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FAIR RENTS LEGISLATION: THE DEFINITION OF "DWELLINGHOUSE."

THE learned Judge in *Dalzell* v. *Smith*, to whose judgment we shall later refer in detail, said that most of the judgments in the Magistrates' Court were referred to in *Collins* v. *Bowman* (*supra*), which, he said, applied to s. 2 substantially the principles which His Honour had endeavoured to formulate. He added, however, that subdivision of the area used in connection with the house by fences—a matter to which several of the Magistrates had referred, as will have been seen above—is generally a factor of minor importance, for that may often be convenient for the use of the land for the domestic convenience of the tenant.

In the latest Magistrate's judgment on this topic, *Howse* v. *Martin*, (1946) 4 M.C.D. 456 (which was not cited to the learned Judge) Mr. Coleman, S.M., in referring to the previous decisions to which reference has been made above, said that the decision in all cases where the exception is in issue, must depend on the facts relative to the premises concerned. The words used in s. 2, he said, are not very precise, and a good deal is thereby necessarily left to the discretion and opinion of the Court regarding matters of fact upon which there may be considerable and honest differences of opinion. In construing the words "or other premises in connection therewith," the learned Magistrate said they are intended to convey the idea of premises domestically appurtenant to the dwellinghouse, and they should, therefore, be interpreted in the sense of being associated with or related to the dwellinghouse as such; so that, to come within them, any area of land must be occupied by the tenant of the dwellinghouse and be used by him as an additional amenity or convenience in connection with the use of the dwellinghouse. In the course of his judgment he observed:

> It is clear that curtilage means a small piece of land near the dwellinghouse and used for essentially domestic purposes—that is, purposes incidental to the use of the dwelling. In *Scott* v. *Austin*, (1919) 122 L.T. 235, 236, Rowlatt, J., makes this clear when he says the Act applies to "premises domestically appurtenent" to the house. I think the words "or other premises in connection therewith" in our Act convey, and were intended to convey, the same idea. The other premises must be in connection with the dwellinghouse: or, to put it more clearly, in connection with the use of the dwellinghouse as such. As Rowlatt, J., said, they must be domestically appurtenant to the house. That, it appears to me, must always be the real test. The matter of area is of subsidiary importance and indeed is only one factor to be considered in coming to a decision whether the other premises are, or are not, domestically appurtenant. Two acres of land, comprising kitchen and flower gardens, tennis-court, drives, and lawns surrounding a dwellinghouse would, no doubt, come within the definition: whereas a smaller area devoted to commercial tobacco-growing, or market-gardening, by the owner of the adjoining dwellinghouse, could not be described as being used in connection with the dwellinghouse. They would be used in connection with the business of the tenant.

He came to the conclusion that, although the words in England are "within the curtilage of the dwellinghouse," and in New Zealand "in connection therewith," they both mean the same thing. He added that the word "curtilage" is not commonly used by law draftsmen in the Dominion, as our dwellings have not developed from feudal times and there has been no necessity, or other influence, operating here for the retention of terms now somewhat archaic. In that case, His Worship held that the use of the balance of an area of 2 acres, after taking from it the site of the dwellinghouse and outbuildings and a garden, for grazing a house cow, is a use of the land as a domestic amenity "in connection with" the dwellinghouse.

In most of these cases, it will have been seen that each Magistrate based his decision on the facts of the particular case when deciding whether the area of land in connection with the site of the dwellinghouse was sufficient *in extent* to come within the exception, and so to take the tenement generally out of the protection of the Fair Rents legislation, because the area exceeded the limitation imposed by the exception.

The last decision having particular reference to the words "where the tenancy does not include any land other than the site of the dwellinghouse and a garden or other premises in connection therewith," is *Dalzell* v. *Smith* (*supra*), and it is of particular interest in that it is the first decision of our Supreme Court on the interpretation of that exception.

His Honour Mr. Justice Fair found the following facts. In July, 1935, the property in question was let to the appellant by the respondent's predecessor in title at a rental of £1 2s. 6d. per week, presumably without any agreement as to the term of the tenancy. In such circumstances, by virtue of s. 16 of the Property Law Act, 1908, it was deemed to be a tenancy determinable by one month's notice in writing. The property comprised a dwellinghouse having around it about 2 acres of land. The land itself was very fertile, and was said to comprise some of the best gardening land in the South Island. Other sections of similar area in the same locality were used as market gardens and, it is stated in the case, are "capable of providing

a good living." At the time he obtained the tenancy, and entered into the occupation, the appellant was working as a day-labourer. He acquired the property as a home for himself, his wife, and his family of five children. At that time the land itself was "a wilderness," and the house had been "unoccupied." At the commencement of the tenancy, the appellant worked the land in his spare time, and kept on it a cow, a pig, and fowls, all for purely domestic use. About seven years ago, that is about 1939, he commenced to sell some of the produce from the land: in the first year selling lettuces for a return of about £10, and in the second year lettuces and spinach for a return of £20. As the appellant extended his activities on the land, he seems to have done less day work (for wages), and since Christmas, 1945, he has been away from the land only for a few days at casual work. In the last three years he made £80 per year net profit from these activities, and now intensively cultivates this land as a market garden. On the road frontage, the appellant had erected a notice board on which he advertised the produce of the land which is available for purchase by the passing public.

The respondent acquired the ownership of the property, subject to the existing tenancy, in December, 1945. He gave the appellant one calendar month's notice to quit, expiring on March 8, 1946, and the acceptance of this notice was admitted by the appellant. Upon the latter failing to give up possession, the respondent commenced an action in the Magistrates' Court at Christchurch, claiming to recover possession of the land and dwellinghouse. The action was heard on April 9, 1946, when it was contended for the tenant that the subject-matter of the tenancy constituted a "dwellinghouse" within the meaning of the Fair Rents Act, 1936. The owner contended that the tenancy was outside the scope of the Fair Rents Act, having regard, in particular, to the use which the appellant was making of the land concerned. The learned Magistrate held that the house and land were not a "dwellinghouse" within the definition of s. 2 of the statute. He made an order for possession in favour of the landlord; but he granted the tenant leave to appeal on the ground that an important question of law was involved.

The appellant set out to show that the tenancy as originally created was within the protection of the Fair Rents legislation. As the learned Judge held, following *Vickery* v. *Martin*, [1944] 2 All E.R. 167, 170,

> Once a house is a dwellinghouse within the meaning of the Act, it is not sufficient to exclude it from the operation of the Act, merely to show that part of the premises are used for business purposes.

Counsel for the respondent submitted that the property let was not a dwellinghouse within s. 2, either at the time it was let, or at the time the notice to quit was given, or at the time of the hearing; but, answering this submission, the learned Judge came to the conclusion that the more extensive use of the land, in the later years, for the growing of produce for sale did not take the tenement out of the definition of "dwellinghouse," if it was originally in it.

In the course of his judgment, Mr. Justice Fair, first considered the principles of construction applicable to an examination of the language of the definition of "dwellinghouse." After citing from the judgments of Bankes and Scrutton, L.JJ., in *Remon* v. *City of London Real Property Co., Ltd.*, [1921] 1 K.B. 49, 54, 55, 58, where the Court of Appeal had to consider a statute *in pari materia*, dealing with the restrictions on a landlord's rights, referred to the broad principle of construction of this class of legislation adopted by the Court of Appeal in *Skinner* v. *Geary*, [1931] 2 K.B. 546, 561, where stress was laid on the broad principle stated by Greer, L.J., in *Rowe* v. *Russell*, [1928] 2 K.B. 117, that the fundamental principle of the Act is to protect the resident in a dwellinghouse in his occupation so long as he pays the rent fixed; or as Romer, J., said in *Haskins* v. *Lewis*, [1931] 2 K.B. 1, the principal object of the legislation is "to protect the person residing in a dwellinghouse from being turned out of his home." His Honour went on to say:

> The Acts invaded the common-law rights of landlords with regard to their property, and must not be extended beyond their plain meaning and intention. But this principle is not in conflict with the principle laid down in *Bakey* v. *Brennan*, [1944] N.Z.L.R. 929, 935, that the construction must be such as to ensure the attainment of the object of the Act according to its true intent, meaning and spirit. That is attained by considering not only each individual word, or each individual provision separately, but also by considering them in relation to the scope and object of the Act when read as a whole. Such a method of construction excludes a strict, narrow or literal construction, as was indeed held in *Remon's* case.

Considering this language in the light of the statements as to the principles of construction and the scope and purview of the Act referred to in the decisions last referred to, it seemed reasonably clear to the learned Judge that the purpose the section was designed to effect is to protect persons in the possession of their homes, used primarily and principally as such. The limitation seemed intended to exclude land used solely for business purposes whether for farming and market-gardening or for commercial or professional businesses. He continued:

> Neither the form nor the language is very happy: indeed, they may fairly be described as imperfect and clumsy. But that is a consequence of the language, for very good reasons, having been largely adopted from earlier English Acts. But there appears nothing in our section or our Act to require or indicate that these principles should not be applied to it. An examination of the language of s. 2 as originally enacted confirms what appears to me to be the fair meaning of the section as it exists to-day. Subsection (*b*) of s. 2 as originally enacted expressly exempted from the definition any premises used by the tenant exclusively or principally for business purposes.

The next contention of counsel for the respondent was that the word "premises" in s. 2 does not include an area of land such as the 2 acres under consideration in the present case. The section excludes from the meaning of dwellinghouse "any land other than the site of the dwellinghouse or a garden or other premises in connection therewith." The next question for consideration, therefore, was whether that part of the 2 acres of the tenement which was not the site of the dwellinghouse fell within the description of "a garden or other premises in connection therewith."

The learned Judge adverted to some judicial definitions of the word "garden" to illustrate that the use of this word would probably not of itself include all land which might ordinarily be found used in connection with an ordinary dwelling, not producing anything for sale or business purposes. So, too, he added, the word would not include the yard of a stable, or the drive leading from a road frontage to a garage

for a car, or to a shed for a horse-vehicle. He came to the conclusion that these considerations point to the strong probability of the word "premises," in the definition of "dwellinghouse," being used in a wider sense, and being capable of including in its meaning areas of that kind. His Honour continued:

> It seems to me on a fair reading of the section in its context, that the word "premises" would include a horse-paddock used in conjunction with the house, certainly where the horse was used for pleasure purposes, and a cow-paddock where the produce of the cow was used for domestic purposes, even though some of it were sold, as well as an entrance drive to stables or paddock. This view is strongly confirmed by the decision in *Scott* v. *Austin*, (1919) 122 L.T. 235, where the learned Judge refers to the curtilage there under consideration which was used for growing fruit trees, vegetable produce, &c., as sites for fowl-houses and rabbit-sheds and keeping poultry and rabbits in them as aptly described by the word "premises." Rowlatt, J., refers to the house and adjoining land as "the [illegible]s" and says "In my opinion the words . . . we. [illegible]ended to apply to premises directly appurtenant to the dwellinghouse."

His Honour said that that construction was borne out by the grammatical and literal meaning of the clause, which throughout is referring to land. Moreover, if the word "premises" was intended to refer to outhouses only and therefore to their sites, it would grammatically have followed the word "dwellinghouse" and the clause would have read: "the site of the dwellinghouse and other premises and a garden in connection therewith." But, grammatically, the word "other" refers to garden and so indicates premises in the nature of land, and is in harmony with the construction of the whole clause. Such a construction, too, made the whole clause reasonable and did not exclude those necessary and usual adjuncts in the form of land which are commonly found attached to dwellings for domestic use. Coming then, to the definition of the important word "premises," the learned Judge said:

> It seems to me clear, therefore, beyond reasonable doubt that the word "premises" does include land used in these ways in connection, that is in conjunction with a dwellinghouse. The facts as found and particularly the keeping of a cow and pigs shows that originally, and for some four years or more, the land was used solely for domestic purposes. That has been held to be so. The fact that it was a "wilderness" when let, and that the appellant was in regular employment as a day labourer on wages negatives any inference that it was intended other than for residential purposes.

Having ascertained, therefore, that the tenement was originally "let as a dwellinghouse" to the appellant who had used it as the home of himself and his family, the general effect of the judgment of the learned Judge is that the 2 acres of land surrounding the dwellinghouse, and used for purposes directly appurtenant to the dwellinghouse, being land, comprised "premises used in connection therewith" within the meaning of the definition. The tenement was, therefore, wholly within the definition of "dwellinghouse." The fact that part of the premises had been used as a market-garden, and its produce sold, by the tenant did not take the tenement out of the protection of the Fair Rents Act, 1936, because—to use the words of s. 6 of the Fair Rents Amendment Act, 1942—the application of the principal Act to the "dwellinghouse" (as the house, garden, and 2 acres were all within the definition) was not excluded by reason only of the fact that part of the premises had been used for business or trade purposes.

POSTSCRIPT.

Since the above article was in print, three judgments relevant to our subject matter have been given.

"*Dwellinghouse.*"—Whether sleeping and having meals on premises let for business purposes constitutes them a "dwellinghouse" was considered in *Macmillan and Co., Ltd.* v. *Rees*, [1946] 1 All E.R. 675. Premises were let on March 24, 1938, with a covenant by the tenant (cl. 2 (5)) that they were not to be used "for any other purpose than as offices for the tenant's business of travel and buying service." It was provided that "the tenant and her partner may however sleep upon the premises should they so require." It was proved that the tenant's partner slept and had meals on the premises, from the end of March, 1938, to August 2, 1938; but there was no evidence of further use as a house or residence. The judgment of the Court of Appeal (Scott and Tucker, L.JJ. and Evershed, J.) is interesting in its finding whether such user amounted to use of the premises in fact as a dwellinghouse. In the judgment of the Court, at p. 677, it is said:

> It is, no doubt, true that the acts of sleeping upon premises at night and having meals upon them by day are acts which may be described as "residential" in character. But the use of premises as a dwellinghouse is by no means necessarily confined to their use by the tenant for sleeping and eating. The experience of great numbers of Englishmen during the last six years provides many instances of sleeping and eating upon premises which could by no fair use of language on that account be described as dwellinghouses. In other words, to sleep on particular premises at night, or to have one's meals upon them by day, or both, ought not *ipso facto* to have the effect in law of making those premises a dwellinghouse; nor, in the light of the facts of *Haskins* v. *Lewis*, [1931] 2 K.B. 1, should the reference by Scrutton, L.J., at p. 11, to the residential character of the act of sleeping on the premises in question, be interpreted as an authority for a contrary proposition.

As the learned editor of the *Reports* points out, in some circumstances sleeping or taking meals on premises may be sufficient to take premises out of the category of business premises, as in *Duke of Richmond* v. *Dewar and Cadogan Hotel Co.*, (1921) 38 T.L.R. 151, where rooms were occupied as sleeping apartments by the hotel staff; but, in general, the test is that laid down in *Greig* v. *Francis and Campion, Ltd.*, (1922) 38 T.L.R. 519: "What has to be determined as a question of fact, is what was the real, main, and substantial purpose of the premises."

In another recent judgment, Callan, J., applied the test of the purpose for which the tenant rented a dwelling of which part was let in rooms as an apartment house: *Ansell* v. *Clapham* (to be reported), and his Honour held that as the premises were the tenant's dwellinghouse from the time he entered into possession, they were, therefore, within the definition of "dwellinghouse" in s. 2 of the Fair Rents Act, 1936.

"*Let as a separate dwelling.*"—Whether or not a tenement was "let as a dwellinghouse," at the time of its letting, as we have indicated, may be a question of fact even when the contract between the parties is examined. In *Meek* v. *Horlock* (to be reported), the lease described the property as "the dwellinghouse" (giving its street number). In fact, it was then an apartment house wholly subdivided and let to various subtenants. Neither at the time of the letting nor at any time during the term of the lease did the tenant reside in it. In his judgment, Myers, C.J., said that the tenement had never been the tenant's dwellinghouse; and, in any event, it did not come within the definition of "dwellinghouse" in s. 2 of the Fair Rents Act, 1936, because it was not "let as a separate dwelling," but as a collection of separate dwellings. On both grounds,

the tenement accordingly had not the protection of the statute.

On the question of the letting of rooms and the sharing of others, it was held by the Court of Appeal in *Neale* v. *Del Soto* [1945] 1 All E.R. 196, that the true test is whether "living rooms" are shared: if they are, they are not "part of a house let as a separate dwelling," within the meaning of those words in the definition of "dwellinghouse." The question whether there is a separate letting of part of a tenement, or a sharing of the whole house, is one of degree dependent on the particular agreement. We do not propose here to carry the matter further, but refer our readers to *Neale* v. *Del Soto* (*supra*), *Sharpe* v. *Nicholls*, [1945] 2 All E.R. 55; *Cole* v. *Harris*, [1945] 2 All E.R. 146; and the latest case *Krauss* v. *Boyne*, [1946] 1 All E.R. 543, in which those several judgments are considered. It must be emphasized that these judgments are inapplicable here in view of s. 5 of the Fair Rents Amendment Act, 1939.

SUMMARY OF RECENT JUDGMENTS.

COOK v. DOYLE.

SUPREME COURT. Timaru. 1946. May 3, 28. FAIR, J.

Practice—Injunction—Service—Prohibitory Injunction in General Terms—No Personal Service of Order—Knowledge of Obedience to it for Seventeen Years—Subsequent Breaches—Vagueness of Order—Whether legally effective—Whether Plaintiff entitled to Writ of Attachment against Defendant.

Where a plaintiff has obtained a prohibitory injunction against a defendant, it is not necessary to prove personal service upon the latter of the order imposing the prohibition to enable the plaintiff to issue an attachment order against the defendant. It is sufficient to prove that notice of the order reached the defendant.

Re Tuck, March v. *Loosemore*, [1906] 1 Ch. 692, followed.

Tucker v. *Tucker*, [1925] G.L.R. 393, distinguished.

Century Insurance Co., Ltd. v. *Larkin*, [1910] 1 I. R. 91; *Re Bryant*, (1876) 4 Ch.D. 98; *United Telephone Co.* v. *Dale*, (1884) 25 Ch.D. 778; *Avery* v. *Andrews*, (1882) 51 L.J. Ch. 414; and *Elliott* v. *Appleton*, (1923) 19 Tas.L.R. 20, referred to.

The plaintiff, a wool-scourer, obtained in 1926, an injunction against the defendant restraining him from wrongly obstructing or polluting the waters of the Fairlie Stream in any manner so as to render them unfit for use or in any way interfering with the rights of the plaintiff in respect to the natural flow of such waters. The defendant, although there was no proof of personal service upon him of the said order, knew of it and obeyed it for seventeen years. Subsequently, at intervals, despite the protests of the plaintiff's solicitors, he reduced and prevented the natural flow of the water in the stream, causing great inconvenience, financial loss, and annoyance to the plaintiff.

On an application for a writ of attachment against the defendant,

Held, ordering the issue of such writ, 1. That the order was not too vague to be legally effective; but, in prohibiting obstruction and polluting, was more specific than it need have been.

Elliot v. *North Eastern Railway Co.*, (1863) 32 L.J. Ch. 402; 11 E.R. 1055, applied.

Low v. *Innes*, (1864) 4 DeG. J. & Sm. 286; 46 E.R. 929, distinguished.

2. That the evidence was clear that the defendant well knew that the order had been made.

Counsel: *M. C. Gresson*, for the plaintiff; *A. D. McRae*, for the defendant.

Solicitors: *Perry, Hudson, and Gresson*, Timaru, for the plaintiff; *A. D. McRae*, Timaru, for the defendant.

R. v. VINCENT.

SUPREME COURT. Wellington. 1946. June 26. JOHNSTON, J.

Criminal Law—Restitution of Property—Stolen Goods—Moneys in Possession of Accused seized by Police under Search-warrant before his Arrest on Charge of Theft—Accused Tried and Acquitted—Moneys, produced as an Exhibit in Hands of Registrar—Claim by Crown as Money Stolen from Post Office—Motion for Payment to Accused—Courses available to Registrar and Police—Crimes Act, 1908, s. 451—Justices of the Peace Act, 1927, s. 280 (1)—Police Force Act, 1913, s. 32—Code of Civil Procedure, R. 482.

Where a person is accused of theft and property in his possession and under his control, suspected of being stolen, is seized by the Police under a search-warrant, possession of the Police becomes possession for the true owners. If he is afterwards acquitted on the charge of theft, he may, in the absence of evidence of right or title in any third person, or that his possession was wrongful, rely on his previous possession, apart from any further proof of ownership, as entitling him to recover the said property; but, if there is another claimant and he wishes to enforce his claim, he must proceed by action.

Field v. *Sullivan*, [1923] N.Z.L.R. 70, applied.

Accused, who was acquitted of breaking and entering a Post Office and committing theft, had moneys in his possession before his arrest of which the Police under a search-warrant took possession. At the trial, these moneys were made an exhibit for the Crown in supporting its case, and so came into possession of the Registrar of the Supreme Court. On acquittal, accused's counsel asked that the money should be repaid to the accused. The Registrar refused to pay them to him, on the ground that the Crown had intimated to him that it had a claim thereto.

On motion on behalf of the accused that the Registrar hand over the moneys to him.

Held That, where ownership of stolen property is disputed, the Registrar can either take out an interpleader summons to determine to whom the property should be given, or hand the property back to the Police, who can relieve themselves of the question as to the propriety of giving up possession by applying to a Magistrate under s. 32 of the Police Force Act, 1913, and obtaining from him an order as to whom the property should be delivered: if the Police fail to obtain such order and deliver the property to a person who was not the true owner, they do so at their own risk.

Winter v. *Bancks*, (1901) 19 Cox C.C. 687, referred to.

Counsel: *Cunningham*, for the Crown: *Joseph*, for the applicant.

Solicitors: *W. H. Cunningham*, Crown Solicitor, Wellington, for the Crown; *Herd, Joseph, Robieson, and Olphert*, Wellington, for the applicant.

WESTLAND TIMBER EMPLOYEES' UNION OF WORKERS v. OGILVIE AND CO., LTD.

COURT OF ARBITRATION. Greymouth. 1946. May 30. TYNDALL, J.

Industrial Conciliation and Arbitration—Award—Statute—Inconsistency—Workers under Factories Act, 1921–22—Wages to be "paid in full at not more than fortnightly intervals"—Test of Inconsistency of Award with Statute—Factories Act, 1921–22, ss. 21 (3), 32 (c) (d).

The test to be applied to ascertain whether any provision of an award is inconsistent with a statute is to examine whether it is possible to obey the direction of the award without infringing in any way the direction of the statute. If it is possible to do so, there is no inconsistency.

Inspector of Awards v. *Wairarapa Farmers' Co-operative Association, Ltd.*, (1912) 13 Bk. of Awards 187, followed.

Wellington District Hotel, Clubs, Restaurant Workers Industrial Union of Workers v. *McKay*, [1920] N.Z.L.R. 675; 21 Bk. of Awards 1875, and *In re Otago and Southland Brick, Tile, and Pottery Makers' Award*, [1930] N.Z.L.R. 321; 30 Bk. of Awards 127, referred to.

Applying this test, a clause in an award providing that "wages shall be paid in full at not more than fortnightly intervals," is not inconsistent with s. 21 or s. 32 of the Factories Act, 1921–22, whether or not the workers are employed in a factory within the meaning of that statute.

Solicitors: *Joyce and Taylor*, Greymouth, for the plaintiff; *Hannan and Seddon* Greymouth, for the defendant.

THE NEW CHIEF JUSTICE.

Appointment of Mr. H. F. O'Leary, K.C.

New Zealand has been fortunate in its Chief Justices. That exalted office has been held in succession by men of great learning great experience, and great industry. Now the mantle falls on Mr. H. F. O'Leary, K.C., who brings to the discharge of the duties of his office his knowledge of the law and wide experience of Courts and men, an ability to get things done, and a sense of humour, an essential ingredient of a judicial mind. For long, one of the leaders of the Bar, for long, as President of the New Zealand Law Society, the acknowledged head of the profession, and for longer still one of its most popular members he brings to the discharge of his higher duties, gifts which fit him, as the seventh Chief Justice of New Zealand, to sustain the dignity of his high office and add lustre to the Supreme Court Bench.

Spencer Digby Photo

THE HON. H. F. O'LEARY,
CHIEF JUSTICE.

There can be little doubt that the appointment will receive the loyal support of the legal profession. There was probably no single practitioner more widely known amongst his professional brethren throughout the Dominion; this being largely due to the services which over many years he rendered to the profession as a whole, to the prominence which he achieved in the councils of the profession, and to his Presidency over the two most recent legal conferences. He used to say himself that the Law Society was his hobby. He now suffers the loss of this hobby, and the profession the loss of a President, whose industry, efficiency, and devotion to the interests of the profession, leave all its members under a debt of gratitude to him.

The new Chief Justice was born in Blenheim in 1886, being a son of Mr. Humphrey O'Leary, later a well-known and highly respected resident of Masterton, who died in 1934. Having removed to Masterton with his family at an early age, Mr. H. F. O'Leary was educated at St. Patrick's School and the Public School in that town. He won an Education Board Scholarship in 1899, and obtained his secondary education at Wellington College.

During his years at Victoria College, the versatility of the new Chief Justice was no less marked than his popularity with his fellow-students. His active interest in the athletic and social life of the College is shown by the fact that he was secretary, member of the executive, and President of the Students' Association. As a fluent and engaging speaker, with a charm of style that was all his own, Mr. O'Leary soon made history in the debating field. He won the Union Prize, and as a representative at the University Tournament held in Auckland, in 1907, opened for Victoria, with Professor B. E. Murphy, as he now is, as reply speaker. They secured the Joynt Scroll in a masterly manner. Probably no better-balanced team has ever taken the platform at an inter-University debate in this country. The pleasant oratorical style of the opener and the cuttingly analytical and subacid fervour of his companion provided in the one team all the weapons of debate. In 1906 Mr. O'Leary won the Plunket medal for oratory, his subject being "Lord Nelson."

Mr. O'Leary was a member of the Victoria College first fifteen, of which he was captain, and of the first eleven. He represented the New Zealand University at football at Sydney in 1908, and was captain of the side; and again secured his "blue" against the Australian Universities in New Zealand in 1909. He gradu-

ated Bachelor of Laws in 1908. Students of *The Old Clay Patch* will remember other details of the prominent part taken at Victoria College, not because he sought offices and honours, but because his ability and popularity destined him for them, in days when, to a quote a capping song of those days, " O'Leary, plump and cheery, was the Coll.'s bright star."

The newly appointed Chief Justice commenced work in the office of Mr. P. Levi, Wellington, and continued with him when he amalgamated his practice with that of Mr. T. M. Wilford and formed the firm of Wilford and Levi. Admitted as barrister and solicitor in 1908, Mr. O'Leary commenced practice in 1910, at Wellington, in partnership with Mr. F. P. Kelly, now of Messrs. Kelly and McNeil, Hastings. Mr. Kelly later went to Hastings, and Mr. O'Leary remained in practice on his own account until 1919, when he had worked up a good common-law connection, being usually occupied on the criminal and divorce side. He was then invited to join the firm of Messrs. Bell, Gully, Bell and Myers as a partner. The inclusion of Mr. O'Leary in that firm, which eventually became Messrs. Bell, Gully, MacKenzie, and O'Leary, enabled the other partners to secure a continuity of their common-law work on the retirement of Mr. Myers (until recently the Chief Justice) on his receiving the patent of King's Counsel. Mr. O'Leary received greater scope for his forensic ability, with the added advantage of daily association with older, experienced, and distinguished counsel. In jury cases, his professional brethren considered that he was favoured of the gods: for nine years he had unbroken success at the criminal Bar, not only in Wellington, but further afield, in practically all of the circuit towns of the Wellington and neighbouring Judicial Districts.

The new Chief Justice has been interested in Law Society affairs since 1918, when he became a member of the Council of the Wellington District Law Society. At various times, he was an ordinary member, Treasurer, Vice-President, and President. In 1921 he became a member of the Council of the New Zealand Law Society; since then he has served continuously, as a member representing the District in which he practised or as a representative of other Districts. In April, 1935, he was elected President of the New Zealand Law Society, and retained that office until his appointment as Chief Justice, this being easily a record term. He was a member of the Council of Law Reporting from 1929 to 1933. He has been chairman of the Disciplinary Committee since its inception.

The new Chief Justice is the second Old Boy of Wellington College and the first graduate of Victoria University College to be elected to the highest office in the Judiciary. Since 1934 he has been a member of the Victoria University College Council, and during the war-years, and until about a month ago, was chairman of that body. He also served on the Senate of the University of New Zealand.

During the war he acted as chairman of the War Pensions Appeal Board; was one of the tribunals to determine the employment and financial adjustments of conscientious objectors to war service: and chairman of the commission appointed to report on the recommendations regarding the fire-services of the Dominion in the light of recommendations made to the Government by a special officer from the Home Office, London.

Perhaps it is not just coincidence that the legal firm which nurtured the Chief Justice who has just retired, nurtured also the Chief Justice now appointed: for both these men were fortunate, in their early days, in having the tutelage and inspiration of Sir Francis Bell, the man, who has been described by those best qualified to speak, as the greatest lawyer of them all.

In entering upon his high office, the profession throughout the Dominion wishes the new Chief Justice success and happiness, and looks forward with confidence to his maintenance of the high standards set by his predecessors in the administration of justice with firmness, impartiality, and courtesy.

RT. HON. SIR MICHEAL MYERS.

The Prime Minister's Tribute To His Services.

On the eve of the appointment of the new Chief Justice, the Prime Minister sent a letter to Sir Michael Myers conveying to him the Government's high appreciation of his services during his long term of office as Chief Justice, on the occasions he acted as Administrator of the Government during absences of the Governor-General, and for his contribution to the United Nations Committee of Jurists at Washington this year, and subsequently at the United Nations Conference in San Francisco.

The text of the letter is as follows:—

" My dear Sir Michael,—His Excellency the Governor-General has advised me of his concurrence in your relinquishment of office as Chief Justice of New Zealand as from July 31, 1946. Your retirement on that date is in accordance with the wish you expressed in your letter to me of July 8. Formal notice of your retirement appears in this week's *Gazette*.

" In advising you of his Excellency's formal concurrence I desire to avail myself of the opportunity of conveying to you the high appreciation of the Government for the services you have so ably and faithfully rendered to the Dominion during your long term of office. With regard to your judicial duties I need not add to the well-merited tributes paid to you by the Solicitor-General (who spoke on behalf of my colleague the Attorney-General), and by the Bar, at a sitting of the Supreme Court in Wellington last week, on the eve of your retirement, other than to say that the sentiments so cordially expressed are fully shared by the Government.

" With regard to administrative duties when acting as Administrator of the Government during absences of the Governor-General, I shall ever have in mind the helpful and dignified manner in which these have been carried out.

" I feel impelled to refer also to the most valuable contribution made by you as the representative of New Zealand at the United Nations Committee of Jurists held in Washington during 1945, and subsequently at the San Francisco Conference.

" On behalf of the Government, and personally, I wish both you and Lady Myers many years of health and happiness."

REFRESHER COURSE.—4

THE LAW OF TRUSTS AND TRUSTEES.

Developments since 1939.

By J. G. HAMILTON, LL.M.

The points which come within the scope of this article arise out of two statutory provisions which affect the perpetuities rule, and numerous reported cases. There have been no regulations dealing with the subject. A Bill which is before Parliament foreshadows statutory powers of maintenance and advancement on the lines of the English provisions and an increase of the power of the Court to authorize dealings with property subject to the Settled Land Act, 1908.

The matters which deserve mention are classified under headings as set out below.

LEGALITY OF OBJECT.

(*a*) *Perpetuities.*—Section 6 of the Law Reform Act, 1944, provides that, in the case of instruments coming into operation after the passing of the Act, where absolute vesting is made to depend on the attainment by a beneficiary of an age exceeding twenty-one years and the gift is thereby rendered void for remoteness under the general rule, the gift shall take effect as if the absolute vesting had been made to depend on the beneficiary attaining the age of twenty-one years.

A concealed difficulty arises in connection with the Statutory Trusts set out in s. 7 of the Administration Amendment Act, 1944, which delay the vesting of the shares of infant next-of-kin until they attain the age of twenty-one years. It is common practice to provide in a will or settlement for an ultimate limitation in favour of next-of-kin ascertained in accordance with the Act. Such a provision is satisfactory when the limitation takes effect during lives in being or immediately on the death of a life in being; but, where this is not the case, the perpetuities rule will be infringed unless words are inserted vesting contingent interests of infants within twenty-one years of a life in being.

The principle that for the purposes of the perpetuities rule regard must be paid to possible events, is illustrated by the case of *Re Engels, National Provincial Bank, Ltd.* v. *Mayer*, [1943] 1 All E.R. 506, where a gift over "after the termination of the present war" was held void upon the ground that at the inception of the trust it could not be said with certainty that the war would be over within the period allowed for vesting.

The previous practice when seeking to prolong the operation of trusts was to provide for the interests to continue during the lives of all descendants of Queen Victoria living at a specified date and twenty-one years thereafter. These descendants are now numerous and it is becoming increasingly difficult to ascertain with certainty which of these are living from time to time. The case of *Re Leverhulme, Cooper* v. *Leverhulme* (No. 2.), [1943] 2 All E.R. 274, shows that although the Courts are still prepared to uphold such provisions where they arise under older instruments it is now advisable to choose the descendants of a later monarch so as to avoid uncertainty.

In *Re Pratt's Settlement Trusts, McCullum* v. *Phipps-Hornby*, [1943] 2 All E.R. 458, it was held that an absolute gift followed by a gift over was not defeated, if the gift over was void for remoteness. Similarly in *Re Spitzell's Will Trusts, Spitzell* v. *Spitzell*, [1939] 2 All E.R. 266, a forfeiture provision not limited to take effect within the period was held void. In *In re Johnson's Settlement Trusts, McClure* v. *Johnson*, [1943] 2 All E.R. 499, a discretion given to trustees to raise capital to supply a deficiency in income on a contingency which might never occur or might be too remote was held void as infringing the rule against perpetuities. This case illustrates, also, the well-known rule that a gift over, following a gift which is defeated by the perpetuities rule, is also void. In *Public Trustee* v. *Nolan*, (1943) 43 N.S.W. S.R. 169, a discretion exercisable at a time beyond the period allowed for vesting was held void.

(*b*) *Trusts for the Upkeep of a Tomb.*—Testators repeatedly show a desire to provide for the upkeep of their graves in perpetuity; and this is commonly done by making a gift of income to a charity, and providing that if the charity fails to care for the grave there shall be a gift over to another charity. In *Re Dalziel, Midland Bank Executor and Trustee Co., Ltd.* v. *St. Bartholomew's Hospital (Governors)*, [1943] 2 All E.R. 656, a trust of this nature failed because part of the property given was charged with a liability to pay for the upkeep of the tomb, and was, therefore, subject to a perpetual trust for a non-charitable purpose.

In *In re Filshie, Raymond* v. *Butcher*, [1939] N.Z.L.R. 91, a will provided for the residue of an estate to be expended in erecting, constructing and keeping in repair suitable kerbing and headstones over the graves of testratrix and other named persons. It was held that, to the extent to which the trust related to the maintenance of the kerbing and headstones, it was void as infringing the rule against perpetuities and that the trust for their erection and construction could be severed from that for their maintenance and was valid.

Re Budge, Ex parte Pascoe, [1942] N.Z.L.R. 350, is authority that a provision for the temporary maintenance of a tomb is valid if it does not infringe the rule against perpetuities, and that, where the amount to be expended is small and there is nothing in the will to show that testator contemplated maintenance beyond the period allowed, the failure to fix a period will not cause the Court to infer a breach of the rule.

(*c*) *Public Policy.*—In *Re Caborne, Hodge* v. *Smith*, [1943] 2 All E.R. 7, a will provided for an absolute gift to a son, if, after testatrix's death, his wife should die or his marriage be otherwise terminated. It was held that this provision was designed or tended to encourage an invasion of the sanctity of the marriage bond, and was therefore void as being against public policy. The cases on this aspect of the law are difficult to reconcile.

In *In re Fry, Reynolds* v. *Denne*, [1945] 2 All E.R. 205, the Court had to consider a condition attached to a gift to a woman that she should use the same

surname both during spinsterhood and after marriage. It held that the use of different surnames by husband and wife would produce consequences so undesirable that a clause obliging a female beneficiary to bear a prescribed surname while married must be regarded as inoperative on the grounds of public policy.

The Necessity for Certainity.

It is well established that a settlor when creating a trust must indicate with certainty the trust property, the beneficiaries, the purposes of the trust, and the conditions under which it is to operate. In *Clayton* v. *Ramsden*, [1943] 1 All E.R. 16, the House of Lords had to construe a will settling a share on a daughter on terms which provided that her interest should cease if she should at any time after testator's death marry a person not "of Jewish parentage and of the Jewish faith." The condition was held void for uncertainty because the words "Jewish faith" did not make it clear whether the parents must be of the Jewish race or of the Jewish faith and because the Court felt uncertainty as to the extent to which it would be necessary for a person to accept all the tenets and observe all the rules of practice prescribed by the Jewish religion before he could be said to be of the Jewish faith. It was held, also, that uncertainty as to the meaning of either of these terms would have been fatal to the validity of the trust.

Following this decision, the Courts in New Zealand have held void for uncertainty conditions as to education in the Protestant faith, adherence to the Protestant religion, and adherence to the Church of England: *In re Lockie, Guardian, Trust, and Executors Co. of New Zealand, Ltd.* v. *Gray*, [1945] N.Z.L.R. 230, and *In re Biggs, Public Trustee* v. *Schneider*, [1945] N.Z.L.R. 303. Notwithstanding these decisions, it is probably still permissible to attach conditions relating to religion, but they are not viewed with favour by the Courts and great care must be taken in framing them so as to avoid uncertainty. This can sometimes be done by specifying overt acts upon the happening of which the gift over is to operate.

In *In re Wright, Hilbery* v. *Greville*, (1941) 192 L.T.J. 294, there was a gift to a grandson "If he does not drink." The Court, after holding this condition to be repugnant in the sense that it was designed to cut down an absolute gift, expressed doubt as to whether the condition was sufficiently certain to be given any effect.

In *Re Parrott's Will Trusts, Cox* v. *Parrott*, [1946] 1 All E.R. 321, a condition that a legatee should by deed poll assume a different Christian name was held void for impossibility, because a Christian name cannot be altered by deed poll, and for uncertainty because there was no indication as to what testator meant by "assume."

In *Re Hains, Hains* v. *Elders Trustee and Executor Co., Ltd.*, [1942] S.A.S.R. 172, a condition subsequent providing that a beneficiary should forfeit a gift, if, by his habits or mode of living or for any other reason, he should be deemed by the trustee to be unfit to manage the estate, was held void for uncertainty.

In *Parker* v. *Westby*, [1941] St. R. Qd. 47, the matron of the B.A.F.S. hospital at Brisbane resigned and went to Sydney whence she wrote a letter to a nursing sister at the hospital enclosing a lottery ticket in the name "B.A.F.S. Staff" and saying that the ticket was "for you and S. and the girls." The ticket won first prize, and it was held that owing to uncertainty as to which members of the staff were intended to benefit the trust failed; and there was a resulting trust in favour of the donor.

Strict Settlements: Forfeiture Provisions.

In protective trusts, it is common practice to provide for payment of income to a beneficiary until he does or attempts to do or suffers any act or thing, or until any event happens whereby the income becomes payable to another person, and to give the trustees discretionary powers to provide for the maintenance of the beneficiary after he has forfeited his life interest. During the war years questions have arisen as to whether there was a forfeiture: (*a*) When income became payable to the Custodian of Enemy Property: *Re Hall, Public Trustee* v. *Montgomery*, [1943] 2 All E.R. 753, *Re Wittke, Reynolds* v. *King Edward's Hospital Fund*, [1944] 1 All E.R. 383, and *Re Harris, Cope* v. *Evans*, [1945] 1 All E.R. 702. (*b*) When a receiver was appointed under the Lunacy Act: *Re Custance's Settlements and Will Trusts*, [1945] W.N. 175. (*c*) As a result of legislation: *Re Viscount Furness, Wilson* v. *Kenmare*, [1944] 1 All E.R. 575. The decisions show that it is necessary to scrutinize the clause and study the intention in each case.

Secret Trusts.

Where a testator is induced to make a gift in his will in reliance on a clear promise by the donee that a trust will be executed in favour of certain named persons, the Court will enforce the donee to carry out the trust so as to prevent fraud. In *Re Cooper, Le Neve Foster* v. *National Provincial Bank, Ltd.*, [1939] 3 All E.R. 586, a testator by his will gave £5,000 by way of secret trust to trustees to whom he communicated the trusts before he executed the will. These trusts were acquiesced in by the trustees. By a later testamentary document the testator purported to cancel the earlier will, and provided that "the sum of £5,000 bequeathed to my trustees in the will now cancelled is to be increased to £10,000, they knowing my wishes regarding that sum." The increased bequest was never communicated to the trustees by the testator in his lifetime and it was held that the gift of the additional £5,000 failed.

In *Shenton* v. *Tyler*, [1938] 4 All E.R. 501, it was held that the common-law rule of evidence that communications between a wife and husband during the marriage are privileged extends equally to a widow after her husband's death, and she cannot be compelled to give evidence as to communications which, if established, might cause a gift to her to become subject to a secret trust.

In *Williams* v. *Commissioner of Stamp Duties*, [1943] N.Z.L.R. 88, the Court held that the Commissioner of Stamp Duties is bound to give full recognition to secret trusts when assessing death duties.

Precatory Trusts.

Difficulties repeatedly arise as to whether precatory words expressive of a donor's request, recommendation, desire, hope or confidence are strong enough to create a trust. These cases depend on the intention to be gathered from the words used and the general context in

each case. In the following instances it was held that there was no trust: *Re Johnson, Public Trustee* v. *Calvert*, [1939] 2 All E.R. 458, where a home-made will contained a request that a donee leave property to certain persons; *Re Turner, Queensland Trustees, Ltd.* v. *Turner*, [1942] St. R. Qd. 223, where the words were "I would strongly advise my trustees to sell"; and *McPhee* v. *Saunders*, (1940) 57 N.S.W. W.N. 101, where there was an expression of wish and desire.

In *In re Benham*, [1939] S.A.S.R. 450, words of desire were held in the context to create a trust.

Duties of Trustee.

There have been several useful cases on this branch of the subject. In *In re Bell, Perpetual Trustees Estate and Agency Co. of New Zealand, Ltd.* v. *Bell*, [1940] N.Z.L.R. 15, trustees, who had voting rights in respect of shares, sought the direction of the Court as to how they should exercise them on a resolution affecting the rights of life tenants and remaindermen so as to discharge their duty of impartiality. They were directed that there was no imperative duty on them to vote either for or against the resolution, and that so long as they exercised their discretion to do one or the other *bona fide* they would fulfil their duty as trustees. The Court gave the trustees a lead in the matter without binding them and the case illustrates the usefulness of trustees seeking the direction of the Court on difficult questions.

In the Australian case of *Gordon* v. *Australian and New Zealand Theatres, Ltd.*, (1940) 40 N.S.W. S.R. 512, it was held that a person who occupies a fiduciary position in relation to a power is free to exercise it as he pleases provided he does not act *mala fide*; that the *prima facia* presumption is in favour of *bona fides*, and that the person who alleged *mala fides* must prove it.

In another Australian case *Re Morish*, (1939) S.A.S.R 305, a will contained a trust for conversion and gave power to postpone. The trustees obtained Court authority to carry on a business for a fixed term, and after the expiration of the term they carried on the business without authority for a further ten years, during seven of which losses were incurred. It was held that it was not necessarily the duty of the trustees to stop the carrying on of the business immediately on the expiration of the term fixed by the Court Order; that after the expiration of the term it was their duty to endeavour to sell and a reasonable time only could be allowed to them for that purpose; and that they had not acted reasonably in the interests of the beneficiaries in carrying on the business, and ought not to be excused for the breach of trust in omitting to obtain the directions of the Court.

A trustee must not derive a profit from his office. In cases therefore where he is appointed a Director in a Company by reason of being the holder of shares belonging to a trust estate he is bound to account to the trust estate for remuneration which he receives as Director: *Re MacAdam, Dallow* v. *Codd*, [1946] 1 Ch. 73, and *In re Sharp, Union Trustee Co. of Australia, Ltd.* v. *Blair*, [1944] A.L.R. 343.

In *Re Kay's Settlement, Broadbent* v. *MacNab*, [1939] 1 All E.R. 245, trustees sought the directions of the Court as to whether they ought to enforce a covenant to settle after acquired property in favour of volunteers where the settlor was unwilling to comply with the covenant. The Court ruled that, as the volunteers had no right to enforce the covenant themselves, the trustees should be directed not to take any proceedings to do so.

Powers of Trustees.

In re W. and R. Holmes and Cosmopolitan Press, Limited's Contract, [1943] 2 All E.R. 716, shows that a power of sale given to the trustees of a will is exercisable only during the period before the beneficial interests are ascertained and vested or at most within a reasonable time thereafter.

In *Re Pratt, Barrow* v. *McCarthy*, [1943] 2 All E.R. 375, it was held that under the English Act trustees had power to sell specific shares which had been settled, and to invest the proceeds in investments authorized by law.

Under s. 81 of the Statutes Amendment Act, 1936, the Court is given wide powers to authorize dealings with trust property. In *In re Fell*, [1940] N.Z.L.R. 552, it was held that the Court has jurisdiction under the section to order a sale of realty even if this is prohibited by the testator. In *In re Bayly, Binnie* v. *Bayly*, [1944] N.Z.L.R. 868, it was held that the section gave the Court power to authorize trustees for the sake of the reputation of the family and the estate of the deceased to make donations and gifts to charitable and local organizations up to a fixed amount per annum. In *Re Harvey, Westminster Bank, Ltd.* v. *Askwith*, [1941] 3 All E.R. 284, the Court invoked the corresponding English section for the purpose of giving trustees power to blend funds held for identical charitable purposes under the wills of two sisters.

In *In re Patterson, Perpetual Executors and Trustees Association of Australia, Ltd.*, v. *Patterson*, [1941] V.L.R. 233, it was held that a statutory power to apply for advancement and benefit may extend to the making of payments for education, but does not extend to payments for maintenance.

Appointment of Trustees.

In re H.W., [1942] N.Z.L.R. 462, is authority that the Court has power under s. 3 of the Trustee Act, 1908, to make a vesting order of *inter alia* mortgages under the Land Transfer Act, 1915, of which the registered proprietor is a trustee who has become a mental defective.

In *In re Boothman*, [1939] N.Z.L.R. 860, it was held that a trustee who is absent from New Zealand for twelve months but before his departure appoints a delegate under s. 104 of the Trustee Act, 1908, does not "remain out of New Zealand" within the meaning of s. 7 of that Act; also that the absence abroad for more than a year even though he has appointed a delegate, and the nature and extent of that absence are relevant factors for consideration by the Court in dealing with an application under s. 41 of the Trustee Act, 1908, to remove such absent trustee from his trusteeship.

The Court has jurisdiction to displace a trustee against his will and appoint a new trustee in substitution for him: *Re Henderson, Henderson* v. *Henderson*, [1940] 3 All E.R. 295.

In *Re Parsons' Settlement, Barnsdale* v. *Parsons*, [1940] 4 All E.R. 65, an infant who was given power to appoint new trustees exercised the power during his minority in a manner detrimental to his interests. It was held that the appointment was not valid and did not bind him. In *Re May's Will Trusts, May and Stanford* v. *Burch*, [1941] Ch. 109, the Court appointed a new trustee to take the place of one in German-occupied territory.

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

Change and Decay.—In *201 Law Times*, 16, Mr. Gilchrist Alexander in a fifty-years retrospect of the English Bar refers to the enormous amount of interlocutory work that used to be done. What was known as the Bear Garden "seethed with life and motion." Dozens of counsel and solicitors, he says, congregated round the doors of the Masters or a Judge in Chambers and there was much jockeying for position amongst the barristers' clerks. In one day in the Commercial Court, that well-known counsel and witty raconteur "Theo" Mathew would exhibit proudly a list of forty summonses for disposal before his father Mathew, J.; and Willes Chitty sometimes had twenty or thirty summonses in one day that required his attention. Other matters upon which Mr. Alexander comments in his interesting review are the virtual disappearance of the Parliamentary Bar (where leaders, with fourteen or fifteen Committees sitting at one time, made fabulous incomes); the huge increase in divorce business involving congestion in the Courts; delegated legislation, Lord Hewart's "new despotism" marking the most significant departure from the old regime; the faithful body of silks prepared to dispose of the many common jury cases at an average of "ten and two"; the excellent lunches in Hall for 1s. 1d. and the dinners, including wine, for 2s.; and the custom of sessions in Courts on Saturdays sometimes till 2 p.m. The last will strike the younger generation as dreadful and barbaric. Indeed, are we not rapidly approaching the time when Saturday legal work of any description may bring us within the term "infamous conduct" and involve our shame-faced appearance before the Disciplinary Committee

Odds and Ends.—An interesting problem arose last month in England in *Property Holding Co., Ltd.* v. *Mischeff*, under the Rent and Mortgage Interest Restriction Act, 1923, s. 10, which provides, *inter alia*, that a dwelling is not controlled if *bona fide* let at a rent which includes payment in respect of furniture providing that the payments attributable to the use of furniture form a substantial portion of the whole rent. There, the Court had to determine whether linoleum, a kitchen cabinet, a refrigerator and a fitted bedroom cabinet with mirrors, provided by the landlords, fell within the word "furniture" as understood to-day, particularly as the fittings were to some degree fixed to the premises. At present prices, a value of £200 was placed upon these fittings and 15 per cent. of that sum—*i.e.* £30, was found to be fairly attributable to them. The rent of the flat came to £275 annually. In these circumstances, Henn Collins, J., held that £30 was "a substantial portion of the whole rent" and that the premises were, in consequence, non-controlled. The decision is regarded as one of far-reaching importance since an astute landlord by insisting upon installing a few accessories could thus exempt his premises from rent restriction; and the Minister of Health has been asked to take steps to give adequate protection to the large number of tenants whom the decision must affect. If the Minister is receptive to group pressure—and the notion is not far-fetched—then *Mischeff's* case will join the many which enjoy only a butterfly duration in this regulation-ridden age.

The Wicked Magistrate.—The benign blessings of the Bench are occasionally conferred upon some barrister—(*e.g.*, upon waiver of costs which he knows his clients could never recover), but it is rare for a solicitor to receive such encomiums. This deficiency has now been repaired by Tucker, L.J., who was appointed last February to inquire into and report upon the circumstances surrounding the hearing of a possession case by some Yorkshire Justices. It seems that the chairman wanted to obtain possession from a former groom whose retention of the premises had no merits, and, in order to insure that he obtained a warrant of ejectment, he had caused a special Court to be summoned for his personal convenience and then had taken a particular justice (who had not sat regularly since 1942), and invited him to sit as he feared that one of the justices summoned might be adverse to him. At the inquiry, the chairman, a justice of the peace for twenty-six years and a chairman of his Bench for ten, answered awkward questions by asserting: "It never entered my head"—a proposition that was accepted, but declared as indicative of a lamentable mentality. "In my view," said Tucker, L.J., "a Magistrate, so far from using his position to further his own private convenience, should be prepared to put up with a greater degree of inconvenience than an ordinary litigant if there is any danger of conflict between his rights as an ordinary citizen and his position as a justice of the peace." And what of the solicitor mentioned at the beginning of this tale of woe? Well, he is the fellow who blew the gaff. His lordship congratulated him on the courage of his action in reporting the matter to the Home Office. As one who practised before that particular Bench, such a course must have been very distasteful to him, but he had been prompted only by a sense of duty and a zealous regard for the proper administration of justice, and he had rendered a public service.

From My Note-book.—The law, precisely because it is not an exact science, is a most exacting profession, and you will find its practitioners driven to do other things—preferably illegal—to preserve their state of mind.—R. L. Hine (*Confessions of an Uncommon Attorney*).

To be wholly devoted to some intellectual exercise is to have succeeded in life: and perhaps only in law and the higher mathematics may this devotion be maintained, suffice to itself without reaction, and find continual rewards without excitement."—R. L. Stevenson (*Weir of Hermiston*).

"Fox-hunting was once characterised by Oscar Wilde as the pursuit of the inedible by the ineffable. If Wilde were still alive he might have said of requisitioning, as practised in these days of peace, that it is the pursuit of the uninhabited by the uninhibited . . . And the tragedy of it is that all this bustling interference with private liberties, while causing anxiety bitterness and fear amongst many people, contributes almost nothing to the solution of the housing problem."—E. B. Gillett, President of the Chartered Surveyors' Institution.,

LAND SALES COURT.

Summary of Judgments.

The summarized judgments of the Lands Sales Court, which appear as under, are published for the general information and assistance of practitioners. They are not intended to be treated as reports of judgments binding on the Court in future applications, each one of which must be considered on its own particular facts. *The reasons for the Court's* conclusions in any one appeal may, however, be found to be of use as a guide to the presentation of a future appeal, and as an indication of the Court's method of considering and determining values.

No. 77.—S. to McP.

Rural Land—Ten-acre Area within Borough—Whether Suitable or Adaptable to Settlement of Discharged Serviceman—Basic Value—Whether Area an Economic Unit—Method of Valuation—"Settlement"—"Productive Value"—Servicemen's Settlement and Land Sales Act, 1943, ss. 51, 53 (1)—Amendment Act, 1945, s. 11.

Appeal again an order under s. 51 of the Servicemen's Settlement and Land Sales Act, 1943. The land is farm-land but would not provide a living for its owner. The grounds of appeal were as follows:

(1) That, because the land would not provide a living, it is not "suitable or adaptable for the settlement of a discharged serviceman."

(2) That the starting point and the only starting point in ascertaining the basic value of "farm-land" is productive value in terms of s. 53: That, as the land is not an "economic unit," it has no productive value within the meaning of that section, and accordingly the Act cannot apply because no productive value can be fixed upon which to base a basic value.

(3) That the application by the Crown for an order under s. 51 has resulted in undue delay and undue hardship to the purchaser.

The parties agreed on the following statement of facts:—

1. That the property affected by this application consists of 10 acres 3 rood 18 poles situated a mile and a half from the centre of Pukekohe. It has on it a villa type dwelling some thirty years old, at the present time in need of considerable repairs, and also a number of outbuildings. At the present time 2 acres are in fallow and 8 acres in light pasture.

2. That the land is farm-land within the meaning of s. 51 of the Servicemen's Settlement and Land Sales Act.

3. That the property is what is commonly known as an "uneconomic unit," in that if a valuation of the land were made in terms of s. 53 (3) (4) and (5) of the Servicemen's Settlement and Land Sales Act no net annual income would remain after the deductions required by the above sections had been made from the gross income that could be obtained from the said land.

4. That the land by itself would not provide a living, and its owner would require to augment the income derived from the property by some other means.

5. That the property is suitable for any person including a discharged serviceman, who by reason of having a pension, or other means, or by reason of doing work away from the property, is able to augment the income derived from the property.

The Court, per Ongley, J., said: "The submission that the land is not suitable or adaptable for the settlement of a discharged serviceman depends upon the meaning of the word 'settlement' in s. 51. It is contended for the appellant that 'settlement' means settlement not partial settlement; that finality is implied in the word 'settlement,' and that it is not settlement within the meaning of that section to place a discharged serviceman on a piece of land on which he cannot make a living; that the section applies only to an economic unit—*i.e.*, farm-land capable of providing a living if farmed with average efficiency.

"Several matters arise for consideration in giving a meaning to 'settlement' because it must be construed with due regard to the context and to the purposes of the Act. It has to be borne in mind that there will be discharged servicemen who, by reason of disability, are not able to work an economic unit. Further, there may not be enough 'economic units' for all who can work them and desire to obtain them. And again, there may be discharged servicemen who prefer to be set up on something less than an economic unit. There will thus be four classes of discharged servicemen, and 'settlement' must be construed with regard to the four classes. (1) Those able to work an economic unit and for whom an economic unit is available. (2) Those able to work an economic unit but for whom there is not an economic unit available. (3) Those not able to work an economic unit. (4) Those who prefer less than an economic unit.

"It may be that a man unable to work an economic unit can be materially assisted in providing for himself by being set up or established on a suitable piece of land that he can work. If a partly disabled man is established on such a piece of land, he is in a sense settled and that land is suitable for the settlement of that discharged serviceman, because he is established there and can there exercise what working powers he has and do something for himself. On the other hand, an economic unit is not suitable for him because he cannot work it. Land suitable for the settlement of a discharged serviceman should at all events be land that he is able to work. If he is disabled to such an extent that he cannot work an economic unit then land suitable for him means land that is not an economic unit. The proposition must also be considered with reference to the man for whom there is no economic unit available and the man who prefers less than an economic unit. If they can be established on land not an economic unit but from which they can obtain a substantial or even material part of their living, they are in a sense settled on that land if they are working it and earning a substantial or material part of their living by working it, notwithstanding that they must obtain part of their living in some other way. If the word 'settlement' is construed with reference to these four classes of discharged servicemen, and we think it must be so construed because they are all discharged servicemen who will require 'settlement,' then it cannot be said that the Act excludes or was intended to exclude an area of farm-land merely because it is not large enough or productive enough to be an economic unit. In the opinion of the Court, s. 51 applies not only to an economic unit, but to any farm-land suitable or adaptable for settlement of a discharged serviceman (including a partly disabled discharged serviceman) if, by working that land, a discharged serviceman (including a partly disabled discharged serviceman) can earn a material part of his living. If the construction contended for is the proper construction, it means that land cannot be acquired under s. 51 for the disabled man, the man who cannot get an economic unit, and the man who prefers less than an economic unit. It is true that such men can be provided for under s. 23, but there does not seem any reason for excluding them in construing s. 51. They are discharged servicemen within the meaning of that section. We therefore find that s. 51 is not limited to economic holdings, and that ground of appeal fails.

"That brings us to the consideration of the second ground of appeal: That the land cannot be valued in terms of s. 53 because it is not an economic unit and has therefore no productive value upon which to begin to fix the basic value. The point is not before us and we are not deciding that land which will not provide a living for its owner has no productive value under s. 53. The statement of facts agreed on by the parties states that 'no net annual income would remain after the deductions required by the sections had been made from the gross income that could be obtained from the said land.' The appeal will be considered on the basis of that statement. Section 53 (1) provides:

> "For the purposes of this Act the basic value of any farm, land shall be deemed to be the productive value of that land as ascertained in the manner provided by this section, increased or reduced by such amount as the Land Sales Committee deems necessary in order to make it a fair value for the purposes of this Act.

"By that section 'productive value' is to be increased where it is necessary to do so to make a 'fair value.' The question is, Does that section apply when there is no productive value to start with, no productive value to be increased? In order to arrive at a fair value in this case the Committee heard

evidence and fixed a value by the method of comparative sales for the land and on a replacement less depreciation basis for the improvements. The value so fixed is not appealed against as to amount: the objection is that it cannot be done that way because this is farm-land and no basis other than the productive basis is permissible, and that what is non-existent cannot be increased. It is not disputed that if there was any productive value to start on the objection would not hold no matter whether the productive value was a pound or a penny so long as there was productive value to start on. The increase contemplated by the section is an increase by addition. What in effect has happened is that the value as found by the Committee has been added to a productive value of nothing. No doubt that is open to objection as a method of expression, but it is not open to objection as a method of finding a 'fair value' in that it has resulted in a fair value being found. Section 51 (*b*) provides: '. . . the Committee shall make an order determining the basic value of the land.' The basic value is in fact the productive value plus what is necessary to make a fair value. That is what has been found. It appears to the Court that a construction that basic value can be found if there is something, no matter how little, to start from, but cannot be found unless there is that little, should be avoided unless the words permit no other construction. We do not think the word 'increase' as used necessarily implies that there must be something to increase or something to start from. In our opinion, it means that the two items of value must be taken together, that is, the productive value plus what is required to make a fair value. That is what the Committee has done. It cannot be said that because there is no 'productive value' it has no value at all: that because there is none of one item making up fair value there must necessarily be none of the other item. In the opinion of the Court the Committee found the fair value in the proper way in the circumstances.

"That still leaves the questions of hardship and undue delay for consideration. There must always be hardship when a buyer is displaced under s. 51, but this is what the Act says is to be done. Therefore that hardship cannot be held to be a ground for refusing the order. On the question of delay it is said that during the delay the vendor and the purchaser made considerable arrangements in anticipation of the completion of the contract, not thinking that s. 51 applies or would be invoked. As the land is 'farm-land' and is suitable for the settlement of a discharged serviceman, it was unwise to do anything until it had been ascertained whether or not the Crown would acquire the land. The position in respect of such land is that an order must be made under s. 51 unless the Crown has decided not to acquire the land. It is not said that the Crown did anything to lead, or which had the effect of leading, either the vendor or the purchaser to believe the Crown had decided not to acquire the land. What it seems really happened is that the vendor and the purchaser did not think s. 51 applied and acted on that belief. The Crown is not responsible for that.

"Counsel for the appellant referred to s. 11 of the Amendment Act, 1945, and pointed out that lands within a borough are expressly excluded from the operation of that section. This land is within a borough. That section does not limit s. 51. It gives additional powers of taking. Under s. 11 land can be taken under s. 51 that could not have been taken before s. 11 became law. Section 51 applies only to farm-land, but it applies to farm-land wherever it is, whether in a borough or not. This is farm-land. What has to be determined under s. 51 is:

(1) Whether the land is farm-land.

(2) If it is farm-land, whether it is suitable or adaptable for the settlement of a discharged serviceman.

(3) Whether the Committee is satisfied that the Crown has decided not to acquire or arrange for the acquisition of the land.

"It is admitted the land is farm-land. The Committee found that it was suitable for the settlement of a discharged serviceman. This Court agrees with that finding. The Crown has not decided 'not to acquire the land.' Section 51 (*b*) then proceeds: 'If the Committee is not so satisfied, the Committee shall make an order determining the basic value of the land.' The Committee has determined the basic value in a way that the Court holds to be in accordance with s. 51. The appeal accordingly fails.

"In the statement of facts agreed on by the parties it is stated 'no net annual income would remain after the deductions required by the above sections (s. 53 (3), (4), and (5), had been made from the gross income that could be obtained from the said land—*i.e.*, that the land had no productive value. We have dealt with the case on that basis, but we do not decide that the land has no productive value. We leave that question open."

No. 78.—R. TO C.

Urban Land—Sections in New Subdivision—Standard of Value established by Local Land Sales Committee in Comparable Sales—Value at Material Date disregarded by Valuers.

Appeal by the Crown against the grant of consent to thirty-three applications respecting a total of thirty-nine sections in a new subdivision running between Joll Road and Gordon Road in the Borough of Hastings. The sole matter in issue was the price at which consent was granted by the Committee.

The Court said: "Happily the amount in difference between the valuers called by the vendor and by the Crown is small in respect of individual sections. In the aggregate, however, there is a difference of £400, and as the price to be fixed may set a standard for similar proposed subdivisions, the Crown deemed it proper to bring this appeal.

"The land now subject to subdivision was purchased by the vendor in June, 1945, for £1,300 and it is stated that his costs of roading and incidental expenses will be not less than £3,000. All the sections appear to have been rapidly sold and the sales were approved by the Committee at an aggregate sum of £6,055 while the aggregate of the valuations presented on behalf of the Crown amounted to £5,655. It will be seen that even at the amount of the Crown's valuation the vendor appears to have an ample margin to cover incidental expenses or any under-estimate of his costs and to show him a substantial profit.

"It is accordingly not surprising that no attempt was made by the vendor to justify the sale prices on a cost basis, and that the case was presented on the basis of comparative sales.

"In this regard Mr. N., for the Crown, valued the sections in the aggregate of £5,655; Mr. W., for the vendor, presented a valuation of £6,055, and Mr. H., for the vendor, a valuation of £6,060. All of these gentlemen are valuers of standing whose opinions are entitled to great weight. It is the duty of the Court, however, to weigh the evidence and it must in the result record its preference in favour of one side or of the other.

"A factor of considerable interest to the Court was that all the valuers purported to justify their valuations by reference to the sale prices approved by the Land Sales Committee in respect of sales of comparable sections during the years 1945 and 1946. In no instance was reference made to any comparable sale in or prior to the year 1942. In explanation of this unusual method of valuation, it was explained that there were very few sales of sections in Hastings in 1942, twenty-five being mentioned by one valuer as probably the maximum number, and it was suggested that none of these sales were suitable for comparison or for the foundation of a basis of valuation in the present case. It appears to the Court, therefore, that instead of directing their attention to comparable values established by actual sales on or about December 15, 1942, in accordance with the Act, the valuers have attempted to apply a standard of values established by the local Land Sales Committee.

"While no doubt the Committee's standards have been arrived at by reference to the value of land in 1942, the Court feels constrained to point out that in order to comply with the provisions of the Act it is necessary constantly to refer back to the initial sales in or about December, 1942, upon which the Committee's subsequent standards may have been based. The vendor's valuers admitted frankly that there would have been little or no sale for these sections in 1942; and we cannot but feel that, in fixing their present prices, they have to some extent been influenced, not merely by the natural growth of the Borough, but by increased demand due to scarcity.

"While a large number of comparative sales were referred to us, we are of opinion that the only really relevant sales are those of the sections in two adjacent subdivisions—namely, those referred to as Ebbett's sections in Oliphant Road and Fletcher's sections in Gordon Road. Mr. W., who sold all Mr. Ebbett's sections, said the average price was £150 and that Mr. Ebbett received the full price which he asked. Mr. H. said that he had had these sections for sale but was unable to sell them. We are, therefore, of opinion that the prices approved by the Committee (which averaged £150) represented the full value of Mr. Ebbett's sections. Mr. Fletcher's sections were much closer and therefore more comparable to the present sections and they sold and were approved at an average of £135. Mr. H. stated that this price was fixed by Mr. Fletcher, and though he (Mr. H.) considered it was a low price there is no evidence on which the Court could properly hold that Mr. Fletcher sold at less than a fair value.

"While certain disadvantages in respect of Ebbett's sections were stressed by the vendor's witnesses, the Court considers on the whole that these sections were substantially of the same

value as those now under discussion, while the same applies to the Fletcher sections which were sold for substantially less than the average value placed upon the present sections by the Crown. The only other section relied upon on behalf of the vendor was a single section in Pepper Street which, however, being in a well-developed and built-up area, is hardly of itself *sufficient to establish a standard of value.*

"For the reasons given, the Court is of opinion that those comparable sales which are really relevant support the valuation put in by Mr. N. in preference to those of Messrs. H. and W. It should be borne in mind that all the sales quoted were made in 1945 and were not strictly related to values in the immediate vicinity in 1942, when, as was admitted, the present sections would have been virtually unsaleable.

"Having regard to the whole of the evidence, and to the fact that, even upon the Crown's figures, it would seem that the vendor will be in receipt of a thoroughly satisfactory return for his enterprise and investment of capital, the Court is of opinion that Mr. N.'s valuation should be accepted, and that, *although the amount in issue in respect of any individual* section is small, the Crown was justified in appealing against the allowance of any sum in excess thereof. The appeals, therefore, in each case will be allowed and consent in respect of each sale will be granted upon the condition that the sale price in each instance is reduced in accordance with Mr. N.'s assessment."

MR. T. D. HARMAN.

Sixty-two Years in Practice.

At the time of his retirement, on May 31 of this year, Mr. T. D. Harman was certainly the doyen of the profession in Canterbury, and probably the longest-practising solicitor in New Zealand. He was admitted to the Bar in 1884; and he had been in practice for sixty-two years without any break, apart from a period of about nine months, over twenty years ago, when he paid a visit to England.

Mr. T. D. Harman was articled to Messrs. Harper and Co. of Christchurch, who at that time had the largest legal practice in New Zealand or Australia. After qualifying, he set up in practice on his own account. He was also a partner in various partnerships, one of his former partners being Mr. H. F. von Haast, now of Wellington. For the last twenty-two years, Mr. T. D. Harman was associated in partnership with his so , Mr. A. D. Harman, in the partnership of T.D. Harman and Son. Mr. T. D. Harman retired from active practice owing to indifferent health.

MR. W. E. MASON.

Presentation to mark Retirement.

Mr. W. E. Mason, who was secretary to the two recent Chief Justices, Sir Charles Skerrett and Sir Michael Myers, recently retired from active work in the Courts.

The occasion was marked by a gathering of his friends in the profession, who met recently to make him a presentation and to extend their good wishes for his time of well-earned leisure.

The presentation was made by Mr. F. C. Spratt, who was supported by Mr. P. B. Cooke, K.C., and by Mr. G. G. G. Watson. All the speakers stressed Mr. Mason's invariable courtesy to all with whom he came officially in contact, and especially his kindness and helpfulness to younger members of the profession during the whole of his long connection with the law.

NEW ZEALAND LAW SOCIETY.

Meeting of Council.

A meeting of the Council of the New Zealand Law Society was held at the Supreme Court Library, Wellington, on June 14, 1946.

The following Societies were represented: Auckland, Messrs. A. H. Johnstone, K.C., L. P. Leary, and V. N. Hubble (proxy); Canterbury, Mr. L. D. Cotterill; Gisborne, Mr. J. G. Nolan; Hamilton, Mr. W. Tanner; Hawke's Bay, Mr. W. G. Wood; Marlborough, Mr. W. Churchward; Nelson, Mr. V. R. Fletcher; Otago, Mr. F. J. D. Rolfe (proxy); Southland, Mr. L. F. Moller; *Taranaki, Mr. R. J. Brokenshire; Wanganui, Mr. R. S. Withers,* and Wellington, Messrs. H. F. O'Leary, K.C., W. P. Shorland, and G. G. G. Watson.

The President, Mr. H. F. O'Leary, K.C., occupied the chair. Mr. A. T. Young (treasurer) was also present. Apologies for absence were received from Messrs. J. B. Johnston, A. Milliken, and J. K. Patterson.

The late Mr. E. F. Hadfield.—The President referred to the death of Mr. E. F. Hadfield, late of Wellington, and the following resolution was passed, members standing in silence as a mark of respect:—

"The members of the Council of the New Zealand Law Society express their deep regret at the death of Mr. E. F. Hadfield, of Wellington, who was from 1904 to 1921 a member of the Council. In later years, until the date of his death, he was a member of the Conveyancing Committee of the New Zealand Law Society, on which he gave very helpful service in connection with many and varied problems arising for consideration. The sincere sympathy of the Council is extended to his relatives."

Mr. W. G. Wood stated that the Hawke's Bay Society desired to be particularly associated with the resolution passed by the Council, Mr. Hadfield being a member of the New Zealand Council for seventeen years as the representative of the Hawke's Bay Society whose interests he had always faithfully served.

The late Mr. H. W. Kitchingham.—Reference was made to the death of Mr. H. W. Kitchingham, late of Greymouth, and the following resolution was passed, members standing in silence as a mark of respect:—

"The members of the Council of the New Zealand Law Society record their deep regret at the death of Mr. H. W. Kitchingham, of Greymouth, one of the oldest members of the profession. Mr. Kitchingham's connection with the law commenced just on seventy years ago and he was admitted to practice in 1883. At various times he represented Westland at the meetings of the Council. Altogether his legal career was a noteworthy one. The members tender their sincere sympathy to his son, Mr. F. A. Kitchingham—a member of the profession—and to the other relatives of the deceased."

Distribution of Statutes.—At the request of the Standing Committee, the Secretary had interviewed the Government Printer concerning the late distribution of statutes.

The Government Printer stated that the practice was to give all Parliamentary matters priority and as soon as it was possible to distribute copies of the Acts. He pointed out that the Department was working two shifts per day and had, in addition to the ordinary staff, co-opted as much casual labour as could be obtained.

In respect to the bound volumes of the statutes, he expected that these would be available by the middle of June and, although he regretted the delay, he stated that skilled labour, in particular bookbinders, was unobtainable. The Secretary had pointed out to him the difficulties which occurred due to the delay in the distribution of statutes, particularly in instances such as the Servicemen's Settlement and Land Sales Amendment Act, as quoted by the Wanganui Society, but the Printer could see no way of lessening the delay.

A list of the legislation enacted last session setting out the date of the assent to the statute and the date of publication had since come to hand. In the case complained of by Wanganui it was stated that the Royal assent was given on December 7, 1945, and the Act was published on January 29, 1946.

Members thought that the Government Printer should be empowered to give priority in certain cases such as in the above amendment and it was decided to discuss the position with the Attorney-General. It was also thought that the Minister should be asked whether arrangements could be made to have the annual bound volume of the statutes completed at an earlier date.

(To be concluded.)

PRACTICAL POINTS.

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

1. Land Transfer.—*Memoranda of Encumbrances—Discharge.*

QUESTION: A.B. is the registered proprietor under the Land Transfer Act of a house property, which he inherited from his father. The title is subject to two memoranda of incumbrances, which were registered by the father's executors to secure two annuities pursuant to the father's will. The first encumbrance is in favour of A.B.'s mother who has just died. She left no estate and it is not proposed to take out administration in her estate. The other encumbrance is in favour of A.B.'s sister, who is still alive. A.B. has sold the property and is desirous of giving the purchaser a clean title. I am concerned as to the expunging of the memoranda of encumbrances from the Register Book. A.B.'s sister is willing to release her annuity on payment of a sum of money. What form will the discharge of her encumbrance take?

ANSWER: Reference should be made to s. 122 of the Land Transfer Act, 1915. It is often easier to register encumbrances under the Land Transfer Act than to get them off the Register. In every case it is always desirable to write to the District Land Registrar, inquiring as to what evidence he requires. In cases where the annuitant has left no legal representative, as in the case of A.B.'s mother, the Land Transfer Department will endeavour to meet the position by accepting the best evidence available. A.B. should make application to have his mother's encumbrance discharged, producing his mother's death certificate, verified by statutory declaration by A.B. Receipts for the annuity payments should also be produced to the District Land Registrar. It often happens in practice, however, that receipts are not obtained: sometimes the payments under the annuity are not made, the parties coming to some family arrangement whereby something else is accepted, in lieu thereof—*e.g.*, free board and lodging. In these cases full disclosure of the facts to the District Land Registrar is necessary.

As regards the discharge of the encumbrance by A.B.'s sister, the ordinary form of receipt does not appear appropriate. An instrument of simple discharge should be drawn. The operative part could read something like this: "In consideration of the sum of paid to me by A.B. (the receipt of which sum is hereby acknowledged) I DO HEREBY RELEASE AND DISCHARGE the said Memorandum of Encumbrance No. ."

XI.

2. Criminal Law.—*Information—Offence punishable by Greater Penalty if committed wilfully—Form of Information.*

QUESTION: I have been asked to draw an information charging an offence which is punishable by a greater penalty if the offence has been committed wilfully. It is claimed that the offence has been wilfully committed. How should I draw the information?

ANSWER: It would appear, both on principle as well as authority, that the information should allege that the offence has been committed wilfully. The point in issue may best be dealt with by taking an example: s. 12 (7) of the Sale of Food and Drugs Act, 1908. The ordinary penalty is £50 for a first offence: but if such offence is wilfully committed the penalty is £200 or three months' imprisonment. If the term "wilfully" is not used a defendant may well assume that he is not charged with wilful commission. An information not alleging wilful commission, when such is really charged, may therefore mislead a defendant: it should be noted that under s. 13 it is no defence that an offence has not been wilfully committed.

As for authority, reference may be made to *Lee Sun* v. *Herbert*, (1906) 26 N.Z.L.R. 370, 373. "Wilful" commission of an offence under the Act is a different offence from an offence not so committed. There is, too, *Judd* v. *Judd*, [1933] N.Z.L.R. 1029, 1036: it is there plainly indicated that a defendant must be informed precisely of the charge he has to meet: and that seems only elementary justice. (In the latter case there are matters which differentiate it from criminal offences: (*a*) s. 17 of the Destitute Persons Act, 1910, prescribes in clear terms what the complaint must contain: (*b*) a complaint of the kind there considered is a civil matter only: see *Jones* v. *Forman*, [1917] N.Z.L.R. 798; (*c*) the onus is placed on defendant: s. 71 (as amended); and (*d*) the proof of good ground for failure to maintain is a defence, and completely answers the complaint so far as maintenance and guardianship is concerned.)

C.1.

3. Charitable Gift.—*Donor dying within three years—Liability to Death Duty.*

QUESTION: If A. makes a gift (charitable in the legal sense) of £10,000 and dies within three years of the gift, is the £10,000 liable to estate and succession duty on A.'s death? Would it make any difference, if the £10,000 absorbed practically the whole of A.'s estate?

ANSWER: If the £10,000 could be used for persons or objects outside New Zealand, it is liable both to estate and succession duty: *Weston and the Guardian Trust* v. *Commissioner of Stamp Duties*, [1945] N.Z.L.R. 192, 316; *Adams's Law of Death and Gift Duties in New Zealand*, 205.

If the £10,000 or the income therefrom *must* be expended in New Zealand, then it is exempt both from estate and succession duty, provided the donee assumes possession and retain possession to the entire exclusion of A. by contract or otherwise and provided that A. does not reserve any benefit or life interest therein—*i.e.*, provided the gift does not come within the ambit of s. 5 (1) (*c*) and/or 5 (1) (*j*) of the Death Duties Act, 1921. In other words the exemption from death duty of charitable gifts applies only to straight-out gifts—*i.e.*, to those coming only within s. 5 (1) (*b*): *Weston* v. *Commissioner of Stamp Duties*, [1945] N.Z.L.R. 183, *Cumulative Supplement No. 2 to Adams's Law of Death and Gift Duties in New Zealand*, 13, 14, 33.

It makes no difference to liability to duty whether or not the £10,000 absorbed practically the whole of A.'s estate: that might make a difference as to the persons against whom the Crown could recover the death duty, that is all.

X.2.

PRACTICE: COURT DOCUMENTS.

Title and Description of new Chief Justice.

For the general information of practitioners, the proper title and description of the new Chief Justice in Court documents is as follows:

In Court Orders: Before the Honourable the Chief Justice.

In Probate: The Honourable Humphrey Francis O'Leary, Chief Justice of New Zealand.

In Petitions: To the Honourable Humphrey Francis O'Leary, Chief Justice of New Zealand.