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FAIR RENTS LEGISLATION: RELATIVE HARDSHIP.

THE most difficult task confronting Magistrates in dealing with an application for an order for possession of a dwellinghouse to which the Fair Rents Act, 1936, applies is the question of the relative hardship that would be caused to the parties by the granting or refusal of the application.* Recently the English Court of Appeal came up against this difficulty, and their judgment, which we propose to examine, is not as helpful as it might have been in respect to the functions of Magistrates in "hardship" cases under the Fair Rents legislation. The method by which their Lordships approached the problem whether an excess of hardship resided in the landlord or the tenant is, however, not without interest.

In view of our intended summary of the recent decision of the Court of Appeal in England on the question of relative hardship where the owner of a dwellinghouse was seeking possession from a tenant, the provisions of our own statutes must be our first consideration.

Section 13 (1) of the Fair Rents Act, 1936, enables the Court to make an order for possession of a dwellinghouse on certain grounds only. The grounds here relevant are:

> (*d*) That the premises are reasonably required by the landlord for his own occupation as a dwellinghouse.

For our purposes, subs. 2 of s. 13 is important. It is as follows:

> (2) On the hearing by any Court of any application for an order to which the last preceding subsection relates, the Court shall take into consideration the hardship that would be caused to the tenant or any other person by the grant of the application and the hardship that would be caused to the landlord or any other person by the refusal of the application, and all other relevant matters; and may in its discretion refuse the application, notwithstanding that any one or more of the grounds mentioned in the last preceding subsection may have been established.

By s. 63 (1) of the Finance Act, 1937, as amended, it is enacted:

> Notwithstanding anything to the contrary in section 13 of the Fair Rents Act, 1936, an order for the recovery of possession of any dwellinghouse to which that Act applies, or an order for the ejectment of the tenant of such dwellinghouse, shall not be made by any Court on the grounds specified in paragraph (*f*) or in paragraph (*h*) of subsection one of that section unless the Court is satisfied that suitable alternative accommodation is available for the tenant or will be available for him when the order takes effect; and no such order shall be made on the grounds specified in paragraph (*d*) or in paragraph (*i*) of that subsection unless the Court is satisfied either—
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> (*a*) That suitable alternative accommodation is or will be available to the tenant as aforesaid; or
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> (*b*) That the hardship caused to the landlord or any other person by the refusal of the Court to make an order for possession or ejectment would exceed hardship caused to the tenant by the making of such an order.

The corresponding provisions of the Rent and Mortgage Restrictions (Amendment) Act, 1933 (23 & 24 Geo. 5, c. 32) (*26 Halsbury's Complete Statutes of England*, 266), are contained in s. 3, which provides that no order for possession may be made unless the Court considers it reasonable to make such an order, as amplified in the First Schedule, which relates to possession or ejectment without proof of alternative accommodation, and provides in part as follows:

> A Court shall, for the purposes of section three of this Act, have power to make or give an order or judgment for the recovery of possession of any dwellinghouse to which the principal Acts apply or for the ejectment of a tenant therefrom without proof of suitable alternative accommodation (where the Court considers it reasonable so to do) if . . .
> (*h*) the dwellinghouse is reasonably required by the landlord (not being a landlord who has become landlord by purchasing the dwellinghouse or any interest therein after the eleventh day of July, nineteen hundred and thirty-one) for occupation as a residence for (i) himself; or (ii) any son or daughter of his over eighteen years of age; or (iii) his father or mother:
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> Provided that an order or judgment shall not be made or given on any ground specified in paragraph (*h*) of the foregoing provisions of this Schedule if the Court is satisfied that having regard to all the circumstances of the case, including the question whether other accommodation is available for the landlord or the tenant, greater hardship would be caused by granting the order or judgment than by refusing to grant it.

The proviso may be compared with s. 13 (2) of the Fair Rents Act, 1936, and s. 63 of the Finance Act, 1937.

Under the English statute, the burden of proving greater hardship is on the tenant: *Fowle* v. *Bell*, [1946] 2 All E.R. 668; *Sims* v. *Wilson*, [1946] 2 All E.R. 261; and *Robinson* v. *Donovan*, [1946] 2 All E.R. 731. In New Zealand the onus is thrown upon the landlord to prove to the satisfaction of the Magistrate the grounds relied upon by him under s. 13 of the Fair Rents Act, 1936, and under s. 63 of the Finance Act, 1937: *Akel* v.

* The question of hardship in similar applications respecting urban property under the Economic Stabilization Emergency Regulations, 1942, may be more difficult still, but this need not concern us for the present.

Clark, [1940] N.Z.L.R. 147, 148. A difference between our statute and the English one becomes apparent. If a landlord reasonably requires the premises for his own occupation as a dwellinghouse, or for occupation as a dwellinghouse by any person in the landlord's regular employment, in terms of s. 3 (1) (*d*) or (*e*) respectively, under our legislation an order for possession will not be made in his favour unless the Court is satisfied that suitable alternative accommodation is or will be available for the tenant, the proof of which is on the landlord, *or* that the hardship caused to the landlord by refusal to make the order would exceed the hardship caused to the tenant by making such an order; and this placing of onus is confirmed by s. 12, which provides that the landlord must give the tenant notice of proceedings for recovery of possession on, *inter alia*, the ground specified in para. (*d*) of s. 13 (1): *Stable Securities, Ltd.* v. *Cooper*, [1941] N.Z.L.R. 879, 887. Under the English statute, in such a case, proof of the availability of suitable alternative accommodation is not necessary, but the Court, in having regard to all the circumstances of the case, is expressly enjoined, in deciding the issue of greater hardship, to have regard to the question whether other accommodation is available for the tenant or the landlord. These differences, however, do not seriously affect any consideration in New Zealand of English judgments, apart from the onus of proof, on the question of relative hardship, as our Courts, in determining that question, would necessarily take into consideration whether accommodation is available to the landlord or the tenant as "other relevant matters" within the meaning of that term in s. 13 (2) of the Fair Rents Act, 1936.

If an applicant for an order for possession can bring himself within the category of "landlord" under s. 13 (1) (*d*) (or (*e*) or (*i*)) of the Fair Rents Act, 1936, he is entitled to urge hardship under s. 63 (1) (*b*) of the Finance Act, 1937. If, on the other hand, he can only bring himself within s. 13 (1) (*f*) or (*h*) of the Fair Rents Act, 1936, then he is bound to provide alternative accommodation.

The word "hardship" as used in s. 13 (2) means financial or physical hardship, but sentimental reasons, such as long residence in a dwellinghouse and reluctance to leave it, do not constitute hardship: *Gwynne* v. *Ross*, (1944) 3 M.C.D. 431 (Luxford, S.M.).

Where there has been continued non-payment of rent, there is no need for the landlord to prove hardship: *Preston* v. *Tayler*, (1945) 4 M.C.D. 352 (Goulding, S.M.); and payment made after the proceedings for an order for possession have begun cannot cure the default: *McGrath* v. *Shields*, [1926] N.Z.L.R. 652. But, where such a ground has been established, although it is not relevant on the ground of hardship, the payment of rent after the commencement of such proceedings is relevant as a matter of consideration in the exercise of the Court's discretion under s. 13 (2) of the Fair Rents Act, 1936, as to whether that order should be made: *Rowe* v. *Foster*, (1946) 4 M.C.D. 599 (Woodward, S.M.).

When a purchaser buys a dwellinghouse over a tenant's head, then the purchaser is not entitled to apply for an order for possession and to urge hardship (pursuant to s. 63 of the Finance Act, 1937), until he has acquired the status of landlord and requires the premises for his own occupation, but, if any one else as landlord meanwhile brings the action, alternative accommodation must of necessity be available: *Beer* v. *Patterson*, (1941) 2 M.C.D. 127 (Goulding, S.M.), followed in *Crocker and Bullen* v. *Fairhurst Et Ux.*, (1945) 4 M.C.D. 333 (Goodall, S.M.), and *Hill* v. *Nicholas*, (1945) 4 M.C.D. 377 (Salmon, S.M.).

There is no doubt that the extension of protection to the tenants of business premises will give our Magistrates opportunities for solving problems of comparative hardship of greater perplexity than have confronted them under the Fair Rents Act. Regulation 21B (1) (*d*) of the Economic Stabilization Emergency Regulations, 1942 (Serial Nos. 1942/335 and 1946/184), and Reg. 21B (2), in respect of business premises, follow, with the necessary change from "dwellinghouse" to "property," the wording of s. 13 (1) (*d*) and (2) of the Fair Rents Act, 1936, while Reg. 21B (3) reproduces the effect of s. 63 of the Finance Act, 1937. In a recent action for possession by a landlord of business premises, *Rayner* v. *Tomlinson*, (1947) 5 M.C.D. 52 (Luxford, S.M.), the words in Reg. 21B (1) (*d*) "for his own occupation," which primarily mean "for his own physical occupation," were considered. It was held that, except under the Fair Rents Act, 1936, personal residence is not essential to occupation, with the result that, in the case of business premises, for the purposes of Reg. 21B (1) (*d*), proof on the part of the owner of an intention to carry on, for his own benefit, a business on the property is sufficient to show that he requires the property for his own occupation. On this basis, the question of relative hardship and other relevant matters came up for decision. The business carried on in the premises was that of an apartment-house; and the furniture therein belonged to the tenant. In this case, the learned Magistrate found no reason for refusing an order for possession, since the hardship caused to the landlord by refusal to make an order for possession would exceed the hardship caused to the defendant by the making of the order. But the order was made on terms that the landlord should, subject to the conditions imposed, purchase the furniture of the tenant which remained on the premises.

We turn now to the facts in *Chandler* v. *Stevett*, [1947] 1 All E.R. 164, the recent decision of the English Court of Appeal to which we have referred. The plaintiff had owned two houses at Hove, and, until the recent war broke out, he had occupied one of them and his daughter and her husband the other. In 1941, they all left Hove. The plaintiff stored his furniture in the house which had been occupied by his daughter, and later sold that house. He let the house formerly in his own occupation to the defendant for three years certain, and at the end of that term refused an extension. He brought an action in the County Court claiming possession of the house on the ground that he wanted it for his own use and occupation. The tenant claimed the protection of the Rent Restriction Acts. At the time of the hearing, the plaintiff (aged seventy-one) and his wife (seventy-five, and suffering from heart trouble), and their daughter and son-in-law, were living at Kingston, in a flat, apparently a first-floor one, to which seventeen steps led; and he was on bad terms with his son-in-law. The dwellinghouse owned by the plaintiff was occupied by the defendant, recently demobilized, his wife, and his five young children. He had sought suitable alternative accommodation without success. In these circumstances, the plaintiff claimed that he reasonably required the house as a residence for himself; and the tenant alleged

that, having regard to all the circumstances, including the question whether suitable alternative accommodation was available for the landlord or the tenant, greater hardship would be caused by granting the order than by refusing it. The County Court Judge made an order for possession, and the tenant appealed.

In his judgment, Scott, L.J., said, that each case must, of course, depend on its own facts, but there are two aspects which frequently call for consideration, and certainly did so in the present case. The first is that it is to the balance of hardship that the Judge is directed to turn his mind, and that means that he has to add up the items of hardship proved in evidence on each side of the statutory profit-and-loss account or balance-sheet (for either metaphor would serve) and then see on which party the greater hardship falls. The second is that the Judge is called on to operate the process by putting a hardship value on the various items on each side. That involves making very human estimates of comparative values, on which widely divergent views may be taken by any two human minds. His Lordship then went on, at p. 166, to consider the facts: He said:

> I will tabulate some of what I will call "the items" on each side of the profit-and-loss account which were clearly proved: (1) The landlord has another house—namely, the one he is living in; the tenant has tried hard to get one in the district where his business compels him to live and cannot. (2) The tenant's desire and need for his present house are both obviously very real; the landlord's desire for the house was obviously not for his own occupation but in order to sell it with vacant possession, as is shown by a series of his letters and his general conduct. (3) The tenant's failure to finance his purchase of the house from the landlord was to some extent due to his being still tied to the Army; had he been free, and back at his business, he would probably have got his second mortgage. On the other hand, the landlord was continually, and, perhaps, dishonestly, trying to bluff the tenant into believing that he was still bound by his tenancy agreement to give up possession. The landlord never once referred to the Rent Restrictions Acts, and it is impossible to imagine that he did not know all about them. I regard his letters as in that sense dishonest.
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> In the result, I can see no reasonable justification for the Judge's conclusion on the hardship issue, and am satisfied that he must have arrived at it by erroneous inferences from the facts and correspondence. I therefore regard his conclusion as unjust, and think that the appeal should be allowed.

In his judgment, Bucknill, L.J., after referring to s. 3 (1) of the Act of 1933, which enacts that no order or judgment for the recovery of possession of any dwellinghouse shall be made "unless the Court considers it reasonable to make such an order," asked if there were evidence on which the Court below could have come to this conclusion. His Lordship considered that the question of what is reasonable in all the circumstances must be a difficult, and, at times, almost insoluble, problem, on which different minds may arrive at different conclusions. It seemed to him, for instance, that in certain circumstances an order for possession might be reasonable although it in fact imposed greater hardship on the tenant than on the landlord. Taking all these things into consideration, he did not see how the Court of Appeal could say that there was no evidence on which a Court could decide that it was reasonable to make the order giving possession to the landlord. He proceeded:

> The next question was whether the house was reasonably required by the landlord for occupation as a residence for himself (which includes his wife) and his daughter, in accordance with para. (*h*) of Schedule I to the Act of 1933. That he so required the house was clearly proved. The question is whether his requirement was reasonable in all the circumstances. It seems to me that the same kind of test must be applied here as in the first question, although in this case the reasonableness hinges more on the actual requirements of the landlord. For instance, one would consider the nature and place of his business (if any), the size of his family, his actual residence or lack of one at the time of asking for the order. Questions of health and cost of living and innumerable other possible factors may have to be taken into account. The question is one entirely of fact for the Judge, and I do not see how this Court can say that there was no evidence to support his conclusion that the landlord reasonably required the house for occupation as a residence.
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> The third question for this Court to decide is whether the Court ought to have been "satisfied that having regard to all the circumstances of the case, including the question whether other accommodation was available for the landlord or the tenant, greater hardship would be caused by granting the order . . . than by refusing to grant it." These are the actual words at the conclusion of para. (*h*) of Schedule I. They are as wide as they can be. The Judge is to consider the problem of other accommodation, but he has to consider all the circumstances of the case, and then, if he is satisfied that an order for possession will cause greater hardship to the tenant than the landlord, he must not make it. The burden of proving greater hardship under this proviso is on the tenant. Unless the Judge is satisfied of that, then he must make the order, provided the other conditions of reasonableness and occupation as a residence by the landlord have been complied with.

Somervell, L.J., considered that the case was a borderline one; but he came to the conclusion that, applying para. (*h*) of the First Schedule to the Act of 1933, and the general principle of the Acts to the admitted facts, the County Court Judge had come to a conclusion that was wrong in law. At p. 168, His Lordship said:

> It is emphasizing the obvious to point out that the Acts were passed, and have been continued and extended, to meet the hardships which would have arisen but for them, whether by increase of rent or ejectment, from the absence of alternative accommodation. In cases brought under s. 3 (1) (*b*) of the Act of 1933, the Court has to be satisfied that suitable alternative accommodation is available. This is not so under para. (*h*) of Schedule I, but, under that paragraph, in having regard to all the circumstances of the case the Court is expressly enjoined, in deciding on the issue of greater hardship, to have regard to the question whether other accommodation is available for the tenant or the landlord. These words and the general principles of the Acts make it clear, to my mind, that alternative accommodation, though not a condition under para. (*h*), is normally the most important of the circumstances to which regard must be had. Admittedly, the landlord with his son-in-law had a financial motive for requiring the house, and also the motive of his wife's health. There was no medical evidence as to the latter, and she was able to go out fairly regularly to lunch outside the flat; but I accept the statements about her health, and they seem to me sufficient to establish that the landlord reasonably required the house. I find it, however, impossible to hold that the County Court Judge correctly applied the law on the issue of greater hardships. On the evidence, the landlord and those with him had a flat in which they could continue to live, whereas the tenant and his large family of children had nowhere to go. There seems to me, therefore, to be only one possible answer on the issue of greater hardship, and that is one in favour of the tenant.

The other question decided in *Chandler* v. *Strevett* was how far the hardship issue should be regarded by the appellate tribunal as a question of fact from which there was no appeal, or whether the problem of relative hardship lay in the debatable land of fact and law, matters of inference and opinion, on which the higher Courts may give guidance. This aspect of the judgment and its bearing, if any, on decisions on questions of hardship arising under the Fair Rents Act, must await another occasion.

SUMMARY OF RECENT JUDGMENTS.

LEVIN BOROUGH AND ANOTHER v. ATTORNEY-GENERAL, EX RELATIONE UNITED THEATRES, LIMITED, AND ANOTHER.

ATTORNEY-GENERAL, EX RELATIONE LEVIN AMUSEMENTS, LIMITED, AND OTHERS v. LEVIN BOROUGH.

COURT OF APPEAL. Wellington. 1946. September 30; October 1, 2, 3, 4, 7. 1947. June 10. BLAIR, J.; KENNEDY, J.; CALLAN, J.

Municipal Corporations—Powers—To "provide or pay to any person such sums as it thinks fit for providing musical entertainments and cinematograph exhibitions"—Arrangement between Borough and Cinematograph Company for Control of Borough's Picture Theatre—Whether Colourable Transaction flouting Enactments specially passed in respect of Leases to meet National Emergency—Whether within Power of Borough Council, and if so, Valid—Municipal Corporations Act, 1933, s. 308 (1) (e).

An appeal from the judgment of Sir Michael Myers, C.J., reported [1945] N.Z.L.R. 279, was dismissed.

An appeal from the judgment of Finlay, J. (unreported) (giving judgment for the defendant, the Levin Borough, in an action for a declaration of the validity of a notice determining the contract which in the previous action was held to be *ultra vires* and void), was also dismissed.

Counsel: *Weston*, K.C., *O'Shea*, and *Beere*, for the appellants. Levin Amusements, Ltd.; *Cleary* and *Harding*, for the respondents.

Solicitors: *O. and H. Beere and Co.*, Wellington, for the appellants; *Barnett and Cleary*, Wellington, for the first respondent; *Park and Bertram*, Levin, for the second respondent.

THE KING v. WILKINSON.

COURT OF APPEAL. Wellington. 1947. March 24, 25; April 3. SIR HUMPHREY O'LEARY, C.J.; SMITH, J.; FAIR, J.; CALLAN, J.; CORNISH, J.

Criminal Law — Appeal — Evidence — Admissibility — Incest — Adopted Daughter—Evidence of Happenings between Accused and Adopted Daughter Two Years before Date of Alleged Incest Admissible as Elements in Proof of their Illicit Connection about the Date charged in the Indictment—Whether such Evidence corroborative of Girl's Evidence—Direction not instructing Jury as to Requirement of Proof of Crime beyond Reasonable Doubt—Whether sufficient—Crimes Act, 1908, s. 155—Criminal Appeal Act, 1945, s. 3.

Although charges made in an indictment for incest refer only to one particular date, evidence as to other occasions is admissible, on the basis that, when a person alleges that an offence has been committed against him and says that the occasion was not an isolated one, he is entitled to give evidence that the offence was indulged in habitually.

R. v. *Hartley*, (1940) 28 Cr. App. R. 15, followed.

The testimony of two men that, about two years before the material date in the indictment for incest, the accused and his adopted daughter were in the same bed, and that the parties were seen to be bare from the waist up, is admissible as evidence tending to establish the guilty relations between the parties and the existence of a sexual passion between them as elements in proving that they had illicit connection in fact on or about the date charged in the indictment; and, further, the evidence is admissible merely on the basis of what it tends to establish in the way of guilty passion for the adopted daughter on the part of the accused, who was at all relevant times *in loco parentis* to her, that basis being that all natural reticences normally existing between a father and daughter were destroyed or broken down before the date of the alleged offence.

R. v. *Ball*, [1911] A.C. 47, and *R.* v. *Hartley*, (1940) 28 Cr. App. R. 15, followed.

Although the girl was only twelve years of age at the time spoken to by the two witnesses, the accused was *in loco parentis* to her, and the house was a Maori one, it was open to the jury to draw the inference of guilty passion from such evidence.

Evidence of another witness as to the accused's occupying the same room as his adopted daughter, but a different bed, while his wife slept elsewhere, is admissible as supplying part of the necessary background to enable the jury to understand the case.

The evidence of all three witnesses was fit to be accepted by the jury as supplying corroboration of the adopted daughter's evidence, which required corroboration, as in all sexual offences against girls; and because, as the jury were entitled to put on her evidence the construction that she was a consenting party to the acts of intercourse, she was at least technically an accomplice.

R. v. *Mountain*, [1945] N.Z.L.R. 319, applied.

While the learned trial Judge's direction to the jury was open to the criticism that it did not instruct the jury as to the standard of proof which they were to require in a criminal case—namely, proof beyond reasonable doubt—and this in itself was *prima facie* a serious omission, such direction had not occasioned any substantial miscarriage of justice, since the learned trial Judge adopted as his own, and passed on to the jury with his approval, a correct statement of that standard of proof, which had just been made by counsel for the accused.

R. v. *Lawrence*, [1933] A.C. 699, referred to.

Counsel: *Hodgson*, for the appellant; *A. E. Currie*, for the Crown.

Solicitors: *Potts and Hodgson*, Opotiki, for the appellant; *Crown Law Office*, Wellington, for the Crown.

HOPPER (INSPECTOR OF AWARDS) v. LYALL BAY PICTURES, LTD.

SUPREME COURT. Wellington. 1947. April 18; May 5. CHRISTIE, J.

Industrial Conciliation and Arbitration—Action for Recovery of Moneys due to Worker—Same Procedure as for Penalty for Breach of Award—Claim exceeding £100 brought in Magistrates' Court—Whether removeable into Supreme Court—Industrial Conciliation and Arbitration Act, 1925, s. 130—Industrial Conciliation and Arbitration Amendment Act, 1943, s. 4 (1)—Magistrates' Courts Act, 1928, s. 162 (1).

An action for a sum in excess of £100 brought in the Magistrates' Court pursuant to s. 4 of the Industrial Conciliation and Arbitration Amendment Act, 1943, is not removable into the Supreme Court by either party under s. 162 (1) of the Magistrates' Courts Act, 1928, as that section does not apply to such an action.

New Zealand Harbour Board's Industrial Union of Employers v. *Tyndall*, [1944] N.Z.L.R. 43, applied.

Moon v. *Kents Bakeries, Ltd. (No. 2)*, [1947] N.Z.L.R. 241, distinguished.

Counsel: *Grieve*, for the plaintiff; *Taylor*, for the defendant.

Solicitors: *G. F. Grieve*, Wellington, for the plaintiff; *Morison, Spratt, and Taylor*, Wellington, for the defendant.

BARTULOVICH v. JOHN FULLER AND SONS, LTD.

SUPREME COURT. Auckland. 1947. March 25, 28. JOHNSTON, J.

Rent Restriction—Urban Property—Front-of-the-House Rights—Purchase of Confectionery business and fittings carried on at Stall in a Picture-theatre—Purchaser informed there was no Lease and none would be given, but Weekly Rent paid to Owner of Theatre and Receipts given for Rent—Whether Tenancy or mere License—"Property"—Economic Stabilization Emergency Regulations, 1942 (Serial No. 1942/335), Regs. 12, 21B.

The plaintiff purchased from E. a confectionery business carried on by E. in a picture-theatre, the only record in writing of the transaction being a receipt for the price paid "for fittings &c., Prince Edward Theatre confectionery stalls." Before buying, the plaintiff asked E. if there was any lease. The latter said, "No." Plaintiff then asked the manager of the defendant company, the owner of the theatre, if there was any chance of a lease, and he said, "No." The weekly rent that E. had been paying was considered by plaintiff as too high, and the said manager agreed to reduce it to £2 10s., and, in the receipts therefor given to her by the defendant, it was called "rent." Upon the assumption that the plaintiff was possessed not of a tenancy but of a mere license to carry on her business, the defendant company gave her notice to quit, offering at the same time to purchase, at valuation, any plant or fittings owned by her.

On the hearing of a motion for an injunction restraining defendant from interfering with the tenancy of the plaintiff of portion of the theatre, it was admitted by both parties that, if plaintiff could show a tenancy, she was entitled to an order on this motion, but that, if it were shown that she held no more than a license, the Economic Stabilization Emergency Regulations, 1942, did not apply, and the motion must be dismissed.

Held, on the evidence as to possession set out in the judgment, That there was no possession so exclusive by the plaintiff that a tenancy could be inferred from it, but that the arrangement amounted to a mere license to the plaintiff to place in some part of the defendant company's premises furniture and equipment necessary to carry on her business.

Joel v. *International Circus and Christmas Fair*, (1920) 124 L.T. 459, *Edwardes* v. *Barrington*, (1901) 85 L.T. 650, *Frank Warr and Co., Ltd.* v. *London County Council*, [1904] 1 K.B. 713, and *Clore* v. *Theatrical Properties, Ltd., and Westby and Co., Ltd.*, [1936] 3 All E.R. 483, referred to.

Counsel: *McKay* and *Rees*, for the plaintiff; *Hamer*, for the defendant.

Solicitors: *Fitchett and Rees*, Auckland, for the plaintiff; *Russell, McVeagh, and Co.*, Auckland, for the defendant.

CROOKE v. STACE.

SUPREME COURT. Christchurch. 1946. December 11, 19. SMITH, J.

Rent Restriction—Business Premises—Judgment for Possession—Order for Leave to issue and proceed with Writ of Possession made but not sealed—Subsequent Extension of Fair Rents Legislation to Business Premises—Retrospective Effect—"Proceedings"—Court's Discretion—Order on Terms—Economic Stabilization Emergency Regulations, 1942 (Serial No. 1942/335), Regs. 21B, 21C—Amendment No. 9 (Serial No. 1946/184), Reg. 3.

The term "proceedings," as used in R. 21C of the Economic Stabilization Emergency Regulations, 1942, includes proceedings in which a completed order for possession has been made. The test is whether the tenant is in fact in possession at the time the Court is asked to exercise its jurisdiction.

Giles v. *Lowe*, [1947] N.Z.L.R. 166, applied.

Such a tenant has the right to be maintained in that possession in the same way as he would have been if proceedings had been taken against him under the Amendment No. 9 to the regulations, unless the landlord can show that he requires the premises for his own occupation, or that he can establish any of the grounds set out in Reg. 21B.

Thus, where a tenant had paid the judgment for mesne profits and the costs, and the rent was paid up to date, there were no special circumstances that would justify the Court in declining to protect the tenant on a ground which was not recognized by R. 21B; and the Court exercised its discretion conferred on it by Reg. 21C to relieve the tenant.

An order was accordingly made suspending the operation of the judgment and of the order for possession upon terms.

Counsel: *R. A. Young*, for the plaintiff in support of the motion; *A. W. Brown*, for the defendant, to oppose.

Solicitors: *R. A. Young and Hunter*, Christchurch, for the plaintiff; *Raymond, Stringer, and Co.*, Christchurch, for the defendant.

In re A PROPOSED SALE: MOUNTNEY TO YOUNG.

LAND SALES COURT. Dunedin. 1946. August 12, 13, 14; October 18. ARCHER, J.

Landlord and Tenant—Land Sales—Jurisdiction—Sale of Property as Going Concern—Single Contract of Sale comprising Land and Personal Property—Indivisible Transaction in accordance with its Terms—Court's Duty—Apportionment by Parties—One Transaction or Related Transactions—Excess of Value payable for Property in Related Transaction—Powers of Court—Hotel Property—Duty of Committee to take into account Value of License, Goodwill, and other Personal Property sold—Assessment as at Date of Sale, not at Material Date—"Speculative purposes"—Value—Ascertainment of Value of Hotels and their Goodwill generally—Servicemen's Settlement and Land Sales Act, 1943, ss. 43, 50 (3) (b), 63.

Although, by virtue of s. 43 (1) of the Servicemen's Settlement and Land Sales Act, 1943, that statute is made applicable *inter alia*, to every contract or agreement for the sale of land, subject to the exceptions enumerated in s. 43 (2), and the Land Sales Court is primarily concerned with land and interests in land *per se*, its powers are not restricted to them. By virtue of s. 50 (3) (*b*), the Court's jurisdiction is extended to transactions relating to land, and, by virtue of s. 63 (1), a full and ample jurisdiction is vested in Land Sales Committees and in the Land Sales Court to implement the objects and purposes of the statute.

If chattels or personal property are sold with land, but by virtue of separate contracts, the consent of the Court is required in respect of the contract relating to the land only; but sales of personal property therewith must be disclosed to the Court, and may properly be taken into account by the Court, under s. 50 (3) (*b*) of the Servicemen's Settlement and Land Sales Act, 1943, as related transactions.

Where, however, a single transaction comprises both land and personal property, and the contract appears to be one and indivisible, the transaction as a whole is within the jurisdiction of the Court; and the duty of the Court is to ensure that the consideration for the whole of the property sold is not excessive. In such a case, applying s. 63 of the statute, in order to give full effect to the intent and purpose of the statute the Court must have regard to the whole of the property disposed of.

If the purchase price is shown by the contract to have been apportioned by the parties between the various items of property comprised in a composite transaction, or if, before the hearing, the parties mutually agreed to such an apportionment, it may be preferable or necessary, according to the circumstances, to treat the sale of the land as one transaction and the sale of the other property therewith as a related transaction; but the onus of making such an apportionment, in the case of an undivided transaction must be upon the parties, and must have their mutual consent, as it involves, in any case, a variation of the contract. Should no such apportionment be made by the parties, the Court must deal with the contract as a single and indivisible transaction in accordance with its terms.

If more than the full value is being paid for property comprised in a related transaction, the Court is entitled to treat the excess over such full value as being paid in whole or in part for the land, and so contrary to the purposes of the statute. In such a case, an order may properly be made refusing consent to the sale of the land, or granting consent only on condition that an appropriate reduction is made in the price of the other property sold.

Thus, whether any part of the property sold with a hotel is treated as a separate or related transaction, or whether the whole is regarded as a single transaction, it is necessary for the Land Sales Committee, and, on appeal, for the Land Sales Court, whatever may be the form of the contract entered into between the parties, to take into account the value of the license, goodwill, and other property (if any) sold with the hotel, as well as the value of the land and buildings. The Committee, in order to ensure that the basic value of the land and buildings has not been exceeded, must ascertain also the value of the license, goodwill, and other personal property (if any) passing with the sale. Should the total price exceed the sum of the values so ascertained, consent to the sale may properly be refused, or suitable conditions may properly be imposed.

The value of the license, goodwill, and other personal property may be assessed as at the date of the sale, and not (as in the case of the value of the land) on the material date, December 15, 1942.

In re Oriental Hotel, Muir to Niall, [1944] N.Z.L.R. 512, followed.

Re Finlay, S.C. (Ct. of Sess.): Unreported; see (1938) 82 Sol. Jo. 805, applied.

Heel v. *O'Neill*, [1933] N.Z.L.R. 319, *Cox* v. *Harper*, [1910] 1 Ch. 480, and *Duncan* v. *Mackie*, [1940] G.L.R. 226, distinguished.

Quaere, Whether a sale at a profit can in any case be deemed *per se* to be an active speculation within s. 50 (3) of the statute, since in the elements of speculation an essential is the seeking of an abnormal profit by a rise in market values, or from a venturesome or risky enterprise, or by taking a chance, as distinguished from regular trading.

General considerations as to the ascertainment of the value of a hotel and its goodwill (including "local" and "personal" goodwill and the ascertainment of the value of goodwill), as to the duty of the Committee in satisfying themselves as to the propriety of the price to be paid for the furniture and stock, and as to the terms of any variation of the contract or of any arrangement between the parties (should any such variation or arrangement have in fact been made) since the original contract was entered into, treating the sale of the furniture and stock and any subsequent arrangement between the parties as being related transactions which should be taken into account.

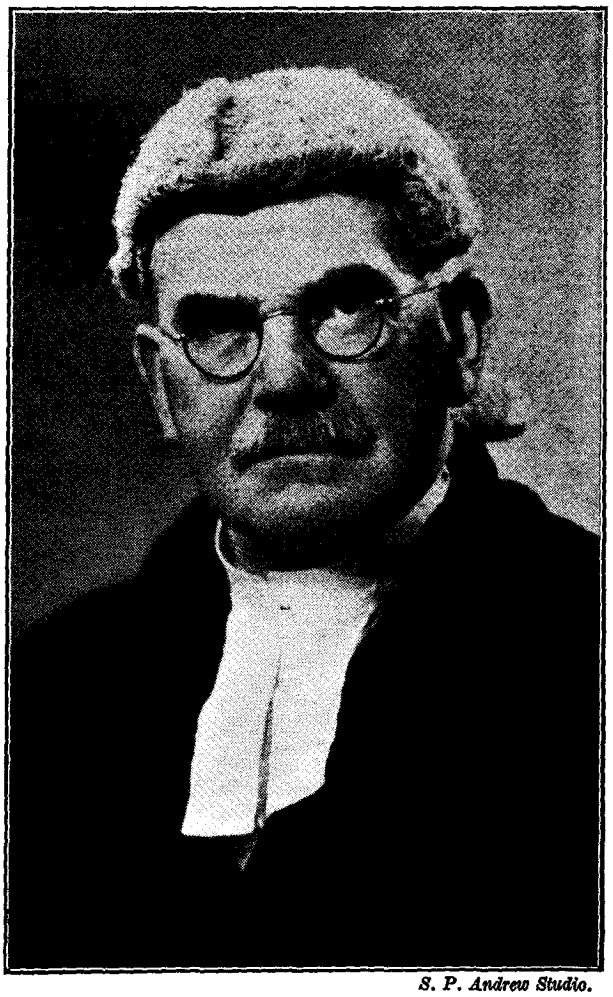
Suggestions for the guidance of Land Sales Committees generally when dealing with applications relating to hotels.

THE LATE HON. P. J. O'REGAN, M.L.C.

"A Veritable Pilgrim in the Law."

The esteem and affection in which the late former Judge of the Compensation Court, and earlier of the Arbitration Court, the Hon. P. J. O'Regan, M.L.C., was held by his professional brethren was shown by the great attendance at the Supreme Court to honour his memory.

Mr. Justice Cornish presided, and with him on the Bench was Judge Tyndall of the Arbitration Court, a successor of the deceased Judge in that office.



S. P. Andrew Studio.

The late Hon. P. J. O'Regan.

MR. JUSTICE CORNISH.

In addressing the members of the Bar, Mr. Justice Cornish said:

"We are met this morning to do honour to the memory of a brother who enjoyed, in unusual measure, our esteem and affection, the Honourable Patrick Joseph O'Regan, for many years a leader, in his chosen sphere, of not only the Wellington but also the New Zealand Bar, and thereafter for nearly a decade Judge successively of the Court of Arbitration and of the Workers' Compensation Court.

"I regret that, on an occasion such as this, all the other Judges should be held by their public duties in various places far from Wellington. You understand, of course, why this is so. But for this circumstance, a Full Bench would have been sitting here this morning to join with you in offering this last tribute to the memory of our friend.

"Our late brother began a public life that was to last for half a century, as a member of the Legislature. When the long day closed—the long and arduous day, filled with honourable achievement—he was again a member of the Legislature, again actively engaged in the shaping of the law. Thus it was *law*, the making, applying, interpreting, and expounding of it, that filled his life.

"Our brother came to the practice of the law with rich endowments. He had great physical strength and energy; ambition and the will to excel; a vigorous mind and a retentive memory; the spirit of a fighting man; and, above all, a high sense of honour and a passion—for it was nothing less—for fair play. With such qualities, he was assured of success, if continuance of health were granted to him. That boon was vouchsafed to him, in full measure. So that he was able to live a life of strenuous exertion, long sustained. He contested innumerable cases, in all parts of the country: and, in the course of doing so, he travelled thousands of miles, a veritable pilgrim in the law.

"Our friend attained early success in the Court. He knew what he fought for, and he loved what he knew—the cause of the casualties of industrial life and their dependants. That cause has never had a stouter champion. But, though he loved a fight, he never rejected a reasonable settlement. He did not fight just for the sake of fighting, or of publicity. In discussions as to settlement, he showed himself fair, willing, and able to see the point of view, and indeed the merits, of the opposing party. Candid himself, he invited candour in others, and never abused it. No one ever complained, or could complain, that he had failed to honour in its entirety any undertaking that he had given. And he was not one who approached discussion on the irritating assumption that, of necessity, his client had all the law and all the merits, and the other party none.

"In the conduct of his cases, he fought with vigour, but without asperity.

He could strive mightily, and remain the friend of those with whom he strove. His personal relations with his brethren were of the happiest. Even his foibles—what positive character is without them?—only served to endear him to his fellows. He was helpful to younger men, always willing, out of his really great store of knowledge and experience, to assist them in the solution of their problems: and he was helpful without expectation or thought of any return.

"He came to the Bench when he was no longer a young man. It was not to be expected that he should continue to enjoy the abundant vitality of earlier days.

But his strong sense of duty enabled him to discharge, with high effectiveness, the exacting duties of both Courts in which he sat. He spared no effort in searching out the essential in the masses of facts presented to him, and in ascertaining and expounding the principles of the innumerable cases that were cited to him. He was invariably courteous to litigants and Bar: he was fair, and was seen to be fair. He toiled unceasingly in the working out of his judgments.

"Patrick Joseph O'Regan was at every point a man, a great-hearted, generous, honourable, and lovable man. We shall miss him, but it is good for us to have known him. To his widow, and the other members of his family, we tender our sincere and respectful sympathy."

The Solicitor-General.

The Solicitor-General, Mr. H. E. Evans, K.C., said that in the absence of the Attorney-General, who was in the South Island, it became his privilege to add, on his behalf, a few words from the Bar to the tribute which His Honour had just paid to the life and work of the Honourable Patrick O'Regan.

"The distinguished career which has just closed affords a splendid example of the mastery to be gained over circumstances by natural gifts, developed by industry and perseverance, and reinforced by courage and high character," Mr. Evans continued: "There is romance as well as inspiration in the life-story of a man who had only a few months of schooling, passed into the House of Representatives before reaching the age of twenty-five, practised the profession of the law with honour and distinction for thirty-two years, reached his rightful place as a Judge in that branch of law to which he had already made so great a contribution, and at length returned for all too short a time to political life as a member of the Legislative Council.

"The period of his legal career has included the greater part of the history of the law of workers' compensation, and he had a very important share in the development of that humane feature of our legal system. In helping to procure the abolition of the defence of common employment, he brought about a reform which, notwithstanding strong comment from the highest Courts in Britain, has not even yet been achieved there. His unfailing fairness and courtesy, both as counsel and as Judge, gained for him, in his dealings with industrial disputes and compensation claims, the confidence of employers and employees alike.

"We extend our sincere sympathy to his widow and family. Their sorrow will be tempered with pride that, in bearing the name of O'Regan, they have an inheritance adorned with the memory of one whose life and work gave expression in humanity and service to his ideals of citizenship."

The New Zealand Law Society.

The President of the New Zealand Law Society, Mr. P. B. Cooke, K.C., was the next speaker. He said that few men while engaged in the practice of the law had been more widely known to their fellow-men than was he whose memory they met to honour: and the members of the legal profession from one end of New Zealand to the other wished to express publicly their sorrow at his passing.

The President continued: "The Honourable Patrick Joseph O'Regan could not be forgotten by those of us who practised with him in his days at the Bar.

"His fairness was proverbial. He was constantly engaged in a great mass of litigation arising out of personal injury, and in that litigation it happened that he was generally for the plaintiff. So fair, however, was his outlook, and so fair his conduct of cases, both in and out of Court, that on many occasions he was deliberately chosen by defendants to arbitrate on such matters.

"His disarming simplicity gave his words and actions a transparent directness of purpose that made conference and negotiation with him a pleasure.

"Side by side with that fairness and that simplicity there was a courage that seemed to increase if the fight grew hard or the battle grew grim, and there was a broad humanity that endeared him to us all.

"He took with him to the Bench of the Arbitration Court not only those great qualities but also an intimate knowledge of compensation law and a remarkable capacity for appreciating and exploring the difficult and controversial medical problems involved in its administration. To that Court he took, too, his quiet dignity: and in that Court and in the Compensation Court he, with conspicuous success and to the satisfaction of all concerned, devoted for eight years the whole of his tireless energy to the service of the public.

"To his widow and to his family all of us throughout New Zealand send our deep sympathy."

The Wellington Law Society.

Mr. J. R. E. Bennett, President of the Wellington District Law Society, said that the members of the Wellington District Law Society desired to associate themselves with the tributes paid by His Honour, by the Solicitor-General, and by the President of the New Zealand Law Society to the memory of the late Judge O'Regan. He proceeded:

"The late Judge became a member of our Society in 1905, and his membership continued until his appointment in 1937 to the position of Judge of the Court of Arbitration.

"The lack of opportunity to attend school in his youth, rather than deter him, evidently intensified the urge within him to develop his faculties. He was possessed of great courage and determination and remarkable industry, as is illustrated by the fact that he did not commence studying for admission to the profession of the law until he was in his 31st year. In that profession he specialized in compensation law and became recognized as an authority on the subject.

"He studied in various fields, including journalism, history, politics, and local government, and was fearless and forceful in expressing his opinion on any topic which interested him.

"While the late Judge did not hold office in our Society, he recognized that every privilege carried with it a corresponding duty, and he discharged that duty by guiding and assisting many of the younger men of the profession in which he earned a high reputation. Those men to-day hold him in grateful memory.

"While he was presiding over the Compensation Court, I remember hearing one practitioner remark: 'Win, draw, or lose, I always enjoy conducting a case before "P.J." Your Honour, I think that remark typifies the respect and esteem in which the late Judge O'Regan was held by those who practised in his Court."

In conclusion, Mr. Bennett said that the members of the Wellington Law Society respectfully requested permission to join with His Honour, the Solicitor-General, and the President of the New Zealand Law Society in tendering their sincere sympathy to the widow and family of the deceased Judge, and especially to the son who was one of their colleagues in the profession.

WAR CRIMINALS TRIALS LAW REPORTS.

A REVIEW BY MAJOR-GENERAL H. K. KIPPENBERGER, C.B., C.B.E., D.S.O. and Bar, E.D.

These are reports selected and prepared by the United Nations War Crimes Commission and published by His Majesty's Stationery Office.* They should be reviewed by a first class international jurist, which I certainly am not.

Six are cases tried by British Military Courts, and three are cases tried by United States Military Commissions. They present a nice sample of "war crimes."

KILLING OF SURVIVORS OF TORPEDOED SHIP.

Kapitanleutnant Eck, a German submarine commander, and four members of his crew were charged before a British Court with the killing of survivors of the torpedoed Greek steamship, *Peleus*. The accused were represented by four German counsel, a German naval captain, and a British barrister, who between them seem to have advanced every imaginable argument.

On March 13, 1944, Eck, then commanding Submarine No. 852, sank the *Peleus* in the middle of the Atlantic. No objection was made to his having done so without warning, this having become an unexceptionable procedure since it was adopted by the British and American Navies. But Eck was anxious to leave no trace, and so for five hours he cruised round the scene picking off the survivors clinging to rafts and wreckage. He missed three, who were picked up twenty-five days later. The submarine was later captured and her log was found to contain an entry of the sinking of a ship in the approximate position where the *Peleus* was torpedoed. One feels that there is a lesson as to thoroughness.

The facts were not denied. Eck had ordered the shooting, and Hoffmann, Weisspfenig, and Schwender had carried it out. The engineer, Lenz, protested against the proceedings, but after a while went on to the bridge, where he found that one of the machine-guns was being handled by Schwender, whom he regarded as a very unsatisfactory type. He did not want human beings to be hit by bullets fired by so bad a character, so very highmindedly took over the gun himself. Weisspfenig, a medical officer, said that he did not regard the use of machine-guns in this particular case as an offensive action, which suggests that he might have made some reputation as a casuist. Hoffmann and the unworthy Schwender relied for defence on their Commander's orders, though Schwender maintained that he had only fired at wreckage, not at the human beings clinging to it. Apparently he considered that they were free to swim to whichever side of the Atlantic they preferred.

The defences raised were:

(*a*) Operational necessity, Professor Wegener pointing out the pathetically unfortunate position in which submarine commanders had long been, with every hand against them. Eck relied solely on this plea.

(*b*) The other accused pleaded superior orders, and the Professor also referred to the maxim *Nulla crimen sine lege, nulla poena sine lege.*

The Judge Advocate made short work of the first defence. He did not deny that in some circumstances operational necessity might justify a killing of unarmed persons, but maintained that such circumstances were not present in this case. It was nonsense to pretend that shooting with small arms at substantial pieces of wreckage and rafts would effectively destroy the traces of the sinking, and obvious that the sensible course for Eck to adopt would have been to remove himself and his boat at the highest possible speed at the earliest possible moment to the greatest possible distance. This seems to be irrefutable.

The defence of superior orders gave more difficulty. Unfortunately, para. 443 of the pre-1944 British *Manual of Military Law* stated that "members of the armed forces who commit such violations of the recognized rules of warfare as are ordered by their Government or by their commander, are not war criminals, and cannot therefore be punished by the enemy," and the United States *Rules of Land Warfare* (para. 347 of the 1940 text) was to the same effect. Considerable doubts had been cast on these statements of the law, and both British and American manuals had been altered in 1944. This was not quite satisfactory, and both Prosecutor and Judge Advocate placed their main reliance on a decision of the German Supreme Court. After the 1914-18 War, the German war criminals were tried by German courts. In the case of the hospital ship *Llandovery Castle*, decided at Leipzig in 1921, the principle was laid down that members of armed forces are bound to obey lawful orders only, and this and the argument that the *Manual of Military Law* is not a legislative instrument, but only a publication setting out the law, and may or may not do so correctly, proved adequate to overthrow this defence. Counsel for the defence declined to challenge the principle laid down at Leipzig, and the Judge Advocate was able to advise the Court that the law was correctly stated in that case and in the amended manuals.

This is all very well, but it leaves the unfortunate members of armed forces in the awkward position of having to decide for themselves, at their own peril, what are lawful orders, and imposes a duty of disobedience, also very much at their own peril.

The maxims referred to were summarily disposed of. The prosecutor said that they were applicable only to

*Law Reports of Trials of War Criminals, selected and prepared by the United Nations War Crimes Commission, English Ed. Vol. I. Foreword by LORD WRIGHT OF DURLEY: His Majesty's Stationery Office, London. (2s. 6d. net.)

municipal or domestic law of a particular State, and could never be applicable to international law, and the Judge Advocate assured the Court that it should not be embarrassed by them.

The Court was not required to give any reasons, and it promptly reached a decision. Eck, Hoffmann, and Weisspfenig were sentenced to death by shooting, the altruistic Lenz to imprisonment for life, and for some obscure reason Schwender got off comparatively lightly with fifteen years' imprisonment. It can only be surmised that the Court considered the superior orders given to him as an extenuating circumstance, though Hoffmann and Weisspfenig were not so excused.

The sentences were duly executed, and the result must be considered satisfactory.

Execution of Prisoners of War.

The next case reported is that of General Dostler, commander of the 75th German Army Corps in Italy. He was tried by an American Military Commission on the charge of having, in March, 1944, ordered the summary execution of fifteen American prisoners of war.

The fifteen Americans were what in the British Army were called Commandos. They were landed a hundred miles behind the front, near Spezia, and had the mission of demolishing a railway tunnel. However, they were captured almost at once, apparently without serious resistance, and, on interrogation, one of the officers revealed the mission of the party. All were Italian-speaking and of Italian origin. Dostler ordered them to be shot, disregarded protests from various junior officers, and his orders were carried out. There was no question of their not having been in uniform. Normally, the Germans treated American and British prisoners reasonably well, so that Dostler's action is at first sight surprising.

The Germans had, however, and perhaps not without cause, a special grudge against Commandos. Both British and Americans trained their Commandos to be very tough. They were not interested in taking prisoners, were trained in every form of thuggery, and, by their own accounts, were very unpleasant people, with no silly chivalrous ideas. There is no doubt that, if the Germans had used similar troops and methods, we would have strongly disapproved, and might even have treated unkindly any that we captured.

Dostler was defended by an American Colonel and Major. They first raised a plea as to the jurisdiction of the Court, maintaining that, under Art. 63 of the Prisoners of War Convention of 1929, a sentence should only be pronounced on a prisoner by the same tribunals, and in accordance with the same procedure, as in the cases of persons belonging to the armed forces of the detaining power. Counsel argued that consequently the proper tribunal to try the accused was a court martial, which it was frankly admitted offers a higher degree of safeguards than trial before a Military Commission. The prosecution replied that this provision applied only to offences committed after capture, and that, as accused was being tried for an offence against the laws of war committed before his capture, a Military Commission was the appropriate Court. The defence put forward two further arguments. The first was that the Commission had been set up by an American General, whereas the forces operating in the theatre were under a British officer, Field-Marshal Alexander, and that Dostler should have been brought before a Court on Commission appointed by him. The prosecution replied that the injured belligerent was the United States, that the Commission had been appointed by the United States Commander in the theatre, and that Field-Marshal Alexander had no authority in the matter.

The defence then argued that in any case the appointment of the Commission was invalid, as it should have been made by the President of the United States. The whole discussion became rather nebulous, but the Court overruled the pleas of the defence and was not under the necessity of stating any reasons. The United Nations commentators remark that a different decision would have had far-reaching consequences.

On the merits, the only defence was that of superior orders. Dostler produced a Fuhrer order of October, 1942, which directed the extermination of Commandos, but also provided that, if captured, they were at once to be handed over to the Security Police. He remarked that it was mandatory on him to obey all orders received from the Fuhrer or under his authority, and that during the war officers could not resign from the German Army. On his desk he had had the detailed order, and he had obeyed it.

His counsel claimed further that the order was conceived as a reprisal, and was so represented in its first sentence. Under the Geneva Convention, it might be lawful, and consequently the accused had a perfect right to believe that the order was lawful. They also quoted the annoying statements of para. 347 of the United States *Rules of Land Warfare*.

The reprisal argument was easily disposed of, and it is surprising that it was raised. Article 2, para. 3, of the Prisoners of War Convention of 1929 expressly forbids reprisals against prisoners of war; and no soldier, and still less a Commanding General, could be heard to say that he considered the summary shooting of prisoners of war legitimate even as a reprisal.

The plea of superior orders was overruled without reference to the *Llandovery Castle* case being thought necessary. The Commission had been ordered to follow the provisions of Regulations for the Trial of War Crimes issued by Headquarters, Mediterranean Theatre, on September 23, 1945. These specifically provided that the fact that an accused acted pursuant to orders should not free him from responsibility, though it might be considered in mitigation of punishment. The amended statement in the British Manual does not include any such provision as to mitigation. The corresponding American amendment does.

In any case, Dostler had gone beyond his orders, in that he had ordered the prisoners to be shot, instead of handing them to the Security Police, though that probably amounted to much the same thing.

The Commission found him guilty and sentenced him to be shot to death by musketry, and this was carried into execution. Dostler had a good reputation as a soldier, but his fate need not be lamented.

The evidence disclosed considerable uneasiness among the German military authorities as to the Fuehrer order cited. It had been kept extremely secret, and the signature on the only copy produced, said to be the only one found, was illegible. Several subordinates had made vigorous protests, and Dostler's superiors, Zangen and Kesselring, were not implicated.

MURDER OF AIR FORCE OFFICER AND CIVILIAN.

In August, 1944, Pilot Officer Hood baled out of a burning Lancaster and was given shelter by a Dutch family named van der Wal. He remained hidden with them until March, 1945, very nearly long enough, when he and the son of the family were discovered by Dutch Nazi Police and handed over to the S.S. After interrogation, they were held for a week and then the S.S Lieutenant ordered one Sandrock to take Hood in a car to a nearby wood and there execute him. Sandrock and two other S.S. men carried out this order, the actual shooting being done by one Schweinberger. A few days later, exactly the same action was taken with the young Dutchman. As the prosecutor remarked, it was a typical gangster murder. There was no trial or formal sentence.

Sandrock and his friends were brought before a British court martial, presided over by a Brigadier. The S.S. lieutenant had unfortunately disappeared. They were defended by a Gunner Major who had been a law clerk, and the Judge Advocate was the well-known Mr. Stirling, who acted in that capacity throughout the war in very many important cases.

The defence was a plea of superior force equivalent to coercion, not merely superior orders. It had been made quite clear to Sandrock that, if he did not carry out his perfectly specific orders, he would himself be executed and his family would suffer. This was certainly a difficult situation, but it was held not to excuse participation in what obviously was murder. Mr. Stirling said that, if the Court considered that reasonable men might have believed that they were carrying out a proper judicial legal execution, then it could acquit the accused, but the Court did not so consider, and Sandrock and Schweinberger were hanged.

PRISON-CAMP MURDERS BY DRUG-INJECTION.

In the Hadamar trial, the accused were members of the staff of a sanatorium, and took part in the killing of over 400 Polish and Russian nationals by injections of poisonous drugs. Some 10,000 Germans, alleged to be mentally ill, had been similarly disposed of, but the accused were not tried for their deaths. They were brought before an American Commission and defended by American counsel, who must have felt that they had a difficult case.

Accused affirmed that they had been told, and believed, that the Poles and Russians came under the provisions of a German law or decree which required such disposition of German insane or incurably ill from tuberculosis. They were unable to prove the existence of any such law; one of them had seen a photostat copy of a Hitler decree so directing, and undoubtedly there was some administrative direction at least, but it was well covered up. Accused maintained that they had failed in attempts to get transfers from the institution; one, however, had not applied for a transfer, as he might have lost his pension! All were well aware of what was going on, and assisted in giving injections and in falsifying the records of death. The Court held that there was no exonerating coercion, but rather surprisingly sentenced only three to be hanged, the other three getting long prison sentences.

It will be noted that the American Commission assumed jurisdiction despite the fact that the crimes had been committed by foreigners, not combatants, outside United States territory, and had not affected United States nationals. This decision is sustained by the recently expounded doctrine of "universality of jurisdiction over war crimes," which has the support of the United Nations War Crimes Commission, and according to which every independent State has jurisdiction to punish war criminals in its custody, regardless of the nationality of the victim or criminal, or of the place where the offence was committed. The mass murder of the German nationals was not a "war crime." Further, it will be remarked that the case is an application of the rule that civilians may become guilty of "war crimes."

It is quite a relief to come to the scuttled U-boats case. Oberleutnant Grumpelt had orders to scuttle two U-boats. Before he could do so, the German Naval Command surrendered, but he went ahead and sank his submarines. He was quite candid about the matter; he wished to deprive the Allies of the use of these boats, which were of the very latest type; but he further maintained that he was not advised of the terms of the surrender. The case turned entirely on the facts. Everyone spoke well of the accused, but he was convicted and sentenced to five years' imprisonment. Mr. Stirling seems to have gone a long way towards inviting the Court to acquit. Grumpelt was vigorously defended by a German naval officer, who, incidentally, insisted on giving his opening and closing speeches in German.

In the Jaliut Atoll case, a Japanese Admiral had ordered the execution of three American airmen. The three officers who personally carried out this order were hanged, a fourth, who had delivered the prisoners from custody knowing that they were to be killed, received a ten-years' sentence.

A German N.C.O. who conducted four airmen into a wood, and then shot them, failed in his defence that they were trying to escape, which, if proven, would have been sufficient. He was hanged, which is a good thing.

Hauptmann Heyer ordered the escort of three airmen not to interfere if civilians should attack them. They were attacked and killed, and Heyer was hanged, which is also satisfactory.

During the Battle of Britain, many German pilots were roughly handled by indignant civilians, and many worthy folk would have approved of their murder. No one who has seen the devastation of the German cities can be surprised that German civilians were occasionally indignant, and it must be counted to their credit that over 40,000 bomber pilots and crews were taken prisoner unhurt.

All that Bruno Tesch's firm had done was to supply poison gas to the extermination camp at Auschwitz, where four and a half million human beings were processed. This satisfactory contract (for two tons of poison gas per month) was obtained by his principal traveller, Weinbacher. He and Tesch maintained that they thought it was being used for the extermination of vermin. The Court found this incredible, and they were both hanged, even although Weinbacher asked that his wife and three children should be considered!

It is sometimes observed that precedents are being created which would be awkward if we are ever on the beaten side. My own reflection is that, if we are, and are proven guilty of such incredible crimes, then such precedents will be useful. There will be no cause for complaint.

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. 103.—R. ESTATE TO B. Co., LTD.

Urban Land—Shop and Office Building—Ascertainment of Market Value—Comparison of Results obtained by Application of Two or more Methods of Valuation—"Replacement cost" Method considered—Capitalization of Net Rental Returns—Hypothetical Increases of Rents.

Appeal relating to a four-storey concrete building at No. 697–699 Colombo Street, Christchurch, known as the Glasgow Building, which is situated on the western side of Colombo Street between Cashel Street and Hereford Street, but nearer to Hereford Street, and was admitted by all parties to be in one of the best retail shopping areas of the city. The building was erected by the late J. A. Redpath, about 1925, and since its erection has at all times been let to various tenants. It was described as a modern shop and office building, so constructed that a further storey or possibly two stories could be added, and is fitted with a lift and other modern conveniences.

The property was sold by the R. Estate to the B. Co., Ltd., for £45,000. Before the Land Sales Committee the vendors presented a valuation of the land at £26,250 and of the buildings at £24,715, making a total of £50,965. For the Crown it was contended that the value of the land was £19,290 and of the buildings £14,795, or a total of £34,085 only. The Committee accepted the vendors' valuation of the land but reduced the value of the buildings to £21,969, making an aggregate value for the premises of £48,219, and consented to the sale at £45,000 accordingly.

The Court said: "It is perhaps desirable to reiterate that the duty of the Committee, and now of the Court, is to ascertain the value of the property as at December 15, 1942, subject in a proper case to increases or deductions which, however, do not appear to be applicable to this case. It has been held that a vendor is entitled to the full value of his property and this is in general synonymous in other than farm land with 'market value' and is the sum which the vendor if willing but not over anxious to sell at the relevant date might reasonably have expected to obtain in the open market for his property.

"In the absence of a well defined 'market' for real property the market value in any particular case must of necessity be arrived at by valuation, which in turn may be based upon one or more of several recognized and accepted methods of valuing. Of these methods none can be claimed to be conclusive and it is conceived that where two or more methods of valuation can properly be applied to a particular property, the true value is most likely to be found by a critical comparison of the results obtained by the application of all such methods as appear appropriate.

"These general considerations are relevant to the present appeal as it would seem that all of the valuers called before the Committee relied entirely on what has been called the 'replacement cost' method of valuation—namely, that they first assessed the value of the land, then the replacement cost of the building at December, 1942, and by adding the two together and making deductions for depreciation purported to arrive at the value of the property. For reasons which will be later referred to, the Court is satisfied that this method in the present case is not an accurate guide to the 'market value,' which is what is to be determined. It is first proposed however to consider the evidence presented upon a replacement cost basis.

"As to the land, Mr. H. for the vendors relied upon a considerable number of comparable sales and arrived at a value of £625 a foot or a total of £26,250. He acknowledged that the sales quoted had included buildings but from an analysis of the prices realized he contended that the proportion of the price which might properly be allocated to the land was in each case in the vicinity of £600 per foot and in some cases considerably more. From an examination of Mr. H.'s careful report, the Court is satisfied that in the particular block where the Glasgow Building is situated four small shop properties were disposed of in the years 1934, 1936, 1938, and 1945 respectively at prices justifying an assessment of from £560 to £650 per foot for the land alone. In the same block between 1924 and 1928 there were four other sales at considerably higher figures while a number of other sales quoted in the near vicinity show similar values. It was claimed that each of these sales was at a substantially higher figure than the existing Government value at the time and it is significant that Mr. M., the valuer for the Crown, was unable to point to any sale in the vicinity at less than the Government value. Mr. M., on the other hand, valued the present land at £19,290 or £460 a foot. He expressed the opinion that no increase had taken place in city values in Christchurch since the Government valuation in 1937, and he refused to acknowledge as being relevant any of the sales quoted by Mr. H. He claimed that these sales were too old to be of value for comparative purposes or that in each case they were influenced by special circumstances.

"It is evident that the Committee was constrained to accept the conclusions of Mr. H., supported by the numerous comparable sales mentioned in his report, in preference to Mr. M.'s opinion, unsupported by any truly comparable sales, that values have remained stationary since the 1937 valuation made at the end of the depression period. Mr. M. has had access to Mr. H.'s report and has had knowledge of the sales relied upon by him since the hearing before the Committee in June last, and it is therefore significant that while generally denying their relevance, Mr. M. made no attempt to explain to the Court the precise reasons why he refused to be influenced in his valuation by any of the sales mentioned. The Court has always understood that evidence of actual sales is the soundest guide as to market value and is therefore unable to accept the valuation put forward by the Crown. From a careful analysis of the sales quoted by Mr. H., however, we have arrived at the conclusion that in his assessment of the land together with its right-of-way access at £625 per foot he has placed too much reliance on one or two particular sales and that the land should be assessed at £600 per foot or at a total of £25,200.

"With regard to the buildings, the vendors relied before the Committee upon Mr. J., a well known builder, who assessed the replacement cost of the buildings at £27,461. At the appeal the vendors also called Mr. G. who estimated the replacement cost at £29,740. Mr. J. then asked leave to amend his valuation by including certain items previously not known to him and his amended figure for replacement cost was £28,611. Mr. J. allowed for builder's profit at the rate of 10 per cent., while Mr. G. considered 7½ per cent. to be sufficient. We are of opinion that Mr. J.'s figure should be adjusted by a reduction of builder's profit to 7½ per cent., reducing his replacement cost to £28,021.

"From the replacement cost, deductions have to be made by reason of the age and condition of the building. It is twenty years old and we are satisfied that a considerable sum will be required for renovations and maintenance in the near future. It was stated that the average amount expended on maintenance and repairs for the last five years was £52 6s., and it is therefore evident that no more than bare essentials have been attended to. Mr. G. acknowledged that the interior painting and decoration would cost £800, but owing to its condition he valued it at £250 only. He also agreed that the bitumen roof, which has developed leaks, would require relaying in a few years' time. Mr. J. admitted that £500 is immediately required for painting and decorating. The Court is of opinion that the sum of £750 should be deducted from the value of the buildings on account of deferred maintenance. As to depreciation, Mr. G. allowed 1 per cent. per annum, but Mr. J. contended that ½ per cent. per annum would be sufficient owing to the solid construction of the building. Neither of these gentlemen admitted that any degree of obsolescence attaches to the premises. Notwithstanding our regard for their practical experience, we are unable to accept the view that a building of this nature can properly be regarded as likely to have a useful life of two hundred years, or even of one hundred years, without substantial expenditure on reconstruction from time to time. We are satisfied from the rental returns to be discussed later, that even to-day the building is not so constructed as to its upper floors as to attract tenants willing to

pay rentals commensurate with the value placed upon the property by the vendors. The Court has previously expressed the view that in every city building, whatever its construction, a certain degree of depreciation and of obsolescence commences to accrue from the date of its erection and that proper allowance in this regard must always be made in accordance with the circumstances of the case. In the present case not less than 1 per cent. for depreciation and ½ per cent. for obsolescence per annum, or a total for twenty years of 25 per cent. should be allowed.

"To sum up the position, we are satisfied that upon the appellant's case alone the buildings should be assessed at £28,021, less a deduction of £7,005 for depreciation and obsolescence, and a further deduction of £750 for deferred maintenance, resulting in a net value as at December, 1942, of £20,266.

"The Crown relied as to the buildings upon Mr. M. and Mr. P., whose valuation amounted to £14,795. It may be noted in passing that the Crown allowed 1 per cent. only for depreciation, but a number of special items, such as the lift and heating apparatus, were brought in at substantially less than their replacement cost, so that in effect the Crown allowed for obsolescence to a degree at least equal to the ½ per cent. per annum which commends itself to the Court. The Crown's valuers relied almost entirely upon a cost per foot basis of valuation which neither the Committee nor the Court considers is comparable as to accuracy with the detailed analysis of materials and costs prepared by the practical builders called for the vendors. In general therefore the Court is in agreement with the Committee that the valuations presented by the vendors should be accepted as of greater reliability than those of the Crown. It is possible that the figures presented by Messrs. G. and J. may be in some degree excessive but in the absence of convincing proof of the inaccuracy of any of their itemized costs we are of opinion that subject to the foregoing adjustments they should be accepted. The vendors are therefore entitled to have the value of the property upon a replacement cost basis assessed as follows: Land £25,200; Buildings £20,266; total £45,466.

"This would, of course, appear to justify the sale price of £45,000, but it is now necessary for us to consider certain factors affecting the value of the property which do not appear to have been stressed or seriously considered by the Committee. The first is the interesting fact, as was frankly admitted by counsel for the appellants, that in 1945, the appellants made an application to the Supreme Court for leave to increase the rentals and for the purpose of that application presented two valuations of the property by well-known Christchurch valuers, one by Mr. McC. of £41,786, and one by Mr. S. of £43,000. It is we think of some significance that neither of these valuers was called in connection with the present sale. Mr. Hill for the appellants properly pointed out that it must be assumed that in their valuations for the Supreme Court these gentlemen purported to value the property as at September 30, 1939, but it is equally proper for the Crown to comment that if the valuers concerned were prepared to place a higher value on the property as at December 15, 1942, it is surprising that they were not called in the present case and that no explanation was given of the appellants' change of valuers. The Crown moreover claimed that there would in fact be little rise in value between September, 1939, and December, 1942, and that if called in the present case Messrs. McC. and S. would have had difficulty in justifying an increase in the values given by them in the Supreme Court. Be that as it may we are of opinion that we are justified in drawing the inference that the value of £45,466 arrived at as above is probably on the high side.

"A more serious matter, however, which was fully canvassed before this Court, was as to the rental return actually received by the vendors from the Glasgow Building over the past few years and the probable return which a purchaser might reasonably expect to receive in the future.

"A well recognized method of valuing city property is by a capitalization of net rental returns. Indeed it is frequently claimed that the true value of a city building, as of many other types of property, can be assessed only by reference to its net earning capacity. On the other hand it is probably fair to say that a valuation based on rental returns is liable to error in that its accuracy depends upon the correct assessment of many items of expenditure which must to some degree be matters of estimate or opinion. For this reason the Court is disposed to treat the capitalization of rental returns rather as a useful check upon other methods of valuation than as an entirely reliable method of valuation in itself. We are of opinion, however, that in the present case certain conclusions from a consideration of the rentals of the Glasgow Building are so inescapable that they must be taken into account in arriving at the true value of the property.

"The Court had the advantage of a statement of rental returns based upon the present rentals and prepared and put in by the vendors. The statement shows gross rentals of £2,080 and it was stated on behalf of the vendors that these rentals had remained practically constant since 1932. It was also admitted that on the application to the Supreme Court in 1945 for permission under the Stabilization Regulations to increase rentals, the Court for reasons said to be of a technical nature but without valuing the building or assessing fair rentals dismissed the application. It was stated that prior to this application some of the tenants had agreed, subject to their being given leases, to increases of from 25 per cent. to 35 per cent. and that a valuer called for the tenants agreed that increases of from 35 per cent. to 41 per cent. would be justified. From these facts the Court is forced to certain conclusions: first, that the present gross rental return of £2,080 may properly be accepted as the actual rental return on December 15, 1942, and might at that time have been accepted as typical of the rentals received for a number of years; secondly, that in view of the Stabilization Regulations a prudent purchaser in December, 1942, would have realized that he would be unlikely to secure increased rentals for some considerable time; and thirdly, that in fact no increase has been possible down to the present time nor is any increase in gross rentals likely for some indefinite period. The Court also concludes from the rental history of the building, and from the facts stated in regard to the evidence given before the Supreme Court, that even supposing the Stabilization Regulations were immediately revoked the rentals which the owners of the building would be likely to procure from tenants for the next five years would not be likely to show an increase upon the present rentals of more than 50 per cent.

"A perusal of the vendor's statement of rental returns shows that the allowances for outgoings are in many cases too low. Depreciation is allowed only at 1 per cent. on £12,000, whereas for the reasons previously given it should be allowed, in the opinion of the Court, at 1½ per cent. on the actual value of the building. £52 6s. which is allowed for maintenance and repairs is stated to be the average for five years, and this no doubt accounts for the heavy amount of deferred maintenance previously referred to. It is our opinion that not less than 1 per cent. or £200 per annum should be allowed under this heading. The allowance of £2 10s. per week for a janitor is obviously on the low side and no provision is made for a lift attendant. Administration is allowed at 2½ per cent., though 5 per cent. is not infrequently claimed, and for sundries a nominal sum of £5 only has been provided. Notwithstanding these inadequate or minimum allowances for outgoings, the net rental return is shown at no more than £836. On the proposed sale price of £45,000 this shows a net return of 1.86 per cent. only and it would seem therefore from the vendor's own evidence that if £45,000 is in fact the value of the Glasgow Building it has returned to its owners less than 2 per cent. for many years. To ascertain value the net return must be capitalized at a reasonable rate. It is recognized that opinions may differ as to a proper rate of capitalization, but it is conceived that in the case of investment in city property an investor would expect a minimum return of 4 per cent. Capitalized at 4 per cent. the net return of £836 shown by the vendors would support a capital value for the property of no more than £20,900.

"It has already been intimated, however, that in the opinion of the Court the outgoings shown in the vendors' statement of income return are too low. It is proposed to make an adjustment only as to the two major items, depreciation and maintenance, which in our opinion should be allowed at 1½ per cent. and 1 per cent. respectively on the present value of the building (say, £20,000). These adjustments would result in an increased allowance for depreciation of £130 and for maintenance of £148 and by the deduction of these amounts the net rental return would be reduced to £558. This sum, upon the proposed sale price of £45,000, shows a net return of 1.24 per cent. and capitalized at 4 per cent. would justify an investment of only £13,950.

"In view of the claim, however, that the present rentals are too low, it is proposed to examine the position as it would be in the event of increases in the gross rentals of 25 per cent. and 50 per cent. respectively. It should be remembered, however, that a computation based upon such increased rentals is no more than an estimate of the income which may possibly be secured at some future indefinite date and has no relationship to the actual return which an owner can secure at the present time or could secure in December, 1942. It would therefore seem clear that if anticipated future rentals are to be taken as the basis of income, the outgoings should be appropriately adjusted.

(To be concluded).

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

Joys of Executorship.—A neat point in trustee administration has been set Christie, J., for determination by a trustee whose one remaining asset is a freehold property. The four beneficiaries (of whom the trustee is one) are equally decided on the question as to whether he should sell to the beneficiary in occupation at the price fixed by the Land Sales price. In spite of valuations which show that, without the expenditure of a substantial sum in repairs, the property is at present worth no more than that fixed for it, the trustee considers that he can obtain more for it when the Act is repealed, and that he is entitled to await this, as it seem to him, happy event. On hearing of this ruthless fellow, Scriblex was reminded of Mrs. Thrale's anger at Dr. Samuel Johnson's disinclination to obtain a purchaser for her late husband's brewery—the same brewery, by the way, that obtruded itself into the argument in the *Onakaka* case. She was satisfied that Johnson, as executor, revelled in the opportunity of dealing for the first time with large sums of money and had no intention of allowing the disposal of the corpus to spoil his fun. In her journal, she complains of the difficult task it will be to "win him from the dirty delight of seeing his name, in a new character, flaming away at the bottom of bonds and leases."

Practice Note.—In the reign of Charles II, the great jurist, Sir Matthew Hale, described an indictment as "a plain, brief, and certain narrative of an offence committed." This beautiful ideal was shattered when the growth of technicalities destroyed both the brevity and the plainness, until the Indictments Act, 1915, assisted towards a better understanding both by accused and jury. In *O'Connell's Case* (1844), the indictment was a hundred yards long!

Oviparous Orders.—The necessity of Orders, the spawn of Emergency Legislation, if they are made to create criminal offences, to be clearly stated for the humble people to whom their provisions are often directed is stressed by Lord Goddard, L.C.J., in *Brierley* v. *Philips and Another*, [1947] 1 All E.R. 269, 270: "I am certainly not prepared ever to support Orders and to find people guilty of criminal offences when the Orders which they are charged with violating are couched in language which is open to all sorts of meanings and causes all sorts of difficulties, so that the unfortunate people cannot know whether they are acting legally or not, unless possibly they get counsel's opinion, or at any rate a solicitor's advice." Here, the question arose as to whether a person who bought eggs for the purposes of hatching was a "consumer" within the meaning of the Eggs (Control and Prices) (Great Britain) Order, 1946. The consumer of an egg, in the opinion of Lord Goddard and Humphreys, J., is one who is going to eat the egg or to use the egg in the process of cooking in his own house. Buy an egg to put to one of your hens to hatch it, and, whatever else you may be, you are not a "consumer" of that egg. The term "consumer," according to the Court, is "a most unhappy expression," although it seems to Scriblex that anyone in this country in possession of a new-laid egg would have a bewildered, rather than an unhappy expression at this seeming miracle.

Other Times, Other Manners.—"I am not compelled to give my reasons to you, sir, nor to any man."

"Let me beg of you to alter your decision," said the man, in a tone of profound respect.

"Utterly impossible, sir; I am a Magistrate."

—George Borrow: *Lavengro*, 1851.

Lord Chelmsford's Wit.—Frederick Thesiger, afterwards that great Chancellor, Lord Chelmsford, had an irrepressible love of a joke. He may perhaps be best remembered for his courage as a junior counsel when appearing in a case before Chief Justice Abbott, who addressed him in a rude and churlish manner. "I don't understand being addressed by your Lordship in such a tone, and it is highly improper for a Judge to use to any gentleman of the Bar, and I will not submit to it," he replied, much to the satisfaction of many counsel who had suffered similar affronts. On one occasion, he objected strenuously to the tactics of his opponent, who persisted, in face of his objection, in putting leading questions to his witness. "I have a right," maintained his opponent determinedly, "to deal with my witnesses as I please." "To that," answered Thesiger, "I offer no objection. You may *deal* as you like, but you shan't *lead*." On another occasion, when some one mentioned that a particular High Sheriff had a remarkably bulbous nose, but that it was nothing compared with the nasal organ of the particular High Sheriff's father, "Ah," said Thesiger, "I see; *damnosa hereditas*."

From my Notebook (Mixed Bag Division).—Recalling the number of changes brought about by various decisions on s. 25 (1) of the Finance Act, 1941, the sedate *Law Quarterly* (October, 1946) contains a striking commentary by Mr. R. E. Megarry entitled, "Will You, Won't You, Will You, Won't You, Will You Join The Dance?"

Counsel has suggested that this appeal (against the grant of a decree *nisi*) is wholly vexatious and that it is an attempt on the part of the husband, out of spite, to prevent his wife marrying the man whom she desires to marry and who is proceeding overseas at an early date. It is impossible for us to determine to-day whether that is so or is not so. If that is the fact, the husband's behaviour is extremely contemptible, but we cannot pre-judge that issue.—Morton, L.J., in *Lloyd-Davies* v. *Lloyd-Davies*, [1947] 1 All E.R. 167.

Cross-examination must always be courageous and no advocate should submit without strong protest to judicial interference where he is justly satisfied that his questions are proper and justified in the circumstances. —Mr. J. V. Barry, K.C. (now Mr. Justice Barry), Victoria, in *Some Problems of Advocacy*.

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. Death Duties.—*Agreement for Sale and Purchase between Father and Son—Half-share in Farming Property—Subsequent Gift of Purchase-money—Liability for Gift and Death Duties.*

QUESTION: A., who is a farmer, sells under an agreement for sale and purchase a one-half interest in his farm to B., his son, and also a one-half interest in the live and dead stock, at Government valuation as to the interest in land and market valuation of the stock, the transaction being approved by the Land Sales Court. By the same agreement, A. and B. agree to carry on farming on the property in equal shares, and it is contemplated that such an arrangement will continue during the lifetime of the father. A. now proposes to make annual gifts of the purchase-money to B. in sums of £500 by partial discharges by deed (see form in (*1942*) *18 N.Z.L.J.*, 249) until the purchase-money is extinguished. As the father remains in possession of the land jointly with his son as a partner, is there a possibility of the whole of the property being caught for death duty under s. 5 (*c*) of the Death Duties Act, 1921? It is to be noted that the gift is of purchase-money, and not of an interest in the land.

In the foregoing case, by the agreement for sale and purchase, the purchase-money is payable in annual instalments spread over seven years. There is no provision for payment of interest on the purchase-money. Can the transaction be caught for duty under ss. 38 and 49 of the Death Duties Act, 1921?

ANSWER: It is assumed that an up-to-date Government valuation has been obtained, and that the valuation of the stock has been approved by the Assistant Commissioner of Stamp Duties. As to the risk, if this has not been done, see *Adams's Law of Death and Gift Duties in New Zealand*, 169, 259. Assuming this has been done, the property would not be caught by s. 5 (1) (c), for *In re Nichol, Johnstone* v. *Commissioner of Stamp Duties* (*No. 2*), [1931] N.Z.L.R. 718, and *Commissioner of Stamp Duties* v. *Shrimpton*, [1941] N.Z.L.R. 761 (Part II), are distinguishable. In both those cases, there were gifts; here, there is no gift, if the valuations are right.

If, however, the arrangement to carry on farming by the father and son during the father's lifetime is in the same agreement, or in one of almost the same date, the transaction may be caught for death duty by s. 5 (1) (*j*): *Riddiford* v. *Commissioner of Stamps*, (1913) 32 N.Z.L.R. 929. It appears that, in order that a transaction may be caught by s. 5 (1) (*j*), it is not necessary for the element of gift to be present: *Adams's Law of Gift and Death Duties in New Zealand*, 68, and *Cumulative Supplement No. 2*, p. 34, citing Fair, J., in *Commissioner of Stamp Duties* v. *Shrimpton*, [1941] N.Z.L.R. 761, 822.

Therefore, it is recommdended that in such cases the arrangement as to the joint farming should be entered into by a separate and substantially later agreement. Also, if possible, the duration of the partnership should not be determined by reference to the life of any person: s. 5 (1) (*j*) and *Riddiford's* case (*supra*). The first gift of the purchase-money should not be until a decent interval—*e.g.*, six months—has been allowed to lapse; the gift must be entirely independent of the prior transaction: see the judgment of Johnston, J., in *Commissioner of Stamp Duties* v. *Card*, [1940] N.Z.L.R. 637, 644. There may be contemporaneous transactions which in their scope for gift-duty and death-duty purposes are to be regarded as one: *Guardian, Trust, and Executors Company of New Zealand, Ltd.* v. *Commissioner of Stamp Duties*, [1943] N.Z.L.R. 314.

The mere fact that there is no provision for payment of interest in the agreement for sale and purchase will not *per se* cause the transaction to be caught for gift duty by s. 38 or s. 49 of the Death Duties Act, 1921: *Commissioner of Stamp Duties* v. *Card*, [1940] N.Z.L.R. 637.

X.2.

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2. Income Tax.—*Dividends on Shares on which Tax paid by Company—Rents from Property—Loss shown in Tax-year on latter—Carrying forward of Loss—Land and Income Tax Amendment Act*, 1945, *s.* 18.

QUESTION: A taxpayer has received income for the year ending March 31, 1947, from two sources only: (*a*) dividends on shares in New Zealand companies on which income tax and Social Security tax has been paid by the company, and (*b*) rents from the letting of house and business premises.

For the year ending March 31, 1947, the taxpayer received from (*a*) an income of, say, £150, and from (*b*) a loss of £125 was incurred.

What loss, if any, is the taxpayer entitled to carry forward in subsequent years for income tax and/or Social Security tax purposes?

ANSWER: The provisions in the tax legislation relative to, carrying forward losses are contained in s. 81 of the Land and Income Tax Act, 1923, and amendments, in particular the amendment made by s. 18 of the Land and Income Tax Amendment Act, 1945.

The main point in reply to the question is that dividend (non-assessable) income is not within the scope of s. 81, which deals with assessable income only. The loss of £125 on rents may be carried forward against *assessable* income for the three following years, in the manner prescribed by s. 18 of the Amendment Act, 1945. This applies for both income tax and Social Security charge purposes.

Before the income year ended March 31, 1946, losses in *business* only could be carried forward, and losses on investment (*e.g.*, rents) could not be set off against subsequent profits, but the amendment made in 1945 removed this disability.

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RULES AND REGULATIONS.

Coal-mines Regulations, 1939, Amendment No. 3. (Coal-mines Act, 1925.) No. 1947/86.

Economic Stabilization Emergency Regulations, 1942. (Emergency Regulations Act, 1939.) No. 1947/87.

Licensing Act Emergency Regulations, 1942 (No. 2), Amendment No. 5. (Emergency Regulations Act, 1939.) No. 1947/88.

Marine Engineers Examination Rules, 1939, Amendment No. 3. (Shipping and Seamen Act, 1908.) No. 1947/89.

Masters and Mates Examination Rules, 1940, Amendment No. 4. (Shipping and Seamen Act, 1908.) No. 1947/90.

Rabbit-destruction (Blue Mountain Rabbit District) Regulations, 1947. (Rabbit Nuisance Act, 1928.) No. 1947/91.

Fertilizer Control Order, 1940. (Primary Industries Emergency Regulations, 1947.) No. 1947/92.

Armed Forces Drivers' Licenses Emergency Regulations, 1947. (Emergency Regulations Act, 1939.) No. 1947/93.

Ships Compasses Regulations, 1947. (Shipping and Seamen Act, 1908.) No. 1947/94.

Industrial Efficiency (Radio) Regulations, 1941, Amendment No. 1. (Industrial Efficiency Act, 1936.) No. 1947/95.

Double Taxation Relief (United Kingdom) Order, 1947. (Land and Income Tax Amendment Act, 1946, and Land and Income Tax Amendment Act, 1935.) No. 1947/96.

Municipal Enrolment Regulations, 1947. (Municipal Corporations Act, 1933.) No. 1947/97.

Coroners' Inquests Fees Regulations, 1947. (Coroners Amendment Act, 1920.) No. 1947/98.

Fencing (Half-cost) Order, 1947. (Fencing Act, 1908.) No. 1947/99.

Suspension of Apprenticeship Emergency Regulations, 1944 (Reprint). (Emergency Regulations Act, 1939.) No. 1947/100.

Sheep-skin Emergency Regulations, 1947. (Emergency Regulations Act, 1939.) No. 1947/101.

Meat Marketing Order, 1942, Amendment No. 5. (Marketing Act, 1936.) No. 1947/102.

Whitebait Fishing Regulations, 1947. (Fisheries Act, 1908.) No. 1947/103.

Industry Licensing (Radio-manufacture) Revocation Notice, 1947. (Industrial Efficiency Act, 1936.) 1947/104.