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SALES TAX: INCIDENCE OF REMOVAL.

SALES tax, from the viewpoint of the taxing authorities, is a very convenient form of obtaining revenue: once the Legislature has enacted a statute providing for the imposition of sales tax, a resolution of the House of Representatives, followed by a verbal alteration in the statute, can raise or lower the rate of sales tax, without any alteration in the machinery for collecting it. The alteration may also, in the terms of the statute, be made by Order in Council. But in the commercial community which has to pay sales tax, such an alteration in rate is not always easy to apply.

Sales tax was first imposed in New Zealand in March, 1933. In Canada, this means of adding to the public revenue was put into operation in 1927. In Australia, the Commonwealth revenue authorities introduced the charging and collection of sales tax in August, 1930.

Sales tax imposed in New Zealand by s. 11 of the Sales Tax Act, 1932–33 (as amended by s. 22 of the Finance Act, 1940, and by s. 10 of the Customs Acts Amendment Act, 1942), is paid, at the rate from time to time determined, on the sale value of all goods (except goods from time to time exempted from the operation of the statute), which are (*a*) sold by a wholesaler otherwise than to a licensed wholesaler for resale by him; (*b*) manufactured by a manufacturing retailer for use by him or for sale otherwise than to a licensed wholesaler for resale by him; or (*c*) imported into New Zealand, and entered therein for home consumption, under the Customs Act, 1913, otherwise than by a licensed wholesaler for resale by him.

By resolution of the House of Representatives on August 15, 1946, certain specified classes of goods were exempted from sales tax as on and from August 16, 1946. This resolution is taken to have the force of law, according to the tenor of such resolution, as an amendment of the Sales Tax Act, 1932–33; and so continues until the passing of the ratifying statute having retrospective effect to the date of the resolution, which usually follows in the same session of the Legislature.

The question at once arises: Upon what goods of the classes specified in the resolution may sales tax not be charged after August 16, 1946? Conversely, it may be asked whether goods of those classes sold to the public after August 16, 1946, may include sales tax at the rate payable before that date.

To clear the way to a consideration of these questions, it is necessary to say that though the general public, through the retail shopkeeper, have the privilege of paying sales tax indirectly, and are considered to be the sole beneficiaries of a benevolent Legislature when the tax is abolished or reduced on goods, they are not directly concerned with the payment of sales tax, though, whatever may be the current rate of sales tax payable, in most cases it is eventually passed on to him.

The sales tax legislation directly concerns itself with the *wholesaler*, the *manufacturing retailer*, and the *importer*, who alone are concerned in the manner in which the tax reaches the revenue collectors.

Coming back to the recent sales tax resolution of the Legislature: we consider the importer first. Before August 16, 1946, he had to pay sales tax at the rate of sales tax then current on the sale value of all imported goods of the classes specified in the resolutions, calculated on the basis specified in s. 13 (1) (c) of the Sales Tax Act, 1932–33; if, before August 16, 1946, such goods were imported *and* entered for home consumption under the Customs Act, 1913, that is, if he were not a licensed wholesaler and imported the goods for resale. The sales tax so paid may be passed on to the purchaser of the goods from the importer. On the other hand, in respect of the specified classes of goods imported before or after August 16, 1946, but *not entered* until that date or afterwards, the Customs authorities would not impose sales tax on the goods exempted by the resolution. On those goods, the importer cannot pass on sales tax since he did not have to pay it.

A manufacturing retailer's position is next to be considered. He is a retailer who manufactures goods for sale, and he is liable for sales tax only upon goods manufactured by him. The goods here in question take their character (subject to the provisions of the Sales Tax Act, 1932–33), from the date of the completion of the manufacturing process in respect of them. In other words, sales tax is payable on the sale value of the finished goods at the time when their manufacture is completed: this is not necessarily the time when they were sold. (The manufacturing retailer must be distinguished from a retailer, who is a person—who is not a licensed wholesaler—who engages in the trade or business of selling goods).

Now, if any part of the process of manufacture of any goods, subject to the abolition of sales tax in pursuance of the resolution to which we have referred, was completed by the manufacturing retailer on or after August 16, 1946, sales tax at the rate current

before that date must be paid on the fair market value of such goods as if they were sold by the manufacturing retailer to a retailer in the ordinary course of business (subject to the provisions of the Sales Tax Act, 1932–33, in respect of the taxable goods used in the manufacture). On the other hand, the manufacturing retailer of goods on which sales tax has been abolished obtains the benefit of such abolition on all goods of which the processes of manufacture were commenced on or after August 16, 1946. Consequently, no sales tax is payable by a manufacturing retailer of goods that were exempt from sales tax before August 16, 1946, or on previously taxable goods, which have been manufactured after that date for sale to a licensed wholesaler for resale by him.

In view of the exemption from sales tax of building material as from August 16, 1946, it should be noted that by s. 4 of the Sales Tax Amendment Act, 1933, the definition of the term "manufacturing retailer" in s. 2 of the principal Act is extended to include any person who manufactures any goods intended to be used by him in the erection or construction of any building or other structure if such goods are taxable goods of the class or kind which are sold by other manufacturing retailers in the ordinary course of their business.

This provision refers to joinery and other fittings (now exempt from sales tax) manufactured by a builder for use by him in building construction. But builders of houses, bridges, &c., who confine their operations to general constructive work have not been required to license as wholesalers or manufacturing retailers.

A licensed wholesaler, is a person (not being a licensed manufacturing retailer) who, exclusively or not, engages in the sale of goods by wholesale, or who, whether exclusively or not, sells goods to a retailer. (A manufacturer, who is not a licensed manufacturing retailer, is also deemed to be a "wholesaler.") Now, if a licensed wholesaler has sold goods to a retailer before August 16, 1946, he is liable to pay sales tax at the former rate of sales tax on the price for which he has actually sold the goods; and, on a sale to a retailer made before that date, he can add the sales tax at the former rate provided that, in the invoice sent by him to the purchaser, he states, in addition to the price for which the goods are sold, the amount of sales tax payable thereon. Sales Tax Act, 1932–33, s. 62; and see *Refrigerators Ltd.* v. *Stevens*, (Auckland, July 12, 1946: Cornish, J. To be reported.). On the other hand, if a wholesaler makes a sale on or after August 16, 1946, to a purchaser of goods on which sales tax has been abolished, he cannot add any sales tax on the price for which he has sold them.

Where a wholesaler manufactures any taxable goods of a class or kind which are sold by other wholesalers or by manufacturing retailers in the ordinary course of their business, such goods, are, if used by him in the erection or construction for any other person of any building or other structure, deemed to have been sold by him as soon as they have been so used: Sales Tax Amendment Act, 1933, s. 4 (2).

In the case of the wholesaler, it may have been noted that sales tax is imposed on the wholesaler in respect of "goods sold" to a retailer, that is, there must be "a contract of sale," which is a contract whereby the seller transfers or agrees to transfer the property in goods to a buyer for a monetary consideration called "the price." For sales tax purposes, it is important to differentiate between an "agreement to sell," and a "sale" of goods, both of which are within the term "contract of sale." Where the transfer of the property in the goods is to take place at a future time, or subject to some condition thereafter to be fulfilled, the contract is called "an agreement to sell." Where, under the contract of sale—a contract pure and simple—the property is transferred (not necessarily by delivery) from the seller to the buyer, the contract is called a "sale," whether by a bargain and sale, or by delivery: Sale of Goods Act, 1908, ss. 2, 3: see *Chalmers's Sale of Goods*, 12th Ed. 9.* Sales-tax, as we have seen, is payable on goods "sold," that is, when the property in the goods passes from the seller to the buyer. The property may be transferred by the contract itself, if the parties so intend; or, if it be so agreed. The property in the goods passes when the parties intend it to pass, and if the time is not specified in the contract, then by s. 20 of the Sale of Goods Act, 1908, statutory rules are provided whereby, in the absence of agreement, it may be determined when the property is deemed to pass, according to the imputed intention of the parties.

A wholesaler must pay sales tax at the rate imposed by the statute before August 16, 1946, on the sale value of all goods the subject of a sale by him before that date to any person who was not a licensed wholesaler, or to any licensed wholesaler, not being goods for sale by him: Sales Tax Act, 1932–33, ss. 11 (1) (*a*), 13 (1) (*a*).

If, however, the wholesaler before August 16, 1946, entered into an "agreement to sell" goods of the kind specified in the resolution of the House of Representatives of August 15, 1946, then, so far as any goods subject to the agreement (the property in which was to pass on or after August 16, 1946) were by such resolution wholly freed from sales tax every such agreement to sell made in New Zealand (unless there is provision to the contrary made by that agreement to sell), is deemed by s. 62 of the Sales Tax Act, 1932–33, to be modified to the following extent: If the resolution freed the seller from liability to pay sales tax on such goods, the purchaser may deduct from the agreed price the sales tax that the seller would have paid had the alteration not been made.

The public are safeguarded against exploitation by unscrupulous persons claiming to charge sales tax which they have not paid, or an amount of sales tax that cannot be justified. Section 64 of the Sales Tax Act, 1932–33, makes it an offence if any person delivers or sends to any other person any invoice or statement in respect of any goods which shows any amount as paid or payable by way of sales tax (whether charged to the purchaser or not) where no sales tax has been paid or is payable, or in excess of the amount of sales tax that has been so paid or payable.

* The definition of sale is extended by s. 2 of the Sales Tax Act, 1932–33, to include barter, and also to include the disposal of goods with a right of purchase, or on terms providing that the seller retains an interest in the goods, and the delivery of goods under any condition as to future payment; and "to sell" has a corresponding meaning.

SUMMARY OF RECENT JUDGMENTS.

HILL v. UNITED REPAIRING COMPANY, LIMITED. RYCROFT v. TASMAN EMPIRE AIRWAYS, LIMITED.

FULL COURT. Wellington. 1946. March 19, 20; July 12. MYERS, C.J.; BLAIR, J.; KENNEDY, J.; CALLAN, J.; FINLAY, J.

Factories—Forty-hour Week—Extension of Hours by General Order in Award—Extension Order made in respect of a Factory referable to one Industry therein—Several Industries subject to separate Awards carried on in Factory—Whether such Extension Order extends the Hours for all Workers in that Factory—"In respect of the factory"—Factories Amendment Act, 1936, s. 3—Industrial Conciliation and Arbitration Amendment Act, 1936, s. 20 (1).

Industrial Conciliation and Arbitration Acts—Limitation of Action—Factory—Short paid Overtime—Worker accepting Less Rate of Pay than provided in Award—Claim made under Factories Act, 1921–22, or on Simple Contract Basis—Limitation fixed by s. 146 of Industrial Conciliation and Arbitration Act, 1925, applicable—Industrial Conciliation and Arbitration Act, 1925, s. 146—Factories Act, 1921–22, s. 21—Factories Amendment Act, 1936, s. 19.

An extension order made under s. 3 (5) of the Factories Amendment Act, 1936 (which must be read in conjunction with s. 20 (1) of the Industrial Conciliation and Arbitration Act, 1925), contained in an award regulating the work in one industry in a factory wherein a number of different industries are being carried on, is confined in its application and is referable only to the workers engaged in the industry to which that award relates.

United Repairing Co., Ltd. v. *Glover*, [1945] N.Z.L.R. 160, mentioned.

As s. 21 of the Factories Act, 1921–22, does not fix any rate of overtime in a factory, but is merely declaratory of a minimum rate, it does not confer personal rights. The relevant award is alone evidentiary of the rate of payment. Consequently, a claim for unpaid overtime, where a worker in a factory has erroneously accepted a rate less than is fixed by the relative award, is founded on the award itself, and is not a statutory debt under s. 21 of the Factories Act, 1921–22, as amended by s. 3 of the Factories Amendment Act, 1936, or founded on the basis of a simple contract. Therefore, the limitation on the period over which recovery of such unpaid overtime can be effected is the limitation imposed by s. 146 of the Industrial Conciliation and Arbitration Act, 1925.

True v. *Amalgamated Collieries of Western Australia Ltd.*, [1940] A.C. 537; [1940] 2 All E.R. 479, distinguished.

Baillie and Co. v. *Reese*, (1906) 26 N.Z.L.R. 451, *Sargent* v. *Levestam and McLaughlin*, [1924] N.Z.L.R. 469, and *Carson* v. *Nightcaps Coal Co., Ltd.*, [1919] N.Z.L.R. 559, referred to.

Counsel: *Tuck*, for the appellant: *Hamer*, for the first respondent; *Alderton*, for the second respondent.

Solicitors: *Tuck and Bond*, Auckland, for the appellants; *Lisle Alderton and Kingston*, Auckland, for the first respondent; *Russell, McVeagh and Co.*, Auckland, for the second respondent.

THE KING v. NESBITT.

COURT OF APPEAL. Wellington. 1946. April 8, June 19. MYERS, C.J.; BLAIR, J.; KENNEDY, J.; CALLAN, J.; FINLAY, J.

Criminal Law—Habitual Criminal—Plea of Guilty to Each of Seven Informations for Separate Offences within Class I—Committal for Sentence—Sentence on all Informations—Whether Seven Separate Occasions upon each of which Prisoner convicted—"Occasions"—Crimes Act, 1908, s. 29.

A person, charged on seven informations of separate offences—each based on a separate transaction, each being within Class I n s. 29 (3) of the Crimes Act, 1908—pleaded guilty to each nformation, each plea being attested by the Magistrate, who signed one committal for sentence on all charges. When the prisoner was before the Supreme Court for sentence on these charges, he was sentenced to a term of imprisonment with hard labour on each charge, all sentences to be concurrent and declared him to be an habitual criminal.

On an appeal against sentence on the ground that the declaration that the prisoner was an habitual criminal was invalid, in that he had not been previously convicted on at least two occasions before being declared an habitual criminal.

Held, by the Court of Appeal, 1. That, as under s. 29 (4) of the Crimes Act, 1908, for the purposes of that section, a committal for sentence is deemed to be a conviction on indictment, there was a conviction in respect of each of seven charges of separate offences within Class I in s. 29 (3) of the statute, and as there was necessarily a sequence of such convictions, there were seven separate occasions.

2. That, as the head sentence was imposed in respect of each charge, the declaration that the prisoner was an habitual criminal must be presumed to follow on the last of the seven sentences, and was accordingly a valid declaration.

R. v. *Crago*, [1917] N.Z.L.R. 863, *R.* v. *Ehrman*, (1911) 31 N.Z.L.R. 136, and *R.* v. *Steele*, (1910) 29 N.Z.L.R. 1039, applied.
R. v. *Tier*, (1912) 32 N.Z.L.R. 428, distinguished.
The appeal was, accordingly, dismissed.

Counsel: *Watson*, for the prisoner in support: *Currie*, for the Crown.

Solicitors: *Crown Law Office*, Wellington, for the Crown.

THE KING v. WALKER.

COURT OF APPEAL. Wellington. 1946. March 25, 26; June 19. MYERS, C.J.; BLAIR, J.; KENNEDY, J.; CALLAN, J.; FINLAY, J.

Criminal Law—Fraudulent Omission to Account—General Balance Deficiency—Misdirection confusing Fraudulent Omission to Account with Fraudulent Conversion—Evidence Sufficient to justify Conviction on Either Charge—References in Summing-up to Embezzlement—No Substantial Miscarriage of Justice—"Account for or pay"—"Any part thereof"—Crimes Act, 1908, s. 242—Criminal Appeal Act, 1945, s. 4.

The accused, a solicitor, was arraigned upon an indictment containing *inter alia* a count that he, having received a specified sum of money on terms requiring him to account for the same to a specified person, did fraudulently omit to account for or pay as aforesaid and did thereby commit the crime of theft, the sum specified being £302 9s. 9d. The sum alleged to have been received and not accounted for represented the balance of sums of money received by him as solicitor for the administratrix of two estates, after making payments which were properly debited to her, and after allowing him a fair and reasonable amount for his costs for the work done by him. He had withdrawn from his trust account and transferred to his ordinary account moneys amounting to about £500 in all, which he debited in his trust-account ledger to the account of the administratrix, although he was not entitled to take more for his costs than, at the most, £80. He had never rendered to the administratrix any bill of costs or any statement of account; and, only after inquiry by an auditor appointed by the Auckland District Law Society, was there supplied to the administratrix even a copy of the account in the trust ledger, showing amounts received and the debits made for costs.

The learned trial Judge, at the conclusion of the evidence, declined an application by counsel for the prisoner that the said count be withdrawn from the jury on the ground that a person cannot be charged with failing to account for an amount alleged to be due and which at the trial is shown to be a general balance or an indeterminable amount.

In his summing-up, the learned Judge referred more than once to the charge being one of embezzlement. There was also confusion in that summing-up as between fraudulent omission to account or fraudulent conversion: and the summing-up was directed to a charge of fraudulent conversion. The jury found the prisoner guilty on the said count.

On a case stated by the learned trial Judge for the opinion of the Court of Appeal,

Held, 1. That, on the evidence, the prisoner could properly be convicted on the count of the crime specified in s. 242 of Crimes Act, 1908, as the words " or any part thereof " in that section cover the case of a general balance deficiency.

2. That a count that the accused, having received a specified sum of money on terms requiring him to account for the same to a specified person, did fraudulently omit to account for or pay as aforesaid and did thereby commit the crime of theft, contained in substance a statement that the accused had committed a crime specified in s. 242 of the Crimes Act, 1908.

3. That although the learned trial Judge referred more than once to the charge being one of embezzlement, it was an offence of a somewhat similar class to embezzlement, as known to the law before the enactment of the Criminal Code Act, 1893, and such a misdirection was not sufficient to avoid the conviction.

4. That, notwithstanding misdirection in the confusion between fraudulent omission to account and fraudulent conversion the evidence would have been precisely the same whether the prisoner had been charged with fraudulent omission to account or fraudulent conversion; and that evidence was sufficient to justify a finding of guilty on either charge: and there had, therefore, been no substantial miscarriage of justice.

The conviction was accordingly affirmed.

Counsel: *W. W. King* and *Nigel Wilson*, for the prisoner: *C. H. Taylor*, for the Crown.

Solicitors: *Crown Law Office*, Wellington, for the Crown.

LOWER HUTT CITY CORPORATION v. HAIN.

COURT OF APPEAL. Wellington. 1946. June 11, 12; July 8. MYERS, C.J.: BLAIR J.; JOHNSTON, J.; FAIR, J.; CORNISH, J.

Rating—Systems of Rating—Annual Value—Change from Rating on Unimproved Value on September 8, 1945—Council's Resolution passed on October 8, 1945, that system of Rating on Annual Value should " in future be in force "—Whether System of Rating on Annual Value in force from April 1, 1946—Result of Poll signed by Substitute Returning Officer on behalf of Mayor—Validity—Whether s. 44 (2) of Rating Act, 1925, complied with—Rating Act, 1925, ss. 4, 7, 8, 44 (2)

Before the year 1921, the system of rating on the capital value was in force in the Lower Hutt Borough. In that year the system was changed to rating on the unimproved value. Pursuant to a poll duly taken on September 8, 1945, the system of rating on the basis of the unimproved value, was, on September 10, 1945, declared by the substitute returning officer to have been rescinded. The notice of the result of the poll published in the *New Zealand Gazette*, as required by s. 44 (2) of the Rating Act, 1925, was signed by the substitute returning officer with the authority of the Mayor and on his behalf.

On October 6, 1945, the Council of the City of Lower Hutt, the Borough, owing to the increase in population, having become a City under the Municipal Corporation Act, preferring to act under the powers of s. 4 of the Rating Act, 1925, passed the following resolution:

> " That the Lower Hutt City Council being a Local Authority of a district in which the system of rating on the unimproved value is not in force by resolution determines that in future the system of rating applicable to the City of Lower Hutt shall be on the annual value."

Professing to act under the powers in s. 4 of the Rating Act, 1925, that the system of rating on the annual value should in future be in force in the said City, on November 16, the Council, pursuant to s. 8 of that statute, appointed a valuer, who duly prepared and signed a valuation list in the prescribed form and transmitted it to the Council before January 15, 1946. Thereafter all matters necessary to enable a rate to be made and levied on the annual valuation were done and all necessary steps taken to comply with the provisions of the Act were taken. Subsequently thereto, a number of ratepayers having questioned the validity of the proceedings taken to enable the rate to be made and levied on the system of rating on the annual value of the property in the City, the plaintiff corporation issued an originating summons under the Declaratory Judgments Act, 1908, asking the Supreme Court to determine whether such power existed. That summons was removed into the Court of Appeal for argument. In that originating summons the following questions were asked:

1. Whether the Council of the plaintiff Corporation, a poll having been conducted pursuant to s. 44 of the Rating Act, 1925, rescinding the previous proposal adopting rating on the unimproved value, such poll being conducted and duly declared in the month of September, 1945, could by resolution of the said Council passed in the month of October, 1945, pursuant to s. 4 of the Rating Act, 1925, validly determine that the system of rating on the annual value shall be in force in the district as from April 1, 1946.

2. Whether in such circumstances a valuation roll prepared and transmitted to the said Council on or before January 15, 1946, in accordance with ss. 7 and 8 of the Rating Act, 1925, is validly available to the said plaintiff Council for the carrying into effect of the resolution referred to question 1 above.

3. Whether the requirements of s. 44 (2) of the Rating Act, 1925, are satisfied if the chairman of the said Council causes the result of the poll to be published by an officer of the Corporation, as in this case, or whether the said section requires a notice over the signature of the chairman himself.

Held, per totam curiam, 1. That s. 44 (2) of the Rating Act, 1925, requiring that " the chairman shall publish the result of the poll " had been complied with.

2. That the system of rating on unimproved value continued in force until and including March 31, 1946.

3. That, notwithstanding the words in s. 4 (1) of the Rating Act, 1925, (" other than a district wherein the system of rating on the unimproved value is in force "), s. 4 should be interpreted so as to enable a local authority once the system of rating on unimproved value has been validly rescinded to determine by resolution whether the system of rating is to be on annual or the capital value as from April 1, immediately following the resolution, and to take forthwith the steps required by the section of the Rating Act, 1925, relating to rating on the annual value.

Accordingly the answer to each of the said questions was " Yes."

Per *Myers*, C.J., *Johnston*, *Fair*, and *Cornish*, JJ., That the Council by the use of the words " in future " in its resolution determined, in effect, that the new system of rating on annual value should come into force as from April 1, 1946, and that the said resolution was valid.

Per *Blair*, J., dissenting, although agreeing that the answer to each of the three questions should be " Yes," That question 1, as framed, was based upon imaginary and not true facts, and the Council did not validly determine that rating on annual value should be in force as from April 1, 1946, because if that resolution had been passed on April 1, 1946, or, although passed on October 8, 1945, had been expressed to become operative only on and after April 1, 1946, it would have been a valid resolution; and that the said resolution was therefore nugatory: and the only way, short of statutory corrections and validation, to bring into force a rating on the annual value would be to pass a new resolution to do so forthwith.

Counsel: *Sim*, K.C., and *Gillespie*, for the plaintiff: *Cousins*, for the defendant.

Solicitors: *Bunny and Gillespie*, Wellington, for the plaintiff: *Finlay, Hoggard, Cousins, and Wright*, Wellington, for the defendant.

NEW ZEALAND ALL GOLDS OLD BOYS' ASSOCIATION, INCORPORATED v. GOLDFINCH.

SUPREME COURT. Auckland. 1946. June 21. CALLAN, J.

Licensing—Offences—Illegal Sale—Unchartered Club—Sale of Liquor to Members—Sale without License—Licensing Act, 1908, ss. 195, 259, 267.

A sale of liquor by an unchartered club to its members and guests is a sale without a license in breach of s. 195 of the Licensing Act, 1908: as a charter to a club is equivalent to a license under that statute.

Plank v. *McIlveney*, (1902) 21 N.Z.L.R. 508, followed.

Graff v. *Evans*, (1882) 8 Q.B.D. 373, distinguished.

Opie v. *Petersen*, [1942] N.Z.L.R. 246, referred to.

Counsel: *W. W. King*, for the appellants: *G. S. Meredith*, for the respondent.

Solicitors: *J. J. K. Terry*, Auckland, for the appellants; *Crown Solicitor*, Auckland, for the respondent.

REFRESHER COURSE.—5

THE LAW OF WILLS AND ADMINISTRATION.

Changes and Developments Since 1939.

By J. P. McVeagh, LL.M.

(*Concluded from p. 218.*)

Description of Property.—There are many reported decisions dealing with the meaning of expressions used by testators in describing the property intended to pass under particular gifts. It is possible to refer to a limited number only of these decisions. Possibly the most important decision during this period is the judgment of the House of Lords in *Perrin* v. *Morgan*, [1943] 1 All E.R. 187, in which the House overruled several earlier decisions on the meaning of the word "money." The will, a home drawn one, after disposing of testatrix's realty provided that "all moneys of which I die possessed of shall be shared by my nephews and nieces now living." There was no residuary clause. The Court held that this bequest included all the net personal estate not specifically disposed of by the will. This decision overrides the old rule that the word "money," when used in a will, must be construed in its strict sense unless there was a context which permitted a wider meaning. The judgment of Lord Simon, L.C., contains an interesting historical review of the meanings of the word "money" and a very important statement on the method to be adopted in construing the wording of a home drawn document.

As further examples of the construction applied to particular words and phrases see *In re Everett, Prince* v. *Hunt*, [1944] 2 All E.R. 19 ("all my stocks and shares" construed strictly); *Re Gifford, Gifford* v. *Seaman*, [1944] 1 All E.R. 268 ("my war bonds" held to include inscribed stock owned at the date of the will, but not Savings Certificates and Defence Bonds purchased later); *Re Morton*, [1944] G.L.R. 8 ("all shares" held to include debenture stock); *In re Rowling, Ellis* v. *Rowling*, [1942] N.Z.L.R. 88 ("monies actually in my possession" held not to include cheques in possession of agent); *In re Ferry, Allen* v. *Allen*, [1945] N.Z.L.R. 448 ("Investments" held not to include monies in the Post Office Savings-bank or on current account).

Ademption of Legacies.—A specific gift by will is adeemed if the subject-matter of the gift, as described in the will, has ceased to exist as part of the assets of the testator at the time of his death. *Re Palmer, National Provincial Bank* v. *Barwell*, [1945] Ch. 8, is an illustration of the principle that the manner in which the property ceases to be part of testator's estate at his death is immaterial. The will in that case contained a bequest of "all such stocks . . . as shall at my death be in the care custody or possession of Grindlay's Bank." Testatrix became insane after the date of the will and the investments in her name were transferred into the name of the Accountant-General and none were held by Grindlay's Bank at her death. It was held that the order vesting the stock in the Accountant-General had the same effect as if testatrix herself had made the transfer and the gift was therefore adeemed.

In *Wallen* v. *Quedley*, [1941] G.L.R. 211, Blair, J., decided that there had been no ademption in a case where testator by his will had specifically devised land of which he described himself as having no title except by possession, but to which he subsequently acquired a Land Transfer title.

Residuary Gifts.—A residuary gift includes not only property not otherwise disposed of by the will but also all property which testator has attempted to dispose of but ineffectually. If part of a particular fund is given to one person and the residue to another it is a question of intention whether the gift of the residue is a gift of the mere balance of the fund after deducting the amount previously given out of it or whether it is a gift of the entire fund subject to the gift previously made out of it. In *In re Parnell, Ranks* v. *Holmes*, [1944] Ch. 107, the will directed the trustees to hold the residuary estate upon trust as to £2,000 thereof to pay the income to a nephew for life with remainder to his children and as to "all the remainder of the residuary trust fund . . . in trust for H.D.N." The nephew died a bachelor and the Court held that H.D.N. was entitled to the £2,000.

Gifts Over on Death of Beneficiary.—In many cases where an absolute interest is given followed by a gift over in the event of the beneficiary dying without children, the word "children" has been construed as being synonymous with "issue." The Court will in the exercise of its discretion construe "child or children" as meaning "issue" if it is satisfied that the expression was used with that meaning and that to construe it strictly would defeat the true intent of the will. *In re Milward*, [1940] Ch. 698.

Conditional Gifts.—In order that a condition attached to a gift may be upheld it is essential that it shall be one that is not contrary to public policy and that it be defined with sufficient certainty. A very common condition, and one which has given rise to a good deal of litigation, is one having reference to the religious beliefs of the beneficiary and many conditions of this nature have failed owing to the omission of the testator to define the condition with sufficient certainty. In *Clayton* v. *Ramsden*, [1943] 1 All E.R. 16, the House of Lords had to consider a will which imposed a condition that the beneficiary should forfeit her interest if she married "a person who is not of Jewish parentage and of the Jewish faith." It was held that the words "of Jewish parentage" were uncertain because they did not show how many ancestors of the husband were to be of the Jewish race and that the words "of the

Jewish faith " were also uncertain because they did not define the degree of adherence to the faith required. A similar decision was reached in *Re Blaiberg, Blaiberg* v. *De Andia Yrarrazaval*, [1940] 1 All E.R. 632, where the words used were " marry any person not of the Jewish faith." Similar words used in the wills under consideration in *Re Moss's Trusts, Moss* v. *Allen*, [1945] 1 All E.R. 207, and *Re Donn's Will Trusts, Donn* v. *Moss*, [1943] 2 All E.R. 564, were also held to be too uncertain.

The Courts of New Zealand had to consider similar questions in *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. In the former case the expression used was " the Protestant Faith," and in the later " adherent of the Church of England." In each case the condition was held void for uncertainty.

It is clear, therefore, that conditions relating to the religious beliefs of any person must be drafted with considerable care, and it would seem essential in every case to include a definition clause, care being taken to see that this clause itself does not fail for uncertainty, defining in what circumstances a person is or is not to be deemed for the purposes of the will an adherent of any particular faith.

Gifts by Implication.—As an illustration of the principle that the Courts will in suitable circumstances imply a gift where there are no words of gift, see *In re Cooper, Eastwood* v. *Cooper*, [1943] N.Z.L.R. 75. In that case testatrix, after providing for certain life interests, directed the trustees to divide the residuary estate into as many shares as there were children of her's living at her death, but made no disposition of such shares. It was held that there was a gift by implication to those children.

Gifts of Absolute Interests.—The rule in *Lassence* v. *Tierney* that, where there is an absolute gift to a legatee on which are engrafted trusts which fail, the absolute gift takes effect was applied in *In re Robinson*, [1944] G.L.R. 140. In that case there was an absolute gift on which were engrafted trusts restricting the devisee's mode of enjoyment while unmarried and without issue. The devisee married but died without issue and the trusts to come into operation on the devisee dying unmarried and without issue failed. The Court held that the estate of the devisee was entitled to the absolute gift.

Probate: Will in Foreign Language.—Reference should be made to *In re Ante Mravicich*, [1940] N.Z.L.R. 886, which defines the procedure to be followed on an application for probate of a will in a foreign language.

Executor Resident out of the Jurisdiction.—In *In re Scullen*, [1940] N.Z.L.R. 746, testator, who resided in the United States, appointed his wife, who also resided there, to be executrix and after giving her a life interest disposed of the interest in remainder to two sisters living in New Zealand. The executrix appointed attorneys in New Zealand to take out a grant of administration c.t.a. until she should obtain probate of the will. The Court made the grant, but on the application of the remaindermen attached suitable conditions under s. 73 of the Court of Probate Act, 1857, restricting the power of the administrators to send capital monies out of the jurisdiction.

Power of Construction of a Court of Probate.—The Court has power to decide questions of construction in so far as they effect the admissibility to probate of a testamentary document: *In the Estate of Fawcett*, [1941] 2 All E.R. 341. In that case testatrix left two testamentary documents, the earlier drawn in proper legal form, the later a home drawn holograph will containing no revocation clause. The Court decided on construing the later will that it was intended to revoke the earlier and should alone be admitted to probate.

Recall of Probate.—An executor, to whom probate in common form has been granted, and who, after receiving notice that proceedings for revocation of the grant of probate are contemplated, pays out legacies given by the will, is liable on probate being recalled to refund to the administrator subsequently appointed the legacies so paid. It is no defence that the executor before paying the legacies invoked the procedure under s. 74 of the Trustee Act, 1908. *Guardian, Trust, and Executors Co. of New Zealand, Ltd.* v. *The Public Trustee*, [1942] N.Z.L.R. 294 (J.C.).

Incidence of Duties.—Section 31 of the Death Duties Act, 1921, defines how death duties are payable as between successors. Under that section duties are declared to be payable in accordance with the directions of the will, so far as regards any property which is subject to the dispositions of that will, and the section goes on to define the incidence of duties where the will does not give such directions.

In re King, Barclays Bank, Ltd. v. *King*, [1942] 2 All E.R. 182, is a decision which has an important bearing on clauses relating to the incidence of death duties. In that case testator made certain gifts some of which were expressed to be free of duties and others in which no mention was made of duties. In the residuary clause testator directed that " all duties payable in respect of " his estate should be paid out of residue. Notwithstanding this general direction the Court held that only those specific gifts which were expressed to be free of duty were entitled to have duty thereon paid out of residue. This decision would, of course, turn on the wording of the particular will; but it is suggested a wise practice in cases where all pecuniary legacies and specific gifts are intended to be paid out of residue either to ensure that each gift is expressed to be free of duties or to make reference to payments of duties in the residue clause only: compare *Guardian, Trust, and Executors Co. of New Zealand, Ltd.* v. *Styles*, [1939] N.Z.L.R. 484, where Reed, J., decided that a devise of a specific asset forming part of residue but not expressed to be free of duty was nevertheless not liable for estate duty as there was a provision in the residuary clause directing payment of testamentary expenses out of residue: *cf.*, *In re Palmer, Greenwood* v. *Palmer*, [1946] 1 Ch. 49. In view of the decision of the Court of Appeal in *In re King* (*supra*) it is prudent, where part of residue is specifically devised, to make express provision for the incidence of duties thereon. In *In re Palmer* the Court threw its own share of legacy duty on each share of residue notwithstanding a general direction for payment of all duties out of residue.

Provision is frequently made in wills for payment of duties in respect of assets forming part of testator's dutiable estate but not passing under the will—*e.g.*, gifts made within three years prior to testator's death.

This practice came before the Court of Appeal in *In re Houghton, McClurg* v. *New Zealand Insurance Co., Ltd.*, [1945] N.Z.L.R. 639, which decided that s. 31 of the Death Duties Act does not deprive a testator of the power to direct payment, out of his actual estate, of duty payable in respect of dutiable estate, not passing under the will. The Court also decided, Myers, C.J., dissenting, that the expression " death succession and other duties " was wide enough to include duties payable in respect of notional estate. This case was distinguished by Finlay, J., in *In re Reid, Guardian, Trust, and Executors Co. of New Zealand, Ltd.* v. *Reid*, [1946] N.Z.L.R. 334, where the words to be construed were " all my just debts funeral and testamentary expenses including death duties." It should be noted that the dissenting judgment of Sir Michael Myers, C.J., in *In re Houghton* (*supra*) is supported by the decision of the High Court of Australia in *Hill* v. *Hill*,(1933) 49 C.L.R. 41.

Insolvent Estates.—Section 100 (9) of the Bankruptcy Act, 1908, applies in the administration of estates under Part IV of the Administration Act, 1908, and a creditor, seeking to justify his delay in proving his debt, must discharge the onus of proving special circumstances to justify the delay. The fact that assets, held by the administrator, had realized more than expected was not a sufficient cause to admit late proofs of secured creditors who had not proved, but had relied on their securities. *In re Swinson, Ex parte Brodie and Public Trustee*, [1942] N.Z.L.R. 232.

Hotchpot Clauses.—Apart from any special directions in the will, there are two methods of bringing advances into hotchpot. One method, applying the rule in *Re Hargreaves, Hargreaves* v. *Hargreaves*, (1903) 88 L.T. 100, is to value the estate at the time fixed by the will for distribution and arrive at the shares of the advanced and unadvanced beneficiaries on that basis. The other method, applying what is commonly known as the rule in *Re Poyser, Landon* v. *Poyser*, [1908] 1 Ch. 828, is to value the estate as at the time of actual distribution. It is sometimes difficult to decide which method to adopt, as some of the authorities are somewhat in conflict. In *In re Wills, Dulverton* v. *Macleod*, [1939] 2 All E.R. 775, Simonds, J., has given a review of the authorities on the subject, to which reference should be made in any case involving the interpretation of a hotchpot clause. In *Re Oram, Oram* v. *Oram*, [1940] 4 All E.R. 161, Bennett, J., following the decision of Farwell, J., in *In re Gunther's Will Trusts, Alexander* v. *Gunther*, [1939] 3 All E.R. 291, distinguished *In re Wills* (*supra*) on the ground that, as there were no directions in the will referring to the date of distribution, the valuation for hotchpot purposes should be made as at the date of death. In *In re Hillas-Drake, National Provincial Bank, Ltd.* v. *Liddell*, [1944] 1 All E.R. 375, the problem again came before Simonds, J., who declined to follow *In re Oram* (*supra*) and *In re Gunther's Will Trusts* (*supra*) on the ground that they were so out of line with authority that he was not bound by them. Reference should also be made to the decision of the High Court of Australia in *In re Tennant*, (1942) 65 C.L.R. 473, where the rules to be applied in deciding which method to adopt are fully discussed.

Order of Application of Assets.—The general personal estate not specifically bequeathed is the primary fund for payment of debts unless such personalty is expressly or by implication exonerated by the will. A direction, charging debts upon a particular asset, does not shift the primary liability on to that asset unless at the same time the charge is expressly or by implication, in exoneration of the other assets in the estate. This principle was applied in *Re Gordon*, [1940] 3 All E.R. 205.

Payment of Debts.—In *In re Tankard, Tankard* v. *Midland Bank Executor and Trustee Co., Ltd.*, [1941] 3 All E.R. 458, the Court had to consider whether or not the executor was liable in damages to the beneficiaries for loss sustained by the estate through delay in paying an interest bearing debt. The judgment discusses generally the duty of an executor in regard to payment of debts and is important from that point of view. The decision was that, as the executor had honestly exercised a power to retain assets conferred on him by the will, he was not liable.

Annuities Free of Tax.—With modern taxation, reaching what many regard as saturation point, the Courts have had to consider many cases where testators have endeavoured to give annuities free of tax so as to ensure that the annuitant will have a fixed and definite amount to live on. Complications have arisen where testators have not defined what taxes are intended to be covered and where annuitants live in a foreign country.

The Court of Appeal had to consider both points in *In re Paterson, Rennick* v. *Guardian, Trust, and Executors Co. of New Zealand, Ltd.*, [1944] N.Z.L.R. 104, where the annuities were given " free of duty and income-tax." The Court held, on the construction of the whole will, that the trustee must pay not only the New Zealand income-tax on the annuities, but also any tax payable in the foreign countries where the annuitants resided. The Court also held that Social Security charge and National Security tax were income-tax for the purposes of the will.

In *In re Frazer, Frazer* v. *Hughes*, [1941] Ch. 326, the annuitant, whose annuity was given " free of all taxes (including income-tax) and duties," went to live in Kenya after the death of testator. It was decided that the income-tax payable by the law of Kenya was not a deduction contemplated by the testator.

In *In re Wells, Public Trustee* v. *Wells*, [1940] 2 All E.R. 68, the will bequeathed an annuity " to be paid free of all deductions." It was held that the annuity was not given free of income-tax. See also *Re Skinner, Milbourne* v. *Skinner*, [1942] 1 All E.R. 32, where Morton, J., gives a useful summary of the authorities on the point, and *Re Best's Marriage Settlement, Belk* v. *Best*, [1941] 3 All E.R. 315.

Distribution on Intestacy.—Provision is made by the Administration Act, 1908, for illegitimate children to succeed on intestacy to the estate of their mother who leaves no husband or legitimate issue. In *In re Peters*, [1945] G.L.R. 214, a case which fell to be determined under the law applicable prior to the coming into force of the Administration Amendment Act, 1944, an attempt was made to extend this to allow an illegitimate grandchild to succeed to its grandfather's estate. The Court held that s. 49 of the Administration Act, 1908, applied to legitimate children only.

In *In re Plowman, Westminster Bank, Ltd.* v. *Plowman*, [1943] 2 All E.R. 532, the Court had to consider the distribution on a partial intestacy under the Administration of Estates Act, 1925, which is somewhat similar to our 1944 Amendment.* Testator who left no issue had disposed of his residuary estate after the death of his wife, but had made no disposition of the income during his wife's lifetime. The Court held that the wife was entitled to the income for life under s. 46 (1) (*a*) of the Act.

Canons of Construction: Conflicting unambiguous provisions.—Where there are two conflicting unambiguous provisions in a will, and no ground for preference between them can be found in the context or in the scheme of the will as a whole, the later provision prevails. This rule was applied in *Re Hume's Estate*, (1939) 34 Tas.L.R. 22, where the Court had to construe the effect of two clauses, the first of which gave the income of a trust fund to a daughter until she attained twenty-seven and the second of which directed that the surplus income of the same fund, after providing for the daughter's maintenance, should form part of the capital of the fund. In view of the irreconcilable inconsistency between the two provisions the later prevailed.

Transposition of words.—The Court, where a will as drawn is ungrammatical, will, for the purpose of construction, transpose words so as to enable the will to be read grammatically. This was done in *Re Horrocks, Brown* v. *Horrocks*, [1944] N.Z.L.R. 314, at p. 322, where it appeared that the number of subclause (1) had been placed by the draftsman a line lower than he intended to, and it was necessary to transpose it in order that the will should read grammatically, and so aid in construction.

THE RULE AGAINST PERPETUITIES.

Was it overlooked in In re Humphries?

In *In re Humphries, McNeil* v. *Humphries*, [1946] G.L.R. 162, the trustee of the will issued an originating summons for the interpretation of the following clause in a will:—

> Subject to the payment of my just debts funeral and testamentary expenses I give devise and bequeath all property of which I shall be possessed or to which I shall be entitled at the date of my death wheresoever such property may be situate and of whatsoever nature the same may be unto my trustee (hereinafter named) upon trust to allow my brother David Jesse Humphries of Rongotea, baker to receive the rents interest income and profits thereof during his life and on the death of my said brother to allow the widow of my said brother to receive such rents interest income and profits during her life and on her death upon trust to pay and divide such property to and among such of the children of my said brother as shall then be living and if more than one in equal shares.

Testator was survived by his brother, his brother's wife, and his brother's five children. The brother's wife predeceased her husband, and one of the five children survived his mother, but died before his father. The other four children survived their father. The Court was asked to decide whether the class of the brother's children was to be ascertained at the date of death of the brother's wife or at the date of the brother's death. It was held that the class was determined at the date of death of the brother's wife, and that the estate of the deceased child was entitled to share. No reference is made in the form of question submitted to the Court, or in the judgment, to the effect of the rule against perpetuities on the gift under the will; but it is submitted that the gift in remainder might possibly have vested at a date outside the period fixed by the rule.

To recapitulate the rule it is defined in 25 *Halsbury's Laws of England*, 2nd Ed. 86, in the following terms:—

> The rule against perpetuities may be shortly enunciated as follows:—An executory devise or other future limitation to be valid must vest, if at all, within a life or lives in being and twenty-one years and a possible period for gestation after; it is not sufficient that it may vest within that period; it must be good in its creation, and, unless it is created in such terms that it cannot vest after the expiration of a life or lives in being and twenty-one years and the period allowed for gestation, it is not valid, and subsequent events cannot make it valid.

Applying that rule to the will in this case, it must be noted that the vesting date is the date of death of the brother's "widow." She is not named, and the brother's "widow" would not necessarily be the person who was his wife at the date of the will or at the date of testator's death. There was, therefore, the possibility that testator's brother might marry after testator's death a woman not born in testator's lifetime. If she survived her husband for more than twenty-one years, the gift in remainder would in that event not vest within a life in being and twenty-one years thereafter, and the gift accordingly not created in such terms that it cannot vest outside the period fixed by the rule. The gift in remainder, is, therefore, invalid at its inception. It is no answer that in the events which have happened the gift has in fact vested within the period allowed by the rule. As Morton, J., said in *In re Curryer's Will Trusts, Wyly* v. *Curryer*, [1938] 3 All E.R. 574, 575: "It is equally clear that the gift to a class to be ascertained on the death of the last surviving widow or widower of the children would infringe the rule against perpetuities, since a child might marry a person who was not a life in being at the testator's death"; see also *1 Garrow on Real Property*, 339; *1 Jarman on Wills*, 7th Ed. 270; *Hodson* v. *Ball*, (1845) 14 Sim 558, 60 E.R. 474.

It is accordingly submitted that the gift in remainder in this will is void as offending the rule.

LAND SALES COURT.

Summary of Judgments.

No. 81.—G. P. Co., Ltd. to W. S. and Co., Ltd.

Urban Land—Site Value—Potentiality Value arising from Purchaser's Adjoining Premises—Brick Buildings—Allowance for Depreciation and Obsolescence—Use of Valuation on Income Basis.

This appeal relates to a freehold section of land with a considerable quantity of brick buildings of various ages, situated in Gore. Both the vendor and purchaser appealed against a reduction in price by the Committee from £17,500 to £16,400.

The Court said: "It does not appear to have been seriously contended before the Committee that the vendor was possessed of any equity in the land and the Committee assessed the price at £14,400 for the buildings and improvements and £2,000 for a potentiality arising from the situation of the property in respect of the adjoining premises of the purchasing company, Wright Stephenson and Co., Ltd.

"Before this Court a considerable volume of evidence was directed to show that the buildings were in fact worth more than the Committee's assessment and indeed that they alone would justify the price of £17,500. Differences of opinion between the valuers related in the main to questions of depreciation and deferred maintenance. We are satisfied as the Court has had reason to hold in previous cases, that notwithstanding that buildings may be constructed of brick or other so-called permanent materials, an appropriate allowance for depreciation and absolescence must always be made and in this regard the allowance of 1 per cent. per annum made by the Government valuer is certainly not excessive. There was a substantial conflict of evidence as to the present condition of the buildings, but we accept in general the evidence of the Crown valuer that a substantial sum is required to make good deferred maintenance. This is confirmed by the admission that little had been done to the property for ten years and by the evidence of Mr. S., for the appellants, when he stated that £4,000 would require to be spent to restore the buildings to a condition which he then claimed would be as good as new. The Government valuer's general conclusion that the buildings are worth £14,360 receives some corroboration from an independent valuation obtained by Wright, Stephenson and Co., Ltd., of £15,500 for the property as a whole, which indicates that the valuation of Mr. S. at £18,555 is far too high.

"In support of the view that Mr. B.'s valuation was too low, the appellants laid stress on the income return and criticized Mr. B.'s check valuation on an income basis. While it is true that these figures taken by themselves might support some small increase in the basic value, the Court is of opinion that a valuation based on income return is at best only a check on other methods of valuation and in this case the difference is not such as to be of substantial importance for the reasons shor ly to be stated.

"Mr. Bannerman, for the appellants, claimed that the vendors had a saleable equity in the lease due to the fact that they were assured of renewal for a further term without an increase in rental. The Court is of opinion that whatever the probabilities, a purchaser cannot be absolutely assured of a renewal without increase and considers it unlikely that any prudent purchaser would be prepared to offer anything more than a nominal sum for such equity, if any, as the vendors may have to dispose of.

"The crucial question is respect of the appeal turns, in the opinion of the Court, upon the valuation to be placed upon the so-called potential value for which the Committee allowed £2,000. That a potential value can properly be allowed where the circumstances so warrant was laid down by the Court in case No. 23.—*L. Trustees to B.*, but it is clear that in the a sessment of potential value regard must be had primarily to the circumstances existing in December, 1942. The appellants' counsel in opening claimed that at the crucial date, the purchaser company would have been ready and willing to buy at £17,500, but that was by no means borne out by the evidence. Indeed, upon the evidence of Mr. P., the Manager of the Company, and of Mr. McG., a business man of wide knowledge and experience both as to property and business conditions generally in Gore, the Court is of opinion that in December, 1942, the purchaser company was interested in this property only to a minor degree and that its interest in the property was by no means a matter of common knowledge. On the evidence as given at the hearing of the appeal, we are satisfied that the Committee was not merely fair but generous to the vendors in assessing the potentiality at £2,000 and that in accordance with the principles enunciated in *L. Trustees to B.*, a very much smaller sum might with propriety have been allowed.

"The Court is of opinion that any further sum which it might have been disposed to allow by reason of an adjustment of the intrinsic value of the buildings or for any small equity in the lease is more than offset by the excessive amount allowed by the Committee for potential value and that on the evidence as placed before it the Committee awarded the full basic value to the vendors. The appeal, therefore, in the normal course would have to be dismissed. It was disclosed, however, in the hearing before this Court that a substantial quantity of fittings in the various buildings will pass with the sale and it would seem that by an oversight the assessment of the value of the fittings was overlooked by both parties before the Committee and consequently no assessment of the value of the fittings was made. The only evidence presented to the Court on this point was that of Mr. S. who claims that the fittings were worth approximately £1,000. He was unable, however, to give a detailed valuation and taking into account the high rate of depreciation properly attributable to fittings, such a sum as claimed by Mr. S. cannot be sustained. We are indeed in some doubt as to whether the total amount awarded by the Committee might not properly be deemed adequate to cover the fittings as well as the other items which otherwise might call for adjustment. After careful consideration, however, the Court has decided that as the Committee had given no consideration to the question of fittings it would be fair to the vendor to allow a sum of £500 on this account.

"The decision of the Committee is therefore varied accordingly and consent will be given to the proposed sale subject to the condition that the purchase price is reduced from £17,500 to £16,900."

No. 82.—P. T. to C.

Urban Land—Shop Property—Basis of Valuation—Depreciation—Obsolescence—Deferred Maintenance—Purchaser a Tenant for Some Years—Whether "special value" to him.

Appeal by the Crown in respect of a small shop property in Hastings Street, Napier. The sale price was £5,000, the average of the valuations presented by the Crown £4,331 and the price at which the sale was approved by the Committee, £4,841.

The Court said: "No less than six valuers gave evidence before the Committee and five before the Court, and their valuations showed a wide disparity both as to the value of the land and of the improvements.

"With regard to the land, the Court found it difficult to arrive at a sound basis by reason of the fact that no single comparable sale, either in or about 1942, or even down to 1946 was referred to by any of the valuers. In the absence of evidence of actual sales, and the Court hesitates to believe that there has been a complete absence of sales of business sites in Napier during the past six years, valuation becomes merely a matter of opinion.

"The Committee, with the benefit of its local knowledge, considered that the Government valuation of 1934 could not be sustained, and the Court sees no reason to reject this considered view nor to differ from the Committee in its acceptance of the opinion of Messrs. C. and D. in assessing the land at £70 a foot. The Court furthermore accepts the Committee's adoption of the minor adjustments proposed by Mr. C. leading to a valuation of the land at £1,817. The further reduction proposed by Mr. C., but not adopted by the Committee, does not seem to be supported by cogent evidence.

"The next matter is to determine the value in December, 1942, of the improvements. The replacement values of the buildings, as assessed by the various valuers, was as follows:

For the Crown: Mr. A., £3,207; Mr. A. (check method), £3,246; Mr. C., £3,294. *For the Vendor:* Mr. B., £3,520; Mr. W. (to Public Trustee) £3,060; (before Committee) £3,471; (before Court) £3,464; and Mr. D., £3,160.

"It will be seen that the valuation of Mr. D. and the original valuation of Mr. W. are both below the valuations presented by the Crown.

"A great deal of evidence was called as to the best method of valuation, but it is noted that Mr. A. based his valuation

upon 29s. 6d. per foot, and Mr. D. and Mr. W. upon 30s. per foot. The Court adopts the rate of 30s. per foot and allows for replacement cost: 2,120 ft. at 30s., £3,180; veranda, £80; total £3,260.

"From this must be deducted a reasonable sum for depreciation, obsolescence, and overdue repairs or 'deferred maintenance.' The Court dissociates itself entirely from the view that depreciation and obsolescence can properly be excluded when valuing a structure of modern design and concrete construction. We are, of course, concerned as to the proper allowance to be made under these headings, but consider that a deduction of 1¼ per cent. per annum to cover both depreciation and obsolescence, as recommended by M. A., is by no means excessive and should be made in this case. The further sum of £100 is deducted for deferred maintenance, while £75 is allowed for the value of outside improvements.

"In the result the Court assesses the basic value of the property as follows:—

	£	£
Replacement cost of buildings ..		3,260
Depreciation and obsolescence at 12½ per cent.	407	
Deferred maintenance	100	
		507
		£2,753
Outside improvements		75
		£2,828
Unimproved value of land		1,817
		£4,645

"It was contended for the vendor that an added value attaches to the property by reason of the purchaser happening to be a tenant who is said to have established a successful business in one portion of the premises. Stated in another way it was claimed that an enhanced value should be allowed to the vendor by reason of the fact that to the purchaser, as a tenant, the premises had a 'special value.' No evidence is before the Court as to the business or the position of the purchaser, and no basis has been suggested for the assessment of this so-called special value. The Court cannot accept the general proposition that on a sale to a tenant a vendor is entitled under the Land Sales Act to a higher price than on a sale to any other person, and is not prepared to hold upon the evidence that the intrinsic value of this property has been enhanced by the nature of the businesses carried on therein. The property in short has the normal characteristics of a building built for letting to tenants as two lock-up shops and situated on the fringe of the retail shopping area. There is nothing abnormal about the tenancies or the rentals, which if anything are below the full rental value. The Court sees no reason to add any further sum to the basic value assessed in the usual manner as above stated.

"As the amount of the basic value so fixed is below that fixed by the Committee the appeal is allowed. Consent to the sale is granted on the conditions that the price is reduced to £4,645."

No. 83.—M. TO D.

Land Agent's Commission—Commission payable by Purchaser—Separate Agreement as to Commission—Substance of Transaction—Court's Disapproval—Consent subject to release of Purchaser from Payment of Commission.

The matters in issue in this appeal relate entirely to the question of whether the commission upon the sale of the property can properly be paid by the purchaser to E. P. Levien and Co., the firm of Land Agents concerned in the transaction. The facts bear a considerable similiarity to those in the case *No. 85.—C. to C.*,* in which the same firm of agents were involved and a similar arrangement for payment of commission by the purchaser had been made.

The Court said: "For the reasons set out in the judgment in *C. to C.* the Court held in that case that the transaction viewed as a whole infringed against the spirit and intention of the Land Sales Act and that consent to the principal transaction should therefore be subject to the condition hereafter provided.

"In the opinion of the Court the present case differes from that of *C. to C.* in minor details as to form rather than in substance. In the present case the agreement whereby the purchaser undertook to pay commission is incorporated in a separate document and not specifically referred to in the principal contract, but the principal contract itself specifies that the vendor shall not in any circumstances be liable to pay commission.

"The Court is satisfied, however, that its proper duty is to regard the substance rather than the form of the transaction and that in substance the present case differs little if at all from that of *C. to C.* The firm of agents concerned were the same in each case and the Court is satisfied that each case represents merely the adaptation of a form of procedure worked out by this firm with the object of altering the ordinary incidence of liability for commission from the vendor to the purchaser so as, in effect, to enable the commission to be paid in addition to the full price as fixed under the Land Sales Act.

"For the reasons set out in the judgment in *C. to C.* the Court is of opinion that it has jurisdiction and that it is its duty to express its disapproval of this type of transaction by attaching to the Order granding consent to the sale a condition as hereafter set out.

"The Order of the Court is therefore as follows:—

"Consent to the sale is granted at the sale price of £2,400 but upon the following condition—namely, that the vendor shall first secure the release of the purchaser from her undertaking to pay any sum by way of commission or otherwise to E. P. Levien and Co. and shall, if such sum has already been paid, secure the repayment of any such sum to the purchaser."

No. 84.—G. TO L. AND M. CO., LTD.

Urban Land—Value—Purchaser willing to pay Contract Price—Comparable Sales in Locality—Basic Value maintained.

This appeal related to an Oamaru leasehold property, consent to the sale of which was granted by the Committee on condition that the price was reduced from £1,750 to £1,550. The appeal was brought on behalf of the purchaser, the New Zealand Loan and Mercantile Agency Co., Ltd., which evidently considered the property to be worth the full sale price to it, and was anxious for the full price to be approved lest the vendor may refuse to complete at the reduced price.

The Court said: "Evidence was called on behalf of the appellant to show that both in respect of the lessee's interest in the land and in respect of the buildings, the values fixed by the Committee were too low. The Committee evidently went to considerable pains in fixing the capital value of the land, as they did, at £2,000. The only comparable sales which appear to be of assistance are those of properties referred to as Heselwood's, Lees (Section 3 Block 24) and Rae's (Section 4 Block 7). The land in Lee's block, though much nearer the centre of the business area seems to have been sold at a price equivalent to £20 a foot and that in Rae's block, on the opposite and much more valuable side of Thames Street, at £30 per foot. In comparison with either of these sales the value of £30 a foot placed on the present property by the Committee seems not merely a fair price but a generous one. It would also appear to be in accordance with the price paid for Heselwood's section. The appellant's valuers relied mainly on their experience and opinion to justify a higher value for the land, but the Court is satisfied that the careful computation made by the Committee after consideration of the foregoing comparative sales should not be disturbed. In any case an adjustment in the value of the land would be insufficient to justify the full sale price without some increase in the Committee's evaluation of the buildings.

"In this regard there was some difference of opinion, but we are again impressed by the fact that the more detailed and careful valuations of the buildings were again presented by the Crown's witnesses. It is evident that all the buildings are in a serious state of disrepair. Although the exterior walls of the main buildings are in stone, it is clear that the building is not suitable to be modernized and to any purchaser intending to make full use of the land as a whole it is doubtful whether any of the buildings will have more than a demolition value. This, of course, is no reason why the vendor should not receive the full value of the buildings as they stand, but we are satisfied that taking into account the obvious and high degrees of obsolescence in the buildings, the rate of depreciation allowed by the Crown's valuers is amply justified. Three valuations of the buildings were presented by the Crown and the Committee gave the benefit of any doubt to the vendor by allowing the buildings at the highest of these valuations. We are satisfied in this regard also that the Committee has arrived at a proper and fair value.

"With regard to Mr. Fitch's suggestion that in order to ensure the purchaser shall be enabled to buy the property we should consent to the sale without fixing a basic value, the Court is of opinion that to do so would be contrary to its bounden duty to restrict prices to basic values as determined under the Land Sales Act. This does not appear to be a case where any increase in the basic value can properly be made in accordance with the terms of the Act. It is regretted, therefore, that the Court is unable to see its way to accede to Mr. Fitch's suggestion. For the foregoing reasons the appeal must be dismissed."

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* To be reported.

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

The Optimistic Counsel.—From Taranaki comes this little story of a local barrister caught, as are we all occasionally, in the grips of a case that has a "hoodoo" upon it. This was a simple undefended divorce based upon a written agreement for separation. The fact that an unstamped copy of the agreement was produced through the petitioner led to a minor argument with the Bench, but the assurances of counsel were accepted and the case proceeded. All went satisfactorily until the petitioner was recalled to identify service of the proceedings upon the respondent. The witness stammered and spluttered, confessing with some hesitation that exhibit "C" was not the photograph of his wife, but of his daughter. A heavy but ominous silence ensued. This tension, however, was relieved, and the matter resolved, to the satisfaction of all, when counsel remarked brightly, "We don't seem to be going at all well, do we, Your Honour?"

Insanity as a Defence.—During recent criminal sessions at Hamilton, a prisoner was arraigned for murder. According to the account given in the local newspaper of the proceedings, the Crown Prosecutor (H. J. McMullin) called three medical men to prove the insanity of the accused at the time of the commission of the act with which he was charged. This seems a departure from the general rule that insanity, if relied upon as a defence, must be established by the defendant. In *R.* v. *Oliver Smith*, (1910) 6 Cr. App. R. 19, the Lord Chief Justice pointed out that, seven or eight years previously, all the Judges had met and resolved that it was not proper for the Crown to call evidence of insanity; but that any evidence in the possession of the Crown should be placed at the disposal of the prisoner's counsel to be used by him if he thought fit. The Crown may, of course, call rebutting evidence; and, where it is clear from the cross-examination of witnesses for the prosecution that the defence of insanity will be raised, and it is ascertained that no evidence will be called to establish this defence, the Crown may before closing its own case, call evidence to negative insanity: *Archbold's Criminal Pleading*, 31st Ed. 17. What was said in *Oliver Smith's* case was referred to with approval by Myers, C.J., in *R.* v. *Brooks*, [1945] N.Z.L.R. 584, 596, and he had the additional comfort of being reinforced by the House of Lords in *Woolmington* v. *Director of Public Prosecutions*, [1935] A.C. 462.

Declamation in Court.—A Wellington newspaper, in mentioning proceedings lodged in the Supreme Court by the Lower Hutt City Corporation and removed into the Court of Appeal, has referred to them as an application for a *declamatory* judgment. This has not escaped the critical eye of a local poet, who in *The New Zealand Listener*, says (*inter alia*):

> Now therefore let the Be..ch prepare
> The sledgehammer and needle,
> The impassioned plea that cleaves the air,
> The whisper and the wheedle:
> Give over splitting legal straws,
> And raise, with noble fury,
> The ringing tones that win a cause
> Before a common jury.

Scriblex is inclined to think that the art of judicial declamation might well be fostered in the delivery of judgments, and oral ones in particular, where the unsuccessful party has the discomfiture of having to listen to them meandering wearily through unnecessarily wide pastures. However, until the main points in them are driven home with ringing emphasis, the newspaper's slip will have to take its place with that of the lady who, in all sincerity, claimed restitution of her "moratorial" rights from the spouse who had, shame-facedly enough, left home because of his "venerable" disease.

Shy and Retiring.—Scriblex shares with a Hawera correspondent the view that felicity of phrase and language, enlivened by examples of wit and illustration, refresh the legal mind and relieve the tedium of reading law reports. In the appeal of *Associated Portland Manufacturers, Ltd.* v. *Inland Revenue Commissioners*, [1946] 1 All E.R., 68, 70, the facts disclosed that the Company had paid £30,000 to two of its directors upon their retirement and had hidden the payment in a reserve account. In the course of his judgment, Lord Greene, M.R., observed:

> It appears that the board [of directors of the company], perhaps through a feeling of modesty, did not expose themselves to the congratulations of the shareholders upon this achievement.

In this comment there is a touch of delicious subtlety, greatly to be relished.

Reform in Divorce Procedure.—On June 26 the Lord Chancellor set up a Committee, with Mr. Justice Denning as chairman, to inquire into the administration of divorce law in England and Wales. The scope of the inquiry does not extend to substantive law, and the grounds on which decrees of divorce or nullity of marriage should be granted is outside the scope of the inquiry. Consideration is to be directed in the main to what procedural reforms ought to be introduced in the general interest of litigants, with special reference to such matters as the expediting of the hearing of suits and attempted reconciliation of parties, either before or after proceedings have been commenced. With remarkable and commendable promptitude, the Committee presented its preliminary report in July; and rules carrying its recommendations into effect were made immediately—a strange contrast to our latest matrimonial rules which seemed to spend years in political gestation. The most striking reform is to reduce the six months period between decree *nisi* and decree absolute to one of six weeks, with power in the King's Proctor to enter an appearance and keep the matter open if his investigations cannot be completed in that time and he thinks further investigation is needed. It is possible that a single decree may be substituted for the decree absolute (such was the position under the Matrimonial Causes Act, 1857); but, on this point, final conclusions are deferred. It is interesting to note that the Committee has removed the necessity of the petitioner's solicitor having to make an affidavit of search on the decree absolute—a minor but useful point in procedure in which we seem to have anticipated this Committee by a few years.

PRACTICAL POINTS.

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1. Land Sales.—*Sale of Land to Bank of New Zealand—Whether exempt as Sale to Crown—Servicemen's Settlement and Land Sales Act*, 1943, *s.* 43.

QUESTION: Is the sale of a piece of land to the Bank of New Zealand exempted from the provisions of the Servicemen's Settlement and Land Sales Act, 1943, pursuant to the provisions of s. 43 of that Act?

ANSWER: There is nothing in s. 43 of the Servicemen's Settlement and Land Sales Act, 1943, which makes the Act inapplicable to a sale of land to the Bank of New Zealand.

A.2.

2. Probate and Administration.—*Intestacy— Nephews and Nieces only surviving Next-of-kin—Method of Distribution.*

QUESTION: A woman dies intestate and her husband, parents, and her brothers and sisters predecease her. She had no children. She left surviving her twelve nieces and nephews all of age. Several nieces and nephews predeceased her leaving issue at her death. Some of the issue are of age and some are not. How is the estate distributed?

ANSWER: It is assumed that deceased died after December 31, 1944, and that the distribution will be governed by the Administration Amendment Act, 1944. Section 6 (1) (*e*) provides that, where the intestate leaves no husband, wife, issue or parent, the estate shall be held on the statutory trusts for the brothers and sisters of the intestate. The statutory trusts are defined in s. 7 (1): and, reading para. (*a*) in conjunction with s. 7 (3), the distribution in this instance will be to the issue living at the death of the intestate who attain twenty-one years or marry under that age of the intestate's brothers and sisters in equal shares *per stirpes*. The brothers and sisters must be taken as the original stocks, and the estate divided primarily into as many equal shares as there are brothers and sisters who left issue living at the death of the intestate. The distribution of each share will extend to that brother's or sister's descendants, however remote: and issue living at the intestate's death, whose parent predeceased the intestate and who attain twenty-one years or marry, will take the share their parent would have taken; but no issue can compete with its own parent, who is living and so capable of taking.

V.2.

3. Company Law.—*Directors—Commission on Selling Shares—Director a Sharebroker—Whether Commission payable to him.*

QUESTION: The Articles of Association of a company provide that on any offer of its shares to the public it is authorized to pay commission or brokerage at 5 per cent. to any person for procuring subscriptions, and this authority is referred to in the Prospectus. Clause 15 of the Prospectus reads: "No Director is interested in the promotion of the company": see Companies Act, 1933, 3rd Schedule, Part 1, cl. 15. One of the promoters and directors is a sharebroker, who has procured subscriptions for shares. Can the company lawfully pay brokerage to this director? *Borden* v. *Stanford*, (1915) 4 N.S.R. 532, (a Canadian case: see 9 English and Empire Digest, 39 (*o*)) may be helpful, but this case is not available in the local library.

ANSWER: It has not been possible to peruse the Canadian case referred to. It would appear however, that the company can lawfully pay brokerage or commission to the director, provided that the shareholders pass an ordinary resolution confirming the payment. If the shareholders do not pass such a resolution, then the payment referred to cannot be made to the director.

Unless the regulations of a company make express provision for a director entering into contracts with the company, his power to do so is limited to taking up shares and any contract so entered into may be set aside: but the shareholders may waive their rights, and by ordinary resolution confirm the contract: *Morison's Company Law in New Zealand*, 2nd Ed., 151. For example, it has been held that a director of a company who is a solicitor, cannot as against the liquidator claim *profit costs*: *In re F. W. Maddox and Company's Metropolitan Chemical and Manufacturing Co., Ltd.*, (1904) 24 N.Z.L.R. 782, is distinguishable on the facts.

X.2.

4. Coroners.—*Evidence—Cross-examination of Witnesses with View to Action for Damages—Whether permissible.*

QUESTION: I am appearing at an inquest, under instructions from the widow of the deceased regarding the mode of whose death the inquest is being held. Am I entitled to examine witnesses with a view of elucidating facts which will be helpful to a claim for damages?

ANSWER: A coroner's inquest is "to ascertain by what means the deceased came to his death": *Jervis on Coroners*, 4th Ed. 206. In *R.* v. *Graham*, (1905) 21 T.L.R. 576, the Lord Chief Justice said that his judgment was based solely on the supreme importance of maintaining the duty of a coroner to inquire into the cause of death. This gives the clue as to what evidence is properly admissible: and clearly the coroner is not concerned with prospective claims for damage or the like. Evidence that will not aid the coroner to discharge his duty should not be admitted. In *Ex parte Routledge*, (1943) 60 N.S.W. W.N. 184, it was held, *inter alia*, by the Full Court, the fact that the applicant is desirous of having the body, claimed to be that of the daughter of the applicant, buried, or the fact that a further coronial inquiry may aid a private claim to property, is not sufficient to justify such an inquiry. The purpose of an inquest is not to assist a prosecutor to obtain evidence: *R.* v. *Graham* (*supra*); and the object of taking depositions is not to afford information to the prisoner, but to secure the testimony: *R.* v. *Hamilton*, (1866) 16 C.P. 340 (Canada).

C.1.

RULES AND REGULATIONS

Health (Burial) Regulations, 1946. (Health Act, 1920.) No. 1946/132.

Fresh-water Fisheries (Otago) Regulations, 1945, Amendment No. 1. (Fisheries Act, 1908.) No. 1946/133.

Fresh-water Fisheries (Southland) Regulations, 1941, Amendment No. 4. (Fisheries Act, 1908.) No. 1946/134.

Social Security (Pharmaceutical Supplies) Regulations, 1941, Amendment No. 4. (Social Security Act, 1938.) No. 1946/135.

Food and Drugs Regulations, 1946. (Sale of Food and Drugs Act, 1908.) No. 1946/136.

Rehabilitation (Psychiatric Nurses) Regulations, 1946. (Rehabilitation Act, 1941.) No. 1946/137.

Prisons Regulations, 1946, No. 2. (Prisons Act, 1908.) No. 1946/138.

Agricultural Workers Labour Legislation Revocation Order, 1946. (Labour Legislation Emergency Regulations, 1940.) No. 1946/139.

Customs Primage Exemption Order, 1946. (Customs Act Amendment Act, 1931.) No. 1946/140.

Patents, Designs, and Trade-marks and Copyright (Hours of Inspection) Revocation Regulations, 1946. (Patents, Designs, and Trade-marks Act, 1921–22, and Copyright Act, 1913.) No. 1946/141.

Copyright Amending Regulations, 1946. (Copyright Act, 1913.) No. 1946/142.

Patents, Designs, and Trade-marks Amending Regulations, 1946. (Patents, Designs, and Trade-marks Act, 1921–22.) No. 1946/143.