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A SEPARATE COURT OF APPEAL.

IT cannot be necessary in an article written for lawyers to expatiate upon the nature or the importance of the duties discharged by the Court of Appeal. Members of the profession who are accustomed to appear before the Court do not require to be reminded of the difficulties under which its duties are performed. How far those difficulties are realized among the profession generally, we have no means of knowing for certain. But we do know that among counsel who regularly appear before the Court there is a strong and general opinion that reform is overdue.

There is no constitutional principle involved in any reform of the Court of Appeal. That Court is the creation of statute. The Judges forming it, as at present constituted, are Judges of the Supreme Court; and their respective warrants of commission so name and appoint them. The question may, therefore, be dealt with on a general consideration of what is best in the public interest, without any reference to the competency of the members of the Supreme Court Bench. We must say at once, in the clearest possible way, that we intend no criticism, direct or indirect, of the learned Judges who now compose the Court of Appeal. It is true, we believe, that the Court of Appeal has become a quite unsatisfactory tribunal. But it would be even more unsatisfactory if the Judges did not constantly strive—as they do—against the difficulties that confront them.

The present system is marred by two inherent major defects.

First, it is impossible, under the present judicial system, to select Judges with a view to their special aptitude for appellate work, on the one hand, or for Courts of first instance, on the other. It is known to every lawyer that different qualities, which by no means always concur in the same individual, are required for each kind of work. This country, however, has so far insisted that every Judge shall be "Jack of both trades." It is not to be hoped, let alone expected, that every Judge will be master of both.

The other defect is that the present system is cumbrous and unwieldy. It is unsatisfactory to counsel and litigants alike. For a considerable part of the judicial year, the Supreme Court is deprived of the services of five Judges who are sitting in the Court of Appeal Those Judges necessarily sit under the shadow of their next impending Supreme Court sittings. At the end of each Court of Appeal sittings, they must hasten away to their Supreme Court engagements without sometimes a day's delay. How they get their judgments done at all, is difficult to understand. It is not surprising that, at the present moment, judgments in some appeals heard in September–October last are still outstanding.

A system which leads to such unfortunate results is surely not to be tolerated if anything better can be devised.

As Lord Chief Justice Denman said of another judicial system before its reform, our own system "is for the most part the neglected growth of time and accident." It is the view of many leading members of the profession that our present appellate system is close to breaking down; and that it may actually break down, if reform is any longer delayed. Here, as in everything else connected with the administration of justice, the interests of the public are paramount.

"Justice must not be delayed," says the Great Charter of our liberty. In this connection, both in the Supreme Court and in the Court of Appeal, it is felt that, at the present time, delay in the giving of reserved judgments is too great—and too frequent. Experienced practitioners maintain that this is the fault of the present system. If that be correct, then it may be said with confidence that an alteration of that system has become imperative.

I.

By the Court of Appeal Act, 1862, a Court of Appeal in New Zealand was constituted. Section 4 provided that all the Judges of the Supreme Court for the time being should be the Judges of the Court of Appeal.* By s. 5, any two or more of those Judges were empowered to act as the Court of Appeal, provided that two at least should concur in every decision of such Court. The judgment of the Court was to be in accordance with the opinion of the majority of the Judges present.

* Then, as now, the Judges were appointed, as their warrants of appointment show, "Justices of the Supreme Court." They sit in the Court of Appeal now by virtue of the provisions of the Judicature Act, 1908.

The Chief Justice, or, in his absence, the senior puisne Judge present, was to preside.

This system was perhaps the only one practicable in a thinly-populated country, with difficult means of communication and with a small volume of litigation; and, be it noted, with a Judiciary consisting of only four members.

The Court of Appeal Act, 1882, repealed the statute of 1862, and repeated the provisions of that statute to which we have already referred.

The present constitution of the Court of Appeal is found in Part II of the Judicature Act, 1908, in which the provisions of the 1862 and 1882 statutes were re-enacted without change; and in its amendments consequential upon the gradual increase in the number of Judges. When the Judicature Amendment Act was passed in 1913, there were six puisne Judges; and provision was then made for a Chief Justice and seven other Judges. The number was increased to eight by s. 5 of the Judicature Amendment Act, 1923. The Judicature Amendment Act, 1935, enacted that the Supreme Court should consist of the Chief Justice of New Zealand and nine other Judges.

The present constitution of the Court of Appeal is set out in s. 57 (1) (2) of the Judicature Act, 1908, and in s. 5 of the Judicature Amendment Act, 1913, which, as amended, reads in part:

> (1) The Court of Appeal shall consist of two Divisions, to be called respectively the First Division and the Second Division of the Court of Appeal.
>
> (2) Each Division shall consist of five Judges of the Supreme Court to be appointed to that Division by the Governor-General in Council:
>
> Provided that whenever all the Judges of the Supreme Court are present in New Zealand and are available to act as members of the Court of Appeal one of the Divisions may consist of six Judges.
>
> (3) Any Judge of the Supreme Court may belong to both Divisions at the same time. . . .

It will thus be seen that the constitution of our highest appellate tribunal remains exactly the same in 1947 as it was in 1862, in that it consists of *all* the Judges of the Supreme Court. At the time of the passing of the Court of Appeal Act, 1862, there was a Chief Justice (Sir George Arney), with two puisne Judges (Gresson and Johnston, JJ.); and a third Judge, Richmond, J., was appointed on the passing of the Court of Appeal Act, 1862, so as to provide a quorum of three in the Court of Appeal. The Court of Appeal now consists of the Chief Justice and nine puisne Judges. (The appointment of additional Judges would, therefore, aggravate, not improve, the present position in the Court of Appeal, and, incidentally, in the Supreme Court.)

Eighty-five years ago, when the Court was constituted, the necessary minimum of three appellate Judges could only be secured by appointing them all. It would, of course, be futile to refer to that as a precedent in any attempt to justify the present system of appointing every one of ten Judges to sit in the Court of Appeal.

The Court of Appeal now, and for some years past, has sat on three occasions during the year, the sittings commencing respectively on the first Monday in March, June, and September. A glance at the list of Supreme Court sittings for 1947 will show that the criminal sessions (followed by the civil sessions in each case) commences in the main centres respectively on February 4, April 29, July 22, and October 21, with the exception of the Wellington sessions which, in each of those periods, commences a day earlier. The period elapsing between the commencement of the sittings of the Court of Appeal on March 3 and the commencement of the criminal sessions as above, is exactly seven weeks, out of which comes the Easter vacation of over a week. The Court of Appeal again sits on June 9, and the various criminal sessions to which we have referred are due to commence on July 21–22, only six weeks later. The third sittings of the Court of Appeal in the present year is due to commence on September 8. The criminal sessions in the main centres, commencing on October 20–21, leave the Court of Appeal an intervening period of six weeks.

We now proceed to show the number of weeks during which the Court of Appeal has sat in the past five years—

1941. First Division (March–April), 5 weeks; Second Division (June–July), 5 weeks; First Division (September–October), 4 weeks: Total: 14 weeks.

1942. First Division (March–April), 4 weeks; Second Division (June), 4 weeks; First Division (September–October), 5 weeks: Total: 14 weeks.

1943. Second Division (March–April), 5 weeks; First Division (June–July), 5 weeks; Second Division (September), 4 weeks: Total: 14 weeks.

1944. First Division (March), 6 weeks; Second Division (June–July), 4 weeks; First Division (September–October), 4½ weeks: Total: 14½ weeks.

1945. Second Division (March), 4 weeks; First Division (June–July), 5 weeks; Second Division (September–October), 4 weeks: Total: 13 weeks.

1946. First Division (March–April), 7 weeks; Second Division (June–July), 4 weeks; First Division (September–October), 6 weeks: Total: 17 weeks. (In this year, the Court sat on occasions for long hours, and sometimes on Saturday mornings.)

The foregoing information is compiled from the actual sitting days beginning and ending the sessions. It takes no account of (*a*) the time occupied by non-resident Judges in travelling to and from Wellington; (*b*) the time spent by all the Judges in considering and writing judgments; and (*c*) the time occupied in the delivery of judgments.

Leaving aside the additional time so spent, the fact remains that, on an average, over the past five years, of fourteen weeks' sittings, five Judges are entirely engaged in sitting in the Court of Appeal, and are away from their ordinary duties in the Supreme Court. It must be remembered, moreover, that every now and then cases like those of *Hall* and *Mareo* will alone occupy the Court for weeks at a time.

It is the considered opinion of many practitioners, as it was of the late Mr. C. H. Weston, K.C., who was keenly interested in the setting-up of a separate and permanent Court of Appeal, that, with the establishment of that tribunal, the present number of Supreme Court Judges could be reduced by two without any congestion arising in the Supreme Court except in very unusual circumstances. Mr. Weston pointed out that to engage five Judges continuously for seventeen weeks in a year (as in 1946) is equivalent to occupying one Judge in sitting for eighty-five weeks. The judicial year consists of forty-five working weeks and seven vacation weeks.

The statement of the learned Chief Justice to the Christchurch Bar, as reported last week in the daily Press, shows the present difficulty of making fixtures in the Supreme Court during the absence from their regular duties of two Judges. But the real cause of the difficulty to which His Honour refers is the impending sequestration of five Judges in the Court of Appeal at Wellington. Were it not for that, there would still be eight Judges continuously available for the work of the Supreme Court.

Something has already been said of the delays that occur between hearing and judgment in the Court of Appeal, and of the appalling pressure put upon the Judiciary by the work of that Court. Both these matters are of the greatest moment. To take only one example relating to delay, there is at present undelivered since September a judgment relating to a picture-theatre. Should the appeal succeed the appellants will have lost a large sum in profits, solely through being kept out of possession meanwhile.

Another defect of the present system—this time in the Court's criminal appellate jurisdiction—imposes great hardship on a possibly innocent prisoner by inevitable delay in having his appeal against conviction heard and determined. This arises from the fact that the Court sits only three times in a year. For example, a prisoner convicted at the criminal sessions in October has anxiously to wait five months until the March sittings of the Court of Appeal for his appeal to be heard. In England, such an appeal would be disposed of within, usually, ten days at the most.

Any one who has had experience of the Court of Appeal in recent years deplores the growing frequency of the occasions, towards the end of a sittings, on which counsel are urged by the Court to finish their arguments by a certain named hour, since members of the Court cannot sit thereafter owing to their having made travel arrangements to enable them to meet their engagements for criminal and civil sittings in the Supreme Court in their respective Districts. Again, lack of time sometimes prevents appeals being heard at the sittings for which they have been set down; and they must inevitably stand over until the next sittings, three months or five months later.

Another result of the pressure of Court of Appeal work, or the preparation of Court of Appeal judgments, is the frequent delay in the appearance of reserved Supreme Court decisions. This, unfortunately, is very embarrassing to poor litigants (or the poor dependants of deceased persons) in actions for damages for personal or fatal injuries; because, if such judgments are delayed indefinitely, uncertainty and real hardship press upon the unfortunate claimants—sometimes in aggravation of their physical or mental condition; always in a continuation of their poverty, which may make avoidable demands on the Social Security funds.

The effects of having appellate work done against time may well be even more serious; and, under the present system, the Court of Appeal must always work against time.

The Court makes its fixtures on the first day of each sittings; and the purpose of their Honours is to fill in as many sitting days as possible in the six weeks' period usually available to them. Almost invariably, in recent years, all such days have been fully occupied in Court.

Judgments given by their Honours during the sittings can only be produced by working long hours at night. Even then, a number of judgments necessarily remain undelivered at the end of the sittings; and these must be produced in the welter of the Supreme Court sittings that follows immediately. (This usually means full time in Court on every day of the week for weeks to come.) It is impossible for Judges so engaged to concentrate on their Court of Appeal judgments in the way that they would wish to do.

The Supreme Court work, for which a Judge leaves the Court of Appeal, brings its own urgencies in the way of reserved judgments requiring consideration; and these, in turn, as we have indicated, are often delayed for many months. It is, therefore, noteworthy that, as has already been stated, the Court of Appeal judgments sometimes remain undelivered for periods up to six months*. At the time of writing, there are at least three judgments still to be delivered in respect of appeals heard at the September, 1946, sittings of the Court of Appeal†; another was delivered on January 31.

This is not at all the atmosphere that ought to surround the members of an appellate tribunal. Ample leisure is essential to them, in order that judgments may be considered and discussed fully and without haste; and a Court of Appeal ought not, as a rule, to be expected to sit on more than half the working-days in the year‡. In addition, the members of the Court require daily access to one another for an exchange of views when preparing their judgments.

The work cannot properly be done except in an atmosphere conducive to calm and detached deliberation. Leisure, in the face of any difficult question, is essential to clarity, first of mind and then of expression. "The law," said Sir Frederick Pollock, "is not made by casual and hasty decisions in Courts of first instance. Its guiding principles and the harmony of its controlling ideas must be sought in the considered judgments of the higher tribunals."

Unhurried consideration leads to certainty of mind, and is evidenced by conciseness, by apt arrangement, and, above all, by exactitude of language. It is not surprising that such characteristics are sometimes lacking in judgments produced under the handicaps of the present system.

It is submitted that, on the foregoing grounds alone, the present system in New Zealand is unfair both to Judges and to litigants alike.

II.

What is the remedy? Surely it lies in the constitution of a separate Court of Appeal whose members are chosen for appellate work, and given leisure to do it. That is the system obtaining in England, where

* *Stannus* v. *Commissioner of Stamp Duties*, [1947] N.Z.L.R. 1, was heard on March 7, 8, 1946, and judgment delivered on October 15, by a Court comprising Judges resident in Dunedin, Auckland, and Wellington.

† One of these appeals, *Horne* v. *The King*, arose out of a petition of right by the widow of a deceased Public Works employee for damages consequent on his death in a collision between a truck and a rail-car. The hearing by the Court of Appeal of a motion for judgment for the suppliant, and a motion for judgment for the Crown or alternatively for a new trial, removed into that Court, took place on October 7-10, 1946.

‡ The English legal periodicals constantly remind us that there is a considerable body of informed opinion that the Court of Appeal in England, which sometimes sits five days in a week, should not be asked to undertake so many days' continuous sittings; because, although their Lordships bring out judgments, on an average, ten days after the last day of hearing, more leisure should be given them for consideration and deliberation.

judgments of the greatest weight and authority, even upon complex questions, are commonly delivered within a week or ten days.

Any suggestion of reform in the present constitution of the Court of Appeal must come from the practising Bar; because, as Lord Chief Justice Denman said:

> To form schemes for altering the law is no part of the Judge's vocation. . . . Besides the constant occupation of their minds in their important functions and the necessity for the undisturbed enjoyment of their hard-earned leisure, there are feelings in the Judges which must ever strengthen the reluctance to assent to alteration. They have administered the law as they found it with implicit confidence and even veneration, which unite in them with all the obvious and instinctive motives for abhorring change. . . . The system which they found they believe to have been established on full deliberation by the wisdom of former ages, and hence impute to all innovators the arrogance of reversing a decision.

It is well known that the late Sir John Findlay, when Attorney-General, had drafted in 1907 a Bill for the establishment of a separate Court of Appeal; and that the measure was dropped on account of opposition by the Judges of that time, coupled with the fact that the Attorney-General did not sufficiently enlist the support of the profession in his proposal.

The general opinion of those members of the profession to whom we referred before writing this article favours the appointment of a permanent Court of Appeal, to consist of three Judges to be entitled "Justices of Appeal."

The only *ex officio* member of the Court, in addition to the Justices of Appeal, would be the Chief Justice; and he should retain his present precedence over all Judges, including the Justices of Appeal*. It seems necessary and advisable that the Chief Justice of New Zealand should remain in close touch with the administration of justice and in proximity to the public, especially in criminal matters, as is traditional in the office of the Lord Chief Justice of England, who, like the Chief Justice of New Zealand, is the person to whom is entrusted the office of supervising generally the administration of justice in the superior Courts. (For these reasons, the Lord Chief Justice of England never sits in the Court of Appeal, though he is an *ex officio* member of that tribunal.)

While the three Justices of Appeal would normally constitute a permanent Court of Appeal, if, through illness or other cause, one of them should be unable to sit, it would appear proper that the Chief Justice of New Zealand should take his place in the Court of Appeal during such absence or incapacity, and, by virtue of his office, preside at the sittings of the Court of Appeal at which he is present. In this connection, it might be well that any statute setting up a permanent Court of Appeal should provide that, if the Chief Justice is unable to sit, or if there are two temporary vacancies on the Court, any Justice of the Supreme Court could be co-opted to become *ad hoc* a temporary member of the Court of Appeal.

Another matter upon which opinion seems well settled is that the salaries of the Justices of Appeal should be the same as those of the puisne Judges of the Supreme Court. This follows the English practice. Whether or not the President of the Court of Appeal should receive some additional remuneration for his duties of administering and directing the sittings of the new Court, is a matter of policy for consideration.

There may be some difference of opinion on the question whether or not the new Court should sit permanently in Wellington. There is nothing to prevent the Court of Appeal as at present constituted from sitting elsewhere than in Wellington; in fact, it has done so, as is shown by *Reg.* v. *Hall*, (1887) N.Z.L.R. 5 C.A. 93, when the Court of Appeal sat in Christchurch; and *Godwin* v. *Walker*, [1938] N.Z.L.R. 712, when the Court sat in Auckland. There seems no reason why the new Court should not, when found convenient, hold its sittings in the centres of the larger judicial districts. In fact, it seems that a good case can be made out for reduction in the cost of litigation by the hearing of appeals where they arise.

III.

The whole success of any Court depends upon its personnel.

Unless the men selected as Justices of Appeal are of the highest standing in the profession—men not only of experience and sound legal knowledge, but also possessing the true appellate type of mind—it would be unfortunate indeed. Such men are in our midst.

Courts of Appeal are nowhere constituted merely for lawyers or for the convenience of Judges, but in the interests of justice and for the benefit of the public at large.

The prime duty of an appellate Court is the search for justice rather than the quest for error. And, to perform that duty, none but the best lawyers should be appointed.

* This follows the provisions of the corresponding English statute: the Supreme Court of Judicature Act, 1925 (*4 Halsury's Complete Statutes of England*, 146).

SUMMARY OF RECENT JUDGMENTS.

GILES v. LOWE.

SUPREME COURT. Wellington. 1946. December 2. JOHNSTON, J.

Rent Restriction—Business Premises—Economic Stabilization Emergency Regulations—Amendment to Regulations—Urban Property—Notice to Quit given and Action for Possession commenced before coming into force of Amending Regulations—Action heard thereafter—Whether Amendment applicable to Action—Economic Stabilization Emergency Regulations, 1942 (Serial No. 1942/335), Reg. 21B (1), (2)—Amendment No. 9 (Serial No. 1946/184), Reg. 3.

The amendment (No. 9) to the Economic Stabilization Emergency Regulations, 1942, which came into force on October 31, 1946, and which, *inter alia*, adds to the principal regulations Reg. 21B (1), which provides that an order for the recovery of possession of any urban property should be made only on one of the grounds therein specified, applies to an action for possession heard after that date, notwithstanding the facts that notice to quit had been given and the proceedings for possession had been commenced before the amending regulations came into force.

Quilter v. *Mapleson*, (1882) 9 Q.B.D. 672, distinguished.
Landrigan v. *Simons*, [1924] 1 K.B. 509, applied.

Observations on the object of the amendment to the regulations in respect of urban property, and the principles to be deduced therefrom.

Counsel: *Harding* and *Macandrew*, for the plaintiff; *J. B. O'Regan*, for the defendant.

Solicitors: *Fell, Putnam, and Macandrew*, Wellington, for the plaintiff; *Bell and O'Regan*, Wellington, for the defendant.

DRUM v. COLEMAN AND ANOTHER.

SUPREME COURT. Wanganui. 1946. November 7. FAIR, J.

Rent Restriction—Dwellinghouse—Tenancy comprising Shop and Dwellinghouse and a Bakehouse distant therefrom on Another Section—Tenant's Consent to Owner's taking Possession of Bakehouse—Whether such Consent prevents Tenant from invoking Statutory Protection in Respect of Dwellinghouse—Fair Rents Act, 1936, s. 2—Fair Rents Amendment Act, 1942, s. 8.

In determining the question whether premises come within the definition of " dwellinghouse " in s. 2 of the Fair Rents Act, 1936, the test is not what was the dominant purpose for which the premises were let, business or dwelling. So long as they have been let and used as a dwellinghouse, they are entitled to protection, even although they have been mainly used for business purposes.

Ellen v. *Goldstein*, (1920) 89 L.J. Ch. 586, *Epsom Grandstand Association, Ltd.* v. *Clarke*, [1919] W.N. 170, and *Lister* v. *Toomey*, [1946] N.Z.L.R. 414, applied.

Where a separate part of the premises is used for other than a residence, it may be taken out of the protection of the Fair Rents Act, 1936, but the remainder is still within the protection.

Gidden v. *Mills*, [1925] 2 K.B. 713, and *Callaghan* v. *Bristowe*, (1920) 89 L.J. K.B. 817, followed.

Therefore, where the tenant (under his lease of a baker's premises) occupied a shop, dwellinghouse, and appurtenances, on one section, and a bakehouse on a detached section some 100 yards away, his consent to an order for possession of the bakehouse did not prevent him invoking the protection of the Fair Rents Act, 1936, as to the balance of the premises let.

Counsel: *Ritchie*, for the plaintiff; *Baird*, for the second defendant.

Solicitors: *L. N. Ritchie*, Raetihi, for the plaintiff; *L. B. Baird*, Raetihi, for the second defendant.

In re BULLOCK AND COMPANY, LIMITED.

SUPREME COURT. Christchurch. 1946. October 11. SMITH, J.

Company Law—Reduction of Capital—Uncalled Capital not required—Company's Business that of Land, Estate and General Commission Agents—Whether such arrangements Constituted " Special circumstances "—Whether justifying Direction as to Non-compliance with the Companies Act, 1933—Direction that the words " And reduced " form part of Company's Title for Period of One Month—Companies Act, 1933, s. 68 (2) (3).

A company carried on business as land, estate, and general commission agents with integrity. It paid all moneys collected by it to which its clients, as property owners, mortgagees and other persons, were entitled into a special trust account at its bank, entirely separate from its ordinary trading account, all such moneys being always available to its respective clients at call. Apart from the claims created by such accounts in connection with such special trust account, the only other liabilities of the company were the debts owing on the usual current account for rent, wages, and other running expenses, that were discharged every month. The company petitioned the Court to confirm a reduction of its capital by cancelling uncalled capital amounting to £6,000 which had never been required or used in excess of the requirements of the company.

The company asked in particular for an order under s. 68 (3) of the Companies Act, 1933, directing that in the " special circumstances " of the case, within the meaning of that phrase in s. 68 (3) (which provides for objections by creditors and settlement of the list of objecting creditors), the provisions of s. 68 (2) should not apply as regards any of the company's creditors.

Held, That the company's trust account arrangements amounted to an appropriation of moneys to meet the claims of the creditors on such trust account, thus constituting " special circumstances " within the meaning of s. 68 (3) of the Companies Act, 1933, and that the said direction should be given.

In re A Petrol-Station Co., Ltd., [1938] N.Z.L.R. 196, *In re Austral Development Pty. Ltd.*, [1942] V.L.R. 81, and *In re Arizona Copper Co., Ltd.*, [1926] S.C. (Ct. of Sess.) 315, applied.

Notice of the reduction having been given to the company's bank, and the consent of the bank to the deduction having been filed, the Court considered the form of the notice of the reduction to be given for the benefit of persons subsequently dealing with the company.

Held further, That notice of the reduction and the reason therefor should be given by advertisement in a newspaper circulating in the district as well as in the *New Zealand Gazette*, and that the words " and reduced " should form part of the title of the company for one month from the date of the Court's order.

In re Adelaide Mortgage and Investment, [1928] S.A.S.R. 478, followed.

Counsel: *Hensley*, in support of the motion on petition.

Solicitors: *Livingstone and Hensley*, Christchurch, for the petitioner.

LATIMER v. LATIMER AND ANOTHER.

SUPREME COURT. Timaru. In Chambers. 1946. October 16, 21. SMITH, J.

Divorce and Matrimonial Causes—Intervention—Condonation—Cohabitation with Respondent since Decree nisi—Right of Solicitor-General to intervene as one of the Public—Fixing of Time within which to file his plea—Divorce and Matrimonial Causes Act, 1928, s. 24 (1)—Matrimonial Causes Rules, 1943, R. 53.

Where the Solicitor-General receives information that a petitioner who has obtained a decree *nisi* and who has filed a motion to have that decree made absolute has, since the making of the decree *nisi*, cohabited with the respondent and condoned the adultery, and that these material facts have not been brought before the Court, he is entitled under s. 24 (1) of the Divorce and Matrimonial Causes Act, 1928, to intervene as one of the public.

Jobson v. *Jobson*, (1911) 30 N.Z.L.R. 48, followed.

In granting leave to intervene the Court should direct the fixing of a time within which the Solicitor-General should file his plea in order to comply with r. 53 of the Matrimonial Causes Rules, and of a time within which, subsequent to such filing, he should deliver a copy thereof to the solicitor for the petitioner

Counsel: *W. D. Campbell*, for the Solicitor-General; *G. J. Walker*, for the petitioner; *R. Stout*, for the respondent; *W. R. Walton*, for the co-respondent.

Solicitors: *W. D. Campbell*, Timaru, for the Solicitor-General; *Joynt and Walker*, Timaru, for the petitioner; *R. Stout*, Timaru, for the respondent; *W. R. Walton*, Timaru, for the co-respondent.

McLEAN v. STAR COAL COMPANY, LIMITED.

COMPENSATION COURT. Invercargill. 1946. April 1, 3, October 21. ONGLEY, J.

Workers' Compensation—Accident arising out of and in the Course of the Employment—Eye-injury—Partial Loss of Sight in One Eye—Stereoscopic Vision still present—Whether any Loss of Earning-power—Workers' Compensation Act, 1922, s. 3.

The Compensation Court has no power to award compensation for injury arising out of and in the course of employment unless the injury results in loss of earning-power, or is a Schedule injury.

Karu v. *Martha Gold-mining Co. (Waihi), Ltd.*, [1945] G.L.R. 204, *Brown* v. *Watson*, [1942] G.L.R. 289, and *Beel* v. *Bruhns*, [1932] N.Z.L.R. 1374, followed.

A worker, after the injury to one eye, had at least 6/18 (meaning that he had lost about 30 per cent. of the vision of that eye) or even not less than 6/24 unaided vision in that eye and normal vision in the other eye: on this, the medical witnesses were in agreement.

The Court had to decide what effect the loss of that amount of vision would have (particularly in regard to headaches, judging distance and timbering work); and what would be the effect of the unequal focus of the plaintiff's eyes; and the extent, (if any) of his incapacity for work as a miner.

After submission of the notes of evidence to a medical referee and perusal of his report,

Held, That, notwithstanding the defective vision in one eye, the plaintiff still had stereoscopic vision and was fit for work underground, and had, therefore, suffered no loss of earning-power.

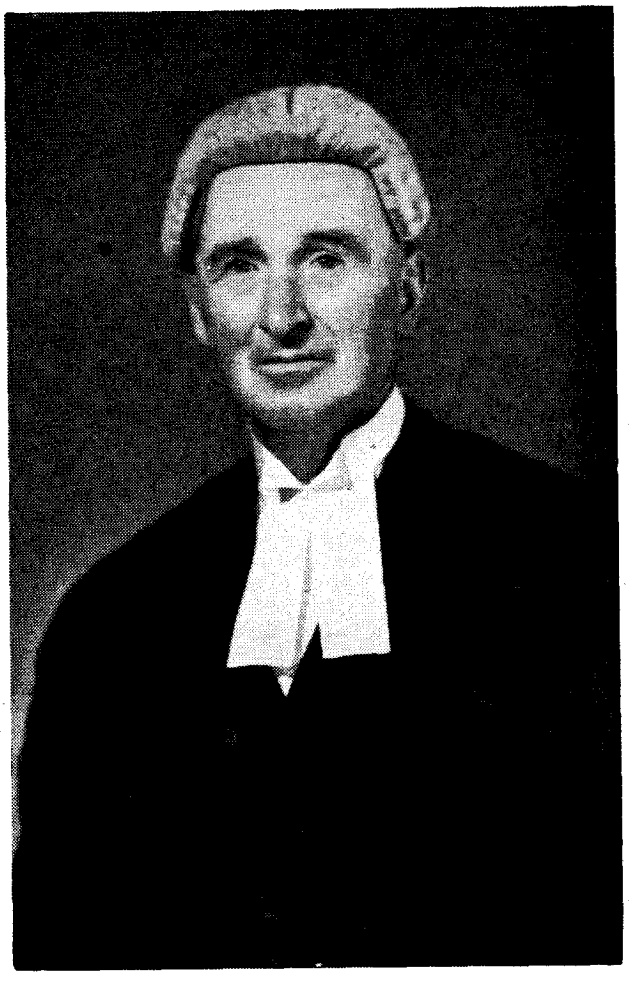
Counsel: *L. F. Moller*, for the plaintiff; *S. M. Macalister*, for the defendant.

Solicitors: *Stout, Hewat, and Moller*, Invercargill, for the plaintiff; *Macalister Brothers*, Invercargill, for the defendant.

MR. JUSTICE CHRISTIE.

Appointment as Temporary Judge.

On February 12, the Attorney-General, the Hon. H. G. R. Mason, K.C., announced the appointment of Mr. James Christie, C.M.G., LL.M., as a temporary Justice of the Supreme Court, consequent on the absence in Japan of Mr. Justice Northcroft and the pending entry of Mr. Justice Finlay upon his duties as chairman of the Royal Commission on Gaming.



S. P. Andrew and Sons, photo.

Mr. Justice Christie.

The new Judge was born in 1880 in the mining town of Blue Spur, near Lawrence, Otago. Mr. Christie is another famous son of that little gold-mining district of Lawrence. Among others from that small place who of recent years have served in prominent positions are Judge Tyndall, and the present Commissioner of Police, Mr. James Cummings, and his predecessor in office, his brother, Mr. D. J. Cummings.

He received his early education at the Blue Spur Public School, then under the headmastership of Mr. A. W. Tyndall 'father of the present Judge of the Court of Arbitration.' After serving for three years as a pupil-teacher under the Otago Education Board, Mr. Christie, in 1900, attended the Lawrence District High School, where that fine educator, the late Mr. John Stenhouse, was Rector. In March, 1901, he was appointed a cadet in the Treasury Department, being transferred to the Crown Law Office, where he served until 1907, when he joined the Law Drafting Office on Professor Salmond's appointment as that Office's counsel.

After serving as acting Law Draftsman under the guidance and direction of Sir John Salmond, who had become Solicitor-General, Mr. Christie became Parliamentary Law Draftsman in 1918, and he continued in that office until 1938. He then retired from the office of Law Draftsman, and became Counsel to the Law Drafting Office and Compiler of Statutes. He resigned from that position in 1945. Now, like Sir Alison Russell, who was Counsel to the Law Drafting Office of the Parliament at Westminster, and afterward became Chief Justice of Tanganyika, he has attained the Judiciary.

From the time when he typed and checked every word of the late Sir John Salmond's Native Bill in 1909, Mr. Christie was intimately connected with the inception of much varied legislation. For instance, he drafted the first War Pensions Bill during the War of 1914–18, and he was responsible for the drafting of the War Pensions Bill in 1944. Mr. Christie drafted many important Bills of an original nature, including the Social Security Act, 1938. Another piece of original drafting which has stood the test of time was his Motor-vehicles Insurance (Third-party Risks) Act, 1928.

His Honour was Consulting Editor and a member of the Editorial Board which supervised the compilation of *The Public Acts of New Zealand (Reprint), 1908–1931*, in connection with which he visited England; and his intimate association with this great work, which has been copied in other Dominions in recent years, is recorded in Volume I, pp. ix, x, and xiv.

During his visit to England in connection with the *Reprint*, in 1930, Mr. Christie was consulted upon the drafting of the Statute of Westminster, and that famous enactment contains suggestions of form made by him.

Since 1937, the new Judge has been a member of the Council of the Society of Comparative Legislation, in company with a number of very distinguished jurists, including Viscount Simon, Lord Macmillan (who is Chairman of the Executive Committee of the Council), Lord du Parcq, and Sir Arnold McNair, K.C., Judge of the new International Court. For more than thirty years he has contributed to the *Journal of Comparative Legislation* an annual review of New Zealand legislation, in addition to articles on various aspects of our law. In the May, 1946, number, the editor of the *Journal*, Sir Cecil Carr, K.C., LL.D., wrote: "For many years Mr. Christie's summaries of New Zealand

laws have furnished an admired model. It is sad that the present volume contains the last of them, as he is now retiring from the Law Drafting Office in which he has served so well."

The great formative influence on the new Judge as a draftsman was his early association with Sir John Salmond, writes one who has been intimately associated with him. When the latter left the University to become Counsel to the Law Drafting Office, Mr. Christie was his First Clerk, and for two years, until Sir John became Solicitor-General, their association was very close indeed. New to law drafting, Mr. Christie had no bad habits to undo. From the beginning he was schooled in what the late Sir Francis Bell subsequently and humorously described "the gospel according to Sir John." Among other lessons he then learned was the value of absolute integrity. This quality was inherent in the man himself, but was well brought out by Sir John.

A little later in his career, Mr. Christie came under the control of Sir Francis Bell as Attorney-General, and here again was a great influence. Much as he profited from Sir Francis, and much as he respected and admired him, he was no "Yes man," a quality which none appreciated more than Sir Francis himself. On one famous occasion, when a head of a Department—since deceased—complained of Mr. Christie's handling of his preliminary draftsmanship, Sir Francis Bell said, "Well, Blank, if it's any consolation to you to know it, Christie thinks you are an even worse draftsman than I am."

Mr. Christie always kept before him the saying of Fitzjames Stephen, that "it is not sufficient that a draftsman should so draft a Bill that a person reading in good faith could understand it; he must so draft it that a person reading in bad faith could not possibly misunderstand it." This was, of course, an unattainable counsel of perfection; but nobody more than James Christie ever strove to achieve it.

Among his other qualities was that of possibly the best proof-reader that ever scanned an official document.

His association with Sir John Salmond started during the latter's first year as a Professor at Victoria College, when Mr. Christie and half a dozen others formed his first class in Constitutional Law, Conflict of Laws, and International Law. Mr. Christie had the whole of his law education at Victoria College, and, though never in private practice, had experience both during his term in the Crown Law Office and in the Law Drafting Office of practically every branch of law.

Judicial criticism of law-drafting is part of the tradition of the profession, but on one occasion Mr. Christie received a great compliment from a Judge very difficult to please, the late Sir William Sim. The consolidation of the Divorce and Matrimonial Causes Act at present on the Statute Book was originally prepared by Sir William, and when he handed the completed draft to the Hon. Mr. Frank Rolleston, then Attorney-General, he sent a note saying that whatever merits the bill had were entirely due to Mr. Christie.

His inherent qualities, so well drawn out and schooled under Sir John Salmond and Sir Francis Bell, should stand the new Judge in good stead during his period on the Supreme Court Bench.

Those who have had the privilege of being associated with the new Judge in his work speak in admiration of the acuteness of his mind in sifting and marshalling a complex mass of facts, in solving the legal and other problems arising from them, and in presenting the solution in a style that might well serve as a model for any one using the English tongue. Combined with these gifts he has a wide range of knowledge, and the qualities of true modesty, kindliness, courtesy, infinite patience, and a sense of humour. Certainly, no one ever appointed to the Judiciary had a more scrupulous conscience, or a higher sense of justice.

ADVERTISING AND THE LAW.

The Regulation of Signs.

By J. R. Marshall, LL.M.

The following report appeared recently in a city newspaper:—

> The City Council's proposal to control all signs and hoardings was viewed with some concern at a meeting of the Council of the Chamber of Commerce. The Secretary explained that the City Council proposed to issue permits for signs and hoardings and to charge an annual license fee.

It might, therefore, be of some practical interest to the profession to know what the law relating to the control of advertising is.

The Common Law.

The common law contains no provisions restricting the right of a man to advertise the products of his industry. He may cover the country side with hoardings and the city with electric signs, without let or hindrance from the common law. The ears may be protected from noise and the nose from offensive and noisome smells, but the eyes must endure the silent loudness of a hoarding, or look the other way.

Before the days of advertisements it was established law that a view or prospect could not be protected except by agreement. In *Attorney-General* v. *Doughty*, (1752) 2 Ves. Sen. 453, 28 E.R. 290, an attempt was made to prevent the erection of buildings which would obstruct the view from Gray's Inn gardens. Lord Hardwicke, L.C., said, "I know no general rule of common law which warrants that, or says that building so as to stop another's prospect is a nuisance." In the famous case of *Dalton* v. *Angus*, (1881) 6 App. Cas. 740, 824, Lord Blackburn said, "It was held expedient that the right of prospect, which would impose a burthen on a very large and indefinite area should not be allowed to be created except by agree-

ment." In *Foli* v. *Devonshire Club*, (1887) 3 T.L.R. 706, Chitty, J., said that the law was well settled that a mere amenity such as a view could not be protected.

It is otherwise where there is a right to a view acquired by agreement, or where the right of advertising is restricted by agreement. In *Heard* v. *Stuart*, (1907) 24 T.L.R. 104, the lessee of a building adjoining a churchyard was restrained by injunction from allowing a wall to be used for bill-posting. The grounds for the decision were that such advertising was, *inter alia*, a breach of the covenant on the part of the lessee not to do anything which might be to the annoyance of the lessor, or the neighbourhood. In *Nussey* v. *Provincial Bill Posting Co. and Eddison*, [1909] 1 Ch. 734, a majority of the Court of Appeal held that an advertisement hoarding, 156 ft. long and 15 ft. high, erected in a residential garden estate, was a breach of a restrictive covenant prohibiting the erection of any building for the carrying on of an offensive trade.

Public Opinion.

That there are many who, in spite of the common law, are not disposed to endure the nuisance of being hit in the eye by a striking advertisement, is evidenced by the success which attended the efforts of Lord Bledisloe, when he was Governor-General of New Zealand, in securing the voluntary removal of many hoardings from the New Zealand countryside, and also by the success of the Wellington Beautifying Society, some years ago, in securing the removal of seats erected in the Wellington streets for the purpose of carrying advertisements.

But the weight of public opinion is not always strong enough to secure the voluntary removal of offending advertisements. In 1901 the advertising agents of a Chicago firm conceived the idea of erecting hoardings on the white cliffs of Dover. Two enormous boards were erected in such a position that they were visible from both land and sea. They were intended to be the first object to catch the attention of Americans crossing to England.

The Mayor, Councillors, and Burgesses of the Borough of Dover rose up in wrath, but the hard-bitten Chicago advertiser, strong in the law and safe beyond the Atlantic Ocean, was unmoved by protests. It says much for the law-abiding spirit of the people of Dover that they did not take up an axe, like Hone Heke, and hew down the offensive structure. Instead, they appealed to the Country and stirred up a general outcry against this desecration of the ramparts of England. To this general outcry Parliament replied with the Dover Corporation Act, 1901. This Act prohibited within the Borough of Dover the erection of all advertisements, whether existing or not, unless licensed by the Corporation, subject to an appeal to a Magistrate.

Encouraged by the success of Dover, the town of Leamington, in Warwickshire, having many scenic beauties to protect, applied for similar powers. But the principles of liberalism were still respected in 1901, and the Local Government Board and the Home Office submitted to the Select Committee which was considering the matter, that, unless such urgent necessity was shown, as was apparent in the case of Dover, similar powers should not be bestowed.

Statute Law in England.

At the beginning of this century the advertiser who did not offend against the criminal law, or the law of libel, was free to advertise to the limit of his resources. But the growth of advertising in many forms, and the excessive lengths to which some advertisers were prepared to go to attract attention to their products, led to an agitation, by those interested in the preservation of the beauty of the English countryside, for some form of control for advertising. The English legislation which is summarized here is given as a basis for comparison with New Zealand statutes.

In 1907 the Advertisements Regulation Act was passed and this Act has since been supplemented by the Advertisements Regulation Act, 1925. The Act of 1907 (7 Edw. 7, c. 27) (*13 Halsbury's Complete Statutes of England*, 908) empowered local authorities to make by-laws—

> (1) For the regulation and control of hoardings and similar structures used for the purpose of advertising when they exceed twelve feet in height.
>
> (2) For regulating, restricting, or preventing the exhibition of advertisements in such places and in such manner, or by such means, as to affect injuriously the amenities of a public park or pleasure promenade, or to disfigure the natural beauty of the landscape.

By the Act of 1925 (15 & 16 Geo. 5, c. 52) (*13 Halsbury's Complete Statutes of England*, 1113), the power to make by-laws was extended to cover the exhibition of advertisements disfiguring or injuriously affecting

> (*a*) The view of rural scenery from the highway or railway, or from any public place or water; or
>
> (*b*) The amenities of any village within the district of a rural district council; or
>
> (*c*) The amenities of any historic or public building or monument or of any place frequented by the public solely or chiefly on account of its beauty or historic interest.

By-laws made under these Acts have been considered by the Courts on a number of occasions and the validity of such by-laws has been upheld. In *United Billposting Co.* v. *Somerset County Council*, (1926) 95 L.J. K.B. 899, on a case stated for the opinion of the High Court, the validity of such a by-law was considered. The by-law provided:

> No advertisement shall be exhibited on any hoarding, stand or other similar erection so as to be visible from any public highway or from any public waterway or from any railway and to disfigure the natural beauty of the landscape.

The appellants contended that the by-law was *ultra vires*, uncertain, unreasonable, and repugnant to the law of England as being in restraint of trade. The Court upheld the by-law and the conviction. Lord Hewart, L.C.J., said:

> Counsel for the appellants says that certainty could not be given to it—the by-law—except by a schedule naming all the landscapes of natural beauty which it was sought to protect. In my opinion, the criticism fails. It is true that the Council might name specific places, if it thought fit, but it is within its powers in saying: "You must not anywhere within the area which we have to administer erect advertisements which disfigure the natural beauty of a landscape; and if you erect advertisements at all (except in boroughs and urban districts) you do so at your own risk if they are found to offend against this rule." The degree of certainty required must obviously be related to the subject-matter, and in my opinion this by-law dealing with a necessarily somewhat ambiguous matter cannot be said to be invalid on the ground of uncertainty.

In the same case Shearman, J., said:

> Natural beauty is a thing which cannot be defined by specific instances, and the only complaint of the appellants really is that the County Council have not attempted to define the indefinable.

Further statutory power for controlling advertisements is contained in the Town and Country Planning Act, 1932 (22 & 23 Geo. 5, c. 48) (*25 Halsbury's Complete Statutes of England*, 470). Section 47 of that Act deals with the powers of a town and country planning authority with respect to advertisements and subs. 1 of that section provides :

> Where it appears to the responsible authority that an advertisement displayed or a hoarding set up in the area to which a scheme applies seriously injures the amenity of land specified in the scheme as land to be protected under this Act in respect of advertisements, the authority may serve in the prescribed manner upon the owner of the advertisement or hoarding a notice requiring him to remove it.

This section was considered in the King's Bench Division in the recent case of *Mills and Rockleys, Ltd.* v. *Leicester City Council*, [1946] 1 All E.R. 424. At p. 426, Lord Goddard, L.C.J., says :

> Section 47 (1), as I have just said, provides that if an advertisement which can be objected to on what I may call aesthetic grounds, or affecting the amenities of the district, is put up, the local authority can require that it shall be taken down, and, by other provisions in the section, if the owner does not take it down they can go to the Court and get an order, and then the expenses of taking down the advertisement have to be paid by the person who ought to have taken it down .

Another statutory provision is contained in the Petroleum (Consolidation) Act, 1928 (18 & 19 Geo. 5, c. 32) (*13 Halsbury's Complete Statutes of England*, 1170), which empowers the council of any county or borough for the purpose of preserving rural scenery and places of historic or picturesque interest to make by-laws regulating the appearance or prohibiting the establishment of petroleum filling stations.

The Public Health Act Amendment Act, 1907, s. 91, contains provisions for the prohibition of sky-signs used for advertising purposes.

(*To be concluded.*)

THE TRIAL OF MAJOR JAPANESE WAR CRIMINALS.

The International Military Tribunal for the Far East.

By Flight-Lieutenant Harold Evans, LL.B.*

VI.—Organization of Court-room and Conduct of Proceedings.

The Tribunal held its first public sitting in the auditorium of the War Ministry Building, Tokyo, on Friday, May 3, 1946. A few days prior to this, the Indictment against the twenty-eight Japanese defendants had been lodged by Chief of Counsel for the Prosecution at a special sitting of the Tribunal in Chambers. The opening proceedings on May 3 will be briefly described in the next article. In the present one, a short account will be given of the organization of the Court-room and the conduct of proceedings generally.

The large building where the trial is being held was formerly the office of the Japanese War Ministry. A more fitting place for the trial could hardly be found anywhere in Japan. Here Tojo, War Minister and Prime Minister from December, 1941, to July, 1944, had his Headquarters ; and, in the auditorium where the Tribunal now sits, he used to address senior Army Staff Officers on the conduct of the war against the Allied Nations. The building consists in all of a large central block and a number of separate buildings. It was erected a few years before the war and first used as a Military Academy. On the outbreak of war, the War Ministry took over the buildings, its former quarters being too small. The main building now contains, in addition to the Court-room, Chambers for the Judges, Counsel and Court Administrative officers, and billets for military personnel connected with the Court.

The Court-room itself is large and impressive. It is oblong in shape, in the form of a large lecture or concert hall. There is a gallery at one end for the general public (Allied personnel on one side, and Japanese on the other), and a stage at the other end for distinguished visitors. The Judges' bench occupies the middle part of one of the long sides, and immediately opposite on the other side is the defendants' dock. The area beneath the gallery is for Press correspondents and photographers (Allied and Japanese). Large boxes, where moving and still cameras are installed, are located in three different parts of the Court-room, and Kleig lights hanging from the roof are turned on and off as required.

Arrayed behind the Judges' bench, in order corresponding to the seating (the President of the Tribunal, Sir William Webb, occupying the middle chair), are the flags of the nations represented by the Judges. Immediately below are seated the Judges' Associates, the Clerk of the Court, and other Secretariat officials. On the main floor of the Court are two counsel's tables, one for the prosecution and the other for the defence, with a lectern between them for use by the counsel who is actually addressing the Court. On the opposite side of the prosecution's table is a Court reporters' table, and next to it the witness-stand. Prosecution counsel present in Court, but not immediately engaged in the proceedings, are seated below the distinguished visitors' stage, while defence counsel not taking an active part occupy several rows of seats in front of the defendants' dock.

On the stage behind the seats provided for distinguished visitors, and behind a glass screen, are the members of the Language Section, they being translators and interpreters whose duty it is, in accordance with the Charter, to translate the proceedings—*i.e.*, everything that is spoken in Court—into Japanese and English. The machinery by which this is achieved is as follows. Every seat in Court is provided with

* Secretary to the Hon. Mr. Justice Northcroft, New Zealand Representative on the International Military Tribunal for the trial of Far Eastern War Criminals.

a pair of earphones, together with a selector switch which may be turned to English or Japanese as desired. The main microphones are located in front of the President, immediately below him in front of the Clerk of the Court (whose function it is to receive the documents tendered in evidence), at counsel's lectern on the main floor of the Court, at the witness-stand, and, of course, in the Language Section box itself. Each microphone is provided with a red light, which is controlled by the Language Section and which is used as a signal to stop the person addressing the Court from continuing to speak while his remarks are being translated into Japanese or English.

In order to avoid delay, counsel are obliged, whenever they intend presenting prepared matter—*e.g.*, lengthy statements and documents which they propose to read—to supply the Language Section with their material, together with translations into Japanese or English, at least twenty-four hours in advance of presentation in Court. This permits the Language Section to have the translation checked beforehand, so that, at the time of presentation, the translation can be read over the sound system on the Japanese or English channel while the other channel is being simultaneously used for the original remarks. This method cannot, of course, be used with any matter not prepared in advance. Objections are taken by counsel, for instance, and these, including all the argument upon them, have to be translated a few sentences at a time, and sometimes even sentence by sentence. This is also, of course, the case with cross-examination. It will be appreciated that all proceedings which do not permit of a simultaneous translation are lengthy, and, whenever language corrections have to be made, extremely laborious.

The translations of the Language Section are continuously under observation by the Language Monitors, whose duty it is immediately to correct errors in translation. Where a dispute arises, the matter is referred to a Board of three Language Arbiters, whose decision is final. The Arbiters are also charged with the duty of keeping a general watch on the proceedings and of making any language corrections which appear to them to be necessary.

Complete written records of the proceedings, both in English and in Japanese, are maintained, and it is interesting to note that these records are placed in the library of SCAP's Civil Information and Education Section, in Tokyo, where they are available to the Japanese public.

As mentioned in an earlier article, the Tribunal was empowered by the Charter to determine its own procedure, and rules were accordingly promulgated by the Tribunal shortly before the first public sitting took place. Some of them are worth noticing here.

In the first place, it was provided that each defendant should receive copies of the Charter and the Indictment. In addition, copies (if available) of all documents referred to in the Indictment were required to be supplied by the prosecution to the defendants on the latter's application. If copies were not available, the original documents themselves were to be produced for inspection by the defence. As to documents generally, it is provided that, if the prosecution or the defence receive, or are apprised of, any additional documents which they intend to use in the trial, they must at once notify the opposing side and furnish them with copies as soon as possible. This provision is supplemented by one which prescribes in detail the procedure to be followed in respect of each document intended to be adduced in evidence by either side. It requires that, except as otherwise provided by the Tribunal, a copy of every such document shall be delivered to the opposing side (and also, as already mentioned, to the Language Section) not less than twenty-four hours before it is tendered in evidence. The parts of the document on which the party presenting it intends to rely must be marked, and must be accompanied by a translation of those parts in English or Japanese, as the case may be. The words "except as otherwise provided by the Tribunal" enable the Tribunal, where it is satisfied that no injustice will be done, to dispense with the requirement that a complete copy of every document—*i.e.*, in its entirety—should be supplied. Many documents being extremely lengthy, and some containing only a very small amount of relevant matter, the reason for the proviso will be readily appreciated.

It is provided that the Tribunal, acting through the President, will rule upon all questions arising during the trial, including questions of admissibility of evidence, as to recesses and upon motions. Incidental matters which do not require to be heard in open Court—*e.g.*, requests for production of witnesses, motions for dispensing with the requirements of the rule relating to documents (referred to in the previous paragraph), &c.—are, by arrangement among the Judges and for the sake of convenience, heard and dealt with by the President alone.

(*To be continued.*)

RULES AND REGULATIONS.

Money-order Amending Regulations, 1946. (Post and Telegraph Act, 1928.) No. 1946/199.

Purchase of Wool Emergency Regulations, 1939, Amendment No. 8. (Emergency Regulations Act, 1939.) No. 1946/200.

Motor-spirits Retail Hours Regulations, 1946. (Shops and Offices Amendment Act, 1946.) No. 1946/201.

Dairy (Milk Treatment) Regulations, 1946. (Dairy Industry Act, 1908, and Agriculture (Emergency Powers) Act, 1934, and also Health Act, 1920.) No. 1946/202.

Enemy Trading (Austria) Notice, 1947. (Enemy Trading Emergency Regulations, 1939.) No. 1947/5.

Enemy Property (Austria) Notice, 1947. (Enemy Property Emergency Regulations, 1939.) No. 1947/6.

Enemy Trading (Hungary) Notice, 1947. (Enemy Trading Emergency Regulations, 1939.) No. 1947/7.

Enemy Property (Hungary) Notice, 1947. (Enemy Property Emergency Regulations, 1939.) No. 1947/8.

Enemy Trading (Germany) Notice, 1947. (Enemy Trading Emergency Regulations, 1939.) No. 1947/9.

New Zealand Reparation Estates Order, 1947. (Treaties of Peace Act, 1919, and Western Samoa Order in Council, 1920.) No. 1947/10.

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. 95.—W. TO H.; H. TO W.

Urban Land—Exchange of House Properties—Separate Agreements contemplating Separate Transfers—Mutually dependent and collateral Contracts of Sale—Mutually-determined Equality of Exchange—Whether subject to Provisions of Statute—Servicemen's Settlement and Land Sales Act, 1943, ss. 40 (1), 50 (4).

These appeals arose out of an exchange of house properties by the respective appellants. Though evidenced by two separate agreements for sale and purchase, it was clear that the documents were executed as part of a single transaction and in pursuance of a verbal agreement for exchange. This is disclosed by a letter addressed to the Land Sales Committee by Mrs. W.'s solicitors, which stated: "Arrangements were therefore made to exchange homes . . . When the arrangements were in train for the exchange it was agreed between Mrs. W. and Mrs. H. that no sum should pass, each property being accepted in full satisfaction of the other." The letter went on to say that Mrs. W.'s property had been valued at £1,975 and Mrs. H.'s at £1,525, so that, on valuation figures, Mrs. W. was sacrificing £450. This, however, she was prepared to do, owing to the difficulty of disposing of her property, by reason of its size, age and heavy liability for rates.

The Court (per *Archer*, J.) said: "For the purpose of argument before the Committee and before this Court, the respective values of the two properties were deemed to be as above stated. The Committee considered that, in the circumstances, it could properly grant consent only subject to a condition that Mrs. H. pay to Mrs. W. the sum of £450 by way of equality of exchange.

"Though separately represented, the case for the appellants was substantially argued by Mr. Haggitt, who urged that, as the *bona fides* of the parties could not be doubted, and as it was evident that Mrs. W. was willing to make a sacrifice in order to effect a quick disposal of her property, and as no payment of money was involved, consent should be granted either as of right or by the exercise of discretion under s. 50 (4).

"In *No. 97: L. to N.Z.S.C., Ltd.*, the Court has recently ruled against the contention commonly advanced that s. 50 (4) of the Servicemen's Settlement and Land Sales Act, 1943, invests Land Sales Committees with a discretion to consent, in special circumstances, to transactions which conflict with the general purposes of the Act. The good faith of the parties cannot avail them if the transaction is one to which, on principle, consent should be refused. The question really in issue is whether an exchange of properties differing in value infringes against the principles of the Land Sales Act.

"As has been said, the present transaction is evidenced by two documents, each entitled "Heads of Agreement for Sale and Purchase." The documents are identical in form, and each is in terms appropriate to a sale of land. In each case, the price for the property sold is stated to be £1,525, and it is provided that the price shall be satisfied by the transfer of the purchaser's property to the vendor. Each agreement is conditional upon the consent of the Land Sales Court being granted to them both. In short, it is clear from the face of the documents that each sale is dependent upon the other, and that the price mentioned is a nominal price, as no money is actually to be paid by either party.

"It is no mere matter of form that the documents provide for two separate transfers. An exchange is, in its very nature, a transaction which may be dissected, as has been done in the present case by the parties themselves, into two mutually dependent and collateral contracts of sale. Whether regarded as a single transaction or as two collateral sales, the consent of the Court is necessary under s. 40 (1) of the Land Sales Act, which applies to every sale "or transfer" of land.

"As the Legislature has not exempted exchanges from the Land Sales Act, but has used words wide enough to include exchanges within its scope, it would seem strange if, as Mr. Haggitt suggests, the Court has no occasion to enquire into, and no effective control over, an exchange, even though there may be a substantial difference in the values of the properties affected. In support of the appellant's case, Mr. Haggitt propounded four arguments, which it is now proposed to examine.

"The first was that no objection can properly be taken to either sale at the price of £1,525 set out in the respective contracts. The fallacy of this contention is evident from a perusal of s. 50 of the Act, which by subs. (3) enjoins Committees to take into account the "purchase money *or other consideration*," and by subs. (4) provides that no consent shall be granted if the purchase money "*or other consideration*" exceeds the basic value. The Court is therefore entitled to go behind the figure named as the price to the real considerations for the respective sales. These are the properties themselves, the one being worth £1,525 and the other £1,975.

"The second argument is that Mrs. W. can properly write down the value of her property to such extent as she thinks fit, and so can fix its value at £1,525 for the purposes of this transaction. It is conceived that this argument is also fallacious, because it wrongly assumes that Mrs. W. can properly do as a buyer what she could admittedly do as a seller. In the present transaction she is both a buyer and a seller, and must comply with the requirements of the Land Sales Act in both capacities. As a seller, Mrs. W. may undoubtedly dispose of her property at an under value. As a buyer, however, she is not entitled to give a consideration in excess of the basic value of the property she is buying. Both the basic value of the property bought and the value of the consideration to be given are matters of fact to be determined by the Committee; but, where the consideration is itself a piece of property, it is the actual value of that property to which the Committee must have regard, in accordance with the Act. Thus, while a seller may sell at an under value, it is not competent for a purchaser to place an arbitrary value upon a property offered by him as the consideration for the purchase of some other property.

"Let us apply these principles to the two sales or transfers involved in the present exchange. When Mrs. W., as the seller, agrees to transfer her property to Mrs. H., the basic value of the property transferred is £1,975, and the consideration for the transfer is of the value of £1,525. This is, therefore, a sale at an under value, to which, if it stood alone, no objection could be raised under the Act. But this sale is conditional upon consent being given to the second sale, which provides for the transfer of Mrs. H.'s property to Mrs. W. In this case, the basic value of the property to be transferred is £1,525, but the consideration to be given for it is of the value of £1,975. The consideration, therefore, exceeds the basic value, and the grant of unconditional consent to such a transaction appears to be expressly prohibited by s. 50 (4).

"Mr. Haggitt's third submission is that an exchange of properties at a nominal consideration (not being above the basic value of either property) neither increases, nor tends to increase, the price of land, and concerns no one but the parties themselves. This raises in another form the contention that the nominal consideration of £1,525 governs and justifies the whole transaction. But, as we have already pointed out, the real consideration for Mrs. H.'s sale has a value of £1,975. We cannot but think that the sale of a property worth £1,525 for a consideration worth £1,975 conflicts with the intention of the Act to prevent undue increases in the price of land. If this is so, the matter is one affecting the public interest as well as the interests of the parties, and we have no discretionary power to relieve them from the obligation of compliance with the Act.

"Mr. Haggitt's final argument is that exchanges are beyond the effective control of the Court, which should not attempt

that which it cannot effectively accomplish. He illustrates his point by the hypothesis that, if Mrs. W. sold her property to Mrs. H. for £1,525 and Mrs. H. quite independently sold her property to Mrs. W. for £1,525, both transactions would be entitled to be approved by the Court and the parties might thus effect an exchange of their present properties without encountering any legal obstacle under the Act. The flaw in this hypothesis is that, though it depends for its validity upon the two supposed sales being independent transactions, sales or transfers pursuant to an exchange cannot be independent of each other. It is quite clear that neither Mrs. W. nor Mrs. H. would have sold her property without the assurance of receiving contemporaneously the property of the other in exchange. It is an essential feature of every exchange that the transfer of one property is the consideration for, and is conditional upon, the transfer of the other. Two contracts giving effect to an exchange must, therefore, of necessity, be related to each other, and it would be incumbent on the applicant for the consent of the Court to either contract to disclose the other, as has properly been done in the present case.

"We are satisfied, therefore, that parties desirous of exchanging properties cannot lawfully achieve their purpose in the manner envisaged by Mr. Haggitt, and that exchanges can be effectively controlled by the Court if such full disclosure is made by the parties as is required under the Act.

"In the result, we are satisfied that exchanges involving the transfer of land are subject to the provisions of the Land Sales Act, and that it was the duty of the Committee to deal with the applications now before us in accordance with the fundamental principle that consent cannot be granted to the transfer of land at a consideration in excess of the basic value. The Committee found the basic value of Mrs. W.'s property to be £1,975 and of Mrs. H.'s to be £1,525. For the transfer to her of Mrs. H.'s property, Mrs. W. proposes in effect to give in money's worth £450 more than its basic value. Conversely, Mrs. H., according to her bargain, is to receive £450 more in value than the basic value of the property which she is selling. Such a transaction, in our opinion, infringes against s. 50 (4) of the Act, and consent must, therefore, be refused unless the parties are prepared to adjust the inequality in value. To give the parties an opportunity to complete the transaction upon a basis permissible under the Act, the Committee granted both applications conditionally upon Mrs. H. paying the sum of £450 to Mrs. W. by way of equality of exchange. The payment of this sum is stipulated, not to ensure that Mrs. W. receives full value for the property she is selling, but to prevent her giving an excessive consideration for the property she is buying. In order that the terms of the respective orders may conform more precisely to the Court's views, the following orders are now made in substitution for those of the Committee:

46/6403 H. to W.:

Consent is granted subject to the condition that the vendor pays to the purchaser the sum of £450 being the amount by which the consideration for the sale exceeds the basic value of the property sold.

46/6502 W. to H.:

Consent is granted subject to the condition that the sale referred to in application 46/6403 is duly completed in accordance with the conditional consent granted thereto.

"In dealing with this matter, we have designedly made no reference to certain submissions by Mr. Haggitt which went to suggest that Mrs. W.'s property might properly be assessed at less than £1,975 and Mrs. H.'s property at more than £1,525. We have disregarded these submissions because no evidence was called, either before the Committee or at the hearing before the Court, on which the basic value could properly have been fixed at any other figures than £1,975 and £1,525 respectively. These figures were accepted by all parties, rather than established in evidence, and, in fairness to the parties, that fact should be recorded. Had the values of the two properties been gone into more fully, it is possible that the Committee might have been justified in fixing other basic values, with a consequential alteration of the amount payable by way of equality of exchange. On the case as presented to us, however, there was no evidence to justify any alteration in the figures as found by the Committee.

"Subject to the substitution of new orders as aforesaid, the appeals are, therefore, dismissed."

No. 96.—H. to R.

Urban Land—House Property—Basic Value—Value of Land—Comparative Sales in Vicinity—Improvements—Cases Wherein Replacement Cost not reflecting Fair Market Value.

This appeal related to a property at Lowry Bay, Wellington, sold by the appellant vendor to the purchaser for £6,500. Before the Committee, and before the Land Sales Court, valuations were presented as follows:

For the Vendor:	Land	£1,650
	Improvements ..	4,862
		£6,512
For the Crown:	Land	£1,265
	Improvements ..	4,865
		£6,130

The Committee, after an inspection, considered that both valuations were too high, and fixed the basic value of the property at £5,000.

The Court (per *Archer*, J.) said: "While we can sympathise with the Committee in its view that both the valuations before it seem high for the property in question, and in its desire to restrict the price to the fair market value of the property in 1942, it is clear that the Committee has exceeded its jurisdiction in rejecting the evidence before it and substituting its own opinion for that of the valuers called to give evidence. If not satisfied as to value, the Committee might properly have requested the Crown to obtain a further valuation or valuations, but to reduce the value without further evidence was inconsistent with the Committee's duty to exercise its functions judicially in accordance with the evidence. The Court, therefore, has no alternative but to allow the appeal.

"Upon the evidence, there was no dispute as to the value of the improvements, and the only matter calling for consideration is the value of the land. Mr. R., for the appellant, justified his valuation of £1,650 by comparison with an adjoining area sold by one B., a piece of back land, originally part of the present property, sold to one K., and several sections facing upon the main road and sea front. Mr. M., for the Crown, claimed that none of these areas was strictly comparable, and he justified his valuation by reference to a number of sales of sections off the main road. After inspecting the various properties cited, the Court is in agreement with Mr. M. that B.'s land is not comparable, and that there were special circumstances relating to the sale to K. which make it unreliable for purposes of comparison. The other sections referred to by Mr. M. are substantially similar to the land now in question, and, in our opinion, form a more appropriate basis of comparison than the sections on the sea front referred to by Mr. R. Mr. M. has allowed for the present section a value somewhat higher than was approved by the Committee for the other rather similar sections to which he refers, and he has, in our opinion, made a proper allowance for any advantages of position possessed by Mr. H.'s land.

"The Court, therefore, accepts Mr. M.'s valuation of the land, and, as there is no dispute as to the improvements, his valuation of the property as a whole at £6,130 is fixed as the basic value.

"The Chairman in his report expressed the opinion that this was a case where replacement cost did not reflect a fair market value (as to the improvements) in 1942. The Court recognizes that cases occur where the value ascertained by an assessment or replacement cost less depreciation is not a fair market value, and that in such cases an adjustment must be made in order to arrive at a fair value. Competent valuers will always have this in mind when preparing their valuations and it is for the Committee to be guided by the evidence as to whether, in any particular case, an adjustment should be made. In the present case, the Crown Valuer intimated that, since the hearing before the Committee, he had considered the question, and was of opinion that his valuation of £6,130 was in fact a fair value as at December, 1942. There is, therefore, no evidence before the Court on which a lower value can properly be fixed.

"The appeal will, therefore, be allowed, and consent will be granted to the sale subject to a reduction in the price to £6,130 accordingly."

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

Potential Value.—In the Onakaka case, counsel for the various companies submitted that, in the taking over of the claimants' assets, the Crown should pay for the potential as well as the actual present values. Apropos of this contention, Blair, J., observed that A. T. Donnelly, one of the assessors, had referred him to a passage in Boswell dealing with Dr. Johnson in his capacity of executor in the estate of Mr. Thrale. The story runs this way :—

> When the sale of Thrale's brewery was going forward, Johnson appeared bustling about, with an ink-horn and pen in his buttonhole, like an exciseman; and on being asked what he really considered to be the value of the property which was to be disposed of, answered, " We are not here to sell a parcel of boilers and vats, but the potentiality of growing rich beyond the dreams of avarice."

On the next day, H. E. Evans, K.C., in the course of his reply asked the Court not to be persuaded by that passage into awarding to the claimants anything like as large a sum as Dr. Johnson had obtained for the brewery. He had looked at his own copy, and found in a footnote that the firm which came into possession of the brewery received £135,000. Whereupon, Hoggard, for a company claiming £150,000, interjected that the price actually was £150,000 less 10 per cent. for cash. Not to be outdone, Scriblex with a measure of trepidation (since the case is still *sub judice*) would remind all concerned that the learned doctor, in a letter referring to the price at which Mrs. Thrale is " disencumbered of her brewhouse," asks, " Is the Nation ruined ? "

Untidy Students.—Scriblex notes with displeasure a tendency on the part of the modern student to bend the backs of his law books and, more heinous still, to score in pencil passages of reported judgments. Richard de Bury, Chancellor of Edward III, wrote in strong terms of the vile manner in which the law student of his time grossly abused the precious books of the library. He " waters the book which lies on his lap with the splutterings of his saliva," and disturbs it " from its usual closure." The holy man (he was a Bishop as well) was vastly upset by the student's dripping nose and foul finger-nails, and his habit of distributing innumerable straws in various places of his book so that " he may recall by the mark what his memory cannot retain." Seems he just couldn't take it, but the student had this consolation—towards the layman he was even more bitter. " Let the Court take order that the dirty scullion, stinking from the pots, do not touch the leaves of books, unwashed."

Here's How.—To specialize in criminal law is not usual, but for a practitioner to do so in homicide cases required the peculiar social conditions of the last century. Between 1869 and 1907, the firm of Howe and Hummel of New York defended more than a thousand persons indicted for murder or manslaughter, and in some six hundred and fifty of these cases the senior partner, William F. Howe, personally appeared. Arriving in America as a ticket-of-leave man from England, he seems to have drawn attention to himself by his love for diamonds, which he wore on his fingers, on his watch chain, as shirt-studs, cuff-buttons, and, as a cluster, in place of a necktie. He wore always a gold-braided, leather-visored yachting cap, its crown white in summer and blue in winter; and Arthur Train once described his appearance as a cross between a Coney Island barker and a costermonger. His partner, Hummel, who was twenty-two years younger, was only five feet tall, and regarded as shifty, fussy, and crafty. The firm modestly drew attention to its merits on a sign thirty feet long and four feet high, that was illuminated at night. Nicer points of legal etiquette did not seem to disturb the partners unduly, even when the Bar Council drew forcible attention to a civil suit in which the firm had represented both plaintiff and defendant. " They were so much a part of the New York scene," says one contemporary writer, " that the wiseacre invariably responded to his drinking companion's ' Here's how ! ' with ' Here's Hummel ! ' "

Half A Life.—As might be expected, Howe appeared in many sensational cases. One of these led to a revision of the statutes dealing with arson. His client, Owen Reilly, a professional arsonist, was a member of a gang of young men who hired themselves out to anyone who wanted to collect insurance by setting fire to his property—a method of amassing wealth that is greatly disliked by insurance companies. Arrested after burning down a row of stores on the lower East Side of New York, he was persuaded by Howe to plead guilty to attempted arson, a plea that was accepted by the prosecutor. When O. Reilly came up for sentence, counsel submitted that the law provided no penalty for this offence. On the Court expressing astonishment, Howe proceeded to explain that the penalty provided by the statutes for any crime attempted but not actually committed was one half of the maximum imposed by the law for the commission of the crime; and the penalty for arson was life imprisonment. The task of the Court would therefore be to determine what half a life amounted to. " Scripture tells us that we know not the day nor the hour of our departure," quoted Howe. " Can this Court sentence the prisoner at the Bar to half of his natural life ? Will it, then, sentence him to half a minute or half the days of Methuselah ? " While Solomon might have solved the problem readily, the Court had no option but to return Reilly to the bosom of his gang, where a warm welcome no doubt awaited him.

From My Note-book.—" I am certainly not an advocate for frequent and untried changes in laws and constitutions. I think moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects. But I know also that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times."—Thomas Jefferson.

Conference Bulletin No. 2.

DOMINION LEGAL CONFERENCE, 1947.

Progress Report.

The Conference Secretaries report that arrangements are proceeding satisfactorily except for the failure of members of the Wellington District to reply to the question asked in the circular. This was probably due to a misunderstanding, and a further questionnaire is being sent to local practitioners to provide the Conference Committees with the information required to complete their plans.

The programme for the Conference is now taking shape.

His Worship the Mayor of Wellington will welcome visitors at the opening meeting on the morning of Wednesday, April 9, and it is possible that His Excellency the Governor-General will be present, depending on whether he is able to return to Wellington from Auckland.

A wide range of topics will be covered by the following papers to be delivered by speakers representing all parts of the country :—

1. The Abuse of Delegated Legislation : Mr. A. C. Stephens, Dunedin.
2. The Problems of the Country Lawyer : Mr. R. J. Larkin, Matamata.
3. The Profession and the Teaching of the Law : Professor R. O. McGechan, Dean of the Law Faculty, Victoria University College.
4. Co-operatives and the Law : Mr. Julius Hogben, Auckland.
5. The Etiquette of the Profession : Mr. J. D. Hutchison, Christchurch.
6. Some Aspects of the Doctrine of Public Policy : Mr. L. F. Moller, Invercargill.
7. Is the Profession sufficiently organized for the Future ? : Mr. D. W. Virtue, Wellington.

The remits for discussion have not yet been decided upon, and the Committee is still willing to receive further suggestions from District Societies.

On Wednesday, April 9, the Conference Ball will be held at the Majestic Cabaret.

On Thursday, April 10, the Conference Dinner will be held at the Royal Oak Hotel ; and there will be a Ladies' Dinner at the Pioneer Club on the same night.

Arrangements for the Sports Day, on Friday, April 11, are nearing completion. All that is required is a fine day and a full muster of members at the Miramar Links, the Lloyd Street Bowling Green, and the Wellington or Thorndon Tennis Courts.

The Secretaries regret that it has not been possible to arrange any travelling concessions either by sea or rail.

It is hoped to publish details of the programme for the ladies in the next bulletin.

PRACTICAL POINTS.

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

1. Land Sales.—*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.1.

CORRESPONDENCE.

The Editor,

NEW ZEALAND LAW JOURNAL.

Sir,

I was interested in your answer to Inquiry 3 (1946) 22 N.Z.L.J. 182) being a case where a wife had disappeared from a mental hospital, but her body could not be found. The husband desired some pronouncement of her death to enable him to re-marry safely.

As you point out, he technically commits bigamy if he re-marries when in fact she is alive, and even although a Coroner's verdict of death or his own reasonable belief in her death might secure his acquittal if charged with bigamy, this would still leave a second marriage void should his first wife in fact be alive. If he wants to make the second marriage secure, could he not try to obtain a divorce from the first marriage ?

The question is, of course, whether the Court would grant a divorce in a case where the wife is most likely dead, but after all, there is no proof or certainty that she is dead, and in many cases of long continued desertion where a respondent is served by advertisement only, the fact may be that the missing spouse is dead, but yet the Court still grants the divorce ; so why should not the husband in this case try for divorce, either on the grounds of desertion or unsoundness of mind (if the facts warrant such grounds) or failing that, by means of preliminary restitution proceedings ?

As an alternative, if the Coroner declines to hold an inquest, the husband could perhaps fortify his reasonable belief in his wife's death by obtaining leave of the Supreme Court to swear as to her death under the Administration Procedure : see the note in *Supreme Court Practice*, under R. 518. Although it was said the wife had no estate, it could, no doubt, be found that she possessed some trifling personal effects, sufficient to justify an application for administration and enable leave to be granted to swear as to her death after proving the facts to the Court.

Some of the requirements regarding leave to swear as to death are set out in *Garrow on Wills and Administration* at pp. 583, 584.

Yours, etc.,

Dunedin. WARRINGTON TAYLOR.