New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."
VOL. XXII. TUESDAY, DECEMBER 17, 1946. No. 23

PRACTICE DECISIONS IN 1946.

IT may be convenient to our readers, as we come to the close of the legal year, to make a collection of the judgments of the various higher Courts in which the decisions dealt with a point of practice arising in the respective proceedings.

PRIVY COUNCIL APPEALS.

Delay in Forwarding Record.—Beginning with appeals to the Judicial Committee of His Majesty's Privy Council, we find that war conditions had something to do with a delay in forwarding the record to England. In *Australian Provincial Assurance Association, Ltd.* v. *E. T. Taylor and Co., Ltd.*, [1946] N.Z.L.R. 24, the Court of Appeal, on June 8, 1942, had granted final leave to the appellant, whose appeal was a matter of right. Early in 1946, the respondent moved for a certificate, under R. 21 of the Privy Council Appeals Rules, 1910, that the appeal had not been effectually prosecuted, on the ground that the appellant had failed to procure the dispatch of the record. The appellant's case centred on the fact that on July 24, 1942, the appellant company had asked him whether the respondent would agree to the hearing of the appeal being postponed until after the war, as the company's chairman of directors wished to attend the hearing of the appeal, and the war position and difficulties of travel were then acute. The respondent's solicitor had no recollection of having informed the appellant's solicitor that he would not press for an early hearing. The Court of Appeal, by a majority (Sir Michael Myers, C.J., dissenting), allowed the appeal to proceed. Mr. Justice Johnston drew the distinction between those cases which deal with applications for special leave to appeal and a case such as the present one, where the appeal was a matter of right and the initial steps had been taken to enforce that right, even though tardily. The main consideration, in His Honour's mind, was that the respondent had not been prejudiced by the delay. He thought it would be wrong not to take into consideration the overriding circumstances and conditions created by the war, and obtaining during the whole period during which the appeal should have been prosecuted. Mr. Justice Fair, who said that a right of appeal is not a mere matter of procedure but a substantive right, considered that in normal circumstances the dilatoriness of a corporation such as the appellant would *prima facie* (the respondent not being in default) justify, and almost require, the Court to treat it as an abuse of the appellant's right that called for drastic action, perhaps even to the point of dismissing the appeal. But, in the abnormal conditions of the war years, this long delay, which might otherwise appear inexcusable and deserving of severe condemnation, appeared in quite a different light. Moreover, the respondent seemed to have acquiesced, in a measure, in the very leisurely prosecution of the appeal, and could not now ask for the very drastic action of dismissing it to be adopted. The interests of justice did not require the Court to do that as a necessary disciplinary measure. Mr. Justice Northcroft said he had been led to the same conclusions and for the same reasons; and Mr. Justice Cornish concurred in the judgment of Mr. Justice Johnston.

Findings of Fact.—The Judicial Committee laid down the practice of the Board with regard to appeals on fact in *Srimati Bibhabati Devi* v. *Kumar Ramendra Narayan Roy*, [1946] W.N. 169, where the appellant was faced with two concurrent judgments of two Courts on a pure question of fact. The practice of the Board has been to decline to review the evidence for a third time, unless there were some special circumstances which would justify a departure from the practice. In the Board's opinion, delivered by Lord Thankerton, the previous decisions of the Board were reviewed to ascertain the practice as it now stands. Their Lordships derived the following propositions therefrom as to the present practice of the Board, and the nature of the special circumstances which would justify a departure from the practice. Their Lordships, at p. 170, said:

> (1) That the practice applies in the case of all the various judicatures whose final tribunal is the Board.
> (2) That it applies to the concurrent findings of fact of two Courts, and not to concurrent findings of the Judges who compose such Courts. Therefore a dissent by a member of the appellate Court does not obviate the practice.
> (3) That a difference in the reasons which bring the Judges to the same finding of fact will not obviate the practice.
> (4) That, in order to obviate the practice, there must be some miscarriage of justice or violation of some principle of law or procedure. That miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all. That the violation of some principle of law or procedure must be such an

erroneous proposition of law that if that proposition be corrected the finding cannot stand; or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the Courts could arrive at their finding is such a question of law.

(5) That the question of admissibility of evidence is a proposition of law, but it must be such as to affect materially the finding. The question of the value of evidence is not a sufficient reason for departure from the practice.

(6) That the practice is not a cast-iron one, and the foregoing statement as to reasons which will justify departure is illustrative only, and there may occur cases of such an unusual nature as will constrain the Board to depart from the practice.

(7) That the Board will always be reluctant to depart from the practice in cases which involve questions of manners, customs or sentiments peculiar to the country or locality from which the case comes, whose significance is specially within the knowledge of the Courts of that country.

(8) That the practice relates to the findings of the Courts below, which are generally stated in the order of the Court, but may be stated as findings on the issues before the Court in the judgments, provided that they are directly related to the final decision of the Court.

Appeals to the Court of Appeal.

New Trial.—Unusual circumstances led to a practice ruling in *Lane* v. *McDonald*, [1946] N.Z.L.R. 640. Two actions heard by two different juries on succeeding days, on substantially the same facts, resulted in a finding for the plaintiff in one case and a verdict for the defendant in the other. The unsuccessful plaintiff appealed to the Court of Appeal. The Court of Appeal held that, where, in litigation between the same parties on substantially the same evidence in two actions in respect of the same (or substantially the same) subject-matter, separately tried, different juries find contradictory verdicts, and the evidence at each trial is so fairly balanced that a jury might find either way, the Court may order a new trial of the whole action, both cases to be tried again, not separately, but together. On the other hand, where the parties are not the same, even though the defendant is the same in both actions, and the evidence is substantially the same, the position is the reverse. Consequently, in the latter case, if it can be said that it was competent on the evidence for a jury to find either way, the fact that there have been two contradictory verdicts cannot be regarded as a feature upon which to base the conclusion that the verdict in either one case or the other is to be regarded as not satisfactory. The question of a new trial in that case, therefore, depends on whether or not there was evidence upon which it was competent for the jury to find as it did.

Final or Interlocutory Order.—An interesting question of practice arising in an action under the Married Women's Property Act, 1908, engaged the attention of the Court of Appeal in *Barrow* v. *Barrow*, [1946] N.Z.L.R. 438. The recent Chief Justice had made an order in default of the wife's appearance that the husband plaintiff was entitled to certain moneys and certain chattels, and directed the wife to pay the said moneys within seven days after service of the order, which was sealed on November 29, 1945. On March 14, 1946—that is, a period of three-and-a-half months after the sealing of the order—the wife filed a notice of motion on appeal from the Chief Justice's order, on the ground that it was erroneous in fact and law. The respondent took a preliminary point that an order made under s. 23 of the Married Women's Property Act, 1908, was an order made by a Judge in Chambers, and that an appeal therefrom does not lie direct to the Court of Appeal, and accordingly there was no jurisdiction to hear the appeal before the appellate tribunal. The Court of Appeal held that such an order was a "final" order, and, therefore, the time for appeal under R. 19 of the Court of Appeal Rules is a period of four months. The section, it was held, authorizes an appeal direct to the Court of Appeal, without first asking for a review of the order by the Supreme Court.

Security for Appeal.—Another practice decision, given by the Court of Appeal in *Keenan* v. *Auckland Harbour Board* (to be reported), shows the proper course to be taken by an appellant who is unable to find security for appeal within the time within which the Rules require his notice of appeal to be given. The appellant sought special leave, as his effective notice of appeal was out of time. He was employed on coastal shipping, and was infrequently in Auckland, where his home was, where the action was heard, and where his solicitor practised. The judgment appealed from was delivered on November 26, 1945, the costs were not settled until February 27, 1946, and judgment was formally entered on March 4. Notice of appeal was lodged on May 1, but it lapsed, as the appellant was unable to find the security for appeal. He could not appeal *in forma pauperis*, as he had sufficient assets to bar him from taking that course. When, on June 28, he was at last able to lodge security, he filed and served another notice of appeal. The respondent Board opposed the application, on the ground that the notice of appeal was out of time, in view of the terms of R. 19 of the Court of Appeal Rules. The Court of Appeal dismissed the application for special leave, because, if an appeal is out of time, the fact that the appellant could not find the security for appeal in time is not a ground for granting special leave under R. 19. The Court pointed out that the proper course to be taken by an appellant who, though in poor circumstances, has sufficient assets to prevent him from appealing to the Court of Appeal *in forma pauperis* is to apply under R. 22 of the Court of Appeal Rules to the Court of first instance to have the amount of security reduced or waived.

Supreme Court Practice.

Service of Injunction.—The question of service arose in *Cook* v. *Doyle*, [1946] N.Z.L.R. 398, where there was an application for leave to issue a writ of attachment for disobedience of a prohibitory injunction. There was no proof that the order of the Court granting the injunction in 1926 had been served on the defendant personally. The learned Judge, Fair, J., pointed out that both English and New Zealand authority—*In re Tuck, Murch* v. *Loosemore*, [1906] 1 Ch. 692, and *Tucker* v. *Tucker*, [1925] G.L.R. 393—showed that, where an order of the Court is mandatory (that is, directing the defendant actively to do something), then, before a writ of attachment will be granted, personal service on the defendant must be proved; but the former judgment is authority for the proposition that personal service is unnecessary in the case of an order which is prohibitive only. However, in the case before him, the evidence was clear that the defendant knew that the order had been made, he had obeyed it for seventeen years, and, at intervals thereafter, despite the protests of the plaintiff's solicitors, he had persistently acted in contravention of the terms of the injunction. In such circumstances,

it was idle for the defendant to seek to rely on non-service of the order.

Special Jury.—In *Courtney* v. *Woods*, [1946] N.Z.L.R. 360, Mr. Justice Cornish made an order for a special jury, under s. 37 of the Statutes Amendment Act, 1939, for the trial of an action for damages at the suit of a dairy-farmer against his former attorney, for alleged negligence in the management of his farm-property while he was overseas on active service. His Honour made the order on the ground that some of the allegations against the defendant raised the question whether or not the defendant saw, or ought to have seen, evidence of bad farming. And that raised the question, What is bad farming? An inquiry into that matter, in all its aspects, is scientific in character. The questions to be answered in this regard deserved, and indeed required, the attention of the best-informed and ablest men that the jury system can provide. In other words, such questions are fit subject-matter for a special jury.

Joinder of Defendant.—In *Courtney* v. *Woods* (*supra*), the defendant, who, it may be remembered, was the attorney of a farmer who was overseas on active service, sought to join with him as co-defendants the lessees in succession, while the plaintiff was absent from the Dominion, of his farm. His Honour distinguished *Croston* v. *Vaughan*, [1937] 4 All E.R. 249, where the plaintiff had himself brought both defendants before the Court, whereas the plaintiff here had brought, and desired to bring, only one. Following *McCheane* v. *Gyles* (*No. 2*), [1902] 1 Ch. 911, the learned Judge held that, even if there was a joint and several liability on the part of the defendant and those whom he wished to be joined, the plaintiff was entitled to be allowed to proceed against the defendant of his choice. The question raised was the extent of the defendant's liability to him, and whether or not the defendant had a claim over against the lessees was of no interest to the plaintiff; and, if he proved his case, the plaintiff would be entitled to judgment against the defendant regardless of any rights the defendant might have against others. His Honour, therefore, dismissed the summons.

SUMMARY OF RECENT JUDGMENTS.

In re BETHELL (DECEASED), BETHELL v. COMMISSIONER OF STAMP DUTIES AND CHURCH PROPERTY TRUSTEES.

COURT OF APPEAL. Wellington. September 10, 11; October 15. O'LEARY, C.J., BLAIR, J., KENNEDY, J., CALLAN, J., FINLAY, J.

Public Revenue—Death Duties (Estate Duty)—Final Balance—Charitable Gift—Transfer of House to Trustees for Nominal Consideration—Contemporaneous Declaration of Charitable Trusts by them—Encumbrance securing Annuity to Transferor—Release thereof by her within Three Years of her Death—Whether Value of House Part of Final Balance of Deceased Transferor's Estate—Death Duties Act, 1921, ss. 5 (1) (b) (j) (3)—Finance Act, 1923, s. 11.

Public Revenue—Death Duties (Estate Duty)—Will—Construction—Dutiable Estate—Direction by Will to pay "the duties payable in respect of my estate"—Whether sufficient Direction to Pay out of Actual Estate Duty payable on Testator's Notional Estate—Death Duties Act, 1921, ss. 5 (1) (b), 28, 29, 30, 31 (2).

B., on January 18, 1935, for a nominal consideration, transferred a house property valued at £1,885 to Church Property Trustees, who in respect thereof contemporaneously declared trusts, which were admittedly for charitable purposes, and by memorandum of encumbrance secured to B. an annuity of £80. B. executed a release of this rent-charge on July 7, 1944, and died on July 15, 1945.

B.'s will contained the following direction: "Subject to the payment of my funeral and testamentary expenses and debts and the legacies bequeathed by this my will or any codicil thereto and the duties payable in respect of my estate I devise and bequeath to my sister Rhoda Bethell the residue of my estate real and personal whatsoever and wheresoever situate." (By a codicil dated November 6, 1936, she declared that a solicitor-trustee *should be entitled to make such charges for* business done by him in relation to the administration "of my estate" as he would have been entitled to make in respect of such business if he had not been an executor or trustee.)

On originating summons for interpretation of questions arising upon the will of B., removed by consent into the Court of Appeal,

Held, That s. 11 of the Finance Act, 1923, applies as a proviso to s. 5 (1) (*b*) of the Death Duties Act, 1921, with the result that s. 11 of the Finance Act, 1923, in no wise prevents the operation of s. 5 (1) (*j*) and s. 5 (3) of the Death Duties Act, 1921; and, although the original gift was for charitable purposes, yet in contemplation of the Death Duties Act, 1921, it was a disposition of property which formed part of the dutiable estate of the deceased.

Weston v. *Commissioner of Stamp Duties*, [1945] N.Z.L.R. 183, approved.

2. That the words in the said direction in B.'s will pointed to death duties in respect of the actual estate and involved no direction that the death duties upon the notional estate should ultimately fall upon the actual estate left by B.; hence the dutiable estate of B., for the purposes of the Death Duties Act, 1921, included the said house property.

O'Grady v. *Wilmot*, [1916] 2 A.C. 231, *Hill* v. *Hill*, (1933) 49 C.L.R. 411, *Chisnall* v. *Macfarlane*, [1923] N.Z.L.R. 585, *Brown* v. *Brown*, [1924] N.Z.L.R. 427, *In re Gollan*, [1935] G.L.R. 48, applied.

In re Houghton, McClurg v. *New Zealand Insurance Co., Ltd.*, [1945] N.Z.L.R. 639, distinguished.

Perpetual Trustee Co., Ltd. v. *Luker*, (1932) 33 N.S.W. S.R. 55, and *Perpetual Trustees, Estate, and Agency Co. of New Zealand, Ltd.* v. *McMaster*, [1916] N.Z.L.R. 56, referred to.

Counsel: *Sim*, K.C., and *Tripe*, for the plaintiffs; *Byrne*, for the Commissioner of Stamp Duties; *K. M. Gresson*, for the Church Property Trustees.

Solicitors: *Duncan, Cotterill and Co.*, Christchurch, for the plaintiffs; *Crown Law Office*, Wellington, for the defendant Commissioner of Stamp Duties: *K. M. Gresson*, Christchurch, for the defendant Church Property Trustees.

ROSKRUGE v. WILLIAMS.

SUPREME COURT. Wellington. 1946. September 30; October 8. JOHNSTON, J.

Will—Construction—Words of Futurity—"Upon trust for all of my children now living in equal shares provided however that if any of my said children shall be then dead leaving issue"—Whether the words "said children" apply to the last antecedent—"Said."

In the construction of a will, before there is a departure from the *prima facie* rule that the word "said" applies to the last antecedent, the ambiguity must be clear and the conflict with the testator's apparent intention plain.

Gorringe v. *Mahlstedt*, [1907] A.C. 225, applied.
Healy v. *Healy*, (1875) 9 I.R. Eq. 418, distinguished.
Loring v. *Thomas*, (1861) 1 Dr. & Sm. 497, and *In re Thompsons Trusts*, (1854) 2 W.R. 218, referred to.

Counsel: *A. T. Young*, for the plaintiff; *Macarthur*, for the first defendant; *Hay*, for the second defendant.

Solicitors: *Young, Courtney, Bennett, and Virtue*, Wellington for the plaintiffs; *Chapman, Tripp, Watson, James, and Co.*, Wellington, for the first defendant; *Mazengarb, Hay, and Macalister*, Wellington, for the second defendant.

STANNUS AND ANOTHER v. COMMISSIONER OF STAMP DUTIES.

SUPREME COURT. Christchurch. 1945. May 31; June 29. NORTHCROFT, J.

COURT OF APPEAL. Wellington. 1946. March 7, 8; October 15. BLAIR, J., KENNEDY, J., CALLAN, J., FINLAY, J.

Public Revenue—Death Duties (Gift Duty)—Part of Testator's Estate invested in New Zealand, Part in England—One Trustee resident in New Zealand, the Other in England—Daughter entitled by Testator's Will to receive Annual Income for her Half-share in Estate After her Death, such Share to be held upon Trust as to Capital and Income for her Children as she might by Deed or Will appoint—Daughter appointing £10,000 out of her Half-share of Testator's Residuary Estate to Son and surrendering her Life Interest therein—Such sum paid out of Assets of Testator's Estate invested in England—No Division of Estate—Estate being Administered as a Whole—Whether Gift or Advancement—If Gift, whether Gift of a Chose in Action—Whether Gift of "property situated in New Zealand"—"Gift"—Death Duties Act, 1921, ss. 8 (e), 41, 62.

By his will, C., the testator, provided for an annuity for his widow. Subject to that annuity, his estate was to be held in two equal shares, one for each of his two daughters. Each daughter was to receive the annual income from her share, and, after her death, the share was to be held upon trust as to capital and income for her children as she might by deed or will appoint. The trustees were empowered at their discretion to raise any part or parts not exceeding altogether one half of the then expectant or presumptive share of any person entitled thereunder and to apply the same for his or her advancement or benefit as the trustees might think fit."

As authorized by the will, part of the C. estate was invested in England and the rest in New Zealand.

From 1929, one of the trustees had an English domicil: the other was domiciled in New Zealand. All the beneficiaries were in England. The daughters, if not the widow, who died in 1935, had an English domicil and rather more than half the estate was situated in England.

The first-named appellant, hereinafter called S., was the only child of the daughter Mrs. S. In 1935, S. desired to obtain payment of the sum of £10,000 in order to enable him to purchase a share in a legal partnership in London; and application was accordingly made by him to the trustees of the C. estate to raise the said sum out of the trust fund of C., and to pay such sum to S. as an advancement pursuant to the powers in that behalf contained in the will of C.

By deed of appointment, dated October 26, 1935, Mrs. S. appointed the trustees of the C. estate to raise, out of the moiety of the residuary estate of C. held upon trust to pay the income to Mrs. S. during her life, the sum of £10,000 free from all deductions, and pay the same to S.; and, to enable the trustees to give effect to such direction by the said deed of appointment, Mrs. S. released and surrendered her life interest in the said sum of £10,000 to the extent that such life interest should merge in the reversionary interest of S. in the said sum.

Payment of the said sum of £10,000 was made to S., after the execution of the said deed, by the trustees of the C. estate entirely out of assets of the estate of the deceased available in England.

Upon the death of Mrs. S. in 1938, income from her share of the portion of the C. estate situate in England had accrued to the amount of £495 14s. 8d. In compiling the statement prescribed by the Death Duties Act, 1921, the appellant administrators of her estate included as an asset of that estate her share of the accrued income of the C. estate derived from the assets situate in New Zealand, and they did not include the said amount of £495 14s. 8d., which, converted into New Zealand currency at current rates of exchange, amounted to £617 3s. 9d.

The Commissioner of Stamp Duties claimed gift duty upon the transaction set out in the immediately preceding paragraphs. In addition, he claimed duty upon the said sum of £617 3s. 9d. The appellants contended (*a*) that the transaction whereby S. received the £10,000 was not a gift but an advancement to S. by the trustees of his grandfather's will pursuant to a power therein contained, or, if it was a gift, that it was not a gift of property situated in New Zealand, and (*b*) that Mrs. S.'s share of the English assets of the C. estate, and consequently the income therefrom—namely, the sum of £617 3s. 9d.—was not property "situated in New Zealand" at the date of Mrs. S.'s death so as to attract New Zealand death duties.

On appeal from the judgment of *Northcroft*, J., holding that the Commissioner of Stamp Duties had rightly included in the dutiable estate of the said deceased the said sum of £617 3s. 9d., and was correct in law in determining that, in releasing and surrendering her life interest in the said sum of £10,000, the said deceased had made a "gift" within the meaning of the Death Duties Act, 1921, and that such gift attracted gift duty as prescribed in the said Act,

Held, per totam curiam, That when the said deed of appointment was presented to the said trustees they were completely deprived of any discretionary power that they had in respect of the said sum of £10,000, and were bound to give effect to the deed, and that, therefore, the transaction in question was a gift from the mother to her son S., and not an exercise by the trustees of the power of advancement.

Nottidge v. *Green*, (1875) 33 L.T. 220, *In re Grant, Trustees Executors and Agency Co., Ltd.* v. *Grant*, [1933] V.L.R. 263, and *In re Hartigan, Considine* v. *Hartigan*, (1915) 17 G.L.R. 703, referred to.

Per *Kennedy*, *Callan*, and *Finlay*, JJ., *Blair*, J., dissenting, 1. That, as Mrs. S. was not the sole life tenant of an ascertained residuary trust fund, she had no legal or equitable proprietary rights in any of the specific investments in which the trust fund was then invested, but a right to have the trusts of her father's will performed by the trustees, and to enforce such performance—which is properly described as an equitable chose in action—and the subject-matter of her gift was accordingly a portion of the equitable chose in action.

In re Young, Trustees Executors and Agency Co., Ltd. v. *Young*, [1942] V.L.R. 4, *Baker* v. *Archer-Shee*, [1927] A.C. 844, *Archer-Shee* v. *Garland*, [1931] A.C. 212, *Attorney-General* v. *Walker*, [1934] N.I. 179, *Lord Sudeley* v. *Attorney-General*, [1897] A.C. 11, *Warren's Trustees* v. *Lord Advocate*, [1928] S.C. 806, *Re White, Skinner* v. *Attorney-General*, [1940] A.C. 350; [1939] 3 All E.R. 787, distinguished.

Nelson v. *Adamson*, [1941] 2 K.B. 12; [1941] 2 All E.R. 44, considered.

Reid's Trustees v. *Inland Revenue Commissioners*, (1929) 14 Tax Cas. 512, referred to.

2. That, as originally the local situation of this chose in action was in New Zealand, and the subsequent history did not warrant a finding, that, in the contemplation of the law of New Zealand this local situation had been lost or changed, the local situation of this chose in action was in New Zealand at the date of the gift. (The tests for determining the local situation of a chose in action are reviewed and considered by *Callan*, J., in his judgment.)

Favorke v. *Steinkopff*, [1922] 1 Ch. 174, followed.

Toronto General Trusts Corporation v. *The King*, [1919] A.C. 679, *R.* v. *Lovitt*, [1912] A.C. 212, and *New York Life Insurance Co.* v. *Public Trustee*, [1924] 2 Ch. 101, applied.

Commissioner of Stamp Duties (N.S.W.) v. *Perpetual Trustee Co., Ltd. (Watt's Case)*, (1926) 38 C.L.R. 12, and *Young* v. *Commissioner of Stamp Duties*, (1931) 31 N.S.W.S.R. 316, referred to.

Duke of Marlborough v. *Attorney-General*, [1945] 1 All E.R. 165, distinguished.

ENGELBERGER v. ONGLEY AND OTHERS.

SUPREME COURT. New Plymouth. 1946. August 20; November 11. CORNISH, J.

Vendor and Purchaser—Land Sales—Undue Aggregation—Whether Limited to Aggregation by Purchaser—Control over Land disproportionate to Reasonable needs of any Individual—"Undue aggregation of land"—Servicemen's Settlement and Land Sales Act, 1943, s. 50 (3).

The words "the undue aggregation of land" in s. 50 (3) of the Servicemen's Settlement and Land Sales Act, 1943, are not limited to such aggregation by the purchaser; and they include "undue aggregation of land" by any person whomsoever resulting from a proposed sale.

A Land Sales Committee is entitled, in the performance of its duty, to treat as "undue aggregation" any control of land—whether *de facto* or *de jure*—that, in its opinion, is disproportionate to the reasonable needs of any individual, and to refuse consent to any acquisition that would result in such control.

In re A Proposed Sale, Stoffel to Smith, [1944] N.Z.L.R. 764, and *In re A Proposed Sale, Grigg's Trustees to Commin*, [1945] N.Z.L.R. 740, referred to.

Counsel: *O'Dea*, in support; *Vautier*, appeared as *amicus curiae*.

Solicitors: *O'Dea and Tonkin*, Hawera, in support; *H. M. Vautier*, Auckland, as *amicus curiae*.

BRIGHTER JUDGMENTS.

Relevant Literary Allusions.

By MAURICE J. GRESSON.

Most lawyers would agree that judgments should be relevant, terse, and logical, but should literary merit find any place? Surely, as Mr. Speaker says, "The ayes have it." If relevant literary allusions appear, the writer is pleased and the reader attracted. Each basks in that harmless self-gratification which all experience when making or recognizing an apposite quotation or a happy literary allusion.

During the past few years, in many English decisions literary allusions have found their place. Dickens has figured in two of them. In *United Australia, Ltd.* v. *Barclays Bank, Ltd.*, [1941] A.C. 1, Viscount Simon, dealing with "the exquisite logic of special pleading rightly understood," quotes the ecstatic comment: "Oh, what a writer Mr. Tidd is, Master Copperfield!"

In the following year, Dickens again appears in the House of Lords. In the New Zealand appeal in *Guardian, Trust, and Executors Co. of New Zealand, Ltd.* v. *Public Trustee*, [1942] N.Z.L.R. 294, 297, 298, Lord Romer, dealing with the position of an executor who paid legacies given by a will which was afterwards declared invalid, quotes from *Pickwick Papers* the sad story told to Sam Weller in the Fleet Prison by an executor similarly situated.

Shakespeare (again in the House of Lords) then enters an appearance in *Blyth* v. *Lord Advocate*, [1945] A.C. 32, 44. There the question for decision was the meaning of the word "common soldier" in the Finance Act, 1894. Viscount Simon prays in aid the following conversation from Henry V:

> "Pistol: *Qui va la?*
>
> King Henry: A friend.
>
> Pistol: Discuss unto me; art thou officer? Or art thou base, common, and popular?"

If it could be postulated that such an august personage as Viscount Simon ever shed the mantle of office and unbent sufficiently to read fairy-tales to his grandchildren, then in Hans Andersen's *Tinder Box* he would find that the husband destined for the beautiful princess is a "common soldier," so a section in the Finance Act, 1894, could be interpreted by the aid of a Shakespearean play written in the time of Elizabeth and a fairy-tale written by a nineteenth-century author.

Lewis Carroll enters next. In *Liversidge* v. *Anderson*, [1942] A.C. 206, 245, Lord Atkin, after caustically suggesting to his brother law lords that they would more fittingly have adorned the Star Chamber than the Judicial Committee of the Privy Council, proceeds to add insult to injury by quoting against them from *Through the Looking-Glass*:

> "I know of only one authority which might justify the suggested method of construction: 'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean, neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be master—that's all.'"

So far, all the instances have been from cases in the House of Lords; but a descent must be made from that "diviner ether" to the lower Courts.

As all would expect, Lord Darling's judgments provide most examples. Take a typical one. In *Whittaker* v. *Forshaw*, [1919] 2 K.B. 419, 430, a little girl had been instructed by her father to take a pail of milk to a customer. An inspector stopped her *en route* and bullied her into selling him a sample. The question arose as to whether she had any authority to sell the milk. Darling, J. (as Lord Darling then was), a true disciple of Wordsworth, was inevitably reminded of *Lucy Gray*. His judgment is as follows:

> "The position in which she was, reminded me, from the moment she was mentioned, of the case . . . of Lucy Gray, which is almost exactly parallel. Lucy Gray's father said:
>
> 'Tonight will be a stormy night—
> You to the town must go;
> And take a lantern, child, to light
> Your mother through the snow.'
>
> "If Lucy Gray had sold the lantern, or had met the village policeman and, because he said 'Sell me the lantern,' had affected to sell it to him, the result would in law have been exactly the same as that which follows from that which the girl did in the present case."

In New Zealand similar cases can be found. Even the late Mr. Justice Sim, for all his verbal austerity, called in the help of Pope in *Attorney-General* v. *Davidson*, [1925] N.Z.L.R. 849, 856. In that case, the *Sun* newspaper was prosecuted for contempt of court in publishing the following report of a murder case:

> "As she spoke of her knowledge of the Mouats, her gaze alternated between the Crown Prosecutor and the dock. From under her brown hat she spared many quick smiles for Mouat."

The defence was that the publication was a true report of a judicial proceeding (which it was), and also fair comment. Mr. Justice Sim would have none of this. Comment, he said, can be made in other ways, than by the spoken word. "One may, to use the words of Pope, 'just hint a fault, and hesitate dislike'."

The generation to which Mr. Justice Denniston belonged enjoyed a classical education which was noticeably absent from that of the writer. As a result, the Judge's excursions into literature were usually in Latin. The best was in the case of *Attorney-General* v. *Geddis*, (1913) 33 N.Z.L.R. 545, 574. There, a paper had been prosecuted for contempt for publishing a scandalous cartoon commenting on the conduct of Mr. Justice Edwards in a case which had been completed. Much learning was expended upon the argument, and certain more or less archaic authorities were produced to justify a contention that any personal criticism of the Bench was contempt. In rejecting that contention, Mr. Justice Denniston said that Judges must rely on their characters to avoid criticism, instead of resorting to archaic sanctions, and that, for his part, he preferred to say "*non tali auxilio nec defensoribus istis.*"

In the case of *Macdonald* v. *Mutual Life and Citizens Assurance Co., Ltd.*, (1910) 29 N.Z.L.R. 1073, 1078, Mr. Justice Cooper joins the literary band. The question there was whether the plaintiff had completely and irrecoverably lost his sight. Mr. Justice Cooper answered the question by quoting from Milton's *Samson Agonistes* :

" O dark, dark, dark, amid the blaze of noon ;
Irrecoverably dark, total eclipse ;
Without all hope of day."

N.P. To bring this somewhat discursive article to a close, two passages must be cited from judgments delivered by Lord Macnaghten, a master of English and a master of satire.

In the case of *Van Grutten* v. *Foxwell*, [1897] A.C. 658, 671, dealing with the application of the rule in *Shelley's Case*, he sets out the contention of a text writer, and adds :

" That was putting the case in a nutshell. But it is one thing to put a case like Shelley's in a nutshell and another thing to keep it there."

In the case of *Gluckstein* v. *Barnes*, [1900] A.C. 240, 255, where a fraudulent director had conspired with his co-directors to defraud the company, and one director complained that, if judgment were given against him, he might not be able to recover contribution from his fraudulent co-directors, Lord Macnaghten deals with the matter thus :

" In these two matters Mr. Gluckstein has been in my opinion extremely fortunate. But he complains that he may have a difficulty in recovering from his co-directors their share of the spoil, and he asks that the official liquidator may proceed against his associates before calling upon him to make good the whole amount with which he has been charged. My Lords, there may be occasions in which that would be a proper course to take. But I cannot think that this is a case in which any indulgence ought to be shewn to Mr. Gluckstein. He may or may not be able to recover a contribution from those who joined with him in defrauding the company. He can bring an action at law if he likes. If he hesitates to take that course or takes it and fails, then his only remedy lies in an appeal to that sense of honour which is popularly supposed to exist among robbers of a humbler type."

When passages such as these are found in a judgment, they stand out like an oasis in the desert, and counsel can with fresh heart proceed with his weary task of endeavouring to distinguish the undistinguishable and to reconcile the irreconcilable.

EXECUTORS AND ADMINISTRATORS: MORTAGE DEBT.

Acquisition of Title by Transmission.

By J. H. Carrad.

With special reference to the article " Appointment of New Trustees : Grant of Probate to One in Other's Absence " (*ante*, p. 136), a correspondent, whose inquiry has been referred by the Editor to me, writes as follows :—

> It is a common practice in New Zealand for a legal personal representative to clear off all debts of an estate, except a mortgage debt secured against a parcel of land. It is also a practice in some parts of New Zealand for the legal personal representative at that stage to transfer the mortgaged land to the beneficiary, *even when the legal personal representative is himself the sole beneficiary*, when the land is under the Land Transfer Act. But is it not a fact that when the legal personal representative is also the sole beneficiary, he should not purport to transfer the land to himself ? Does he not still hold the land in a representative capacity *qua* executor and strictly speaking there is nothing to transfer ? *cf.*, *Hosken* v. *Danaher*, [1911] V.L.R. 214 ; *Ex parte Wisewould*, (1890) 16 V.L.R. 149.
>
> The object in registration of such a transfer is to save the necessity for letters of administration *de bonis non*, should the legal personal representative die intestate.

This correspondent raises a most important question ; but that importance is, I think, not always recognized. Shortly stated, the question relates to creditors' rights and to the title of the vendor or lessor when land, the title to which is in certain circumstances held under transmissions, is sold or leased.

Let us first take the following case bearing on the question of title :—

A. dies intestate and letters of administration of his estate are granted to B. who either under the intestacy or otherwise becomes solely entitled to land in A.'s estate, subject of course to A.'s debts, funeral and testamentary expenses, and the death duties in respect of his estate being paid. B. goes on the title to the land by transmission, but dies without having transferred the land to himself as being the beneficiary or person solely entitled to the land. It is clear that B. could have so transferred the land : *Hosken* v. *Danaher* cited by our correspondent and s. 19 of the Property Law Act, 1908. C., the administrator of B.'s estate, now desires to obtain title to the land in A.'s estate. The present Registrar-General of Land has stated that in such circumstances, and upon proof of B.'s sole right to the land, he would allow C. to go on the title by transmission from B. notwithstanding the decision in *Public Trustee* v. *Registrar-General of Land*, [1927] N.Z.L.R. 839. C. accordingly goes on the title as registered proprietor by transmission from B. He could not go on the title by transmission from A.

C.'s solicitor would no doubt feel that he had done a neat job and would expect a pat on the back from his client if he thought the client could understand the legal questions involved and could appreciate the fact that his solicitor had been able to avoid obtaining a grant of administration *de bonis non* in A.'s estate. But let us consider the legal position as regards the title

to the land. The transmission to C. gives him only whatever title B. had, which title was a title as administrator of A.'s estate and as such is of no value after B.'s death if *Public Trustee* v. *Registrar-General of Land* (*supra*) was correctly decided. This case, in effect, decided that the administrator of an estate has, after his death, no transmissible interest in the land of which he was registered proprietor by transmission (as administrator) at his death. The position would be the same if A. had made a will and appointed B. his executor and B. had died intestate. In such a case, B. has no transmissible interest after his death in land of which he was registered proprietor as executor at his death, but he would have such an interest if he left a will probate of which was obtained by an executor. This seems somewhat absurd, but is the effect of the decision in *Public Trustee* v. *Registrar-General of Land* (*supra*). C. now enters into an agreement to sell or lease the land to D. The latter's solicitor searches the title to the land and questions C.'s title. He says that C. cannot give a good title to the land because he is on the title by transmission as the executor or administrator of the estate of B., who is on the title by transmission merely as the administrator of A.'s estate, no person beneficially entitled to the land having been placed on the title by transfer after A.'s death. D.'s solicitor cites *Public Trustee* v. *Registrar-General of Land*. He further says that, even assuming that C. is properly on the title, his title is no better than B.'s title which was merely that of an administrator, and accordingly C. must prove conclusively, first that all the funeral and testamentary expenses, debts and death duties in connection with A.'s estate have been paid, secondly, that B. was absolutely entitled to the land, and thirdly, that he, C., has a power to sell (or lease) the land to D. as provided by the agreement. D.'s solicitor further states that in order to prove that B. was absolutely entitled to the land, C. must furnish proper declarations supported by the relevant birth, death and marriage certificates establishing that B. took the land as the next-of-kin of A. entitled thereto under the Administration Act. D.'s solicitors' answer to C. is that, if B. did not take the whole of the land as next-of-kin of A. but in some way acquired interests therein from others, he (D.'s solicitor) will require: (*a*) to peruse the relevant documents, (*b*) to be satisfied that any purchase money has been fully paid, together with the stamp duty payable, and (*c*) that the persons from whom B. acquired such interests were "kept at arm's length," having regard to the fact that at the time the interest was acquired B. was acting in a fiduciary capacity—*i.e.*, as administrator of the estate. In other words D.'s solicitor contends that C. does not possess a "clear certificate," to use the apt phrase used by the Chief Justice of Victoria in *Hosken* v. *Danaher* (*supra*). C. in reply to the statement of D.'s solicitor that he (C.) cannot give a good title could contend that, in his application for transmission from B., he, as required by s. 123 (2) of the Land Transfer Act, 1915, defined the estate or interest claimed by him as being the fee simple beneficially owned by B. and that accordingly the transmission registered on such application transmitted the estate or interest so claimed (s. 124 of the Land Transfer Act) and not merely the estate or interest of B. as administrator of A.'s estate. D.'s solicitor would almost certainly not accept such a contention, and C. might then seek to prove payment of all funeral and testamentary expenses, debts and death duties in connection with A.'s estate. In passing, it may be pointed out that this task would be impossible if A. left a will and land devised by it had been transferred to the devisee subject to the mortgage thereon at A.'s death. C. must satisfy D.'s solicitor that he has a power of sale (or leasing, as the case may be). B., if alive, could, as administrator of A.'s estate, sell the land only with the consent of the Court, the debts, &c., having been paid: (s. 7 of the Administration Act, 1908. If the case came under the Amendment Act, 1944, B. as administrator, could not sell the land as his only duty would be to transfer it to the person beneficially entitled thereto.) C., as executor or administrator of B.'s estate, could not point to any authority giving him power to sell land belonging to A.'s estate and would again have to contend that he was selling (or leasing) the land as executor or administrator of B., the person beneficially entitled thereto, though B. was on the title only as administrator of A. This contention might be well founded, but most legal practitioners would almost certainly endeavour to avoid having to put it forward.

Our correspondent in his communication says,

> But is it not a fact that when the legal personal representative is also the sole beneficiary, he should not purport to transfer the land to himself? Does he not still hold the land in a representative capacity *qua* executor and strictly speaking there is nothing to transfer?

He then cites the two Victorian cases. The answer to each question should, it is submitted, be "No." The position, rather, is that the land should in all cases be transferred to the person beneficially entitled, even if he is the executor or administrator of the estate and that, on such transfer, the registered proprietor will not be a person holding title in a representative capacity and his executor or administrator will not be concerned with the derivation of his title. Our correspondent's letter speaks of a transfer of the land subject to the mortgage thereover at the owner's death. On the transfer of the mortgaged lands to the beneficiary entitled thereto in the estate, the mortgagee could enforce his claim to repayment of the mortgage debt by action against the mortgagor, or, if the deceased owner was the mortgagor, then against his executor or administrator, provided, of course, the latter had other assets available, or which ought to be available, for payment of the mortgage debt. Moreover, if any such assets had been transferred to a beneficiary, the mortgagee could follow them into the beneficiary's hands. It would appear therefore that the mortgagee would not sustain any damage by the mere transfer by the administrator of the land to himself subject to the mortgage. The mortgagee could enforce his claim by sale of the land, and, if the deceased owner was the mortgagor, by action against the administrator, but in the latter case only to the extent that assets are available or ought to be available for payment of the mortgage debt. Our correspondent's final statement that "The object in registration of such a transfer is to save the necessity for letters of administration *de bonis non*, should the legal personal representative die intestate" is hardly correct. Such object is really to keep the title of the land clear of anything which may hamper dealings with the land and lead to requisitions as to title in such dealings. The object is to have a "clear certificate" of title.

In a case where the deceased owner of the mortgaged land was not the mortgagor, the mortgagee could not claim from the mortgagor any deficiency between the

amount realised by a sale of the land and the amount of the mortgage debt unless he protected himself by giving to the mortgagor the notice required by s. 3 (5) of the Property Law Amendment Act, 1939. The administrator of the deceased owner of the land would have to indemnify the mortgagor and pay the deficiency, if the estate had assets available in due course of administration for such payment: s. 88 of the Land Transfer Act, 1915. Moreover the mortgagee could take a transfer from the mortgagor of the benefit of the implied covenant contained in that section and could then himself sue the administrator.

NEW ZEALAND LAW SOCIETY.

Council Meeting

(*Concluded from p. 306.*)

State Advances Corporation—Signing Releases of Mortgages.—The Hamilton Society wrote as follows:—

"The Council of this Society have asked me to write to you and request that the State Advances Corporation be approached with a view to securing the authority for its Hamilton representatives to sign releases of mortgage in the same way as is at present done by the District Public Trustee. The present procedure whereby releases have to be sent to Wellington for signature results in lengthy delays."

Mr. Tanner stated that the long delays caused by the present practice of sending the documents to Wellington resulted in unnecessary inconvenience. Some of the members referred to similar difficulties in other districts. It was resolved that a letter should be sent to the State Advances Corporation asking if arrangements could be made for its Branch representatives to sign the necessary documents similar to the existing arrangements adopted by the Public Trust Office.

Trustee Act.—The Secretary drew attention to the fact that the Trustee Amendment Bill included in Clauses 4 and 5, the provision recommended by the Hawke's Bay Society last year and approved by the Conveyancing Committee and the Council of the New Zealand Society. The recommendation had been forwarded to the Law Revision Committee. Further suggestions made by the Society in this connection had been approved and it was hoped that these would be enacted in the Statutes Amendment Act, 1946.

Land Transfer Amendment Act, 1939, s. 4.—The following letter was received from Wellington for the consideration of the New Zealand Council:—

"Section 4 of the Land Transfer Amendment Act, 1939, authorizes the extension of the term of a lease by 'Memorandum,' somewhat similar to a Memorandum of Variation of a mortgage. Subsection 3 authorizes variation of the terms of the lease by the 'memorandum of extension.' It appears, therefore, that the terms of a lease cannot be varied by 'memorandum' unless the term of the lease is, by the same instrument, extended, if only for one day.

"We suggest that an endeavour be made to obtain legislation amending the section so as to make it authorize any variation of lease. Provision could be included that a variation of rent must comply with the appropriate provisions of the Land Sales Act.

"This matter now arises in connection with leasing operations of a certain corporation which is a 'public body' for leasing purposes. This corporation has granted a considerable number of perpetually renewable building leases at ground rents. Recently the corporation decided, by resolution, to grant variations of certain terms of the leases to such lessees as required it, with the object of facilitating mortgaging of the leasehold estate. The first of these cases has now arisen, and the prospective mortgagee naturally requires that the amended terms be actually incorporated in the registered lease of which mortgage is to be taken."

On the motion of the Vice-President it was decided to forward the letter to the Law Revision Committee.

LAND SALES COURT.

Summary of Judgments.

The summarized judgments of the Land 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. 92.—R. to M.

Urban Land—Proposed Factory site—Value—Residential or Commercial Area—Potentiality Value as Commercial Site—Proper Basis of Valuation.

Appeal by the owner of some 22 acres of freehold land on the main Auckland–Rotorua highway just outside the borough boundary of Rotorua. The appeal related to a sale of approximately 4 acres of this land to the trustee for a company called California Productions (N.Z.), Ltd. The company was stated to have a capital of £32,000 and to have been formed for the purpose of erecting a modern factory at a cost of not less than £40,000 for the production of women's apparel on the site in question. The choice of Rotorua as the site for the company's activities was said to have been made in pursuance of the Government's policy of decentralisation of industry, and by reason, in particular, of the supply of female labour which was expected to be available in the Rotorua district. It was claimed by the vendor, and confirmed by a director of the purchasing company, that the site in question had many advantages which rendered it particularly desirable for the company's purposes. Stress was laid on the fact that a considerable proportion of the land in Rotorua is Native land or is held on leasehold tenure, and that few suitable factory sites were available within or close to the borough. It was shown that a town-planning scheme had recently been adopted under which an area of land in the borough had been zoned for industrial purposes, but the company's representative claimed that he had been unable to find a site with advantages comparable to the land now under consideration in the zoned area. The price agreed upon by the parties was £600 an acre, or a total of £2,560. The principal matter in dispute before the Committee and on appeal was whether the land should be valued as a residential or commercial area. The Crown valuation of £1,200 was accepted as being the true value of the land in December, 1942, for residential purposes. The appellant contended that the property should be valued as a commercial site, and that, as such, the sale price should be approved. The

Committee considered that the property should be valued on a residential basis, and granted its consent subject to a reduction of the price to £1,200.

The evidence and argument before the Court followed the same pattern as before the Committee. Evidence was called to show that the establishment of industries in Rotorua should be encouraged, and that this would be made possible only if commercial concerns were permitted to buy the land which they desired at prices sufficiently attractive to encourage vendors to sell. The opinion was expressed that it was a recognized practice in Rotorua for land required for commercial purposes to be bought and sold at much greater prices than the same land would command for residential purposes, and, indeed, the general view of the appellant's witnesses appeared to be that, immediately it could be shown that a particular piece of land was required for commercial use, its value, as compared with residential sites in the same vicinity, would be approximately doubled. In pursuance of this theory, the appellant's witnesses, while accepting the Crown's valuation of the land in question at approximately £300 per acre for residential purposes, claimed that its value on a sale to a commercial company for factory purposes should properly be assessed at £600 per acre. No reason was offered for the precise amount of the increase in value, save the general proposition that commercial land is worth approximately twice the value of similar residential land.

The Court (per Archer, J.) said: "The Court is unable to accept the contention that a single piece of land can, for the purposes of the Land Sales Act, have two distinct and widely differing values, dependent upon the use to which the land is proposed to be put by the purchaser. It is, of course, well recognized that land may be classified in various ways, and that its classification may be an important factor in assessing value, but the proper classification of land depends upon its own inherent characteristics, and not upon the intentions of a particular purchaser. The 22 acres of which the land now sold forms a part has been used, up to the present time, only as farm land, and, as such, its value would probably be no more than £60 per acre. A portion of the land, however, would no doubt have been suitable, even in 1942, for subdivision into residential sites, and for that purpose might have realised £300 an acre. It is also quite clear that the land now sold has many advantages for such a factory as is proposed to be erected, and it is quite suitable for a commercial site. We cannot agree, however, that the land can have three different values according to whether it is being purchased by a farmer, by a speculative builder or by a commercial concern. It has frequently been said that a vendor is entitled to be paid, and to be allowed under the Act to receive, the full value of his land, including any sum by which the value of the land is increased by any potentiality pertaining to it. In accordance with this principle, the present property is admitted by the Crown to have a value far in excess of its value as farm land, by virtue of its potentiality for residential purposes, and it may well be that it has some further value by reason of its potentiality for commercial purposes, but whatever value is arrived at after a due consideration of all the potentialities affecting the land is its value for all purposes under the Land Sales Act, and is not to be increased or reduced because a particular purchaser may intend to use the land in a particular manner.

"From a general consideration of their evidence, we are satisfied that the appellant's witnesses, in valuing the land at £600 per acre, were guided almost entirely by the fact that the purchasing company had offered that sum for the land and claimed it to be worth that sum for its particular purposes. They did not deny that, until the purchasing company became interested in seeking a site at Rotorua, they would have valued this land as residential land, but they claimed that, immediately it was selected by the purchasing company as a site for its factory, its character changed from residential to commercial land, and its value was increased accordingly by approximately 100 per cent. This contention is based upon the fallacy that the land is to be valued by reference to the use to which it is to be put by the purchaser. What has to be valued, however, is the land, in its condition, and with all its characteristics and potentialities, at or immediately prior to the sale. That, and that only, is what the vendor had to sell, and in fact sold, in the present transaction. The fact that the purchasing company desires to buy the land for commercial purposes may properly be accepted as evidence that the property had a potential value as a commercial site, but the amount which the purchaser is prepared to pay should not, in our opinion, be accepted as a measure of the value of that potentiality. As was stated in *No. 23—L. Trustees to B.*, [1944] N.Z.L.R. 772, it is the possibilities, of the land, and not as realized possibilities, that must be taken into account. We are of opinion that the proper course to be followed is to ascertain the value of the land, including any potentiality which it might possess, either for residential or for commercial development, as at the crucial date, December 15, 1942, subject to any adjustment in the basic value which may be necessary by reason of changed circumstances since 1942, in order to arrive at a fair value between the parties. As was indicated by the Court in *In re A Sale, S. to A. Bros., Ltd.* (To be reported), we are of opinion that we should have regard to a change since 1942 in the nature or extent of a potentiality which affects the land, and in this category we include such a change of circumstances as is created by the cessation of the war and the adoption by the Government of a policy of decentralisation, which may have the effect of increasing the demand for suitable commercial sites in such towns as Rotorua. The particular desires or requirements of the purchaser, insofar as they are personal to the purchaser, and do not affect the land as such, must, in our opinion, be disregarded.

"In applying the foregoing principles to the property now under consideration, we find, upon the evidence, that the area in question is one of the few freehold sites in Rotorua and district which are suitable for the establishment of a large factory. Assuming, therefore, that the present demand for factory sites in secondary centres existed in 1942, but disregarding the particular requirements of the purchasing company, we are of opinion that the vendor in 1942 would have been justified in expecting to realize for the property now sold something in excess of its value as farm land or as residential land, by reason of the fact that it had some potential value as a commercial site. The assessment of the total value of the land, including this potentiality, is a matter of some difficulty, particularly as none of the valuers was able to give the Court much assistance in this respect. We are of opinion, however, that a proper basis for valuation is to assess the value of the land for residential purposes by comparison with sales of sections in the vicinity, and then to add a reasonable sum to represent its added potential value for commercial purposes. As to residential value, the evidence of the Crown Valuer was unchallenged, and the Court therefore accepts his valuation of the land for residential purposes at £1,200. In support of his claim to a substantial sum for commercial potentiality, the appellant claimed that the property had particular advantages by virtue of its area, its shape, its freehold tenure, its being on the main highway, its lying to the sun, its water supply, and its accessibility to an available supply of labour. The Court agrees that in all these respects the property is very suitable for a factory site, though many of these advantages are no doubt possessed to an equal degree by other land. It does seem to be clear, however, that a purchaser seeking such a site might well have difficulty in securing another freehold property of similar area with the ready access and advertising value which this section derives from its lengthy frontage to the main highway. For these reasons, the vendor would have been justified in believing that, if and when a substantial factory came to be established in Rotorua, his land might well appeal to the promoters as a desirable factory site. Our real concern, however, is to estimate how much in excess of the residential value it would be reasonable for the vendor to ask, and for a purchaser to pay, by reason of this commercial potentiality, over and above the admitted value of the land as residential land. We do not think that the appellant's valuers seriously believed that any large sum over and above the residential value would have been paid by any purchaser by reason of the potentiality in question, until such time as the present offer was pending. In other words, the possibility that the land might be required for industrial purposes was of little monetary value until such time as it became a realized possibility, by virtue of the present purchaser's decision to acquire the property.

"We are satisfied that such a potential value as this must be assessed in every case by reference to the particular circumstances of the case, and that it is impossible to arrive at a formula for determining the degree or the value of a potentiality. It should be possible, however, for valuers, from their knowledge and experience, to arrive at a sound judgment as to the added value conferred by a potentiality, and therefore to be of considerable assistance to Committees and to the Court when a question of potential value has to be considered. In the present case, we are of opinion that the amount which can properly be added to what has been called the residential value of this land by reason of the possibility of its being required for commercial purposes is comparatively small, and that by no process of reasoning can a valuation of the land, for the purposes of the Land Sales Act, at £600 per acre be justified. After careful consideration of the evidence, the Court is of opinion that the basic value should have been fixed at £1,400. The appeal will therefore be allowed, and consent will be granted to the sale on condition that the price is reduced to £1,400 accordingly."

WELLINGTON BAR DINNER.

Annual Function Resumed.

The Wellington Law Society recently held its first post-war Bar Dinner, an annual function that had, unfortunately, to be postponed until happier times. There was a large attendance of members of the profession, and Palmerston North and the country districts were well represented.

The Chief Justice, the Hon. H. F. O'Leary, and Mr. Justice Blair, Mr. Justice Kennedy, and Mr. Justice Callan, were guests of the Society. Other guests were the local Magistrates, Messrs. W. F. Stilwell, A. M. Goulding, and H. J. Thompson, the senior Magistrate, Mr. Stout, being unable be present.

There was only one toast, "The Judiciary," apart from the Loyal Toast.

"The Judiciary."

The President of the Wellington District Law Society, Mr. W. P. Shorland, in proposing the toast of "The Judiciary," said that this year the privilege and the pleasure of proposing the toast of the evening had fallen to his lot, and he hoped in some measure to enjoy himself in fulfilling his task. He continued:

"Being conscious of the fact that I would speak in a representative capacity, and realizing that the various comments I had heard from time to time from practitioners—mainly unsuccessful practitioners—in the robing-room of the Supreme Court, and in the solicitors' room of the Magistrates' Court, would not be opinions truly reflecting the considered opinions of the profession on the delicate matter of the Judiciary, I felt that, for the purposes of proposing this toast, it was only proper that I should consult various members of the profession, and gain what assistance I could from them. I hoped that one or other would prepare the speech that I would deliver.

"Results were somewhat like this. I first consulted an eminent King's Counsel. He had just completed a case in the Court of Appeal where he had had a run which was not quite up to his expectations. At all events, he made it clear to me that he would reserve his opinion on the Judges as a whole, and on some Judges in particular, until he had received the decision. I went on my weary way and consulted another King's Counsel. He confessed that he was a little interested in politics, and his complaint was that, in travelling from one end of New Zealand to the other, he could not find a single Judge or Magistrate who would take an interest in politics. I next came across one of our famous jury-advocates and thought, 'Here is the man to help me.' His reaction was entirely cordial. He took me into his office, and from his secret drawer, containing addresses to the jury, he extracted the address for the particularly respectable injured plaintiff. We scanned it together; and I thought, 'This is the very thing,' but he took it back into his hands and replaced it with the others in the drawer, saying, 'It is too good. It would be the end of judicial modesty for twenty-five years if you put that over.' I went on and came across a very eminent and good-natured practitioner of this city. I put the matter to him. To my horror, the moment he knew the object of my visit he went to his large collection of bills of indictment and went through them hurriedly. He then said: 'Charge them collectively!' I do submit to their Honours and to their Worships that that opinion disclosed no offence.

"Our tribute to-night is a sincere tribute to the probity, the great ability, and the energy of our Judges and Magistrates, who so worthily uphold the traditions of our Courts and the administration of justice."

The speaker went on to say that the members of the profession for whom he spoke were honoured and delighted to have with them that evening His Honour the Chief Justice, their Honours Mr. Justice Blair, Mr. Justice Kennedy, and Mr. Justice Callan, and their Worships Mr. Stilwell, Mr. Goulding, and Mr. Thompson. They were delighted to have them present to hear the profession's tribute to the worthy manner in which they had upheld the traditions of the Courts and the administration of justice during their term of office.

The Chief Justice.

"We are doubly pleased to have with us to-night His Honour the Chief Justice," Mr. Shorland continued, "first and primarily, because his presence gives us the occasion that we wish collectively to have to express to him our respective congratulations on his appointment to the high office of Chief Justice, our best wishes for a long and happy term of office, and our confidence that his term of office will be a successful one. Furthermore, we are glad of the occasion this gathering affords to give him the sincere thanks which is no less than is due for the great services that he rendered our profession during the time he was at the Bar, as President of the New Zealand Law Society, as President of the Wellington Law Society, and, for many years before that, as a member of the Council of that body. His Honour the Chief Justice has throughout the years of his professional life served well the interests of the profession, and we record our sincere thanks for his work in that behalf.

"His Honour's position at the Bar, an eminent King's Counsel and one of our great advocates, coupled with the fact that he was the chosen President of some years' standing of the New Zealand Law Society, and, therefore, the chosen head of our profession, made it in no way unexpected that he was called to the high office of Chief Justice. His Honour carries to that office the talents and the learning and the experience which carried him to the position at the Bar which he held at the time of his appointment. He carries to that office a reputation at the Bar for great fairness, fairness even in the heat of advocacy—a reputation that was second to none—and he goes from us to his high office leaving with us the confidence that justice will always be done. It is our view that a good relationship between the Bar and the Bench is in the best interests of justice. It is our good fortune to have had that relationship for as long as I can remember. His Honour's practice at the Bar was characterized by that fairness to which I have referred, and we know, and look forward with certain knowledge to the fact, that our good relationship with the Bench will not only be maintained, but will prosper.

"It is perhaps not inappropriate to mention that at the Law dinner on the occasion of the Dominion Legal Conference, in Christchurch, His Honour proposed the toast with which I am dealing at the present moment. In the course of his excellent speech, he disclosed the fact that he was thinking of writing a book. The title of the book was to be 'Advice to Judges.' I have no doubt that His Honour has written the book. The profession were in unanimous agreement with the principles which he disclosed in that speech, and which he assured us were to go into the book. Any one wishing to read these principles will find them recorded in the Law Journal.*

"We are proud of our Judiciary. We are proud of our Chief Justice. We are proud of the honour he has brought to this city, to this Society, and to our profession, in obtaining the highest prize open to the profession in New Zealand.

"We are proud of our Judiciary; and, in honouring this toast to-night, our minds go back to the past, and we link with the present Bench the names of great Judges of the past, who, by their probity, industry, courage, and great learning, built and maintained for us the tradition and reputation enjoyed by our Courts. I can pay to the present Bench no greater compliment than this: that we say of them that they are worthy of the great Judges of the past."

After the toast had been honoured, His Honour the Chief Justice, on rising to reply, was most enthusiastically received.

The Chief Justice's Reply.

The Chief Justice thanked Mr. Shorland on behalf of the members of the Supreme Court Bench who were present, and on behalf of the Magistrates, for his toast of "The Judiciary," a toast which the President had given in pleasant and graceful, but, so far as His Honour himself was concerned, too flattering, terms.

"Like Mr. Shorland, I have been worried a little as to what I would say on this occasion," the Chief Justice proceeded. "He apparently had some good friends to whom he could turn

* (1938) 14 New Zealand Law Journal 149.)

for aid in preparing what he had to say. I have had no such assistance. I have mentioned during the last few days on more than one occasion to my brother Judges that I had to reply to this toast. One of them at once said, 'Are we expected to say anything?' I said, 'No, apparently not. It is left for me.' That soon went around, and, since then, my brethren have seemed to think it it was a good joke that I would have to bear and take the full responsibility, and shoulder the whole burden, of replying on behalf of the Judiciary.

"Well, now, Mr. Shorland, as I said, like you I was a little worried about what I had to say. On recollecting, I find that, on all occasions on which I have had to speak at gatherings of this kind, I have always had the task of proposing the toast of some person or somebody, and not replying. I have realized during the last few days, in the few minutes that I have had to think of what I should say, that it is a very difficult thing replying to a toast. When you are proposing a toast, you have the whole field before you. You can be pleasant or unpleasant, or you can be humorous—or, rather, attempt to be humourous—or serious. Your audience has just got to take what you give, and the person who has got to reply has to do the best he can with the material put before him. So I thought that I would get some assistance from law journals, which, I recollected, gave you some assistance of this kind; and I remembered that in the English *Law Journal* I had seen this written about proposing the toast of the Judiciary:

> As a barrister, meeting a Judge in the street, automatically raises his hat; as the good citizen, on the first stroke or bar of the National Anthem, jumps or struggles to his feet, so upon every one of the multitudinous occasions when 'The Judges' or 'The Judiciary' is the subject of a toast the same speech is delivered; being words and phrases of unadulterated and indiscriminating eulogy, and thanksgiving in superlatives. The words used in private conversation are, in relation to the Judges, discriminating, truthful and often harsh; but always on the public occasions not only our judicial system but all our Judges are marvellous; the very least of them is at an altitude to which the best of nations (other than British) might aspire but could never achieve.

I felt sure, too, that Mr. Shorland would say something about my elevation and make some complimentary remarks about me, so I thought of something else I had seen, and turned up this in an American biography:

> The public liked to insist on keeping their Judges symbols of the mechanical perfection which life did not vouchsafe to laymen. They never stopped to wonder how the brief ceremony of induction could endow the incumbent with that perfection.

Then I expected that Mr. Shorland would give the usual speech of adulation. I am pleased to see that he has not quite followed the recognized lines, but whatever he has said concerning us I accept with the greatest pleasure and enthusiasm for my brethren and for the Magistrates. I cannot accept it for myself. After all, I am only two months old as a Judge. I have the disabilities and disadvantages of the newly-appointed. They, of course, are tried, and we know of their qualities and, I was going to say, their defects: but according to this writer they have none—at least, none in public. However, I cannot refrain for a moment from thinking of some of the qualities of some of my brethren who are here to-night. I will start with the senior, who has been on the Bench since 1928. We know he is an excellent Judge, but perhaps you would agree with me that he is a misplaced plumber or engineer. I think that, if, when he was at College, they had had career masters, he would not, over the last seventeen or eighteen years, have been working his life out for a mere £2,000 a year. He would not to-day be scanning the daily papers to see if our masters will allow us to have another £250. His career master would have put him into business as a contractor in a large way, and by this time he would have retired with a fortune, after having built, say, the Sydney Bridge or a bathing-platform at Day's Bay.

"Judge Callan has been enjoying this, but I am coming to him. We all know him. He is the silent Judge, a strong silent Judge. You get no jokes from him on the Bench, no quips, nothing that is news for the daily papers. In contrast to the strong silent Mr. Justice Callan, I would have you remember the other Judge who is present, the jaunty, sprightly, garrulous Mr. Justice Kennedy.

"It might be only speculation, but I am conceited enough to think that some legal eyes are on me. They are wondering whether I will make a good Judge or a sound Judge. There is talk as to how the new Chief Justice got on in his first cases. A week or so after I was sworn in, I took a succession of jury cases, and I think I must have done pretty well, because Mr John O'Shea called on me and told me I did. Don't misunderstand me. I was not perfect. He gave me a tip or two. As I say, for the moment I am the subject of speculation and anticipation, and it will be at some dinner in the future that one of my brethren will be able to put before you my qualities, defects or whatever you like to call such as I have mentioned.

"But, gentlemen, passing from the facetious or semi-facetious, I would say this—truthfully and in all sincerity—that the members of the Bench at the present time, no less than members of the Bench in the past, appreciate the importance of the office they hold, the honour that attaches to it, and the solemn authority and duty that are entrusted to them to hold the scales of justice fairly between man and man and between ruler and subject. They realize that they must be fearless and upright. They know, too, that they must have dignity. Perhaps, as Mr. Justice Oliver Wendell Holmes said, 'They must have dignity, but not too much.' We in New Zealand have great legal traditions. We have a great line of Judges to follow. Judges whose work and prestige should be, and is, a guide to those who have followed them.

"Speaking again of the present Bench, I would like to take this opportunity of saying to you, amongst whom until so recently I was a member, how much I have appreciated the kindness of the present members of the Bench to me. The transition from being a member of the Bar to being an encumbent of the Bench is a great one. The transition from appearing at the Bar of the Court of Appeal as counsel to that of appearing as the presiding member of the Court might be a little embarrassing, and certainly is something of a strain, but, so far as I am concerned, the strain has been lessened by the welcome and help I have received and by the expressions of loyalty to me from the puisne Judges. By placing at my disposal their experience, their knowledge of precedent and of the past, they have certainly eased my position, lessened any embarrassment, and certainly lessened the strain of passing from the Bar to the Bench. I take this opportunity of stating how much I have appreciated it, and I feel already that we will be a friendly and industrious band, and, that being so, I have no doubt that our duties will be carried out to the satisfaction of the Bar and of the public generally.

"As to the Magistrates, I do not want to forget them, and I thank you on their behalf. If I am permitted, I would like to say something later, in lighter vein, about the Magistrates we have had in Wellington. Over the whole of my experience, we have had an excellent lot of Magistrates presiding here, men of ability, judicially-minded, and at the same time men that we could look upon and associate with as friends. At times, as a Judge, one has to review the decisions of Magistrates. At times, they have to be differed from. But I have no doubt that, if I have to overrule a Magistrate, I will be able to do it with the same delicacy and astuteness as that with which a Judge differs from one of his brethren, or is a party to overruling in the Court of Appeal a brother Judge.

"Mr. Shorland has spoken of the relationship of Bench and Bar. A good relationship is essential. There is a responsibility on both sides, and there should be mutual trust. The Bench is entitled to expect from the Bar respect, help and candour. Equally, the Bar is entitled to receive from the Bench help and consideration and courtesy, and, if these mutual requirements are observed (and I am sure they ever will be in New Zealand), then, as I have said, justice will run smoothly and efficiently.

"That is all I have to say in serious or semi-serious vein, but, as this is the first occasion since I became Chief Justice that I have met you amongst whom I was so recently a member, and as, in the future, to some extent, our paths inevitably diverge a little (not that I want it to be so, but I can see already that the isolation is beginning to be imposed upon me; I have seen one or two old friends hurrying round the corner on my approach), and as I know that certain renunciations are not only becoming but are necessary, indeed they are imperative, I would like on this occasion, if I have time, to recollect some of the past and I feel I would be better able to do it if I could assume from now on, this evening, that the Chief Justice has gone home, and that Humphrey O'Leary has stayed behind with you."

His Honour then entertained the gathering with some humorous stories of practitioners of his early days in the profession in Wellington, as well as with some amusing incidents in the Courts in those days.

The gathering was a very happy one, and was a most successful inauguration of a new series of those annual dinners for which the Wellington Society has always been renowned.

AN AMERICAN SERVICEMAN'S DIVORCE.

Divorce granted without Wife's Knowledge.

From time to time we hear of New Zealand wives of United States servicemen learning of decrees of divorce having been granted against them, at the suit of the husbands, before they knew that such proceedings were even contemplated.

The JOURNAL has been favoured by Messrs. Brassington and Gough, of Christchurch, with the facts of one such case. As they obtained the views of the Judge who granted the decree, and as the question of the maintenance of the child of the marriage, born and living in New Zealand, is raised, the facts and the Judge's letter are published for the information and assistance of any practitioner having a similar problem before him. It must be borne in mind, however, that divorce law and practice vary considerably in the State jurisdictions throughout the United States.

In 1943, A.B., a spinster, was married to X.Y., a member of the United States Marine Corps at Wellington in New Zealand. X.Y., soon after the marriage took place, was posted to his unit in the Pacific Zone, and later returned direct to the United States. A.B. never saw X.Y. again. After X.Y. returned to the United States, he spent some leave at his parents' home in San Francisco: and then, later (still as a member of the U.S. Marine Corps), he took up residence in the State of Nevada. There he consulted the District Attorney with reference to obtaining a divorce from A.B. In August, 1945, A.B. received a letter from the District Attorney stating that he had been retained by X.Y. for the divorce action and he was informed by X.Y. that A.B. had been advised of "the extraordinary domestic situation with which X.Y. is now confronted." Accordingly, the District Attorney enclosed a form of appearance and waiver for her consideration. After X.Y.'s departure from New Zealand, a child had been born to the parties.

Subsequently to the receipt of the letter from the District Attorney, A.B. received a summons from the Fifth Judicial District Court of the State of Nevada, together with a complaint alleging "that X.Y. had been more than six weeks resident in the State of Nevada, and intended to make his home in the said State." Also that there had been extreme cruelty "in that defendant has been guilty of extreme cruelty towards the plaintiff, entirely mental in its nature, which caused the plaintiff great mental anguish, and which therefore seriously affected his health." X.Y., as plaintiff, therefore prayed the judgment of the Court for divorce and for custody of the child of the marriage to be granted to the defendant: also that the plaintiff pay to the defendant the sum of $30 per month towards the child's support. The summons and complaint were served upon A.B. as defendant by registered post.

A.B.'s solicitors, concerned with obtaining for her, if possible, adequate maintenance for the child of the marriage, endeavoured to explore all possible avenues of getting before the Court, but were unsuccessful in doing so. On October 27, 1945 (the summons was dated at Nevada on August 22, 1945, and was sent by surface mail), the Court heard the action and granted the decree. A.B.'s solicitors, at the suggestion of the Clerk of the Court, wrote to the Trial Judge, raising the question of enforcement of the maintenance order should it ever become necessary. The Trial Judge was kind enough to reply, and there now follows the Judge's reply:—

State of Nevada
Fifth Judicial District
Esmeralda, Mineral and Nge
Counties

WM. D. HATTON,
Judge

Tonopah, Nevada, May 6, 1946.

Messrs. Brassington & Gough,
Barristers and Solicitors,
Christchurch, New Zealand.

Gentlemen:

Re X.Y. *v.* A.B.

I have this morning received your esteemed letter of the first inst.

My note book shows that the above case was heard at Hawthorne on October 27th, 1945, and decree of divorce entered on that date.

The decree provides that the defendant shall have the custody of the child of the parties, although I surmise that there was an absence of jurisdiction to cover the particular point, the child being out of this country. It is also required that plaintiff shall pay to defendant the sum of $30 per month for the support of the child. That feature of the decree I would take to be binding.

Where the father, obligated under the decree to pay support money, remains within the jurisdiction of the court, it is not unusual to compel payment. If X.Y. should get behindhand with the payments, I would suggest that you take the matter up with Mr. Martin G. Evansen, attorney at Hawthorne, who is also the District Attorney.

My notes indicate that the plaintiff testified that he arrived in Hawthorne July 11, 1945, with the intention to remain indefinitely.

In Nevada, a non-resident of the State may be served by publication locally of the summons and the mailing of certified copy of the complaint and copy of summons to the defendant, at her place of residence. The court takes jurisdiction upon the proof of such publication and mailing, after thirty days from the date of mailing, or from expiration of publication whichever is later.

On my visit to Hawthorne this week, I will arrange for the furnishing to you of a copy of the decree.

Very truly yours,
WM. D. HATTON, District Judge.

RULES AND REGULATIONS.

Agricultural Workers Wage-fixation Order, 1946. (Agricultural Workers Act, 1936.) No. 1946/183.

Economic Stabilization Emergency Regulations, 1942, Amendment No. 9. (Emergency Regulations Act, 1939.) No. 1946/184.

Rotorua Trout-fishing Regulations, 1939, Amendment No. 4. (Fisheries Act, 1908.) No. 1946/185.

Diplomatic Privileges (United Nations) Order, 1946. (Diplomatic Privileges Extension Act, 1945.) No. 1946/186.

Customs Duty (Synthetic Substitutes) Order, 1946. (Customs Act 1913.) No. 1946/187.

Industry Licensing (Paua Shell) Notice, 1946. (Industry Efficiency Act, 1936.) No. 1946/188.

Social Security (Dental Benefits) Regulations, 1946. (Social Security Act, 1938.) 1946/189.

Education Amending Regulations, 1946. (Education Act, 1914, and War Legislation Act, 1917.) No. 1946/190.

Samoa Prisons and Constabulary Order, 1929, Amendment No. 2. (Samoa Act, 1921.) No. 1946/191.

Samoa Land Registration Amendment Order, 1946. (Samoa Act, 1921.) No. 1946/192.

Samoa Sea Carriage of Goods Order, 1946. (Sea Carriage of Goods Act, 1921.) No. 1946/193.

Cook Islands Sea Carriage of Goods Order, 1946. (Sea Carriage of Goods Act, 1940, and Cook Islands Act, 1915.) No. 1946/194.

Motor-spirits Prices Regulations 1942, Amendment No. 5. (Motor-spirits (Regulation of Prices) Act, 1933.) No. 1946/195.

Passport Regulations, 1946. (Passports Act, 1946.) No. 1946/196.

Tobacco-growing Industry Regulations, 1945, Amendment No. 1. (Tobacco-growing Industry Act, 1935.) No. 1946/197.

Magistrates' Courts Fee Rules, 1946. (Magistrates' Courts Act, 1928.) No. 1946/198.

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

Professional Parable.—With the approach of another year, Scriblex feels impelled to give some good advice, having reached an age when he can no longer set a bad example. To point a moral, rather than to adorn a tale, he recalls for the benefit of young practitioners a recent version told to him of Jonah and the whale. It seems that Jonah became so agitated in the whale's belly that he could not refrain from nervously pacing up and down. Finally, the whale got angry and called out: "Can't you stay still, Jonah, you're ruining my digestion." "It's all very well for you to talk," replied Jonah. "If only you'd kept your big mouth shut, neither of us would be in this fix now." How many times do we feel that something had much better been left unasked or unsaid! But, as a character sagely observed in one of Frederick Lonsdale's comedies, "Aren't we all . . . ?"

Allotments and Savings.—Both in England and Australia recently, Courts have affirmed the principle that a wife must account to her husband for her savings out of house-keeping moneys. Wynn-Parry, J., in *Re Sims* had to consider the case of an Army reservist, who, called up at the outbreak of war, had made a voluntary weekly allotment to his wife in addition to which she received the State's contribution and the compulsory basic allotment which he had to make. She also earned wages, but of these moneys—she could not prove the exact source—there had been paid instalments due under a hire-purchase agreement for furniture and a gas-stove; and the wife, after quarrelling with and leaving her husband, claimed the furniture as hers. The object of the Army allowance, said Wynn-Parry, J., to which the State contributed, was to compensate both parties, but the husband in particular, for the change in circumstances caused by his having to cease to be a wage-earner and to serve in the Army at what was agreed to be a comparatively low rate of remuneration; and in his view the allowance was not paid to the wife to spend on herself, but to enable her to keep herself and the house going during the husband's absence. In the Australian case, the allotment moneys were similar except that the husband maintained that his voluntary allotment was larger than necessary in order that his wife might save while he was on active service. On a summons under the Married Women's Property Act, it was held that, as the moneys had been paid into the wife's account at a Commonwealth Savings Bank, there was a presumption in the wife's favour which presumption the husband had rebutted by showing that the money had been accumulated for his future use: *Ewing* v. *Ewing*, (1946) 63 W.N. (N.S.W.) 116. But the unkindest thrust of all has been reserved for the frugal wife who got a cutlery set by saving coupons given with packets of tea and was held to have no title against the husband as the supplier of the tea-money: *Shrapnel* v. *Shrapnel*, (1946) 90 So.Jo. 191. It rather shakes one's faith in the wisdom of Proverbs (Ch. xxxi): "The heart of her husband doth safely trust in her so that he shall have no need of spoil."

The Royal Prerogative.—The introduction of the Coinage Bill into the English House of Commons draws attention to the opposite views held by two great Judges upon the point as to whether the Royal Prerogative extends to the altering of the value of coin above or below sterling value. Sir Matthew Hale considered that it did not; Lord Coke disagreed. It would seem that the King has unquestionably the right to fix the denomination of coins, to determine their design and issue them, and to declare that certain coin (whether coined in England or elsewhere) should be lawfully current. Although from ancient times English money consisted of silver and gold, it was not until 1672 that copper coins were rendered current. The word "sterling" which our Court of Appeal in *De Bueger's* case, [1936] N.Z.L.R. 511, found difficult to define, and considered of uncertain derivation, is thought to have been derived from the "Easterlings" who were North German merchants, arriving in England in the 13th Century and forming a "hansa" or gild modelled on those of the merchants of Cologne. Originally the sterling was itself a coin—a silver penny of which 240 went to the "pound sterling." Those happy days are not, unfortunately, here again. By s. 11 of the Coinage Act, 1870, the Crown still has the power by proclamation to determine the design and denomination of coins—the present proposed legislation providing for cupro-nickel coins from threepence to half-a-crown. By the same Act, the Chancellor of the Exchequer takes over the duties and rights of the Master of the Mint, an office dating from the time of Edward I, and, like many other offices of ecclesiastical origin, containing its fair share of fat and juicy perquisites.

Notes of Evidence.—When the Judicature Act was passed in England in 1875, Bacon was one of the three Vice-Chancellors who were transferred to the Chancery Division and kept their judicial title. A journalist in his early days, he reported cases, and on the Bench became distinguished for the facile and admirable style of his judgments. His notes were often illustrated with clever sketches. In one case in the Court of Appeal, his complete notes were contained on a single sheet of paper, and consisted only of a caricature of the appellant, accompanied by the comment: "This man is a liar." The late Evan Parry, who had practised at the English Bar before coming to New Zealand, used to tell a story of "Pops" Hewitt, a near-sighted Magistrate much liked on the West Coast for his homely approach to the problems of litigation. Wishing to appeal in a collision case, Parry requested access to the Magistrate's notes, only to find these comprised merely a sketch of two motor-vehicles, a series of lines and arrows and the words: "This is how it happened." Protesting to the Magistrate at the absence of notes and his consequent embarrassment in preparing an appeal, he was met with the good-humoured observation: "But why *should* I take notes, Mr.Parry? I only get £600 a year, you know!"

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. Tenants in Common claiming under Agreement.—*Title taken as joint tenants—Consent of Land Sales Court.*

QUESTION: In 1939 A. agreed to sell to H. and W. land for £800 and in the agreement H. and W. are expressed to be tenants in common. The purchase price has now been paid, and H. and W. have requested A. to transfer the land to them as joint tenants, which A. has agreed to do. Will the consent of the Land Sales Court be necessary?

ANSWER: No. The initial transaction is dated prior to the Servicemen's Settlement and Land Sales Act, 1943 (which is not retrospective), and it is considered that the mere transformation of an equitable tenancy in common into a joint tenancy would be within the exemption of s. 43 (2) (b) (*ibid.*) H. and W. will each still own one-half share, and either may break the joint tenancy *inter vivos*, and as between H. and W. no valuable consideration (it is assumed) is passing.

X.

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2. Contract.—*Lending Library—Daily Fine for Non-return of Book after Specified Return Date—Whether Chargeable.*

QUESTION: A client of mine runs a small lending library. The terms on which the books are lent are printed on a sheet attached to the front page of each book, one of the terms being that, if the book is not returned by the date below, a fine of 3d. per week is payable.

One customer, who has been long overdue in returning a book, now objects to paying the fine, on the grounds that it is not legally recoverable. The charge of a fine seems to be a universal practice in all lending libraries, and I am unable to find any authority against it apart from the question of penalty.

Is such a fine properly chargeable?

ANSWER: Yes. It is of the essence of the running of a lending library that books should be returned after a reasonable time for perusal, so that all the members of or subscribers to the library may have the opportunity of reading them. The fact that the payment for delay is called a "fine" does not make it unrecoverable. It is in the same category as those sums mentioned in *Leake on Contracts*, 8th Ed. 844: "accordingly charter-parties usually fix the sum to be paid daily for the demurrage or detention of the ship beyond the days allowed for loading and unloading. And building contracts stipulate for a fixed sum to be paid daily or weekly for delay in completion of the work": and see *10 Halsbury's Laws of England*, 2nd Ed. 142; *Cellulose Acetate Silk Co.* v. *Widnes Foundry (1925) Ltd.*, [1933] A.C. 20, 25, and *Law* v. *Redditch Local Board*, [1892] 1 Q.B. 127, 132.

B.2.

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3. Local Authorities.—*Encroachment on Road—Removal of Encroachment—Procedure to be followed.*

QUESTION: A local authority is compelled to obtain from the Court a declaration as to its rights under the following facts. Some eighteen persons encroached on a beach road and erected shacks of a more or less permanent nature. Owing to housing shortage, they have been allowed to remain, but the local authority now desires to ascertain its legal position. What is the correct form of action: (*a*) By an originating summons for a Declaratory Order: or (*b*) an ordinary action? Can all be joined in one action, or must there be as many separate actions as there are parties concerned?

ANSWER: It is assumed that the local authority is a Borough Council or a Town Board to which the relevant sections of the Municipal Corporations Act apply. It is also assumed that the "beach road" is a street as defined by s. 174 of the Municipal Corporations Act, 1933. In these circumstances, s. 203 of the Municipal Corporations Act, 1933, applies.

Any licenses authorizing the encroachment, referred to in subs. 1 should be revoked, and notice should be given requiring the removal of the shacks. If any person fails to remove the encroachment, a complaint should be made and an order obtained; and, if the encroachment is not then removed, the Council may remove it and recover the cost incurred. A complaint under this section would have to be made against each person separately: see s. 110 of the Justices of the Peace Act, 1927.

If the local authority does not wish to take proceedings under s. 203, it may bring an action for ejectment and recovery of possession commenced by writ of summons and statement of claim: see *McDonald* v. *Selwyn Millinery Co., Ltd.*, [1937] N.Z.L.R. 24. The local authority owns the land in the street in fee simple, and has the rights available to an owner of land in fee simple. In this connection attention should be drawn to s. 97 (1) of the Judicature Act, 1908.

Proceedings by way of originating summons under the Declaratory Judgments Act, 1908, would not be appropriate, as no question of interpretation appears to be involved.

The several defendants could be joined in one action (see R. 61 of the Code of Civil Procedure): but it might be more convenient, if the parties were agreeable, to take a test case.

J.2.

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4. Charitable Gift—*Donation for Building of Cathedral.—Liability to Gift and Death Duty.*

QUESTION: Will a straight-out gift of £1,000 in aid of the building fund of the Wellington Cathedral be liable to gift and to death duty, if the donor dies within three years of gift? Will the taxation be the same if the gift is *inter vivos* or by will? If made by will, and there is liability to death duty, who will be liable for same?

ANSWER: Such a gift is a good charitable trust, as it is in aid of the fabric of a church: *In re Bain, Public Trustee* v. *Ross*, (1929) 45 T.L.R. 617, *In re Martley, Simpson* v. *Cardinal Bourne*, (1931) 47 T.L.R. 392. It will therefore be exempt from all gift duty, if made *inter vivos*, and also from all death duty: s. 2 (*a*) of the Death Duties Amendment Act, 1923, s. 11 of the Finance Act, 1923. *Adams's Law of Death and Gift Duties in New Zealand*, 37. But if it is made by will, it will be liable to estate duty; and the Building Fund will be liable to pay the duty, unless the testator otherwise directs expressly: s. 31 of Death Duties Act, 1921. But it will be exempt from succession duty: *ibid* s. 18.

X.1.