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SALE OF LAND: "SUBJECT TO FINANCE".

A MATTER of practical everyday importance was the subject of a recent judgment of Mr Justice Cleary in *Barber* v. *Crickett* (to be reported), allowing an appeal from the Magistrates' Court.

His Honour had to consider an agreement for sale and purchase containing a clause to the effect that the agreement was conditional on the purchaser arranging the necessary mortgage finance to purchase the property within thirty days from the date of the agreement, with the addition that in the event of the purchaser's being unable to secure the finance, the agreement would become null and void and the deposit was to be repaid to the purchaser. The Court interpreted that clause and applied it in the circumstances of the case.

In a judgment given in the Magistrates' Court, the learned Magistrate held that the purchaser was entitled to recover from the vendor a deposit of £250 paid by him. The vendor appealed. The facts, as found by Cleary J., follow.

On February 15, 1957, the appellant agreed to sell his house property together with certain chattels to the respondent for £4,850, of which a deposit of £250 was paid on the execution of the agreement and it was provided that the balance of the purchase money should be paid in cash on or before April 1, 1957. The agreement was in the standard form approved by the Real Estate Institute, but cl. 13 made special provision as follows:

> This agreement is conditional on the purchaser arranging the necessary mortgage finance to purchase the property within thirty days from the date of this agreement. In the event of his being unable to secure the finance this agreement will become null and void and the deposit now made by the purchaser is to be refunded to him without deduction.

Upon the execution of the agreement, the respondent made application to the Northern Co-operative Terminating Building Society for a loan of £3,000 on the security of the property. In a statement accompanying the application for the loan, the respondent was required to give certain particulars, and among these particulars he stated that he proposed to finance the purchase of the property by the deposit of £250 already paid, by £1,600 to be contributed by himself and his wife, and by the loan of £3,000: these amounts totalling £4,850.

On February 27, 1957, the respondent's solicitors wrote to the appellant's solicitors stating that their client had taken steps to raise the finance he required, and, if this was available, it was desired that the title be taken in the names of the respondent and his wife as joint tenants. The appellant's solicitors wrote in answer agreeing to this proposal.

On March 6, 1957, the Building Society wrote to the respondent stating that it was prepared to make the advance of £3,000 on certain conditions and enclosing a form of acceptance for completion by the respondent. The respondent did not appear to have formally accepted this offer to make the advance, but it did not appear to have been suggested at any time—and it was not suggested on the hearing of the appeal—that the conditions laid down by the Building Society were unacceptable to the respondent. His Honour accordingly dealt with the matter on the footing that the respondent was agreeable to these conditions.

The thirty days stipulated in the agreement for the arrangement of the necessary mortgage finance expired on March 17, 1957, which was a Sunday. On March 18, the respondent's solicitor wrote to the agents in the transaction as follows:

> Our client is unable to complete the agreement in terms of cl. 13 and we accordingly ask that you return the deposit of £250 to us.

There was no evidence that the appellant or his solicitors had been advised that the Building Society had agreed to make the advance applied for by the respondent, and the reason for this letter of March 18 was afterwards explained in evidence as follows. The deposit of £250 had been found by the respondent by way of temporary overdraft from his bank. The respondent and his wife were the owners of shares in two companies and their intention at the time of the agreement was to sell these shares, from the proceeds of which, together with the £3,000 to be advanced on mortgage, they expected to repay the bank and have sufficient cash to enable the purchase to be completed. In fact, some difficulty was experienced in the sale of the shares, mainly on account of a drop in the market price of the shares of one of the companies. The respondent's broker at first had difficulty in effecting sales at the price nominated by the respondent, and, when the market price began to improve, he refrained from making sales in the hope of securing a slightly better price. The result was that, on the expiration of the thirty days stipulated in cl. 13 of the agreement, about two-thirds in value of the shares had been sold, and the respondent conceived that, as he did not on

that date have sufficient money in hand (together with the advance he had arranged) to enable him to complete the purchase, he was entitled to notify the appellant that the condition in cl. 13 of the agreement had not been fulfilled. In so acting, the learned Judge said, for reasons which he gave later in his judgment, the respondent misconceived his rights; but His Honour added that, in fact, the remaining shares were sold within another ten days or so and before April 1, the date provided in the agreement for completion of the purchase.

The learned Judge continued:

> If cl. 13 of the agreement had provided that the contract was conditional on the respondent arranging a mortgage for a specified sum there could, I think, be no doubt as to the rights of the parties. Such a stipulation in a contract for the sale of land would plainly be for the benefit of the purchaser, so that he might, if he chose, waive fulfilment of the condition and insist on the vendor performing the contract: *Fry on Specific Performance*, 6th ed., 175, 461.
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> Further, there would be an obligation on the purchaser to use all reasonable endeavours to have the condition fulfilled. Thus, in *Gibson* v. *Bain* [1925] G.L.R. 407, the contract provided that the purchase money was to be paid "within 14 days from the date on which the Government loan is granted and the sale is made subject to such loan being granted", and Sim J. said: "Under this contract the plaintiff would have been liable for damages for breach of contract if she had neglected or refused to apply for a Government loan, and she would have been entitled to complete the purchase by paying the balance of the purchase money in cash without waiting for a Government loan" (*ibid.*, 407).
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> In that particular case the purchaser's application for a Government loan was refused, and the purchaser was held entitled to recover the deposit paid. But it is clear from the judgment that she would not have recovered her deposit if she had made no application for a Government loan, and indeed, as Sim J. observed, she would have been liable in damages to the vendor. I think this would also be the position even if the agreement provided expressly, as it does here, that on non-fulfilment of the condition the contract is to be null and void. The word 'void' is to be construed as meaning voidable at the instance of the party not in default, or, if neither party be in default, at the instance of either party.

The learned Judge then referred to *New Zealand Shipping Company Ltd.* v. *Societe des Ateliers et Chantiers de France* [1919] A.C. 1, in which a shipbuilding contract provided that if the builders should be unable to deliver the ship within eighteen months from the contractual date for completion by reason of war (which eventuated) the contract was to become void and all money paid by the purchasers of the ship was to be repaid to them. It was held that as the event had occurred without default by either party the contract was avoided, and Lord Atkinson said:

> It is undoubtedly competent for the two parties to a contract to stipulate by a clause in it that the contract shall be void upon the happening of an event over which neither of the parties shall have any control, cannot bring about, prevent or retard. For instance, they may stipulate that if rain should fall on the thirtieth day after the date of the contract, the contract should be void. Then if rain did fall on that day the contract would be put to an end by this event, whether the parties so desire or not. . . . But if the stipulation be that the contract shall be void on the happening of an event which one or either of them can by his own act or omission bring about, then the party, who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party, who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong, in the one case directly, and in the other case indirectly in a roundabout way, but in either way putting an end to the contract (*ibid.*, 9).

His Honour said that the matter was taken a step further by the judgment of the High Court of Australia in *Suttor* v. *Gundowda Pty. Ltd.* (1950) 81 C.L.R. 418. There the contract of sale was subject to the consent of the Treasurer being obtained, and provided that, if the consent was not obtained within two months, the contract should be deemed to be cancelled. The consent was not obtained within the two months without any default on the part of either party, but was afterwards obtained. The Court rejected a contention that the contract had come to an end at the expiration of the two months. After referring to the *New Zealand Shipping Company* case [1919] A.C. 1, the judgment said:

> Where the event in question is one which cannot occur without default on the part of one party to the contract, the position is clear. The provision is then construed as making the contract not void but voidable: only the party who is not in default can avoid it, and he may please himself whether he does so or not. In the present case the happening of the event (not obtaining the Treasurer's consent) may be brought about by failure on the part of either party to take certain necessary steps (provision of particulars by the vendor or making of application by the purchaser) to obtain the Treasurer's consent, or it may be brought about without any default on the part of either party. In fact, although there was some argument to the contrary, it was, we think, bronght about without any default on the part of either party. Such a case is perhaps not quite so clear as the simpler case where the event cannot occur without default on one side or the other. But we are of opinion that the *New Zealand Shipping Company case* (1919 A.C. 1) requires the same construction to be given to the contract in both classes of case. The provision in question is to be construed as making the contract not void but voidable. The question of who may avoid it depends on what happens. If one party has by his default brought about the happening of the event, the other party alone has the option of avoiding the contract. If the event has happened without default on either side, then either party may avoid the contract (*ibid.*, 441).

Mr Justice Cleary went on to say:

> In the light of the foregoing authorities, I think that, where a contract is conditional on a purchaser raising a mortgage, the purchaser can assert the non-fulfilment of the condition only where it occurs without any default on his part. As I have already mentioned, I think such a condition is one for the benefit and protection of the purchaser. In this respect, a condition of this kind differs from the stipulation in the *New Zealand Shipping Company* case where, as Lord Shaw pointed out at p. 12, the stipulation was one in favour of both parties to the contract; but here it seems to me that the position is the same as in the cases which were discussed in argument dealing with contracts for the sale of goods conditional on the vendor obtaining an export licence or fulfilling some similar requirement. In *Brauer & Co. (Great Britain) Ltd.* v. *James Clark (Brush Materials) Ltd.* [1952] 2 All E.R. 497, Denning L.J. said:
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> > The answer to all these questions is, I think, that this clause is a special exemption inserted in favour of the sellers. In order to enable them to take advantage of it they must show that, notwithstanding that all reasonable steps were taken by them, they could not obtain a licence to export during any part of the shipment period, or, alternatively, that it was useless for them to take such steps, or any further steps, because it was quite impossible for them to obtain a licence (*ibid.*, 501).
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> In a case, *Carmody* v. *Irvine* (Auckland, February 2, 1954, unreported), Stanton J. took this view of a stipulation in an agreement for the sale of land making the agreement conditional upon the purchaser arranging the finance necessary to enable him to complete the purchase, saying:
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> > In this case there can be no doubt that the party who was responsible for fulfilling the condition was the purchasers, and I think the clause can properly be read as meaning that the purchasers were to make all reasonable effort to arrange the necessary finance, and were only to be relieved of liability under the agreement if they found this was not reasonably possible.

His Honour then turned more particularly to a

consideration of cl. 13 of the agreement in the present case :

> Counsel for the respondent argued, in the first place, that the agreement had become void at the end of the thirty days, because the respondent had not then arranged the necessary mortgage finance. It follows, however, from what I have already said that the respondent's assertion that he had not obtained the finance does not conclude the matter, as was pointed out by Mansfield C.J. as long ago as 1810 in a passage cited in the *New Zealand Shipping Company* case [1919] A.C. 1, 7. Before he can say the contract was at an end he must show that he had failed to obtain the mortgage finance, and that such failure had occurred notwithstanding reasonable efforts on his part.

The respondent's counsel also referred to *In re Sandwell Park Colliery, Field* v. *The Company* [1929] 1 Ch. 277, where the contract was conditional on the approval of the Court and in the event of its not being so approved it was to become void, and Maughan J. pointed out the difference between a stipulation as to the time for completion and a stipulation as to the time for the performance of a condition upon which the existence of the contract is dependent (*ibid.*, 282). In that case, Mr Justice Cleary said, it was the vendor who was in default, and who was seeking to hold the purchaser to the contract against the wish of the purchaser, who had elected to treat the contract as being at an end when, by reason of the vendor's fault, the necessary consent was not obtained. The case was accordingly quite consistent with the views His Honour had expressed, and he did not think it afforded assistance to the respondent's argument.

The main ground relied on by the respondent's counsel was the ground on which the learned Magistrate had found that the respondent was entitled to recover his deposit—namely, that the language of cl. 13 of the agreement, and, in particular, the words "the necessary mortgage finance to purchase the property", were so vague that the whole agreement failed because of uncertainty. In support of this, he referred to such cases as *Pearce* v. *Watts* (1875) 20 Eq. 492, and *G. Scammell and Nephew Ltd.* v. *H. C. and J. G. Ouston* [1941] A.C. 251 ; [1941] 1 All E.R. 14. In the former case, the land intended to be conveyed had not been sufficiently defined by the agreement, and on this ground it was held that the Court could not decree specific performance of the agreement. In the latter case, the House of Lords held that there was no concluded agreement between the parties because they had yet to agree upon the meaning of the words "on hire-purchase terms for a period of two years" before there could be complete *consensus ad idem*, and rejected the respondent's argument that there was an agreement for sale in existence which was subject to a condition.

The learned Judge distinguished those judgments. He said :

> Here, however, there was an agreement for sale and the parties were agreed upon all the terms of their contract including the stipulation that the contract was conditiona on the respondent obtaining the necessary mortgage finance, and, there being an agreement for sale between the parties, although a conditional one, the position is, I think, different from what it was in *G. Scammell and Nephew Ltd.* v. *H. C. and J. G. Ouston.*
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> Although the respondent's counsel had referred to cl. 13 as constituting a condition precedent to the contract, I very much think it was a condition subsequent : see *Suttor* v. *Gundowda Pty. Ltd.* (1950) 81 C.L.R. 418, 443 ; *Dwyer* v. *Jerram* [1956] V.L.R. 279, and *Williams on Vendor and Purchaser*, 4th ed., 974. As I have earlier said, the condition was one for the benefit of the respondent alone, and I think that the respondent can rely on uncertainty only if the words can be given no ascertainable meaning so that it is impossible for a Court to say whether the condition had been fulfilled or not. If the respondent could go that far there might possibly arise a question whether the condition should be disregarded altogether, on the principle applied in *Nicolene Ltd.* v. *Simmonds* [1953] 1 Q.B. 543 ; [1953] 1 All E.R. 822 : see particularly the judgment of Denning L.J. (*ibid.*, 551 ; 825). But I do not think the respondent can go as far as that. The amount of any "mortgage finance necessary to complete the purchase" cannot be left for capricious determination by the purchaser. In *Carmody* v. *Irvine* (Auckland, February 2, 1954, unreported), Stanton J. held a purchaser to be in default under a condition expressed in almost identical terms with the language of cl. 13 in the present agreement, and the deposit was forfeited. And in a Queensland case, the Court gave a meaning to "subject to finance ": *Hines* v. *Good* [1951] Q.W.N. 2.
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> In some cases, the Court may be able to fix the amount by extrinsic evidence of the nature referred to by Lord Wright in *Tankexpress A/S* v. *Compagnie Financiere Belge des Petroles S. A.* [1949] A.C. 76, 95 ; [1948] 2 All E.R. 939, 947 ; although that case was quite different from the present case. However the amount be determined in any given case, I do not think that the words are in themselves so vague or obscure that the Court is prevented from attributing a meaning to them in order to say whether or not the condition is fulfilled, and in the present case the respondent himself has given a meaning to them. I do not think he can complain if the sum of £3,000 is taken as the amount of the mortgage finance necessary to enable him to complete the purchase, because this was the amount which he, with his knowledge of his own financial position, specified in his application for a loan made to the Building Society dated the same day as the date of the agreement.

His Honour did not think that it was open to the respondent to say that he was absolved from the contract because mortgage finance for more than £3,000 was necessary to enable him to complete the purchase, for he never sought to obtain more than £3,000, and he could not set up the failure of a condition which he did not attempt to perform. In truth, however, it was clear that the respondent regarded £3,000 as sufficient ; and, if necessary, His Honour would have been prepared to hold that it was in fact sufficient. As His Honour read the evidence, the respondent virtually agreed that with this advance he could have completed the purchase ; but he appeared to have misled himself by thinking that the amount of mortgage finance necessary to enable him to complete the purchase was to be determined by the fortuitous circumstance whether his broker had completed the sale of his shares on the thirtieth day after the contract was entered into. In His Honour's opinion, the condition as to obtaining the necessary mortgage finance became fulfilled by the Building Society agreeing to make the advance applied for ; and it was not thereafter open to the respondent to claim that the condition in cl. 13 of the agreement remained unfulfilled so as to release him from the contract.

The appeal was therefore allowed.

The general effect of His Honour's judgment is that where a contract for the sale of land is "subject to finance", here, in terms, conditional on the purchaser "arranging the necessary mortgage finance to purchase the property", the purchaser can assert the non-fulfilment of the condition and so recover his deposit only where the failure to secure the necessary finance occurs without default on his part. Before he can say that the contract is at an end, and recover his deposit, he must show that he has failed to obtain the mortgage finance, and that such failure has occurred notwithstanding reasonable efforts on his part.

SUMMARY OF RECENT LAW.

BANKS AND BANKING.

Cheque—Cheques returned marked "Present Again"—Drawer entitled to have same paid on Presentation—Non-trader—Proof of Damage—Nominal Damages for Proved Breach of Banker's Contsactual Duty. B. claimed damages from the defendant bank in respect of its action in failing to pay three cheques drawn by B. in favour of named payees, making such cheques "Present Again" and returned them to the bank presenting them for collection. The state of B.'s current account on the dates when each cheque was presented for payment was such that B. was entitled to have each cheque paid. *Baker* v. *Australia and New Zealand Bank Ltd.* (S.C. Auckland. 1958. July 11. Shorland J.)

BILLS OF EXCHANGE.

Cheque—Cheque paid by Drawer to Company at Request of His Creditor—Payment later stopped—Company, as Original Party to Cheque, not "holder in due course"—Company put to Proof of Its having given "valuable Consideration" for Cheque—Debt by Drawer to His Creditor not discharged by Company—No "valuable consideration proved—Rules of Exchange Act 1908, ss. 27, 38. A. was induced by the fraudulent misrepresentation of one D. to purchase a motor car for the sum of £825. D. saw the company's secretary, who agreed to finance a balance on a car he was selling to A. A. paid a deposit of £200 and D. accepted A.'s car as a "trade-in" at £450, the balance, with interest, was to be paid in three equal monthly instalments. A. agreed to sign a conditional purchase agreement and to give three post-dated cheques each for £61. The company paid D. the £175 before it knew that the conditional purchase agreement had been signed, and on a promise by D. to bring in the conditional purchase agreement and A.'s cheques. A. executed a printed form of conditional purchase agreement, but the agreement was not completed by D. It showed that the total price was £833 (being the agreed price £825 plus interest £8). The next day, D. telephoned A., and asked him to give the three post-dated cheques to the respondent company, saying "he was doing business with Winstones and it suited him". At the time of the sale, D. had spoken to A. of fixing "finance", but that was all. A. offered no objection and called on the company, and signed and delivered three post-dated cheques, each for £61. Shortly afterwards, A. found that he had been deceived by D. who could not be found, and A. stopped payment of the three cheques. The company was innocent of D.'s fraud, and acted throughout in good faith. On appeal from the judgment of a Magistrate in favour of the company as payee of the three cheques, *Held*, 1. That, the company was an original party to the cheques and could not claim the protection given to "holders in due course". by the Bills of Exchange Act 1908. (*R. E. Jones Ltd.* v *Wasing and Gillows Ltd.* [1926] A.C. 670, and *Oliver* v. *Davis* [1949 2 K.B. 727; [1949] 2 All E.R. 353, followed.) 2. That, as D had invited A. to discharge D.'s obligation by handing the cheques to the company with which A. was in no way involved, and A. merely complied with the request, the company had not discharged a debt due by A. to D., either at the request or even with the consent of A., and, consequently, the company had not given for the three cheques a "valuable consideration" within the meaning of s. 27 of the Bills of Exchange Act 1908. *Ash* v. *Frank M. Winstone (Merchants) Ltd.* (S.C. Auckland. 1958. June 26. North J.)

CONTRACT.

Frustration—Works Contract—Unexpected Change of Circumstances—Basis of Doctrine of Frustration—No Implied Warranty as to Conditions in which Work was to be done. A juridical basis of the doctrine of frustration is that it rests on an implied term of the contract to the effect that the parties will not be bound if a certain event happens, or does not happen. It is not enough to say that, in the event of something unexpected happening, some term must be implied; it must be clear also what that term should be. Equally, if the judicial basis of the doctrine rests not on an implied term of the contract between the parties, but on the impact of the law on a situation in which an unexpected event would make it unjust to hold parties to their bargain, the doctrine has been, and must be, kept within very narrow limits. (Statement of Viscount Simonds in *Davis Contractors Ltd.* v. *Fareham Urban District Council* [1956] A.C. 696, 714; [1956] 2 All E.R. 145, 152, followed.) It is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be, as well, such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for. (Statement of Lord Radcliffe (*ibid.* 729, 160) followed.) A substantial item of a contract in connection with the Borough's drainage works was the construction of, and sinking below ground level, an Imhoff tank and pump chamber. The plaintiff alleged that the contract had become wholly inapplicable to the circumstances which were actually encountered, because the ground in which the tank was to be sunk contained a heavy clay pan which made it impossible to excavate by machine, and the water and ground conditions above were encountered; and, since the terms of the contract no longer applied, the plaintiff was entitled to succeed as on the basis of quantum meruit; (b) if, contrary to (a) the terms of the contract still applied, then additional work, which lay outside the contract, was done, and for this the plaintiff was entitled to be paid on the basis of quantum meruit; (c) if the additional work was not outside the contract, then, since it was within the contract and it was an alteration or addition authorized by the defendant's engineers for which the plaintiff was entitled to be paid under the contract; and (d) there was a breach by the defendant of warranty as to the conditions which the plaintiff would encounter in the execution of the work, and the plaintiff was entitled to recover damages for such breach. *Held*, 1. That the plaintiff had not proved that there was frustration of the contract as the result of either the existence of the clay found or the excess of water encountered, or as a result of both combined; and the plaintiff was not entitled, on either of the juridical bases of frustration (as set out above), to the benefit of the doctrine. 2. That the work in respect of which the claim for payment on the basis of quantum meruit was based, was not work done outside the contract, but work within the contract necessary to enable the plaintiff to carry out its obligations; and it was not work authorized as an alteration to the contract. 3. That the plaintiff was not entitled to have implied into the contract any warranty by the defendant as to the water and ground conditions. (*Tharsis Sulphur and Copper Co.* v. *McElroy and Sons* (1878) 3 App. Cas. 1040, applied.) *Wilkins & Davies Construction Co. Ltd.* v. *Geraldine Borough.* (S.C. Timaru. 1958. July 16. Henry J.)

Sale of Goods—Rescission—Difference between Rescission ab initio and Rescission in Sense of Discharge by Breach—Effect of Exercise of Party's Right to treat Contract for Sale of Goods as discharged by Breach—Revival of Unpaid Seller's Lien over Goods subject to Contract. On the facts, *Held*, That the word "rescind" in para. 14 (a) of the contract meant the right of P., as vendor, to treat the contract as discharged by breach, and not a right of rescission of the contract ab initio. *Bines* v. *Sankey and Others.* (S.C. Auckland. 1958. June 27. Turner J.)

CONVERSION.

Measure of Damages in Conversion. *102 Solicitors' Journal*, 241.

CONVEYANCING.

Requirements of a Deed. *102 Solicitors' Journal*, 242.

Consideration and the Absolute Gift. *102 Solicitors' Journal*, 355.

Equitable Assignments: Some Reflections. *32 Australian Law Journal*, 34.

CRIMINAL LAW.

The Brighton Conspiracy. *225 Law Times*, 294.

Trial—Special Jury—Questions relating to Business and Professional Matters likely to arise—Such Questions not of Such Complexity or Difficulty as to make it likely that Injustice might be done if Case tried by Common Jury—Juries Act 1908, s. 37—Statutes Amendment Act 1939, s. 37. Section 84 of the Juries Act 1908 gives the Court a discretion to order a trial of a criminal case by a special jury, but that discretion is strictly limited by s. 37 of the Statutes Amendment Act 1939, which draws no distinction between civil and criminal cases. In criminal cases, however, the evidence for the prosecution, in the form of depositions, is normally before the Court when an application is made for a special jury, but in civil cases the evidence for the plaintiff is not before the Court. In the

present case, where the accused had been committed for trial on, inter alia, three charges of theft and one charge of attempted false pretences, and an application was made for trial by a special jury on those charges, *Held*, That, while questions relating to business and professional matters were sure to arise and some of them would present a certain degree of difficulty, those questions were not of such complexity or difficulty as to make it likely that injustice might be done to either party if the case was tried by a common jury. *Knapp* v. *McGavin*. (S.C. Wellington. 1958. July 25. Barrowclough C.J.)

Young Offenders—Sentence of Imprisonment on Youthful Offender not precluded—Each Case to be considered on Its Own Facts—Criminal Justice Act 1954, s. 14 (1). Section 14 of the Criminal Justice Act 1954 is not to be interpreted as precluding a sentence of imprisonment on a youthful offender for unlawful carnal knowledge under s. 216 of the Crimes Act 1908, or for other offences. Such a sentence may or may not be warranted. Each case must be carefully considered on its totam curiam. *Held also*, by a majority, That a sentence of imprisonment on a youtful offender (to be followed by a term of probation) in the circumstances of this case, was not warranted, and his appeal was allowed and the sentence quashed, a fine of £50 being imposed in lieu thereof, with a period of probation for one year from the time when the sentence was pronounced upon the terms imposed by the Judge who sentenced the appellant. *R.* v. *Halliday*. (C.A. Wellington. 1958. July 31. Barrowclough C.J., Gresson P., North J., Cleary J., Turner J.)

DEATH DUTIES.

"Merger" and Estate Duty. *102 Solicitoss' Journal*, 429.

DEFAMATION.

Cheques returned marked "Present Again"—Such Words, in Circumstances of Publication, reasonably capable of Defamatory Meaning—Answers made, "Present Again", in Fact, libelling Drawer—Drawer entitled to Damages. B. claimed damages from the defendant bank in respect of its action in failing to pay three cheques drawn by B. in favour of named payees, making such cheques, "Present Again" and returned them to the bank presenting them for collection. The state of B.'s current account on the dates when each cheque was presented for payment was such that B. was entitled to have each cheque paid. *Held*, 1. That B., not being a trader, was not entitled to recover substantial damages for the breach by the defendant bank of its contractual duty in respect of each of the three cheques unless the damages were alleged and proved as actual damages suffered; that she had failed to prove actual damage, but was entitled to nominal damages for the proved breach of contractual duty to honour the cheques. (*Gibbons* v. *Westminster Bank* [1939] 2 K.B. 882; [1939] 3 All E.R. 577, followed.) 2. That the defendant bank, by marking the cheques with the answer "Present Again", published words in writing of and concerning B., and, in the circumstances in which they were published, they were reasonably capable of a defamatory meaning, i.e., as conveying the meaning that B. had insufficient credit in her account to meet the cheques on their original presentation, and the intimation that B. had defaulted as to time for performance of the legal and ethical obligation to provide for payment by the bank on presentation of a cheque issued for immediate payment; and that the answers made, "Present Again", did, as a matter of fact, in each instance libel B. (*Capital and Counties Bank Ltd.* v. *George Henty and Sons* (1882) 7 App. Cas. 741, followed. *J. Lionel Barber and Co. Ltd.* v. *Deutsche Bank (Berlin) London Agency* [1919] A.C. 304, applied. *Pyke* v. *Hibernian Bank Ltd.* [1950] I.R. 195, referred to.) 3. That there were three libels of limited publication on B., a woman engaged in commercial rather than domestic activities, touching her reputation in respect of financial solvency and punctiliousness in having her cheques met, an absence of retraction and apology, and a defence of no liability made in Court; and that, in such circumstances, she was entitled to £100 as damages in respect of all three libels. *Baker* v. *Australia and New Zealand Bank Ltd.* (S.C. Auckland. 1958. July 11. Shorland J.)

DIVORCE AND MATRIMONIAL CAUSES.

Discretion Statements: A Changing Viewpoint. *108 Law Journal*, 356.

Seven Years' Separation—Meaning of "living apart"—"Living apart" and Cohabitation mutually exclusive Opposites—Question whether cohabitation resumed One of Fact and Degree to be determined according to Commonsense Principles—Casual and Intermittent Acts of Sexual Intercourse between Spouses not, of themselves, constituting End of Period of "living apart"—Divorce and Matrimonial Causes Act 1928, s. 10 (jj) (Divorce and Matrimonial Causes Act 1928, s. 10 (jj) (Divorce and Matrimonial Causes Amendment Act 1953, s. 7 (1). The term "living apart" as used in s. 10 (jj) of the Divorce and Matrimonial Causes Act 1928 (added by s. 7 (1) of the Divorce and Matrimonial Causes Amendment Act 1953) is the antonym of "cohabitation", so that living apart and cohabitation are mutually exclusive opposites. In a suit under s. 10 (jj), the question whether cohabitation or marital relationship has or has not been resumed is a question of fact and degree to be determined according to commonsense principles. (Dictum of Sir Raymond Evershed M.R. in *Perry* v. *Perry* [1952] P. 203, 215, applied.) Casual and intermittent acts of sexual intercourse between the spouses, merely as such and by their mere occurrence, do not constitute a resumption of cohabitation and end a period of living apart. In every case the inquiry must be the same: whether in the whole of the circumstances, the proper inference is that there has been a mutual reconciliation and that the state of cohabitation has been resumed. (*Rowell* v. *Rowell* [1900] 1 Q.B. 9; *O'Callaghan* v. *O'Callaghan* (1904) 6 G.L.R. 534, and *Jobson* v. *Wheeler* (1910) 29 N.Z.L.R. 491, applied.) *Bennett* v. *Bennett* [1936] N.Z.L.R. 872; [1936] G.L.R. 624, distinguished.) The term "living apart" in s. 10 (jj), has relation to a state of affairs in which the parties are living separate and apart from one another and in a state which there is an absence of that consortium which is characteristic of the proper relationship of man and wife. There must also be the further inquiry whether the spouses are "unlikely to be reconciled". *So held*, by the Court of Appeal, *per totam curiam*. On appeal from the judgment of Stanton J. [1957] N.Z.L.R. 532, *Held*, by the Court of Appeal (Hutchison and McCarthy JJ., dissenting), That, on the application of the foregoing principles to the facts as found by the learned trial Judge, the appeal should be dismissed. Judgment of Stanton J., reported [1957] N.Z.L.R. 532, affirmed. Per Finlay J. The significance of every act of intercourse between the spouses must be determined, in the light of the circumstances in which it took place, and considered from the point of view whether there was at any point of time some reality of resumed cohabitation: this is a question of fact. Per Hutchison J. That "living apart" for the purposes of s. 10 (jj) involves both a physical separation and a mental attitude on the part of one or both of the spouses, but, dubitante, whether that mental attitude must necessarily be averse to cohabitation. Per Turner J. That "living apart" involves two essential ingredients—a physical separation, and a mental attitude averse to cohabitation on the part of one or both of the spouses. Per Henry J. That the intention of the spouses is a relevant matter of fact for the consideration of the Court. Per McCarthy n. 1. That the state of mind of the parties may be material, but may have to yield to an objective test as in the case of constructive desertion; and it should not be elevated to the importance which it has assumed in the law relating to desertion. 2. That, in determining whether, as a question of fact in any given case, a state of affairs exists, in which the parties are living separate and apart and in a state in which there is an absence of consortium, the Court must have regard to all the surrounding circumstances, including the conduct of the parties, and, where necessary, the purpose for which the physical separation took place. *Sullivan* v. *Sullivan*. (C.A. Wellington. 1958. July 4. Finlay J., Hutchison J., Turner J., Henry J., McCarthy J.)

Sodomy—Wife's Voluntary Consent to Husband's Acts of Sodomy—Wife Party to Commission of Crime—Wife disentitled to Divorce—"Induced or contributed to the wrong complained of"—Divorce and Matrimonial Causes Act 1928, ss. 10 (k), 16. The crimes mentioned in s. 10 (k) of the Divorce and Matrimonial Causes Act 1928 are available as grounds of divorce to a wife only when their commission can be regarded as wrongs against her, but not when she is a party to their commission. The words in s. 16 of the statute, "induced or contributed to the wrong complained of," include the voluntary consent of a wife to acts of sodomy on the husband's part. Even if such consent is to be regarded as going only to the question of discretion, it would be a wrong exercise of the discretion entrusted to a Court to allow the wife to seek relief in respect of criminal acts to which she was a party. (*R.* v. *Jellyman* (1838) 8 C. & P. 604, *R.* v. *Ram* (1893) 18 Cox C.C. 609, and *R.* v. *Donovan* [1934] 2 K.B. 498, followed.) *So held* by the Court of Appeal, dismissing an appeal against the judgment of McGregor J. [1957]

N.Z.L.R. 549. *M.* v. *M.* (*No. 2.*) (C.A. 1958. July 31. Gresson P. North J. Cleary J.)

EVIDENCE.

Children as Witnesses. *225 Law Times*, 253, 280.

The Previous Statements of Witnesses. *34 Australian Law Journal*, 88.

INTERNATIONAL LAW.

Immunities of Diplomatic Agents. *108 Law Journal*, 243, 375.

LANDLORD AND TENANT.

Court of Review reducing Minimum Rental in Adjustable Lease—Variation of Right of Renewal—Court's Jurisdiction to make Order—Effect of Order on Rental for Renewed Term—Mortgagors and Lessees Rehabilitation Act 1936, ss. 8, 45, 71. By Memorandum of Lease No. 5908, dated December 20, 1935, the Tairawhiti District Maori Land Board granted to W. a lease of certain Native freehold land for a term of twenty-one years from July 1, 1934, at a yearly rental of £345 16s. Clause 13 of the lease provided for renewal in the following terms: "13. On the request of the Lessee by notice in writing to the Lessors or to the Board made not less than six months nor more than nine months before the expiration of the term hereby created, and if there shall not at the time of such request be any existing breach or non-observance of any of the covenants on the part of the Lessee herein contained but not otherwise the Lessors will at the expense of the Lessee grant to him a Lease of the demised premises for a further term of twenty-one years from the expiration of the said term at the yearly rental of five per centum per annum on the then unimproved value of the said lands plus the sum of £770 being the value of the owner's improvements on Lots 5 and 6, provided however that the rental for the renewal term shall be not less than the rental reserved under this present lease . . . ." In 1938, W. applied for adjustment of his liabilities under the Mortgagors and Lessees Rehabilitation Act 1936. The Gisborne Adjustment Commission made an order in, inter alia, the following terms: "3. That as from the 1st day of July 1938 and until expiry thereof the rental payable under Memorandum of Lease No. 5908 shall be and the same hereby is fixed at £209 per annum. "4. That Memorandum of Lease No. 5908 more particularly mentioned in the schedule hereto shall be and the same is hereby varied by deleting from cl. 13 thereof the last seven words of the first paragraph thereof being as follows 'the rental reserved under this present lease' and substituting therefor the words 'the sum of £209 per annum'." On originating summons for an order determining the rental which could properly be demanded for the renewed term, McCarthy J. [1958] N.Z.L.R. 218, held that the Court of Review was empowered to make the order for variation of the right of renewal contained in cl. 13 of the lease, the effect of which on the terms of the renewed lease was consequential and arose upon the exercise of the option On appeal against that determination. *Held*, by the Court of Appeal. 1. That the combined effect of ss. 45 and 71 of the Mortgagors and Lessees Rehabilitation Act 1936 was to permit a variation of the provisions of an adjustable lease which the Court of Review considered just and equitable and consonant with the general purposes of the statute. 2. That cl. 13 of the lease, which contained the right of renewal was an integral part of the lease, and, as a "provision of an adjustable lease," within the meaning of s. 45, it was subject to variation under the powers conferred by that section; and, consequently, there was jurisdiction to make the order, even though what was done in the present case was not an adjustment of a present liability. Appeal against the judgment of McCarthy J. [1958] N.Z.L.R. 218, dismissed. *In re a Lease, Watkins* v. *Maori Trustee*. (C.A. Wellington. 1958. July 31. Gresson P., North J., Hutchison J.)

MAGISTRATES' COURT.

Bias, arising from Pre-determination, on Magistrate's Part alleged—Test to be applied—Application of Principles of Natural Justice where Magistrate prejudged Issue without giving Unsuccessful Party Opportunity to present His Case—Cumulative Effect of Comments during Hearing. Practice—Certiorari—Magistrates' Court—Writ of Certiorari available against Judgment given in Magistrates' Court in Its Civil Jurisdiction—Where writ issues, Case to be retried before Another Magistrate. The test to be applied in cases where bias is alleged on the part of a Magistrate arising from predetermination, and not from pecuniary or proprietary interest, is that of real likelihood of bias. Reasonable suspicion of bias is insufficient. (*R.* v. *Camborne Justices, Ex parte Pearce* [1955] 1 Q.B. 41; [1954] 2 All E.R. 850, and *R.* v. *Grimsby Borough Quarter Sessions, Ex parte Fuller* [1956] 1 Q.B. 36; [1955] 3 All E.R. 300, followed. *Black* v. *Black* [1951] N.Z.L.R. 723; [1951] G.L.R. 395, referred to.) Bias, involves the mind of a judicial person being turned in a certain direction by something antecedent to his entering upon the hearing of the case. In general, the evidence of bias may appear in the course of the hearing; but, before bias is established, the evidence must show a mind leaning in a certain direction before the hearing of the case commenced. *Semble*, There may possibly be cases wherein that which causes a turning of the mind amounting to bias may be contemporaneous with the the hearing of the case; but it must be outside the hearing. A failure of natural justice results where a Magistrate has prematurely formed a view adverse to one of the parties. Thus, where a Magistrate prejudged the case so that the opportunity of a party to present his case was no opportunity at all, and he showed by his comments directly bearing on the case between the parties that he had made up his mind in favour of one of them, the cumulative effect of his comments or sets of comments during the hearing showed that he had prejudged the issue between the parties so that the unsuccessful party did not have a fair opportunity to present his case. (*Black* v. *Black* [1951] N.Z.L.R. 723; [1951] G.L.R. 395, and dictum of McCarthy J. in *In re Glennie and Rountree* (Wanganui, December 20, 1957, unreported), followed.) A writ of certiorari will, in a proper case, lie against a judgment given in the Magistrates' Court in its civil jurisdiction. (*New Zealand Waterside Workers Federation Industrial Association of Workers* v. *Frazer* [1924] N.Z.L.R. 689; [1924] G.L.R. 139, followed.) When a writ of certiorari issues to bring up and quash a Magistrate's judgment, where a real likelihood that the Magistrate prejudged the case has been established, the proper course is to remit the case to the Magistrates' Court for the issue to be retried there before another Magistrate. *Healey* v. *Rauhina and Another* (*F.A.M.E. Insurance Co. Ltd., Third Party*). (S.C. Wanganui. 1958. June 3. Hutchison J.)

MARRIAGE.

Consent by Magistrate to Marriage of Minor—No Right of Appeal against Grant of Refusal of Consent—Marriage Act 1955, s. 19—Magistrates' Courts Act 1947, s. 71. No right of appeal is given by the Marriage Act 1955 (or by any other statute) against the grant or refusal by a Magistrate under s. 19 of the Marriage Act 1955 of his consent to the marriage of a minor. *Wong and Another* v. *Hatton et Ux.* (S.C. Auckland. 1958. July 25. Shorland J.)

PRACTICE.

Appeal to Supreme Court—Matters which may be raised on Appeal—Objection not taken in Court below—Appeal determined thereon—No Costs—Magistrates' Courts Act 1947, s. 71. Any objection not taken in the Magistrates' Court may be taken on appeal, where it distinctly appears on the facts of the case, it goes to the root of the action, and could not have been cured by evidence if it had been taken in that Court: and it makes no hardship or injustice to the other party if the appeal is determined on such an objection. (*Painton* v. *Abel* (1893) 11 N.Z.L.R. 162 and *McKinnel* v. *Roxburgh East Rabbit Board* [1942] N.Z.L.R. 74; [1942] G.L.R. 92, followed.) If the appeal is upheld on a contention which was not in terms raised in the Magistrates' Court, the appellant will be denied costs on the ground that if the point had been raised in specific terms, there might have been no necessity for any appeal. (*McKinnell* v. *Roxburgh East Rabbit Board* [1942] N.Z.L.R. 74; [1942] G.L.R. 92, followed. *Upham* v. *Bardebs* [1927] N.Z.L.R. 722; [1927] G.L.R. 412, referred to.) *The Queen* v. *Rushbrooke and Others*. (S.C. Auckland. 1958. July 10. T. A. Gresson J.)

Statement of Claim—Amended Statement of Claim introducing New Cause of Action barred by Limitation Act 1950—Defendant deprived of Benefit under that Statute—Plaintiff's Right to apply for Leave to Bring Action on added—Court's Discretion more properly exercisable thereon—Amendment Struck out—"Cause of action"—Limitation Act 1950, s. 4 (7)—Code of Civil Procedure, RR. 144, 270, 271. Even under RR. 270 or 271 of the Code of Civil Procedure, the Court will not, save in exceptional circumstances, authorize an amendment introducing a new cause of action which is barred by a statute of limitation and thereby permit a party, by reliance upon proceedings filed earlier, to defeat the statute and take away a right existing in the other party. (*Weldon* v. *Neal* (1887) 19 Q.B.D. 394; *Bass* v. *The King* [1948] N.Z.L.R. 777; [1948] G.L.R. 305, and *Hall* v. *Meyrick* [1957] 2 Q.B. 455; [1957] 1 All E.R. 208, followed.) A "new cause of action" involves a new departure

or a new head of claim, and it may be brought about by alterations in matters of law or of fact, or both: in each case, it must be a question of degree. (Statement of Lord Wright M.R. in *Marshall* v. *London Passenger Transport Board* [1936] 3 All E.R. 83, 87, followed.) In the present case, the essence of the plaintiff's claim for common-law negligence in his amended statement of claim was the same as in the original statement of claim, and such alterations as there were did not amount to the introduction of a new cause of action. But, in the added "further and alternative cause of action" introducing an allegation of a breach of statutory duty, the ground was new in law and fact and appeared, on the face of it, to deprive the defendant of a benefit under the Limitation Act 1950; and it should be struck out. (Statement of Lord Wright in *London Passenger Transport Board* v. *Upson* [1949] A.C. 155, 168; [1948] 1 All E.R. 60, and *Murfin* v. *United Steel Companies Ltd.* (*Power Gas Corporation Ltd.* (*Third Party*)) [1957] 1 W.L.R. 104; [1957] 1 All E.R. 23, followed.) While the power given by RR. 270 and 271 to allow amendments may be discretionary, it was still open to the plaintiff to apply under the proviso to s. 4 (7) of the Limitation Act 1950 for leave to bring action upon the breach of statutory duty, and any discretion in the Court could be exercised more properly upon such an application. (*Western Canadian Greyhound Lines Ltd.* v. *Pomerleau and Pomerleau* [1955] 4 D.L.R. 133, distinguished.) *Smith* v. *Wilkins and Davies Construction Co. Ltd.* (S.C. Wellington. 1958. July 29. McCarthy J.)

SALE OF LAND.

Specific Performance: Doubtful Title. *108 Law Journal*, 339.

Innocent Misrepresentation by a Vendor. *108 Law Journal*, 371.

VENDOR AND PURCHASER.

Specific Performance—Defence of Hardship—Nature of Hardship operating as Defence. In an action for specific performance of a contract for the sale of land, hardship on the part of the defendant may operate as a defence. But the hardship must, in general, be such as existed at the time of the contract and not such as has arisen subsequently from a change of circumstances. The hardship that operates as a defence is great hardship or hardship amounting to injustice. In considering whether there is such hardship on the defendant, the Court must also consider the hardship on the plaintiff which would result in the decree for specific performance were refused. (*Tamplin* v. *James* (1880) 15 Ch. D. 215, *Eastes* v. *Russ* [1914] 1 Ch. 468, and *Keats* v. *Wallis* [1953] N.Z.L.R. 563, followed.) *Nicholas* v. *Ingram.* (S.C. Blenheim. 1958. July 31. Hutchison J.)

WAGES PROTECTION AND CONTRACTORS' LIENS.

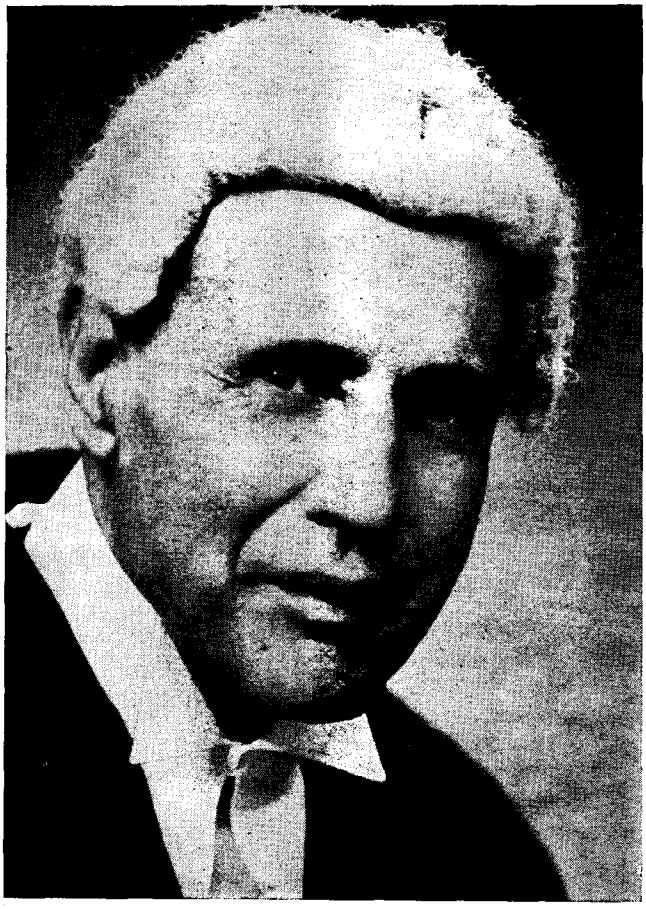
Moving Logs from the Stump to Skids and making of Roads (for Transport of Logs) and Construction of Skids—"Work" done "in respect of" the logs—Priority of Unpaid Seller's Lien on Logs over Contractor's Lien—Wages Protection and Contractors' Liens Act 1939, ss. 20 (1) and 21 (1). Sale of Goods—Unpaid Seller's Lien—Priority of Such Lien over Contractor's Lien in Respect of Same Chattels—Sale of Goods Act 1908, s. 42. On September 15, 1955, P., being at that time the lessee of certain land with rights over the timber on the property, entered into a written agreement with a company whereby the company agreed to purchase the timber after it had been cut. On or about July 2, 1956, the company purported orally to assign the agreement to S. By a further agreement in writing, dated November 2, 1956, and made directly between P. and S., P. recognized and consented to this assignment, and, in effect, entered into a new contract with S. under which, with unimportant modifications, the parties adopted as between themselves the terms of the original agreement of September 15, 1955, S. being in effect substituted for the company as purchaser. The terms of the agreement thus constituted between P. as vendor and S. as purchaser were as follows: P. agreed to sell and S. to purchase all the timber upon the land as described in the schedule at prices therein set forth. P. agreed to fell and cross-cut the timber in reasonable lengths for hauling, leaving it ready at the stump for S. to haul it. Paragraph 4 of the agreement provided: "4. The property in the timber hereby agreed to be sold shall be deemed to pass from the vendor to the purchaser as to each log, when it is felled, cross-cut, and ready and available at the stump for the purchaser to haul out." Payment depended upon the quantity of timber reaching the skids on or before the 20th of each month. Paragraph 14 provided for the eventuality of default in payment and is deserving of being quoted in full. It was in the following terms: "14. If the purchaser shall make default in payment of any of the purchase moneys hereby agreed to be paid as and when such moneys become due or in the performance or observance of any other stipulation or agreement on the part of the purchaser herein contained or implied (the times for such payment or performance or observance fixed by these presents being both at law and in equity strictly of the essence of the contract) and such default shall be continued for the space of seven days then and in such case the vendor without prejudice to his other remedies may at his option exercise all or any of the following remedies, that is to say, (a) May rescind this contract of sale, and thereupon all moneys theretofore paid may be forfeited to the vendor as liquidated damages. (b) May re-enter upon and take possession of the timber (or any of it) the subject of this agreement without the necessity of giving any notice or making any formal demand." Under an agreement made between S. and B., it was agreed that B. should construct skids for loading the timber and should construct new logging roads leading to them from various parts of the block, and should repair other logging roads to proper efficiency and should haul upon these roads to the skids such timber as required by S. B. constructed the skids and did the necessary construction and repair work on the logging roads; and, between October 4, 1956, and December 20, 1956, he had hauled to the skids, in accordance with his contract, logs measuring 291,888 h.d. feet. As at December 20, 1956, S. had not paid B. anything on account of his work and owed him £1,605 8s. S. had not paid P. any money and was in such default under his agreement as entitled P. to exercise his powers under para. 14 of the agreement. On December 19, 1956, P. by oral notice to S. purported to rescind the agreement of September 15, 1955; and, on December 21, this was confirmed in writing by his solicitors. B., by virtue of notice in writing dated January 17, 1957 (served on S. on January 23, 1957, and on P. on January 21, 1957), claimed a lien on the timber which he had actually moved and placed on or alongside the skids, for the sum of £1,605 8s. In an action to enforce that lien, *Held*, 1. That the moving of the logs from the stump into their new position on the skids by B. was "work" within the meaning of s. 20 (1) done "upon or in respect of" the logs within the meaning of s. 21 (1) of the Wages Protection and Contractors' Liens Act 1939, and, further, that the making of the roads (exclusively to be used for the transport of the logs) and the construction of the skids, when viewed against the circumstantial background of this case, was also work done "in respect of" the logs, the performance of which, if other circumstances did not prevent it, gave rise to a lien. (*Haynes* v. *McKillop* (1905) 24 N.Z.L.R. 833, followed. *In re Williams, Ex parte Official Assignee* (1899) 17 N.Z.L.R. 712, applied.) 2. That the ownership of the logs (as felled, cross-cut, and left ready at the stump) passed, as they were felled, to S., as purchaser, and as there was no express provision that upon default being made, the property in those logs should pass from him and revest in P., the property therein remained in S. 3. That the word "rescind" in para. 14 (a) of the contract meant the right of P., as vendor, to treat the contract as discharged by breach, and not a right of rescission of the contract *ab initio*. 4. That the effect of para. 14 (b) of the contract was that P. might, upon rescission, take possession, as against S., of any timber still in situ, either at the stump or at the skids, which then was still owned by P. and was still in his possession, the property in which had not already passed from S. to a subsequent purchaser. 5. That para. 14 (b) of the contract had the effect, as between S. and P. of empowering P., after default, upon the giving of the requisite notice, to revive P.'s unpaid seller's lien in terms of s. 42 of the Sale of Goods Act 1908, with the result that, as between S. and P. the logs were owned by S. but those of which P. had resumed possession were subject to his revived unpaid seller's lien. 6. That B. became entitled to a lien when he commenced his work in making the roads and constructing the skids, and, having given his notice and commenced his action as prescribed by the Wages Protection and Contractors' Liens Act 1939, he was entitled to a lien on S.'s whole interest in the logs, including any interest in the logs vested in P. if that interest was acquired under S. after the work was commenced. (*Re A. & T. Burt Ltd.* (1902) 21 N.Z.L.R. 540, applied.) 7. That the reivalv of his unpaid seller's lien by P. did not constitute the acquisition of any new right by him, but was merely the enforcement of a pre-existing right, which had been contingently reserved before B.'s work was commenced, with the consequence that, as between B. and P. the latter's unpaid vendor's lien took priority over B.'s lien under the Wages Protection and Contractors' Liens Act 1939. (*Aitken* v. *McLean* [1923] N.Z.L.R. 382, applied.) *Bines* v. *Sankey and Others.* (S.C. Auckland. 1958. June 27. Turner J.)

MR JUSTICE FINLAY.

Tributes on Retirement.

On August 6, on the eve of his seventy-second birthday, His Honour Mr Justice Finlay presided in the Supreme Court, Auckland, for the last time. It was the occasion of the practitioners' farewell to him him as a Judge of the Supreme Court. He had held that office since October 15, 1943.

The warmth of affection and regard in which His Honour has been held by the members of the Bar was shown by the unprecedentedly large attendance of practitioners. Some had been his professional colleagues and others had only recently been admitted by him to the profession. The same spirit actuated them all: reverence for a great and kindly Judge and affection and regard for one whom all present considered a personal friend.



Spencer Digby, photo.

Mr Justice Finlay.

Mr B. C. Haggitt, President of the Auckland District Law Society and Vice-President of the New Zealand Law Society addressing His Honour, said:

"Tomorrow, we understand, your Honour attains the age of 72 years, and, because of the compulsion of statute, you will then relinquish your office of a Judge of the Supreme Court, the high office which your Honour has held for the past fifteen years.

"When a Judge of the Supreme Court retires it is proper that the members of the legal profession should assemble to pay tribute in open Court to the services rendered by the retiring Judge in the administration of justice. This is even more so when the retiring Judge, before his appointment to the Bench, rendered great service to the profession of which he was a member. Those services to our profession were particularly outstanding in the case of your Honour. And so the members of the Bar assembled here today welcome this opportunity of appearing before your Honour on this last occasion on which you will sit in this Courtroom, in which you have so often appeared both as a barrister and as a Judge, and of paying tribute to the success and eminence you have attained.

"It falls to me to address you, both on behalf of the New Zealand Law Society and of the Auckland District Law Society, as Mr A. B. Buxton, President of the New Zealand Law Society, is unable to be present to-day.

The Attorney-General's Message.

"First, however, I would read a message which I have received from the Attorney-General the Hon. H. G. R. Mason Q.C., who regrets very much his inability to be present. He says this in his message:

'I am sorry indeed that my Parliamentary duties will not admit of my being in attendance on Wednesday when practitioners of the Auckland district assemble at the Supreme Court at Auckland in order to pay tribute to Mr Justice Finlay's service and wish him well in his retirement, and I should be obliged if you would express my apologies at not being able personally to be present to express the Government's appreciation of the retiring Judge's eminent services.

'When, in anticipation of this gathering, I referred to the Justice Department to verify some dates, they showed me a letter I had written soon after Mr Justice Finlay's appointment years ago. I then wrote: "No one in the Northern half of this island is better known or more widely liked. This is because he is so eminently human, friendly, and helpful. There is no one less likely to forget human needs amid legal technicalities — his temperament is altogether too decided to leave any room for two opinions as to that. In other words, he has eminently the qualities and attitude of mind which fit him for judicial work." And I am sure that today, as then, our thoughts of him as a friend are added to our respect for him as a Judge.

'Mr Justice Finlay has served his country in innumerable fields both before and since his appointment to the Supreme Court Bench. He was, during the war, the Aliens Authority in Auckland and later became Chairman of the Aliens Appeal Tribunal. As a Judge, from the Supreme Court Bench he was seconded to the Land Sales Court and he acted as a temporary Judge of the Compensation Court. He has served as chairman of important Royal Commissions and was for nine years chairman of the Parole Board. He has thus served in many judicial capacities, and in all of them has manifested that kindliness which has caused us to hold such friendly thoughts of him.

'The Government is further indebted to Mr

Justice Finlay for making his exceptional knowledge and experience available at present in the revision of the criminal law.

'I should be glad if you would express my wish to be personally identified with the members of the Bar in their expressions of appreciation and good wishes'.

THE NEW ZEALAND LAW SOCIETY.

"As I said a moment ago," continued Mr Haggitt, "the President of the New Zealand Law Society, Mr Buxton, is not able to be present, but he has asked me to read at this ceremony a letter which he has addressed thus:

'The New Zealand Law Society remembers with gratitude your Honour's outstanding service to the society as one of the Auckland delegates in the difficult years from 1931 to 1937, which raised so many new problems and saw the birth and growing pains of our Guarantee Fund.

'In 1943 we heard with the greatest pleasure that the wisdom, energy, and judgment so ungrudgingly given to our society would now be given to the discharge of your Honour's high office.

'Now, fifteen years later, when the limitations on judicial age brings well-earned years of leisure, we are glad that your Honour will enter upon them with unimpaired health and vigour. We hope that these years will be many and contented, and that not the least pleasant part of your retirement will be the recollection of your long and, to us, happy association with the members of our profession to which you have given so much both as a member and as a Judge.'

"Although the Attorney-General and Mr Buxton have not been able to attend today," Mr Haggitt said, "we are happy to have present Mr J. H. Sheat, president of the Taranaki District Law Society and Mr H. C. M. Norris, president of the Hamilton District Law Society, who will be addressing your Honour on behalf of those societies. It is particularly happy that these two societies should be represented, as apart from the fact that you frequently presided over sittings at New Plymouth and Hamilton, your earlier career was so closely associated with those two centres—New Plymouth where you completed your Bar examinations and were admitted; Hamilton in which District you commenced your career and where you practised for some years before coming to Auckland in 1924, and in which District your gifts of advocacy, which led to your appointment to the Bench, were first developed.

THE AUCKLAND LAW SOCIETY.

"The broad details of the history of events which make up your achievements during your years of practice and as a Judge are well known to many, if not to most of us; but, nevertheless, I think it proper for me to traverse briefly that history.

"Like so many who have attained eminence at law, your Honour is one whose achievements have been due solely to your own efforts. You were not one of those persons who could step into a practice ready made for you by your forebears; you attained success solely through your own ability and industry. Your early association with law commenced when you joined the Justice Department as a clerk in the Court at Hamilton, and the best indication of your desire to succeed in your chosen profession is that you were not content to remain a civil servant, but in your spare time you chose to study, with the result that in 1909 you were admitted to the Bar. Following that your Honour commenced practice in Te Kuiti in partnership and remained there until 1924. During those formative years you speedily made your mark as a barrister, and, as early as 1915, when you were still under thirty years of age, you led for the respondent in the Taumarunui election case, both in the Election Court and in the Court of Appeal, where other leaders appearing were men of such eminence as C. P. Skerrett, Sir John Findlay, and J. R. Reed.

"In 1924, your Honour set up practice on your own account at Auckland, and your success at the Bar was such that in 1943 you were appointed a Judge of the Supreme Court. When you came to Auckland, it was to set up in opposition to an exceedingly strong Bar. It would perhaps be invidious for me to mention names, but the Bar at that time was at its top strength, with a large number of leaders of outstanding ability. However, your Honour's ability as a nisi prius advocate, combined with a profound knowledge of legal principles, brought you speedily to eminence, and there were few cases of importance in which you were not engaged.

"For your Honour's ability as a barrister we remember you with admiration. And for another achievement, we remember you with gratitude and appreciation—that is, for your services to the profession as a member of the Council, and as an officer of the Auckland District Law Society, as well as of the New Zealand Law Society. Mr Buxton, in the letter which I have read, made reference to your services in what he termed the difficult years of 1931 to 1937, and he made short reference to one particular accomplishment by the Law Society of which you were one of the architects mainly responsible. I refer to the establishment of the Fidelity Guarantee Fund. At that time the setting up of such a fund, with compulsory membership, was warmly opposed by many; and it says much, not only for your powers of persuasion, but for your foresight, that the fund was established—a step which proved to be of the greatest possible benefit to the profession, especially in that it had the effect of restoring, in the eyes of the public, a reputation which unhappily had become sadly tarnished. Then, in 1934, you became president of the Auckland District Law Society, a tribute not only to your ability but to your popularity with your professional brethren; and it was during your term of office that our library block, of which we are justifiably proud, was built—an achievement for which you were largely responsible, and for which we must ever be grateful.

"Now I turn to the years from 1943 onwards. When you were appointed to the high office as a Judge of the Supreme Court, you were also appointed the Judge of the Land Sales Court, a newly-created Court set up to administer novel and generally unpopular legislation; and it is true to say that you earned the highest esteem for the manner in which, under your guidance, that Court laid down the principles on which that legislation should be carried into practical effect with as little disturbance as was possible to the sanctity of contracts.

"The Hon. the Attorney-General has made reference to your services to the country in other fields, both before and since your elevation to the Bench. I need not repeat them. It is sufficient that I respectfully concur in what he has said. But giving due recognition to these other services, your main work for the country

over the past fifteen years has been in your position as a Judge of the Supreme Court, for the last three years as senior puisne Judge, and, until the beginning of this year, as a Judge of the Court of Appeal over which, in more recent years, you so often presided.

" It is a difficult task to refer in public to the attributes of a Judge, because of the risk of being deemed presumptuous, but I take that risk and say that your Honour, throughout your period of office, has always been what is called a strong Judge. At all times you have truly been the President of your Court, and from you juries always received what they are entitled to, the benefit of a direct, helpful, and able summing-up.

" Although, when at the Bar, a great deal of your work was at nisi prius, none the less you had a profound knowledge of the law—of its principles and problems—and that knowledge has found its expression in your many judgments which appear in the *Law Reports*. Your judgments all bear the mark of learning and industry, and they follow a pattern, helpful and practical, of first establishing what you conceived to be the true legal principles underlying the questions in issue, and then developing your reasons for reaching your ultimate conclusion. It is unnecessary to refer specifically to individual judgments delivered by you, but I feel I should make this exception, that your enunciation of principles and examination of authorities is demonstrated to the full in your judgment in *In re Rayner, Daniell* v. *Rayner* ([1948] N.Z.L.R. 455, 487), a judgment which was concurred in with express approval by the other four Judges, who, with you, reached the majority conclusion.

" Through the passage of years, your duties have come to an end. The many and valuable services which you have given to your country and to your chosen profession have reached their conclusion, save as matters of record. On behalf of the societies whom I represent today, I thank you for those services and give you our warmest wishes for many years of happy retirement, with the satisfaction of knowing that you have well earned that retirement after a full life of success and duty unsparingly performed."

The Taranaki Law Society.

Mr Sheat, president of the Taranaki District Law Society, said he had come from New Plymouth, to support, on behalf of the profession in Taranaki, what had been said by Mr Haggitt, because it was felt that there were special reasons why a representative of the profession from that city should attend personally to convey to His Honour the good wishes of the profession there.

" I refer particularly to the fact, that your Honour qualified as a solicitor while employed as a clerk at the office of the Court in New Plymouth," he said, " and I recall also that, while your Honour practised at Te Kuiti, you had frequent contact with the Taranaki District, and that later we had the pleasure from time to time of visits from your Honour when you came to New Plymouth to preside over sittings of the Court.

" It was a source of special satisfaction to the profession in Taranaki that in February of this year you were able to come to New Plymouth to preside over what was to be your last circuit sitting before retirement; so that there was an opportunity then of saying farewell to you informally in the place where your career in the law began. If I may say so with respect, New Plymouth has a feeling of peculiar pride in your Honour's career. This will be shared I think by Hamilton. It is thought that there can have been few instances anywhere of a man returning as Judge to preside in the Court where he was formerly employed as a clerk in the office.

" On behalf of the profession in Taranaki, I offer your Honour the respectful thanks of its members for your long service to the profession both at the Bar and on the Bench, and the wish that you may enjoy a long and happy retirement. If I may conclude on a personal note—I am especially charged by my former partner, Mr J. C. Nicholson (with whom, I understand, your Honour was very closely associated in New Plymouth over fifty years ago), to express his personal regret that he is not able to be present this afternoon."

Hamilton Law Society.

Mr Norris, president of the Hamilton District Law Society, said it was particularly fitting that the practitioners of the Hamilton Judicial District should be represented that day. Because His Honour's career has been so ably spoken of already he felt that perhaps he could touch a little more lightly on His Honour's connection with Hamilton. There, as a clerk in the Magistrates' Court, he was still remembered, even if it was only as acting well the part of the heavy villian in the local comedy club. Mr Norris said he had also been told by one of His Honour's old friends that in those youthful years he had a special liking for hot freshly-baked cakes. His Honour would see that he was not forgotten altogether by his friends of those earlier times.

" When you commenced practice in Te Kuiti," said Mr Norris, addressing His Honour, " it was not very long before your reputation in the Courts became very well known and briefs came to you, not only from the northern King Country, but from other parts of the King Country and the Waikato as well. Te Kuiti, perhaps, could be looked upon in those days as almost a backblocks town and it is a remarkable thing—I doubt if one could find another instance of it—that both partners of the firm of Broadfoot and Finlay were subsequently knighted.

" The memories of your frequent appearances in the Supreme Court at Hamilton are linked, of course, with the more unusual happening perhaps (but it is recorded) that on one occasion you appeared for a local body clerk on a charge of embezzlement and it looked as if it was a very hopeless case, but the eloquence of your Honour actually brought tears to the eyes of the jury.

" I will not go any more fully into your Honour's career than has already been done. I will only convey to you the congratulations of the practitioners in my District on your eminent and very successful career, and our very best wishes for a long and pleasant retirement."

His Honour's Reply.

His Honour, in reply, said:

" Thank you for this crowning testimony of appreciation. If my work in the profession and on the Bench has been of value, then my reward is rich indeed. What you have so kindly said emboldens me to hope that I have not altogether failed.

" But no man achieves any measure of success by his own unaided efforts, and, whatever my accomplish-

ment may be, I have not achieved it alone. I have always been helped by the kindness, courtesy, and industry of the members of the profession. To them I owe a debt of gratitude ; and, at this moment of parting, I would fail in my duty if I did not give it expression. Nor do my obligations end there. I am much indebted to the Attorney-General for his kind remarks. He has ever commanded our respect and affection. We know that we have, in him, a man in a position of authority who understands the need for the maintenance of the independence and integrity of the Bench, and a man who comprehends the high quality of its ideals.

" I am indebted also to the Magistrates. So much of the work of a Judge concerns appeals, and it is never an easy matter to sit in judgment on the work of men who have given time and thought to their conclusions. My work has always been made easier by the high quality of the thought upon which their conclusions were founded.

" And then there are more personal thanks that I must offer. I was glad to hear one of you refer to my erstwhile and only partner, Sir Walter Broadfoot. I hold him still in the deepest affection and can only say of him that there could be no better friend and no better partner.

" And then I am indebted—as I think most of you know—to my associate, Miss Mary Enright, for many years of unselfish devotion and loyalty. May I pay a tribute to her that I fear is insufficient.

" Then there are the Registrars and the staffs of the various Courts. It would be ungenerous of me, and unjust, if I did not acknowledge my indebtedness to them. They have rendered me wonderful service, and they are rendering it still to all the Judges.

" If, therefore, you feel that I have accomplished anything, I would crave your leave to ask all of these to be participators in your tribute.

" The day of his retirement must be a climacteric day in the life of any Judge. Memory ranges back to figures long loved but long passed away, who press upon the mind. Good fortune decreed that I should enter the profession in an era of great Judges, and at a time when eminent advocates were at the height of their powers. Against the background of these ageing walls, I can see in retrospect men upon this Bench who gave it lustre : men who, by their wisdom, have enriched the legal learning of our times. Their names are still familiar to us as household words.

" With three I had much to do. First, Edwards J.—difficult, but a great lawyer. But to me he was always courtesy and kindness itself. But to two in particular I would refer because, with them, I was closely associated : Cooper J. and Stringer J.—great Judges and great gentlemen. No one could sit at their feet as I did and not come away wiser and imbued with the highest ideals. No counsel could practice before them and not feel much their debtor.

" Forgive me if I stay a moment to pay a tribute to their memory. With that tribute I would like to associate the band of men who constituted the brotherhood I joined. Their wisdom will enlighten generations of lawyers yet to come, and their names will live while the Common Law governs our civilization. Perhaps this was their greatest achievement, that they handed on to their successors the torch of judicial excellence, with its flame undimmed.

" But I cannot refrain from deviating from the general to the particular by recalling one whom you and I all loved, and whose memory will remain green as long as memory lasts. I refer to my old colleague and friend, J. B. Callan. I feel still the aching void of his absence. Such were the Judges of that earlier day.

" To many of you the names of the advocates of that time will be merely traditional. To some of us they were men we knew. It was not the only era of great advocacy in New Zealand, but it was one of the eras when men at the Bar in New Zealand were fit to take their place with the greatest men abroad. In the forefront were such men as Skerrett, Bell, and Findlay in Wellington. Further south there were men of nearly equal eminence. In Auckland there were Cotter, Earl, Reed, Martin—with Bamford and McVeagh as younger men making their way. Not far to the rear was another young man possessed of all the talents, R. N. Moody.

" To be associated with them as junior—as I often was—was a boon indeed to a young advocate. There could be no greater exemplars of the whole art of advocacy.

The Art of Advocacy.

" It is on that art that I would, if I may, speak a word today. Its methods and manners may change ; its basic principles are enduring and unalterable. Proficiency lies within the power of many men, for many have the natural aptitudes. For such men not to cultivate the art is a squander of talents. At the root of all good advocacy lies a profound knowledge of human nature. It is the tool with which the advocate works. It is the material he works upon. Human motives, human emotions, human characteristics are the constant subject of an advocate's study. Advocacy is an art to be learned by application and example. A knowledge of human nature and a knowledge of the art of advocacy are not natural gifts. They are won by effort. The advocate must carry with him on his daily round his thought upon such topics. He must, if only in imagination, practise. No good batsman can eschew practising at the nets : so no young advocate, if he would be great, can escape study and practice, actual or contemplative, of the art he professes. He insures failure if he goes in to bat unprepared. Good advocacy is an essential to the proper administration of justice. Its practice assures eminence and high reward. Such is my parting message to the younger practitioners.

" There is little I can say to the profession as a whole which might not savour of presumption. There are, however, two topics to which I might, with propriety, advert. The first is that, in recent days, difficulties of conduct have presented themselves. The diagnosticians and the purveyors of remedies are men from sources outside the legal profession, and, with respect, I fear that sentimentality and speculation are creeping in and that plain badness is being identified with sickness.

" No one would today countenance harshness ; but the question arises whether the legal profession, in whose province such social questions undoubtedly lie, should not re-emphasize the fundamental virtues of honesty and good citizenship and recommend that discipline—kind but firm—be adopted as a means towards their inculcation.

" The unfurling scroll of human destiny is, as to the future, hidden from human eyes, but there are signs and portents from which conclusions may be drawn.

" I apprehend that the area of influence of the legal profession is widening. In a world riven by con-

the only panacea is order based on law. As exponents of a law founded on the greatest measure of freedom that good citizenship allows, it may soon become the duty of our profession to promulgate its faith abroad to the end that others may see that freedom and good order and good human relationships are not incompatible.

" The American Bar Association is conscious of some such duty. It has recognized that the need for law in the world community is the greatest gap in the growing structure of civilization. Acting upon that assumption, it is on the march to prove Paine's dictum that an army of principles will penetrate where an army of soldiers cannot. It is a high conception. To give it effect, it requires, in the words of Roscoe Pound, only the will and work of devoted lawyers and statesmen to turn the incomplete body of already recognized principles of adjusting relations and regulating conduct into a true legal and universal order. At the end of that effort may well lie security and peace.

" Be that as it may, no one is better qualified than a lawyer, educated in our Common Law, to deal with and controvert the arguments of those who—in the name of order and the common good—would deny men the right of personal freedom. In summary, there is in the world today a sphere to which the lawyer's influence may yet extend and, by extending, make another contribution to the welfare of mankind.

" Gentlemen, I have done. Again I thank you for all your kindnesses. I am not parting from you. I hope we may for long march shoulder to shoulder to meet the difficulties and enjoy the pleasures that the future holds.

" May I, merely in my character as a Judge, conclude with Thackeray's words : ' The play is done : the curtain drops. Slow falling to the Prompter's bell. A moment yet, the actor stops, to look around and say farewell '."

THE LIMITATION ACT 1950 AS EFFECTING TITLE TO LAND.

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

Because most of the privately-owned land in New Zealand is now subject to the Land Transfer Act, and because s. 64 of the Land Transfer Act provides that after land has become subject to that Act, no title thereto, or to any right, privilege, or easement in, upon, or over the same, shall be acquired by possession or used adversely to or in derogation of the title of the registered proprietor, the student of law should not assume that the Limitation Act 1950 has merely a theoretical interest with regard to title to land in New Zealand.

Section 64 does not state that the Limitation Acts shall have no effect with regard to land subject to the Land Transfer Act. The section protects the estate or interest of the registered proprietor : the section, however, does protect the registered proprietor of every subsidiary estate or interest as well as the registered proprietor of the fee simple : *Campbell* v. *District Land Registrar* (1909) 29 N.Z.L.R. 332 ; 12 G.L.R. 484. Thus the Limitation Act 1950 does not *per se* destroy the legal estate or interest of the registered mortgagee of land subject to the Land Transfer, but it may be destroyed by the registration of an order of the Supreme Court under s. 112 of the Land Transfer Act 1952, or s. 87 of the Property Law Act 1952.

Section 112 of the Land Transfer Act 1952 authorizes the Supreme Court to discharge a land-transfer mortgage where it is satisfied that any action by the mortgagee for payment of the moneys would be barred by the provisions of the Limitation Act, and where it is satisfied that, but for the provisions of s. 64 of the Land Transfer Act 1952, the remedies thereunder (e.g., exercise of power of sale) would likewise be barred. The matter is within the discretion of the Supreme Court, but an order will not be obtained *ex debito justitiae* ; the mortgagor must prove that there is some good reason why the order should be made : *Thomson* v. *Commissioner of Inland Revenue* [1955] N.Z.L.R. 69.

Section 87 of the Property Law Act 1952 applies to all mortgages including those registered under the Land Transfer Act. Where any person entitled to receive, or, having received payment of any money secured by mortgage is out of the jurisdiction, cannot be found, or is unknown, or is dead, or it is uncertain who is entitled, the Supreme Court may, upon the application of the person entitled to redeem the mortgaged premises, order the amount of the debt to be ascertained in such manner as the Court thinks fit, and direct the amount so ascertained to be paid into Court or, as the case may be, may by order declare that all moneys secured by the mortgage have been paid in full. Machinery is provided for registering any such order under the Land Transfer Act. Alternatively, the mortgagor may apply to the Public Trustee for a similar order. To obtain an order under this section, it is not necessary, of course, that the debt should have been barred by the Limitation Act 1950.

By virtue of the Land Transfer (Compulsory Registration of Titles) Act 1924 (now Part XII of the Land Transfer Act 1952) there are now thousands of limited land-transfer titles in New Zealand. Section 199 (1) (d) of the Land Transfer Act 1952 provides that a *limited* certificate of title shall not prevail against the title (if any) of any person adversely in actual occupation of, and rightfully entitled to, any such land or any part thereof. It is possible therefore for many limited certificates of title to be void as against a trespasser in possession, especially as, unlike a title issued under a voluntary application (e.g. *Kelly* v. *Bentick* (1902) 22 N.Z.L.R. 235 ; 5 G.L.R. 175), the issue of a limited certificate of title does not cause time to cease running in favour of a trespasser in adverse possession at the date of the first bringing of the land under the Land Transfer Act. Consequently, s. 200 of the Land Transfer Act 1952 has been enacted as follows :

> 200. So long as any land continues to be comprised in a limited certificate of title any person claiming to be seised

or possessed of an estate of freehold in that land or any part thereof—

(a) By virtue of possession adverse to the title of the proprietor in whose name the certificate of title was issued; or

(b) Under any title the existence of which, or the probable or possible existence of which, is set forth in the Registrar's minutes—

may make an application under the provisions of this Act as if the Land Transfer (Compulsory Registration of Titles) Act 1924 and this Part of this Act had not been passed and the limited certificate of title had not been issued. The Examiner and Registrar shall deal with every such application in the manner provided in this Act other than this part, and if they are satisfied as to the grounds of the applicant's claim the Registrar shall in due course issue an ordinary certificate of title to the applicant, and shall call in and cancel or correct the limited certificate of title, as the case may require, under the powers conferred upon him by this Act for the correction of errors.

As a corollary, s. 197 of the Land Transfer Act 1952 provides that the District Land Registrar may, in his discretion require satisfactory evidence that the estate of the registered proprietor has not been extinguished by adverse possession, before (a) issuing an ordinary certificate of title in substitution for a certificate that is limited as to parcels or as to title or as to parcels and title; or (*b*) constituting such a limited certificate of title an ordinary certificate of title; or (*c*) removing the limitations as to title of a certificate that is limited as to parcels and title; or (*d*) registering any dealing with the land comprised in a certificate that is limited as to parcels or as to title or as to parcels and title.

Then there may be pointed out those very important provisions of the Native Land Court Act 1894, which were designed to bring under the Land Transfer Act, land held by Maoris under freehold tenure not previously subject to the Land Transfer Act. These far-reaching provisions have been brought forward into subsequent Maori Land Acts, the Native Land Act 1909, the Native Land Act 1931 and the Maori Affairs Act 1953. These statutory provisions provide that certain classes of these titles are subject to the Land Transfer Act even though no certificate of title has been issued therefor. The orders may still be lying in the Maori Land Court without ever having been sent forward to the Land Transfer Office, nevertheless the lands affected thereby are subject to the Land Transfer Act because the statutory provisions make them so. In other cases, the lands are not subject to the Land Transfer Act until the orders are registered in the Land Transfer Office. The reasons why hundreds of both such classes of orders have not been sent sent forward to the Land Transfer Office for registration are mostly because the survey or Court fees have not been paid in connection therewith. It is most regretable that this delay in the registration of the orders has occurred: the good intentions of those who framed the Native Land Court Act 1894 appear to me to have been frustrated somewhat; and I think that, sooner or later, the effect of the Limitation Act 1950 on these unregistered orders will come before the Supreme Court.

As proof that the Limitation Act 1950 has some practical effect on title to land in New Zealand, there may be mentioned two recent cases, where the relevant law was gone into most exhaustively by the respective presiding Judges.

In *Robinson* v. *Attorney-General* [1955] N.Z.L.R. 1230, the question was whether the owner of adjoining land had acquired title to a piece of unalienated Crown land by sixty years' adverse possession as against the Crown, and F. B. Adams J. held that title had been so acquired, although during the relevant period of adverse possession there was a statutory prohibition against occupying or alienating the Crown land. The reason is that a title to land which may be acquired by adverse possession is purely possessory, not resting on a presumed grant, but solely on the statutory destruction of the true owner's remedy and estate.

In *Hira Tamati* v. *District Land Registrar* [1957] N.Z.L.R. 231, the question was whether a title had been acquired by adverse possession to a Maori burial ground (called a Urupa), and North J. held that a title had not been so acquired because the Urupa was subject to the Land Transfer Act although the Crown Grant had been registered under the Deeds Registration Act and not under the Land Transfer Act, and apparently the Urupa had never been the subject of a certificate of title under the Land Transfer Act. Obviously the reason why the Crown Grant dated May 20, 1892, was registered under the "old system" was that it was ante-vested to a date before the constitution of the Auckland Registration District. But His Honour held that land granted by the Crown to Maoris on the commutation of their ownership under Native custom since the coming into operation of the Land Transfer Act 1885 became subject to the Land Transfer Act upon the issue of the Crown Grant, notwithstanding any ante-vesting clause to a date before the constitution of the Land Registration District.

Therefore, as these difficulties as to "squatters" titles, do occur in New Zealand from time to time, I think that the recent English Court of Appeal case, *Williams Brothers Direct Supply Stores Ltd.* v. *Raftery* [1957] 3 All E.R. 593, will prove of more than passing interest to the New Zealand practitioner and law student. The case shows that acts of user by a squatter may fall far short of dispossession of the documentary or *de jure* owner for the purposes of the Limitation Act 1950.

The plaintiffs were the documentary owners of the strip of land in question, a small strip of land at the rear of No. 367, approximately 13ft. wide and 110ft. long: the defendant (the squatter) was the tenant of 367A on which was situated a maisonette, let to him by the London Co-operative Society, which leased the whole premises from the plaintiffs. Number 367 appears to have been shop premises and 367A a maisonette over the shop premises. The plaintiffs had bought the property in 1937. They had taken down some old cottages and built the premises, renumbered 365 to 375. But the land at the back (including the small strip which the defendant claimed by operation of the Limitation Act 1939 (U.K.)), which, for all relevant purposes is the same as the Limitation Act 1950, was left vacant. It was found by the County Court Judge that the plaintiffs intended to develop that land when an opportunity arose; and that, until that opportunity arose, they did not, in the meantime intend to use it. The war came and there were the great difficulties of building on the land. So it came about that the vacant land at the back of these premises was used by the various tenants of the maisonettes for the purposes of growing garden produce. This was a result of the national "Dig for Victory" campaign. Two of the tenants obtained oral permission to do so. But neither the defendant nor his predecessor in title (one Haydon) obtained any

such permission. It was in 1943 that the defendant started growing vegetables on the vacant strip. After the war, the other tenants, one by one, stopped growing vegetables on their vacant strips; but the defendant kept on growing potatoes. The strip, however, was overrun with weeds; and, in 1949, he went in for greyhounds, first putting up a shelter and later better sheds and a fence to keep the dogs in. The strip of vacant land had been marked off not by the defendant but by Haydon, who did it by laying bricks "down from the old cottages", to mark it off from the land on each side, and to cultivate it. The evidence showed that the defendant had had no idea of taking over the land, but had thought that he was exercising rights over the strip of land to which he was entitled as a tenant of No. 367A. The defendant's mother-in-law also gave evidence. She was in flat No. 365, and she said: "I did not regard it as my own land". She was speaking with reference to a corresponding *user*. She said her husband worked part, and Haydon worked part: "We just took it and used it". (Moral: Never get your mother-in-law to give evidence on your behalf.) One Howey, a director of the plaintiff company had gone on to the strip of land in 1948, and there was no let or hindrance at all. He went on to the land with an official. No fence of any kind stopped him. He took measurements, he prepared a plan of the proposed development. Similarly, no attempt was made to stop Howey going on to the strip again in 1953, when some rubbish was dumped by him on the strip. These facts were sufficient to satisfy the Court that there was never any intention on the part of the plaintiffs to discontinue their ownership. "Indeed, they were doing all they could do in the circumstances, being landlords who intended to use the land for no other purpose than to develop it, and who have been prevented from circumstances hitherto from so doing." The real question, however, was this: Was there any evidence that the plaintiffs had in fact been dispossessed of the strip by the defendant. The County Court Judge held that there had been. He said: "In my view what was done by Haydon and the defendant was quite sufficient to amount to actual ousting of the plaintiffs". The Judge of first instance relied on *Marshall* v. *Taylor* [1895] 1 Ch. 641. In that case, more than twelve years before the action was brought, the defendant paved part of the surface with cobblestones and laid cinders on part, and also planted a rose-garden and made a fowl-house on other parts. Aut the plaintiff continued to cut his hedge from the defendant's side, and, on two occasions, opened the ditch to clean out the drains. It was held that, assuming that the plaintiff was the original owner of the ditch, he had lost the ownership of the surface by lapse of time, the acts of ownership of the defendant having been sufficient to dispossess him within the meaning of the third section of 3 &4 Will. 4, c. 27. In distinguishing this case, Hodson L.J., who delivered the leading judgment in *Williams Brothers Direct Supply Stores Ltd.* v. *Raftery*, at p. 597, said:

> ". . . I think it is sufficient, to distinguish this case, to point out that in that case the defendant had completely enclosed the property in question by a hedge and made it entirely part of his garden, which was a property of the same kind and of the same nature as the garden of the plaintiff alongside. The plaintiff was excluded from access to the defendant's garden unless he had chosen, as Lord Halsbury pointed out, to creep through the hedge; whereas in this case there was nothing of the kind."

The Court of Appeal in *Raftery's* case unanimously held that, having regard to the nature of the property (this is always a most important factor), the acts of *user* by the defendant did not interfere and were consistent with the purpose to which the owners intended to devote it, and were not sufficient to amount to a dispossession of them within the meaning of s. 5 (1) of the Limitation Act 1939 (U.K.) (Limitation Act 1950, s. 8 (1)); and that the owners were accordingly entitled titled to orders for possession and for the removal of the fencing and sheds, and to nominal damages for possession.

The case principally relied on by two of the Lord Justices was *Leigh* v. *Jack* (1879) 5 Ex.D. 264. The headnote to that case reads:

> "Acts of user committed upon land, which do not interfere and are consistent with the purpose to which the owner intends to devote it, do not amount to a 'dispossession" of him, and are not evidence of 'discontinuance of possession' by him within the meaning of the Act."

In that case, the plaintiff was the owner of the land, and the defendant had become, at the material time, the owner of land on each side of the land in dispute, the land in dispute being Grundy Street and Napier Place, names used to describe certain portions of waste land which belonged to J. S. Leigh, who was the predecessor of the plaintiff. The defendant, who had occupied the land on each side of this piece of ground, had enclosed it and placed on it a quantity of old graving-dock materials, screw propellers and boilers, and refuse from his foundry. He had spread this stuff over the surface of Grundy Street so as to make the place impassable for carts and horses, although people did occasionally pass on foot until the place was fully enclosed. The only intention which the owner had referable to that piece of ground was that it should be used as a road. It was never dedicated to the public as a highway. In short, the acts of the defendant were consistent with the intention of J. S. Leigh—namely, that the soil of Grundy Street should be at some time dedicated to the public as a highway. The defendant only used the land until that intention could be carried out.

It is interesting to note that F. B. Adams J. distinguished *Leigh* v. *Jack* in *Robinson* v. *Attorney-General* [1955] N.Z.L.R. 1230, thus recognizing its authority. As pointed out in Robinson's case at p. 1235 of the report, possession with the *animus possidendi* automatically excludes the owner: in *Williams Brothers Direct Supplies Stores Ltd.* v. *Raftery*, both elements were missing, there being neither *animus* nor *factum possidendi*. Trivial acts of trespass or user which in no way interfere with a contemplated subsequent user, do not constitute adverse possession for the purposes of the Limitation Act 1950.

A Good Charitable Trust.—"I am very surprised to hear that anyone suggests that the Boy Scouts Movement, as distinguishable from the Boy Scouts Association, or the Boy Scouts Organization, is other than an educational charity. . . . . The testator wants this income to be devoted to the purpose of furthering the Boy Scouts Movement . . . . by helping with the purchase of sites for camping, for outfits, and so forth; and I should have thought that was a very good and correct description of one of the most notable activities of the movement, or the association, or organization." Vaisey J. in *Re Webber, Barclays Bank* v. *Webber* [1954] 3 All E.R. 712, 713.

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

French Trials.—"When the examining magistrate asked the assassin of Henry IV the motive for his crime, Ravaillac replied simply, 'I saw flames.' The French are a race of 'flame-seers'—especially Parisians. The criminal trial is a lively show enacted by the flame-seer who committed the crime, the flame-seers who made the arrest, the flame-seer in the robes of judge. Add the flame-seeing lawyers and the flame-seers among the spectators who are too excited to remain quiet, and you have a French court-room scene where the judge leans so far out over the bench that he almost falls on the floor, and the accused has to be restrained, by force, from leaving his barrier. It is never objective, it is never dull, and frequently it leads to miscarriage of justice."—Ludwig Bemelmans, "French Rogues."

Negligence Note.—Law students of the vagaries of domestic life will be interested to know that a writer in *Woman and Beauty* has observed: "One girl I know used to hide an entire make-up outfit under the pillow, together with a tiny alarm clock, especially designed to buzz discreetly in her ear. The moment it went off she would hasten to make herself up, while her husband, vaguely disturbed by the buzzing, was still dreaming about wasps. Inevitably, he discovered her secret and, for a few months, put up with it with the tolerant smile reserved for the first months of marriage. One day, however, he mistook her lipstick for a nasal inhaler which he had concealed beneath his pillow and, in the darkness, tried to inhale the lipstick. The tolerant smile faded and two weeks later, waking in an admittedly bad temper, he hurled the little buzzer out of the window, hitting a postman who claimed, and received, substantial damages." The situation is "an addition to the categories of negligence which, as Lord Macmillan said in *Donoghue* v. *Stevenson*, are never closed"—to use the precise language that Professor A. G. Davis employs in a critical note on the judgment of Barrow-clough C.J. in *Furniss* v. *Fitchett* [1958] N.Z.L.R. 398: see *Modern Law Review*, July 1958, p. 438, "Whom Should A Doctor Tell?"

The Value of Probation Reports.—"I see that all the children concerned with this application are siblings," observed the Chief Justice to counsel in an interlocutory matter heard recently. The blankness of counsel's expression indicated that further particulars would be welcome. "I'm not surprised that the word 'siblings' is unfamiliar to you," added the C.J., "I only learnt of it myself the other day when I read a probation report!" David Stafford-Clark in his *Psychiatry To-Day* refers to the term as "a convenient one for describing children of the same parents whether they are brothers or sisters." Sib is an Anglo-Saxon word for kin and is to be found in the original "god-sip" or gossip, the foundation of most actions for defamation and of supposed changes of governmental heart.

Personal Fixit.—In *Wells* v. *Cooper* [1958] 2 All E.R. 527 the facts, as stated, are that in the late summer of 1954 a householder, who was an amateur carpenter of some experience, well accustomed to doing small jobs about the house, fitted a new door handle to the outside of the back door of his house with three-quarter inch screws. The door opened inwards from a small unfenced exterior platform about four feet above ground level. On December 4, 1954, when an exceptionally high wind was blowing against the door, the plaintiff, an invitee, who was leaving the house, gave the door a fairly stiff pull in order to shut it. The handle, which during the previous four or five months had remained secure, came away in his hand, causing him to lose his balance, fall off the platform, and suffer injury. A reasonably competent carpenter would not necessarily have appreciated, when doing the work, that screws longer than threequarter inch screws were necessary to secure the handle to the door. The Court of Appeal (Jenkins, Parker, and Pearce L.JJ.) considered that some kinds of work involve such highly specialized skill and knowledge, and create such serious dangers if not properly done, that an ordinary occupier owing a duty of care to others in regard to the safety of the premises would fail in that duty if he undertook such work himself instead of employing experts to do it for him. It also considered, however, that the defendant had discharged the duty of care which he, as occupier, owed to the plaintiff as invitee, because the fixing of the handle was a trifling domestic replacement well within the competence of the defendant, who exercised the degree of care and skill to be expected of a reasonably competent carpenter in doing the work. The decision seems to negate the doctrine expressed by Hilaire Belloc:

> Lord Finchley tried to mend the electric light.
> It struck him dead: And serve him right!
> It is the business of the wealthy man
> To give employment to the artisan.

Today it is one thing to give employment to the artisan, and another to survive until his arrival.

Questions in Court.—The increase in the sale of New Zealand wines as the result of import restrictions on spirits reminds Scriblex of a story from a Scottish newsletter appearing in a recent number of the *Criminal Law Review*. It seems that a Judge on the Glasgow circuit, hearing a case of assault following a drunken brawl at a "wine party", gravely asked the witness whether they were drinking cheap red wine. "Oh, no my Lord", replied the witness, with a nice sense of social history and injured dignity. "It wasn't cheap wine. It costs 5s. 9d. a bottle." And apropos of assault, the other day when counsel, pressing a defence of provocation, sought from the female complainant an admission that she called his client a bastard—and sought so hard that she burst into tears—she said, "That's the last thing I would do. I have two of my own."

Tailpiece.—The common view that stenographers have little or no interest in the contents of letters dictated to them is not borne out in an experience of one of Scriblex's fellow-practitioners. A proposition, belatedly made and described by him as "in striking contrast" to an earlier one was apparently regarded by his typist as lacking in colour and emphasis. "In *stinking* contrast", it had become.

TOWN AND COUNTRY PLANNING APPEALS.

St. Andrews Hill Ltd. *v.* Rotorua Borough.

Town and Country Planning Appeal Board. Rotorua. 1958. March 27.

Subdivision—Commercial Sites—Balance of Large Block already sold for Residential Sites and Residences erected thereon—Local Commercial Shopping Area needed in Future—Another Area in Vicinity zoned "Commercial"—Conflict as to More Appropriate Site for Shopping Area—Permit granted subject to Conditions—Town and Country Planning Act 1953, s. 38 (1) (d).

Appeal by the owner of a property being Lots 34 and 35 on Deposited Plan No. 27272 situated on the junction of Otonga Road and Old Taupo Road in the Borough of Rotorua.

It submitted a plan for the subdivision of this land into six commercial sites to the Council for approval. This approval was refused on the grounds that under the Council's undisclosed district scheme sufficient land was already zoned for local commercial purposes in the area under consideration. This appeal followed.

The land in question formed part of a subdivision of a large block of 63 acres.

This land was originally purchased in one block by the appellant company, and over the years it had been subdivided for residential purposes; a substantial number of sections had been sold and residences erected. Further subdivision for residential purposes was now taking place.

The judgment of the Board was delivered by

REID S.M. (Chairman). After hearing the evidence adduced and the submissions of counsel the Board finds:

1. That the property under consideration is in a rapidly-developing residential area and it is common ground that a local commercial shopping centre will be needed if not immediately at least in the near future to supply the local shopping needs of the area.
2. That the land lying to the south and west of this property is suitable for residential purposes, it already carries a substantial residential population and this can be reasonably expected to increase in the immediate future.
3. That under its undisclosed district scheme the Council has already zoned "commercial" a block of land owned by the Council on the south-eastern corner o Devon Street and Old Taupo Road having frontages to both and its case is that this provides for the foreseeable local commercial needs of the area.

   The real conflict between the parties is whether the company's site or the Council's proposed site is the more appropriate for the needed local commercial centre.
4. That Old Taupo Road is a busy by-pass highway carrying a substantial volume of traffic—a volume which can be expected to increase in the future.

   It is an established town-and-country-planning principle that wherever possible commercial centres should not be sited on main highways.
5. The Board accepts the necessity for the provision of a local commercial centre in the vicinity and it considers the company's proposed site to be the more suitable.

To establish a commercial centre on the site proposed by the Council would necessitate all the residents living to the north-west, west, and south part of this intersection crossing and recrossing Old Taupo Road to do this shopping. Whereas if shops are erected on the company's site fronting on to Otonga Road at least a substantial proportion of the residents will not need to go into Old Taupo Road.

The appeal is allowed but subject to the condition that the appellant's plan is to be altered so as to provide:

(a) That no shops have public-access frontage on Old Taupo Road though rear-access service lanes be permitted.

(b) That the corner site at the junction of Old Taupo Road and Otonga Road is to be used as a service-station site only.

(c) That shops fronting on to Otonga Road be set back sixteen feet from the road boundary.

No order as to costs.

Appeal allowed accordingly.

W. G. and J. M. Taylor *v.* Warkworth Town Council.

Town and Country Planning Appeal Board. Auckland. 1958. May 13.

Subdivision—Area zoned as "Rural"—Small Property used for Dairy-farming—Proposed Severance of Quarter Acre for Residential Purposes—"Hardship" referable to Subdividing Owner and not to Intending Purchaser—Undisclosed District Scheme adequately providing for Residential Sites—Use for Other than Rural Purposes Encroaching on Rural Land—Avoidance of Residential Pockets on Main Highways—Town and Country Planning Act 1953, s. 38 (1) (b)—Town and Country Planning Regulations 1954 (S.R. 1954-140), cl. 10 (2).

Appeal by the owners of a property situated in Matakana Road comprising 9 ac. 3 ro. 30 pp. being Lot 9 on Deposited Deposited Plan 703 part of Allotments 48, 48A and 49 of the Parish of Mahurangi.

The appellants lived on this property and did a certain amount of dairy farming on it, though that was not their main source of income. They applied to the Council for consent to a subdivision by the severing of approximately 1 ro. which it was proposed should be sold to one Ralph Barker, for the purpose of erecting a home.

The property in question was approximately half a mile from the Warkworth town boundary and it fronted on to the Warkworth-Matakana Main Highway. Under the Council's undisclosed district scheme, this property was in an area zoned as rural. The Council declined its approval of the proposed subdivision on the grounds:

1. That it would not be in accordance with the town-and-country-planning principles likely to be embodied in its undisclosed district scheme, and, in particular, it held that to allow the subdivision would be likely to cause demands to be made on the Council for the extension of water supply and other public services;
2. That it would cause encroachment on to farming lands;
3. That it would tend to approve of residential development on a main highway, with a consequential tendency to create a traffic hazard.

The submission was also made that a refusal of this permit would cause grave hardship to the intending purchaser. In respect of this last submission, Mr Butler submitted that in its undisclosed district scheme the Council, as part of its Code of Ordinances, has adopted in the main the Fourth Schedule to the Town and Country Planning Regulations 1954 (S.R. 1954-141), and, in particular, cl. 10 (2), where, in certain circumstances a Council may permit subdivision of land in a rural zone so as to produce an allotment of less than the minimum area, when, inter alia, approval tdereof was necessary to avoid undue hardship.

The judgment of the Board was delivered by

REID S.M. (Chairman). The Board agrees with Mr Butler's submission that the word "hardship" must here be read as applying to the subdividing owner and not to the intending purchaser. In this case, there is no evidence of any hardship being caused, or likely to be caused, to the owners. The only possible hardship that may be suffered will be the opportunity lost to Mr Barker to acquire a cheap building site.

After hearing the submissions of counsel and the evidence adduced, the Board finds:

1. That the Council's undisclosed district scheme appear to make more than adequate provisions for the foreseeable population needs of Warkworth town for the next twenty years in the area already zoned as residential.
2. The land in question here would appear to be appropriately zoned as rural, and its use for other than rural purposes would tend to encroach on rural land.
3. That the creation of pockets of residential development on main highways, however small, is to be avoided wherever possible. This property is situated on an important main highway upon which traffic can be expected to increase substantially and residential development along it should be avoided as much as possible.

The appeal is disallowed. No order as to costs.

Appeal dismissed.