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THE LAND SALES ACT, 1943: THE MEANING OF "UNDUE AGGREGATION" OF LAND.

UNTIL recently, the acquisition of land in unlimited areas has not been restricted in law in New Zealand, as was pointed out by the Land Sales Court recently, except in respect of such Crown and Native leases as have fallen, or fall, into certain clearly-defined statutory categories. For the first time, such a restriction has been imposed by the Servicemen's Settlement and Land Sales Act, 1943, one of the purposes of which, as the Preamble to the statute recites, is to prevent "the Undue Aggregation of Land."

In a recent judgment, *S. to S.* and *W. to H.* (to be reported), it became necessary for the Land Sales Court to define, in relation to rural land, the phrase, "undue aggregation," where it appears in s. 50 (3) of the statute, as follows:—

> In considering any such application [for the consent of the Court to any transaction] the Land Sales Committee shall have regard to the desirability of facilitating the settlement of discharged servicemen and of preventing undue increases in the price of land, *the undue aggregation of land*, and its use for speculative or uneconomic purposes, taking into account the circumstances of the particular case and all other relevant considerations, including in particular the following matters . . .

In another judgment, *F. to S.*, the application of the phrase, "undue aggregation," to urban land came up for consideration. We propose to consider the Court's definition of the phrase as a matter of law, and to set out indications made for guidance as to the tests to be applied, in the light of that definition, to the questions of fact arising for determination where the applicant for consent already owns other farm properties or town sections, as the case may be.

I.—Rural Land.

The Court was required to define the phrase, "undue aggregation" of land in the consolidated appeals, *S. to S.* and *W. to H.*

In the circumstances in which these appeals came before the Court, what primarily called for consideration by that tribunal was what the Legislature meant to convey by the expression "undue aggregation." In other words, what had to be ascertained was the intent with which the Legislature used that phrase, which has nowhere been made the subject of definition. It appeared to the Court to resemble many legal expressions of much earlier origin in that it is incapable of any adequate or precise definition. It became incumbent upon the Court, therefore, to determine the sense in which the phrase was used by the Legislature by reference to the rules of construction applicable for the ascertainment of the intention of the legislative authority. The two rules applied by the Court were: (*a*) The meaning of each statute must primarily be sought in the statute itself, and each statute must be construed according to its subject-matter and object; and (*b*) all words must be construed in their popular sense—that is, according to their ordinary grammatical meaning. Summarized, the Court said, these rules require that the phrase "undue aggregation" must be construed according to its ordinary meaning as limited and controlled by the necessity of giving effect to the disclosed objects of the statute. The judgment proceeded:

> An examination of the phrase from the point of view of its ordinary meaning indicates that what the Legislature had in mind was not a mere aggregation, but such aggregation as would, if permitted, be fairly and reasonably susceptible of being defined as "undue." Inherently, therefore, the question is one of degree. As such, it is comparative in character, for the degree or quality of "undueness" must be determined in relation to some standard, which, whilst it involves "aggregation," does not involve it to a degree or an extent which would warrant the application of the word "undue" in the sense of improper or excessive.

In the absence of any previous general standard, the word "undue" must be construed according to the purposes and objects of the statute which are, briefly, but compendiously, summarized in the Preamble alone. These are, so far as is relevant, (*a*) to control the sales and leases of land "in order to facilitate the settlement of discharged servicemen"; and (*b*) to prevent "the undue aggregation of land." Commenting on these purposes, the Court said:

> These purposes, incidentally, serve to distinguish this Act from all other Acts relating to land which are now or have at any time been in force; and a mere recital of the objects and purposes of the Act invalidates all arguments founded upon the various Land Acts which have been in operation from time to time. Such Acts cannot be said to be *in pari materia* with the Servicemen's Settlement and Land Sales Act, 1943, or bear any relation to it. What, therefore, was regarded as "undue" in the sense of improper aggregation under those Acts—passed as they were in former years to deal with

other and different circumstances and to achieve other and different objects—can have no bearing upon what should be regarded as "undue aggregation" under the present legislation with which alone the Court is concerned.

The Court went on to say that facilitation of the settlement of discharged servicemen is, at more than one point in the statute, clearly described as one of the principal objects, if not the principal object, of the Act. It might be contended that any question of soldier settlement is finally disposed of once a Land Sales Committee has decided under s. 51 that land proposed to be alienated is not suitable or adaptable for the settlement of a discharged serviceman, or for two or more discharged servicemen; or the Committee has been constrained to act under s. 51 (*e*); or, alternatively, once the Crown has, in terms of s. 51 (*a*), decided not to acquire or arrange for the acquisition of the land. The Court felt, however, that, by virtue of s. 50 (3), the control of sales for the purpose of facilitating the settlement of discharged servicemen is a function not altogether exhausted when the land involved was not immediately required for settlement; and when, in consequence, s. 51 (*a*) and s. 51 (*e*) apply.

On the other hand, the Court added, the Legislature may have had the availability of land for settlement by discharged servicemen in mind, apart from the scope of the scheme of settlement prescribed by the statute, and may, from that point of view, have considered that settlement by soldiers would be more readily facilitated if land were left in the hands of an owner who had already demonstrated his willingness to sell, than if it were allowed to become the property of an owner from whom it would have to be acquired compulsorily under s. 23.

The Court drew attention to the change in language from the general continuing direction to Land Sales Committees conveyed by the expression "regard to the desirability of facilitating the settlement of servicemen" in s. 50 (3) to the immediate and particular "suitable and adaptable" in the latter parts of the statute. It proceeded:

> However that may be, where the result of a transaction will be to make the purchaser the owner of more than one economic holding, the Minister is vested with the right under s. 23 to acquire one or more holdings. The Court is anxious to be understood as not inferring from s. 23 that the acquisition of another economic holding by any person who already holds one is necessarily undue aggregation; for s. 23 does no more than put such a person on a parity with all other owners of land comprising two or more economic holdings, in that they are, all of them, subjected, in the circumstances, to the Minister's right of acquisition.
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> Apart from this aspect of s. 23, however, there is necessarily implicit in it the conception that for the duration of the Act an owner of land comprising two economic holdings is liable in the interests of the settlement of discharged servicemen to dispossession in respect of one. In other words, security in the retention of ownership and possession is, under the Act and for the purposes of the Act, limited to one economic holding. Thus, by fixing a standard of security of possession, the Act does more than adumbrate, for it indicates, with some clarity, the extent to which, in the view of the Legislature, individual ownership should be assured for the purposes of the Act. To that extent, it is definitive of what, in the view of the Legislature, it is proper during the subsistence of the Act for one individual to own and retain; and, inferentially, also, of what it is proper for an owner to acquire.

It was thought, therefore, that what the phrase "undue aggregation" implies is not only such an aggregation as would be excessive in the ordinary sense of the word, but also such an aggregation as may reasonably be expected to prejudice or retard the achievement of the purposes of the Act, of which the primary one is the settlement on the land of such discharged servicemen as may desire to follow farming pursuits.

A careful perusal of all the relevant parts of the statute somewhat forcibly suggested to the Court that it was the intention of the Legislature that every man should, during the period the statute is in force, have enough land to answer his reasonable needs, but not so much that the settlement of returned servicemen would be prejudiced or impeded. This may be, and probably is in particular instances (the Court said), a check to initiative; but the legislation is war legislation and of temporary duration, so that some sacrifice by those who have not been exposed to the trials and dangers of actual warfare may well have been regarded by the Legislature as justified.

The Court, therefore, defined the phrase "undue aggregation" in terms of the statute as being, *prima facie*, "the acquisition of a substantial or substantially useful area of additional land by an owner who already has all the land that is reasonably necessary for his needs." This definition, it added, may be offset or outweighed by considerations affecting either the proposed alienee, or the particular land involved, or the locality in which it is situate.

Thus, as a matter of law, a test is elucidated by which transactions are to be judged; or a yardstick is provided by which particular transactions are to be measured. But it is a question of fact, whether the circumstances of any particular transaction, when measured by that yardstick, disclose any quality of "undueness."

The Court then gave some useful directions as to the manner in which it should approach the determination of whether or not a proposed transaction amounts to "undue aggregation" as defined above. It said:

> In this respect, the questions involved in these appeals are in various respects analogous to the questions dealt with by the Court of Appeal in England in *R.* v. *Board of Education*, [1910] 2 K.B. 165. The responsible tribunal must in each case determine for itself whether the transaction it is considering will, as a matter of fact, result in an aggregation which can fairly be termed "undue," in the sense of inconsistent with the purposes of the Act, or incompatible with the achievement of its objects. Circumstances of general application are so variable from time to time, and the particular circumstances and characteristics of people and places are of such infinite variety, that no fixed or inflexible formula can be evolved. Just as at common law, what is reasonable is in every case a question of fact to be determined in the light of all relevant circumstances, so what and what is not "undue aggregation" must also be decided as a question of fact in the light of all the circumstances attendant upon each particular application.

Accordingly, the Court was of the opinion that the circumstances of each applicant must be weighed as at the date of hearing; his present and potential needs estimated; the nature of the locality must be considered, and the present and potential demands of discharged servicemen for land on which to settle in that particular locality must be taken into account. This postulates, as the Court later said in another judgment, that all relevant circumstances must be made the subject of critical examination.

In a subsequent judgment, *B. to B.*, the owner of several rural areas desired to exercise his right under a lease to purchase fifteen acres adjoining one of his properties. As a residential site, it had no value by itself, and, as a segregated farm unit, its value was negligible.

One, possibly two, other adjacent owners desired to purchase. The Crown representative contended that it is " undue aggregation " for an owner who held the totality of the area of land owned by the appellant to acquire the additional area of fifteen acres, when others had more need of it. This proposition, the Court said, was superficially more appealing then it was inherently sound. " The Servicemen's Settlement and Land Sales Act, 1943," it added, " is not an Act designed to improve land settlement by securing a more equitable distribution of land amongst civilians. Its purpose is the settlement of returned servicemen ; and no serviceman wants, or is ever likely to want, this isolated area of fifteen acres." There was, however, no proof of the preponderating value of this area to any one who was willing and able to acquire it. On the other hand, its acquisition by the appellant may tend in some measure to achieve the purposes of the statute if it be left in association with the area with which it had hitherto been held—namely, forty-five acres of grazing land, which was adjacent to another area of ninety-seven acres owned by the appellant. In such a case s. 23 of the statute would apply to both ; and both might be brought into use for the settlement of returned servicemen. If, however, the fifteen acres became vested in some owner of a small area, so that the conjoined areas did not constitute more than one economic holding, the fifteen acres would irrevocably cease to be available for soldier settlement. Applying the foregoing, and other tests, the Court did not regard the proposed acquisition of that area by the appellant as constituting " undue aggregation " as defined in the earlier judgment.

II.—Urban Land.

In *F. to S.*, the Land Sales Court had, for the first time, to consider urban land, and the application, if any, to it of the phrase " undue aggregation," as used in the Servicemen's Settlement and Land Sales Act, 1943.

The facts were not in dispute. The proposed purchaser was a builder, who for some years had made it his business to buy building sites, and either sell them to purchasers (who would contract with him for the erection of houses upon them) or himself build houses on the sites and sell them. At the date of his application for consent to the purchase of another building lot, he owned, in addition to his residence, five vacant building sites in East Invercargill. He also owned five vacant lots in South Invercargill, which the Court considered were more of a burden than a benefit to the appellant.

The question arose, whether it is " undue aggregation " for a man engaged in the class of business in which the appellant was engaged to acquire an additional building lot, when he already owned four.

In the course of its judgment, the Court said that a proper understanding of what the Legislature intended to convey by the phrase " undue aggregation " when applied to urban lands necessitated an appreciation that the primary purpose the Legislature sought to achieve by the Act—the facilitation of the settlement of discharged servicemen—had no application to such lands. With respect to them the interpretation is therefore relieved of any limitation or restriction attributable to a consideration of the relationship of the phrase to any such purpose ; and the phrase must, in consequence, be interpreted solely in the sense conveyed by the ordinary grammatical meaning of the words constituting it. The judgment proceeded :

> So regarded, it is apprehended that the phrase will extend to cover the ownership of such a number of properties as, judged by ordinary and reasonable standards, would be considered excessive or inordinate, or such number as would be contrary to the public interest. What would be regarded as ordinary or reasonable must necessarily be determined in relation to the whole body of circumstances attendant upon each particular application. It will involve a consideration of the nature and extent of the demand for the property in question, the particular circumstances and needs of the proposed purchaser, the nature of the use to which the purchaser proposes to devote the area, and his competence or ability to achieve that purpose. These specific phases, are mentioned not with any conception that they are an exhaustive summary, but more by way of illustration of the kind of circumstance that will call for consideration.
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> From the point of view of the public interest, each application must be considered from the point of view of the benefits or detriments which will accrue to the public generally from the grant of consent. This will involve a consideration of the advantage or utility to the public of the use which it is proposed to make of the land, as well as of all other features which may in any proximate way affect the public at large. The circumstances which may influence a decision are, from every point of view, so general and so incapable of anything even approximating precise definition by reason of their infinite variety, that it is impossible to anticipate or summarize them. Any attempt to do so, even generically, must obviously be foredoomed to failure.

Despite the difficulties, however, the Court added that a decision on the subject has to be made on every occasion when " undue aggregation " is alleged. The question must be determined reasonably, as must all questions of fact.

SUMMARY OF RECENT JUDGMENTS.

SPEED v. HORNE.

Supreme Court. Auckland. 1944. July 19, 20, 24. Callan, J.

Workers' Compensation—Limitation of Action—Employer obtaining Order—Weekly Payments and awarding Lump Sum to Worker—Worker opposing Application—Acceptance by Worker of such Lump-sum Payment—Worker's Subsequent Action for Damages against Third Party—Whether Action barred by Judgment "recovered" for Compensation—"Recover judgment"—Workers' Compensation Act, 1922, s. 49 (4).

The employer of a worker, who had been receiving regular weekly payments from his employer's insurer in respect of injuries sustained by him in an accident arising out of and in the course of his employment, applied to the Compensation Court for an order to send or diminish the weekly payments. The worker in no way agreed to, but opposed the application. On the hearing, the Court made an order ending such payments, and gave judgment for a lump sum of compensation which was paid by the insurer to the worker and accepted by him. Subsequently the worker brought a common-law action for damages for negligence against a defendant other than his employer.

On argument of a preliminary question of law ordered to be argued before trial,

Held, That the worker's claim for damages was not barred by s. 49 (4) of the Workers' Compensation Act, 1922, as he had not " recovered judgment for compensation " within the meaning of that subsection, inasmuch as a man cannot be described as " recovering " something he had never sought ; and the plaintiff had never sought from the Compensation Court any order for a lump sum or any order at all.

Bowley v. *W. Booth and Co., Ltd.*, [1918] N.Z.L.R. 77, [1917] G.L.R. 437 ; *Westport-Stockton Coal Co.* v. *Watterson*, [1918] N.Z.L.R. 177, G.L.R. 156 ; *Bodell* v. *William Cable and Co., Ltd.*, [1921] N.Z.L.R. 211, G.L.R. 161 ; and *Shaw, Savill, and Albion Co., Ltd.* v. *Tucker*, [1943] G.L.R. 5, referred to.

Page v. *Burtwell*, [1908] 2 K.B. 758, distinguished.

Counsel: *North*, for the defendant; *Gould*, for the plaintiff.
Solicitors: *Morpeth, Gould, Wilson and Dyson*, Auckland, for the plaintiff; *E. W. Inder*, Auckland, for the defendant.

STONE v. SCAIFE.

SUPREME COURT. Auckland. 1944. July 11, 18. CALLAN, J.

Practice—Trial—New Trial—Notice of Motion—Time for Filing—Court's discretionary Power to Enlarge—Principles affecting Exercise of Discretion—Evidentiary Requirements—"Within four days after trial"—"Trial"—Code of Civil Procedure, RR. 284, 594.

The time for moving for a new trial under R. 284 of the Code of Civil Procedure runs from the date of the finding of the jury, not from the date when judgment is given by the Judge.

Greene v. *Croome*, [1908] 1 K.B. 277, followed.

The Court has, under R. 594, a discretionary power to enlarge the time mentioned in R. 284. There should be a substantive application for exercise of the power of enlargement; and, if a satisfactory case can be made out on the merits, it would be a proper exercise of discretion to enlarge the time.

Black v. *Mackenzie*, [1918] N.Z.L.R. 235, G.L.R. 190; *Lindop* v. *Tully*, (1898) 16 N.Z.L.R. 574; and *Commercial Agency, Ltd.* v. *Adams*, (1901) 19 N.Z.L.R. 578, 3 G.L.R. 227, followed.

If a motion for a new trial is to succeed upon the grounds mentioned in R. 276 (*g*)—that a witness has been guilty of such misconduct as to affect the result of the trial, to wit, perjury at the trial—the fact that such perjury has been committed should be clearly established.

Austin v. *Austin*, [1931] G.L.R. 640, referred to.

Counsel: *Glaister*, for the plaintiff; *Fortune*, for the defendant.

Solicitors: *Glaister and Ennor*, Auckland, for the plaintiff; *Sexton, Manning, and Fortune*, Auckland, for the defendant.

STONE v. SCAIFE (No. 2).

SUPREME COURT. Auckland. 1944. August 15, 24. CALLAN, J.

Contract — Frustration — Gift — Marriage — Contract to Marry terminated by Woman with Legal Justification—Right of Man to Return of Gifts in Anticipation of Marriage.

Plaintiff and defendant agreed to marry. Defendant, unknown to plaintiff, was already married. She discovered this fact when she read in the paper that he had obtained a decree *nisi*. Thereupon, she broke off the engagement and sued him for damages obtaining a verdict for £500. He counter-claimed to recover from her (*a*) as gifts made by him and received by her in anticipation of marriage—*viz.*, (i) engagement ring, and cameo pendant intended to be worn on the wedding day; (ii) articles of furniture, particulars of which are set out in the judgment; and (*b*) payment for improvement work done by him to and upon the plaintiff's property where some time before the final break between the parties he had resided as a lodger and which the parties intended should be their home after marriage; and repayment of £10 in respect of an instalment paid on a State Advances mortgage on the said property.

Held, 1. That the articles in (*a*) (i) and (ii) were returnable either as pledges or as being subject to an implied condition that the plaintiff would marry the defendant, the fulfilment of which the plaintiff had herself frustrated.

Cohen v. *Sellar*, [1926] 1 K.B. 536, and *Seiler* v. *Funk*, (1914) 32 O.L.R. 99.

2. That as to (*b*) the defendant was a person who had chosen without request to improve the property of another, because he expected events so to turn out that he could enjoy the results of his own efforts for a time long enough to make them worth while, but who had been disappointed in this expectation.

Counsel: *Glaister*, for the plaintiff; *Fortune*, for the defendant.

Solicitors: *Glaister and Ennor*, Auckland, for the plaintiff; *Sexton, Manning, and Fortune*, Auckland, for the defendant.

In re TUCKER (DECEASED), WEST v. TUCKER AND OTHERS.

SUPREME COURT. Palmerston North. 1944. August 1, 17. JOHNSTON, J.

Will—Construction—Direction to pay the net resulting Income of Residue of Estate to Widow—Subsequent Provisions of Will and Codicil made subject thereto—No Income earned by Estate—Whether Widow entitled to resort to Capital.

A will contained the following provisions:—

"4. To pay the net resulting income of the residue of my estate (not exceeding the sum of seven pounds (£7) per week) to my wife Caroline Tucker payable every four (4) weeks during her life and if the said net income shall be less than seven pounds (£7) per week then to pay the whole of such net income to my said wife during her lifetime.

"5. Subject to the provisions of the last preceding clause to pay to my daughter Mabel Tucker out of the income of my estate the weekly sum of three pounds (£3) payable every four (4) weeks during the lifetime of my said daughter Mabel or until she shall marry.

"6. Subject to the bequests hereinbefore given to divide the whole of my estate amongst my children in the shares following."

A codicil to the will giving an annuity to a daughter, Maud, declared that the said annuity should be "subject to and after providing the payments to my wife and my said daughter Mabel as aforesaid a first charge on my estate."

On an originating summons for the interpretation of the will,

Held, That the widow was entitled to have capital resorted to in the event of the estate not earning any income.

In re Watkins' Settlement, Wills v. *Spence*, [1911] 1 Ch. 1; *In re Boden, Boden* v. *Boden*, [1907] 1 Ch. 132; and *In re Young, Brown* v. *Hodgson*, [1912] 2 Ch. 479, applied.

In re Levinge, Wynn Williams v. *Mortimer*, [1933] N.Z.L.R. 814, G.L.R. 175; and *In re Tredgold, Midland Bank Executor and Trustee Co., Ltd.*, v. *Tredgold* [1943] 1 Ch. 69, [1943] 1 All E.R. 120, referred to.

Counsel: *Ongley*, for the plaintiff; *G. I. McGregor*, for Tucker; *H. R. Cooper*, for the trustees; *J. A. Grant*, for Maud Passmore, a beneficiary, defendants.

Solicitors: *A. M. Ongley*, Palmerston North, for the plaintiff; *Cooper, Rapley, and Rutherfurd*, Palmerston North, for the trustees; *Peter Jenkins*, Auckland, for Tucker; *Jacobs and Grant*, Palmerston North, for Maud Passmore; *J. M. Gordon*, Palmerston North, for Florence Mabel Wright.

TRICKETT v. LAURENCE.

SUPREME COURT. Wellington. 1944. July 3. MYERS, C.J.

Government Contract—Power to investigate Accounts and Require Information in relation—Necessity on Proof of Existence of a Government Contract—"Government contract"—Evidence—Privilege—Finance Act (No. 3), 1943, s. 2.

Paragraphs (*a*), (*b*), (*c*), (*d*), and (*e*) of s. 2 (3) of the Finance Act (No. 3), 1943, empowering the Treasury and Controller and Auditor-General to investigate accounts and require the furnishing of information in relation to "any Government contract," cannot be read literally but must be read in a restricted sense.

On an information under s. 2, the prosecution must prove that the contract alleged to exist is a contract within the meaning of s. 2 (1)—that is to say, a contract for the supply of goods or the execution of works in consideration of any payment out of public moneys.

There is no privilege against making self-incriminating answers in respect of any question which may properly be asked under s. 2 (3) (*c*) of the statute.

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

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

THE LATE MR. A. C. HANLON, K.C.

New Zealand's Outstanding Criminal Counsel.

The death of Alfred Charles Hanlon, K.C., calls for a chronicle of the life of one of the ablest criminal barristers this country has produced.

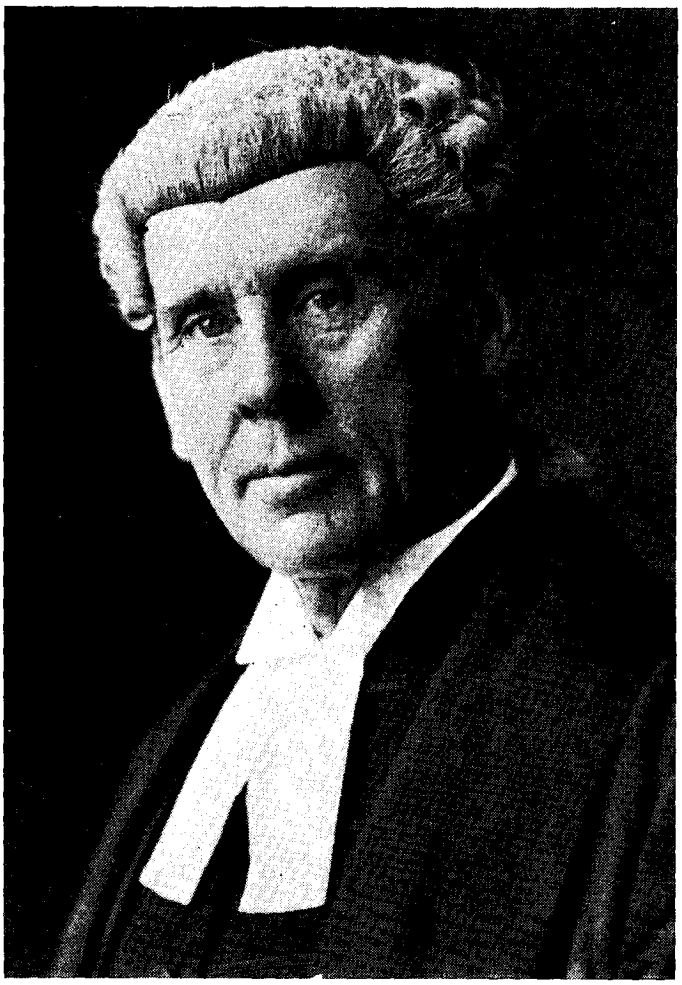
Born in New Zealand, the son of a respected sergeant of Police, he received his primary education at the Port Chalmers District High School. The details of his early life are to be found in the publication issued a few years ago which he entitled *Random Recollections*. Written in characteristically whimsical style, he portrayed the character and mind of a youth, without influence or a financial background, carving out a meteoric career culminating in his appointment as a King's Counsel.

In his early thirties his future was assured; and, had he chosen, the Bench must inevitably have been his goal. But this simple and lovable man sought no judicial reward for his unquestioned talents. He was content to continue at the Bar in the atmosphere which he enjoyed, and which most suited him. The enforced semi-isolation of the Judiciary was unsuited to a character such as his, whose daily pleasure was to contact and enjoy the companionship of his many friends and acquaintances and the interchange of views.

There was an occasion at a comparatively early stage in his career when the establishment of a permanent Criminal Circuit Court throughout New Zealand presided over by one Circuit Judge was contemplated. Mr. Hanlon was approached and had the idea been brought to fruition as was then intended, this colourful figure would have adorned the high office with distinction.

It may be disclosed that, although disappointment naturally followed the contemplated elevation, Mr. Hanlon bore no permanent regrets, as he remained with his contemporaries at the Bar whose comradeship and personal friendship he so much coveted. Such philosophy brings to mind the words of Henry Labouchere, one of the greatest humorists of all time and the most beloved politician of his day in the British House of Commons, when Gladstone, by reason of Royal disfavour, was unable to include him in his Cabinet. Labouchere wrote to a friend—

> So that the good ship "democracy" sails prosperously into Joppa, I care not whether my berth is in the Officers' Quarters or in the forecastle. Jones or Jonah it is all the same to me, and if I thought that my being thrown overboard would render the success of the voyage more certain overboard I would go with pleasure—all the more as I can swim.



Jas. J. Webster Studios

The late Mr. A. C. Hanlon, K.C.

If in the background of Mr. Hanlon's career any fault may be found, it was lack of ambition and his paramount love of sport and recreation. His active participation in public affairs was inconsequential, but he was well versed in questions of international importance. He was one of those fortunate people who refused to allow professional work perpetually to saturate his mind. He confided in his friends that, on completion of his day's work, the mantle of business was completely shred from his thoughts. In relaxation, he delved deeply into many subjects as an occupation for a receptive mind. Amongst these were navigation, astronomy, and wireless. On each he became a recognized authority, and indeed the first became of practical value to him in his frequent appearances in Admiralty cases.

This subject brings to mind the wreck of a palatial pleasure yacht, the *Ariadne*. It was estimated that she cost about £30,000 to build. In 1898 the yacht was purchased for £2,000 by a man named Kerry, and insured by him at Lloyds for £10,000. Kerry was an explorer and a man of means. After changing hands the yacht (schooner-rigged) was sailed from Southampton to Sydney. Shortly after her arrival a new crew was engaged, and under the command of one Captain Mumford, she sailed for Port Chalmers, with a view to reprovisioning there.

While sailing down the East Coast of New Zealand off the mouth of the Waitaki River just north of Oamaru, she ran ashore and became a wreck. Eventually the underwriters abandoned her. At the Nautical Inquiry, Mr. Hanlon represented the owner, Kerry. The master was found guilty of a grave error of judgment. As a result of investigations by Lloyds' surveyor, dramatic

events followed. Captain Mumford confessed to an alleged arrangement with the owner to wreck the yacht and, for a reward, indiscreetly promised him by Lloyds' surveyor, he signed a written confession. He also undertook to produce an agreement, in confirmation of this statement, purporting to be made between Kerry and himself.

Kerry, Mumford, and a man named Freke were arrested and, at the trial of the charge of wilfully wrecking the yacht, Mr. Hanlon, led by Mr. (later Sir) Charles Skerrett, appeared for Kerry. They were successful in obtaining an acquittal of their client.

The charge against the latter turned mainly upon whether certain incriminating words were in the agreement when it was signed, or whether they were wrongfully inserted thereafter by Mumford. The words were: "and a further sum of £400 if the vessel is totally wrecked." At the instigation of Mr. Hanlon, the document was privately photographed, and, when thrown on a large screen by means of a magic lantern, counsel's suspicions were confirmed beyond doubt.

During the trial of the accused the Crown Prosecutor was afforded a private view, whereupon, with characteristic fairness and promptitude, he requested the presiding Judge to order the excission of this evidence from the records in the case.

It was a fitting compliment to Mr. Hanlon that by the desire of his distinguished leader he delivered the final address to the jury.

Space will not permit reference to many interesting and important cases in which he appeared.

Born in simple surroundings, his views throughout were genuinely democratic combined with intolerance for pomp, show, or self-aggrandizement. In modesty and simplicity, there is greatness. Deeds, not words, are the only sound stratum upon which a self-made successful career at the Bar may be built up.

It was on the Criminal side that Mr. Hanlon specialized. The combination of a masterful personality trained in elocution, an easy flow of language and a keen analytical mind, is the perfect equipment for a career at the Bar.

His chance came when he was briefed to defend Minnie Dean on a charge of murder. The accused was charged with the commission of a series of diabolical murders in the form of strangulations of babies committed to her charge, the evidence being of a nature unparalleled in the criminal records of New Zealand. Yet so eloquent was the final plea of her young counsel that the presiding Judge was constrained to adjourn the Court so that, by the time they perforce must adjudicate upon their verdict, the spell-bound jury would by then have recovered from the profound impression made upon them. No higher testimony has been paid any advocate.

His term at the Bar, extending over fifty years, was characterized by a continued series of brilliant successes. Many of his successes may perhaps be termed "verdicts for the counsel," apropos of which a story is told of a trial of a cause on a Welsh Circuit. When the jury were asked for a verdict, the foreman answered: "My Lord, we do not know who is the plaintiff or who is the defendant, but we find for whoever is Mr. Jones's man."

In the hey-day of his triumphs, the Bar of Otago contained a particularly strong personnel of distinguished legal gentlemen. Six of his contemporaries afterwards became Judges of the Supreme Court. They were Mr. Justice Sim, Mr. Justice Chapman, Mr. Justice Hosking, Mr. Justice Adams, Mr. Justice Macgregor, and Mr. Justice Callan.

He maintained the unquestioned title of the outstanding criminal barrister in this country. Few will deny him this exalted position.

The Bar of Dunedin is proud of this friendly and simple man, "Alf" Hanlon, universally known as such, respected and admired by all sections of the community. He is yet another of the select coterie of distinguished legal gentlemen who have passed on, and whose names are perpetuated for their outstanding feats at the Bar of New Zealand.

Tributes from Bench and Bar.

Eloquent tributes to the memory of Mr. A. C. Hanlon, K.C., were paid by Mr. Justice Kennedy and Mr. C. J. I. White, president of the Otago Law Society, at a special sitting of the Supreme Court a few days after Mr. Hanlon's death. There was an unusually large representation of members of the legal profession, and also present were members of Mr. Hanlon's family—Mr. Jack Hanlon and Mesdames W. S. Robertson, E. R. Harty, and M. M. Chrystall. Mr. J. R. Bartholomew, S.M., represented the lower Court Bench, and apologies for unavoidable absence were received from Mr. H. W. Bundle, S.M., and Mr. H. J. Dixon, S.M. The Invercargill and Camaru practitioners were represented by Mr. L. F. Moller and Mr. S. I. Fitch respectively.

Otago Law Society.

Addressing His Honour, Mr. White said that the reason for this large and representative assembly of the Bar was a sad one. They had come together to mourn for the dead and to mark the passing of a very great advocate. He continued: "Alfred Charles Hanlon, King's Counsel, after a comparatively short illness, has been laid to rest, and we, the members of the Otago Bar, now extend to his sorrowing family our most sincere sympathy.

"Mr. Hanlon's career at the Bar was a remarkable one, and the profession could not allow his death to pass without paying public tribute to his memory—indeed, members feel that they have lost not only one of their most distinguished brethren, but also a dear personal friend."

Born in Dunedin some seventy-eight years ago, Mr. Hanlon at the early age of fifteen was articled as a law clerk to the late Mr. J. A. D. Adams, and, having qualified as a barrister and solicitor, he was admitted to the Bar in the year 1888 by the late Sir Joshua Williams. Two years later he commenced practising on his own account.

"It was soon realized," Mr. White said, "that this young man was an advocate of no mean ability, and that he was possessed of all the necessary attributes to enable him to go far in his profession. His chance to demonstrate his real ability to handle a criminal case of the first magnitude came when he was briefed to defend a notorious slayer of infants who was tried for murder in Invercargill in the year 1895. Although he was unsuccessful in saving his client from the gallows, this young advocate put forward a defence of such ability and brilliance that it at once established him as one of the leading criminal advocates of his day. His subsequent career progressively substantiated his claim to such a distinction, until, I think, one may say without exaggeration that he was generally accepted by the profession and the public of New Zealand alike as one of the most able, if not the most able, criminal advocates in New Zealand.

"It is rather strange that it should fall to my lot, as President of the Otago Law Society, to pay this last tribute, because I am able to speak with intimate personal knowledge of the man in his professional capacity."

Mr. White went on to say: "During the time I was associated with him, Mr. Hanlon was at the very zenith of his career, and one could not fail to be amazed at the masterly methods adopted by him in preparing his cases for trial. He maintained that surprise was the keynote of successful cross-examination, and that so far as speeches were concerned, they should be on the broadest possible lines, and with the least possible niggling

over small details. The result was that his conduct of his cases in Court was remarkable for the originality of his lines of attack and for the subtle brilliance and eloquence of his advocacy. His ability for rapidly assimilating the details of cases had to be observed to be credited.

"He was, I think, the last survivor of that great array of legal giants who practised at the Dunedin Bar about the commencement of this present century, Notwithstanding the fact that he practised among such brilliant company, I doubt whether any of them could address a jury with so much artistry and skill and with so much vigour as characterised Mr. Hanlon's efforts.

"In 1930 the deceased was granted the patent of King's Counsel, and he appeared for some years as senior counsel in many important cases. Gradually, however, with advancing years, his familiar and outstanding figure was seen less and less about the environs of these buildings, and I think it is now two or three years since he last appeared in this Court. It is sad and difficult to believe that his resonant voice, which for about half a century resounded through these buildings, is now for ever silent.

"Mr. Hanlon was a former President of the Otago Law Society, and for many years was a member of its Council. Apart from his profession, although resolutely refusing to take any active part in politics, local or national, he was closely associated with a number of local clubs and a large number of sporting bodies, of most of which he had at times been president. He was also president on several occasions of the Dunedin Orphans' Club and was a foundation member and later president of the Dunedin Competitions Society. I know, however, that the society which took pride of place in his affections was the Dunedin Shakespeare Club, of which he was the oldest member, with a record of half a century as president, life member, coach, and outstanding public performer. He was withal a man of infinite jest and was a jolly companion, and with his highly developed Irish sense of *humour*, he was a *raconteur* of no mean order. All his life he paid tribute to the fact that he owed his extensive vocabulary to his long study of the works of Shakespeare, and I think it fitting that I should close these remarks with words which he himself so frequently declaimed from the public platform in Dunedin, words which were spoken by Marc Antony over the dead body of Brutus, but which seem aptly to describe our brother for whom we now mourn: 'And the elements so mixed in him, that Nature might stand up and say to all the world, this was a man.'"

HIS HONOUR MR. JUSTICE KENNEDY.

His Honour said that he joined in the profession's expression of deep regret at the death of their learned friend, Mr. Hanlon. His death was mourned by the Bench no less than by the Bar.

"It was in this city that he began his work and in our Courts that he first displayed those great abilities which were to carry him so far," the learned Judge continued. "Here he took silk and was called within the Bar, and here, within this hall, he made his last appearances as counsel. It is here, where we knew him so well, that his advocacy will be taken as a *model* and the Bench and the Bar will hereafter refer to him.

"His commanding presence, his grasp of facts, his rich and expressive vocabulary, and his singular eloquence specially fitted him for *nisi prius* work, and he early disclosed himself as one of the great masters of civil and especially, criminal advocacy. He had extraordinary gifts of understanding and powers of cross-examination, and withal he acted with such scrupulous fairness, perfect courtesy, and proper deference, that he invariably won the confidence of the tribunal before which he appeared. He maintained criminal pleading on its proper plane as the discharge of a high and honourable duty.

"I have often thought that, in this city, young men at the Bar have been specially favoured to have before them so brilliant an advocate as an example and pattern," His Honour said. "He had a great capacity for friendship and a genius for inspiring young men, and indeed he never did grow old except as time is reckoned in years. When he took silk it was obvious to the Court that he was faithfully discharging the obligations of that office, and by example and by precept leading his juniors in his own tradition. His life was full and he had many interests and great achievements, but within these walls we speak of him chiefly as an officer of the Court upon whose support and assistance the Court could implicitly rely. He has now gone from us. Others may follow him, but no one will fill his place.

"I associate myself with your expressions of sympathy with members of the family in their great loss, and to you, gentlemen of the Bar, I express my sympathy in the loss you have personally suffered through the death of your leader."

CAPITAL PUNISHMENT.

IS ITS ABOLITION JUSTIFIABLE?

By C. A. L. TREADWELL.

Now that we in New Zealand have followed the example of some of the European countries and abolished capital punishment, the question arises whether the public conscience has been satisfied. Is public opinion now content with the perpetrator of a cruel and wanton murder cleansing his wrong in the eye of the law by enduring a life sentence of imprisonment? Knowing, too, that such a sentence may in fact be served in fifteen years, and that, during that period of incarceration, the criminal will be well fed, will have his slightest ailment the anxious consideration of a fully qualified medical practitioner, will be employed in some useful occupation, and that his morale (if he has such potentiality) may be helped by a visit from a travelling cinema, an abundance of books, and by the right to correspond, as well as to receive visitors, will the public feel that, taking it all in all, the sinner has atoned for his wrong and that due payment has been made by him to society?

The answer to that question could easily be given if put to the innocent widowed or orphaned. Yet the question is not an easy one to answer, and it certainly behoves the legal profession to express its view as a body on a topic of such a nature. Indeed, it may be said, that the principal way in which the public learn the view of the profession on matters of public concern is out of the mouths of the Judges when they show their disapproval at some legislative novelty. Some of the Judges in their usually guarded way have shown concern and regret at their inability to order a flogging for some act of human bestiality.

It would be of general benefit if the profession met on occasions to form and voice an opinion on matters outside those which merely affect their personal advantage. One would have thought that on the matter of the abolition of capital punishment the Law Society would have canvassed its members in order to learn what view it took on a proposal that was designed to upset a long established and generally approved practice.

However, the experiment has been made and whether it is likely to prove a success or not is worth considera-

tion. There is no doubt that social experiments, revolutionary in their character and suddenness, have, before, now proved worth while. Public opinion is a test on a matter such as capital punishment. Few are affected personally and directly, yet it is a common concern to all. To test the question one must remember that changes in capital offences have occurred down the ages, and what was tolerable once would be unanimously condemned to-day.

From the earliest days of the Mosaic law the right of the State over the individual for capital offences was recognized. Readers need only refer to Deuteronomy XXI where death of wrongdoers by stoning or by hanging is recognized; women for unchastity were burnt to death (Genesis XXXVIII, 24); while crucifixion and beheading were also methods in those days of coping with crime.

Let us, however, concern ourselves, and that shortly, with capital offences down the ages in England. It is recorded as long ago as 450 B.C. that the condemned were thrown into a quagmire, and executions were carried out in the most public way available. That no doubt was in accordance with the view expressed by Quintillian, who said that when criminals were executed the most public places were chosen "where there will be the greatest number of persons, and so the most for the fear of punishment to work upon them." That view has persisted and probably persists even to this day amongst some of the uninstructed. One well known authority on this subject says:

> History bears out that the very publicity involved defeated its object, and that gallows became in course of time a scene of merry-making at its worst, and the resort of thieves and other criminals at the best. As a deterrent, publicity undoubtedly failed, a fact not universally recognized until the 19th century.

An interesting view of this matter was expressed by that very extraordinary man, who was so intimately concerned with the beginnings of New Zealand, Edward Gibbon Wakefield. He refers to it in his book, *Facts relating to the Punishment of Death in the Metropolis*, which he published a year after his release from Newgate. He had just served a sentence of three years penal servitude for an atrocious crime and, during his term, he collected the information from which he wrote his book. He was of the firm opinion (most of his opinions on any subject were very firm) that public executions created criminals. The following is an extract from the book:—

> Indeed what follows is copied from a note made at the time of a conversation held with a convict who was within an ace of being hanged for coining.
>
> *Q.* Have you often seen an execution?
> Yes, often.
>
> *Q.* Did it not frighten you?
> No, why should it?
>
> *Q.* Did not it make you think that the same would happen to yourself?
> Not a bit.
>
> *Q.* What did you think then?
> Think? Why I thought that it was a ———— shame.
>
> *Q.* Now when you were going to run a great risk of being caught and hanged, did the thought never come into your head that it would be as well to avoid the risk?
> Never.
>
> *Q.* Not when you remembered having seen men hanged for the same thing?
> Oh! I never remembered anything about it; and, if I had, what difference would that make? We must all take our chance. I never thought it would fall to me and I don't think it will.
>
> *Q.* But if it should?
> Then, I hope I shall suffer like a man—where's the use of snivelling?

The situation in those days (Wakefield was sentenced in 1827) was different, too, in that there were so many capital offences; the age being a very brutal and callous one. Life was cheap, and young and old, men and women, were hanged for many crimes. To-day we are so changed in our outlook that we should be inexpressibly horrified if any suggestion were made to revert to a semblance of the system of a century back. The problem to-day is whether we ought to be alarmed at the distance the pendulum of the law has swung into the realm of lenity.

Less than five hundred years ago a man stealing ropes and nets from a ship of the value of ninepence "should at low-water mark have his hands and feet bound, his throat cut, his tongue pulled out, and his body thrown into the sea." Prisoners refusing to plead were starved to death till the humane law of *peine forte et dure* was substituted for that slow torture. By this method the prisoner was

> placed on his back arms and legs outstretched. As many weights as he could bear without his ribs being actually crushed in, were placed on him. He was given a small quantity of bad bread the first day, some foul water the next day, and to use the words of the Act "so shall he continue till he dies."

Henry VIII rather overdid things, as in some respects is well known, and he executed 72,000 of his subjects. It was in his term that capital punishment by being boiled to death was initiated. Even in those days this form revolted the people, so after sixteen years it was repealed in the reign of Edward VI. It is not necessary to say more than that hanging, *drawing, and quartering and burning* were frequently applied as punishments to many of the offending. In the 18th century according to Blackstone there were one hundred and sixty capital offences. These increased to over two hundred at the beginning of the 19th century.

One further quotation will suffice to illustrate the barbarous state of affairs existing within the last one hundred and fifty years in England.

> Elizabeth Marsh who was executed in 1794 at Dorchester for the murder of her grandfather was only fifteen. As late as 1831 a boy of nine years was publicly hanged at Chelmsford for having set fire to a house at Witham. In the days of George II it was no uncommon thing for children under the age of ten to be hanged, and on one occasion ten of them were strung up together, as a warning to men and a spectacle to the angels. In 1833 the death sentence was passed on a boy for housebreaking . . . but the sentence was not carried out. In 1808 Michael Hamond and his sister aged seven and eleven respectively were hanged at Lynn for felony.

Then during the reign of Victoria the condition of the people improved and greater regard to humaneness developed. With the changed outlook in England similar changes took place in the colonies. Sentences generally were reduced in severity, conditions improved, and during this present century the improvements have been so great and the consideration extended to the criminals become so benign that one may wonder if the word "punishment" is not soon likely to mean something not at present acceptable within its definition in the *Oxford Dictionary*.

In order to balance our views on this problem, let us accept Sir John Salmond's classification of the purposes of punishment in his order of their importance:

(1) deterrent; (2) preventive; (3) reformative; and (4) retributive.

As that great jurist said "the first is the essential and all important one, the others being merely accessory, . . . the chief end of the law of crime is to make the evildoers an example and a warning to all that are likeminded with him." He went on to say, "Punishment prevents offences by destroying this conflict of interest to which they owe their origin" (wrongdoer's interest *v.* society's)—"by making all deeds which are injurious to others injurious also to the doers of them—by making every offence, in the words of Locke, 'an ill-bargain to the offender'."

The 2nd and 3rd classification can, of course, have no application to the capital offender.

It is of little use to say that over a space of years the crime of murder has increased, hence the ineffectiveness of the abolition of capital punishment. It is impossible to say that because murders have been more frequent in New Zealand during the last few years (if they have) that that is due to the changed legislation in question. We must look at the problem unaffected by any such impression. It is quite certain that the effect of this change cannot at present be estimated. Let us, therefore, consider the question as if such a change were contemplated and not *fait accompli*.

Every man is a unit in society. He lives within that order, and must conform to its requirements. If he breaks from its edicts he is anti-social and may be compelled to conform. Merely at his whim he may not harm another. That is all elementary and fundamental. It seems that man owns nothing against society's rights thereto. For orderly living that is so. *Sic utere tuo ut alienum non laedas* applies to one's realty as well as personalty. If an offender persists in disregarding the rights of others he may be forcibly prevented. Even when in goal for his offending he is still within the society, and accordingly responsible thereto. If he so behaves as to show by his acts that the rights of others to live within that society are imperilled, he may be restrained. When he goes further and deprives another of his earthly existence may not society call on him to forfeit the right to enjoy the existence of which he has deprived an innocent? Does not that sound in justice and common sense? Till recently when murder was almost the only capital offence the impression was current that capital punishment was a survivor of *lex talionis*. Yet that is hardly so. Death was the penalty for two hundred offences a century ago, and now murder and treason of them all alone survived as capital offences. The reason of their persisting as such no doubt was on account of their heinous nature and, in the case of treason, widespread effect. No term of imprisonment would satisfy the public conscience. The striving of the law is always to be just, and merely to restrict the liberty of a murderer or traitor might well be deemed inadequate.

There is no religious objection to hanging a murderer. A great and living ecclesiast writing on this subject had little doubt on that score.

> The notion that the State has no right to take the life of an incorrigible anti-social citizen will not bear examination. . . . The Government has the right to protect itself against political assassins and to protect private citizens from being murdered.

A French professor of law, it is said, declared that if capital punishment were done away with it should be announced that "henceforth the law of France will guarantee the lives of none but murderers."

If the general body of opinion in New Zealand is against the abolition of the death penalty, it looks as if the Government in its intense desire to please the under-dog has allowed a false sentimentality to direct its judgment. Before the death penalty was abolished there may have been a few individuals who raised their voices against the destruction of murderers. One plucks the rank weeds out of one's garden, one destroys a mad dog, yet we comfort, house, and guard a fiend in human form who mercilessly for his own purposes murders an innocent fellow-being. The balance of advantage is heavily in favour of the murderer in the scales of human justice. It seems odd that society should spend large sums of money for the benefit of guarding one who has by his act wilfully violated the perfect right of a law-abiding citizen to live. Against society an individual's life ought not to be inviolate.

One feels inherently that mawkish sentimentality ought not to shield the ravisher or the murderer, and, if such a person be taken, then let him forfeit his right to live. That seems just. It does not follow that every murderer should be hanged. Circumstances may and often do palliate the offence. But the gross murderer has surely forfeited his right to a place in society. After this war, when Hitler, Himmler, and company take their place in the criminal dock, will there be any voice raised in favour of sparing their lives? Certainly no one who remembers their crimes against Poland, Czeko-Slovakia, Greece, and the Jews. It may be a question of degree as well as of principle. Against those fiends the world will be the society claiming the forfeit—in the ordinary case of a murderer it is the nation making the claim—but in principle there is no difference.

In any event, when we settle down again to peaceful occupations we may have learnt how to regard social conditions free from political pettiness, and face serenely and justly the problems that affect the responsibilities as well as the rights of man. It seems difficult to justify a proposition that an individual may wantonly deprive another of his life and yet society may not as a retributive measure do so.

Unless, therefore, there is something sacrosanct in human life; that it possesses some indefinable protection against damage or loss no matter how unworthy be its possessor; that no matter of injustice may stand in its right to continue in being until nature or an accident ends it; that, indeed, by some mysterious right, it is utterly indefensible to destroy it; then, unless these strange attributes obtain one may in the name of Justice remove from the company of men any one who wilfully and maliciously destroys an innocent member of society.

Then justice seems to be done; otherwise it seems to be in default. And it is only when justice prevails that we can truly have peace on earth and goodwill between men. For as Voltaire said: "The sentiment of justice is so natural, so universally acquired by all mankind, that it seems to me independent of all law, all party, all religion."

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. 17.—F. TO A.

Urban Land—Subdivision into Lots outside Borough—Purchased as a Whole—No Improvements effected—Consideration of Suitability as Residential Sites—Assessment of Value of Lots in comparison with Purchase Price of Subdivision.

This appeal concerns the basic value in terms of the Servicemen's Settlement and Land Sales Act, 1943, of a number of subdivisional sections in the vicinity of Mairangi. The sale of only one lot was, at the suggestion of both parties, alone specifically considered, that lot being the most valuable of all the lots sold. It was agreed that the judgment of the Court in respect of that lot should be regarded as conclusive of all the appeals in respect of all the lots.

Somewhat more than the aggregate area affected by all the sales was purchased by the appellant in 1939 for £775. The property had already then been subdivided for a good many years in the sense that, generally speaking, the subdivisional areas the appellant was now selling had been surveyed off.

The subdivisional plan had been prepared, passed, and deposited by the former owner who sold to the appellant. As all the lots face, and at all material times faced, a public road no roading or other work was necessary and none of any moment has at any time been done. In short, the appellant acquired by transfer on December 7, 1939, an already subdivided block in which the subdivisional areas were then available for immediate sale. The appellant's original intention was, he says, (he being a builder) to erect houses on the block and sell them.

He envisaged difficulties, however, as a result of War conditions and so decided to leave the whole undertaking in abeyance until after the War. This resolution he abandoned when in recent months he found a demand for the lots existed. The extent and date of development of the specific demand for these lots, and the appellant's reaction to that demand were best expressed in his own words. He said in this relation in the course of his evidence, "Recently I had a large number of inquiries for sections. After consideration I thought I would sell them."

The Court said: "Seeing that the appellant bought as a whole at the end of 1939 what he is now selling almost as to its entirety in parts, without in the meantime doing anything to add to the value, the price paid by the appellant might be a convenient starting point from which to consider the question of value as at December 15, 1942. The appellant, however, contends that he made a fortuitous purchase and refutes the suggestion that the price he paid is any indication of value. Mr. B., who was called as a witness for the Crown, does not concur in this view. He thinks the price paid by the appellant was fair and proper.

"In support of this conclusion he refers to the sale of an area of 93½ acres in the same general locality for £275 in May, 1939, and the sale of an area of 38½ acres close to the appellant's block in June, 1938, for £500. This latter area was resold in December, 1939, for £450, but for a sufficient reason that resale must be disregarded,

"The evidence was not sufficient to enable the Court to judge with any degree of accuracy to what extent (if any) the appellant made a good bargain when he bought. It is not, however, without significance that, having spent a sum of £29 only in connection with the block since he bought it—and that in having some minor survey work done—he is now reselling or seeking to resell at £4,000-odd most, but not all, of what he bought for £775. Either he made an extraordinarily good bargain or, if the basic value of Lots is what the appellant claims, there must have been a remarkable increase in the value of the lots from the end of 1939 to the end of 1942.

"There is, however, some danger inherent in endeavouring to determine the only question before the Court—namely, the basic value of Lot 14, by endeavouring to determine to what extent the appellant made a fortunate purchase. The safer and better course is to decide that question by reference to the more usual criteria of value. It was these alone which were made the subject of definitive testimony. A basic value of £300 was supported by the evidence of two private valuers. Their evidence, if accepted in its entirety, would justify the granting of consent at the full sale price of £300, but was not intended to and would not justify a sale at any higher figure. Such a position demands a close examination of the various factors upon which their conclusion as to value is based.

"It is, however, necessary first to postulate that all the valuations proceed upon the assumption that Lot 14, in common with the other lots, must be valued as a residential site. As the appellant said, 'Most people who bought them (*i.e.*, the lots) intend to build permanent homes.' Referring to the already existent houses in the locality, he said, 'The owners of these houses all live there and travel to and fro to Auckland or elsewhere to work.'

"As residential sites, these lots as a whole suffer from many disadvantages. Situate about two miles from the Takapuna Borough, they are about three-quarters of a mile from any means of transport and the road for this distance is not tar-sealed: they are without water and drainage; are in a sparsely settled gum-land area; and are some four-fifths of a mile from the sea. The advantages, and the only advantages, they enjoy are that they are large in size (Lot 14 contains 2 roods 21·4 perches) and have good, and, in the case of Lot 14, exceptionally good, land and water views.

"In examining the factors upon which the witnesses for the appellant based their assessment of value, it is but fair to appreciate that they had not the advantage of the sale prices of similar or substantially similar properties upon which to base an opinion. Thus Mr. H. was constrained to mainly draw his inference as to the value of Lot 14 from the sale of a section at £90. This section he valued at £100 and Mr. B. at £90. It has no view and was so wet that the owner had to spend £30 in draining it. For the rest, he calls in aid of his valuation the prices paid for land at Aberdeen Road. He particularly refers to the sale of a corner section at £300. This section, he says, enjoys a view somewhat similar to Lot 14. But this section is, on Mr. H.'s estimate, three-quarters of a mile nearer to Takapuna, which is the main centre. It has a bus service—an infrequent one truly—but nevertheless a service—within a short distance, and other amenities denied to Lot 14.

"Mr. B. further widens the disparity by pointing out that the Aberdeen Road section is on a cliff looking immediately down on the water, whilst the view of the sea from Lot 14 is distant. In his opinion, the two sites are not comparable as an average buyer would regard the Aberdeen Road site as incomparably the better of the two. If any comparison with this corner section at Aberdeen Road is invalid, as the Court is driven to conclude it is, then Mr. H., on his own statement, is left with only the £90 section as the basis of his conclusion as to the value of Lot 14. This means, in effect, that the assessment of the difference in value between the £90 section and Lot 14 at £300 depends wholly and entirely upon Mr. H.'s personal opinion, and upon nothing else.

"Mr. S., in the absence of readily comparable sales, first claimed that what he termed its 'super-grandstand situation' put Lot 14 into a different category to all other lands sold he added value on this account to the prices paid for other areas; but to get a basis of prices to which to add, he in his turn was constrained to make reference to sales in areas much nearer to high value areas. The Sunshine Estate, for instance, is very near to Milford Beach, which is a focal point of value, whilst the Rothesay Bay subdivision is one and a half miles away from Lot 14 and near another focal point of value, Brown's Bay. The latter has a special value as a holiday resort. Incidentally, the Sunshine Estate sections from a residential point of view, whilst they only have water from a private bore, do in fact enjoy the benefit of electric light and power and of a metal road over the 200 yards of distance that separates them from a bus stop.

"A detailed examination of the evidence given by the expert witnesses for the appellant suggests forcibly that, in its essence, that evidence is dependent for its probative value solely upon the personal opinion of the respective witnesses, without any or any convincing support from fairly comparable sales. That Mr. S. himself appreciated this is implicit in his statement where he said 'My reasoning as an experienced valuer tells me that section (*i.e.*, Lot 14) was worth £300 as at 1942.'

"On the other hand, Mr. B., who was called by the Crown representative, gave a good many instances of sales at relevant dates to support his assessment of value and was able to establish in most instances a reasonable basis of comparison.

"It seems to be, as Mr. B. deposed, that the demand for such sections as those concerned in this appeal has become accentuated in the last couple of years. To meet that demand there is an abundance of land capable of subdivision, but not yet subdivided, so that, for the moment, the already subdivided areas are enjoying a scarcity value. From the totality of the evidence the Court is satisfied that Lot 14 did not enjoy that value at December 15, 1942.

"In the result, the Court is of opinion that the Committee fixed a fair and proper basic value for Lot 14 and the appeal with respect to it is dismissed. As it was agreed that the various other appeals brought by the appellant should also be dismissed if the appeal with respect to Lot 14 should fail, they are also dismissed."

No. 18.—R. TO G.

Urban Land—Section of Subdivided Block—Erection of New Industrial Undertaking in Locality—Suggested Effect of Value—Whether a Circumstance to be taken into Account—Servicemen's Settlement and Land Sales Act, 1943, *s.* 54 (2) (c).

This appeal by the vendors concerned the sale of a section of one-quarter of an acre of land to be cut out of a presently unsubdivided block of some 17 acres owned by the appellant vendors.

The section sold fronted Harris Street in the Borough of Pukekohe. Adjoining it and constituting a part of the same block were three other section sites which were available for sale and presumably had been available for sale for some years. The proposed purchaser spontaneously offered the vendors £300 for the land now in question, and that offer was accepted on the spot and without bargaining.

The case of the appellants was put upon a dual footing. It was contended that the section, as at December 15, 1942, was reasonably worth the sale price of £300. In so far, however, as that contention might be held not to be established by the evidence, it was contended that the development of large dehydration works in Pukekohe since 1942 had materially increased the value of residential sites in the borough, and that this was a circumstance of which the Court could and should take account under s. 54 (2) (*c*) of the Servicemen's Settlement and Land Sales Act, 1943.

The contention was that, taking this factor into account, the present sale price, irrespective of the value of the land at December, 1942, represented a fair value in terms of s. 54 (1) of the Act. Great weight was attached by counsel to this latter contention, and the evidence led by the appellants appeared to be in a marked degree designed to establish this recent accrual of value.

The Court said: "By implication, any substantial accretion in value since 1942 negatives the existence at that point of time of a value equal to the present sale price. The truth of this implication was established by the appellant's evidence. It was conceded throughout that values in Pukekohe were higher in earlier years than they were for some considerable time following the slump. In fact, the conclusion seems justified that it is only since 1942 that there has been any demonstrable demand for sections. Even so, judging from the comparative paucity of completed sales to which reference was made in the evidence on both sides, the market for sections to date has been what is commonly described as 'weak.'

"The existence through the years of but a meagre demand, and the absence, in consequence, of a sufficient number of sales to provide any definitive criterion of value, is an outstanding characteristic of the case.

"A careful consideration of all the comparable sales inevitably leads to two conclusions. The first is that the land now in question was not, on December 15, 1942, worth the sum or, perhaps, even anything approaching the sum agreed to be paid for it by the present purchaser. This conclusion is fortified by the disappointment expressed by Mr. R. in the progress of the town up to some two or three years ago, and his expression of opinion that more progress has been made in the last two or three years than it was forty years ago thought it would make in ten years.

"It is also fortified by the fact that, until the present time, the land now in question and other adjoining desirable sites have remained in 'a paddock state.' Had any real demand for sections existed up to now, the vendors, who are and have been admittedly, willing sellers, would have been impelled to subdivide their holdings and to make sections available.

"The second conclusion to which a consideration of comparable sales necessarily leads is that the demand for sections is of such recent origin that up to the present stable values have not been created. This is demonstrated by the fact that every instance in which a price tending to suggest £300 as the fair value of the land now in question has been realized is offset by the fact that a very much lower price was realized for an equally desirable, or even better, site at approximately the same point of time. What individual purchasers will pay appears at the moment to be governed not only by their personal desire to acquire a particular site, but also by the degree of optimism with which each individual regards the effect upon the town of the establishment of the new dehydrating industry.

"For the Court to assess the value of this land, as the appellants ask, at the maximum sum realized in these circumstances for similar land would defeat the whole purpose of the Act.

"Even apart from that consideration, however, it may well be that the proper conclusion to be drawn from all the instances of comparable sales is that land in Pukekohe has not, up to the present, acquired a value which would justify a sale of this land at £300. As to that, however, no opinion is expressed, as the question may have to be considered in future proceedings and in the light of further evidence. For all present purposes it is sufficient to say that the Court is not, on the evidence before it, satisfied that the value of the land now in question has been increased sufficiently (if increased at all) above its value on December 15, 1942, by the advent of the new industry to justify the claim that its fair value in terms of s. 54 (1) of the Act is the price agreed to be paid by Mrs. G. Any increase from any other suggested cause it is the purpose of the legislation to restrain.

"With these considerations in mind, the Court cannot but conclude that the basic value fixed by the Committee was both fair and proper. The appeal is therefore dismissed. No order is made as to costs."

RULES AND REGULATIONS.

Fertilizer Control Order, 1944, Amendment No. 1. (Primary Industries Emergency Regulations, 1939.) No. 1944/123.

Opticians Employment Order, 1944. (Industrial Man-power Emergency Regulations, 1944.) No. 1944/124.

Maize Marketing Emergency Regulations, 1944. (Emergency Regulations Act, 1939.) No. 1944/125.

Soil Conservation and Rivers Control (Travelling allowance) Regulations, 1944. (Soil Conservation and Rivers Control Act, 1941.) No. 1944/126.

Purchase of Wool Emergency Regulations, 1939, Amendment No. 4. (Emergency Regulations Act, 1939.) No. 1944/127.

Pharmacy Regulations, 1944. (Pharmacy Act, 1939.) No. 1944/128.

Postal Amending Regulations, 1944. (Post and Telegraph Act, 1928.) No. 1944/129.

Rationing Emergency Regulations, 1942 (Reprint). (Emergency Regulations Act, 1939.) No. 1944/130.

Rabbit-destruction (Redcliff Rabbit District) Regulations, 1944. (Rabbit Nuisance Act, 1928.) No. 1944/131.

Sale of Food and Drugs Amending Regulations, 1944. (Sale of Food and Drugs Act, 1908.) No. 1944/132.

Rotorua Trout-fishing Regulations, 1939, Amendment No. 2. (Fisheries Act, 1908.) No. 1944/133.

Taupo Trout-fishing Regulations, 1939, Amendment No. 2. (Fisheries Act, 1908, and Native Land Amendment and Native Land Claims Adjustment Act, 1926.) No. 1944/134.

Trout-fishing (Ashburton) Regulations, 1941, Amendment No. 2. (Fisheries Act, 1908.). No. 1944/135.

Trout-fishing (Auckland) Regulations, 1937, Amendment No. 7. (Fisheries Act, 1908.) No. 1944/136.

NEW ZEALAND LAW REVISION COMMITTEE.

Eleventh Meeting.

The eleventh meeting of the New Zealand Law Revision Committee was held at Parliament Buildings, Wellington, recently.

There were present—the Attorney-General, the Hon. H. G. R. Mason, chairman; the Parliamentary Law Draftsman, Mr H. D. C. Adams; the Under-Secretary for Justice, Mr. B. L. Dallard; and Messrs. W. J. Sim, K.C., K. M. Gresson, and A. C. Stephens.

The various matters brought to the Committee's notice were dealt with as under:—

Evidence Act, 1908.—(*a*) Adoption of the Evidence Act, 1938, (1 & 2 Geo. 6, c. 28).—The Committee considered this question in the light of the cases showing the successful operation of the Imperial Act, over the period of six years since its enactment. It was decided to recommend the adoption of the Imperial statute. The Law Draftsman was requested to draft a Bill amending the Evidence Act, 1908, accordingly, and including any consequential amendments to the existing statute.

(*b*) Adoption of S. 95A of the Evidence Act, 1910 (Tas.) added to the principal Act by the Evidence Act, 1943 (Tas.), enabling either spouse to give direct evidence of non-access.

It was resolved to request Messrs. W. E. Leicester, A. J. Mazengarb, and J. D. Willis to submit a joint report as to the desirability of adopting this section thus abrogating the rule applied and confirmed in *Russell* v. *Russell*, [1924] A.C. 687.

Collisions on Land.—It was decided to leave this matter over to a more suitable time, it being impracticable under present conditions to undertake the investigation of such a difficult and involved problem.

Matters outstanding from previous meetings:—

Justices of the Peace Act, 1927.—Publication of evidence in lower Court.—It was decided that this matter should be deferred.

Legal Aid Act, 1939.—As the present staffing difficulties of all practitioners would prevent the successful implementation of the proposed scheme, it was agreed to defer the matter until conditions were more favourable.

Destitute Persons Act, 1910: Blood tests in affiliation cases.—It was agreed that the proposal be recommended for adoption, and the Law Draftsman was requested to prepare a draft based on the English and New South Wales Acts for circulation to members.

Magistrates' Courts Bill.—This, as drafted, was referred to the Law Draftsman. When the draft Bill is available the comments of several senior Magistrates are to be secured.

Land Transfer Bill and Property Law Bill.—The Law Draftsman reported that some progress had been made and an endeavour would be made to resume work with the Sub-committee on these Bills.

Trustee Bill.—The Law Draftsman reported that this Sub-committee was functioning and fair progress had been made. In response to inquiry by the Law Draftsman, the Committee decided that this Bill should take priority over the Land Transfer and Property Law Bills, and be drafted as soon as possible.

Statute of Limitations.—The Law Draftsman advised that a draft Bill had been prepared for the Committee on the lines of the Imperial statute, and that he would endeavour to have this draft revised and submitted to the Committee.

Evidence Act: Proof of formal documents.—The Law Draftsman was requested to include in the draft of the amending Bill adopting the Evidence Act, 1938 (Imp.) (*supra*), a clause embodying suggestions made.

Damages.—Protection of infants and certain other persons to whom damages are payable. The Committee had previously approved this matter; and the Law Draftsman was requested to include it in the Law Reform Bill, 1944.

Law Reform Bill, 1939.—It was decided to recommend that the Bill as drafted, with additions arising out of this meeting, should proceed to enactment.

Frustrated Contracts.—After discussion, it was recommended that the Law Reform (Frustrated Contracts) Act, 1943 (6 & 7 Geo. 6, c. 40), be adopted in New Zealand; and it was agreed that for the sake of uniformity it should follow the wording of the Imperial statute uniformly and the full benefit of English decisions would thus be obtained, and the Act could be amended from time to time in accordance with any subsequent amendments made to the Imperial Act. The Law Draftsman was asked to prepare a draft accordingly.

Settled Land.—(*a*) Limitation of alienability, where an estate is administered by the Public Trustee. It was decided that the present distinction between the rights of life tenants where the Public Trustee is acting, and where there is a private trustee, be referred to the Sub-committee appointed to revise the Trustee Act for consideration, along with other distinctions similarly made between the powers of the Public Trustee and of private trustees.

(*b*) Section 81 (4) of the Statutes Amendment Act, 1936 (amending the Trustee Act, 1908). It was decided to recommend that this subsection be repealed.

Land Transfer Act, 1915: Amendment to enable registration of memorandum of variation of a lease.—The Law Draftsman was requested to draft an amendment accordingly.

Glasgow Leases.—The automatic bringing down of encumbrances on renewal of leases granting by a "leasing authority" as defined by the Public Bodies' Leases Act, 1908, had been suggested. After discussion, it was decided that the New Zealand Law Society be advised that the Committee recognized the convenience the suggestion would serve, but considered that the practical difficulties are such that the idea is not feasible. The provisions of s. 5 of the Land Transfer Amendment Act, 1939, and the present protection which may be obtained by lodging a caveat were considered to provide machinery to give as full a cover as was practicable.

Justices of the Peace Act, 1927.—(*a*) Review of sentence by Supreme Court on appeal on point of law. As these appeals are by way of case stated, and not by way of rehearing, it was considered that the proposal was not practicable.

(*b*) It was decided to recommend that an amendment be drafted enabling an aggrieved party to appeal to the Court of Appeal on point of law subject to a proviso that such right of appeal shall be exercisable only by consent of a Judge of the Supreme Court.

(*c*) Substitution of "week" for "month" in s. 315 (1) giving a right of general appeal.

It was decided to invite the New Zealand Law Society to express its opinion as to whether a right of appeal should be given (i) in all cases where a term of imprisonment is imposed; or (ii) in all cases where a term of imprisonment exceeding seven days is imposed; or (iii) in all cases of imprisonment for more than one month as at present. The Under-Secretary of Justice will also obtain the views of Magistrates in the four centres.

Wills.—The adoption of the Imperial provisions relating to the non-revocation of a will when made in contemplation of a particular marriage, which is subsequently solemnized, was recommended and referred to the Law Draftsman to include in a suitable Bill.

Family Protection Act, 1908.—The Law Draftsman was requested to prepare for further consideration by the Committee a draft of a provision bringing children of a deceased child of the testator within the protection of the Act. It was agreed that more remote issue should not be admitted. The suggestion made by the Public Trustee, that provision be made for "agreements under the Act" to be confirmed or approved in a summary manner by the Supreme Court, was referred to the Rules Committee for its consideration.

Trusts for Life Tenants.—After full discussion on the proposal that the Court be empowered to vary the provisions of trusts for life tenants in order to meet changed circumstances or conditions, it was decided that no action be taken.

Life Insurance Amendment Bill.—The draft Bill was referred to the Law Draftsman for consideration. Members of the Committee agreed to consider the Bill and forward their comments to the Law Draftsman.

Chattels Transfer Act, 1924.—It was recommended that an amendment be drafted providing for the late registration by the Registrar of an instrument or an affidavit of renewal upon a supporting statement on oath: such registration to be subject to the conditions laid down in *In re J. and J. Byers* (24 N.Z.L.R. 903).

Service Aircraft.—After discussion the Committee recommended that an Order in Council be enacted applying the provisions of s. 7 of the Air Navigation Act, 1931, to aircraft belonging to or employed in the service of His Majesty, thus giving full rights to persons to claim against the Crown in

respect of personal injury, loss, or damage resulting from the use of service aircraft.

Rule against Perpetuities: Pension funds of firms.—It was recommended that a clause be drafted providing that the rule of law relating to perpetuities shall not apply and shall be deemed never to have applied to the trusts of any fund approved under s. 82 of the Land and Income Tax Act, 1923. It was also recommended that the provisions of s. 163 of the Law of Property Act, 1925 (Imp.), validating as at an earlier date a gift otherwise void for remoteness, be adopted.

The Law Draftsman was requested to include the amendments in a suitable Bill.

Divorce and Matrimonial Causes Act, 1928.—After discussion it was recommended that the provisions of s. 36 of the Act empowering the Court to make an order or disposition of any property of a "guilty" wife should be applied equally to all property owned by a "guilty" husband, including the "family home."

Destitute Persons Act, 1910.—It was approved in principle that a mother and a father should be placed on an equal basis of responsibility for maintenance of children as a "parent" under the provisions of s. 26 of the Act. The matter was referred to the Law Draftsman to draft a suitable amendment.

Administration Amendment Bill: Intestate Succession.—Mr. Carrad, Solicitor to the Public Trust Office, was present, at the invitation of the Committee. The draft Bill was considered in detail and attention drawn to a number of points for consideration and adjustment by the Law Draftsman. In particular, it was agreed that (*a*) where there was a surviving wife or husband but no surviving parents or issue, then the whole estate should go to the wife or husband in preference to brothers and sisters of the deceased and other more remote relatives; (*b*) the preference given by the Imperial statute to brothers and sisters of the whole blood as against brothers and sisters of the half-blood should not be adopted; (*c*) an illegitimate child should rank equally with a legitimate child with regard to succession to his mother's estate.

It was decided that the Bill, when redrafted, be referred to the New Zealand Law Society with a request that it express its views by a date which will enable the Bill to be placed before Parliament during next session. The Bill will also be similarly circulated to members, and to the Public Trustee.

Survival of Causes of Action: Law Reform Act, 1936.—After discussion it was decided that no action be taken regarding certain suggested amendments. The point raised regarding a wife's claim for permanent maintenance against the estate of the deceased husband will be covered by an amendment to the Divorce and Matrimonial Causes Act, 1928.

Harbours Act, 1923: Limitation of time for bringing action.—This matter was referred to the Law Draftsman for consideration in connection with the Limitations Bill referred to above.

Infants Act, 1908, s. 22.—It was resolved that the question of providing a right of appeal to the Supreme Court in respect of an application for discharge of an order of adoption be deferred for the time being.

Infanticide Act, 1938 (Imp.).—After discussion, as to whether the Imperial Act should be adopted in New Zealand in a modified form, it was decided to refer the matter to the Right Hon. the Chief Justice for his opinion, and also to ascertain whether other parts of the Empire had enacted legislation similar to that in force in England.

LAND AND INCOME TAX PRACTICE.

Recent Tax Decisions.

Marais v. *Commissioner for Inland Revenue*, [1944] S.Af. T.C. 190.—The appellant, a medical practitioner, had over a long period returned annually as his income for income-tax purposes the amounts actually received by him during the year of assessment irrespective of the periods during which such amounts had been earned by him. During the year of assessment ended June 30, 1940, the appellant recovered a large sum, £3,475, outstanding in respect of fees for services rendered during previous years, and included that amount in his return for the year ended June 30, 1940. The Commissioner for Inland Revenue made assessments upon the income returned by the appellant, who objected on the grounds that the fees earned by him in the preceding years should be excluded from the assessment for the year ended June 30, 1940, and included in assessments of tax on income derived during the years in which the fees had been earned and accrued,

The decision of the Supreme Court was that the case was covered by *Commissioner for Inland Revenue* v. *Delfos*, (1933) 6 S.Af. T.C. 92, in which the majority of the Court held that amounts received during the year of assessment and amounts accrued during that period were taxable as income of that year.

The provision of the South African taxing Act which formed the basis of the case is s. 7 (1), which reads:

> ". . . Gross income means the total amount whether in cash or otherwise *received by or accrued to or in favour of* any person, excluding such receipts or accruals of a capital nature . . . in any year or period assessable under this chapter from any source within the Union . . . and includes the following:—
>
> (*b*) Any amount *so received or accrued* in respect of services rendered, whether due and payable under a contract of service or not . . ."

In *Barnes' Income Tax Handbook*, 5th Ed. 4, the author states: "The meaning assigned to the words 'accrued to or in favour of the taxpayer' by Watermeyer, J., in *Lategan* v. *Inland Revenue Commissioners*, [1926] C.P.D. 203, as being 'to which he has become entitled' was approved by Wessels, C.J., in *Inland Revenue Commissioners* v. *Delfos*, [1933] App.D. 250, 6 S.Af. T.C. 92. The Chief Justice further said: 'It was for the Legislature to say how it wished to determine the taxable income of the citizen, and we cannot say that where in a definition it is said "received by" it did not mean to include everything that the taxpayer received in the year of assessment (not being something of a capital nature); nor can we say that when the Legislature said disjunctively "received by or accrued to" it meant "received by and accrued to"'."

The words "received by or accrued to" must therefore be given this plain meaning, and they thus confer on the Commissioner the right to tax an amount either when it has accrued or alternatively when it has been received. de Villiers, J.A., said in *Commissioner for Inland Revenue* v. *Delfos* (*supra*):

> ". . . Section 7 . . . defines gross income on two bases—*viz.*, (1) receipts and (2) accruals. These bases are in my opinion independent of each other; that is to say, the Commissioner can claim to regard as gross income all amounts actually received during the tax year, whenever they may have originally accrued, and also all amounts accruing during the tax year. There is, however, a necessary implication that the same amount shall not be taxed twice in the hands of the same taxpayer, as has been held in English cases decided under statutes which, according to the plain meaning of their language, imposed such a double taxation: *Bradbury* v. *English Sewing Cotton Co., Ltd.*, [1923] A.C. 760; *Gilbertson* v. *Fergusson*, (1881) 7 Q.B.D. 570."

Under the South African statute it would appear that income cannot accrue until there has arisen an enforceable right to claim payment of a debt immediately, or at some future time. The method of finding the date of accrual is to fix the moment of time when the taxpayer acquired the right "or became entitled to" the income, and to regard that as indicating the date of accrual.

It is interesting to compare the South African provision with s. 79 of the New Zealand Act:

> "Without in any way limiting the meaning of the term, the assessable income of any person shall . . . be deemed to include . . . —
>
> "(*a*) All profits or gains *derived* from any business;
>
> "(*b*) All salaries, wages, or allowances . . . including all sums *received or receivable* by way of bonus, gratuity, extra salary, or emolument of any kind, in respect of or in relation to the employment or service of the taxpayer . . . "

Section 79 should be read in conjunction with s. 90:—

> "For the purposes of this Act every person shall be deemed to have *derived* income though it has not been actually paid to or received by him, or already become due or receivable, but has been credited in account, or invested, accumulated, or capitalized, or carried to any reserve, sinking, or insurance fund, or otherwise dealt with in his interest or on his behalf."

In his *Taxation Laws of New Zealand*, 225, Dr. Cunningham deals with the word "derived" thus:

"The word 'derived' has no technical meaning but is equivalent to 'arising' or 'accruing' or to 'received' or 'drawn' by the recipient for his separate use, benefit, and disposal. In an Australian case, Isaacs, J., held that it meant 'obtained' or 'got' or 'acquired'."

Mr. J. A. L. Gunn in his *Commonwealth Income Tax Law and Practice*, p. 177, gives a meaning of "derived.":

"I see no difference between income arising from a source and income derived from a source, at any rate for present purposes, and the two interpretations would carry precisely the same meaning for present purposes if the one word were substituted for the other. In *Commissioner of Taxation* v. *Kirk*, [1900] A.C. 588, will be found observations by Lord Davey, speaking for the Judicial Committee, on the words 'derived,' 'arising,' or 'accruing,' which are to the point in this connection. The case arose under the Land and Income Tax Assessment Act of 1895 (N.S.W.) and, speaking of the terms of s. 15 of that Act the learned Lord said: 'Their Lordships attach no special meaning to the word "derived" which they treat as synonymous with "arising" or "accruing": per Barton, A.C.J., in *Harding* v. *Federal Commissioner of Taxation*, (1917) 23 C.L.R. 119, 131'."

"The word 'derived' was considered by the Privy Council in *Kirk's* case, an income-tax case, and their Lordships attached no technical meaning to the word, but considered it in such a connection as equivalent to 'arising or accruing.' In the *Oxford Dictionary*, under the word 'derive' (Vol. III, D, p. 229, col. 3, par. 6), the definition includes 'to . . . get, gain, obtain (a thing from a source).' This exactly touches the present contention. The examples there given show how broadly the word may be used."

It should be noted that the word "derived" in the New Zealand Act is used in connection with profits or gains from a business.

The words used in connection with salaries or wages in respect of the taxpayer's employment are "*received or receivable.*" These words convey a more restricted meaning than the words "received by or accrued to" as used in the South African law, and a note upon the words "or receivable" in the section is perhaps indicated in a comment made by Wessels, C.J., in *Commissioner of Inland Revenue* v. *Delfos* (*supra*): "There is no provision in the Act giving the Commissioner a discretion to bring into his assessment that part of a salary which is paid, and then to wait and see whether the unpaid part will eventually be paid in some future year and then at a later date re-open the assessment and bring the amount into the year in which it ought to have been paid."

The word "receivable" does not appear to be used in the provisions defining assessable income in Australia or the United Kingdom and there is little assistance to be obtained from those countries in this connection. There is, however, a South African case, *Income Tax Case No. 243*, (1932) 6 S.Af. T.C. 370, in which the meaning of the term "receivable" in relation to income is discussed.

The section under consideration, s. 11 (2) (*c*), Income Tax Act, 1941 (South Africa), reads, in part: "The deductions allowed shall be sums expended for the repairs of property occupied for the purpose of trade or in respect of which *income is receivable* . . . ." Dr. Manfred Nathan, K.C., said that the Court had great difficulty in determining the meaning of the words "is receivable" in this section. He referred to the definition given in various dictionaries and said: ". . . It appears that the main meaning of 'receivable' is 'capable of being received.' If that is so, 'receivable' has not as its primary meaning definitely to be received, but merely capable of being received. It would have been otherwise if subsection (*c*) of section 11 (2) had stated 'in respect of which income is received or is to be received.' It merely means that the property must be in such a state, or property of such a kind from which income may be received. That being the primary meaning we come to the conclusion that this is an allowable deduction. There is an undoubted expenditure on repairs, and according to the meaning of the word 'receivable' it does not follow that at the exact date there must be an agreement for the receipt of income."

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. Stamp Duty.—*Gift Duty—Marriage Settlement—Breaking of Ante-nuptial Marriage Settlement in favour of Settlor—Release of special Power authorizing Appointment to Second Husband and issue of Second Marriage—Liability to Gift and Stamp Duty.*

QUESTION: By ante-nuptial marriage settlement dated November 1, 1911, A. (then a spinster), in contemplation of her marriage with B., settled certain property upon trust to pay the income to A. for life, and after her death to pay the said income to B. for life, and after the deaths of A. and B. upon trust for all and every the children of the said marriage who being sons or a son should attain the age of twenty-one years and being daughters or a daughter should attain that age or marry under that age, to be divided between and amongst such children, and if more than one in equal shares. There was a provision in the marriage settlement that if A. (the settlor) should survive B., it should be lawful for her, at any time or times after the death of B., to appoint by deed or will in favour of any husband with whom she might intermarry after the death of the said B. and her child or children of any future husband, any part not exceeding one-half of the trust premises thereby settled. The marriage was duly solemnized, and there have been four children of the marriage, C., D., E., and F., all of whom have reached the age of twenty-one years. B. recently died. A. and the four children desire to break the settlement and to vest the trust property beneficially in A. absolutely. The present trustees are G. and H. The assets of the marriage settlement comprise realty of which the Government valuation is £3,000 and a Land Transfer mortgage for £1,000. A.'s age is fifty-four. Please state what instruments will require to be drawn and the amount of duty to be paid?

ANSWER: (*a*) A deed will be required to which A., all the children, and the trustees are parties. In this deed A. should release her special power of appointment. The children should transfer all their beneficial estate right and interest in the settlement to A. A. and the children should jointly and severally covenant with the trustees G. and H. that they will keep them indemnified against all claims, &c., in respect of the marriage settlement. It is desirable to set out the assets of the settlement in a schedule to the deed. The land and the mortgage must be transferred by the trustees to A. by memorandum of transfer duly registered.

(*b*) As to gift duty, what has been done in substance is that the children have gifted the corpus to A., *less* A.'s pre-existing life-interest therein. Actuarially calculated at 5 per cent. according to the Carlile Tables (which in practice are used by the Stamp Department) the value of A.'s life-interest in the corpus is approximately £2,360. Therefore the value of each gift made by the children is one-fourth of £4,000 *less* £2,360, which equals £410. As the value of each gift is less than £500 no gift duty will be payable unless each donor has made or makes other gifts within twelve months. *Ad valorem* stamp duty will be payable, as a voluntary conveyance, on the beneficial interest of the children in the land and mortgage and this will be payable on the deed. The duty payable in respect of the land, £1,230, will be £13 15s., and in respect of the mortgage (£410), £1 7s. 6d. The stamp duty on the transfer will be 15s., as a conveyance from trustees to the beneficiary.