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"We must remember that laws were not made for their own sakes, but for the sake of those who were to be guided by them. If they become unuseful for their own end, they must either be amended or new laws substituted."

—Sir Matthew Hale, C.J. (1671-1676), in *Considerations touching the Amendment of the Law.*

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Pensions and Damages in Fatal Accidents Suits.

IN the discussion at the recent Legal Conference on proposed amendments to the Deaths by Accidents Compensation Act, 1908, *ante*, p. 108, while the Conference recommended, *inter alia*, that where the deceased had a policy of insurance, any moneys coming thereunder to the plaintiff should not abate the liability of the defendant, the suggested amendments made no mention of amending the statute so as to exclude pensions in the assessment of damages under the Act. As this seems an omission with which our existing statute-law does not deal, we propose here to show that the present law in England provides for such exclusion, and to suggest that, when the amending Bill is finally drafted, provision should be made to remedy this defect in our legislation.

A recent case, *Shaw v. Hill*, [1935] N.Z.L.R. 915, gives point to the need for amendment of the law in the direction we have indicated. The facts, briefly, were that plaintiff's husband sustained injuries in a collision with a motor-car, and, as the result, subsequently died. In an action under the Deaths by Accidents Compensation Act, 1908, the jury found that the defendant had failed to keep a proper look out, and assessed damages at £1,750, apportioning to the widow £1,250, and to the child of the deceased £500. Mr. Justice Johnston, in the course of his judgment upon an application for a new trial, at p. 916, said:

> "The widow was receiving a widow's pension. It was admitted that this pension might be subject to variation according to the damages recovered by plaintiff in this action, but no exact estimate was given of the precise change. I advised the jury that they should leave the pension out of account, my view being that a pension of this nature is not analagous to a pension from a fund to which testator had contributed by way of insurance premiums, nor to the pension payable to the widow of a servant for services rendered for a certain period of employment."

His Honour was not satisfied that the jury assessed damages higher than the circumstances and the information available justified, and he held that the assessment of damages should not be set aside.

From this judgment, defendant appealed, but, in the argument in the Court of Appeal the question of the widow's pension was only lightly touched upon in the course of the submissions on the quantum of damages awarded. Mr. Justice Reed, in delivering the judgment of Myers, C.J., himself, and Fair, J. (which ordered a new trial, to be confined to the one issue the quantum of damages), at p. 920, said:

> "The widow is in receipt of a Government widow's pension of £3 18s. per month until her child is fifteen years old. It is stated that this pension is liable to be withdrawn or reduced, dependent on the amount of damages she may recover in this action.
>
> "The learned Judge directed the jury not to take this pension into consideration at all, and, without expressing any opinion as to whether this was a misdirection or not, we have not taken it into consideration."

Mr. Justice Smith, in a short judgment, thought there should be a new trial of the whole case, including the question as to whether the verdict was against the weight of evidence, and therefore did not find it necessary to consider whether the damages awarded were excessive or not.

The judgments in both Courts in *Shaw v. Hill*, in relation to the question of the pension, leave much to be desired, as, in effect, no opinion was expressed on the matter of exclusion or not in the Court of Appeal. It may be that in the passage cited from his judgment, Mr. Justice Johnston has correctly stated the law, and that what appears to be a contrary decision in *Carling v. Lebbon*, [1927] 2 K.B. 108, is either unsound or distinguishable, though this case does not appear to have been referred to in argument in either Court. The majority in the Court of Appeal, in view of the result of their decision, did not consider it necessary to deal with the point; yet their judgment seems, however, to suggest that the matter of misdirection so far as the widow's pension was concerned is at least open for further argument. It will, therefore, be interesting to consider the effect of the judgment in *Carling v. Lebbon* (*supra*), and to observe the statutory amendment by the Parliament at Westminster of the Fatal Accidents Act, 1846 (of which our Deaths by Accidents Compensation Act, 1908, is largely an adaptation), that almost immediately followed that decision.

The facts in *Carling v. Lebbon*, briefly stated, were as follows: The plaintiff, the widow, sued under the Fatal Accidents Acts on behalf of herself and the two infant children of her deceased husband to recover damages for the death of her husband from injuries caused by defendant's negligence in driving a motor mail-van. The husband was a labourer, earning £2 10s. a week, the sole support of his wife and family, whom he left destitute, except for a sum of 18s. a week paid to her under the Widow's, Orphans', and Old Age Contributory Pensions Act, 1925. Negligence was proved, and the question for the Court (Lord Hewart, L.C.J.) was whether, in computing damages, regard should be had to this pension.

In the course of his judgment, the learned Lord Chief Justice said he had come to the conclusion that the pension must be taken into consideration in the assessment of the plaintiff's compensation, as he thought that conclusion was made plain as well by the terms of Lord Campbell's Act itself (our Deaths by Accidents Compensation Act, 1908) as by the decision of the Court of Appeal (Bankes, Scrutton, and Younger, L.JJ.) in *Baker v. Dalgleish Steam Shipping Co.*, [1922], 1 K.B. 361, where it was held that the fact that the plaintiff in an action of the nature now under notice was, in consequence of the death, in receipt of a pension from the

Crown, ought, as a general rule, to be taken into consideration, notwithstanding that the pension was dependent on the voluntary bounty of the Crown. Lord Hewart went on to say that a widow's pension did not even satisfy the requirements of the amending Act, excluding "sums paid or payable on the death of the deceased under any contract of assurance or insurance," as the pension could not be described as "a sum paid or payable on the death of the deceased," and it was not a sum "payable . . . under any contract of assurance or insurance."

The result reached by the decision in *Carling v. Lebbon* was, therefore, that the pension concerned, whatever its true value may have been, had to be taken into account in the sense of reducing the damages which would otherwise have been payable to the plaintiff for herself and her infant children.

His Lordship reached this decision with regret. He said that:

> "When a man dies in circumstances in which his widow and children became entitled to the little pension to which the deceased man himself has contributed, the value of that pension must be deducted from any sum which the widow might otherwise recover in an action under Lord Campbell's Act."

He concluded his judgment by saying:

> "I should have decided the matter the other way if it had been possible for me to do so. But, in my opinion, as the law stands, there is no course open to me except to diminish the damages by taking that pension into account. Whether that is a desirable state of the law is a matter on which I am not called to express any opinion."

Upon the judgment in *Carling v. Lebbon*, an amendment of the law followed, as the Widows', Orphans', and Old Age Contributory Pensions Act, 1929 (Gt. Brit.), by s. 22 provided, with retrospective effect:

> "In assessing damages in any action under the Fatal Accidents Acts, 1846 to 1908, whether commenced before or after the commencement of this Act, there shall not be taken into account any widows' pension, additional allowance, or orphans' pension payable under the principal Act."

In the note to s. 1 of the Fatal Accidents (Damages) Act, 1908, *23 Halsbury's Complete Statutes of England*, p. 340 (the statute excluding payments by insurers in the assessment of damages under the Fatal Accidents Acts), the annotator mentions the above section of the 1929 statute, as "overruling *Carling v. Lebbon*, [1927] 2 K.B. 108."

We think this matter is sufficiently of importance that the doubts existing as to the inclusion or exclusion of pensions in assessing damages under the Deaths by Accidents Compensation Act, 1908, should be resolved at an early date by an amendment on the lines of s. 22 of the statute of Great Britain to which we have referred. Where the financial position of widows and children is concerned, it is an undesirable state of the law if amendment in cases of doubt be not effected until a definite decision of the Court be found against their interests; and is particularly of importance that the law should be made definite in this regard in this country, where pensions are almost exclusively provided by the State. If, in New Zealand, pensions are not to be taken into consideration in the assessment of damages in fatal-accident cases, then the effect is virtually to throw upon the taxpayer the incidence of a burden which should properly fall upon the wrongdoer who caused the death.

We have no doubt that the learned Attorney-General will consider the suggested amendment in his proposed Law Reform Bill, if he has not already done so.

Summary of Recent Judgments.

COURT OF APPEAL.
Wellington.
1936.
Mar. 30;
May 10.
Reed, J.
Ostler, J.
Blair, J.
Kennedy, J.

J. BALLANTYNE AND CO., LTD.
v.
DE BUEGER.

Contract—Performance—Contract of service made in New Zealand to be performed in New Zealand—Payment in "pounds sterling"—Whether English or New Zealand currency.

Appeal from the judgment of Northcroft, J., reported [1935] N.Z.L.R. 1043, where the question to be decided was whether upon the true construction of the contract which was made in England as set out in the judgment appealed from, it provided for the equivalent of £700 in English currency to be paid in New Zealand currency in New Zealand or for the payment in New Zealand of £700 in legal tender there; in other words whether the word "sterling" annexed to the word "pounds" required the obligation measured in English money of account to be discharged by payment of New Zealand currency equivalent to the nominal amount of English currency or whether it merely indicated and emphasized that the money of account was English.

A. W. Brown, and **Hensley,** for appellant; **O'Leary,** K.C., and **Buxton,** for respondent.

Held, by the Court of Appeal (*Ostler* and *Kennedy*, JJ., *Blair*, J., concurring, and *Reed*, A.C.J., dissenting), That payment in New Zealand where the contract was to be performed in the stipulated number of pounds in New Zealand currency is complete performance of the contract.

Adelaide Electric Supply Co., Ltd. v. Prudential Assurance Co., Ltd., [1934] A.C. 122, as applied in **Alliance Assurance Co., Ltd. v. Auckland City Corporation and Auckland Transport Board,** *ante*, p. 170, followed.

Upon the grounds,

Per Ostler, J., That the meaning of the word "sterling" as used now both in New Zealand and in England is "the currency which has now taken the place of gold as legal tender" and it was used in the contract to indicate that the parties were speaking of the English pound as a unit of account, and that they were stipulating for payment in the New Zealand currency which had taken the place of sovereigns as legal tender.

Per Kennedy, J., That the pound in New Zealand is the same unit of account as the pound in England, not merely a unit of account with the same name, and it was impossible to say that any other or different unit of account had ever taken its place; and, consequently, the obligation to be discharged by payment in New Zealand expressed in a money of account common to New Zealand and to England would be discharged by tender of that which was legal tender at the place of performance.

Semble, There may be no difference between an agreement in England to pay there £700, or £700 sterling, but the word "sterling" does not call for a greater payment in New Zealand than legal tender there of the nominal amount expressed.

Per Reed, J., 1. That, on the construction of the contract, it was a commercial contract drawn and executed in London, the word "sterling" being in constant use at that time as signifying British currency, use of the word "sterling" in a contract of service not being in common form.

2. That the contract was an English contract dealing with what was, in effect, a foreign currency, and it must be taken to express the intentions of the parties as to the currency in which the remuneration should be paid.

Semble, "Sterling" should be given the meaning given in s. 2 of the Reserve Bank of New Zealand Act, 1933—*viz.*, "moneys that for the time being are legal tender in the United Kingdom."

Solicitors: Raymond, Stringer, Hamilton, and Donnelly, Christchurch, for the appellant; **Bell, Gully, MacKenzie, and Evans,** Wellington, for the respondent.

Case Annotation: *Adelaide Electric Supply Co., Ltd. v. Prudential Assurance Co., Ltd.*, E. & E. Digest, Supp. No. 10, Vol. 35, title *Money and Money-lending*, p. 11, No. 17F.

COURT OF APPEAL.
Wellington.
1936.
Mar. 13; June 10.
Reed, J.
Ostler, J.
Blair, J.
Kennedy, J.

TUTUA TEONE
v.
JONES AND ANOTHER.

Natives and Native Land—Native Land Court—Jurisdiction—Whether Chief Judge has power to rectify "mistake, error, or omission" of the Native Land Court or of the Native Appellate Court—Whether the "mistake, error, or omission" must be that of the Court on the Material placed before it—Native Land Act, 1931, s. 38—Native Purposes Act, 1935, s. 3.

The intention of the Legislature in enacting s. 38 of the Native Land Act, 1931, was to provide that, if by any mistake or error or omission (however it should occur), the Native Land Court in effect did something which it would not have done, or left undone something which it would have done, then the Chief Judge would have jurisdiction to remedy that mistake. The section gives the Chief Judge the jurisdiction to remedy the mistake of the Native Land Court or the Native Appellate Court if it has given an erroneous decision in law.

The relief given by s. 38 is not restricted to cases where the "mistake, error, or omission" is made by the Court on the material before it.

In re Tume Tume, Tipene v. Jones, (1935) 11 N.Z.L.J. 82, overruled.

Taitumu Marangataua v. Patena Kerehi, (1912) 31 N.Z.L.R. 513, **Puhi Maihi v. Mackay,** (1914) 33 N.Z.L.R. 889, referred to.

So Held by the Court of Appeal (*Reed*, A.C.J., *Ostler*, *Blair*, and *Kennedy*, JJ.) refusing a writ of prohibition directed to the Chief Judge of the Native Land Court to forbid him to act upon or proceed further upon the application of the defendant Tipene for a rectification, cancellation, or amendment of certain succession orders of the Native Land Court.

Held further, per *Reed*, A.C.J., and *Ostler* and *Blair*, JJ. (*Kennedy*, J., expressing no final opinion), That s. 3 of the Native Purposes Act, 1935, has no effect upon the interpretation of s. 38 of the Native Land Act, 1931.

NOTE:—For the Native Land Act, 1931, see THE PUBLIC ACTS OF NEW ZEALAND (REPRINT), 1908-1931, Vol. 6, title *Natives and Native Land*, p. 103.

SUPREME COURT
Wellington.
In Chambers.
1936.
June 8, 9, 13.
Smith, J.

RE W.

Aged and Infirm Persons—Protection Order—Appointment of Manager of defined Part of Estate—Evidence required by Court before exercise of Discretion—Evidence required in support of Petition for an Order restricting testamentary Powers—Power to vary Protection Order—Aged and Infirm Persons Protection Act, 1912, ss. 5, 7 (2), 26.

The Court has jurisdiction to make a protection order under s. 5 of the Aged and Infirm Persons Protection Act, 1912, in order to safeguard the best interests of him and his dependants, when it is satisfied that a person by reason of his taking and using alcoholic liquors is unable to manage his affairs.

The power to make such an order, when read with the form in the Second Schedule to the Act, enables the Court to appoint a manager of a defined part of the estate, or of the whole of the estate excepting a defined part or parts.

On an application for an order restricting W.'s testamentary powers,

Held, That, there being no evidence that undue influence had been exercised upon the person concerned or that he will not properly exercise the power of testamentary disposition, a matter which is separate and distinct from the wasting of his own property in his own hands during his lifetime, an order would be not made under s. 26 of the Act.

Semble, As there is power under s. 7 (2) of the Act to vary an order made under s. 5, as well as to rescind it, a subsequent application for an order under s. 26 might lie if there were grounds to support it.

NOTE:—For the Aged and Infirm Persons Protection Act, 1912, see THE PUBLIC ACTS OF NEW ZEALAND (REPRINT), 1908-1931, Vol. 2, title *Destitute Persons*, p. 887.

SUPREME COURT
Wellington.
1936.
June 5, 15.
Blair, J.

CORNFORD AND ANOTHER
v.
GOWER AND ANOTHER (No. 2).

Practice—Appeal to the Court of Appeal—Security for Appeal—How Amount determined—Court of Appeal Rules, R. 22.

The words "due security for costs" in Rule 22 of the Court of Appeal Rules mean the costs already awarded and also such costs in the Court of Appeal as may be awarded there if appellant be unsuccessful.

Young v. Harper, (1889) 8 N.Z.L.R. 179, and **Robertson v. Howden,** (1891) 10 N.Z.L.R. 471, referred to.

Counsel: S. A. Wiren, for the defendants, in support; **H. R. Cooper,** for the plaintiffs, to oppose.

Solicitors: Cooper, Rapley, and Rutherfurd, Palmerston North, for the plaintiffs; **Humphries and Humphries,** Napier, for the defendants.

SUPREME COURT
Auckland.
1936.
Feb. 26;
June 16.
Blair, J.

WALLACE v. McGIRR.

Contract—Mistake—Unilateral Mistakes to Subject-matter—Consensus ad Idem—Damages.

Defendant was offered a house described as "No. 6"; he carelessly went and inspected No. 16 in the same street, and then signed an offer for No. 6 believing it to be the house he had inspected. The mistake was the defendant's and was in no way attributable to the plaintiff or her agent, neither of whom was made aware of the fact that the defendant had made the inspection. The defendant knew he had inspected No. 16, and afterwards signed the offer for No. 6 after reading it.

In an action by the plaintiff for specific performance, or alternatively, for damages,

F. C. Jordan, for the plaintiff; **R. N. White,** for the defendant.

Held, That the case was one of mistake as to the identity of the subject-matter of the contract, but such mistake was purely unilateral, as the plaintiff was guiltless of such mistake and was unaware until the contract was complete that the defendant believed he was buying No. 16. Defendant was accordingly bound by the contract.

Smith v. Hughes, (1871) L.R. 6 Q.B. 597, applied.

Raffles v. Wichelhause, (1864) 2 H. & C. 906, 159 E.R. 375, distinguished.

Van Praagh v. Everidge, [1903] 1 Ch. 434, referred to.

2. That, in the circumstances, the proper remedy was damages.

Solicitors: Dignan, Armstrong, and Jordan, Auckland, for the plaintiff; **Marshall White and White,** Auckland, for the defendant.

Case Annotation: *Smith v. Hughes*, E. & E. Digest, Vol. 35, title *Mistake*, p. 107, para. 125; *Raffles v. Wichelhause*, *Ibid*, p. 99, para. 77; *Van Praagh v. Everidge*, *Ibid*, p. 101, para. 86.

"In this case the plaintiff is a bookmaker and defendant was a foolish person because in December, 1932, he made thirty bets with the plaintiff and lost twenty-eight of them. Therefore, he must, as I say, be a foolish person."
—per MACKINNON, J., in *Latter* v. *Colwill* [1936] ALL E.R. 441.

Extrinsic Evidence in aid of Interpretation of Wills.

Some Guiding Principles.

By R. L. Ziman.

Not infrequently a practitioner, called upon to advise upon a question arising under a will, finds difficulty in tracing the principle or heading under which to seek for authority. The difficulty is by no means lessened by the mass of authority in the way of Judicial decisions and the many excellent text-books that have appeared on the subject of Wills. In fact the practitioner is likely to be overwhelmed with riches in the way of authority, and bewildered in endeavouring to steer a course through the vast and trackless ocean of precedents. A concise statement of a few guiding principles may, therefore, help in choosing the route of exploration of authority required to be made in many such cases.

In this article, the term " will " is used as including a will and any codicils thereto.

The first guiding principle arises from the fact that by statute, the Wills Act, 1837, a will must be in writing. No evidence is therefore admissible to add to or vary a will. However cogent the evidence may be of the intention of a testator to make a gift not contained in his will, or of his intention not to make some gift which is contained therein, such evidence must be disregarded. The intention of the testator is to be gathered from interpretation of the words of the will and from that source alone.

In interpreting a will, therefore, the inquiry must be limited to ascertaining the intention of the testator from the words he has used in his will, with the assistance of such explanatory evidence as is admissible. In embarking on that inquiry, it is to be borne in mind that the words used in the will are the words of the testator. This being so, one factor to be considered is: What were the circumstances of the testator and of his family and affairs at the time he made his will? This principle, commonly called " the Armchair Rule," is in many cases of considerable importance in ascertaining both the subject of disposition and the object of the testator's bounty. For example, if by his will a testator gave his real estate to A, it would be insufficient to end the inquiry on ascertaining that the testator had no real estate strictly so called. If it turned out that he had an interest in the proceeds of real estate, the circumstances might show that it was that interest which was intended to be given when the expression " real estate " was used: *Re Glassington, Glassington* v. *Follett*, [1906] 2. Ch. 305. Similarly in regard to the object of a testator's bounty, there are numerous cases in which the word " child " or " children," which of course means, strictly, lawful child or lawful children, has been held, in the circumstances, to denote reputed or illegitimate children. So also in *Collins* v. *Day*, [1925] N.Z.L.R. 280, the term " wife " which, strictly, means " lawful wife " was held, in the circumstances, to denote the testator's reputed wife and not his lawful wife.

Two common types of case in which extrinsic evidence is freely admitted may now be briefly considered, namely: cases where the description of the subject or object may apply to two persons or things; and cases where the description in the will is false, so as not to apply accurately to any existing subject or object.

Where the description in the will may apply equally to either of two objects or subjects, then the proper procedure is, in the first instance, to endeavour to ascertain whether from the surrounding circumstances it can be inferred which of such two objects or subjects was intended. If such an inference can be drawn from the surrounding circumstances, then the evidence should be limited to evidence of such surrounding circumstances. In some cases where the evidence of surrounding circumstances has been insufficient to resolve the ambiguity, evidence has been admitted to prove the testator's declarations of his intention as to which of the persons and things so described was meant by him: 28 *Halsbury's Laws of England*, p. 643, para. 1247. The Courts may, however, still have to consider how far the cases allowing such evidence of intention are consistent with the Wills Act, 1837: *Ibid.*, note (*l*). It is safer, therefore, to endeavour to avoid considering direct evidence of intention; and, even in cases where some of the circumstances show an ambiguity in the description of a person or thing, to try rather to resolve the ambiguity by fuller examination of the circumstances.

Coming now to the case of a false description, the general principle embodied in the maxim, *Falsa demonstratio non nocet*, is well established. Where the description of either property or donee, or other person or thing mentioned in the will, is false, so that no known existing thing or person satisfies the description, but *the context of the will and the circumstances of the case* show unambiguously who or what the testator meant, the description is rejected and the intention of the testator effectuated. The extrinsic evidence which is looked to for assistance in such a case should not include any direct statement of intention. Consideration is to be given to the context of the will and the circumstances of the case. The extrinsic evidence so admitted (though including no direct statement of intention) helps to a knowledge of the intention of the testator.

> " The whole search is for that intention. No rule of law is infringed if that search is confined to an examination of the words used in the will and an attempt to apply them to the facts by which the testatrix was surrounded ": per Callan, J., *In re McAnnalley, decd.*: *Mc Annalley v. Public Trustee*, [1935] N.Z.L.R. s. 106, s. 109, *l.* 35.

Many illustrations may be given of the ascertainment, in cases of a false description, of the intention of the testator by consideration of the context of the will and the circumstances of the case. Well-known modern examples are:—

In re Jameson, King v. *Winn*, [1908] 2 Ch. 111 (gift by testatrix of all her shares in a banking company wrongly described, and which, prior to the date of the will, had been absorbed by another banking company, held to pass the shares in that other company which she received in exchange for the shares in the absorbed company):

In re Price, Trumper v. *Price*, [1932] 2 Ch. 54 (gift by will of " my £400 five per cent. War Loan 1929/1947." Testator never had any War Loan but had had £400 National War Bonds which, before date of will, were converted into Conversion Stock and Treasury Bonds. It was held that such stock and bonds passed by the bequest).

Two recent New Zealand cases in which the same principle was applied are: *In re Nathan (deceased), Nathan* v. *Hewitt*, [1933] N.Z.L.R. s. 141 (gift by will of a policy on the donee's life and direction to pay premiums on it. Prior to the date of the will the named policy had been replaced by another policy in same

office at a higher premium. It was held that the gift and direction to pay premiums applied to the substituted policy).

In re Mc Annalley (deceased), Mc Annalley v. *Public Trustee*, [1935] N.Z.L.R. s. 106 (gift by will of "all moneys held by the said Public Trustee for me at my death": a certain fund formerly held by the Public Trustee for testatrix had prior to date of the will been lodged in the Auckland Savings Bank. The circumstances showed that, at the time of making her will, testatrix laboured under the error that the fund was still held by the Public Trustee. After examination of extrinsic evidence of the nature and extent of the property of testatrix, her knowledge of it and of the history of the particular fund, it was held that the moneys in the Auckland Savings Bank passed by the bequest).

In *Lindgren* v. *Lindgren*, (1846) 9 Beav. 358, 361, 50 E.R. 381, Lord Langdale, M.R., said

> "I cannot assume that the testatrix meant nothing by her bequest or that she caused it to be inserted in her will in mere mockery, meaning only to delude and disappoint the objects of a pretended bounty.
>
> "It ought rather to be assumed that she had a rational meaning: and the real question is whether that meaning, or the true effect of her will, can be discovered by the addition of evidence consistently with the rules of law."

This dictum, though uttered many years ago, appears to epitomize the general tendency of the modern decisions. There appears to have been, in recent years, an increasing number of cases in which extrinsic evidence has been admitted. When the cases are examined, however, it will be found that, generally speaking, no new principles are involved: but that progress has been rather in the way of applying to new facts—and with more confidence—the existing principle of seeking to ascertain, from the context of the will and from the circumstances of the testator and of his family and affairs, what he really intended by the words used in the will.

The Law in Palestine.

Palestine, like Tanganyika, is administered by Britain under mandate of the League of Nations, following conquest in the Great War. The conquest of Palestine by the forces, of which New Zealanders formed part, of General Allenby was completed in 1917, but the official mandate dates from September 29, 1923. The total population is about 1,250,000. West of the Jordan the total is a little more than 1,000,000, of whom 750,000 are Moslems and 175,000 Jews. It is recorded that of the 181,000 immigrants who have gone to Palestine since 1920, the great majority are Jews. The difficulties, administrative and legal, are exceptional and perennial.

Sir Michael McDonnell still reigns as Chief Justice in Jerusalem, with Mr. O. C. K. Corrie as his Senior Puisne, and now Manning, J., as Puisne. There are four Courts with presidents: at Jerusalem, Haifa, Nablus, and Jaffa. Mr. H. H. Trusted, K.C., is Attorney-General.

It is not without interest to compare the products of the land as viewed by the Law-Giver from the far side of Jordan, and the products of the land flowing with milk and honey as enumerated in Holy Writ at that time, with the latest record, which describes the country as "generally fertile; cereals, vegetables, olives, oranges, grapes, tobacco, and various fruits are produced; factories producing wine, soap, edible oils, cigarettes, cement, hosiery, etc., are established on a large scale to meet local requirements and for export."

The Pound in Contracts.

The Natural Function of Money.

By the Rev. J. A. Higgins.

The Adelaide Case Considered.

I.

The judgment of the House of Lords in *Adelaide Electric Supply Co., Ltd.* v. *Prudential Assurance Co., Ltd.*, [1934] A.C. 122, is highly interesting, not so much in regard to the decision as in regard to the reasons given. For these reasons disclose a fundamental attitude towards a very important element in life: and this article is much more concerned with the radical attitude adopted towards money than with any precise point of law or economics.

One does not, and would not, desire to be merely critical of reasonings which command our deep respect if only because of the high office of those who are concerned; nevertheless, it is important to realize what is at stake in such a case: for this was the question involved: Has money a natural function, and must that natural function ultimately control its use?

What obviously exerted the minds of both counsel and Law Lords in the *Adelaide* case was whether the pound in a contract is a unit of value, or a unit of account, or both. Counsel for the appellants submitted that the decision of the majority in the Court of Appeal was based upon a fallacy

> "which consists in confusing a pound, which is a unit of account, with the coin of the same name but more properly called a sovereign, by which a debt of a pound is discharged."

Lord Russell of Killowen, at p. 148, said:

> "a debt is not incurred in terms of currency, but in terms of units of account."

With all respect, it is here submitted that a debt, strictly speaking, cannot be incurred in terms of account but must be reduced to terms of currency; that the reason why the *Adelaide* case went to the House of Lords was because the contract was only in terms of units of account; and that what the learned Lords did was to reduce the contract to terms of currency. The reasons for this submission lie in the very nature of the pound. And we are perhaps allowed to assert that the decision of the *Adelaide* case turned upon the relation in which the English and Australian pounds stand to each other, a relation resting upon the function, and, therefore, upon the nature of the pound.

Clearly if the English pound is always in all respects the same as the Australian pound no difficulty would have arisen. It is perhaps not so clear why no difficulty would then arise; but the reason is that the pound in the contract would easily fulfil its natural function to the satisfaction of the contracting parties: the reason is that then the pound could do its work in spite of being used as a unit of account.

In the article entitled "Economics and the Law" in this Journal, (1934) Vol. 10, p. 86, the learned author says:

> "'Money' has several different functions, two of the most important of which are to serve as a unit of account and to provide a measure of value."

This statement may be correctly explained, and apparently the meaning of its author is correct, for he proceeds to explain that "the pound is our unit of account." We may well ask, however, is the pound as a unit of account, "money" in any real sense? The answer seems to be that it is not. For, whatever functions

have been attached to money, money (as such) has but one function, to be a measure of value in exchange.

In the article already quoted the learned contributor also says at p. 87 :

> "It is submitted that, both in principle, and, now, on authority, it is proper when construing a contract expressed in pounds, to consider the pound only as a unit of account. If it were considered as a measure of value, questions would arise as to date of payment as well as to place . . . which is absurd."

But, we may ask, is time of no consequence in discharging an obligation ? And we may, I think, assert that time is frequently a very important factor, for as the value of the pound varies with place so it may with time : and obligations falling due on a certain date may not be postponed by the debtor nor anticipated by the creditor.

Actually, I submit, not only was the *Adelaide* case not settled on the pound taken as a unit of account, but it could not have been thus settled. The fact that the pound, as also other denominations of money, has been used for purposes other than the natural function of money, proves only that the pound has been so used ; that fact does not prove that such uses are functions of money as such.

Inquiry into the use of the pound as a unit of account discovers that, in that connection, the pound becomes equal to the symbol "£," and as such is used as the means by which the wills of the contracting parties meet "*ad idem*" ; but it is not in this manner that money fulfils its function as money. Yet, as a matter of fact, the object of contract is frequently expressed in pounds. Certainly ; but that only amounts to this : owing to the practical impossibility of expressing the end, the means is used instead. This is important. The result of thus stating the means for the end is that contracts are rendered obscure as often as there is any obscurity in the means.

Money by its nature is not an end in itself : it is a means to an end. A man may make money his aim and end, but if he does, he is acting against the nature of money. If money itself, as an end, had been the object of obligation in the *Adelaide* case, the question would have been to decide, was the contract for this pound or for that ? and then, irrespective of the value of this or that pound—and even if all pounds happened to be of the same value—performance would have been real only in the pound of contract. But there is no doubt that the *Adelaide* case arose because the respondents wanted English pounds not as English pounds, but as more valuable pounds than Australian pounds. That is, money in its function as a measure of value was demanded as performance.

As I have already said, the practical impossibility of expressing the object of contract justifies the use in contracts of the means for the end. The *Adelaide* case, however, raises the question : Is it wise to use "the pound" to express the object of contract ? It is one thing to use means for end ; it is quite another if the wrong means is used. One of the functions of legal instruments is to make clear that which is obscure, or to render definite the indefinite. Can we say that in expressing contracts in terms of the pound clarity is obtained ? The *Adelaide* case is a pertinent example. The respondents wanted value as their dividend and demanded payment in money as a unit of value. Value was their object, not merely money. Money was what it is naturally, a means to an end. And the question was, what was the means due in performance of the contract ? If in contracts expressed in pounds, the pound is to be considered simply as a unit of account, solution is impossible.

The normal practice of expressing contracts in pounds led to the difficulty. The contract was made in terms of money, terms which were indefinite : for the term "pound" is itself indefinite. Doubtless from consideration definition was achieved : that is, however, scarcely the point. The contract did not carry its own definition. I submit that it should have done so. Had the contract been expressed not only in terms of unit of account but also in terms of unit of value, the difficulty would not have arisen. Nor does it seem pertinent to remark that generally contracts made in terms of the pound cause no trouble ; because the necessary definition of the pound in any given case is either practically self-evident or comes by mutual consent of the contracting parties.

But there is the English, the Irish, the Australian, the South African, and the New Zealand pound. All these pounds may agree or may be at variance. It is scarcely correct to say that these pounds are all one and the same when used as units of account, however much they may happen to vary as units of value : for when the pound is used as a unit of account, as in the *Adelaide* case, no one of these pounds is used. The generic pound, not the pound specifically, is used as the unit of account. And when the pound which is no specific pound but is only generic is used as a unit of account, the contract in that unit is obscure. It is as unit of value that the pound becomes specific, and in that often differs from the pound used as unit of account. If, therefore, a specific pound be used as unit of account the contract is clear ; because then the unit of account is the same pound as the unit of value.

In the *Adelaide* case Lord Atkin, at p. 134, said :

> "We do not seem to get very far by describing the 'pound' as a unit of account. Its essential use is to denote a measure of value expressed in a specific currency or currencies. I say currencies, for it seems to me that it may well happen that the recipient of an obligation expressed in pounds may be different as to the currency denoted by 'pound' in which the obligation is discharged and is prepared to accept the currency which is legal tender in the country where performance is made, and that the legal rights of the parties accord with that position. It is in that sense that the 'pound' can be said to be the 'same' in two countries."

The writer of the article already twice referred to, says, concerning these words of Lord Atkin :

> "With great respect, it is submitted that it is in this very sense that the pound *is* a unit of account, and not a measure of value. If the recipient is indifferent as to the currency, he is indifferent as to the value of the pound ; and, if he uses the word 'pound' being indifferent as to its value, he must be using it merely as a unit of account."

With due respect to the learned contributor, I differ from him and agree with Lord Atkin. The fact seems clearly to be that the recipent of obligation, however indifferent he may be, cannot in practice use the pound merely as a unit of account. Such a pound is generic and does not exist outside of the contract itself, and therefore is not possible in performance. The indifference of the recipient of obligation could amount only to indifference as to which pound as unit of value he received : indifference as to which specific pound.

Also, I submit, what counts is not the temper of the recipient of obligation, but the terms of the contract. Indifference may lead to a recipient of obligation accepting as performance that which is not really so : but surely that is not to say that contracts may wisely be expressed in terms of the pound as generic when only the pound as specific is possible for performance.

(To be concluded.)

Australian Notes.

By Wilfred Blacket, K.C.

Marathon Philanthropy.— Mrs. Catherine Kirby, of Sydney, widow of a worthy citizen who having been an undertaker had made much money out of "funeral marches to the grave," left about £165,000 of her estate for the benefit of returned soldiers and the widows, children, and grandchildren of British or Australian-born soldiers. Part of this sum is to be paid in pensions, but the greater part is to be used for providing farms for soldiers and their descendants. Each person coming within this benefit must have had experience of farming or be the son of a man so qualified. So far the scheme sounds good, but the trustees are limited to an expenditure not exceeding £500 for any one person and the land to be purchased for his farm must be "virgin land unenclosed and unfenced" and not within fifty miles of Sydney. The land is to be let to the said person for one peppercorn per year and he is to pay rates and taxes. Large areas of land within the description are, of course, obtainable; but if no one has yet ventured to wed his labour to such virgin land or even to enclose it the chances are that it is for ever on the shelf as far as farming purposes are concerned. If it will grow any peppercorns the tenant will be able to live rent free, but rates and taxes may present an insuperable difficulty. Still it seems likely that the legal profession may benefit by this elaborate will of a philanthropic lady, for the trust is to continue until "the expiration of twenty years after the death of the last survivor of returned Australian soldiers who at the date of my death shall be in receipt of a pension." Those words above should some day account for a mass meeting of members of the Bar in Sydney Supreme Court, and possibly for some legislation to follow.

Money, Matrimony, and Alimony.—At Melbourne, Mann, A.C.J., had to consider what was the worth of a wife who had been unfaithful to her husband. Mrs. Winifred Wall left her husband's home and their child some years ago and had obtained employment for three periods before she met W. B. Cowan who was destined to be co-respondent in her suit. The jury awarded to the husband £650 and Cowan moved for a new trial on the ground that the damages were excessive. There certainly seemed to be some grounds for contending that they were. "The price of a virtuous woman is far above rubies" (Proverbs 31, 10); and, although we are not told how far above, nor how many rubies, nor the state of the market at the time, we can unreservedly accept the quotation, but the question remains as to what discount ought to be allowed in the case of a woman who was just a woman. In this present case it appears that the husband wanted to get rid of her. Her determination to remain away from home necessarily detracted from her value as a wife. She had become, after she had been led astray, merely a cause of action: she, so to speak, sounded in damages, but the jury gave £650 for the loss of her as a wife and not as a business asset. But after all, what do these considerations matter? Jurors give damages against a co-respondent simply and solely because they hate an adulterer. "Good enough for the cow," is the basis of their verdict; and this is as it should be. His Honour refused to disturb the verdict.

Gordon Whelan, at Prahran (Victoria) Police Court, was sent to prison for non-payment of £296 arrears of maintenance for his wife, from whom he had been divorced two years ago, and his child. He has already been in prison for some considerable time for non-payment of arrears and is vice-president of the Alimony Reform League of Victoria. Whether the President and other members are in residence with him is not stated.

Mr. Justice Boyce, sitting in Sydney Supreme Court, has just decided an important question of alimony. Mrs. M. E. Roberts had obtained a divorce from her husband, H. E. Roberts, on account of his adultery with Miss E. Plummer, and an order for alimony at the rate of £3 a week had been made. The husband married Miss Plummer and the Registrar then reduced the order to £1 10s. per week. M. E. Roberts appealed against the variation of the order. His Honour said that he would not consider the points as to the variation but would apply the rule laid down in *Loss* v. *Loss* 23 N.S.W.S.R. 287. The husband was getting £10 a week, the first wife had no income: he therefore awarded her £3 3s. per week, approximately one-third of the income, as in accordance with the "rough and ready" rule in the case stated. Unlike the Registrar, he disregarded the second wife altogether, for the way of the transgressor is hard.

I should like to refer to another case on alimony cited in *Red Virtue* reported by Ella Winter and decided in an imitation of a Court in Soviet Russia. There, in the case of *X.* v. *X.*, an order against an habitual husband was sought by his fourth wife. The ruling rate of alimony under the Soviet is one-third of the husband's income, but the Court refrained from making any order because the husband was already paying three one-thirds of his income to three former wives and was only able to maintain himself because his fifth wife was receiving alimony from five of her former husbands.

Short Matters.—George Edward Crawford, of Melbourne, who, as stated in my Notes recently, had been convicted for supplying false particulars of name and address upon registration under the Business Names Act, appealed to the Supreme Court on the ground that there was no evidence that he had carried on any business, but the Court held that the offence of giving a false name was not obliterated by the fact that it related to a non-existent business. Also he appealed against the sentence of six months, but, as the police report was that his regular occupation was that of obtaining partners with some capital to buy into businesses "that never were on land or sea," the Supreme Court was not sympathetic.

"Three jolly butcher boys," Gosper, Rees, and Thompson, at Sydney, arranged a cheery get-rich-quick scheme, and in pursuance thereof Rees insured Gosper as his employee and Gosper cut off three fingers with a cleaver. He had only promised to cut off two but he seems to have been a liberal-minded sort of a chap. Then he drew £2 a week and a lump sum of £248, out of which sums Rees and Thompson were paid their shares as agreed. Then Gosper got annoyed over something and the Insurance Company got to hear about the joke and Thompson got three years. Rees was bound over and ordered to pay his share of the proceeds of Gosper's fingers, to wit £60.

The Federal Arbitration Court is nearing the conclusion of the case in which the railway-engine men of Victoria, South Australia, and Tasmania are asking for higher wages and better conditions. The hearing began in 1927 and the transcript extends over 12,200 pages. This case therefore does not seem properly to come under the heading of "Short Matters."

New Zealand Conveyancing.

By S. I. Goodall, LL.M.

Memorandum of Lease of Mines and Minerals with Incidental Rights and Liberties of Working (with respective Covenants and other Provisions relegated to Schedules to the Instrument).

Under the Land Transfer Act, 1915.

Memorandum of Lease and Grant of Mines and Minerals.

A.B. LIMITED a company duly incorporated under the Companies Act 1933 and having its registered office at (hereinafter called "the Lessor") being registered as proprietor of an estate in fee-simple subject etc. in ALL THAT etc. (hereinafter called "the said land") IN CONSIDERATION of the rents and royalties hereinafter reserved and the covenants hereinafter contained and on the part of the Lessee to be performed DOTH HEREBY LEASE unto C.D. LIMITED a Company duly incorporated as aforesaid and having its registered office at (hereinafter called "the Lessee") ALL AND EVERY the mines quarries and beds seams veins and strata of coal fire-clay and other substances (hereinafter called "the minerals") opened or unopened and whether or not yet discovered within under or upon the said land TOGETHER WITH the liberties powers and privileges for the Lessee in working the minerals set forth in the First Schedule hereto TO BE HELD by the Lessee as tenant for the space or term of years as from and inclusive of the day of 19 at the rental and subject to the royalties set forth in the Second Schedule hereto payable at the times and in the manner therein set forth AND subject to the covenants conditions and restrictions set forth respectively in the Third Fourth and Fifth Schedules hereto

IT BEING EXPRESSLY declared that all and every the said Schedules hereto shall be deemed to be part hereof and shall have the like force and effect and may be enforced in the like manner as if the same had been set out at length herein.

AND the Lessee DOTH HEREBY ACCEPT this lease of the minerals together with the said liberties powers and privileges to be held by the Lessee as tenant and subject to the said covenants conditions and restrictions.

IN WITNESS etc.

SCHEDULES.

First Schedule.

Lessee's Powers.

The following liberties powers and privileges are included in the above lease for the purposes thereof namely full liberty power and privilege :—

1. To enter by managers miners agents workmen and servants at any time during the term of this Lease with or without engines vehicles implements tools and animals upon and into the said land and to occupy so much of the surface thereof as may be necessary or convenient for working the minerals.

2. To prospect and search for win work quarry raise manufacture and take away sell and dispose of for the Lessee's benefit the minerals and so far as may be necessary or convenient for the working of the minerals to remove support from and let down any part of the surface of the said land not for the time being having any building thereon and paying compensation therefor as hereinafter provided.

3. To use any existing and/or to open sink drive make and use any new mine pit shaft adit exit tunnel airway watercourse and other work and to deposit and stack the minerals and any earth rubbish and spoil on the surface of the said land.

4. To bring other minerals from any adjoining mines in lease to the Lessee during the said term through the said land or to take away the minerals (hereby leased) through any such adjoining mines with liberty to work by outstroke or instroke drift accordingly.

5. To lay make maintain and use such railways tramways and roads erect build repair and occupy such offices stores sheds and dwellings and instal and maintain such engines machinery elevators screens hoppers and other works in and upon the said land as may be required for the convenient working of the minerals.

6. To do all things generally convenient or necessary for the enjoyment of the foregoing liberties powers and privileges and the full exploitation of the minerals by any means or operations now known or hereafter to be discovered.

Second Schedule.

Rents and Royalties.

The following rents and royalties shall be paid by the Lessee namely :

1. The fixed yearly rent of £ payable by equal calendar monthly instalments on the days of each and every month during the said term the first whereof shall be paid on the day of next.

2. For every acre of the surface of the said land which shall be entered upon used or occupied by the Lessee under the above liberties and powers for the opening of mines and making of railways tramways and roads erection of offices stores sheds and dwellings engines machinery or other works the yearly rent of £ payable in similar manner and at the same times as the above fixed rent with a proportionate part for any quantity less than one acre and for any period less than one year.

3. In respect of the minerals and any part thereof won by the Lessee and sold or given away the following royalties for every ton of 2,240 lbs. of coal s. of fireclay d. and other substances d.

PROVIDED that no royalty shall be payable in respect of coal used for working and ventilating the said mines and firing boilers and engines upon the said land or used for fires in any such offices stores sheds and dwellings not exceeding in all tons for any one calendar month :

AND PROVIDED that in respect of such royalties the following provisions shall apply :—

(1) The royalties shall be paid by calendar monthly instalments at the same times as the above rents and shall be tendered together with a full statement of account of all and every part of the minerals won by the Lessee during the then preceding calendar month inclusive of a record of any coal or other mineral used for the purposes of working ventilation and firing and exempted from payment of royalty under this present clause.

(2) The Lessee shall cause to be regularly kept full and accurate records of the quantity and weight of the minerals so won which shall be open to the inspection of the agents of the Lessor at any time.

(3) Notwithstanding anything herein contained the royalties payable for any one calendar month of the said term shall not be less than £ irrespective of whether the Lessee shall have won or sold sufficient of the minerals to support that sum by way of royalty or any quantity or weight thereof at all.

(*To be continued*).

New Zealand Law Society.

Council Meeting.

(*Continued from p. 180.*)

Appointment of Magistrates.—The following report was received from Mr. G. P. Finlay :—

"I waited on the Minister of Justice to-day and represented to him the views of the Council on the subject of the salary, status, and appointment of Magistrates.

"So that there might be some permanent record of the details we discussed, I handed to the Minister a memorandum signed by the President, Messrs. Wright, Watson, and myself. I enclose a copy of the memorandum.

"The Minister received me with the utmost graciousness, and gave me a very patient hearing.

General Statement of the representation made by the deputation from the N.Z. Law Society to The Hon. the Minister of Justice on the subject of the Magistracy.

1. The Magistrates' Court, by virtue of its place in the judicial system of the country, and by reason of the nature of the various functions it discharges, is the Court with which the great majority of the people of the Dominion are almost exclusively concerned.

2. The civil jurisdiction of the Court is extensive. Whilst, however, our Magistrates have jurisdiction up to £300, the great majority of the civil work done by the Court concerns much lesser amounts. The cases with which the Court deals are, however, generally speaking, of substantial moment to the litigants concerned, and involve sums which are, to them, of paramount importance. It is essential, therefore, that the law should be administered in respect of all such actions with the same certainty and breadth of comprehension as is expected from the higher Courts. This is all the more necessary as the greater proportion of the litigants in the Magistrates' Court cannot afford to appeal, and any error made by the Court will be found to create a miscarriage of justice.

3. In many widespread areas not in immediate contact with the main centres, the Magistrates' Court is, in respect of both its civil and its criminal jurisdiction, the only Court the people know. In such districts it has been found in practice that the decisions of the Court are almost invariably accepted as final. Resort is seldom had to appeal.

4. The importance of a sound judgment on questions of fact is accentuated by the principle upon which all Appellate Tribunals proceed with respect to such questions. The findings of fact of a Magistrate are accepted as conclusive and absolutely binding on every Appellate Tribunal, so long as there is any reasonable evidence in support of them. Any consideration, therefore, of the qualities required in a Magistrate must proceed upon a due recognition of the important circumstance that on questions of fact the decisions of Magistrates are, broadly speaking, almost always final and conclusive.

5. Apart from their extensive civil jurisdiction, Magistrates, in respect of a great many of their functions, are charged with grave responsibilities which affect the happiness and touch the welfare of a great many of our people. For instance, the duties of assessing penalties for offences involving the determination of the serious question of whether imprisonment should be imposed or not, falls almost daily upon every Magistrate. Then, too, they have the responsibility of determining whether Orders for imprisonment should or should not, in all kinds of diverse circumstances, be made in Judgment Summons proceedings. Their responsibility is particularly great in dealing wiith matrimonial causes, and particularly in deciding questions involving the custody of children. The responsibility of the Magistrate is more than considerable in dealing with the questions that arise on appeals from income-tax assessments, in connection with marine inquiries, and in relation to many other classes of proceedings which occur readily to mind.

6. Having regard to the nature and importance of their functions, and the far-reaching effect of their decisions in many respects upon the people of the country, it is essential that the Magistrates who constitute the Court should have a sound and extensive working knowledge of the law ; that they should be men with a wide knowledge of human nature, and in particular with an intimate knowledge of the course of development of cases from the point of time when a Legal Adviser is first consulted to the point when they reach the Court. It is only with that knowledge that they can be relied upon to administer the law with accuracy and certainty, and to find, with any degree of exactitude, where truth lies. Then, finally, they should be men of broad human sympathy and understanding, so that they may give to their administration of the law that humanitarian inflexion which the law expects.

7. Members of the profession have been growing increasingly conscious of the fact that in some cases the Magistrates' Courts are losing the confidence of the profession and are no longer commanding that measure of public respect which they should possess. The Council of the New Zealand Law Society has given this subject consideration, and has reached certain conclusions which it is desirous of communicating to the Minister.

8. The Council is of opinion that the loss of prestige by the Court is due to two factors, namely : (*a*) the quality of the men appointed to the Magisterial Bench, and (*b*) the absence of any proper status. The question of remuneration is, it is thought, involved in (*a*).

9. *Past Appointments* : The Council has considered the appointments made since 1928. It is noted, in this relation, that since that year, three appointments have been made from amongst Clerks of Court, whilst two appointments were made from amongst men previously associated with the Justice Department. The appointment of Magistrates from the Civil Service has for long been deprecated by the New Zealand Law Society. Representations on the subject have been made from time to time to various Ministers of Justice. The practice has, nevertheless, continued with, the Council believes, unsatisfactory results. The Council is imbued with the conviction that men appointed from the Civil Service are, generally speaking, restricted in their outlook. They are, during their working lives, and before their appointment to the Bench, wholly subservient to Departmental Rules and Regulations, and are disciplined into obedience to their Departmental seniors. This does not tend to develop that independence of thought and of judgment which is essential in a judicial officer. They are, too, by the circumstances of their occupation, limited in their activities and in their association with their fellow men. This does not tend to promote in them that wide knowledge of human nature which a successful Magistrate should possess. In a sheltered Government position they are not conscious of the stresses and difficulties to which people in the outside world are exposed. In addition, they have no knowledge, and no means of acquiring knowledge, of how cases develop from the point of time at which a solicitor is first consulted to the point of time at which the case is presented to the Court. They have, therefore, no knowledge of the difficulties with which legal practitioners have to contend. Their experience is wholly limited to a knowledge of how cases appear when presented to the Court, and that at a point of time when their true functions are purely clerical and when they have no personal interest in arriving at decisions. Furthermore, Clerks of Court are not ordinarily called upon to make decisions on legal matters of moment in the course of their work. In some minor degree Registrars of the Supreme Court are, but even so, the decisions which they are called upon to make in the course of their duties as Civil Servants are not comparable in number or complexity with the decisions which a legal practitioner in active practice is continually called upon to make. Finally, the work of a Clerk in the Justice Department does not require him to make any study of the law in its application to practical affairs. His knowledge of it is therefore purely theoretic and partial. For the reasons given, it is submitted that every appointment to the Bench from the Civil Service tends to weaken the

Bench and to prejudice its prestige. It is true that there have been in the history of the Dominion, some successful appointments made from the Civil Service. These, however, are few in number and may well be regarded as the exceptions which prove the rule. Conditions in earlier days were simple, and in the course of its evolution from a lay Magistracy there were necessarily periods when gentlemen appointed to the Stipendiary Magistracy required qualities and qualifications different from and simplier than those required in a competent Magistrate to-day.

10. In urging that all future appointments should be made from amongst the practising members of the legal profession, it is readily conceded that every legal practitioner is not qualified to be a Magistrate. It is submitted, however, that to improve the standard of the judicial work in the Magistrates' Court, it is essential that appointments should be confined to men who have had extensive experience of the law in practice, and have practised with success. It is realized that men of this type are to-day reluctant to accept appointments to the Bench, and it is submitted that, to attract men of satisfactory quality, the position of the Magistracy must be improved in respect of both status and salary.

11. *Status*: There is a growing fear that Magistrates are coming to be regarded as Departmental and administrative officers holding positions analagous to Registrars of the Supreme Court and to Official Assignees. The Council is convinced that it is essential to the improvement of the status of the Bench that Magistrates should be recognized as exclusively Judicial Officers of the Crown, and that they should be appointed *quamdiu se bene gesserint*, thus assuring them of freedom from any appearance of control and enabling them to function impartially and fearlessly. Given a proper status, and with appointments limited to men of capacity from members of the practising profession, the ability and efficiency of the Bench would improve, and still better men would be attracted to the position.

12. As a necessary concomitant to the changes previously advocated, it is thought essential that the salaries of Magistrates should be materially raised. At present the net salary received by the average Magistrate is believed to be somewhere in the neighbourhood of £720 per annum. Out of this the Magistrate has to pay his fixed commitments. These are always augmented by heavy life insurance premiums by reason of the fact that the widow of a Magistrate receives a small sum only per annum in the event of his death. Every Magistrate is, therefore, concerned to insure heavily in order to secure his wife and family against want in the event of his early demise. In some cases it is known that a Magistrate's fixed charges aggregate as much as £330 per annum, thus leaving him somewhere in the neighbourhood of £400 per annum to meet his living expenses, to educate his children, and to cover all the other contingencies of life other then the making of provision for his family after his death. The Council is convinced that the present salary is insufficient to attract to the Bench men of the necessary capacity and ability. Apart from this altogether, it is well-known that many members of the Bench now in office are dissatisfied. This condition of affairs repels well qualified men who might otherwise accept appointment.

To attract to the Bench men who will do credit to it, the remuneration must, it is submitted, be made adequate. The Council is led to believe that the Magistrates themselves have in the past made representations on more than one occasion to Parliament with a view to having their remuneration increased. Its attention has been drawn to the representations made in recent years to a Committee of the House by Mr. Page, S.M. (now Mr. Justice Page), and by Mr. Barton, S.M. The Council feels that it is a matter for regret that Judicial Officers of the Crown should feel themselves constrained, by the uncertainty of their position and by the inadequacy of their remuneration, to appeal to the Legislature. The Council is informed that the representatives of the Magistracy were assured of sympathetic consideration by the Committee of the House before which they appeared. Nothing material has yet, however, apparently resulted from their representations.

The Council is under the impression that an increase in remuneration might be effected with economy, as it is thought that if better men were appointed, fewer would be required to do the work of the Courts. In addition, the work would be better done.

13. It is thought that if the status of the Magistrates were established upon the basis which has been found not only desirable but necessary in the case of Judges of the higher Court, and the salaries were materially increased, practising members of the legal profession of the requisite competence would be glad to accept appointment. The Council is convinced that if this should prove to be the case, as it believes it would, then the Magistrates' Courts in the country would be put in a position to regain the confidence of the profession and the respect of the public."

A special vote of thanks to Mr. Finlay for his excellent report and representations to the Minister, was carried with acclamation.

(To be continued.)

Legal Literature.

Civilization and the Growth of Law: A Study of the Relations between Men's Ideas about the Universe and the Institutions of Law and Government. By William A. Robson, Ph.D., LL.M., B.Sc. (Econ.), Barrister-at-Law, Reader in Administrative Law in the University of London. Pp. xv., 354, including Index. (London: Macmillan and Co.).

Civilisation and the Growth of Law is described by its author as a study of the relations between men's ideas about the universe and the institutions of Law and Government. The use of such words as "forbid," "obey," "compel," "allow," to denote the essence of the law is anathema to Dr. Robson. In Great Britain, he says philosophy and law are barely on speaking terms, while sociology and law are strangers who have never even met.

Dr. Robson seeks examples alike from civilised communities and uncivilised tribes in an endeavour to fix the proper relationship which law bears to humanity. He begins with the embryonic conception of the law as it emerged from its early surroundings of magic and superstition, passes to the identification in the Middle Ages of the authority of the law with the authority of the Deity, and points to the final triumph of "right reason" as the true source and authority of the law as it exists to-day.

Whatever law may have been in the past, in the author's view it is more realistic to consider jural law to-day as a formulation of the pattern of social behaviour, a view comparable to the conception of scientific law as a formulation of the pattern of physical behaviour. Throughout the book he sets before us the necessity for a comprehensive outlook if the law is to remain a living thing. He will not agree that the authority of a "state" is necessary to the existence of law—that law is the exclusive possession of the mature apparatus of thought and action which we term "civilisation." This is his complaint against the "standard" English writers, that they exclude from their consideration much of day-to-day occurrence which in the author's view is properly the subject of study by a student of jurisprudence. Dr. Robson sets out to break down the dividing-wall, which, he considers, has been erected between the law and the affairs of everyday life.

Civilisation and the Growth of Law is, of course, of cultural rather than everyday office interest; but it is a book which should be read by all of us who tend to fall into that vice of narrow-mindedness of which the profession is so frequently accused. It is a modern approach to questions that have long exercised the minds of lawyers. Above all, it is comprehensive—not tied in its illustrations to our own system of English law. To quote the author's own words:

> "I must confess at the outset that, no matter how grave the heresy may be in these days of ever-increasing specialisation I shall not hesitate to study the world 'as a whole' whenever the purposes of my enquiry demand it."

—C.P.R.

Practice Precedents.

Letters of Administration with Will annexed to an Attorney in New Zealand for the use and benefit of an Executor of a Will, probate whereof has been granted in America to the Executor therein named.

Rule 531E of the Code of Civil Procedure provides that, in the case of a person residing out of New Zealand, administration or administration with the will annexed may be granted to his attorney acting under a power of attorney.

The attorney is liable to account only to his principal or to any other person subsequently appointed executor or administrator of the estate: Administration Act, 1908, s. 19.

All grants to attorneys are expressed to be for the use and benefit of the person entitled: *Mortimer on Probate Law and Practice*, 2nd Ed., p. 360; as to power of attorney, notarial declarations, &c., see *Ibid*, 362.

As to proof of death, if applicant cannot swear positively and definitely that deceased died on or about a specified date, he must place such evidence as he has before the Court and obtain leave to swear to same: *In re Harris*, [1916] N.Z.L.R. 96; G.L.R. 586.

The Court will not dispense with sureties on grant of Letters of Administration to an attorney, even if there are no debts: *In re Morrison*, (1931) 7 N.Z.L.J. 115; but, in the case of an approved Insurance Company, sureties to the Bond are not required.

Pursuant to Rule 517 of the Code of Civil Procedure, when deceased is not resident or domiciled in New Zealand, the documents must be filed in the principal registry of the Judicial District wherein is the property of the deceased; and, if such property is in more than one Judicial District, then in the Registry at the City of Wellington, or in such other Registry as the Court may on motion made prior to the filing allow. In every case of such an order being made, notice thereof must be sent by the Registrar to the Registrar at Wellington.

MOTION PAPER FOR LETTERS OF ADMINISTRATION WITH WILL ANNEXED.

IN THE SUPREME COURT OF NEW ZEALAND.

.....District.

.....Registry.

IN THE ESTATE of A.B. late of in the County of in the United States of America, farmer, deceased.

Mr. of Counsel for the Attorney for the Executor of the Will of the above-named A.B. deceased TO MOVE in Chambers before The Right Honourable Sir Chief Justice of New Zealand at the Supreme Courthouse at on the day of 19 at o'clock in the forenoon or so soon thereafter as Counsel can be heard for an order:—

1. That on the authenticated copy of the Will of A.B. late of in the County of in the United States of America farmer deceased and of the Probate thereof granted out of the Probate Court holden at in and for the County of in the United States of America on the day of 19 to and on the Power of Attorney dated the day of 19 from the said to (referred to in the affidavit of the said sworn and filed in this matter) being filed in this Court at Letters of Administration with the said Will annexed of the estate effects and credits of A.B. deceased situate or outstanding or recoverable in New Zealand be granted to the said as Attorney for the said for the use and benefit of the said and until the said shall apply for and obtain Probate of the said Will in New Zealand.

2. That the Bond of the said be varied from the usual form prescribed by the Code of Civil Procedure by the insertion therein after the words "well and truly administer the same according to law" of the words "or duly convey transfer assign pay over or account for the same to the said Executor or to any person or persons appointed Executor or Administrator or Executors or Administrators of the said deceased after the appointment of the said as Attorney of the said .

Dated at this day of 19 .

Solicitor for the Attorney for the Executor.

Certified pursuant to the rules of Court to be correct.

Solicitors for applicant.

REFERENCE: His Honour is respectfully referred to Rule 531E of the Code of Civil Procedure (*Stout and Sims' Supreme Court Practice*, 7th Ed., p. 335).

In the Estate of J. G. Tancred, (1913) 32 N.Z.L.R. 991; 15 G.L.R. 653.

The Administration Act, 1908, ss. 3 and 19.

Counsel moving.

AFFIDAVIT TO LEAD GRANT OF LETTERS OF ADMINISTRATION WITH WILL ANNEXED TO ATTORNEY OF EXECUTOR.

(*Same heading.*)

I of in the Dominion of New Zealand Solicitor make oath and say as follows:—

1. That the above-named A.B. deceased died at in the United States of America on the day of 19 as I am able to depose from having been present at his funeral whilst on a visit to the United States aforesaid.

2. That the said A.B. left a Will dated the day of 19 whereof he appointed of in the United States of America, agent, to be the Executor and Trustee.

3. That the said Will was proved by the said in the United States of America in the Probate Court holden at in and for the County of in the United States of America on the day of 19 .

4. That the paper writing marked with the letter "A" produced and shown to me at the time of the swearing of this my affidavit purports to be an authenticated copy of the said Will and Probate and of the documents relating to the said Grant of Probate issued out of the said Court under the hand of the Registrar and under the seal of the said Court.

5. That the said resides in the County of in the United States of America and by a Power of Attorney dated the day of 19 purported to be under his hand and which is now produced and shown to me and marked with the letter "B" the said duly appointed me this deponent to be his lawful attorney for the purpose (*inter alia*) of obtaining Letters of Administration with the said Will annexed of the estate effects and credits in the Dominion of New Zealand to be granted to me for the use and benefit of the said and until the said shall apply for and obtain Probate of the said Will to be granted to him in the said Dominion of New Zealand.

6. That to the best of my information knowledge and belief the estate effects and credits of the said deceased to be administered by me are under the value of £ and that such estate consists of (shares etc.) and (land) situate in the district.

7. That the said deceased was the husband of my sister and had resided in the United States of America during his whole life and that with the exception of short visits to the Dominion of New Zealand had not resided in the said Dominion and I verily believe the said deceased had not any debts or liabilities in the said Dominion.

8. That I believe the paper writing marked with the letter "A" produced and shown to me at the time of swearing this my affidavit to be an authenticated copy of the said Will and Probate and the Will therein contained is the last Will and Testament of the said deceased.

9. That I will faithfully execute the said Will in the said Dominion of New Zealand by paying the debts and legacies of the said deceased so far as the property in New Zealand will extend and the law binds and will well and faithfully administer the estate and effects in the said Dominion which by law devolves to and vests in the personal representative of the said deceased as the Attorney for and for the use and benefit of the said and until he shall apply for and obtain Probate of the said Will to be granted to him in the said Dominion by paying the just debts (if any) of the said deceased in the said Dominion and by disposing of the residue of the said estate and effects according to law.

10. That I will exhibit unto this Court a true full and perfect inventory of all the estate effects and credits in the said Dominion of the said deceased within three calendar months of the grant to me as such Attorney as aforesaid of Letters of Administration with the Will annexed of the estate in the said Dominion of New Zealand of the said deceased and will file a true account of my administratorship within twelve calendar months after the grant of such Letters of Administration.

Sworn *etc.*

LETTERS OF ADMINISTRATION WITH WILL ANNEXED.

(*Same heading.*)

To of Solicitor the duly appointed Attorney of of in the County of in the United States of America the Executor and Trustee named in the Will of the above-named A.B. deceased.

WHEREAS the above-named A.B. died at in the County of in the United States of America on the day of 19 leaving a Will bearing date the day of 19 (a copy of which is hereunto annexed) and did therein appoint of in the County of in the United States of America to be the Executor and Trustee thereof AND WHEREAS the said Will was duly proved by the said in the Probate Court holden at in and for the County of in the United States of America on the day of 19 AND WHEREAS you are the duly appointed Attorney of the said and have applied to this Court for Letters of Administration with Will annexed limited to the estate and effects of the said A.B. situate or outstanding or recoverable in New Zealand to be granted to you as such Attorney NOW THEREFORE you are fully empowered and authorized by these presents to administer the estate effects and credits of the said A.B. deceased situate or outstanding or recoverable in New Zealand and to demand and recover whatever debts may belong to his estate and to pay whatever debts the said deceased did owe and also the legacies contained in the said Will so far as such estate effects and credits extend you having already been sworn well and faithfully to administer the same and to exhibit to this Court a true and perfect inventory of all and singular the estate effects and credits of the said deceased in New Zealand on or before the day of 19 and to file a full and true account of your administratorship thereof on or before the day of 19 AND YOU ARE THEREFORE by these presents constituted Administrator with Will annexed of all the estate effects and credits of the said deceased situate or outstanding or recoverable in New Zealand for the use and benefit of the said and until he or some other person legally entitled thereto shall apply for and obtain in New Zealand Probate of the said Will or Letters of Administration with the said Will annexed.

Given under the Seal of the Supreme Court of New Zealand at this day of 19 .

Registrar.

ADMINISTRATION BOND.

(*Same heading.*)

KNOW ALL MEN BY THESE PRESENTS that we of in the Dominion of New Zealand and THE INSURANCE COMPANY LIMITED are held and firmly bound unto Registrar for the said District at in the sum of £ for which payment well and truly to be made to the said or to such Registrar for the time being we do and each of us both bind ourselves and each of us and the executors and administrators of us and each of us jointly and severally firmly by these presents:

WHEREAS Probate of the Will of the above-named A.B. was granted in the Probate Court holden at in and for the County of in the United States of America to the Executor in the said Will named.

AND WHEREAS by an Order of this Court of the day of 19 IT IS ORDERED that Letters of Administration with the Will annexed of the estate effects and credits in New Zealand of the said A.B. deceased be granted to the said as Attorney for and for the use and benefit of the said until he shall apply for and obtain Probate of the said Will to be granted to him AND WHEREAS the said has sworn that to the best of his knowledge information and belief the said estate effects and credits are under the value of £ NOW THE CONDITION of the above-written bond is that if the above-bounden exhibits unto this Court a true and perfect inventory of all the estate effects and credits of the deceased which shall come into possession of the said or any other person (or persons) by his (or their) order or for his (or their) use on or before the day of 19 and well and truly administer the same according to law or duly convey transfer assign pay over or account for the same to the said Executor or any person or persons appointed Executor or Administrator or Executors or Administrators of the said deceased after the appointment of the said as Attorney of the said and render to this Court a true and just account of his (or their) administratorship on or before the day of 19 then this Bond shall be void and of none effect but otherwise shall remain in full force.

Signed by the said this day of 19 in the presence of:

The Common Seal of The Insurance Company Limited was hereto annexed this day of 19 in the presence of:

Rules and Regulations

Health Act, 1920. Bottling of Milk Regulations amended.—*Gazette* No. 40, June 11, 1936.

Animals Protection and Game Act, 1921-22. Regulations (additional) for Perch-fishing in the Wellington Acclimatization District.—*Gazette* No. 40, June 11, 1936.

Explosive and Dangerous Goods Act, 1908. Amending Regulations (No. 16).—*Gazette* No. 40, June 11, 1936.

Animals Protection and Game Act, 1921-22. Open Season for the taking or killing of Opossums in the Hawke's Bay Acclimatization District.—*Gazette* No. 40, June 11, 1936.

Noxious Weeds Act, 1928. Variegated thistle (*Silybum mariamum*) declared a noxious weed in the Kiwitea County.—*Gazette* No. 40, June 11, 1936.

Noxious Weeds Act, 1928. Milk or variegated thistle (*Silybum*) declared a noxious weed in the Akitio County.—*Gazette* No. 40, June 11, 1936.

Animals Protection and Game Act, 1921-22. Protection of Californian Quail (*Callipepla Californica*) in County of Murchison in Nelson Acclimatization District, reimposed as from August 1, 1936.—*Gazette* No. 40, June 11, 1936.

Noxious Weed Act, 1928. Counties Act, 1920. Milk or variegated thistle declared to be a noxious weed in Wairarapa South.—*Gazette* No. 40, June 11, 1936.

Animals Protection and Game Act, 1921-22. Regulations (additional) for Perch-fishing in the Wellington Acclimatization District.—*Gazette* No. 40, June 11, 1936.

Rabbit Nuisance Act, 1928. Orders in Council declaring certain animals to be natural enemies of the rabbit revoked.—*Gazette* No. 40, June 18, 1936.

Slaughtering and Inspection Act, 1908. Regulations amending principal Regulations.—*Gazette* No. 40, June 18, 1936.

Agriculture (Emergency Powers) Act, 1934. Calves (Sales for Slaughter) Regulations.—*Gazette* No. 40, June 18, 1936.

Health Act, 1920. Regulations as to drainage and plumbing applied to the Borough of Matamata. — *Gazette*, No. 43, June 25, 1936.

Fisheries Act, 1908. Regulation 135 amended to prohibit trawling in the Bay of Islands.—*Gazette* No. 43, July 2, 1936.

Native Purposes Act, 1935. Regulations as to Block Committees of East Coast Native Trust Lands.—*Gazette* No. 43, July 2, 1936.

Aged and Infirm Persons Protection Act, 1912. The Aged and Infirm Persons Protection Rules, 1936.—*Gazette* No. 42, June 25, 1936.

Naval Defence Act, 1913. Amending and supplementary regulations.—*Gazette* No. 44, July 9, 1936.

Fisheries Act, 1908. Amending Reg. 18, as to trout-fishing in the Nelson Acclimatization District.—*Gazette* No. 44, July 9, 1936.

Health Act, 1920. Amending regulations as to the carriage and storage of Milk and Cream.—*Gazette* No. 44, July 9, 1936.

State Advances Corporation Act, 1934-1935. State Advances Corporation Act, 1936. State Advances Corporation Regulations.—*Gazette* No. 44, July 9, 1936.

Defence Act, 1909. Amending Regulations for the New Zealand Military Forces (Permission to marry).—*Gazette* No. 44, July 9, 1936.

Sharebrokers Act, 1908.—Finance Act, 1931 (No. 4). Rules of the Stock Exchange Association of New Zealand: Amendments and additions, as approved by His Excellency the Governor-General in Council.—*Gazette* No. 44, July 9, 1936.