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WILL: DIRECTION AS TO PAYMENT OF DUTY ON NOTIONAL ESTATE.

THE recent judgment of the majority of the Court of Appeal in *In re Houghton, McClurg* v. *New Zealand Insurance Co., Ltd.*, [1945] N.Z.L.R. 639, appears to be at variance with a decision of the High Court of Australia in *Hill* v. *Hill*, (1933) 49 C.L.R. 411, which was not brought to the attention of their Honours in the Court of first instance or in the Court of Appeal. The facts in both cases are similar, and the relevant clauses in both wills not unalike; and, the law of New South Wales as to the incidence of duty as regards the testator's actual estate and his notional estate, referred to in *Hill's* case, may be accepted as being on all fours with New Zealand legislation on the point, though our s. 31 (2) of the Death Duties Act, 1921, is an express provision that does not appear in the New South Wales legislation.

In both cases, the contest centred on the question whether the testator, by the terms of his will, had given a sufficient direction to his executors to pay out of the estate which he possessed at the time of his death the amount of duty payable on assets with which he had parted before the date of his death (such assets being termed his "notional estate"). In other words, were the estate and succession duties to which the notional estate became liable on the testator's death to be paid out of the residue of his actual estate of which he died possessed, or were they to be paid out of notional estate as a charge against the recipients of his bounty given them before his death?

To take *Houghton's* case first: The testator died on July 22, 1942, leaving a will and codicil. By the will, made in August 24, 1939, the deceased, after making a specific bequest of personalty to his daughter, gave, devised, and bequeathed his residuary estate to his trustee upon trust for sale.

> and after payment of my just debts, funeral and testamentary expenses death succession and other duties,

to hold one-half of the net proceeds upon the trusts appearing in his will in favour of his daughter and grand-daughter, and to hold the other half of the residue in named shares for named persons and for certain charities. On December 13, 1939, the testator executed a codicil, in which it was recited as follows: "And whereas my primary care is for the welfare of my said daughter and my said grand-daughter"; and he directed the setting-aside of assets the value of which would be sufficient to fulfil the trusts created by his will in favour of his daughter and grand-daughter, thus freeing that half of the residue from the trust imposed thereon by the will.

On February 11, 1941, the deceased executed two settlements of shares, the one in favour of his daughter who was to receive the income therefrom during her life, and the other similarly in favour of his grand-daughter, with remainder as they should respectively appoint. (Gift duty was paid in respect of the former amounting to £3,911 5s., and in respect of the latter, £2,607 10s.)

In assessing duty on the testator's estate, the property comprised in the settlements made seventeen months before his death, was by virtue of s. 5 (1) (*b*) of the Death Duties Act, 1921, included as part of his dutiable estate. This resulted, first, in the payment of duty on property which the testator did not own at the date of his death, and, secondly, in an increase of the rate of duty charged on the whole of the dutiable estate. The question for the Court's determination was thus put by Mr. Justice Callan, before whom it came for determination:

> The substantial question for determination is whether the burden of the duties payable in respect of the settled properties is to fall upon the property so settled and those entitled thereto under the settlements, or upon the residue of the testator's actual estate over which he had a disposing power at the date of his death and those who take under the terms of his testamentary provisions.

His Honour, after a consideration of the New Zealand cases, was not satisfied that it was the testator's intention that his estate should bear the burdens occasioned by the settlements. After referring to *Re McMaster, Perpetual Trustees, Estate, and Agency Co., Ltd.* v. *McMaster*, [1916] N.Z.L.R. 56, the learned Judge added:

> There are words in the passage in Mr. Houghton's will which were not used in Mr. McMaster's will. These additional words after "testamentary expenses" are "death succession and other duties." But, in my view, this makes no difference. *In re Holmes, Beetham* v. *Holmes*, (1912) 32 N.Z.L.R. 577, is authority for the propositions that estate duty is a testamentary expense, and that a direction by a testator as to payment of "my testamentary expenses" covers and includes the estate duty payable in respect of *his* estate. It follows that the express mention by Mr. Houghton of estate duty carries the matter no further than it is taken by the mention of "my testamentary expenses." The mention by Mr. Houghton of "my succession and other duties" covers all succession and other duties payable in respect of *his* estate,

but, conformably to the reasoning in *Re McMaster* goes no further.

Reliance was also placed on the express statement in the codicil that Mr. Houghton's primary care was for the welfare of his daughter and grand-daughter. But I think it reasonable to ask for something more explicit than this. Mr. Houghton's concern for these ladies led him to make the codicil; but neither the codicil nor what he said in it tells me whether it was his will and intention that his own estate should bear burdens occasioned by settlements he afterwards made during his life.

His Honour's answer to the question asked him was that the words "death succession and other duties" in the will did not include the additional estate and succession duties payable by the deceased's estate by reason of the inclusion therein, by virtue of s. 5 (1) (*b*) of the Death Duties Act, 1921, of the notional estate; and he explained the word "additional" as being restricted to duties assessed upon the settled property, and not to include any increase in the rate of estate duty consequent upon the inclusion in the estate of the value of the settled property. Under s. 31 (5), His Honour allowed interest at the rate of 3 per cent. on the duties paid in the first instance by the executor, and refundable by the notional estate.

From His Honour's judgment, the beneficiaries under the settlements appealed. The Court of Appeal, by a majority (Fair, J., Northcroft, J., and Cornish, J., Sir Michael Myers, C.J., dissenting), allowed the appeal; and the majority held, for the reasons given in their respective judgments, that whether or not a testator by his will has directed that his actual estate shall bear the duties on his notional estate is to be decided by considering whether the directions of the testator are adequate to comprehend duties on notional as well as actual estate; and that the direction in the will under consideration for payment of "my just debts funeral testamentary expenses death succession and other duties" included the payment of duties on notional as well as on actual estate.

In *Houghton's* case, the learned Chief Justice, after setting out the relevant provisions of the Death Duties Act, 1921, and in particular the first five subsections of s. 31, including the following subsection, which does not appear in the New South Wales legislation,—

(2) Estate and succession duty shall be payable in accordance with the directions of the will of the deceased so far as regards any property which is subject to the dispositions of that will,

said, at p. 649:

The principle to be applied, therefore, seems to me to be that unless there is to be found a sufficient direction in this will to the contrary the estate and succession duties in respect of the assets comprised in the settlements are payable out of those assets and not out of the testator's actual estate disposed of by his will. *Ostler*, J., in *In re Gollan*, [1935] G.L.R. 48, said that it had been laid down in a number of decisions in New Zealand that a clear and explicit direction is required to vary the incidence prescribed by s. 31, and he obviously regarded those decisions as laying that down as a principle. Mr. Rogerson contends that the words "clear and explicit direction" put the position too strongly. That may be so, but still a "sufficient" direction is necessary, and inasmuch as it would appear that in the absence thereof the statutory prescription is to prevail, it appears to me that such direction, to be "sufficient," must at least be unambiguous.

His Honour then went on to say that he thought that to be the effect of the judgments in *O'Grady* v. *Wilmot*, [1916] 2 A.C. 231 (which, we may interpolate, was followed in *Hill* v. *Hill*); *In re Holmes, Beetham* v. *Holmes*, (1912) 32 N.Z.L.R. 577, and in the Australian case, *Perpetual Trustee Co.* v. *Luker*, (1932) 33 N.S.W. S.R. 85. He also drew attention to the judgment of Salmond, J., in *Public Trustee* v. *Canterbury College*, [1924] N.Z.L.R. 942, 960, where, he said, the position was very clearly expressed by that learned Judge. His Honour then continued:

This view certainly seems to be logical because, if the duties in respect of the settled assets are to be paid out of the residue of the testator's actual estate, that is in substance a legacy or a new gift to the persons to whom the settled property is given, and it is natural to expect that such a gift or legacy should be given in unambiguous terms.

Before considering *Hill* v. *Hill* (*supra*), the case of *Permanent Trustee Co.* v. *Weekes*, (1929) 47 N.S.W. W.N. 86, may be looked at. The will in that case, in the opinion of Mr. Justice Fair, in *Houghton's* case (at p. 654), contained language nearest to that under consideration by our Court of Appeal; and (at p. 655) His Honour asked if there were any reason in *Houghton's* case for modifying the ordinary meaning of the words, which, in his view, corresponded with that adopted in *Weekes's* case, and in *Ashby* v. *Hayden*, (1931) 31 N.S.W. W.N. 324, in which it was followed. The learned Chief Justice distinguished *Weekes's* case, as the words there were wider, and said it was unnecessary to consider whether or not it had been correctly decided. Mr. Justice Northcroft, after considering the Australian cases, said (at p. 660) that he did not regard them as any more helpful for or against the appellants than the New Zealand cases, as they were no more than decisions upon their own facts.

However, *Weekes's* case was pressed on our Court of Appeal in *Houghton's* case by counsel for the appellant, just as it was pressed on the High Court of Australia by the unsuccessful counsel for the respondent in *Hill's* case. The words in the clause in *Weekes's* case were:

my just debts funeral and testamentary expenses legacies and any probate or any other duties payable to the Government of the Commonwealth of Australia or to any of the States of the Commonwealth or to any other Government.

Harvey, C.J. in Eq., held that such words exonerated the notional estate from contribution of duty. Later, when Hill's will came before him, his was the judgment (*Permanent Trustee Co.* v. *Reeves*, (1933) 50 N.S.W. W.N. 111) that was reversed on appeal, *sub nom. Hill* v. *Hill* (*supra*). In argument in the latter case before the High Court of Australia, Mr. Teece, K.C., for the appellant, submitted as follows:—

It is not enough to have words which are sufficient to include duty on notional estate they must go further and show a clear intention to include the notional estate, for this reason *Permanent Trustee Co.* v. *Weekes*, (1929) 47 N.S.W.W.N. 86, was wrongly decided.

Counsel for the respondent submitted that the words in *Hill's* case were stronger than those in *Weekes's* case to direct payment, finally, of all duties on the dutiable estate out of the residue of the actual estate. No reference to *Weekes's* case was made in any of the judgments in the High Court.

The facts in *Hill* v. *Hill* were that in January, 1914, certain property was conveyed by way of settlement to trustees upon trust, as to one-third in favour of Frank Hill for his benefit during his life with remainder upon trust for the benefit of his wife and children; and his third-share was valued at the date of his death at £7, 554. By his will made in May, 1931, Hill, after making certain specific bequests, gave, devised, and bequeathed the residue of his property to his trustees upon trust for sale and conversion,

to pay thereout my just debts funeral and testamentary expenses (which latter expression shall be deemed to mean and include Probate Duty payable to the Government of the State of New South Wales and Estate Duty payable to the Government of the Commonwealth of Australia).

The property included in the trust disposition was included among his assets for the purpose of the assessment of death duties. On originating summons by the executors, the Court was asked whether, on the true construction of the will, the amount of State duty payable by reason of the inclusion in the testator's dutiable estate of the property subject to the trust should be paid out of such property or out of the testator's residuary estate? The summons was heard by Harvey, C.J., in Eq., who held that death duty and estate duty payable in respect of the property notionally included in the testator's dutiable estate should be paid out of the residuary estate. From this decision, the persons benefiting by the residuary estate appealed to the High Court of Australia.

The section of the New South Wales statute under notice was s. 120 of the Stamp Duties Act, 1920–1931, which provides that:

> Where any property which is or the value of which is included in the dutiable estate of a deceased person is vested in any person other than the administrator, the duty payable in respect thereof shall be paid by the persons entitled thereto according to the value of their respective interests therein, to the administrator.

Thus, the ultimate burden is distributed, as between the dutiable estate on which the whole duty is payable and the actual estate, by requiring recoupment to the administrator of that part of the duty which is payable in respect of property vested in any person other than the administrator, as in New Zealand: see the Death Duties Act, 1921, s. 31 (1) (5).

In a joint judgment, Rich and McTiernan, JJ., said the question was whether the clause in the will was a provision to the contrary which prevented the operation of s. 120, and removed from the trustees and *cestuis que trust* of the notional property the onus of repaying their proportional part of the duty. They said:

> If the clause is interpreted in this way it virtually gives to the beneficiaries of the property passing under the settlement "a legacy equal in amount to the rateable proportion of the estate duty which is chargeable upon it" (*O'Grady* v. *Wilmot*, [1916] 2 A.C. 231, 274). The words of the clause are not clear enough for this purpose. The clause is in common form with certain explanatory words added. It is an attempt by the draftsman to express to the lay executor his powers and duty as to payment of debts, &c. In this respect it is unnecessary. It does, however, "serve to define the content of the residuary bequest" (*ibid.*, 275), and relieve other gifts at the expense of the residue, a matter of much importance in estate duty but not in death duty. The scope of such a clause is usually confined to these purposes. *It is not naturally the proper medium for conferring gifts or bounties on non-participants under the will* . . . The clause in this will does not indicate any intention to make any gift or provision in favour of strangers to the estate proper, and does not "suffice to control or defeat the operation" (*ibid.*, 275) of s. 120.

(The italics are ours. It seems to us, however, that a clear direction could be given, even by means of such a clause, by directing payment "out of my *dutiable* estate of my just debts funeral and testamentary expenses"; and adding, for guidance of the lay executor, as well as to make the intention clearer still, "and all estate succession and other duties.")

In his judgment, Starke, J., said:

> The clause provides clearly enough that death duties payable in respect of the estate of the deceased shall be paid out of residue. But it does not follow that the clause negatives the statutory obligation cast by s. 120 upon strangers to the estate and gives in effect a legacy of the amount of the duty to persons taking property outside the will and only notionally part of the testator's estate. Such a gift requires clear and explicit language.

Dixon, J., in construing the clause in the will, said that the words appeared to him plainly to mean that the whole sum payable by the executors to the Crown for death duty should be defrayed by "the trustees" out of the proceeds of conversion in execution of the primary trust declared—namely, to pay debts, funeral, and testamentary expenses. Whatever the executors are called upon to pay to Commonwealth or State for estate and death duty is regarded as a testamentary expense, and the trustees are directed to pay all testamentary expenses out of the proceeds of conversion. In so far as the payment is final, in fact, so that the residue is diminished, and is not in the event recouped, then whether in law strangers to the actual estate of the testator passing under the will are or are not under an obligation, unfulfilled, to make some corresponding payment, the burden of the payment must, under the clause, remain upon residue. But, he added, the question is whether the words evince an intention that the entire payment shall be final and that strangers to the actual estate who are under a liability to recoup part of the payment shall be relieved at the expense of the residue. His Honour proceeded:

> A provision depriving the estate vested in the executor of the operation of s. 120 (1) amounts to a disposition in favour of the persons taking under the settlement. In *Permanent Trustee Co. of New South Wales* v. *Hill*, (1933) 33 N.S.W. S.R. 222, 226, Long Innes, J., says: "in order to displace the liability imposed by statute on those taking the notional property of the testator, it is necessary for the Court to be satisfied that the testator has expressed a clear intention to displace that statutory liability, and, in effect, to bequeath to the donees of the notional property a legacy of the amount of the death duty payable in respect thereof," and this statement appears an accurate description of the position (*cf.* Lord Sumner) in *O'Grady* v. *Wilmot*, [1916] 2 A.C. 231, 274.

The learned Judge then added:

> I do not find in the provision of this will any such clear intention. The clause primarily relates to disbursements for which the actual estate is unavoidably answerable—namely, debts, funeral, and testamentary expenses. Death duty is included among them. The primary trust to make these payments looks to the need of discharging the burdens and specifies the source whence they are to be paid. Doubtless, the result, if not the intention, is to exonerate other parts of the estate, that is, of the actual estate passing under the will. But, in my opinion, no intention appears of conferring any benefit upon strangers to the testamentary dispositions. The provision is expressed in terms consistent with the continuance and the fulfilment of the obligation imposed by s. 120 (1), and the context and general tenor support the view that nothing to the contrary was intended.

Mr. Justice Evatt dissented, as he considered it unnecessary that, in order to relieve persons liable under s. 120, there should be an express reference either to that section or to the persons who might be liable thereunder; and he considered the relevant clause of the will a provision intended to ensure the relief of all who might be disadvantaged and prejudiced by being made liable, directly or indirectly, to pay a quota of the statutory duties, and he could see no justification for depriving those not otherwise benefiting under the will of the same advantage.

The reasoning of the majority in the High Court in *Hill's* case (Rich, Starke, Dixon, and McTiernan, JJ.) is reminiscent of the reasoning of Mr. Justice Callan, in the Court of first instance, and the learned Chief Justice in the Court of Appeal. But the strange feature of *Houghton's* case is that *Hill* v. *Hill* was not cited in either Court to their Honours.

The moral, if moral there be, to be drawn from *Houghton's* case, as from all the other cases cited therein, is that the draftsman of a will must be astute, in the words of the Privy Council in *O'Grady* v. *Wilmot* (*supra*)

so to draft a provision exonerating the notional estate from duty as to "suffice to control or defeat the operation" of the first proviso to s. 30 of the Death Duties Act, 1921, (which corresponds with s. 120 of the New South Wales statute). This must be effected in clear and explicit language. Moreover, if a testator should, as in *Houghton's* case, divest himself of property after executing his will at a time when that property formed part of his transmissible estate, that will should be revised, and the same clear and explicit direction should be given to express the testator's intention regarding the duties on what may form part of his notional estate. As the majority judgment in *Hill's* case, as well as several of the judgments cited in *Houghton's* case, show, a mere direction to pay out of residue the testator's debts, funeral and testamentary expenses does not indicate any intention to make any gift or provision in favour of persons who are strangers to the will itself. (Even though such persons may also be named beneficiaries under the will, it is their proportion of duties *qua* beneficiaries under the settlement or other disposition that must be considered.) In fact, the only safe way in which to relieve the notional estate is to include in the will such a clear and explicit expression of the testator's intention as would be used in giving a legacy of any other kind.

SUMMARY OF RECENT JUDGMENTS.

In re KING.

SUPREME COURT. Wellington. 1945. October 8. MYERS, C.J.; NORTHCROFT, J.; CORNISH, J.

Transport Licensing—Transport Appeal Authority—Powers—Modification of Decision of Licensing Authority—Failure of Applicant to obtain License—Licensing Authority's Discrimination against him Erroneous—Whether Appeal Authority has Power to Direct that such Applicant be granted License additional to those issued—Transport Licensing Act, 1936, s. 12—Statutes Amendment Act, 1940, s. 56.

It is within the powers given to the Transport Appeal Authority by s. 12 of the Transport Licensing Amendment Act, 1936, and s. 56 of the Statutes Amendment Act, 1940—in deciding an appeal against the decision of a Licensing Authority which, in refusing a taxicab license to the appellant, one of a number of applicants, erroneously discriminated against him—

(*a*) To modify the decision of the Licensing Authority by adding the name of the appellant to that decision; or

(*b*) To give a decision or direction to the effect that the appellant shall receive a license in addition to the licenses granted to the successful applicants.

So held, on the facts of this particular case and in the light of its own peculiar circumstances, on case stated by the Transport Appeal Authority (following on the writ of mandamus which issued against him in pursuance of the judgment reported *sub nom. King* v. *Frazer* ([1945] N.Z.L.R. 175) asking, *inter alia*, if he had such powers).

Counsel: *Hurley*, for King; *Stewart Hardy*, for Torrington and other successful applicants; *O'Shea*, for the Wellington Metropolitan Transport Licensing Authority; *A. E. Currie*, for the Transport Appeal Authority, as *amicus curiae*.

Solicitors: *Martin and Hurley*, Wellington, for the appellant; *Stewart Hardy*, Wellington, for C. Torrington; *Kent and Webb*, and *Joseph, George, and Olphert*, Wellington, for other applicants; *Crown Law Office*, Wellington, for the Transport Appeal Authority.

CRADOCK v. CRADOCK.

SUPREME COURT. Wellington. In Chambers. 1945. August 24. MYERS, C.J.

Divorce and Matrimonial Causes—Custody of Children—Interim Order for Custody made during Suit for Restitution of Conjugal Rights—Decree for Restitution made—Wife subsequently returning to Husband's Home—Cohabitation since Decree made—Wife subsequently leaving Home—Variation of interim Custody Order refused.

When, after a decree has been made for restitution of conjugal rights, the wife has returned home and the parties have cohabitated, the suit is dead; and a motion for variation of an interim custody order made during the restitution proceedings may not be entertained as that order is also gone.

Counsel: *Harding*, for the husband, in support; *Sievwright*, for the wife, to oppose.

Solicitors: *J. A. Scott and Bergin*, Wellington, for the husband; *A. B. Sievwright*, Wellington, for the wife.

FOGDEN v. WADE.

SUPREME COURT. Auckland. 1945. September 12, 13, 28. BLAIR, J.

Criminal Law—Assault—No physical touching of Person allegedly Assaulted—Whether "Assault" commit ed—Crimes Act, 1908, s. 207.

Criminal Law—Evidence—Assault charged—Evidence tendered as to alleged Indecent Act Two Weeks earlier—Disagreement of Jury in respect of such Charge—Appeal from Magistrate's Conviction on Assault Charge—Evidence of Alleges Indecent Act tendered on Hearing of Appeal from Conviction for Assault—Inadmissible.

Accused was convicted by a Stipendiary Magistrate of assault on a member of the Women's Auxiliary Air Force, and sentenced to two months' imprisonment. On a general appeal from his conviction, the following facts were proved: On September 26, 1944, as the girl was walking up the driveway leading to her hostel, she saw accused standing in the shadows of the driveway. As she drew level with him he asked her if she were frightened. Without stopping, she answered that he should not stand there as he might frighten somebody. They were then about ten feet apart. As she went forward, he followed her; and, when he got into such a position that he could have touched her, he made an indecent suggestion. Thinking she was going to be molested, and being frightened, she screamed. The accused turned and ran to his cycle and rode away.

Held, dismissing the appeal, That but for the girl's vigorous rejection of accused's improper advances and her loud outcry which brought out the guard, he would have physically assaulted her, his actions showing an intention to do so; and therefore, an assault within the meaning of s. 207 of the Crimes Act, 1908, had been committed.

Turbervell v. *Savage*, (1669) 1 Mod. Rep. 3, 84 E.R. 341 and *Stephens* v. *Myers*, (1830) 4 C. & P. 349, 172 E.R. 735, applied.

R. v. *Fogden*, [1945] N.Z.L.R. 380, referred to.

At the hearing of this appeal, the Crown tendered the evidence of another resident of the W.A.A.F. hostel who had been the alleged victim of an indecent act on September 9, 1944, which was claimed to be relevant to a charge having certain similarities to the facts in this appeal, but of earlier date. The present appellant was indicted in respect of that incident, but the jury had failed to agree.

Held, That such evidence was inadmissible as part of the Crown's case in this appeal, as it was evidence tending to show that the person charged, but not convicted, of an offence similar in character and allegedly having occurred some fortnight before the offence that was the subject-matter of this appeal, had been guilty of such earlier offence.

Semble, Even if the appellant had been actually convicted of the earlier offence, that fact would not be admissible in another and subsequent case. Previous convictions of an accused person are not relevant in a subsequent case, except in very exceptional circumstances, not here present. He can be examined as to previous convictions if he gives evidence, but such evidence would then be only deemed to be relevant as touching his credit as a witness.

Counsel: *G. Skelton*, for the appellant; *Cleal*, for the Crown.

Solicitors: *Hall Skelton and Skelton*, Auckland, for the appellant; *Meredith, Meredith, Kerr, and Cleal*, Auckland, for the respondent.

SURVEYS OF LAND UNDER THE LAND TRANSFER ACT.

When is a New Survey Required?

By E. C. ADAMS, LL.M.

(*Concluded from p. 263*).

1. *A new survey will be required on any application under the principal Act to bring land under the Land Transfer Act [continued]*:—

Now as to these anomalous ordinary fully-guaranteed titles which are based on inadequate surveys, what is the real legal position? It may be confidently stated that in determining the true legal boundaries regard must be had to old pegs, old fences, and other *indicia* of possession or occupation, and to natural boundaries, if any. The actual measurements shown on such certificates (and they are only "more or less") are not conclusive: one must also not rob Peter to pay Paul. If there are no reliable old pegs, then, as under the "old system," possession is the best evidence as to title. As was said in the Privy Council case, *James* v. *Stevenson*, [1893] A.C. 162, 167, long established fences constitute *prima facie* evidence of true boundaries, and it is only displaced by the most conclusive evidence of error in the actual position of the fences. If a solicitor or surveyor in practice encounters any of these anomalous titles he will find a perusal of the following cases useful: *Equitable Building and Investment Co.* v. *Ross*, (1886) N.Z.L.R. 5 S.C. 229, *Tanner* v. *Thomson*, (1888) 7 N.Z.L.R. 71, *Moore* v. *Dentice*, (1901) 20 N.Z.L.R. 128, and *Solicitor-General* v. *Bartlett*, (1900) 18 N.Z.L.R. 142.

Despite the fact that the Land Transfer (Compulsory Registration of Titles) Act, 1924, has been in force for more than twenty years, applications under the principal Act to bring land under the Act are by no means obsolete. In most districts very defective titles were not brought under the Act by the Land Transfer Department, and the compulsory Act itself provides for applications under the principal Act in respect of land comprised in *limited* titles issued under the compulsory Act: s. 17 of the Land Transfer (Compulsory Registration of Titles) Act, 1924.

2. *A new survey will be required on any application for the removal of the limitation as to parcels on certificates of title limited as to parcels under the Land Transfer (Compulsory Registration of Titles) Act, 1924, or for the making absolute of an interim title under the Land Transfer (Hawke's Bay Earthquake) Act, 1931.*—Most titles issued under the 1924 compulsory Act had necessarily to be limited as to parcels. "To issue fully guaranteed titles without requiring surveys would be to invite numerous claims upon the Assurance Fund (now the Consolidated Fund) in cases, which abound especially in towns, where the documentary title holder has lost his title to part of the land by the encroachment and adverse possession of his neighbour, and in cases where descriptions of land in deeds are erroneous." The Registrar is not bound to issue an ordinary certificate of title until he is satisfied that the position and boundaries of the land are sufficiently defined, and this usually means a new survey: ss. 8 (2), 11, and 24 of the Land Transfer (Compulsory Registration of Titles) Act, 1924, ss. 9 and 10 of the Land Transfer (Hawke's Bay) Act, 1931. A certificate limited as to parcels, or an interim Hawke's Bay one, therefore, as to boundaries, is in no better position than an "old system" title. The Law Society, it is understood, has ruled that in an open contract of sale of land comprised in a limited as to parcels title, the purchaser cannot requisition the vendor for a new survey: some cautious vendors make no mistake about the matter by expressly stipulating to that effect in the contract. It is apprehended, however, that in exceptional cases a purchaser could force the vendor to get a new survey: for example, a house property is sold as "all my dwellinghouse, outbuildings, and grounds situate in Street in the Borough of ": if manifestly the house and/or outbuildings encroach on to the documentary title of the neighbouring owner, how can the vendor carry out his duty, as outlined by Sir Charles Skerrett in *Schiscka* v. *Peddle* (*supra*), unless he gets a new survey.

3. *On every application for the inclusion of an accretion in a Land Transfer title a survey will be required.*—The common-law principle as to movable boundaries applies to land under the Land Transfer Act: *Auty* v. *Thomson*, (1905) 25 N.Z.L.R. 78. As to the requirements of the survey when the boundary is the sea or otherwise tidal, see *Attorney-General* v. *Findlay*, [1919] N.Z.L.R. 513. For the procedure and the evidence required in every application, see article in (1943) 19 NEW ZEALAND LAW JOURNAL, 104, 119.

4. *A new survey may be required on the ordering of a residue fully-guaranteed title.*—This has been explained in the beginning of this article. A new survey will be required, unless the residue is clearly and accurately defined in the existing records.

5. *A new survey may be required where part only of land comprised in a certificate of title is being dealt with.*—It is submitted that the Land Transfer Department cannot ask for a new survey where only part of the land in a certificate of title *limited as to parcels* is being dealt with. This opinion is based on the terms of s. 14 of the Land Transfer (Compulsory Registration of Titles) Act, 1924, and on general policy. Under the "old system" a landowner was not compelled by a State Department or local body to get his land surveyed on subdivision (excepting "towns" within the meaning of the Land Act or subdivisions for the purpose of the Municipal Corporations Act), and one of the expressed policies of the framers of the compulsory Act was to avoid all unnecessary expense to landowners. And, as pointed out previously, a limited as to parcels title, is in no better position, as regards boundaries, than an "old system" title. If landowners are willing to accept such a title, why should the State intervene and compel a survey? It must be pointed out, however, that the opinion expressed in this paragraph does not represent the universal opinion and practice of the Land Transfer Department.

The only remaining question for this article (but, perhaps, the most important one) is, when does the Land Transfer Department require a new survey when part only of land comprised in an ordinary certificate of title is being dealt with ?

All solicitors and surveyors know that sometimes, in lieu of a new survey, diagrams on instruments are accepted. When are diagrams accepted and when are they not accepted ?

No inflexible rules can be laid down hereunder. Each case must be decided on its own facts by the District Land Registrar with the assistance of the Land Transfer Draughtsman, who is a qualified surveyor, an officer of the Land and Survey Department, and whose special function is to give advice to the District Land Registrar on survey matters.

Where a dealing is contemplated of *part* only of land comprised in an ordinary certificate of title, and the expense of a new survey is desired to be avoided, a written inquiry should be addressed to the District Land Registrar. It is bad policy for the parties to settle first and then have the dealing thrown out at the Land Registry on requisition for a new survey.

It is the duty of the Land Transfer Department to assist wherever possible and not to impede the business of the country : *Drake* v. *Templeton*, (1913) 16 C.L.R. 153. The District Land Registrar will take every relevant factor into consideration. The expense of a new survey may be considerable these days, and, if the value of the land is small, or if the dealing is not very important—*e.g.*, a short term lease with no right of renewal—the Registrar will be more inclined to accept a diagram on the instrument. A most important relevant factor is the accuracy of the original survey—*i.e.*, the correctness of the external boundaries. Where a new boundary consists of more than one new line, a new survey is usually required, unless the value of the land is small. *No new pegging is permitted* without a new survey (and the reason for this is often misunderstood by solicitors and surveyors). No pegs, no fences, and no buildings must be shown on the diagram. Where there has been new pegging, it is reasonable to suppose that the land has been sold according to the new survey, and accordingly such new survey should be checked and approved by the Chief Surveyor in accordance with regllations—*i.e.*, a Land Transfer plan must be deposited in the usual manner. As a former Registrar-General once put it : " The question of pegging certificate is one which cannot be considered, as by accepting a pegging certificate the office is virtually putting the owner into possession without any verification of his boundaries, other than a close of the circuit traverse, which merely indicates that the survey work is correct in itself and does not necessarily purport to fix the land."

Alternatively, the District Land Registrar will sometimes accept the deposit of a *compiled* plan. A compiled plan, being one compiled from existing data, is not a plan of survey, and is therefore liable to a fixed checking fee of 5s., and not *ad valorem*, in accordance with the Land Transfer Regulations, gazetted May 25, 1922. Where there is a lease of flats, offices, or rooms, in large buildings, an architect's plan is often accepted in practice, and that, too, is liable to the fixed checking fee of 5s.

ADOPTION OF CHILDREN.

Procedure in the Magistrates' Court.

(*Continued from p. 262.*)

Before continuing with the routine procedure leading to the adoption of children under the provisions of the Infants Act, 1908, it is helpful to make comparison with a few matters of procedure laid down in England under the Adoption of Children Act, 1926. The Court having jurisdiction to make adoption orders under that Act is the High Court, or, at the option of the applicant, any County Court or any Court of summary jurisdiction *within the jurisdiction of which either the applicant or the infant resides at the date of the application* (s. 8 (1)).

While no similar residential restriction is imposed by the New Zealand Act or rules, it is the practice here for the Court officer to discourage the filing of applications in a Court other than in the magisterial district where the applicant resides. In support of this it should be borne in mind that the Magistrate is concerned with promoting the welfare and interests of the child ; that the child's future home is inspected ; that the moral, social, and financial status of the applicant is investigated ; and that delays are avoided. It will not be denied that reasons may be advanced in favour of the application being filed elsewhere, in which case solicitors should present a memorandum of the facts and reasons to the appropriate Magistrate and ask for his direction or permission.

The rules under the English Act prescribe the form of petition which by s. 2 of the Act is the application to be filed in the Court. This petition sets out all of the matters required to be shown in the New Zealand application in conjunction with the facts required in applicant's affidavit in support. Important additions to the English petition arising out of the statute are (1) domicil, (2) nationality, (3) property child is entitled to, (4) names and addresses of persons liable to contribute to the support of child, and (5) reference to previous adoption or petition for adoption of the child. The New Zealand statute does not stipulate such requirements and the practice appears to be that all of those additional matters, if necessary, can be inferred or ascertained from the documents and reports filed. That may not be so, and solicitors would do well to ensure that the information is available for filing in affidavit form in the event that the Magistrate in the exercise of his discretionary powers may requisition it.

The English rules require the petition to be served on the parents, the guardians, the persons having actual custody, and the persons liable to contribute to the support of the infant, unless the Judge dispenses with service on any of those persons or otherwise directs service (R. 4). Except in the case of application to dispense with consents under s. 23 of the Infants Act, 1908, and s. 36 of the Statutes Amendment Act, 1941, service of notice of time and place of hearing of the application on the applicants only is required by the

New Zealand rules. As previously stated the applicant's solicitor has already advised them of the time and place for their attendance.

Adoption of children already adopted is dealt with specifically by s. 7 of the English Act, the consents required being those of the adoptive parents and not of the natural parents. No such provision is contained in the New Zealand Act, and it is generally considered that discharge of the existing adoption order under the provisions of s. 22 must precede grant to other adoptive parents (see dicta of Sir Michal Myers, C.J., in *In re H. (an Infant)*, [1944] N.Z.L.R. 367. Subject to conditions (if any) named in the discharging order the child and its natural parents shall be deemed for all purposes to be restored to the same position *inter se* as existed immediately before the order of adoption was made (s. 22 (2)). This renders the consents of the natural parents again necessary. Application for discharge is required to be made to a Magistrate exercising jurisdiction in the district where the adoption order was made (s. 22 (1)).

Reference to the English practice may be mentioned again to amplify the reasons for certain procedure here; for, in some respects, the statutory provisions follow one another closely in both countries.

Under the heading " Preparation of Documents " (*ante*, p. 262), attestation of the prescribed application and consents and of a certificate by " *a* Clerk of Court " (amongst others) was referred to. The rules prescribe that the application and consents may be so witnessed.

The definitions under s. 15 of the Act include—

> " Clerk of *the* Court " means the Clerk of the Magistrate's Court at which any application is made under this Act."

The evidence given by *affidavit* in accordance with s. 18 (1) (*b*) is referred to in s. 18 (2) which reads—

> The affidavit referred to in paragraph (*b*) hereof may be sworn before any Judge, Magistrate, Solicitor, Registrar or Deputy Registrar of the Supreme Court, Clerk of *the* Court, or any Justice.

While it is difficult to understand what the Legislature had in mind in placing that restriction on Clerks of Court who, in the main, are experts on adoption procedure and have more legal knowledge of the requirements of such evidence than " any " Justice of the Peace, it appears clear that *affidavits* should be sworn before the Clerk of the Court only where the application is filed.

Regarding the affidavit of character and means (Form 8, R. 8), also referred to on p. 262, *ante*, it sometimes occurs that where husband and wife are applying only one of the spouses is known to the deponent and in this event an affidavit by a further " reputable and well-known person " must be filed. It is considered that the persons furnishing such affidavits should be of sufficient prominence to be regarded by the Magistrate or the Police as of good repute and well-known.

CONSENTS REQUIRED PREVIOUS TO ADOPTION OF CHILD.

By s. 18 of the Act it will be seen that—

> (1) Before making such order of adoption the Magistrate— . . .
>
> (*e*) Shall require the consent in writing of the parents, whether living in or out of New Zealand, or such one of them as is living at the date of the application, or if both the parents are dead, then of the legal guardian of the child, or if one of the parents has deserted the child, then the consent of the other parent:
>
> (*f*) Shall not require any such consent in the case of a deserted child.

The questions arising as to the requirements demanded in clearing-off the natural parents or guardians of a child proposed to be adopted are numerous and are the subject of a considerable amount of judicial decision.

In the case of legitimate children whose natural parents or legal guardians have consented in writing to the adoption by specified applicants it is rare that any difficult problems arise.

However, with regard to illegitimate children who, as has been stated, are the subject of the majority of applications at the present time, the position is by no means clear concerning consents of other than the natural mother. The question as to whether the consent of the putative or natural father of an illegitimate child may be insisted upon cannot be regarded as settled from the point of view of the discretionary powers of a Magistrate. The putative or natural father can hardly be defined as a " parent " within the statutory provisions of Part III of the Act, and, therefore, it would appear that there is no justification for withholding grant of adoption merely for the reason that his consent is not filed or that he is not present or given the opportunity of attending at the hearing. The effect of an adoption under the Act is to—

> terminate all the rights and legal responsibilities and incidents existing between the child and his natural parents, except the right of the child to take property as heir or next-of-kin

The statute, encroaching on rights, is subject to strict construction, and in the absence of a clear intention expressed or implied by the Legislature it would appear that it does not desire to encroach on the rights of persons, or it will manifest it plainly in the legislation: see *Maxwell on the Interpretation of Statutes*, 7th Ed. 245.

The burden of certain authorities goes to show that the father of an illegitimate child has certain rights, though very limited in character, in respect of such child, and further, that the mother of such child is greatly, if not entirely, preferred to the father. It would appear that the Legislature has encroached upon such rights as exist of the natural father of an illegitimate child. In fact, it appears to have ignored him deliberately. In s. 15 of the Act is defined a deserted child—

> " Deserted child " means any child who, in the opinion of the Judge (Magistrate) dealing with such child under this Act, is deserted, and has ceased to be cared for and maintained by its parents, or by such one of them as is living, or by the guardian of such child, or by the mother of such child if the child is illegitimate.

The definition contemplates three classes of persons—namely, parents, guardians, and the mother of an illegitimate child. Nowhere in Part III of the Act is the father of an illegitimate child mentioned, nor is he included in the definition of " parent " under Part IV of the Destitute Persons Act, 1910, as to maintenance of children (s. 26 (2) (*a*) to (*d*) and (3) (*a*) to (*d*), or under s. 8 of the Guardianship of Infants Act, 1926, as a person whose consent to the marriage of an infant is required under Part II of the Schedule to that Act where he is ignored as having consequential rights as guardian of an illegitimate child whose mother is dead. While the New Zealand statutes have succeeded in imposing legal responsibilities upon a person adjudicated as the father of an illegitimate child (s. 10 of the Destitute Persons Act, 1910) and retaining his liabilities after an adoption order is made (s. 12, *ibid.*) there does not appear to be any statutory provision whereby his rights are, for the purpose of this Act, to be considered.

(*To be Continued*)

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. 53.—B. to J.

Rural Land—Dairy-farm—Excess Value of Buildings—Utility Value—Development of Productive Capacity—Need for Fertilizers —Subdivisional Value.

Appeal from the decision of a Rural Land Sales Committee.

The members of the Court made an inspection of the property with a view to the better understanding of the evidence in its various aspects.

The Court said: "The Committee in this case appears to have fixed the basic value of the property by first determining that the appellant paid a proper price for the farm when he bought it for £3,100, in September, 1942, and then adding a sum of about £900 to represent what it termed 'the utility value' of the considerable improvements since effected at much higher cost by the appellant. In the result, it assessed the basic value at £4,000. The sale price was £6,000 including the price of chattels valued by the appellant at £557, but by the Crown at £371 10s.

"On the hearing of the appeal there was a considerable conflict of evidence as to the productive value of the property. Mr. H., Mr. A., Mr. M., and Mr. T., witnesses for the appellant, all testified that the property in its present condition would carry sixty-five cows and that those cows would produce 250 lb. of butterfat per cow.

"From the totality of the evidence it can only be concluded that the state of the pasture at any given time on any property in the locality in which this farm is situated and, in consequence, the productivity at that time of any property there, which is the subject of inquiry, bears a direct relation to the quantity and character of the manure that has been applied during the preceding two or three seasons.

"As this land was not, to use the words of the appellant, 'seriously farmed' for some time before his purchase of it in September, 1942, and as since then and until very recently it has been used merely as a run-off for stock from the appellant's other properties, and has been given but limited quantities of manure, the Court has formed the opinion that the contention of the Crown witnesses is correct and that the pasture has neither the density nor the strength at the present time to maintain the number of cows which the appellant's witnesses considered it would carry. The Court also concludes that in the present state of the pasture a production of 250 lb. per cow cannot, in the average season, be reasonably expected. This having been a season of high, if not abnormally high, production, the returns this year may well reach or even exceed 250 lb. of fat per cow: it would, however, be unsafe to base any unqualified conclusions on peak figures of this type.

"A careful consideration of the evidence given by the appellant's witnesses suggests that they have been influenced in their view of the pasture, and its present productive capacity by what they know from their own experience it can, by proper manuring, be developed into and made to produce. This, and the relation which the pasture in that area bears to the quantity and quality of the manure used, are somewhat forcibly indicated by the evidence given by a neighbouring farmer, Mr. T. His pastures are admittedly somewhat better than the pastures on the farm of the appellant. Mr. T. testified that before restrictions were imposed he had been in the habit of using from 4 to 5 cwt. of superphosphate per acre per annum in addition to an aggregate quantity of from 10 to 20 tons of lime per annum over the whole property. Only the best farmers use so much manure, as the average farmer in the district limits his manure to 3 cwt. per acre.

"In the result, the Court feels that it has no option but to accept the carrying-capacity deposed to by the Crown witnesses, and no option but to find that the cows will produce 240 lb. of butterfat per cow, and no more.

"This leaves for consideration the question of how what Messrs. B. and L., the Crown witnesses, termed 'the excess value' of the buildings should be treated. They allowed a sum of £774 by way of addition to the productive value on this account. On the whole, the buildings, whilst good and in some respects excellent, cannot fairly be called excessive. The Court, however, has grave doubts as to whether they cost anything approaching the sum represented. If they did, then the appellant did not get value for his money.

"In the opinion of the Court the sum of £774 is a proper sum to allow for the excess value of the buildings: this both because that seems a reasonable assessment of the sum by which the buildings exceed in value the value of buildings usually found on such a farm and because a surplus value to that extent appears justified by the greater utility of the buildings in the working of the property. The productive value can, in consequence, be fairly increased by this sum of £774.

"This addition will, however, operate to increase the maintenance and depreciation items as the buildings to be maintained and in respect of which depreciation must be calculated are more valuable and extensive than is usually the case. Neither the type nor the character of the buildings suggests that they will cost less to maintain, nor that depreciation will be less than normal. Those items must, therefore, be calculated at a proper rate—2 per cent. for maintenance and 1½ per cent. for depreciation seem proper—upon the basis of buildings valued at £1,909.

"It is thought that a fair annual sum to deduct on this account would therefore be £66 16s. instead of £48 as shown in Mr. B.'s budget.

This is not the only item in the latter's budget which requires adjustment. He has adopted 16·793d. per pound for butterfat as the basis of his calculation of revenue. This is the sum paid by the dairy company to its suppliers. These latter, however, are required to invest capital without interest in order to qualify for the receipt of the payment or at least to qualify for the receipt of payment at this rate. As each supplier is required to take up one share for every 100 lb. of butterfat, the appellant, to receive a payment calculated at the rate of 16·793d. per pound, must take up some-hundred-and-forty £1 shares. Interest at 5 per cent. should, in the view of the Court (see the judgment of the Court in No. 43.—W. to B.) be charged on this sum and deducted from the total receipts for butterfat. This will reduce the latter total by some seven pounds.

The foregoing adjustments are all to the detriment of the appellant. There is, however, one item which should be adjusted to his advantage—that is, the amount charged in Mr. B.'s budget for labour reward. This topic is exhaustively discussed in the judgment of the Court in No. 45.—D. to S. and, on the principle there enunciated, the sum of £17 6s. 8d. which Mr. B. has charged in excess of the labour reward fixed by the guaranteed-price formula should be deducted from the total of his estimate of expenses. There is no justification for any extra allowance in respect of labour, for this property calls for no labour beyond that envisaged as necessary in the relative constituent item in the guaranteed price.

"In addition, Mr. B. agreed under cross-examination that an increase in production of 550 lb. of fat would have to be allowed if an additional sum of £17 per annum were expended upon manure. That an average efficient farmer would expend this sum on manure seems certain. Mr. B.'s budget will therefore require adjustment by crediting income with the proceeds of a further 550 lb. of fat and by charging up to outgoings an additional sum of £17 for manure.

"In the result, the outgoings shown by Mr. B. will have to be increased by a sum of £18 16s. in respect of depreciation and maintenance and by a sum of £17 in respect of the cost of additional fertilizer. On the other hand, the costs of labour and management will have to be reduced by £17 6s. 8d. A

sum of £7 must, however, be deducted as representative of the loss of return on moneys invested as share capital.

"On the income side of Mr. B.'s computation the receipts will have to be adjusted by increasing the butterfat production by 550 lb. of fat. This requires an increase of £38 10s. in the total revenue. When all these adjustments are made, it will be found that the total revenue is £1,121 10s., and the total debit by way of expenditure and the like £962 9s. 4d.

"This shows a surplus of £159 0s. 8d. This surplus capitalized at 4½ per cent. gives a total productive value of £3,534 1s. 11d. To that value, however, must be added two items: first, the sum of £774 in respect of the excess value of the buildings; and, secondly, the sum of £111, being the value of the 6 acres of undeveloped land. The result is that the basic value of the land is £4,419 1s. 11d., say, £4,420.

"Some evidence was given that the property, as to its frontage, had a subdivisional value. Having regard to the extent of land of similar character closer to Rotorua which is available for subdivision, there seems little prospect that any of this farm will be wanted for subdivisional purposes for some considerable period. The Court does not therefore, in the absence of any present market, or any potential market within reasonable anticipation, attach any additional value to the land on this account.

"The basic value of the property is fixed at £4,420 and consent is given to the sale of the land at that price. This figure does not, of course, include the value of the chattels sold."

No. 54.—H. to X.

Land Sales Committee—Jurisdiction—"Such order as is just and equitable"—Principles upon which such Jurisdiction exercisable—Consideration of Party's Bad Faith—Servicemen's Settlement and Land Sales Act, 1943, s. 63.

Appeal against the decision of the Wellington Urban Land Sales Committee given on July 5, 1945. By that decision the Committee purported to refuse to consent to the withdrawal of an application for consent to the sale of a house property to W. and refused to consent to the sale of the same property to a second and later purchaser, Mr. X.

The Committee expressed the view that, in the circumstances, the respective purchasers might well have legal rights, the enforcement of which lay outside the ambit of the Committee's jurisdiction. The Committee expressed itself as intending to leave these rights unprejudiced by its decision. As authority for its proceeding, the Committee relied upon s. 63 of the Servicemen's Settlement and Land Sales Act, 1943, which confers upon a Committee the right to make such order as is just and equitable in the circumstances.

The Court said: "This being the first occasion upon which this particular provision of s. 63 has been invoked, it is desirable to define the principles on which that phase of the section should be administered.

"These principles are it is thought, the same, or substantially the same, as the principles which apply with respect to the confirmation of alienations of Native lands. They have, in that relation, been made the subject of a number of authoritative decisions. In *Bond* v. *Coleman and Clarke*, ((1882) N.Z.L.R. 1 S.C. 171, *Richmond*, J., in agreeing with the judgment of *Gillies*, J., in *Russell* v. *Campbell*, (1878) 4 N.Z. Jur. N.S. 19) said: 'The Commissioner ought to confine himself to questions of equity and good conscience; so that, for instance, in the too frequent case of a Native selling the same land to successive purchasers, the Commissioner ought to give each purchaser a certificate if he finds that the second purchaser has paid his money in ignorance of the former purchase; thus leaving the two to fight out the battle for priority before some competent tribunal. . . . . On the other hand, should the Commissioner find that the applicant for a certificate when dealing with a Native was actually aware of the existence of some prior *bona fide* contract, or disposition, plainly inconsistent with his own proposed transaction, the certificate should be refused, the new transaction being contrary to equity and good conscience': *ibid.*, 173.

"*Sir James Prendergast*, C.J., in *Hapi Puketapu* v. *Rewiri Tokoiwa*, (1893) 12 N.Z.L.R. 688, added a qualification when he said: 'Where there is a dispute between an owner of land and one who alleges he is purchaser of the land or an interest in it, the owner does not, nor does any one who with knowledge of the dispute purchases from him, necessarily act with *mala fides*': *ibid.*, 694.

"*Sir Robert Stout*, C.J., dealt with the same topic in *In re Brown*, [1916] N.Z.L.R. 580. He said: 'I may add, further, that I agree with what was stated in two or three cases that have been decided in New Zealand, that if the Maori Land Board should find that there are two Europeans claiming to be entitled to a confirmation, say, as in this case, of a lease and a transfer of a lease, and both claiming that they are the original grantees of either the lease or the transfer of the lease, it might be wise for the Maori Land Board to confirm both transactions if they are not contrary to equity and good conscience, leaving the parties to their redress in the Supreme Court as to who had priority': *ibid.*, 583.

"*In re Brown* was overruled, but not on this point: *Nuku* v. *Phillips*, [1920] N.Z.L.R. 446.

"*Russell* v. *Campbell* and *Bond* v. *Coleman and Clarke* were approved by the Court of Appeal in *Wilson* v. *Herries*, (1913) 33 N.Z.L.R. 417. Their purport is summarized in the judgment of the Court, delivered by *Edwards*, J., where it is stated: 'There is here an express decision . . . that the tribunal charged with the inquiry into such matters must confine itself to the matters specified in the statutory provision which directs the inquiry; and that, if that tribunal finds that an instrument presented for inquiry complies with the provisions of the statute, it must grant its certificate without considering the effect upon the title, or whether the instrument will affect the title—if this were not so it is plain that very great injustice might result: *ibid.*, 425.

"The judgment then proceeds to point out that, in the absence of confirmation under the Native Land Act (just as in the absence of consent under the Servicemen's Settlement and Land Sales Act), a party is deprived of all legal rights, for without consent, the contract, in terms of s. 46 of the latter Act, is unlawful and void.

"What evolves, therefore, is that the purpose of the Servicemen's Settlement and Land Sales Act being to regulate prices, so long as the price does not exceed the basic value, all applicants for consent are entitled to that consent unless the Committee, as a tribunal of conscience, considers that one or other is affected with bad faith, in which case consent to the sale to the one so affected can properly be refused.

"These being the principles applicable, it is now convenient to examine the facts of this particular case. The Court has investigated those facts fully, and the witnesses who testified to them have been subjected to cross-examination. So far as they are material, the incidents, stated chronologically, are as follows: April 12, 1945.—Consent granted to the sale to W. subject to a reduction of the price from £2,435 to £2,015, plus £10 for chattels. April 18, 1945.—(*a*) Agreement for sale and purchase signed by Messrs. H. and X. (*b*) H. and Co. who, as agents, had introduced W., wrote Mr. H. that W. would complete at the reduced price fixed by the Committee. April 23 1945.—W.'s solicitors wrote that H. and Co. would forgo their claim to commission on the sale to W. May 8, 1945.—Notice of appeal lodged by W. June 4, 1945.—Letter received from W.'s solicitors withdrawing the appeal, but without prejudice to W.'s rights under his contract for sale. July 5, 1945.—Committee gave its decision, the subject of the present appeal. July 18, 1945.—Notice of appeal given by Mr. X.

"The crucial period is the period between April 12 and April 18, for it is during that period that the events occurred which culminated in Mr. X. becoming a purchaser, so that it is in respect of the events which occurred in that period that any equity arose, if any did in fact arise.

"There had, it appears, been discussions between Mr. H., the vendor, and Mr. X. early in the year when the latter visited the former as a result of having been told by a mutual friend that Mr. H. wished to sell his house. Before that time the parties were not acquainted. If they had met, Mr. X., at least, had forgotten the circumstances. On this occasion Mr. X. inspected the property and left with Mr. H. a verbal standing offer of £2,100. That sum represented Mr. X.'s maximum price. Mr. H. wanted and expressed himself as intending, if possible, to get more. He, however, undertook to advise Mr. X. if any further offer were received, the understanding being apparently that in that contingency Mr. X. was to have an opportunity of raising his offer.

"In due course Mr. H. found in W. a purchaser at £2,435. He advised Mr. X of this fact, but the latter was not prepared to increase his offer. W. was introduced by H. and Co., a well-known firm of land agents, into whose hands, subsequent to his interview with Mr. X., Mr. H. had put the property for sale.

"When the Committee reduced the price from £2,435 to £2,015 Mr. H., having regard to his promise, felt himself under some obligation to still give Mr. X an opportunity of purchasing the property, the sale price permitted being below the amount of Mr. X.'s original offer. Mr. H. telephoned Mr. W., told him that the sale at £2,435 had been, as he put it, 'turned down,' that he had explained to W. that, in the circumstances, Mr. X. should have the first right to buy at the reduced price, that W. agreed and was already looking for a property elsewhere. Mr. X. expressed himself as still interested and, within a matter of days, the sale to Mr. X. was arranged and a sale-note executed.

"It is obvious that Mr. X. acted with propriety throughout the transaction. His *bona fides* in the matter were not in any way challenged in cross-examination; nor was it suggested in cross-examination that the confirmatory account of the transaction given by Mr. H. was other than entirely correct. The only adverse comment possible seems to be that Mr. H. elected to sell to a purchaser with respect to the sale to whom no commission would be payable, in preference to selling at the same price to a purchaser in respect of the sale to whom, as he then thought, a commission would be payable.

"The Act does not purport and cannot be construed as requiring a vendor to sell to any particular purchaser. A landowner is entitled to select any purchaser he likes, and it would be strange if Mr. H., who had known for a considerable time that Mr. X. would buy at a price up to £2,100, should be accused of bad faith because he preferred to sell to Mr. X. rather than to a subsequent buyer with respect to whom he had every reason to believe, at that stage, a commission would be payable. Besides, in this instance, Mr. H. felt himself bound in honour to give Mr. X. the opportunity to buy, and, apparently, with that conclusion W. agreed. In the circumstances, no question of bad faith arises, and recourse could not properly be had to the just and equitable provision of s. 63.

"In accordance with the principles to which reference has been made, consent to the sale to Mr. X. should have been given, and the same is now given.

"It may be of use in some future proceeding if the Court adds the comment that, as at present advised, it does not think that any application to withdraw the application for consent to the sale to W. could be other than a nullity when the application to withdraw was made and, equally so, on July 5, when the Committee's decision was given. The application for consent to the sale to W. was disposed of when the Committee gave its decision on April 12 and the Committee's order became final and conclusive on June 4 when W. withdrew his appeal. There was, in consequence, no application to sell to W. fit, at any material time, to be made the subject of an application for leave to withdraw.

"There was a consent to the sale to W. under which, if he had any rights, he could enforce them. Mr. X. could have no enforceable rights unless the Committee gave consent to the sale to him. This serves to emphasize the need there is for appreciation that the primary function of a Committee is to control prices, and that, for the rest, in the absence of bad faith, its function in all cases where it is satisfied upon those topics upon which, in terms of the statute, it has to be satisfied, is to give consent, thus leaving contending parties to seek their remedy before the Courts established to enforce those remedies. To act otherwise is to appropriate a jurisdiction which Committees do not possess."

No. 55.—S., LTD. TO B.

Urban Land—Section in Subdivision—Price of Sections in Immediate Locality—Indication of Value—Discrimination between Sections sold.

Appeal concerning the value of Lot 71 of a subdivision at Haughton Bay, Wellington. The area was 26.7 perches.

The Court said: "The lot has a number of advantages in that it is in a sheltered position, has a view, although a somewhat limited one, of the entrance to the harbour, and reasonably good access for the delivery of building materials on the site. As against these advantages, it has a number of disadvantages. It is a steep section with a considerable area of waste land on or towards its southern boundary, while the approach by Cave Road is steep and rough.

"Mr. G., a witness for the appellant, relied, in fixing his value of the lot, on the recent sale of Lot 74 for £200. Consent to that sale was, however, given without a hearing, so it is not as reliable a basis as it otherwise might have been upon which to judge other sales in the locality.

"On the other hand, Mr. M., for the Crown, relied upon an equally unstable basis when he referred to the value of Lot 73. Any inference as to the price paid for the land on the sale of that lot depends on the accuracy of the assumption as to what the purchaser paid for the house and other improvements. Such instances are not without value, but they clearly must be viewed with discrimination.

"Lot 102, the sale of which was approved at £175, was also referred to as an indication of value. Lot 102 is a good section which lies particularly well and has no hollow as was suggested. The price realized for it seems, however, to afford some indication of the value of sections in the immediate locality. The sale of Lot 54 at £125 in 1939 is also an indication of value, but Lot 54 is a larger section. These sale prices afford a more reliable basis than taking an average of sales spread over a considerable number of lots and over a good many years, and then arriving at a conclusion by working out the average prices paid on an area basis.

"Taking every factor into account, £90 seems too low a value to attach to Lot 71. Its real value would seem to be £110. The basic value of this lot is therefore fixed at that sum accordingly, and the appeal allowed to that extent. Consent to the sale of Lot 71 at £110 is given."

DEVIL'S OWN GOLF TOURNAMENT.

A Successful Outing.

The Devil's Own Golf Tournament, held at Palmerston North, on September 22–24, was an outstanding success, with a record attendance, and "a good time was had by all." The following were the prize-winners:—

Guarantee Fund Handicap: K. N. Struthers, 1st; L. M. Abraham, 2nd.

Stabilization Handicap: R. J. Carruthers, 1st; A. M. Hollings, 2nd.

Certiorari Handicap: P. C. Miles, 1st; R. J. Carruthers, 2nd.

Public Trust Bogey Handicap: J. E. Matheson, 1st; R. T. Peacock, 2nd.

Teams Match: J. E. Matheson, K. N. Struthers, R. J. Carruthers, and R. Siddells.

Distress Foursome: A. M. Ongley, and C. C. Marsack.

Butterworth's Hurdle Four-ball: E. D. Blundell, and R. E. Pope, who will hold the LAW JOURNAL Cup for the ensuing year.

Qualifying Rounds: K. N. Struthers.

Devil's Own Cup: J. A. Ongley, winner; J. Matheson, runner-up.

Ancient Lights: S. W. Rapley, winner; S. A. Wiren, runner-up.

Paupers' Appeal: F. P. Fawcett, winner; C. H. Hain, runner-up.

LAND AND INCOME TAX PRACTICE.

Legal Costs incurred by Partnership Firm.—In the recent case, *Spofforth and Prince* v. *Golder* (*Inspector of Taxes*), [1945] 1 All E.R. 363, the appellants were partners of a firm of chartered accountants. The appellant S. had advised one White to form a company with the object of avoiding the payment of sur-tax. Subsequently S. received a letter from the Solicitor of Inland Revenue stating that he wished to take evidence from two employees of the appellant's firm, in order to determine whether there had been any infringement of the criminal law. S. immediatly consulted his solicitors who arranged for the statements to be taken in their presence. The Solicitor of Inland Revenue advised the solicitors of S. that the facts disclosed constituted a conspiracy by S., White and other persons to defraud the Crown. In due course S. and White were summoned to appear before the Bow Street Police Court on a charge of defrauding the Revenue. When the summons was issued S.'s solicitors who had so far acted for the appellants jointly as a partnership firm, advised him that arrangements for separate representation should be made This was done and on the hearing of the summons the appellant S. was represented by leading counsel and junior counsel. The appellant P. retained leading counsel and junior counsel to hold watching briefs. The final result of the proceedings, after several adjournments, was that Magistrate dismissed the summons. The total of the costs incurred by the appellants in connection with these proceedings (including the costs incurred before the issue of the summons and the costs of the watching of the proceedings on behalf of the appellant P.), was £1,187 4s. 3d. In their profit and loss account for the year ended March 31, 1941, the appellants showed "legal costs" amounting to £1,052 as an expense, and the question at issue was whether this sum, being part of the legal costs incurred in connection with the criminal proceedings, was in whole or in part an allowable deduction in computing the profits of the firm for the year in question.

It was held that (i) the costs of the solicitors acting for the appellants' firm down to the issue of the summons were costs incurred by the appellants for ordinary professional purposes and, therefore, deductible; and (ii) neither the costs of the defence of S., even if they were strictly incurred by the firm, and not by him personally, nor the costs in respect of the advice and separate legal assistance of P., were disbursements or expenses wholly and exclusively laid out or expended for the purposes of the appellants' profession.

The learned Judge, Wrottesley, J., applied the test laid down by Lord Davey in *Strong and Co., Ltd.* v. *Woodifield*, [1906] A.C. 448, 5 Tax Cas. 215, when he said: "It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits." In the course of his judgment, he said, "In order to succeed in this claim it must be shown that these costs were incurred by the appellants' firm, and were moneys wholly and exclusively laid out or expended for the purpose of the appellants' profession—accountancy. Alternatively, the appellants claim that the sums so expended were an allowable deduction in computing their profits. The Commissioners found that these costs were not wholly and exclusively laid out or expended for the purpose of the profession, and were not allowable as a deduction under Schedule D, case II. . . . The establishment of Spofforth's innocence, the saving of him from conviction and punishment, are matters which must have been the purpose of the expenditure, just as it would have been had the charge been one of fraud against Spofforth in his personal capacity. No doubt Spofforth was an important member of the firm, and his conviction, and still more his, imprisonment, would have been a severe blow to it. That however, is not the test. It is not every expenditure made by a firm which falls within the definition, however prudent it may be, even though it may tend to benefit the firm."

Referring to the test laid down by Lord Davey in the case of *Strong and Co., Ltd.* v. *Woodifield* (*supra*), the learned Judge said: "Here it is once more: Is the disbursement one made not merely in the course of, or arising out of or connected with, or made out of the profits of the profession, but also for the purpose of earning the profits of the profession? . . . As I have said, it was, of course, important to Spofforth and to his partner, and so to the firm, that he should be acquitted, or still better that the charge should be dismissed by the Magistrate. But so was it important to the appellant in *Norman* v. *Golder*, [1945] 1 All E.R. 352, a shorthand writer, that he should recover his health. *Mutatis mutandis* I could apply almost word for word the reasoning of Lord Greene, M.R., in that case, substituting for the doctor's bill in that case, the lawyer's bill in this case, and for Norman's bodily health—Spofforth's good name and freedom. I am driven therefore, to this conclusion, that in respect of the bill of costs for Spofforth's defence, even if it were strictly incurred by the firm, it is not deductible."

Referring to the bill of costs incurred by the firm before the issue of the summons, the learned Judge said: "There had been a somewhat unusual demand by a Government Department to interview servants of the firm, and in that case it was an ordinary business precaution that the firm's solicitors should be called in to advise. If, therefore, any appreciable sum of costs was incurred by the firm up to this point, it is, in my view, properly to be deducted."

Regarding the costs incurred by Prince whose solicitors' held a watching brief for him, His Lordship observed: "Prince was not the partnership, and the object and purpose of the retainer by Prince of Messrs. Godden, Holme, and Ward was not the best interests of the partnership, but the best interests of Prince, if necessary at the expense of the partnership. Moreover, counsel for the appellants agrees that unless the costs were authorized in advance to be incurred by the partnership they cannot be said to be incurred by it. These costs seem to me to be comparable with the charges which Prince doubtless incurs in order to reach the firm's office in the morning. Here again, therefore, I am quite unable to say that on the facts so carefully found by the Commissioners, and supported by the documents, the Commissioners were wrong in saying that the costs of Messrs. Godden, Holme, and Ward were not expenditure by the firm solely and exclusively for the purposes of the partnership profits, as a firm of accountants."

Moneys Expended in obtaining Employment.—In *Henderson Shortt* v. *McIlgorm* (*Inspector of Taxes*), [1945] 1 All E.R. 391, the appellant obtained a position through an employment agency as Secretary-accountant to a firm at a salary of £450 per annum. On his appointment a fee of £30 became payable to the agency, calculated at the agreed rate of 5 per cent. of the appellant's remuneration for the first year. He claimed to deduct the amount of £30 from his salary on the ground that the fee was entirely dependent on the amount earned in performing the duties of the office, and that it was money expended by him in performing such duties. The Commissioners disallowed the deduction and a case was then stated for the opinion of the King's Bench Division of the High Court of Justice. The appellant's contention in the case stated was that the sum of £30 was an expense necessarily incurred within the meaning of Schedule E, r. 9, and that by having obtained the post through the agency he became liable to pay their fee, the amount of which depended on the salary actually earned, and that he was, therefore, necessarily obliged to incur and defray, out of the emoluments of his office, the money so expended.

It was held that the money expended in order to obtain employment was not money spent in the performance of the duties attached to the employment within the meaning of Schedule E, r. 9.

In the course of his judgment Wrottesley, J., said: "It seems to me that where the appellant's claim fails is that this expenditure was not money spent wholly, exclusively and necessarily in the performance of the said duties; indeed, I go so far as to say it was not spent in the performance of the said duties at all within the meaning of that rule. It was money, the liability to pay which was incurred when he went to this particular employment agency and when they found him a job, for he then became liable, subject to certain conditions, to pay that money in respect of the services which he had received from the employment agency in finding him the job; so that the money expended in order to get the job was in no sense money spent in the performance of the duties attached to the job; and I think, therefore, that the commissioners came to a right conclusion."

Farming Partner: Depreciation on Residence.—A member of a partnership engaged in a farming business is employed by the partnership as the farm-manager and is provided with a house. He is assessable on the salary received plus the full value of any allowances, such as free house, food, fuel, &c., and depreciation on the full cost price of the house occupied by him is allowable as a deduction in arriving at the income of the partnership.

THE LATE MR. S. I. GOODALL, S.M.

Tributes to His Memory.

"His life was a life of work, and the many textbooks and legal works which bear his name as author will be a monument to his knowledge and industry" said Mr. J. H. Luxford, senior Magistrate in Auckland, on September 17, when the Bench and Bar gathered in the Magistrates' Court to pay tributes to the memory of the late Mr. S. I. Goodall, S.M., whose death occurred suddenly on the night of the 17th. Associated with Mr. Luxford on the Bench in the crowded Court-room were Mr. F. H. Levien, S.M., and Mr. J. Morling, S.M. The President of the Auckland District Law Society, Mr. A. Milliken, spoke on behalf of the legal profession.

THE MAGISTERIAL BENCH.

After thanking the President and members of the Auckland District Law Society for attending the Court to join with the members of the Magisterial Bench in paying tribute to the late Mr. Stephen I. Goodall, Mr. Luxford said that he had had a long personal friendship of over twenty years with the late Magistrate. He remembered his first meeting with him soon after he became a member of the staff of Messrs. Stanton, Johnson, and Spence, and his lovable personal qualities and his profound knowledge of the law soon became apparent.

"I have watched his career with interest and was delighted when at last I knew that he was to be appointed to the Magisterial Bench and was to become one of the Magistrates presiding over the Courts in the City of Auckland." Mr. Luxford proceeded:

"It is somewhat unique that a practitioner of the City of Auckland should be appointed to the Bench in Auckland. Probably in no other case would such have been justified; but he had already served with distinction on a number of judicial bodies and became so identified with judicial work in the Auckland Province that his elevation to local Bench of Magistrates followed almost as a matter of course.

"It is only a little over three months ago that I had the honour and the privilege of administering to him the oaths that he was required to take on assuming office as a Stipendairy Magistrate, and now unfortunately we meet together to pay tribute to his memory. In the short space of time since his appointment he endeared himself to his brother Magistrates, to the staff of this Court, and, I think, to the members of the legal profession.

"He came to the Bench well equipped with legal knowledge and well skilled in legal principle and, above all, well skilled in the ways of human nature. But the hard grind of legal research and composition did not diminish an ever ready and impish wit, or the faculty of calling to mind an anecdote apposite to the occasion."

Mr. Luxford went on to say that he did not propose to deal with Mr. Goodall's career as a member of the legal profession; that was much better known by his brother practitioners with whom he was so recently associated. He wished to speak of him as a member of this Bench.

"In a metropolitan area where the Courts of summary jurisdiction deal with matters intimately affecting the lives and homes of so many people as well as matters involving questions of law and fact, it is necessary that the Magisterial Bench should be a well-knit, smooth-working, and co-operative team. Mr. Goodall fitted in from the very beginning," Mr. Luxford said. "We will miss greatly his wise and kindly counsel in those frequent conferences at which we discuss our work and our problems. The work of the Magistrates' Court is very important and is likely to become more important still; and it was, I think, a matter of congratulation to the country when Mr. Goodall accepted appointment to the Bench. It is essential that appointees to this Bench should be experienced in the ways of legal practice. It is just as essential that he be experienced in the ways of human beings. Mr. Goodall had both these qualifications. His innate sense of decency and honesty did not, however, lessen his understanding and appreciation of the frailties of human nature nor his desire whenever possible to temper justice with mercy. My brother Magistrates and I regarded Mr. Goodall's appointment with the greatest pleasure, knowing how well qualified he was to undertake his duties; and, during the few months that he worked on this Bench, he justified to the fullest extent the hopes we expressed when we heard of his appointment."

"A gathering such as this is tinged with sadness. We see cut off in the very prime of life when ripe judgment follows intensive research and training, a very brilliant mind and a very lovable gentleman. His untimely death is indeed a loss to this Bench. To his widow and his children, to whom his loss is so much greater, we extend our very deep and sincere sympathy."

THE AUCKLAND LAW SOCIETY.

Mr. A. Milliken, President of the Auckland Law Society, said that the members of the legal profession assembled were anxious to join with their Worships in paying tribute to the memory of their late colleague.

The speaker recalled that the late Mr. Goodall was born at Kaikoura, in 1896, and received his education at the District High School there and at Wellington College. Upon leaving college, he took up farming as a career on his own property at Otorohanga, which he sold when he joined the forces during the War of 1914–1918. He was in a reinforcement draft in Trentham Camp ready for overseas service, when the Armistice was declared. Upon discharge from the forces he decided to study law, and enrolled as a student at Victoria College, while he took up a position in the legal office of Messrs. Meek and von Haast. In 1921 he was admitted as a solicitor, and in the following year he was admitted as a barrister. He gained his Master's degree in law in 1923, and was awarded the Jacob Joseph Scholarship in Law and the Senior Scholarship in Law for New Zealand. Mr. Milliken, went on to say that Mr. Goodall, in 1923 joined the firm of Messrs. Stanton, Johnstone, and Spence, in Auckland; and, in 1927, he commenced practice on his own account, to be joined in 1929 by Mr. H. L. Kayes. Again, for eighteen years he was a Lecturer in Law at the Auckland University College. On the passing of the Mortgagors and Lessees Rehabilitation Act, 1936, he was appointed Chairman of an Adjustment Commission. Later he was appointed Crown Representative for the Whangarei Armed Forces Appeal Board. He was the first Chairman of the North Auckland Land Sales Committee. Local politics claimed his interest when for three years he was a member of the Mount Roskill Road Board.

In the field of sport, Mr. Goodall was an enthusiastic tennis player, and was the founder, first President, and first life member of the Waiata Tennis Club.

For five years he was a member of the Council of the Auckland Law Society of this District.

"His writings on 'Conveyancing' and the 'Law of Real Property' will ever be a lasting monument to his great knowledge on such matters, the speaker continued:

"He was the author of *Conveyancing in New Zealand*, and he edited the Third Edition of *Garrow's Real Property*. He was the author of the *New Zealand Supplement*, in two volumes, of the *Encyclopaedia of Forms and Precedents*, a *magnum opus* which took him two years to complete, and is undoubtedly the *vade mecum* of the conveyancer.

"A few short months ago he stood in our ranks, and his elevation to the Magistracy was an event which evoked the heartiest congratulations of us all.

"Few men have accomplished what he had in such a short space of life, nor have they done so and not 'lost the common touch.' We were proud of his academic attainments. We admired him for his breadth of vision, for the diversity of his interests, and for the enthusiasm he always showed in the advancement of legal knowledge. He was an inspiration to the younger members of the profession, and he knew them all personally as his friends. He had a kindly and lovable nature; he was a modest man and had a keen sense of humour; and he regulated his life by square conduct, level steps, and upright intentions.

"We respected him for his great ability; we all liked him for his friendliness and his pleasing personality; and, though he was for all too short a period of time a worthy and respected member of the Bench, it is as one of our fellow-practitioners that we shall ever hold the name of 'Steve Goodall' in sincere and affectionate memory.

"To his bereaved widow and daughters we extend our heartfelt sympathy and trust that the Great Architect of the Universe will dry the tears from their swollen eyes, and console and support them and keep ever green in their hearts and minds sweet memories of a loving and devoted husband and father."

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

Juries that Linger.—The invitation extended to a jury recently by the Chief Justice to find two accused persons guilty without leaving the box may have been warranted by the facts of the particular case in which the charge was theft by a servant of a large sum and in which the evidence was plain and uncontradicted. In this instance, the invitation was not accepted and was followed, after the jury had been out for some hours, by a sharp reminder of their duty. However, it is respectfully submitted that such a course should be adopted only in exceptional cases, since, if the jury are deprived of the opportunity for deliberation, their verdict cannot be other than a prompt echo of the Bench's own view. Some years ago, in a criminal trial in New South Wales, the Judge, expecting a speedy verdict and conviction, found on their being called into Court that the jury were disinclined either to have the evidence read over or to receive any further explanation. After a further interval of some hours, they were recalled into Court when it seemed that one only of the number was being difficult, whereupon His Honour stressed the desirability of a decision being reached without further delay and the duty of a juror to reconsider his opinion on finding that his fellows, free from doubt upon the evidence, had been able to reach a firm conclusion. After some moments of this, the odd man, flushed with indignation, could contain himself no longer and burst forth: "But, Sir, I am the only one on your Honour's side!"

Dicks.—Called upon to advise an ill-intentioned and blundering client who would insist on referring to the detectives in the case as "the dicks," Scriblex has pondered over this piece of criminal argot. Was the client using an abbreviated mispronounciation of "detectives," or was he kin with Biron of *Love's Labour's Lost* with his distain of

> Some carry-tale, some please-man, some slight zany
>
> Some mumble-news, some trencher-Knight, some dick.

Is "dick" an instance of slang extending its vocabulary by the use of hidden resemblances as "bull" for policeman, "ice" for diamonds, and "third-degree" from the highly respectable science of freemasonry? The great Victorian novelist took a keen interest in the administration of justice but the "dick" is not a shortening of his name. Nor is the expression "the dickens!" associated with it, as it occurs in 1598 in *Merry Wives of Windsor*: "I cannot tell what the dickens his name is." In this phrase, as in its more popular fellows, "the dickens take you," and "you can go to the dickens," it would seem that the Devil is contemplated, and it may well be that it was with Old Nick that the client associated the detectives who plagued him so.

The Humour of Lord Macnaghten.—Lord Macnaghten was fond of importing a touch of gaiety to the judicial work of the House of Lords and the Privy Council. many of his judgments are storehouses of polished legal humour. "Fraud," he once said in a judgment, "is infinite in variety; sometimes it is audacious and unblushing; sometimes it pays a sort of homage to virtue, and then it is modest and retiring; it would be honesty itself if it could only afford it." In another case, when the Law Lords were reversing a decision of the Lord Justices, Lord Macnaghten began his judgment thus: "This case seems to me to be very plain and very simple, but I must express my opinion with diffidence, because I find that the view which I venture to think so plain and simple has been described by one of the learned Lord Justices in a most elaborate judgment as 'based on premises which are absurd and ridiculous.'" On another occasion—a passing-off case relating to rival ales sold under similar names—counsel's argument as to the means that could be taken to bring to the notice of consumers the distinction between the two beverages provoked the following comment from Lord Macnaghten: "Thirsty folk want beer, not explanations." When eighty-two years of age Lord Macnaghten took the chair at a dinner given by the Chancery Bar to Lord Haldane on the occasion of his appointment to the Lord Chancellorship. In a speech which delighted all hearers, he described Lord Haldane as having been a junior in whose presence a leader always felt a little shy, and as one whose arguments in the House of Lords he had always listened to with pleasure and often understood!

The New Order.—In his new, and greatly praised book, *Law and Orders*, Dr. C. K. Allen, K.C., relates the following incidents as having been mentioned to him on excellent authority and as being typical of many others. A bench of Magistrates dismissed a charge on legal grounds, under a Defence Order. The prosecuting Ministry demanded that a case should be stated for the High Court. The Magistrates refused on the bold ground that the application was frivolous. They then waited, with some trepidation, for a mandamus to compel them to state a case. To their surprise, it never came. Soon after, one of the Magistrates met an official in the Ministry (a personal friend), and asked why the recalcitrant Justices had not been made to toe the line. The official replied, with some condescension: "Well, it was hardly worth our while, you know—it is much easier to make a new Order."

View Points.—In *McGrath* v. *Donaghy's Rope and Twine Co., Ltd.*, heard before Ongley, J., at Dunedin, the plaintiff claimed compensation for disablement due to his changing to a draughty rope-walk from a heated condition arising from exertion. For the defendant, A. N. Haggitt said: "Your Honour, you saw the factory to-day, and, if you looked at the workmen I am sure you did not see any sign of anybody doing any exertion worth speaking of." . . . In the Supreme Court Library at Wellington is posted details of a rehabilitation course in "The Interpretation of Statues." But would it not be preferable for the jaded professional man to accept statues in their natural sense rather than to place upon them a more forced construction?

PRACTICAL POINTS.

This service is available free to all paid annual subscribers, but the number of questions accepted for reply from subscribers during each subscription year must necessarily be limited, such limit being entirely within the Publishers' discretion. Questions should be as brief as the circumstances will allow; the reply will be in similar form. The questions should be typewritten, and sent in duplicate, the name and address of the subscriber being stated, and a stamped addressed envelope enclosed for reply. They should be addressed to: "NEW ZEALAND LAW JOURNAL" (Practical Points), P.O. Box 472, Wellington.

1. Land Transfer.—*Agreement for Sale and Purchase of Land—Restrictive Covenant by Purchaser—Whether registrable or caveatable under the Land Transfer Act.*

QUESTION: A., by written agreement for sale and purchase agreed to sell a parcel of land under the Land Transfer Act to B., who covenanted not to build on the land a house of a less value than £2,000. The transaction has been approved by the Land Sales Court and the transfer from A. to B. is about to be drawn. I am acting for A., the covenantee, who is retaining the balance of the land in the estate and desire to protect his interest as covenantee. Can the covenant be inserted in the transfer? If not, can A. caveat the title after the transfer has been registered? In this latter connection you are referred to the following extract (cited with approval in *Hutchen's Land Transfer Act*) from the judgment of Sir John Salmond in *Wellington City Corporation* v. *Public Trustee*, [1921] N.Z.L.R. 423, 434, where, after citing s. 146 of the Land Transfer Act, 1915, he says: "Notwithstanding a dictum to the contrary in *Staples* v. *Corby*, it is not clear to me that this provision is inapplicable to a person claiming the benefit of a covenant or agreement that runs with and binds the land in equity": see *Hutchen's Land Transfer Act*, 2nd Ed. 142.

ANSWER: The restrictive covenant cannot be registered under the Land Transfer Act, and cannot be inserted in the transfer: *Staples* v. *Corby*, (1900) 19 N.Z.L.R. 517, 530, *Wellington and Manawatu Railway Co., Ltd.* v. *Registrar-General of Land*, (1899) 18 N.Z.L.R. 250; *Staples* v. *Mackay*, (1892) 11 N.Z.L.R. 258, 262; *Martin's Conveyancing in New Zealand*, 206.

In the jurisdictions where restrictive covenants are registrable under the Torrens system, there is special Legislative provision—*e.g.*, England and Ontario: *Hogg's Registration of Title Throughout the Empire*, 176. Thus also the registration of fencing covenants had to be specially authorized in New Zealand: see the Fencing Act, 1908, s. 7.

For a similar reason a caveat cannot be registered to protect the restrictive covenant. The preponderance of judicial and professional opinion is that a caveat can be registered only if it is to protect an interest or estate which is capable of being transformed into a registrable interest. *Wellington City Corporation* v. *Public Trustee*, [1921] N.Z.L.R. 523, was varied by the Court of Appeal, [1921] N.Z.L.R. 1086, although the point under discussion was not mentioned. The basis of Sir John Salmond's opinion on s. 146 of the Land Transfer Act, 1915, however, was his construction of s. 197 of that statute, and that construction is opposed to the construction of the Full Court in *Carpet Import Co., Ltd.* v. *Beath and Co., Ltd.*, [1927] N.Z.L.R. 37, 59.

The covenant is good in equity despite its non-registrability, and would prevail against a purchaser who had notice of it: *Tulk* v. *Moxhay*, (1848) 2 Ph. 774, 41 E.R. 1143; *Staples* v. *Corby* (*supra*). The difficulty in practice is to fix a purchaser with notice. It is submitted that B. should have expressly covenanted with A. to get a purchaser from him to make a similar covenant with A. at B.'s expense. By these means the maximum amount of possible protection is attained by the covenantee. X2.