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AFFIDAVITS AND THE VERIFICATION OF DOCUMENTS OF SERVICEMEN OVERSEAS.

SO many New Zealanders are now serving in different branches of His Majesty's Forces overseas that the sending and receiving of legal documents to which they are parties is almost an everyday occurrence in legal offices in the Dominion. We have been asked to supplement the other articles, which have appeared here relating to the legal affairs of our servicemen*, with a summary of the current provisions regarding their affidavits and the verification of their documents.

I.—Affidavits.

Early in the year 1940, it was considered necessary for the dispatch of legal business to appoint certain members of the Second New Zealand Expeditionary Force as persons qualified to take affidavits. Consequently, on the application of the Judge-Advocate-General, Colonel C. H. Weston, K.C., an order was made on May 20, 1940, by His Honour Mr. Justice Ostler, pursuant to s. 47 (1) of the Judicature Act, 1908. This order appointed certain members of the Expeditionary Force on active service abroad to be and act as Commissioners of the Supreme Court of New Zealand, for the purpose of administering and taking any oath, affidavit, or affirmation, in any cause, proceeding, matter, or thing commenced or pending in the Supreme Court or in any Court of concurrent or inferior jurisdiction in New Zealand, or in any proceeding, matter, or thing whatsoever within the cognizance or jurisdiction of any such Court.

The members of the Expeditionary Force so appointed were either (*a*) officers at that time holding the rank of Lieutenant-Colonel or above (many of whom, but not all, were lawyers), who were already serving abroad or who were members of the Third Echelon then about to proceed overseas; or (*b*) certain named solicitors who were then serving or about to proceed on service overseas.

The names of the Commissioners of the Supreme Court so appointed appear in (1940) 16 N.Z.L.J. 136. Most of these gentlemen are still on active service, and some have returned wounded or unfit for further service. The remainder, most of whom were formerly lawyers, lie on some foreign field, in Africa, Greece, or Crete. *Sed miles, sed pro patria.*

It will be observed that the appointments made by Mr. Justice Ostler's order were all officers of the Second New Zealand Expeditionary Force and intended to be of service to its members of all ranks; and no provision was made for Navy and Air Force personnel. It became necessary, therefore, to make general provision for the taking of affidavits (including in that term any affirmation or statutory or other declaration). This was effected by the Evidence Emergency Regulations, 1941 (Serial No. 1941/114), which have been recently amended and extended, as from October 14, 1943, by Serial No. 1943/157.

As the regulations now stand, oaths may be administered to, and affidavits taken from, any member of His Majesty's Naval, Military, or Air Forces, whether raised in New Zealand or elsewhere, by—

(*a*) Any officer of His Majesty's Naval Forces, while serving outside New Zealand, who holds a rank not below that of Lieutenant-Commander; or

(*b*) Any officer of His Majesty's Military Forces, while serving outside New Zealand, who holds a rank not below that of Major; or

(*c*) Any officer of His Majesty's Air Forces, while serving outside New Zealand, who holds a rank not below that of Squadron-Leader; or

(*d*) Any officer of those Forces, whether raised in New Zealand or elsewhere, while serving outside New Zealand, who holds an equivalent rank to those specified above; or

(*e*) Any member of those Forces, while serving outside New Zealand, who holds an appointment as a Legal Staff Officer, whatever be his rank.

Every oath or affidavit administered by or sworn before any such officer as is specified above is to be as effectual as if duly administered by, or sworn before, any lawful authority in New Zealand (Reg. 3, as amended).

* Divorce: Service on members of the Armed Forces Overseas: (1942) Vol. 18, p. 25.
Maintenance Orders: Soldiers, (1940) Vol. 16, p. 287; Naval Personnel, (1942) Vol. 18, p. 42.
Probate and Administration: Deaths on War Service, (1941) Vol. 17, pp. 145, 163, 199; Proof of Deaths on Active Service: (1942) Vol. 18, p. 266.
Soldiers' Allotment Accounts: Soldiers dying Overseas, (1942) Vol. 18, p. 68.
Soldiers', Sailors', and Airmen's Wills: Execution, (1940) Vol. 16, p. 148; Revocation, (1941) Vol. 17, p. 157.

When forwarding affidavits or declarations abroad for swearing or making, it should be pointed out that the officer empowered to administer an oath or take an affidavit, by virtue of the powers conferred by these regulations, must state in the jurat or attestation to the document in question, or after his signature, the date on which the oath or affidavit is administered or sworn, and the name and rank of the officer; and (if his rank is below that of a Lieutenant-Commander, Major, or Squadron-Leader) the fact that he is a Legal Staff Officer. It is not necessary to state the place where the oath or affidavit is administered or sworn (Reg. 4, as amended).

Any document purporting to have subscribed thereto the signature of any officer in testimony of any oath or affidavit being administered or sworn before him is to be admitted in evidence without proof of the rank or appointment of the officer, and without proof that the signature is the signature of the officer, or that the officer was, on the date on which the oath or affidavit was administered or sworn, serving outside New Zealand (Reg. 5, as amended).

These regulations do not, of course, affect the powers conferred on the surviving Commissioners of the Supreme Court still serving overseas in the Expeditionary Force: they merely provide a wider choice and opportunity to members of all the Armed Forces wherever they may be outside New Zealand in respect to oaths, affidavits, affirmations, and statutory or other declarations required in New Zealand.

II.—Verification of Documents.

Every one is familiar with s. 119 of the Property Law Act, 1908, and its twin section, s. 176 of the Land Transfer Act, 1915, and the requirements therein respectively specified for the verification of the execution of documents and instruments outside the Dominion. It may be that, since our Expeditionary Force went overseas, there was some acceptance of the polite fiction that its members were not, for the purposes of these sections, "outside New Zealand"; and some documents may have been accepted as correctly executed since they were witnessed by members of the Legal Department of the Expeditionary Force, or by officers of a rank not lower than those specified in respect of the taking of oaths. Such an execution, in view of the specific provisions of the two sections mentioned, was not in order; but all documents so executed have now been retrospectively regularized by the recent amendment of the Evidence Emergency Regulations, 1941, to which we have already referred. Provision is now made for the verification of the execution of every document of any kind duly executed outside New Zealand, whether before or after October 14, 1943, at any time during the present war, by any member of His Majesty's Naval, Military, or Air Forces, whether raised in New Zealand or elsewhere.

Every document duly executed out of New Zealand by servicemen will be admissible in evidence in any Court of Justice in New Zealand, and before any officer or person having by law or the consent of parties authority to hear, receive, and examine evidence in New Zealand, so long as the following conditions have been observed:

(*a*) The execution of any document purporting to have been executed out of New Zealand before an officer of His Majesty's Naval, Military, or Air Forces who holds a rank not below that of Lieutenant-Commander, Major, or Squadron-Leader, or any equivalent rank, or who holds an appointment as a Legal Staff Officer; or

(*b*) The verification of the execution of any document executed out of New Zealand by a declaration of its due execution out of New Zealand purporting to be made by an attesting witness before any such officer as aforesaid, and endorsed on or annexed to such document.

The new regulations also provide that it is to be presumed that any signature subscribed to any document, tendered in evidence under the paragraph to which we have referred above, is genuine, and that any person appearing to have attested the document had in fact authority to attest it, unless the party objecting to the admission of the document proves the contrary.

It is specifically provided that the regulations regarding the verification of the execution of documents are in addition to, and not in derogation of, the provisions of s. 119 of the Property Law Act, 1908, or s. 176 of the Land Transfer Act, 1915, or any other enactment.

III.—Method of Taking Evidence.

Another matter that follows from the authority given by the Evidence Emergency Regulations, 1941, to administer oaths or to take affidavits is the taking of evidence of servicemen abroad for tendering in actions in our Courts.

It was suggested by His Honour Mr. Justice Blair, in *Rogers* v. *J. C. Milnes, Ltd.* (unreported), that the evidence of our servicemen overseas may be taken cheaply through the Advocate-General or other officer holding a similar office in the services. He added that there are no doubt plenty of practitioners in the Forces who can adequately take the evidence required or cross-examine for the opposing party.

SUMMARY OF RECENT JUDGMENTS.

Supreme Court. Auckland. 1943. September 24, 29. *Callan*, J.

HARWOOD v. WESTFIELD FREEZING COMPANY, LIMITED.

War Emergency Legislation—Industrial Man-power Emergency Regulations—Minimum Weekly Wage—"Overtime"—Method of Computation—Whether Employer may apply Money earned as Overtime towards Amount of Minimum Weekly Wage—Minimum Weekly Wage (Essential Undertakings) Order, 1942 (No. 2) (Serial No. 1942/320), Cls 4 (1) (a), 5 (a) (c) (d).

The meaning of "overtime," where used in cls. 4 and 5 of the Minimum Weekly Wage (Essential Undertakings) Order, 1942 (No. 2), is precisely defined by reference to the relevant award industrial agreement, or contract of employment.

Clause 5 (*d*) of the order ensures that any amount earned by a worker in excess of what is earned during ordinary working-hours at ordinary rates is not to be brought into account in calculating the rights of such worker to the minimum weekly wage.

Thus, in calculating the amount of the minimum weekly wage (if any) payable to a worker in terms of the Minimum Weekly Wage (Essential Undertakings) Order, 1942 (No. 2), all payments made as "overtime, bonus, or other special payments" (as, for instance, overtime paid for hours worked outside the ordinary working-hours of the industry stated in the award, industrial agreement, or contract of employment under which the worker is working) must be disregarded; and if,

during ordinary working-hours, the minimum weekly wage is not fully earned, then the difference between that amount and the actual amount earned during ordinary hours must be paid.

Counsel: *Sullivan*, for the appellant; *Alderton*, for the respondent.

Solicitors: *J. J. Sullivan*, Auckland, for the appellant; *Lisle Alderton and Kingston*, Auckland, for the respondent.

COURT OF APPEAL.
Wellington.
1943.
September 22.
Myers, C.J.
Blair, J.
Smith, J.
Johnston, J.
Fair, J.

In re TAUPO TOTARA TIMBER COMPANY, LIMITED (No. 2).

Practice—Appeals to Privy Council—Company not a Creditor opposing Confirmation of another Company's Reductions of Capital—Application by Objecting Company for Leave to Appeal therefrom—Latter Company's possible Contingent Claim in tort sole Ground of Objection to Reduction—Whether "Property or some civil right" involved—Whether Question involved of "Great general or public importance"—"Civil right"—Privy Council Appeals Rules, R. 2 (a) (b).

On an application by New Zealand Forest Products, Ltd., for leave to appeal to His Majesty in Council from the judgment, reported [1943] N.Z.L.R. 557,

Held, by the Court of Appeal (*Myers*, C.J., *Blair*, *Smith*, and *Johnston*, JJ., *Fair*, J., dissenting), refusing such leave, 1. That no "property" or "civil right" of the applicant was involved in the appeal so as to bring it within R. 2 (*a*) of the Privy Council Appeals Rules.

2. That, if "a question" were involved in the appeal to the Court of Appeal concerning which there could be an appeal to the Privy Council, there was no "question of great general or public importance" involved so as to bring it within R. 2 (*b*) of the rule.

Per *Fair*, J., dissenting, That leave should be granted under the second clause of R. 2 (*a*) and also under R. 2 (*b*), the words "or otherwise" giving the Court a wide discretion, and, in a case involving a considerable known amount, power to do what the justice of the case required unrestricted by rigid limitations.

Counsel: *Cleary*, for New Zealand Forest Products, Ltd., in support; *Cousins*, for Taupo Totara Timber Co., Ltd., to oppose.

Solicitors: *Bell and Johnson*, Hamilton, for Taupo Totara Timber Co., Ltd.; *Earl, Kent, Massey, Stanton, North, and Palmer*, Auckland, for New Zealand Forest Products, Ltd.

COURT OF APPEAL.
Wellington.
1943.
September 22, 23.
Myers, C.J.
Blair, J.
Smith, J.
Johnston, J.
Fair, J.

ASSOCIATED MOTORISTS PETROL COMPANY, LIMITED v. BANNERMAN (No. 2).

Practice—Appeals to Privy Council—Discretion of Court of Appeal—Appellant unsuccessful in Magistrates' Court, Supreme Court, and Court of Appeal—Statutory Rights of "Office-assistants" in receipt of Higher Salaries to Payment for Overtime—Whether Question involved of "Great general or public importance"—Privy Council Appeals Rules, R. 2 (b).

The respondent sued for and recovered £155 in the Magistrates' Court for payment for overtime as "office-assistant" under s. 49 of the Shops and Offices Act, 1921–22, as amended. The appellant company did not remove the action into the Supreme Court, but appealed to that Court. Defeated there, it applied for and obtained special leave under s. 67 of the Judicature Act, 1908, to appeal to the Court of Appeal, where it was defeated for the third time: [1943] N.Z.L.R. 491.

On a motion for leave to appeal to the Privy Council, in support of which no affidavit was filed, the appellant offered, if such leave were granted, that it be made a condition that the appellant should pay to the respondent the amount of his judgment forthwith, subject only to a liability to repay that amount if the appeal should be allowed by the Privy Council, and, in any event, to indemnify him in the costs of such appeal.

Held, per totam Curiam, 1. That after a hearing in three successive Courts, there must be special circumstances to justify the Court of Appeal in allowing the case to proceed to the Privy Council.

2. That the only ground on which such leave could be granted in the circumstances was that the question involved was of "great general or public importance" within R. 2 (*b*) of the Privy Council Appeals Rules.

Held, per *Myers*, C.J., *Blair*, *Johnston*, and *Fair*, JJ., *Smith*, J., dissenting, That that ground had not been established, and leave must be refused.

Per *Smith*, J. (dissenting), That it was obvious from the judgment itself, the effect of which is stated in the headnote ([1943] N.Z.L.R. 491), that extraordinary results, both civil and criminal, followed from it; that the questions raised were, on the civil side, of great general importance, and, on the criminal side, of great public importance, and thus were within R. 2 (*b*) of the Privy Council Appeals Rules; and that leave should be granted upon the terms offered by the appellant.

Rutherfurd v. *Waite*, [1923] G.L.R. 34, distinguished.

Counsel: *Spratt*, for the appellant; *S. G. Stephenson*, for the respondent.

Solicitors: *Morison, Spratt, Morison, and Taylor*, Wellington, for the appellant; *Stephenson and Anyon*, Wellington, for the respondent.

SUPREME COURT.
Auckland.
1943.
August 27;
September 2.
Fair, J.

WATSON v. AUCKLAND HARBOUR BOARD AND BRITISH PHOSPHATE COMMISSIONERS.

Practice — Trial — Special Jury — Striking and Reducing — Defendant added after Order made for Trial by Special Jury of Twelve—Defect in Procedure—Jurisdiction—Condition that Number of Special Jurors drawn be increased from Forty-eight to Sixty—Striking out by Parties alternately—Juries Act, 1908, ss. 71 (3), 73, 75, 76—Acts Interpretation Act, 1924, s. 4—Code of Civil Procedure, R. 604.

Under s. 71 (3) of the Juries Act, 1908, and the application thereto of R. 604 of the Code of Civil Procedure, the Court has jurisdiction in special circumstances, where a new defendant is added in an action, after an order has been made upon the application of the original defendant for the trial of the action before a Judge and a special jury of twelve (such, for instance, as where the defendant is a large company that has become the object of widespread popular dislike or antipathy), the Court has jurisdiction to modify, upon the adding of such defendant, the order granting a special jury already made, so as to impose a condition that might have been made had the added defendant been named as defendant in the writ when originally issued: that the forty-eight special jurors named should be increased to sixty, and that each defendant should have power to strike out twelve names so as to reduce to twenty-four the number of jurors to be summoned to attend and serve on the trial of the action.

New Zealand National Creditmen's Association (Wellington) Ltd. v. *Dun's Agency (Wellington), Ltd.*, [1937] N.Z.L.R. 1209, G.L.R. 657, applied.

Except in such special circumstances, the rights of the party or parties requiring special jurors should not be enlarged and the procedure of striking specified in ss. 75 and 76 of the Juries Act, 1908, should be followed, forty-eight names being drawn, and the plaintiff striking out one juror and each defendant alternately striking out one.

Gay Co., Ltd. v. *Trick*, [1927] 1 D.L.R. 1091, referred to.

Conlon v. *Parr and Unwin*, [1928] G.L.R. 277, distinguished.

Counsel: *W. H. M. Adams*, for the Auckland Harbour Board; *Chalmers*, for British Phosphate Commissioners; *Fawcett*, for the plaintiff.

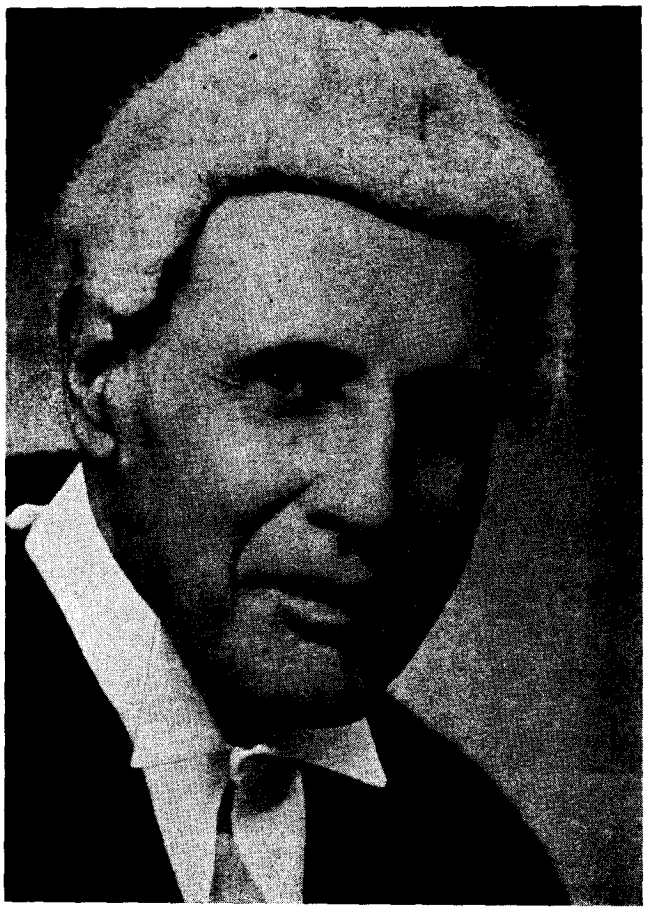
Solicitors: *Dufaur, Lusk, Biss, and Fawcett*, Auckland, for the plaintiff; *Russell, McVeagh, Macky, and Barrowclough*, Auckland, for the Auckland Harbour Board; *Buddle, Richmond, and Buddle*, Auckland, for British Phosphate Commissioners.

HIS HONOUR MR. JUSTICE FINLAY.

Our New Supreme Court Judge.

The speculation on the Government's choice for the onerous position of President of the Land Sales Court has been answered by the appointment of Mr. George Panton Finlay, who becomes at the same time a Judge of the Supreme Court. The appointment of His Honour had been forecast for some time in Auckland, where the profession was united in welcoming the elevation of one of the most able and popular of its members. Throughout New Zealand there will be approval of the appointment to the Bench of a practising member of the Bar of long experience.

The new Judge was born in Thames, where he received his primary and high school education. He then became a clerk in the Magistrate's Court at Hamilton, until he was admitted as a barrister and solicitor. It was in practice in Te Kuiti in partnership with Mr. Broadfoot, now a member of Parliament, that Mr. Finlay gained his thorough grounding in the exacting profession of the law. He learnt to know the nature of litigants and witnesses in the hurly-burly of the Magistrates' Court and rapidly acquired an extensive practice which soon brought him into prominence in the Supreme Court at Hamilton. He became one of the busiest members of the Bar in the Waikato, where a frequent adversary was the present Mr. Justice Northcroft. Mr. Finlay found time as well to devote himself to public affairs. He became Mayor of Te Kuiti, and always took a prominent part in sporting organizations. His success and experience in Te Kuiti were an admirable foundation for his practice in Auckland, where he established himself in 1924.



Spencer Digby Photo

Mr. Justice Finlay.

Mr. Finlay speedily assumed the rank of one of the leaders of the Auckland Bar. He appeared in every class of case, and frequently in the Court of Appeal. He eventually became a member of the Council of the Auckland Law Society, was its President from 1934 to 1936, and was for some time a member of the Council of the New Zealand Law Society. He took a prominent part in the steps leading to the erection of the Auckland Law Library, of which Auckland practitioners are justly proud.

His work as an Aliens Authority at first in Auckland and later in Wellington, after the commencement of the present struggle was done with great ability and celerity. In addition to these services to the Dominion he acted for some time as Chairman of the No. 1 A Armed Forces Appeal Board in Whangarei. It can be truly said of the new Judge that he is in no sense a narrow man, and has shown a public spiritedness which augurs well for his success in an office demanding breadth of vision and knowledge of mankind.

There have been many occasions of the new Judge's success in cross-examination. In no branch of the work of an advocate did he achieve greater success than in that most difficult art. His former associates in Auckland will often recall how he has risen to cross-examine with scarcely a note in his hand, and pursued a lengthy examination, avoiding pitfalls, and establishing his point with devastating success. Those who study the Law Reports will recall the remarks of Mr. Justice Ostler in the Court of Appeal in 1932, when that learned Judge referred specifically to the skill used in cross-examination by Mr. Finlay in a case before a jury.

The new Judge has a personality admirably suited for success in advocacy. His presence is commanding, his voice good, and his addresses to the jury have always been most effective. Auckland practitioners will remember his appearance in 1925 on behalf of James Simpkin, who was charged with the murder of his wife. After a lengthy trial the jury brought in a verdict of manslaughter. Those who heard it will not readily forget the effect of an eloquent and moving address by counsel for the accused.

The new Judge will thus bring to the Bench a wide experience of men and affairs. He has always shown a proper appreciation of the facts of a case. His knowledge of human nature has won for him many a case where another lawyer might have delved more into the books than into the character of the parties and the witnesses. Mr. Justice Finlay should be readily able to detect the lying witness, and the honest

but stupid witness. It is rightly of particular importance that the Judges presiding in criminal cases and in civil cases tried with a jury should know the minds of those who constitute a jury. Mr. Justice Finlay has the temperament which will fit him well as a Judge at *nisi prius*.

His Honour is a merciful man. Those who have known him at the Bar and in the Councils of the Law Society will endorse this statement. He is aware that men and women as human beings are apt to err. On the Bench he will, it may be respectfully written, temper justice with mercy. Nobody who comes to know Mr. Justice Finlay will ever describe him as a hanging Judge, if hanging were still a part of our communal system. Nobody could imagine him as the unrelenting avenger of justice exemplified in the late Mr. Justice Avory. In his exercise of criminal jurisdiction Mr. Justice Finlay will not spare the malefactor, but he will be anxious to help in the redemption of the victim of misfortune and weakness.

The new Judge is noted for his geniality and friendliness. Those who have known him well in Auckland—and they are many—will wish him well in the transaction of his new and important task. They recall that for many years he practised in a rural community and there acquired an understanding of the ways and aspirations of farmers—something which should stand him well as President of the Land Sales Court. Those who have practised with him are confident that the profession will receive from him on the Bench the courtesy, the good humour, and the patience characteristic of him at the Bar. To be a Judge of the Supreme Court is a great honour; to attain that dignity is a mark of high professional distinction; and the Bar will congratulate Mr. Justice Finlay on his achieving a rank which his qualities and experience have merited.

BAR DINNER IN HONOUR OF THE NEW JUDGE.

The Law Society of the District of Auckland showed their appreciation of the appointment of Mr. Justice Finlay, and their personal regard and affection for him, by tendering him a dinner on the evening of October 22.

Mr. J. Stanton, the Society's President, presided over an attendance of members of the profession, numbering over two hundred. Enthusiasm and great cordiality were the principal features of the gathering; and the welcome to the new Judge, tinged with regret at his leaving the ranks of the practising Bar, showed that his colleagues of many years were unanimous as to his worthiness for the high office that he has attained.

The Bench was represented by the Hon. Mr. Justice Fair and the Hon. Mr. Justice Callan. The Attorney-General, the Hon. H. G. R. Mason, had made a special trip from Wellington to be present. The Judge-Advocate in New Zealand of the United States Armed Forces, Major Vincent C. Allred, was one of the guests. There were also present, as guests, Mr. Justice Tindall, of the Court of Arbitration, and Messrs. J. H. Luxford, S.M., F. H. Levien, S.M., and J. Morling, S.M.

The President of the Law Society.

After the loyal toast had been honoured, the President of the Auckland District Law Society, Mr. Stanton, proposed the toast of the guest of honour, Mr. Justice Finlay. He expressed the Council's regret that circumstances had compelled the holding of the function at such short notice, with the result that a number who would have wished to attend had been prevented from doing so. The large attendance, however, was a great tribute to the regard in which their new Judge was held in the Auckland Province. He thought no member of the profession had to a greater extent earned the affection of his professional brethren. Mr. Justice Finlay had been with them for twenty years and it was, he felt sure, true to say that all the Judges before whom the new Judge had practised had listened to him always with respect and even with admiration. They who had worked beside him had been compelled in opposition to treat him always with respect and with gratitude. He now entered upon his new duties with the goodwill and the good wishes of hosts of friends. He was assuming office at a time of peculiar stress and instability when old methods had had to be thrown into the discard.

Mr. Justice Finlay would be the head of a new Court, one which would represent a change, so far as lawyers were concerned, of the most fundamental kind. From time immemorial the profession had considered the sale and disposition of property as the bread-and-butter line of its existence, and that was now, if not exactly threatened, encumbered with new difficulties. Although the new statute had been passed several weeks ago, they were still in the dark as to the lines along which it would operate. Upon Mr. Justice Finlay would devolve very largely the moulding of the policy of the new Court over which he was to preside, and what that policy was to be was fraught with great consequences to all. So it was with satisfaction and confidence that members of the profession, who were possibly in the best position to judge, had learned that the President of that new Court was to be Mr. Justice Finlay.

It was the Judges who were called upon to determine how far the lines laid down from time immemorial must be moulded by the unceasing demands of changing conditions, and how far that process must be arrested lest it lead to a state of confusion where, as was said long ago, principles may vary in accordance with the length of the Chancellor's foot. They could depend upon it that Mr. Justice Finlay would not be one to make changes merely for the sake of change; but, on the other hand, he would not consider any proposal that originated from the policy of stagnation leading to decay.

Mr. Stanton added that they were met that night as friends of the new Judge; and, on their behalf, he conveyed to him their congratulations on his appointment. They all felt that such an appointment was the legitimate ambition of any worthy and public-spirited barrister. In the case of their guest it had come to fruition; and, in congratulating him on his appointment, the community also was to be congratulated on the service that could be expected from him.

The President then proposed the toast, "Mr. Justice Finlay," and it was honoured with enthusiasm.

The Hon. Mr Justice Finlay.

On rising to reply, Mr. Justice Finlay received a memorable ovation. He confessed that he had never tried to make a speech under more difficult circumstances, but he knew that they would understand and forgive him. He continued:

"May I begin by saying how very grateful I am to you all for coming here to-night to join in what I will perhaps be forgiven if I call a wonderful demonstration of affection.

"In particular, I would like to express my deep appreciation of the action of my old friend, Robert McVeagh, in attending. Much as I owe to the Law and to lawyers, I, in common with many others, owe the greatest individual debt of all to the help and the sympathy throughout the years of the doyen of the Auckland Bar. His ready response to every appeal is now traditional. I confess it was with a sense of deep pride that I saw him to-night setting out to join us.

"I have said that I owe a deep debt of gratitude to the law and lawyers. It would be idle for me to deny that all I am and have I owe to the Law, which has been the main preoccupation of my life. It is only fitting that on this, one of the most important occasions in my life, I should make that confession.

"I will not burden you with personal reminiscences, but I will only comment that the man I am to-night—and I trust that this will not be taken for egotism—differs widely from the youth who, many years ago, made it a practice to deliver impassioned orations to the empty jury boxes in the old District Court-house at Hamilton. The day came when that lad's dreams came true, and he did address real juries, with some successes here and there. This experience may help and encourage some other youngster to dream and to strive to make his dreams come true."

His Honour went on to say that he was approaching the task before him very anxiously and very humbly, because he was aware of the qualities demanded of a man who would sit in the

seat of judgment. "I apprehend," he continued, "that he needs the legal intuition of a Solon, the wisdom of a Solomon and the patience of a Job. Then, too, I am oppressed by the recollection of the great Judges and Magistrates before whom I have practised. They were, many of them, men of gigantic stature; and when I measure my own qualifications and qualities against the background of the qualities required, and against the stature of the men who have preceded me, I cannot but feel that my measure is small indeed. Nevertheless the enthusiasm with which you have received my appointment, and the expressions of public confidence which have everywhere been so widely expressed, give me courage to go on with a good heart.

"To you, as my friends, I can only give the assurance that I will do my best. I am acutely aware that this is my farewell to the legal profession and, were it not for the warm welcome I have received from the brotherhood whom I go to join, I would feel as did Dante, who, after his banishment from Florence, changed the opening of his 'Divine Comedy' by the adoption of the words, 'In the midst of this our mortal life, I find myself in a gloomy wood alone'."

His Honour said that he trusted his ceasing to be a member of the profession would cause no disruption of his friendships with those who remain in it. That would be too great a price to pay for any promotion. His earnest hope was that his friendships in the profession would increase, because he trusted that young practitioners would find that they could come with firm confidence to any Court in which he sits, knowing that they will meet with nothing but consideration and kindness.

"Ours is a great profession," the speaker proceeded. "We know its origin in the dust and gloom of the cloister, we can trace its history through time. The great uncertainty is what is its future to be. This is a world of change, and our profession must change with the world of which it is an integral part. I am convinced that the profession must abandon conservatism and become flexible. If you guard well the portals, and see that the men coming on are professionally well equipped; if you take a broad view and realize that the existence of the profession depends upon the measure of its service to the public, then I feel assured that, whatever change may come, the profession will go on and prosper in the future as it has gone on and prospered in the past.

"May I, in conclusion, as a plain and simple soul, say 'Thank you' for your friendship, for the help that you have given me, and for the support that you are extending to me to-night."

The Guests.

The toast of "Our Guests" was proposed by Mr. A. Milliken, who expressed pleasure at having with them Their Honours the Judges, the Attorney-General who was the leader of their profession, as well as three city Magistrates, and last, but not least, Major Vincent C. Allred, Judge-Advocate of the Armed Forces of the United States of America in New Zealand, to each and all of whom he gave, on behalf of the Council, a most hearty welcome to their festive board. He thanked them for joining in doing honour to the new Judge. The relationship between the Judges and the profession in Auckland had always been of the happiest. It was pleasing to have with them Major Allred, who was a practising lawyer in his home town of Leamingworth, Kansas. They welcomed him not only because of his high office, but because he represented that night a very mighty nation with whom our own Empire marches forward; and the entwining of their respective flags was a reminder to mankind wherever they might be that while the American eagle soars and the British lion roars they would march to victory.

The Hon. Mr. Justice Callan, on behalf of Mr. Justice Fair and himself, expressed great gratitude to Mr. Justice Finlay for seeing his way clear to accept appointment, because it had been the occasion of that very delightful gathering. Such gatherings were rare, and yet they were really good for all of them. They, the people of the law, necessarily lived their working lives in an atmosphere of conflict. The gentlemen at the Bar contended with one another—it must be so—and they came before Magistrates and Judges with whom they also contended. It was, therefore, a good thing for both of them to come together occasionally and remind themselves that they all had far more in common than the things about which they could differ. They were indeed performing work of great value to the community, and they did not often remind either the community or each other of it. Such gatherings helped them to do their work better, and the visitors were grateful to the Council for including them as guests. The Judges welcomed the new Judge sincerely and fraternally and they had told him so. They wished him every happiness in his new sphere which he was joining at a time when the old age-long process was changing and for a man of the courageous temperament of Mr. Justice Finlay it was the opening of a career which the speaker hoped would be a happy event.

The Hon. H. G. R. Mason, Attorney-General and Minister of Justice, expressed thanks for the way in which the toast had been received, but added that it was rather a curious experience for him to be a guest in Auckland where he had worked among them for such a long time. He expressed thankfulness that they had one of Mr. Justice Finlay's qualifications to take up judicial appointment, and it was gratifying to have such a one to enter upon what was really an uncharted sea in connection with the Land Sales Court. They knew how much depended on a Judge for the smooth working of a Court.

Mr. Mason continued that he felt very strongly the truth of the statement that they had a duty as professional men. The profession was the repository of tradition, and the tradition of the law was the greatest of all traditions. What was the significance of the profession in the world to-day? For one thing it demonstrated to the world the importance of the rule of law; it was the world's teacher in that respect, and just as the Romans had taught the value of law and had benefited the world and enabled it everywhere to be organized, so surely should the aim of the profession to-day to be the Romans of the modern world. How could there be democracy without law? If they failed to cherish that tradition it could not flourish so well. He thought they would forgive his emphasizing that they had a profession of which they could, and ought to be, very proud. He expressed thanks for the kind way in which the toast had been honoured and was glad that they had with them a representative of the United States of America.

Major Vincent C. Allred, who on rising was greeted with hearty applause, said that he did really appreciate the kindness of the Law Society in inviting him there that night. It was another one of those instances of the courtesies which New Zealand had shown to the American Forces ever since they had landed, and for which they were very grateful. It brought back to him the atmosphere of home to be at such a gathering. It so happened that just before Pearl Harbour he had attended such a gathering in his own home town, and of course he did not then think that the next gathering of the kind he would attend would be in New Zealand. As Judge-Advocate of the American Armed Forces here he came in contact with the local legal profession, and their association had always been most pleasant. He had enjoyed that contact very much, and thanked every one again for the kindness of his reception.

The gathering was altogether a delightful one. The fervour with which references to the guest of honour were greeted was its outstanding feature. The continued enthusiasm and cordiality marked it as probably the most successful function of the kind ever held in Auckland.

BENCH AND BAR.

Lieutenant-Colonel P. B. Cooke, M.C., K.C., who was attached to the Adjutant-General's Branch, Army Headquarters, on part-time duty from November, 1940, until the beginning of 1942 and who since then has held the full-time appointment of Director of Personal Services at Army Headquarters, has relinquished that appointment and has resumed practice at 57 Ballance Street, Wellington.

Mr. Trevor Henry and Mr. Frederick McCarthy, of Auckland, have amalgamated their practice with Mr. A. R. Wilson, who has taken over the practice carried on, until his elevation to the Supreme Court Bench, by Mr. G. P. Finlay, with whom Mr. Wilson was for twenty years associated. The new practice will be carried on under the firm name, Messrs. Wilson, Henry, and McCarthy, in Gifford's Buildings, corner of High Street and Vulcan Lane.

OPTIONS TO PURCHASE AND THE PERPETUITY RULE.

Sixty Years with Gomm's Case.*

By I. D. CAMPBELL.

(*Continued from p. 226.*)

Cases under the rule against perpetuities are of two quite distinct types. A disposition of property may fall within the rule because it has the effect of leaving the property without an owner capable of disposing of it. Thus it may be left to trustees on trust for persons yet to be born. Neither the trustees nor the intended beneficiaries are in a position to alienate the property. This suspensory condition of the estate must accordingly be limited to the perpetuity period. But there is another very different type of case which falls within the rule. This arises where the property is at all times vested in a beneficial owner, but is subject to some contingent future interest which prevents the owner of the property subject to such interest from disposing of the property free of the fetter created by the contingent interest. The property is not inalienable, but is not freely alienable, and this tendency to restrict free alienation of the property brings it within the rule. Where a future right to property arises under a covenant such as the one in this case or an option to purchase contained in a lease the case is of this second type. There is no objection on the ground that the property is at any time left without a beneficial owner. The objection, if any, lies in the effect of the covenant as imposing on the owner a fetter or restraint of indefinite duration hindering the alienation of the fee-simple until a remote date or even in perpetuity. As one writer says, the real owners of the property would be unreasonably hampered in the exercise of their rights of alienation by the existence for too long a period of these possibilities of property outstanding or to arise in the persons intended to take the property in the contingency specified. (Compare the statement of the rule by Lord Macnaghten in *Edwards* v. *Edwards*, [1909] A.C. 275, in which the judgment of Jessel, M.R., in *Gomm's* case was approved.)

It is true that every type of alienation is not restricted in these cases. A purchaser for value without notice acquires the legal estate free of the equitable interest, and there is often nothing to prevent such a sale. Even so, the owner cannot destroy the contingent interest on any other disposition of the property. It holds good against donees, devisees, and purchasers with notice. This is ample restraint on alienation to bring it within the rule. As Jessel, M.R., stated during the course of the argument in *Gomm's* case (p. 579): "That the equity may be got rid of by purchase for value cannot affect the question of remoteness." But if the rule stated by Lewis and adopted by the Court of Appeal is to be accurate it must be amended so that it will not appear to exclude equitable interests which are so destructible. The proviso might be made to read: "And which are not destructible . . . except with the concurrence of the individual interested under the limitation or by conveyance of the property to a *bona fide* purchaser for value."

An option to purchase falls for these reasons within the scope of the perpetuity rule, among what Challis has described as "nondescript equities not amounting either to express trusts or to equitable estates, but being in the nature of claims upon specific property arising out of covenants and other contracts for the assurance, at some future time and upon specified terms, of a proprietary interest." At one time it was thought that if such claims could be released by the claimant—*i.e.*, where he was in being and *sui juris*, the perpetuity rule did not apply: *Gilbertson* v. *Richards*, (1859) 4 H. & N. 277, 157 E.R. 845; *Birmingham Canal Co.* v. *Cartwright*, (1879) 11 Ch.D. 421. In these cases it was said that the rule against perpetuities was aimed at preventing the suspension of the power of dealing with property. But that is only one-half of the rule. It is equally aimed at preventing a fetter of a contingent nature and indefinite duration being placed upon an existing alienable interest. The dictum in *Gilbertson* v. *Richards* and the decision in *Birmingham Canal Co.* v. *Cartwright* were disapproved by Kay, J., the trial Judge in *Gomm's* case, and on appeal his view was sustained and those cases were overruled.

At this point one may doubt the correctness of a principle deduced from this case by the editors of *1 Jarman on Wills*, 7th Ed. 252. In that work there is a section under the heading: "Whether a vested alienable interest can constitute a perpetuity." Probably no reader has come upon that heading for the first time without something of a shock. The paragraph is referring to the modern rule against perpetuities, which requires that an estate become vested in interest within a certain period. If it be already vested in interest, what can the perpetuity rule possibly require in addition? It is suggested that there is here a confusion in the use of the word "vested," carried over from the judgment of Fry, J., in *Birmingham Canal Co.* v. *Cartwright*. The text maintains, on the authority of *Gomm's* case, that where property is presently vested in A. subject to a right or interest presently vested in B. which may not take effect *in possession* until the happening of an event which need not necessarily happen within the perpetuity period, B.'s "presently vested interest" is void. It is, indeed, admitted that in *Gomm's* case the option was contingent, as the right to call for a conveyance did not arise until the land was required for the railway or works of the company. But apart from that condition it is apparently considered that the option would have been vested. This seems a clear case of confusion of terms. It is true that there is vested in an option-holder a present contractual right to exercise his option. But this does not affect the nature of the equitable interest created by the option. That interest is contingent. It is not and cannot be "vested" in the sense required under the perpetuity rule. If it were, it would have arisen not under an option but under an unconditional contract of sale. Not until the option-holder exercises his option does any equitable estate vest in him unconditionally as required by the rule. It is submitted that nothing in the judgments in the Court of Appeal in *Gomm's* case will support the view taken in Jarman, and that an option which has yet to be

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

exercised confers no more than a contingent interest which naturally falls within the perpetuity rule.

Such, then, was *Gomm's* case. It was to lead directly to some of the most ill-considered decisions to be found anywhere in our property law, precipitating for a period a state of affairs that might justly be described as Cyprian Williams against the rest. "The rest" (His Majesty's Judges of first instance and of the Court of Appeal) were to have their decisions alternately approved, laboriously explained, or shown up as absurd by the series of articles which he produced. In the retrospect of nearly forty years one is still inclined to feel that when Cyprian Williams and the Judges differed, the case made out by Williams had the more to commend it. In the law of property the doctrine of *stare decisis* has, no doubt, its most important application; but the comments and criticisms of a recognized authority like Williams, voiced immediately after the decisions in question, have had the effect of preserving doubts which would otherwise have become untenable through lapse of time.

(To be continued.)

NEW ZEALAND LAW SOCIETY.

Council Meeting.

(Continued from p. 229.)

Servicemen's Settlement and Land Sales Bill.—The Standing Committee reported that advance copies were obtained of the Servicemen's Settlement and Land Sales Bill, and a meeting of the Committee was held at which Messrs. A. B. Buxton, S. J. Castle, D. Perry, and J. Miles were asked to attend.

The Bill was carefully examined, and it was decided to make a statement to the Press, and also to obtain an appointment with the Prime Minister with a view to pointing out objections to and defects in the Bill.

Prior to departing to Auckland, the President drafted a statement which was left for Messrs. G. G. G. Watson and T. P. Cleary, the other members of the Standing Committee, to put into final form. This statement was handed to the Press and received wide publicity throughout the Dominion.

The sub-committee and the Secretary waited on the Prime Minister, the Minister of Finance, and the Minister of Lands on the 10th August. There were also in attendance Mr. C. M. Williams, M.P., and Mr. P. Roberts, M.P., Mr. E. C. Adams, Law Draftsman, and representatives of Government Departments interested in the machinery of the Bill.

A full report of the discussion which took place is recorded in the Order Paper.

Mr. Watson then traversed some of the details of the criticism of the Bill.

Members noted that the only substantial amendments made to the Bill were those based on the suggestions of the Law Society. Mr. Watson stated that the points gained as the result of the representations were (1) that the Judge could not be overruled; (2) "land" in Part II was defined as "farmland"; (3) proceedings, where considered advisable, should not be heard in public; (4) with respect to the Committee obtaining a valuer's opinion, it was agreed that the evidence should be in open Court, with liberty to cross-examine (cl. 19 (5) of the Bill); (5) the period for which the Act was to operate was defined.

Mr. Cleary stated that as the work arising out of the Act would have to be done by the profession, the Council of the Wellington Society thought that the profession should offer its assistance to the Government with a view to making the rules workable.

It was pointed out that this was done in respect to the procedure arising out of the Mortgagors Rehabilitation Act, when members of the Wellington Society gave their assistance.

It was resolved that the Council of the Wellington District Law Society should be authorized to approach the Law Draftsman and offer their assistance in the drafting of the regulations and forms.

Industrial Conciliation and Arbitration Amendment Act.—Mr. Watson reported that the attention of the Society was drawn to the Industrial Conciliation and Arbitration Amendment Bill, with a request that the Law Society should make a statement to the Press on the lines of the protest made in 1943.

As the President was in Christchurch at the time, the matter was referred to him by Mr. Watson with a recommendation that a public statement be made on the proposed amendment.

In due course the President discussed the matter with members of the profession in Christchurch, and they, along with him, considered a public statement was not called for.

It was decided to make the following representations to the Prime Minister and the Minister of Labour:—

"Section 2 (1) (*d*). 1.—It was thought that provision should be made relieving an employer from a penalty in cases where he had in good faith paid an employee all that the employee was believed to be entitled to, but it turned out afterwards by reason of a legal decision or on taking legal advice that the employee was entitled to more.

"Section 4. 2.—That there should be an appropriate right of appeal from decisions of the Court of Arbitration both in proceedings for breaches of award and in actions for the recovery of wages. It was also considered undesirable that jurisdiction should be conferred upon any Court or tribunal without preserving the right of appeal for the correction of errors, and that this consideration applied equally to actions for the recovery of wages where large amounts may be in dispute as to other actions arising out of contract."

These views were set out in a letter to the Prime Minister and Minister of Labour, and subsequently Mr. Cleary appeared before the Labour Bills Committee.

Other than a clarification of the clauses referred to, no alteration was made to the amendment.

Mr. G. G. G. Watson; Mr. T. P. Cleary.—A resolution was passed with acclamation expressing the gratitude felt by members to Mr. Watson and to Mr. Cleary, and also to the Wellington members who were associated with them in making representations with respect to (1) the question of Death Duty Procedure, (2) the Land Sales Bill, and (3) the Industrial Conciliation and Arbitration Amendment.

Mr. Watson referred to the suggestion made in the recent issue of the LAW JOURNAL that there should be added to the Standing Committee additional Wellington members, who would act as a Legislative Committee to deal with matters arising out of new legislation. It was decided to deal with the suggestion at the Annual Meeting of the Council.

Post-War Aid.—The Post-War Aid Committee reported as follows:—

"In response to the recent appeal for text-books for the use of law clerks and practitioners serving with the forces, parcels containing the following books were sent per courtesy of the Army Education and Welfare Service Department to the British Council, Cairo: Phipson: *Law of Evidence.* Kier and Lawson: *Cases on Constitutional Law.* Stout and Sim: *Code* (2). Indermaur: *Leading Conveyancing and Equity Cases.* Salmond: *Torts.* Salmond: *Jurisprudence.* Dicey: *Conflict of Laws.* Dicey: *Law of Constitution.* Anson: *Contract.* Maine: *Ancient Law* (3). Sim: *Divorce* (2). Adamson: *English Statutes and Conflict of Law.* Moyle: *Institutes of Justinian.* Kenny: *Outlines of Criminal Law.* Indermaur: *Leading Common Law Cases.* Pitt-Cobbett: *Leading Cases in Constitutional Law*, Volumes 1 and 3. Wright and Strickland: *Finch's Cases on Contract.* Garrow: *Crimes Act and Supplement* (2). Garrow: *Wills and Supplement.* Garrow: *Trusts and Supplement.* Garrow: *Personal Property and Supplement.* Garrow: *Real Property and Supplement.* Garrow: *Notes on Torts.* Wily's *Magistrates' Court Practice.*

"The last seven items were donated by Messrs. Butterworth and Co.

"It is intended to forward some of the books to Lieut. Campbell, Staff Officer, University and Professional Courses of the Army Education Department, for the use of mobilised students, and the remainder will be sent for the use of law clerks stationed in New Caledonia.

"The Committee is grateful to the solicitors who so kindly donated the text-books, to Butterworth and Co. for packing the books, and to Lieut. Campbell for arranging for the free transport of the parcels.

"The Committee is pleased to report that Professor R. O. McGechan, Dean of the Law Faculty, has agreed to act as a member of the Committee.

"With regard to the examination of students in Cairo and prisoner of war camps, the Registrar of the University of New Zealand has advised that a limited number of entries has already been received from both sources, and the University intends to arrange the necessary examinations."

New Zealand Law Journal.—In response to an inquiry Messrs. Butterworth and Co. offered to send three copies of the *New Zealand Law Journal* to New Caledonia for the use of solicitors and law clerks who may be stationed in that area, and also a copy each to the prisoner of war camps in Italy and in Germany. It was decided to thank Messrs. Butterworth and Co. for their action, and also for the gift of text-books which had been included in the parcels sent to Cairo.

King's Counsel Appointment in War Time.—Ten replies were received from District Societies. Nine of the Societies were of opinion that no appointments should be made during the war, but of these four qualified their opinion by adding "unless circumstances necessitated such an appointment."

It was decided to inform the Prime Minister that the majority of the District Societies were of opinion that no appointments should be made in war time.

Law of Succession.—The Secretary reported that she had been informed by the Law Drafting Department that it was hoped next year to completely revise the present laws of succession, when the suggested amendment by the Society would be taken into consideration.

It was decided not to lose sight of this matter.

The Public Trustee and Life Tenants of Freehold Property.—The Hawke's Bay Society forwarded a letter from a member of the Society stating that he was acting for a life tenant A. who had entered into an agreement to lease the property to B. for a period of five years. B. then disposed of her interest under the lease to a new company known as C. The settled land formed part of an estate of which the Public Trustee was trustee. The solicitor forwarded to the Public Trustee for execution a transfer to A. of her life interest. In reply the Public Trustee drew the attention of the solicitor to the provisions of s. 59 of the Public Trust Office Amendment Act, 1921, and pointed out that A. would not be entitled to exercise the powers contained in the Settled Land Act, 1908.

The Hawke's Bay Society suggested that the New Zealand Society either give publicity to the fact that such restrictions existed or take some steps to having the restrictions removed. The Conveyancing Committee was asked to consider the matter and furnish a report, which was as follows:—

"We refer to your letter to us dated 21st June, 1943. Subsection 59 (5) of the Public Trust Office Amendment Act, 1921–22, reads as follows:—

"'In respect of any estate under administration by the Public Trustee, the provisions of the Settled Land Act, 1908, shall have no application, and the powers of leasing and sale thereof shall only be exercised by the Public Trustee, and not by the tenant for life or other person entitled to exercise such power under that Act.'

"The subsection apparently does not transfer to the Public Trustee the powers of leasing and sale given to the life tenant by the Settled Land Act, 1908, and the Public Trustee is thus left to resort to the powers conferred upon him by section 29 of the Public Trust Office Act, 1908, as amended by section 21, Amendment Act, 1913, and also by section 20, Amendment Act, 1921–22. But the subsection seems without doubt to take away from the life tenant in the circumstances envisaged the powers of sale and leasing given to him by the Settled Land Act.

"Even if the subsection had that result the mere transfer of the powers of leasing and sale in the case of estates administered by the Public Trustee, although he is in control of a large number of estates in the Dominion from the life tenant to the Trustee, might not justly be a subject for criticism. A testator who contemplated limiting his freehold property in successive interests should have section 59 (5) in mind when deciding upon the choice of his trustee and make his selection accordingly. This aspect of the matter does not seem to us of very great importance; indeed, some practitioners of wide experience consider that the trustee does not possess sufficient powers of control over the life tenant, and in practice makes little, if any, serious attempt to exercise such control. On the other hand, the trend of opinion in the opposite direction in England has given the life tenant almost completely the status of an owner in fee-simple.

"As we see the position, however, more is involved in this withdrawal of powers from the life tenant.

"The power of sale conferred by Part II of the Settled Land Act is protected by section 67 of the latter Act, which makes void any prohibition against its exercise. A good example of this voidance is to be seen in *Re McCabe*, (1909) 28 N.Z.L.R. 780, where a devise to trustees for the use of the widow for life to carry on a farming business was held in effect to constitute the widow tenant for life, and therefore a clause in the will forbidding the sale of the farm lands was held to be void under section 67.

"The main purpose of Part II of the Settled Land Act was to foster alienability—*Lord Henry Bruce* v. *Marquess of Aylesbury*, [1892] A.C. 356; *Re Mundy and Roper's Contract*, [1899] 1 Ch. 275—and that purpose has been reinforced in England by the 1925 Conveyancing Legislation.

"It would appear that the Public Trustee can only exercise his powers under section 29 of the Public Trust Office Act, 1908, 'if he is not prohibited by the Act or by or under an instrument.' The free alienability created by the Settled Land Act is, therefore, partly destroyed in the case of estates administered by the Public Trustee for the very reason that he can only exercise his powers of sale when the will or settlement does not prohibit their exercise.

"This is a matter that we think deserves consideration by the Law Revision Committee.

"Section 81, the Statutes Amendment Act, 1936, and the decisions thereon, and section 64, the Public Trust Office Act, 1908, will demand attention."

It was decided to send the report to the Law Revision Committee.

(To be concluded).

OBITUARY.

Mr. W. P. Rollings, Wellington.

The death of William Penrose Rollings at a Christchurch Hospital, on Sunday, October 17, 1943, cut short a life which in only thirty-eight years showed solid achievement and much more of rich promise.

In the strong religious background of the home of his parents, the Rev. W. S. and Mrs. Rollings, the enduring qualities of character were formed. In his professional career, Pen Rollings willingly obeyed the biblical injunction to befriend the widowed, fatherless and poor: justice was with him a passion.

After leaving the Wellington Boys' College, Pen Rollings passed through Victoria University College with success, gaining his Master of Arts and LL.B. degrees, and leaving his mark upon student life. In debating, he won high honours with the Union Prize, the Plunket Medal for oratory, and the Joynt Scroll, which with John Platts Mills, now practising law in England, he captured for Victoria University College. He was also editor of *Spike*, and President of the Students' Association. His interest in student affairs did not cease when he left Victoria College, and in 1939 he was elected by his fellow-graduates to the College Council, and he was also a member of the Council of the Massey Agricultural College.

Called to the Bar in 1930, Pen Rollings commenced practice on his own account in Wellington in 1932, and later opened an office in Levin in partnership with J. F. Gavin. His talents led him mainly into common-law work, in which he built up an extensive practice.

In 1937, Pen Rollings married Miss Vivienne Tait, of Wellington, and two children, Clare and Christopher, were born.

In recreation, Pen Rollings turned his attention mainly to yachting. His brother, Theodore, was lost at sea in the yacht *Windward*, when on an ocean voyage to the Chatham Islands. In the Royal Port Nicholson Yacht Club, Pen Rollings was an active administrator, and was at one time its Commodore. The months following the entry of Japan into the war saw Pen Rollings active in forming the Naval Auxiliary Patrol Service among volunteer yachtsmen.

The strain of these months and years added to ill health, necessitated the closing of his office early this year. With

great courage and strength of character, Pen Rollings turned his back on all in which he had spent so much of himself, and set himself with determination to regain his lost health. His last months were a magnificent battle against illness.

It was Pen Rollings's achievement that he always gave of his best without stint.

—H.

TRIBUTES FROM BENCH AND BAR.

There was a large attendance of Wellington members of the profession in the Supreme Court, Wellington, on the morning of October 26, to pay tribute to the memory of their deceased colleague.

His Honour the Chief Justice, the Rt. Hon. Sir Michael Myers, presided, and His Honour Mr. Justice Smith was with him on the Bench.

The President of the Wellington District Law Society, Mr. T. P. Cleary, said that the members of the Wellington Bar had assembled that morning to seek their Honours' leave to pay a tribute to the memory of their late colleague and friend, William Penrose Rollings. He continued: "We have come together on other occasions in the past when death has claimed one of our members; usually one who has spent a long and full life in the practice of the law; who has held high office in the Councils of our profession, and whose eminence at the Bar and services to the Law have called for fitting commemoration. But this morning we mourn one who was not spared to achieve all these things, and the thought uppermost in our minds less praise for the attainments than sorrow for the lost promise of one who is dead ere his prime."

The President went on to say that there could be no doubt that had Mr. Rollings lived his talents would have gained for him a foremost place at the Bar. He was amply endowed with the qualities that go to the making of the accomplished advocate. A scholarly, well-ordered and alert mind, a sound and balanced judgment, and a striking eloquence, were combined with an able knowledge of the law and a persevering industry in the task at hand. Thus equipped, he had at the age of thirty-eight years built up a growing common-law practice, and had already met with a success in the Courts which, although considerable in itself, was believed by his friends to be only an earnest of what was to come. They little thought that he was fated not to live to gain the full measure of success and enjoy the rewards that his ability marked out for him.

"Nor were his interests wholly absorbed by the law," Mr. Cleary said. "From his student days he had played a prominent part in University life, which culminated when he became a member of the Council of Victoria University College at an exceptionally early age. He was active also in a number of other bodies whose work attracted his interest; but it is as a lawyer that we wish to speak of him this morning in this Court where he so recently practised. It was a shock to his colleagues to hear at the end of last year that he had suffered a breakdown in health; and the news of his death came with a sense of tragedy that a career so full of hope and promise had been cut short before even it could reach maturity. It was here in Wellington that he received his legal training, here also that he practised; and his Wellington colleagues, who knew him so well, will bear him in remembrance as a man of the highest ideals and of sterling character; as one who was always loyal to the best traditions and most exacting standards of our profession; and as one who bore success with modesty, and endured the severest trials and suffering with courage and cheerfulness.

"To his widow, left with a young family, to his parents and to his relatives, we extend our sincere and respectful sympathy."

His Honour the Chief Justice then addressed the Bar, as follows:—

"Like yourselves, we of the Bench heard with deep regret of the death of your colleague at the Bar whose loss you mourn to-day. You know that the Judges who in the nature of things take a detached view of men and affairs and who are above all things jealous of the maintenance of the highest professional standards, always watch with the greatest interest and satisfaction the progress of young men at the Bar whose high character and ability mark them out as potential leaders of their great profession. Such a one was the late Mr. Rollings. His ability and character compelled the respect, his courage in his losing fight against ill health, the admiration, of all who knew him. His untimely passing is a great loss not only to the profession, but to the public. The knowledge that he has left behind him the record of good service and of a noble character will, one ventures to hope, to some extent alleviate the grief of those near and dear to him who are left to mourn his loss, and to whom we would express our word of sincere sympathy."

CORRESPONDENCE.

Evidence in Running-down Cases.

The Editor,
N.Z. LAW JOURNAL, Wellington.

SIR,—

It is a common, but improper, practice, in Magistrates' Courts, in civil actions for negligence arising out of street accidents, for evidence to be given for the plaintiff that the defendant has already been convicted of negligent driving on the occasion in question. There are dicta in some old cases, and statements in early text-books on Evidence, that such prior convictions constitute some, or *prima facie*, evidence of the fact in issue in the subsequent civil proceedings, but the recent judgment of the Court of Appeal, per Goddard, L.J., in *Hollington* v. *F. Hewthorn and Co., Ltd.*, [1943] 2 All E.R. 35, disposes, finally, of these. The old cases and text-books were carefully examined; and the evidence of the prior conviction there, was rejected on the ground that it was *res inter alios acta*. At p. 43, Goddard, L.J., said:

> The contention that a conviction or other judgment ought to be admitted as *prima facie* evidence is usually supported on the ground that the facts have been investigated, and the result of the previous investigation is, therefore, at least some evidence of the facts that have been established thereby. To take the present case, it could be said that the conviction shows that the Magistrates were satisfied, on the facts before them, that the defendant was guilty of negligent driving. If that be so, it ought to be open to a defendant who had been acquitted to prove it, as showing that the Criminal Court was not satisfied of his guilt; though the discussion by text-book writers and in the cases all turn on the admissibility of convictions, not of acquittals. If a conviction can be admitted, not as an estoppel, but as *prima facie* evidence, so ought an acquittal: and this only goes to show that the Court trying the civil action can get no real guidance from the former proceedings without retrying the criminal case.

If, of course, in connection with the earlier conviction, the defendant has pleaded guilty, or admitted he was negligent (at p. 42):

> Proof by a witness, present at the trial, of the confession is admissible, because an admission can always be given in evidence against the party who made it.

Another common, but improper, practice is for a witness, such as a bystander, as part of his evidence, to say that he considered, or that in his view, one, or the other, of the usual two parties involved was responsible for the accident. This, of course, is purely opinion evidence of a type which is inadmissible. As to this, Goddard, L.J. (at p. 40), said:

> It frequently happens that a bystander has a complete and full view of an accident; it is beyond question that while he may inform the Court of everything that he saw, he may not express any opinion on whether either or both of the parties were negligent. The reason commonly assigned is that this is the precise question the Court has to decide; but in truth it is because his opinion is not relevant. Any fact that he can prove is relevant; but his opinion is not.

It is thought that it is worth while drawing particular attention to this recent, important decision of the Court of Appeal.

Yours, &c., C. C. CHALMERS.

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

Actions against Local Bodies.—Nearly all local bodies in this country are protected by statutory provisions requiring actions against them to be commenced within a fixed time and requiring, in addition, the giving of written notice before action is commenced. In the recent case of *Colonial Mutual Life Assurance Society, Ltd.* v. *Wellington City Corporation*, [1943] N.Z.L.R. 547, Myers, C.J., said that it might be suggested, probably with good reason, that a notice of action is an anachronism, and pointed out that its necessity, as a condition precedent to actions against public authorities, was abolished in England as long ago as 1893. But it is not only the requirement of a notice of action that is an anachronism. There is to-day no valid reason why local authorities should be protected by any *special* time-limit on actions. The argument that such provisions are necessary in order to enable local bodies to budget for expenditure is a specious one, and it is high time that the motley of special and differently worded time-limits to be found in such legislative jungles as our Municipal Corporations Act, our Counties Act, our Harbours Act, and our Electric-power Boards Act was swept altogether from our statute-book.

The Length of Judgments.—Just as there are concise opinions of counsel and prolix opinions of counsel, so there are concise judgments and prolix judgments. Generally speaking, the judgments of Sim, J., were models of brevity and conciseness. At all events one could never apply to any judgment of his the words that were used last year by an English Lord Justice concerning a judgment then under appeal. The *Solicitors' Journal* (London) says that the Lord Justice commenced his own judgment thus: "This is as plain a case as was ever brought. If the learned Judge had not achieved the remarkable feat I should have thought that it would have exceeded the bounds of human prolixity to have delivered a judgment on it which occupied fifteen pages." Unfortunately our London contemporary names neither the Lord Justice nor the Judge appealed from!

Parental Wealth and Children.—A short time ago, during the hearing of proceedings under the Family Protection Act, Callan, J., expressed some views on parental wealth and its effect upon children. Journalists are journalists, and the judicial observations were headlined in the daily papers:

> His Honour said that some men by ability and industry, or by good fortune, acquired considerable money. Their children grew up in an atmosphere knowing that their father was wealthy and vaguely understanding that something would come to them later. That had an unfortunate effect on their characters. In old age some fathers discovered that it would have been a very much better thing if they had not saved so much.
>
> All the children suffered, said His Honour. The daughters were sought after by the wrong kind of suitors and made unhappy marriages. The sons did not strike out wholeheartedly for themselves in the way they would have done if it had not been for a father's wealth.

These words, like so many of the headlined observations of the late McCardie, J., recall what that great Judge of the Supreme Court of the United States, O. W. Holmes, J., said in one of his judgments: "To philosophize is to generalize, but to generalize is to omit." For every case that can be found to support Callan, J.'s, observations, it is probable that at least one other could be found where parental wealth had no such effect on son or daughter. The truth is that everything depends upon the characters of the children —and that is a subject upon which it is impossible to generalize.

Execution of Documents by Servicemen.—The recent amendment to the Evidence Emergency Regulations makes provision for the admissibility in evidence of any document executed out of New Zealand by any member of the Forces if it is executed before (or if it carries a declaration of due execution made by an attesting witness before) an officer holding a rank not below that of Lieutenant-Commander, Major, or Squadron-Leader, or an equivalent rank, or holding an appointment as a Legal Staff Officer. The only extraordinary thing about this badly needed provision is that it has been so long in making its appearance. There is little saving grace in the fact that the regulation applies to documents "heretofore or hereafter" executed.

Judges and Insomnia.—The Bar is not at present troubled by any Judge with the habit of appearing to slumber on the Bench. But MacGregor, J., when discharging his judicial duties, used often to assume a somnolent appearance, though whether he actually slept or not has never been decisively proved. Certainly there is a remembered occasion when he delivered a judgment omitting all mention of a point that had been raised in argument shortly after lunch, during a period of seeming detachment; but the Court of Appeal soon put the matter right. In England there have been Judges who have undoubtedly slept upon the Bench. Coleridge, L.C.J., is said to have been one of the soundest sleepers. On one occasion Matthew, L.J., was asked how his colleague the Lord Chief Justice was. "Quite recovered from his insomnia," was the prompt reply.

The Law as to Companies.—In England the Government has recently set up a Committee on Company Law charged with the duty of considering and reporting as to what major amendments are desirable in the Companies Act, 1929 (Eng.), and, in particular, of reviewing the requirements prescribed with regard to the formation and affairs of companies and the safeguards afforded for investors and for the public interest. Cohen, J., the new Judge of the Chancery Division, is President of the Committee, the proceedings of which are to be regarded as a matter of urgency. Considering that it is war-time and that only fourteen years have elapsed since the English Act of 1929, it is perhaps a little surprising to find the matter of amendment of company law regarded as an urgent one. The *Law Journal* (London) suggests that among the matters leading to the setting-up of the Committee are the increase in the practice of forming subsidiary companies, the growth of purely holding companies, and the overworked practice of placing shares in the names of nominees. Our Act of 1933 being modelled on the English Act of 1929, the report of the Committee will be awaited with much interest by the profession here.

PRACTICAL POINTS.

This service is available free to all paid annual subscribers, but the number of questions accepted for reply from subscribers during each subscription year must necessarily be limited, such limit being entirely within the Publishers' discretion. Questions should be as brief as the circumstances will allow; the reply will be in similar form. The questions should be typewritten, and sent in duplicate, the name and address of the subscriber being stated, and a stamped addressed envelope enclosed for reply. They should be addressed to: "NEW ZEALAND LAW JOURNAL" (Practical Points), P.O. Box 472, Wellington.

1. Lease.—*Assignment of Lease—Lessor's Consent Conditional on Deed of Covenant by Assignee—Costs.*

QUESTION: A lease from A. to B. contains the following clause: "The lessee will not assign sublet transfer or part with possession of the said land or any part thereof without the previous written consent of the lessor first had and obtained but such consent shall not be unreasonably or arbitrarily withheld." B. has agreed to assign the lease to C. A. has agreed to such assignment subject to C. entering into a deed of covenant with A. C. is agreeable to enter into such deed of covenant, but B. objects to paying the costs of same. Is A. entitled to withhold his consent till a deed of covenant is entered into? There is no local practice regarding the matter, and, as far as I can ascertain, this is the first time the matter has been raised locally.

ANSWER: In *Balfour* v. *Kensington Gardens Mansions, Ltd.*, (1932) 49 T.L.R. 29, decided on the English proviso corresponding with the proviso to be implied in lease by s. 19 (1) of our Law Reform Act, 1936, Macnaghten, J., said, "It might well be that, in the case of an assignment, it might not be unreasonable on the part of a lessor to require an assignee to enter into a direct covenant with him." Assuming this is the case (but see *Evans* v. *Levy*, [1910] 1 Ch. 452), and B. agrees to the condition, then A. is justified in withholding his consent until the deed of covenant is entered into, in which case the costs of the deed of covenant would be payable by B.

2. Probate and Administration.—*Application to reseal Probate—Affidavit as to Nationality—Swearing of same.*

QUESTION: In connection with the resealing in New Zealand of a probate granted in New South Wales an affidavit as to nationality has been received. There are two deponents in the affidavit in question, one of whom has sworn the affidavit "on active service" before a "commissioned officer of the rank of Captain in the A.M.F." The other deponent has sworn before a Justice of the Peace, this deponent being a civilian. Is there any provision for the filing in the Supreme Court in New Zealand of an affidavit so sworn?

ANSWER: Under R. 188 of the Code of Civil Procedure affidavits may be sworn or made outside New Zealand in Great Britain or any other State of the British Commonwealth of Nations before any Judge or person lawfully authorized to administer oaths in such country.

Paragraph 4092 of *Butterworth's Digest of War Legislation (Australia)* (Vol. II) sets out an amendment of the National Security (Supplementary) Regulations—Administration of Oaths, &c., to Members of Forces. This provides for the swearing of affidavits by soldiers on active service before commissioned officers of the rank of Captain and upwards, and that it is not necessary to state in the jurat the place where such affidavit was sworn. With regard to the swearing before a Justice of the Peace, *Pilcher's Practice of the Supreme Court of New South Wales*, para. 1569, sets out the provision under which a Justice of the Peace is empowered to take oaths in all matters pending in the Supreme Court.

3. Probate and Administration.—*Exemplification of Probate granted in England—Resealing in New Zealand—Whether Power of Attorney required.*

QUESTION: Can exemplification of probate granted in England be resealed in New Zealand by attorney of English executors where no express authority to reseal is given by the power of attorney?

Probate of a will was granted in England. The executors of same have forwarded an exemplification of the probate to us, also a power of attorney which recites "we desire to appoint an attorney to obtain probate of the said will or resealing of the same or letters of administration with will annexed," but in the operative part of the power no reference is made as to resealing and only gives power to apply for a grant of probate or letters of administration with will annexed. The power also gives power to deal with the estate generally and to execute such deeds, transfers, releases, and other documents necessary in connection with the estate.

Your practice precedent in (1938) 14 N.Z. LAW JOURNAL, 183, does not directly affect the point raised, but it does distinguish between resealing letters of administration and probates and that in the latter case no affidavit is required. A case referred to in such article, *In re Willcox*, is not on all fours, as that also referred to resealing letters of administration and not probate. Actually in the case of resealing a probate the question arises as to whether the power of attorney is necessary at all for Court purposes except perhaps as an indication that the applicant to reseal is a person properly authorized to deal with the estate.

ANSWER: Exemplification of probate granted in England can be resealed in New Zealand without a power of attorney.

Sections 43 and 44 of the Administration Act, 1908, provide the authority for resealing in New Zealand, and there are no rules concerning resealing. There is no mention in these sections, or any known authority, that requires the appointment in New Zealand of an attorney for the purpose of resealing an English grant here.

The practice in the Supreme Court at Wellington is to reseal English grants irrespective of whether the solicitors here have a power of attorney or not. If there is a power of attorney, it is merely produced for inspection. If there is a specific clause in the power of attorney to reseal, then there is definite authority. If there is no specific clause, then the fact that the solicitors have been appointed attorneys in New Zealand to handle the portion of the estate situated here and remit the proceeds to England is sufficient indication to the Court that the person applying to reseal is one properly authorized to deal with the estate in New Zealand. In some cases there is no power of attorney, the New Zealand solicitors acting in such cases on a letter of instructions from their principals in England.

It may be that some Registries adopt the practice of requesting evidence that the person applying for resealing is a person properly authorized to do so. Where the person holds a power of attorney, then such document is produced for inspection, and a copy is left on the Court file. Where the solicitors are resealing on instructions given in a letter from their principal, in England, the letter is produced, and a copy left on the Court file; or a copy of such letter is exhibited to an affidavit, which is filed. There is something to be said for such practice in that it ensures some safeguard to the Court resealing. However, there does not seem to be any authority for it.

With regard to resealing, attention is drawn to RR. 531DD and 531EE of the Code of Civil Procedure, which require an affidavit whether or not the attorney or other person resealing, and the executor, are alien enemies; also, as to whether the deceased was or was not an alien enemy.

RULES AND REGULATIONS.

Servicemen's Settlement and Land Sales Regulations, 1943. (Servicemen's Settlement and Land Sales Act, 1943.) No. 1943/162.

Land Sales Court Remuneration Regulations, 1943. (Servicemen's Settlement and Land Sales Act, 1943.) No. 1943/163.

Revoking the Sale of Potatoes Control Order, 1943, and the South Island Potatoes Control Order, 1943. (Primary Industries Emergency Regulations, 1939.) No. 1943/164.

Rationing Emergency Regulations, 1942, Amendment No. 2. (Emergency Regulations Act, 1939.) No. 1943/165.