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THE LAW REFORM ACT, 1944.

IT is impossible to generalize concerning the "Miscellaneous Reforms in the Law" (to quote the preamble) contained in the Law Reform Act, 1944, beyond saying that they are the product of the New Zealand Law Revision Committee under the chairmanship of the learned Attorney-General, the Hon. H. G. R. Mason. Each section in the new statute has been the subject of much hard work and careful consideration on the part of the members of that Committee; but they would be the last to minimize the helpful assistance and advice given to them by fellow-practitioners in different parts of the Dominion, from some of whom came suggestions that are now clothed in statutory form. Furthermore, it can now be disclosed that most of the new statute was ready for presentation to the Legislature in Bill form just before the war broke out, when the maxim, *inter arma silent leges* had, in its regard, to be given a practical local application. Its recent enactment is a result of the removal from the Dominion of the threats that have menaced us in the intervening years.

An examination of each self-contained section of the Law Reform Act, 1944, shows that it brings about a change in the existing common law on the topic with which it specifically deals. These changes are, in essence, of differing natures; but all are of importance in daily practice. Consequently, we trust it will be found helpful if we show in detail what the new statute sets out to accomplish.

Damages for Injuries arising from Mental or Nervous Shock.

It is on record that an eminent contemporary barrister once suffered a nervous breakdown as the result of a wild bull breaking into his home, and disturbing him in the repose of his well-stocked library; but, being learned in the law, his recovery was not hastened by the knowledge that, being in New Zealand, he had no prospective claim for damages, as the intruder had not physically hurt him. Here, following the decision of the Judicial Committee of the Privy Council in *Victorian Railway Commissioners* v. *Coultas*, (1888) 13 App. Cas. 222, proof of physical impact or lesion was necessary as a ground of liability for damages in negligence at the suit of the injured person. This decision was, of course, binding in our Courts: *Stevenson* v. *Basham*, [1922] N.Z.L.R. 225, 231, and in all Courts subject to ultimate revision by the Privy Council. It has, however, (in the words of MacKinnon, L.J., in a recent case) been uniformly discredited and disapproved ever since. The much-criticized doctrine was stated by their Lordships in the *Coultas* case as follows:—

> Damages arising from mere sudden terror unaccompanied by any actual physical injury but occasioning a nervous or mental shock cannot in such circumstances be considered a consequence, which, in the ordinary course of things, would flow from the negligence of the defendant.

So the law has stood in New Zealand in Workers' Compensation and Deaths by Accidents Compensation cases, and at common law.

But the House of Lords, some thirty years ago, held that the *Coultas* case was, and is, not a decision of guiding authority in England, Scotland, and Ireland: *Coyle (or Brown)* v. *John Watson, Ltd.*, [1915] A.C. 1, where, among many decisions in Great Britain and in the Dominions showing reluctance in having to apply the doctrine enunciated by the Privy Council in the *Coultas* case, the argument against it was the most forcibly expressed. For a statement of the present law on the subject in Great Britain, reference should be made to the judgment of the majority of the Court of Appeal in *Hambrook* v. *Stokes Bros.*, [1925] 1 K.B. 141; and, for the highwater mark of its application by the same Court, to *Owens* v. *Liverpool Corporation*, [1938] 4 All E.R. 727, which, however, has not escaped criticism.

In this place, in 1937 (13 New Zealand Law Journal, 73), we discussed the various judgments relating to sudden terror causing shock without physical injury. In a plea for statutory abrogation of the principle of the *Coultas* case, we expressed the hope that the learned Attorney-General, in his zeal for reform and passion for justice, would give our suggestion for such remedial legislation his best attention. We are happy to record that the law of New Zealand has now been brought into line with the expression of the common law as laid down by the House of Lords in *Coyle's* case, and stated in *10 Halsbury's Laws of England*, 2nd Ed., 106, 107, para. 133. This is the effect of s. 2 of the Law Reform Act, 1944, which, after unavoidable delay, follows a corresponding abrogation of the *Coultas* doctrine, by statute, in the State of Victoria.

The section is as follows:—

2. *In any action for injury to the person, whether founded on contract or in tort or otherwise, a party shall not be debarred from recovering damages merely*

because the injury complained of arose wholly or in part from mental or nervous shock.

The effect of this restatement of the law, may be gathered from a passage from the speech of Lord Macmillan in *Hay (or Bourhill)* v. *Young*, [1943] A.C. 92, 103, [1942] 2 All E.R. 396, 402, in which His Lordship with a disapproving side-glance at the *Coultas* doctrine, now no longer with us, said :

> It is no longer necessary to consider whether the infliction of what is called mental shock may constitute an actionable wrong. The crude view that the law should take cognizance only of physical injury resulting from actual impact has been discarded, and it is now well recognized that an action will lie for injury by shock sustained through the medium of the eye or the ear without direct contact. The distinction between mental shock and bodily injury was never a scientific one, for mental shock is presumably in all cases the result of, or at least accompanied by, some physical disturbance in the sufferer's system. And a mental shock may have consequences more serious than those resulting from physical impact. But in the case of mental shock there are elements of greater subtlety than in the case of an ordinary physical injury and these elements may give rise to debate as to the precise scope of legal liability.

(*Hay (or Bourhill)* v. *Young* is an outstanding example of the truth of the last observation; and we hope, on another occasion, to return to it in relation to its own subtleties in the law of negligence.)

In considering s. 2 of the Law Reform Act, 1944, we must not overlook its common-law limitation, whether the claim be made in tort, or in contract, since it goes without saying, to use the words of Lord Wright in *Bourhill's* case, at p. 106, in any action for injury to the person " the damage must be attributable to the breach by the defendant of some duty owing to the plaintiff " ; or, in contract, some obligation under the contract.

Unfulfilled Promise to Remunerate by Testamentary Provision.

The common-law rule as to the non-enforceability of an understanding or agreement to provide by will for a legacy as remuneration for work done for, or services rendered to, a deceased person, when it is subsequently found that no such legacy had been so provided by him, is stated in a passage approved in *Te Ira Roa* v. *Materi*, [1919] N.Z.L.R. 681, 682, which appears in *14 Halsbury's Laws of England*, 2nd Ed. 407, para. 764, as follows :—

> A man who does work for a testator on the understanding that he is to be remunerated by a legacy has no claim against his estate, if the testator fails to provide for the legacy—*Osborn* v. *Governors of Guy's Hospital*, (1726) 2 Stra. 728, 93 E.R. 812, and *Maddison* v. *Alderson*, (1883) 8 App. Cas. 467—and the executors are not entitled to satisfy such a claim —*Shallcross* v. *Wright*, (1850) 12 Beav. 558, 50 E.R. 1174.

Thus, where a person, whether or not he be a relative, does work for or renders services to the testator upon an understanding with the testator that the latter is to be remunerated for his services by a legacy, in lieu of a payment *inter vivos*, he has no claim against the estate if the testator fails to fulfil his promise " to remember him in his will."

There have been a number of such claims against executors in New Zealand, both in the Supreme Court and in the Magistrates' Court. We merely refer to *Te Ira Roa* v. *Materi* (*supra*), where it was proved that there was an " understanding " between the plaintiff and one Marie Gray, who died intestate, that he was to receive no wages, but was to be remunerated for his services by being provided for by a will to be made by her in his favour; and, therefore, it was held that no contract, either express or implied, by Mrs. Gray to pay wages to him during his service with her had been proved. In that case, Cooper, J., reviewed the leading authorities.

The common-law rule already stated has been modified by s. 3 (1) of the Law Reform Act, 1944, which is as follows :—

> 3. (1) *Where in the administration of the estate of any deceased person a claim is made against the estate founded upon the rendering of services to or the performance of work for the deceased in his lifetime and the claimant proves an express or implied promise by the deceased to reward him for the services or work by making some testamentary provision for the claimant, the claim shall, to the extent to which the deceased has failed to make that testamentary provision or otherwise remunerate the claimant (whether or not a claim for such remuneration could have been enforced in the lifetime of the deceased), be enforceable against the personal representatives of the deceased in the same manner and to the same extent as if the promise of the deceased were a promise for payment by the deceased in his lifetime of the amount specified in the promise or, if no amount is specified, of such amount as may be reasonable, having regard to all the circumstances of the case, including in particular the circumstances in which the promise was made and the services were rendered or the work was performed, the value of the services or work, the amount of the estate, and the nature and amounts of the claims of other persons against the estate, whether as creditors, beneficiaries, wife, husband, children, next-of-kin, or otherwise.*

Safeguards against abuse of this modification of the common-law rule are provided in the following subsections :—

> (2) *No action to enforce a claim under this section shall be maintainable unless the action is commenced within* twelve *months after the personal representative of the deceased took out representation.*
>
> (3) *All actions to enforce claims under this section shall be commenced in the Supreme Court and, notwithstanding anything to the contrary in the Judicature Amendment Act, 1936, shall be tried before a Judge without a jury.*
>
> (4) *For the purposes of the Death Duties Act, 1921, and for all other purposes any amount awarded on a claim under this section shall be deemed to be a legacy left by the deceased to the claimant.*

It may be observed that the section does not affect the converse common-law principle, applied, for example, in *Crawshaw* v. *Public Trustee*, [1925] N.Z.L.R. 12, and expressed in *14 Halsbury's Laws of England*, 2nd Ed. 407, in the second part of para. 764, as follows :—

> The mere forbearance to send in a claim for work done in expectation of a legacy is no bar to a claim against the executors for the services rendered if the party is disappointed in his expectation: *Baxter* v. *Gray*, (1842) 3 Man. & G. 771; 133 E.R. 1349.

This principle applies if the person does work for, or renders services to, the testator under a mere expectation of a legacy, as distinct from a promise on the testator's part. Where there is no proof of any understanding that payment was to be made by a legacy, the mere expectation of a legacy, and delay in making a claim for remuneration for such work or services, are,

subject to the Statute of Limitations, no bar to a claim against the estate. As Sim, J., said in *Crawshaw's* case at p. 215, claims of this nature must be regarded in the first instance with suspicion, but such suspicion can be dispelled by satisfactory evidence. In *Dick* v. *Nicholson*, [1920] G.L.R. 454, there was a *prima facie* presumption, as well as evidence, that the plaintiff's services as testator's housekeeper rendered under an express or implied contract were to be remunerated by wages, and that she did not forbear to claim them upon an understanding that she was not to make any charge in consideration of their being satisfied by a legacy which failed to materialize.

THE TERM " MONTH " IN DOCUMENTS AND INSTRUMENTS.

In *Phipps and Co., Ltd.* v. *Rogers*, [1925] 1 K.B. 14, 23, Scrutton, L.J., said :

> Parliament may alter any common-law rule it likes ; there are several it may usefully alter ; but I do not see how the Court of Appeal can alter a common-law rule because it thinks from its general knowledge that the meaning of " month " is changing.

Well, s. 4 of the Law Reform Act, 1944, has now altered this common-law rule, by enacting as follows :—

> 4. *In all deeds, contracts, wills, orders, and other instruments executed or made after the passing of this Act, unless the context otherwise requires, the word " month " shall be deemed to mean a calendar month.*

The necessity for this very sensible provision may come as a surprise to practitioners, as s. 4 of the Acts Interpretation Act, 1924, defines the word " month " as a calendar month ; but this has application only where the word is used in Acts of the General Assembly of New Zealand, including all rules and regulations made thereunder.

Apart from the meaning of " month " as calendar month in a bill of exchange (Bills of Exchange Act, 1908, s. 14 (*d*)), and, *prima facie*, in a contract of sale (Sale of Goods Act, 1908, s. 12 (3)), there was no statutory provision in New Zealand to give, other than a statutory connection, to the term " month " in any contract or legal instrument a meaning other than lunar month : *Sewell* v. *Donald and Sons, Ltd.*, [1917] N.Z.L.R. 760 ; *Liddle* v. *Rolleston*, [1919] N.Z.L.R. 408. Consequently, until the enactment of the above section, the common law in this Dominion remained as stated in *27 Halsbury's Laws of England*, (1st Edn.) 437, para. 863.

As a general rule, therefore, and in the absence of anything to indicate an intention to the contrary, the term " month," where used in New Zealand in a contract made and coming into force before the passing of the Law Reform Act, 1944, still means a lunar month ; for, as Edwards, J., said in *Liddle's* case, at p. 416, this was " a rule which has hitherto been considered so firmly established that it can be modified or altered only by Parliament."

The language of s. 4 of the Law Reform Act, 1944, is taken directly from s. 61 of the Law of Property Act, 1925 (15 Geo. 5, c. 20), and, like that provision, it reverses the old common-law rule that " month " *prima facie* means lunar month ; but it applies only to the enumerated documents and instruments executed or made *after* December 5, 1944.

Sections 5, 6, and 7 of the Law Reform Act, 1944, will be considered in our next issue.

SUMMARY OF RECENT JUDGMENTS.

In re ISDALE, ISDALE v. MEDICAL COUNCIL.

SUPREME COURT. Auckland. 1944. July 13, 14, 17. MYERS, C.J.

COURT OF APPEAL. Wellington. 1944. September 12, 13; October 2. BLAIR, J. ; KENNEDY, J. ; FINLAY, J.

Medical Practitioners—Removal of Name from Register—" Grave impropriety "—" Infamous conduct in any professional respect "—" Indictable offence "—Whether mutually exclusive—Medical Practitioners Act, 1914, s. 22.

The two grounds upon which proceedings may be taken under s. 22 of the Medical Practitioners Act, 1914, to remove the name of a registered medical practitioner from the Register, are not mutually exclusive. The phrases " grave impropriety " and " infamous conduct " are not limited to acts or conduct which do not offend against the criminal law.

Therefore, the name of a medical practitioner may be removed from the register for " infamous conduct in a professional respect " with relation to acts upon which he has been indicted, and upon which the jury disagreed, and the Crown filed a *stet processus*.

In re McKinnon, [1918] N.Z.L.R. 566, G.L.R. 374 ; *In re Dundas Mackenzie*, (1924) Unreported : Auckland : Herdman, J ; *In re Wallace McKenzie*, (1920) Unreported : Wellington ; *In re Crick*, (1907) 7 N.S.W. S.R. 576 ; and *Re Washington*, (1893) 23 O.R. 299, applied.

So held by the Court of Appeal affirming the judgment and order of MYERS, C.J.

Counsel : *Skelton*, for the appellant ; *Solicitor-General* and *V. R. S. Meredith*, for the respondent.

Solicitors : *Hall, Skelton, and Skelton*, Auckland, for the appellant ; *V. R. S. Meredith*, Crown Solicitor, Auckland, for the respondent.

ALLEN v. HOPPER.

SUPREME COURT. Wellington. 1944. September 26 ; October 3, 4, 9. SMITH, J.

War Emergency Legislation—Industrial Man-power Emergency Regulations—Nature of Duty Imposed—Strike and Lock-out Emergency Regulations—Whether " Employment " includes Overtime Work as well as Work done in Ordinary Working-hours—Whether Breach of Obligation to work Overtime under an Award or Industrial Agreement an Offence under latter Regulations—" Prescribed working-hours "—Industrial Man-power Emergency Regulations, 1944 (Serial No. 1944/8), Reg. 13 (1) (n), 18, 46—Strike and Lockout Emergency Regulations, 1939, (Serial No. 1939/204), Regs. 3, 4.

The term " prescribed working-hours," as used in Regs. 18 and 24 of the Industrial Man-power Emergency Regulations, 1944, includes all ordinary working-hours, but only the additional hours specified under Reg. 20 when they are specified by notice by the Minister of Labour. When that notice has been given, it may appear that the overtime provisions of the award or industrial agreement are excluded, modified, or supplemented according to the construction of such award or industrial agreement.

The facts that the duty imposed by Reg. 13 (1) (*a*) of the Industrial Man-power Emergency Regulations, 1944, is limited to the ordinary hours (fixed by an award, industrial agreement, or contract of employment) worked in an essential undertaking, unless additional hours have been prescribed, and that a breach of this duty is an offence under Reg. 46 of those regulations, does not prevent the breach of the obligation to work additional hours under an award or an agreement being an offence under other regulations such as the Strike and Lockout Emergency Regulations, 1939.

The Industrial Man-power Emergency Regulations, 1944, do not affect the continuance of the operation of awards and industrial agreements.

The term "employment" used in the Strike and Lockout Emergency Regulations, 1939, includes both ordinary time and overtime, provided the overtime is for work on which the workers are usually employed.

Counsel: *Leicester*, for the appellant; *W. H. Cunningham*, for the respondent.

Solicitors: *Leicester, Rainey, and McCarthy*, Wellington, for the appellant; *Luke, Cunningham, and Clere*, Wellington, for the respondent.

DUNEDIN CITY CORPORATION v. A. TAYLOR AND SONS.

COURT OF APPEAL. Wellington. 1944. September 19, 20; October 6. MYERS, C.J.; BLAIR, J.; CALLAN, J.; FINLAY, J.

War Emergency Legislation—Economic Stabilization—Glasgow Lease—Lease on Renewal offered by Public Auction—New Rent in Excess of Rent under former Lease—Determination of "Basic rent"—Economic Stabilization Emergency Regulations, 1942 (Serial No. 1942/335), Reg. 14.

The words "pursuant to" in the proviso to Reg. 14 of the Economic Stabilization Emergency Regulations, 1942, mean "under," and that proviso applies only to "progressive" rentals under an agreement made before September 1, 1942; not only where the rent for each successive period is of a stated amount; but also when the amount is not stated but there is machinery for its being worked out—*e.g.*, by valuation.

So held, by the Court of Appeal (*Myers*, C.J., *Blair*, J., and *Callan*, J., and *semble Finlay*, J.), dismissing an appeal from the judgment of *Kennedy*, J., reported [1944] N.Z.L.R. 434.

Counsel: *Robertson*, for the appellant; *Stevens*, for the respondent.

Solicitors: *Ramsay, Haggitt, and Robertson*, Dunedin, for the appellant; *Osborne, Stevens, and Stevens*, Dunedin, for the respondent.

COOK v. NELSON HOSPITAL BOARD.

SUPREME COURT. Nelson. 1944. August 30; October 18. FINLAY, J.

Hospitals and Charitable Institutions—Limitation of Action—Boards Liability for Acts not done by Persons engaged in Professional or some analogous Capacity—Notice of Action—Application of ejusdem generis *Rule—"Or other person"—Hospitals and Charitable Institutions Amendment Act, 1936, s. 2.*

Section 2 of the Hospitals and Charitable Institutions Amendment Act, 1936, has relation only to such persons as are employed or engaged by a hospital board in the capacity of "medical practitioner, dentist, matron, nurse, midwife, or attendant," or in some analogous capacity—namely, persons who in the course of their duty come into immediate contact with patients and are in some way associated with the treatment of patients.

In re Stockport Ragged, Industrial, and Reformatory Schools, [1898] 2 Ch. 687, and *Knight and McLellan* v. *National Mortgage and Agency Co. of New Zealand, Ltd., and Ashton*, [1920] N.Z.L.R. 748, G.L.R. 477, applied.

Logan v. *Waitaki Hospital Board*, [1935] N.Z.L.R. 385, G.L.R. 421, and *National Association of Local Government Officers* v. *Bolton Corporation*, [1943] A.C. 166, [1942] 2 All E.R. 425, referred to.

An action was brought against a Hospital Board on the ground of negligence in not providing the plaintiff with a proper means of escape from fire, the plaintiff in consequence having been injured in escaping from the nurses' home when it was destroyed by fire, but such action was not commenced until more than six months had elapsed after such fire.

On argument before trial of the question of law whether s. 2 of the Amendment Act, 1936, was applicable to the causes of action alleged by the plaintiff,

Held, That the section was not a bar to the prosecution of the action.

Counsel: *F. W. Ongley*, for the plaintiff; *Fell*, for the defendant.

Solicitors: *Ongley, O'Donovan, and Arndt*, Wellington, for the plaintiff; *Fell and Harley*, Nelson, for the defendant.

In re A SOLICITOR.

SUPREME COURT. Auckland. 1944. September 8. FAIR, J.

Law Practitioners—Taxation—Solicitor's Bill referred by District Law Society to Registrar for Taxation—Application to Judge to review Registrar's Assessment—Whether Judge has power to fix a Lump Sum—Statutes Amendment Act, 1943, s. 19 (7).

The Judge to whom an application is made to review the taxation by the Registrar of a solicitor's bill referred to him by a District Law Society pursuant to s. 19 (7) of the Statutes Amendment Act, 1943 (which empowers the Judge to "make such order varying the taxation as he may consider fair and reasonable"), has power to fix a lump sum.

Semble, The Registrar has no such power.

Counsel: *A. K. Turner*, for the Auckland District Law Society, in support of the summons; *C. G. Lennard*, for the solicitor to oppose.

In re BARWELL (DECEASED), BARWELL v. PUBLIC TRUSTEE.

SUPREME COURT. Auckland. 1944. October 10. NORTHCROFT, J.

Insurance—Life—Inalienable Life Annuities—Will—Devises and Bequests—Will directing Investment in Annuity for Benefit of Legatee—Investment, to extent of £104 per annum, in Inalienable Life Annuity unless Supreme Court Orders Otherwise——Jurisdiction to determine whether such Investment "beneficial or otherwise to legatee"—Benefit to Legatee's Estate not to be considered—Inalienable Life Annuities Act, 1910, s. 21.

The Supreme Court, in considering under s. 21 (*e*) of the Inalienable Life Annuities Act, 1910, whether adherence to the provisions of that section as to investment in an inalienable life annuity is "likely to prove beneficial or otherwise to the legatee," must consider only the personal benefit to the legatee himself, apart from that to his estate and to the dependants who will survive him.

Counsel: *McElroy*, for the plaintiff; *Ryan*, for the defendant.

Solicitors: *D. L. Ewan*, Auckland, for the plaintiff; *District Solicitor, Public Trust Office*, Auckland, for the defendant.

BISHOP v. FLETCHER CONSTRUCTION COMPANY, LIMITED.

COMPENSATION COURT. Auckland. 1944. October 12, 20. O'REGAN, J.

Workers' Compensation—Accident Arising out of or in the Course of Employment—Hernia—"Aggravation of pre-existent hernia resulting in immediate pain and disablement"—"Disablement"—Pain and Disablement of same Duration—Workers' Compensation Act, 1922, s. 2—Workers' Compensation Amendment Act, 1943, s. 6 (1) (a) (ii).

The conditions of s. 6 (1) of the Workers' Compensation Act, 1943, where the hernia and pain is "an aggravation or strangulation of a pre-existent hernia resulting in immediate pain and disablement," are satisfied if the pain and disablement in the case of the aggravation or strangulation of a pre-existent hernia are of the same duration.

Wilton v. *Treseder*, [1940] N.Z.L.R. 769, G.L.R. 563; *Watson* v. *Northcote Borough Council*, [1940] N.Z.L.R. 388, G.L.R. 245; and *Gibson* v. *Kaitangata Coal Co., Ltd.*, [1943] G.L.R. 193, referred to.

Counsel: *A. M. Finlay*, for the plaintiff; *G. S. Meredith*, for the defendant.

Solicitors: *A. M. Finlay*, Auckland, for the plaintiff; *V. R. S. Meredith*, Crown Solicitor, Auckland, for the defendant.

THE OFFICE AND STATUS OF MAGISTRATES.

A Needed and Overdue Change.

[CONTRIBUTED].

A subject that is receiving a certain amount of notice at the present time relates to the Magistracy, particularly the prevailing conditions of appointment and dismissal, tenure of office, and lack of magisterial immunity in some circumstances.

First, there is the question of magisterial appointments. Section 7 of the Magistrates' Courts Act, 1928, vests in the Governor-General the power of appointment to the Magistracy. The persons to be appointed are "to be fit and proper" for the purpose, "to exercise criminal and civil jurisdiction within New Zealand." Those are the only indications of the qualities a person considered for appointment must possess. To qualify for such appointment he must be a barrister or solicitor "of not less than five years' standing," whatever that may be interpreted to mean, since "practice" is no qualification at all. Alternatively, he must have had some experience of Courts if he is appointed from the Justice Department under s. 7 (3) (*b*). However, it is plain that such a person must obviously be of good character; he must possess sound and balanced judgment; and he must possess a sufficient knowledge of the law: these essentials are implicit in the language of the section.

Now, although the appointment is made nominally by the Governor-General, yet the fitness of the appointee is, in the first analysis, approved by the Justice Department, and ultimately determined by the Government of the day, whatever its politics may be, or the Executive thereof. This fact seems to suggest—though, of course, not conclusively—the potential danger that an appointee must be of the right "political colour," otherwise, it is submitted, it is conceivable that he may not have been considered for appointment. "Political" qualifications, and appointments* are of the same objectionable character as those deriving from "the old school tie," though the latter is, at least, indicative of well-understood qualities, the product of recognized training in early years. If an appointment be of a "political" origin, the seed is sown for a dismissal by a rival political party succeeding to office. Thus, the vicious circle of appointments by "the Governor-General" becomes complete, and a Magistrate, under the present conditions is no more, in status, than a civil servant open to departmental discipline.

Granted, then, that it is undesirable that the right of appointment should actually vest in the Executive, it may well be inquired what would constitute a satisfactory substitute.

In England, under the County Courts Act, 1888 (51 & 52 Vict., c. 43), and its amendments, the power of appointment of a County Court Judge is conferred on the Lord Chancellor; and it must be allowed that such a method of appointment is beyond question or reproach. The Lord Chancellor is, of course, the highest judicial officer in England. In New Zealand, we have, corresponding to the Lord Chancellor, the person holding the office of Chief Justice, the highest judicial officer in the Dominion. Appointments made to the Magistracy by the Chief Justice, or on his nomination or with his approval, would negative any suggestion of political influence; and would bring the matter of appointments in line with those of County Court Judges. In this connection, reference may be made to an essay by the late Earl of Birkenhead, entitled, "A Ministry of Justice" and contained in his book, *Points of View*. His Lordship, who was then Lord Chancellor, pointed out the undesirability of removing the right of appointment of Judges from the Lord Chancellor to a Ministry of Justice. He instanced an occasion when Disraeli approached a Lord Chancellor with a suggestion that a certain person, who was lacking in the attributes so necessary to the judicial character, should be appointed to the Judiciary. The reply of the Lord Chancellor was straight and to the point: the appointment could not be made, and there was something of a more than gentle reminder that it is good for persons to remain and function within their own particular spheres. The point made was whether a Minister could resist the pressure of a political nature that could be brought to bear? All interested in the subject of this article are strongly advised to peruse that essay. Obviously a person should be appointed on his merits, and not on his political affiliations or leanings, or on his being *persona grata* with the current head of a Department, or for any reason other than merit and fitness.

If appointments are made by the Chief Justice, no question could then arise—as it does now—whether, when such appointees have not been in actual practice as barristers or solicitors, they are suitable for appointment.

Having dealt with the question of appointment, let us turn to the topic of tenure of office. Subsection (2) of s. 7 provides: "All Stipendiary Magistrates shall hold office during the pleasure of the Governor-General," which, in modern experience, is a euphuism for the Executive Government, the Cabinet, the Ministerial head of the Department, or the permanent head, as the case may be.

It is a matter of history that the independent position gained by the superior Courts after the Revolution restored their efficiency by destroying the "Nazi" tendencies of the seventeenth century. Since they cannot now be removed except by the joint action of the three branches of the Legislature, the Judges have nothing to fear, either from the Crown, or the Executive: see *6 Holdsworth's History of English Law*, 252 *et seq.*; and, for examples of previous abuses, see *3 Macaulay's History of England*, 305. This security of judicial tenure of office *quamdiu se bene gesserit*, with the consequent removal from the Judiciary of any Crown, Executive, or departmental interference affords the best of all securities for the protection of the liberties of the subject.

This hard-won constitutional freedom that after long struggles was conferred on the Judiciary, should also

* An example of a "political" appointment concerns a certain Judge Robinson, of whom Lord Brougham said that he was the author of many stupid, slavish, and scurrilous political pamphlets, "and, by his demerits was raised to the eminence which he thus disgraced."

An interesting passage at arms between that Judge and Curran, the celebrated barrister, is contained in *A Book of Famous Wits* by Walter Jerrold. The example shows what political appointments can lead to.

apply to the Magistracy. From the standpoint of the ordinary citizen who comes into closer and more frequent contact with "the people's Court," it is open to grave objection that the tenure of magisterial office should depend on the pleasure (or displeasure) of an Executive Government, advised by a Minister, or a superior Public Servant. A Magistrate should, like a Judge, have "nothing to fear and nothing to hope for" in relation to his office, in which he should be secure *quamdiu se bene gesserit*. If that principle is accepted in relation to the Judiciary, as a constitutional safeguard of the people's interests, it must be applied equally to Magistrates. To suggest any modification in their regard is to attack the principle itself.

At this stage attention is directed to certain authorities bearing on the questions in issue.

First of all, take *Ex parte Ramshay*, (1852) 18 Q.B. 173, 118 E.R. 65, where it appears that the law relating to the removal of County Court Judges was the same as it is to-day. At p. 191 (71) Lord Campbell, L.C., referred to them as certainly filling "an office of great dignity and importance in the administration of justice"—an observation applying with equal force to our Magistrates. And at the beginning of the next page there is this reference to the removal of a County Court Judge for inability or misconduct:

> But it may not be very improbable that the Legislature, amidst a choice of difficulties, intended to confer this power of removal without an appeal to a jury, upon the Lord Chancellor or the Chancellor of the Duchy of Lancaster. There must be a power lodged somewhere of removing County Court Judges, both for inability and misbehaviour. Practically, this power could hardly be exercised by the Crown on the address of the two Houses of Parliament, according to the course prescribed for the removal of the Judges of the Superior Courts in Westminster Hall . . . With all due deference for juries in the exercise of their proper functions, the Legislature may have thought that the Lord High Chancellor of Great Britain is likely to form quite as impartial and enlightened an opinion, after hearing evidence on the subject, as to the ability and behaviour of a Judge in his office.

(It may be that there is a certain irony and sarcasm in the last sentence.) Here, the question of a removal of a Magistrate, on either of the grounds mentioned, could best be left to the Chief Justice.

Our next case is *Garnett* v. *Ferrand*, (1827) 6 B. & C. 611, 108 E.R. 576, which is more concerned with the freedom of Judges from actions arising out of acts connected with the exercise of their functions; and it gives good and adequate grounds why Magistrates should enjoy the same immunity as Judges:

Speaking of a Coroner and his Court, Lord Tenterden, C.J., at p. 625 (581), said:

> It is a general rule of very great antiquity that no action will lie against a Court of Record for any matter done by him in the exercise of his judicial functions . . . This freedom from action and question at the suit of an individual is given by the law to the Judges not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions they may be *free in thought and independent in judgment, as all who are to administer justice ought to be.* And it is not to be supposed beforehand, that those who are selected for the administration of justice will make ill use of the authority vested in them. Even inferior Justices, and those not of record, cannot be called in question for an error in judgment, so long as they act within the bounds of their jurisdiction. In the imperfection of human nature it is better, even, that an individual should occasionally suffer a wrong, than that the general course of justice should be impeded and fettered by constant and perpetual restraints and apprehensions on the part of those who are to administer it.

Special attention is directed to the last sentence, as well as to that italicized by the writer.

The citation ends with these words:

> Corruption is quite another matter; so, also, are neglect of duty and misconduct in it. For these, I trust, there is and always will be some due course of punishment by public prosecution.

The judgment wisely discriminates and differentiates between mistake and corruption. A Stipendiary Magistrate should be absolutely protected in the exercise of his functions without regard to limits of his jurisdiction; but see s. 344 *et seq.* of the Justices of the Peace Act, 1927.

The next authority, is *Taafe* v. *Downes* (*Chief Justice of the King's Bench in Ireland*), (1813) 3 Moo. P.C. 36*a*, 13 E.R. 15, and the purpose of its citation needs no elaboration. Mayne, J., in the Court of Common Pleas (Ir.), at pp. 41, 42 (18), said:

> Judges are to be equally independent of the Crown, and of the people . . . The honest, good, and constitutional mind will always wish to see them entirely free and unbiased. The constitutional idea of a Judge is "*dignity*," for the sake of the King and people. Liability to every man's action for every judicial act a Judge is called upon to do is a degradation of the Judge, and cannot be the object of any true patriot or honest subject. It is to render the Judges slaves in every Court that holds plea . . . If you once break down the barrier of their dignity, and subject them to an action, you let in upon the judicial authority a wide wasting, and harassing persecution, and establish its weakness in a degrading responsibility.

The learned Judge was speaking of the Judges of the Superior Courts. He had previously been speaking of the difference between the Judges of Superior and Inferior Courts in the following terms, at p. 16:

> The King's Judges stand next to, or with the King, or for him, appointed by him, and responsible to him; and he will have his justice done by them alone. The inferior Judges stand under, and represent the authority of subjects; they have only the responsible power of subjects entrusted to them; or they are placed at a distance in responsibility from the King and are subject to the control and direction of the superior Courts.

In the same case, Mr. Justice Fox said at p. 49 (23):

> The principle at law, or exemption from being sued for matters done by Judges in their judicial capacity, is of great importance. It is necessary to the free and impartial administration of justice that the persons administering it should be uninfluenced by fear and unbiased by hope. Judges have not been invested with this privilege for their own protection merely—it is calculated for the benefit of the people, by ensuring to them a calm, steady, and impartial administration of justice; it is a principle coeval with the law of the land, and the dispensating justice in this country; it is to be met with in our earliest books of law; and has been continued down to the present time without one authority or diction to the contrary that I had been enabled to find.

The full text of these judgments deserves perusal.

Inseparable from the foregoing considerations is the importance of maintaining the correlative condition that no Magistrate, during his term of office as such, should receive anything over and above his statutory salary. The constitutional principle of judicial independence makes it imperative that the Executive Government should not have it in its power to increase the salary of any selected Magistrate—any more than it may increase the salary of any Supreme Court Judge—by giving him additional emolument for such services as presiding over Commissions of Inquiry, acting as Coroner, and the like. Not one penny, apart from reasonable travelling allowance, should be receivable by a Magistrate as increment to his magisterial salary. And the profession should officially make its voice heard

in maintenance of this fundamental principle of independence of judicial officers.

It will have been noticed that an inferior Court is protected only so long as it acts within its jurisdiction; but the reasons urged in favour of the immunity of Judges apply with equal cogency to those presiding over inferior Courts. Moreover, litigants are in a much better position with regard to inferior Courts, because such Courts are subject to the control and direction of the superior Courts. The point urged for adoption is the provision of absolute immunity of Stipendiary Magistrates in respect of all acts done by them in the exercise of their judicial functions, without restricting such immunity to acts within the scope of their jurisdiction: in other words, to place them in a position of safety in this regard, such as is given to Supreme Court Judges, and for the self-same reasons. And from any point of view, this is unquestionably A Fair Thing.†

The removal of Magistrates for misbehaviour or inability, a power vested in the Lord Chancellor alone by s. 15 of the County Courts Act, 1888, could, and should, be left to the discretion of the Chief Justice; and the earlier remarks regarding the person in whom should be vested the right of appointment of Magistrates have equivalent application here. Briefly, the appointment and removal of Magistrates should be solely a matter for the Chief Justice of New Zealand, who could, if he thought fit, consult with the other members of the Supreme Court Bench regarding suitable appointees. Moreover, the fact that the power of appointment and removal is vested in the superior Court, would emphasize the continuing difference in judicial status of the inferior Court Magistrates from that of the Supreme Court Judges.

There is a minor matter to which reference may be made in speaking of Magistrates, and that is the title by which they are known. It seems to many of us practitioners that the term "Judge" is much more suitable and fitting. There is a dignity attaching to such term, that is absent from the word "Magistrate," and moreover there is an indication of the functions exercised by the holder of the office to which such terms should apply. In short, the word "Judge" has a significance and force that the term "Magistrate" lacks. The adjective forming part of the title of "Stipendiary Magistrate," though imposing in length, has, it may be suggested, a mercenary aspect; and though the word is of generous dimensions, it indicates nothing more than that the holder is paid a stipend. Is there need to emphasize the fact? It seems an outmoded expression used in bygone days to differentiate between paid and unpaid Magistrates. But the present terms, "Stipendiary" and "Magistrate," should be abolished and superseded by "District Court Judges." It will be recalled that the persons who preside over the Native Land Courts, with their necessarily limited scope, are termed "Judges." It must be emphasized, however, that the title "Judge," if conferred, should not alter the present form of address ("Your Worship"), in which is implicit the difference between the "Judges" of the inferior Courts, and their Honours, the Justices of the Supreme Court.

† In a recent judgment of Mr. S. L. Paterson, S.M., *Police* v. *Williams*, which has not yet been reported, the learned Magistrate says, incidentally: "A Magistrate in dealing with questions affecting his jurisdiction must tread warily. Magistrates have not the immunity of Judges, and, if they exceed their jurisdiction, no matter how difficult the issue and how carefully they act, they are liable to damages."—ED.

A useful comparison may be made with the status of those presiding in inferior Courts in New South Wales. There the Stipendiary Magistrates, in general, are confined to the lower Court hearings of criminal and quasi-criminal matters (by-law and traffic offences, and the like). (In the metropolitan district of Sydney, these are termed Police Magistrates.) But judicial officers functioning as our Magistrates do, in Sydney and throughout the State, are called "District Judges," and are addressed, as our Magistrates are now addressed.

It is implicit in the foregoing paragraph, that our Magistrates' Courts should be known as "District Courts." In point of fact this country is divided up into districts (s. 6 (1)); and Magistrates, consequently, could similarly be called "District Courts Judges": see hereon the County Courts Act, 1888, ss. 2, 3; and the notes thereon in *1943 Annual County Courts Practice*,7. The retiring age of County Court Judges is attainment of the age of seventy-two years: s. 7.

In conclusion, the question of salaries may be touched upon. County Court Judges receive £2,000 a year (Statutory Salaries Act, 1937, 1 Edw. 8 & 1 Geo. 6, c. 35), (*30 Halsbury's Complete Statutes of England, 114*) while the highest salary paid to a Magistrate in New Zealand is £1,000, most of the others receiving less. So far as can be seen, a County Court Judge, as such, is not called upon to exercise criminal jurisdiction. A Magistrate is asked to do this on an extensive scale. While it must be conceded that the former exercise certain jurisdiction in civil matters not possessed by Magistrates, yet the limits of the respective jurisdictions are all in Magistrates' favour, as a County Court Judge has jurisdiction only in any action founded on contract or in tort where the debt, demand, or damage claimed does not exceed £100, in comparison with our Magistrates' jurisdiction up to £300, and with consent, up to £500. Moreover, Magistrates are called upon to deal with many matters beyond those strictly relating to Court proceedings. Of course, this may be true of County Court Judges; but it is undeniably the fact in regard to Magistrates. Our Magistrates, too, are called upon to preside over Commissions and Appeal Boards and such like; and it is always with a feeling of satisfaction that appellants or parties concerned appear before a tribunal presided over, either alone, or with others, by a Magistrate. Such is the confidence our people feel in the Magistracy.

To summarize: Appointment to, and dismissals from, the Magistracy should be in the hands of the Chief Justice for the time being; Magistrates should enjoy the same immunity as Judges, without regard to the fact that they may have exceeded their jurisdiction; and Magistrates should be paid salaries commensurate with the scope and importance of the duties they are called upon to perform. And no objections can well be raised to an increase in their present salaries, in view of the fact that the highest Court in the land—the Legislature—has recently increased the salaries of all its members.

Finally, the writer wishes to make it plain that nothing that has been said herein has any concrete application; the matters dealt with have been considered solely from the abstract point of view. It is a practitioner's view—the view of one among the profession's P.B.I.; and, if any of the writer's brethren disagree, the JOURNAL would, no doubt, welcome his expressions of disagreement.

LAW IN THE FIELD.

Practice within Sound of the Guns.

By MAJOR E. T. PLEASANTS, Sometime Legal Staff Officer, 2nd New Zealand Division.

Law and War go ill together. In fact, one may say that the lawyer who goes to war may close his textbooks for the duration and turn his thoughts to things which are the direct negation of all that his training, study, and practice have made him think desirable and worthy of striving for.

To myself, however, came the duty of following my civilian profession in some fashion within sound of the guns. To be technically at any rate a soldier on operations but one whose daily weapons were the *Manual of Military Law* and such precedents of wills, &c., as his memory allowed him.

I was appointed Legal Staff Officer to 2nd New Zealand Division just prior to its now famous move from Syria to the Western Desert in June, 1942, and remained in that appointment until the return of the division to Egypt at the conclusion of the Tunisian campaign in May, 1943.

The official duties of a Legal Staff Officer consist in the main of advising the Administration Branch of the division on disciplinary matters, perusing and checking court-martial proceedings, Courts of inquiry, road accident reports, drafting charges under the Army Act, and such-like matters. In addition, 2nd New Zealand Expeditionary Force Legal Department has made it a practice to give whatever assistance it can to any soldier who has private or personal legal troubles and to make wills and prepare powers of attorney. This service is also made available through the Legal Staff Officer to all members of the division and in fact comprises a large part of his work. At all times, therefore, during the long and victorious trek from Alamein to the mountains surrounding Tunis any member of the 2nd New Zealand Division had such legal assistance as I could give him within reach. I do not suggest that any soldier could stop in the middle of a battle and ask permission to go back and consult a lawyer, but there were many occasions when no action was in progress for days and sometimes weeks, and during those periods I had a steady practice, particularly after the arrival of New Zealand mail.

The Eighth Army established and carried along fairly well to its rear a permanent court-martial centre to which offenders and their witnesses and so on were sent for trial. Consequently, a legal staff was attached to this centre and neither divisions nor corps, other than 2nd New Zealand Division, included a Legal Staff Officer on their headquarters. Hence, I had the privilege, such as it was, of being the first to carry the law into the domain of Mussolini in Tripolitania, and later into Tunisia. The New Zealand Division, I may mention, did not make use of the court-martial centre as in general the principle is followed that New Zealanders are tried only by their fellow-countrymen. We often had English units and formations under command and their courts-martial, &c., were dealt with on the same basis as our own.

During periods of fighting and our long advances my legal duties were, of course, at a minimum, and I performed other administrative duties, but, whenever we halted for any period, my tent was up, my trestle table desk was prepared, and files laid out, and my invaluable sergeant, (Sergeant S. G. Sauer of the staff of Messrs. Graham and Reed of Feilding), was standing by for "clients." I am sure the law was never practised under stranger circumstances or in more unexpected parts of the world. During the flanking movement for the El Hamma gap in Tunisia (outflanking the Mareth Line), the division was on the edge of the Sahara, but while waiting a few days for the fierce fighting which was to come, business was as usual, and wills were made and opinions given. Half an hour's notice to move and the tent was down, truck packed, and the Legal Department was ready for a new location.

My normal position was at Rear Divisional Headquarters which comprises the Administrative and "Q" staff and attached services. Often, however, to carry out the other administrative duties I have mentioned, I was stationed in rear of the whole division. At these times a battle was usually in progress, and there was little or no inquiry for legal services, but I was always in touch with Rear Headquarters and appointments could be arranged at any time.

It follows, of course, that there was little likelihood of my deliberations on any weighty point of law being interrupted by the sudden arrival of a German tank or even by enemy artillery. However, we were usually well within sound of the guns and the Luftwaffe seemed to regard us as objects worthy of attention now and then. Only once was a consultation rather ruined by *nova causa interveniens*. One nice sunny morning near Gabes in Tunisia, I was being consulted by a company commander on some point of discipline which we were cosily discussing when the noise of anti-aircraft guns seemed to burst out in all directions and next the whistle of bombs. Both the law and the layman lost no time in finding "mother earth" and clinging to it while the crack split the air. They were far enough away not to do us any harm fortunately, but that point of discipline seemed to have lost its importance somehow, and my "client" decided to accept my advice and be on his way.

The majority of my visitors with personal troubles had matrimonial worries. If it appeared from correspondence that definite evidence of unfaithfulness or other grounds of divorce existed, I wrote to solicitors in New Zealand, had arrangements made for inquiries which would lead to cancellation of their allotments, and—very helpful, I think—made the best possible arrangement for payment of the solicitors instructed. Very often, of course, only suspicions or rumours were known, and in such cases application would be made in the proper quarter for inquiries to be made in New Zealand. In some cases there was nothing one could do at all at that distance from the scene, but I found that a discussion of the matter which was troubling him often eased the soldier's mind and smoothed away difficulties which were more apparent than real. A worried soldier is not a good soldier as a rule, and anything done to relieve his mind is of value.

Before the final defeat of the Axis the division was more or less anchored in the vicinity of Enfidaville for some four or five weeks of fighting and resting, and its units spread back nearly to Sousse. I was stationed at Sousse in a delightful spot amidst olive trees and found my legal practice fairly considerable. One day a visitor produced to me a tax demand and correspondence and told his story. The Commissioner, of course, would not allow the exemption. It was years since I had seen the Land and Income Tax Act, for which fact I was exceedingly thankful, and no copy, so far as I was aware, existed in the Middle East, which I regarded as another praiseworthy matter. But I wrote and told the Commissioner all about it, and, if my statement of the law was shaky, the appeal to his better and patriotic feelings (if Commissioners of Taxes possess such things) was strong, and I know that my "client," even if he still had to pay, did so more cheerfully.

At the time of which I am writing no official contact existed between the 2nd New Zealand Expeditionary Force Legal Department and the New Zealand Law Society in respect of this personal service to soldiers. I hope that this may now have been remedied as I often had cases in which it was not possible to advise a soldier to go to any expense without further information or more detailed advice, and if such matters could have been referred to New Zealand for inquiry or opinion as to the advisability of proceeding, a real service would have been rendered. Further, the Legal Department at that time had little information as to changes in the law in New Zealand, and this is a further difficulty which close contact with the Society would overcome.

I should add that prompt and efficient service was always rendered by every practitioner in New Zealand to whom I had occasion to write on behalf of a soldier.

FARM SUBJECT TO MORTGAGE.

Settlement on Infant Child.

By E. C. Adams, LL.M.

Explanatory Note.

This is a straight-forward settlement of the equity of redemption of farm land on the infant child of settlor; the land has by contemporaneous transfer been vested in the two trustees, subject to the mortgage. In such a transfer the careful conveyancer will modify in favour of the trustees the covenant implied by s. 88 of the Land Transfer Act, 1915. As to the limiting of personal covenants by trustees to the assets of the trust, see *Goodall's Conveyancing in New Zealand*, 318; *Gower* v. *Cornford*, [1937] N.Z.L.R. 1176, G.L.R. 357; *Hope* v. *Public Trustee*, [1943] N.Z.L.R. 398, G.L.R. 257; and articles in (1944) 20 N.Z.L.J. 7, 29.

The powers conferred on the trustees to manage the trust property appear to be sufficiently wide for all practical purposes: the power to invest trust moneys on *contributory* mortgage is an expedient provision, for it is esteemed a breach of trust to invest trust funds on contributory mortgage in the absence of express authority in that behalf: *Webb* v. *Jonas*, (1888) 39 Ch.D 660.

Gift duty will be payable on the value of the equity of redemption, if it exceeds £500, or if its value together with the value of all other gifts made or to be made within twelve months previously or subsequently exceeds £500. If gift duty is payable in the first instance, *ad valorem* stamp duty at the rate of 11s. per £50 will be exigible on the amount (£10,000) of the mortgage taken over by the trust. If no gift duty is payable in the first instance, *ad valorem* stamp duty at the rate aforesaid will be payable on the value of the land, if it exceeds the amount due under the mortgage. The value of the land is ascertained by taking the Government valuation of it and adding thereto the value of all improvements effected since the date of such valuation. But both the settlor and the Stamp Department have the right to obtain a *special* valuation as at the date of the transaction: the settlor pays the expense of obtaining a special valuation, whichever side orders it: s. 70 (7) of the Death Duties Act, 1921.

Thus, if the value of the land ascertained as aforesaid is £11,000 and there are no other gifts to take into consideration, there will be payable on the transfer: (*a*) Stamp duty on £10,000, £110; (*b*) Gift duty on £1,000, £50; (Total, £160).

In addition 15s. stamp duty will be payable on the declaration of trust: s. 101 (3) of the Stamp Duties Act, 1923.

As the land itself does not constitute an economic unit, and, as gift duty (unlike stamp duty), is payable not so much in respect of instruments as *transactions*, the Stamp Department will ask for relevant information as to the ownership and possession of the farming stock and implements on the farm.

The value of the equity of redemption gifted will come into the settlor's estate for death-duty purposes, if she *dies within three years of the gift*: s. 5 (1) (*b*) of the Death Duties Act, 1921. But, as she has reserved no interest or benefit in the gift, it will not be caught for death duty if she survives three years, unless she retains possession of the farm; if she retains possession (even under a lease or tenancy at a *rack rent* paid or payable to the trustees), the equity of redemption will be liable for death duty under s. 5 (1) (*c*) on the principle of *Commissioner of Stamp Duties* v. *Shrimpton*, [1941] N.Z.L.R. 761, G.L.R. 338 (Pt. II). To avoid death duty she must get out of possession and keep out of possession for a period of at least three years before her death: *Commissioner of Stamp Duties* v. *Perpetual Trustees*, [1943] 1 All E.R. 525, a decision of the Privy Council on an appeal from New South Wales.

If the settlor subsequently by way of gift pays off or reduces the mortgage, that *prima facie* will be an independent gift transaction and liable to gift duty accordingly: *Shrimpton's* case (*supra*), also to death duty if the settlor dies within three years of such gift, but s. 5 (1) (*c*) will not catch it, as the last-cited case shows, if she survives three years.

PRECEDENT.

THIS DEED made the day of one thousand nine hundred and forty BETWEEN A.B. wife of C.D. of Napier in the Provincial District of Hawke's Bay sheep-farmer (hereinafter called "the settlor") of the one part and E.F. of Napier in the Provincial District of Hawke's Bay accountant and G.H. of Napier aforesaid solicitor (hereinafter called "the trustees") of the other part WHEREAS by memorandum of transfer of even date herewith the settlor has transferred to the trustees ALL that piece of land situate in the Provincial District of containing acres more or less being [*Set out here official description of land*] and being all the land in Certificate of Title Volume folio subject to memorandum of mortgage registered Number securing the principal sum of Ten thousand pounds (£10,000) AND WHEREAS the said piece of land was so as aforesaid vested in the trustees by the said recited transfer to the intent that the same should be held by the trustees upon and subject to the trusts and to and for the ends intents and purposes by these presents (the same being executed contemporaneously with the said recited transfer) declared of and concerning the same NOW THIS DEED WITNESSETH that the settlor in consideration of the natural love and affection which she bears to her infant son I.J. doth hereby direct and declare AND it is hereby covenanted and agreed by and between the settlor and the trustees that the trustees shall stand seised and possessed of the said piece of land and all the rents issues and profits therefrom (hereinafter called "the said settled premises") UPON TRUST for the said I.J. absolutely if and when he shall attain the age of twenty-one (21) years PROVIDED ALWAYS and it is hereby declared that if the said I.J. shall die before attaining the age of twenty-one (21) years the trustees shall hold the said settled premises UPON TRUST for all the children of the settlor (except the said I.J.) by her marriage with the said C.D. who shall be living when the youngest of such children attains the age of twenty-one (21) years in equal shares as tenants in common and if there shall be only one such child the whole to be in trust for that one child AND if there shall be no such child then in trust for the person or persons who under the Statutes of Distribution of the effects of intestates would on the decease of the settlor have been entitled thereto if she had died possessed thereof intestate such persons if more than one to take as tenants in common in the shares in which the same would have been divisible between them under the same statutes AND IT IS HEREBY AGREED AND DECLARED by and between the parties hereto that the trustees shall have the following powers discretions and obligations in respect of the said settled premises that is to say:—

1. Power to invest any funds in their hands upon any form of investment and in manner hereinafter authorised.

2. Power to farm and manage any landed property for the time being part of the said settled premises and for such purposes to purchase and sell stock implements and any other goods chattels and things necessary for such farming; to receive the rents income and profits and manage or superintend the management of the said premises; to erect repair pull down and rebuild or re-erect houses buildings fences and other structures; to make drains roads and fences and to improve the said premises or any part thereof and to insure buildings against damage by fire and pay out of such rents income and profits or out of the income or when they shall think fit out of the capital of the said premises all or any rates taxes insurance premiums and other outgoings and the costs and expenses of and incident to the exercise of such powers of management or improvement and generally do all such acts and things in relation to the premises as they might do if they were the absolute beneficial owners thereof without being accountable for any loss which may be occasioned thereby PROVIDED FURTHER that it shall be lawful for the trustees from time to time in their absolute discretion to appoint retain employ and dismiss such managers agents bailiffs stewards clerks or other persons to aid and assist them in the care and management of the said premises or any part thereof or otherwise in the performance and execution of the trusts and purposes herein declared concerning the said premises as to the trustees may seem best and also to pay or allow to all such persons as aforesaid so appointed retained and employed from time to time such salary or salaries or other compensation as the trustees shall in their discretion think fit.

OBITUARY.

Mr. C. B. O'Donnell (Wellington).

The death occurred recently, as the result of a motor-car accident, of Mr. Carroll Bernard O'Donnell, formerly a well-known Wellington practitioner, aged forty-eight years. Mr. O'Donnell was born at Hawera and educated at the Convent School, Hawera, St. Patrick's College, and Victoria University College. He qualified as a solicitor in 1918, and was managing clerk to Mr. H. F. O'Leary when the latter was in practice on his own account. Upon Mr. O'Leary joining the firm of Messrs. Bell, Gully, Bell, and Myers, he commenced practice in Mr. O'Leary's former offices. Later he admitted Mr. T. P. Cleary into partnership with him. This partnership was dissolved when Mr. O'Donnell left New Zealand for a trip around the world. Shortly after his return, early in 1939, he recommenced practice and took into partnership Messrs. R. L. A. Cresswell and W. H. Cudby. He retired from active practice in 1941, and had latterly spent a considerable portion of his time in Australia.

* * *

Few Wellington practitioners, however eminent, have left behind them such vivid memories as the late Carroll O'Donnell. His qualities would undoubtedly have brought him to the front rank as an advocate, had he possessed any marked inclination in that direction. He was, however, more interested in the commercial side of legal practice. He had a wide knowledge of Company Law, and few, if any, were better versed in the intricacies of the laws pertaining to taxation. It was, however, for his social qualities that he will be remembered. His great charm of personality, fluent tongue, and keen Irish wit, inevitably made him the centre of any group of which he was a member. Although by his own exertions and keen financial sense, he was possessed of substantial means, which had enabled him to retire from active practice some years ago, he retained his interest in the profession and his contact, in particular, with his contemporaries and the younger generation, as closely as ever; and many pleasant social gatherings among them had been largely due to his generosity. His innumerable friends will never forget him.

—R.L.A.C.

RULES AND REGULATIONS.

Commercial Gardens Regulations, 1943, Amendment No. 1. (Commercial Gardens Registration Act, 1943.) No. 1944/160.

Stock Importation Amending Regulations, 1944. (Stock Act, 1908.) No. 1944/161.

Electrical Equipment Order, 1944. (Electricity Emergency Regulations, 1939, and Supply Control Emergency Regulations, 1939.) No. 1944/162.

Honey Emergency Regulations, 1944. (Emergency Regulations Act, 1939.) No. 1944/163.

Local Authorities (Temporary Housing) Emergency Regulations, 1944. (Emergency Regulations Act, 1939.) No. 1944/164.

Evidence Emergency Regulations, 1941, Amendment No. 2. (Emergency Regulations Act, 1939.) No. 1944/165.

Waikato Coal-mines Control Emergency Regulations, 1942, Amendment No. 1. (Emergency Regulations Act, 1939.) No. 1944/166.

Education Boards (Travelling-expenses) Regulations, 1944. (Education Act, 1914.) No. 1944/167.

Warrant of Fitness Emergency Order, 1944 (No. 2). (Transport Emergency Regulations, 1940.) No. 1944/168.

Wool Board Election Regulations, 1944. (Wool Industry Act, 1944.) No. 1944/169.

Oil Fuel Emergency Regulations, 1939 Amendment No. 9. (Emergency Regulations Act, 1939.) No. 1944/170.

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

The Late Sir Walter Stringer.—When a Judge or ex-Judge dies and Bench and Bar pay tribute to his memory, one is sometimes inclined to feel some doubt as to whether the deceased Judge was really held by his former colleagues and the members of the profession as a whole in that high degree of affection which the tributes paid would indicate. No such doubt, however, could possibly arise in the case of the late Sir Walter Stringer. His friendly, equable, and unassuming manner and his conspicuous fairness, both as a Crown Prosecutor and later as a Judge, endeared him to all. He will long be remembered as being yet another Judge who has demonstrated by his example that patience and courtesy, and a knowledge of the world and human nature, are among the judicial qualities placed highest by both counsel and litigants.

Directing Jury to reconsider "Not Guilty" Verdict.—At the last sittings of the Supreme Court at Gisborne, Myers, C.J., adopted an unusual course. In a criminal case, on the jury returning, after a retirement of three-quarters of an hour, a straight-out "not guilty" verdict, the learned Chief Justice declined to accept the verdict "for the present" and directed the jury to reconsider it. The accused had been indicted upon two counts under the Wool Emergency Regulations, 1939—first, dealing in wool in contravention of the regulations; and, secondly, purchasing wool otherwise than in accordance with the terms of his license. The accused pleaded not guilty to both charges. The evidence called by the Crown consisted, in part, of evidence of certain statements made by the accused. The accused called no evidence. According to the report in the *Gisborne Herald*, Myers, C.J., concluded his summing-up by saying that he thought the jury would have little difficulty with the facts of the case, and on the law involved he was able to direct them to find a positive verdict. The newspaper's report then continues as follows:—

> After a retirement of forty-five minutes the jury returned with a verdict of not guilty on both counts. The Chief Justice indicated that he did not propose to accept that verdict for the present, since the jury could not have understood his direction on the law of the case. He had given the jury a clear indication of the law as it affected the case, said His Honour, and if they had understood that direction they could not possibly have come to the verdict they now announced. He would ask them to retire and reconsider their verdict in accordance with his direction.
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> After a further retirement of nearly an hour, the jury returned with a verdict of not guilty on the first count, but guilty on the second count—that of purchasing wool other than in accordance with the terms of a license. His Honour expressed satisfaction with the verdict, pointing out that they had avoided a miscarriage of justice, since the law and the facts both pointed directly to the verdict.
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> His Honour, addressing the accused, said that in view of the fact that no question had been raised as to the honesty of his dealings, and also in view of the confused state of the regulations, he did not regard the offence as a serious one. He would impose a fine of only 40s., and on counsel's personal undertaking that that would be paid he would refrain from fixing any penalty for default. To members of the jury, still standing by, His Honour remarked: "You have not done the accused serious harm by your verdict, gentlemen!"

Doubts as to Wisdom of the Course.—Scriblex, on holiday away from lawyers and law books, would have been inclined to assert that a Judge is not entitled to refuse to accept a straight-out "not guilty" verdict; but, thanks to the efforts of the only practitioner within twenty miles, he has been able to refer to a somewhat elderly edition of a leading English textbook on criminal law. From this work it would seem that there appears to be English authority for the course adopted by Myers, C.J., at Gisborne; for apparently, *unless a jury insists on having its verdict recorded*, a Judge is not *bound* to receive the first verdict which the jury gives but *may* direct the jury to reconsider it—and this, it seems, even though the first verdict may amount to one of not guilty. But, even so, Scriblex would venture to doubt whether, in the case of a straight-out "not guilty" verdict, the course is really a wise one. Certainly any attempt by the Judges to adopt it in cases—*e.g.*, abortion and bookmaking charges—where juries are known to have a predilection for perverse "not guilty" verdicts would be inadvisable. For juries would soon come to learn of their right to insist on having their verdicts recorded, and it would not be long before scenes like this would take place in our Courts:

> Mr. Justice X: "Gentlemen, your verdict of not guilty shows that you cannot have understood my direction. I must ask you to retire again and reconsider your verdict."
>
> Foreman of Jury: "Your Honour, the jury has fully considered the whole case and *insists* that its verdict of not guilty be recorded."

Far better, in Scriblex's view, for the Judge to accept the "not guilty" verdict, and then, if he so chooses, to tell the jurors that their verdict shows that they have disregarded their oaths. Possibly that is the view that has hitherto been taken by our New Zealand Judges. Certainly, Scriblex has never heard of any other case where a New Zealand Judge has directed a jury to reconsider a straight-out "not guilty" verdict.

Changes in England's Judiciary.—Lord Justice Luxmoore has died and his place in the Court of Appeal has been filled by the promotion of Morton, J., from the Chancery Division. Morton, J.'s place has been filled by the appointment of Hon. Charles Romer, K.C. Romer, J., is the third member of his family to hold judicial office. His father was Lord Romer who died recently, shortly after his retirement from office as a Lord of Appeal in Ordinary; and his grandfather was Sir Robert Romer who was a Lord Justice of Appeal from 1899 to 1906. There is another precedent for three successive generations of Judges—the Coleridge family (Coleridge, J., 1835 to 1858; Baron Coleridge, C.J., of the Common Pleas, 1873 to 1880, and Lord Chief Justice, 1880 to 1894; and Coleridge, J., 1907 to 1923). And then there is the different, but perhaps even more striking case of the Pollock, Martin, Macnaghten family. The present Macnaghten, J., is a son of Lord Macnaghten, a grandson of Baron Martin of the Exchequer, and a great-grandson of Pollock, C.B.

A Judicial Defect.—Lord Justice James once said of his colleague, Mellish, L.J., that he had only one defect as a Judge: "He was too anxious to convince counsel that they were wrong, when he thought their contention unsound, seeming to forget that counsel are paid not to be convinced."

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. 28.—L. Co., Ltd. to K.

Urban Land—Vacant Residential Section—Site Value—Availability for Purchase at Material Date.

Appeal by vendor of vacant residential section.

The Court said: "The decision of the value on any given date of an area of the character of that involved in this appeal must necessarily depend to a considerable extent upon the degree to which the site was on such date attractive to buyers by reason of particular attributes possessed by it. No doubt detriments of all kinds must also be taken into account, but if a site enjoys, and particularly if it enjoys to a marked degree, any particular advantage such as an excellent view, any minor disadvantages such as small difficulties in drainage are, generally speaking, overlooked or passed over by buyers as negligible.

"Any too refined an assessment of value in respect of such a site as that now in question is not, in consequence, likely to be just. With this consideration in mind, the Court cannot lightly pass over the confident testimony of such experienced valuers as Messrs. B. and McC. Both are agreed that this land would easily and readily have sold on December 15, 1942, at £350 if its availability had then been sufficiently made known

"The reasons given by Mr. S. for the lack, over several years, of knowledge by the public that the land was available are reasonable and convincing. No inference as to lack of value can therefore be drawn from the fact that the land was not sold at an earlier date.

"That the river view from the land will be extensive and that the general outlook will be wide if a house is properly sited is beyond question. This serves to distinguish this site from most of the sites sold to which reference was made by way of comparison. The two best indiciae of value appear to be the price paid recently for the section sold by Mr. G. and the price paid some years ago by Mr. T. for the land adjoining the land now in question. Both these sales support the contention that £350 and not £300 was the real value of the appellant's land as at December 15, 1942. Any other view is suggestive of a too conservative and too nicely calculated an assessment, having regard to the nature and advantages of this site and the character of the market for sites of that type. On such topics Messrs. B. and McC. speak with wide and intimate knowledge and the Court, having regard to all the circumstances, accepts their assessment as correct.

The appeal is therefore allowed, and consent to the sale at £350 is given."

No. 29.—M. and D. to McL.

Rural Land—Sale of Land and Stock—Neglected Farm—Productive Value—Value of Pasture.

Appeal by trustees of the estate of a deceased person, concerning a farm property of 241 acres at Wainui. The last owner died on March 29, 1939, and the farm had since remained an unrealized asset in his estate. The whole property was in a very neglected and deteriorated condition. From its history, as given by such of the witnesses before the Court as dealt with that topic, it was reasonable to conclude that the process of deterioration had been current from a point of time some years before the death of the late owner, and that it had been proceeding at an increasing rate ever since.

The Committee fixed the basic value of the property at £2,450, which is approximately £10 per acre. The sale price for the land alone purported to be £3,254, a sum of £1,196 being represented as the sale price of stock and chattels. On this basis the price of the land worked out at approximately £13 10s. per acre. The conflict of opinion between the witnesses for the respective parties as to the productive value of the farm was sharp and the differences between them wide.

The Court said: "Called by the appellants, Mr. L., who is managing a farm in the district but who does some incidental valuing, attributed to it a value of £4,244, which represents £17 12s. per acre; Mr. C., a professional valuer in practice at Auckland, valued it at £4,444, which equals £18 8s. per acre or thereabouts; whilst Messrs. D. and M., two old residents of the district and both of them reputable and experienced farmers with an intimate knowledge of the locality and of this farm in particular, valued it at £14 and £14 10s. per acre respectively. Neither of the two latter witnesses' valuations purported to be based upon the productive value of the farm. Valuation upon the latter basis is essential and inescapable when a value has to be determined on the exclusive basis prescribed by the statute. Whilst for this reason the valuations of Messrs. D. and M. cannot be accepted in their result, there are, nevertheless, particular features in their evidence which are of considerable value.

"The estimates of value given by Messrs. L. and C. seem to have little relation to reality. This is forcibly suggested by a number of circumstances. For instance, Mr. L.'s valuation of the land alone is but £206 less than the sum for which the trustees have sold the land, the stock, and the chattels, and this despite the fact that Mr. L. himself values the stock and chattels at £1,204.

"The Court proposes, therefore, to treat the case for the appellants as dependent solely upon the evidence of the other witnesses called in support of the appeal. These latter witnesses are opposed by Mr. O. who was called for the Crown. He assessed the productive value of the property at £1,355 and its non-budgetary value at £2,070. The stock and chattels sold he valued at £876.

"A proper approach to the task of ascertaining the true productive value of this property demands an appreciation of the fact that the production from this farm is wholly dependent upon the pasture upon it. The quality and quantity of that pasture is therefore a question of first moment. Generally speaking, the pasture was at one time good. Some years ago it maintained stock in considerable quantities and in good condition. This feature is of some moment because the Court feels with some degree of certainty that several of the farmer witnesses, in their estimate of the present productive capacity, have been influenced, no doubt unconsciously, by their knowledge of what the property has done in the past.

"Mr. O. has a very poor opinion of the pasture. His conception is that it should all be replaced. For present purposes, however, he has budgeted upon the basis that the present carrying-capacity is 50 dairy cows with replacement stock. He estimates that the yield per cow will be 200 lb. of butterfat. This view of the property is in sharp conflict with that held by Messrs. D. and M. The former testified that an area of 145 acres, properly subdivided, would now carry 65 cows, the usual quantity of replacement stock, and 100 sheep. Mr. M. has a still higher opinion of the present carrying-capacity. He thinks it would easily run 70 cows and replacement stock in its present state.

"A test as to which of these conflicting opinions is correct can be had by reference to the testimony of Mr. D., one of the trustees in the estate. Mr. D. gave evidence that the property has in fact carried 70 cows this winter and for some seasons past has carried an average of 65 cows throughout the year. At the present time there are, he says, over 70 cows on the place. None of this stock has been grazed off the property at any time, and little provision has at any time been made for periods of feed shortage by growing crops or otherwise. The substantial truth of this testimony is confirmed by the fact that Mr. M., when he made his inspection of the property in June last, counted the stock upon the place and found that there were 69 cows and a lot of heifers running there. The stock was dependent entirely upon the pasture, for no hay had then been fed to them, yet the stock was in good condition, the yearlings in particular being well grown.

"This demonstrated carrying-capacity of the property is a fact that cannot be disregarded. It suggests that Mr. O. has formed a too unfavourable opinion of the pasture and that the true capacity of the property more nearly approaches the estimates of Messrs. D. and M. These two witnesses, however,

may well have been somewhat influenced in favour of the property by a knowledge of its past capacity and by the fact that, being neighbouring farmers, they can improve it more conveniently and more economically and with less risk of loss by reason of their readily accessible pasture resources than an average efficient farmer who had only this place upon which to rely.

"The Court feels, therefore, that their estimate of the carrying-capacity should be somewhat discounted. It finds as a fact that the property will carry 65 cows and replacement stock, as well as 100 sheep. This herd of cows can, it is thought, be reasonably expected to produce 200 lb. of butterfat per cow.

"In making its assessment the Court has in mind the production likely to result from the operations of an average efficient farmer. As it is, the place has been very badly managed. In fact, sufficiently badly managed to earn the condign condemnation of Mr. M. It is but fair to say, however, that the conditions under which the present management is operating are extremely bad.

"There is no doubt but that a new cow-shed will have to be built on a new site and that water will have to be provided. The residence too will have to be extensively renovated. A reasonable sum in respect of these necessary items of expenditure must be allowed against the productive value.

"A careful budgeting of all items of income and expenditure discloses that an average efficient farmer should realize a total net surplus of income of £146. This capitalized at 4½ per cent. gives a value of £3,244. From this latter sum must be deducted a sum of £500 representing the cost of a new cow-shed and the cost of renovating the fencing and the house. The basic value is therefore, declared to be £2,744.

"The value of the stock, however, remains to be determined, that being an integral part of the transaction. As to this, the difference between the witnesses is considerable and as that issue was not debated nor made the subject of evidence in the Appeal proceedings, the Court, whilst finding the basic value to be as above stated, refers the case back to the Committee to determine the value of the stock and to give consent to the sale at the aggregate of the value so found by it and the basic price fixed by the Court.

"At the hearing of the appeal the Crown representative intimated that the Crown did not intend to acquire this land for settlement by discharged servicemen."

No. 30.—G. to W.

Rural Land — Dairy-farm — Productive Capacity — Deterioration due to Deferred Maintenance—Suitability for Two Discharged Servicemen.

Appeal by the vendor against a decision of the South Auckland Land Sales Committee fixing the basic price of a farm property situated at Waiterimu, near Ohinewai, at £7,900. The property was sold by the appellant for approximately £9,210.

It consisted of 255 acres 2 roods 25 perches, and was situated in a locality where it enjoyed such amenities as good access, power, light, and telephone services. It lay in close proximity to a public school. The property was admittedly, as to most of it, in good pasture. The farm was broken in by the present vendor who had brought it to its present state of productivity. During recent years, however, owing to advancing age and labour difficulties, he had reduced his dairy herd from time to time and had turned to sheep and cattle grazing as a substitute for the reduction in his dairying activities.

The Court said: "In fixing the basic value at £7,900 the Committee adhered fairly closely to the assessment of the carrying-capacity of the property and its productivity to which Mr. M. of the Lands Department testified. On the hearing of the appeal it was apparent that the wide difference between the productive value as fixed by Mr. M. and the sale price was due chiefly to a difference of opinion between Mr. M., on the one hand, and the appellant vendor and the purchasers, on the other, as to the probable production of butterfat per cow.

"Some account of what the property has in fact carried is, however, not irrelevant. In 1939 the appellant carried wholly upon the property a herd of 109 milking cows and the necessary replacement stock. Throughout that year he also carried 100 sheep. In subsequent years the herd was reduced from time to time, but an equivalent number of other stock was substituted, so that the carrying-capacity of the property was proved to have remained constant since 1939.

"Mr. M. assessed the carrying-capacity of the property at 100 cows and replacement stock and 200 ewes, so that on the carrying-capacity there is no material difference of opinion. In considering the question of production per cow it is not immaterial to note that the appellant has never been short of feed although he has never provided hay or ensilage for winter feed in normal quantities. An average efficient farmer would therefore have no difficulty in doing his stock well.

"Mr. M.'s opinion as to the weight of butterfat that can be obtained from the cows may not have taken account, or sufficient account, of this fact. The average production of butterfat per cow over the last five seasons was proved to have been 250 lb. per cow, and this has been achieved despite a shortage of fertilizer and despite what is a very important factor on a farm of this character—lack of labour to clean out drains. Then, too, the management during recent years has been progressively failing in vigour and initiative.

"Mr. M.'s assessment of 220 lb. of butterfat per cow per season cannot, in these circumstances, be held to be correct. What he claims conflicts with the actual demonstrated returns.

"A just view of the evidence following an inspection of the property satisfies the Court that the productive capacity per cow will certainly be not less than 240 lb. of fat per season. Production at this rate, Mr. M. agreed, would justify the basic value of the property being fixed at the price at which it has been sold. Normally, therefore, a basic value of £9,210 would have to be held as established. Some draining and fencing is, however, necessary to cover deterioration due to deferred maintenance. For this £200 must be deducted, leaving the basic value £9,010. In reaching this conclusion the Court has offset the extra quality of the residence against the state of disrepair of the cowshed and of the cottage.

"Inspection made of the property and a consideration of the evidence generally has satisfied the Court that this property is capable of subdivision into two economic farms suitable for the settlement of returned servicemen. The only additional building required upon subdivision would be one cowshed. The appeal is therefore allowed. The basic value of the property is fixed at £9,010. The case is, however, remitted to the Committee to consider whether or not in its opinion the property is suitable for the settlement of discharged servicemen and to take such action as its conclusion on that issue requires."

No. 31.—S. and Others to L.

Leasehold—Industrial Buildings—Lessees' Interest—"Value for Essential Industry"—Proper Allocation of Such Value.

Appeal by the owners of buildings used in a manufacturing concern. They were lessees of the land on which the buildings were erected.

The Court said: "In this case the valuers called for the appellant testified to a value much in excess of that to which the Government valuer deposed.

"Mr. J., for the appellants, after allowing for an error in computation, assessed the value of the lessee's interest in the property at £1,376 made up, as stated by him, as follows: Lessee's interest in land, £376; buildings, £700; desirability of position, £300, (£1,376).

"Mr. H., who was also called by the appellants, after allowing for a correction, fixed the same interest as worth £1,247 5s. made up as follows: Lessee's interest in land, £336; added value for essential industry, £200; building, £670; fencing, £41 5s., (£1,247 5s.).

"Mr. J. estimated the life of the building at from fifty years from date. Mr. H. says not more than half their life has gone. In point of fact the buildings are in a state of abandonment and appear derelict. They do not appear to have ever been very substantial. There is, however, no need to consider with care any item constituting the aggregate value to which these witnesses respectively testify for there is a cardinal error common to their valuations which goes far to dispose of the appeal.

"The factor which Mr. J. calls the value of 'the desirability of position' and what Mr. H. calls 'the added value for essential industry' is not a factor of value pertaining to the lessee alone, as they have assumed. It is a constituent of the value of the freehold of the land. As such, both lessor and lessee are participants in it, and it is divisible between them in the same proportions as the totality of the other elements which constitute the whole value of the land.

"If this distribution is effected Mr. J.'s value of the lessee's interest shrinks to £1,168 or thereabouts, and Mr. H.'s to £1,113 5s. The Committee consented to the sale at £1,000. This leaves only £168 difference between the basic value as fixed by the Committee and the highest value attributed by any witness called for the appellants. This difference is more than accounted for by what the Court cannot but think is an over-estimation by the appellants' witnesses of the value of the buildings.

"The Court can, in the circumstances, do no other than dismiss the appeal and it is dismissed accordingly."

PRACTICAL POINTS.

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1. Land Transfer.—*Executors and Administrators—Transmission to Administrator of an Executor—Executor sole Beneficiary in first Estate.*

QUESTION: A. died in 1943 owning a parcel of land under the Land Transfer Act, subject only to Part XIII of the Land Act, 1924. He left all his property to W., his widow, whom he appointed executrix. W. took out probate and duly discharged all A.'s debts, and paid his funeral expenses (there being no death duty payable). W. died intestate in 1944, before she had procured herself to be registered as proprietress by transmission. W. left three children, one of whom B. has been granted letters of administration *re* W.'s estate. Can B. become registered as the proprietor of A.'s land, or must letters of administration *de bonis non* be taken out in A.'s estate, which latter procedure would be expensive? If so, what would be the fee on the transmission?

ANSWER: Letters of administration *de bonis non* will not be necessary, as at W.'s death the equitable estate was vested in her, also the right to be registered as owner of the legal estate: there has been a union of estates: *Selby* v. *Alston*, (1797) 3 Ves. 339, 30 E.R. 1042; *In re Hodge, Hodge* v. *Griffiths*, [1940] 1 Ch. 260. The relevant facts should be recited in the transmission, on which only one fee of 10s. is payable, as there will be only one act of registration: see also article in 1944 NEW ZEALAND LAW JOURNAL 79.

2. Crown Lease.—*Dissolved Company Registered as Proprietor of Crown Lease—Present Owner—Whether* Bona Vacantia—*Companies Act, 1933, s. 283.*

QUESTION: A Crown leasehold registered under the Land Transfer Act is in the name of a company, which became dissolved in 1932; the lease is subject to a registered mortgage and the mortgagee now desires to confer title on a purchaser from him. In whom has the Crown leasehold vested? It will be observed that the company was dissolved before the coming into operation of the Companies Act, 1933, s. 283 of which declares that property of a dissolved company shall vest in the Crown as *bona vacantia*.

ANSWER: Although s. 283 of the Companies Act, 1933, is not retrospective, and, although the decision of *In re Langford*, (1932) 27 M.C.R. 69 (dealing with a freehold estate) is very doubtful, the Crown leasehold has vested in the Crown, subject to the mortgage: *Re Wells, Swinburne-Hanham* v. *Howard*, [1933] Ch. 29, 48 T.L.R. 617.

Any notices should be served on the Attorney-General as representing the Crown.

3. Death Duties.—*Gift of Life Insurance Policy within Three Years of Donor's Death—Premiums paid with Money lent by Donor—Liability to Death Duty.*

QUESTION: Within three years of his death A. transferred to trustees in trust for his three children a life insurance policy. In the trust instrument there was a provision that the trustees could borrow money for the purpose of paying subsequent premiums. After the assignment *all* the premiums were paid with money borrowed by the trustees from A. in pursuance of this provision. At date of gift the surrender value of the policy was £450. Upon A.'s death the sum of £1,500-odd became payable under the policy. To what extent, if any, are the insurance moneys liable to death duty in A.'s estate? The interests of the children were indefeasibly vested as from date of gift.

ANSWER: The fact that A. lent the money to pay the subsequent premiums does not cause s. 5 (1) (*f*) to operate, (because thereby A. did not diminish his estate) so as to make the full sum of £1,500 dutiable: *Inland Revenue Commissioners* v. *Hamilton*, [1942] S.C. (Ct. of Sess.) 426.

Under s. 5 (1) (*b*) the liability to death duty is confined to the sum of £450: see speech of Lord MacMillan in *Lord Advocate* v. *Inzievar Estates*, [1938] A.C. 402, [1938] 2 All E.R. 424, A.C. 402; and also s. 6 (2) of the Act.

Of course the amount, owing by the trustees to A. for payment of the premiums, comes into A.'s estate for death-duty purposes under s. 5 (1) (*a*).

4. Practice.—*Affidavit—More than one Deponent—"Severally."*

QUESTION: May an affidavit be collectively sworn by several deponents?

ANSWER: No; even if there should be separate jurats. The affidavit should commence by stating that the deponents "'severally' make oath and say . . . ": *In re the Estate of Bowes*, [1942] N.Z.L.R. 292; G.L.R. 229.

5. Mortgage.—*Discharge—Mortgagee's whereabouts unknown—Procedure to obtain Valid Discharge of Mortgage—Statutes Amendment Act, 1936, s. 43.*

QUESTION: My client gave a memorandum of mortgage, and later repaid the amount owing, obtaining a receipt for same; but no discharge of the mortage was registered, the parties overlooking the question of registering a discharge. These transactions took place over twenty years ago; and in the meantime the receipt for the moneys repaid has been lost, and the mortgagee cannot be traced. It is now desired to sell the property, but it will be necessary first to obtain a discharge of the memorandum of mortgage. What procedure is available in respect of such an application?

ANSWER: Application can be made to the Supreme Court under s. 43 of the Statutes Amendment Act, 1936, for an order directing the mortgage to be discharged. The application is by way of motion with supporting affidavits. In an application, recently before the Supreme Court at Wellington, in similar circumstances, the Court made an order under s. 43 of the Statutes Amendment Act, 1936.

6. Divorce.—*Access to Children—Application by Respondent—Custody given Petitioner by Decree Absolute—Procedure.*

QUESTION: The petitioner in a divorce suit was given the custody of a child of the marriage, the custody being given by the decree absolute granted six months ago. The respondent now desires to make application to the Court to fix terms of access to the child. Leave to apply was not reserved in the decree absolute. Can the application for access by the respondent be made as an application for ancillary relief under R. 41 of the Divorce Rules?

ANSWER: Under s. 38 (1) of the Divorce and Matrimonial Causes Act, 1928, the Court may from time to time, either before or *after* the final decree, make provision in respect of custody.

Rule 41 of the Matrimonial Causes Rules provides that every application for ancillary relief—that is to say, every application for alimony pending suit, and for *any relief* authorized by sections, including s. 38—must be to the Court by notice in Form 10 in the Schedule.

In view of the terms of s. 38 (1) and R. 41, the application for access can properly be made by way of an application for ancillary relief.

7. Justices of the Peace.—Autrefois acquit—*Conviction without Jurisdiction—When Bar to Later Proceedings.*

QUESTION: If Justices convict without jurisdiction, does such conviction operate as a bar to subsequent proceedings?

ANSWER: No; because the person was not placed in jeopardy: *Bannister* v. *Clark*, [1920] 3 K.B. 598 (where a person was committed for trial in respect of summary offences only, and it was held that the jurisdiction of the Justices had not been exhausted, and they could hear the charge at a subsequent date); and *R.* v. *Marsham*, [1912] 2 K.B. 362 (where a defendant had been convicted on unsworn testimony, and the Magistrate, on discovering the error, had the evidence given on oath, and it was held that the second hearing was good): see also *R.* v. *Rix*, [1931] N.Z.L.R. 984, G.L.R. 582.