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FAIR RENTS ACT: WHETHER AN APARTMENT HOUSE IS A "DWELLINGHOUSE."

IN a recent judgment, *Rickey* v. *Brennan* (to be reported), His Honour Mr. Justice Fair, said that the questions which arise under the Fair Rents Act, 1936, and its amendments often are unusual, and they vary very much in their circumstances. He commented on the fact that legislation dealing with the principles to be applied in this new branch of the law is not expressed in the precise and clear language dealing with ordinary business questions and well established principles. Similar legislation in England was the subject of frequent judicial consideration after its enactment in 1915; but it was not until nearly sixteen years later that the basic principle of the Rent Restriction Acts was finally determined by the judgments of the Court of Appeal in *Haskins* v. *Lewis*, [1931] 2 K.B. 1, and in *Skinner* v. *Geary*, [1931] 2 K.B. 546. These cases decided that the principal object of the legislation was to protect a tenant who is residing in a house from being turned out of his home; and the legislation was not designed to protect a person who is not resident in a dwellinghouse, but who is making money by subletting it. Personal occupation is the basis of the protection.

A question that has caused much difficulty, and resulted in a divergence of views, is whether premises let to a tenant as a boarding or apartment house, and sublet by him as flats or apartments, constitute a "dwellinghouse" within the meaning of the definition of that term in s. 2 of the Fair Rents Act, 1936, as amended. If such premises do not come within the definition, the premises as a whole are without the protection of the statute, notwithstanding the fact that each separate apartment or flat which is sublet is within the definition and so subject to the legislation.

Originally, in s. 2 of the Fair Rents Act, 1936, unless the context otherwise required, "dwellinghouse" was defined as meaning—

> Any house or part of a house let as a separate dwelling where the tenancy does not include any land other than the site of the dwellinghouse and a garden or other premises in connection therewith; and includes any furniture that may be let therewith; but does not include—
>
> (*a*) Any premises let at a rent that includes payments in respect of board or attendance; or
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> (*b*) Any premises used by the tenant exclusively or principally for business purposes; or
>
> (*c*) Any premises forming part of a building originally erected for the purpose of being let as two or more separate flats or apartments.

By the year 1941, the definition had been amended, in 1937 and again in 1939. Paragraph (*c*) had gone, on its repeal by s. 3 (1) of the Amendment Act, 1937. The new para. (*c*), then substituted was, in turn, repealed by s. 3 (1) of the Amendment Act, 1939. And, in 1941, with the amendment of para. (*a*) by s. 10 of the Statutes Amendment Act, 1940, the definition stood, as to its first part; but from, and including the words, "but does not include," it was as follows:—

> (*a*) Any premises let at a rent that includes payments in respect of board; or
>
> (*b*) Any premises used by the tenant exclusively or principally for business purposes.

In *Kirkland* v. *Anderson*, [1941] 2 M.C.D. 74, Mr. A. M. Goulding, S.M., where a house in question had been let as an apartment house, said that, in order to determine whether or not a property is subject to the Fair Rents Act, it is necessary to see what is the subject-matter of the contract between the parties. In the case before him, there was no dispute as to the subject-matter of the contract, which was a building or house to be used as a boarding or apartment house, or as to its being used for business purposes within s. 2 (*b*) of the Fair Rents Act, 1936. If both parties agree that a particular building or particular premises are to be used for business premises only, then those premises are never within the statute. The learned Magistrate went on to say:

> I agree with the view of counsel for plaintiff as to the construction to be placed on the definition of "dwellinghouse" in s. 2 of the Act. The word is defined to mean "any house or part of a house let as a separate dwelling." I think the words "let as a separate dwelling" govern both a whole house or part of a house. The whole intention of the legislation is to regulate the letting of dwellinghouses. The word "let" in the phrase "let as a separate dwelling" must

be read in conjunction with the words "any house" and "any part of a house." It is impossible to separate the word "let" from the rest of the phrase.

The passing of the Fair Rents Amendment Act, 1942, brought some changes. By s. 3 (1), it applied the principal Act to every dwellinghouse that on the passing of the amendment (October 26, 1942) or at any time thereafter is let as a dwellinghouse. Section 6 (1) provided:

> The application of the principal Act to any dwellinghouse shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade, or professional purposes.

Subsection (2) substituted a new para. (*b*) to the definition of "dwellinghouse" in s. 2 of the principal Act, by excluding licensed premises within the meaning of the Licensing Act, 1908.

Since the passing of the Amendment Act, 1942, the definition of "dwellinghouse" in s. 2 of the principal Act, as amended, appears as follows:—

> 2. In this Act, unless the context otherwise requires, "dwellinghouse" means any house or part of a house let as a separate dwelling where the tenancy does not include any land other than the site of the dwellinghouse and a garden or other premises in connection therewith; and includes any furniture that may be let therewith; but does not include—
>
> (*a*) Any premises let at a rent that includes payments in respect of board; or
>
> (*b*) Any licensed premises within the meaning of the Licensing Act, 1908.

There soon arose some conflict of opinion as to whether these amendments had brought an apartment house, let as such, within the definition of "dwellinghouse."

In *Briggs* v. *Kirkland*, (1943) 3 M.C.D. 240, the same learned Magistrate, Mr. A. M. Goulding, S.M., where the premises had for a long time been let as an apartment or boarding house, held that, notwithstanding the amendments made in 1942, the matter was still covered by his decision in *Kirkland* v. *Anderson* (*supra*). He said:

> If a tenant chooses to take a tenancy of premises to be used not as a dwellinghouse but for business purposes—to wit, as an apartment or boardinghouse—then the tenant cannot ask for a fixation of the fair rent of those premises. I think that is so even though upon subletting apartments in the premises for dwelling purposes the apartments so sublet come within the Act because they are separate dwellinghouses within the definition given in the Act. In many cases where premises are leased for apartment or boarding houses, the tenant does not live in the premises at all. But if a tenant does choose to live in such premises, it does not bring them within the Act.

Six months or so after the last-mentioned judgment, in *Crump* v. *Carnaby*, (1944) 3 M.C.D. 397, Mr. J. H. Luxford, S.M., distinguished *Kirkland* v. *Anderson* (*supra*), by reason of the amendments to the Fair Rents Act made in 1942. The question that the learned Magistrate here set out to answer was this: Is a building used solely for the purpose of carrying on therein the business of an apartment-house keeper a "dwellinghouse" within the meaning of the Fair Rents Act, 1936? He said, in the course of his judgment, in which he held that such premises were within the protection of the statute:

> Originally the Act provided that any premises used by the tenant exclusively or principally for business purposes were not included in the term "dwellinghouse." That exemption was taken away by the 1942 Act, which also enacted that
>
> "the application of the principal Act to any dwellinghouse shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade, or professional purposes": see s. 6 (1).
>
> It has been suggested that because the reference is made to "part of the premises" being used for a shop, &c., an inference should be drawn that when the whole of the premises are used for business purposes they are outside the protection of the Act. In my opinion, this section is meant to cover the familiar type of building known as a combined shop and dwelling, and other buildings where the living-rooms are connected with business premises. It does not whittle down or affect the statutory definition of a dwellinghouse.

The learned Magistrate, after separating dwellinghouses into classes, according to their uses, continued:

> The Legislature, in my opinion, by repealing the exemption in favour of premises used by the tenant exclusively or principally for business purposes, made all boardinghouses and apartment houses subject to the Act. This is apparent from the special exemption the Amendment Act, 1942, makes in respect of premises licensed under the Licensing Act, 1908.

In answer to an argument that the purpose of the statute is to keep a roof over a tenant's head, and that consequently the Act does not apply where the tenant does not live upon the premises, the learned Magistrate said that argument was correct up to a point, but it overlooked that the purposes of the legislation are twofold, and the first and paramount object was to give the Court jurisdiction to fix the fair rent of dwellinghouses. He added:

> In the case of an apartment house where the proprietor is a tenant, the fixing of the fair rent payable by the subtenants—*i.e.*, the tenants of the apartments—is based on the rent payable by the proprietor: see *Berry* v. *Coad*, (1940) 1 M.C.D. 447. If the proprietor is paying an excessive rent and the Court had no power to reduce that rent, then there would be very few cases where the Court would be able to reduce the rent payable by the subtenant. That, unfortunately, was the position prior to the passing of the 1942 Act, and was one of the evils that Act was designed to remedy.

Recently, Mr. H. P. Lawry, S.M., in *Pegden* v. *Key*, (1944) 3 M.C.D. 429, had to consider the question. The premises consisted of eleven rooms, five of them being sublet to three tenants with the use of conveniences, and the remainder being occupied by the defendant (the tenant). The premises had been in the tenant's occupation long before the passing of the Fair Rents legislation. The learned Magistrate said that, at the time of the letting, and at the time of the passing of the Fair Rents Amendments Act, 1942, the premises were not a "dwellinghouse" within the meaning of the Act, but were premises used by the defendant principally for business purposes and therefore outside the Act: *Kirkland* v. *Anderson*, (1941) 2 M.C.D. 74. The original letting and use having been for business purposes, the premises did not come within the legislation by reason of the Amendment Act, 1942. For those reasons, the defendant did not have the protection of the statute. In *Cowan* v. *Dods*, (1944) 3 M.C.D. 494, 495, Mr. W. Carrol Harley, S.M., came to a like conclusion.

It was with some relief that practitioners, whose work brings them in touch with the Fair Rents legislation, recently learnt that the Supreme Court, in *Blakey* v. *Brennan*, had been asked to decide whether a building, the whole of which had been subdivided into flats and sublet, was a "dwellinghouse" within the meaning of that term as defined in s. 2 of the Fair Rents Act, 1936, as now amended.

The owners sought possession of the premises from their tenant, the defendant, on the ground that the tenancy had been determined, and the tenant had refused to vacate. In order to understand exactly what was decided, it is as well to recall the admitted facts.

The defendant, in February, 1943, had purchased from the then tenant of the premises in question the business of an apartment house carried on therein, together with the furniture used in that business. As from February, 1943, the defendant had continued in possession of the building as tenant of the plaintiffs. The defendant did not himself reside in the building; the whole of which he sublet as apartments (except two rooms and a kitchenette, which were occupied by the tenant's manageress). The entrance to the building, and all passages and general offices, were in common use by all the subtenants of the various apartments, the defendant being responsible for keeping such passages and offices, and the garden, in good order. It was admitted that if the building did not come within the provisions of the Fair Rents Act, 1936, and its amendments, the notice determining the tenancy was effective for that purpose.

The learned Judge, in his judgment, began, as Mr. Goulding, S.M., had begun in *Kirkland* v. *Anderson* (*supra*), by deciding whether the words " let as a separate dwelling " in s. 2 qualify the word " house " as well as the words " any part of a house." The same question, he said, had arisen in England in respect of s. 2 (2) of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, which contained a like phrase, and it was held, as the result of judicial decisions, and made clear by s. 16 of the Rent Restriction Act, 1933, that it was the intention of Legislature when, in 1915, the original statute was passed, that the words were to be read as if the words " let as a separate dwelling " qualified the word " house."

His Honour was asked to consider that interpretation inapplicable to s. 2 of our statute as there was no provision in the English legislation corresponding with the former s. 2 (*b*); but the learned Judge considered that a house which is a dwellinghouse may still be used by a tenant exclusively or principally for business purposes, if the business consists of making a profit from the use of the premises as a dwellinghouse, either as a boardinghouse, or for letting apartments: (*Burne* v. *Radcliffe*, [1942] 2 I.R. 158); and he could not see that s. 6 (2), providing the new para. (*b*) should modify that conclusion. He thought that that subsection was necessary when the former s. 2 (*b*) was repealed and s. 6 (1) enacted, if licensed premises were to be exempted from the provisions of the statute.

The next point for consideration was whether the premises in question, let as they were as an apartment house, were a house " let as a separate dwelling."

The learned Judge said that the insertion of para. (*b*) in s. 2 of the principal Act, excluding from the operation of the statute " any premises used by the tenant exclusively or principally for business purposes," by implication indicated that it was thought necessary to provide this exemption expressly, as otherwise the premises would have been included in the definition of " dwellinghouse." This consideration was confirmed by the repeal of para. (*b*) by s. 6 (2) of the Amendment Act, 1942, as the Legislature by such repeal must have intended to include in the definition of " dwellinghouse " premises used exclusively or principally for business purposes, and must have thought that no additional words were necessary for that object, but that the word " dwellinghouse " would include it while the premises were used as a dwelling.

It was submitted that the language of s. 2 of the Fair Rents Act, 1936, and s. 7 (2) of the Amendment Act, 1942, showed that the definition of " dwellinghouse " was not intended to apply to a building containing several flats, but only to individual flats. To fall within the definition of " dwellinghouse," the learned Judge pointed out, premises must be let as " *a* separate dwelling." By considering the now repealed s. 2 (*c*), for the purpose of ascertaining the effect of the unrepealed portion of the section, it appeared to His Honour that para. (*c*) was intended to exempt separate flats, originally erected as such, from the operation of the statute. But it exempted only " premises forming part " of such a building, and this did not extend in terms to exempt a " block " of flats: and the fair inference is, as His Honour said, that it was only the separate flats that were considered to fall within the definition; because, if the " block " had been considered within the definition, upon the separate flats being exempted, *a fortiori* the whole block would have been. Such a block of flats or apartments is " a collection of separate homes which are separately occupied ": per Lord Alverstone, L.C.J. (Lawrence and Phillimore, L.JJ., concurring), in *Wetheritt* v. *Cantlay*, [1901] 2 K.B. 285.

The foregoing view, in His Honour's opinion, was confirmed by the terms of s. 13 (1) (*d*), (*e*), and (*f*), and s. 13 (2), for they indicate that the occupation of the tenant may be terminated where the premises are required *for occupation* by the landlord, his employee, or a purchaser. This aspect is further emphasised by the provisions of s. 63 of the Finance Act, 1937, as amended. It appeared to the learned Judge that the provision of s. 13 (1) (*g*), providing as a ground for recovery of possession—

> That the tenant by subletting the dwellinghouse or any part thereof is making a profit which, having regard to the rent paid by the tenant, is unreasonable—

does not extend the meaning of " dwellinghouse," but is limited in its application to dwellinghouses within the meaning of the definition in s. 2.

It was argued that a construction excluding a building let as separate flats or apartments from the protection of the Act, would defeat its purpose. As we have seen, one of the learned Magistrates had considered, as the head-rent is a relevant circumstance, to be considered on an application by a subtenant to fix a fair rent, that if the head-rent does not fall within s. 7, a serious obstacle would be put in the way of the Magistrate endeavouring to reduce the subtenant's rent to what is fair and equitable. His Honour said:

> This aspect requires consideration, but it does not, I think, justify a modification of the conclusion arrived at from the language of the Act, and a consideration of its scope and purpose. Moreover the weight to be attached to the head-tenant's rent will depend on all the circumstances. If he has agreed to pay an unduly high rent with a knowledge that subtenants may apply for a fair rent to be fixed for their subtenancies, then it may be that the legal obligations he has undertaken should be regarded as the result of his own bargain: and not of weight as against the subtenants' claim to pay only a fair rent.

A further objection made on behalf of the tenant was to the effect that an order for possession could not be made because the furniture in the flats had been provided by the tenant. Section 7 (1) of the 1942 Amendment Act provides:—

> Where at any time after the passing of this Act any person (hereinafter referred to as the subtenant) is in possession of any dwellinghouse to which the principal Act applies as

a result of the subletting of it to him by a tenant with the express or implied consent of the landlord, and the tenancy of the tenant is determined, whether as the result of an order for possession or ejectment or by expiry or the provisions of the principal Act, be deemed to become the tenant of the landlord in respect of the dwellinghouse on the same terms as he would have held from the tenant if the tenancy had continued.

The learned Judge said that obviously the language of this subsection does not expressly contemplate any apportionment of the rent in respect of the subtenants' use of furniture. But s. 2 of the principal Act makes it applicable to the furniture in "houses." He continued:

> A *casus omissus* in s. 7 (1) with regard to this matter should not be allowed to defeat the main and obvious purpose of the section. There seems no sufficient reason why the literal terms of the section should not be given effect to and subtenants protected in their possession of the furniture as well as of the flat. The landlord would, of course, be trustee for the owner in respect of that portion of the rent attributable to the use of the furniture. An apportionment of an inclusive price paid for real and personal property may be made, even for revenue assessment, without statutory authority: *Zealandia Soap and Candle Co., Ltd.* v. *Minister of Stamp Duties*, [1922] N.Z.L.R. 1117, 1124, 1129, 1134. Such an apportionment must be implied as incidental and necessary to effect the main purpose of protecting subtenants in the occupation of their homes, in which the Act specifically includes the furniture. Apart from any other provisions, the power of the Magistrate's Court to give judgment in accordance with equity and good conscience provides machinery for settling any dispute as to the portion of the rent payable by the subtenant which is attributable to the use of the furniture. Upon the determination of the sub-tenancy the owner of the furniture is, of course, entitled to recover possession of it.

It appeared, therefore, that both a consideration of the exact meaning of the language of the relevant sections, and of the scope and effect of the Act, established that a building of this kind is not a "dwellinghouse" within the meaning of the Act, and that the plaintiffs were entitled to an order for possession.

His Honour added that the conclusion to which he came was not in any way affected by the occupation of the two rooms by the manageress. Her occupation of these rooms for this purpose is very different from the position of the chaffeur who was part of the household staff in *Callaghan* v. *Bristowe*, (1920) 89 L.J. K.B. 817). She is there merely for business purposes; her occupation does not extend to the whole block so as to make it a dwellinghouse; and, it may be inferred, is of a relatively small proportion of the building.

SUMMARY OF RECENT JUDGMENTS.

BILLENS v. LONG.

SUPREME COURT (Full Court). Wellington. 1944. July 6, 7; August 11. MYERS, C.J.; JOHNSTON, J.; NORTHCROFT, J.

War Emergency Legislation—Censorship and Publicity Regulations—Publication of Statement that Censor had refused Authority for Publication of certain "Matter" or "kind of matter"—Whether Daily Newspaper a "Periodical publication"—Necessary ingredients of Breach of Regulation—Censorship and Publicity Emergency Regulations, 1939 (Serial No. 1939/121), Regs. 13, 15, 16 (5) (b).

The appellant, the editor of a daily newspaper, was charged under Reg. 16 (5) (*b*) of the Censorship and Publicity Emergency Regulations, 1939, that he did publish in such newspaper a statement or indication that a censor had refused his authority for the printing or publishing of certain matter or kind of matter.

The article, in which it was alleged that the said statement or indication appeared, was headed "The Gag Again," and was a criticism of the suppression of information by the Director of Publicity, and asserted that not the war effort but solicitude for the Government, was the prime consideration that moved him to action. The fourth paragraph began "On three occasions the gag has been applied." The fifth paragraph referred to "the fact that all three recent cases of suppression concern the workers for whose special interests that Government exists or claims to exist," and that the subsequent paragraphs approved the right of the workers to air their grievances through the Press.

The prosecution relied upon three "directives," issued by the Director of Publicity which it was said were to be read with the article. In the first the Director said he would appreciate the elimination "from all press matter . . . of any suggestions that only by striking or threatening to strike can persons or bodies of persons with a grievance obtain redress."

The second forbade publication without his approval "of any statement or resolution containing any direct or indirect reference to the topic of the employment of members of the Police Force in any occupation outside the Force or of the civil or military employment of wives of members of the Police Force."

The third gave notice that without his previous written consent information was "not to be published relating to any act of any person if such act amounts to a counselling or inciting of any person to commit an offence against any emergency regulations."

On appeal to the Supreme Court, from the appellant's conviction and fine by a Stipendiary Magistrate, *Held*, by the Full Court (*Johnston*, and *Northcroft*, JJ., *Myers*, C.J., dissenting), That no breach of the Regulation had been proved for the following reasons respectively:—

(*a*) The term "periodical publication" in Reg. 16 (5) (*b*) does not include a daily newspaper.

(*b*) A charge of publishing without authority demands proof of refusal of authority in respect of the particular matter the subject-matter of refusal; but no statement in the article referred to a refusal by the censor to grant authority in response to an application for permission to publish.

(*c*) The statement that "the censor has refused his authority for the printing or the publication" of any matter is an offence only when published in or on the writing or document or periodical containing or omitting the censored matter.

Per *Northcroft*, J., That Regulation 16 (5) (*b*) must be read as prohibiting a statement as to what "matters" or "kind of matters" have been required to be submitted to the censorship and of which publication is forbidden; and, upon that interpretation, the article complained of did not involve a breach of the regulation: if it gave a wrong impression of what in fact was prohibited that is not an offence, because what the regulation purported to make an offence was the statement of what *in fact* had been prohibited.

Per *Myers*, C.J., dissenting, 1. That a daily newspaper is a "periodical publication" within the meaning of Reg. 16 (5) (*b*).

2. That Reg. 16 (5) must be read as a separate and distinct regulation containing an express prohibition, independently of any other regulation or of any reference thereto.

3. That an offence is committed by the publication of the statement or indication that "any matter or kind of matter" had been required to be submitted to censorship (whether or not, in fact, it had been so required), and that the censor had refused his authority for its printing or publication, whether or not there had been such a refusal.

4. That publication of the fifth paragraph of the said article and portions of the subsequent paragraphs amounted to a breach

of the said regulation, for they indicated that the Director of Publicity had refused his authority to the publication of matter relating to the airing of grievances by or of the workers.

5. That, on a prosecution under Reg. 16 (5) the defence which might have been made to a charge under Reg. 15, as to the invalidity of the directives, was not open to the accused.

Counsel: *G. G. G. Watson* and *Oram*, for the appellant; *Solicitor-General*, *Cornish*, K.C., and *Foden*, for the respondent.

Solicitors: *Oram, Yortt, and Struthers*, Palmerston North, for the appellant; *H. R. Cooper*, Crown Solicitor, Palmerston North, for the respondent.

LEWIS AND ANOTHER v. LEWIS.

SUPREME COURT. Wellington. 1944. May 19, 30. JOHNSTON, J.

COURT OF APPEAL. Wellington. 1944. June 21; August 7. MYERS, C.J.; SMITH, J.; FAIR, J.; NORTHCROFT, J.

Divorce and Matrimonial Causes—Practice—Trial—Method of Trial—Wife's Petition on Ground of Separation Order in Force for Three Years—Husband's Answer praying Relief—Allegation that Separation Order obtained by Wife's Desertion—Answer also alleging Adultery with Co-respondent and containing Prayer for Divorce—Damages not Claimed—Denial by both Wife and Co-respondent—Pleas of Condonation, Connivance, and Delay—Wife's plea of res judicata *and Estoppel—Husband's Application for Trial by Jury—Exercise of Discretion in ordering Trial by Judge and Jury or Judge alone—Various Issues—Factors to be considered in Deciding Method of Trial—Divorce and Matrimonial Causes Act, 1928, ss. 10 (j), 18, 43—Matrimonial Causes Rules, 1943, RR. 36, 37.*

A wife petitioned for divorce under s. 10 (*j*) of the Divorce and Matrimonial Causes Act, 1928, on the ground that she and respondent husband were parties to a separation order made on her application by a Stipendiary Magistrate, and that such separation order was in full force and had been in full force for not less than three years. In an answer praying relief, the husband opposed the making of a decree in the wife's favour, under s. 18 of the statute, on the ground that the separation order had been brought about by the wrongful act of the wife in deserting the husband, and he prayed for a decree of divorce against his wife on the ground that the wife over a period of five years, before and since the making of the separation order, had lived in adultery with a named co-respondent. He did not claim damages against the co-respondent.

In her reply, the wife denied that her conduct was the cause of the making of the separation order, and pleaded that the matter of the separation being due to the wrongful act of the wife was *res judicata* in that the husband was estopped from making the allegation by an order of the Supreme Court, which by consent of the husband had dismissed his appeal from the Magistrate's judgment in making the separation order. Both the wife in her reply, and the co-respondent in his answer, denied adultery, but pleaded condonation, and connivance, and delay by the husband in bringing his allegations of adultery until the wife had filed her petition against him.

On the husband's application for a trial before a common jury of twelve on the ground that it was desirable that the question of fact in regard to the issue of adultery be so determined, *Johnston*, J., ordered that the cause be set down for trial before a Judge and jury. From this order the wife and the co-respondent each appealed; and, on the hearing of the appeal, the order was treated as an order for trial in that form.

Held, by the Court of Appeal, That the issue of adultery be determined by the verdict of the jury, and that all other issues be determined by a Judge alone; thus compromising the following opinions:—

Per *Myers*, C.J., That the order of *Johnston*, J., should stand, leaving to the trial Judge the discretion of submitting to the jury other issues in addition to that of adultery, if he should consider it necessary.

Per *Smith* and *Northcroft*, JJ., That the issue of adultery alone should be determined by the verdict of the jury.

Per *Fair*, J., That all issues should be heard by a Judge alone.

Held also by *Myers*, C.J., and *Fair*, J., That there is no inflexible rule that adultery in a defended case should, *prima facie*, be tried before a jury, if either of the parties wants one. Section 43 of the statute confers a very wide discretion upon the Judge on an application for the trial of a cause before a jury; and it is difficult, if not impossible, to lay down any rigid principle upon which that discretion should be exercised.

Trinder v. *Trinder*, [1935] P. 61, and *Rugg-Gunn* v. *Rugg-Gunn and Archer*, [1931] P. 147, applied.

Held by *Smith*, J., That questions of connivance and condonation raise mixed questions of fact and law; but ultimately the question whether the acts proved constitute connivance or condonation is a question of law.

Marychurch v. *Marychurch*, (1913) 32 N.Z.L.R. 712, 15 G.L.R. 381; *Lloyd* v. *Lloyd and Leggeri*, [1938] P. 174, [1938] 2 All E.R. 480 (condonation); and *Germany* v. *Germany*, [1938] P. 203, [1938] 3 All E.R. 64 (connivance), referred to.

Held by *Fair*, J., 1. That the principles upon which the Court of Appeal should consider an appeal from the exercise of a Judge's discretion in divorce are sufficiently fully stated for the purpose of the appeal in *Blunt* v. *Blunt*, [1943] A.C. 517, [1943] 1 All E.R. 67.

2. That the broad principles upon which the question of a trial with a jury should be approached and largely applicable in a divorce suit are that a Judge is entitled to consider the method of trial best suited practically and speedily to dispose of the case, considering the interests of the parties, and the Court, and the jury whose time it occupies, and the general interests of the administration of justice.

Ford v. *Blurton*, (1922) 38 T.L.R. 801, followed.

3. That the issues raised by the wife's petition were proper to be decided by a Judge alone, particularly, as the decision of the questions of *res judicata* and estoppel must be decided by him, and would raise questions of mixed law and fact.

Keast v. *Keast*, [1934] N.Z.L.R. 316, G.L.R. 292; *Tickner* v. *Tickner*, [1937] N.Z.L.R. 44, G.L.R. 57; and *Harriman* v. *Harriman*, [1909] P. 123, referred to.

4. That the allegations of condonation and connivance and delay raised questions of fact which approach, in some measure, questions of law.

Lloyd v. *Lloyd and Leggeri*, [1938] P. 174, [1938] 2 All E.R. 480, and *Gipps* v. *Gipps*, (1864) 11 H.L. Cas. 1, 11 E.R. 1230, referred to.

5. That the application of the principles as to the exercise of the discretion of the Divorce Court in favour of a guilty petitioner, laid down in *Blunt* v. *Blunt*, [1943] A.C. 517, [1943] 1 All E.R. 67, raised questions of first importance to the parties as to what amounts to wrongful conduct under s. 18 of the statute, and as to the possible rights of petitioner and respondent to simultaneous decrees. The opinion of the learned Judge would require him to make the findings of fact and the inferences on these matters, as well as on connivance, conduct conducing, or condonation.

6. That questions of the length of the trial, the expense to the parties, and the possible disagreement of the jury are factors of weight to be considered in deciding whether a divorce suit should be tried before a jury or heard by a Judge alone.

Counsel: *Treadwell*, for the first appellant; *Leicester*, for the second appellant; *Sievwright*, for the respondent.

Solicitors: *Bell and Grogan*, Wellington, for the first appellant; *Leicester, Rainey, and McCarthy*, Wellington, for the second appellant; *A. B. Sievwright*, Wellington, for the respondent.

PUBLIC TRUSTEE v. O'DONOGHUE.

SUPREME COURT. Blenheim. 1944. July 11; August 15. FINLAY, J.

War Emergency Legislation—Mortgages Extention Regulations—Originating Summons for Order for Possession of Mortgaged Land—Whether Issue of Summons without Leave of the Court—Whether contrary to Regulations—Mortgages Extension Emergency Regulations, 1940 (Serial No. 1940/163), Regs. 6 (1) (2) (b), 10.

The issue of an originating summons under R. 550 of the Supreme Court Code of Civil Procedure by a mortgagor seeking

an order, authorizing entry into possession of mortgaged land without first obtaining leave of the Court, is contrary to Reg. 6 (2) (*b*) of the Mortgages Extension Emergency Regulations, 1940, even though, by the consent of the mortgagor under the said regulations, an order has been made granting leave to exercise the power of sale.

Salt v. *Edgar*, (1886) 54 L.T. 374, referred to.

Counsel: *Scantlebury*, for the plaintiff; *Smith*, for the defendant.

Solicitors: *Scantlebury and Noble-Adams*, Blenheim, for the plaintiff; *Smith and Gascoigne*, Blenheim, for the defendant.

MACPHERSON AND OTHERS v. INVERCARGILL LICENSING TRUST.

SUPREME COURT. Invercargill. 1944. June 21, 22; July 11. KENNEDY, J.

Licensing—Invercargill Licensing Trust—Objections to establishment of Hotel—"In the immediate vicinity"—"Not required in the neighbourhood"—"Quiet of neighbourhood will be disturbed"—Onus of Proof—Matters to be taken into Consideration by Court—Invercargill Licensing Trust Act, 1944, s. 19 (3).

Section 19 (3) of the Invercargill Licensing Trust Act, 1944, provides for the hearing by a Judge of the Supreme Court of objections by residents in the neighbourhood to the establishment of an hotel by the Trust on the following grounds: (*a*) "That it is not required in the neighbourhood"; or (*b*) "that it will be in the immediate vicinity of a place of public worship"; or (*c*) "that the quiet of the neighbourhood will be disturbed."

The onus of proof in each case is upon the objectors. The expression "in the immediate vicinity" means "very near": this proximity is a question of fact to be determined independently of considerations of nuisance or inconvenience.

Mullens v. *Norton*, [1938] V.L.R. 292, applied.

The extent to which any hotel is "required" depends upon the existing accommodation and upon the population—its extent, character, and habits.

Isitt v. *Taylor*, (1892) 10 N.Z.L.R. 646, referred to.

Counsel: *Adams* and *Prain*, for the objectors; *Tait*, for the Invercargill Licensing Trust.

Solicitors: *Adams Bros.*, Dunedin; *J. C. Prain*, Invercargill, for the objectors; *W. C. and J. Tait*, Invercargill, for the Invercargill Licensing Trust.

BOLLAND v. LEVIN AND COMPANY, LIMITED.

COMPENSATION COURT. Wellington. 1944. July 31; August 3. O'REGAN, J.

Workers' Compensation—Assessment—Permanent partial Incapacity—Weekly Payments and Payment of Lump Sum—Whether Court's Discretion fettered by Amendment Act, 1943—Workers' Compensation Act, 1922, ss. 5, 29—Workers' Compensation Amendment Act, 1936, s. 6 (1)—Workers' Compensation Amendment Act, 1943, s. 3.

The amendment made in s. 5 of the Workers' Compensation Act, 1922, by s. 3 of the Workers' Compensation Amendment Act, 1943, does not fetter the discretion vested in the Court in dealing with the amount of the weekly payments to be made to an injured worker, and in deciding whether the matter should be concluded by the payment of a lump sum.

Fairman v. *Grey Valley Collieries*, [1943] N.Z.L.R. 368, G.L.R. 227, referred to.

Counsel: *C. A. L. Treadwell*, for the plaintiff; *W. P. Shorland*, for the defendant.

Solicitors: *Treadwells*, Wellington, for the plaintiff; *Chapman, Tripp, Watson, James, and Co.*, Wellington, for the defendant.

"RULE BY REGULATION."

Some Observations from Another Viewpoint.

By R. T. DIXON.

The subject of delegated legislation is of such interest that Mr. D. J. Hewitt's article on Suggested Safeguards (*ante*, p. 200) merits the close attention of lawyers who are daily involved in the toil of regulations, and of bureaucrats, against whom the article is in some degree directed. But as lawyers know, better than most, there are two sides at least to every question, and this subject has so many sides that it must nearly be spherical. This article is an attempt to consider the subject from the rather novel angle of the bureaucrat, and the writer's qualification is that for eighteen years he has, under various Governments, been closely associated with the preparation and issue of Bills and regulations. This confession is of the category graphically, if uncouthly, described by our friends of U.S.A. as "sticking one's neck out."

Mr. Hewitt mentions the chief argument for delegated legislation—namely, the complexity of modern life for which the parliamentary statute is too rigid an instrument in itself. This is particularly the case in time of war and accounts for the host of Emergency Regulations now filling our shelves. While apparently admitting the force of this argument, Mr. Hewitt contends that, as "Departments of State" are authorized to make regulations, this amounts to surrender of the Legislature's rights to a "small group of public officials" and "inevitably" results in a "serious encroachment on the liberty of the individual."

Actually the law-making machinery for the enactment of regulations is fundamentally the same as for the enactment of legislation. In both cases the broad measures of policy are likely to have been initiated by the Minister, and must at least have been approved by him before the enactment is even drafted. In both cases the very elect of the elected representatives of the people—namely, the members of Cabinet—have to approve of the measure before it is submitted to the Governor-General for signature (in the case of regulations) or to Parliament (in the case of legislation). It is true that legislation is subject to the voting and procedure of Parliament before being passed; but once decided upon by the party in power, it is rarely altered in essentials from the time when it is first approved by Cabinet.

There are many safeguards against abuses in the system of regulations. The one most frequently demanded by critics of the system, and one generally in force, is the act of having copies "laid before Parliament," so that they may be criticized by legislators or their repeal demanded. This is of little practical value as is shown by the fact that each Session this is done in the case (*inter alia*) of all Emergency Regulations, and so far as the writer is aware no reference ever has been made in the House to any of them or to any other regulations as a result of this procedure.

A far more effective safeguard is the ultimate responsibility of the Government to electors, coupled with the right of any member to demand a reply in Parliament from any Minister on matters affecting the latter's administration, inclusive of the regulations for which he is responsible.

Further brakes on excess of bureaucratic zeal are provided by the Crown Law Officers and the Law Draftsman. All proposed Bills and regulations require to be revised by these experienced Law Officers and it is their respective responsibility to ensure that the regulations lie within the powers provided by the legislation and that the legislation gives effect to the intentions of the Government.

Finally, as is so often evident from the Law Reports, the Courts are zealous to ensure that regulations are authorized by the respective legislation. Time and again in every British country the Courts assert their right to hold *ultra vires* a regulation which has not been expressly authorized by Parliament.

There are two other matters on which Mr. Hewitt dwells which do not directly bear on the foregoing, namely, the delegation to public officials of the power to decide questions of a judicial nature, and the issue by Ministers of the Crown of explanations concerning regulations which they administer.

The first of these subjects raises the issue of what is a "question of a judicial nature." Mr. Hewitt gives as examples the Transport Licensing Act, 1931, and the Industrial Efficiency Act, 1936, presumably so far as they relate to the grant or refusal of licenses required by those Acts. In regard to the former, the following is an extract from the decision in *Kendall* v. *Matthews*, (1939) 1 M.C.D. 172, which was upheld on appeal by Blair, J.:—

> *Prima facie* the granting of the permission, privilege, or license to operate such [road] services and the supervision and control thereof are administrative functions, and although the authorities set up to grant the necessary privileges . . . may have to act judicially in carrying out these functions, these authorities are *prima facie* administrative and not judicial authorities. The granting of licenses is in effect an act of the State which Parliament for the convenience of administration has delegated to the Licensing Authority. I am fortified in this general conclusion by the circumstance that (as was pointed out by *Scrutton*, J., in *Huish* v. *Liverpool Justices*, [1914] 1 K.B. 109), it has been repeatedly held that licensing powers are administrative as distinguished from judicial functions. . . . It should be observed that the decision which the Authority is required to make is not a decision in favour of any person. It is a determination whether or not in the public interest it is desirable to grant the privilege asked for, and the only matter to be considered is the public interest. A decision of this nature is essentially a decision of a matter of public administration: *Boulter* v. *Kent Justices*, [1897] A.C. 556, and *Royal Aquarium, &c.*, v. *Parkinson*, [1892] 1 Q.B. 431.

It is submitted that these remarks are equally applicable to the administration of the Industrial Efficiency Act, 1936, and other Acts which are quoted on occasions as examples of the exercise by public officials of acts of a judicial nature. It is necessary to avoid confusion between criticism of the policy measures as contained in legislation and criticism of the machinery provided for its administration.

The publicity issued by Ministers of the Crown in explanation of regulations is an attempt to explain the new measures to the public in plain non-legal language. The same purpose is sought in Great Britain by the printing of an explanation at the foot of the regulations on issue to the public, and this system has been advocated by the Special Committee set up in Australia to examine the national security regulations. While there may be valid criticism of this practice, it seems that it is generally in the public interest and that its value to the public (in the lack of any alternative method) outweighs its faults.

Mr. Hewitt's suggested safeguards may now be examined in the light of these comments: First, no one will gainsay that so far as possible legislation should be specific in fixing the power to make regulations. It is a matter for Parliament and the administration to achieve the desirable mean between a too rigid authorization which would defeat the purpose in delegating the regulation powers and a too general authorization which would leave to regulations matters which should be included in the legislation. Parliament has the duty of examining legislation with this purpose in view. Secondly, it is submitted that no legislation would be effectual in preventing the test in the Courts of the validity of regulations issued under that legislation. If the regulations are invalid then they can be validated only by subsequent legislation, and this appears to be the position whatever may be the wording of the authorizing legislation. This view is put forward with respect, and the writer would be very interested to hear of any case which indicates that he is wrong. Thirdly, the suggestion that three Supreme Court Judges should have power to suspend the operation of a regulation on application by an aggrieved party would surely give rise to confusion between the functions of the judiciary and the administration. Presumable the suggestion implies the right of the Minister or his representative to appear in support and justification of the regulation. The writer confesses that he has difficulty in seeing how this suggestion could be worked out as a practical proposition.

The fourth suggestion has to some extent already been traversed. In the writer's opinion little practical value would attach to any formal scheme which attempts to use Parliament for passing judgment on regulations. There is ample machinery available to Parliament now for this purpose. In some instances the suggestion (that regulations should require the confirmation by Parliament or otherwise lapse) has already been carried out—*e.g.*, Agricultural (Emergency Powers) Act, 1934, s. 27 (6), and all Emergency Regulations hitherto passed are confirmed by legislation in each Session.

Unfortunately modern social developments have brought about many restrictions and inhibitions in living. Even flight to some remote Pacific island may be no remedy as recent years have shown. We must bow to the inevitable and place our trust in the great birthrights of British democracy and justice to safeguard our fundamental rights as free men.

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. 19.—S. TO S. : W. TO H.

Aggregation—Rural Property—"Undue aggregation"—Meaning and Application.

The Committee refused consent to a sale in respect of each of these transactions upon the ground that if effect were allowed to be given to either of them, the purchaser in each case would become the owner of such a total area of farming-land that "undue aggregation" of such land in the hands of the purchaser would result. The question of "undue aggregation" is, therefore, equally, as it is exclusively, involved in each appeal. What in these circumstances primarily calls for consideration is what the Legislature meant to convey by the expression "undue aggregation." In other words, what has to be ascertained is the intent with which the Legislature used the phrase, the ascertainment of such intent being the dominant purpose in the construction of all statutes.

In the S. to S. appeal, the appellant purchaser already owned 119 acres of dairying-land. For years he recovered 14,000 lb. of butterfat per annum by dairying upon this area. In his best year he took 19,000 lb. of fat. The property, he was seeking to acquire, contained some 320 acres. It was in bad order, but Mr. M., one of the appellant's witnesses, testified that by an expenditure of £1,574 it could in time be converted into two dairy-farms. Meantime it could be used for grazing purposes. It therefore comprised two potential dairy-farms, although passing for the immediate present as one.

In the W. to H. appeal, the appellant purchaser was getting annually from his present farm of 120 acres, reinforced by an area of leasehold land, some 17,000 lb. of butterfat. Without the leasehold land he could get 15,000 lb. of fat. The property, of also some 120 acres, which he sought to acquire was also presently an economic holding. The result of the proposed transaction would be to double Mr. H.'s land-holding in a high production area where farms are certain to be much sought after by servicemen. Mr. H. was not so circumstanced either with respect to his family or otherwise that he had any present need materially to increase his land-holding.

The Court said: "Before proceeding further it may be first pertinent to observe that the phrase 'undue aggregation' has nowhere been made the subject of definition; indeed, it appears to resemble many legal expressions of much earlier origin in that it is incapable of any adequate or precise definition. It becomes incumbent upon the Court, therefore, to determine the sense in which the phrase was used by the Legislature by reference to those broad rules, so far as they are rolevant, which have been laid down since early times for the ascertainment of the intention of the legislative authority.

"The first of those rules as laid down by the highest authority is that the meaning of each statute must primarily be sought in the statute itself and that each statute must be construed according to its subject-matter and object. The second is that all words must be construed in their popular sense—that is, in accordance with their ordinary grammatical meaning.

"These two primary rules will, it is thought, be sufficient for all present purposes. Summarised, they 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 Act. An examination of the phrase from the point of view of its ordinary meaning indicates that what the Legislature had in mind was not 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.

"The acquisition of land in unlimited areas has never previously been prohibited or restricted by law in New Zealand except in respect of such Crown and Native lands as have fallen or fall into certain clearly defined statutory categories. This absence of any previous general standard indicates that the meaning of the word 'undue' must here be determined under the primary rule of construction to which reference has been made—namely, by reference to the purposes and objects of this particular Act alone. Those purposes and objects are briefly, but compendiously, summarized in the preamble. They 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.

"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 to 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. Facilitation of the settlement of discharged servicemen is at more than one point in the Act 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 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 has been constrained to act under s. 51 (*e*) of the Act, or, alternatively, once the Crown has, in terms of s. 51 (*a*), decided not to acquire or arrange for the acquisition of the land.

"It is 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 is not immediately required for settlement and when, in consequence, s. 51 (*a*) and s. 51 (*e*) apply.

"On the other hand, 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 Act, 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.

"In this relation the change in language from the general continuing direction to Committees conveyed by the expression 'regard to the desirability of facilitating the settlement of discharged servicemen' in s. 50 (3) to the immediate and particular 'suitable and adaptable' in the later parts of the Act is significant. 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 owns 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.

"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 is 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 purposes 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 Act somewhat forcibly suggests that it was the intention of the Legislature that every man should, during the period the Act 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, 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.

"However that may be, the Court cannot but conclude that, any 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 *prima facie* amounts to 'undue aggregation' in terms of the Act. This may, of course, be offset and outweighed by considerations affecting either the proposed alienee or the particular land involved or the locality in which it is situate.

"So much may be said to be a matter of law. The result is the elucidation of a test by which transactions are to be judged, the definition of the yardstick, if that expression may be used, by which particular transactions are to be measured. But the question of whether the circumstances of any particular transaction, when measured by that yardstick, disclose the quality of 'unduness' is a question of fact.

"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 be fairly 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.

"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 by discharged servicemen for land on which to settle in that particular locality must be taken into account. Judged by the test which is here propounded there is no doubt but that both these appeals must be dismissed.

"That Mr. S. has sufficient land now to answer all his needs is unquestionable. Indeed, in making the proposed purchase he is relying upon getting help from a relative now on service. The addition of this large area to his present holding will treble the size of his landed interests in the district, and that in a district in which returned servicemen in considerable numbers are certain to be anxious to settle. We think that both because he has already sufficient land and because the land he is seeking to acquire should be left available for soldier settlement that the appeal should be dismissed.

"Much the same considerations apply to the W. to H. transaction. In this case too, therefore, we cannot but think that undue aggregation in terms of the Act would result if the sale were allowed to be completed.

"In neither case is there any special feature to offset the objection to the proposed acquisition. Both appeals are therefore dismissed."

No. 20.—F. TO E.

Rural Land—Residential Property, near but outside Borough—Basic Value of Dwelling increased—Acquisition Value to Average Purchaser of such Property.

The property involved in this appeal could not, by common acceptance, be regarded as an economic unit. It was a desirable residential site near but outside the Borough of Morrinsville, and provided an attractive home for a purchaser wishing to retire from active employment or desirous of intermingling farming pursuits upon a minor scale with some other concurrent occupation. This being so, what had to be determined, pursuant to s. 54 of the Servicemen's Settlement and Land Sales Act, 1943, was the value of the property as at December 15, 1942.

The Court said: "As is becoming increasingly common when questions of value are in these circumstances involved, the Court was afforded the advantage of hearing much evidence not adduced before the Committee and was given the benefit during the course of the evidence of a closer examination of detail. The result of this in respect of this appeal is to enable a good many subjects of contention to be avoided, as an analysis of the details and a finding in respect of them effectively disposes of the appeal.

"The first item calling for consideration is the value of the house. This house, Mr. McG., a witness for the Crown, valued as at December, 1942, at £800. His assessment of that value was, however, not accepted by the Committee, which added £100 to his value, making it £900. That the Committee was justified in this course is demonstrated by the fact that Mr. H., a professional builder called by the Crown on the hearing of the Appeal, estimated the value of the house at £920 in December, 1942. However, in the assessment of that value Mr. H. had made an overall deduction for depreciation covering the whole period from the date of construction of the earlier part of the house. Upon the history of the building being drawn to his attention, Mr. H. assessed the value of the newer portion, also after allowing for depreciation, at £440, giving his aggregate value as at December, 1942, at £1,151. This assessment of value the Court accepts.

"The result of so doing is to require that the basic value of £2,150 fixed by the Committee should be increased by £251, being the difference between the value of the house as fixed by the Committee and the value of it as determined by the evidence of the expert, Mr. H., whose testimony the Committee did not have the advantage of hearing. This addition raises the basic value to £2,400. It must, however, be increased by a further sum.

"The Committee determined the value of the constituent items which make up the whole value of the property, but did not allow (no doubt because it was not asked so to do) for any sum which an average purchaser would pay for the purpose of securing a property of this description. Mr. McG. agreed that such a purchaser might well pay £150 to £200 more than the bare value of the property in order to acquire it for himself. To ascertain the fair value, therefore, this sum of £150 to £200 must be added to the basic value. If the lower assessment of £150, be accepted, the basic value will be increased to £2,550, which is the sale price. The Court accepts Mr. McG.'s testimony, subject to the corrections made by the Committee, and to the correction necessitated by Mr. H.'s evidence, as sound and reliable, but the result of so doing is to raise the basic value of the property to precisely the sale price.

"This being so, the Court can do no other than fix the basic value of the land at £2,550, allow the appeal, and give consent to the sale. It does so accordingly. No order is made as to costs."

NEW ZEALAND LAW SOCIETY.

Council Meeting.

A meeting of the Council of the New Zealand Law Society was held on September 8, 1944.

The following Societies were represented: Auckland, by Messers. A. H. Johnstone, K.C., J. B. Johnston, and A. Milliken; Canterbury, Messers. R. L. Ronaldson and A. W. Brown; Hamilton, Mr. A. L. Tompkins; Hawke's Bay, Mr. E. J. W. Hallett; Marlborough, Mr. G. M. Spence; Otago, Mr. R. C. Rutherford; Southland, Mr. T. V. Mahoney; Taranaki, Mr. R. H. Quilliam (proxy); Wanganui, Mr. A. B. Wilson; and Wellington, Messrs. H. F. O'Leary, K.C., A. M. Cousins and G. G. G. Watson. Mr. A. T. Young, Treasurer, was also present.

The President, Mr. H. F. O'Leary, K.C., occupied the chair.

Rt. Hon. Sir Michael Myers.—Before commencing the ordinary business the Council passed the following resolution on the occasion of the election of the Chief Justice of the Supreme Court of New Zealand as a Master of the Bench of the Inner Temple:

"Resolved that the New Zealand Law Society respectfully tenders its congratulations to the Honourable the Chief Justice on his election as a Master of the Bench of the Inner Temple. The Society feels that whilst primarily the honour is a recognition of His Honour's legal eminence and merits, it is also a compliment to the Bench and the Profession in New Zealand and thus is a source of additional gratification to members of the Society."

The President reported that a letter had been received from Major-General H. K. Kippenberger expressing his thanks for the good wishes of the Society.

It was also reported that the Standing Committee had met and extended a welcome to Mr. R. E. Etherton, a member of the English Bar, who was one of the English and Canadian Parliamentary delegation which recently visited New Zealand.

New Zealand Law Reports: Library of Congress.—The Council was of opinion that the Society should present a copy of the Law Reports to the Library of Congress.

It was decided that the President and Mr. Watson should make inquiries regarding a suitable set and report to the next meeting.

Post War Aid: Rehabilitation Refresher Courses.—The Post War Aid Committee reported as follows:—

"The Post War Aid Committee of the Society were of opinion that practitioners in the Forces stationed in and around Wellington should be invited to attend the 'refresher' course of lectures now being given in Wellington. The suggestion was approved by Victoria University College. It was hoped in this connection that the fee (two guineas) might be paid by the Rehabilitation Department but on inquiry it was found that this was not possible.

"It was decided to notify those concerned of the details of the scheme and per medium of the Army Education and Welfare Service a circular was therefore distributed among all units stationed in and around Wellington.

"The Chairman of the Committee and the Secretary waited on the Director of the Army Education and Welfare Service with a view to endeavouring to co-ordinate the efforts of the Society and the Department on behalf of servicemen solicitors and clerks.

"It was accordingly agreed that the Society should be consulted in all matters appertaining to legal education for members of the Forces.

"The Director of the Department, Lt.-Col. D. G. Ball, and Captain I. D. Campbell, legal officer, subsequently attended a meeting of the Post War Aid Committee held at the Supreme Court Library, Wellington, when it was decided that a Digest should be printed containing the principal changes which had taken place in legislation and case law since the beginning of the War.

"It was arranged that Professor McGechan, Dean of the Law Faculty, Victora University College and a member of the Post War Aid Committee, should endeavour to obtain as soon as possible the relevant material from various members of the profession.

"The Committee with the addition of Captain Campbell will act as an editorial committee. The Rehabilitation Department and Army Education and Welfare Service intend having sufficient copies printed to distribute to members of the profession still in the Forces and to discharged members who have not already received a copy.

"This arrangement is now being proceeded with."

The report was received.

The Otago Society wrote as follows:—

"At a meeting of my Council held yesterday it was decided to make representations to your Council as to the possibility of a pass being granted to returned students in one subject, and also regarding the possible establishment of an additional examination in each year along the lines which prevailed at the conclusion of the last war."

The matter was left to the President to discuss with the Vice-Chancellor of the University.

(To be concluded.)

LEGAL LITERATURE.

Garrow and Willis's "Principles of the Law of Evidence in New Zealand," 2nd Edition, 248 pp. Wellington: Butterworth and Co. (Aust.), Ltd.

Those who were familiar with the late Professor Garrow's *Notes on Evidence* may be pardoned if, on seeing Garrow and Willis's *Law of Evidence*, they fail to realize at first glance that the one is but a new edition of the other. In the sphere of legal editing it would be hard to find a more sweeping and salutary overhaul, and Mr. Willis is to be congratulated on the achievement. He has made available a text of convenient size dealing with the law of evidence as it now stands in New Zealand. Law students and teachers of law will be particularly pleased that this gap has been filled.

From a haphazard and ill-assorted set of notes the editor of this second edition has produced a clear and logical presentation of the entire subject. He has cleared away dead wood with the vigour of a competitor at an axemen's carnival. The minutiae of side issues, microscopic points about the form of an affidavit and the like, and thick encrusttations of case law have been efficiently removed. The legislation and a selection of the cases of the last twenty years have been included where relevant, with a sound sense of proportion. Possibly *R.* v. *Roberts*, [1942] 1 All E.R. 187 (C.C.A.), and a few other cases could usefully be added, but as far as your reviewer can see, no decision which must be included in a work of this scope has been overlooked.

Without detracting from what has been achieved one may suggest that the policy which has been so actively pursued might be taken yet further. The book still contains material which could with advantage be subjected to further editing.

The book is very well produced, and bears none of the marks of war-time publishing. There are, however, a number of slips in the names of cases. On p. 145, line 30, "operative" should apparently read "inoperative."

Garrow and Willis will undoubtedly become the accepted textbook for classes in evidence at the University Colleges, and it can also be recommended as an invaluable ready-reference for practitioners.—I. D. C.

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

Acquisition of Land by Aliens.—Scriblex is one of those who would prohibit altogether the war-time acquisition of land by aliens. That, however, is not the law of our country. Our Aliens Land Purchase Regulations allow aliens to acquire land provided the consent of the Minister of Justice is obtained. The regulations vest in the Minister an absolute discretion to grant or refuse consent; but they give him no power to attach conditions to the granting of consent. Publicity was recently given in the House of Representatives to a case where a Chinaman applied for consent to purchase land for a market garden and was informed that consent would be given only if he took up War Loan Stock to the amount of £1,000—later reduced to £500. During the discussion of the case in the House, the Minister of Justice stated that it was his policy to require that aliens who seek consent to purchase land should show that they are supporting our country's war effort by subscribing to War Loans in accordance with their ability, and both he and the Prime Minister endeavoured to defend that policy. So long, however, as the regulations contain no requirement of subscription to War Loans and give the Minister no power to attach conditions to his consent, the fact of the matter is that the so-called "policy" is quite indefensible. It is simply another example of bureaucracy beyond the law.

Quotations by Judges from the Poets.—Benjamin Cardozo, one-time Chief Judge of the New York Circuit Court of Appeals, and later a Judge of the Supreme Court of the United States, disapproved of the quotation of poetry in judgments. In *Law and Literature*, published in 1931, he said:

> In days not far remote, Judges were not unwilling to embellish their deliverances with quotations from the poets. I shall observe towards such a practice the tone of decent civility that is due to those departed.

There can be no doubt that, generally speaking, Cardozo's view is right; but sometimes an occasion arises which permits of an exception. An instance is to be found in the judgment of Rich, J., in the recent case of *Minister of State for the Army* v. *Dalziel*, 68 C.L.R., 261, 286. The question was whether the taking by the Commonwealth of the exclusive possession of property for an indefinite period constituted an acquisition of property within the meaning of a provision in the Australian Constitution. Rich, J., answered the question in the affirmative, and illustrated his reasoning with an apt quotation from Shylock in *The Merchant of Venice*:

> In the case now before us, the Minister has seized and taken away from Dalziel everything that made his weekly tenancy worth having, and has left him with the empty husk of tenancy. In such circumstances, he may well say—
>
> "You take my house, when you do take the prop
> That doth sustain my house; you take my life
> When you do take the means whereby I live."

An example of an undesirable kind is to be found in the judgment which Darling, J., delivered on behalf of the Court of Criminal Appeal in the trial of Roger Casement. Serjeant Sullivan, for Casement, had challenged the authority of a statement of Lord Coke. Darling, J., pointed out that, although Stephen and other writers had spoken lightly of Lord Coke's learning, he had been recognized in the Courts for centuries as a great authority. Darling, J., quoted from a judgment of Best, C.J., and then said:

> If one wanted an opinion of a person who was not a lawyer, one with whom I dare say Serjeant Sullivan, at all events, is perfectly familiar, it is where this same Lord Coke is alluded to by John Milton on one who—
>
> On the Royal Bench
> Of British Themis, with no mean applause,
> Pronounced and in his volumes taught our Laws,
> Which others at their Bar too often wrench.

The views of poets are of no assistance in determining the authority to be attributed to judicial pronouncements, and there can be no doubt that Darling, J., was simply showing off his knowledge of Milton's sonnets. The delivery of a judgment of a final appellate Court on a capital charge was hardly an appropriate occasion.

Further Judicial Changes in England.—The vacancy in the ranks of the Lords of Appeal in Ordinary caused by the death of Lord Atkin has been filled by promoting Goddard, L.J., from the Court of Appeal. Goddard, L.J., was made a Judge of the King's Bench Division in 1932, and became a Lord Justice of Appeal in 1938. He is now sixty-seven. His place in the Court of Appeal has been filled by promoting Lawrence, J., from the King's Bench Division to which he was appointed in 1932. (Lawrence, L.J.'s father was A. T. Lawrence, J., who later became Lord Trevethin and held the office of Lord Chief Justice from April, 1921, to March, 1922). Lawrence, L.J., is sixty-four. Justin Lynskey, K.C., who is fifty-six, has been appointed a Judge of the King's Bench Division.

Strange Words in Judgments.—When plain everyday words are found an insufficient medium for the expression of judgments the results can be strange indeed. Last year the Judge of the Court of Arbitration unearthed that rare and curious word "pejorative," and gave us:

> Reference was made in a *pejorative* way during the hearing to the fact that two of the partners were infants.

More recently Finlay, J., abandoning the word "useless," has given us the resuscitated Gallicism "inutile":

> Any comparison with Mr. B.'s farm is *inutile* because the latter has 50 acres of good volcanic terrace land as the basis for his dairying undertaking and for the development of the residue of clay land on his property.

It is true that both "pejorative" and "inutile" are to be found in the dictionaries; but few would suggest that good English requires the use of either word. At the moment, however, in the search for the unusual word, A. Coleman, S.M., appears to be easily the winner, for in his recent judgment in *Allan* v. *Valuer General*, (1944) 3 M.C.D. 457, 459, he improves on all the dictionaries and gives us "integritous":

> It is obvious that it would be quite possible, and, indeed, most probable, that two thoroughly competent and *integritous* valuers might vary to the extent of, say, £5 on each of five different items of income and to a like extent on each of five different items of expenditure.

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.

Rates and Rating.—*Amendment of Roll—Rate Demand issued before Objection heard—"Unimproved value"—Whether Market Value.*

QUESTION: 1. B. purchased for £450 in July, 1943, two sections in a borough rated on unimproved values. The sections were part of a subdivision of a block of five acres with an unimproved value of £1,250. In July, 1944, he received a notice under s. 10 (*e*) of the Valuation of Land Act, 1925, adjusting the value at £375 unimproved, operating from March 31, 1944. B. has written the Department objecting. No time for objection was fixed in the notice under s. 13 (2). B. has now received a demand for rates for 1944–45 from the Borough Council based on £375. It seems inequitable that the rate demand should be issued before his objection is heard. Has the Council the right to levy the rate under s. 39 (*b*)? This subsection appears to make the levy retrospective, and to be an authority for ante-dating the new valuation to March 31, 1944, yet the subsection adds that the rate shall not be affected by any alteration in value during the year. A new valuation under s. 3 (3) of the 1933 amendment is deemed to be entered in the valuation roll on March 31 in the calendar year *following* the owner's notice.

2. "Unimproved value" as defined in s. 2 of the Valuation of Land Act, 1925, suggests market value, but as rating values are usually below market values, does the Assessment Court in practice adhere to prices paid for nearby properties, or the one under review, when considering an owner's objection?

ANSWER: 1. By ss. 34 and 35 of the Valuation of Land Act, 1925, provision is made for the adjustment of rates, and a refund of the amount over paid where the value is reduced on appeal. This should cover the correspondent's main point.

The Borough Council may amend its roll after March 31 to correspond with the district roll as at that date, for the Valuer-General is not limited to any time within which he must notify the Borough: Rating Act, 1925, s. 6; *Mc Nab* v. *Commissioner of Taxes*, [1919] N.Z.L.R. 267, 275.

Presumably, the Valuer-General revalued the land as at March 31, 1944, under s. 10 of the Valuation of Land Act, 1925, and see s. 57 of the Statutes Amendment Act, 1940; and consequently it may be argued that no alteration in the value of the land during the current year has been taken into consideration by the Borough Council in levying the rate. Section 3 of the Valuation of Land Amendment Act, 1933, is not inconsistent with this, for there the revaluation is to take effect from March 31 of the following year, even though, as a result of an appeal, the value is not determined until after that date. The facts in *Mc Nab* v. *Commissioner of Taxes* are similar to those mentioned herein, and though the decision turned upon the construction of another statute, a perusal of the Full Court's judgment will be found helpful.

2. It has been laid down in several cases that the value to be placed upon a property is that which it might be expected to realize if it were sold on the open market—*e.g.*, *Duthie* v. *Valuer-General*, (1901) 20 N.Z.L.R. 585; *Thomas* v. *Valuer-General*, [1918] N.Z.L.R. 164; *Valuer-General* v. *Wellington City Corporation*, [1933] N.Z.L.R. 855. Nevertheless, the final words in s. 57 of the Statutes Amendment Act, 1940, should not be overlooked: "such fresh valuations would preserve uniformity with existing roll values of comparable parcels of land."