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FAIR RENTS LEGISLATION: THE DEFINITION OF "DWELLINGHOUSE."

THE question whether or not a tenement is a "dwellinghouse" within the meaning of that term as defined in s. 2 of the Fair Rents Act, 1936, is not a preliminary or collateral question to be determined as to the existence of jurisdiction, but is the very question to be determined by a Magistrate in the exercise of his jurisdiction whenever the restrictions upon the rights of a landlord imposed by the legislation are in dispute in an action for possession of a tenement. In *Bethune* v. *Bydder*, [1938] N.Z.L.R. 1, 3, Ostler, J., said:

> In an ejectment action it is not the duty of a Judge to assume that the premises are within the Fair Rents Act. That must be proved by evidence. The Act is for the protection of the tenant, and is a drastic interference with the rights of property. If the tenant claims the protection of the Act, the onus rests upon him to prove that he is entitled to it.

In that case the Court of Appeal held that the question whether the premises were a "dwellinghouse," as defined, is a preliminary question that must be decided before an order can be made. Where the question arises in an inferior Court, it goes to the jurisdiction and is subject to inquiry in a superior Court, s. 20 of the statute notwithstanding.

In the same case, at pp. 23, 24, Johnston, J., relying on *Slater* v. *Lask*, [1924] 1 K.B. 754, *White* v. *Bembridge*, [1935] 1 K.B. 244, and *Williams* v. *Perry*, [1924] 1 K.B. 936, said that a plea that a tenement is within the protection of the Fair Rents legislation is a matter of defence, and he stated the following propositions:—

> (i) The onus of proving the applicability of the Act to the premises lies on the person invoking the provisions of the Act; and (ii) that to bring the premises within the Act the party invoking it has to prove (*a*) that the demised premises are in fact used as a dwellinghouse, and (*b*) that the user relied on is not in breach of the conditions of the tenancy, remembering in this connection that, while the question whether the tenant by his mere use, or disuse, of the demised premises, without the landlord's knowledge, can either take the premises out of the Act or bring the premises within the Act, has not yet been decided: it is clear the change must be unmistakeable and supported by unequivocal evidence. It is clear also, in my opinion, the terms of the tenancy, express or implied, are relevant to determine the nature of user and raise a presumption that has to be set aside by evidence of unequivocal facts.

In *Sykes* v. *Atkin*, [1942] N.Z.L.R. 63, a Full Court (Smith, Kennedy, and Callan, JJ.) said that the judgment in *Bethune* v. *Bydder* (*supra*), applies in principle to the question whether a tenement constitutes premises which are excluded from the definition of "dwellinghouse" in s. 2 of the principal Act, by the excluding paragraphs of that section. Their Honours, at p. 65 said that that is just as much a preliminary question and goes just as much to the jurisdiction as does the question whether premises, which admittedly constitute a "dwellinghouse," as defined, are, or are not, excluded from the operation of the Act by virtue of the exceptions, then contained in s. 3 (1), which has since been repealed, but has been replaced by s. 3 (1) of the Fair Rents Amendment Act, 1942, which is as follows:—

> The principal Act shall apply with respect to every dwellinghouse that on the passing of this Act [October 26, 1942] or at any time thereafter is let as a dwellinghouse.

The paramount inquiry, therefore, now is whether premises have been, and are, "let as a dwellinghouse." And, in order to ascertain whether the statute applies to any particular premises, they must not only be "let" as a dwellinghouse, but must come within the definition of "dwellinghouse" in s. 2 of the principal Act.

In the recent case, *Lister* v. *Toomey* (to be reported), which was an application for prohibition on the ground that the Magistrate had purported to apply the provisions of the Fair Rents Act, 1936, to a house that did not fall within the provisions of the statute, Fair, J., summarized the matter of jurisdiction, as follows:—

> To enable any Magistrate to consider the provisions of the Fair Rents Act in relation to any matter coming before him, he has first to find whether or not the house is a "dwellinghouse" within the meaning of s. 2 of the Fair Rents Act, 1936. If it is, it falls within the Act and the Magistrate has jurisdiction. If it is not, then it does not fall within the Act, and the Magistrate has no jurisdiction to apply the provisions of the Fair Rents Act, which has application only to a "dwellinghouse" as defined by it.
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> If he refuses jurisdiction on the ground that the house is not a dwellinghouse, and that is an erroneous decision in law, this Court, in the exercise of its duty in the jurisdiction of exercising supervision over Courts of subordinate jurisdiction, has power, and will require him to exercise the jurisdiction which the law requires him to exercise in those cases to which the Act applies. If, on the other hand, he holds he has jurisdiction in respect of a house which is not within the scope of the Act, then this Court equally has jurisdiction to restrain him from applying the law to circumstances to which it is not applicable. That, of course, is quite a different function from considering whether the decision is right or wrong in respect of matters over which he has jurisdiction.

From the foregoing, it is clear that the proper construction of the definition of "dwellinghouse" in s. 2 of the principal Act, as amended, is of the utmost importance in every proceeding in which the Fair

Rents Act, 1936, comes up for consideration. That definition carries within its terms exceptions which are difficult to construe, as, both in England and here, Judges have constantly complained of the bad draftsmanship of the definition. As we have seen, the onus is upon the person setting up the Fair Rents Act, 1936, whether as a tenant to bring himself within the definition, or as a landlord to bring himself within the exceptions, to prove respectively, to the satisfaction of the Court that the premises are within the definition of "dwellinghouse," or that they come within the exceptions in that definition or otherwise in the statute. This is so, because the statute applies only to premises "let as a dwellinghouse," and, only when that paramount condition is established, does it become necessary to prove that the premises, in fact, come within the definition of "dwellinghouse." If they do not, the Act has no application, and the Court no jurisdiction. This brings us accordingly to consider the definition itself, and to consider in detail the several phrases that go to make it up.

The definition of "dwellinghouse" in s. 2 of the Fair Rents Act, 1936, as amended, is as follows:—

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

Section 6 of the Fair Rents Amendment Act, 1942, is as follows:—

> 6. (1) The application of the principal Act to any dwellinghouse shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade, or professional purposes.

"Let as a Dwellinghouse."

As we have seen, the jurisdiction to determine any questions arising out of the Fair Rents Act, 1936, and its amendments, depends on the applicability of the statute, as stated in s. 3 (1) of the Fair Rents Amendment Act, 1942: that is, whether or not they were "let as a dwellinghouse." That is the preliminary inquiry, because if they were not so let, the matter is at an end; and the detailed examination of the facts showing whether or not they come within the definition of "dwellinghouse" is unnecessary.

The first duty of the Court, therefore, is to ascertain the subject-matter of the contract between the parties. If the contract between the parties shows that the premises were not let as a dwellinghouse, then the premises are outside the protection of the statute: *Bethune* v. *Bydder* (*supra*). Thus, in *Blakey* v. *Brennan*, [1944] N.Z.L.R. 929,* it was admitted that the premises had been let as an apartment house, and the tenant did not himself reside in the building, which had been subdivided and let by him in flats. The fact that one of the flats was occupied by the manageress of the tenant did not bring the building within the definition of "dwellinghouse." Again, in *Wood* v. *Barber*, [1943] N.Z.L.R. 323, the premises were built for, let, and occupied by the tenant as a large boardinghouse or private hotel. Blair, J., rejected the contention that because the proprietor-tenant occupied a room in these premises, his occupation in that respect converted the thirty-roomed boardinghouse into his dwellinghouse, and thus conferred on the whole establishment the protection given by the statute to premises let as a dwellinghouse. His Honour held that, as the premises had been let as a boardinghouse or private hotel, the tenant's occupation was for the purposes of his business since the premises had been not "let as a dwellinghouse" but for purely business premises.

The test as to whether premises have been "let as a dwellinghouse" was put by the Court of Appeal in *Epsom Grandstand Association, Ltd.* v. *Clarke*, (1919) 35 T.L.R. 525, and was stated, at p. 526, in the judgment of Bankes, L.J., as follows:—

> The defendant and his family and servants continually lived on the premises, and their residence was in accordance with the terms of the agreement. Was this a dwellinghouse? The house was dwelt in, and it was let to the defendant for that purpose. In the fullest sense it was a dwellinghouse, and none the less so because it was also a public-house. He could not accept Mr. Disturnal's contention that because it was let for business purposes it could not be a dwellinghouse within the Act. If that contention were accepted it would exclude a great many premises which the Legislature did not intend to be excluded.

That judgment has been followed, and its test applied consistently by the Courts in England, (though not, at times, without criticism), ever since. The Court must, in every case, seek the purpose for which the premises were let, as evidenced by the contract between the parties, and not the use to which they are put.

The underlying principle of all the English authorities, since that case was decided, appears to be that the principal object of the Fair Rents legislation is to protect a tenant who is residing in a house, let to him and used by him as his dwelling, from being turned out of his home; and not to protect a person who is not resident in a dwellinghouse, but is making money by subletting it. In other words, personal occupation for use as a home is the basis of the protection: see *Haskins* v. *Lewis*, [1931] 2 K.B. 1, and *Skinner* v. *Geary*, [1931] 2 K.B. 546, both of which are followed in *Blakey* v. *Brennan*, at p. 935. Thus, in one of the latest English cases, *Vickery* v. *Martin*, [1944] 2 All E.R. 167,† the Court of Appeal held that a house let as a dwellinghouse, and used by the tenant for the letting of rooms while her husband was serving in the army, was within the protection of the statute, as the taking of lodgers by the tenant who used the premises as her dwelling was ancillary to her occupation of the house as a dwellinghouse. As Fair, J., explains in *Blakey* v. *Brennan* (*supra*) at pp. 936, 937, a house, which is within the definition of "dwellinghouse," and has been let as such, may be used by a tenant for business purposes if the business consists of making a profit from the use of the premises as a dwellinghouse, either as a boardinghouse or for letting apartments.

Other applications of the principle are found in the decisions of our Magistrates. Thus, in *Briggs* v. *Kirkland*, (1943) 3 M.C.D. 240, Mr. Goulding, S.M., who had held in *Kirkland* v. *Anderson*, (1941) 2 M.C.D. 75, that the subject-matter of the contract between the parties was a building "to be used as a boarding or apartment house," said that the amendments of the Fair Rents Act, 1936, which had been enacted since the latter judgment had been given had not affected the

* For a fuller consideration of *Blakey* v. *Brennan*, see (1944) 20 N.Z.L.J. 224.

† For a fuller consideration of *Vickery* v. *Martin*, see (1944) 20 N.Z.L.J. 272.

necessity of proving that premises had been "let as a dwellinghouse" to bring them within the statute. The tenant in *Briggs* v. *Kirkland* was holding under the same lease as was under consideration in *Kirkland* v. *Anderson*. During the currency of that lease the tenant wished to occupy the premises as a dwelling for herself and her family. As that was in breach of the contract of letting for use as a boarding or apartment house, she could not bring the premises within the definition by ceasing so to use them and occupying them as a residence for herself and her family. This decision was followed by Mr. Lawry, S.M., in *Pegden* v. *Key*, (1944) 3 M.C.D. 429; and Mr. Harley, S.M., in *Cowan* v. *Dodds*, (1944) 3 M.C.D. 494, came to the same conclusion.

In *Pegden* v. *Key* (*supra*), the original letting had been for business premises, thus excluding them from the Fair Rents Act, 1936; and, when s. 3 of the Amendment Act, 1942, was passed, that section did not give them the protection of the statute, since, at the time of the passing of the amendment, the premises were not let as a dwellinghouse, but for business purposes. Though, in *Blakey* v. *Brennan*, it was held that premises let as an apartment house were not within the definition of "dwellinghouse," and had not been let as such, each of the flats into which the premises were subdivided was "let as a dwellinghouse."

Where the letting is indeterminate, as for any lawful purpose, in the contract between the parties, then it is the actual user at the time when possession is sought that has to be considered by the Court in determining whether or not the premises have the protection of the Act: *cf. Gidden* v. *Mills*, [1925] 2 K.B. 713.

In view of s. 6 of the Fair Rents Amendment Act, 1942, once the tenement has been found to have been let as a "dwellinghouse," within the meaning of the definition, it is not sufficient, in order to exclude it from the operation of the statute, to show that, after it was so let, part of the premises were used for business purposes: *Dalzell* v. *Smith*, (to be reported), following *Vickery* v. *Martin*, [1944] 2 All. E.R. 167.

"Let as a Separate Dwelling."

Coming now to the definition of "dwellinghouse" in s. 2 of the Fair Rents Act, 1936, the first phrase to which attention must be given is that comprising the words "let as a separate dwelling."

In *Kirkland* v. *Anderson*, (1941) 2 M.C.D. 75, Mr. Goulding, S.M., held that the words govern both a whole house and part of a house. The whole intention of the legislation, he said, is to regulate the letting of dwellinghouses; and the word "let" in the phrase under notice must be read in conjunction with the words "any house" and "any part of a house," in the definition, and it is impossible to separate the word "let" from the rest of the phrase. Later, in *Blakey* v. *Brennan* (*supra*), as the learned trial Judge pointed out, both counsel had agreed upon a like construction. In that case, it was held that each of the flats into which the premises were subdivided had been "let as a separate dwelling," and were accordingly within the definition of "dwellinghouse": Fair Rents Amendment Act, 1939, s. 5; but the whole block of apartments, as already stated, was held, following *Weatheritt* v. *Cantlay*, [1901] 2 K.B. 285, 289, not to be "let as a separate dwelling," apart from the fact that it had not been "let as a dwellinghouse." So, too, Mr. Harley, S.M., held in *Cowan* v. *Dodds* (*supra*), that premises let as a boardinghouse were not within the statute; but each of the rooms let to boarders was "let as a separate dwelling."

In the most recent case under this heading, *Lister* v. *Toomey* (to be reported), the premises were let, and had been used, in two parts: three rooms as a flat, and the remaining seven rooms and a porch upstairs, as another flat or residence, which was occupied by the tenant himself, and the bathroom and lavatory were used by the occupants of both units. The premises were used as a residence both by the tenants of the flat, and the tenant of the whole building, and the three rooms of the flat were self-contained. It was contended that the premises were not "let as a separate dwelling," but were let as two separate dwellings. His Honour Mr. Justice Fair, said that it was concluded against that submission by decisions of the Court of Appeal in England, and the principle of which seemed to be directly applicable, though the facts were not analagous. He referred to the *Epsom Grandstand Association* case (*supra*), a decision that which had been suggested by McCardie, J., in *Brakspear* v. *Barton*, [1924] 2 K.B. 88, (where the test of "dominant purpose" was rejected) as being open to juristic criticism, but which has been consistently followed by the Court of Appeal in England: see *Hill on Landlord and Tenant*, 735. Applying the test stated in the *Epsom Grandstand Association* case (*cit. supra*), the learned Judge said that one started with the view that the building at the commencement of the tenancy was a dwelling. So far as the ordinary meaning is concerned, it was a separate dwelling; that is, the whole house, including the flat, was a separate dwelling, though it had then been subdivided for the purpose of letting three rooms as a flat. It was let to the tenant primarily for use as a home, although admittedly, at the time, three rooms were sublet, and in one sense there might be said to be two separate dwellings. He continued:

> But the cases show that premises are let as a dwelling which have included in them a portion that is used as a business—I use the word in the broad sense and not in the ordinary sense of the word—for the purpose of deriving income. The fact that this house has included in it three rooms entirely apart from those used by the tenant which are let to a subtenant, and that the only parts in joint occupation are the bathroom and lavatory, and which are let for the purpose of producing income, seems to me to be a position not different in substance from the cases referred to where a great portion of the building was occupied as business premises in the narrower sense—that is, as shops and offices, or as an hotel, or as a boarding-house.
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> And so it seems to me that this house does fall within the definition in this case and consequently, that the house is a house let as a separate dwelling, and the use of it or part of it for another purpose *qua* tenant does not take it out of the Act. That is my present view and that seems to be confirmed by the original form of s. 2 (*b*), which excluded "any premises used by the tenant exclusively or principally for business purposes," which means by implication that premises used party for business purposes were not excluded. That view is confirmed, too, by s. 6 of the 1942 Amendment Act, although the words "business purposes" are not very apt to apply to the letting of a single flat. The position has to be judged at the time the tenancy was created. But, if later on, the premises are changed in their nature from the tenancy that was created, where the tenant has the right under his letting to change the nature of the use of the building and such change of use takes it outside s. 2, then the premises lose the protection—they are decontrolled.

In another article, we shall return to a consideration of the definition of "dwellinghouse," with particular reference to the phrase used therein, as an exception, "where the tenancy does not include any land other than the site of the dwellinghouse and a garden or other premises in connection therewith." This phrase has

been the subject of a number of conflicting decisions in the Magistrates' Courts, and of judgments qualifying the opinions expressed in earlier ones. It has now become the subject of a judgment in the Supreme Court, *Dalzell* v. *Smith*, in a case heard recently in Christchurch by Mr. Justice Fair. As the first pronouncement on this difficult phrase by a superior Court, the judgment is of importance on the proper construction of that difficult phrase; and we shall consider it in detail in our next issue.

SUMMARY OF RECENT JUDGMENTS.

COMMISSIONER OF TAXES v. JOHNSON AND MAEDER.

COURT OF APPEAL. Wellington. 1946. March 26; June 19. MYERS, C.J.: KENNEDY, J.: CALLAN, J.; FINLAY, J.

Public Revenue—Income-tax—Trustee's Income—Income derived by an Infant Beneficiary whose Interest therein Vested—Whether the word "vested" includes a Defeasibly Vesting Interest in such Income—Land and Income Tax Act, 1923, s. 102 (a) (b)—*Land and Income Tax Amendment Act, 1941, s. 7.*

Social Security—Social Security Charge—National Security Tax—Trustee and Infant Beneficiary both Ordinarily resident out of New Zealand—Income derived in New Zealand—Whether such Income liable to Social Security charge and National Security Tax—Social Security Act, 1938, s. 124 (1)—*Social Security Amendment Act, 1939, s. 20.—Finance Act, 1940, ss. 16–19.*

The word "vested" in the second proviso to s. 102 (*b*) of the Land and Income Tax Act, 1923, as added by s. 7 of the Land and Income Tax Amendment Act, 1941, which proviso is as follows:—

> "Provided also that where the income of the trustee is also income derived by any beneficiary who is an infant but whose interest in that income is vested, the beneficiary shall for the purposes of this section be deemed to be entitled in possession to the receipt of that income under the trust during the same income year."

means indefeasibly vested, and does not cover a merely defeasible vesting.

Therefore, where a trustee derived income from trust property in New Zealand as trustee for an infant beneficiary, whose interest in that income was vested not absolutely or finally, but defeasibly, that income should be assessed for income-tax to the trustee under s. 102 (*b*) of the Land and Income Tax Act, 1923.

Stanley v. *Inland Revenue Commissioners*, [1944] K.B. 255: [1944] 1 All E.R. 230, applied.

Doody v. *Commissioner of Taxes*, [1941] N.Z.L.R. 452, referred to.

Neither s. 124 nor s. 127 of the Social Security Act, 1938, creates an exception to the general scheme of the statute that liability to pay the Social Security charge depends on residence in New Zealand.

Therefore, the trustee and the beneficiary above referred to, who were both ordinarily resident out of New Zealand, were not liable, in respect of income derived in New Zealand for Social Security charge or National Security Tax thereon.

Birmingham University v. *Commissioner of Taxation of the Commonwealth of Australia*, (1938) 1 A.I.T.R. 383, and *Holden* v. *Minister of National Revenue*, [1933] A.C. 526, distinguished.

Judgment of Johnston, J., varied.

Counsel: *Byrne*, for the appellant: *Sim*, K.C., and *R. C. Christie*, for the respondents.

Solicitors: *Crown Law Office*, Wellington, for the appellant: *Chapman, Tripp, Watson, James, and Co.*, Wellington, for the respondents.

ZIMMERMAN v. PUBLIC TRUSTEE.

SUPREME COURT. Hamilton. 1946. February 12; June 10. BLAIR, J.

Donatio Mortis Causa—*Post Office Savings-bank Pass-book—National Savings Pass-book—Both in Donor's Name—Whether Delivery of Same to Donee Valid*—Donatio Mortis causa *of Money in Both Accounts.*

A Post Office Savings-bank pass-book and a National Savings pass-book can be the subject-matter of a valid *donatio mortis causa* of the moneys in such accounts, for each contains in substance the whole of the terms regulating the contract of deposit, and in each case the book itself has to be produced when money is deposited or withdrawn.

In re Weston, Bartholomew v. *Menzies*, [1902] 1 Ch. 680, followed.

Delgoffe v. *Fodor*, [1939] 3 All E.R. 682, applied.

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

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

BENNETT v. KIRK.

SUPREME COURT. Christchurch. 1946. May 23, 27. FAIR, J.

Law Reform—Work done Under Promise of Testamentary Provision—No Specific Contract binding in Law upon Deceased—Effect given to his Plain Intentions—Method of Approach to Claim based upon such Promise—Principles to be applied—Law Reform Act, 1944, s. 3 (1).

A claim under s. 3 (1) of the Law Reform Act, 1944, based upon a promise by a deceased person to reward by testamentary provision the claimant for the rendering of services to or the performance of work for the deceased in his lifetime, should be dealt with on much the same ground as the claim against a person after his death. The rule that such claims should be regarded with caution and some suspicion, and should generally be corroborated, should be applied.

The Court must be satisfied on satisfactory evidence that the promise was made, was relied upon by the claimant and resulted in benefit to the deceased or detriment to the claimant; but the Court should not ask for a standard of proof that is impossible to satisfy.

Rawlinson v. *Scholes*, (1898) 79 L.T. 350, and *In re Hawke, Hawke* v. *Public Trustee*, [1935] N.Z.L.R. s. 157, applied.

Counsel: *Cavell*, for the plaintiff: *England*, for the defendant.

Solicitors: *Cavell and Leitch*, Christchurch, for the plaintiff: *Lane, Neave, and Wanklyn*, Christchurch, for the defendant.

D'ARTH AND OTHERS v. BESIRE.

SUPREME COURT. Wellington. 1946. June 5, 21. MYERS, C.J.

Marriage—Setting Aside—Mental Incapacity—One Party to Marriage deceased—Declaration that Marriage void ab initio—*Validity of Marriage—Persons entitled to Contest same.*

Aged and Infirm Persons—Protected Person—Marriage during Currency of Order—Whether a "contract"—"Any contract"—Aged and Infirm Persons Protection Act, 1912, s. 24 (1).

A person, whose interest in property would be affected by the marriage of his relative, has the right to contest the validity of such marriage.

Holmes v. *Holmes*, (1922) 24 W.A.L.R. 70, applied.

Where one of the parties to such marriage has died, the marriage cannot be set aside, and the only competent procedure for a person interested in the estate of one or other of the spouses is an action in the ordinary jurisdiction of the Supreme Court for a declaration that the said marriage was void *ab initio* because of the mental incapacity of such spouse.

The same principles apply to such an action as in a suit for nullity in the divorce jurisdiction on the ground of the mental incapacity of one of the parties to the marriage.

Turner v. *Myers*, (1808) 1 Hagg. Con. 355: 162 E.R. 611, followed.

Semble, That the words "any contract" in s. 24 (1) of the Aged and Infirm Persons Protection Act, 1912, envisages a contract directly concerning the property of the protected person.

Counsel: *Joseph*, for the plaintiffs; *Watson*, for the defendant.

Solicitors: *Herd, Joseph, Robieson and Olphert*, Wellington, for the plaintiffs; *Chapman, Tripp, Watson and Co.*, Wellington for the defendant.

REFRESHER COURSE.—2.

LAW OF REAL PROPERTY.

Changes since 1939.

By E. C. ADAMS, LL.M.

In the realm of real property law, the changes of most moment have been effected by statute and regulations made under the authority of the Emergency Regulations Act, 1939, which have the same force and effect as statutes. There has been very little case law; and this is only as it should be, for conveyancing and questions of title should proceed smoothly along lines which have been settled: the two great desiderata are certainty of title and celerity in the acquisition thereof.

Just after war broke out in September, 1939, two important statutes were passed: the Land Transfer Amendment Act, 1939, and the Property Law Amendment Act, 1939. The practitioner, who has been away on war service for any length of time, should carefully examine these two Acts, if he hopes to keep his conveyancing up-to-date: indeed it is the writer's opinion that most practising solicitors and their conveyancing clerks, whether they have been absent on active service or not, are not yet sufficiently acquainted with these statutes.

AMENDMENTS TO LAND TRANSFER ACT.

The Land Transfer Amendment Act, 1939, may for the most part be described as conveyancing shorthand: it is designed to shorten forms, to save the drawing-up of further instruments and to facilitate and cheapen conveyancing.

Variation of Priority conferred by Registration.—We all know that with a few exceptions (*e.g.*, s. 30 of the State Advances Corporation Act, 1934–35) priority is in accordance with time of presentation. This rule tends to certainty of title: a person who gets his instrument registered knows where he stands; but the rule sometimes causes considerable expense to landowners when they desire to re-arrange their securities. A person, for example, may have a mortgage over his land and desire to get another advance thereon, and the mortgagee may be willing to postpone his mortgage to a subsequent one. Before the passing of the Land Transfer Amendment Act, 1939, this could be effected only by discharging the existing mortgage, registering the new one to secure the new advance, and then re-registering another mortgage to secure the original amount advanced. Now, it is not necessary to discharge the existing mortgage or get another one in substitution thereof: all that is required to effectuate the intentions of the three parties is for the mortgagee of the existing mortgage to execute a short form of postponement of priority in the Form N. prescribed by the Act, and which forms may be purchased from the Stamp Duties or Land Transfer Offices for a small sum. When this is registered simultaneously with the new mortgage, the new mortgage becomes the first, and the existing one the second one.

Extension of Memoranda of Lease.—Similarly the Amendment Act, 1939, provides for the extension of leases. It often happens in practice that when a lease expires by effluxion of time, the parties desire to renew it on precisely, or substantially, the same terms. Before the passing of the Amendment Act, 1939, it was necessary to register a new lease; and leases usually are bulky instruments involving much typing. Now all the parties need do is to execute a short form of extension, as prescribed in Form M, which when registered shall have the same effect for the extended term as the expired lease had for the original term. During the war this provision must have been a boon to the busy practitioner who was experiencing difficulty in obtaining competent typists. However, this procedure will save nothing in the way of registration fees or stamp duty. Obviously, for the purposes of the Stamp Duties Act, an extension of a lease is a lease. But this procedure will lessen costs, especially if the expired lease was subject to mortgages or encumbrances, for the section provides that the extension of the lease, when registered, will automatically be subject to these, thus saving the cost of drawing new securities.

There is also a very convenient provision that the covenants, conditions, and restrictions contained or implied in the lease may be expressly varied, negatived, or added to by the memorandum of extension.

Mortgagees should consent to Extensions of Leases.—There is one provision, however, which may prove a trap to the unwary conveyancer. Section 95 of the Land Transfer Act, 1915, provides that a lease of land which is mortgaged, shall not be binding on the mortgagee except so far as he has consented thereto. It is not necessary that the mortgagee shall consent on the memorandum of lease itself. But s. 4 (5) of the Land Transfer Amendment Act, 1939, provides that, if the land affected by the memorandum of extension of a lease is at the time of the registration of the memorandum of extension subject to any mortgage, the memorandum shall not be binding on the mortgagee unless he has consented thereto *in writing on the memorandum*. It need scarcely be added that a lessee of mortgaged land has little security of tenure, if the mortgagee has not effectively consented thereto.

Removal of Dead Easements and Fencing Covenants.—Sections 3 and 10 of the Land Transfer Amendment Act, 1939, contain very handy machinery provisions, which so far have not been sufficiently availed of by conveyancers: the former provides for the expunging from the Register Book of determined or extinguished easements or *profits à prendre*; the latter, of dead fencing covenants. It is the writer's opinion that in these matters the title to land should be cleaned up, wherever possible.

Bringing forward of Mortgages on Renewed Leases.—In equity, a mortgagee of a renewable lease has an equitable mortgage of the new lease when it is renewed: *Boundy* v. *Bennett*, [1946] N.Z.L.R. 69.

Several State lending departments have provisions in their statutes providing that their mortgages shall be deemed to affect a renewed lease: mortgages of leases under the Land Act, 1924, and the Land for Settlements Act, 1925 (no matter who the mortgagee may be), also affect a renewed lease. A list of these special provisions will be found in *Ball on Mortgages*, at p. 128. But until the passing of s. 5 of the Land Transfer Amendment Act, 1939, other mortgages did not affect the

legal estate of the new lease, until a new mortgage was registered against it: this involved the expense of drawing up a new mortgage: the mortgagee, it is true, meantime could protect himself by lodging a caveat: *Boundy* v. *Bennett* (*supra*). Section 5 (1) is designed to remedy this mischief, and contains provisions for the bringing forward on to the new lease of existing encumbrances against the renewed or substituted lease. But the section is rather involved and practitioners sometimes overlook that the new lease must be registered not later than one year after the expiry or surrender of the prior lease, and the lessee (*not* the mortgagee of the lease be it noted) must specially request that there be stated in the memorial of the new lease that it is in renewal or substitution of the prior lease. The section has not given universal satisfaction, and at least one Law Society has recommended that its operation be made automatic, like the special legislation set out in *Ball on Mortgages*: see (1942) 18 N.Z.L.J., pp. 44, 45.

Covenants by Trustees as to Land Transfer Land.—Persons entering into covenants in a fiduciary capacity must beware lest they render their own beneficially-owned property liable or make the covenant nugatory: see *Goodall's Conveyancing in New Zealand*, p. 318, and article in (1944) 20 N.Z.L.J., p. 29.

The usual intention is that the liability should be confined to the trust property. But s. 130 of the Land Transfer Act, 1915, which sets out one fundamental principle of the Torrens System—*viz.*, that no notice of a trust shall be entered on the Register, if strictly construed would prevent the insertion of any such limiting liability clause in a Land Transfer Act instrument. Accordingly s. 9 of the Land Transfer Amendment Act, 1939, provides that for the purposes of s. 130 (1) of the Land Transfer Act, 1915, a provision in any instrument to the effect that a person executing the instrument assumes liability only to the extent of any estate or interest of which he is a trustee shall not be deemed to be notice of trust.

Amendments to the Property Law Act.

The Property Law Amendment Act, 1939, which came into operation on September 8, 1939, and which applies to land transfer mortgages as well as to mortgages of land under the general law, contains important provisions dealing with the respective rights of mortgagors and mortgagees, with a distinct leaning towards mortgagors, which is but a tendency of the times. Section 3 thereof may be conveniently likened to ss. 93 and 94 of the Property Law Act, 1908, containing the well-known provisions as to restrictions on and relief against forfeiture of leases. The parties *cannot contract out of these provisions*.

Restrictions on Exercise by Mortgagee of his Rights.—Before exercising power of sale—or entering into possession—a mortgagee must give at least one month's notice to the mortgagor, specifying the default complained of and a date on which the power shall become exercisable, and requiring the owner to remedy the default. The mortgagee must also serve a copy of the notice on any subsequent mortgagee, if he has actual notice of his name and address. The requirement as to service of notice on the mortgagor is probably lying dormant during the continuance of the Mortgages Extension Emergency Regulations, 1940 (Serial No. 1940/163). It was held in *In re a Mortgage, Humphries* v. *Inglis*, [1940] G.L.R. 169, that where a mortgage was affected by s. 7 of the Mortgagors and Lessees Rehabilitation Amendment Act, 1937, two notices must be given, one under that Act, and the other under s. 3 of the Property Law Amendment Act, 1939. But the two notices could be combined in the one document.

Restrictions on Right of Mortgagee to recover against Sureties and Guarantors.—Another important provision is s. 3 (5) which provides that, if at any time after January 1, 1940, a mortgagee exercises the power of sale conferred by any mortgage of land and the amount realized is less than the amount owing under the covenant to repay expressed or implied, no action to recover the amount of the deficiency or any part thereof shall be commenced by the mortgagee against any person (*not being the registered owner of the land*), unless the mortgagee, at least one month before the exercise of the power of sale, serves on that person notice of his intention to exercise the power of sale and to commence action against that person to recover the amount of the deficiency in the event of the amount realized being less than the amount owing under the covenant to repay.

Incidental Powers extended to Mortgagees.—Sections 5 and 6 of the Property Law Amendment Act, 1939, are in aid of the mortgagee; but they apply only to mortgages executed after the passing of that Act, and only in so far as a contrary intention is not expressed in the mortgage, and shall have effect subject to the terms of the mortgage and to the provisions therein contained. These include powers to sell with or without exception or reservation as to mines and minerals, to impose restrictive covenants on the purchaser when part only is being sold, or to create easements. But the conveyancer should note well that nothing shall authorize the registration under the Land Transfer Act, 1915, of any instrument that would otherwise not be registrable. Restrictive covenants, for example, are not registrable under the Land Transfer Act: *Staples and Co. (Ltd.)* v. *Corby and District Land Registrar*, (1900) 19 N.Z.L.R. 517. Section 6 gives a mortgagee in possession power to cut and sell timber and other trees on the land ripe for cutting, and not planted or left standing for shelter or ornament.

Where a mortgagee's power of sale does not extend to the selling of the land and the minerals separately, the Supreme Court may authorize the mortgagee to do so: s. 4, which applies to mortgages executed before or after the passing of the Act.

Service of Notices.—Section 8 of the Property Law Amendment Act, 1939, contains provisions as to the service of notices required or authorized by the principal Act, and repeals s. 116 of the principal Act.

Moratorium Provisions.

As was only to be expected, the War produced a moratorium; indeed since 1914 only for two short periods have mortgagees been able to exercise their contractual power of sale unimpeded by special legislation; and the writer of this article predicts, that although the tumult of war has ceased, the present moratorium (or provisions substantially to the same effect) will remain in force for several years yet. It behoves the conveyancer therefore to know well the Mortgages Extension Emergency Regulations, 1940 (Serial No. 1940/163) and the Debtors Emergency Regulations, 1940 (Serial No. 1940/162): see, in detail, *Kavanagh's Debts and Mortgages Emergency Legislation*, 1940.

Definition of "mortgage" extended.—There is first to be noted the very wide definition of "mortgage," and as in previous New Zealand moratorium legislation,

a mortgage includes an agreement for sale and purchase. Indeed, they go very much further and provide that where a lease contains a compulsory purchasing clause or an optional purchasing clause, and the lessee has (whether before or after the commencement of the regulations) duly notified his intention to exercise the option to purchase, the lease shall be deemed to be an agreement for sale and purchase: and the rent reserved by the lease shall be deemed to be interest. Then follow further provisions protecting the lessee. Furthermore, for the purposes of the regulations every license to occupy land pending the purchase thereof from His Majesty the King on a system of deferred payments shall be deemed to be an agreement for sale and purchase.

Universal Application of Moratorium.—The Regulations apply to all mortgages except that they shall not at any time after the maturity of any policy for securing a life insurance, endowment, or annuity apply with respect to any mortgage of that policy. This is important for Reg. 6 (3) provides that nothing in s. 7 of the Mortgagors and Lessees Rehabilitation Amendment Act, 1937, or in s. 3 of the Property Law Amendment Act, 1939, shall apply with respect to any mortgage to which the regulations apply. That is why the writer thinks that the provisions of s. 3 of the Property Law Amendment Act, 1939, as explained (*supra*), are at present lying dormant.

Restriction of Mortgagee's Rights.—Regulation 6 of the Mortgages Extension Emergency Regulations, 1940, provides that except with the consent of the Court (which means the Supreme Court where the principal sum for the time being exceeds £2,000, and in every other case the Supreme Court or the Magistrates' Court) it shall not be lawful for the mortgagee or any other person to do any of the following acts:—

(*a*) To call up or demand payment from any mortgagor or guarantor of the principal sum or any part of the principal sum secured by any mortgage or guarantee:

(*b*) To commence, continue, or complete the exercise of any power of sale conferred by any mortgage or to exercise any power of recission or entry into possession conferred by any mortgage, *except in respect of property which the mortgagor has abandoned*:

(*c*) To commence or continue any action or proceeding in any Court for breach of any covenant, condition, or agreement expressed or implied in any mortgage or guarantee other than a covenant, condition, or agreement for the payment of interest:

(*d*) To commence or continue any action or proceeding in any Court for any interest secured by any mortgage or guarantee in excess of interest at the reduced rate (if any) provided for in the mortgage or guarantee in the case of punctual payment.

Abandonment by Mortgagor.—At the present day, when a mortgagee purposes exercising his power of sale, the question often arises in practice: Has the mortgagor actually abandoned the property? The regulations (like the Mortgagors Relief Act, 1931—the depression moratorium enactment) do not define *abandonment*. Before the solicitor advises his client to exercise his power of sale (without a Court Order) he should put the facts before the District Land Registrar, to see whether abandonment can be proved to his satisfaction. If there is written evidence of abandonment, well and good: the District Land Registrar can peruse and assess such evidence. A typical case of abandonment is *In re Mayall, Ex parte Galbraith*, [1936] N.Z.L.R. 270, where the mortgagor went bankrupt and the Official Assignee wrote to the mortgagee: "I hereby abandon my interest in same to you as mortgagee." But it is the writer's experience in these matters that *written* evidence of abandonment is the exception rather than the rule.

Abandonment at common law was a pure question of fact to be determined by the jury. It also appears to be a question of fact under the Mortgages Extension Emergency Regulations, 1940. Although the mere entry into possession by the mortgagee, or the vacation of the premises by the mortgagor, does not constitute abandonment it is submitted that abandonment may be established by the facts and the surrounding circumstances and there are probably many cases where it would be proper to *infer* abandonment, especially where the mortgagor has been out of possession for a long time, has left the district, has not required a statement of accounts from the mortgagee (where the mortgagee is in possession) and has done nothing to salvage his property.

Mortgagor's Limited Right to Contract out of Moratorium.—Regulation 15 constitutes the only mode whereby a mortgagor or guarantor can contract themselves out of the regulations. This is most important: the mortgagor or the guarantor must have had advice from an independent solicitor, and such solicitor must certify accordingly on the consent.

Solicitors should also remember that, if the mortgagor is an assisted discharged soldier of the 1914–1918 War, the regulations continued in force by the War Regulations Continuance Act, 1920, require the consent of the Attorney-General. Here, however, the mortgagor may contract himself out and consent to the transfer exercising power of sale: *Re Tollison*, [1924] N.Z.L.R. 860.

In *Public Trustee* v. *O'Donoghue*, [1944] N.Z.L.R. 687, the Supreme Court held that the consent of the Court to the exercise of the power of sale, did not include power for the mortgagee to enter into possession of the mortgaged premises: a separate application under the regulations would have to be made before the mortgagee could enter into possession.

Restrictions on Rights of Creditors and Lessors.—The Debtors Emergency Regulations, 1940 (Serial No. 1940/162), limit the rights of creditors to do certain acts, if the debtor is a member of the Forces or a dependant of a member of the Forces, or has filed in the office of the Court in respect of the act or acts in question a notice in the Form to the Schedule to the regulations. Among the prohibited acts which interest the conveyancer are the following:—

(*a*) To have a charging order *nisi* made absolute.

(*b*) To commence, continue, or complete the exercise of any power of sale or leasing under the Rating Act, 1925.

(*c*) To exercise any power of re-entry conferred by any lease or any power of determining any lease.

(*d*) To seize or sell any property by way of distress for rent.

As in the case of the Mortgages Extension Emergency Regulations, 1940, the only way in which persons entitled to the benefit of the Debtors Emergency Regulations, 1940, can contract themselves out of the regulations, is to first obtain advice from an independent solicitor, &c.: Reg. 11.

Restrictions on Right to Contract regarding Land: Land Sales Act.

Perhaps the most revolutionary change since the War is that effected by the Servicemen's Settlement and Land Sales Act, 1943. The change or growth

from status to contract which *Maine* pointed out in his *Ancient Law*, appears to have been arrested in our time. I am sure that the learned author would have revised his opinion in this respect, if he had lived to peruse this Act. Its purposes are set out in the preamble—

> To provide for the Acquisition of Land for the Settlement of Discharged Servicemen: and to provide for the control of Sales and Leases of Land in order to facilitate the Settlement of Discharged Servicemen and to prevent Undue Increases in the Price of Land, the Undue Aggregation of Land and its Use for Speculative or Uneconomic Purposes.

Restrictions on Sales, Leases, and Options of Land.—What particularly concerns the conveyancer and the real-property lawyer is its control of sales of and leases of, and, incidentally, options to purchase land, and the manner in which this is effected. These restrictions are contained in Part III of the statute. Section 44 provides that unless the consent of the Land Sales Court (which in practice is the Land Sales Committee for the district, with a right of appeal to the Court), no person shall (whether as vendor, purchaser, lessor, lessee, or other party, and whether as principal or agent) enter into any transaction to which that Part of the Act applies. As pointed out by the Land Sales Court (which is a Court of Record) it is *transactions* which the statute prohibits: *In re a Proposed Sale: Lee to Taylor*, [1945] N.Z.L.R. 217. Section 45, however, provides that where a transaction to which that Part of the Act applies has been entered into subject to the consent of the Court, the transaction shall not be deemed to have been entered into in contravention of that Part of the statute if an application for the consent of the Court (which means in practice the Land Sales Committee) is made within one month after the date of the transaction: but such transaction shall not have any effect unless such consent is obtained, and the conditions upon or subject to which the consent is granted are complied with. For stamp duty purposes the date of the sealing of the order of consent is deemed the date of execution for the purposes of the Stamp Duties Act: s. 12 of Servicemen's Settlement and Land Sales Amendment Act, 1945.

Effect on Title of Non-compliance with Act.—Section 46 provides that where any transaction is entered into in contravention of Part III of the Act, or where any condition upon or subject to which the Court grants its consent to any transaction is not complied with the transaction shall be deemed to be unlawful *and shall have no effect*. But it is submitted that this must be read subject to the provisions of the Land Transfer Act conferring indefeasibility of title. In the absence of fraud (which means actual dishonesty of some sort) a transferee or lessee who gets his instrument registered under the Land Transfer Act obtains an indefeasible title in accordance with its registration: *Boyd* v. *Mayor, &c., of Wellington*, [1924] N.Z.L.R. 1174.

If the land is under the "old system," there is no doubt that the title would be defective, although s. 47 of the Act empowers the Registrar of Deeds as well as the District Land Registrar to refuse to register any instrument relating to a transaction in contravention of the Act. For the sake of security of title therefore it is probably just as well that almost all the privately-owned land in the Dominion is now under the Torrens system, for there are many exempted transactions from Part III, and, as in taxation statutes, where you have exemptions, you also find much room for argument and to a certain degree an atmosphere of doubt.

The Stamp Duties Department is empowered to refuse to stamp any instrument relating to a transaction in contravention of the Act. Consequently it appears to be the practice throughout New Zealand for practitioners to seek the opinion of the Assistant Commissioner of Stamp Duties and the District Land Registrar as to whether or not they consider a proposed transaction should be consented to by the Land Sales Court, when they themselves are doubtful as to whether or not it comes within one of the numerous exemptions. If the Assistant Commissioner of Stamp Duties declines to stamp an instrument, the aggrieved party may apply for a writ of mandamus in the Supreme Court, as in *Dunedin City Corporation* v. *Commissioner of Stamp Duties*, [1944] N.Z.L.R. 851. If it is the District Land Registrar who raises objections, he may at the option of the aggrieved party either be summoned to the Supreme Court, or his decision appealed against to the Registrar-General of Land. The latter course was pursued last year where a District Land Registrar declined to register without the consent of the Land Sales Court a transfer of *mortgaged* land "in consideration of natural love and affection." The Registrar-General of Land held that it came within exemption s. 43 (2) (*b*)—

> Any contract or agreement for the transfer of any estate or interest in land, or for the leasing of any land, without any valuable consideration in money or money's worth.

The fundamental principles of the Act have now been explained by numerous reported judgments of the Land Sales Court presided over by His Honour Mr. Justice Finlay. Many of them deal with the principles of valuation of land, and will probably be referred to by valuers and lawyers long after the need for the control of sales and leases of land has disappeared.

Orders of Land Sales Court do not confer Title.—The primary function of the Land Sales Court is to control prices of land, and it has no jurisdiction to affect the title to land and its orders do not confer title. A transaction which comes within the Act, is not enforceable by the parties until the consent has been duly given, but when given it does not give the transaction any other efficacy. Thus, if there are competing transactions before it, each application must be heard and determined, leaving it for the parties themselves to the transactions to seek redress in the Supreme Court or elsewhere as to which transaction has priority. In short the Land Sales Court has applied the principles laid down by the Supreme Court and the Court of Appeal as governing competing applications for confirmation of alienations of Native land: *Wilson* v. *Herries*, (1913) 33 N.Z.L.R. 417. If the Court or a Land Sales Committee is satisfied with respect to a transaction with the matters upon which the statute directs its determination—(*e.g.*, price, aggregation), it must grant its consent, without considering its effect upon the title, or whether the instrument (if there is one) will affect the title: *In re a Proposed Sale, Hendry to Weir*, [1945] N.Z.L.R. 744.

It is the writer's opinion that another principle laid down in the Native-land cases also applies to transactions affected by the Land Sales Court—*viz.*, that once the consent has been given, it has a retroactive effect with regard to transactions entered into subject to the consent of the Land Sales Court. It appears to be inevitable logic that, if *Wilson* v. *Herries* has any application, so has *The King* v. *Waiariki District Maori Land Board*, [1922] N.Z.L.R. 417. The statute, it is submitted, should not be construed as interfering

with or modifying the law of contract more than is absolutely necessary for the achievement of its declared purposes. This interpretation appears to be supported by the provisions (above referred to) as to the stamping of instruments, for it is a fundamental principle of stamp law that an inoperative instrument—(*e.g.*, an escrow) does not require stamping.

Limited Right of Contract still preserved to Landowners.—Furthermore, the statute does not purport and cannot be construed as requiring a vendor to sell to any particular person, subject to the qualification introduced by s. 10 of the 1945 Amendment. To this limited extent a vendor has preserved to him the freedom of the law of contract: see also *In re a Sale Giles to Burns*, [1946] G.L.R. 151.

A vendor cannot be compelled to sell or lease to a returned serviceman in preference to a civilian; but if a transaction is consented to by the Land Sales Court or a committee subject to a condition, and the vendor exercises his right of not agreeing to the condition and withdraws from the contract, then, if it is urban land, he cannot sell it within twelve months to any person other than a serviceman or the widow of a serviceman, unless the Minister of Lands consents thereto.

The Administration Amendment Act, 1944, and the Law Reform Act, 1944.

These statutes introduce alterations and reforms to the law of real property, with which every conveyancer should make himself familiar. These two statutes were adequately dealt with by the learned editor in (1945) 21 N.Z.L.J., at pp. 1, 15, 29, 43, 57, 70, 85.

Administrator's Powers extended.—It is now no longer necessary for an administrator of an intestate estate to apply for the consent of the Supreme Court to a sale of land where the deceased died after the coming into operation of the Administration Amendment Act, 1944. That Act also alters radically the canons of descent; the surviving spouse has now greater beneficial rights than under the former law—in the writer's opinion a long-overdue reform.

Rule against Perpetuities relaxed.—The rule against perpetuities (or as some writers, such as *Garrow*, prefer to call it, "the rule against remoteness of vesting"), has tripped up many a draftsman of a settlement or will, and it will continue to do so. But now, where the postponement of the vesting is with reference to the age of beneficiaries, and the only flaw is that the age stipulated exceeds that allowed by the rule, the instrument will be corrected, and the period of the postponement of vesting reduced to the longest permissible—*i.e.*, twenty-one years.

It is, however, difficult to explain s. 6 of the Law Reform Act, 1944, which must be carefully read in order to be thoroughly understood. Suffice it to state that it will not prove a panacea for all evils; the draftsman will still require to know the rule, if he desires not to frustrate the intentions of his client—to tie up property to the utmost limits allowed by our legal system. To employ the learned editor's words—

> The rule against perpetuities is that, in order to be validly created, an interest in property, if not vested at creation, must vest, if it vest at all, within the period allowed by law for the vesting of future interests—namely, not later than twenty-one years after the termination of a life or lives in being at the date of the creation of the interest.

Subject to s. 6 of the Law Reform Act, 1944, every future interest which does not so vest within the legal period is void *ab initio*. Note well the words *at the date of the creation of the interest*. These are very important, especially at the present time when it pays people of some substance to make gifts *inter vivos*, the rates of gift duty on large gifts being much lower than those of death duty on large estates. In a settlement or gift *inter vivos* the date of the creation of the interest for the purposes of the rule against remoteness is the date of the instrument itself; in the case of a testamentary gift, it is the date of testator's death.

Section 6 reproduces s. 163 of the Law of Property Act, 1925 (15 Geo. 5, c. 20), and reads as follows:—

> 6. (1) Where in a will, settlement, or other instrument the absolute vesting either of capital or income of property, or the ascertainment of a beneficiary or class of beneficiaries, is made to depend on the attainment by the beneficiary or members of the class of an age exceeding twenty-one years, and thereby the gift to that beneficiary or class or any member thereof, or any gift over, remainder, executory limitation, or trust arising on the total or partial failure of the original gift, is, or but for this section would be, rendered void for remoteness, the will, settlement, or other instrument shall take effect for the purposes of such gift, gift over, remainder, executory limitation, or trust as if the absolute vesting or ascertainment aforesaid had been made to depend on the beneficiary or member of the class attaining the age of twenty-one years, and that age shall be substituted for the age stated in the will, settlement, or other instrument.
>
> (2) This section applies to any instrument executed after the passing of this Act and to any testamentary appointment (whether made in exercise of a general or special power), devise, or bequest contained in the will of a person dying after such passing, whether the will is made before or after such passing.
>
> (3) This section applies without prejudice to any provision whereby the absolute vesting or ascertainment is also made to depend on the marriage of any person, or any other event which may occur before the age stated in the will, settlement, or other instrument is attained.

In (1941) 17 N.Z.L.J. at p. 103, I gave an example of a settlement *inter vivos* which came before the late Mr. Justice Ostler a few years ago, and which His Honour held was void as infringing the rule against perpetuities. A married woman conveyed property to trustees to pay the income to her during her lifetime. The settlement then provided:

> On the death of the settlor the trustees shall hold the trust property *In Trust* for all the children of the settlor who shall survive the settlor and live to attain the age of twenty-five years (*subject as hereinafter provided*).
>
> There was also the following provision. If any child of the settlor shall predecease her leaving issue who shall survive her and live to attain the age of twenty-one years such issue shall take and if more than one equally between them the share his her or their deceased parent would have taken in the settled property had such parent survived the settlor and lived to attain the age of twenty-five years.

Had the first provision been in a will it would have been perfectly good, but, as the date of the creation of the future interests was the date of the settlement, it was bad. Now by virtue of s. 6 of the Law Reform Act, 1944, if the settlement was executed after the passing of that Act, the period of twenty-one years would be substituted for that of twenty-five set out in the trust settlement, and the gift would thus be validated and the intentions of the settlor saved from frustration.

Protection of Pension and Superannuation Funds.—Section 5 of the same Act operates so as to prevent superannuation and pension funds from being declared void as infringing the rule against perpetuities. Until this there was a doubt on the point. Of course schemes such as the Public Service Superannuation Fund

being based on statutory authority did not require any such validating legislation.

Revocation of Wills by subsequent marriage of Testator.

As regards wills *made in contemplation of* marriage the New Zealand law has been brought into line with that of England: see s. 177 of the Law of Property Act, 1925 (15 Geo. 5, c. 20). Section 7 of the Law Reform Act, 1944, provides that a will *expressed* to be made in contemplation of marriage shall, notwithstanding anything in s. 18 of the Wills Act, 1837, or any other statutory provision or rule of law to the contrary, not be revoked by the solemnization of the marriage contemplated. This provision applies only to wills made after December 5, 1944.

Restrictions on Subdivision of Land.

It behoves all conveyancers to be well up in the law of subdivision of land. The old notion, that a landowner's rights to alienate, how and when he chooses, should be jealously guarded, appears to be going overboard—and very rapidly too. This century has witnessed the introduction by the Legislature of restriction upon restriction of the owner's rights to subdivide land. Last Session, there was passed the Housing Improvement Act, 1945, which tightens up considerably the subdividing of land within a city, borough, or town district, by forcing the owner to seek the approval of the local body in many cases, which previously came within the exemptions set out in s. 332 of the Municipal Corporations Act, 1933. Now, when a landowner sells or leases any part of his land or applies for the issue of a separate certificate of title for part, if the land is situated in a city, borough, or town board district, he must get the local body's consent, unless such part is shown as a separate Lot on a plan previously deposited in the Land Registry Office or the Deeds Register Office, *and previously approved as a subdivision by the Council or Town Board.*

One point often overlooked by practitioners is the principle of *Peers* v. *McMenamin*, (1908) 27 N.Z.L.R 833. (That principle was also overlooked by the Supreme Court and counsel in *Upham* v. *Bardebs*, [1927] N.Z.L.R. 722, Sir Charles Skerrett, C.J., in the Court of Appeal first drawing counsel's attention to it). The principle is that whether a man is subdividing his land or not does not depend upon whether or not he is selling the whole or part of his land held under one title, but whether or not he is selling the whole or part of his land owned in one physical unit. If a public road or railway intersects the land then it is held in two units, and the selling or leasing of any such unit does not constitute a subdivision. Therefore in order to ascertain whether or not a landowner is subdividing his land it is often necessary not only to examine the particular title under which the land being sold is held, but also to search the titles for the adjoining lands.

Real Property Case-law.

When we examine case-law for the War period, we find few of any outstanding importance for the conveyancer. This is just as well, for title to land should be certain, and much litigation would show that certainty had not been attained.

I think that I need mention only two cases.

Indefeasibility of Title.—The paramount feature of our system of land registration under the Land Transfer system (which is now almost universal throughout the Dominion), is the indefeasibility of title which registration confers. Last year this principle was advanced a further step by the Supreme Court. His Honour Mr. Justice Finlay held in *Pearson* v. *Aotea District Maori Land Board*, [1945] N.Z.L.R. 542, that a right to a renewal in a registered land transfer lease conferred on the registered lessee for the time being an indefeasible right to have the lease renewed, although the right to renewal may have been in contravention of statute law; obviously the same principle would apply to a right of renewal by a trustee in breach of trust.

Commorientes.—The law as to *Commorientes* has been settled by the House of Lords in *Hickman* v. *Peacey*, [1945] 2 All E.R. 215. The English Court of Appeal had given rather a narrow interpretation, holding that the statutory presumption as to the order of deaths created by the English statutory provision corresponding to our s. 6 of the Property Law Amendment Act, 1927, did not apply to simultaneous deaths. That section provides that in all cases where, after the passing of the Act, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths are (subject to any order of the Court) for all purposes affecting the title to property to be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder. Fortunately, I think, and more in accord with the purpose of the legislation, the House of Lords has held that it does apply where in all probability the deaths were simultaneous: see article in (1945) 21 N.Z.L.J. 239.

DOMINION LEGAL CONFERENCE, 1947.

Dates of Conference.

The Wellington District Law Society has appointed Messrs. J. C. White and H. R. C. Wild as Joint Secretaries for the Dominion Legal Conference; and practitioners are asked to address all correspondence to: "The Joint Secretaries, Dominion Legal Conference, P.O. Box 1465, Wellington."

The Conference will be held in Wellington, on *Wednesday, April 9; Thursday, April 10th: and Friday, April 11*, following Easter, 1947, and not on the 4th, 5th, and 6th, as previously stated.

All practitioners desiring accommodation arranged for them, are requested to forward the necessary particulars to the Joint Secretaries, urgently.

ROAD TRAFFIC AND THE WAR EMERGENCY REGULATIONS.

XVII.—Recent Revocations of Regulations.

By R. T. Dixon.

The revocation of Emergency Regulations affecting road traffic continues, and since the last article (*ante*, p. 22) the following revocations have taken place.

Revocation of the Taxicab Emergency Regulations, 1942 (*Serial No.* 1946/66).—The effect of this order is to revoke the Regulations named (Serial No. 1942/91), and thus to abolish the wartime concession to taxi-drivers, under the revoked regulations, whereby they were permitted to hire the cab to two hirers. Now the position is again controlled by paragraph (*c*) of the definition of "taxicab" in s. 15 of the Transport Law Amendment Act, 1939—*i.e.*, the cab must be "available for hire to any member of the public on terms that do not expressly or impliedly require the payment of separate fares by each passenger."

Revocation of Emergency Regulations and Order Relating to Registration and Licensing of Motor-vehicles, (*Serial No.* 1946/81).—Under this order the following are revoked:—Motor-vehicles Registration Emergency Regulations, 1942 (Serial No. 1942/152) and two amendments thereof (Serial Nos. 1943/48, 1944/80) and the Motor-vehicles Registration Emergency Order, 1943 (Serial No. 1943/39). The three first mentioned provided for the replacement of the pre-war annual number-plate system by an annual license label system: also the former annual license fee of £2 for private motor-cars was reduced to £1 15s. The Motor-vehicle Registration Regulations, 1946 (Serial No. 1946/78) now restore the former license fee and the annual number-plate system as from June 30, 1946. By revocation of the Motor-vehicles Registration Emergency Order, 1943 (Serial No. 1943/39), the abolition is effected as from June 30, 1946, of the wartime exemption of Armed Services motor-vehicles from Part I of the Motor-vehicles Act, 1924 (relating to the registration and licensing of motor-vehicles).

Abolition of Oil Fuel Rationing.—By Warrant published in 1946 *New Zealand Gazette*, 711, the provisions of Regs. 10 to 28 and 34 to 39 of the Oil Fuel Emergency Regulations, 1939 (Serial No. 1939/133) are suspended from June 1, 1946. In effect this means that the license or coupon control over the sale and delivery of oil fuel is abolished. It has been announced that administrative steps have been taken meantime to limit the bulk supply made available through the oil companies.

LAW EXAMINATIONS FOR SERVICEMEN.

To be held in March, 1947.

These will be conducted in the professional subjects only of the courses for Accountants and Solicitors, and under the following conditions set up in accordance with the Statutes Amendment Act, 1943, s. 23.

1. Entries will be accepted only from Service or ex-Service personnel who submit with their entries evidence of their having been mobilised for not less than three years (36 months) and who, in the opinion of the War Concessions Committee, have had their studies seriously interfered with by Service.

2. A candidate who has, during mobilisation had reasonable opportunities of continuing study, as shown by his academic record during the period, may have his entry refused by the War Concessions Committee.

3. The subjects which may be entered will be:—

Solicitors—Subjects of divisions II, III, and IV, and Conveyancing.

Accountancy—All professional subjects, provided that Trustee Law, or Bankruptcy Law, may be entered singly only by a candidate already credited with the other of these two subjects.

LL.B. and B.Com.—*Degree students may also enter in the* subjects shown above as available at these examinations. See Clause 5 (*b*) (i).

4. The examinations will be held from Monday March 24, to Tuesday, April 1 (inclusive) at the following centres only:—Whangarei, Auckland, Hamilton, Tauranga, Rotorua, New Plymouth, Wanganui, Palmerston North, Gisborne, Napier, Masterton, Wellington, Blenheim, Nelson, Greymouth, Christchurch, Timaru, Dunedin, Invercargill.

5. Entries must be made on the special form provided, must be in the hands of the Registrar, Box 1524, Wellington, C.1., before 5 p.m. on January 17, 1947, and must comply with the following conditions:—

(*a*) Fees at the usual rate (17/- per paper) must accompany the entry.

(*b*) The conditions published in the University Statutes must be fully complied with save that:—

(i) Terms will not be required from students taking *the subjects for degree purposes as well as for* professional purposes.

(ii) Law students must adhere to the rules regarding maximum number and order of subjects unless *prior to the date of entry, they have obtained written permission to depart from those rules.*

(iii) Single subject entries will be allowed for both courses, but if a single subject is presented in accountancy a concession in marks is not allowed.

(iv) No late entries, and no applications for aegrotat passes or reconsiderations, will be accepted.

6. No candidate may enter in both Law and Accountancy.

7. The War Concessions Committee of the University may consider cases in which candidates fail by a small margin.

Timetable.

Morning 9.30 a.m.—12.30 p.m.	Afternoon 2.30 p.m.—5.30 p.m.
March, 1947.	
Monday 24th:	
Contract a.	Torts.
Book-keeping III. a.	Mercantile Law I.
Tuesday 25th:	
Contract b.	Criminal Law.
Book-keeping III. b.	Secretarial Law.
Wednesday 26th:	
Property a.	Trusts, Wills, etc.
Book-keeping III. c.	Trustee and Bankruptcy Law (jointly or singly).
Thursday 27th:	
Property b.	Company Law and Bankruptcy (solicitors).
Auditing a.	Book-keeping I. a.
Friday 28th:	
Procedure.	Evidence.
Auditing b.	*Book-keeping II. a.*
Monday 31st:	
Constitutional Law.	Jurisprudence.
Book-keeping II. a.	Company Law (accountancy)
April	
Tuesday 1st:	
Conveyancing.	Mercantile Law II.
Book-keeping II. b.	

RETIREMENT OF MR. J. R. BARTHOLOMEW, S.M.

Record Magisterial Term of Thirty-seven Years.

For thirty-seven years a Stipendiary Magistrate in Dunedin, Mr. James Rankin Bartholomew presided over his last sitting of the Court on May 28. Following the dispatch of civil cases in the Magistrates' Court, a large number of practitioners gathered to pay their tribute to a man who has been held by them in the highest regard by reason of the outstanding professional and personal qualities which made him admirably fitted for the responsible post he occupied.

THE PROFESSION'S TRIBUTE.

Mr. I. B. Stevenson, President of the Otago Law Society, said that Mr. Bartholomew's last appearance on the Bench was a milestone in the history of the Court in Dunedin. Although he was not born in Otago, Mr. Bartholomew had been brought there when he was very young; and he had every claim to be regarded as a full "Otagoan." He was in practice in Dunedin and in Alexandra before he was appointed to the Bench in 1909, at the early age of thirty-one years; and his record of thirty-seven years' service in that capacity was a continuous one. He had fulfilled his duties as senior Stipendiary Magistrate since 1924, with honour to himself and credit to his office.

"Of all who carry out a public service," Mr. Stevenson said, "those who are appointed to the Bench are perhaps the most open to criticism. It is a great credit to you, Sir, that throughout your thirty-seven years as a Magistrate there has been a complete absence of complaint and criticism. You have been in close touch with all sections of the community; and, throughout your many associations, the popularity and respect in which you have been held are unparalleled."

Mr. Stevenson said that Mr. Bartholomew had also been chairman of the Armed Forces Appeal Board, and of two of the licensing committees, and he had been president of various courts of inquiry; and in every respect he had demonstrated that he possessed the characteristics necessary for the full discharge of such duties.

"I desire to refer to three principal characteristics with which everyone is agreed you are endowed," said Mr. Stevenson. "The first is your ability, and it is the opinion of members of the legal profession that you have shown a deep knowledge of the law and a wide appreciation of human affairs. Superimposed on that characteristic has been the use of a true sense of justice. You have safeguarded the canons of justice; and, in the case of litigants who have not engaged counsel, you have shown to them a courtesy and consideration which have been commendable. You have had the happy faculty of cloaking the Court with a mantle of dignity; without dignity the system of justice loses much. While proceedings have at times been tinged with lighter moments, you have set an example of dignity not only in the Court, but to the entire legal profession in this district. While no person is infallible, the general opinion expressed of your Worship has been that 'he was nearly always right.'"

Mr. Stevenson concluded by expressing the hope of the profession that Mr. Bartholomew would for long enjoy his well-merited period of retirement.

Mr. B. S. Irwin, who had been associated with Mr. Bartholomew before he was called to the Bar, said that the members of the legal fraternity had been accorded a great measure of kindness by His Worship. Mr. Bartholomew's career had been followed with interest and admiration by his contemporaries. "It has been a great value to the community and it has brought honour to yourself," he said. The speaker hoped that, in his retirement, Mr. Bartholomew would meet members of the profession socially more than had been possible during his term on the Bench.

MR. BARTHOLOMEW'S REPLY.

"My aim has been to do my duty as I saw it, and, in conformity with the dignity of the Court; and to have due regard to the rights and privileges of the Bar," Mr. Bartholomew said in reply. He appreciated the "generous references" which had been made to him. He was sensible of the honour that had been accorded him through the presence of such a representative gathering of members of the legal profession. While he had maintained the prestige of the Court, he would at once acknowledge that the members of the Bar had reciprocated. There had been many strenuous times; and, when the Court had been burdened with work, the members of the legal profession had understood the position, and had co-operated to the fullest extent. His association with the Bar in the twenty-four years he had been senior Magistrate had been happy and cordial; and, in that connection, Mr. Bartholomew said that he had been given every assistance.

Referring to the civil side of the Court, Mr. Bartholomew said that special jurisdiction had been given the Magistrates' Courts to deal with the assessment of damages up to £500; and such cases had from time to time been heard, involving especially motor-vehicle litigation. On the criminal side, a marked feature had been the development of the probation system. In Dunedin, there was a full-time probation officer; and when there was a fully experienced person in that position, as was the case in that city, the probation officer was of great assistance to the Court. When this measure of probation had been introduced in Great Britain there had been a lot of adverse criticism that was not now justified on the results that had been attained. Another duty that deserved special mention concerned the activities of the Child Welfare Act, under which had been set up the Children's Courts to deal with delinquent and indigent children. The backbone of the Department was the staff of officers, both male and female. The value of their duties was not generally recognized; and he was glad to be given the opportunity of mentioning their services.

"The Dunedin Bar has a proud record," said Mr. Bartholomew, "and many of its members have reached the heights of the profession. In my time, six or seven of them have been elevated to the Supreme Court Bench. It is on you members of the profession that depends the cherishing of the dignity and greatness of British justice; and I know that, as in the past, the future of the Bar is in good hands."

In conclusion, His Worship paid a tribute to the work of the Court staff, and he thanked the Press for the accurate manner in which his cases had been reported and for the manner in which, at times, "my utterances have been improved on."

In the Birthday Honours, Mr. Bartholomew's great services to the Dominion were acknowledged by the conferring on him of the Companionship of St. Michael and St. George.

RULES AND REGULATIONS

Air Navigation Regulations, 1933, Amendment No. 12. (Air Navigation Act, 1931.) No. 1946/96.

Air Navigation Regulations, 1933, Amendment No. 13. (Air Navigation Act, 1931.) No. 1946/97.

Cinematograph Films (Storage, Exhibition, and Renting) Regulations, 1929, Amendment No. 3. (Cinematograph Films Act, 1928.) No. 1946/98.

Cinematograph Operators Licensing Regulations, 1938, Amendment No. 3. (Cinematograph Films Act, 1928.) No. 1946/99.

Prisons Regulations, 1946. (Prisons Act, 1908, and Criminal Appeal Act, 1945.) No. 1946/100.

Emergency Regulations Revocation Order No. 3. (Emergency Regulations Act, 1939.) No. 1946/101.

Waterfront Industry Emergency Regulations, 1946. (Emergency Regulations Act, 1939.) No. 1946/102.

Revocation of Termites Act (Application) Order, 1943. (Termites Act, 1940.) No. 1946/103.

Wool Emergency Regulations Exemption Order, 1946. (Emergency Regulations Act, 1939.) No. 1946/104.

Purchase of Wool Emergency Regulations, 1939, Amendment No. 7. (Emergency Regulations Act, 1939.) No. 1946/105.

Wool Disposal Regulations, 1946. (Wool Disposal Act, 1945.) No. 1946/106.

Rabbit-destruction (Kowai Rabbit District) Regulations, 1946. (Rabbit Nuisance Act, 1928.) No. 1946/107.

Oyster-fishing Regulations, 1946. Fisheries Act, 1908, and Customs Act, 1913.) No. 1946/108.

Post and Telegraph (Staff) Regulations, 1925, Amendment No. 20. (Post and Telegraph Act, 1920.) No. 1946/109.

Deposits Interest Restriction Order, 1945, Amendment No. 1. (National Expenditure Adjustment Act, 1932.) No. 1946/110.

Public Service Salary Order, 1946. (Appropriation Act, 1920.) No. 1946/111.

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

Criticism of Sentences.—The backwash of ill-informed and unjustifiable criticism of the decision in the case of Ruby Nelson seems to have swept over the Magistrate (J. H. Luxford), who sentenced the father of the maltreated child to three months' imprisonment, the maximum he could impose upon the cruelty charge with which he had to deal. That the deceased child had been subjected to revolting brutality is beyond doubt: but, had the offence charged been manslaughter, it is by no means clear that a conviction could have been upheld since the child actually died from beri beri, a disease due primarily to malnutrition. However, while the facts of this case appear to warrant a substantial increase of sentence for calculated cruelty towards a child, the parrot-cry of press critics for equality of sentence can produce little result while those entrusted with judicial functions remain individuals with human prejudices rather than automatons with no prejudices at all. There are no instruments of precision to measure legal sentences. In *Ambard* v. *Attorney-General for Trinidad and Tobago*, [1936] A.C. 322, 336, Lord Atkin remarks:—

> It is very seldom that the observer has the means of ascertaining all the circumstances which weigh with an experienced Judge in awarding sentence. Sentences are unequal because the conditions in which offences are committed are unequal . . . Some very conscientious Judges have thought it their duty to visit particular crimes with exemplary sentences: others equally conscientious have thought it their duty to view the same crimes with leniency.

The student of morals will find a more cynical outlook expressed in *Thrasymachus*, wherein Professor C. E. M. Joad complains that the man who steals a leg of mutton goes to prison for a month, while the captain of industry grown rich upon profits stolen from his workmen gets a knighthood.

Disraeli and Gladstone.—One of the interests of P. J. O'Regan, when at the Bar, was a study of nineteenth century politics. Were he to hear, as Scriblex did the other day, one counsel describe another as "a sophistical rhetorician, inebriated with the exuberance of his own verbosity," he would almost be sure to declare that those were the identical words that Disraeli used of his opponent in the House, W. E. Gladstone. It is not commonly known that the man whose fame George Arliss and the Suez Canal have recalled to the modern generation showed, as a youth, considerable promise of becoming a shrewd and wealthy solicitor. Hungering for wider opportunities to display his talents, he took steps to be called to the Bar and was admitted a member of Lincoln's Inn, being described on the books of the Inn as "Benjamin D'Israeli, of Bloomsbury Square, Esq., the son of Isaac D'Israeli of same Esq." Some nine years later, he took his name off the books, upon the ground of ill-health, arrayed himself in black velvet trousers, lace ruffles, and boots with high scarlet heels and turned to the writing of novels in one of which, *Vivien Grey*, he says: "To succeed as an advocate I must be a great lawyer, and to be a great lawyer I must give up my chances of being a great man!" Curiously enough, within a year or two of Disraeli's leaving the Inn, his lifelong political protagonist, Gladstone, joined it, kept thirteen terms and then prayed that his name be taken off the books. His son, later, became a member and he visited it with him on various occasions.

Counsel's Choice.—An apt retort was given in the Court of Appeal last month, by P. B. Cooke, K.C., who was appearing for the respondent in an appeal against the decision of Johnston, J. In the course of argument, he had been seeking to distinguish such a number of cases that the Chief Justice observed: "You won't have the judgments of Sir Robert Stout or Mr. Justice Sim in some cases, and you cavil at the judgments of Mr. Justice McGregor and Mr. Justice Salmond in others; perhaps you will tell us precisely what judgment you do like." There was no hesitation in Cooke's reply. "Mr. Justice Johnston's," he said.

The Admiralty Rule.—One of the matters peeping out of the pigeon-holes of the Law Revision Committee is the question as to whether our Legislature should adopt, as England has done, the Admiralty principle of apportioning liability according to the degrees of fault where the damage is caused by the negligence of both plaintiff and defendant. In such instances at common law, the plaintiff can recover nothing and the English Law Reform (Contributory Negligence) Act, 1945, brings the law as to liability for accidents on land into conformity with that as to collisions at sea. The Maritime Conventions Act, 1911, providing for loss to be divided according to the degree of fault altered the Admiralty rule that where there was blame on both sides the loss was to be equally divided. The author of *Marsden on Collisions* finds instances of the present rule in the Admiralty Records of James I. According to historians, it was respected and followed in England by the Law or Judgments of Oleron six centuries ago. The Maritime Conventions Act, 1919, carried the position one step further forward in that it sanctions the Court so acting upon the doctrine as to apportion loss between two vessels even if there has been no collision. The application of this later rule to collisions on land would no doubt encompass the case of a motorist who, in the moment of critical emergency, misses the pedestrian but (to borrow Blair, J.'s phrase) proceeds to scale the nearest available lamp-post.

Ex Abundante Cautela.—"That the Committee shall consist of three members, one of which shall be either male or female."—Motion passed by the Victoria University College Biological Society.

Company Note.—Mr. Buckley renowned for his book on companies, was once engaged in a case in the Court of Appeal when Bowen, L.J., sent down a note asking him to dinner. Buckley declined the invitation upon the ground that he was hourly expecting an increase in his family and might have to be called away suddenly. Whereupon Bowen wrote him a further message reading: "I congratulate you on the projected issue of a new memorandum of association."

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. Companies.—*Bank Account—Opening and Operation of Account not mentioned in Memorandum of Association—Objection by Banker.*

QUESTION: A private company was formed by me, and the ancillary powers, as usually set out, were deleted. The objects for which the company was incorporated are well defined: but a question has arisen as to whether the company requires power to open and operate upon the bank account. The articles detail the manner of signing cheques, &c. The usual resolution to operate the bank account has been passed: but the banker points out that power to operate a bank account is invariably given in the memorandum of association.

Can the company properly operate on the bank account in the absence of power to do so in the memorandum of association: and is this a matter that the banker should be concerned with?

ANSWER: It is in the nature of things that there are certain powers which must be reasonably implied in respect of all companies, such as the ordinary incidents of business and trading common to all businesses: *In re Norwich Providence Assurance Society, Bath's Case*, (1878) 8 Ch.D. 334. Furthermore, the opening of the bank account would be fairly incidental to the attainment of the company's specific objects, or consequential upon the general powers of the company, as expressed in the memorandum and not forbidden in the Companies Act, 1933. Such a power, if not negatived, is implied: *Attorney-General* v. *Great Eastern Railway Co.*, (1880) 5 App. Cas. 473, 481; *Deuchar* v. *Gas Light and Coal Co.*, [1925] A.C. 691; and *Dundee Harbour Trustees* v. *Nicol*, [1945] A.C. 550, 556.

It would be almost impossible under modern conditions for any company to operate successfully without a bank account. Consequently, the company can properly operate on its bank account in the manner set out in its articles of association, and it should be suggested to the bank manager, that he should refer the point to his Head Office, or the bank's local solicitor, if he is still unconvinced. It would appear that the bank is concerned only to satisfy itself that the account is operated in terms of the articles in that behalf.

X1.

2. Practice.—*Statutory Bar to Proceedings—Existing Bars—Affidavit required.*

QUESTION: Solicitors are frequently called on to make an affidavit before commencing or continuing certain Court proceedings that "*There is no statutory bar to these proceedings.*" What are the statutory bars still applicable?

ANSWER: Statutory bars still applicable would include, as far as can be ascertained, those contained in the following:

Hawke's Bay Earthquake Act, 1931, which possibly has no application at date.

Mortgagors and Lessees Rehabilitation Act, 1936.

Debtors Emergency Regulations, 1940 (Serial No. 1940/162).

Mortgages Extension Emergency Regulations, 1940 (Serial No. 1940/163) and

Certain Regulations made under the War Regulations Act, 1914, and its amendments, and continued in force under the War Regulations Continuance Act, 1920, where they are set out in the Second Schedule.

It might be mentioned that some Courts do not use the general term referred to in the question, but require a specific statement on affidavit negativing the application of a particular Act or regulation, which might or could apply to a particular proceedings. Other Courts, while requiring the use of this general term, require a specific statement that a particular Act or regulation does not apply if there is any possibility of such Act or regulation applying to the specific proceedings.

E.2.

3. Husband and Wife.—*Wife's Disappearance from Mental Hospital—Search for Body unsuccessful—Re-marriage of Husband contemplated—Whether Pronouncement of Wife's Death obtainable.*

QUESTION: A married woman, who had been a patient in a Mental Hospital for approximately eight years, escaped from hospital, in November, 1944. Her husband was not informed of the escape until February, 1945, when he was advised that she was being struck off the register. It appears clear from the hospital authorities that at the time of her disappearance the patient was so mentally defective that she was unable to care for herself and wandered away, and died. Extensive search, however, did not locate the body. The Coroner refuses to hold inquest on the ground that no dead body has been found. The wife had no estate, but the husband desires a pronouncement of death of sufficient authority to enable him to re-marry. Can such a declaration be secured; and, if so, on what authority? Can you refer us to a precedent for claiming such a declaration?

ANSWER: We know of no means of obtaining such a pronouncement, nor do we think any exists. A second marriage in such circumstances must always remain subject to the hazard that the first wife, supposed to be deceased, will turn up. But, apart from this, unless the husband waits for seven years before re-marrying, technically he commits bigamy: Crimes Act, 1908, s. 224 (5). It is improbable that he would be charged because of the practical certainty that a defence that he believed in good faith and on reasonable grounds that his wife was dead would succeed: see *The Queen* v. *Tolson*, (1889) 23 Q.B.D. 168; and *The King* v. *Carswell*, [1926] N.Z.L.R. 321. In itself, the fact that after her escape, the name of the patient was "struck off" does not appear to assist, as s. 79 (3) of the Mental Defectives Act, 1911, enacts that a patient who escapes and is not retaken within three months, is thereupon deemed to be discharged. Such a defence would be materially assisted if it could be shown that the death had been registered following a verdict of a Coroner on an inquest held pursuant to a direction of the Attorney-General given under s. 3 of the Coroners Amendment Act, 1930.

It is probable that the Police will not yet consider their investigations closed, and that when sufficient time has elapsed to make it unlikely that any evidence of the fate of the patient will be found, they will bring the matter before the Coroner again with a view to action under s. 3. It should be emphasized that although a prosecution for bigamy in such circumstances would be most improbable there appears to be no means of assuring immunity from the penal consequences of a second marriage at the present stage.

R.2.

4. Magistrates' Court.—*Practice — Plaint-note — Omission of Amount claimed—Amendment.*

QUESTION: I have instituted proceedings in a Magistrates' Court, but now find that I have omitted to state the specific amount claimed. Is there any step I can take to rectify matters?

ANSWER: You should apply to the Court for an amendment to insert the specific amount you claim; and the Court is bound to grant your application: *Tegon* v. *Count*, [1945] 1 All E.R. 710. The plaint-note, it is assumed, shows that your claim is one to recover money, though it does not specify the exact amount. The "substance of the action" therefore appears; and the insertion of the amount is only completion.

X.1.