New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."

VOL. XXI. TUESDAY, JUNE 19, 1945 No. 11

PRACTICE: DECISIONS OF THE COURT OF APPEAL BINDING ON THAT COURT.

LIKE our own Court of Appeal, the English Court of Appeal sits in Divisions; and at rare intervals, when it is constituted of all its members instead of the normal divisional maximum, reference is usually made to it as "The Full Court of Appeal." Though every lawyer knows what is intended, the expression is not a happy one, and is apt to lead the unwary into thinking that the decisions of the Full Court have greater authority than those of a Division of the Court of Appeal (containing in England three members, and here five or less). This thought gives rise to the implication that the Full Court is not bound by the decisions of a less number comprising one of its divisions; with the corollary that the Full Court may overrule decisions of one such Division, while each Division is bound by the decision of a Division but not by that of the Full Court of Appeal.

The question arose in *Newsholme Bros.* v. *Road Transport and General Insurance Co.*, [1929] 2 K.B. 356, 375, where Scrutton, L.J., said:

> The decision of the Court of Appeal on fact is not binding on any other Court, except as between the same parties. When the decision is that from certain facts certain legal consequences follow, the decision is, I think, binding on the Court of Appeal in any case raising substantially similar facts.

But Greer, L.J., in the same case, at p. 384, said:

> I should like to point out this fact, that [this Court] has, at least on two occasions, sitting as a Full Court, differed from a previous decision by the same Court; and it seems to me that, if that is right, it is equally right to say that, sitting with a quorum of three Judges, it has exactly the same power as if it were sitting with six Judges, though it would only be in most exceptional cases that those powers would be exercised.

In *Shoesmith* v. *Lancashire Mental Hospital Board*, [1938] 3 All E.R. 186, 189, Greer, L.J., said:

> I wish to repeat what I said in the course of the argument, that the Court has more than once, sitting as a Court with all its six members, decided that it can overrule a decision of the Court of Appeal which has held the field for a number of years. If the Court of Appeal, sitting with its six members, can do so, equally a Court sitting with a quorum of members can do the same thing.

The substantial question in *Newsholme Bros.* v. *Road Transport and General Insurance Co.* (*supra*) was not whether the Court of Appeal had jurisdiction to overrule a previous decision, but how it should exercise its choice between apparently irreconcilable decisions given by it previously. The two decisions mentioned by Greer, L. J., in the passage first quoted, were *Kelly and Co.* v. *Kellond*, (1888) 20 Q.B.D. 569, and *Wynne-Finch* v. *Chaytor*, [1903] 2 Ch. 475. In the former case, Lord Esher, M.R., at p. 572, said:

> This Court is one composed of six members, and, if at any time a decision of a lesser number is called in question, and a difficulty arises about the accuracy of it, I think this Court is entitled, sitting as a full Court, to decide whether we will follow or not the decision arrived at by the smaller number.

This *dictum* of Lord Esher, M.R., was not assented to by Fry, L.J., who, at p. 574, said:

> As to the power of this Court when sitting as a full Court to overrule the decision of a Court consisting of a smaller number, I do not think it is necessary to give an opinion. I think that if it should ever become a matter for consideration I should desire to consider it carefully.

It is not very clear what view was taken by Lopes, L.J., the other member of the Court. He said, at p. 575:

> I do not desire to express an opinion as to what is the power of a full Court of Appeal in respect of a decision of three of their number, but I understand that the Full Court was called together in *In re Barber, Ex parte Stanford* ((1886) 17 Q.B.D. 259) to consider the question arising in that case, and to revise and reconsider any decision touching the point in that case which had been previously laid down.

But, later in his judgment, at p. 575, said that, if the earlier decision decided what was contended for, it was overruled by the later decision, a view which seems consistent with what he said in the passage quoted.

The question in *Kelly and Co.* v. *Kellond* (*supra*) was not whether a particular decision should be overruled, but which of two inconsistent decisions should be followed; and it appears to have been open to the Court to choose between them. The two decisions in question were *Roberts* v. *Roberts*, (1884) 13 Q.B.D. 794, and *In re Barber, Ex parte Stanford*, (1886) 17 Q.B.D. 259, the latter being a decision of the Full Court of Appeal; and the Court followed *Ex parte Stanford*. In *Wynne-Finch* v. *Chaytor* (*supra*), where the decision was on a point of practice, the question was directed to be argued before the Full Court of Appeal. Stirling,

L.J., who delivered the judgment of the Court, at p. 485, said :

> Certainly it can not be said that there is any statutory right of appeal from a decision of the Court of Appeal to the Full Court, although on occasions, where there has been a conflict caused by the existence of inconsistent earlier decisions, the Court has ordered the case to be argued before a Full Court.

In *Mills* v. *Jennings*, (1880) 13 Ch.D. 639, the Court of Appeal had declined to follow a decision of the old Court of Appeal in Chancery; and such was the justification given for the Court of Appeal's view. Cotton, L.J., in delivering the judgment of the Court, at p. 648, said :

> We think that we are at liberty to reconsider and review the decision in that case as if it were being re-heard in the old Court of Appeal in Chancery, as was not uncommon.

In *Australian Agricultural Co.* v. *Federated Engine-drivers' and Firemen's Association of Australiasia*, (1913) 17 C.L.R. 261, the majority of the High Court of Australia overruled an earlier decision of its own on the ground that it had been given *per incuriam*. Isaacs, J., said that it was beyond question that it was the High Court's duty to accept any rule laid down by the Privy Council, and that august tribunal had never countenanced the doctrine that its decisions are not reviewable. He added :

> The oath of a Justice of this Court is " to do right to all manner of people *according to the law*," . . . If, then, we find the law to be plainly in conflict with what we or any of our predecessors erroneously thought it to be, we have, as I conceive, no right to choose between giving effect to the law, and maintaining an incorrect judgment. It is not, in my opinion, better that the Court should be persistently wrong than that it should be ultimately right.

Higgins, J., in concurring with those views, said that the Court was not only entitled, but in duty bound, to overrule a previous decision of its own that was erroneous.

In New Zealand, the question has arisen on several occasions. In *Hutchison* v. *Ripeka te Peehi*, [1919] N.Z.L.R. 373, the Court consisted of four Judges of one Division. In concluding the Court's judgment, delivered by Hosking, J., reference was made, at p. 384, to a previous decision of the Court of Appeal consisting of four Judges, given when all the Judges of the Supreme Court sat together as the Court of Appeal :

> We also think it as well clearly to say that, in so far as the decision of this Court in *Commissioner of Taxes* v. *Kauri Timber Co.*, (17 N.Z.L.R. 696, 700) is inconsistent with the principles established by the English authorities, it must be regarded as having been given *per incuriam*.

In *R.* v. *Jackson*, [1919] N.Z.L.R. 607, before both Divisions of the Court of Appeal sitting together, the Solicitor-General, Sir John Salmond, K.C., said he was prepared to re-argue *R.* v. *Lander*, [1919] N.Z.L.R. 305, which had been heard by a Division at the previous sittings; but the Court intimated, at p. 609, that it had no power to review that decision. The learned Solicitor-General did not pursue his argument further on that topic; and in the judgment of six members of the Court, delivered by Chapman, J., it appears that the question arising in *Jackson's* case was entirely different from that in *Lander's* case. In his judgment dissenting from the majority on the matters in issue, Sir Robert Stout, C.J., said the question in *Jackson's* case was not involved in *Lander's* case. It has since been held by the Court of Appeal that the observation of the Court, in answer to the learned Solicitor-General, was *obiter*, and cannot be regarded in any way as authority for the proposition that the Court of Appeal cannot review its own decisions.

In *R.* v. *Storey*, [1931] N.Z.L.R. 417, in which both Divisions of the Court of Appeal, comprising seven Judges, sat together, it did not become necessary to decide the question whether, if a previous decision of the Court of Appeal was found to be erroneous, the Court of Appeal had the power to decline to follow it. Sir Michael Myers, C.J., considered that the Court was bound by the judgment in *R.* v. *Dawe*, (1911) 30 N.Z.L.R. 673, a decision by six Judges sitting as the Court of Appeal before the institution of Divisions, because, in any event, he agreed with it. Herdman, J., was of the opinion that the Court was so bound. After saying that the decisions of our Court of Appeal are appealable to the Privy Council, and are therefore not final, Reed, J., at p. 457, said it would appear in those circumstances that the weight of authority is in favour of the proposition that the Court of Appeal is not necessarily bound by its own decisions. He added that the right to decline to follow a previous decision, in view of the grave consequences following on uncertainty in the law, should be exercised only in exceptional circumstances, and with the greatest hesitation; and it should never be exercised except by a Court constituted of both Divisions sitting together. After reviewing all the authorities, English and Australian, at that time, Kennedy, J., at p. 474, said :

> I think that the weight of authority is in favour of the view that the English Court of Appeal is bound by its own decisions, and that the Court of Appeal in New Zealand should hold itself likewise bound by its own decisions, unless, of course, it appears from the decision of a superior Court that its earlier decision should not be followed. Whether or not there is an exception to this rule where the Court, which ordinarily sits in Divisions, sits as a Full Court of Appeal, it is immaterial to determine for the purposes of this case, because when *R.* v. *Dawe* was decided the Court did not sit in Divisions. But, even if the rule be that, the Court may in exceptional cases, perhaps more readily where there are penal consequences, decline to follow its own decisions, but even then exercising extreme caution. This is not, in my opinion, such a case.

So the law stood in 1933 when the Full Court of Appeal in New Zealand, composed of both Divisions sitting together, heard *In re Rhodes, Barton* v. *Moorhouse*, [1933] N.Z.L.R. 1348; and the matter arose for determination whether the Full Court of Appeal so constituted may decline to follow a previous decision, in this instance that of a single Division, of the Court of Appeal.

A Division consisting of four members, had decided a revenue appeal, *Rhodes-Moorhouse* v. *Commissioner of Stamp Duties*, [1931] N.Z.L.R. 865. Two years later, when an originating summons was removed into the Court of Appeal and came before the other Division of the Court, it appeared that the argument involved a review of the previous decision in the revenue case. So the Court was reconstituted to consist of the two Divisions; and it comprised seven members, three of whom were parties to the decision in the revenue appeal. All counsel agreed that the previous decision was *per incuriam*. After hearing argument on the merits, all the members of the Full Court came to a conclusion contrary to that which had been reached in the revenue appeal. It therefore became necessary to consider whether the Full Court, if of opinion that that judgment of the single Division had been given *per incuriam*, was legally entitled to disregard it.

In his judgment, Sir Michael Myers, C.J., first considered the judgments in *Kelly and Co.* v. *Kellond* (*supra*), *Ex parte Stanford* (*supra*), *Wynne-Finch* v. *Chaytor* (*supra*), and *Newsholme Bros.* v. *Road Transport and General Insurance Co., Ltd.* (*supra*), the Australian case already mentioned, and the previous New Zealand cases to which we have referred. At p. 1377, he concluded as follows:—

> I have already pointed out that in this case we are all, as I understand, agreed that the ground which formed the basis of the decision in the recent revenue appeal is erroneous, and that the present Court includes three of the four Judges who were parties to the previous decision. It would be deplorable if, in such circumstances, this Court were bound to follow a previous decision which all its members are agreed was erroneous, and thus compel a litigant to suffer the expense and delay of carrying his case by way of appeal to the Privy Council. I agree, of course, that before this Court refuses to follow its own previous decision it must be clearly shown that that previous decision is erroneous and not consistent with the current of authority by which this Court should consider itself bound. I agree also with the opinion expressed by *Reed*, J., in *The King* v. *Storey* ([1931] N.Z.L.R. 417, 457,) that, so long as our present system of Divisions of this Court remains, the course of declining to follow a previous decision should not be adopted except by the two Divisions of the Court sitting together. In the present case, for the reasons that I have expressed, in my opinion the proper course for this Court to take is to say that the ground of the decision in the revenue appeal is erroneous and contrary to English authority and should not be followed.

Reed, J., at p. 1388, said:

> There is no common-law or statutory rule to oblige a Court to bow to its own decisions, it does so on the ground of judicial comity: *The Vera Cruz* (*No. 2*), (1884) 9 P.D. 98, per Brett, M.R. Although there are conflicting decisions in England as to whether or not a particular Court in a particular case is bound by a decision of a co-ordinate Court or of the same Court, the above statement of the law has, so far as I can ascertain, never been controverted, so that the only question before us is as to whether on the ground of "judicial comity" we should consider ourselves bound by a decision of a Division of this Court of Appeal, a decision that we feel was given *per incuriam*. To do so would appear to extend the principle of judicial comity to an absurd length. It is not as if the Privy Council, which alone can reverse a decision of this Court, was situated within the Dominion and could be appealed to at a minimum of expense.

On p. 1389, the same learned Judge so observed that it had been held in England that a numerically stronger Court of Appeal can overrule the decision of a Court of Appeal consisting of a lesser number; and he instanced *Kelly and Co.* v. *Kellond*, (1888) 20 Q.B.D. 569, 572, where Lord Esher, M.R., said that if at any time a decision of a lesser number were called in question, and a difficulty arose about the accuracy of it, he thought the Court of Appeal was entitled, sitting as a Full Court, to decide whether or not to follow the decision arrived at by the smaller number; and *Wynne-Finch* v. *Chaytor* (*supra*), where the Full Bench of the Court of Appeal expressly overruled a former decision of the Court of Appeal. He continued:

> I can find no case where the right of a Full Bench of the Court of Appeal to overrule the decision of a numerically smaller number of Judges has been called in question. There are several cases where the Court of Appeal has held itself to be bound by decisions of previous Courts of Appeal, but in no case where there has been a Full Bench constituted for the hearing of a case.

Finally, Reed, J., at pp. 1390, 1391, after citing from the judgment of Isaacs, J., and Higgins, J., in the *Australian Agricultural Co.'s* case (*supra*), said:

> It is unnecessary in the present case to go so far as saying that one Court of Appeal can reverse the decision of a former Court. We have the power to call both Divisions together and so constitute a Full Court. That such Full Court should exercise the power of reversing manifestly incorrect decisions of the Court of Appeal is, I think, beyond question. The power should be exercised sparingly and with extreme caution. In the present case we have seven Judges sitting, three of whom were members of the Court of Appeal of four that delivered the erroneous judgment, all of whom agree that the decision was given *per incuriam*. In these circumstances, I think it is our clear duty to decline to be bound by that decision.

Ostler, J., on p. 1398, after observing that the jurisdiction should be exercised with extreme caution, said:

> Where it plainly appears that *per incuriam* a decision has been given by the Court of Appeal which is erroneous in law, in my opinion that Court not only has the power but it has a duty to say so, and to refuse to treat its former decision as binding. Where a former decision falls to be reviewed by a Court consisting of both Divisions of the Court of Appeal (as in this case), that duty becomes both more clear and more easy of performance.

In his judgment, at p. 1410, Kennedy, J., after referring to his discussion in *Storey's* case (*cit. supra*) whether the Court of Appeal is bound by its own decisions, said:

> This case, in my view, comes within the exception that the Full Court, composed of both Divisions sitting together, may reconsider, and, if necessary, decline to follow, the decision of the Court composed of one Division only, and that the more readily where, as here, a majority of the members of the Court, who were parties to the other decision, are agreed that it was not in accordance with authority. The observations of Lord Esher, M.R., in *Kelly and Co.* v. *Kellond*, and the decision in *Wynne-Finch* v. *Chaytor* support this course.

The conclusion to be drawn from the foregoing expressions of opinion in our Court of Appeal in the several judgments to which reference has been made is that the Court of Appeal has jurisdiction to overrule a previous judgment of its own; and, moreover, it has the duty to do so, where (*a*) a previous judgment is inconsistent with the principles established by the English authorities; and (*b*) a previous decision was manifestly given *per incuriam*. The learned Judges have not entirely agreed on the method by which a previous incorrect decision may be put right, the majority view seeming to be that it may be done only by both Divisions of the Court of Appeal sitting together.

This question as to the jurisdiction of the Court of Appeal to refuse to follow decisions of its own was raised recently in *Young* v. *Bristol Aeroplane Co., Ltd.*, [1944] 2 All E.R. 293, before a Full Court of the English Court of Appeal, consisting of Lord Greene, M.R., Scott, MacKinnon and Luxmoore, L.JJ., Lord Goddard, and du Parcq, L.J., before whom it was ordered to be argued, as "it was one of great general importance," to use the words of the learned Master of the Rolls in his judgment, which was that of the whole Court. "It is surprising," His Lordship added, "that so fundamental a matter should at this date remain in doubt."

After giving some examples where the Court had expressed its regret at finding itself bound by previous decisions of its own, and referring to numerous other examples to be found in the Reports, Lord Greene said that, when, in such cases, the matter had been carried to the House of Lords, it had never been suggested there that such view was wrong, and that the Court of Appeal could itself have done justice by declining to follow a judgment of its own which it considered to be erroneous. On the contrary, the

House of Lords had, so far as their Lordships were aware, invariably assumed, and in many cases expressly stated, that the Court of Appeal was bound by its own previous decisions to act as it did. In these cases, the Court which held itself to be so bound consisted of three members only.

The learned Master of the Rolls first addressed himself to the suggestion that the Full Court of Appeal had greater power to refuse to follow previous decisions of the Court than had a Division of that Court. Their Lordships, he said, could find no warrant for this proposition. At p. 298, he continued :

> The Court of Appeal is a creature of statute and its powers are statutory. It is one Court though it usually sits in two or three Divisions ; each Division has co-ordinate jurisdiction, but the Full Court has no greater powers or jurisdiction than any Division of the Court. . . . What can be done by a Full Court can equally well be done by a Division of the Court. The corollary of this is, we think, clearly true—namely, that what cannot be done by a Division of the Court cannot be done by the Full Court.

In *Storey's* case, it will be remembered, Reed, J., favoured the view that the jurisdiction of the Court of Appeal to decline to follow a previous decision of that Court should not be exercised except by a Court consisting of both Divisions; and Kennedy, J., referred to an exception to his view (that the Court was bound by previous decisions of its own) in that the Full Court, consisting of both Divisions, acting together, may, if necessary, decline to follow the decision of the Court consisting of one Division only. Later, in the *Rhodes* case, the learned Chief Justice, without committing himself to any view that the power of the full Court of Appeal was superior to that of a single Division, agreed with the view expressed by Reed, J., in *Storey's* case that, so long as our present system of Divisions of the Court of Appeal remained, the course of declining to follow a previous decision should not be pursued except by the two Divisions sitting together.

Returning to *Young's* case : The learned Master of the Rolls next considered the question whether or not the Court of Appeal is bound by its previous decisions and those of Courts of co-ordinate jurisdiction. Here, he said, it is necessary to distinguish between four classes of case. These are as follows :—

(*a*) Cases where the Court of Appeal finds itself confronted with one or more decisions of its own or of a Court of co-ordinate jurisdiction which cover the question before it, and there is no conflicting decision of its own or of a Court of co-ordinate jurisdiction. In this class, the Court came to the conclusion that it was bound to follow such decisions.

(*b*) Cases where the Court is shown that two or more decisions of its own or of a Court of co-ordinate jurisdiction are in conflict. Here, their Lordships held that the Court is unquestionably entitled to choose between the conflicting decisions.

(*c*) Cases where the Court of Appeal comes to the conclusion that a previous decision, though not expressly overruled, cannot stand with a subsequent decision of the House of Lords. In this class of case, the Court, in not following its previous decision, is merely giving effect to what it considers to have been a decision of the House of Lords by which it is bound.

(*d*) The fourth class (a special case) is where the Court of Appeal comes to the conclusion that a previous decision of its own was given *per incuriam*.

The last class required special examination, the judgment said. Their Lordships said they knew of only two cases in which the Court of Appeal exercised the power of declining to follow a previous decision on the ground that it had been given *per incuriam*. These were *Mills* v. *Jennings*, (1880) 13 Ch.D. 639, which was referred to by Kennedy, J., in *Storey's* case, at p. 471 ; and a case decided since that judgment was given in New Zealand—namely, *Lancaster Motor Co. (London), Ltd.* v. *Bremith, Ltd.*, [1941] 2 All E.R. 11, in which a Court consisting of Sir Wilfred Greene, M.R., and Clauson and Goddard, L.JJ., declined to follow an earlier decision of a Court consisting of Slesser and Romer, L.JJ., and where it was clear that the earlier decision was given *per incuriam*. Referring to this case, in the course of the judgment in *Young's* case, Lord Greene, M.R., said :

> It depended upon the true meaning (which in the later decision was regarded as clear beyond argument) of a rule of the Supreme Court to which the Court was apparently not referred, and which it obviously had not in mind. . . . It cannot, in our opinion, be right to say that in such a case the Court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given *per incuriam*.

His Lordship went on to say that the members of the Court did not think it would be right to say that there may not be other cases of decisions given *per incuriam*, in which the Court of Appeal might properly consider itself entitled not to follow an earlier decision of its own. Such cases would obviously be of the rarest occurrence, and must be dealt with in accordance with their special facts. (The *Rhodes* case can be mentioned as being within this class, as so described.)

Two classes of decisions *per incuriam*, the judgment proceeded, fell outside the scope of their Lordships' inquiry, namely :—

(i) Those where the Court has acted in ignorance of a previous decision of its own or of a Court of co-ordinate jurisdiction which covers the case before it—in such a case a subsequent Court must decide which of the two decisions to follow. (*Hutchison* v. *Ripeka te Peehi*, (*supra*) would appear to be such a case.)

(ii) Those where it has acted in ignorance of a decision of the House of Lords which covers the point—in such a case a subsequent Court is bound by the decision of the House of Lords. (In New Zealand, this would also apply to a decision of the Judicial Committee of the Privy Council.)

On a careful examination of the whole matter, their Lordships " came to the clear conclusion " that the Court of Appeal is bound to follow previous decisions of its own as well as those of Courts of co-ordinate jurisdiction.

The only exceptions to this rule (two of them apparent only) are those already mentioned, but which, for convenience, their Lordships summarized, as follows :—

(i) The Court is entitled and bound to decide which of two conflicting decisions of its own it will follow.

(ii) The Court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot in its opinion stand with a decision of the House of Lords.

(iii) The Court is not bound to follow a decision of its own if it is satisfied that the decision was given *per incuriam*.

The general effect of this decision,* in formulating a rule whereby the Court of Appeal may measure its jurisdiction when asked to decline to follow a previous decision of its own, is the same as has been put into practice, but without such precise definition, by the Court of Appeal in New Zealand. On the other question, as to the powers of a Full Court of Appeal being no greater than those of a single Division, *Young's* case is instructive here. It may well be that if the situation should again arise, their Honours, while observing respectfully the decision in *Young's* case, will be in favour of putting into practice the view expressed by Ostler, J., in *Rhodes's* case, when he said that the duty of refusing to consider as binding a previous decision of the Court of Appeal would be more conveniently performed by both Divisions of the Court of Appeal sitting together.

* Leave was granted to appeal to the House of Lords; but there is no record of such an appeal being proceeded with.

THE WORLD CONFERENCE OF JURISTS.

Appreciation of the Chief Justice's Work.

In a statement on June 10, on the eve of the return of His Honour the Chief Justice (the Rt. Hon. Sir Michael Myers), the Acting-Prime Minister (the Hon. Walter Nash), said that he desired to record the country's high appreciation of the splendid services rendered by the Chief Justice, as the Dominion's representative at the recent Conference of Jurists in the United States.

"In a telegram which I have just received from San Francisco," said Mr. Nash, "the Prime Minister tells me of the notable contribution which the Chief Justice has made both toward the drafting of the Statute of the International Court of Justice and in stating the viewpoint of New Zealand. Mr. Fraser states that the Chief Justice's experience as a jurist and his high standing earned him immediate respect both at the Washington conference and afterwards at San Francisco, and concludes by saying that no New Zealand representative could have rendered more able service to our country and to the Conference of Jurists."

"To this I would only wish to add," said Mr. Nash, "how deeply grateful we are to Sir Michael for having been willing to represent New Zealand at the International Conference of Jurists, with all the onerous work which that has inevitably involved. Sir Michael has not spared himself for a moment, and I am sure we are all proud to know that he has carried out his task with such conspicuous ability."

SUMMARY OF RECENT JUDGMENTS.

MIDDLETON v. TAKAPUNA BOROUGH.

SUPREME COURT. Auckland. 1945. April 12, 13; May 1. CALLAN, J.

Municipal Corporation—Street—Right of Frontager thereon to have Access to every Part of his Frontage—Erection of Omnibus Shelter-shed on Footpath obstructing such Access to Part of Frontage—Whether Erection authorized by Statute—Municipal Corporations Act, 1933, s. 175.

Section 175 of the Municipal Corporations Act, 1933, does not authorize the erection by the local authority of an omnibus shelter-shed on the footpath that obstructs a frontager on the street as to any part of his frontage thereon.

According to the common law, a frontager is not to be obstructed as to any part of his frontage, and it is not necessary for him to show that any access of which he actually makes use, or had intended to make use, has been denied him. It suffices if access which he or his successor might hereafter desire to use has been prevented by some erection of a permanent nature, or of whose permanence some one else claims to be the judge. Whether the historical origin of a New Zealand street is (*a*) reservation by the Crown as such, or (*b*) reservation by a subdividing private owner as such, or (*c*) toleration by a private owner of a use by the public to which there was originally no right, what is created in each case is a street, with the incidents which in law appertain to a street, including this right of every frontager thereon to have access thereto at every part of his frontage.

Marshall v. *Blackpool Corporation*, [1935] A.C. 16, followed.

The Queen v. *Wellington City Corporation*, (1896) 15 N.Z.L.R. 72, *Mayor, &c., of Christchurch* v. *Shah*, (1902) 21 N.Z.L.R. 578, *Mayor, &c., of Invercargill and Wright, Stevenson, and Co.* v. *Hazlemore*, (1905) 25 N.Z.L.R. 194, *Farelly* v. *Pahiatua County*, (1903) 22 N.Z.L.R. 683, *Attorney-General Ex rel. Shaw* v. *New Plymouth Borough*, [1920] N.Z.L.R. 761, and *Irvine and Co., Ltd.* v. *Dunedin City Corporation*, [1939] N.Z.L.R. 741, G.L.R. 390, distinguished.

Counsel: *West*, for the plaintiff; *Stanton*, for the defendant.

Solicitors: *Rennie, Cox, and Garlick*, Auckland, for the plaintiff; *McGregor, Lowrie, and Butler*, Auckland, for the defendant.

PIPER v. GOLD BAND TAXIS, LIMITED, AND ANOTHER.

SUPREME COURT. Christchurch. 1945. May 15. NORTHCROFT, J.

Practice—Trial—Special Jury—Application for Trial by Special Jury—Conflict of Medical Evidence going to Issue of Liability and whether "Difficult questions in relation to scientific, technical, and professional matters"—"Likely to arise"—Evidence required in Support of Application—Statutes Amendment Act, 1939, s. 37.

Where the pleadings in an action do not reveal the nature of the controversy so as to permit the Court to form an opinion upon the justification for a special jury, sufficient information should be given in the affidavits filed in support of an application for such jury to enable the Court to form such opinion.

Auckland Hospital Board v. *Marelich*, [1944] N.Z.L.R. 596, distinguished.

In an action for damages in a running-down case, the defendant pleaded inevitable accident without negligence, in that as the defendant's taxi-cab was passing the plaintiff he collapsed and fell against such taxi-cab. The defendant in support of a summons for a special jury filed an affidavit by a medical practitioner, who had examined the plaintiff, that he was, "of the opinion that for the purpose of deciding whether the plaintiff suffered a very severe shock and a form of stroke and as to whether such a condition if it exists or has existed was caused by the accident as alleged by the plaintiff, or as to whether the condition of the plaintiff if it exists or has existed was the direct cause of the accident, specialist medical evidence will be necessary, directed to difficult scientific, technical, and professional matters."

In opposition, the solicitor for the plaintiff expressed in an affidavit his opinion that no difficult questions in relation to such matters were likely to arise upon the trial.

In argument, it was admitted that one of the principal questions for determination was whether the accident was caused by the plaintiff's having a stroke and collapsing in the path of the taxi, or whether his stroke supervened upon the collision; that there would be substantial medical controversy as to whether a cerebral haemmorhage or thrombosis which caused the stroke could be the result of violence as from a blow from a motor-car; and that the medical evidence would probably involve one of the main subjects, and perhaps the only one, upon the question of liability.

Held, 1. That the information given in the affidavit was inadequate to enable the Court to form an opinion upon the justification for a special jury.

2. That (on the further information given by counsel for defendant and admitted by counsel for plaintiff) difficult questions in relation to scientific, technical, and professional matters were likely to arise.

An order for a special jury was, therefore, made.

Counsel: *Thomas* and *R. A. Young*, in support of summons for special jury; *Lascelles*, to oppose.

Solicitors: *Thomas and Thompson*, Christchurch, for the plaintiff; *Weston, Ward, and Lascelles*, Christchurch, for the defendants.

CHATTERTON v. CRAWFORD.

SUPREME COURT. Palmerston North. 1944. October 30. 1945. May 21. BLAIR, A.C.J.

Practice—Costs—Commission to take Evidence outside of New Zealand—Party-and-party Costs up to Order for Commission—Costs allowable subsequent thereto—Code of Civil Procedure, R. 568, Third Schedule, Table C, Items 11, 21, 22, 23.

Where a commission is obtained to examine witnesses outside New Zealand, Table C of the Third Schedule to the Code of Civil Procedure applies up to the examination (party-and-party costs only being allowed). The appropriate amount allowed for the order and commission of witnesses out of New Zealand includes the party-and-party costs of an incidental to preparing the papers for application to the Court, for the order together with the costs of counsel's appearance upon the order, and arguing the matter if necessary.

All items subsequent to the order are in the discretion of the Registrar or the Court, and the reasonable expenditure that the successful party had had in connection with the commission, subsequent to the order, should be allowed as a disbursement.

In the present case, therefore, the costs allowed to the successful plaintiff in connection with taking evidence on commission in Sydney were the costs of and incidental to obtaining order (£10 10s. as per Schedule C); counsel's fee in Sydney, as paid; solicitor's charges upon the basis of preparation for trial (under item 11 of Table C, £12 12s.); the Commissioner's fees; the shorthand-writer's fees; the witnesses' expenses, including qualifying expenses of all of them giving expert evidence; and out-of-pocket disbursements.

Loughnan v. *Dalgety and Co., Ltd.*, (1897) 16 N.Z.L.R. 299, followed.

Wentworth v. *Lloyd*, (1865) 12 L.T. 226, distinguished.

Mondy v. *Bank of New Zealand*, (1888) 6 N.Z.L.R. 705, referred to.

Counsel: *H. R. Cooper* and *G. I. McGregor*, for the plaintiff; *Oram*, for the defendant.

Solicitors: *Cooper, Rapley, and Rutherfurd*, Palmerston North, for the plaintiff; *Oram and Yortt*, Palmerston North, for the defendant.

MURDOCH v. RHIND AND MURDOCH.

SUPREME COURT. 1945. May 31. NORTHCROFT, J.

Executors and Administrators—Corpse of Testator—Disposal of Body—Rights and Duties of Executors.

The Executor has both the right and duty of disposing of the body of the testator, and it is for him to say how and where the body is to be disposed of.

Williams v. *Williams*, (1882) 20 Ch.D. 659, followed.

Counsel: *C. S. Thomas*, for the plaintiff; *K. M. Gresson*, for the second defendant.

Solicitors: *Park, Murdoch, and James*, Hokitika, for the plaintiff; *K. M. Gresson*, Christchurch, for the defendants.

MEADES v. BORACURE (N.Z.) LIMITED.

SUPREME COURT. Wanganui. 1944. November 8, 9, 10; December 11. 1945. May 4. FINLAY, J.

Master and Servant—Negligence—Liability of Master—Scope of Employment—Authorized Act done in Improper Manner—Use of Inflammable Material—No Warning as to Danger thereof given by Master—Servant lighting Match in Dangerous Circumstances—During Course of Work—Fire resulting from such Act—Whether within the Scope of his Employment—Whether Master Negligent in failing to warn Workman of Danger of Fire.

If a workman during the course of his work does something of an incidental or interjectional character to satisfy some immediate purpose of his own, and what he does is dangerous having regard to the circumstances created by or associated with the work, then his act is a negligent mode of performing the authorized work and within the scope of his employment.

Century Insurance Co., Ltd. v. *Northern Ireland Road Transport Board*, [1942] A.C. 509, [1942] 1 All E.R. 491, applied.

Where a servant of the defendant company, which was giving the understructure of the plaintiff's house protective treatment against borer involving the use of inflammable material, lit a match under dangerous circumstances with the result that the understructure of the house caught fire and the house and its contents were destroyed.

Held, That the servant's act was within the scope of his employment, and the defendant company was liable for his negligence.

Held, further, That the defendant company was negligent in failing to warn its workmen of the danger of fire in the use of the material, and that such absence of knowledge had a causal relationship with the fire.

Counsel: *A. M. Ongley*, for the plaintiff; *McGregor* and *Rowe*, for the defendant.

Solicitors: *A. M. Ongley*, Palmerston North, for the plaintiff *G. E. Rowe*, Palmerston North, for the defendant.

In re FERRY (DECEASED), ALLEN v. ALLEN AND OTHERS.

SUPREME COURT. Dunedin. 1944. September 6, December 8. KENNEDY, J.

Will—Construction—"Investments"—Whether Term includes Moneys in Post Office Savings-bank on Current Account.

The word "investments" in a will should be given its ordinary meaning, unless the Court, guided by the context and considering the condition of things to which the will refers as if it had been executed immediately before the testator's death (unless a contrary intention appears in the will), comes to the conclusion that another meaning is indicated by the testator.

In the present case the words "my investments" were held not to include money on current account either in the National Bank or in the Post Office Savings-bank.

Perrin v. *Morgan*, [1943] 1 All E.R. 187, applied.

In re Powell's Trust, (1858) John. 49, 70 E.R. 334, *Re Rodmell, Safford* v. *Safford*, (1913) 108 L.T. 184, *Re Cosgrove's Estate, Wills* v. *Goddard*, (1909) *Times*, Apr. 3, 44 E. & E. Dig. 729, *Stein* v. *Ritherdon*, (1868) 37 L.J. Ch. 369, *Mayne* v. *Mayne*, [1897] 1 I.R. 324, *In re Price, Price* v. *Newton*, [1905] 2 Ch. 55, *In re Sudlow, Smith* v. *Sudlow*, (1914) 59 Sol. Jo. 162, *In re Wragg, Wragg* v. *Palmer*, (1919) 2 Ch., s. 8, and *In re Lewis's Will Trusts, O'Sullivan* v. *Robbins*, [1937] 1 All E.R. 227, referred to.

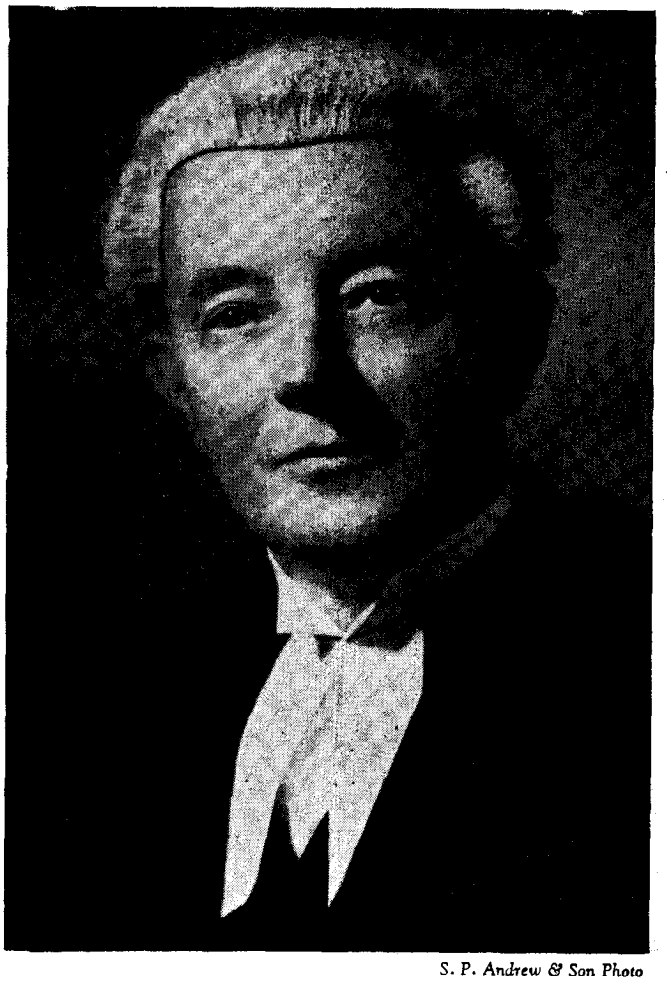
Counsel: *Jeavons*, for the plaintiff; *Paterson*, for the first set of defendants; *J. S. Sinclair*, for the second set of defendants.

Solicitors: *Ferens and Jeavons*, Dunedin, for the plaintiff; *Paterson and Lang*, Dunedin, for first set of defendants; *Sinclair and Stevenson*, Dunedin, for second set of defendants.

MR. H. E. EVANS.

The New Solicitor-General.

The legal profession may well feel that in the appointment of Herbert Edgar Evans to the office of Solicitor-General it has received adequate recompense for Governmental tardiness in finding a successor to H. H. Cornish, K.C., on his elevation to the Supreme Court Bench; indeed, it is difficult to think that a more suitable appointment could have been made. Most courteous in manner, assiduous and untiring in his efforts, meticulous in all his work and skilled in the law, Mr. H. E. Evans is one of those practitioners whose presence in the profession lends strength to it and whose real value is in no way lessened because to some extent it has not been fully recognized. For the most part, his appearances in the Supreme Court and in the Court of Appeal have been restricted to cases involving wills, settlements, estates, and their gloomy but inevitable companion, taxation; but he has specialized also in the difficult field of patent law. In some branches of patent work, his knowledge and experience must be almost unequalled in New Zealand.



S. P. Andrew & Son Photo

Mr. H. E. Evans.

Mr. Evans was born in Sudbury, Suffolk, in 1884, and his family came to live in New Zealand in 1902. His father, the late Captain E. J. Evans, was well known in Wellington, where from 1902 to 1915 he was marine superintendent of the Shaw, Savill, and Albion Company. Mr. Evans was educated at Whitgift Grammar School, Croydon, Surrey, and at Victoria University College in Wellington. He graduated B.A. in 1906, and LL.M. in 1910. He gained further distinction as a student of Victoria College by winning the Bowen Prize in 1905, and the Macmillan-Brown Prize in 1906. In 1907 he was editor of *Spike*, the college magazine. He was also prominent at Victoria College as a debater, winning the Union Prize in 1907 for most points in debates. He won the Jacob Joseph Scholarship in law. With John Mason of Napier, he won the Joynt Scroll for debating at the inter-university tournament.

In 1903, Mr. Evans started his career as a junior clerk in the offices of Messrs. Bell, Gully, Bell, and Myers, and was attached to the staff of Sir Francis Bell. Save for a brief visit to England, he continued with this firm, becoming common-law clerk to Mr. Michael Myers, now the Rt. Hon. the Chief Justice. He was admitted as a barrister and solicitor in 1911, and eleven years later became a partner in this distinguished firm. He freely acknowledges the advantage he has had in serving under such prominent members of the New Zealand Bar, and, in particular, the value of his association with Mr. Ernest Bell, a great conveyancing lawyer, In his forty years with his firm, Mr. Evans has covered a wide range of legal work and has handled it always in a manner for which his fellow-practitioners have had high praise and admiration.

During much of the war period, the new Solicitor-General has been acting-treasurer of the New Zealand Law Society and an active member of its Conveyancing Committee. He is also a member of the New Zealand Council of Law Reporting. For nearly thirty years, he has taken a prominent part in the work of the Anglican Church. He has been a member of the Wellington Diocesan Synod since 1916, and since 1925 of the General Synod, a lay canon of the Wellington Cathedral Chapter; and he has been a member of the standing committee of the Wellington diocese for many years.

Like many of the former occupants of the office, Mr. Evans is small in stature, but, like them also, he is resolute in determination and not likely to be persuaded to adopt any course which he feels is not in keeping with the traditions of the high office he now occupies.

The new Solicitor-General will bring to his high office not only a thorough knowledge of the law and a capacity to express in clear and analytical form the results of concentrated research into the most abstruse legal problem, but also an ardent desire to do all that is in his power to uphold the dignity of his office, and, even more important, the fundamental principles of justice and honourable dealings between men. A good citizen and a good lawyer, H. E. Evans will be a good Solicitor-General.

ROAD TRAFFIC AND THE WAR EMERGENCY REGULATIONS.

XV.—Recent Regulations and Cases.

By R. T. Dixon.

Since the last article in this series (*ante*, p. 64), there have been few additional emergency regulations on road transport, but several cases of interest. Fresh regulations are as follows :—

Goods-service Charges Tribunal Emergency Regulations, 1943, Amendment No. 2 (Serial No. 1944/182).—This amends the regulations which vest the control of commercial motor-vehicle rates in the Goods-service Charges Tribunal by providing that in the case of a contract fixing charges, the latter shall be varied only if all parties agree, or if application is made to increase the charges and the Tribunal is of the opinion that failure to do so will by reason of increased costs cause hardship to the licensee.

Transport Licenses Emergency Regulations, 1942, Amendment No. 2 (Serial No. 1945/17).—These regulations effect two important changes. Previous to their issue, the majority of transport licenses, goods, and passengers were expressed to continue in force until the first quarter following the termination of the present war; *vide* Reg. 8 of the Transport Licenses Emergency Regulations, 1942 (Serial No. 1942/43). Now, this Amendment No. 2 states that all the licenses are to expire on March 28, 1945, with the exception of temporary licenses, suspended licenses, and "ancillary" licenses granted consequent on the provisions of the Transport (Goods) Emergency Regulations, 1943 (Serial No. 1943/17).

This Amendment No. 2 also restores the former provisions in regard to time within which after the relevant decision a transport appeal has to be lodged and the period of notice to be given before review of a transport license. In both cases the periods were reduced to seven days by the passing of the Transport Licensing Emergency Regulations, 1940 (Serial No. 1940/137), and the Amendment No. 1 thereof (Serial No. 1940/173), but owing to the revocation of the latter two sets of regulations the respective periods have been restored to twenty-one days for appeals (*vide* Reg. 16 (1) of the Transport Licensing Passenger Regulations, 1936, *1936 New Zealand Gazette*, 1347) and fourteen days for reviews of licenses (*vide* s. 8 (3) of the Transport Licensing Amendment Act, 1936, and cl. 17 (2) of the Transport Goods Applied Provisions Order, 1942 (Serial No. 1942/21)).

Transport Licenses Emergency Regulations, 1942, Amendment No. 3 (Serial No. 1945/30).—This should be read with the appointment of the Transport Appeal Authority as published in *1945 New Zealand Gazette*, 316. This Order in Council no doubt is for the purpose of meeting a possible contention that the appointment may be *ultra vires* so far as the period is concerned between January 1, 1945, and March 22, 1945, being the date on which the appointment was signed.

Heavy Motor-vehicle Emergency Regulations, 1941, Amendment No. 1 (Serial No. 1945/50).—These regulations have the effect of reducing by half the heavy-traffic fees otherwise payable in respect of horse-floats. The regulations are operative as from June 1, 1945.

Recent Judgments.

Two cases of interest relating to oil-fuel rationing have recently been heard.

The first arises out of the recent Oil Fuel Emergency Regulations, 1939, Amendment No. 7 (Serial No. 1944/63), which was made in consequence of the decision in *Taylor* v. *Shortland*, [1944] N.Z.L.R. 345, and *Lindsay* v. *Heads*, [1944] N.Z.L.R. 349. In a case of refusing to supply information concerning the source of acquisition of oil fuel upon demand by a Traffic Inspector in terms of the latter regulations the defence was raised that the words in the new para. (*h*) of Reg. 5, "and to require that any such information be verified by statutory declaration," are mandatory; and that, as such requirement was not made by the Inspector, the prosecution failed. Mr. R. C. Abernethy, S.M., held that the requirement for a statutory declaration is permissive only and not a necessary ingredient of the offence of failing to supply information: *Police* v. *Collings* (Invercargill Court: February 28, 1945).

The other decision is that given in *Police* v. *New Zealand Farmers' Co-operative Association of Canterbury, Ltd.*, by Mr. E. C. Levvey, S.M., at the Christchurch Court, on May 6, 1945. In this case, a servant of the company sold petrol without the authority of coupons or licenses and covered up the transactions by making false entries in the returns. It was admitted by the prosecution that no other officer of the company knew of the transactions, and the defence was that, in spite of the absolute prohibition contained in Reg. 20 of the Oil Fuel Emergency Regulations, 1939 (Serial No. 1939/133), it was necessary to prove *mens rea* before the prosecution could succeed and that there was no *mens rea* on the part of the company. In support of this contention it was argued that the penalty clause—namely, Reg. 10 (2) of the Supply Control Emergency Regulations, 1939 (Serial No. 1939/131), imports the words "without lawful excuse" into the prohibition, and thus implies the necessity of *mens rea*. The learned Magistrate, in entering a conviction, refused to admit that this latter regulation could be construed as overriding an absolute prohibition as contained in above Reg. 20. This case is, of course, clearly distinguishable from *Graham* v. *Fitzgerald Brothers, Ltd.*, (1940) 1 M.C.D. 550, which was taken under Reg. 10 (1) of the latter regulations. It follows *Vuletic* v. *Miller*, [1941] G.L.R. 511, in the adoption of the view that an employer is responsible under the above Reg. 20 for the acts of his employee.

MONTHLY TENANCY OF FLATS.

Conditions of Letting.

By E. C. ADAMS, LL.M.

EXPLANATORY NOTE.

The drift of population from the country and the villages to the four main centres of population, the scarcity of dwellinghouses, and the customary small family of to-day, all these tend towards an increase in the building and habitation of flats. We are gradually, for better or worse, becoming more accustomed to flats, and the conditions of letting same are attaining more uniformity than heretofore. Readers may therefore be interested in the following precedent taken from practice, containing conditions of letting of flats.

From the landlord's point of view the precedent appears satisfactory (apparently covering every reasonably anticipated contingency, including even the keeping of pets by the flat-dweller), but does it sufficiently protect the tenant against total or partial damage of the flat by fire, flood, tempest, earthquake, or inevitable accident during the currency of the tenancy ?

By cl. 6 (*a*) the tenant undertakes to keep the flat in repair. The general rule is that, if a lessee enters into a general covenant to repair—that is, into a covenant without any exception—he is bound to rebuild in case of destruction of the leased premises by fire or other cause: *Garrow's Real Property in New Zealand*, 3rd Ed. 538. Clause 6 (*a*) is not in the form of a covenant, but would that make any difference in the *construction* of the contract ? The exception, fair wear and tear excepted, would not cover damage or loss by fire or other cause.

Again, there is no provision for cessation of rent in the event of damage or loss by fire during the currency of the tenancy. In *Goodall's Conveyancing in New Zealand*, 254, there is the following timely warning to the conveyancer :—

> Throughout there is no provision in any of these four kinds of instruments either at common law or by statute for the abatement of rent in the case of damage to demised premises, or cesser of the term in case of destruction thereof whether by fire, earthquake, or disaster of any kind. It will be recollected that the old rule established as long ago as *Paradine* v. *Jane* has been applied to make tenants from year to year of a second floor liable for use and occupation for the period between an accidental fire consuming the premises and the regular determination of their tenancy. No relief against the burden of an express covenant for payment of rent is now to be found in the application of any alleged equitable principles or apparently, in the doctrine of the implied term established by the "Coronation Cases." The necessity for express qualification of the covenant to pay rent in these contingencies needs no further comment.

It is therefore considered that for the tenant's protection there should be added a clause similar to cl. 12 given by *Goodall*, *ibid.*, 274 (Precedent No. 7—Memorandum of Lease of Parts of City Building for Warehouse Purposes).

Also cl. 6 (*a*) should be added to and modified so as to agree more with cl. 4, *ibid.*, 267 (Precedent No. 5—Deed of Sub-lease of Part of City Building for Shop and Workroom Purposes).

The instrument must be stamped at the Stamp Duties Office in accordance with Part VI of the Stamp Duties Act, 1923.

PRECEDENT.

GENERAL CONDITIONS OF LETTING OF FLATS.

1. The tenant of each flat shall during his tenancy have the exclusive use of a motor-shed and wood-shed allocated to him by the landlord.

2. The tenants of Flats Nos. 1 and 2 shall have the use in common of the large wash-house, and the tenant of Flat No. 3 shall have the exclusive use of the small wash-house.

3. Each tenant shall have the exclusive use of those areas of ground allocated to him by the landlord for the purposes of flower and vegetable gardens and will at all times keep such areas in good order and cultivation and will not remove or damage any trees or shrubs growing therein without the landlord's permission.

4. The landlord shall retain control of the rest of the grounds and property and no tenant shall cut or break any trees shrubs or flowers for the time being growing thereon without the landlord's permission.

5. No tenant shall——

(*a*) Assign his tenancy in whole or part.

(*b*) Sublet the premises included in his tenancy, or any part thereof.

(*c*) Accommodate boarders or use the premises for any purpose other than that of a private residence.

(*d*) Allow to be brought on the premises any borer-affected furniture or effects, including timber and firewood. Any furniture or effects subsequently found to be borer-affected shall immediately be removed from the premises.

(*e*) Make or permit or cause to be made any alteration or addition to the premises or any apparatus or fittings (including water-heating and lighting apparatus or fittings) installed or fitted therein nor cut or injure any of the floors walls or timbers of the premises.

(*f*) Affix to or exhibit on the premises any notice nameplate or advertisement.

(*g*) Keep on the premises or any part thereof any animals or birds after objection made by the landlord or any of the other tenants.

(*h*) Encumber or obstruct in any way or place or leave rubbish on any part of the buildings drive-ways yards or paths used in common with the landlord or any of the other tenants.

(*i*) Do or permit to be done in the premises or elsewhere on the landlord's property anything which may be a nuisance to or may tend to the reasonable annoyance of the landlord or the tenants of any of the other flats.

6. Each tenant shall during his tenancy—

(*a*) Keep the interior of the premises included in his tenancy, and all the landlord's fittings fixtures and floor cover (if any) therein and all glass in the windows and doors thereof and all veranda's and porches of which he shall have the exclusive use in good clean tenantable and serviceable condition and repair fair wear and tear excepted.

(*b*) Replace all electric-light globes in the premises as they wear out, or are broken, or become unserviceable, with others of at least the same quality and power as the original globes.

(*c*) Duly and punctually pay all charges for gas and/or electricity consumed in the premises.

(*d*) Permit the landlord and all persons authorized by him at all reasonable times to enter and view the state and

condition of the premises and to execute and do such repairs or work as the landlord may desire.

7. Where the tenant fails to repair and maintain the premises or omits to do anything in manner above provided the landlord may himself carry out such work or remedy such omission and recover from the tenant (as rent in arrear) the cost thereof.

8. The landlord shall throughout the tenancy keep in good tenantable repair the external parts of the premises and all drains water-pipes and sanitary and water apparatus thereof (except as regards damage caused or resulting from any act default or negligence of the tenant or any of his family servants or visitors).

PARTICULARS OF TENANCY.

LANDLORD: C.D. of Wellington, the Administrator of the Estate of E.F. deceased.

TENANT: A.B. of Wellington married woman.

DESCRIPTION OF PREMISES: Flat No. 1.
Motor-shed No. 1.
Wood-shed No. 1.

DATE OF COMMENCEMENT OF TENANCY: 1st August, 1944.

TERM: One month's notice on either side.

RENT: £2 5s. per week, Payable Monthly on the 1st day of each month.

I AGREE to take the above-described premises for the term and at the rate specified above and upon and subject to the foregoing General Conditions of letting.

Dated this day of , 1944.

[*Signature of tenant.*]

A.B.

NEW ZEALAND LAW SOCIETY.

Annual Meeting of Council.

(*Concluded from p. 134.*)

It was decided to write to the members of the Conveyancing Committee who were not members of the New Zealand Council, and thank them for the work carried out by them during the year.

Death Duties Act, 1921, s. 84.—The Conveyancing Committee furnished the following report on the question raised by the Hawke's Bay Society:—

"It is suggested by the Hawke's Bay District Law Society that the exemptions from estate and succession duty conferred by the above section upon the lineal ancestors and descendants of a deceased soldier should be extended to step-parents and step-children.

"It is urged by the Society in the first place that the definition of 'child' in s. 2 of the Act comprises 'step-child' and that under the Destitute Persons Act, 1910, a man is liable to maintain his step-children until they attain the age of sixteen years. It is also pointed out that successions in favour of step-parents are liable to the same rate of succession duty as those in favour of parents—subs. 17 (5) Death Duties Act, 1921.

"In the majority of cases a step-child in the eyes of the law is not a child. In ordinary legal language a step-child is not the step-parent's child. He is not his or her issue as the case may be; he is somebody else's child: *Andrew* v. *Commissioner of Stamps*, [1922] N.Z.L.R. 172, [1921] G.L.R. 562 (Sim, J.). Consequently unless a testator has made his own dictionary so as to include a step-child in the word 'child' a step-child is not included. For an instance of a testator so doing see the case quoted in *Garrow's Law of Wills and Administration*, p. 155: *In re Jeans*, (1895) 72 L.T. 835. A step-child does not share in his step-parent's estate in an intestacy. A step-child is not protected by the Family Protection Act, 1908. A step-parent or step-child is not a 'near relative' under the Destitute Persons Act, 1910, and a step-father's liability for maintenance ceases when the step-child becomes sixteen. The rights given to a step-father over a step-child by that Act are limited: *In re Eddy*, (1914) 33 N.Z.L.R. 949, 16 G.L.R. 669 (Denniston, J.).

"The inclusion of a step-child amongst children by s. 2 of the Death Duties Act, 1921, is to his benefit because certain concessions in duty are made to children (s. 17 (4), Death Duties Act, 1921) but that gives him no legal claim to other concessions. The same reasoning applies, we think, to a step-parent.

"Further, the financial circumstances of a step-child may be better than those of his half-brothers and sisters where soldiers have married women with children whose natural fathers have been able to make material provision for them.

"It seems to us this is a matter more for political than legal action. The Legislature has deliberately excluded step-parents and step-children from the exemptions created by s. 84 of the Death Duties Act, 1921, and there is, so far as we can see, no logical reason for interference by the New Zealand Law Society. The case is to be distinguished from that referring to s. 84 (5) upon which we advised the Society in March, 1944 (see No. 15, minutes of 10th March, 1944). There, grounds existed for thinking that a legislative oversight had occurred."

In view of the submissions by the Conveyancing Committee it was decided to adopt the report and take no further action.

War Regulations Continuance Act, 1920.—In reply to the request of the Society the Attorney-General wrote as follows:—

"I have received your letter of the 8th instant embodying copy of letter received from the Wanganui Society requesting that representations be made to have the above regulations revoked. I will look into the possibility of making the change requested."

Magistrates' Courts Act, 1928.—The Under-Secretary of Justice wrote as follows:—

"With further reference to my letter of the 21st November regarding the suggestion that the procedure under s. 150 of the Magistrates' Courts Act, 1928, be assimilated to that under s. 13 of the Domestic Proceedings Act, 1939, I have to inform you that the matter has been given careful consideration but it is not considered that the present is an appropriate time to effect any alteration in the existing procedure. There are certain difficulties, particularly in connection with payment into Court which might well give rise to confusion and uncertainty not only to defendants but also to Court officers. The matter has been noted for further consideration when conditions become more favourable."

The letter was received.

Trustee Act, 1908.—The following letter was received from the Auckland Society too late to circulate in the order paper:—

"A local practitioner has brought to the notice of my Council the fact that while under section 24 of the Property Law Act, 1908, a means of protection is afforded in respect of certain relatives of the settlor no such protection appears to exist for the protection of other beneficiaries as exists in England under Section 33 of the Trustee Act, 1935.

"My Council recommends that steps be taken to have Section 33 of the English Act adopted in New Zealand and that consideration be given to the advisability of having the New Zealand Trustee Act remodelled on the lines of the corresponding English Act.

"I should be glad if you would kindly bring this matter to the attention of the members of your Council."

It was decided that the question raised should be referred to the Law Revision Committee for consideration. It was thought that the Committee should consider the question as to whether the New Zealand Act should be brought into line with the corresponding English Act.

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. 43.—W. TO B.

Rural Land — Dairy-farm — Shareholder's Bonus — Whether "Income derived from land"—Nature of Deduction to be made from Butterfat receipts—Capitalization of such Deduction—"Productive value of the land"—Servicemen's Settlement and Land Sales Act, 1943, s. 53.

Appeal by the vendor of a dairy-farm from the determination of a Rural Land Sales Committee.

The appellant had agreed to sell his farm for £3,983 10s. That sum included the sale price of chattels, which all parties to the appeal agreed were worth £85. The sale price of the land alone was, therefore, £3,898 10s. The Committee fixed the basic value of the land alone at £3,400 and consented to its sale at that price.

In fixing the basic value at £3,400, however, the Committee wholly disregarded a sum of £26 15s. 3d. which was disbursed by the dairy company and accepted by the appellant as a shareholder's bonus. In so doing the Committee apparently acted upon the view that any moneys paid out by a dairy company in the way and on the footing that this sum of £26 15s. 3d. was paid represent a return on the capital moneys invested in the company and so do not form part of the income derived from the farming operations on the land.

The Court said: "This appeal involves only one major question—namely, whether a sum paid out as shareholder's bonus by the New Zealand Co-operative Dairy Co., Ltd., should or should not be taken into account in the computation under s. 53 of the Servicemen's Settlement and Land Sales Act, 1943, of 'the net annual income that can be derived from the land' which is the subject of the proposed sale. If such sum is to be so taken into account, then subordinate questions arise as to whether it should be taken into account wholly or in part only; and, if in part only, then as to what part.

"A determination of the correctness or otherwise of the Committee's view requires that the true nature and character of the payment should be investigated and considered. Merely descriptive designations in the nature of catch phrases or labels, whether employed by any company in particular or by people engaged in the dairying industry generally, may well be misleading. What it is essential to ascertain is whether the payment was made, in truth and in fact, as a return upon capital or whether it was not in reality made as a further payment for butterfat supplied. In reaching a conclusion upon this topic due consideration must be given to the character given to the payment by the company.

"As was pointed out by Smith, J., in *Eltham Co-operative Dairy Factory Co., Ltd.* v. *Johnson*, [1931] N.Z.L.R. 216, 262, co-operative dairy companies in New Zealand are no more and no less than ordinary registered companies under the Companies Act. They have the same limitations as other companies, and the same powers except where those powers have been specifically augmented or supplemented by statute: see, too, *Macdonald* v. *Normanby Co-operative Dairy Factory Co., Ltd.*, [1923] N.Z.L.R. 122, 139.

"So far, therefore, as is material for present purposes, they have the same authority over and the same control of their funds and affairs as other companies. If, therefore, any company having authority to pay interest does in fact do so upon any moneys constituting its share capital, then the character given to any such payment is conclusive. Moneys so paid could not be taken into account as 'income derived from land' within the meaning of s. 53. Equally, if moneys were paid by way of a dividend on shares the character given by the company to the payment would preclude its being money of which account could be taken under s. 53.

"The conclusiveness of the character which a company impresses upon payments made by way of interest or by way of dividend has its basis, at least in part, in the fact that 'interest' and 'dividend' are terms with a clearly defined legal connotation, so that moneys declared by a company to be of either character must be taken as intended by the company to be of the declared character.

"Apart from authority, the word 'bonus' as a single term has no such clearly defined connotation, and the addition to it of the word 'shareholder's' does not give it a more definitive meaning. That use of the expression does, however, in a sense indicate, *prima facie*, that the payment made under that description was neither a payment by way of interest nor yet by way of dividend. Had it been an interest payment it would have been so declared, for the company has power to pay interest. Had it been a bonus dividend, it would have had to be so declared, and a procedure which was not followed would have been essential to its validity. Needless to say, it was not a return of capital. The payment would, in consequence, appear to have been of some character not having relation to the capital of the shareholder in the company. It could in these circumstances only relate to the butterfat supplied by the appellant to the company. The use of the word 'bonus' in relation to a final payment for butterfat supplied has over many years received some measure of judicial recognition.

"Stringer, J., gave the true meaning of the term and explained its application in the course of his judgment in *Brook* v. *Cambridge Co-operative Dairy Co., Ltd.*, [1924] N.Z.L.R. 602, where, after referring to the contract between the company and its suppliers for the division among the latter of the company's net profits in proportion to the quantity of butterfat supplied, he said: 'In practice, co-operative companies such as the defendant company make payments from time to time to their supplier-shareholders in anticipation of profits to be earned . . . the surplus, if any, being ultimately distributed amongst the suppliers *by way of bonus*' (*ibid.*, 607).

"Blair, J., in *Max* v. *Waimea Dairy Co.*, [1933] G.L.R. 91, reiterated this view. He said: 'Every dairy-farmer knows that the bonus represented his share of the unexpended profits, after due allowance for the monthly advances has been made' (*ibid.*, 92). He then proceeded to express the opinion that judicial notice might well be taken of this amongst other features of the co-operative principle of operating dairy factories in New Zealand.

"Over-payments by a co-operative dairy company have been held, in consequence, to be recoverable as so-called 'reclamations.' The representative character of such a company as agent for its suppliers which was accepted in *Good* v. *Bruce*, [1917] N.Z.L.R. 514, as the proper definition of their relationship has thus become a source from which has sprung rights and liabilities recognized by law and enforceable by the Courts.

"If there was ever a time when such a final payment as that now in question could have been said to have been other than a payment for butterfat delivered, it is now too late to do so. Its origin, purpose, and nature have too long been judicially recognized to permit of questioning at this stage of the history of the industry. The *prima facie* indication of its character deducible from the fact that the payment is calculated upon the basis of the relative quantities supplied by the suppliers is thus irrevocably confirmed, apart from statutory interference.

"The sum of £26 15s. 3d. being thus an integral part of the total sum earned by the sale of the products of the farm, it constitutes part of the income derived from the land and must be taken into account under s. 53.

"Whether any and, if so, what deduction should be made from the gross aggregate income, of which this sum forms part, is the subordinate question to which reference has been made. It arises in this way: a supplier, in order to acquire a right to supply the company, must take up a number of shares having a definite relation to the quantum of his supply. If he does not take shares, then the acceptance of his supply is subject to the initial and continued agreement of the company: if it does accept, then it pays for the product a lesser price than it pays to its shareholder-suppliers.

" It is correct to say, in consequence, that in order to secure, first, a right to supply the company and, secondly, a right to the higher price payable by the company, a supplier must take up shares. The latter in other words, represent a capital investment which the supplier must make to secure an assured market for his product and the best price for that product. It is, in consequence, an expenditure incurred as an essential factor in earning the income from the land; but this capital produces no other return than the right to supply and the right to the higher price, for the company pays no interest, nor yet any dividend.

" Thus, if the shares are paid for in cash, the sum so paid is, as it were, isolated, and its capacity to earn the interest or return it would normally earn is suspended or destroyed. It is accepted as being incapable of increment. In the result, therefore, the shareholder-supplier loses the monetary return that that part of his capital could otherwise be employed to earn. If the shares are paid for by deduction, as is commonly the case, that deduction is made at some fixed rate on the weight of butterfat supplied. Until the shares are fully paid the shareholder-supplier does not, in consequence, obtain payment in money of a part of the sum to which his supply would otherwise entitle him. That part is compulsorily diverted to capital uses.

" Whether, therefore, the shares are paid for in cash or by a process of deduction, the shareholder-supplier suffers a detriment by being constrained to put aside capital moneys without hope of increment which he might otherwise employ to produce interest or some alternative form of return.

" The monetary value of that detriment should and must be taken into account in the calculation of the net income. As 5 per cent. is accepted as a proper rate to charge on other items of capital expenditure, there seems no reason why the same rate should not be employed for present purposes. In this case the appellant had to take up 244 £1 shares. The interest at 5 per cent. on that investment is £12 2s. per annum. Deducting this from the bonus payment leaves the sum of £14 13s. 3d. to be capitalized. The productive value fixed by the Court must therefore be increased by £325 16s. 8d.

" The basic value of the land is therefore fixed at £3,725 16s. 8d., and consent to its sale at that sum is given. To this extent the appeal is allowed. The appellant will, of course, be entitled to payment for the chattels in addition to the £3,725 16s. 8d. Order varied accordingly."

No. 44.—F. TO T.

Urban Land—Undue Aggregation—Widow owning several Properties let to Tenants—Proposed Purchase of Suitable Dwelling-house—Reasonable Necessity owing to Widow's Age and Physical Condition—Whether " Undue aggregation of land "—Servicemen's Settlement and Land Sales Act, 1943, s. 50 (3).

Appeal from the determination of an Urban Land Sales Committee.

The Court said: " This case presents very special circumstances. The appellant, who is seventy-four years of age, is seeking to acquire a home in Feilding where she resided with her now deceased husband for thirty years, which period extended down to the date of his death in October, 1941. She has a weak heart, and the property she proposes to purchase has been selected by reason of its position and its suitability to her needs and infirmities. Following the death of her husband Mrs. T. went to reside for various periods with different members of her family, but finally in January, 1943, purchased a house in Wanganui as a residence. This latter residence she recently sold with a view to changing permanently her place of residence to Feilding.

" Apparently the appellant's husband, in order to provide himself and his wife with an income, made a practice during the years before his death of buying up old properties of low value, of putting them in order, and then leasing them. Of these properties she has now six houses and one shop. Together they bring her in an income of £4 a week. Except for the £1,000 necessary to buy the house now in question, she has, substantially speaking, no other assets.

" The houses are all let to tenants who have been long—several of them for a good many years—in occupation. None of these houses is really suited to the appellant's needs, and it may well be that she could not get possession of any of them whilst the present legislation governing such matters is in force. Then, too, if she occupied any one of the houses she owns her income would be reduced materially, as indeed it would be if she sold any of them, for the rents exceed the return the proceeds would presently produce. At her age and in her condition her needs are such that she can doubtless ill afford any reduction in income if she is to live comfortably and independently.

" This all implies that aggregation is not the true purpose of the appellant in seeking to make the proposed purchase. That implication is confirmed by the fact that since her husband's death the appellant has sold several houses, presumably to the tenants who were in occupation, whilst she has since she was widowed bought no property except the house at Wanganui.

" One of the houses which she sold was of a type suitable as a house for her, but it was too far from any centre to be suitable for her needs. In any case, it was sold to the tenant, and it by no means follows that she could have evicted him and secured occupation for herself.

" Under the circumstances, the Court takes the view that the acquisition of the house she has agreed to buy is reasonably necessary, having regard to the age and physical condition of the appellant. Its acquisition represents, in a sense, the substitution of a house at Feilding for the house at Wanganui. This is not, in the view of the Court, a case of ' undue aggregation ' in consequence.

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

LAND AND INCOME TAX PRACTICE.

Damages for Negligent Acts of a Partner.—A partner in a legal firm wrongly advised a client regarding certain securities, and the firm eventually had to pay damages for negligence.

In these circumstances the damages are allowable as a deduction to the firm, as the negligence of the partner in the performance of his professional duties is a normal and ordinary risk which is incidental to the business of the partnership.

The circumstances in such a case are distinguishable from those in the case of a partner embezzling or misappropriating the partnership funds, as that cannot be said to be a normal business risk, and no deduction would be allowed.

In the case of negligence or embezzlement on the part of an employee, a deduction, of course, would be allowed in respect of any damages or the amount of the embezzlement.

National Provident Fund.—All benefits payable out of the National Provident Fund to contributors by way of pensions or allowances payable on the death of a contributor to or for the benefit of his wife constitute assessable income and are liable to income-tax, social security charge, and national security tax accordingly.

Any payments made to a widow or any other person for the maintenance and upkeep of the children of a contributor are deemed to be the income of such children, and as such children are under fourteen years of age, the payments are accordingly exempt from social security charge and national security tax.

Lump-sum payments made out of the National Provident Fund by way of a refund of contributions and any allowances paid to a contributor in respect of sickness or incapacity are not assessable and are not subject to income-tax, social security charge, or national security tax.

Destruction of Old Records.—In reply to an inquiry as to the length of time for which old records should be kept and as to what statutory provisions there were in this respect, the Commissioner of Taxes advised as follows:—

(*a*) There are no statutory provisions requiring obsolete books and records to be kept apart from Reg. 12 (3) of the Social Security Contribution Regulations, 1939, which require wages-tax records to be kept for five years.

(*b*) Under s. 16 of the Land and Income Tax Act, 1923, as amended by s. 5 of the Land and Income Tax Amendment Act, 1939, and s. 8 of the Finance Act (No. 3), 1943, provision is made for the Commissioner to reopen assessments for a period of ten years. If circumstances arose which made an investigation for that period necessary and the records were not available, then the incomes for the years for which there were no records available would no doubt require to be estimated.

In view of the above, it would appear to be advisable that all books and records should be retained for a period of at least ten years.

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

Ramparts of Freedom.—G. G. G. Watson's excellent address to the Royal Society of St. George (*ante*, p. 119) calls to mind the Archer-Shee case, so vividly described by Edward Majoribanks in his *Life of Carson*. An article on this fascinating case appears in Alexander Woolcott's posthumously published work *Long, Long Ago*. Commenting upon the fact that no transcript of the trial appears in the *Notable British Trials*, he suggests that a study of "this short, sharp, illuminating chapter in the long history of human liberty" might stiffen the purpose of all those who in our own day are freshly resolved that that liberty shall not perish from the earth. Of the determination of the elder Archer-Shee (the alleged youthful culprit seems to have been the only person connected with the case that kept calm) to challenge the obtuse, if not cruel, attitude of the Lords Commissioners of the Admiralty, Woolcott remarks: "He was entering the lists against the massive, complacent inertia of a Government department which is not used to being questioned and does not like to be bothered. He was girding his loins for the kind of combat that takes all the courage and patience and will power a man can summon to his aid. He was challenging a bureaucracy to battle."

Judicial Knowledge.—Judges have no judicial knowledge of the habits of horses, not even if they have been stewards of the Pegasus Club*—Goddard, L.J., in *Bowater* v. *Rowley Regis Borough Council*, [1944] 1 All E.R. 465; the craft of the charwoman may have its mysteries, but there is no esoteric quality in the nature of the work which the cleaning of a snow-covered step demands—du Parcq, L.J., in *Woodward* v. *Governors of Hastings Grammar School*, (1944) J.P. 41; it is common knowledge that silk stockings are a most popular form of gift—Lord Macmillan in *Aristoc Ltd.* v. *Rysta Ltd.*, [1945] 1 All E.R. 34.

Bookmakers.—The decision of the Court of Appeal in the *Albertson* case will not serve to relieve appreciably the difficulty experienced by Magistrates in sentencing bookmakers. The penalty imposed by the Gaming Amendment Act, 1920, is a fine of £500 or imprisonment for a term of two years. According to Northcroft, J., the prisoner had been fined several times for gaming offences and was carrying on his bookmaking business in defiance of the law; and he imposed the sentence of a year's imprisonment. The Court of Appeal did not find that the sentence was unjustified by the circumstances of the case. It expressly declined to be a party to a system of licensing by fine, since to permit such a system would be in itself flouting the law, encouraging lawlessness, and legislating in a manner contrary to the enactment of Parliament itself:

> So long as the law remains as it is, the duty of the Court is to enforce it, irrespective of any consideration of expediency, or the fact that the public or a section of the public may dislike the law or think it unwise.

Yet, despite this weighty language, the sentence was reduced to nine months, because that had been the maximum sentence to date. This seems an instance of illogical reasoning which (apart from making somewhat lighter the tribulations of this particular offender) does little more than set an artificial maximum for the future misguidance of inferior Courts. The plain fact of the matter is that Magistrates, whose work enables them to feel the pulse of public opinion, do not for the most part want to inflict terms of imprisonment for breaches of the Gaming Act, some of the sections of which are archaic, and openly ignored by all sections of the community—for instance, s. 53, which makes it an offence for one person to invest money on the totalizator for another. "I have never been a gambler," says Asquith in his *Memoirs*, "not because I think gambling wrong, but simply from the lack of gambling temperament, which in greater or less degree is inbred in the average Englishman." The degree in the average New Zealander is greater rather than less, and it is because the majority of Magistrates recognize this fact that they find themselves within the definition of a "crab" as given by Oliver Herford, famous American wit. "The crab," he observed, "more than any of God's creatures, has formulated the perfect philosophy of life, whenever he is confronted by a great moral crisis in life, he first makes up his mind what is right, and then goes sideways as fast as he can."

Any Further Questions?—Some of the former occupants of the Supreme Court Bench could with advantage have read the recent strictures of the Master of the Rolls upon that "no well-tuned cymbal," the over-speaking Judge. On one occasion, the late Saul Solomon, K.C., had spent a trying day in the Court of Appeal attempting to conduct a difficult argument in the face of a barrage of interruptions by Denniston, J. As he concluded his argument in the late afternoon, and just as the Court was about to adjourn, Solomon gathered his papers together and turning to the Bench said, imperturbably, "In the words of the immortal Sam Weller, 'Would any other gen'l'm'n like to ask me anythin'?'." Denniston, J., appeared about to make an angry rejoinder, when Williams, J., tugged his brother Judge's gown and remarked, in a voice audible to the Bar, "Please don't spoil the only light moment we've had all day!"

Glancing Backwards.—In 1875, the Abolition of the Provinces Act was passed; Mr. Robert Stout was elected member for Caversham, and there were twenty-one admissions to the Bar of New Zealand. The *Law List* of that year shows that there were then 212 barristers and solicitors in practice in the Colony. A glance at the admissions recalls some interesting facts—within a week of each other, Worley Basset Edwards and John Henry Hosking became members of the Bar. The former served for twenty-five years on the Supreme Court Bench, and the latter for eleven years. Both were Knighted. In the same year, Henry Francis Dillon Bell and Martin Chapman were admitted. These gentlemen both became King's Counsel and founded the two largest firms in Wellington, and from these firms have been drawn the present Chief Justice (Sir Michael Myers) and his predecessor in office (Sir Charles Skerrett). This particular year, then, has a high legal average even though its loss in brigs, barques, and other ships was, as Damon Runyon would say, "more than somewhat."

* A number of the equestrian members of the English Bench have been members of this famous club. Lord Hanworth was one of them. Once, when staying in a hunting county, he was introduced to several of the county set as "Master of the Rolls." Whereon one of those present inquired: "Is that good country?"

PRACTICAL POINTS.

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1. Destitute Persons.—*Maintenance — Wife and Children — Apportionment.*

QUESTION: When an amount is allowed to a wife for the maintenance of herself and children, must the amount be apportioned?

ANSWER: An order for payment of £2 10s. weekly, where no part of the payment is expressed to be for the maintenance of the child, is bad and uncertain according to (1944) *Stone's Justices Manual*, 76th Ed., 1040 (i), relating to *Beddington* v. *Beddington*, (1921) 127 L.T. 755, 38 T.L.R. 743, the amount of maintenance allowable to a wife under the statute in that case was £2, it is important to note. Up till the passing of the Destitute Persons Amendment Act, 1926, the maximum amount that could be allowed to a wife was £3; but in consequence of the amendment no limit is fixed. Before the passing of that statute, *Beddington's* case would have applied. In many cases where custody of the children is awarded to a wife, there do not exist the necessary grounds under s. 26 of the Destitute Persons Act, 1910, for making an order for maintenance of children; while in other cases such grounds do exist. In the former, as the wife has the children with her, it is right that extra maintenance should be awarded to her to cover the maintenance of the children; while in the latter, the proper course would be to fix separate amounts in respect of the maintenance of the wife and of the children. The position is thus stated in *Burke* v. *Burke*, [1934] N.Z.L.R. 978, 980: "Maintenance orders sometimes provide for maintenance of the wife and separately for the maintenance of the children, while others provide a sum for the maintenance of the wife, but that sum is made larger because she has been given the guardianship and custody of the children of the marriage."

2. Land Sales.—*Purchase of Land by Education Board—House for Schoolmaster—Consent of Land Sales Court.*

QUESTION: An Education Board is entering into negotiations for the purchase of a section of land and house as a residence for one of its schoolmasters. Is the consent of the Land Sales Court necessary? Attention is drawn to s. 29 of the Finance Act (No. 3), 1934, and to exemption s. 43 (2) (*h*) of the Servicemen's Settlement and Land Sales Act, 1943.

ANSWER: The exemption cited exempts, *inter alia*, from the operation of the Servicemen's Settlement and Land Sales Act, 1943, a contract for the sale of any land to the *Crown*. Section 29 of the Finance Act (No. 3), 1934, confers on Education Boards certain immunities, but does not make them the Crown: *Banks* v. *Taranaki Education Board and The King*, [1944] N.Z.L.R. 571. Therefore, the exemption in s. 43 (2) (*h*) apparently does not apply. It is considered, however, that the consent of the Land Sales Court will not be necessary because it is apprehended that the land will be held on a charitable trust in New Zealand: s. 43 (2) (*g*). All land vested in an Education Board, it is submitted, is held on a charitable trust in *New Zealand*: *R.* v. *Special Commissioners of Income Tax, University College of North Wales*, (1909) 78 L.J. K.B. 576.