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PRACTICE: APPEAL FROM JUDGMENT BY DEFAULT OR IN ABSENTIA.

RULE 236 of the Code of Civil Procedure is as follows:

> Any judgment obtained by default may be set aside or varied by the Court on such terms as may seem just.*

The purpose of this rule was explained by Lord Justice Bowen in *Jacques* v. *Harrison*, (1884) 12 Q.B.D. 165, 166, when he said:

> In this case (and we hope and believe in many others) the Court is fortunately able to cure the slips and errors that have been made in practice upon terms which will prevent the possibility of injustice, and will place the parties in the position in which they would have stood and ought to have stood but for technical mistakes.

Rule 5 of the Court of Appeal Rules gives to the Court of Appeal all the powers and duties as to amendment and otherwise of the Court of first instance, together with full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in Court, by affidavit, or by deposition taken before an Examiners or Commissioner.†

Where judgment has been given by default in an action in the Supreme Court, or where judgment has been given in an action in the absence of an interested party who had no knowledge of the hearing, the question arises whether the remedy is to apply to have the judgment set aside under R. 236 of the Code of Civil Procedure; or to appeal from the judgment to the Court of Appeal, under R. 5.

In the circumstances that we have indicated, either course involves a fresh hearing. There are really three alternatives—assuming that the applicant party is entitled to leave to appeal—

(*a*) To apply to the Court of Appeal to admit fresh evidence and proceed by way of appeal from the judgment of the Court below; or

(*b*) To apply to the Court of first instance to set aside its judgment; or

(*c*) To appeal from the judgment, and ask for a new trial, or referring.

It appears from the authorities that the course to be taken depends on the answer to the question: Does the absent party desire the Court to consider questions of fact, or is his proceeding in the nature of an appeal on questions of law?

Before considering that question, it must be borne in mind that all appeals to the Court of Appeal are by way of rehearing (R. 3), and that leave to appeal by a person not a party to the judgment appealed from may be obtained from the Court of Appeal *ex parte*.

The question of obtaining leave to appeal was considered in *In re Securities Insurance Co.*, [1894] 2 Ch. 410, where Lindley, L.J., in considering the practice of the Court of Chancery before 1862, and what it had been since, at p. 413, said:

> I understand the practice to be perfectly well settled that a person who is a party can appeal (of course within the proper time) without any leave, and that a person, who, without being a party, is aggrieved by it, or is prejudically affected by it, cannot appeal without leave.

He went on to say:

> It does not require much to obtain leave. If a person alleging himself to be aggrieved by an order can make out even a *prima facie* case why he should have leave he will get it; but, without leave, he is not entitled to appeal.

Leave to appeal will be given only to a party who might have been a party to the action but was not, because his special interests are interfered with by the order: *In re Madras Irrigation and Canal Co.*, (1883) 23 Ch.D. 248; for, as Sir George Jessel, M.R., put it, the test in such applications is "Could or could not the applicant by possibility be made a party to the action by service?" Consequently, leave will not be given to a person to appeal from a judgment to which he was not a party, unless his interest is such that he might have been made a party by service: *Crawcour* v. *Salter*, (1882) 30 W.R. 3291. There is no power to give to a person who could not be made a party to the action leave to appeal against the judgment: *In re Youngs, Doggett* v. *Revett*, (1885) 30 Ch.D. 421; and see thereon, *The Millwall*, [1905] P. 155.

In *Dorset County Council* v. *Pethick Brothers*, (1898) 16 T.L.R. 183, A. L. Smith, L.J., delivering the judgment of the Court of Appeal, said that applications of this kind for leave to appeal from the Court of first instance should always be made *ex parte*, and if the

* *Cf.* O. 27 r. 15 of the Rules of the Supreme Court, England, which is as follows: "Any judgment by default . . may be set aside by the Court or a Judge, upon such terms as to costs or otherwise as such Court or Judge may think fit . . ."

† *Cf.* O. 58, r. 4 (*ibid.*).

Court of Appeal desired the other side to be heard they would direct notice to be served upon them.

The Court of Appeal has jurisdiction to entertain an appeal from a judgment given on default. It was so decided in *Vint* v. *Hudspeth*, (1885) 54 L.J. Ch. 844, and it was also held that the proper course to be taken by the party against whom such judgment has been given is for him to apply to the Judge of first instance to restore the action, upon the ground that the plaintiff was absent *per incuriam*.

The reason given by Cotton, L.J., with whom Bowen and Fry, L.JJ., concurred, was that it was important to prevent the Court of Appeal from being flooded by cases of this sort in the first instance. The course adopted was to stand over the appeal to give the plaintiff time to make application to the Judge to reinstate the action: so that the cause in the first instance could be tried in the Court below.

The matter went back to be heard by Pollock, B., but, on hearing the application, he was of opinion that the judgment he had already given was right, and refused to give a rehearing. The appeal was then proceeded with in the Court of Appeal.

This, it will be observed, was an appeal by a plaintiff who had instructed his solicitors to abandon the action: and the first he knew of its having been heard was a levy of execution for the defendant's costs. As the question was one of law, it would seem that the effective remedy was to allow his appeal to proceed in the Court of Appeal. The course taken was to stand the appeal over, and let the appellant have the case reinstated and reheard in the Court of first instance. It must be assumed that the learned trial Judge had considered the cause of action to be unsound in law, or he would not have given judgment for the defendant. It followed, as the report shows, that the trial Judge refused to set aside his judgment, and refused a rehearing. The appeal was then heard by the Court of Appeal. It would seem that, in all appeals of this kind where the sole issue is one of law, the Court of Appeal should proceed and hear the appeal, without requiring reinstatement in the Court below while standing the appeal over until the judgment of that Court be known.

In *Mitcheison and Brothers* v. *Brown*, (1900) 18 N.Z.L.R. 759, Conolly, J., following his own judgment, *Boylan* v. *Bloxsome*, (1892: not reported), held that a proceeding in the Supreme Court to set aside a judgment obtained by default, should not be brought on by summons, but by a motion in Court, which, however, may, if it should appear convenient, be removed into Chambers.

In *In re Markham*, *Markham* v. *Markham*, (1880) 16 Ch.D. 1, a suit was instituted for the administration of the testator's estate after the death of his widow. The terms of the order of the Court excluded one Robinson, then deceased, who had left no personal representative: but, after the testator's death, he had assigned his interest under the will, and the assignee had had no notice of the administration suit, and was not represented. He desired to appeal from the order, which excluded him from participating in the estate, and applied for leave to appeal by motion *ex parte*. The Court of Appeal (Lord Selborne, L.C., and Brett and Collins, L.JJ.), gave leave to appeal, upon production to the Registrar of an affidavit verifying the applicant's title to Robinson's interest.

Enlargement of time is sometimes necessary where the appellant had had no notice of the proceedings from which he desires to appeal. In *In re Padstow Total Loss and Collision Assurance Association*, (1882) 20 Ch.D. 137, a winding-up order was made on May 28, 1880, on a creditor's petition, no one appearing to oppose. In November, 1881, a member of the association heard, for the first time, of the winding-up order, and within a week applied for leave to appeal against it. Sir George Jessel, M.R., in his judgment, at pp. 142, 143, said:

> The first point to be considered is whether, assuming that the association was an unlawful one, and that the Court had no jurisdiction to make the order, an appeal is the proper mode of getting rid of that order. I think that it is. I think that an order made by a Court of competent jurisdiction which has authority to decide as to its own competency must be taken to be a decision by the Court that it has jurisdiction to make the order, and consequently you may appeal from it on the ground that such decision is erroneous.
>
> The next question is whether we ought to give leave to appeal after this long period of time has elapsed. I think that we ought. The present appellant knew nothing about the order, and when we come to look at the circumstances it is plain that it was obtained without disclosing to the Court the difficulty as to the constitution of the company, which has been the subject of so much discussion to-day. It was therefore an order, I do not say obtained from the Court improperly, for I have no doubt that the counsel who obtained it did not know of the difficulty, but made improvidently, and looking at the circumstances under which it was obtained, and the ignorance of the present appellant of the fact of its being obtained, the case appears to me to fall within the authorities cited in favour of giving leave to appeal after the time has expired.

Brett, L.J. (as Lord Esher then was) at pp. 145, 146, said:

> In this case an order has been made to wind up an association or company as such. That order was the order of a superior Court, which superior Court has jurisdiction in a certain given state of facts to make a winding-up order, and if there has been a mistake made it is a mistake as to the facts of the particular case and not the assumption of a jurisdiction which the Court had not. I am inclined, therefore, to say that this order could never so long as it existed be treated either by the Court that made it or by any other Court as a nullity, and that the only way of getting rid of it was by appeal. The case, therefore, as it seems to me, is merely one of an erroneous judgment, and I should think that it was subject to the ordinary rules as to the time for bringing an appeal. It is however hardly necessary to decide that in the present case, for assuming the case to be one where the appeal ought to have been brought within a certain time, it is one in which the Court ought to exercise its power of enlarging the time.

Lindley, L.J., was of the same opinion.

Both *Markham's* case and the *Padstow Association's* case were concerned with questions of law; and in each of them the appellant was not a party in the Court below. No question of fact was involved; and, once leave was given, the effective remedy was available in the Court of Appeal.

In *Allum* v. *Dickinson*, (1882) 9 Q.B.D. 632, a special case was stated by the parties for the opinion of the Court on a question of law. When the case was called before a Divisional Court, the plaintiffs did not appear, in consequence of some mistake or inadvertence on the part of their solicitors. The Court, however, read the special case, and having heard the counsel for the defendant, gave judgment in the defendant's favour in the absence of the plaintiffs, who appealed from that decision to the Court of Appeal.

The Master of the Rolls, Sir George Jessel, raised the question whether the appeal could be entertained. He said that, in an ordinary case, if the plaintiff does

not appear and lets judgment be taken against him by default, he cannot appeal. If there has been a mistake he must apply to the Court of first instance to have the case restored and reheard: *Walker* v. *Budden*, (1879) 5 Q.B.D. 267.

In answer, the plaintiff's counsel submitted that a special case is on a different footing from an action, the facts are agreed upon, and the Court has the same materials on which to decide as if all the parties were present; and in this case the Judge had read and considered the special case.

On the defendant's counsel saying that they had no objection to the appeal being heard, Sir George Jessel, M.R., said that their Lordships would hear the appeal, adding, however, "but it must not be drawn into a precedent as to the practice in special cases."

This was a plaintiff's appeal on fact and law. It would appear from the argument that the plaintiff's counsel (afterwards Lord Loreburn, L.C.) implied that this case was different from one in which new facts could be admitted on a rehearing. And it seems implicit in the observations of the Master of the Rolls that the proper course, in most cases of mixed fact and law, is not to proceed in the Court of Appeal, but to order a new trial or have the action reinstated in the Court below. He refused to allow their Lordships' decision to hamper the Court in dealing with future applications in which mixed questions of fact and law might be involved.

We pause here to remind our readers that, although an appeal to the Court of Appeal is a rehearing, it is a rehearing on documents in the ordinary case. Where the question at issue is the proper inference to be drawn from facts which are not in doubt, the appellate tribunal is in as good a position to decide the question as the trial Judge was. If, where questions of fact are contraverted by an applicant who was not a party to the judgment and he proposes to put forward new facts, or the judgment was given by default without the facts being considered, it would appear that an appeal under R. 5 of the Court of Appeal Rules is not a proper or convenient procedure. Where the trial Judge has come to a conclusion upon which of the witnesses he has seen and heard are trustworthy, and which are not, he is normally in a better position to judge of this matter than an appellate tribunal can be, and that tribunal will generally defer to the conclusion which the trial Judge has formed: *Powell* v. *Streatham Manor Nursing Home*, [1935] A.C. 243.

It follows therefore, that the Court of Appeal is placed in a difficult position if it hears and has to estimate the value of the new evidence put forward by the appellant to whom it has granted leave to appeal, and has, at the same time, to accept, on the documentary record, the conclusions of the trial Judge as to credibility on the evidence which he has heard. In some such cases, the result may be almost impossible to determine: in all such cases, it is a very inconvenient form of procedure, because the parties are bound by the facts found in the Court below while new and perhaps contradictory evidence, is produced in the Court of Appeal.

In certain circumstances strangers to the litigation may benefit by R. 236, but they must adopt one of the two means of setting the judgment aside that are open to them. In *Jacques* v. *Harrison*, (1884) 12 Q.B.D. 165, it was held by the Court consisting of Brett, M.R., and Bowen, L.J., if a person, who is not a party to the proceedings, seeks to set aside a judgment by which he is injuriously affected, and which the defendant, who had no interest in the litigation, had allowed to go by default, he may have the judgment set aside. It was further held that O. 27 r. 15 (which is to the same effect as R. 236 of the Code of Civil Procedure) is designed to enable judgments by default to be set aside on terms by those who had or who could acquire a *locus standi*: and it does not give a *locus standi* to persons who had none. In delivering the judgment of the Court, Bowen, L.J. (as he then was) pointed out what is in such circumstances the proper practice to be followed; especially, as he said it is one that, in their Lordship's opinion, is based, not on any mere formal rule, but on the strict requirements of justice. It must be remembered that here the defendant himself had no right to have the judgment set aside. His Lordship said:

> There ar[illegible]r as we can see, only two modes open by which a st[illegible]anger to an action, who is injuriously affected through any judgment suffered by a defendant by default, can set the judgment aside: and these two modes are amply sufficient to protect any such stranger in all cases in all his rights. He may, in the first place, obtain the defendant's leave to use the defendant's name, if the defendant has not already bound himself to allow such use of his name to be made; and he may thereupon, in the defendant's name, apply to have the judgment set aside on such terms as the Judge may think reasonable or just. Or he may, if he is not entitled without further proceedings to use the defendant's name, take out a summons in his own name at Chambers to be served on both the defendant and the plaintiff, asking leave to have the judgment set aside, and to be at liberty either to defend the action for the defendant on such terms of indemnifying the defendant as the Judge may consider right.

In recent years, the Court of Appeal (Greer and MacKinnon, L.JJ., Slesser, L.J., dissenting), in *Windsor* v. *Chalcraft*, [1938] 2 All E.R. 731, have applied the principle of *Jacques* v. *Harrison*, and held that an insurance company, which was bound under a statutory liability to pay the plaintiff the amount of a judgment, which, by default, he had obtained against the defendant, was entitled, in the circumstances of that case, as being "injuriously affected" through the judgment, to have it set aside.

In October, 1937, the plaintiff issued a writ against the defendant in a running-down action claiming damages for negligence. The plaintiff informed the insurance company (the appellants) that the writ had been *issued*. In November the writ was served, but the defendant did not appear. No notice that the writ was *served*, or that it had been set down for hearing, or of any further proceedings, was given to the insurance company. In December, judgment was signed in default of appearance and damages were ordered to be assessed before a Master. In January, 1938, damages were assessed at £2,550, and in February, application was made to the underwriters, under s. 10 of the Road Traffic Act, 1934 (Eng.) (which provides that insurers are liable to satisfy the judgments awarded against their policyholders in certain circumstances) to pay this amount to the plaintiff. The underwriters applied under O. 27, r. 15 (our R. 236 of the Code) to have the judgment set aside, on the ground that if the defendant did not pay, in the absence of any defence, they would be liable in law, that there was a substantial defence on the merits; and that the Court would set aside a judgment by default in which, no inquiry into the merits having been made, a substantial defence

appeared: *Evans* v. *Bartlam*, [1937] 2 All E.R. 646. The Master made an order setting aside the judgment; du Parcq, J. (as he then was), reversed the order; and, by a majority, the Court of Appeal restored it.

The majority, as we have said, relied upon the principle laid down by the Court, per Bowen, L.J., in *Jacques* v. *Harrison* (*supra*), in which it was held that there were two ways by which "a stranger to an action, who is injuriously affected through any judgment suffered by a defendant by default, can set that judgment aside." One mode is to obtain the defendant's leave to use his name, if the defendant has not already bound himself to allow his name to be used. In *Windsor's* case (as Greer, L.J., pointed out) the defendant, by his policy, had bound himself to allow the company to use his name. The company might, therefore, in the defendant's name, apply to have the judgment set aside "on such terms as the Judge may think reasonable or just"—*e.g.*, that the defendant be indemnified against the costs of the second action. The second mode—if "the stranger to an action" is not entitled, without further proceedings, to use the defendant's name—is to take out a summons in Chambers against the plaintiff and the defendant, asking leave to have the judgment set aside, and to be at liberty to defend on terms of indemnity. Speaking of O. 27, r. 15, (our R. 236) MacKinnon, L.J., said:

> *Prima facie*, it contemplates an application to set aside a judgment by default by the parties against whom judgment is given, but it is quite clear that an application to set aside a judgment against the nominal defendant may be made by some other person, not a party to the record, who is interested in the judgment, and who has an interest in getting it set aside. That is exactly the position contemplated and defined by Bowen, L.J., in the crucial passage in *Jacques* v. *Harrison*, [*cit. sup.*].

Further on, the learned Lord Justice said:

> It is by reason of the fact that he has no pecuniary interest in his liability, and that the strangers to the proceedings really have the whole interest, that they have a right to set aside the judgment. The rule would have very little effect given to it in such a case as this if it were held that strangers to the litigation could exercise their right under this rule only in a case where the nominal defendant himself has similar rights.

If it appears to the Court of Appeal that a party has first heard of litigation in which he is interested only after an appeal has been set down in that Court by other interested parties who were heard in the Court of first instance, then, where the question is one of mixed fact and law, or of fact only, the proper course would seem to be to stand the appeal over, upon the aggrieved party's undertaking to make prompt application to the Court below to set aside the judgment and rehear the action.

From the above-cited cases, it would appear:—

1. Where the question is solely one of law, leave to appeal direct to the Court of Appeal may be given to an applicant, who, though not a party to the action from which he desires to appeal, is affected by the judgment.

This seems to be founded on common sense; as, if the party applied to the Court of first instance to reinstate the action, the judgment on the question of law involved would probably be to the same effect as the original judgment; and the applicant would be compelled to come back to the Court of Appeal to appeal against the first or the second judgment, or both.

2. Where the question is one of fact, there is no authority against giving leave to appeal direct to the Court of Appeal; but the inference is open that, where there are questions of fact, the proper course is to apply in the Court of first instance to have the action reinstated.

If leave to appeal were given in these circumstances, the Court of Appeal would, in effect be turning itself into a Court of first instance, as the facts would be at large. On the ground of convenience alone, the re-hearing of evidence, including the applicant's fresh evidence, could be better dealt with in the Court of first instance. Moreover, it at least seems open to doubt whether Rule 5 of the Court of Appeal Rules contemplates what amounts to a new hearing, as distinct from a rehearing.

3. Where the questions involved are mixed questions of fact and law, the Court of Appeal, on an application for leave to appeal could, in a proper case, stand the appeal over so that the applicant may have the judgment set aside and the action reheard.

Such a course would avoid (*a*) the difficulties indicated as above, as there would be little likelihood of any repetition of the judgment on questions of law already decided when the facts were not in dispute, in the Court below; and (*b*) inconvenience of admitting the evidence of new facts in the Court of Appeal, which on those questions, would be sitting as a Court of first instance, while, on the questions of law involved, it would be re-hearing an appeal on law decided on different facts.

SUMMARY OF RECENT JUDGMENTS.

GOURLAY v. CORNISH AND ANOTHER.

SUPREME COURT. Dunedin. 1945. May 17; June 27. KENNEDY, J.

Meetings—Election of Officers—Rule providing for Election at General Meeting in Month of February—Chairman closing Meeting held in February without Election of Officers—Whether such Officers could be elected at Later Meeting—Rule directory only.

A rule of an Industrial Union of Workers—providing that all the officers of the union, except the general secretary, should be elected to office at the general meeting of the union in the month of February in each year, and should (subject to a named rule) hold office until they resign or until the successors are elected, whichever shall first happen, and shall be eligible for re-election—is not mandatory in the sense of implying a prohibition of election at any other time, but is directory as to precise date, in the sense that it is sufficient substantially to comply with it, the obligation to elect being merely a matter of direction not amounting to an implied nullification of election upon any other later day.

At a meeting of the Union called for February 2, for the election of officers and the revision of the rules, the chairman, owing to noise and interruption, prematurely and contrary to the wish of the majority of the meeting, closed the meeting. On a proper requisition for a special meeting for the election of

officers and revision of the rules the president and secretary of the union called a meeting for the latter purpose, but refused to do so for the election of officers, claiming that the existing officers continued in office for a further year without election.

On an application for a mandamus to the union's president and secretary to convene a special meeting of the union for the election of officers.

Held, granting the mandamus, That the Court was not precluded from directing a meeting for the election of officers when the election could not, and did not, take place in February.

R. v. *Denbighshire Justices*, (1803) 4 East 784, 102 E.R. 802, *R.* v. *Norwich City Corporation*, (1830) 1 B. & A. 309, 109 E.R. 802, *R.* v. *Sneyd*, (1841) 5 J.P. 579, 5 Jur. 962, *R.* v. *Sparrow*, (1739) 2 Stra. 1123, 93 E.R. 179, *R.* v. *Rochester Corporation*, (1857) 7 El. & B. 910, 119 E.R. 1485, and *R.* v. *Leicester Justices*, (1827) 7 B. & C. 6; 108 E.R. 627 applied.

Holt v. *Catterall*, (1931) 47 T.L.R. 332 distinguished.

National Dwellings Society v. *Sykes*, [1894] 3 Ch. 159 referred to.

Counsel: *Robertson*, for the plaintiff; *White* and *Lloyd*, for the defendants.

Solicitors: *Ramsay, Haggitt and Robertson*, Dunedin, for the plaintiff: *C. J. L. White* and *G. M. Lloyd*, Dunedin, for the defendants.

ADAMS AND OTHERS v. REGISTRAR-GENERAL OF LAND.

SUPREME COURT. Dunedin. 1945. November 25; December 14. KENNEDY, J.

Land Transfer—Mortgage—Registration—Contributory Mortgage—Principal Advanced in Differing Shares—Special Provision as to Priority of Contributors' repayment applying as between Mortgagees inter se—*Registrar requiring Registration as Two Mortgages—Order to Register as One Mortgage subject to One Registration Fee—Land Transfer Act, 1915 s. 101.*

A contributory mortgage, in which funds to a total of £565 were provided by mortgagees in shares of £365 and £200, but the covenant for repayment, in which was a covenant for repayment of the whole of the moneys as an aggregate sum with interest thereon calculated in a particular way, contained the following provision:

> "That all moneys from time to time actually paid by the mortgagor on account of the principal moneys hereby secured shall be divided between the mortgagees in proportion to the sums advanced by them respectively but, except only as provided in the foregoing provisions of this clause the said sum of £365 and the interest thereon shall have priority over the said sum of £200 and the interest thereon in the same manner in all respects as if the sum of £200 had been secured by a subsequent mortgage of the said land, provided however that this present provision shall apply as between the mortgagees only and should not prejudice or affect any liability or obligation of the mortgagor."

The Registrar-General of Land decided that the mortgage should be registered as a second and third mortgage, and that two registration fees should be paid.

On [illegible] by the mortgagees to the Registrar-General to substantiate the grounds of such decision,

Held, ordering and directing the registration of the mortgage, That the said contributory mortgage was but one mortgage, and should be registered as a single mortgage subject to one registration fee.

Perpetual Executors and Trustees Association of Australia, Ltd. v. *Hosken (Registrar of Titles)*, (1912) 14 C.L.R. 286 applied.

R. v. *Registrar-General, Ex parte Roxburgh*, (1868) 1 Qd. S.C.R. 201, and *Drake* v. *Templeton (Registrar of Titles)*, (1913) 16 C.L.R. 153) referred to.

Counsel: *H. S. Adams*, for the applicants; *A. N. Haggitt*, for the respondent.

Solicitors: *Adams Bros.*, Dunedin, for the applicants; *Ramsay, Haggitt and Robertson*, Dunedin, for the respondent.

GREY v. WAGSTAFF.

SUPREME COURT. Hamilton. 1946. February 11. BLAIR, J.

Principal and Agent—Land Agents—Commission—Servicemen's Settlement and Land Sales—Agreement for Commission if Sale effected to Purchaser introduced through Plaintiff's Agency—Purchaser found—Agreed Sale-price held to be Basic Value—Minister of Lands exercising Statutory Power of Acquisition—Whether Agent entitled to Commission or on Quantum Meruit—*Servicemen's Settlement and Land Sales Act, 1943, ss. 45, 51.*

W. agreed to pay G. commission if his land were sold to any one introduced through G.'s agency. G. found, at the defendant's price, a purchaser who entered into an agreement to purchase subject to the consent of the Land Sales Court. The Land Sales Committee considering that the land was "*farm land suitable or adaptable for the settlement of a discharged* serviceman," refused its consent under s. 37 of the Servicemen's Settlement and Land Sales Act, 1943, and made an order determining that the basic value of the land was the same as the price stated in the said agreement. The Minister of Lands thereupon exercised his Statutory powers and declared that the land was taken for the settlement of discharged servicemen.

In an action by G. against W. for the commission agreed upon or alternatively on a *quantum meruit*,

Held, That, as the land was never actually sold, the plaintiff was entitled neither to the commission claimed nor on a *quantum meruit*.

Semble. The land agent plaintiff could have embodied in his agency contract an appropriate provision for commission in the event of the land being taken by the Crown under s. 51 of the statute.

Counsel: *Tompkins*, for the plaintiff; *King*, for the defendant.

Solicitors: *Tompkins and Wake*, Hamilton, for the plaintiff; *King, McCaw and Smith*, Hamilton, for the defendant.

SERVICE BUILDINGS, LIMITED v. TODD MOTORS, LIMITED.

SUPREME COURT. Dunedin. 1945. May 14; June 29. KENNEDY, J.

War Emergency Legislation—Economic Stabilization Emergency Regulations—Rent—Recovery of Excess Rent paid over and above Fair Rent—Limitation on Right to Recover—"Irrecoverable"—Economic Stabilization Emergency Regulations, 1942 (Serial No. 1942/335), Regs. 18 19.

The words in Reg. 19 of the Economic Stabilization Emergency Regulations, 1942 "any sum that by virtue of this Part of these regulations is irrecoverable," refer to rent payable or paid, which is irrecoverable by the landlord in terms of Reg. 14 (any increase of the basic rent made since September 1, 1942, or after the commencement of the regulations), or to rent which is irrecoverable under Reg. 18 (rent in excess of the fair rent) where an order has been made fixing the fair rent is in force) during the period commencing on the date, retrospective or prospective, on which that order is specified to take effect and continuing until the order ceases to have effect in terms of Reg. 17.

Sharp Brothers and Knight v. *Chant*, (1917) 86 L.J.K.B. 608, referred to.

The remedies of a tenant to recover excess rent paid by him before or after the date on which an order of the Court fixing the fair rent took effect in terms of that order, are limited to those given by Reg. 19; and such a tenant is not entitled, except within six months after the date of the payment of a sum in excess of the basic rent or of the fair rent, as the case may be, to recover that excess or to set it off against any rent payable by him.

Counsel: *H. Brash*, for the plaintiff; *F. B. Adams* and *W. S. Armitage*, for the defendant.

Solicitors: *Brash and Thompson*, Dunedin, for the plaintiff; *Adams Brothers* and *Downie Stewart, Payne and Forrester*, Dunedin, for the defendant.

CONTRIBUTORY MORTGAGES UNDER THE LAND TRANSFER SYSTEM.

Some Considerations for the Conveyancer.

By E. C. Adams, LL.M.

Contributory mortgages are a feature of our modern economic system, being advantageous to both borrower and lender. They create healthy competition between the powerful lending corporations (including the State loan departments) and the private lenders. The borrowers have a wider choice of mortgagees, and the private lenders by pooling their resources (often very limited) are enabled to secure more satisfactory and more frequent investments.

The skill of the modern conveyancer in Australia and New Zealand has moulded the old form of contributory mortgages (although not without official opposition at times) to suit the form of mortgage prescribed by the various Torrens statutes, so as to arrive at substantially the same practical result, as under the general law.

The opposition from the Registry Office officials has been based mainly on the grounds that contributory mortgages often contain provisions which are embarrassing to the Office by leaving certain rights of the parties in doubt, and that they constitute attempts to effect by one instrument what in fact are two or more transactions. The officials have thought that the rights of the mortgagees to exercise power of sale, and their rights when they have exercised it, have been left in doubt: sometimes they have not been certain whether the mortgagees are tenants in common or joint tenants. And, in two at least of the three cases discussed in this article, the officials have unsuccessfully claimed a double registration fee.

This important conveyancing topic has just received added interest by the recent decision of Mr. Justice Kennedy at Dunedin, in *Adams* v. *Registrar-General of Land*, (*ante*, p. 61). Rather strangely, this appears to be the only New Zealand case on contributory mortgages under the Torrens system, and it is convenient to consider two Australian cases before entering upon a detailed examination of it.

The Torrens system was only in its first decade when a case cropped up in the Queensland jurisdiction. In *Reg.* v. *Registrar-General, Ex parte Roxburgh*, (1868) 1 Q.S.C.R. 201, the registered proprietor of land under the Real Property Act of 1861 (Qd.) executed a mortgage in the statutory form in favour of two mortgagees, in consideration of separate advances. The Registrar-General being of opinion that the document contained two distinct mortgages, declined registration. It was held that, although the security was a joint one, there was in fact only one mortgage, and the instrument was registrable as such. This case is cited as authority for this statement: "And a contributory mortgage, or even a single instrument containing two mortgage transactions, is valid and registrable": *Hogg's Registration of Title to Land Throughout the Empire*, 213.

But the leading Torrens case on contributory mortgages is *Drake v. Templeton (Registrar of Titles)*, (1913) 16 C.L.R. 153, which demands the minutest examination from every conveyancer in New Zealand.

By an instrument of mortgage a registered proprietor mortgaged certain land in Victoria under the Torrens system to two mortgagees. The instrument contained the usual covenants: at the end of a proviso to a covenant was a clause stating that "it is hereby agreed" that the principal sum "belongs to" the two mortgagees in unequal specified proportions. It was held that the mortgage was a mortgage to the two mortgagees as tenants in common and not as joint tenants: that there was nothing in the Act prohibiting the registration of such a mortgage: accordingly the Registrar had to register the instrument as one mortgage only.

It was stated in the mortgage that the consideration was the sum of £700 lent to the mortgagor by the mortgagees: the mortgagor covenanted to pay to the mortgagees the principal sum of £700 on first December next and interest thereon at a certain rate so long as the principal or any portion of it should remain unpaid. (In this respect the instrument was similar in form to *Adams* v. *Registrar-General of Land, supra*.)

The special clause in the proviso on which the highest Court in Australia held that a tenancy in common had been created was "and it is hereby agreed that the said sum of £700 belongs to the said [*setting out the names of the mortgagees*] in the proportions of £475 to the said and £225 to the said ."

Besides raising objections as to form the Registrar had submitted that the effect of the proposed dealing would be to make one instrument of mortgage do duty for two distinct mortgages under one stamp and without giving priority to either mortgage as against the other, which would not only be inconsistent with the provisions of the Act (which confers priority in order of registration) *but would render it impossible for the office, if occasion arose to determine the respective claims of the respective mortgagees* inter se *or to act with safety to the Assurance Fund in the event of the exercise of the right to sell or foreclose on the part of either mortgagee*. But Sir Samuel Griffiths, C.J., at p. 158, effectively disposed of this objection in these words:

> There can be no dealing with the land, so long as both mortgagees are alive, without the signatures of both. If they seek to foreclose, both must join in the application. If they seek to exercise the power of sale both must join in the sale, If they wish to give a release on payment, both must join in the release.

Following this judgment we may add that in the event of the death of one of the contributory mortgagees, his legal personal representative would have to get on to the Register by transmission before there could be any such dealing with the mortgage.

As will have been previously gleaned from a perusal of the foregoing the Registrar also unsuccessfully submitted that the instrument contained in fact two mortgages and accordingly was liable to two registration fees, whereas only one was paid or tendered. Curiously enough this last point was the only one which

fell to be decided in *Adams* v. *Registrar-General of Land*, *supra*.

As pointed out by Isaacs, J., in *Drake* v. *Templeton*, *supra*, at p. 161, the various Torrens statutes do not prevent registration of contributory mortgages because the Acts do not set out to limit the class of mortgages which may be made and registered, but they prescribe the form which they are to assume and the land to which they are to refer. The statutory mortgage authorized by these statutes, although differing substantially in *form* from the mortgage under the general law, operating as a charge merely and not as a transfer of the legal estate, *has an economic identity* with the mortgage under the general law: *Hogg's Registration of Title to Land Throughout the Empire*, 212 (*n*), citing *Thom's Canadian Torrens System*, 289, 290, and *Smith* v. *National Trust Co.*, (1912) 45 Can. S.C.R. 618, 667. As a general rule, the Registrar is not concerned with the *contractual* parts of a mortgage: *In re Goldstone's Mortgage, Registrar-General of Land* v. *Dixon Investment Co., Ltd.*, [1916] N.Z.L.R. 489. Nevertheless *Drake* v. *Templeton*, *supra*, shows that in order to ascertain whether mortgagees at law are joint tenants or tenants in common, it may be necessary to examine the contractual parts, for in that case the expression of a tenancy in common, which, it was held, rebutted the presumption of a joint tenancy, was found in a proviso to a covenant.

Now the Land Transfer Department in New Zealand has never doubted the efficacy of *Drake* v. *Templeton*, as an authority, and has always followed it. But it was considered that, by reason of certain additional provisions not present in *Drake* v. *Templeton*, the instrument in the recent Dunedin case, *Adams* v. *Registrar-General of Land*, was distinguishable. Although the District Land Registrar thought the instrument was registrable, he ruled that it was liable to two registration fees as two mortgages, one having legal or statutory priority over the other.

The facts in *Adams* v. *Registrar-General of Land*, must be set out at length for a proper understanding of the judgment.

The memorandum of mortgage provided that in consideration of the sum of £565 lent to the mortgagor by the mortgagees in shares mentioned the mortgagor covenanted with the mortgagees to pay by equal monthly instalments and by a final payment on September 1, 1946, the sum of £565 with interest thereon. The charge was expressed to be (and this appears a most important point)

> and for the better securing to the mortgagees in the shares aforesaid the payment in manner aforesaid of the *said principal interest and other moneys* the mortgagor HEREBY MORTGAGES to the mortgagees all the mortgagor's estate or interest in the land above decribed as tenants in common in the shares aforesaid as between the said Francis Boyd Adams and Herbert Stanley Adams on the one hand and the said Alfred John Campbell on the other hand but so that the said Francis Boyd Adams and Herbert Stanley Adams shall be joint tenants between themselves.

Interest was calculated at one rate upon the sum of £365 and at another rate upon the sum of £200, but it was payable in *aggregate sums* to the mortgagees being included in monthly payments. The mortgage recited that as to £365 this was provided by Francis Boyd Adams and Herbert Stanley Adams and as to £200 by Alfred John Campbell. In the mortgage it was agreed and declared

> THAT all moneys from time to time actually paid by the mortgagor on account of the principal moneys hereby secured shall be divided between the mortgagees in proportion to the sums advanced by them respectively as aforesaid but except only as provided in the foregoing provisions of this clause the said sum of Three hundred and sixty-five pounds (£365) and the interest thereon shall have priority over the said sum of Two hundred pounds (£200) and the interest thereon in the same manner in all respects as if the said sum of Two hundred pounds (£200) had been secured by a subsequent mortgage of the said land *provided however that this present provision shall apply as between the mortgagees only and shall not prejudice or affect any liability or obligation of the mortgagor hereunder.*

The powers of sale were exercisable in respect of the aggregate sum or in respect of part of the aggregate sum by *each mortgagee separately and independently*.

It was these provisions, as to the priorities and the separate and independent exercise of the power of sale, which caused the Registry Office officials most concern.

The draft mortgage had been previously approved by the District Land Registrar, but when the mortgagees came to register it they were concerned not so much with the intended imposition of a double registration fee, but with the way the District Land Registrar intended to register it. He proposed to register it as two mortgages, and to endorse two separate memorials on the Register Book, one having priority over the other. On appeal to the Registrar-General of Land (necessarily on the *quantum* of fee only) he thought that if instruments in this form were registrable (of which he had grave doubts) they were registrable only as two mortgages because of the special provisions above set out. At the hearing in the Supreme Court before Mr. Justice Kennedy the registrability of the mortgage was argued by counsel, but His Honour declined to deal expressly with this point, because it had not been the subject of decision by the Registrar-General adverse to the mortgagees.

There appears, however, to be implicit in the judgment an opinion that mortgages in this form are registrable; this may be inferred from the following part of His Honour's judgment, and also from the long extract cited from the judgment of Isaacs, J., in *Perpetual Executors and Trustees Association of Australia, Ltd.* v. *Hosken* (*Registrar of Titles*), (1912) 14 C.L.R. 286, 293, the gist of which the reader will also find in *Kerr's Australian Land Titles* (*Torrens*) *System* 63, 64.

In ruling that only one registration fee was payable His Honour said:

> There is no doubt that the mortgage is a contributory mortgage in the sense that funds are provided by mortgagees in different shares, but the covenant for repayment is a covenant for repayment of the whole of the moneys as an aggregate sum with interest thereon calculated in a particular way. The provision as to so called priority is a provision which operates only as between the mortgagees, and it does not alter the relationship as between mortgagor and mortgagees. There is, it was conceded, but one charge and that charge secures repayment of the one aggregate sum to the mortgagees with interest. In operation then, although there are several owners of the mortgage, there is but one mortgage and the proper course was accordingly to register it as one mortgage and to charge but one fee for the one registrable operation.

It must not be concluded, however, from the judgent that anything can be included in an instrument

under the Land Transfer Act, if the instrument is substantially one in the statutory form. If for example, in the operative part, or in any part which obtains the benefit of state-guarantee when registered, property other than land under the Torrens system is purported to be included, then the instrument is not registrable. Thus a lease of land subject to the Land Transfer Act purporting to include also, land not under that Act, or chattels, or other personal property, must be refused registration: *Horne* v. *Horne*, (1906) 26 N.Z.L.R. 1208, *Quill* v. *Hall*, (1908) 27 N.Z.L.R. 545, 554, and *Boswell* v. *Reid*, [1917] N.Z.L.R. 225. This is because only estates and interests which are *authorized* to be registered by the Land Transfer Act or any other statute or any other enactment having the force of a statute, can be registered under the Torrens system: *Fells* v. *Knowles*, (1906) 26 N.Z.L.R. 604, approved by the Privy Council in *Waimiha Sawmilling Co., Ltd.* v. *Waione Timber Co., Ltd.*, [1926] A.C. 101, N.Z.P.C.C. 267. In New Zealand this rule has been codified in Reg. 10 of the Land Transfer Regulations, the material part of which reads:

> No instrument shall be received for registration which purports to deal with matters or to create interests not capable of registration, or to affect land or other property not subject to the provisions of the Act, or which for any other reason is incapable of complete registration.

Also a mortgage would have to be refused registration, if it contained provisions *contra bonos mores*: per Sir Robert Stout, C.J., in *In re Goldstone's Mortgage*, [1916] N.Z.L.R. 19, 25. For example, a mortgage *ex facie* in contravention of a statute would surely be *contra bonos mores*. It is also submitted that a provision in a mortgage purporting to clog the equity of redemption (if the reader will permit me to apply that term to a Torrens mortgage) would justify the Registrar in declining registration, for a mortgagor's equity of redemption or right to a discharge on repayment of the full amount owing, is an essential feature of every mortgage, as developed by our Courts of Equity. (There are certain exceptions created by the Companies Act, 1933.) Even at common law a mortgagor had a legal right to redeem on the due date.

The Courts (realizing perhaps that it is the duty of the Land Registry officials wherever possible to assist rather than impede the business of the community) have regarded many of the provisions in these contributory mortgages to which Registrars have taken objection, as merely personal between the mortgagees themselves. They do not affect the general principle that if there are more than one mortgagee, every registered mortgagee must concur in exercising power of sale, or at least in conferring title on a purchaser, which is all the Registry is concerned with. Thus, in *Adams* v. *Registrar-General of Land*, although, as previously pointed out, there was a provision that the power of sale was exercisable by each mortgagee separately and independently, that would not enable either contributory mortgagee to confer title on a purchaser in exercise of power of sale. The position would be the same as pointed out by Sir Samuel Griffiths, C.J., in *Templeton's* case, *supra*. Section 109 of the Land Transfer Act, 1915, would require execution by *all* the mortgagees. Under s. 2, "mortgagee" means *the* proprietor of a mortgage, and therefore, if there are more than one mortgagee, "mortgagee" in s. 109 must mean *all* the proprietors of the mortgage and not just one proprietor of the mortgage.

In fact the position is the same under the general law, under which all mortgagees in a contributory mortgage must concur in foreclosure proceedings or in conveying the legal estate to a purchaser: *23 Halsbury's Laws of England*, 2nd Ed., p. 464, para. 683, and *2 Davidson's Precedents in Conveyancing*, 4th Ed., Part 2, 385 (*n*). This is the reason why in the absence of an express power in the trust instrument, it is a breach of trust for trustees to invest on a contributory mortgage, for in such a mortgage the *sole* control of the moneys is not vested in them: *Webb* v. *Jonas*, (1888) 39 Ch.D. 660.

If in a contributory mortgage, either under the general law or under the Land Transfer Act, it is desired that one of two or more co-mortgagees should be enabled to exercise power of sale so as to vest the land effectually in a purchaser, then a special power of attorney clause should be inserted in the instrument. It is considered that the form given in *10 Encyclopaedia of Forms and Precedents*, 2nd Ed., 137, could be easily modified to suit the circumstances. A transfer by A., a contributory mortgagee, in his own right and as attorney (duly authorized) for B., his co-mortgagee, is at law a transfer from A. and B., for *qui facit per alium facit per se*.

The draftsman of a contributory mortgage under the Land Transfer Act, however, must be careful not to interfere with the *legal* priorities conferred by registration under that Act. It will be recollected that this was one of the grounds of objection taken by the respective Registrars in *Drake* v. *Templeton*, *supra*, and *Adams* v. *Registrar-General of Land*, *supra*. In the Australian case the Court surmounted the objection by ruling that in effect there was only one mortgage and that therefore the question of priority not in accordance with the statute did not arise, there being no statement in the instrument itself as to respective priorities of the sums advanced. In the New Zealand case there was such a statement, but there were added these very material words:

> *Provided however that this present provision shall apply only as between the Mortgagees only and shall not prejudice or affect any liability or obligation of the Mortgagor hereunder.*

Had these words or words to the same effect not been added, then it is submitted that the mortgage, if registrable, was registrable only in the manner which the Registrar proposed to register it, *i.e.*, as two mortgages, one having legal priority over the other. As it was, the addition of these words showed that the parties did not intend to alter the legal priorities conferred by registration under the Land Transfer Act. In His Honour's words:

> The provisions as to so called priority [N.B. the word "so-called"] is a provision which operates only as between morgatgor and mortgagee.

The draftsman should also note that in both cases there was a covenant for repayment of the whole of the moneys advanced as an aggregate sum. That appears a most material point also.

Finally, it may be of interest to conveyancers to learn that in both cases only one *stamp duty* fee was paid. Therefore it may be taken that contributory mortgages in the usual form are not liable to two stamp duties, either under s. 60 or s. 61 of the Stamp Duties Act, 1923.

SUMMARY TRIAL OF INDICTABLE OFFENCES.

The Extent of the Jurisdiction.

An interesting decision relating to the summary trial of indictable offences is that of *Police* v. *Murray*, (1939) 1 M.C.D. 146 ; and it invites close examination. The history of the legislation on this kind of jurisdiction is there dealt with. Commenting on *Reg.* v. *Anderson*, (1899) 18 N.Z.L.R. 245, the learned Magistrate (Luxford, S.M.), at p. 147, said :

> He [Edwards, J.] said that an offender who may, under the Act, be dealt with summarily by the Justices, may yet, at their discretion, be committed by them for trial by a superior Court, and such an offender who has evaded prosecution for six months must be so committed for trial (*ibid.*, 249). That dictum is clearly inconsistent with the view that the 1894 Act empowered proceedings to be commenced as for a summary offence.

The real question involved in *Reg.* v. *Anderson* is thus stated in the judgment in that case, at p. 247 :

> The question for determination in this case is whether the jurisdiction of the Superior Courts over certain indictable offences mentioned in the Indictable Offences Summary Jurisdiction Act, 1894, is taken away by that Act, which gives a summary jurisdiction over such offences to two Justices or a Magistrate.

It was held that the Superior Courts were not deprived of their jurisdiction over such cases.

This decision has been enshrined in s. 186 (2) of our Act. On p. 249 of the judgment it was pointed out that if the offenders could escape prosecution for six months (the period of time fixed by the Act of 1894 for commencing proceedings) they should evade all punishment for their crimes. As stated, the position is made clear by s. 186 (2). While on this point, it is instructive to refer to the case of *R.* v. *Hertfordshire Justices*, [1911] 1 K.B. 612, where it was held that the Justices may, up to the time of their determination to convict and sentence, notwithstanding the accused's consent to be dealt with summarily, commit him for trial.

In regard to time-limitation, the following paragraph appears in *Garrow on Crimes*, 2nd Ed., 348 :

> Summary proceedings in regard to indictable offences taken under Part V of the Justices of the Peace Act, 1908, must be commenced within twelve months (now two years) after the commission of the offences ; except in case of assault. If proceedings are not brought within this period, they must be brought, if at all, under the provisions of the Crimes Act, 1908. The summary jurisdiction thus given to Justices in certain indictable cases does not interfere with the jurisdiction of the Supreme Court in regard to such cases : *Reg.* v. *Anderson*.

Referring next to *McDonald* v. *Dyer*, [1917] N.Z.L.R. 793, and particularly to Mr. Maunsell's remarks in his *New Zealand Justices of the Peace and Police Court Practice*, 89,

> If the operation of s. 124 is excluded from the whole of Part V (as the dictum in *McDonald* v. *Dyer* suggests) then there are a number of offences for which the maximum punishment exceeds imprisonment for three months.

As introductory to the citation of that passage in *Police* v. *Murray*, it is said there, at p. 148 :

> If Part V were regarded as an exclusive enactment, an accused person would not be entitled to claim a right of trial by jury in respect of offences (other than offences referred to in s. 238) punishable by imprisonment for more than three months.

Now to revert to *McDonald* v. *Dyer*, which was a case involving the theft of £5 (the form of information used being that prescribed for indictable offences), the procedure laid down to be followed in such a case is that enacted in s. 238 of the Justices of the Peace Act, 1927. On p. 795, it is stated :

> It was for an offence which came within Part V of the Act (headed "Summary Trial of Indictable Offences") and s. 122 has no application.

It seems that this statement must be read with and not isolated from the context. This would be clear from the remarks appearing on p. 796 :

> Therefore it is, in my opinion, perfectly clear that in such a case as the present one the procedure defined in s. 226 is the only procedure the Magistrate can legally follow in order to deal summarily with any of the offences detailed in s. 179, and unless that procedure is followed, and the person charged consents to be dealt with summarily, the Magistrate has no jurisdiction to punish the person charged.

And then follows this vital observation :

> The case of *Reg.* v. *Cockshott*, [1898] 1 Q.B. 582, has therefore no application to cases coming within ss. 179, 180, 223 and 226.

Section 179 (now s. 188) related to extended jurisdiction conferred on a Magistrate alone in respect of certain offences mentioned in the section ; s. 180 (now s. 189) placed certain restrictions on the exercise of the jurisdiction conferred by s. 179 ; s. 223 (now s. 235) related to the obtaining of property by means of a false pretence is, in the language of s. 238, "dishonestly obtaining anything capable of being stolen" ; and s. 226 (now s. 238) the procedure laid down in that section was to be followed. The effect of the judgment in *McDonald* v. *Dyer* is adequately expressed on p. 707, "The position was that s. 226 was the only provision applicable to the case, s. 122 having been excluded by virtue of the provisions of s. 180."

It would appear that the learned Judge in that case has necessarily implied that s. 122 (now s. 124) would apply to other cases mentioned in Part V in respect of which the punishment was imprisonment for more than three months ; otherwise why the specific mention of certain sections only as not being covered by the procedure under s. 124 ? The reason is given in the passage just quoted, and it merely shows that when a specific procedure is provided, it overrides a general procedure ; but it does nothing more, and it goes no further. It seems that the headnote to that case is defective in saying : s. 122 has no application to any offence coming within Part V of the Act. That statement is far too wide, as has been shown.

In *Police* v. *Murray*, attention is directed, at p. 148, to the interpretation of the phrase "those offences may be summarily prosecuted" ; and the clause is

thus interpreted as meaning "'those offences may be punished on summary conviction,' and, accordingly, any person charged with such an offence is liable to be punished on summary conviction." There cannot, of course, be any disagreement with that statement. The judgment then continues:

> It follows, therefore, that the provisions of s. 49 apply, and the form of information therein referred to (Form No. 4) must be used. If the form prescribed for an indictable offence (Form No. 31) is used, the accused is not being prosecuted summarily.

Later on it is stated:

> For these reasons I conclude that the procedure specified in Part II of the Act is applicable to Part V, except in respect of offences under s. 238. Offences under that section are separate and distinct from those referred to in s. 187. Proceedings in respect of them must be commenced by the information prescribed for an indictable offence.

It must be noted, however, that the procedure under s. 238 is, by reason of s. 239 (*a*), applicable also to the offences mentioned in s. 188; so, clearly, the provisions of s. 124 cannot apply to such offences. Section 187 provides that two Justices or a Magistrate may exercise jurisdiction under Part V (except of course that Justices may not exercise jurisdiction in respect of the offences mentioned in s. 188), and among such cases is theft under s. 238. All such offences are to be or may be "prosecuted summarily." It is hard to see why a distinction should be drawn between one such offence and another, so far as the form of information is concerned.

A question of considerable importance arises as to the manner in which such proceedings should be commenced and conducted in the preliminary stages; because important results follow according as to whether the offences are regarded as indictable offences or merely as summary ones; whether the procedure to be followed prior to the actual hearing is that mentioned in Part VI or in Part II of the Act. There necessarily arises the question whether when the hearing is postponed the Justices have the right to adjourn the case under s. 86 for "any length of time" (*21 Halsbury's Laws of England*, 2nd Ed., p. 614, para. 1069), or whether they are confined to the period mentioned in s. 147 (should consent to a further period not be forthcoming.)

It seems that as the Court is to have summary jurisdiction in respect of all the offences mentioned in Part V, there cannot be any discrimination between them in the manner of instituting and conducting them in the early stages.

Part V is designed to provide summary trial in respect of certain indictable offences. Section 187 provides that, except where otherwise provided (as in cases under s. 188), any two or more Justices are to have summary jurisdiction in respect of the indictable offences mentioned in Part V; and those offences may accordingly be prosecuted summarily under such Part.

Apart from, and in absence of, statutory definition, "summary jurisdiction" and "summary prosecution" connote proceedings before Magistrates or a Magistrate on a complaint or information, heard and determined summarily (per Macdonald, L.J.C., in *Lamb* v. *Threshie*, (1892) 19 R. (Jus.) 78: In *R.* v. *Goldberg*, [1904] 2 K.B. 866, 869, it is said:

> The Act provides by s. 680 that the offence under the Act punishable with imprisonment for any term not exceeding six months "shall be prosecuted summarily in manner provided by the Summary Jurisdiction Acts"—in other words, the proceedings shall be commenced in the way contemplated by these Acts.

But Part V does not contain any such express provision. In s. 3 of the Act of 1894, it is enacted:

> Every charge of an indictable offence may be heard and all proceedings consequent thereon or in relation thereto may be had and taken before two Justices or a Magistrate.

In *Harris' Principles of the Criminal Law*, 12th Ed., p. 499, we find—

> Convictions of a certain class are described as "summary" to distinguish them from such as follow after a regular trial on an indictment or information. The essence of summary proceedings is the absence of the intervention of a jury, the person accused being acquitted or condemned by the decision of the person who is instituted judge.

And at p. 523:

> We may again draw attention to the fact that the examination and punishment of offences in a summary manner by Justices of the Peace, without the intervention of a jury, is founded entirely upon a special authority conferred and regulated by statute in the case of such offence.

"Prosecute" is defined in *Funk and Wagnall's Standard Dictionary* as (*inter alia*) "Carry on a judicial proceeding against, as to prosecute a criminal." In *Maunsell's New Zealand Justice of the Peace and Police Court Practice*, p. 88, it is said: "Moreover the information would have to be on Form No. 31 in the Schedule for an indictable offence." In *21 Halsbury's Laws of England*, 2nd Ed., p. 1069, para. 1032 appears:

> The rule with regard to procedure in indictable cases that may be dealt with summarily is that the procedure in indictable cases is to be followed until the justices have assumed the power to deal summarily with the matter, and after that the procedure is summary jurisdiction.

It is submitted that the word "prosecuted" in s. 187 refers only to the carrying on of the proceedings before the Justices, and does not relate to the commencement of the proceedings; the term is governed by the context and means the actual prosecution of the offender before the justices. It means, it would appear, much the same as "prosecuting" an appeal or an action, and is not concerned with the manner of originating proceedings. That in a word, Part V is concerned with the summary trial of indictable offences (as the heading states.)

The following brief statement, it is submitted, sets out the position:—

Part V is derived from the Indictable Offences Summary Jurisdiction Act, 1894, which was an Act, according to the title, "to define the Summary Jurisdiction of Justices of the Peace with respect to Indictable Offences." That statute did not purport to create offences—its purpose was to provide summary jurisdiction with respect to certain indictable offences mentioned therein. It was designed to give Justices summary jurisdiction of certain specified offences, over which the jurisdiction had at one time been the exclusive province of the superior Courts. The offences are created by the Crimes Act and other Acts; and it is jurisdiction to try certain of these offences that is given by Part V. It is indeed true to say that all the offences mentioned in Part V are indictable ones,

because Part V itself declares them so to be; and therefore they should be so described in the information. When these offences are actually before the Court, then it is for the Court to say (assuming that other conditions are fulfilled) whether it will deal with them summarily or otherwise.

These propositions, would seem to be justified:

1. There is nothing in *McDonald* v. *Dyer* that can properly be regarded as deciding that s. 124 does not apply to appropriate cases under Part V.

2. Part V is concerned only with the summary trial of the indictable offences named therein (as indicated in the heading to that Part).

3. The purpose of Part V is to give Magistrates, and to a lesser extent, summary jurisdiction over the indictable offences named therein.

4. That by express provision the jurisdiction of the Supreme Court over such offences is preserved.

5. The offences mentioned in Part V are indictable offences, and should be so described in the information.

6. If proceedings for offences named in Part V are not commenced within the prescribed periods, there is no right of summary trial in respect of them.

7. Section 124 of the Justices of the Peace Act, 1927, does apply to appropriate cases under Part V is proved by the history of the legislation (to which we are entitled to look in construing a consolidating measure if there be any doubt as to the meaning: see the observations of Sir Michael Myers, C.J., in *Tobin* v. *Dorman*, [1937] N.Z.L.R. 937, 941.

8. The case of *Ah Kan* v. *Cox*, (1902) 21 N.Z.L.R. 645, recognizes that the procedure under s. 124 is available in respect of appropriate offences under Part V. The reference to "assault" in s. 124 and to s. 92 (2) (which latter refers to s. 239 of Part V) indicates that Part V is not isolated from the rest of the Act of which it is deemed to form part: see the reasoning in *Hole* v. *Hole*, [1941] N.Z.L.R. 418.

ARREST WITHOUT WARRANT.

The Limits of Retention in Custody.

Solicitors are sometimes instructed to appear for a client who is to appear shortly to answer a certain charge, on which he has been arrested. The indications may be that that charge will be abandoned; but it is proposed to hold the arrested person in custody pending further investigations. Is such a course legal?

This point was considered at length in the recent case of *Leachinsky* v. *Christie*, [1945] 2 All E.R. 395, where, at p. 404, Scott, L.J., said:

> The law does not allow an arrest *in vacuo*, or without reason assigned: and the reason assigned must be that the arrest is for the purpose of a prosecution on the self-same charge, as is the justification for the arrest.

Then follows what constitutes the answer to the question posed, as above:

> It follows, and it is a principle lying at the very roots of English freedom, that if a man is arrested on one charge he is entitled to his release the moment the prosecution of that charge is abandoned. The prosecution cannot arrest on one charge, abandon their intention to proceed on that charge, and then keep him in cold storage still nominally on that charge, whilst they inquire into the possibility of putting forward a different charge. To do that they must release him; then, when they propose to put forward some other charge, they can make that new charge the occasion of a new arrest.

Another pertinent passage is contained at pp. 404 and 405, and is as follows:—

> It follows from what I have said that the practice, if there be one, which the Judge obviously had in mind, of arresting a supposed murderer, for instance, on a minor charge, as a means of preventing his escape from justice at a time when the police suspect, but have no sufficient clues to constitute reasonable and probable cause for arresting the suspect for the suspected crime, is in my opinion illegal, and gives the person arrested a cause of action for false imprisonment. In practice the police would, as a rule, incur no liability for substantial damages, except where their anticipatory suspicions prove ill-founded; but it is important, for the sake of the great principle of the liberty of the subject, that the illegality of the practice should be widely known—to Judges, to the legal profession, to the police and to the public. It is better that an occasional criminal should escape punishment, than that the Judges should let in the thin edge of the wedge for discretionary arrest at the instance of the Executive.

In dealing with the question, it must be pointed out that, at p. 404, the learned Lord Justice says:

> Again, to prevent misunderstanding, it may be well to point out, that once a prisoner has been lawfully arrested on a definite charge and brought before a Magistrate's Court for committal, there is nothing in the law of arrest to prevent a more serious charge being added to or substituted for the existing charge. That questions appertains not to the law of arrest but to the procedural law of the Court.

As to the necessity of keeping the right of arrest without warrant within the proper limits, he said at p. 405:

> Subject only to the sovereignty of Parliament which under our Constitution can make any law, English liberty is absolutely dependent on our Courts of Justice. To keep clear the distinctions between the functions of the Executive and those of justice is vital.

and on the same page, he added:

> Arrest by the Executive uncontrolled by the Courts has happened in past times in English history; and it needed the intervention of the Courts to curb the Executive . . . The *lettres de cachet* of 18th century France afford another illustration; the Gestapo in Germany in recent years afford a third; and finally it is the fear of a repetition of that vast, insidious and progressive evil of encroachment by the Executive, on the proper sphere of the Judiciary which is paramount in men's minds when they say they fear and therefore hate bureaucracy.

The Courts then are very jealous of the liberty of the subject; and it needs must be that the Courts enjoy the fullest freedom and independence of the Executive in the exercise of their proper functions. And the case of *Wallis* v. *Solicitor-General*, (1903) N.Z.P.C.C. 23, the Privy Council, and the celebrated Protest of the Bench and Bar in connection with such case (on pp. 730 *et seq*) equally affirm such principle. It is clear that in order that the Magistracy may enjoy the same independence as the Judiciary, the tenure of their office should be changed from, as at present, the pleasure of the Executive, to the holding of their office during good behaviour. Such a change would remove any suggestion that the Magistracy may be subject to the Executive, and would supply a long-felt want in regard to the Magistrates, with safety and satisfaction, both as to themselves and the public.

LAW SOCIETIES' ANNUAL MEETINGS.

AUCKLAND.

The Annual General Meeting of members of the Law Society of the District of Auckland was held in the University College Hall, on Friday, March 8, 1946. The chair was occupied by the retiring President, Mr. A. Milliken.

The Annual Report presented to the meeting showed that 480 certificates had been issued during the year, as compared with 436 for the preceding year; the increase being due to the number of men who had returned from service with the Armed Forces and had recommenced practice.

During the year the deaths of the following members and former members had been recorded: Messrs. R. Abbott, D. W. B. Baird, Fred Earl, K.C., W. D. M. Glaister, S. I. Goodall, G. G. Thorpe, and C. E. McCormick.

There had been seventy-two inquiries made for missing wills, which had been discovered in a number of cases. The Council reported that up to the end of 1945 grants totalling £1,063 18s. had been made for the purpose of assisting the rehabilitation of returned servicemen, and during the current year a further sum of £331 9s. had been granted. Appreciative reference was made to the booklet "Changes in New Zealand Law, 1939–1944" which had been prepared by a Committee of the New Zealand Law Society. A copy of this booklet had been placed in the hands of each returned practitioner.

A very fine painting of Sir Joshua Strange Williams had been presented to the Society by his son. The gift had been much appreciated, and had been hung in a prominent place in the Library.

Congratulations had been forwarded to Messrs. A. H. Johnstone, K.C., O.B.E., and I. J. Goldstine, O.B.E., on the honours recently conferred on them.

The revenue account showed a small credit balance for the year's working, this after a series of debits during the war period. On the motion of the President, seconded by Mr. Leary, the annual report and balance sheet were adopted.

Mr. L. P. Leary was then declared elected President, he being the only nominee for the position. The new President declared Messrs. V. N. Hubble and H. R. A. Vialoux duly elected Vice-President and Treasurer respectively.

The following were then declared elected members of the Council as a result of the postal ballot: Messrs. C. J. Garland, T. E. Henry, A. H. Johnstone, K.C., G. H. Wallace, H. C. Rishworth (representing the Northern District), R. M. Grant, J. B. Johnston, A. Milliken, and M. R. Grierson (representing the Southern District).

The following were duly elected to represent the Society on the Council of the New Zealand Law Society: Messrs. L. P. Leary, A. Milliken, J. B. Johnston, A. H. Johnstone, K.C.

Mr. A. H. Johnstone, K.C., gave a report on the present position of the Guarantee Fund.

There was a discussion on the operation of the Servicemen's Settlement and Land Sales Act, and it was resolved that certain questions be referred to the incoming Council for consideration.

Several returned servicemen amongst those present thanked the Council for what had been done on their behalf. In particular they referred to the gift parcels, to the booklet setting out the changes in the law, and to the list of practitioners supplied to whom might be referred any problems which might confront them on their resumption of practice.

The meeting closed with a vote of thanks and appreciation to Mr. Milliken for his services as President during the past two years.

CANTERBURY.

The annual meeting of the Canterbury District Law Society was held on March 11, 1946, at 8 p.m. Mr. E. A. Lee presided, and there were sixty-four members present.

In moving the adoption of the annual report and balance sheet, the President appealed to members to give practical assistance to practitioners returning from overseas. He reported that the year had been a busy one for the Council. Many Government Departments had been interviewed concerning difficulties confronting the profession, and these had been satisfactorily overcome.

The President spoke of the profession's regret at the deaths of Messrs. Harold Edgar, G. W. C. Smithson and F. Wilding, K.C. The sympathy of the Society had been conveyed to the relatives of the deceased members, and tributes were paid in the Supreme Court to the late Mr. Wilding.

Mr. L. J. Hensley seconded the motion, which was carried.

The President also reported on progress made in obviating delays in connection with finalization of stamp accounts. He wished to place on record the debt that members owed to the outgoing Council, particularly to Messrs. Bowie, Penlington, and Hensley.

The following officers were elected for the ensuing year:—President, Mr. L. D. Cotterill; Vice-president, Mr. W. R. Lascelles, and Hon. Treasurer, Mr. L. J. Hensley. Members of Council: Messrs. E. S. Bowie and A. I. Cottrell, Dr. A. L. Haslam, Messrs. L. J. Hensley, E. A. Lee, C. G. Penlington, and A. C. Perry, and a Timaru representative. Delegates to New Zealand Law Society: Messrs. L. D. Cottrell and E. A. Lee.

It was left for the incoming Council to fix the holidays for Christmas 1946, and Easter 1947.

Mr. L. J. Hensley moved, and Mr. G. P. Purnell seconded the motion, which was carried unanimously, that £1 1s. levy be imposed on all members, to be paid in or before June, 1946, and applied to the benevolent fund.

It was also agreed that future annual meetings be held at 8 p.m. instead of 4 p.m. as hitherto. The sub-committee of the Council on the Legal Aid Act, made their report, which was endorsed by the meeting.

SOUTHLAND.

There was a large attendance at the annual general meeting of the Law Society of the District of Southland, held in the Law Library, on March 6, 1946, at 7.30 p.m. The President, Mr. John Tait, was in the chair.

Following the reading of annual report and balance sheet, Mr. Tait, in moving their adoption, expressed his personal appreciation of the support afforded him by the outgoing Council, and the courtesy of the profession as a whole, and thanked those who had assisted him by acting as deputies at the New Zealand Council meetings. The year had been a comparatively quiet one. He referred to the burden of work falling upon Land Sales Committees, and upon Crown Valuers. Those who had been overseas were welcomed back. He also made mention of the manner in which bureaucracy had flourished during the war period, and the duty of the profession to guard against undue interference with the liberty of the subject. There was, it was unfortunately true a sad lack of reinforcement for the profession from the secondary schools. At the present time the trend was towards the accountancy profession, but he felt that this might cure itself in time.

The motion was seconded by Mr. Mahoney.

The result of the election of officers was as follows: President, Mr. L. F. Moller; Vice-President, Mr. Kenneth G. Roy; Hon. Secretary, Mr. J. H. B. Scholefield; Hon. Treasurer and Librarian, Mr. C. N. B. French; Council, Messrs. John Tait, H. E. Russell, W. H. Tustin, H. K. Carswell, and N. L. Watson; Representative on the Council of the New Zealand Law Society, Mr. L. F. Moller; Hon. Auditor, Mr. M. M. Macdonald; Delegate to the Chamber of Commerce, Mr. J. C. Prain; Delegate to the Progress League, Mr. J. R. Hanan.

It was resolved, after discussion, that a levy or levies not exceeding £3 in all be imposed on all members of the Society practising on their own account or in partnership, payable at such times and in such manner as the Council should direct.

The following resolution was also carried:

"That the Secretary write the New Zealand Law Society asking them, in view of the extreme delays still being experienced in obtaining release of probates, to approach the Commissioner again with the suggestion that all estates having a Final Balance of less than £10,000 be certified by local offices, without the delay involved in submitting the matter to Wellington."

The Secretary reported on the suggestions put to the Land Sales Committee upon which no decision had so far been received. The action of the outgoing Council in this respect was approved.

Mr. Tait reported on what was apparently the practice in northern centres with regard to wife's costs, where she had given an address for service, but filed no answer. It was decided that the northern practice be referred to the incoming Council for consideration.

The meeting directed the incoming Council forthwith to take into consideration the honoraria paid to the Secretary and Treasurer-Librarian, with a view to making them more commensurate with the duties performed.

The question of renewing the Annual Bar Dinner was referred to the incoming Council.

The meeting closed with a vote of thanks to the outgoing Council and a vote of thanks to the Chair.

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

Land Sales and Compensation.—The appointment of Ongley, J., as Judge of the Land Sales Court will meet with the approval of the conveyancing branch of the profession with which he was associated for many years in the South Island, before he arrived in Wellington. On the other hand, common-law practitioners may not look upon the position with that happy abandon that it is easier for the "indoor man" to assume, freed as he is from the worries of case-law and the difficulties of persuading witnesses, and in particular medical ones, to appear in Court. As he would be the first to admit, Ongley, J., has not enjoyed the same advantages as his predecessor, O'Regan, J., who was a walking compendium of compensation law, and found his life on the Bench took him along the same routes as he had followed at the Bar. The accumulation of decided cases, the many amendments hidden away in Statutes Amendment Acts and elsewhere, the introduction of various diseases as "accidents," and the constant expansion of the Act, have combined to add to the complexity of the problems that fall to be decided in the Court of Compensation. Delay there bears heavily upon both employer and worker. Since the decision of the Court of Appeal in *Logie* v. *Union Steam Ship Co., Ltd.*, [1945] N.Z.L.R. 388, the employer has been compelled to discontinue the former practice of moving to have lump sum compensation fixed and is thus totally reliant upon the worker proceeding with his writ in cases where settlement cannot be made. The worker, for his part, is often seriously embarrassed by delayed hearings which tend to create a neurasthenic condition in an injured applicant and are soul-destroying to the honest worker, who fears that, if he returns to work too early, his rights under the Act may be prejudiced. Whether the pressure upon the Land Sales Court and the Court of Compensation can be smoothly regulated remains to be seen; but, at first glance, the experiment seems dubious, and casts a grave responsibility upon the new Judge, whose ability to work excessively long hours has long been admitted by members of the profession.

The Hare and the Hounds.—An unusual situation arose at this sessions of the Court of Appeal in *Re Heffron*, a case involving the question as to whether the Court had jurisdiction to apportion the shares of dependant children under the Deaths by Accidents Act, 1908, by creating a class fund. D. R. White who was leading for the Public Trustee, informed the Court that his junior, W. Brown (who had appeared in the Court below) had arrived at a view different from his own and he asked whether each of them might argue different sides. Remarking that the question was primarily academic, the Chief Justice (after consulting his brethren) granted the necessary permission; although Blair, J., observed that once when he had said that he differed from his leader the Judge had told him that the correct way to put this delicate situation was to state that an alternative submission would be made. Scriblex is reminded of a case in which Judge Ruegg (then Ruegg, K.C.) was once in consultation upon an appeal under the Workmen's Compensation Act. His junior raised a certain point that did not commend itself to him. On its being repeated, he had to confess that it was too subtle for him to grasps. "But," he added, "you shall have an opportunity of arguing it before the Court of Appeal yourself." The junior thanked him for the chance, and afterwards told the solicitor that it seemed to him that Ruegg was getting past his work not to 'spot' a simple point like that. Next day came, and with it the argument of the appeal. Mr. Ruegg, having finished his argument, asked the Court to hear his junior upon one particular point. The Court having assented, the aspiring junior put his point, if not well, at least fully, and was listened to with such patience as the Lords Justices felt constrained to bestow. When judgment came to be given, only one of them alluded to the argument of the junior counsel, and that was Lord Justice A. L. Smith, who thus referred to the effort: "Mr. H. *rushed in* on certain sections where Mr. Ruegg *feared to tread*."

Lawyers.—When giving evidence recently before *Johnston, J., in Christchurch*, a witness admitted, under cross-examination, that he had consulted a firm of solicitors. "I found out later that these people were only solicitors, not lawyers," said the witness, to the amusement of the Court. The distinction is subtle, if it exists at all. More probably it is like the invisible fish that the gullible public sees in the tank filled merely with rippling waters. Actually, the word "solicitor," although it appears as early as 1420, is almost a century later in origin than "attorney" who was at first a mere messenger and often a woman. One Hudson, called to the Bar in 1605, wrote that "in our age there are stepped up a new sort of people called solicitors unknown to the records of the law who, like the grasshoppers of Egypt, devour the whole land." In his famous *Diary*, Evelyn, who had studied law at the Middle Temple, speaks of Parliament in 1700 voting that the exorbitant number of attornies be lessened—"now indeede swarming and evidently causing lawsuits and disturbance, eating out the estates of people, provoking them to go to law." The story is told that, in 1820, some one said to Lord Tenterden, L.C.J., "I am the *plaintiff's solicitor*." "Sir, he replied, "we know nothing of solicitors here; we know the respectable rank of attorney." Since the Solicitors Act of 1843, "attornies" and "solicitors" are synonymous. Today, an "attorney" has a special meaning, but for some reason or other the litigant who boasts of the "good lawyer" he has got, seems to frighten his opponent who has merely succeeded in engaging a "good solicitor."

British Justice.—"The history of English law during the war years shows that the ancient tag *inter arma leges silent* has been proved false in this country, and that, even during the years when Great Britain and the Empire alone faced the greatest military tyranny in the history of the world, the common law continued on its calm and unbroken way. Changes there have been as there must be in every living thing; but the basic principles of the law have remained untouched—freedom for the individual, equality before the law, and, justice for all men."—*Law Quarterly Review* (October, 1945).

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. Landlord and Tenant.—*Land subject to a Lease with Purchasing-clause—Whether Consent of Lessee necessary to Mortgage by Lessor.*

QUESTION: A.B., the registered proprietor of a parcel of land under the Land Transfer Act, 1915, has given a registered lease with a purchasing clause to C.D. A.B. now intends to mortgage the land to a bank, subject to the lease. Should the consent of C.D. be obtained to the mortgage?

ANSWER: There does not appear to be any necessity to obtain C.D.'s consent to the mortgage, unless the amount of the proposed advances exceeds the amount of the unpaid purchase money, or unless A.B. has covenanted with C.D. not to mortgage the land during the currency of the lease. (Sometimes such a clause is inserted in a lease, and the question is silent on this point.) Probably the intended mortgage is to secure an overdraft which will be repayable at any time. When the time comes for C.D. to pay the purchase money and take title, the bank's mortgage can easily be paid off: *Garrow's Real Property in New Zealand*, 3rd Ed., 200, citing, *inter alia*, *Daveney* v. *Carey*, (1913) 33 N.Z.L.R. 598.

Different considerations will apply, if the intended mortgage is collateral, and is for an amount exceeding the unpaid purchase money. In such a case, the bank should covenant to discharge the mortgage as to the land concerned upon payment of the purchase money. X1.

2. Real Property.—*Tenants in Common—One Owner missing—Sale by Other Owner—Procedure.*

QUESTION: A. and B. hold a section as tenants in common in equal shares. A. left New Zealand fifteen years ago and has not been heard of since. It is not known whether he is alive or dead. B. wishes to sell. What is the procedure?

ANSWER: Communicate with the Public Trustee, who may apply to a Judge of the Supreme Court for leave to sell A.'s share: see s. 87 (1) (c) of the Public Trust Office Act, 1908. If the value does not exceed £1,000, the consent of the Supreme Court will not be necessary: see s. 41 of the Public Trust Office Amendment Act, 1921–22. X2.

3. Practice.—*Magistrates' Court — Plaint — Defendant named Twice in Title to Action—Whether allowable—Proper Procedure.*

QUESTION: I have been instructed to sue a person in two different capacities: can you please advise if it is regular to name the same person twice in the title to the action?

ANSWER: No, it is quite incorrect to name such person twice, as the following passage from the judgment of Lawrence, L.J., in *Hardie* v. *Chiltern*, [1928] 1 K.B. 663, 700, clearly shows: "This action is unusually constituted in that the three defendants are named as parties twice over . . . In my opinion, this double naming on the record . . . is altogether irregular. There is no objection to combining in the same action claims against defendants who are sued in a representative capacity with claims against them personally, if such claims can be conveniently tried or disposed of together (see Order XVIII, r. 1, of the Rules of the Supreme Court) [to which R. 100 of the Code of Civil Procedure and s. 60 of the Magistrates' Courts Act, 1928, correspond] and it is usual in such cases . . . to state in the endorsement of claim on the writ that the defendants are sued in their personal capacity as well as their representative capacity, but I know of no case in which the Court has permitted the same parties to be named twice over on the record." The learned Lord Justice (at p. 701) points out that this objection is purely technical and could readily be dealt with by a formal amendment of the record if it does not affect the substance of the matter.

In the Magistrates' Court it is suggested that while such person could be properly named once only as defendant, yet the plaint-note, summons, and statement of claim should show that such persons is sued personally as well as in his other capacity, and the statement of claim should show in the prayer that judgment is asked against him personally as well as in the other capacity. C1.

4. Mortgage—Company.—*Mortgage in name of Defunct Corporation—Principal Moneys repaid but no Discharge obtained—Procedure to expunge Mortgage from Register Book.*

QUESTION: Fifteen years ago, A. mortgaged a parcel of Land Transfer land to B. Ltd., a company registered under the Companies Act. The company went into liquidation and became defunct seven years ago; just before it became defunct A. re-paid the amount owing under the mortgage to the liquidator but omitted to obtain a discharge. A. has now sold to C. and wishes to give C. a clear title freed of the mortgage.

(*a*) Can the District Land Registrar on being supplied with evidence as to the facts expunge the entry of the mortgage from the Register Book?

(*b*) If not, can the liquidator, who is still alive, now execute a registrable discharge?

(*c*) If the reply to (*a*) and (*b*) are both in the negative, how can A. give C. a clear title?

ANSWER: (*a*) The District Land Registrar has no authority to expunge the entry of the mortgage from the Register Book or mark it discharged thereon: *Campbell* v. *District Land Registrar of Auckland*, (1910) 29 N.Z.L.R. 332.

(*b*) The liquidator has no authority to execute a discharge: he is in fact no longer the liquidator. When the company went out of existence, he became *functus officio*.

(*c*) If the mortgage had been repaid for 20 years, the mortgagor could avail himself of s. 43 of the Statutes Amendment Act, 1936. But on the facts that section is not applicable.

The mortgagor should petition the Supreme Court for a vesting order under s. 11 of the Trustee Act, 1908, vesting the mortgage in A., the mortgagor. The vesting order will require to be stamped: s. 64 of the Trustee Act, 1908.

A. can then get the mortgage expunged either by applying to the District Land Registrar to have the mortgage marked "merged," or by executing a discharge thereof and registering the discharge: see *In re J. J. Craig's Contract*, [1928] N.Z.L.R. 303, *In re a Mortgage, McDonald to Martin, Ex parte McDonald*, [1933] N.Z.L.R. 602; and see article in (1942) 18 N.Z.L.J. 115.

As assets of a dissolved company vest in the Crown, the Court may require notice to be served on the Attorney-General, although the Court dispensed with such notice in *In re J. J. Craig's Contract*, *supra*. X1.