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"If democratic institutions are to survive, it will not be simply by maintaining majority rule and by swift adaptions to the needs of the moment, but by the dominance of a sense of justice which will not long survive if judicial processes do not conserve it."

—CHIEF JUSTICE HUGHES, *to the American Law Institute.*

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DEATHS IN THE SAME CALAMITY: DEATH DUTIES.

IN the last issue, *ante*, p. 121, we dealt with the presumption as to survivorship, for all purposes affecting the title to property, among persons who have perished in the same calamity in circumstances rendering it uncertain which of them survived the other or others.

There remains to be considered the position of the estates of *commorientes* regarding death duty in New Zealand. Many will no doubt be amazed to learn that there is absolutely no provision for a reduction, remission, or postponement of death duty in the cases of the same property passing twice or oftener within a short interval. In New Zealand law the phrase "death duty" is generic, embracing both estate and succession duty. There is also no ameliorating provision with regard to Native succession duty; but, as that duty is at the very modest rate of 2 per cent., the need for some concession on a quick succession of deaths affecting the same land, is not so clamant.

In England the Legislature has made some attempt to meet the difficulty, although it does not appear to be entirely satisfactory. The English provision is s. 15 of the Finance Act, 1914, which provides for a reduction of 50 per cent. in the *estate* duty on *land* or a *business* (not being a business carried on by a company) or any interest therein payable on the death of the survivor of the spouses, when such property has already borne estate duty on the death of the first to die. For a succinct account of the English provisions see *101 Law Journal* (London), 118.

As the death duty rates in New Zealand have been substantially increased twice since 1939, the difficulties of the situation have been accentuated, and the possibility of the property of *commorientes* passing more than once by a quick succession of deaths, should be seriously considered by every person of any degree of wealth and by his legal advisers. A simple example will show the seriousness of the position.

A., aged forty years (who has not troubled to make his will), his wife aged thirty, and their only child aged six, are killed in a motor-car accident; and die in that order or under such circumstances that they are presumed by s. 6 of the Property Law Amendment Act, 1927, to have died in that order. The final balance of A.'s estate amounts to £50,000.

On A.'s estate, the death duty will amount to £19,644 8s. 8d. (estate, £15,166 13s. 4d., succession, £4,477 15s. 4d.). Assuming the testamentary and administration expenses amount to £200, there will be left of A.'s estate, £30,155 odd.

Of this £30,155, the wife's estate will be entitled to one-third; that is to say, to £10,051 odd. If she, too, dies intestate, the child will be entitled to all this. The wife's estate (assuming she owns no estate in her own right) will be liable to death duty of £2,004 1s. 2d. (estate, £1,401; succession, £603 1s. 2d.). Assuming the testamentary expenses amount to £75, there will be left out of the wife's estate, £7,972 odd.

The final balance for death duty purposes of the child's estate will be £20,102 odd (from his father's estate) *plus* the above sum of £7,972 from his mother's estate, that equals, £28,074. His next of kin will inherit this sum. Assuming his next of kin are six aunts and uncles, death duty payable in the child's estate will be £9,181 8s. (estate, £6,374; succession, £2,807 8s.). What the child's six uncles and aunts will actually inherit of the original £50,000 will be about £18,800. Of A.'s £50,000, the State will collect in death duty no less than £30,830 odd. And this sum must all be paid within three months of date of death, otherwise interest at the prescribed rate will accrue. In this age of motor traffic, caravan holidays, and aeroplane travel, this is by no means an unlikely example. How can such an unfortunate result be avoided?

So far as can be ascertained, there has as yet been little effort made in drafting New Zealand wills to meet the contingency of *commorientes*. In one or two instances, however, there has been a testamentary gift *conditional* on the beneficiary surviving the testator by one month. This will have the desired effect except

in such cases where the younger ones linger for a month or so and then die. Provision should be made for a gift over, in the event of the condition not being satisfied; for, if there is no gift over, the only result would be an intestacy with all the unfortunate results above stated. In the example given, if the wife and child did not survive A. by one month, and there was an effective gift over, there would be only one estate, A.'s, to be assessed for death duty.

An effective provision would be a life estate to the widow, followed on her death to a life estate to the son, with remainder to the child's children, with a gift over in default of grandchildren. In the example given, the wife's life estate and the child's life estate would be for all practical purposes *valueless* (*Weldon's* case, (1925) 36 C.L.R. 165), for when A. died, or is presumed to have died, their expectation of life would be slight indeed. There would only be one lot of estate and succession duty payable in respect of A.'s death. Assuming the gift over was in favour of three brothers and sisters, the total death duty payable would be £22,166 odd. (estate £15,166 13s. 4d.; succession, £7,000). This would be a substantial saving on £30,830 payable in the event of A.'s dying intestate. Besides it would have the advantage of ensuring that A.'s property would devolve in accordance with his wishes. But the tying up of property to the third generation is not very much favoured in New Zealand.

It is suggested in an English precedent book—*2 Key and Elphinstone's Precedents in Conveyancing*, 14th Ed. 1019—that a desirable method is for a married person to give his spouse a life interest coupled with a *general* power of appointment by deed, or in default of appointment to other persons. This would not prevent the State from getting duty on the child's estate in respect of A.'s £50,000, if the child, as is probable, were the person nominated to take on default, unless in the example we are taking, he is not to take a vested interest until he is twenty-one. The wife's estate, too, would be assessable on the full £50,000 *less* duty and testamentary expenses payable in respect of A.'s estate. There would thus be two and probably three lots of estate and succession duty payable; for, in New Zealand, death duty is payable in respect of any property situate in New Zealand at the death of deceased over or in respect of which he had at the time of his death a *general* power of appointment; and "general power of appointment" includes any power which enables the donee to appoint or dispose of property, as he thinks fit for his own benefit, whether exercisable by instrument *inter vivos* or by will, ss. 2, 5 (1) (*h*), 16 (1) (*a*), and 16 (1) (*c*) of the Death Duties Act, 1921. As the wife had a *general* power of appointment, her estate would be caught by these provisions. This suggested method, therefore, is not very effective in New Zealand in mitigating the heavy duties payable on a *commorientes*.

It is rightly pointed out, however, that death duty can be avoided on the estate of the surviving spouse, if such spouse is given only a *special* power of appointment—*e.g.*, to appoint among the children of the marriage. Thus, in the example given, none of A.'s £50,000 would be an asset in the estate of his wife for death duty, unless as will later be pointed out, A.'s estate actually devolves as on an intestacy. But the child again would probably be the person who was to take on default of appointment, and the child's estate for death duty purposes would consist of A.'s £50,000 *less* the amount of death duty and testamentary expenses payable in respect of A.'s estate. In the example given, however, the child's estate would not take under A.'s will, if the persons to take on default of appointment were limited to those attaining the age of twenty-one years: see the example given in *Garrow's Real Property*, 3rd Ed. 430, note (*p*). But, unless there was a further person nominated to take on default of A.'s issue attaining twenty-one years, A.'s estate would devolve as on an intestacy, and we would have still the same unfortunate result as stated in the beginning.

No suggested method therefore is entirely satisfactory. It is the view of members of the profession who have considered the matter that the Legislature should intervene, and make provision for the relief of estates of *commorientes* so that the same property should not be subject to death duty in respect of more than one person's death within a short period, say one year.

What is the effect of a quick succession of deaths? Simply that the State gets its duty much sooner than in normal circumstances. Now in assessing for succession duty such interests as life estates and annuities, the Stamp Duties Department uses life-expectation tables. Why, it may be asked, should not use be made of the same tables in ameliorating the disastrous effect of a quick succession of deaths affecting the same property? Thus, in the example given, on A.'s death, the life-expectation tables would show his wife's expectancy as 34.3 years, the child's as 51.6. It would seem a fair amendment of the present law that payment of death duty should be postponed in respect of the second and subsequent deaths, to the respective periods of the normal expectation of life of persons of equal age living at the death of first deceased's death; and that, meantime, it should not bear interest. The death duty payable in respect of the wife's estate in the example given would not be payable until 34.3 years after A.'s death; that in respect of the child's estate not until 51.6 years after A.'s death. Meantime the Crown could protect its interest by registration of its charge.

Provision should also be made for a complete discharge of the death-duty liability on payment for the time being of the *present* value of the duty owing. In the example given it does not appear to be perfectly fair to the State that the wife's and child's estates or any part thereof should altogether escape death duty, for had they not died with deceased (or shortly afterwards) the State would eventually have received duty in respect of their estates. But the postponement of payment of duty and the remission of interest thereon until in normal circumstances their estates would have been liable, ought to afford substantial relief to the original estate, besides, it would appear, being scrupulously fair to the State.

The Life of a Lawyer.—"It is a great thing to be a lawyer, especially in days when material possessions dwindle and interior resources rise in value. I doubt if any body of men have opportunities for service greater than ours. I am certain that no other group has so many interesting things to think about. This is equivalent to saying that lawyers are the happiest people in the community, for in my estimation happiness consists in thinking interesting thoughts."

—SENATOR G. W. PEPPER, in an address to the Bar Association of New York.

SUMMARY OF RECENT JUDGMENTS.

SUPREME COURT. Auckland. 1941. April 22; June 4. *Fair*, J.

In re **MATAHINA RIMU COMPANY, LIMITED (IN LIQUIDATION).**

Company Law—Winding up—Contract—Consideration—Estoppel—Agreement by Holders of Vendors' Shares originally Issued as Fully Paid, in order to Facilitate Sale of Company's Assets to "forgo" such Shares and to relinquish their Claims as Holders thereof to any Assets of Company or any part of Capital retained in Favour of Contributing Shareholders—On Liquidation after Repayment of Capital due to both Debenture Holders and Contributing Shareholders, surplus left—Whether Consideration given by Contributing Shareholders for agreement to Vendor Shareholders—Whether Vendor Shareholders Estopped—Powers of Liquidator to Accept Surrender of Shares—Method of Effecting Agreement, whether by Surrender of Vendors' Shares to Company or by transfer of such Shares to Contributing Shareholders pro rata*—Companies Act, 1908, ss. 195 (i), 114 (b), 226.*

A timber company's capital consisted of (*a*) 25,000 vendors' shares which were originally issued as fully paid up to the vendors of the company and undertaking, and which were held by the debenture holders of the company, and of (*b*) contributing shares.

Negotiations were in progress for the sale of practically all the timber lands of the company.

An informal meeting of the majority of the debentureholders unanimously decided to accept £50,000 further debentures and "forgo" their 25,000 vendors' shares in order to facilitate the sale.

The directors eventually made the sale and on October 6, 1933, the vendors' shareholders (except one person who held two shares), agreed, on a winding-up of the company or on any return of capital to shareholders, to relinquish their claims as the holders of such shares to any assets of the company or to any part of the capital so returned to the intent that only the shareholders other than the vendor shareholders should be entitled to participate in such assets or in any such return of capital.

At the same meeting, holders of all the debenture stock of the company resolved that the purchase-money—after payment of certain expenses—should be paid to the stockholders and contributing shareholders in the following proportions—namely, three-fourths thereof to the stockholders and one-fourth thereof to the contributing shareholders until such stockholders and contributing shareholders shall have received 20s. in the £ in respect to their holdings of stock or contributing shares. Unless and until the stockholders and contributing shareholders have received 20s. in the £ on their respective holdings no part of the aforesaid purchase price should be payable in respect of any vendors' shares.

At the annual meeting of the company on October 13, 1933, attended by debentureholders, vendor shareholders, and contributing shareholders, the chairman reported that the purchase price with interest made it possible to anticipate returning not only the reduced requirements of the debentureholders, but also 20s. in the £ on the money paid up by shareholders.

The meeting of shareholders then, after referring to the resolutions of October 6, including that of the vendor shareholders with reference to their *surrender* of their claims in respect of vendor shares, ratified and confirmed the sale.

On the liquidation of the company after the debentureholders had been paid the capital due to them and the contributing shareholders had been repaid the capital due to them the liquidators held a surplus.

On an application under s. 226 of the Companies Act, 1908, to determine the respective rights of the vendor shareholders and the contributing shareholders and the proper distribution of the net surplus after paying certain expenses,

Elliot, for the liquidators; *Towle*, for the vendor shareholders; *Stanton*, for the contributing shareholders.

Held, 1. That the word "forgo" in the circumstances was equivalent to "surrender."

2. That consideration was given both by the company and the contributing shareholders for the assignment to the latter of the vendors' shares of the surrender thereof to the company with the resultant transfer to the contributing shareholders of the rights they conferred to share in the distribution of the assets.

Torkington v. *Magee*, [1902] 2 K.B. 427; *Re Westerton, Public Trustee* v. *Gray*, [1919] 2 Ch. 104; *Milroy* v. *Lord*, (1862) 4 De G.F. & J. 264, 45 E.R. 1185; *Glegg* v. *Bromley*, [1912] 3 K.B. 474, *West Yorkshire Darracq Agency, Ltd.* v. *Coleridge*, [1911] 2 K.B. 326; *Cook* v. *Lister*, (1863) 13 C.B. (N.S.) 543, 143 E.R. 215; *Welby* v. *Drake*, (1825) 1 C. & P. 557; and *Hirachand Punamchand* v. *Temple*, [1911] 2 K.B. 330, referred to.

3. That the vendor shareholders were estopped from alleging that there was no consideration for their agreement on the ground that having obtained all they desired as a result of their offer and its acceptance, it would be inequitable to allow them to question it.

Binney v. *Ince Hall Coal and Cannel Co.*, (1866) 35 L.J. Ch. 363, and *Midland Railway Co.* v. *Taylor*, (1862) 8 H.L. Cas. 751, referred to.

4. That, although the fact that a surrender of shares is a reduction of the company's capital normally prevents a surrender for valuable consideration provided by the company, surrender in the present case, resulting in a release of the obligations of the company and differing from a surrender of partly paid-up shares or a purchase of shares, was in substance a transfer to the contributing shareholders of the vendor shareholders' shares, and was permissible in lieu of ordering the transfer of such shares to the contributing shareholders *pro rata*.

Trevor v. *Whitworth*, (1887) 12 App. Cas. 409, and *Bellerby* v. *Rowland and Marwood's S.S. Co., Ltd.*, [1902] 2 Ch. 14, distinguished.

5. That, although a power to accept such a surrender without application to the Court seemed to be conferred on the liquidators by ss. 195 (*i*) and 224 (*b*) of the Companies Act, 1908, in view of the large amount involved, the application under s. 226 was proper and could be treated as one for sanctioning the exercise of the said power.

Solicitors: *Russell, McVeagh, Macky, and Barrowclough*, Auckland, for the liquidators; *J. Stanton*, Auckland, for the contributing shareholders; *Towle and Cooper*, Auckland, for the vendor shareholders.

Case Annotation: Torkington v. *Magee*, E. and E. Digest, Vol. 8, p. 431, para. 81; *Re Westerton, Public Trustee* v. *Gray*, *ibid.*, p. 443, para. 193; *Milroy* v. *Lord*, *ibid.*, p. 499, para. 634; *Glegg* v. *Bromley*, *ibid.*, p. 432, para. 94; *West Yorkshire Darracq Agency, Ltd.* v. *Coleridge*, *ibid.*, Vol. 12, p. 208, para. 1669; *Hirachand Punamchand* v. *Temple*, *ibid.*, p. 458, para. 3712; *Cook* v. *Lister*, *ibid.*, Vol. 6, p. 344, para. 2285; *Welby* v. *Drake*, *ibid.*, p. 355, para. 2349; *Binney* v. *Ince Hall Coal and Cannel Co.*, *ibid.*, Vol. 9, p. 415, para. 2683; *Midland Railway Co.* v. *Taylor*, *ibid.*, p. 389, para. 2465; *Trevor* v. *Whitworth*, *ibid.*, p. 98, para. 411, *Bellerby* v. *Rowland and Marwood's S.S. Co., Ltd.*, *ibid.*, p. 154, para. 871.

SUPREME COURT. Auckland. 1941. June 9, 10, 18. *Ostler*, J.

In re **TUVAINE AND ANOTHER.**

Cook Islands—Practice—Appeal from Native Land Court—Procedure on Appeal—Cook Islands Act, 1915, ss. 161, 172.

The most convenient procedure for an appeal from the Native Land Court of the Cook Islands to the Supreme Court of New Zealand is that adopted for appeals in law and fact from the decision of a Magistrate in civil cases, where the pleadings, evidence, and judgment are set out in the record, the parties are bound by what is contained in the record, and they are not permitted to adduce fresh evidence in the Supreme Court.

The case is reported on this point of practice only.

Counsel: *T. P. McCarthy*, for the respondent, Mrs. Love.

Solicitors: *Leicester, Rainey, and McCarthy*, Wellington, for the respondent.

SUPREME COURT. Wellington. 1941. April 30; May 23. *Myers*, C.J.

ARTHUR v. BURGESS.

Rent Restriction—Determination of Fair Rent—Public Health—Closing Order—Whether Application can be made for Determination of Fair Rent of Premises in respect of which Closing Order in Force—Fair Rents Act, 1936, s. 6 (1)—Health Act, 1920, ss. 40, 44.

Neither landlord or tenant is entitled to make an application under s. 6 (1) of the Fair Rents Act, 1936, for the determination of the fair rent of premises which are for the time being subject to a closing order under the Health Act, 1920.

Haigh v. *Dyer*, [1918] N.Z.L.R. 638 G.L.R. 354, and *Popular Catering Association, Ltd.* v. *Romagnoli*, [1937] 1 All E.R. 167, distinguished.

Blake v. *Smith*, [1921] 2 K.B. 685, referred to.

Counsel: *Harding*, for the plaintiff; *J. A. Scott*, for the defendant.

Solicitors: *Meek, Kirk, Harding, and Phillips*, Wellington, for the plaintiff; *J. A. Scott*, Wellington, for the defendant.

SUPREME COURT. Wanganui. 1941. May 9, 16, 28. *Smith*, J.

In re **AN ARBITRATION BETWEEN FANTHAM AND SETH-SMITH.**

Arbitration—War Emergency Legislation—Mortgages—Extension—Award on Dissolution of Partnership fixing Price to be paid by one Partner for another's Share and Directing Payment to Third Person—Whether Objection could be taken to Enforcement of Award on ground of such Direction—Award including Agreement for Sale and Purchase of Land—"Mortgage"—Whether Leave of Court required to commence Proceedings to enforce Award as on Grounds of Breach of Agreement—Arbitration Act, 1908, s. 13—Mortgages Extension Emergency Regulations, 1940 (Serial No. 1940/163), Regs. 5, 6 (1) (c).

Partners agreed to dissolve the partnership on the basis that one should purchase the other's interest therein and referred their difference as to the price to be paid, *inter alia*, to arbitration. The award fixed the price, and directed that the purchaser should pay it to a third person, who should make thereout certain specified payments and pay the balance to the purchaser.

On a summons by the vendor partner under the Arbitration Act, 1908, for leave to enforce the award in the same manner as a judgment or order to the same effect,

E. P. Hay, in support; *Rollings*, to oppose.

Held, 1. That the amount ordered to be paid constituted a debt.

2. That there was no agreement for the sale and purchase of land, deemed by Reg. 5 of the Mortgages Extension Emergency Regulations, 1940, to be a mortgage of land.

3. That no objection could be taken to the enforcement of the award as a judgment, on the ground that the award required the purchaser to pay the money to a third party.

Solicitors: *Mazengarb, Hay, and Macalister*, Wellington, for the applicant; *W. P. Rollings*, Wellington, for the defendant.

SUPREME COURT. Christchurch. 1941. June 3. *Northcroft*, J.

In re **AVON MOTORS, LIMITED (IN LIQUIDATION).**

Company Law—Directors—Disqualification—Fraud—Actions constituting Disqualification—Companies Act, 1933, s. 216 (1).

B. and F. were the only directors of A. Co., to which money, urgently needed, was owing for calls by B. Co. in which B. was vitally concerned. B. used his position as director of A. Co. so as to delay or avoid the payment of that money by the B. Co.

B. also arranged a sale of A. Co.'s premises to B. Co. although the latter was unable to pay its debt to A. Co.; and, by immediately forming a new company to take over the premises from B. Co., provided a profit of £1,000 on the transaction for the B. Co.

B. and F., knowing that A. Co. was hopelessly insolvent and that its winding-up was inevitable, made a declaration that the company was solvent.

On an application by the Official Assignee under s. 216 (1) of the Companies Act, 1933,

A. W. Brown, in support of the summons; *Lester*, for Burns; *Spiller*, for Foote.

Held, That both B. and F. had committed fraud in accordance with the section.

B. was disqualified for the full period of five years; F. for two years.

Solicitors: *Raymond, Stringer, Hamilton, and Donnelly*, Christchurch, for the Official Assignee; *Barnett and Murdoch*, Dunedin, for Burns; *V. G. Spiller*, Christchurch, for Foote.

COMPENSATION COURT. Christchurch. 1941. May 26. *O'Regan*, J.

FINDLAY v. THE KING.

Workers' Compensation—Accident arising out of and in the Course of Employment—Waterside Worker returning to Work—Injured at locus *of Employment a few minutes before Commencement of Work by agency connected with Work—Whether Accident arose out of and in the Course of Employment—Workers' Compensation Act, 1922, s. 3.*

A waterside worker, residing in Christchurch, unloading cargo at Lyttelton, ceased work at 5 p.m. for the meal hour and, as was the practice, took his meal in a shed some distance away. Arriving at the scene of his labour (close to the ship that he was unloading) ten or fifteen minutes before 6 p.m. the time for resumption of work, he was seated on a crane-rail near the wharf edge and within a few yards of the truck he had been filling, when one of the vessel's mooring-wires slipped from its wharf-post, and, striking him on the right knee, fractured the patella.

M. J. Gresson, for the suppliant; *A. W. Brown*, for the respondent.

Held, That he was injured by accident arising out of and in the course of his employment.

Fitzpatrick v. *Hindley Field Colliery Co.*, (1901) 4 W.C.C. 7; *Sharp* v. *Johnson and Co., Ltd.*, [1905] 2 K.B. 139, 7 W.C.C. 28; *Colley* v. *Associated British Cinemas*, (1939) 31 B.W.C.C. 238; and *St. Helens Colliery Co., Ltd.* v. *Hewitson*, [1924] A.C. 59, 16 B.W.C.C. 230, applied.

Smith v. *South Normanton Colliery Co., Ltd.*, [1903] 1 K.B. 204, 5 W.C.C. 14; *Sparey* v. *Bath Rural District Council*, [1931] W.N. 251, 24 B.W.C.C. 414; and *Forde* v. *Shaw, Savill, and Albion Co., Ltd.*, Unreported: Invercargill, May 27, 1941, distinguished.

Solicitors: *Wynn-Williams, Brown, and Gresson*, Christchurch, for the suppliant; *A. T. Donnelly*, Crown Solicitor, Christchurch, for the respondent.

Case Annotation: Fitzpatrick v. *Hindley Field Colliery Co.*, E. and E. Digest, Vol. 34, p. 283, para. 2373; *Sharp* v. *Johnson and Co., Ltd., ibid.*, p. 282, para. 2372; *St. Helens Colliery Co., Ltd.* v. *Hewitson, ibid.*, p. 280, para. 2364; *Smith* v. *South Normanton Colliery Co., Ltd., ibid.*, p. 278, para. 2350; *Colley* v. *Associated British Cinemas, ibid.*, Supp. Vol. 34, para. 3162b; *Sparey* v. *Bath Rural District Council, ibid.*, para. 2355a.

"NO SURVIVORSHIP" TITLES.

Procedure on Death of a Registered Proprietor.

By E. C. ADAMS, LL.M.

The interesting and informative article on ss. 131–134 of the Land Transfer Act, 1915, in (1939) 15 N.Z.L.J., p. 138, which was written just after *Main* v. *District Land Registrar*, [1939] N.Z.L.R. 226, G.L.R. 143, requires revision in the light of *In re Denniston and Hudson*, [1940] N.Z.L.R. 255, G.L.R. 171. This last case appears to have settled the practice under these novel provisions, which are peculiar to the Torrens system of registration of title; in addition it has given a well-deserved and long overdue quietus to certain *dicta* in earlier cases.

It is well to bear in mind that these "no survivorship" provisions are in a part of the Land Transfer Act, 1915, dealing with *trusts*. They form one method of protecting trusts affecting land subject to the Land Transfer Act, but the protection is only partial and is by no means as effective as the protection afforded by (1) the registration of a caveat, or (2) to public reserves or other public lands by Appendix I to the Act, or (3) by operation of s. 135, authorizing the appointment of the District Land Registrar to act as a trustee for the purpose of any dealing. Except for the restriction on dealings contained in s. 133, joint proprietors registered under the Land Transfer Act with "no survivorship" can in the absence of a caveat (either by the District Land Registrar or by some interested person) deal with the land as they choose, and, unless there is something on the face of the instrument to suggest fraud or other improper dealing, the District Land Registrar must register the dealing. Section 133 appears to be based on a sound rule of human conduct, that, although one trustee may prove unfaithful to his trust, it is less likely that *all* the trustees will be guilty of such moral turpitude. It is therefore submitted that when the full number of registered proprietors deal with land so as to put an end to the trust so far as it affects the land—*e.g.*, by exercise of power of sale—the restriction "no survivorship" automatically ceases to affect the title. *Cessante ratione legis, cessat ipsa lex.* Section 134 of the Act has been quoted as authority for the proposition that once a Land Transfer title has been noted "no survivorship," it remains subject to the "no survivorship" provisions, until an order of the Court has been obtained removing them, but s. 134 refers only to the making of an order under s. 133, and s. 133 applies only in certain circumstances. Section 133 reads as follows:—

> After such entry has been made and signed by the Registrar in either case as aforesaid it shall not be lawful for any less number of joint proprietors than the number then registered to transfer or otherwise deal with the said land, estate, or interest without obtaining the sanction of the Supreme Court, or a Judge thereof, or by an order on motion or petition.

The restriction, it will be noticed, refers only to a transfer or dealing by any *less* number of joint proprietors than the number then registered. If the joint proprietors equal in number to those originally appointed, transfer or deal with the property, no consent under ss. 131–134 is necessary, and their dealing will take effect according to ordinary Land Transfer principles—*i.e.*, like any other dealing by joint tenants. The suggestion in some of the cases that ss. 131–134 of the Land Transfer Act, 1915, create some novel tenancy (neither joint nor common) is definitely (and there can be no doubt quite rightly) rejected: *In re Denniston and Hudson* (*supra*). For example the *jus accrescendi* (a feature of joint tenancy) applies to joint proprietors registered with "no survivorship," but the rights of the survivor or survivors to transfer or otherwise deal with the land are restricted as above by s. 133. The case also makes it clear that the legal personal representatives of a dead proprietor (where at least one proprietor still survives) have no *locus standi*, and their consent is not required to a dealing. Thus is one long standing heresy given its death blow.

Conversely when the trust still subsists, the "no survivorship" provisions imposed by s. 133 continue to apply to the title, unless perchance in an application under s. 134, the Court could be persuaded to sanction a transfer to only one trustee but that does not appear likely. In this connection it is interesting to observe that in *In re Denniston and Hudson* (*supra*) (where the trust was to subsist) application was in the first instance made to delete the words "no survivorship" from the title, but counsel eventually withdrew his application in that respect.

The real importance of *In re Denniston and Hudson* (*supra*) is that an application to the District Land Registrar to register a transmission by operation of law, such as by way of survivorship to the survivor or survivors, is a dealing for the purpose of s. 133 and requires the consent of the Court accordingly. It is in this respect that the judgment goes further than the requirements of previous Land Transfer practice, so far as the writer has been able to ascertain. In the course of his judgment, His Honour Mr. Justice Smith said:

> It seems, then, that the only way to give full effect to the intention of s. 133 is to hold that it prevents, without the sanction of the Court, any registration to give effect to any acquirement of title by operation of law or by contract or otherwise within the meaning of the words "to transfer or otherwise deal" in s. 133. I hold therefore that the sanction of the Court is required under s. 133 for the registration of any transmission.

Readers of the NEW ZEALAND LAW JOURNAL may be interested in the procedure to be adopted in a "no survivorship" title, when one of a number of trustees dies and it is desired to transfer the land to the existing ones and another to be appointed in his place.

The procedure is by way of motion or petition. In a recent case where A.B. and C.D. were registered as joint proprietors with "no survivorship" and A.B. had died, C.D. applied by petition. It was headed "In the Matter of Sections 133 and 134 of the Land Transfer Act, 1915, and in the Matter of the Relative Certificate of Title," and set out:

(*a*) That A.B. and C.D. were registered as joint tenants of the land concerned, the official Land Transfer description being given.

(*b*) That the said land was subject to the restriction of "no survivorship."

(*c*) The facts and circumstances leading up to the creation of the particular trust. (In this case no trust instrument could be found. If a trust instrument is in existence, presumably it would need to be produced to the Court.)

(*d*) That A.B. had died. (The death certificate of A.B. was annexed to the petition.)

(*e*) That the petitioner C.D., the surviving joint tenant, desired to appoint E.F. in place of and instead of A.B.

The notice of motion was similarly headed, and set out that counsel was to move for an order:

(*a*) Sanctioning registration of a transmission noting the death of A.B. deceased.

(*b*) Sanctioning a transfer from C.D. named and described in his petition filed in this Honourable Court, to the petitioner and E.F., also named and described in the said petition, as joint tenants of the land comprised and described in the relative C.D.

(*c*) As to costs of the said petition.

(*d*) Such further or other order as His Honour shall think fit upon the facts and circumstances set out in the petition of C.D. filed herein.

By memorandum His Honour was referred to *In re Denniston and Hudson*, [1940] N.Z.L.R. 255, G.L.R. 171.

His Honour directed service of the papers on the District Land Registrar, who was given an opportunity to appear in Chambers, and object to the granting of the Order, if he thought fit. It is to be remembered that a caveat might have been registered in the Land Transfer Office *or* a copy of the trust instrument filed in that office under s. 130 (2) of the Land Transfer Act, 1915.

MUTUAL ASSISTANCE BY SMALL FARMERS.

Liability under Workers' Compensation Act.

By F. J. GREEN, LL.M.

It is well known that small farmers frequently require assistance in carrying out farming operations which have to be done urgently according to the seasons and the vagaries of the weather and from time immemorial neighbouring farmers have banded together to assist one another in this respect.

Probably the farmers concerned have given little thought to the possible legal consequences but one aspect has been before the Courts in New Zealand on a number of occasions and that is the question of liability for workers compensation. It is a useful study to consider the cases which exemplify the many sides to the problem and to restate the principles which are applied. The first case was *Goulden* v. *Burke*, [1926] N.Z.L.R. 459, which concerned the operations of four neighbouring farmers in Taranaki. The report is not very full but apparently the facts were that a haymaking plant was owned in common and the four farmers worked together on each other's farms, getting in the hay and making use of the jointly-owned haymaking plant. As it was found that some worked longer hours than others a record of time was kept and after the completion of the work and discrepancy was adjusted at the fixed rate of 2s. per hour. The plaintiff's husband was killed while working on defendant's farm under this arrangement and counsel for plaintiff argued strenuously that a separate contract of master and servant arose whenever the gang worked on a farm, the employer being the owner of that particular farm and each of the others being employees while working on that farm. Contra it was argued that there was a contract, the parties being all four farmers who were either partners or else engaged in a joint adventure. In a short oral judgment *Frazer*, J., held in favour of the latter contention referring to the arrangement as one for "pooling" their labour resources and saying that no one could have been dismissed without a general conference of all parties. This type of arrangement, incidentally, is very common in Taranaki.

That *Goulden* v. *Burke* was a decision on special facts was made clear by *Frazer*, J., in the next case of the kind *Calder* v. *Douglass*, [1929] N.Z.L.R. 49, where he says, "That case was really somewhat unusual. The report is brief and the facts not so fully stated as they might have been. Four men between them owned their own plant, pooled their labour and hired other men. The arrangement was of such an unusual nature that it could not be called that of master and servant." In *Calder* v. *Douglass* two neighbouring farmers in north Otago assisted one another at busy times and at the end of the year struck a balance which was paid for at the current rate of wages for that year. The arrangement was entered into as they found one another's services more satisfactory than those of casual workers "picked up off the road." The owner of the farm directed the work personally in so far as any control was necessary as both parties were competent farmers. No plant was owned in common although each farmer would take his own team but no payment was made in this respect. There was no legal obligation to return the labour although this was always done as a matter of decency. Counsel for defendant relied on *Goulden* v. *Burke* and argued the arrangement was a co-operative contract but *Frazer*, J., had no difficulty in deciding that a contract existed and that owing to the right of control in the farmer on whose land the work was being done it was a contract of master and servant and the plaintiff was not a co-operative contractor or independent contractor.

The next case was *Masters* v. *Manson*, [1939] N.Z.L.R. 50, where the facts were a little different. Two neighbouring small farmers in Hawke's Bay had

assisted one another for many years, at any farm work required. Such services were always paid for either by striking a balance or in cash at the rate of 2s. per hour. On the day before the accident the defendant's wife, on behalf of the defendant who was in ill health at the time and was also somewhat deaf, requested the plaintiff to have a look at the roof of their dwelling-house to see whether he could fix certain leaks which were apparent. The next day the plaintiff came to defendant's dwellinghouse and climbed to the roof by means of the defendant's ladder carrying the defendant's hammer but a tin of his own nails. While on the roof the plaintiff slipped and fell to the ground breaking both wrists. The defendant had a workers' compensation policy and had always declared to his insurers the wages he paid to the plaintiff. Counsel for defendant strenuously argued this was a case of an independent contractor and not to be distinguished from that of a plumber who was asked to do such a job (compare *Oldroyd* v. *Turner*, [1935] 28 B.W.C.C. 369) and that the fact that the work was on the dwellinghouse differentiated it from all previous work done which was obviously farm work.

O'Regan, J., found that the arrangement about wages was explicit and the case was covered by *Calder* v. *Douglass*. The work in question was held to be farm work (following the decision of Herdman, J., in *Carr* v. *Guardian Assurance Co., Ltd. and Cracknell and Crimp*, [1928] N.Z.L.R. 108) and *Oldroyd* v. *Turner* (*supra*) was distinguished on the ground that the plaintiff there was a plumber by trade and not a farmer or farm labourer employed by a farmer.

It will be seen that each of the above cases turned on its own facts, questions such as degree of control, ownership of common plant and insurance against liability under the Workers' Compensation Act being canvassed in detail. In no case, however, was it questioned that a contract existed, the dispute being in each case as to the nature of the contract.

The recent case of *Cartwright* v. *Martin, et Ux.*, [1939] N.Z.L.R. 946, carries the cases one stage further. The facts in that case were that two farmers on becoming neighbours agreed that if each had a horse they could "work in" together and they proceeded to render one another various services. No strict time sheets were kept, no balance struck and no money payments passed. As the male defendant said in evidence, "There was no arrangement but if he (the plaintiff) worked for me I would give him his time back. I was never exacting about time."

It was argued for the plaintiff that this case was covered by the decisions in *Calder* v. *Douglass* and *Masters* v. *Manson* but the defendants argued that there was no contract at all as one of the elements of a valid contract namely the intention to create legal relations, did not exist. O'Regan, J., in referring to this point adopts the view point of the learned expositors of the law of contract, Sir William Anson and Sir Frederick Pollock (both of whom follow Savigny) that there may be agreements bearing all the outward badges of contract but not being contracts because the necessary intention to create legal relations is absent. This is clearly shown by the following definition of contract given by Sir William Anson:

> Contract is an agreement *enforceable at law* made between two or more persons by which rights are acquired by one or more, to acts or forbearances on the part of the other or others.

Applying this test, O'Regan, J., says:

> Here there were no settlements and no money payments, nor is there any suggestion that such were even in contemplation and there is the additional fact—very important under the circumstances—that neither party had a policy of indemnity against the liability imposed by the Workers Compensation Act. This goes to confirm the view that the parties did not contemplate contractual relatives. A contract of service is a prerequisite of liability under the Workers' Compensation Act.

The position as it now stands can be conveniently summarized as follows:

1. The plaintiff must prove there was a contract and not merely "a neighbourly arrangement" not intended to have legal consequences (*Cartwright* v. *Martin*).

2. The plaintiff must show the contract was that of master and servant and not,

(*a*) A co-operative contract or partnership (as in *Goulden* v. *Burke*).

(*b*) An independent contract for services (as contended by defendant in *Masters* v. *Manson*).

The principles to be applied are quite clear but in each case there was careful attention by counsel to minute detail in order to elucidate the true nature of the transaction. No farmer entering into such a working arrangement with his neighbour should in the circumstances feel reasonably safe unless he takes out a policy of indemnity against claims based on the existence of the status of master and servant as the making of loose friendly arrangements between neighbours (to whom farmers are peculiarly prone) while intended to promote neighbourliness may be productive of the opposite result if the farmer has to pay personally to compensate an injured neighbour.

FIFTY YEARS A LAW CLERK.

Continuous Service in Same Office.

On June 1, 1891, Mr. H. F. Tilley entered the employ of the firm of Messrs. Fitzherbert and Marshall, of Wanganui. Now, in June, 1941, he occupies the position of head clerk to the firm of Messrs. Marshall, Izard, and Wilson, thus completing a term of fifty years' continuous service in one office. During this long period, Mr. Tilley has seen many changes. He has served under seven different principals: of these, two (Messrs. S. T. Fitzherbert and Gifford Marshall) retired from practice; three (Messrs. C. C. Hutton, M. C. Barton, and W. A. Izard) died in practice; and two, (Messrs. A. B. Wilson and Nowell Izard) survive and carry on the business. With the change in partners, the name of the firm has changed from time to time. First it was Fitzherbert and Marshall, then Marshall and Hutton, next Marshall, Hutton, and Izard, then Marshall, Izard, and Barton, and now finally, Marshall, Izard, and Wilson. Such a record must be almost unique in the Dominion, and on June 1 Mr. Tilley received congratulations and messages of goodwill from all the members of the profession in Wanganui.

NEW ZEALAND LAW SOCIETY.

Council Meeting.

A meeting of the Council of the New Zealand Law Society was held in the Supreme Court Library, Wellington, on June 6, 1941.

The following Societies were represented: Auckland by Messrs. W. H. Cocker, J. B. Johnston and S. R. Mason; Canterbury, Messrs. A. W. Brown and A. R. Jacobson; Gisborne, Mr. J. G. Nolan; Hamilton, Mr. A. L. Tompkins; Hawke's Bay, Mr. H. B. Lusk; Marlborough, Mr. A. E. L. Scantlebury; Nelson, Mr. J. Glasgow (proxy); Otago, Mr. W. F. Forrester; Southland, Mr. N. L. Watson; Taranaki, Mr. J. H. Sheat; Wanganui, Mr. A. A. Barton; Westland, Mr. A. R. Elcock; Wellington, Messrs. H. F. O'Leary, K.C., D. G. B. Morison, and G. G. G. Watson. Mr. A. T. Young, Treasurer, was also present.

The President, Mr. H. F. O'Leary, K.C., occupied the chair. Apologies for absence were received from Messrs. C. R. Fell and A. H. Johnstone, K.C. The President welcomed delegates who were attending the meeting of the Council for the first time.

Obituary.—Members stood in silence as an expression of their sympathy with Mr. C. R. Fell, of Nelson, whose son, Lieut. R. Fell, had been killed in action.

Audit of Power of Attorney Transactions.—Letters were received from eight Societies, and also a report from the Joint Audit Committee expressing the opinion that it was considered unnecessary to amend the existing audit regulations. It was decided, in view of the opinion of Mr. P. B. Cooke, K.C., no action should be taken.

Appointment of Auditors.—The following proposals were submitted to the District Law Societies and to the New Zealand Society of Accountants in October last:—

1.:

(*a*) In each of the Law Society districts a joint committee of representatives of the District Law Society and of the New Zealand Society of Accountants be set up.

(*b*) That such joint committee consist of two members appointed by the District Law Society and two appointed by the New Zealand Society of Accountants and the President of the District Law Society.

(*c*) As there are thirteen District Law Societies there would be thirteen Committees. The legal members would be appointed by the District Law Societies. The accountants have not districts corresponding with the districts of the Law Societies but the accountants would ensure that their two appointees would in each case be from members within the particular Law Society district.

(*d*) It would be a matter for each body to decide when and for what period the appointments should be made.

(*e*) The Committee should meet at least quarterly—more frequently if required.

(*f*) All new appointments by solicitors of their trust account auditors (including change of auditors) should be submitted to the Committee by the District Law Society when approval of an appointment is asked. The Committee to report on the suitability or otherwise of the proposed appointment.

(*g*) The Committee should discuss matters of mutual interest to the two Societies relative to trust accounts and the financial affairs of legal practitioners and generally supply each other with information which would be helpful in safeguarding practitioners' trust funds and in ensuring that auditors and solicitors efficiently carried out their respective duties.

2.:

(*a*) That legislation be promoted to bring about privity of contract between the auditor of a solicitor's trust account and the New Zealand Law Society.

1. In reply to proposals (1) the Society of Accountants had now replied:—

> With further reference to yours of October 25 last, dealing with the appointment of auditors, I have to advise that the proposals outlined under No. 6, Minutes of 20/9/40, have been considered by the New Zealand Society of Accountants' representatives on the Joint Audit Committee and approved.

A motion was carried that the District Societies be now asked to give effect to these proposals.

2. In so far as privity of contract was concerned the accountant representatives on the Joint Audit Committee took the view that the proposal was a matter for the Law Society to independently decide: they expressed neither concurrence nor disagreement with it.

After some discussion, it was resolved that legislation be requested to bring about privity of contract between the auditor and the Law Society.

Death Duties.—The following letter was received from the Minister of Stamp Duties:

> On February 14, a deputation from your Society waited upon the Right Hon. the Prime Minister and asked that the rate of interest on unpaid death duty be reduced and that the time for payment without interest be extended to six months. At the conclusion of the interview the representations were referred to me, and in reply I have to advise that while moneys are required for war purposes, and all death duty is used for that purpose, it is not considered advisable to reduce the interest rate or to extend the time for payment without interest. I regret, therefore, that at the present time your request cannot be granted.

Conveyancing Scale: Vendor and Purchaser: Separate Charges.—It was decided at the last Meeting of the Council that before any revision was made of the conveyancing scale charges, the position as to whether the Price Fixing Regulations applied should be ascertained from the Price Tribunal. In this connection Mr. Morison reported.

Members thought that under the recent ruling each solicitor was empowered to deal with the question according to the circumstances.

It was agreed that the first resolution contained in the minutes of the last meeting should remain.

Pass Books: Cheques Entered by Numbers.—The following letter was received from the Otago Society:—

> My Council has received the following letter from a member of this Society, with regard to the above matter:

"I have read through the minutes of the New Zealand Law Society sent to me as a member of your Council.

"With regard to the concluding part of Minute 12, I wish to draw your attention to the fact that the making of all cheques payable to order would entail considerable trouble and difficulty to practitioners collecting maintenance moneys on any large scale. My practice is to enter these on a cheque butt each week, and draw one cheque for the lot. Some of these clients are incredibly ignorant, and to hand them cheques would be simply courting trouble besides adding greatly to the work and expense of the solicitor concerned. I suggest that, if the proposal is adopted, cheques under, say, £15 or £20 should be excepted."

The Joint Audit Committee reported as follows:—

The proposals of the New Zealand Law Society concerning this question were considered by the Committee, who were of opinion that the following suggestions might help to obviate the difficulty:

(1) That the New Zealand Law Society make representations to the associated banks with a view to having some form of receipt incorporated in the cheque form as it appears certain trading companies are now doing.

(2) That in any case rules be drafted to compel solicitors to authorize the bank to hand the cheques every month to the auditor.

It was decided that the matter be referred to the District Societies for further consideration.

Scale of Costs on Transfers of Properties Specifically Devised.—The scale of costs submitted by the Otago Society had been considered by the District Societies, letters from nine of whom were considered by the Council.

After further discussion, a proposal was moved that the Otago scale be adopted with the addition of "transfers rendered necessary by the appointment of a new trustee." An amendment proposed that the Auckland scale be adopted, with the addition of "transfers rendered necessary by the appointment of a new trustee." The amendment was then carried by a majority.

It was, therefore, decided that the following scale of costs on transfer of properties specifically devised and transfers rendered necessary by the appointment of a new trustee be adopted: Minimum charge of £2 2s., two-thirds of ordinary scale costs up to £10 10s., thereafter, half the scale costs with a minimum of £10 10s.

Divorce Proceedings.—The suggestion received at the last meeting that the English practice be adopted in New Zealand of requiring the certified copy of the marriage certificate to be lodged in the Registry when the proceedings were launched was considered by the District Societies the majority of whom considered that much inconvenience and delay would be incurred if the practice was adopted. It was decided not to take any action in the matter.

Members of the Profession in England: (*a*) **New Zealand Homes for Children of Members of the Profession in England.**—Replies were received from the District Societies who were all in sympathy with the proposal that New Zealand homes should be offered for children of members of the profession in England, but it was felt by some that as the evacuation scheme was not being proceeded with at present, no recommendation was required. One member pointed out that, although such an offer may only be regarded as a gesture, even as such it would be greatly appreciated by the English people.

The proposals of the Auckland Society that an offer be made to the Law Societies and Bar Councils in the United Kingdom offering to care for any children of legal practitioners should it be possible to arrange for their evacuation, was accordingly carried unanimously.

(*b*) **Cables to Profession in England.**—The President reported that following on the resolution of the Council at the last meeting, cables were sent as follows:—

Secretary,
Law Society.
Annual Meeting New Zealand Law Society passed resolution sympathizing with but at same time expressing greatest admiration for Profession in Great Britain in present ordeal. Trust victory will soon end your trials meantime best wishes.

Secretary,
Bar Council.
Annual Meeting New Zealand Law Society passed resolution sympathizing with Brethren in Great Britain in present ordeal. Unbounded admiration was expressed for courage and resolution shown by them along with all people of Britain. Certainty expressed of ultimate victory. Please convey Treasurers Middle and Inner Temples our sorrow at damage to their beautiful halls. Best wishes.

Replies, reading as follows, had been received:

From the Law Society, London: "Your encouraging resolution will be reported to Council and I know be greatly appreciated."

From Chairman of the Bar Council, Sir Herbert Cunliffe: "General Council of Bar of England sends the New Zealand Law Society grateful thanks and warm appreciation for kind message of sympathy and encouragement."

From the Treasurer of Middle Temple, Sir Patrick Hastings: "Deeply appreciate your greetings."

Oral Evidence of Soldiers Overseas.—The following letter had been received from the Otago Society, and was referred to the Judge-Advocate-General direct:

My Council would be glad if you would place the enclosed letter before your Council for consideration:

Enclosure:

We have recently been concerned in a case where cross-actions were pending by and against a member of the New Zealand Expeditionary Force who is now serving overseas with the Middle East Forces. The particular circumstances of that case are not of importance, but it raised the general question of taking evidence overseas in cases where soldiers are parties or necessary witnesses in a case.

Arrangements have already been made for serving legal proceedings upon soldiers on active service overseas, and a number of commissioned solicitors have been appointed Commissioners of Oaths. The short effect is that soldiers can be effectively served by a simple and inexpensive procedure, and can readily give evidence on affidavit, but no special provision appears to exist enabling the evidence of these soldiers to be taken in any case where affidavit evidence would not be admissible.

The question of taking evidence was raised early last year, but apparently has not been taken any further. If our understanding of the position is correct, there is surely a danger of grave injustice to soldiers overseas. In most contentious matters, affidavit evidence is inadmissible, so that a soldier can be served but has no real opportunity of getting his evidence before the Court.

If the proceedings are in the Supreme Court, he can in theory have his evidence taken on commission under the provisions which exist in the Supreme Court Code, but expense combined with the exigencies of active service, make this quite impracticable in most cases. If the proceedings are in the Magistrates' Court, no provision at all exists for taking evidence overseas, and if they are under the Destitute Persons Act, the existing provisions for enforcement overseas extend only to the British Empire. (These provisions are further restricted under the Maintenance Orders (Military Forces) Emergency Regulations, 1940 (Serial No. 1940/298).) Some questions may well arise as to the extra-territorial jurisdiction of the lower Courts, but it is specifically stated by the Judge-

Advocate-General that the arrangements regarding service made by Army Headquarters will hold good for proceedings in any Court of justice, and indeed the question originally arose in connection with affiliation proceedings.

We are not here concerned with any considerations of public policy, and whether it is desirable that soldiers on active service should be subject to the distraction and worry of legal proceedings. But when facilities have already been afforded for service, surely equal facilities should be provided for some simple and inexpensive method of taking *viva voce* evidence on commission. There does not seem to be any objection to its being taken before the special Commissioners of Oaths in the same way as evidence on commission is usually taken (including, of course, provision for cross-examination), and all that is needed is the machinery and the authority to make such evidence admissible.

Everything that has been said regarding proceedings where a soldier is defendant applies equally to cases where he may wish as plaintiff to initiate proceedings in his own interests. To a lesser degree it applies also to material and necessary witnesses.

It may be that some arrangements have already been made to meet this difficulty, and that we are not conversant with the true position. If that is so, particulars are not readily available here, and some more effective publicity should be given to those who are professionally interested. If no such arrangements exist, then we suggest that some action is surely desirable.

The Judge-Advocate-General replied as follows:

I am in receipt of your memorandum dated 2nd inst., enclosing letter from the Secretary, Otago District Law Society, with reference to the taking on commission of the evidence of New Zealand soldiers overseas.

The writer summarizes the position accurately when he says "all that is needed is the machinery and the authority to make such evidence admissible." The Army authorities will be happy to co-operate by making the machinery available. The office of the Deputy Judge-Advocate-General (Major C. A. L. Treadwell) on some such simple procedure as that instanced in the making of "Letters of Request," could provide capable and experienced Commissioners to take evidence. The authority to make such evidence admissible, however, in my view, is in the hands of the proper institutions in New Zealand to establish.

I venture to suggest that the question of "authority to make the evidence admissible" be placed by your Society before the Rules Committee for consideration by the Justices Department.

As the Rules Committee were meeting on June 1, the matter was referred to the Committee for consideration, who replied as follows:

1. I am directed to acknowledge receipt of your letter of April 30, last and to say that the letter and its enclosures were laid before the Rules Committee at a meeting held on 1st inst.

2. I am further directed to say that the Committee resolved as follows:—

(1) That the matter be referred to the Hon. Attorney-General so that if he thinks it necessary some comprehensive regulations may be prepared to cover all Courts.

(2) That the Committee will be glad to consider any draft regulations so far as they affect the Supreme Court.

3. Copies of the correspondence are being sent to the Hon. Attorney-General accordingly.

4. I permit myself to add for the assistance of your Society in case it is desired to supplement the correspondence already sent forward, that as regards Supreme Court proceedings no indication has yet been given by your Society of any way in which the usual procedure under Rules 177 to 178 for getting a Letter of Request, or an order for a Special Examiner, as the case may require, is to be regarded as inadequate, or capable of simplification or improvement. The innovation of machinery for taking evidence abroad for inferior Courts might be regarded as running counter to the tradition of speedy decisions in these Courts, but no indication has yet been given as to how the profession would view the conflict that must arise between the legitimate claim of one party to a prompt decision, in cases where long delay might amount to a denial of justice, and the wish of the other party to get evidence taken abroad from witnesses whose place of residence might be constantly changing. In the particular case of proceedings under the Destitute Persons Act, I have referred to a report of discussion at the Legal Conference of Easter, 1929 (5 N.Z.L.J. 78–80), from which it seems that opinions were divided as to the advisability of permitting evidence to be given on commission, even within New Zealand. Apart from considerations of a different kind, such as diplomatic issues, into which your Society would probably not care to enter, there may well be other factors on which your Society would wish to express a view.

The correspondence having been considered by the Otago Society, that Society wrote as follows:

My Council considered this matter in view of the correspondence shown in the agenda for the next meeting of the New Zealand Law Society, and it was decided that the question of possible delay could be met on the application to have the evidence taken of a soldier abroad by the proposed rules requiring that complete disclosure be made as far as possible as to the nature of the evidence required of the witness, and it would then be for the Court to decide whether such evidence was vital or not to the applicant's case. It should not be difficult to frame rules to govern the different aspects of this matter.

It was decided that the Wellington members should take up the points raised with the Attorney-General.

Joint Audit Committee.—The Taranaki Society's letter concerning a solicitor undertaking military duties and leaving an unqualified clerk to collect rents and interests was referred to the Joint Audit Committee for their opinion as to whether the monthly balances could be certified by an agent or servant.

The Committee were of opinion that "Emergency regulations should be passed to authorize certification for audit purposes by a supervisor *who is a qualified solicitor and responsible for the trust account.*"

It was decided that it be left to the Standing Committee to request that a suitable regulation be passed.

Members Serving with the Forces: Guarantee Fund Contribution.—The following letters were received:

(*a*) From the Wellington Society:

I have been directed to convey to you the following resolution, which was passed at the meeting of my Council held on the 27th inst.:

That as members of the Council were doubtful whether it was intended that the discretion conferred on the Management Committee of the Guarantee Fund as a result of the motion (No. 6 of 7/3/41) was limited by the reported discussion on the motion to cases where hardship was proved by the applicant for remission or refund and as the members of the Council were unanimously of the opinion that contributions by members of the Military, Naval and Air Forces should always be remitted or refunded except possibly in exceptional cases, a request be made to the New Zealand Society for a ruling.

(*b*) From the Taranaki Society:

I am directed to acknowledge receipt of your letter of 3rd April in which you advise that the Management Committee requires to know whether payment to the Guarantee Fund levy will involve hardship and to ask you to submit to the Council of the New Zealand Society the following resolution passed by the Council of this Society:—

"That when a solicitor is on full-time military service his practising fee and Guarantee Fund levy should be remitted as of course."

After discussion it was resolved that notwithstanding the previous rulings with reference to payment of contributions to the Guarantee Fund by practitioners engaged in military service, it is now decided that no such contribution be collected from any practitioner engaged in full-time military service whether in New Zealand or overseas, and that this present ruling take effect as from the beginning of the year 1941. Any practitioners affected by this ruling and who have paid their contributions for the year 1941 shall be entitled to a refund of the whole or part thereof.

New Divorce Rules.—It was decided that the Rules Committee be asked for the immediate promulgation of the new Divorce Rules.

LONDON LETTER.

Somewhere in England,
May 25, 1941.

My dear EnZers,—

We have become too much accustomed in this disastrous war to the desolation of famous and valued historic buildings to feel surprised at the lamentable destruction which has been done by the insensate fury of the German air force to Westminster Abbey, to Westminster Hall, and to the Houses of Parliament. The Houses of Parliament, though modern in their general reconstruction after the fire of a hundred years ago, are renowned throughout the world as the home of the Mother of Parliaments—the Citadel of Freedom. Westminster Abbey holds the memorials of those who have earned the foremost place in English life and history. Westminster Hall, from its antiquity and associations, ranks with these neighbouring treasures of stone *primus inter pares*. There has been no such group of buildings in the world. They will be rebuilt, and Freedom will triumph. The canker that will destroy the enemy is already appearing. But at the present the loss is none the less heavy, nor of course can all be told. There are tears for lawyers to shed in due time.

Judicial Disagreement.—The decision of the Court of Appeal in the *Borders Case*, [1940] 1 All E.R. 302, has now been reversed by the House of Lords. A remarkable feature of this case is not merely that the House of Lords has differed from the Court of Appeal—each tribunal was unanimous. In the Court of Appeal, Clauson, L.J., delivered the judgment of the Master of the Rolls, Scott, L.J., and himself. In the House of Lords Lord Maugham delivered a judgment in which Lords Russell, Wright, Romer, and Porter concurred. The Court of Appeal, while exonerating the directors of the building society from personal blame, held that the close relations existing between the builders and the society, in connection with a "pool" deposit agreement, involved the society in the builders' misrepresentations. Here the House of Lords disagree. For Mrs. Borders to succeed on the counterclaim it was necessary for her to bring home to the society the misrepresentation of the builders. Mere "association" was not enough. But it is singular that on a question of responsibility of this nature the Court of Appeal and the House of Lords should be each unanimously in disagreement.

Allied Maritime Courts.—The Allied Powers (Maritime Courts) Bill is intended to fill an undoubted gap in legal organization which has come about as a consequence of allied countries being completely overrun. An offence by a member of the crew of a foreign ship on the high seas is not triable in this country, and offences against the national law of the ship are also not triable by our Courts. There is no Court before which such persons can be brought, and the Bill will authorize our Allies to set up Courts which will try offences committed on any such ship by any person other than a British subject, and offences by the master and crew of any such ship against the national shipping law, and also offences by a foreign seafarer against the mercantile marine conscription law of his own state. It is undoubtedly the best solution. Our Courts do not administer foreign criminal law, and have no facilities for doing so. A British subject will remain subject to the jurisdiction of the British Courts. It may, however, be doubted whether contempt of Court in relation to the proposed Courts should be made a mere summary offence. Our own Courts of Summary Jurisdiction have no power to deal with contempt of Court committed in relation to themselves, and the procedure by report to the High Court and motion to commit, as is done in bankruptcy matters, would probably be equally efficacious and certainly more consonant with the dignity which will attach to these new Courts of our Allies. It is not to be expected that there will be many such cases. Nor does it seem at all likely that there would be a sufficient number of cases where a person accused before the new Courts claims to be a British subject to warrant the setting up of a still further set of tribunals especially to try such a claim. If the jurisdiction were conferred on, say, the Chief Magistrate in London and the Stipendiary Magistrates of the principal shipping ports, it is suggested that justice would be done to the satisfaction of all concerned.

Reasonably Fit.—Opinion will always differ as to when a house is reasonably fit for human habitation. Under the Housing Act, 1936, s. 2, landlords are by statute compelled to keep them so if they are, roughly speaking, low-rented houses. Is a house reasonably fit for human habitation when the sash-cord of one window is broken? This was the problem presented to the Court of Appeal the other week in *Summers* v. *Salford County Council* (*Times*, May 9). A tenant found one sash-cord broken. At some time, in February, she told the landlord's rent-collector of the damage; but nothing was done to repair it before the last day of April. Then the remaining cord gave way and an accident followed which led to an action for breach of the statutory covenant. The Judge on circuit declined to find that the breaking of a sash-cord makes a house less than reasonably fit within the statute; and two Judges of the Court of Appeal have now agreed with him. Lord Justice Luxmoore differed, pointing to the essential necessity of means of ventilation. Leave was given to appeal to the House of Lords, so I say no more now. Everybody agrees about the necessity of ventilation, but, without full facts, one cannot say how much it was impeded by the loss of one sash-cord.

An Unwise Bishop.—Bishops are nearly always discreet, but now and then one finds a Bishop who permits his desire for real or imagined public good to outrun his discretion. This was the case of the Bishop of Birmingham. He committed himself at a public meeting to some highly defamatory observations about the cement-making industry, or rather the Cement Makers' Federation, which largely controls it. It is enough to say that the Bishop said that if the chief men in the Federation behaved in Germany as they are doing in England they would be seized by the Gestapo, taken to a concentration camp and shot in an attempt, so-called, to escape. This was a serious statement, and it was evident from Mr. Justice Wrottesley's judgment that he thought nothing should have prevented the Bishop, when he found himself unable to justify or plead fair comment, from making some apology which was more generous than the words of dignity which he did use through his learned counsel at the trial. The damages awarded were substantial,

and came up to £1,600. As the learned Judge said, humility is a Christian virtue. Here there was nothing like enough of it.

A Curious Conscience.—The Reverend Sydney Smith once told the story of a man so moved by a charity sermon that he picked his neighbour's pocket of a guinea to put in the plate. The same queer kind of conscience may belong to the man aged twenty-nine, described as a conscientious objector, who was sentenced to twelve months for stealing cigarettes and possessing counterfeit coin. In his own defence he pleaded that he could not get work by reason of his conscientious objection to military service, so he had to do something or starve. It seems strange that a man who has thought out the question of military service and taken up a stand for what he believes to be right should find it consistent with his conscience to become a thief. It is impossible to avoid some suspicion that this was a newly found conscience, sensitive to the ideas of discipline and danger, especially as it turned out that the man had previous convictions for housebreaking and false pretences. It would be unfair to generalize about conscientious objectors on the strength of one instance like this. As we have said before, there are some so called conscientious objectors who have no title to respect or esteem, but there are others who are undoubtedly genuine and indifferent to danger, so that however much we may differ from them we must respect them. The conscientious objector who disgraces himself does injustice to all those others who, even if they are mistaken, are doing what they believe to be right.

Yours as ever,
APTERYX.

OBITUARY.

Mr. O. J. Howells, Gore.

Mr. O. J. Howells, of Gore, met his death in a tragic manner during the recent duck-shooting season. He was a member of the firm of Messrs. Bowler, Bannerman, and Howells, and had just prior to his death been passed as fit for overseas service and was awaiting his turn to go into camp.

"He was known and respected by us all and his passing has removed from our midst one who, although young in practice, had already taken a prominent part in the life of the profession in Southland and who, because of his sterling qualities, undoubtedly would have gone far in his profession," said Mr. N. L. Watson, president of the Southland District Law Society in paying a tribute to the late Mr. O. J. Howells, of Gore, at a large gathering of members of the Invercargill Bar at the Magistrate's Court. Mr. R. C. Abernethy, S.M., was accompanied on the bench by His Honour Mr. Justice O'Regan, Judge of the Compensation Court.

Mr. Watson said that the late Mr. Howells, during his professional career, had established a sound reputation and his outlook on life was governed by that clear estimate of the principles of right and wrong which produced feelings of the highest regard in those with whom he came in contact. His activities were not confined solely to the practice of law. They extended and embraced all forms of sport and social activity. His enthusiasm for those typical Southland pastimes, shooting and fishing, were lifelong and very real.

"We mourn his loss with deep and sincere feeling," Mr. Watson continued. "We extend our sympathy on his death to all his relations. I can pay no higher tribute to his memory than to say that in his death his family, the profession, and the community in general have lost, in the true sense of the word, a good man."

Mr. G. C. Cruickshank, vice-president of the society, said that the late Mr. Howells had commanded the regard and the respect of the profession and public alike, and he had maintained the highest ideals of the legal profession. He joined with Mr. Watson in extending to the relations heartfelt and deepest sympathy.

Messrs. H. J. Macalister, Crown Solicitor, and J. C. Prain added tributes of regard and sympathy.

Mr. Justice O'Regan associated himself with all that had been said. He added: "Mr. Howells's tragic passing reminds us that even those who exult in life hang on to it by a very slender thread. It has been said that the late Mr. Howells was a good sportsman, and if a man is a good sportsman he is also a good citizen. I esteem it a privilege to be able to associate myself with this demonstration of sympathy and respect."

Mr. Abernethy, S.M., said that if the present war was going to prove anything it was going to prove the value of a nation of men of character, men who like Mr. Howells were good men. The influence of leaders for good or ill was immense, but the influence of ordinary citizens in their hundreds and thousands, whether good or bad citizens, was also important. "Mr. Howells was a good man," Mr. Abernethy continued. "He did his job and left his mark, not perhaps a big one but none of us leaves a big mark." Mr. Abernethy concluded by saying that he wished to associate himself with the expressions of sympathy to the relations.

RULES AND REGULATIONS.

Health Act, 1920. Camping-ground Regulations Extension Order, 1941, No. 1. No. 1941/85.
Primary Industries Emergency Regulations, 1939. Phosphatic Fertilizer Control Notice, 1941. No. 1941/86.
Health Act, 1920. Hairdressers (Health) Regulations Extension Order, 1941, No. 2. No. 1941/87.
Factory Emergency Regulations, 1939. Paper (Newsprint) Control Notice, 1941. No. 1941/88.
Marketing Amendment Act, 1939. Purchase of Scheelite Order, 1941. No. 1941/89.
Emergency Regulations Act, 1939. Suspension of Apprenticeship Emergency Regulations, 1939. Amendment No. 2. No. 1941/90.
Emergency Regulations Act, 1939. Occupational Re-establishment Emergency Regulations, 1940. Amendment No. 1. No. 1941/91.
Marketing Amendment Act, 1939. Marketing Department (Extension of Powers) Order, 1939. Amendment No. 3. No. 1941/92.
Customs Act, 1913, and the Finance Act, 1931 (No. 2). Customs Import Prohibition Order, 1941, No. 1. No. 1941/93.
Customs Act, 1913. Customs Export Prohibition Order, 1941, No. 1. No. 1941/94.
Factory Emergency Regulations, 1939. Zinc Control Notice, 1941. No. 1941/95.
Fisheries Act, 1908. Sea Fisheries Regulations, 1939. Amendment No. 11. No. 1941/96.
Emergency Regulations Act, 1939. Patriotic Purposes Emergency Regulations, 1939. Amendment No. 5. No. 1941/97.
Emergency Regulations Act, 1939. Lighting Restrictions Emergency Regulations, 1941. Amendment No. 2. No. 1941/98.