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PRACTICE: ENLARGEMENT OF TIME FOR SERVICE OF WRIT OF SUMMONS, &c.

AN interesting point of practice was decided by the Court of Appeal in England recently in *Holman* v. *George Elliot and Co., Ltd.*, [1944] 1 All E.R. 639. It relates to the extension of time for service of a writ of summons, which has not been served within twelve month of its issue, where the claim was subject to the statutory limitation imposed by the Fatal Accidents Act, 1846, which prescribes the same limitation as does s. 8 of our Deaths by Accidents Compensation Act.

On October 9, 1941, the plaintiff's husband was killed in an accident. Under the statutes mentioned any claim arising out of a fatal accident must be brought within twelve months. Two days short of the time-limit—namely, on October 7, 1942—the widow's solicitors issued a writ claiming compensation for the loss of her husband. Through admittedly grave negligence on the part of those solicitors' managing clerk, no steps were taken to serve the writ on the defendants until it was served on October 7, 1943, one day after the expiration of twelve months from the date of issue.

For simplification, we now propose to translate the English rules in terms of our own.

Rule 36 of the Code of Civil Procedure, which corresponds in all material points with R.S.C. Ord. 8, r. 1, is as follows :—

> Where a writ has not been served on the defendant, or any defendant named therein, within twelve months from the date thereof, the plaintiff may, before the expiration of the said period of twelve months, apply to the Court for leave to renew the writ, and the Court, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original and duplicate writs of summons be renewed for six months from the date of such renewal, and so from time to time during the currency of the renewed writ.

Rule 594, which reproduces, almost without difference in wording, R.S.C. Ord. 64, r. 7, provides :

> The Court shall have power to enlarge or abridge the time appointed by these rules, or fixed by any order enlarging time for doing any act or taking any proceeding, on such terms (if any) as the justice of the case may require; and any such enlargement may be ordered, although the application for the same is not made until after the expiration of the time appointed or allowed.

Now, it is clear that the writ in *Holman's* case had ceased to be in force under the former rule. On November 1, the defendant company moved to set aside the writ on the ground that it had expired, and the Master (who under the English rule has the power to deal with such applications) ordered that "the service of the writ be set aside on the ground that the writ, having been issued on October 7, 1942, was not served on the defendants until October 7, 1943, on which date it was no longer in force."

The plaintiff applied, on January 17, 1944, to the Master, asking for an extension of time for the service of the writ, pursuant to the rule corresponding with our R. 594. He refused that application. An appeal was taken to Stable, J., who ordered that the appeal be allowed, and that the writ should be renewed for six months from the date of its expiry. The defendant company appealed from that order to the Court of Appeal. Reliance was placed, in particular, in argument by the appellant, on the old cases which lay down the rule that, where an extension of time would have the effect of depriving a defendant of an accrued defence under a statute of limitation or its equivalent, such an extension ought not to be allowed. In particular he relied upon a decision of the Queen's Bench Division, confirmed by the Court of Appeal in *Doyle* v. *Kaufman*, (1877) 3 Q.B.D. 7, 340, where it was held that the Court has no power under R. 594 (Ord. 64, r. 7) to extend the time for renewing the writ of summons where the claim would, in the absence of such renewal, be barred by the Statute of Limitations.

MacKinnon, L.J., in his judgment, said that counsel for the plaintiff had pointed out, and His Lordship thought with reason, that *Holman's* case was not a case where the order of the Court extending the period for the delivery of the writ deprived the defendant of an accrued right of defence pursuant to the Statute of Limitations or its equivalent under Lord Campbell's Act (the Deaths by Accidents Compensation Act, 1908). The right of defence by the limitation section of that statute would arise if the writ had not been *issued* before October 9, 1942. It was, in fact, issued two days before the expiry of the twelve months.

The learned Lord Justice said that the sole question for decision was, first of all, whether there is a discretion in the Court under R. 594 (Ord. 64, r. 7) to enlarge the time fixed for the service of a writ under R. 36; and, secondly, if there is such a discretion, whether Stable, J., had exercised it rightly.

His Lordship proceeded to say that he thought it was not accurate to say that *Doyle* v. *Kaufman* (*supra*) laid down as a settled rule that the Court had no power to extend the time within the rule. He thought the true view to be, as indicated by Kay, L.J., in a subsequent judgment in *Hewett* v. *Barr*, [1891] 1 Q.B. 98, that there is a discretion in appropriate circumstances though no doubt *Doyle* v. *Kaufman* points out circumstances in which it would be wrong to exercise that discretion in favour of an applicant plaintiff. Such a discretion has been recognized in subsequent cases, such as *Mabro* v. *Eagle Star and British Dominions Insurance Co., Ltd.*, [1932] 1 K.B. 485, where again the rule about depriving a defendant of an accrued defence under a statute of limitation had been relied upon as a reason why no order should be made. Greer, L.J., summed up the matter at the end of his judgment, when he said:

> Whether the matter is one of discretion or not, it appears to me inconceivable that we should make an order which would have the effect I have mentioned. It has been the accepted practice for a long time that amendments which would deprive a party of a vested right ought not to be allowed.

MacKinnon, L.J., said he thought that there was no rule that the Court or a Judge is deprived of any discretion of allowing such an extension of time as was involved in the appeal under notice, but that there had been an accepted practice for a long time not to exercise that discretion in such circumstances as were dealt with in *Doyle* v. *Kaufman*.

In the circumstances, which we have already outlined, two days over the twelve months' limitation imposed by Lord Campbell's Act were allowed to elapse before the writ was actually served. In those circumstances, there was a discretion on the part of Stable, J., to make the order extending the time. Not only was that an exercise of discretion in which the learned Lord Justice would not interfere, but it was an exercise of discretion which he thought was perfectly right and proper.

In agreeing that the appeal should be dismissed, Morton, J., who, with MacKinnon, L.J., comprised the Court of Appeal, considered the wording of Ord. 64, r. 7, which, as we have said, is almost identical with our R. 594; and he was satisfied, for the reasons given by MacKinnon, L.J., that *Doyle* v. *Kaufman* and *Hewett* v. *Barr* did not deprive the Judge of a discretion under that rule. He added that in *Hewett* v. *Barr*, Lord Esher commenced his judgment by saying:

> It has been laid down in *Weldon* v. *Neal* ((1887) 19 Q.B.D. 394), as a good rule of conduct, with regard to the granting of amendments, that they ought not to be granted where they would have the effect of altering the existing rights of the parties. This being the rule with regard to amendments of pleadings, the same principle applies still more strongly to the case where we are asked to allow the renewal of a writ, though by so doing we should deprive the defendant of his existing right to the benefit of the Statute of Limitations.

As Morton, J., read the judgment, he considered that Lord Esher was not suggesting that the discretion had gone. Similarly, Lopes, L.J., after referring to *Doyle* v. *Kaufman*, ended by saying "In my experience the practice as laid down in that case has been followed ever since." There again His Lordship did not think that any of the members of the Court of Appeal in *Hewett* v. *Barr* had intended that there was such an absolute prohibition against exercising what appeared to be a discretion under our R. 594, as had been suggested by counsel for the appellant. He himself would have exercised the discretion in the same way as had Stable, J.

It is noteworthy that R. 594 came under consideration by our Court of Appeal in *Wright* v. *Anderson*, [1936] N.Z.L.R. 315, on a summons for an order enlarging the time for giving a notice under R. 254 of the Code of Civil Procedure requiring an action to be tried before a jury and enlarging the time for delivery of the notice. On appeal from the order of Ostler, J., refusing the application, the Court of Appeal, in a judgment delivered by Reed, A.C.J., held that no hard-and-fast rule for the exercise of discretion under R. 594 can be laid down, but each case must be considered solely on its merits. We do not propose to deal with this judgment in any detail; but it is clear that our Court of Appeal came to the same conclusion as their Lordships did in *Holman* v. *Elliot and Co.* (*supra*), though not one of the authorities cited by their Lordships in their judgments was referred to either in argument or judgment in our Court of Appeal. The compelling authority in that Court was the dictum of Bowen, L.J., in *Cusack* v. *London and North Western Railway Co.*, [1891] 1 Q.B. 347, 349, where he disagreed with the cases belonging to the period when stricter views were held—*e.g.*, *Collins* v. *Vestry of Paddington*, (1880) 5 Q.B.D. 368, and *In re Pilcher*, *Pilcher* v. *Hinds*, (1879) 11 Ch.D. 905, 907.

Similarly, in an earlier decision, *Black* v. *McKenzie* (*No. 2*), [1918] N.Z.L.R. 235, our Court of Appeal decided that the granting, under R. 594, of an order for enlargement of time within which to move for a new trial under R. 284, was a matter of discretion, and that no specific or fixed or binding rule could be laid down as to the grounds which must be proved before such order is made; but the circumstances of each case must be considered.

Recently, in *Stone* v. *Scaife* (to be reported), on a motion for a new trial, Callan, J., held, where the application had not been made under R. 284 ("within four days after trial"),—in respect of which the time for moving runs from the date of the finding of the jury and not from the date of entry of judgment by the Judge—that the Court has, under R. 594, a discretionary power to enlarge the time mentioned in R. 284. His Honour thought that, if a satisfactory case could be made out on the merits, it would be a proper exercise of discretion under R. 594 to enlarge the time.

Finally, it must always be borne in mind, when considering any decisions on the exercise of judicial discretion, that, as Lord Wright pointed out in *Evans* v. *Bartlam*, [1937] 2 All E.R. 646, 656, a discretion necessarily involves a latitude of individual choice, according to the particular circumstances, and differs from a case where the decision follows *ex debito justitiae*, once the facts are ascertained. While the principles enunciated in other cases help the Court or Judge too in exercising the discretion, in matters of discretion, as under R. 594, no one case can be an authority for another. This, in effect, is what Chapman, J., indicated in 1917 in *Black* v. *McKenzie* (*No. 2*), *supra*, at p. 242, when he said that he strongly objected to the Court's fettering itself by turning a matter of discretion into a question of law by means of a set of decisions forming a sort of *corpus juris* relating to a particular subject; but, at the same time, the Court ought to endeavour to observe some recognizable principle in acting in such matters.

SUMMARY OF RECENT JUDGMENTS.

NEW ZEALAND HARBOUR BOARDS' INDUSTRIAL UNION OF EMPLOYERS v. TYNDALL AND OTHERS

COURT OF APPEAL. Wellington. 1944. March 29; June 20. BLAIR, J.; KENNEDY, J.; CALLAN, J.; NORTHCROFT, J.

Industrial Conciliation and Arbitration Acts—Award—Ambiguity in Terms—Whether such Award invalidated by Statute—Industrial Conciliation and Arbitration Act, 1925, s. 89 (1) (2).

The following provisions of s. 89 of the Industrial Conciliation and Arbitration Act, 1925,—

(1) The award shall be framed in such manner as shall best express the decision of the Court, avoiding all technicality where possible, . . .

(2) The award shall also state in clear terms what is or is not to be done by each party on whom the award is binding, or by the workers affected by the award, and may provide for an alternative course to be taken by any party,—

are not mandatory, but directory only, and their exact fulfilment is not a condition of jurisdiction.

The case is reported on this point only.

So held, by the Court of Appeal affirming the judgment of *Sir Michael Myers*, C.J., reported [1944] N.Z.L.R. 43.

Counsel: *Stevenson*, for the appellant; *Solicitor-General* (*Cornish*, K.C.,) for Members of Court of Arbitration; *Gresson*, for the New Zealand Harbour Boards' Employers' Industrial Union of Workers.

Solicitors: *Izard, Weston, Stevenson, and Castle*, Wellington, for the appellant; *Crown Law Office*, Wellington, for the respondents.

In re A.B. (AN INFANT).

SUPREME COURT. Hamilton. 1944. July 31; August 4. MYERS, C.J.

Guardianship of Infants—Consent of Court to Infant's Marriage—One Parent of pregnant Infant refusing Consent to her Marriage to Father of her Unborn Child—Factors to be considered—Appeal from decision of Stipendiary Magistrate—Appellate Court's Duty to deal with Matter anew—Guardianship of Infants Act, 1926, s. 8 (1) (b).

In an application under s. 8 (1) (*b*) of the Guardianship of Infants Act, 1926, for the consent of the Court to the marriage of an infant, where a person, whose consent is required, refuses his consent, and the infant applicant is a girl whose intimacy with the man she desires to marry has resulted in her pregnancy, the principal factors to be considered are the welfare of the girl and the interests of her unborn child. These matters are more important than a parent's refusal, even though the Court might consider the refusal a reasonable one from the parent's point of view. Due consideration should be given to such point of view, and also to the fact of the proposed marriage being a mixed marriage, if that is the case, whether the mixture be a matter of race, colour, or religion.

On an appeal from the decision of a Stipendiary Magistrate refusing such consent, the Court must consider the matter anew, and, if necessary, substitute its own impression for that of the Magistrates' Court.

Reid v. *Reid*, [1941] N.Z.L.R. 952, *sub nom. In re Reid* (*an Infant*) G.L.R. 404, applied.

A pregnant girl between nineteen and twenty years of age applied to the Magistrates' Court for its consent to her marriage to the father of her unborn child, who was twenty-two and a half-caste Maori, the son of a Maori father and an English mother. Their marriage was happy, their household conducted on English lines, and their son had received an English education at a primary and a secondary school. The mother of the girl consented to the marriage, but her father refused his consent. The Magistrate also refused his consent. On appeal, the Court reversed the learned Magistrate's decision and gave its consent.

Counsel: *de la Mare*, for the appellant.
Solicitors: *F. A. de la Mare*, Hamilton, for the appellant.

SHARPLEY v. WARD.

SUPREME COURT. Palmerston North. 1944. February 7; May 24. JOHNSTON, J.

Land Agent—Commission—Land Agent authorized to sell Farm Property "on terms approved by" Vendor—Prospective Purchaser introduced by Agent but Terms offered not approved—Sale to same Person through another Agent able to conclude Sale on Terms approved by Vendor—Whether First-named Agent entitled to Commission.

Practice—Judgment—Appeal—Evidence of Defendant not Heard in Magistrates' Court—Case entirely dependent on Factual Evidence affecting Contract between Parties—Judgment for Defendant—Whether Nonsuit proper Decision.

S., a licensed land agent, who was duly authorized to sell W. farm property "on terms approved by me [W.]," introduced J., who ultimately became the purchaser on terms approved by W. W. denied liability on the grounds that, although J. was introduced by S. and did become the purchaser, the actual sale was carried out by another agent, S.'s authority having in the mean time been revoked for the reason, *inter alia*, that J. was unable to secure the required deposit. On claim by S. against W. for commission on the sale at the agreed rate, S. sued W. for the commission agreed upon. At the conclusion of the plaintiff's case, the defendant moved for a nonsuit, but the learned Magistrate finding that the plaintiff had put his whole case forward, entered judgment for the defendant.

On appeal from that decision,

Held, 1. That a revocation of an authority to sell before completion of the sale, but subsequent to the introduction of the purchaser, does not *per se* render the introduction abortive. If a principal revokes an authority to introduce a purchaser, and then, "building" on the introduction, completes the purchase with the person introduced, he must pay the agreed commission or a *quantum meruit*.

2. That the authority given by W. to S. was not a limited mandate, because the sale was to be on terms approved by W. and in any event the person introduced by the agent had become the purchaser on terms approved by W.

Toulmin v. *Millar*, (1887) 58 L.T. 96, applied.

Kennedy and Co., Ltd. v. *Hannafin*, [1929] G.L.R. 43; *Luxor* (*Eastbourne*), *Ltd.* v. *Cooper*, [1941] A.C. 108, [1941] 1 All E.R. 33; *Kirkland* v. *Coulter*, [1936] G.L.R. 674; *Nightingale* v. *Parsons*, [1914] 2 K.B. 621; and *Bentall, Horsley, and Baldry* v. *Vicary*, [1931] 1 K.B. 253, distinguished.

3. That, in the absence of evidence on the part of W., S. had shown a *prima facie* case entitling him to commission, and that the case must be referred back to the Magistrate for a further and complete hearing.

Quaere, Whether *Knight* v. *Mason*, (1912) 15 G.L.R. 300, is authority for substituting judgment for defendant in lieu of a nonsuit in a case entirely dependent on factual evidence affecting a contract between parties.

Counsel: *T. H. G. Lloyd*, for the appellant; *McGregor*, for the respondent.
Solicitors: *Lloyd and Lloyd*, Dannevirke, for the appellant; *G. I. McGregor*, Palmerston North, for the respondent.

GUARDIAN, TRUST, AND EXECUTORS COMPANY OF NEW ZEALAND, LIMITED v. COMMISSIONER OF STAMP DUTIES.

SUPREME COURT. Wellington. 1944. July 17; August 7. BLAIR, J.

Public Revenue—Death Duties (Estate Duty)—Company Shares—Assessment of Value—Considerations likely to depreciate Value of Shares to contemplating Purchaser—Evidence of Experienced Sharebroker contrasted with that of Public Accountants.

In ascertaining for the assessment of death duties under the Death Duties Act, 1921, what sum would fairly represent the shares in a deceased estate if they were turned into cash at the death of the deceased, and, where there is no actual market, applying the test of what a man desiring to buy the shares would have had to pay for them on the date of the death of the

deceased to a vendor willing to sell at a fair price but not desiring to sell, the Court may, *inter alia*, regard the following factors as affecting the price that such a contemplating purchaser would be willing to pay :—

(*a*) Where a company has sustained disastrous losses due to State interference in its operations, the possibility of a recurrence of such interference.

(*b*) The possibility of an increase of income tax of 14s. in the pound.

(*c*) The necessity for making provision from profits for the payment of previous losses sustained by the company.

In ascertaining the value of such shares, the evidence of share-brokers with experience in the buying and selling of shares is to be preferred to that of public accountants without such experience.

In re Goldfinch, Tremaine v. *Commissioner of Stamp Duties*, [1942] N.Z.L.R. 157, G.L.R. 121, and *In re Munro* (deceased), *Turnbull* v. *Commissioner of Stamp Duties*, [1944] G.L.R. 58, followed.

Counsel: *Hoggard*, for the appellant; *Byrne*, for the respondent.

Solicitors: *Findlay, Hoggard, Cousins, and Wright*, Wellington, for the appellant; *Crown Law Office*, Wellington, for the respondent.

"RULE BY REGULATION."

Suggested Safeguards.

By D. J. Hewitt, LL.M.

It was interesting to learn that " Rule by Regulation " was debated in the House of Commons recently, and that the Home Secretary agreed to set up a Select Committee of the House of Commons " to examine rules, orders, and other instruments, and report to Parliament." The task of this scrutinizing Committee will be to safeguard the supremacy of the law. The Committee will report on whether any " rules, orders, and other instruments " should be brought to the special attention of the House.

Delegated legislation, which began in England with the Reform Movement of 1832, received an enormous impetus during the Great War, and was maintained with even greater vigour during the post-war years. " A note of warning," however, was sounded in 1929 by Lord Hewart of Bury, Lord Chief Justice of England. Shortly before " The New Despotism " appeared, the Lord Chancellor appointed a strong Committee under Lord Donoughmore to investigate the legislative and judicial powers of Ministers, and to report upon safeguards " to secure the constitutional principles of the Sovereignty of Parliament and the Rule of Law." The Report of the Committee, a happy blend of sound learning with practical wisdom, was a State document of high authority. Then came a recession in the tide of delegated legislation. In 1939, the call to arms again sounded, and delegation of legislative power again came to the forefront as a measure for meeting the exigencies of war.

The Rule or Supremacy of the Law is one of the two features which distinguish the British constitution from that of foreign constitutions. It has been so ever since the eleventh century. Professor Dicey, in his admirable treatise on the Law of the Constitution, enunciates three distinct yet kindred conceptions of this Rule of Law. First, it means that no man can be punished except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts. Secondly, it means that not only is no man above the law, but every man, whatever his rank or condition may be, is subject to the ordinary law of the land and the jurisdiction of the ordinary Courts. Thirdly, it means that the general principles of the British constitution are mainly the result of judicial decisions determining the rights of private individuals in particular cases brought before the Courts.

Not only in England but in the British Dominions, notably Australia and New Zealand, Parliament has adopted the practice of delegating legislative power to the Crown. In New Zealand, a list of statutory regulations recently published showed 208 regulations to have been issued in one year under various Acts of Parliament. This number, at the rate of four per week, emphasizes the extent to which Orders in Council regulate the lives of the people as compared with the length and number of the Acts of Parliament under whose authority these regulations operate.

It is now generally recognized that regulations must play a part in the conduct of orderly government. It is not possible within the limits of a parliamentary statute to define and provide against all possible contingencies. When a complex subject has to be dealt with it is a common practice to provide for the making of regulations, because a statute would either be too cumbersome and discursive or else require Parliament to be sitting continuously so as to effect amendments.

Into this system there have been creeping for years past, many growing abuses. There have been cases where Bills have been brought before Parliament in a mere framework, and passed into law, leaving to the Crown power to make regulations having the force of law. Thus, Parliament, by its own methods, delegates in a greater or less degree its own statutory powers. Departments of State are then authorized to make regulations which rank equivalent to parliamentary statutes. The inevitable result is a serious encroachment upon the liberty of the individual. For the elected representatives of the people to surrender their rights to a small group of public officials, is a state of affairs that is contrary to the principles of democratic government.

It is well known that there exists in New Zealand a considerable number of statutes—*e.g.*, the Transport Licensing Act, 1931, and the Industrial Efficiency Act, 1936—which have delegated to public officials, to the exclusion of the Courts of law, the power of deciding questions of a judicial nature. Usually the only right of appeal is to the Minister himself. The matter is decided behind closed doors and the Minister can protect himself by sheltering behind the public official appointed to make a report. A constitutional parallel between the wrongs of the Stuart period and the evils now manifest in modern democracy may be readily drawn by the student of history. Proclamations, licensing of monopolies, irregular tribunals, and interference with the ordinary course of justice all have their counterpart in New Zealand to-day. It is becoming increasingly common for Ministers of the Crown to issue their own interpretations of regulations in the form of

newspaper statements, broadcast talks, and even Government pamphlets.

In time of war, some partial surrender of power to the Crown may become necessary, but there is grave danger that this encroachment upon the rights of the individual, and the sovereignty of Parliament, will be maintained with the coming of peace, unless vigorous measures are taken to counteract it. The question is: What is to be done? That some reform will be necessary cannot be doubted.

The following measures are suggested for consideration as suitable safeguards which would reinstate the supreme authority of Parliament as a law-making body.

First, Parliament should fix the scope of the power which it delegates. That is to say, where regulations are authorized, the authority to make them should be "specific" and not "general."

Secondly, citizens should have access to the Courts of the land to test, if they so desire, the validity of any regulations by which they are affected.

Thirdly, a specially constituted tribunal, consisting of three Supreme Court Judges, should be given power to suspend temporarily, on application by an aggrieved party, the operation of a clause in a regulation, if its enforcement might lead to consequences manifestly unjust, which the Legislature could never have contemplated.

Fourthly, all forms of legislation should be directly under the control of Parliament. A law should be enacted prescribing that all regulations automatically lapse unless confirmed by both Houses of Parliament within say, two months, after the commencement of the session following the gazetting of the regulations.

WORLD SECURITY: INTERNATIONAL JUDICIARY.

The American Bar Association Plan.

By J. S. Reid, LL.B., First Secretary to the New Zealand Legation at Washington.

In the expectant atmosphere created by the preparations for the two tripartite meetings on World Security between the United States, United Kingdom, and Russia, and the United States, United Kingdom, and China, which will be held in August, the American Bar Association has been giving earnest consideration to an aspect of international relations which lawyers at least think has been somewhat overshadowed by preoccupation with political and economic questions. A report has now been completed by a Special Committee of the Bar Association which was directed to seek the basis for an international judiciary system that would prove effective in the post-war world. This Committee has now made recommendations to the American Bar Association and in particular has asked the House of Delegates of the Association to adopt the following declaration:

> Whereas, the effective administration of international justice is an indispensable element in the maintenance of peace: and
>
> Whereas, there have not been readily accessible permanent international Courts for the adjudication of all justiciable disputes among nations; and
>
> Whereas, the history of the development of judicial tribunals in various nations demonstrates the advantage of circuit courts and the service by members of the highest tribunals on circuit courts:
>
> Now therefore be it resolved:
>
> I. That the Permanent Court of International Justice, organized in 1922 at The Hague and known as the World Court, should be continued as the highest tribunal of an accessible system of interrelated permanent international courts with obligatory jurisdiction.
>
> II. That a permanent International Circuit Court should be established in the capital of each member nation of the International Judicial System, with jurisdiction over cases against the government in whose capital such Court sits. Each Circuit Court should consist of one member of the World Court on Circuit and one or more International Commissioners assigned to sit with the Court in an advisory capacity.
>
> III. That an International Judicial Conference composed of jurists should be called at the earliest practicable moment with a view to concluding an "International Judiciary Agreement" based on the Statute of the World Court, with such amendments as may be necessary to give effect to the foregoing resolutions, and to provide for the prompt organization and maintenance of the "International Judicial System."

The Committee has also proposed machinery for the appointment of judicial officers and administration of the Court. The World Court at the Hague should continue as the highest tribunal of the international judicial system and in addition a permanent international Circuit Court should be established in the capital of every member nation consisting of one Judge of the World Court on circuit and one or more International Commissioners. The Judges and Commissioners of the Circuit Court should be appointed, not by Governments as in the past, but by a permanent International Conference of Jurists on the nomination of national judicial tribunals. The Judge of the World Court when on Circuit in any national capital would be assisted by the Resident Commissioners acting purely in an advisory capacity. The Commissioners would be vested with authority to deal with interlocutory and minor matters in the intervals between the terms of the Circuit Court and their decisions would be subject to review by the Court.

The jurisdiction of the International Circuit Court would extend to the trial of claims alleging violation of international law or treaties against the Government of the nation in which the Court sits by nationals of any other Government, and also all general international controversies of a legal nature in which both parties agree to give jurisdiction of the Court. The body of law to be administered by the Circuit Courts will be the Statute Law of International Conventions, Customary International Law and the Common Law of the Judicial Decisions of the Circuit Court and the World Court.

The scheme proposed by the Committee would provide for permanent judicial conferences which would supervize the administration of the whole international judiciary system and elect Judges and Commissioners from time to time. It should be initiated by a formal International Conference to be called as soon as possible after the conclusion of the war. It is also suggested that the Conference should foster the study and statement of international law by sponsoring and financing research and publications by scholars, practitioners, and Judges.

These proposals are made in an endeavour to give some continuity and substance to the International Judiciary system which was attempted in the setting up of the Permanent Court of Arbitration at the Hague. Instead of the *ad hoc* selection of jurists under special agreements, a Permanent Judiciary System is proposed whose influence and prestige should be sufficient to establish it firmly as an instrument of international justice.

LAND SALES COURT.

Summary of Judgments.

The summarized judgments of the Lands Sales Court, which appear as under, are published for the general information and assistance of practitioners. They are not intended to be treated as reports of judgments binding on the Court in future applications, each one of which must be considered on its own particular facts. The reasons for the Court's conclusions in any one appeal may, however, be found to be of use as a guide to the presentation of a future appeal, and as an indication of the Court's method of considering and determining values.

No. 15.—McC. to C.

Rural Property—Carrying-capacity—Value as Non-economic Unit—Subdivisional Prospects—Consideration as Home for Person following Limited Farming Pursuits.

This case was productive of a sharp conflict of testimony between the appellant and Mr. W. on the one side and the witnesses for the Crown on the other side. The contest centred almost exclusively on the question of the basis on which the property should be valued.

With a view to a better understanding of the evidence, an inspection of the property was made. It confirmed the testimony that the property was naturally divisible into three areas. First, fronting the road there was an area of some 12 acres of good volcanic loam terrace; secondly, and immediately at the rear of this, there was an area of some 13 acres of light volcanic loam which could be fairly described as consisting of sidlings, with frequent heavy stone outcrops. Of this area some 9 acres were in mixed native bush. On the 12 acres of volcanic loam terrace there was good pasture consisting of English grasses and some paspalum, but some 2 acres of it was carrying a good deal of buffalo grass. On the area of the 13 acres which was not covered by bush, there were approximately 4 acres of somewhat poor pasture, although in the bush itself there was some rough grazing. Thirdly, and finally, at the rear of the 13 acre area there was an area of 57 acres of clay country. This country was in poor pasture and was, admittedly, of much lesser value intrinsically than the volcanic areas on the property.

The Court said: "The description of the property as it in fact exists, suggests very forcibly that the place is not at present an economic unit, and the Court cannot but conclude that Mr. W., in attributing to it, as it stands, an ability to carry thirty-nine cows, one bull and two horses, departed widely from any consideration of reality. His anticipation that a herd of thirty-nine cows on this property would yield 309 lb. of butterfat per cow per annum also seems to exceed the limits of even wishful thinking.

"The truth, as the Court finds it, is that only the 12 acre area described as consisting of volcanic loam terrace is presently susceptible of being used for dairying purposes. The 13 acres of sidlings is too steep and too stony to be capable of much, if any, development, whilst the 57 acre area is of poor quality.

"Any comparison with Mr. B.'s farm is inutile because the latter has 50 acres of good volcanic terrace land as the basis for his dairying undertaking and for the development of the residue of clay land on his property. In fact, the evidence suggests forcibly that the existence of a substantial or preponderating area of volcanic land which is inherently rich and susceptible of development is exceedingly helpful to the successful pursuit of dairying in the locality. Of this type of land the appellant has only 12 acres of real use for dairying purposes, the 13 acre area being too steep and too broken up by stone outcrops to be of very much value for farming purposes.

"The pasture on the 57 acre area is too poor as it stands to be of any substantial utility value to a dairy-farmer. In the result, therefore, it is obvious beyond question that the property is not presently an economic unit and, as it is not contended that its use for any other purpose would make it an economic unit, the Court has no difficulty in accepting the testimony of Messrs. S. and S.

"This conclusion raises the question of the value of the property as a non-economic unit. For the establishment of that value, the appellant relied upon a scheme of subdivision propounded by Mr. W., and upon reference to various sales in the locality.

"Mr. W.'s subdivisional scheme does not commend itself to the Court as in any sense feasible. The property as a whole has a character and characteristic which entitled it to a very real value, but that character and characteristic the subdivisional scheme propounded by Mr. W. would destroy. Besides, there is no reliable evidence that any market exists for the subdivisional areas proposed. In particular, the subdivisional scheme would entail the sale as an exclusive entity of the poor clay area of some 57 acres for farming purposes. Mr. W. somewhat blithely asserted that this area, reinforced with much better volcanic land, cannot be treated as an economic unit, so it is impossible to accept the suggestion that the 57 acre area alone could be converted into a successful dairying proposition.

"These findings invalidate the scheme propounded by Mr. W. and necessitate that the value of the property should be determined as a whole. In that determination the sales of the B., B., and S., properties are not of much assistance as the evidence is that all three of these properties consist of the better quality volcanic-terrace type of country which is admittedly the most valuable in the vicinity. Incidentally, the prices realized for those properties go far to support the testimony of Mr. S. that the volcanic-loam country is, generally speaking, worth some £70 per acre. The Court finds difficulty, too, in seeing any basis for a proper comparison with the sale price of the other properties to which reference was made.

"The highest value of the property in the opinion of the Court lies in its saleability as an attractive home for some one desiring to follow limited farming pursuits whilst engaged concurrently in some other form of avocation. The Court, however, cannot but conclude that the Committee assessed a fair value for the property from this point of view when it fixed the basic value at £3,025.

"As counsel has asked that the Court, instead of dismissing the appeal if it felt itself constrained so to do, should grant consent to the sale at £3,025, it therefore adopts that course. Consent to the sale at £3,025 is therefore given, provided the sale is completed on or before August 20 next, otherwise the appeal is dismissed."

No. 16.—D. to B.

Rural Property—Carrying-capacity—Condition of Property—Policies of Possible Development disregarded.

On the hearing of this appeal the appellant presented a case very different from the case presented to the Committee. Before the latter all parties were agreed as to the carrying-capacity of the property in terms of dairy cows. Indeed, the witness called for the Crown gave credit for a slightly greater carrying-capacity than was claimed for the property by the appellant's witness. There was no suggestion that any sheep should be carried. The real contest on that occasion centred around the question of the labour cost.

On the hearing of the appeal an attempt was made to establish that the carrying-capacity of the property exceeded the capacity originally contended for by one hundred breeding-ewes. In other words, it was claimed that, besides carrying all the cows the Crown witness said could be carried, it was claimed the property would also carry one hundred sheep. It is not without significance that the profit from this extra stock would offset the labour cost which the Committee by its decision found to be unavoidable. The result would be that the production value of the property would be increased sufficiently to justify a price of £5,300, to which sum appellant's counsel asked that the original sale price of £5,820 should be reduced.

The Court said: "The recital of the history of the proceedings demonstrates that the sole question before the Court is whether the property can carry one hundred breeding-ewes in addition to the herd of milking cows which the appellant had formerly contended represented the limit of its capacity.

"The Crown witness's description of the areas of soil types comprised in the area is more flattering to the property than the description given by the appellant's witness, Mr. L. The latter describes the area as containing 75 acres of volcanic land, 91 acres of heavy clay, and 77 acres of lighter clay.

"The Crown witness describes the place as follows: First, an area of some 96 acres of warm brown loam; secondly, an area of some 45 acres of poor, heavy clay; thirdly, an area of some 60 acres on medium clay superimposed on heavy clay; and, finally, 41 acres of fair, brown loam on medium clay. The area of 96 acres is, he says, mostly terrace lands, with easy sloping sides. It is all ploughable. The area of 45 acres is, it is said, sour land which has in parts reverted to manuka. It is easily ploughable, but requires ploughing, fallowing, liming, and manuring.

"Of the 60 acre area some 40 acres, it is said, are in manuka and light bush, whilst the balance of 20 acres is in poor pasture. This area is, most of it, capable of being ploughed. Of the 41 acre area, approximately 30 acres are warm, useful land, easily ploughable; 3 acres are comprehended in a somewhat wet creek; whilst the balance of 8 acres consist of poor clay sidling lying at a somewhat steep angle.

"Mr. L., having himself some land of the same description as the poorer clay area of the appellant's property, says that by stumping, manuring, and ploughing these poorer areas can be induced to produce profitable crops of swedes. He regards the area as not absolutely poor. One can only judge Mr. L.'s testimony that work of this description is necessary to make remunerative what he describes as 77 acres of lighter country. That this area should be made profitable seems essential to the establishment and maintenance of the carrying-capacity of which Mr. L. testifies. That seems the only proper conclusion to be drawn from his evidence.

Mr. V. also seems to anticipate that a good deal of agricultural work is necessary to establish and sustain the carrying-capacity at the level suggested by the appellant. On the other hand, the Crown witness is not only satisfied that a herd of 70 cows represents the maximum profitable carrying-capacity of the property, but, in the light of his latest inspection, is inclined to change his view by somewhat reducing the capacity.

"It is a truism to say that any property of sufficient acreage if subjected to intensive cultivation and development can be brought to a carrying-capacity much in excess of its normal capacity.

"The condition of the property being what it is, what has to be determined is what an average efficient farmer would be able to carry upon the land. The results of any unusually progressive or unusually expensive policy of development and improvement cannot be regarded. Judging from the terms upon which he is purchasing, it is highly improbable that the proposed purchaser of this property would embark upon any such policy anyhow.

"This statement of the position renders inapplicable the policy of development which Mr. L. and Mr. V. both seem to envisage as necessary in order to make the place carry the one hundred ewes. In any event, the Court has no evidence that their policy is one usually or generally adopted in the locality, and so none that it would be a policy to which an average efficient farmer would resort. On the contrary, the evidence is that Mr. L. is unusually efficient. It would seem, therefore, that judged by the proper standard, the carrying-capacity of the property does not exceed that which the Crown witness and the appellant's own witness before the Committee agreed represented its maximum.

"The Committee, in fixing the basic value at £4,200, allowed a very reasonable margin for any features by reason of which the appellant is entitled to have the productive value increased. The Court is not disposed to disturb that finding. On the contrary, having regard to the totality of the evidence, it is satisfied that the finding was proper and just.

"As the appellant may desire to proceed with the proposed sale, the Court, instead of dismissing the appeal, will give consent to the sale at £4,200 if the sale is completed by August 20 next, and consent to the sale is given accordingly. If the sale is not completed within the time limited, the appeal is dismissed."

NEW ZEALAND LAW SOCIETY.

Meeting of Council.

A meeting of the Council of the New Zealand Law Society was held on Friday, June 9, 1944.

The following societies were represented: Auckland, Messrs. A. H. Johnstone, K.C., J. B. Johnston, W. H. Cocker (proxy), and J. Stanton; Canterbury, Messrs. R. L. Ronaldson and A. W. Brown; Hamilton, Mr. A. L. Tompkins; Hawke's Bay, Mr. E. J. W. Hallett; Marlborough, Mr. G. M. Spence; Otago, Mr. J. C. Rutherford; Southland, Mr. T. V. Mahoney; Taranaki, Mr. N. F. Little; Wanganui, Mr. A. B. Wilson; and Wellington, Messrs. H. F. O'Leary, K.C., A. M. Cousins and G. G. G. Watson.

Mr. A. T. Young, Treasurer, was also present.

Mr. H. F. O'Leary expressed his regret at being unavoidably absent from the Annual Meeting and thanked the members for re-electing him as President.

The President also expressed regret at the death of Mrs. Rains, who had for many years prior to her retirement, acted as Librarian and as Assistant Secretary to the New Zealand Law Society.

Obituary.—Mr. R. McVeagh: The President, before commencing the business of the meeting, referred to the death of Mr. McVeagh, who had been a member of the New Zealand Law Society and also for many years a member of the Council of Law Reporting. Mr. McVeagh had been highly thought of in the profession, and the news of his death would be received with deep regret by all.

Disciplinary Committee.—At the meeting held on May 4, the following resolution was passed:

"The Disciplinary Committee expresses its deep regret at the death of Mr. Lusk, a member of the Committee since its inception, and records its great appreciation of the very valuable service rendered by him during his term of office."

Economic Stabilization Emergency Regulations.—This matter had been again brought to the attention of the Attorney-General, and the reply was still awaited.

Claims against the United States Government and Members of Their Forces.—The President reported that the Secretary and he had waited upon the Attorney-General with a view to expediting some satisfactory arrangement in these claims. The Minister agreed to further consider the matter.

The Secretary drew attention to the fact that a settlement had been arrived at in England and referred to the following extract from the *Solicitors' Journal*:—

"After Mr. Eden's announcement in the Commons on 31st March that a settlement had been reached on the difficult question of dealing with civil claims against members of the U.S.A. Forces in this country, a detailed statement was circulated on the subject. This says that for some time past 'training and manoeuvre claims' (arising chiefly out of damage to crops, &c.) and claims arising from damage caused by aircraft crashes have been settled by the British Government on behalf of the United States Government as a matter of reciprocal aid. Arrangements, including collision agreements, were originally made with the United States authorities here for settlement of other claims arising from torts committed by members of the United States Forces, but these proved incompatible with United States law and practice, and lapsed last autumn. Although in consequence, some claims have been delayed, the United States Claims Commissions have since settled satisfactorily large numbers. These commissions, which are governed by United States law and practice, were not, however, authorized to treat judgments of the British Courts as binding upon them, and were subject to a financial limit of $5,000. Other arrangements were therefore necessary, and with the co-operation of the United States Government, a settlement has now been reached in regard to claims arising out of (*a*) traffic accidents, (*b*) accidental shootings, (*c*) accidental explosions, (*d*) loss or damage to chattels in requisitioned premises occupied by United States Forces under arrangements made with the departments of H.M. Government, (*e*) certain other incidents (practice gunfire, fires in billets, &c.) where H.M Government would in certain circumstances accept responsibility had members of H.M. Forces been involved. Claims in these classes against members of the United States Forces on duty will be settled on the following lines: Claims arising from torts committed on or after 20th March, 1944: H.M. Government will settle all such claims as a matter of reciprocal aid. They will be dealt with by the British Claims

Commission, just as claims against members of H.M. Forces in the United Kingdom would be. British law and practice will apply, and claimants dissatisfied with an award can sue the defendant as if he were a member of H.M. Forces, any judgment so obtained being satisfied by H.M. Government in the same manner as judgments obtained in comparable circumstances against British Service members. Claims arising from torts committed before March, 1944: The British Claims Commission could not assume responsibility for settling the considerable accumulation of such claims without serious prejudice to its other work. Except claims for more than $5,000, which will at once be taken over by the British Commission, the U.S. Claims Commissions will continue to investigate and settle all claims in this class, consulting the British Commission in order to ensure uniformity of treatment. H.M. Government will, however, undertake responsibility for making as a matter of reciprocal aid all necessary payments, including the payment of any Court judgments. This will make possible the reinstatement of the collision agreements and will greatly facilitate the rapid disposal of these claims. These arrangements will not apply to claims arising from torts committed while off duty. The U.S. Commissions will continue to deal with such claims and make awards in appropriate cases."

It was pointed out that in Auckland the matter was considered to be of some importance and urgency.

It was decided to again see the Minister in the matter and to point out the urgency of some decision being arrived at.

Translation of Native Processes.—It was stated that the Taranaki Society was not satisfied with the present position and asked that further representations be made to the Minister with a view to seeing whether some amelioration of the position could be obtained. The view was expressed that it was unlikely that objection would be raised by the Natives, and suggested that provision could be made to the effect that where desired the Natives could ask for a translation.

Time for Sealing Probate.—It was pointed out that the request made by the Law Society to the Rules Committee in 1942 that the time for sealing probate be extended had now been given effect to in R. 5 of the Supreme Court Amendment Rules, 1944, amending the time from one month to two.

Ad Valorem Duty on Purchase of Properties by Soldiers.—The following letter was received from the Auckland Society:

"This matter was raised by a practitioner at the Annual General Meeting of this Society, and it was a recommendation to my Council that representations be made to the appropriate quarter that the *ad valorem* duty on purchases of property by soldiers be considerably reduced. It was pointed out to the meeting that representations had already been made by the New Zealand Society without result, but it was felt that the matter should be again pressed in view of the fact that certain other organisations were making representations to the Government for a reduction.

"I am, therefore, directed by my Council to ask you to place this matter before your Council, and to state that my Council favours a reduction in the duty."

It was decided to support the views of the Auckland Society and to bring the matter to the attention of the Minister.

Rehabilitation Act, 1941.—The following report was submitted by the Conveyancing Committee:—

"We have considered the question raised in the letter received by you from the Rehabilitation Board, and we recommend as follows:—

"(1) That in respect of the formation of Limited Companies the charges should be two-thirds of those set out in Ruling No. 47 of 24th September, 1937, with a maximum of £15 15s.

"(2) That in respect of debentures the charges should be two-thirds of those set out in Ruling No. 52 of 24th June, 1938, with a maximum of £10 10s.

"We understand that the normal maximum advances which will be made by the State Advances Corporation to Returned Servicemen will be £3,900 in case of advances on the security of land and £500 in case of advances on the security of businesses.

"Under the suggested scale the fee on the formation of a company with a nominal capital of £500 would be £10 10s. and the maximum of £15 15s. would be reached in the case of a company having a nominal capital of £2,000. Likewise the fee in respect of a debenture securing £500 would be £4 4s. and the maximum of £10 10s. would be reached in the case of a debenture securing £1,300.

"The concessions already recommended by the Society in respect of transactions under the Rehabilitation Act have been as follows:

"(1) In respect of transfers, the charge to be two-thirds of the Law Society scale charge, with a minimum fee of £1 11s. 6d. in case of a Memorandum of Transfer and £2 2s. in any other case (Ruling No. 80 of 18th September, 1942).

"(2) In respect of mortgages, the charge to be the State Advances scale less 20 per cent. with the existing minima, the maximum charge to be £7 7s., provided that this amount does not include charges for collateral security (£7 7s. is 80 per cent. of the charge in respect of a mortgage securing about £2,700).

"The Committee is of the opinion that the concessions now suggested in the cases of companies and debentures are in line with those already recommended by the Society in respect of transfers and mortgages.

"It is to be noted that while the Stamp Duties Department is to waive the fees payable in respect of incorporation of a company and those payable in respect of registration and stamping of mortgages, no concession has yet been made by the Government in respect of *ad valorem* duty on transfers."

On the motion of Mr. Stanton the scale was adopted.

Divorce: Filing Petition.—The followibg letter was received from the Canterbury Society:—

"I enclose a copy of a letter which has been received by my Council and at a meeting held yesterday I was directed to send to you a copy of same so that your Council could consider the advisability of endeavouring to get the procedure altered."

Enclosure:

"Quite recently this office has filed a petition in **Dunedin** and the petitioner and her corroborative witness **travelled** to the Supreme Court, there to give evidence upon **an** undefended petition. In another case, where a **petitioning** husband's wife had left for Auckland, a special **application** was made for an order for change of place of hearing **upon** the grounds that the petitioner filled an appointment [illegible] which made it most inconvenient for him to visit Auckland.

"Difficulties of expense, waste of time in travel, **and also** expenses of corroborative witness again arose. An **order for** change of place of hearing was made, which, of course, involved the payment of additional costs.

"The above steps were the result of the decision of Mr. Justice Northcroft in *Huxtable* v. *Huxtable*, [1943] N.Z.L.R. 466. The head-note to that case reads as follows:—

"'A petitioner in divorce is not at liberty to file his petition in any office of the Supreme Court that he chooses. By analogy R. 4 of the Code of Civil Procedure should apply, and he should file the petition in the office of the Supreme Court nearest the respondent's residence, in the district in which the respondent resides, subject to an application under R. 50 of Divorce rules if the circumstances require it. *Hedlund* v. *Hedlund* ((1914) 33 N.Z.L.R. 1493; 16 G.L.R. 692) not followed.'

"*Sim's Divorce Law and Practice*, 5th Ed., at p. 113, has the following note:—

"'*Place for Filing of Petition.*—A petition may be filed in any Registry of the Supreme Court, without regard to the place of residence of the parties: *Hedlund* v. *Hedlund*, (1914) 33 N.Z.L.R. 1493; 16 G.L.R. 692. This has been the accepted practice since that decision was given, but see, however, the recent decision of *Huxtable* v. *Huxtable*, [1943] N.Z.L.R. 466, G.L.R. 329, where Mr. Justice Northcroft found himself unable to accept the view of Stout, C.J., in *Hedlund* v. *Hedlund*, and held by analogy, R. 4 of the Code of Civil Procedure should be applied subject to an application under R. 50 (now R. 33) of the Divorce Rules if the circumstances require it. The matter remains for determination how far other Judges will adopt this departure from long continued practice.'"

"The new rules make no relevant alteration on the subject. As to the place of trial, see RR. 32 and 33; and as to the place for (*a*) filing and (*b*) hearing other applications in the suit, see the notes to R. 2.

"It appears to us that the rule should be altered to accord with the principles of judicial safety in personal causes; simplicity, avoidance of unnecessary expense and litigation, and of convenience."

It was decided that the matter should be taken up with the relevant authorities.

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

The late Lord Atkin.—Lord Atkin, doyen of the English judiciary in point of years of service as a Judge, died recently—aged seventy-six. Of Irish parentage, he was born in Brisbane, Queensland, his father being a member of the Queensland Legislative Assembly. He left Australia in early childhood and was educated in England. He was called to the Bar in 1891. Small in stature and quiet in demeanour, he was slow in acquiring a practice commensurate with his real talent; but when his abilities were once recognized success came quickly. He built up a leading practice in the Commercial Court, taking silk in 1906. In 1913, aged forty-five, he became a Judge of the King's Bench Division. Six years later he was appointed a Lord Justice of Appeal. In 1928, on the retirement of Lord Atkinson, he was promoted a Lord of Appeal in Ordinary. In all, he served for thirty-one years as a Judge, eclipsing all English records since that of Lord Mansfield who was Lord Chief Justice for thirty-two years. In every way Lord Atkin was a great lawyer. In the words of the Solicitor-General (Maxwell Fyfe, K.C.) he brought to legal problems "that rare gift, seen only once or twice in a legal generation, of constructive intuition which operates after learning and analysis are exhausted." Lord Atkin regarded the law as a living and common-sense thing and his judgments reflected a virility of outlook and breadth of view beyond the common. By his death England loses one of the greatest of her Judges of the present century.

Children Concession Clause.—Blair, J.'s suggestion, made from the Bench at Wanganui, that larger families might be encouraged if leases were to include provision for a reduction in rent in the event of a child being born to the tenants, is hardly likely to be viewed with great favour by landlords or to cause a demand for new precedent books. Nevertheless, optimistic conveyancers may find it interesting to speculate upon how they would frame such a clause if called upon to do so, and what safeguards they would attach to it. Apparently, in the actual case referred to by the Judge, the clause provided for a reduction in rent of £10 a year "on a child being born to the tenants." From a landlord's point of view language to that effect might prove expensive if the tenants should happen to be Mr. and Mrs. Dionne!

Appointments to Magisterial Bench.—The qualifications for appointment as a Magistrate are prescribed by s. 7 (3) of the Magistrates' Courts Act, 1928:

> A person shall not be appointed a Magistrate unless—
>
> (*a*) He is a barrister or solicitor of the Supreme Court of not less than five years' standing; or
>
> (*b*) He has been continuously employed as an officer of the Justice Department for a period of at least ten years, and during such period employed for not less than five years as the Clerk of a Magistrate's Court, and is a barrister or solicitor.

The profession has never approved of this provision, and it has always claimed, and rightly so, that there should be one, and only one, qualification for the Magistracy—a sufficient period of actual practice in the law. Accordingly, the profession has always urged that appointments to the Magisterial Bench should be made only from those who have been engaged in private practice for not less than the period referred to in the section. Mr. A. E. Dobbie, who has recently been appointed a temporary Magistrate, is a solicitor and has had long experience as a Clerk of Magistrates' Courts and as a Registrar of the Supreme Court, but he has spent all his working life in the Justice Department and has never engaged in private practice. At present his appointment is for three months, expiring next November. If the real object of this temporary appointment is simply to fill a vacancy pending the filling of the permanent position from the ranks of some of the practising profession at present serving with the forces, there is much to commend the course that has been adopted. If, however, the intention of the Government is to appoint Mr. Dobbie permanently at a later date, or to so extend his appointment from time to time as to make it, in effect, permanent, the matter is one for strong criticism. The Minister of Justice should be asked to state explicitly the Government's intention in the matter.

The Yielding Disposition.—In *Fender* v. *Mildmay*, [1937] 3 All E.R. 402, the House of Lords, by a majority of three to two, held that a promise to marry made after decree *nisi*, but before decree absolute, was not contrary to public policy. The late Lord Atkin was one of the majority. His judgment is a classic, and that part of it which deals with *Wilson* v. *Carnley*, [1908] 1 K.B. 720, contains a particularly bright passage. *Wilson* v. *Carnley* was a case of a promise to marry *after the death* of the promisor's spouse, and, commenting on the judgments in that case, Lord Atkin said:

> The Judges appear to have thought that a promise made in such circumstances tended to cause immoral relations. They may be right. Speaking for myself, I really do not know whether that result would follow as a rule. I can only say that, if the lady yields to a promise with such an indefinite date, she is probably of a yielding disposition, and it would appear difficult to predicate that immorality is either facilitated or accelerated by the promise.

Spontaneous Wit?—When MacGregor, J., was at the Bar it used to be said that some of his most spontaneous witticisms had been carefully noted on the margin of his brief during his preparation for trial. According to Gilchrist Alexander in his *The Temple of the Nineties*, a somewhat similar spontaneity often attached to some of the best jokes of Darling, J. Here is his comment on Darling's humour:

> Give him a breach of promise, society scandal, or good old libel or slander case and he prinked and plumed himself on the Bench. Sometimes he came away with a delightfully genuine impromptu, but, as a rule, his most generally admired impromptus came on the second day of the trial. . . . At the end of his career I saw Darling sitting as a member of the Privy Council. It is one thing to jest when you are cock of the walk. It is quite another matter when you are surrounded by other and bigger roosters. Darling's jests did not go down in Downing Street.

Incidentally, *The Temple of the Nineties* contains an inimitable sketch by Theobald Mathew of Darling, J., rebuking the usher for checking the laughter in Court!

LAND AND INCOME TAX PRACTICE.

Recent Tax Cases.

Higgs v. *Wrightson* (*H.M. Inspector of Taxes*), [1944] 1 All E.R. 488.—The appellant was the owner of agricultural land, where for a number of years he had carried on business as a dairy-farmer. There were statutory provisions under which the Minister of Agriculture might make grants in respect of the ploughing-up of grass land and bringing it into a state of cleanliness and fertility. The appellant ploughed up a certain area, and the Minister of Agriculture was able to make a grant of £662. The question to be decided was whether the grant ought to be included as a revenue receipt in the computation of the farming profits, or as a capital receipt?

For the appellant, it was said that the ploughing-up of the land effected either a capital improvement or capital depreciation, and that in the case of the area which he ploughed it did in fact effect a capital depreciation. It was further represented that the grant ought to be regarded as a contribution towards the capital expenses incurred in buying tractors, ploughs, harrows, &c.

It was held by Macnaghten, J., that the ploughing grant must be included as a receipt in the compensation of the appellant's farming profits.

Thompson (*H.M. Inspector of Taxes*) v. *Magnesium Elektron, Ltd.*, [1944] 1 All E.R. 126.—For the purpose of manufacturing magnesium, the appellant company ascertained that chlorine was a necessary chemical, and the company intended to produce the chlorine by a process which yielded caustic soda as saleable a by-product, or purchase manufactured chlorine. They negotiated with I.C.I., Ltd., to supply the chlorine, but the price was prohibitive. The appellant company therefore decided to prepare the chlorine and incidentally obtain revenue from the sale of the caustic soda by-product, but at this stage I.C.I., Ltd., did not wish to have opposition in the caustic-soda market. I.C.I., Ltd., then made two agreements with the appellant company: (*a*) For the supply of chlorine; and (*b*) to the effect that the appellants should refrain from entering the caustic-soda market; and that, so long as the appellants observed this covenant, I.C.I., Ltd., would pay to the appellants compensation at an agreed rate for the loss incurred as the result of their abstention from the manufacture of chlorine and caustic soda.

The question for decision was whether the payments receivable by the appellants under agreement (*b*) were trade receipts.

It was argued for the appellants that if the periodic payments made to them under the agreement were taxable at all they were not part of the receipts of the appellants from the exercise of their trade; that the payment was for a restriction and nothing else; and that a sum of money cannot be a receipt of a trade and fall to charge unless the trade is truly the source of the payment.

After considering and discussing the submissions made for the appellant company, Lord Greene, M.R., concluded his judgment by saying:

> "The problem, as I see it, is to be solved in a very simple way. A manufacturer of magnesium desires to obtain a firm contract for the supply of chlorine which he requires in manufacturing his magnesium. He gets that contract by entering into a complicated arrangement under which he agrees not to manufacture or be interested in the manufacture of chlorine or caustic soda, that undertaking being qualified, so to speak, by a payment made to him to cover either the whole or a part of the loss that he incurred by not manufacturing chlorine or caustic soda. When the whole thing is linked up together, it must be regarded, in my opinion, that one of the terms under which he was to get his contract was the incurring of a liability under the covenant, minus the benefit of this payment. Regarded in that way the payments seem to me to be trade receipts, just the same as if, in order to get a contract for the supply of chlorine, they had entered into some collateral bargain, under which they incurred expense. Here they are getting their chlorine on terms under which with one hand they give away their covenant, and with the other at the same time they get these payments. That appears to me to stamp them with the character of trade receipts, and, in my opinion, the assessment was rightly made under case 1, and the appeal fails."

Associated Insulation Products, Ltd. v. *H. Golder* (*H.M. Inspector of Taxes*), [1944] 1 All E.R. 533.—The appellant company was the beneficial owner of a number of shares in a corporation formed in United States of America. On December 15, 1936, the American Corporation declared a dividend but by a further resolution provided that the distribution of the dividend should be in the form of a certificate of indebtedness to the shareholders payable on January 1, 1940, with interest thereon at a fixed rate until payment. The appellant company contended that it was assessable to income-tax in respect of this dividend in the year in which the dividend was declared.

It was held that the company was assessable in respect of the dividend in the year in which it was actually paid.

The editorial note states that the point is small but important. If it were held that the assessment could be made at the time of the declaration, an assessment might be made upon a sum which was not ultimately received, since it is quite possible that the company might find itself unable to fulfil its promise to pay, or able to fulfil it only in part.

Glasson (*Inspector of Taxes*) v. *Rougier*, [1944] 1 All E.R. 535.—Mrs. Rougier, who was an authoress, received in respect of certain novels royalties under a number of agreements with her publishers. Subsequently, being desirous of raising a substantial sum of money, she entered into a further agreement which annulled previous agreements so far as three of her novels were concerned, and Mrs. Rougier granted exclusive rights to publish those three novels for a sum of £750 payable in three instalments.

It was argued that the sum of £750 was capital. The Crown relied on the principle that the £750 paid was a sum paid in computation of annual sums which would have been "income" from the profits or emoluments derived from the vocation of an authoress.

Macnaghten, J., held that the £750 was income, and not a capital sum.

Building Constructors v. *Commissioner of Taxes* (*Southern Rhodesia*), (1941) 12 South African Tax Cases, 182.—The appellants entered into a contract for the erection of buildings, it being a condition of the contract that 10 per cent. of the consideration should be retained for a period of three months after the completion of the work. The buildings were completed in February, 1939, and in terms of the contract the retention money was paid over in June, 1939, and was included in an assessment of tax on income derived during the year ended March 31, 1940.

The appellants objected on the grounds that the moneys retained had accrued to them during the year ended March 31, 1939; alternatively that there had accrued to them during the year ended March 31, 1939, the present value as at March 31, 1939, of the sum payable three months after the completion of the building.

After reviewing the facts, Hudson, J., said:

> "It will thus be seen that the first ground of appeal depends on the application of the words 'has accrued to or in favour of any person' appearing in s. 9 (1) of the Income Tax Act. The meaning of these words has been considered in various cases decided in the Courts of South Africa. In *Lategan* v. *Commissioner for Inland Revenue*, Watermeyer, J., defined them as meaning 'to which he has become entitled.' While this meaning was adopted by Wessels, C.J., in *Commissioner for Inland Revenue* v. *Delfos*, De Villiers and Stratford, JJ.A., in the course of their judgments in the latter case, expressed the view that 'accrued' means 'due and payable.' If the latter view is correct, then, the appellants' first ground for appeal must fail. Though there is much to be said in favour of applying the meaning 'due and payable' to 'accrued'—particularly the use of the former expression in s. 10 of the Act—I propose to adopt for the purpose of this case the meaning enunciated in *Lategan's* case. The question as to when appellants became entitled to the retention money of £941 19s. depends on the construction of the contract governing the erection of the buildings in question. . . . In my opinion then the sum of £941 19s. did not accrue to the appellants till after the 31st March, 1939, and was rightly taken into account in arriving at the income of the appellants for the year ended 31st March, 1940."

Inland Revenue Commissioners v. *Terence Byron, Ltd.*, [1944] 1 All E.R. 608.—The Crown appealed from the decision of Macnaghten, J., reported in [1943] 2 All E.R. 415. The facts were summarized, *ante*, p. 71.

The Court of Appeal affirmed the decision of Macnaghten, J., and held that, notwithstanding its destruction, the destroyed theatre remained "capital employed in the business" within the meaning of the English provisions.

PRACTICAL POINTS.

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1. Mortgage.—*Variation of Mortgage—Mortgagor Trustee—Modification of Personal Covenant.*

QUESTION: My client, E.F., is trustee in the estate of A.B., deceased, who mortgaged his land to C.D. The mortgage is overdue and arrangement has been made for an extension of the term for another three years. Will it be safe for my client just to execute the usual statutory memorandum of variation under the Land Transfer Act, or should a special covenant be inserted, expressly limiting my client's personal liability to the assets of the deceased?

ANSWER: (*a*) It would be unsafe for your client just to execute the usual statutory form: *Gower* v. *Cornford*, [1907] N.Z.L.R. 1176, G.L.R. 357, which discloses a remarkable difference of judicial opinion; see also article in (1944) 20 N.Z.L.J. 29, and *Goodall's Conveyancing in New Zealand*, 318, 319.

The following clause has been used in practice:—

"AND IT IS HEREBY DECLARED that these presents have been executed by the said E.F. as trustee of the will of A.B. deceased and that accordingly his liability under the personal covenant herein expressed or implied shall be limited to take effect only in respect of the assets of the said A.B. deceased which shall be got in by the said E.F. as such trustee and any execution or other proceedings on any judgment obtained against the said E.F. in any Court of law in respect of the obligations herein expressed or implied shall be directed only against the assets in the estate of the said A.B. deceased and in no case against the personal private estate of the said E.F."

Alternatively, the following might be considered more appropriate:—

"IT IS HEREBY AGREED AND DECLARED that the execution of this variation shall not operate by way of novation to release the estate of A.B. deceased from its present liability under the said memorandum of mortgage as hereby varied nor to impose any separate or personal liability upon E.F. for the payment of the moneys secured by the said memorandum of mortgage as hereby varied PROVIDED ALWAYS that nothing in this paragraph hereof contained or implied shall be deemed to release or excuse E.F. from liability should E.F. have committed such a breach of his duties as executor or trustee of the said estate as would enable the mortgagee to obtain a judgment against him for loss suffered by the mortgagee as a result of such breach."

The short clause in *Hope* v. *Public Trustee*, [1943] N.Z.L.R. 398, G.L.R. 257, has also stood the test.

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2. Probate and Administration.—*Letters of Administration—Widower's Application—No Children, but Next-of-kin.*

QUESTION: Where an application for letters of administration is made by a widower, there being no children, is it necessary to supply any details as to next-of-kin in the affidavit supporting the motion? Form 37 (affidavit to lead grant of administration to a widow or widower) set out in the Schedule to the Code of Civil Procedure, does not indicate that this information is required.

ANSWER: Yes; such information is necessary: see *Re Windelburn*, [1919] G.L.R. 351.