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RUNNING-DOWN CASES: APPEAL FROM APPORTIONMENT OF DAMAGES.

IN *Stevens* v. *Collinson*, [1938] N.Z.L.R. 64, it was held by Reed, J., that an action for contribution by one tortfeasor to another, under s. 17 of the Law Reform Act, 1936, being an equitable remedy, should be tried before a Judge alone. The relevant provisions of s. 17, as the learned Judge pointed out, are copied from s. 6 of the English statute, the Law Reform (Married Women and Tortfeasors) Act, 1935. After holding that the relief claimed in an action based on s. 17 is not "payment of a debt or pecuniary damages, or the recovery of chattels," within the meaning of s. 2 of the Judicature Amendment Act, 1936, he said, following *Ward* v. *National Bank of New Zealand*, (1883) 8 App. Cas. 755, 765, N.Z.P.C.C. 551, 557, that it is an action for contribution, which is an equitable remedy; and that the powers given to "the Court" by ss. 17 (1) (*b*) and 17 (2) of the Law Reform Act, 1936, are of such a nature as to imply that, in proceedings for contribution, trial by a Judge is indicated. His Honour then said, at p. 69:

> The statute has not specifically provided that the Admiralty practice shall be followed, and, so far, there is no report of any case in which the question has been debated. No principle upon which apportionment shall be made has been laid down, and the matter is left to the discretion of the Court. It would appear then that the responsibility of assessing the contribution or indemnifying one or other of the parties is cast by s. 17 (2) of the Act upon myself as "the Court" within that subsection.

The matter may now be taken a little further. In *Ingram* v. *United Automobile Services, Ltd.*, [1943] 2 All E.R. 71, it was held by the Court of Appeal (MacKinnon, du Parcq, L.JJ., and Uthwatt, J.) that, except in exceptional circumstances, an appellate Court should not interfere with the Judge's apportionment of the damages between the tortfeasors, when his finding on the facts is not disturbed. In addition, the Court of Appeal came to the interesting conclusion that this rule, which is always applicable in cases of collisions at sea, is the same in cases of collisions on land.

To learn how the Court of Appeal arrived at this conclusion, it is necessary to go back to its decision in *British Fame* (*Owners*) v. *Macgregor* (*Owners*), where MacKinnon and du Parcq, L.JJ., and Lewis, J., unanimously varied a decision of Bucknill, J., on the proportions of blame to be attached to the two ships concerned, arising out of a collision between them while they were forming part of a convoy, the findings of fact in the Court of first instance not being disputed. The question of the distribution of the blame became the subject of an appeal to the House of Lords (Viscount Simon, L.C., and Lords Atkin, Thankerton, Wright, and Porter): [1943] 1 All E.R. 33. In the course of his speech, the Lord Chancellor, with whom their Lordships all concurred, at p. 34, said:

> It seems to me that the cases must be very exceptional indeed in which an appellate Court, while accepting the findings of fact of the Court below as to the fixing of blame, none the less has sufficient reason to alter the allocation of blame made by the trial Judge. I apprehend that, if a number of different reasons were given why one ship is to blame, but on examination some of those reasons were in the Court of Appeal found not to be valid, that might have the effect of altering the distribution of the burden. If there were a case where the Judge, when distributing blame, could be shown to have misapprehended a vital fact bearing on the matter, that might perhaps be—it would be, I think—a reason for considering whether there should be a change made on appeal. But subject to rare exceptions, I submit to the House that when findings of fact are not disputed and the conclusion that both vessels are to blame stands, the cases in which an appellate tribunal will undertake to revise the distribution of blame will be rare.

His Lordship drew attention to the language used by Lord Wright in *The Umtali*, (1938) 160 L.T. 114, 117, when he said:

> It would require a very strong and exceptional case to induce an appellate Court to vary the apportionment of the different degrees of blame which the Judge has made, when the appellate Court accepts the findings of the Judge.

This passage, Lord Simon added, had direct application; and the apportionment made by the Judge of first instance should stand.

Lord Wright referred to *Ceramic* (*Owners*) v. *Testbank* (*Owners*), [1942] 1 All E.R. 281, in which the Court of Appeal had recently varied the trial Judge's apportionment of degrees of blame as between two vessels actually found to be in fault. He said the statement of principle by that Court, namely—

> The finding of the trial Judge as to the degrees of blame to be attributed to two or more ships which are at fault . . . is a conclusion of fact, and as such is open to review by the Court of Appeal no more and no less than any other finding of the trial Judge—

was not quite in accord with the authorities, as so far laid down. He then referred to *The Umtali* (*supra*), a decision of the House of Lords, and *The Karamea*, [1921] P. 76, in which Lord Sterndale, M.R., a great authority on these matters, dealing with the question of apportionment, at p. 78, said :

> I think it would need a very strong case indeed to induce this Court to interfere with his discretion as to the proportions of blame. We have power to do it, but I do not suppose that we should ever think of doing it.

At pp. 83, 84, Warrington, L.J., said :

> It may well be and probably is the case that if the Court arrives at the same conclusion both on the facts and in law, it would not interfere merely because the learned Judge in his discretion has given proportions which this Court thinks it would not have given.

And Scrutton, L.J., at p. 89, said :

> . . . if the Court of Appeal agrees with the findings of fact and law of the learned Judge below, and the only difference is that it attached more importance to a particular fact than he did, it would require an extremely strong case to alter the proportions of blame which the learned Judge below has attributed to the ships. . . .

It seemed to Lord Wright that these observations of, as he said, three very eminent Judges were in accord with what was said in *The Umtali*, and with what the Lord Chancellor had just said. While under proper conditions such as those indicated in the dicta we have just cited, the Judge's apportionment might not be interfered with, he repeated that it would require a very strong case to justify any such review of or interference with this matter of apportionment where the same view is taken of the law and the facts. His Lordship added :

> It is a question not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations; it involves an individual choice or discretion, as to which there may well be differences of opinfon by different minds. It is for that reason, I think, that the Courts have warned an appellate Court against interfering, save in very exceptional circumstances, with the Judge's apportionment.

Lord Porter, in concurring with the Lord Chancellor and with Lord Wright, considered the principle applicable to a review of apportionment of blame was too widely stated in *The Testbank* (*supra*), having regard to the series of decisions which preceded it. He instanced the judgments in *The Peter Benoit*, (1915) 84 L.J.P. 87, aff. on app. 85 L.J.P. 12 ; *The Karamea* (*supra*), which, on appeal, *sub nom. S.S. Haughland* v. *S.S. Karamea*, is reported [1922] 1 A.C. 68, and which was followed in *The Clara Camus*, (1925) 134 L.T. 50, on appeal (1926) 136 L.T. 291 ; and *Kitano Maru* (*Owners*) v. *Otranto* (*Owners*), *The Otranto*, [1931] A.C. 194.

Before coming back to *Ingram's* case, it may be well to remind ourselves that, while running-down cases in New Zealand are invariably heard before a jury, in England it is the general practice, with few exceptions, for such cases to be heard before a Judge alone. Both in England and, as we have seen on the authority of *Stevens* v. *Collinson* (*supra*), in New Zealand the apportionment of damages between joint tortfeasors is for the Judge alone. Again, reverting to the *British Fame* case, it should be pointed out that, under the Maritime Conventions Act, 1911, the apportionment of blame for a collision between two ships is for the Judge in the Admiralty Division who tries the case.

In *Ingram's* case, the plaintiff was a passenger in an omnibus, which, in the course of its journey, while passing a lorry which had been left stationary early in the morning during a blackout on the side of an ice-covered road, ran into the parapet of a bridge at the side of that road. She claimed that her injuries were caused by the negligent driving of the omnibus, or, alternatively, by the negligence of the owners of the lorry in leaving it where it was. As provided by s. 17 of our Law Reform Act, 1936, as by the corresponding section in the English statute to which we have referred, if the plaintiff established negligence against either of the defendants she could have recovered her whole damage against that one, and if there was negligence on the part of the other, then that one would be entitled to claim contribution from the other. Hallett, J., gave judgment against both defendants, and held that the lorry-owners were liable for two-thirds of the damages, and the omnibus-owners were liable for one-third. The lorry-owners appealed, alleging that they should have been absolved from any liability, and, alternatively, they said that, if they were at all negligent, the attribution to them of two-thirds of the damages was a wrong apportionment, and that they ought to pay a great deal less and the omnibus-owners a great deal more. There was a cross-appeal by the omnibus-owners, who wanted the whole of the loss to be borne by the lorry-owners. The Court of Appeal agreed with the Judge of the Court below that both the defendants were negligent.

The Court of Appeal had to consider whether it was open to them to review the apportionment of liability found by the trial Judge. In *British Fame* v. *Macgregor*, when it was before them, the Court of Appeal had thought that the dictum expressed by a Judge in that Court some years ago that it would be undesirable except in exceptional circumstances for the Court of Appeal to vary the degree of blame apportioned by the Judge below (Lord Sterndale, M.R., in *The Karamea*, (*cit. sup.*) was only obiter ; and that, in principle, there was no reason why this decision of fact by the Judge below should not be open to review like any other decision of fact. This had been their view in *The Testbank* (*supra*) ; and they pointed out in the course of their judgment in the *British Fame* case that exactly the same question would arise with regard to the apportionment of liability between two defendants under the Law Reform (Married Women and Tortfeasors) Act, 1935. However, as MacKinnon, L.J., said in the course of his judgment in *Ingram's* case, the House of Lords had thought that they were wrong in the *British Fame* case and in *The Testbank* and that, the Admiralty Court having applied the provisions of the Maritime Conventions Act, 1911, the Court of Appeal ought not, if they agreed with the finding of fact as to the liability of both parties, to interfere with the apportionment or extent of that liability made by the Judge who decided the case. It will be remembered that MacKinnon and du Parcq, L.JJ., were members of the Court of Appeal reversed in the *British Fame* case. Point is therefore given to the former's observation that he ventured to think it would have been kinder, at any rate, to the members of the Court of Appeal, faced with the difficulties arising from collisions on land, if the House of Lords

had intimated for the guidance of the Court of Appeal what the position is under the Law Reform Act of 1935, and whether the same rule is to be applied as under the 1911 statute with regard to a ship; but, His Lordship added, "Not one of their Lordships condescended to say a single word about that problem which we had expressly raised."

The learned Lord Justice then said that, as both the statutes referred to were modern statutes, there cannot be any difference in the duty imposed upon a Judge of first instance, by the 1911 Act and by the 1935 Act. He concluded:

> As at present advised, I think applying the rule laid down by Viscount Simon, L.C., that, since the findings of fact are not disputed, we ought not to interfere with the apportionment of the blame by the Judge, two-thirds to the lorry and one-third to the omnibus.

With him, the other members of the Court agreed.

In concluding his judgment, du Parcq, L.J., made this observation, which is outside the point we are considering, but is interesting as regards the present practice as to contribution between joint tortfeasors. Speaking of the law before 1935, he said:

> It is familiar to us all that very often a plaintiff preferred to rely on his claim against the less negligent of two possible defendants because he happened to be the person able to pay. The law has not been substantially altered, so far as that goes, by recent legislation, for it now provides for contribution in certain cases between the tortfeasors. It is very often possible for the tortfeasors to say: "I may be negligent, but this accident would never have happened but for the negligence of the other tortfeasor." Each can say that of the other. The law says: 'You were negligent in some respect, and, if your negligence in part caused the accident, then in part you must pay, and, between you, you must pay the injured party the whole of the damage.' That is the law, and I am glad to think that we have not disturbed it.

Now, applying the judgments reviewed to running-down cases in New Zealand in which there is ground for the apportionment of blame between tortfeasors, and the jury's findings of fact have not been disputed or disturbed, and the determination that both defendants are to blame stands, we conclude that no appeal lies from the apportionment of responsibility and damages by the trial Judge under s. 17 of the Law Reform Act, 1936, except in rare exceptional cases, and then only, for the reasons indicated by the Lord Chancellor in the *British Fame* case, if there is some error of law or in fact in his judgment.

SUMMARY OF RECENT JUDGMENTS.

SUPREME COURT.
Wellington.
1943.
March 4, 9, 10;
July 23;
August 19.
Myers, C.J.

COLONIAL MUTUAL LIFE ASSURANCE SOCIETY, LIMITED v. WELLINGTON CITY CORPORATION.

Limitation of Action—Municipal Corporation—Notice of Action—"The cause of the action or proceeding"—Non-disclosure in Notice of Material Part of Cause of Action—Evidence of Cause or Ground of Action not specified in Notice—Whether permissible—Municipal Corporations Act, 1933, s. 361 (1).

If the notice of action, given under s. 361 (1) of the Municipal Corporations Act, 1933, does not disclose a material part of the cause of action or state the cause of action as actually presented at the hearing it does not "specify the cause of the action" as required by the statute, and the plaintiff cannot be permitted to rely upon the evidence of such cause of action.

Hence, where a plaintiff, who sued a municipal Corporation for damages for negligence and nuisance, or either, in connection with a safety-zone with which his motor-car collided and was damaged, and who, both in his notice pursuant to s. 361 (1) of the Municipal Corporations Act, 1933, and, in his statement of claim, alleged that the car was driven by his "duly authorized agent," and the defendant, in its statement of defence, pleaded contributory negligence on the part of the driver and the evidence established not only such contributory negligence, but also that the driver was not plaintiff's agent, the plaintiff could not rely on the cause of action that he might have had if the driver had not been his agent, because the notice given did not "specify the cause of the action," as it failed to disclose a material part of the cause of action and was so framed as to mislead.

James Smith and Co. v. *West Derby Local Board*, (1878) 3 C.P.D. 423, and *Larter* v. *Melbourne and Metropolitan Board of Works*, (1896) 22 V.L.R. 519, applied.

Young v. *Christchurch City Corporation*, (1907) 27 N.Z.L.R. 729, 10 G.L.R. 28; *Oamaru Borough* v. *Clarke*, [1927] N.Z.L.R. 464, G.L.R. 350; and *Edwards* v. *Melbourne and Metropolitan Board of Works*, (1893) 19 V.L.R. 432, distinguished.

Cerchi v. *Wellington City Corporation*, (1913) 15 G.L.R. 626; *Knight* v. *Heath*, [1916] N.Z.L.R. 393, G.L.R. 244; *Elstob* v. *Wright*, (1851) 3 C. & K. 31, 175 E.R. 450; *Taylor* v. *Nesfield*, (1854) 23 L.J. M.C. 169; and *Aked* v. *Stocks*, (1828) 4 Bing. 509, 130 E.R. 863, referred to.

Greenwood v. *Central Service Co.*, [1940] 2 K.B. 447, [1940] 3 All E.R. 389; *Wodehouse* v. *Levy*, [1940] 2 K.B. 561, [1940] 4 All E.R. 14; *Lyus* v. *Stepney Borough Council*, [1941] 1 K.B. 134, [1940] 4 All E.R. 463; and *Fox* v. *Newcastle-upon-Tyne Corporation*, [1941] 2 K.B. 120, [1941] 2 All E.R. 563, mentioned.

Observations on the distinction of English cases relating to collisions with unlighted objects in a "blackout."

Counsel: *Leicester*, for the plaintiff; *O'Shea* and *A. R. Cooper*, for the defendant.

Solicitors: *Leicester, Rainey, and McCarthy*, Wellington, for the plaintiff; *John O'Shea*, City Solicitor, Wellington, for the defendant.

Case Annotation: James Smith and Co. v. *West Derby Local Board*, E. and E. Digest, Vol. 26, p. 411, para. 1317; *Larter* v. *Melbourne and Metropolitan Board of Works, ibid.*, Vol. 38, p. 134, note dd; *Edwards* v. *Melbourne and Metropolitan Board of Works, ibid.*, Vol. 36, p. 122, note 814i; *Taylor* v. *Nesfield, ibid.*, Vol. 38, p. 87, para. 642; *Greenwood* v. *Central Service Co., ibid.*, Sup. Vol. 26, para. 1192c; *Wodehouse* v. *Levy, ibid.*, Sup. Vol. 26, para. 1192b; *Lyus* v. *Stepney Borough Council, ibid.*, Sup. Vol. 26, para. 1192d.

SUPREME COURT.
Palmerston North.
1943.
August 26;
September 3.
Smith, J.

LEE v. MADGE AND COLE.

Road Traffic—Motor-vehicles—Turning at Intersection—"Intersection"—"Roadway"—Prolongation of "Lateral boundary-lines" of each Roadway—Curving Lines of Bitumen or other usable Roadway—Meaning of "Lateral boundary-lines" in such Circumstances—Traffic Regulations, 1936 (Serial No. 1936/86), Regs. 2, 14 (5).

In the Traffic Regulations, 1936, the term "intersection," in relation to two intersecting or meeting roadways, is defined by Reg. 2 to mean "that area embraced by the prolongation or connection of the lateral boundary-lines of each roadway." The term "roadway" is defined to mean "that portion of the road used or reasonably usable for the time being for vehicular traffic in general."

Regulation 2 must be interpreted in the light of its purpose as shown, for example by Reg. 14 (5); and the "lateral boundary-lines" of the roadway specified in the definition of "intersection" are the normal lateral lines approaching the intersection, not the curving lines of bitumen or other usable roadway from the commencement of the curve to the corner, where the ordinary area of traffic takes a curving line round each corner.

Counsel: *Graham*, in support; *H. R. Cooper* and *Bergin*, to oppose, and for motion on judgment.

Solicitors: *Graham and Reed*, Feilding, for the plaintiff; *Moore and Bergin*, Foxton, for the defendants.

SUPREME COURT. Palmerston North. 1943. August 10; September 3. *Smith*, J.

SLUGGISH RIVER DRAINAGE BOARD v. OROUA DRAINAGE BOARD.

Land Drainage—Drain—"Improving"—"Defence against water"—Proclamation directing control of Drain by one Local Authority and Proportions of "improving" it to be borne by it and another Local Authority—Flood-gate erected in Drain—Whether "Improvement" thereof—Land Drainage Act, 1908, ss. 17, 64, 65.

By virtue of ss. 64 and 65 of the Land Drainage Act, 1908, one local authority may by Proclamation of the Governor-General in Council be given the exclusive control and management of any drain or drainage work, and another may be required to contribute to the cost of an alteration in that work decided upon by the controlling authority.

No alteration is in law "an improvement" within the meaning of the word "improving" in those sections unless it partakes of the character of the drainage work that is the subject of the Proclamation.

A Proclamation pursuant to the said s. 64 directed that a certain specified drain should be controlled by the plaintiff and that the cost of "improving" the said drain should be paid by the plaintiff and the defendant in the proportions specified. The plaintiff and the M. Board agreed that the latter should construct a flood-gate, the nature of which is described in the judgment, near the outlet of the said drain into the Oroua River, each body to bear one-half of the cost. The plaintiff sued the defendant for its proportions of the cost of the said flood-gate.

Held, That the flood-gate was not an improvement of the said drain.

Horseshoe Land Drainage Board Trustees v. *Sluggish River Drainage Board Trustees*, (1907) 26 N.Z.L.R. 545, 9 G.L.R. 481, referred to.

Semble, Such a flood-gate was a sluice of such a kind as to constitute a separate drainage work in the nature of a "defence against water" which might itself be the subject of a Proclamation under s. 64 after an inquiry, if thought fit, under s. 65 of the statute.

Gore Borough v. *Southland County*, [1924] N.Z.L.R. 6, [1923] G.L.R. 278, distinguished.

Counsel: *Laurenson*, for the plaintiff; *H. R. Cooper*, for the defendant.

Solicitors: *Innes and Oakley*, Palmerston North, for the plaintiff; *Cooper, Rapley, and Rutherfurd*, Palmerston North, for the defendant.

OPTIONS TO PURCHASE AND THE PERPETUITY RULE.

Sixty Years with Gomm's Case.*

By I. D. CAMPBELL.

The rule against perpetuities, it has been said, is rich men's law. There are many who will agree. But it may be seriously doubted whether the London and South Western Railway Co., proprietor of a vast and prosperous undertaking and great landowner, felt able to subscribe to this dictum when, some sixty years ago, its efforts to obtain a little piece of land worth £100 were frustrated by a Mr. Gomm by a timely appeal to that same rule.

It was, as Mr. Justice Warrington observed in later years, "a rather puzzling case," but there was no puzzle until the law took a hand. The facts were, as Holmes has it, elementary. The company had a surplus piece of land, not needed for current purposes but possibly necessary in the future. It accordingly sold the land to Mr. Powell for £100, obtaining from him an undertaking that whenever the land was required for the railway or works of the company, it could give six months' notice, pay £100, and obtain a reconveyance. This undertaking was incorporated in legal documents drawn with the usual conveyancer's foresight—the covenant was by Powell on behalf of himself, his heirs, his executors, his administrators and his assigns, and it was made with the company, its successors and assigns. The draftsman rendered his bill, conscious of work well done.

Powell, by the unfortunate but inevitable dispensation of nature, eventually died. Powell, jun., was his heir. In this capacity the younger Powell thought fit to sell the lands, tenements, and hereditaments acquired from his father, and a sale of the property was negotiated. A Mr. Gomm, it appeared, was willing to buy. He perused the abstract of title, noted the onerous covenant in favour of the railway company, but was undeterred. The transaction was completed and Gomm became the owner of an estate in fee-simple, subject to such liability (if any) as the covenant might impose on him or his new acquisition.

With the turn of events and the march of progress the company came to require the land again. Discovering that Gomm was now the proprietor it served on him a six months' notice pursuant to the covenant and drew a cheque for £100 in readiness for settlement. But Mr. Gomm was not impressed. He declined to recognize any liability in the matter, and was so far from proving amenable to the company's wishes that resort was had to litigation. Relying on the covenant entered into by Gomm's predecessor in title the company sued for specific performance and was optimistic of the outcome.

These hopes at first proved well founded, for Kay, J., was satisfied that Mr. Gomm's conscience in the matter was not all that it might be. In other words he had acquired his land with notice of a covenant which equity, on the principle of *Tulk* v. *Moxhay*, (1848) 2 Ph. 774, 41 E.R. 1143, would not allow him to repudiate. He was ordered to comply with its terms and part with his roods and perches.

But to Gomm this piece of land, small though it was, was yet forever England, and he was not so readily to be deprived of his foothold on his country's soil. Was there not another tribunal in England, something referred to by a Mr. Gray (on Perpetuities) as "the Court of Appeals?" Indeed there was. And here

* *London and South Western Railway Co.* v. *Gomm*, (1881) 20 Ch.D. 562.

the company's success proved short-lived, for Mr. Gomm rode to triumph on the rule against perpetuities.

The legal possibilities soon narrowed down sufficiently for a few neat questions to emerge. Was Gomm bound on the basis of contract? If not, was he caught by some rule from the ample supply of the principles of equity? As for the first question, it was not necessary to defer the problem, like Pilate, pondering over hypothetical solutions. Gomm was not made a party to the covenant by the mere device of inserting "assigns," nor did the notice from the company constitute an acceptance of any offer made by Gomm. The only effect of the reference to assigns was to expose Powell or his estate (1) to a possible claim for damages (a question considered later in this article) if his assign should decline to reconvey pursuant to notice, and (2) to a possible action for damages based on anticipatory breach of the contract if he should assign to a purchaser without ensuring that the new owner had notice of the covenant. It may be an implied term of the contract that the land subject to an option of purchase or repurchase shall not be so disposed of, by the person who gave the option or his successors in estate, that it shall come to the hands of a person not bound to give effect to the option. (See T. Cyprian Williams in *51 Solicitors' Journal*, 648, 669.) But neither of these possible consequences could affect Gomm, with whom there was no contractual relationship on which to found an action by the company.

Nor was there any relationship of landlord and tenant to call in aid the advantages and blessings of privity of estate. No argument that the covenant "ran with the land at law" could have any relevance. But was it not possible to call in aid some principle of equity? It was here that Kay, J., had felt able to assist the company. *Tulk* v. *Moxhay* (*supra*) was thought to be in point. But as the principle of that case is now understood, it may be said (taking a deep breath) that a covenant relating to the user of land entered into by the covenantor with the covenantee for the benefit of some land in which the covenantee has an interest creates a burden on the land sometimes described as an "equitable easement" which is enforceable against all who acquire an interest in the land of the covenantor otherwise than by purchase for value without notice if the covenant is purely negative or restrictive in character and if the person suing on the covenant is interested in the land for the benefit of which the covenant was entered into. The requirement that the covenant must be negative is no less essential than the others. The point was overlooked by Kay, J., in administering justice to the recalcitrant Gomm, but the Court of Appeal had no difficulty in holding that a man who covenants to part with his land in a certain contingency undertakes obligations that are not entirely passive, however much he may leave to his lawyers.

This might have been thought sufficient to end the case. Indeed, Lindley, L.J., in the Court of Appeal, expressly stated that it did. But the Master of the Rolls, Sir George Jessel, had for some time been saving up some very good dicta on the rule against perpetuities. In particular he was prepared to enunciate a principle which (if we are to believe a later comment by Kay, J.) was entirely novel, and which brought options within the scope of the perpetuity rule. An option of purchase or repurchase might not be a *Tulk* v. *Moxhay* covenant, but the Master of the Rolls was ready to assert that it nevertheless created an equitable interest in land. This he expounded in words too often cited to be repeated here. The equitable interest, in this case, like any other equitable interest, would survive the perils of conveyance, gift, or devolution until such time as the legal estate became vested in a purchaser for value without notice. Gomm was not such a purchaser, for he knew all about the covenant. He must, therefore, if the equitable interest was validly created, take his title subject to the burden. This led straight to the question, Was the interest validly created, or was it void for perpetuity?

Not having the assistance of the various revised versions of the perpetuity rule produced by writers of a later day and generation, Judges at this time commonly referred to the classical statement of the rule in such works as *Lewis on Perpetuities*. There the rule appeared in this form:

> A perpetuity is a future limitation whether executory or by way of remainder and of either real or personal property which is not to vest until after the expiration of or will not necessarily vest within the period fixed by law for the creation of future interests and estates; and which is not destructible by the persons for the time being entitled to the property subject to the future limitation except with the concurrence of the individual interested under that limitation.

As the equitable interest created by the option to purchase was not limited in point of time, Gomm and many others after him might each in turn hold the land subject to the contingent equitable interest of the railway company, its successors, and assigns. It was not beyond the ingenuity of the law to rectify this state of affairs. The equitable interest was held void for perpetuity.

This decision, though thoroughly sound, may at first sight seem somewhat curious from certain points of view. Powell's estate in the land was always alienable, and had actually been alienated to Gomm, notwithstanding the covenant with the company. Alienation was always in the contemplation of the parties, as the terms of the covenant expressly included assigns. If, then, the company's interest did not at any point of time prevent the owner for the time being from disposing of the land, how can it be said that such an interest is a perpetuity? The reason for the rule had long been stated to be that no contrivance shall be valid which tends to tie up land or personalty in perpetual settlement or by similar means, so that it shall remain out of the reach of the exercise of the power of alienation annexed to ownership. Was Powell's estate in some phenomenal way an alienable inalienable interest?

In another respect the decision might also appear strange. The Court laid considerable stress on the words of the proviso in Lewis's definition—that the interest was not destructible without the concurrence of the person entitled thereto. But it is of the very nature of equitable interests that they are destroyed when a purchaser acquires the legal estate without notice of the equitable interest. Unless (as here) the equity arises under the very documents of title of which a purchaser would have actual or constructive notice, any equitable interest is readily destructible without the consent of the person interested. The qualification in the definition was, of course, aimed at a different case entirely. A contingent limitation to arise during or after an estate tail was not within the mischief of the remoteness rule because it could at any time be destroyed by barring the entail, and it was with reference to such interests that the proviso was added. But in *Gomm's* case the Court of Appeal applied this wording to equitable interests which are often readily destructible.

How can the perpetuity rule—designed to ensure that property is alienable—invalidate an interest which is itself destroyed by the very act of alienation ?

The explanation in regard to each of these questions is to be found partly in the two-fold nature of the perpetuity rule, and to some extent in the fact that a partial restriction on alienation is sufficient to bring a future limitation within the rule.

(To be continued.)

THE TALE OF ARTEMUS.

"The Characters and their Names are entirely fictitious."

"When I shall send Artemas unto thee . . . Bring Zenas the lawyer."—*The Epistle to Titus, the third chapter, the twelfth and thirteenth verses.*

In or about the year 1909 there was in practice in the north-eastern parts of England an oncoming lawyer who had been admitted ("called" is the local term) in 1901. Baptized "Thomas," he had in youth acquired the additional name of "Artemus" to distinguish him from the other Thomas Joneses of North Wales. In this name he was confirmed, and it was as "Mr. Artemus Jones" that his name got not infrequently into the papers.

Though it is not material, it may be interpolated that he also practised journalism; he had been in the Press Gallery for two newspapers, and thereafter continued free-lancing, in particular for the *Sunday Chronicle* at Manchester. It may also be added that the promise of his early career has been fulfilled. He became a K.C. in 1919, was knighted in 1931, and when "Who's Who" for 1942 was prepared was a County Court Judge for North Wales and a member of the Reform Club.

Then this same *Sunday Chronicle* published a descriptive article about a festival at Dieppe. "Upon the terraces marches the world, attracted by the motor races . . . 'Whist! there is Artemus Jones with a woman who is not his wife, who must be, you know—the other thing!' whispers a fair neighbour of mine excitedly. . . . Really, is it not surprising how certain of our fellow-countrymen behave when they come abroad? Who would suppose, by his goings-on, that he was a Churchwarden at Peckham? . . . the life and soul of a gay little band that haunts the Casino and turns night into day, besides betraying a most unholy delight in the society of female butterflies."

Mr. Thomas Artemus Jones, of the North Wales Circuit, brought his action for libel, recovered from a jury damages of £1,750, and held them in the Court of Appeal and the House of Lords: *Jones* v. *E. Hulton and Co.*, [1909] 2 K.B. 444, *E. Hulton and Co.* v. *Jones*, [1910] A.C. 20. The only dissenting judgment was that of a Lord Justice of the Court of Appeal, Sir J. F. Moulton. Names of counsel include those of Rufus Isaacs, K.C., Montague Lush, K.C., Norman Craig, and Gordon Hewart. The paper had published a generous disclaimer, "It seems hardly necessary for us to state that the imaginary Mr. Artemus Jones . . . was not Mr. Thomas Artemus Jones, barrister . . . " The author of the article explained that he had been discussing the American humorist whose pseudonym was Artemus Ward, that he thought he would call his man "Jones," and as the name "Artemus" stuck in his mind he put the two together, thinking that it would be impossible for any person in real life to have such a name. The plaintiff was not a Churchwarden, nor did he reside at Peckham. Nevertheless other people put two and two together. The plaintiff's own father and other witnesses were called who said they had read the article and thought it referred to the plaintiff. The editor of the paper had not, when passing the article, recalled the name of his occasional contributor; a Mr. Hulton, connected with the paper, reading the article in print, had noted the coincidence of names, but concluded that it could not refer to the plaintiff.

The law that emerged is concisely set out in the head-note to the House of Lords report: "In an action for libel it is no defence to show that the defendant did not intend to defame the plaintiff, if reasonable people would think the language to be defamatory of the plaintiff." Under the law thus laid down, certain types of fiction-writers, or their publishers, or both, have been writhing ever since. A not unusual prolegomenon reads: "All the characters and their names in this story are fictitious and no reference is made or intended to any actual person living or dead." (The "or dead" may be inserted advisedly; though one cannot actionably libel a dead man, it is possible through the dead to libel the living.) A shorter form reads: "The characters in this book are entirely imaginary, and have no relation to any living person."

It is at least curious that a writer whose art (if any) consists in trying to give an effect of reality should be at pains to destroy it before he begins. It is more to the point to observe that such a disclaimer in advance is nearly as futile as the subsequent disclaimer in *Jones* v. *Hulton*. If you succeed, deliberately or unwittingly, in libelling a person—that is to say, in publishing defamatory matter which reasonable people think refers to him—it is no defence to assert that you are not going to refer to him. A lot depends on the context; your assertion may not be accepted. At most it may have a bearing on the reasonableness of the witnesses' identification.

Another device was that of a little-known writer who obtained from several better-known writers permission to use their names for his characters. Whatever this may have been worth as advertisement, it was no sounder in law. If you create a villain and call him Anthony Hope of Kaiapoi, nutmeg-manufacturer, and the friends of a real Mr. Anthony Hope of Kaikohe, nutmeg-manufacturer, or Mr. Anchovy Hope of Kaiapoi, master grocer (for minor discrepancies will not save you), reasonably think it is he you are describing, it is no defence that Mr. Anthony Hope of London, novelist (whose private name, by the way, was Hawkins), gave you leave to use the name which he possibly shared with other people.

Sturdier writers make game of such precautions. A book the title of which reads "As I was Going Down Sackville Street a Phantasy in Fact" begins thus: "Note.—The names in this book are real, the characters fictitious." (By the way, the library in which I read the volume classifies it under "Biography," despite this warning. The distinction between biography and other fiction is, of course, nowadays conventional. It is understood that a librarian is usually guided by the presence or absence of an index.) Cabell's latest book, "The First American Gentleman," or "The First Gentleman in America"—it is issued dysonymously—is prefaced thus: "Inasmuch as the characters and happenings of this book are all pilfered from fact, any incidental resemblance to fictitious events, or to imaginary persons, is unintentional." It is necessary to read the book to estimate the value of this observation.

The proper precaution to take is obvious. The life-like effect of a character does not depend on his name A name is merely an identification, and the Levite and the Good Samaritan have survived with none at all. Older writers were content with grossly impossible labels, Titmarsh, Jorrocks, and Turveydrop, carrying which their characters nevertheless came splendidly to life. Earlier still, classical names were found acceptable —Lucia and Acasto in Steele, Cléante and Dorimène and the rest in Molière. Conversely, of course, pseudonymity or anonymity will not help a writer if the portrait is clear and the cap fits; though I do not know whether the names "Atticus" and "Bishop Blougram" were ever intended as defences against possible libel actions.

LONDON LETTER.

August 30, 1943.

My dear EnZ-ers,

Lord Hemingford.—It was with great pleasure that the profession recently learned that a peerage had been conferred on Sir Dennis Herbert on his resignation of the offices of Chairman of Ways and Means and Deputy Speaker of the House of Commons, which he had occupied with great distinction since 1931. Sir Dennis who was born in 1869 and educated at the King's School, Ely, and Wadham College, Oxford, was admitted a Solicitor in 1895. For many years he has been a member of the Council of the Law Society and served as President in 1941–42; and ever since 1912 he has served upon the Hertfordshire County Council, of which he became an Alderman in 1933. His long career of public service is fittingly crowned by the peerage which has just been gazetted; the title he has selected, that of Lord Hemingford, perpetuates his family association with Hemingford Abbots in Huntingdonshire.

Domicil and Divorce.—Correspondents to the *Law Journal* (London) have called attention to a recent decision of Mr. Justice Henn Collins, in an undefended nullity suit, *Trebicka* v. *Trebicka*. Jurisdiction in divorce, of course, depends on the domicil of the husband, which must be English (*10 Halsbury's Laws of England*, 2nd Ed. 691–92); in nullity, the ordinary rule is that the presence of the respondent within the jurisdiction at the institution of the suit is sufficient (*ibid.* p. 640); but it has been held in *Inverclyde* v. *Inverclyde*, [1931] P. 29, that where a decree of nullity is claimed on the ground of the respondent's impotence, the Court of the domicil has exclusive jurisdiction. In the case with which the correspondents were concerned, the petitioner was the wife of a Polish soldier serving in this country, and the petition alleged wilful refusal or, alternatively, incapacity, to consummate the marriage; both the husband and wife had come to this country after the invasion of Poland in 1939, and the husband, while not defending the suit, appeared at the hearing and gave evidence that he had no intention of returning to Poland to stay there after the war, and that he was intending to settle in England, which he looked upon as his future home. On this evidence Mr. Justice Henn Collins granted a decree, and although, as no judgment was given, it cannot be said definitely that the learned Judge took the view that an English domicil had been established, the case is useful as showing the kind of evidence which will apparently be accepted, in such cases as this, as evidence of the adoption of a domicil of choice.

Applying the Law to the Facts.—In his recent essays, Sir Henry Slesser deals with the function of the Judge in applying the law to an ascertained body of fact. This law may be found mainly in specific enactment, in the principle of law recognized by the Courts in decided cases (the common law) or "by recourse to undisputed customs of law so certain as never to have been the subject of contention." Sir Henry regrets, as do many of us, that there are many factors at work in modern Courts of law which tend to obscure the importance of the principle in juristic determination. Arbitrary amendments of the law by statute, "the uncritical multiplication of Law Reports and the constant increase of digests and text-books"—all, he says, encourage mechanical solutions and the unintelligent search for precedent. He proceeds to examine the way in which Judges apply themselves to the decisions of those cases in which "no exact authority can be found either to follow or from which logical deductions can be formed." In such cases, for example those where questions of public policy are involved, the immediate standards and ideals of the age may, says Sir Henry, become almost decisive; "yet even here . . . the Judge should apply, not his own private opinions, but an objective test. The customary prevailing moral habits of the good citizen should be his criterion, not his own personal preferences." And this principle, consciously or unconsciously applied, is what enables a Judge who, for example, believes in the indissolubility of marriage, to give effect from the Bench to the fact that the people as a whole, both through Parliament and in their minds, have accepted divorce as a social institution. Sir Henry, having established that a Judge is no mere automatic interpreter of pre-existing law, proceeds by way of conclusion of a fascinating essay to make "a tentative excursion into . . . the science of prophetics." He is troubled, as are so many of us, by the decrease in the respect paid to individual personality and by the increasing tendency to withdraw matters raising essentially juridical problems from the Courts of law; and he fears that one conse-

quence may be " the disappearance of that comparative juridical certainty which Sir Frederick Pollock and other jurists have declared to be the basic characteristic of a stable system of law." It would, indeed, be a serious matter if what Sir Henry Slesser calls " the decay of essential personal rights " and the replacement of juridical determination, as we have hitherto understood it, by decisions of departmental officials, were to have such a result. We hope and believe that, in the end, the tradition of personal liberty which is ingrained in us will prove too strong for any such tendency.

Dangerous Premises: The Duty of Non-Occupiers.—In the current number of the *Modern Law Review*, Dr. Granville Williams discusses the question when and to what extent are non-occupiers—*e.g.*, landlords—of premises under a duty towards persons on the premises in respect of the fitness and safety of those premises? Dividing his subject into two parts, (*a*) the duty of a lessee as vendor of premises, and (*b*) the duty of one who has contracted to build, repair, or fit premises or fixtures, Dr. Williams discusses the relevant cases, and as to (*a*), whilst accepting the general conclusion, stated in the books, that on a sale or lease of immovable property there is (except in the case of lettings of furnished houses and lettings under the Housing Act, and except for a possible liability in nuisance to persons not on the premises) no implied warranty condition or representation that the property is fit for its purpose, he suggests that any Court could hold that there was an implied warranty or condition that the vendor or lessor knows of no latent fact making the premises not reasonably fit for the known purposes of the purchaser or lessee; that any Court could hold that there is a duty of care in tort to disclose any such fact; and that the House of Lords could hold that an owner-builder who sells or leases the house and land is liable in negligence if the building negligently contains a defect which causes damage. As to (*b*), Dr. Williams summarizes his conclusions by saying that a person who contracts to build, repair, or fit premises or fixtures is liable in tort for negligence if his work negligently contains a defect that causes damage, whether he is also vendor or lessor or not; but that he is not liable in tort for pure non-feasance. The whole essay will repay careful study.

Protection for Shops.—It is a striking proof of the honesty of the public that the keepers of large shops should confidently spread out their wares on numerous stalls and counters, believing that they are generally safe from dishonest pilferage. Only in a society of honest people would such wholesale exhibitions be possible. But the large shopkeepers do employ "detectives," male and female, and these people have a difficult and invidious task. A case which has been decided by Mr. Justice Birkett recently provides one of the rare examples of the case where the detective went too far. She accosted a shopper, took hold of her arm, which was, of course, an assault, and accused her of larceny in the hearing of other shoppers. The plaintiff had paid for the article seen in her hand, and had a receipt in her pocket; but was for the moment unnerved and did not then and there produce it. A few steps to the detective's headquarters, a brief and satisfactory explanation, a sincere apology and all seemed over. But the shopper was aggrieved and sued for damages, which, of course, she got. Just men will congratulate her, but will recognize that the mistake was an honest one of a kind which even the most scrupulous detective may at times fail to avoid.

John Selden.—Three and a half centuries have passed since John Selden—statesman, lawyer, and antiquary—saw the light of day in the quiet village of Selvington in Sussex. Called to the Bar at the Inner Temple at the early age of twenty-one after a career at Oxford in which he showed an early predilection for historical research, he lived to create a record of constitutional and legal activity which secured him a place in our legal annals that is never likely to be disturbed. When he died in 1653 he was given his last resting place in the Temple Church, where the Selden memorial has occupied a very prominent place ever since. His life was by no means free from conflict—indeed, it may almost be said of him that he was a man of war from his youth. Not infrequently was he ranged beside Edward Coke, his famous contemporary, in maintaining the rights of the people in Parliament against the pretensions of the Crown—so far offending the susceptibilities of James I that he found himself in custody as the result of a legal opinion supplied to the House of Commons upholding their rights as against the pressure of the Crown. But he was equally at war with the Church. His *History of Tithes*, published in 1618, brought him before the Court of High Commission, where pressure from the King as well as from the angry heads of the Church extracted from him an apology which is considered now to have been less a withdrawal of his opinions founded upon history that was true than of his surprise and regret that by writing his book he had unintentionally roused the ire of episcopacy and of the King.

—APTERYX.

NEW ZEALAND LAW SOCIETY.

Council Meeting.

A Meeting of the Council of the New Zealand Law Society was held at the Supreme Court Library, Wellington, on Friday, September 10, 1943.

Societies represented.—Auckland, represented by Messrs. A. H. Johnstone, K.C., W. H. Cocker (proxy), J. Stanton, and J. B. Johnston; Canterbury, Mr. R. L. Ronaldson; Hamilton, Mr. H. M. Hammond; Hawke's Bay, Mr. H. B. Lusk; Marlborough, Mr. A. E. L. Scantlebury; Nelson, Mr. M. C. H. Cheek; Otago, Mr. C. J. L. White; Southland, Mr. J. H. B. Scholefield; Taranaki, Mr. F. W. Horner; Wanganui, Mr. A. B. Wilson; Westland, Mr. J. K. Patterson; and Wellington, Messrs. H. F. O'Leary, K.C., T. P. Cleary, 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.

Brigadier H. K. Kippenberger, D.S.O. and Bar.—The President reported that a telegram had been sent conveying the good wishes of the Society to Brigadier H. K. Kippenberger on his return to New Zealand with the members of the 2nd N.Z.E.F.

Mr. W. H. Kitchingham.—On the sixtieth anniversary of his admission to the legal profession, the congratulations of the Society were sent to Mr. W. H. Kitchingham, of Greymouth.

Death-duty Procedure.—The details of the discussion of death-duty procedure by Mr. G. G. G. Watson, Mr. A. B. Buxton, and Mr. A. T. Young with the Minister of Stamp Duties (the Hon. H. G. R. Mason), the Commissioner and Mr. Stewart were set out at length in the order paper.

The only matter in which a concession was made was in respect to the certification of accounts owing by a deceased at the date of death. Members of the Society had submitted that this was unnecessary, because the executor had already made a declaration as to the authenticity of the accounts.

The Minister agreed with this viewpoint, and suggested that if the tradesmen's accounts showed clearly that they were debts contracted before death then they should be accepted on the declaration of the executor.

The Secretary advised that the Minister had subsequently received a copy of the report and expressed his intention of looking further into the matter.

Death Duties—Deceased Soldiers' Estates.—With respect to the penalty of 5 per cent. interest payable on unpaid death duty in a deceased soldier's estate—where the delay in payment was due to obtaining confirmatory evidence of the death of the soldier—the Minister advised that where in the opinion of the solicitor hardship was involved by the payment of interest, the matter could be brought to the attention of the Commissioner of Stamp Duties for the consideration of the Minister.

Crown Suits Amendment Act, 1910.—It was reported that s. 9 of the Crown Suits Amendment Act, 1910, was now repealed, thus removing the limit of £2,000 on claims against the Crown in respect of death or personal injury.

Bailments and Hire-purchase Agreements: Scale of Costs on—The Auckland Society wrote as follows:—

"In this matter the Auckland District Law Society had been asked to prepare a scale of costs for bailments and hire-purchase agreements. The existing provision was the subject of a report by this Society reproduced as item No. 12 on p. 6 of the Minutes of the Council of the New Zealand Law Society on the 12th March, 1943, and the anomaly therein pointed out now proves a major problem in framing a new scale equitable in its application to all cases. It was felt, however, that while the present method of computing the charges may weigh rather heavily on the bailee in the smaller class of transaction, yet the scale of charges for leases of land is, of all the scales, the one most germane to the lease of chattels; but any attempt to frame a single scale to embrace the whole range of bailments leads to inconsistencies inseparable from the divergence between the different classes of these instruments. It was accordingly thought best to make separate provisions for the lease of chattels and those bailments carrying optional or compulsory purchase of chattels."

The proposed scale was set out in the Order Paper and circulated for consideration by the District Societies. It was pointed out that as no increase on the existing charges was contemplated by the proposed new scale, no consent of the Price Tribunal appeared to be necessary. It was decided that the scale be adopted in substitution for Part V of the Scale of Conveyancing Charges.

Bankruptcy Act.—The following letter from the Minister of Justice was received:—

"I have to acknowledge the receipt of your letter of the 17th June, relating to the suggested amendment of the Bankruptcy Act, 1908.

"The Bankruptcy Act, 1908, is a consolidation or re-enactment of the Act of 1892, an enactment which was described as being in harmony with the English Act, 1883.

"The English bankruptcy law was revised in 1914, when the Act of 1883 and numerous amendments were repealed, and the Act of 1914 was itself substantially amended in 1926. There has also, I believe, been considerable legislative activity in bankruptcy matters in the various Dominions since the date of the Act on which our present statute is based.

"I believe that many of the provisions of the present English legislation and of some of the Dominion statutes should be enacted in New Zealand, and I hope at the first convenient opportunity to arrange for a revision of the New Zealand Act. The section of the Bankruptcy Act raised in your letter would then come under review. In the meantime I prefer as far as possible to avoid any piecemeal amendment of the bankruptcy law by restricting amendments to urgent matters.

"The risk of leased property coming under the order and disposition clause is quite well-known, so that there is nothing in the nature of a trap in the legislation as it now stands. The risk can be guarded against by comparatively simple and inexpensive means. Under those circumstances I do not think that the amendment can be viewed as a matter of urgency."

It was decided that the matter should be left in abeyance meanwhile, but that it should not be lost sight of.

Jury Service During the War Period.—The Attorney-General wrote as follows:—

"I have your letter of the 18th August. Many questions have arisen as to the subject you mention and as yet no decision has been reached."

Divorce Rules.—On June 26, 1943, the Rt. Hon. the Prime Minister wrote as follows:—

"I have to acknowledge the receipt of your letter of the 17th June, in which you urge on behalf of your Council that the new Divorce Rules be promulgated without further delay.

"In reply I have to state that I shall be pleased to discuss the matter with the Hon. Minister of Justice and you may rest assured that your Council's representations will receive every consideration."

Since that date the rules have been promulgated: see the Matrimonial Causes Rules, 1943 (Serial No. 1943/135.)

(To be continued.)

OBITUARY.

MR. CLEMENT W. NASH, Napier.

The death occurred in hospital in Blenheim, on September 29, of Mr. Clement Nash, eldest son of the Minister of Finance, Hon. Walter Nash, and Mrs. Nash. He was a member of the R.N.Z.A.F., and became seriously ill a few days previously.

Thirty-seven years of age, Mr. Nash was married, with three young children. He was born in England and was educated at the New Plymouth Boys' High School, Wellington College, and Victoria University College, where he graduated LL.M., with first-class honours, while on the staff of Messrs. Perry, Perry, and Pope. He was in practice on his own account in Napier.

Mr. Nash had been a member of the armed forces for about eleven months. First he was in the Army and subsequently transferred to the Air Force. He was attending an officers' training course at an R.N.Z.A.F. school of instruction. Mr. Nash was a former president of the Napier branch of the Labour Party, and was also vice-chairman of the Napier Labour Representation Committee. He also held office as a member of the Napier Secondary Schools' Board of Governors.

On October 4, in the Magistrate's Court at Napier, before Mr. Miller, S.M., and a large gathering of practitioners, Mr. W. G. Wood, speaking on behalf of the Hawke's Bay Law Society, said that they had assembled to pay tribute to the memory of their late friend and colleague, Mr. C. W. Nash, whose loss they so much deplored. He added that Mr. Lusk, as President of the Law Society, would have undertaken the duty of expressing their sorrow, but he was out of town on public business.

"It is a lamentable fact," Mr. Wood continued, "that in a comparatively short time, the Hawke's Bay Bar has lost by death six of its members, all of them young and promising men, of whom Mr. Nash was one.

"Mr. Nash came amongst us in 1929, and became known to us as a man of integrity. He practised in this Court and in the Supreme Court with marked ability, and both in the Courts and in his office showed that he had a proper appreciation of and regard for the high duties and responsibilities that fall to a member of our profession.

"Last year Mr. Nash, when the time came for him to serve his country, entered the Army. He afterwards transferred to the Air Force, and, unhappily, while on service, contracted an illness which ended fatally. As was said the other day in another place, he has given his life for his country, for us, just as surely as if he had fallen in the field.

"He has left to mourn him his wife and three little boys. To them, and to his parents, we offer this expression of our deep sympathy. We trust that it will comfort and sustain them to remember, always, that the husband and father and son they have lost won the respect and esteem of his fellowmen, and particularly of his fellow-practitioners.

Mr. Miller, S.M., also spoke of Mr. Nash's ability and integrity, and expressed his own sympathy with the deceased's family.

LAND AND INCOME TAX PRACTICE.

Practice Points.

Libraries: Replacements.—The cost of new books or replacements or professional journals cannot be allowed as a deduction against the income of a salaried taxpayer—such expenditure is not exclusively incurred in producing assessable income during the income year, but is rather a private or personal expense in assisting a person to qualify for holding his position. Special arrangements have been made with respect to ministers of religion.

A taxpayer who is in a business or a profession may claim for replacements of books used exclusively for business or professional purposes, but the initial cost of new books cannot be allowed as a deduction. For example, a solicitor in practice on his own account could not claim the cost of the first edition of *Cunningham and Dowland's Taxation Laws of New Zealand*, but if he replaced the first edition by the second edition, the cost of the second edition is allowable. Similarly, the full cost of a new edition of an expensive publication, such as *Halsbury's Laws of England*, Second Edition, purchased to *replace* an out-of-date edition is allowable in full in the year in which the purchase is made, except where such replacement is purchased on instalment terms, in which case the amount of the instalments paid in each tax year is allowed. The annual charge made for service supplements to the *Taxation Laws of New Zealand* and similar publications is considered to be a replacement and is allowable in all cases except that of a person in receipt of salary only. The cost of replacing an obsolete publication by the purchase of a more expensive book by a different author is allowable, but the loss on sale of a book no longer required is not allowable. The annual cost of professional journals including the cost of binding—*e.g.*, the LAW JOURNAL—is allowable (except against salary).

Due Date for payment of Income-tax and the Charge payable by Companies.—The following due dates have been fixed by Order in Council:—

Income-tax.—On income derived during the year ended March 31, 1943, or equivalent balance date—due date, February 10, 1944; last day for payment without 5 per cent. additional tax, March 2, 1944.

Social Security Charge and National Security Tax payable by companies.—On income derived during the year ended March 31, 1943, or equivalent balance date; due date February 2, 1944; last day for payment without 10 per cent. additional charge, March 2, 1944.

It will be observed that the last day for payment of income-tax (persons and companies) coincides with the last day for payment of social security charge and national security tax payable by companies.

Evacuees.—In certain cases the wives of colonial officials who are in enemy hands have been evacuated to New Zealand, and receive allotments from salaries normally payable to the officials concerned. Such allotments, or maintenance allowances, are not assessable for taxation, and an evacuee wholly dependent upon the allowances or allotments is not required to furnish any returns.

Bonuses.—For income-tax purposes, a bonus received by a person on salary or wages is treated as income derived during the year in which payment is actually received, notwithstanding that the employer may intend the bonus to cover services rendered over several years.

For social security charge and national security tax purposes, however, a bonus is regarded as accruing from day to day, over the year for which the payment is made. Where an alteration in the rate of combined charge on wages has occurred during the year, appropriate adjustments may be made by the employer.

An employer may claim the amount of bonus paid to an employee as a deduction against assessable income during the year in which the bonus was actually paid. Sums allocated to a bonus reserve in the employer's books cannot be claimed as a deduction unless an entry is made debiting the reserve account and crediting an account for each employee with the amount of bonus due—in these circumstances only may a bonus be claimed as a deduction before payment is actually made.

Allowances paid to Trainees: Government Training Centres.—Regulation 11 (1) (*e*) of the Social Security Contribution Regulations, 1939, provides for the exemption from social security charge and national security tax of allowances paid to students in respect of attendance at an educational institution in terms of a scholarship or bursary. The allowances being paid by the Government to trainees at training centres instituted under rehabilitation schemes do not come within the provisions of the regulation and are therefore liable to taxation.

Musterers, Drovers, and Shearers: Deductions allowed.—The Commissioner of Taxes has indicated that the following scale allowances will in future be deductible from the earnings of the above classes of taxpayers, for the purpose of calculating social security charge and national security tax on wages. For income-tax purposes actual annual expenses must be shown in lieu of the scale rates.

Musterers.—Twenty per cent. of the gross weekly wages will be allowed to cover expenses of maintaining horses and dogs and other expenses in travelling from one job to another.

Drovers.—Thirty-three and one-third per cent. of the gross wages will be allowed while droving, and while mustering at drover's rates of pay. When drovers are mustering on musterer's rates of pay—*i.e.*, for extended periods exceeding fourteen days—they will be entitled to a 20 per cent. deduction from their wages to cover expenses. In cases where the engagement extends beyond fourteen days, the expense allowance for the first fourteen days is to be calculated at 20 per cent. and not 33⅓ per cent.

Shearers.—A deduction of 2s. in each pound will be allowed to cover the replacement of equipment provided by shearers.

War Pensions: Exemptions.—Pensions granted under the War Pensions Act, 1915, in respect of the 1914–19 war, and under the War Pensions Extension Act, 1940 (including Part I of the Finance Act (No. 4), 1940), in respect of the present war, are now payable under the War Pensions Act, 1943, and are wholly exempt from income-tax, social security charge, and national security tax. Pensions payable under the War Pensions and Allowances (Mercantile Marine) Act, 1940, are also exempt from all taxation—*vide* s. 2 (4) of the latter enactment.

A person in receipt of a *total* disability pension granted by the Government of any British jurisdiction in respect of his service in the war of *1914–19 only* is exempt from social security charge and national security tax on *all income other than salary or wages*: *vide* Reg. 11 (1) (*b*) of the Social Security Contribution Regulations, 1939. It is to be noted that the exemption contained therein attaches to the person who receives a *total* disability pension in respect of all income other than salary or wages, but does not extend to exemption from the charge on salaries or wages. There are no similar provisions to exempt from the charge on income other than salary or wages a person who receives a total disability pension, in respect of service in the present war, and such persons are required to pay the combined charge on all income other than the pension itself. The right of a taxpayer to apply for exemption on the grounds of hardship, in terms of s. 112 of the Social Security Act, 1938, should not be overlooked.

Unless this point is fully appreciated, confusion may arise by reason of pensions in respect of the 1914–19 war, and the present war, being payable under the War Pensions Act, 1943.

THE NEW JUDGE.

Mr. G. P. Finlay, of Auckland, has been appointed a Justice of the Supreme Court, and it is reported that he will be seconded to preside over the new Land Sales Court. It is hoped to include in the next issue an account of his career and his photograph.

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

Our New Judge.—The Government has acted with commendable wisdom in filling the first judgeship of the Land Sales Court by making an appointment to the Supreme Court Bench and "seconding" the appointee to the Land Sales Court; for, had it sought to make an appointment simply to the latter Court, it could hardly have expected to have obtained the services of a barrister of the experience and standing of Finlay, J. Another pleasing feature about the appointment is the Government's successful resistance to the temptation of making politics a governing factor in its choice. At the Bar the new Judge has unquestionably been one of the most outstanding of our *nisi prius* advocates. As a general rule, profundity of legal learning is not one of the characteristics of those who succeed best at *nisi prius*; but, while it is probably true that the new Judge is no exception to this general rule, those who know him well are not given to underrating his ability as a lawyer. And there are other qualities just as essential to the successful Judge—a ripe experience of practical affairs, sound common sense, a judicial mind, an aptitude for decision, and, last but not least, a courteous and pleasing personality. Each of these qualities is possessed in marked degree by the new Judge, and, when he comes to be released from his Land Sales Court duties and sits as a Judge of the Supreme Court, those members of the Bar who have fixtures before him are not likely to feel a last-minute urge to settle their cases.

The Law in Parliament.—The House of Representatives still contains no Stouts, no Bells, no Findlays, and no Wilfords; but its legal talent has been considerably strengthened as a result of the elections. One lawyer member has lost his seat—the Speaker, Hon. W. E. Barnard, of Napier. The other five sitting lawyers have been returned. They are the Attorney-General (Hon. H. G. R. Mason), W. A. Bodkin (Alexandra), W. J. Broadfoot (Te Kuiti), C. G. E. Harker (Waipawa), and F. W. Schramm (Auckland). Lawyers elected to the House for the first time are R. M. Algie (Auckland), M. H. Oram (Palmerston North), J. T. Watts (Christchurch), and T. C. Webb (Auckland); and at the time of writing it looks as if H. T. Morton (Te Kuiti) may also be returned. Thus, the profession will certainly have nine, and may have ten, of its members in the House.

Judicial Condescension.—MacKinnon, L.J., has thrown the word "condescend" back at the House of Lords; but he has chosen an occasion the justification for which may be doubtful. In *The Testbank*, [1942] 1 All E.R. 281, the Court of Appeal held that a trial Judge's apportionment under the Maritime Conventions Act, 1911, of degrees of blame between two colliding vessels, and his consequential apportionment of the damages, was open to review by the Court of Appeal no more and no less than any other finding of fact by the trial Judge. Lord Greene, M.R., confined his observations to the Maritime Conventions Act, but the two other members of the Court, MacKinnon and Goddard, L.JJ., referred to, and commented on, the somewhat similar situation arising under the Law Reform (Married Women and Tortfeasors) Act, 1935 (Eng.), as regards contribution between tortfeasors. However, shortly afterwards, in *British Fame* v. *Macgregor*, [1943] 1 All E.R. 33, another case under the Maritime Conventions Act, the House of Lords unanimously overruled *The Testbank*, but their Lordships confined their observations to that particular Act and made no observations as to contribution between tortfeasors under the Law Reform Act. More recently a case under the latter Act has come before the Court of Appeal—*Ingram* v. *United Automobile Services, Ltd.*, [1943] 2 All E.R. 71. In his judgment in that case MacKinnon, L.J., says:

> In *British Fame* v. *MacGregor* the House of Lords thought that we were wrong (in *The Testbank*). We had in this Court expressly referred to the arising of an exactly similar question under the Law Reform (Married Women and Tortfeasors) Act, 1935, and I venture to think that it would have been kinder, at any rate, to the members of this tribunal, faced with these difficulties, if the House of Lords had intimated for our guidance what the position is under the Act of 1935 and whether the same rule is to be applied as under the Maritime Conventions Act, 1911, with regard to a ship; *but not one of their Lordships condescended to say a word about that problem which we had expressly raised.*

It is unusual for the House of Lords to be judicially criticized for declining to embark upon observations which would necessarily have become a classic example of the purest *obiter dicta*.

From Hamlet to Paul.—"I eat the air, promise-crammed." During the hearing of the Onakaka case before the Court of Appeal these words from *Hamlet* were quoted by Philip Cooke, K.C., while he was stressing a submission that during certain correspondence a Minister of the Crown had repeatedly promised a reply on a particular matter, but had failed to carry out his promise. Blair, J., thereupon reminded counsel of the story of the inebriated gentleman who, having been assisted home by a kindly stranger, profusely thanked his benefactor and inquired as to his name, and, on being told that it was Paul, exclaimed: "Paul! Tell me, have you received any reply yet from all those letters you wrote to the Ephesians?" Blair, J.'s, story may be somewhat bewhiskered, but the occasion of its retelling was certainly appropriate.

Interviewing Witnesses for Prosecution.—Last July, Lewis, J., during the hearing of a case at the Manchester Assizes, had some observations to make on this subject. A witness for the prosecution said during the course of her evidence that a few days before the trial she had gone to the office of the defending solicitor and had gone through her statement in the presence of the solicitor's clerk. According to *The Times* (London), Lewis, J., said:

> For a solicitor, or his clerk, when instructed by a prisoner, to interview a witness for the prosecution is most reprehensible. I take so serious a view of it that I propose to get a transcript of the girl's evidence and send it to the Law Society. I am not saying whether the girl's evidence is true or not, but the Law Society should know that this statement has been made on oath. If it is true, I take an extremely serious view of it, and, if it is not true, the solicitor ought to be cleared of such a charge.

Ghosts and Justice.—"Where ghosts of the past stand in the way of justice, clanking their medieval chains, the proper course for the Judge is to pass through them undeterred."—Lord Atkin.

PRACTICAL POINTS.

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1. Divorce.—*Petitioner Prisoner of War — Proceedings by Attorney.*

QUESTION: A husband, who is a prisoner of war, wishes to bring divorce proceedings against his wife. Can he bring the proceedings by his attorney in New Zealand? If necessary, the power of attorney could include a special clause or clauses to bring such proceedings.

ANSWER: In a divorce case heard at Auckland early this year—the ground being adultery, and damages being claimed from the co-respondent — similar circumstances prevailed. A preliminary application was made by motion for an order granting leave to the attorney to sign a petition for divorce and for an order dispensing with the petitioner's attendance at the hearing. Authorities cited were: *Collyns* v. *Collyns*, [1924] G.L.R. 297; *Ross* v. *Ross*, (1882) 7 P.D. 20; *Ex parte Bruce*, (1881) 6 P.D. 16; *Ex parte Hobson*, (1894) 70 L.T. 816; *Mills* v. *Mills*, (1886) N.Z.L.R. 5 S.C. 71; and *Kingsland* v. *Kingsland*, [1919] N.Z.L.R. 527. Attention was also drawn to s. 29 of the Divorce and Matrimonial Causes Act, 1928, limiting the time within which damages may be claimed by the petitioner on the ground of adultery to three years from the date of the alleged adultery.

An order was made on the motion, and the attorney signed the petition and made the necessary verifying affidavit. In this case, the power of attorney specially provided for the bringing of the divorce proceedings: *Hadley* v. *Hadley* (unreported).

2. Divorce.—*Respondent Husband Prisoner of War—Service of Proceedings.*

QUESTION: It is desired to bring a petition in divorce on the ground of three years' separation against a husband who is a prisoner of war in Germany. Is there any provision for service in such case? If not, would there be any likelihood of an order being made for substituted service, or dispensing with service?

ANSWER: There is no provision for service of a divorce petition on a husband who is now a prisoner of war. An application, in similar circumstances, has been made to the Court for substituted service, but it has been refused.

It is possible that the Court might consider an application for substituted service, where the husband has an attorney in New Zealand, the power of attorney containing an express provision for the attorney to accept service and act on his behalf in any divorce proceedings against the husband.

3. Stamp Duty.—*Option over Mining Privilege— Assignment of Option—Stamp Duty payable.*

QUESTION: A., the registered owner of a mining privilege, as defined in the Mining Act, in consideration of the sum of £500 paid to him by B., grants B. an option to purchase the mining privilege for £2,000. B. later by deed assigns the benefit of the option to C., in consideration of the sum of £400 paid by C. to B. What stamp duties respectively are payable on the option and the assignment thereof?

ANSWER: (*a*) As to the option: If in the form of a deed, 15s.; if not by deed, 1s. 3d.

(*b*) As to the assignment: Section 96 (2) of the Stamp Duties Act, 1923, deals with the stamp duty payable on the assignment of options.

Now the option created an equitable interest in the mining privilege itself: *Morland* v. *Hales*, (1910) 30 N.Z.L.R. 201. Section 79 (*d*) of the Act extends to an equitable interest in a mining privilege. Therefore the assignment is entitled to be stamped under s. 79 (*d*) and not s. 79 (*a*). The duty on the deed of assignment is therefore £1 8s.

4. Divorce.—*Members of New Zealand Armed Forces—Method of Service.*

QUESTION: What is the procedure for service of divorce petition on a husband who may be a member of the New Zealand Armed Forces? Does the one procedure cover the Navy, Army, and Air Force members?

ANSWER: The procedure for service of divorce petitions on members of the New Zealand Navy, Army, and Air Force is covered by the following cases: *Navy*: *Turley* v. *Turley* (unreported); *Army*: *A.* v. *A.*, [1940] N.Z.L.R. 394; and *Air Force*: *Kennerley* v. *Kennerley and Rundle* (unreported).

With regard to members of the Army and the Air Force, the procedure is identical, subject to slight minor alteration in the case of Air Force members.

The above cases, procedure, and the various notices required, are set out at length in an article contained in this JOURNAL, (1942) 18 N.Z.L.J. 25, to which reference should be made.

5. Stamp Duty.—*Transfer to a School incorporated for "Advancement of religion and morality"—Stamp Duty payable.*

QUESTION: A., in consideration of the sum of £600, transfers a piece of land to a New Zealand school, duly incorporated "for the advancement of religion and morality, and the promotion of useful knowledge by offering to the youth of the province general education of a superior character." The trusts or purposes on or for which the land is being acquired are not expressed in the transfer. What is the correct stamp duty payable on the transfer, there being no prior agreement in writing?

ANSWER: Fifteen shillings, as a deed not otherwise chargeable: s. 168 of the Stamp Duties Act, 1923: *Southland Boys' and Girls' High School Board* v. *Mayor, &c., of Invercargill*, [1931] N.Z.L.R. 881, G.L.R. 487. The transferee is a charity within the meaning of English law, and all land acquired by it *simpliciter* is held on a charitable trust: *Income Tax Commissioner* v. *Pemsel*, [1891] A.C. 531, 583; *R.* v. *Income Tax Special Commissioners, Ex parte University College of North Wales*, (1909) 78 L.J. K.B. 576, 25 T.L.R. 368. It is therefore exempt from *ad valorem* stamp duty by s. 81 (*f*) of the Stamp Duties Act, 1923.

RULES AND REGULATIONS.

Public Service Superannuation Emergency Regulations, 1943. (Emergency Regulations Act, 1939.) No. 1943/152.

New-Zealand-grown Fruit Regulations, 1940, Amendment No. 3. (Orchard and Garden Diseases Act, 1928.) No. 1943/153.

Expeditionary Force Emergency Regulations, 1940, Amendment No. 6. (Emergency Regulations Act, 1939.) No. 1943/154.

Social Security (Pharmaceutical Supplies) Regulations, 1941, Amendment No. 3. (Social Security Act, 1938.) No. 1943/155.

Social Security (Medical Benefits) Regulations, 1941, Amendment No. 1. (Social Security Act, 1938.) No. 1943/156.

Evidence Emergency Regulations, 1941, Amendment No. 1. (Emergency Regulations Act, 1939.) No. 1943/157.

Manual and Technical Instruction Regulations, 1925, Amendment No. 17. (Education Act, 1914.) No. 1943/158.

Sale of Food and Drugs Amending Regulations, 1943, No. 2. (Sale of Food and Drugs Act, 1908.) No. 1943/159.

Electrical Supply Regulations, 1935, Amendment No. 5. (Public Works Act, 1928.) No. 1943/160.

His Majesty's Forces (Motor-vehicles) Suspension Order, 1943. (Transport Legislation Emergency Regulations, 1940.) No. 1943/161.