERSONS.

Evidence—Evidence of Complainant in England, seeking Variation of Maintenance Order, tendered by Affidavit—Exercise of Discretion as to Admissibility so as to do Justice to All Parties—Destitute Persons Act 1910, s. 68. The discretion given by s. 68 of the Destitute Persons Act 1910, which rests on general principles, must be exercised to do justice to all parties. Where evidence on affidavit is tendered the evidentiary value is lessened by the fact that it is not open to cross-examination and the principle of the value of *viva voce* examination of witnesses must not be detracted from save under express authority and then only if it is right and proper to do so. (*Seed* v. *Somerville* (1904) 7 G.L.R. 199, applied. *Dormer* v. *Taylor* (1904) 23 N.Z.L.R. 810 and *Gannon* v. *S.* (1906) 26 N.Z.L.R. 126, referred to.) In the present case, where the complainant, who resided in England, sought a variation of a maintenance order, her evidence was rendered on affidavit. It was held that such evidence, which was rebuttable, could not safely be relied upon, even quantum valeat. The affidavit was accordingly held to be inadmissible. *Thorpy* v. *Thorpy.* (Auckland. 1958. April 22. Astley S.M.)

INFANTS AND CHILDREN.

Adoption—Hearing in Camera—Application for Writ of Mandamus commanding Magistrate to hear and determine Application for Adoption Order, and for Writ of Certiorari, to be heard in Camera—"Application"—"Proceedings"—Court File comprising "adoption records"—No Production or Inspection permissible—Adoption Act 1955, ss. 22, 23 (1). The terms "application under this Act" and "proceedings under this Act", as used in s. 22 of the Adoption Act 1955, include an application for writs of mandamus and certiorari relative to a hearing by a Magistrate of an application for an adoption order. Consequently the case must be heard in camera, and any report of it is prohibited. The Court file comes within the words "adoption records" as used in s. 23 (1), and it is the duty of the Registrar so to deal with it as to ensure that it is not produced or inspected in breach of that subsection. *In re E.* (S.C. Christchurch. 1958. March 27. F. B. Adams J.)

LAND TRANSFER.

Caveat—Covenant to make Will reserving Life Interest to Testator, devising Land to Named Beneficiaries—Testator accepting Benefit of Estate for Life—Revocation of Will by Testator's Remarriage—Land impressed with Trust binding on Testator—Persons Entitled Beneficially to Reversionary Interest Entitled to lodge Caveat—Land Transfer Act 1952, s. 137. In August, 1953, a property owned by C.'s wife was registered as a joint family home in the joint name of herself and C. under the provisions of the Joint Family Home Act 1950. At the time of the registration, the parties agreed that in the event of the death of either of them, the survivor would leave the property by will to the five daughters of Mrs C. by a former marriage. Mrs C. died on December 6, 1953. Shortly after his wife's death, C. executed a deed of covenant, dated December 9, 1953, which recited the undertaking previously given by C. to his wife to leave the property to the latter's daughters by will, and in which C. covenanted with the five daughters irrevocably that he would leave the property upon his death to them as tenants-in-common in equal shares, and would forthwith execute a will giving effect to that covenant. On December 11, 1953, C. executed a will accordingly, and appointed two of the daughters executrices and trustees. On February 28, 1955, C. remarried, thus effecting the revocation by operation of law, by virtue of s. 18 of the Wills Act 1837, the will made on December 11, 1953. The daughters then registered a caveat against the title to the property forbidding the registration of any instrument. In an action, C. asked for a declaration that the deed of covenant was void as having been obtained by undue influence and as being contrary to public policy. He also asked for an order that the caveat be removed on the ground that the deed of covenant, if valid, did not create any interest in the land which would support a caveat. *Held,* 1. That, under the will, the stepdaughters could not claim to be "beneficially interested in any land, estate, or interest" in terms of s. 137 of the Land Transfer Act 1952, as the will had been revoked by operation of law by the marriage of the testator. (*Guardian Trust & Executors Co. of New Zealand Ltd.* v. *Hall* [1938] N.Z.L.R. 1020; [1938] G.L.R. 516, applied.) 2. That, under the deed of covenant, C. had obtained the benefit of an estate for life, which he had accepted; the arrangement was binding in equity; the deed provided clear evidence of a trust whereby C. accepted the property for his own enjoyment during his life but on his death for the five stepdaughters, and the effect of the deed was that the property was impressed with a trust binding on C. (*Dufour* v. *Pereira* (1769) 1 Dick. 419; 21 E.R. 332, followed.) 3. That, accordingly, the stepdaughters had a reversionary interest in the specific property, and were entitled to lodge a caveat. (*Gray* v. *Perpetual Trustee Co. Ltd.* [1928] A.C. 391, distinguished.) *Clausen* v. *Denson and Others.* (S.C. Palmerston North. 1958. February 14. McGregor J.)

LAW PRACTITIONERS.

Solicitor—Ostensible Authority—Compromise of Action—Solicitor authorized to negotiate Settlement—Extent of His Authority to bind His Client—Circumstances in which Compromise binding on Client whether Authority is General or Specific. Practice—Compromise of Action—Executed Compromise being Valid Contract—Grant of Stay of Compromised Proceedings Ex debito justitiae. While the solicitor on the record, after action brought, necessarily has ostensible authority in the absence of a communicated limitation of his authority to bind his client by a compromise, it is not essential, in order that a solicitor may possess such ostensible authority, that his name should actually be on the record. The ostensible authority vests in any solicitor who is, for the time being, after the suit has been commenced, in fact retained to conduct it. If a client by his conduct induces his solicitor to believe that he has authority to make a certain compromise and he, reasonably relying on that conduct and believing that he has that authority, does make that compromise, the compromise is binding on the client, whether the authority is general (i.e. ostensible) or specific. (*Little* v. *Spreadbury* [1910] 2 K.B. 658, followed.) Where no more is required by way of enforcement than a stay of the compromised proceedings, the Court has no discretion to refrain from enforcing an executed compromise made by, or with the actual authority of, a party to litigation and not vitiated by reason of any of the rules of law relating to the validity of contracts. In such a case, the granting of a stay is *ex debito justitiae*. *Semble,* 1. Except where the ostensible authority arises, a solicitor authorized to negotiate a settlement has only such special authority as may be conferred upon him for the purpose, and cannot bind his client except to the extent, if any, to which he is specifically authorized so to do. 2. If the compromise agreement is binding on a plaintiff by reason of his own acts and conduct, it should be enforced by the Court if its assistance is sought. In the present case, on the motion reported, the Court made an order declaring that the compromise and the payment made thereunder amounted to a valid and binding settlement of the claims made by the plaintiff in the action, and staying all proceedings in the action except such proceedings as might be necessary for the purpose of enabling the plaintiff to procure the repayment to him (subject to deduction of costs) of the sum of £290 15s. originally paid to him but subsequently held in Court. The order further directed the payment out of Court of that sum to the plaintiff, subject to the deduction of the costs payable out of Court by him to the defendant. *Kontvanis* v. *O'Brien* (No. 2). (S.C. Christchurch. 1958. April 15. F. B. Adams J.)

MARRIAGE.

Consent of Court—Jurisdiction—Adopted Son and Natural Daughter of the Adoptive Parents seeking Consent to their Marriage—Parties, in Law, Brother and Sister and so within Prohibited Degrees of Consanguinity—No Jurisdiction to grant Consent—(Adoption Act 1955 s. 16 (2) (a) (c)—Marriage Act 1955, ss. 15 (1) (2) Second Schedule. P. who was born on January 17, 1933, was formally adopted on March 24, 1953, by T. and his wife, who had a daughter, L., by their marriage. On an application by P. and L. under s. 15 (2) of the Marriage Act 1955, for the Court's consent to their marriage. *Held,* 1. That the combined effect of paras. (a) and (c) of s. 16 (2) of the Adoption Act 1955 was to make P. and L. "deemed" to be brother and sister, and they thus came within the Second Schedule to the Marriage Act 1955; and that, consequently, they were within the prohbited degrees of consanguinity appearing in that Schedule, in that, in law, they were brother and sister; and they did not fall within any degrees of affinity. 2. That, accordingly, the Court had no jurisdiction to grant the consent sought. *In re Thomson and Thomson.* (S.C. Wellington. 1958. March 20. Haslam J.)

PRACTICE.

New Trial—No Formal Judgment drawn up and Sealed—Leave not reserved at Trial to move to set aside Judgment—Party not thereby deprived of Right to New Trial—Code of Civil Procedure, R. 276 (c). In cases where no formal judgment has been drawn up and sealed, a party is not deprived of his right to have a new trial by the mere circumstance that leave was not reserved to him at the trial to move to set aside the judgment. (*Adams* v. *Davies* (1884) N.Z.L.R. 2 S.C. 328, distinguished.) It is competent for a plaintiff to move to set aside the judgment and verdict, even though it be a judgment for which he asked and which he was given, and to have a new trial, if he can make out the ground upon which his motion was based. (*Burrows* v. *London General Omnibus Co.* (1894) 10 T.L.R. 298, followed.) *Quaere,* Whether there is any right to have a new trial when the judgment had been formally drawn up and sealed, if leave is not reserved under R. 286 (c) to move to set it aside. *Jarvis* v. *United Box Co. Ltd.* (S.C. Palmerston North. 1958. April 14. Barrowclough C.J.)

Special Jury—Claim arising out of Routine Hospital Procedure of No Complexity or Difficulty—Questions at Issue within Capacity of Common Jury to determine—Statutes Amendment Act 1939, s. 37. The pleadings showed that on February 23, 1957, the plaintiff was admitted to the Waikato Hospital with severe broncho-pneumonia, collapse, and asthma. The allegation against the Hospital Board was that a negligent penicillin injection was administered by a nurse on March 5, 1957, damaging the plaintiff's sciatic nerve, which in turn, it was alleged, caused weakness in her right leg, foot drop, and paralysis of the extensor muscles of the right foot. It was claimed that she now had no useful movement below the ankle and that she might require a permanent steel brace. On an application, under s. 37 of the Statutes Amendment Act 1939, for a special jury, it was claimed that difficult questions would arise in regard to the site of the intra-muscular injection, the technique of intra-muscular injection, the cause of the plaintiff's disability, and the possibility of drift of the substance injected causing damage to the sciatic nerve; and that there would be conflicting medical evidence and expressions of opinion from neuro-surgeons and neuro-physicians. *Held,* 1. That the onus rested on the applicant to show that "difficult questions in relation to scientific, technical, . . . or professional matters" were likely to arise; she was not required to show that a special jury was necessary, but rather that one was

desirable and would serve to do justice between the parties. 2. That, here, the claim arose out of a routine hospital procedure of no particular complexity or difficulty; it was the type of procedure that is habitually delegated to nurses and was a routine feature of hospital administration or care not requiring any particular degree of professional care or skill such as is required of a surgeon in the performance of an operation. 3. That there was no question that the questions that would arise were well within the capacity of a common jury to determine. (*Auckland Hospital Board* v. *Marelich* [1944] N.Z.L.R. 456, distinguished.) *Carswell* v. *Waikato Hospital Board.* (S.C. Hamilton. 1958. April 1. T. A. Gresson J.)

SHIPPING.

Charterparty—Construction—Incorporation of U.S. Paramount Clause—Application to Charterparty of United States Carriage of Goods by Sea Act 1936—Whether Paramount Clause must be rejected as insensible—Whether Loss or Damage excepted by s. 4 (2) (a) of the Act includes Loss of Services of Vessel—Whether damages assessed solely in Relation to the Voyage in which the Breach occurred—United States Carriage of Goods by Sea Act, 1936 (Public Statutes No. 521), Preamble, s. 3 (1), s. 4 (1), (2), s. 5, s. 13. An oil tanker was chartered from the owners by a voyage charterparty which was to remain in force for as many consecutive voyages as the vessel could perform within a period of about eighteen months. By cl. 1, the vessel " being tight, staunch and strong, and every way fitted for the voyage, and to be maintained in such condition during the voyage, perils of the sea excepted " was to proceed to the port of loading. The charterparty incorporated the U.S. " Paramount Clause ", which was attached to the charterparty and was in these terms: " This bill of lading shall have effect subject to . . . the Carriage of Goods by Sea Act of the United States . . . which shall be deemed to be incorporated herein . . . If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further ". Section 5 of the U.S. Act provided that the Act should " not be applicable to charterparties "; s. 13 limited the scope of the Act to contracts for carriage of goods by sea to or from ports of the United States in foreign trade. Owing to mechanical breakdowns, the first of which occurred on the vessel's voyage to the port of loading, and owing to other breakdowns and incidents, she lost 106 days. The charterers claimed damages for this delay. It was found that, in the main, the breakdown of the machinery was due to incompetence of the engine-room staff amounting to unseaworthiness, but that the owners had exercised due diligence in appointing the staff; in one respect, however, the vessel was unseaworthy, and the owners had not exercised due diligence to make her seaworthy. Under s. 4 (1) and (2) of the U.S. Act, the owners would not be liable for " loss or damage arising from unseaworthiness unless caused by want of due diligence " on their part, and would not be responsible for " loss or damage arising or resulting from act, neglect or default of the master . . . or the servants " of the owners in the management of the ship. Section 3 (1) of the U.S. Act bound the owners before and at the beginning of the voyage to exercise due diligence to " (a) make the ship seaworthy . . . (c) make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation ".

Held, (i) On the true construction of the charterparty the Paramount Clause was incorporated in the contract, and accordingly (a) the words " bill of lading " in that clause should be rejected as *falsa demonstratio* and the reference should be read as referring to the charterparty, and (b) it being insensible for the Paramount Clause to incorporate s. 5 of the U.S. Act in the charterparty (as s. 5 would prevent the Act from applying to it) that enactment would be rejected as inapplicable. (*Golodetz* v. *Kersten & Co.* ((1926) 24 Lloyd's Rep. 374) considered by Lord Morton of Henryton and Lord Somervell of Harrow.) (ii) (by Viscount Simonds, Lord Keith of Avonholm and Lord Somervell of Harrow) On the true construction of the charterparty the owners were excepted by it from liability where they had observed due diligence (within s. 3 (1) and s. 4 (1), (2) of the U.S. Act) for the following reasons—(a) (Lord Morton of Henryton and Lord Reid dissenting) the contractual modification of the liability between owners and charterers effected by the incorporation of the U.S. Act in the charterparty applied to all voyages under the charterparty, whether to or from ports of the United States or ports of other countries, notwithstanding the territorial limit enacted by s. 13 of the U.S. Act. (b) (Lord Morton of Henryton dissenting) the same qualified standard of obligation as to the vessel's seaworthiness was applied contractually between the owners and the charterers to all voyages under the charterparty, whether cargo was or was not carried (c) the words " loss or damage " in s. 4 (1) and s. 4 (2) of the U.S. Act were not limited to physical loss of or damage to goods, and were subject only to the limitations imposed by s. 2 of the Act that they must arise in relation to loading, handling, stowage, carriage, custody, care and discharge of the goods; therefore the charterers' claim for damages for time lost fell within the ambit of the words " loss or damage " in those provisions as incorporated in the contract. (Principles of construction laid down in *Hamilton & Co.* v. *Mackie & Sons* ((1889) 5 T.L.R. 677) and approved in *Thomas & Co., Ltd.* v. *Portsea S.S. Co., Ltd.* [1912] A.C. 1, applied.) Application of the principle that an exception to an obligation can be established only by clear words (see *Nelson Line (Liverpool), Ltd.* v. *Nelson & Sons, Ltd.* [1908] A.C. 16; *Hillas & Co., Ltd.* v. *Arcos, Ltd.* (1932), 147 L.T. 503; *Petrofina S.A. of Brussels* v. *Compagnia Italiana Transporto Olii Minerali of Genoa* (1937), 42 Com. Cas. 286, considered). Decision of the Court of Appeal (sub nom. *Anglo-Saxon Petroleum Co. Ltd.* v. *Adamastos Shipping Co. Ltd.* [1957] 2 All E.R. 311) reversed. *Adamastos Shipping Co. Ltd.* v. *Anglo-Saxon Petroleum Co. Ltd.* [1958] 1 All E.R. 725, H.L.

TENANCY.

Possession—Tenant-in-Common letting Persons other than Co-owner into Possession as His Tenants—Tenancy so created a " Separate tenancy "—No Jurisdiction to eject Tenant except on Statutory Grounds—Tenancy Act 1948, ss. 2, 24—(Tenancy Act 1955, ss. 2, 36.) A tenant-in-common is entitled to possession, though not, as against a co-owner, to sole possession; and his rights include the right to let other persons into possession as his tenants. If, however, the other co-owners do not concur therein, such tenancies will confer no rights as against them, and the tenants thereunder may be obliged to share possession with such co-owners or their tenants. A tenancy created by one tenant-in-common, particularly by one who purports to be the sole owner, is a separate tenancy although the other tenant-in-common may be entitled to share the occupation of the premises. Even if the tenant is the tenant of only one co-owner, he is still a tenant, and the Court has no jurisdiction to make an order for his ejectment except on one or more of the statutory grounds contained in, and subject to the other provisions of the Tenancy Act 1955. (*Barton* v. *Fincham* [1921] 2 K.B. 291 and *Middleton* v. *Baldock* [1950] 1 K.B. 657, applied. *Thorne* v. *Smith* [1947] 1 K.B. 307, referred to.) *Burfitt* v. *Johansen and Others.* (S.C. Auckland. 1953. September 21; November 27. F. B. Adams J.)

TRUSTS AND TRUSTEES.

Modification or Revocation of Trust—No Jurisdiction to alter Trusts of Will to distribute Shares in Residue before Death of Life Tenant Entitled to Income of Residue—Trustee Act 1956, s. 64 (2). Section 64 (2) of the Trustee Act 1956 postulates agreement between some parties having varying types of interest and competent to agree for themselves but incompetent to give effect to their agreement because of outstanding interests in unborn or unascertained or unknown persons or persons under a disability. The Court will not revoke or modify the terms of a trust except in those exceptional circumstances in which revocation or modification has been resorted to by the Courts for particular and cogent established reasons or unless the jurisdiction so to do is conferred by clear words. The Court has no inherent or other jurisdiction so to alter the trusts of a will to distribute to residuary beneficiaries their respective shares in the residuary fund before the death of the life tenant who is entitled under the will to income from that fund (here a mental defective), in effect, to revoke in whole or part of the life interest and to apportion the corpus between the life tenant and the remaindermen. Even if the Court had jurisdiction to make the order sought, it should not be exercised as it could not operate other than prejudicially to the interests of the mentally defective life tenant. *Semble*, An application under s. 119E of the Mental Health Act 1911, inserted by s. 16 of the Mental Health Amendment Act 1957 should be a substantive application definitively made under it. *In re Hollis, Hollis and Others* v. *Public Trustee.* (S.C. Auckland. 1958. March 25. Finlay J. (Auckland: M. No. 95-57)).

JUDGES OF THE COURT OF APPEAL AND SUPREME COURT OF NEW ZEALAND.

The following list of the Judges of the Court of Appeal and the Supreme Court of New Zealand was commenced by the late Sir Frederick Chapman, formerly a Judge of the Supreme Court. Working in conjunction with Dr Guy Scholefield, Dominion Archivist and Parliamentary Librarian, he brought the record up to 1935.

Sir Frederick had known all the Judges who had been on the Bench until 1935 with the exception of Mr Justice Sidney Stephen and Mr Justice Wakefield, and he appeared before all the Judges appointed before his own elevation to the Bench in 1903, with the exception of the two already named and Sir William Martin C.J. and Mr Justice Buckley, the former of whom retired in 1860 and the latter held office for less than six months in 1895-96. Mr Justice Stephen and Mr Justice Wakefield died within a few days of each other in January, 1858.

The complete list, now brought up to date, as on January 1, 1958, is as follows:

Court of Appeal.

Right Hon. Sir Harold Eric Barrowclough, K.C.M.G., C.B., D.S.O., M.C., Chief Justice of New Zealand. (Ex officio).

Sir Kenneth Macfarlane Gresson: Appointed October 2, 1947. President Court of Appeal October 23, 1957. K.B.E. 1958.

Alfred Kingsley North: Appointed November 2, 1951. Member of Court of Appeal October 23, 1957.

Timothy Patrick Cleary: Appointed October 23, 1957, with appointment to Court of Appeal.

Chief Justices.

Sir William Martin: Appointed January 10, 1842. Resigned June 12, 1857. Kt. Bach., 1860. Died November 18, 1880.

Sir George Alfred Arney: Appointed March 1, 1858 (warrant under Royal sign manual, September 2, 1857). Kt. Bach., 1862. Resigned March 31, 1875. Died April 7, 1883.

Sir James Prendergast: Appointed April 1, 1875. Resigned May 25, 1899. Kt. Bach., 1881. Died February 27, 1921.

Right Hon. Sir Robert Stout: K.C.M.G. 1880. Appointed June 22, 1899. Resigned January 31, 1926. Died July 19, 1930.

Sir Charles Perrin Skerrett: Appointed February 1, 1926. K.C.M.G. 1927. Died February 13, 1929.

Right Hon. Sir Michael Myers: Appointed May 3, 1929. K.C.M.G. 1930. G.C.M.G. 1937. Resigned September 6, 1945. Reappointed for one year. Resigned August 7, 1946. Died April 8, 1950.

Right Hon. Sir Humphrey Francis O'Leary: Appointed August 12, 1946. K.C.M.G. 1947. Died October 16, 1953.

Right Hon. Sir Harold Eric Barrowclough, C.B., D.S.O., M.C.: Appointed November 17, 1953. K.C.M.G. 1954.

Puisne Judges.

Henry Samuel Chapman: Appointed December 26, 1843. Royal Warrant, January 14, 1850. Resigned March 13, 1852. Reappointed March 23, 1864. Resigned March 31, 1875. Temporary appointments June 3, 1875, and September 7, 1875. Died December 27, 1881.

Sidney Stephen: Appointed July 30, 1850. Acting Chief Justice October 20, 1855. Died January 13, 1858.

Daniel Wakefield: Appointed October 1855. Died January 8, 1858.

Henry Barnes Gresson: Appointed temporarily December 8, 1857; permanently, July 1, 1862. Resigned March 31, 1875. Died January 31, 1901.

Alexander James Johnston: Appointed November 3, 1858. Died June 1, 1888.

Christopher William Richmond: Appointed October 20, 1862. Died August 3, 1895.

Thomas Bannatyne Gillies: Appointed March 3, 1875. Died July 26, 1889.

Sir Joshua Strange Williams: Appointed March 3, 1875. Kt. Bach., 1911. Resigned January 31, 1914, on being called to Privy Council. Died December 22, 1915.

Sir John Edward Denniston: Appointed February 11, 1889. Kt. Bach., 1917. Resigned August 5, 1918. Died July 22, 1919.

Edward Tennyson Conolly: Appointed August 19, 1889. Resigned September 9, 1903. Died December 8, 1908.

Sir Patrick Alphonsus Buckley: K.C.M.G. 1892. Appointed December 21, 1895. Died May 18, 1896.

Sir Worley Bassett Edwards: Appointed March 2, 1890 (held invalid by Privy Council, May 21, 1892). Appointed July 11, 1896. Resigned January 31, 1921. Died June 2, 1927.

Sir Theophilus Cooper: Appointed February 21, 1901. Kt. Bach., 1921. Resigned March 22, 1921. Died May 18, 1925.

Sir Frederick Revans Chapman: Appointed September 11, 1903. Resigned March 2, 1921. Later, temporary appointments: October 18, 1921, June 26 1922, May 10, 1923, April 17, 1924. Kt. Bach. 1923. Resigned finally June 11, 1924. Died June 24, 1936.

Sir William Alexander Sim: Appointed temporarily (also Judge of Arbitration Court) March 1, 1909. Appointed permanently January 16, 1911. Kt. Bach., 1924. Died August 29, 1928.

Sir John Henry Hosking: Appointed February 11, 1914. Resigned February 18, 1925. Appointed temporarily March 9, 1925. Reappointed September 9, 1925. Kt. Bach., 1925. Resigned December 31, 1925. Died May 30, 1928.

Sir Thomas Walter Stringer: Appointed February 19. 1914. Resigned November 3, 1927. Kt. Bach., 1928. Died, December 7, 1944.

Sir Alexander Lawrence Herdman: Appointed February 4, 1918. Kt. Bach., 1929. Resigned July 31, 1935. Died June 13, 1953.

Sir John William Salmond: Kt. Bach., 1918. Appointed temporarily May 14, 1920. Permanently February 26, 1921. Died September 19, 1924.

Sir John Ranken Reed: Appointed March 3, 1921. Kt. Bach., 1936. Resigned December 26, 1936. Died April 25, 1955.

Alexander Samuel Adams: Appointed March 22, 1921. Resigned August, 1933. Died September 12, 1937.

William Cunningham MacGregor: Appointed September 8, 1923. Resigned April 3, 1934. Died August 26, 1934.

Sir Henry Hubert Ostler: Appointed February 2, 1925. Kt. Bach., 1939. Resigned February 1, 1943. Died February 24, 1944.

Oscar Thorwald Johan Alpers: Appointed February 19, 1925. Died November 21, 1927.

Sir Archibald William Blair: Appointed February 1, 1928. Term extended. Kt. Bach., 1946. Resigned February 2, 1948. Died April 10, 1952.

Sir David Stanley Smith: Appointed April 26, 1928. Kt. Bach., 1948. Resigned May 31, 1948. Temporary reappointment July 8, 1949 to May 31, 1950.

Sir Robert Kennedy: Appointed February 11, 1929. Kt. Bach., 1949. Resigned July 20, 1950.

Sir Harold Featherston Johnston: Appointed February 1, 1934. Kt. Bach., 1947. Resigned April 18, 1947.

Sir Arthur Fair, M.C.: Appointed April 14, 1934. Kt. Bach., 1951. Resigned June 15, 1955.

John Bartholomew Callan: Temporary appointment May 3, 1935. Permanent appointment August 1, 1935. Died February 12, 1951.

Sir Erima Harvey Northcroft. D.S.O.: Temporary appointment May 13, 1935. Permanent appointment November 14, 1935. Kt. Bach., 1949. Died October 10, 1953.

Sir George Panton Finlay: Appointed October 15, 1943. Kt. Bach., 1955.

Henry Havelock Cornish: Appointed February 5, 1945. Resigned February 28, 1950. Died July 24, 1952.

Sir Joseph Stanton: Appointed May 27, 1948. Term extended October 27, 1955. Kt. Bach., 1957. Resigned October 31, 1957.

James Douglas Hutchison: Appointed July 30, 1948.

Ernst Peterson Hay: Appointed January 27, 1949. Resigned through ill-health February 4, 1955. Died December 31, 1955.

Philip Brunskill Cooke, M.C.: Appointed March 31, 1950. Died November 11, 1956.

Francis Boyd Adams: Appointed August 3, 1950.

Alexander Kingcombe Turner: Appointed June 29, 1953.

George Innes McGregor: Appointed November 16, 1953.

William Perry Shorland: Temporary appointment October 29, 1954. Permanent appointment February 2, 1955.

Trevor Ernest Henry: Temporary appointment February 24, 1955. Permanent appointment May 23, 1955.

Terence Arbuthnot Gresson: Appointed November 27, 1956.

Thaddeus Pearcey McCarthy: Appointed February 15, 1957.

Alec Leslie Haslam: Appointed August 23, 1957.

Temporary Judges.

Joseph Schroder Moore: Appointed temporarily May 15, 1866. Appointment ceased June 30, 1868. (No record of death).

Charles Dudley Robert Ward: Appointed temporarily October 1, 1868. Resigned May 1, 1870. Appointed temporarily October 1, 1886. Resigned February 12, 1889. Died August 31, 1913.

Frederick William Pennefather: Appointed temporarily April 25, 1898. Resigned April 24, 1899. (No record of death).

James Crosby Martin (acting): Appointed April 12, 1900. Resigned December 31, 1900. Died June 4, 1926.

Charles Edward Button: Temporarily appointed March 12, 1907. Resigned February 29, 1908. Died December 27, 1920.

Sir Francis Vernon Frazer: Appointed temporarily November 16, 1928. Resigned February 13, 1929. Kt. Bach., 1938. Died May 10, 1948.

Patrick Joseph Burke O'Regan: Appointed June 1, 1937. Resigned August 31, 1937. Died, April 24, 1947.

James Henry Quilliam: Appointed May 14, 1938. Resigned December 31, 1938. Died December 21, 1949.

James Christie: Appointed February 12, 1947. Resigned February 28, 1949.

Thomas Joseph Fleming: Appointed March 9, 1947. Resigned February 28, 1949.

Charles Richmond Fell: Appointed February 23, 1951. Resigned December 31, 1951. Died, May 5, 1952.

Kendrick Gee Archer: Appointed November 27, 1953 to August 31, 1954 and August 22, 1956 to December 31, 1956.

LAND VALUATION TRIBUNALS.

By J. F. NORTHEY, B.A., LL.M., DR. JUR. (Toronto).

This article does not purport to deal with general questions concerning the valuation of land;[1] it is concerned solely with the powers and functions of the Land Valuation Court and Land Valuation Committees.[2] Because the statutory provisions governing the procedure and jurisdiction of the Court and Committees are contained not only in the Land Valuation Court Act 1948, but also in a number of other statutes,[3] it is necessary to refer to a surprisingly large number of statutes in order to understand the functions of land valuation tribunals.

In order to give a fairly complete picture of the way the tribunals function, it is desirable to examine in turn:

(a) the legislation in force prior to 1948;

(b) the provisions of the Land Valuation Court Act 1948;

(c) the jurisdiction and procedure of Land Valuation Committees;

(d) the jurisdiction and procedure of the Land Valuation Court.

Finally, some conclusions will be offered on the efficacy of the legislation and the manner in which the tribunals have functioned. At that point, it will be appropriate to consider the relationship between the Supreme Court and the Land Valuation Court.

I. THE LEGISLATION IN FORCE BEFORE 1948.

Before 1948, there were a number of tribunals charged with the task of determining the valuation of land. Under the Public Works Act 1928, the Compensation Court[4] determined the amount of compensation to be paid when land was taken for public works or was injuriously affected thereby.[5] Tribunals created by the Servicemen's Settlement and Land Sales Act 1943 settled values for the purpose of sales and leases of land. Assessment Courts constituted by the Valuation of Land Act 1925 determined objections to valuations made in terms of that Act.[6] Assessment Courts also functioned under the Rating Act 1925.[7] The Magistrates' Court also had jurisdiction in relation to appeals under the Valuation of Land Act 1925.[8] Under the Death Duties Act 1921 and the Stamp Duties Act 1923, special arrangements were made to determine appeals from valuations for stamp duty, gift duty and death duty purposes. Thus, it was possible for the Minister of Lands to say in 1948:

> Valuations are made for many purposes—for compensation for land taken under the Public Works Act, for sale purposes for mortgage purposes, for leasing, for rating, for stamp duty, gift duty, for death duty, and for numbers of other, purposes.[9]

The Minister might also have said that for most of these purposes a differently constituted tribunal had been created. The result of the multiplicity of tribunals was what would be expected—a lack of uniformity in the approach to valuations and thus in the valuations themselves. The stated purpose of the Land Valuation Court Act was uniformity. The need for uniformity was conceded by the opposition. For example, the Member for Remuera stated:

> In future, four different types of valuation will be dealt with by the Court that is set up under the Bill. The first will comprise all those cases where the Crown takes land for a public work, and where the citizen asks to have compensation granted to him on the basis of the land taken. The second class of case will be where a person makes a gift or leaves a will disposing of land to somebody, and the Crown will want to have the land valued for the purpose of assessing the duty or tax that should be paid in respect of that gift. Then there will be a third class of case where land is valued for rating or taxation purposes. Last of all, there will be the case where the Crown is itself acquiring land for soldier settlement, or where citizens are selling land, and the value has to be fixed by a Court like a Land Sales Court.[10]

The opposition to the Bill was addressed to certain portions of the Bill and to the policy that was thought to lie behind it. In particular, there was criticism of:

(a) the use of the title "Judge" in relation to the person who was to preside over the Land Valuation Court;[11]

(b) the insecurity of tenure of the other members of the Land Valuation Court and the Land Valuation Committees;[12]

(c) the abolition of assessors appointed by the parties;[13]

(*d*) the possibility of the legislation being used to facilitate state ownership of land.[14]

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[1] See *J. P. McVeagh's Land Valuation Law in New Zealand* (Butterworths, 1952).

[2] See the Land Valuation Court Act 1948.

[3] The other statutes include the Public Works Act 1928, the Land Act 1948, the Valuation of Land Act 1951, the Land Settlement Promotion Act 1952, the Maori Affairs Act 1953, the Maori Vested Lands Administration Act 1954, the Estate and Gift Duties Act 1955 and the Maori Reserved Lands Act 1955. See also the Land Valuation Court Rules 1953 (S.R. 1953/70).

[4] The Court was differently constituted according to the amount of compensation claimed. Two assessors sat with a Magistrate or Judge as President.

[5] See Public Works Act 1928, ss. 42-6.

[6] The valuations were used for the purposes listed in ss. 38 & 40 (now the Valuation of Land Act 1951, ss. 28 & 31).

[7] ss. 24-35. Those Courts still function, as do the Assessment Courts created by the Urban Farm Land Rating Act 1932. Neither Court was abolished by the legislation of 1948 and objections to valuations made for the purposes of those statutes are not within the jurisdiction of the Land Valuation Committees or the Land Valuation Court. Decisions of the Assessment Courts are stated to be final.

[8] s. 43 (now Valuation of Land Act 1951, s. 34).

[9] *Hansard*, Vol. 283, p. 2823.

[10] *Hansard*, Vol. 283, pp. 2918-9.

[11] E.g., *Hansard*, Vol. 283, p. 2829. Mr. Holland thought that the title should not be conferred upon persons who were not Judges of the Supreme Court.

[12] E.g., *Hansard*, Vol. 283, pp. 2830-3, 2841, 2843, 2919, 2921-2. Many speakers in the debate referred to the removal of the Chairman of a Land Sales Committee by the Minister of Lands. Reference should be made to the debates on 23-25 July, 1946 (*Hansard*, Vol. 273, pp. 601-747) on a motion of no confidence.

[13] E.g., *Hansard*, Vol. 283, p. 2842. See, however, f.n. 60, *infra*.

[14] E.g., *Hansard*, Vol. 283, pp. 2828-9.

Although the then Opposition has since become the Government, very few changes were made to the legislation. The changes made include the repeal of s. 32[15] and the Third and Fourth Schedules of the Act.[16] No steps were taken to strengthen the provisions of the Act dealing with the tenure of the lay members of the Court.[17] It can, perhaps, be concluded that the Land Valuation Court and Committees have performed their functions to the complete satisfaction of both political parties and that no changes are justified.

II. The Land Valuation Court Act 1948.

As has been stated, the principal purpose of this Act was to substitute a single authority for the various tribunals which had been engaged in determining the valuation of land for different purposes.[18] The Act created a Land Valuation Court, which was declared to be a court of record,[19] consisting of three persons of whom one was to be the Judge of the Court.[20] The Judge must have not less than seven years' standing as a barrister or solicitor of the Supreme Court; his tenure is that of a Judge of the Supreme Court.[21] The other members are appointed for five-year terms, but are eligible for reappointment.[22]

In addition to the Court, there are a number of Land Valuation Committees with jurisdiction defined on a geographical basis.[23] Members are appointed by and hold office during the pleasure of the Governor-General.[24] Committees have the status of a commission of inquiry and, subject to the Act and regulations, may determine their own procedure.

The powers and functions of the Court and the Committees are discussed below. The Land Valuation Court Act conferred on the Court[25] jurisdiction in relation to the following claims, applications or objections:

(a) claims for compensation under the Public Works Act 1928 which formerly went to the Compensation Court;[26]

(b) applications and objections under the Servicemen's Settlement and Land Sales Act 1943.[27] Comparable functions are now exercised under the Land Settlement Promotion Act 1952[28] under which the Court hears objections to the taking of land for settlement[29] and fixes the compensation payable.[30] Its consent to certain transactions is also required;[31]

(c) objections to valuations made under the Valuation of Land Act 1925;[32]

(d) appeals against valuations of land for death duty, gift duty, and stamp duty purposes;[33]

(e) any additional jurisdiction that may be conferred on the Court by the Governor-General in Council.[34]

Certain other statutes have increased the jurisdiction of the Court which is empowered to

(a) determine the purchase price where the fee simple is acquired by a lessee or licensee under the Land Act 1948;[35]

(b) determine the valuation of land and improvements for the purposes of a renewal of a lease under the Land Act 1948;[36]

(c) determine the rental value of or the rent payable under a lease or deferred payment licences under the Land Act 1948;[37]

(d) determine, in the case of servicemen and discharged servicemen, the basic value of land under the Land Act 1948;[38]

(e) determine the compensation payable to a lessee or the rental to be paid after review or on renewal of a lease under the Maori Affairs Act 1953;[39]

(f) determine disputes between a lessee and the Maori Trustee as to the compensation for improvements in terms of the Maori Vested Lands Administration Act 1954;[40]

(g) determine the valuation for purposes of rent fixation in terms of the Maori Reserved Land Act 1955.[41]

It will be seen that the jurisdiction of the Court and Committees[42] is extensive. As a result, it is probably

[15] See Estate and Death Duties Act 1955, s. 89. The changes made were not important; see ss. 69, 75, 76 and p. 123, *post*.

[16] Valuation of Land Act 1951, s. 50, and the Maori Affairs Act 1953, s. 473. Cf. the Maori Land Act 1931, s. 278.

[17] In the debate on the motion of no confidence (f.n. 12, *supra*), some members showed a thorough appreciation of the principle involved and of the status and functions of administrative tribunals. But despite the assurance given by Mr Holland (*Hansard*, Vol. 283, p. 2835) that the question of tenure would be reviewed if the then Opposition became the Government, nothing was done.

[18] See however f.n. 15, *supra*. The amendment referred to deprived the Court of part of its functions; it is extremely doubtful if the change was necessary or even desirable. See p. 122, *post*. It did, however, confine the Court to valuations of land and could be justified on that basis.

[19] s. 3.

[20] s. 4.

[21] s. 5.

[22] s. 7. This is to be preferred to the former practice of *ad hoc* appointments because the members secure special knowledge and insight not necessarily possessed by *ad hoc* appointees.

[23] s. 9.

[24] See pp. 120-121, *supra*, as to security of tenure.

[25] In most cases, the jurisdiction is also exercisable by Land Valuation Committees; see p. 122, *post*.

[26] s. 28. A saving provision covered proceedings already commenced before the Compensation Court.

[27] s. 29. The 1943 Act was repealed by the Servicemen's Settlement Act 1950, which expired on June 30, 1952.

[28] That Act came into force on October 16, 1952. There was thus a gap of three and a half months when no restrictions on disposition or acquisition existed. For a comparison of the legislation of 1943 and 1952: see E. C. Adams (1952) 28 N.Z.L.J. 329.

[29] ss. 3-6.

[30] ss. 9-19.

[31] ss. 23-35. These sections deal with undue aggregation and the requirement of personal residence. Personal residence is not required in respect of transactions entered into after August 31, 1955.

[32] Now the Valuation of Land Act 1951, ss. 20-23.

[33] This jurisdiction has since been restricted; see f.n. 15 and 18, *supra* and pp. 122-123, *post*. There was no discussion as reported in *Hansard* of the reasons for the change.

[34] s. 33. No such Order in Council has been made.

[35] s. 123. The Court has an appellate jurisdiction.

[36] s. 133. The Court has an appellate jurisdiction.

[37] ss. 140-2. The Court has an appellate jurisdiction.

[38] ss. 157-9 as amended by the Land Amendment Act 1951, ss. 17-19. The Court has an appellate jurisdiction.

[39] ss. 245 and 348. The Court has an appellate function.

[40] ss. 10, 35-54. It seems that only the Court and not Committees can exercise this jurisdiction.

[41] ss. 33-57.

[42] See f.n. 25, *supra*.

both necessary and desirable to deal with each statute in turn and indicate whether the Court alone or the Court and the Committees may exercise jurisdiction. Because the Court exercises an appellate jurisdiction in respect of decisions of Committees, it is logical to discuss the latter before discussing the procedure and jurisdiction of the Court itself.

III. The Jurisdiction and Procedure of Land Valuation Committees.

The commencement of proceedings and the procedure to be followed by Land Sales Committees in the performance of the functions assigned to them is governed by the Land Valuation Court Act 1948, the Land Valuation Court Rules[43] and the particular statute confirming the jurisdiction. The Act and the Rules will be discussed first, and then the various specific statutes will be examined.

Land Valuation Committees have the powers of a commission of inquiry[44] and are empowered to settle their own procedure so long as it is consistent with the Act and Rules.[45] Proceedings are commenced in the manner fixed by the statute or Rules; the Committee must fix a date of hearing and give notice thereof to the parties.[46] Parties are entitled to appear personally or may appoint a solicitor or other person to present their case; their right to produce evidence and to cross-examine witnesses is secured to them by the Act.[47]

Committees may refer questions to the Court for directions,[48] but, if it does so, the parties are assured of the right to make representations to the Court.

Committees give notice of their decisions to the parties and if no appeal is lodged the order is sealed.[49] The proceedings of Committees are protected from review by the Courts.[50] The rules governing the commencement of proceedings, the conduct of the hearing, and the taking of the decision by Committees are very similar to those in the Magistrates' Court. The fact that a Magistrate acts as the Chairman of each Land Valuation Committee ensures compliance with a judicial procedure. A solicitor familiar with the procedure of that Court would not find any substantial difference between the practice of the Court and a Land Valuation Committee. The function of the Committee is clearly judicial and the rules are designed accordingly. There are, however, special rules to be considered in relation to particular claims.

[43] S.R. 1953/70. The Rules are expressly declared to be subject to any other procedure prescribed by statute; Reg. 4 (1). The office for the filing of applications, etc., is the appropriate office of the Supreme Court.

[44] s. 19 (9).

[45] s. 19 (10). Under Reg. 6 (2), the Committee is given a discretion, where no rule exists, to dispose of the issue in a manner best calculated to promote justice.

[46] s. 23 (1). See Regs. 10-18 as to forms and preparation of documents.

[47] s. 23 (2). See Regs. 19-22 as to service and Regs. 29-38 as to conduct of the hearing. Committees presumably have the power to make an order as to costs, but the power is seldom, if ever, used.

[48] s. 24 (1); see also s. 16 as to the issue of directions by the Court to Committees and s. 27 (1) as to the effect of such directions.

[49] ss. 25 and 26 as to appeals to the Court.

[50] s. 27 (2); see also s. 13 (3). In any case, an appeal rather than an application for review would in general be more satisfactory.

(*a*) *Claims for compensation under the Public Works Act 1928*: The substantive law is contained in Part III of the Public Works Act which determines who may claim compensation and the manner in which a claim is made.[51] The form of claim and the service of it is settled by the Act.[52] A copy of the claim is filed in the Land Valuation Court[53] and, if the parties fail to agree, the amount of compensation to be paid is fixed by the Court or a Land Valuation Committee.[54] The hearing is governed by the provisions of the Land Valuation Court Act and Rules.[55]

(*b*) *Proceedings under the Land Settlement Promotion Act 1952*: Under the above Act, Committees have two functions:

(a) the hearing of objections to the taking of land for settlement;[56] and

(b) the consideration of applications for consent to dispositions of land.

Objections are disposed of by Committees in terms of s. 6 and the Regulations.[57]

Part II of the Land Settlement Promotion Act is designed to prevent undue aggregation; the provision as to personal residence on farm properties operated only in respect of transactions entered into before August 31, 1955. Under the Act, the consent of a Land Valuation Committee to certain transactions is required.[58] In reaching their decision, Land Valuation Committees must have regard to the provisions of s. 31 as to undue aggregation. A formal hearing takes place only if the application for consent is opposed by the Crown. It has become the responsibility of the Crown to examine all applications for consent and to compel a formal hearing where evidence as to existing land holding and use will be placed before Committees. It is believed that the power conferred by s. 34 to revoke consent should ensure a full disclosure to the Committee, but the power is limited.[59]

[51] ss. 42-101. Many of these sections have been repealed by the Land Valuation Court Act. Other statutes, e.g., the Land Drainage Act 1908, the Soil Conservation and Rivers Control Act 1941 and the Town and Country Planning Act 1953, make the provisions of the Public Works Act applicable to the assessment of compensation under those Acts.

[52] ss. 50 and 51.

[53] s. 53.

[54] Land Valuation Court Act 1948, s. 22. As to the office of the Court when the claim is to be filed, see s. 21: and see *Allison* v. *Piako County*, [1957] N.Z.L.R. 1214, for a discussion of the respective functions of the Town and Country Planning Appeal Board and the Land Valuation Court.

[55] These have been discussed, but see especially ss. 23, 26, 27 and Regs. 12, 39 (1), 40, and 49.

[56] s. 6. As to the determination of compensation to be paid, it appears that only the Court has jurisdiction; ss. 9-12. Under the Servicemen's Settlement and Land Sales Act 1943, Land Valuation Committees determined compensation; but there is no section of the 1952 Act comparable to s. 30 of the 1943 Act as to which see *Re a Sale, Morgan Estate to the Crown* [1948] G.L.R. 524.

[57] See p. 121, *supra*.

[58] See ss. 2, 3 and 24 and ss. 28 and 29 as to the need for a hearing. If consent is not sought or secured the transaction is unlawful; *Leys* v. *Money* [1957] N.Z.L.R. 156. For comments on the comparable provision in the 1943 Act, see Taylor (1947), 23 N.Z.L.J. 263, 275 and Brown (1948) 24 N.Z.L.J. 192. See Regs. 14, 15, 20, 29, 35, 39, 43 and the forms set out in the First Schedule to the Regulations.

[59] See *In re a Proposed Sale, Lee to Taylor* [1945] N.Z.L.R. 217 and *In re a Proposed Sale, Fisher to Pitman* [1946] N.Z.L.R. 64, as to the exercise of this power.

(c) *Objections under the Valuation of Land Act 1951*:[60] An owner is entitled to object to the valuation of his land made by the Valuer-General for the purposes of the Act.[61] If the Valuer-General does not alter the valuation to the extent sought by him, the objector may require the objection to be heard by a Land Valuation Committee.[62] The Committee proceeds in terms of the Act and Regulations to hear and dispose of the objection.

[60] See Land Valuation Court Act 1948, ss. 30 and 31 and the Valuation of Land Act 1951, ss. 18-23. Under s. 31, a local authority has power to appoint an additional member of the district Land Valuation Committee. This is a survival of the former practice when assessors were appointed by the parties.

[61] ss. 18 and 19. The purposes for which the valuation roll may be used are set out in ss. 28-31. The primary purpose is for the levying of rates.

[62] s. 20 (3). That provision refers to the "Court," but it appears that Land Valuation Committees have jurisdiction in the first instance, subject to an appeal to the Court; Valuation of Land Act 1951, ss. 21 and 24, and the Land Valuation Court Act 1948, ss. 21-23 and Regs. 40 and 41.

(To be concluded.)

SUBDIVISION OF LAND: PERMISSION TO LAY OUT NARROW ROADS OR STREETS.

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

For many years now it has been the general rule in New Zealand that new roads or streets laid out on a subdivision of land must be in width not less than 66 ft. Thus, s. 125 of the Public Works Act 1928 (the statutory progenitor of which was s. 20 of the Public Works Amendment Act 1900) provides that where any owner *sells* any *part* of his land, he shall unless such part has a frontage to an existing public road or street, provide and dedicate as a public road or street a strip of land not less than 66 ft. in width, giving access to an existing public highway. "Sale" is widely defined as including gift, exchange, or other disposition affecting the fee simple, and lease for any term (including renewals under the lease) of not less than 14 years.

Section 125 of the Public Works Act 1928, in this respect does not apply to subdivisions which come within the ambit of the Land Subdivision in Counties Act 1946, but s. 9 of that Act provides that, subject to the provisions of that section, the proposed roads shall be of such widths and have such grades as seem to the Minister most suitable having regard to the matters aforesaid and probable traffic on the roads.

Section 34 of the Town and Country Planning Act 1953 provides that the provisions of the Land Subdivision in Counties Act 1946 and of ss. 125 and 128 of the Public Works Act 1928 and of any other Act as to the minimum width of roads and streets shall be deemed not to be contravened if they are of the minimum width specified in an operative district scheme; but no district scheme shall provide for any new road or street of a width less than 66 ft. in an area intended under the scheme to be used for residential, commercial, or industrial purposes unless the Council first passes a special order confirming that in the opinion of the Council the width proposed will, having regard to the district scheme as a whole, be sufficient for the period of the scheme for all normal road or street uses and for amenity purposes in relation to adjoining properties, provided, however, that no such road or street shall be of a less width than forty feet.

Section 11 (3) of the Housing Act 1955 provides that subject to the provisions of the Town and Country Planning Act 1953, but, notwithstanding anything to the contrary in the Public Works Act 1928, the Municipal Corporations Act 1954, or any other Act, it shall be lawful for any local authority to consent under s. 29 of the Public Works Amendment Act 1948 to the proclaiming of any land as a street of a width less than 66 ft., but not less than 40 ft. if the land is State housing land or if the street is required to provide access to any State housing land or land subject to an agreement for sale or licence to occupy under s. 16 or s. 17 of the Housing Act 1955.

As previously pointed out, s. 125 (1) of the Public Works Act 1928 makes imperative dedication of a new street or road of a width of at least 1 chain where part of a piece of land sold has no access to an existing road or street. Subsection (2) thereof, however, provides that in any case of subdivision to which the provisions of s. 187 of the Municipal Corporations Act 1920 are applicable, there shall be substituted for the requirements of subs. (1) thereof a requirement to provide and dedicate a strip of land of the width of the street authorized by the said s. 187. Now s. 187 of the Municipal Corporations Act 1920 is represented by s. 186 of the Municipal Corporations Act 1954, which reads as follows:—

> 186. (1) Where it is difficult or inexpedient to lay off a street at a width of sixty-six feet throughout the whole of its length as required by this Act,—
>
> (a) The Governor-General, on the application of the Council, may, by Order in Council, authorize the Council to lay off or permit the laying off of the street at a width for the whole or any part or parts of its length of less than sixty-six feet but not less than forty feet:
>
> (b) The Council may, pursuant to a special order in that behalf, lay off or permit the laying off of the street at a width for the whole or any part or parts of its length of less than sixty-six feet but not less than fifty feet:
>
> Provided that in every such case, except where the street serves only industrial or commercial premises, the Council shall require that, when new buildings are erected or any buildings are rebuilt or re-erected or are substantially rebuilt or re-erected on land having a frontage to any part of that street which has a width of less than sixty-six feet, no part of any such buildings shall stand within a specified distance (being not less than eight feet) of the side line of the street.
>
> (2) The provisions of section one hundred and twenty-eight of the Public Works Act 1928 shall not apply with respect to any land having a frontage to any part of a street which has been laid off at a width of less than sixty-six feet pursuant to a special order under paragraph (b) of subsection one of this section.
>
> (3) As soon as conveniently may be after the making of a special order under paragraph (b) of subsection one of this section, the Council shall send a copy of the special order to the District Land Registrar or the Registrar of Deeds, as the case may require, who shall, without payment of any fee,

deposit the same in his office and register against the title to all land affected thereby a memorandum under his hand that the land is subject to the building line restriction specified in the proviso to paragraph (b) of subsection one of this section.

(4) In this section the term "street" does not include a service lane within the meaning of Part I of the Public Works Amendment Act 1948.

It will be noted that the section provides two methods: the procedure under para. (a) of s. 186 (1) is by way of Order-in-Council—that under para. (b) is by way of *special* order passed by the Council. It will also be observed that s. 186 refers also to s. 128 of the Public Works Act 1928—the section requiring dedication of a strip of land to bring an existing narrow street or road up to a minimum width of one chain where land is subdivided into allotments for the purposes of *sale*; and in that section "sale" has the same definition as in s. 125.

Subsection (3) of s. 125 of the Public Works Act 1928 provides that any local authority other than a Borough Council may in any case by resolution authorize the provision and dedication within its district of a public road of a less width than 66 ft., but not less than 40 ft., but otherwise in accordance with s. 125; but no such resolution shall take effect unless and until it has been approved by the Governor-General in Council.

Section 191 of the Counties Act 1956 provides that the Council shall have the control and management of all county roads in the county within the meaning of the Public Works Act 1928: subs. (4) thereof (as enacted by s. 3 of the Counties Amendment Act 1957) contains provisions very similar to para. (b) of s. 186 of the Municipal Corporations Act 1954. Again, the procedure is by way of *special* order, and a copy thereof must be registered in the Land Transfer Office.

If the narrow road or street is authorized by the Land Subdivision in Counties Act 1946 or by para. (a) of s. 186 (1) of the Municipal Corporations Act 1954, the necessary formalities will be attended to by the appropriate Government Department. But, if the narrow street or road is to be authorized under para. (b) of s. 186 of the Municipal Corporations Act 1954 or s. 191 (4) of the Counties Act 1956, then the formalities will have to be attended to either by the Corporation's solicitor or the solicitor to the subdividing owner; and this will include registration of a copy of the special order in the Land Transfer Office. It is therefore considered that the following precedent may be of some use to the practitioner.

The time limits imposed by the Municipal Corporations Act and the Counties Act, as to the confirmation of the Council's resolution, must be carefully observed; these will be checked up by the Land Registry Office before a copy of the special order is deposited therein. It will be observed that in both cases no fee is charged for depositing the copy of the special resolution.

By s. 2 of the Municipal Corporations Act 1954, "special order" means a special order made in manner provided by s. 77 of that Act; that section provides that the resolution shall be passed at a special meeting, and that the resolution shall be confirmed at a subsequent meeting (either ordinary or special) held not sooner than the twenty-eighth day after the day of the special meeting, and not later than the forty-second day after that special meeting. The requisites of a special meeting are set out in s. 76 of the Act.

By s. 2 of the Counties Act 1956 "special order" means a special order made in manner provided by s. 87 of that Act; that section provides that the resolution shall be passed at a special meeting, and that the resolution shall be confirmed at a subsequent meeting (either ordinary or special) held not sooner than the twenty-eighth day after the day of that special meeting and not later than the seventieth day after that special meeting. The requisites of a special meeting are set out in s. 86 of the Act.

CONVEYANCING PRECEDENT.

Council's Permission to Lay-off Narrow Street: Copy of Resolution for Filing in Land Registry Office.

IN THE MATTER of the Municipal Corporations Act 1954

AND

IN THE MATTER of a subdivisional plan prepared by A. B. Esq., Registered Surveyor, and lodged for deposit in the Land Registry Office at .... under Number....................

IN EXERCISE of the powers conferred on it by Section 186 of the Municipal Corporations Act 1954, the .... Borough Council by way of special Order HEREBY RESOLVES that:—

1. WHEREAS the Lots comprised in the above-mentioned plan constitute a subdivision of that parcel of land situate in the Borough of .... comprising [*Set out here total area of subdivision*] be the same a little more or less being [*Set out here official description of land surveyed*] and being the land comprised and described in Certificate of Title Volume .... Folio ....Registry AND WHEREAS it is necessary for the purposes of the said subdivision to lay off a new street being Lot numbered .... on the said plan AND WHEREAS it is difficult or inexpedient to lay-off the said s reet at a width of sixty-six feet throughout the whole of its length as required by the said Act NOW THEREFORE the registered proprietor of the said land is HEREBY AUTHORIZED AND PERMITTED to lay-off the said street at a width of the whole or any part or parts of its length of less than Sixty-six feet but not less than fifty feet* PROVIDED THAT in every such case except where the street serves only industrial or commercial premises, the Council shall require that, when new buildings are erected or any buildings are rebuilt or re-erected or are substantially rebuilt or re-erected on land having a frontage to any part of that street which has a width of less than sixty-six feet no part of any such buildings shall stand within a distance of eight feet of the side line of the street.

2. A copy of this Special Order be sent to the District Land Registrar....................

IT IS HEREBY CERTIFIED that the foregoing is a true copy of a Special Order passed by the .... Borough Council at a special meeting held on .... day of .... 1958 and confirmed at a subsequent meeting held on the .... day of .... 1958.

IN WITNESS WHEREOF these presents have been executed this .... day of .... 1958.

THE COMMON SEAL of THE MAYOR COUNCILLORS AND CITIZENS OF THE BOROUGH OF .... was hereto affixed pursuant to a Resolution of the .... Borough Council dated the .... day of .... 1958, in the presence of:

.... Mayor

.... Councillor

.... Town Clerk

* The minimum width which a Council may authorize is forty feet.

PAGES FROM THE PAST.

VI. Beginnings of Gaol Reform in the Sixties and Seventies.

By R. J.

Settlement in New Zealand was much less than half a century old and the cumbersome and distracting system of Provincial Government was still hamstringing the evolution of administration in the Colony when one of the first of the country's skeletons began a noisy rattling in the national cupboard. Her Majesty's prisons were under fire, and although conditions were disclosed as an affront to the most elementary principles of humanity and ordinary decency, a deaf ear was still being turned as late as the seventies by Government and people to the growing volume of remonstrance.

In short, it was not fashionable to speculate on what happened to the prisoner after justice had been done ; nor was it regarded as necessary to dwell on the probable effect, moral, physical, or spiritual, of the accepted standards of penal accommodation and discipline. If, as Dunedin was wont proudly to brag, correction could be achieved at a profit there was little to worry about. For years there had been a rising sentiment of dissatisfaction with procedures and conditions that were condoned by authority, if not specifically ordained, but the Gaol Commissioners were completely unmoved by all protests. Even that most sarcastic and acidulated of Governors, Sir James Fergusson, who tried to bludgeon national pride into doing something about it, discovered that the most intentionally wounding accents of vice-regal criticism were unavailing.

Even today imprisonment is something less than a retreat, but in the days when Mr James Caldwell, of Dunedin, was delighting the Provincial Treasurer of Otago with annual profits from the public gaol, a prison sentence meant a corroding interlude, long or short, in which time, instead of progressing, revolved—a circle round one centre, a paralysing immobility of life with every circumstance regulated to an unvarying pattern and schedule of squalor and bitterness, and a not inconsiderable leavening of brutality.

A Wellington barrister who spent a month in gaol for contempt made some revealing charges of excessive cruelty in the treatment of ordinary prisoners. His allegations were at first received sceptically ; but subsequent investigations unearthed, in some prisons, some of the abominations that Dickens had discovered in the lunatic asylums of England. It was proved, for instance, that the Wellington police were not above indulging the pleasant whimsy of roping their prisoners down in the cell by means of a ring in the floor, and it was left to the imagination how many baton taps on the head accompanied the roping down process. That, by the way, was as late as 1878.

Bench Intervenes.

It was from the Supreme Court Bench, out of the mouths of those whose duty it was to commit law-breakers to prison, that some of the more importunate exhortations against the system were heard. But not even the weight and influence of the Judges could secure an immediate flow of public expenditure in the direction of an improvement in corrective establishments. The repositories of shelved humanity that men called prisons continued to brook nothing that might smack of the repair or mending of damaged lives. Time and again the Bench drew attention to the disgraceful conditions which had constrained Mr. Justice Richmond in Dunedin to describe the country's gaols as " seed-beds of crime, with the punishment which is designed to prevent evil-doing resulting positively in an increase in crime."

The Supreme Court Bench had frequently called for " the classification of criminals," but still youths serving a week for pilfering were herded with hardened criminals, sometimes complete gangs of them.

" Our gaols," said Sir James Prendergast C.J. in one of his characteristic outbursts, " are sources of a moral contagion, a subtle infection more dangerous than anything that spreads from neglected drains or cesspools."

Perhaps the most voluble of the Judges was the inimitable Richmond J. Naturally addicted to a habit of extra-judicial comment on almost anything under the sun, he was a firm favourite with the newspapers which delighted to chronicle all the small beer solemnly retailed by the learned Judge, and at a criminal sitting his charge to the Grand Jury often assumed the proportions and tenor of a Bishop's pastoral. In Dunedin, on the occasion of his translation to Nelson he approached the prison question with customary indirectness in terms that have an intriguing ring today :

" Hitherto, I have not urged this subject as strenuously and as pointedly as I am now doing . . . because I have never forgotten the life-and-death struggle that was going on in the North ; because I have felt certainly, as an individual, that it was an impossibility for a civilized people to submit to a barbarian ascendancy ; because I have felt it a duty that could not be escaped that we should assert the Queen's supremacy over the whole population of these islands regardless of race or creed ; because I have felt it a duty not to be escaped to bring about a state of things in which our fellow colonists in the North Island could with personal safety till their lands, could pursue their quiet avocations, and feel secure of not being suddenly roused by a yell from a band of savages, and perhaps struck down by a volley from their muskets."

Referring to the " great subject of Gaol Reform and the necessity for increased expenditure upon [our] penal establishments," His Honour said it was a matter of " vast importance upon which I have addressed you often." He urged that a great deal of the crime in the Colony was not of its own making as it was committed by old convicts of the Mother Country, but what he did not stress was that England faced with an outcry from the Colonies against her policy of protecting society at Home by weeding out criminals and transporting them, was commencing an extensive and costly system of coercive detention in which were discernible the first halting steps against the extreme rigidity of penalties and penal conditions. The deterrent of disabling imprisonment was gradually losing its adherents.

Richmond J. developed at length the theme that responsibility for "the spread of crime by means of our own gaols will lie at our own door as a community . . . As individuals we shall be responsible, for it will be no excuse to any one of us that 'we have followed a multitude to do evil'."

Mr Justice Henry Barnes Gresson, Canterbury's first resident Judge, had a somewhat different approach to the matter. Nothing became His Honour's judgeship more than his extraordinary ability to distil from his crowded and exacting days as a Supreme Court Judge on circuit enough time and opportunity to acquaint himself with what went on about him. His interests were broad, humane, and exhaustive; and the conditions he discovered in the Hokitika Gaol in 1866 shocked him into immediate action.

In his charge to the West Coast Grand Jury, His Honour expressed surprise and disgust at what had come under his notice. With an impressive economy of vocabulary and rhetoric he contented himself with a firm direction to the Medical Officer of Health to make a report in detail That official's description of the prison disclosed a deplorable state of affairs.

The Hokitika Gaol comprised two buildings; one, fashioned of logs, had two cells measuring twelve feet and ten feet, and the other, built of deal, had four cells, each ten feet by eight feet. In these two hovel-like structures, fifty-nine prisoners were held, thirteen each in the two larger cells and nine, nine, eight, and seven in each of the four smaller cells. The only ventilation was a door held ajar on a chain, a facility which enabled passers-by to talk freely with the prisoners. There was no walled yard, but the inmates by some means were permitted half an hour's exercise each day. All meals were served and consumed in the cells, which were innocent of any sort of proper sanitation and generously vermin-infested. The prisoners slept on the floor, and the separation of the sexes was considered an entirely unnecessary inconvenience.

If it is conceded that a criminal is one who suffers from a defective sense of citizenship, could there be discerned in such conditions anything that might conceivably make good the lack? Gresson J. thought not, and forced the issue to such effect that within a matter of months the Canterbury Provincial Government was stirred into ordering the erection of a new gaol which provided less congested quarters, even if more reasonable conditions of living and discipline had still to await more widespread policy.

Regulations of 1875.

The calendar of daily conduct and labour, with name and sentence written upon it, which hung on the outside of every cell door was in many cases regarded, by prisoners and relatives alike, as an epitaph. The pitiful inadequacy of the system may be measured from a perusal of new regulations which one can only suppose found their way into the *Gazette* in 1875 as the best the authorities could concede to the continual judicial demands. The new rules, though hailed as reforms, merely served to emphasize how futile was the hope that anything could be born out of punishment but resentment and despair as long as the prisons of the country were regarded as trading departments from which profits must somehow be contrived.

The Regulations provide only a sensation of the menial offices with which each day began and finished, the harsh orders that routine in any system of regimentation seems to necessitate, the dress that made retribution grotesque to look at, and the silence and solitude that annihilated both hope and feeling.

One of the first requirements of the new code concerned that cleanliness which is supposed to be akin to godliness. All prisoners must be "kept in a cleanly state." This was simple. Walls and ceilings of wards, cells, rooms and passages must be painted with oil or lime-washed; oiled walls to be washed with hot water and soap every six months, and the lime-wash renewed at similar intervals. Cleaning of cells and day-rooms needed to be no more than a weekly business.

But surely ahead of its time, if it was ever practised, was the provision for a uniform system of discipline—"Criminal prisoners of inferior mental capacity will not be more rigorously dealt with than those of superior attainment, but those of a restless disposition will be placed at such description of labour as requires the closest and unvarying attention . . . ." How many horrors could that final instruction conceal!

Implicit obedience to all lawful commands was, of course, insisted upon, but complaints could be addressed to Visiting Justices, with always the liability for serious punishment in the case of frivolous protests on charges that could not be substantiated.

No doubt as a corollary to six-monthly cleanliness, provision was made for Divine service and the maintenance of a proper standard of behaviour on such occasions. Personal adherence determined the denomination of the worship to be indulged, but that principle was carried still further with a rigid embargo on "intercourse with a clergyman of a different denomination," except in extraordinary circumstances, the chief of which seemed to be "the immediate prospect of death." A Bible and a Prayer Book, carefully selected in terms of creed, were standard issue to all prisoners, with dire safeguards against misuse, and there was something almost Calvinistic about Reg. 16 which strictly prohibited "gaming, dancing, swearing, and singing," not, as North of the Tweed, on the Sabbath alone, but at all times.

Sleeping out of one's own berth was a heinous form of misconduct, and two hour's exercise morning and afternoon, without option, were included in the compulsory diversions of prisoners not serving hard labour sentences.

In Reg. 23 there was a nice regard for personal modesty, which even today the Army's King's Regulations treat with scorn. Prisoners were spared the embarrassment on admission of being stripped for search in the presence of any other inmate. It must be a strictly private proceeding.

Discharge was apparently a question of health as much as the effluxion of time, since Reg. 26 provided that ". . . . no prisoner shall be discharged from prison if labouring under any acute or dangerous distemper, nor until, in the opinion of the Surgeon, such discharge is safe."

No tobacco in any form was permitted and there was, of course, a complete embargo on "wine, beer, or other fermented liquor," except under the express instructions of the Surgeon who was himself restrained to the extent of entering the dosage prescribed, the

(Concluded on p. 128.)

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

The Professor's Best Friend.—An unusual and effective opening to Haslam J. in *Dale* v. *Atkinson and Others* was made by W. L. Ellingham for the trustee in an originating summons in the Wellington Supreme Court. " On August 15, 1925," he began, " there was a leader in the *Evening Post,* which said, 'The testator who makes his own will has long been a favourite with the legal profession. His posthumous value in fees to the lawyers was celebrated by Lord Neaves, the learned and witty Scotch Judge, in some verses which adjured them to keep green the memory of so great a benefactor :

When a festive occasion your spirit unbends,
You should never forget the profession's best friends ;
So we'll send round the wine and a light bumper fill
To the jolly testator who makes his own will.

" The author of the leader in question," he continued, " was the late Arthur Richmond Atkinson, a well-known solicitor, whose will, drawn by himself, has now to be interpreted. In his lifetime, he drew hundreds of wills, and, so far as is known, this is the first of them to require elucidation by the Court."

The Lighter Side.—The legal profession has reason to feel gratitude towards those writers who throw the light of humour on some of its problems. Among the most successful of these is Henry Cecil, whose trilogy *Brothers in Law, Friends in Court,* and *Much in Evidence* have brought pleasure even to the most ardent admirers of his work in the more customary field of detection. The latest novel *Sober as a Judge* (Michael Joseph, London) deals with some of the cases and misadventures that befall Roger Thursby as a High Court Judge, and abounds in delightful and slightly malicious touches, such as the picture of one of Roger's colleagues on the Bench :

> Mr Justice Breeze was a very cheerful bachelor. He did not pretend to be a good lawyer nor, indeed, a particularly good Judge, but he dealt out rough and ready justice with robust good humour. When at the Bar he had been almost irresistible to juries. His smiling red face and his down-to-earth, boisterous speeches, full of colloquialisms, jollied the jury along with him. When he went on the Bench he retained very much the same manner, though he toned it down a little. Counsel in his Court knew that it was no use relying on the finer points. Mr Justice Breeze was going to take the broad view and he intensely disliked technical points. " That's a mean little point, Mr Jones," he would say. " You know what I'd like to tell you to do with that. Abandon it. Hasn't your client any merits ? I'm sure such a jovial looking man must have some. Take fresh instructions, Mr Jones," he would add. " Tell your client not to skulk in the nasty, mean little street he's wandered down and to come out into the broad, open highway of justice."

Another writer in the same genre, Hastings Draper, achieved success with his *Wiggery Pokery,* although his approach to the law is along more farcical lines. His new effort, *Wigged and Gowned* (W. H. Allen, London) is well up to standard :

> Aiden, sitting opposite Hunt and Alan, had before him a notebook, two volumes of law books, a throat spray, and four unsharpened pencils. The throat spray and pencils were weapons of an offensive nature. Whenever he wished to make a wordless comment on what his opponent, or his opponent's witnesses, said, he sprayed his throat. Every time he squeezed the bulb of the spray there was a loud, and unmistakably derisory, hiss. The pencils were mainly for use before juries. If Aiden wished to wean away the attention of the jury from what was being said, he began to sharpen a pencil. He made the operation so delicate and so vital a one, that on a never-to-be-forgotten occasion not one of the twelve had heard the prisoner suddenly confess to the crime with which he had been charged.

Scriblex has no hesitation in recommending both books as an antidote to ill-considered judgments and settlements that go wrong.

Two Legal Inquiries.—An attorney has asked the American Bar Association whether it would be in breach of Canon 27 (which prohibits the solicitation of professional employment by advertisements) for him to insert in the *New York Law Journal* the following description : " Research Expert and Trial Counsel. Intricate Problems of law solved. Procedural and technical advice given. Trials and causes conducted from (a) to (z). Briefs at short notice. Moderate fees." On the other hand, the *Journal of the Law Society of Scotland* (February, 1958) illustrates the difficulty experienced " south of the Border " in obtaining suitable staff. It draws attention to an advertisement inserted in an English legal periodical by a South Yorkshire firm of solicitors. " An assistant solicitor, preferably single, for busy general practice in unattractive industrial district. Conveyances of £100 and backyard disputes frequent. Compensation for undertaking this ill-paid, unappreciated and difficult work consists of a good salary, splendid staff and employers with a keen sense of humour, and the opportunity to enjoy the Peak Country and good music."

Slips in the Type.—" On the question of speeding motorists the Mayor (Mr Kitts) said that an extra five traffic inspectors were being detailed for *snupervisory* duty in that connection."—*The Dominion* (1/5/58).

" The Trustees shall have power to take and *set* upon the opinion of counsel " etc.—*McKenzie Trusts Act,* 1954, Schedule, Second Part, cl. 11.

From My Notebook.—" It may seem very strange that a taxpayer who succeeds in delaying payment of his just dues to the tax collector and enjoys himself as much as he likes by gambling, yet should not come within the mischief of s. 157 (1) (a) of the Bankruptcy Act 1914, when he is made bankrupt and it is found that his estate is considerably diminished by his activities in gambling. The only answer that this Court can make is to say that that is not a matter for the Court but for Parliament. We have to interpret the law and the Act of 1914 as we find it, and s. 157 (1) is applicable only to a debt which is contracted in the course, and for the purposes, of the trade or business on which a man has been engaged."—Cassels J. delivering the judgment of the Court of Appeal in *R.* v. *Vaccari* [1958] 1 All E.R. 468.

PAGES FROM THE PAST.

(*Concluded from p. 126.*)

name of the fortunate recipient, and the reason, in "a journal" provided fir that purpose.

Complete prison dress was specified but on discharge a prisoner must have his private habiliments returned to him, "purified," if such a precaution were indicated, "unless it has been found necessary to destroy them, in which case he shall be provided with new clothing."

Regulation 72, "Interpretation," laid down that ". . . . the masculine gender shall, where applicable, include the feminine," but some special dispensations in the matter of sex were necessary. Most of them can readily be imagined but an important one was the permission granted to a female prisoner "to bring with her to the prison any child under twelve months of age," with bedding and food provided according to the scale ordered by the Surgeon. Women were also protected by a provision which declared that their hair must not be cut off without their consent, unless "on account of vermin and dirt" or following "repeated offences against prison regulations."

The hair of male prisoners must, willy-nilly, "be shorn short," and no growth was tolerated on the face "unless in any case it shall be deemed necessary by the Surgeon." Their locks were preserved to those serving sentences of a month or less, and the hair and whiskers of other prisoners approaching the time of their release had to be permitted to grow unchecked for one month before discharge. Personal hygiene was summarily disposed of in a few words: "daily shaving and washing of feet, and a weekly clean shirt."

Sundays, Christmas Day, and Good Friday were the only statutory holidays for Her Majesty's guests on hard labour, and the day's work began at 8 a.m. and finished at 4 p.m. from April to September, with 7 a.m. to 5 p.m. the daily schedule for the other six months of the year. No doubt winter committals were more popular then summer durance. Silence was demanded from the ringing of the 8 p.m. bell which heralded darkness in the cell and the evening of another day.

There was provision for instruction for the illiterate in the three R's; but, though Reg. 59 insisted that such diversions should in no circumstances impinge on "the hours prescribed for labour under sentence of penal servitude or hard labour," there was no indication as to when such studies could be pursued.

Even subordinate gaol officers had a limited freedom of action. Condign penalties were stipulated for absence from the precincts without written leave, and there were no such amenities as late nights. Warders who might divert themselves not wisely but too well so as to arrive at the gaol gates after 10 p.m. were locked out for the night. No ingress or egress was permitted in any circumstances, except to the Gaoler, the Matron, and the Surgeon, between the hours of 10 p.m. and 6 a.m.

SPARE THE ROD.

ADVOCATUS RURALIS.

What with the medical profession and the Junior Partner, Advocatus has been banished to a downstairs room, and the Junior Partner is no longer the Junior Partner while Advocatus is now known on his letter paper as "and Co." To one who is pleased at times to ruminate on the passing scene, this has its advantages for we are able to commune with others of a like age on the delinquencies of another generation without our visitors having to climb the stairs.

One of our first callers was a friend who went to the same war with us some time ago. In those days he was a good footballer and today he has two nephews (or are they grandnephews ?) who follow in his footsteps. After swapping symptoms, my Digger friend came out with the object of his visit. Apparently his heart, though still in the right place, is not as strong as it was forty years ago and twice recently he has had experiences with that type of idiot who infests the roadway on foot and plays "chicken". One particularly stirring episode occurred when two bright lights (apparently a car) came towards him and then one light went each side of the road. His heart may have weakened since we lived in the mud with our army in Flanders, but the years apparently have not affected his powers of expression. He was all for retaliation. But what could he do ?

Advocatus pointed out that Lord Chief Justice Goddard, like the experienced gentleman who wrote the Book of Proverbs (our generation did not need to have this explained), was a great believer in the power of the rod. The Chief Justice thought that the indignity of being spanked made a youth a figure of fun to his girl friends, and a warning to his boy friends. Digger wanted to know whether birching was still possible in New Zealand, and, as it was to one of his own generation, Advocatus did not mind confessing that he did not know. We reminded Digger of those very useful riding crops that used to hang in the harness-room fifty years ago and we asked after the health of the nephews (or grand-nephews).

In reminiscent mood we remembered one spring in Flanders when we were annoyed by a German machine-gun post which pestered us even more than today's "chickens". In those days we had a nasty thing called a Stokes mortar, with which we dropped bombs the size of a thermos flask with the intention of committing mayhem. The difficulty was to get the Germans to stay out while we popped them off. Rawdon, who was then our second-in-command, conceived the idea one First of April that it would annoy the Germans if one of our boys made a noise by shaking the German barbed wire, threw two or three bombs, and then dived for a hole till the machine-guns stopped. Rawdon arranged that when the German machine guns started so did the Stokes mortars. After three or four nights of this the Germans hid in their holes and refused to play; so, after the usual Stokes shower, Rawdon sent over a small team who winkled the machine gunners out of their dugouts and brought a selection home.

If you are not of Advocatus's generation you mightn't think stories like that had much to do with those darned "chickens", but very shortly afterwards the story came down the grapevine that two youths had been captured playing "chicken" and had been spanked with a riding crop. To make the coincidence even more complete the castigators were supposed to have borne a considerable likeness to Digger's nephews (or grand-nephews).