New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."

VOL. XXIII. TUESDAY, JULY 15, 1947. No. 13

FAIR RENTS LEGISLATION: APPEALS.

IN the judgment considered in our last issue, *Chandler* v. *Strevett*, [1947] 1 All E.R. 164, the second question dealt with by the Court of Appeal was whether an appeal lay from the decision of an inferior Court in its determination whether or not the making of an order for possession of a tenement to which the Rent Restriction legislation applied would cause greater hardship to the landlord or to the tenant.

We now propose to consider whether that judgment is of any effect in New Zealand—that is to say, whether a Magistrate's decision on relative hardship, in the course of an action for possession of a tenement to which the Fair Rents legislation applies, is appealable on any ground. This will involve a careful consideration of the effect of s. 20 of the Fair Rents Act, 1936,* which is as follows:

> No appeal shall lie from any decision, determination, or order made under the provisions of this Act; and, except upon the ground of lack of jurisdiction, no such decision, determination, or order shall be liable to be challenged, reviewed, quashed, or called into question in any Court.

I. Under the English Rent Restriction Acts.

There is no provision in the English Rent Restriction Acts corresponding to s. 20 of the Fair Rents Act, 1936; but, under s. 105 of the County Courts Act, 1934, a party dissatisfied with a judgment of a County Court Judge has the right to appeal to the Court of Appeal from the determination of the Judge in point of law or equity, or upon the admission or rejection of any evidence, where the amount or value exceeds £20.

In *Robinson* v. *Donovan*, [1946] 2 All E.R. 732, the Court of Appeal gave consideration to the question whether the English statutory provision corresponding with s. 63 of the Finance Act, 1937 ("unless the Court is satisfied"), gave grounds for an appeal from the decision of a County Court Judge on the question of relative hardship. In his judgment, with which the other members of the Court (Bucknill and Somervell, L.JJ.) agreed, Scott, L.J., said that the County Court Judge was given a discretion which would enable him to take into account all the circumstances on both sides to the question of (*inter alia*) hardship, and to make up his mind whether it was a case in which the tenant proves that the hardship on the tenant would be so great that he ought to refuse possession; and it is most important in these cases that the appellate tribunal should not interfere with findings of fact where there is evidence to support them.

In *Chandler* v. *Strevett*, [1947] 1 All E.R. 164, Scott, L.J., expressed the view that the question where lies the balance of hardship is not one of fact (on which there is no right of appeal under s. 105 of the County Court Act, 1934); but that, while the County Court Judge's finding of fact on the evidence is final, his inferences regarding the incidence of hardship are open to review. They lie, he said, in the debatable land of fact and law, matters of inference and opinion in which the proper Courts can give guidance. The difference is between the function of finding specific facts and the function of drawing the right inferences from the specific facts when so judicially established. In the case before him, his Lordship saw no reasonable justification for the Judge's conclusion on the hardship issue, and was satisfied that he must have arrived at it by erroneous inferences from the facts; and he regarded such conclusion as unjust. Bucknill, L.J., considered that the appeal should be allowed, because the Judge was wrong in law in that he did not pay due regard to the question of relative hardship. Applying the relative hardship provision and the general principle of the Rent Restriction Acts to the admitted facts, Somervell, L.J., came to the conclusion that the Judge was wrong in law, and the appeal from that determination should be allowed.

II. Appeals before the Fair Rents Legislation.

Before considering the effect of s. 20 of the Fair Rents Act, 1936, we must understand what was the position regarding appeals in tenement cases before that statute was enacted. (The position remains unaltered save and in so far as it is modified or restricted by the Fair Rents legislation, which we shall consider later.)

An action for possession of any tenement may be brought under the Magistrates' Courts Act, 1928—under s. 180 if the tenancy has been determined, or under s. 181 if the rent is in arrear.

In exercise of his jurisdiction under that statute, a Magistrate may make an order for possession, or else refuse an order and give judgment for the tenant.

* The corresponding Reg. 23 of the Economic Stabilization Emergency Regulations, 1942, before last year's amendment was in the same words, with the substitution of the words "of this Part of these regulations" for the words "of this Act."

The remedy for an error of law or fact in the proper exercise of that jurisdiction is appeal, or rehearing. If a Magistrate has disregarded the limits of his jurisdiction, prohibition is the appropriate remedy; but appeal is the remedy for an erroneous exercise by him of the jurisdiction committed to him: per Salmond, J., in *Van de Water* v. *Bailey and Russell*, [1921] N.Z.L.R. 122, 124. If an excess of jurisdiction is alleged, the Magistrate's decision may be reviewed by the use of the appropriate extraordinary remedy, and also, it has been held, by appeal: see *McPherson* v. *Andrew Lees, Ltd.*, [1926] N.Z.L.R. 533.

There is no appeal from the refusal of a Magistrate to make an order for possession of a tenement; but the landlord is not bound by that refusal, as he may proceed in the Supreme Court in an action for ejectment. The right of appeal in tenement cases is limited to an appeal by the tenant against an ejectment order actually made. It was so held by Salmond, J., in *Aiken* v. *Smedley*, [1921] N.Z.L.R. 236. Thus, an order for possession wrongfully made can be appealed against: *Saraty* v. *Morice*, [1923] N.Z.L.R. 729, 731, where Adams, J., in following *Aiken* v. *Smedley*, explained how the difference arises:

> On first impression there appears to be an inconsistency in the view that a right of appeal is given against an order for delivery of possession of a tenement and not also against a refusal of an order; but no estoppel is created as between the parties by the granting or refusal of an order for delivery of possession, and on a refusal of an application the parties are left *in statu quo*. The landlord or person aggrieved by the refusal of any order may therefore obtain complete redress by an action for possession in this [the Supreme] Court. Where an order is made, however, the person in possession can only obtain a stay of execution by giving security under s. 178 [s. 189 of the Act of 1928], by a bond with two approved sureties, to sue the person to whom the warrant was granted, and to pay all the costs of the proceedings in the event of judgment for the defendant. Moreover, in any such action the burden of proving that at the time the warrant was granted the person applying for it had no lawful right to the possession of the premises would lie on the plaintiff.

So far as we have seen, apart from any effect upon the question of appeal of the Fair Rents Act, 1936, in general, or s. 20 of that statute in particular, an order for possession made by a Magistrate may be reviewed by the Supreme Court; and, if the order for possession is refused, then, on the same authorities, an appeal from that refusal will not lie, and a landlord's remedy is a common-law action for ejectment in the Supreme Court.

In our next issue, we shall consider the questions arising under the Fair Rents legislation regarding appeals, and, in particular, whether s. 20 of the Fair Rents Act, 1936, is of such restricted application as to render such an appeal as was successful in *Chandler* v. *Strevett* maintainable in this country, or whether s. 20 is of general application to all cases relating to orders for the possession of tenements which are subject to the provision of our Fair Rents legislation.

SUMMARY OF RECENT JUDGMENTS.

MINISTER OF LANDS v. MAPERA MAKU ERIHANA.

COURT OF APPEAL. Wellington. 1947. March 19; April 3. SIR HUMPHREY O'LEARY, C.J.; SMITH, J.; FAIR, J.; CALLAN, J.

Rating—Systems of Rating—Swamp Drainage—Native Land in Drainage Area—Native Land classified as receiving or likely to receive Direct Benefit from Execution of Drainage Works—Native Owner not Appealing against Classification or Applying to Minister to amend Classification List—On failure of payment of Rates, Application made for Charging-order—Remission of Rates sought on Ground that Circumstances constitute "Special circumstances arising from hardship"—Whether Classification if, in fact, in Wrong Class, could constitute "Hardship"—Discretion of Native Land Court as to what constitutes "Special circumstances"—Swamp Drainage Amendment Act, 1928, ss. 2, 3—Rating Act, 1925, s. 108 (3) (4) (6).

The Native Land Court, in considering an application for remission of rates under s. 108 (6) of the Rating Act, 1925, must accept the validity of the rate which it has power to remit, and the effect of the classification upon which the rate is based cannot constitute "special circumstances arising from hardship" within the meaning of the subsection.

Attorney-General v. *De Keyser's Royal Hotel, Ltd.*, [1920] A.C. 508, applied.

So held by the Court of Appeal, allowing an appeal from the judgment of *Finlay*, J., [1946] N.Z.L.R. 356, by varying the answer made in the Court below to the question put in the originating summons, in the manner following: That the Native Land Court has no power under s. 108 (6) of the Rating Act, 1925, to remit any rates to the plaintiff upon the basis or finding by it that the benefit received by her land is other than that settled by an existing classification under the Swamp Drainage Act, 1915, as amended by the Swamp Drainage Amendment Act, 1928.

Julius v. *Oxford* (*Bishop*), (1880) 5 App. Cas. 214, referred to.

Observations by *Fair* and *Callan*, JJ., as to objection to the Supreme Court considering matters on originating summonses when specific facts relating to a particular class to be affected by it have not been put before it.

Appeal from the judgment of *Finlay*, J., [1946] N.Z.L.R. 356, allowed, and answer varied as above.

Counsel: *A. E. Currie*, for the appellant; *Bate*, for the respondent.

Solicitors: *Kennedy, Lusk, Willis, and Sproule*, Napier, for the appellant; *Simpson and Bate*, Hastings, for the respondent.

THE KING v. GILLESPIE.

COURT OF APPEAL. Wellington. 1947. March 17, 24. SIR HUMPHREY O'LEARY, C.J.; SMITH, J.; FAIR, J.; CALLAN, J.; CORNISH, J.

Criminal Law—Appeal—Substantial Miscarriage of Justice—Judge directing Jury that there was Corroboration in Certain Evidence which was not Corroborative—Whether such Direction resulted in a Substantial Miscarriage of Justice—New Trial granted—Criminal Appeal Act, 1945, s. 4 (1) (2).

A direction by the presiding Judge in a criminal case that there was corroboration in certain evidence, which, in fact, was not corroborative, must be taken to have resulted in a substantial miscarriage of justice.

R. v. *Baskerville*, [1916] 2 K.B. 658, distinguished.

In the present case, the conviction was quashed, and a new trial was ordered.

Counsel: *Johnstone*, K.C., and *Trimmer*, for the appellant; *C. H. Taylor*, for the Crown.

Solicitors: *Trimmer and Teape*, Auckland, for the appellant; *Crown Law Office*, Wellington, for the Crown.

THE KING v. WAY.

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

Criminal Law—Appeal from Conviction—Attempt—Misdirection—Evidence—Attempted Indecent Assault of Girl of Ten Years—Whether Evidence disclosed such Offence—Failure of Judge to warn Jury of Danger of Accepting Evidence of Young Children—Failure to Inform Jury as to what Parts of Children's Evidence corroborative—New Trial granted—Criminal Appeal Act, 1945, ss. 3, 4.

Criminal Law—Practice—Trial—Extract from Reported Judgment read to Jury by Judge—No distinguishing of Facts therein from Facts before Jury—Wrong Practice.

It is for the Court to rule whether evidence, if accepted, or any part of it, amounts to an attempt to commit a crime, leaving to the jury the question whether the facts relied upon, and the alleged intent with which they were done, had been proved to their satisfaction. The fact that the jury was not warned that they should examine the evidence of young children with care and normally should not act upon it without corroboration, or told as to what parts of their evidence should be regarded as corroborative, is a substantial ground for an appeal on the grounds of misdirection.

R. v. *Ostler and Christie*, [1941]N.Z.L.R. 318, and *R.* v. *Yelds*, [1928] N.Z.L.R. 18, followed.

The reading of a long extract from a judgment in another case is apt to be confusing and not helpful to a jury, and is a course to be deprecated on the part of either Judge or counsel.

Consequently, it was held by the Court that, although the evidence, if accepted by the jury, was sufficient to entitle them to infer that the appellant's acts constituted in law an attempt to commit an indecent assault, yet having regard to the failure of the learned Judge to give the warning as to the danger of accepting the evidence of young children, and the reading of the extract from the earlier judgment without distinguishing its facts, the appeal should be allowed and a new trial ordered.

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

Solicitors: *Blair and Parker*, Gisborne, for the appellant; *Crown Law Office*, Wellington, for the Crown.

NEWSOME v. NEWSOME.

SUPREME COURT. Christchurch. 1947. May 23; June 6. FLEMING, J.

Divorce and Matrimonial Causes—Alimony and Maintenance—Jurisdiction—Maintenance Order in Existence—Application to Supreme Court in Divorce for Permanent Maintenance—Election by Applicant to abandon Rights under Destitute Persons Act, 1910—Effect of Order for Permanent Maintenance made before Decree Absolute—Divorce and Matrimonial Causes Act, 1928, s. 33 (2)—Destitute Persons Act, 1910, s. 17—Domestic Proceedings Act, 1939, s. 9.

Section 9 of the Domestic Proceedings Act, 1939, which enacts that—"No maintenance order made under Part III of the principal Act [the Destitute Persons Act, 1910] shall be deemed to be or to have been cancelled by reason only of the dissolution (whether before or after the commencement of this Act) of the marriage between the husband and the wife"—has not taken away the right of a wife to claim permanent maintenance under s. 33 of the Divorce and Matrimonial Causes Act, 1928, although there is in existence a maintenance order in her favour under the Destitute Persons Act, 1910. Such an application for permanent maintenance is an election by the applicant to abandon her rights under the latter maintenance order, and to rely upon the order of the Supreme Court.

Burke v. *Burke*, [1934] N.Z.L.R. 978, and *Ritchie* v. *Ritchie*, [1938] G.L.R. 56, applied.

Richards v. *Richards*, [1942] N.Z.L.R. 313, referred to.

Such an order for permanent maintenance made before the decree absolute would have to be a suspensory one, and payments under it could not begin to run from an earlier date than that of the decree absolute.

In the present case, therefore, where the wife during the existence of a maintenance order in her favour, applied for permanent maintenance after the making of the decree *nisi* but before the time for making that decree absolute had expired, the learned Judge adjourned the matter until the making of the decree absolute.

Thomson v. *Thomson*, [1932] G.L.R. 655, followed.

Counsel: *Russell*, for the petitioner; *E. S. Bowie*, for the respondent.

Solicitors: *D. W. Russell*, Christchurch, for the petitioner *Bowie and Bowie*, Christchurch, for the respondent.

WONG GEE FAT AND OTHERS v. LEE HOY CHONG.

SUPREME COURT. Auckland. 1947. March 17, 18, 24. JOHNSTON, J.

Contract—Illegality—Action claiming Return of Moneys deposited with Defendant to be held by him for Plaintiffs—Alternative Claim for Return of Moneys to be kept by Defendant in safe Custody and not returned—Circumstances in which Moneys Paid not disclosed or proved—Moneys honestly obtained but actually paid for Shares in Fan-tan Bank—Dividends paid out of Profits—Share-moneys held intact—Carrying on Unlawful Game—Ex dolo malo non oritur actio—*Gaming Act, 1908, ss. 9, 10, 70.*

Plaintiffs claimed from the defendant the return of sums which had been deposited by each one of them with him (such moneys to be held by him as they should direct), and which he failed to return after demands made upon him therefor. The moneys were in each case paid to the defendant for two shares in two banks established for the purpose of carrying on the unlawful game of fan-tan. The moneys deposited were kept intact, and dividends only were paid out of profits. It was therefore contended that the claim was one for a refund of capital honestly obtained.

Held, That, as, in order to succeed, the plaintiffs had to prove the exact circumstances in which the money was paid, and they could establish their case only by proving facts which showed that the moneys were paid to carry on an unlawful game—*viz.*, fan-tan—the Court, on the ground of public policy, could not assist them to recover the money they claimed.

In re Ghee, Ex parte Lowe King, Public Trustee v. *Lowe King*, [1928] N.Z.L.R. 266, *Holman* v. *Johnson*, (1775) 1 Cowp. 341; 98 E.R. 1120, and *Berg* v. *Sadler and Moore*, [1937] 2 K.B. 158; [1937] 1 All E.R. 637, applied.

Gordon v. *Metropolitan Police Chief Commissioner*, [1910] 2 K.B. 1080, distinguished.

Counsel: *V. R. S. Meredith* and *Aekins*, for the plaintiffs; *Dickson*, for the defendant.

Solicitors: *Meredith, Meredith, Kerr, and Cleal*, Auckland, for the plaintiffs; *J. F. W. Dickson*, Auckland, for the defendant.

GOODFELLOW v. CARSON.

SUPREME COURT. Christchurch. 1947. March 28, 31. FLEMING, J.

Criminal Law—Police Offences—Found in or upon any Building without Lawful excuse in Circumstances not disclosing Commission of Any Other Offence—Defence that Circumstances Disclosed the Offence of Wilful Trespass—Ingredients of that Offence—No Proof that Warning given to Accused—Other Offence of Trespass not proved—Police Offences Act, 1927, ss. 6 (c), 54.

The wording of s. 54 of the Police Offences Act, 1927, is wide enough to include any person found at any time in or on any building without lawful excuse.

Where, on a prosecution for an offence under s. 54, the defence is set up that the circumstances disclosed the commission of another offence, that of wilful trespass under s. 6 (c) of the statute, but there is no satisfactory evidence that a warning within the meaning of the said s. 6 (c) was received by the accused, there are no circumstances disclosing the commission of another offence by the accused which could prevent him from being convicted under s. 54.

Reg. v. *Price*, (1897) 16 N.Z.L.R. 81, followed.

Counsel: *J. A. Kennedy*, for the appellant; *T. A. Gresson*, for the respondent.

Solicitors: *J. A. Kennedy*, Christchurch, for the appellant; *Wynn-Williams, Brown, and Gresson*, Christchurch, for the respondent.

(*Concluded on p. 198.*)

AUCKLAND LAW SOCIETY'S WAR MEMORIAL.

The Unveiling Ceremony.

On the afternoon of May 23, the vestibule of the Supreme Court was the scene of a notable gathering. It was the occasion of the official unveiling of the bronze memorial tablet erected by members of the Auckland District Law Society to the memory of those of their number who fell on active service during the Second World War.

The Governor-General, Sir Bernard Freyberg, V.C., took part in the ceremony, and addressed the gathering; but the actual unveiling was done by R. Elliot and R. Gray, sons of two of the men commemorated on the tablet.

The Governor-General and Lady Freyberg were escorted by the President of the Law Society, Mr. L. P. Leary, and were accompanied by Mr. Justice Callan, Mr. Justice Smith, who was sitting in Auckland as an additional Judge, and Sir John Reed. Mr. J. H. Luxford, S.M., and other members of the Magistracy were present. There was a record attendance of practitioners. The next-of-kin of those commemorated on the tablet were accommodated on the balcony overlooking the entrance hall.

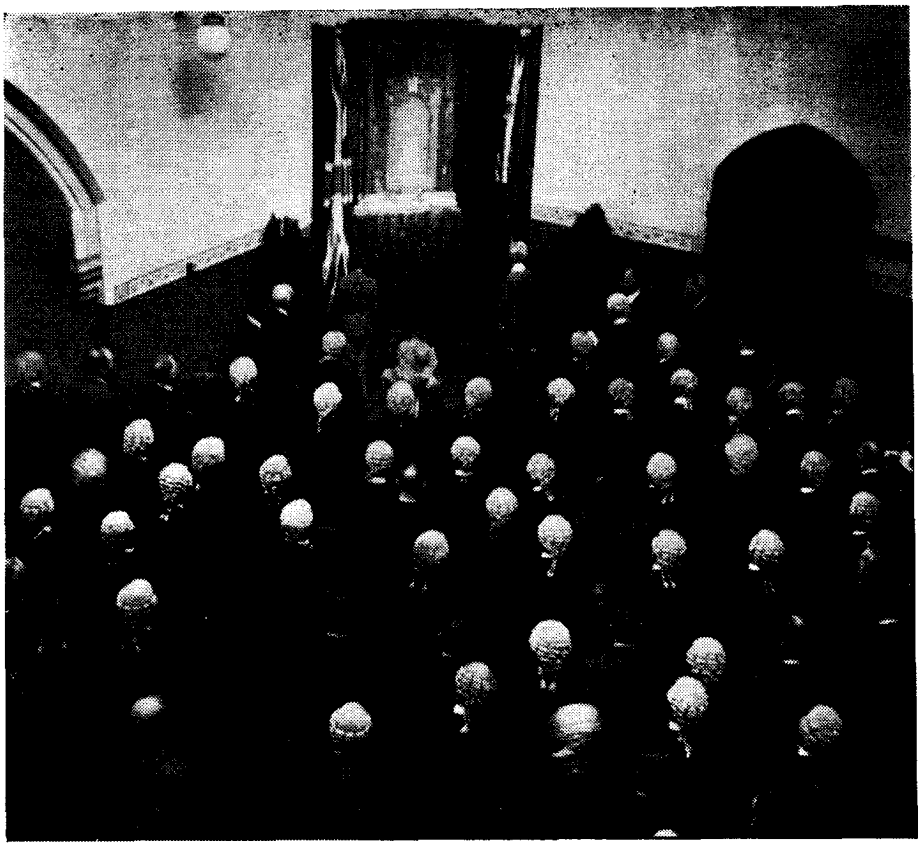
The tablet, which is a richly symbolic piece of craftsmanship, is from the hand of Mr. R. O. Gross, C.M.G.

The Auckland President.

Mr. L. P. Leary, President of the Auckland District Law Society, addressed His Excellency as follows:

"This grave assembly, this august assembly, is gathered on a grave and proud occasion. We, the members of the Auckland District Law Society, propose to unveil a memorial tablet to those of our number who fell in the second Great World War. This vestibule is only the temporary resting-place of the plaque, for convenience in carrying out this ceremony. Actually, it will repose in the No. 1 Library, opposite the Memorial to those who fell in the first Great World War. And, indeed, that place is a Hall of Monuments. Not only will it contain these two tablets, but it contains those other monuments of the law—the great judgments of the finest legal minds that we have produced. There, on those shelves, are to be found the judgments of Mansfield, who rationalized the mercantile law of England. There you will find the judgments of Stowell, who contributed so greatly to the maritime law of England. And there also you will find the monumental judgments of Eldon, who codified the law of equity and good conscience. Those men and their *confreres* have had a profound effect upon subsequent generations; and we conceive it fitting that we should place among the works of those men who lived for the law the names of these men who died for the law. For the young lawyer, working there at night, and late at night, going to trial in the morning, tired and harrassed, it will be an inspiration to remember that, tired though he be, these men did not falter in their last great brief until it fell from their nerveless fingers.

"And here, before this tablet, we pledge ourselves that, if there shall be a third world war, we will take up the bloodstained brief again. Their sacrifice shall not be forgotten.



Sparrow Industrial Pictures, Ltd., Photo

The Unveiling of the Memorial Tablet.

"In the law, may it please you, Sir, we have an oath. No man can join our ranks unless he has sworn allegiance to the King. No alien can come among us, because it is not lawful for an alien to swear such an oath. And we feel, Sir, that we have implemented that oath, for, of our 500 membership in this district, 211 saw service in the Second World War. If you add to this those who served in the First World War, then far more than every other man in this room has served his King in the field. This is a great boast, and this is the time and place to make it.

"And now we turn to our tablet. To relate exactly what each man did is too long a matter; but I cannot

pass it over without saying of two of the men that one, knowing his aircraft was doomed to crash, ordered his colleagues out in their parachutes and their lives were saved, and he went to his death on the ground; the other found himself in a small motor launch one morning surrounded by powerful units of the Japanese Navy: he roared straight into action and was blown out of the water by an overwhelming weight of metal. But of all the others named here, they met their death where it was appointed, at their duty, unfaltering and unafraid.

"And so, Sir, we have considered what form this ceremony should take. Should it be a requiem, with the laying of wreaths, or should it be more a setting of them up on high, so that their spirits will live with us? We felt that we preferred it to be more in the nature of a parade than a memorial. We thought it would be proper that we should commence the proceeding with a reveille to call their spirits here and to dwell in these halls. Then we will, following the symbolism, parade them, and the parade will take the form of the drawing of these flags by two boys of the honoured names of Gray and Elliot. And in whose hands can be more fittingly entrusted this task than to the boys in whom their fathers live again? Then, they being paraded, we will call the muster roll, and, they being here—and it would be a bold man who will assert for certain that they are not here—we will ask your Excellency, as their commanding officer, to address them and us.

"Now, Sir, with your permission, we will carry out this ceremony."

The Memorial Tablet.

After the sounding of the Reveille, the sons of J. R. Gray and Bruce Elliot unveiled the memorial tablet, which disclosed the following names, which were read by Mr. Leary:—

Cyril Francis Blanchard. R.N.Z.A.F. Killed in operations over Germany, May 6, 1943.

James Bruce Elliot. Artillery. Killed in action at Sangro River, December 5, 1943.

John Russell Gray. Infantry. Killed in action, Libya, July 5, 1942.

Morris Campbell Green. Infantry. Killed in action, Egypt, July 22, 1942.

Greville Lloyd Hesketh. R.N.Z.A.F. Shot down, Singapore, January 12, 1942.

John Andrew Jamieson. Infantry. Died of wounds, Crete, June 2, 1941.

Trevor Vernon Mitchell. Killed on patrol, El Marir, shortly before El Alamein.

John Ernest Moodie. R.A.F. In charge of plane which became unmanageable. Ordered crew to jump and they landed safely. Moodie crashed with plane in Manchester, December 7, 1941.

Archibald Graham McCurdy Tudhope. Died in Camp in New Zealand, April 26, 1942.

John Pierce Upton. R.N.Z.N.V.R. The day after the fall of Singapore, Upton was in charge of an armed motor launch. Units of the Japanese Navy were sighted near Singapore, and the launch proceeded towards the enemy firing her gun, until she was sunk.

His Excellency The Governor-General.

His Excellency the Governor-General, Sir Bernard Freyberg, V.C., then said:

"I am glad to be here with you this afternoon to help in your ceremony to the memory of those members of your Society who fell during the last war. Looking through the names inscribed upon this Memorial, and through your list of members that came overseas, I am reminded of the fact that so many of them are known to me personally, and that a great number of them fought hard and with distinction during this war. Five of the ten names on this Tablet are of men known to me as friends. Bruce Elliot I knew well. John Gray was a comrade of mine in many battles. Green, Jamieson, and Mitchell were also known to me. It is with feelings, therefore, of comradeship to members of your Society that I make this short address to them and to the relatives and friends of those of your members who gave their lives.

"When I think back over this war, one thing strikes me as typical of our nation—our attitude before war, our efforts to avoid war, but, when we were committed, our determination to see it through at any cost. In this crisis, great military qualities have been shown by inhabitants of this small country of ours. In no walk of life were these qualities shown more clearly than in your profession. It is even more to their credit that none wanted to fight, everyone who went overseas did so from a sense of duty and at great personal sacrifice.

"Now that peace has come, we are apt to forget the misery and unhappiness that war brought in its wake. For my part, I think of the words of a young Englishman, who himself gave his life in 1915, and who wrote, while sharing the same hut with me in Dorsetshire, words that, I think, express the greatness of their sacrifice:

> *These laid the world away; poured out the red*
> *Sweet wine of youth; gave up the years to be*
> *Of work and joy, and that unhoped serene,*
> *That men call age, and those who would have been,*
> *Their sons, they gave, their immortality.*

Those are noble words, of which Mr. Churchill once said, 'They reign by right divine over men and over centuries.'

"We are often tempted to ask ourselves what we have gained by all the sacrifices made by those to whom this Memorial is erected. But that was never the issue with them when they marched away. They never asked the question, 'What shall we gain?' They only saw the light shining brightly upon the path of duty.

"Good will surely come of it all. But we who enjoy the fruits of victory must never allow ourselves to forget the debt we owe to the brave and unselfish men and women of our country, who came forward at once, and to whose courage we owe our right to live as free citizens, in this lovely land of ours."

The members of the Auckland Law Society were deeply grateful to His Excellency for his touching and impressive address. It was a splendid conclusion to a ceremony that no one who participated in it will ever forget. The whole of the proceedings, in their simplicity and symbolic content, were conceived and carried out in a manner fitting the proud and solemn occasion.

LEASE OF BUSINESS PREMISES.

Special Clauses to Protect Lessor and Lessee in respect of Developments in Factory Legislation.

By E. C. ADAMS, LL.M.

Explanatory Note.

There is great scope for the ingenuity of the conveyancer in the drawing of the contractual clauses of a lease; the draftsman must not only protect the parties against the perils of the present law, but must also endeavour to anticipate the whims and vagaries of the Legislature, remembering always that the modern growth of socialistic ideas is causing less respect to be paid to vested estates and rights in property than they enjoyed in the not very distant past, for example in the Victorian era. The modern concept is that private rights must be subordinated to what is considered the public good; the present day tendency of the Legislature is against the maxim, *modus et conventio legem vincunt*; modern statutes often provide that parties cannot contract themselves out of legislative provisions intended for their benefit.

A firm of solicitors, to whom I am very much indebted, but who insist on remaining anonymous, have kindly forwarded us the following clauses, designed to make provision, so far as possible, to protect the parties to a lease against the consequences of development in factory legislation, and it is thought that these clauses, which are most comprehensive, and appear to guard against every contingency, will be of general interest to practitioners.

It will be observed that cls. 15 and 16 deal with different matters; the former clause refers to future legislation affecting the particular kind of business of the lessee, whereas the latter refers to "any amendment extension variation or modification of the law in New Zealand affecting generally *all premises used as factories in New Zealand.*"

Clause 15 provides that upon such surrender all liability of the lessee hereunder as from that date shall cease and determine. The lease, however, if registered under the Land Transfer Act, would not be determined until the surrender was duly registered: s. 96 of the Land Transfer Act, 1915, *Suttie* v. *Te Winitana Tupotahi*, (1914) 33 N.Z.L.R. 1216. Until so determined, the relationship of lessee and lessor would continue. Moreover, a surrender of lease must be executed by the lessee and *accepted by the lessor*. Therefore, the writer recommends the addition of a power-of-attorney provision to cl. 15, authorizing the lessee to accept the surrender in the name of, and on behalf of, the lessor. The same criticism and recommendation, *mutatis mutandis*, apply to cls. 16 and 17 (*c*).

Clause 18 will probably render the lease liable to additional *ad valorem* duty. Section 119 of the Stamp Duties Act, 1923, provides that every lease shall, so far as the consideration therefor consists of rent, be charged with *ad valorem* duty computed at the rate of 3s. 6d. for every £50 or fractional part of £50 of the *maximum rent* which is or *may* become payable under the lease in any year, and s. 124 authorizes the Stamp Department to stamp a lease with a fixed duty of £5 in respect of the consideration so far as it is so deemed to be unascertainable.

The surrenders of lease envisaged by cls. 15, 16, and 17 (*c*) would probably each be stampable under s. 168 of the Stamp Duties Act, 1923, as deeds not otherwise charged; it is conceived that in such circumstances the leases would be treated as burdensome, and therefore as valueless; it is submitted that s. 99 of that statute has no application to the surrender of an estate or right which has no pecuniary or marketable value.

However, it is better to pay a little extra stamp duty than run the risk of being ruined or financially prejudiced by future factory legislation.

Precedent.

AND THIS MEMORANDUM OF LEASE FURTHER WITNESSETH THAT WHEREAS (*a*) the law for the time being in force in New Zealand affecting factories and the premises of industrial undertakings (hereinafter called "factories") requires that certain constructional features or conditions of accommodation (or both) shall be provided in the building wherein the business of a factory is operated and conducted and (*b*) such law may be amended extended varied or modified from time to time and (*c*) some of such requirements as aforesaid are or may in the future be applicable only because of the type of business carried on but others of such requirements are or may in the future be applicable to all factories in New Zealand whatever the nature of the business operated and conducted in them and (*d*) the parties hereto desire to make reasonable provision to meet the consequences to them respectively of any alteration or alterations in the law so affecting factories as aforesaid as far as such alterations may now be anticipated NOW IT IS HEREBY FURTHER COVENANTED AGREED AND DECLARED by and between the lessors and the lessee (which latter term where used in the succeeding paras. 15 to 19 hereof inclusive shall not extend to assigns of "X" Company Limited [the lessee] unless the lessors so agree on any assignment by that company):—

15. THAT if by reason of the particular kind of business carried on by the lessee the lessee or the lessors shall be required by law to do any act or to provide any thing or circumstance which involves alteration of or addition to the improvements upon the land comprised in this lease or any part thereof then subject as hereinafter provided the lessee shall at its own cost and expense so do or provide but shall first and promptly request in writing and obtain the written consent of the lessors thereto and if such consent shall not upon due request be forthcoming within one calendar month then and in such case (if failure to comply with any such requirement shall render the lessee liable to any action claim or prosecution) and the lessee shall have given to the lessors at least one calendar month's prior notice of its intention so to do the lessee shall be at liberty to surrender this lease (at the expense in all things of the lessee) on the expiration of three calendar months from the date of such written request for consent as aforesaid; and upon such surrender all liability of the lessee hereunder as from that date shall cease and determine.

16. THAT if by reason of any amendment extension variation or modification of the law in New Zealand affecting generally all premises used as factories in New Zealand and not consequent only upon the particular type of business carried on by the lessee the lessee or the lessors shall be required to do any act or provide any thing or circumstance which involves alteration of or addition to the premises hereby leased then if default in satisfying any such requirement of law as aforesaid shall render the lessee liable to any action claim or prosecution

and subject as hereinafter provided the lessors shall upon receipt of written request by the lessee at the expense of the lessors so do or provide and in addition to any other remedies available to the lessee in respect of default by the lessors hereunder if the lessors shall fail within one calendar month after actual receipt of any such request to notify the lessee of their willingness so to do or provide or after notifying such willingness shall after reasonable time and opportunity have failed to do whatever is necessary to enable the lessee to comply with such requirements of law then and in such case if the lessee shall have given to the lessors at least one calendar month's prior notice of its intention so to do the lessee shall be at liberty to surrender this lease upon the expiration of three calendar months after either of such failures as aforesaid such surrender to be at the expense of the lessee and to relieve the lessee of any subsequent obligation hereunder.

17. THAT notwithstanding anything to the contrary hereinbefore expressed or implied the lessors and the lessee respectively shall be at liberty to decline to undertake any substantial outlay of money or substantial alteration of or addition to the improvements upon the said land hereby demised and in such event (if either the lessors or the lessee or both are by failure to expend a substantial sum of money or failure to make such alteration or addition rendered liable to any action claim or prosecution) :—

(*a*) The party so declining shall within a reasonable time give notice of its decision in that behalf in writing to the other party and

(*b*) (Without prejudice to the lessor's right always to forbid material alteration or addition to their property) such other party as aforesaid shall if thereby rendered liable to action claim or prosecution as aforesaid be at liberty to undertake such outlay or alteration or addition at their or its own expense but shall within one calendar month give written notice of willingness so to do and

(*c*) Failing such other party so notifying its willingness to undertake such outlay or alteration or addition as aforesaid the party so declining shall be at liberty on the expiration of three calendar months written notice (to be given within a reasonable time thereafter) to determine or to surrender this lease as the case may be and the costs of such determination or surrender shall be paid by the party so declining as aforesaid.

18. THAT if the lessors shall in pursuance of any of the provisions of the foregoing paras. 15, 16 or 17 hereof expend money on or otherwise provide any alteration or addition to the premises hereby leased the lessee shall thereafter pay to the lessors a reasonable additional rental in respect thereof such rent to be paid in the same manner and at the same time as the rent hereinbefore reserved.

19. THAT if any dispute shall arise between the lessors and lessee regarding the interpretation of any of the foregoing paras. 15, 16, 17 or 18 hereof or any part thereof or as to the meaning of any word or words therein used or as to that which either party (or both) ought (having regard to the hereinbefore recited facts) fairly and reasonably to do in pursuance thereof such dispute shall be determined by arbitration in the manner provided by the Arbitration Act 1908 and this clause and the agreement hereby made shall be deemed to be a sufficient submission within the meaning of the said Act.

OBITUARY.

Mr. F. O. Langley, London ("Inner Templar").

Readers of the JOURNAL who for many years enjoyed the "London Letter" by "Inner Templar," will be sorry to hear of the death of that entertaining and versatile learned contributor.

Frederick Oswald Langley was born on May 9, 1883, the son of the late Mr. F. T. Langley, of Wolverhampton. He was educated at Uppingham and at Gonville and Caius College, Cambridge, and gained scholarships at both school and University.

"F.O.," as he came to be called by friends and acquaintances, was called to the Bar in 1907 as a member of the Inner Temple. In 1914, within two days of the outbreak of war, he was commissioned to the 6th Battalion South Staffordshire Regiment, with which battalion he went to France in 1915. Later, he served at the Third and Fourth Army Headquarters; and in 1917 he became a G.S.O. 3 (Intelligence). His services gained for him the Military Cross and two Mentions in Dispatches; and he was also awarded the Legion of Honour. His last two years in the Army were spent at the British Embassy in Berne, as Assistant Military Attache.

The late Mr. F. O. Langley.

When he returned to the Bar in 1921, he was appointed Public Prosecutor in the Federated Malay States, a post he held until 1923. Then he went back to England, and, three years later, he was selected to be Recorder of Oswestry. In 1929, he became Chancellor of the Diocese of Lichfield, and a year or two later Chancellor of the Diocese of Ripon. He made frequent appearances in the Courts, notably as junior in several New Zealand appeals in the Privy Council.

In 1932, the Home Secretary (Sir John Gilmour) nominated Mr. Langley as a Metropolitan Police Magistrate, and he went to Old Street, where most of his career on the Bench was spent, and where he became such a well-known figure.

Mr. Langley's contributions to literature included *Singapore to Shoreditch* and one or more novels. He also contributed light verse and prose to *Punch*, the most notable of the latter being a series of articles entitled "Watch Dogs," written during the 1914-18 War, many of them from the trenches. Later, he wrote the "Inner Templar" letters to the NEW ZEALAND LAW JOURNAL for several years, which were discontinued on his appointment as a Magistrate. His connection with New Zealand and his many friends there, including the Rt. Hon. Sir Michael Myers, were a source of great happiness to him.

He married, in 1912, Muriel Janet, daughter of the late Mr. Rowland Lewis, of Penn, Staffs., and had a son and a daughter. "F.O." will always be remembered as a sound lawyer with wide human sympathies. A tribute to him in the *Times* said :

> "To all who appeared before him he was ever the soul of courtesy, and to the problems with which he had to deal he brought a real human sympathy and understanding allied with a frankness, courage and sense of justice. To this must be added a sound practical knowledge of law so that his decisions were very rarely reversed. He will long be remembered with respect and affection as a Magistrate who maintained and enhanced the high traditions of the administration of justice in the Police Courts of the Metropolis."

REFRESHER COURSE 8.

THE LAW OF CONTRACT.

Developments since 1939.

By PROFESSOR J. WILLIAMS.

I.

INTRODUCTORY.

This article is in considerable measure based on notes of a course of lectures delivered to returned servicemen in Sydney and afterwards published in *Refresher Courses in Law, New South Wales, 1939–1945*. These notes contained frequent mention of Australian decisions. It has occurred to me that it may be of interest to readers in New Zealand to have some reference to recent Australian authorities, and I have therefore retained most of the Australian citations.

I have endeavoured in this article to relate the various decisions to the general principles, almost all well settled long before 1939, which they exemplify and confirm. The different topics are treated in the order in which they occur in *Salmond and Williams on Contracts*.

I have not particularly dealt with the various special or mercantile contracts, such as partnership, negotiable instruments, contracts of carriage, and the like.

TEXT BOOKS.

New editions of *Anson* (the 19th) and *Pollock* (the 12th) have lately been published, as has a new book by Dr. Cheshire and Mr. Fifoot. A book in which I have myself had some part, and of which the larger portion is new, was published some little time ago, *viz., Salmond and Williams on Contracts*.

NATURE OF CONTRACT.

Readers of *Anson* will recall in the first few pages a discussion on the general nature of a contract, and in particular a reference to agreements, such as the agreement involved in marriage, which were productive of obligations but were not regarded by Anson as contracts. The distinction has been thus explained: "Although the assumption of such an obligation is dependent upon the declared wills of the parties, the nature and contents of it are not so dependent, but are defined and determined authoritatively by the law itself independently of the wills of the parties. The nature and contents of a contractual obligation, however, are determined and defined by the declared will which constitutes the contract, the law contenting itself with giving legal force and authority to that declared will . . . The distinction . . . is sometimes indicated by contrasting contract with *status*. Obligations whose nature and content are defined by the law independently of the wills of the parties are said to be matters of *status* and may be called *status-obligations*." *Salmond and Williams on Contract*, 8–9.

This may seem a sufficiently theoretical distinction but it has received judicial sanction in some recent cases, of which reference may here be made to *Mynott* v. *Barnard*, (1939) 62 C.L.R. 68, 78, 89, 91, and *Commonwealth* v. *Quince*, (1944) 68 C.L.R. 227, both in the High Court. In the former case, the question was whether the dependants of a deceased worker who had entered into a contract in Victoria with a Victorian builder to work as a carpenter in the erection of a building in New South Wales were entitled to compensation under the Workers' Compensation Act of Victoria. The worker had suffered an accident at his work in New South Wales and as a result had died in Victoria. The Act was expressed in general and unlimited terms. It was contended for the applicants that they were entitled to recover on the ground, *inter alia*, that the contract of employment was made in Victoria; but the Court rejected this contention, and Sir John Latham, C.J., relied to some extent on the view that the right to compensation was not contractual. "But the obligations created by the statute cannot be said to be contractual in any sense. They have none of the characteristics of contractual obligations. They attach independently of the will of the parties. The parties cannot by agreement exclude or modify their own rights and obligations which arise under the Act."

In *Commonwealth* v. *Quince* the Commonwealth sued the defendants on the ground that by reason of the negligent driving of one of the defendants it had lost the services of a volunteer member of the R.A.A.F. injured in a collision resulting from negligence. Sir John Latham in his judgment considered the nature of the legal relations between the Commonwealth and the airman. He said (p. 234): "It is difficult to suppose that a contract exists in the case of compulsory enlistment, and it cannot be argued that the relations between the Crown and a member of the Forces in such a case are different from those which exist between the Crown and the person who has enlisted voluntarily. The oath of enlistment imposes an obligation to render service, but that obligation is created by law, and does not depend upon any contract to which the airman and the Crown are parties"; and (at p. 237): "It may be observed that the word 'status' is used in describing the position of a soldier . . ." The other Judges either did not consider the point, or were content to say that there was no contract because at common law the engagement and remuneration of military (or civil) servants of the Crown is entirely at the Crown's pleasure.

AGREEMENT AND SPECIALTY.

It is very common to say that all contracts are agreements. Those who say this are then hard-pressed to accommodate the contract by deed in their scheme of things, for a deed binds the maker from the moment of its execution whether or not the other party has assented to it; and even if he has not heard of it. As was said by Blackburn, J., in advising the House of Lords in *Xenos* v. *Wickham*, (1867) L.R. 2 H.L. 296: "It is clear . . . that the deed is binding on the obligor before it comes into the custody of the obligee, nay, before he even knows of it: though, of course, if he has not previously assented to the making of the deed, the obligee may refuse it."

That a deed is not necessarily an agreement was strongly emphasized in the House of Lords in *Naas* v.

Westminster Bank, Ltd., [1940] A.C. 366 ; see per Lord Russell of Killowen, p. 396. Lord Wright said, at p. 403 : " I think it is misleading to import into the law of deeds analogies from an entirely different region of law, that of simple contracts."

There is also to be found in *Naas* v. *Westminster Bank, Ltd.*, at p. 399, judicial recognition that two rules stated in *Sheppard's Touchstone*, 58—*viz.*, that express and formal words are necessary to constitute delivery of a deed in escrow, and that an escrow may not be delivered " to the party himself to whom it is made " —are not recognized in the modern law.

It is further said in *Naas* v. *Westminster Bank, Ltd.*, at p. 373, that : " It is clear beyond doubt that a party who knowingly takes the benefit of a deed is bound by it although he has not executed it." This statement, however, should be read in the light of the exposition of the law given by Jordan, C.J., in *Commonwealth Dairy Produce Equalisation Committee, Ltd.* v. *McCabe*, (1938) 38 N.S.W. S.R. 397, 402, 403.

Intention to Contract.

It is an essential element of a contract that the parties should intend to contract, and you will remember such cases as *Balfour* v. *Balfour*, [1919] 2 K.B. 571 (agreement by husband to pay wife a weekly sum for housekeeping not contractual), and *Rose and Frank Co.* v. *J. R. Crompton and Brothers, Ltd.*, [1925] A.C. 445 (agreement containing express term that it was not a formal or legal agreement and not subject to legal jurisdiction in law courts held not a contract).

This principle was lately exemplified in *Appleson* v. *H. Littlewood, Ltd.*, [1939] 1 All E.R. 464. Plaintiff sued to recover £4,335 alleged to have been won in a football pool. The competition was subject to the usual rule, described as a basic condition, that the transaction should not be attended by or give rise to any legal relationship, rights, duties, or consequences, or be legally enforceable or the subject of litigation. It was held by the Court of Appeal that the condition was not contrary to public policy, but was binding according to its terms and that no action could be brought in respect of the transaction.

Offer and Acceptance.

In *Wiles* v. *Maddison*, [1943] 1 All E.R. 315, 317, Viscount Caldecote, L.C.J., expressed the opinion that exhibiting an article in a shop-window with a price marked on it constituted an offer to sell the article within the meaning of a Rationing Order. On the general question of whether exhibiting goods amounts to an offer to sell or merely an invitation to persons to make offers to buy, see *Salmond and Williams on Contract*, 95, and *Cheshire and Fifoot on Contract*, 21, 22.

Implied Terms.

It is a well-established principle that there will be read into a contract such implied terms as are derivable by necessary implication from the express terms of that contract, read in the light of the subject-matter and purpose of the contract and the circumstances in which it is made (*Salmond and Williams on Contract*, 39). This principle, a leading illustration of which is *The Moorcock*, (1889) 14 P.D. 64, has frequently been invoked in modern cases. According to some writers, the rules as to discharge of contract by breach, frustration, and essential error (see *Bell* v. *Lever Bros. Ltd.*, [1932] A.C. 161, 226, and *Mulvay* v. *Henry Berry and Co. N.S.W. Pty., Ltd.*, (1938) 38 N.S.W. S.R. 389, 395 (Jordan, C.J.)) are merely special applications of the principle (*Salmond and Williams on Contract*, 56). The nature of the principle in its general form is clearly expounded by Jordan, C.J., in *Heimann* v. *Commonwealth N.S.W.*, (1938) 38 N.S.W. S.R. 691, 695, 696. In a passage, part of which was quoted by our Court of Appeal in *Devonport Borough* v. *Candy Filters (N.Z.), Ltd.*, [1945] N.Z.L.R. 403, 423, the Chief Justice of New South Wales observes that " it is essential that the express terms of the contract should be such that it is clearly necessary to imply the term in order to make the contract operative according to the intention of the parties as indicated by the express terms. It is not sufficient that it would be reasonable to imply the term . . . It must be clearly necessary. And the test of whether it is clearly necessary is whether the express terms of the contract are such that both parties, treating them as reasonable men—and they cannot be heard to say that they are not—must clearly have intended the term, or, if they have not adverted to it, would certainly have included it, if the contingency involving the term had suggested itself to their minds. . . . The implication is one of law, and does not depend upon an ascertainment of the actual intention of the parties to the contract. . . . No term can be implied if it is inconsistent with the express terms of the contract . . . nor can a term be implied if it appears on the face of the contract that the parties adverted to the point and deliberately abstained from dealing with it." (As to the last point, see per Viscount Simon, L.C., in *Cricklewood Property and Investment Trust, Ltd.* v. *Leightons Investment Trust, Ltd.*, [1945] 1 All E.R. 252, 255).

Two recent cases in which the question of the implication of terms was considered are *Broome* v. *Pardess Co-operative Society of Orange Growers (Est. 1900), Ltd.*, [1940] 1 All E.R. 603, and *Southern Foundries (1926), Ltd.* v. *Shirlaw*, [1940] A.C. 701. The catchwords of *Broome's* case are as follows : " *Contract—Implied Terms—Business Efficacy—Broker's Contract—Sale of Fruit by Agent—Advance to Grower by Agent—Shipment unsound on Arrival and Unsaleable in Market—Implied Term that Fruit on Arrival to be of Merchantable Quality.*" The Court of Appeal refused to imply such a term.

Consideration.

In *Young* v. *Anderson*, [1940] N.Z.L.R. 239, Ostler, J., applied the principle that the relinquishment of claims genuinely believed to be valid may constitute a valid consideration even though in fact the claims are legally bad. *Williams* v. *Beech*, [1945] N.Z.L.R. 298, exemplifies the principles that a promise to do more than the promisor is already bound to the promisee to do may constitute a valid consideration. In that case, a mortgagee had bought the mortgaged premises at a sale conducted by the Registrar of the Supreme Court. The mortgagor was still in possession, and was legally compellable to give up possession only when the transfer from the Registrar to the mortgagee should be registered. Smith, J., held that the giving up of possession by the mortgagor before registration was a valid consideration for a promise made by the mortgagee.

The question of the consideration necessary to support an equitable assignment of a chose in action was discussed in *In re Matahina Rimu Co., Ltd.*, [1941] N.Z.L.R. 490. See Assignment of Contractual Rights, *post*.

(*To be continued.*)

LAND SALES COURT

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.

(*Concluded from p. 184.*)

We have no doubt at all that in several respects the outgoings shown in the vendors' statement will be found to be substantially exceeded by the time increased rentals can be secured. For the purpose of this computation, however, it is proposed to increase only the allowance for rates, from the figure of £561 set out in the vendors' statement to the actual amount of the rates assessed for 1946/47—namely, £700.

"Based upon hypothetical increases of rentals as above stated, and with the other adjustments mentioned, the rental returns and the capitalized value of the Glasgow Building would be as follows:—

On basis of 25 per cent. increase:		£
Present net rentals (adjusted)	..	558
25 per cent. increase in gross rentals		520
		1,078
Less increase in rates	..	139
Net rental return ..	..	£939
£939 capitalized at 4 per cent.	=	£23,475
On sale price of £45,000	=	2.1 per cent.

On basis of 50 per cent. increase:		£
Present net rentals (adjusted)	..	558
50 per cent. increase in gross rentals		1,040
		1,598
Less increase in rates	..	139
Net rental return ..	..	£1,359
£1,359 capitalized at 4 per cent.	=	£33,975
On sale price of £45,000	=	3 per cent.

"It has already been stated that the Court prefers to treat any assessment based on the capitalization of rental returns rather as a check of other methods of valuation than as a method reliable in itself. We are satisfied, however, that the rental figures in the present case are so clear and that both past and prospective returns are so totally inadequate to justify the sale price of £45,000 that we would be failing in our duty if we took no account of the rentals in assessing the fair value of the Glasgow Building under the Land Sales Act. It seems to be demonstrated beyond doubt that a purchaser at £45,000 in December, 1942, would be limited to a 2 per cent. return upon his capital to the present time and for some period to come and that the prospect of such an inadequate return must or should have been appreciated by any purchaser acquainted with the facts and having a knowledge of the Stabilization Regulations. The vendors in effect asked us to take no account of actual rentals but to assume that at some future date the Glasgow Building may produce rentals which will show an adequate return upon the purchase price. It is not for us to act upon such an assumption, but to ascertain the value of the property in the circumstances existing in December, 1942, but taking into account of course any increased value which may properly be attributed to the possibility of increased earnings in the future. Even assuming an increase of 50 per cent. in rentals, however, the building would be a very poor investment at £45,000. To our mind there is no evidence to justify the view that a greater increase in rentals is likely to be received for many years to come.

"We therefore find ourselves in the position that on the basis of replacement cost less depreciation, the Glasgow Building may properly be valued as at December, 1942, at £45,466, but that on a capitalization of rentals, even allowing for a hypothetical increase of 50 per cent. in gross rentals, its capitalized value at 4 per cent. would not exceed £34,000. We are of opinion that a prudent purchaser acquainted with all the relevant facts would take both of these factors into account and that the market value, being the amount which a willing but not over anxious vendor might reasonably expect to obtain from a prudent and willing but not over anxious purchaser, must be somewhere between these amounts. It has to be admitted that the Court has little to guide it in determining the exact market value. It is conceived, however, that the valuations of Mr. McC. at £41,786 and of Mr. S. at £43,000 being valuations for the vendors and made no doubt without regard to rental returns (as they were given for the purpose of justifying increases in rents) lend support to the view that the market value, even in December, 1942, would not exceed these figures. Some regard must also be had to the opinion of Mr. M., for the Crown, which, though not acceptable in general for the reasons above stated, does represent his opinion that the value of the property is not more than £34,085. It is pointed out by the vendors that the purchasing company proposes to use a substantial part of the building for its own retail premises and it is claimed that the vendors might reasonably have expected in December, 1942, to sell to a purchaser who by reason of his intention to make personal use of the premises would no doubt be prepared to pay something more than would be justified if the building were bought purely as an investment.

"Taking all these factors into account the Court assesses the basic value of the property at £40,000. The appeal is therefore allowed. Consent is granted to the sale upon condition that the price is reduced to £40,000."

No. 104.—B. TO N.Z.B., LTD.

Urban Land—Undue Aggregation—Hotel Property—Proposed Purchase by Large Brewery Proprietors and Hotel Owners—Whether "undue aggregation."

Appeal from a decision of a Land Sales Committe, in which the substantial issue was whether consent to the purchase by New Zealand Breweries, Ltd., of the Bruce Hotel at Akaroa should be refused on the ground of undue aggregation. The relevant facts were not in dispute. New Zealand Breweries, Ltd., the largest brewery proprietor in New Zealand, was also the owner of a large number of hotels, and was interested as lessee or mortgagee in many other hotels. It had held a lease of the Bruce Hotel for some years, and now desired to buy it. Apart from its lease of the Bruce, it had no proprietary interest in any of the four hotels at Akaroa.

The Court (per *Archer*, J.) said: "While the matter may be of great importance to those interested in hotel proprietorship, we are of opinion that it must be decided by the application of principles frequently stated by the Court, and most recently set out in *No. 98, C. to A.M.P Society*. In that case, the matters calling for consideration when undue aggregation is in issue were enumerated in the following terms: 'In any matter where the issue of undue aggregation is raised it is necessary to give due weight to the circumstances, needs, and qualifications of the purchaser, and to the character of the property sold and the hardship (if any) which might be imposed on the vendor by the refusal of consent to the sale. Subject to such considerations the determining factor in every case is whether the proposed aggregation of land is prejudicial to the public interest.'

"In the present case, the circumstances and qualifications of the purchasing company call for no comment, but it is not contended on its behalf that it is under any compelling need to become the owner of this particular hotel. There is no evidence before us to suggest that any hardship will accrue to the vendor should the present sale fall through. The determining consideration must, therefore, be that of public interest.

"In *No. 98, C. to A.M.P. Society*, the Court said: 'From the fact that such Legislative interference with ordinary private rights was deemed to be necessary in the public interest, it follows that any proposed course of action, which if developed to its logical extent, would tend to increase the demand for real property without a corresponding increase in the supply, is contrary to the public interest.'

"'It is conceived that one of the objects of the Legislature was to ensure that in a limited market the available land would be distributed as widely as possible among a diversity of owners.'

"'It is true that the aggregation against which the Act is directed is "undue aggregation," but we are of opinion that in every case where a purchaser already possesses sufficient land for his own use and for the reasonable requirements of his business, the acquisition of further land must be deemed to be undue aggregation unless it can be justified by reference to special circumstances.'

"We are of opinion that New Zealand Breweries, Ltd., already possesses sufficient land and sufficient hotels for its own use and for the reasonable requirements of its business,

and, in the absence of special circumstances, its acquisition of further hotels must, therefore, be deemed to be undue aggregation. Where the admitted facts disclose a *prima facie* case of undue aggregation, the onus of proof of such special circumstances is upon the party alleging the same.

" The facts relied upon and claimed by the purchasing company to justify its purchase of the Bruce Hotel in the public interest were the following: (*a*) that the ownership of hotels is part of the ordinary and legitimate business of the company, which owns no hotels in Akaroa; (*b*) that, in the peculiar circumstances existing in Akaroa, no undue increase in hotel values is likely to result from the purchase of a hotel by New Zealand Breweries, Ltd.; (*c*) that the company will be assisting the owner by taking over the hotel; and (*d*) that in accordance with its general policy it will cater for the accommodation of the public and will improve the facilities of the hotel for the tourist trade.

" We do not consider that either individually or as a whole the foregoing facts amount to ' special circumstances ' sufficient to justify a purchase which *prima facie* infringes the principles of the Land Sales Act. The mere fact that a person or corporation carries on a business involving the extensive ownership of land does not justify it in extending its holdings beyond the reasonable needs of its business. It may be true that the acquisition of the Bruce Hotel at Akaroa by New Zealand Breweries, Ltd., would have little effect upon hotel values generally, but, if the purchase infringes in principle against the Act, we do not think that it should be approved merely because of the comparatively small amount involved. We are not satisfied on the evidence that the present sale is particularly advantageous to the owner, or that she could not readily find another buyer. Finally, there is no evidence as to what improvements, if any, the company will effect if it acquires this hotel, and we cannot agree that a general policy of catering for the tourist trade is in itself sufficient justification for its further aggregation of hotel properties.

" The reasons advanced by New Zealand Breweries, Ltd., for the purchase of this hotel differ in no material particular from those which might well be advanced by any individual or company already owning hotels in New Zealand in support of a similar application for consent to the purchase of further hotels. They amount to little more than a claim that the company will control and manage the hotel in the ordinary course of its business in accordance with its usual high standard of efficiency. The Court does not question the motives and qualifications of New Zealand Breweries, Ltd., and does not propose to embark upon a consideration of the merits and demerits of hotel ownership by brewery companies. If the general considerations advanced by the appellants are sufficient to justify the purchase of this hotel, we are of opinion that, upon similar grounds, any individual or company now owning hotels in New Zealand can logically claim the consent of the Court to the purchase of further hotels. The company has shown no ' special circumstances ' affecting this particular hotel, and the real issue is whether companies such as New Zealand Breweries, Ltd., are entitled to increase their holdings of hotel properties without restraint under the Land Sales Act.

" We have previously had occasion to point out that the Act makes no exceptions in favour of corporations, and we have no reason to suppose that the Legislature intended that hotel-owning companies should be exempted from the provisions of the Act relating to undue aggregation. Nor do we see any reason to apply to such an application as is now before us any different principles than those already referred to and regularly applied by the Court in the case of proposed purchases of land for other business enterprises. We are satisfied from applications that have come before us concerning the sale of hotels that there is a substantial and unsatisfied demand for hotels from prospective owner-licensees, including discharged servicemen, and the prices commonly agreed to be paid for hotels suggest to us that there is no type of real property in respect of which the restraining influence of the Land Sales Act is more necessary to curb the dangers of inflationary increases in price. The general considerations of public interest which have been deemed sufficient by the Legislature to justify a restriction in the right to aggregate land seem to us to apply with full force to the ownership of hotels. In view of the terms of the Land Sales Act, it is not necessary for the Crown to prove that undue aggregation is contrary to the public interest. The Act presupposes that such is the case, and must be presumed to include within its ambit the undue aggregation of hotels.

" We hold, therefore, that New Zealand Breweries, Ltd., has failed to satisfy us that special circumstances exist by reason of which it is justified in seeking to acquire the Bruce Hotel in addition to its present substantial and sufficient holdings of hotel properties, and that the application must, therefore, be refused.

" It has been suggested that a number of similar applications are dependent upon the determination of this appeal. Each such application must, of course, be dealt with on its merits, and it would be improper for us to make a general pronouncement which might appear to prejudge the merits of any application. It should be clear, however, that in its consideration of this application the Court has had regard only to general principles, and has not found it necessary to enquire into the relative merits of New Zealand Breweries, Ltd., as an owner of hotels."

No. 105.—H. TO C.

Urban Land—Hotel Property—Valuation—Depreciation—Amount Allowable.

Appeal relating to the sale of the Exchange Hotel, Nelson, for £8,000. At the hearing before the Committee, the vendor submitted a valuation, based upon eleven years' rental returns, of approximately £8,000. The Crown representative intimated his agreement with the method of computation, but made certain minor amendments to the vendor's figures, so as to reduce the value to £7,587 10s. The Committee rejected both valuations and imposed a condition that the price be reduced to £4,500.

The Court (per *Archer*, J.) said: " A Committee which is dissatisfied with the evidence of value placed before it is entitled to require further evidence to be adduced, or to invite the Crown to give further consideration to any aspect of the evidence, but it is not entitled to substitute its own opinion for the evidence or to adopt a value which is not supported by evidence.

" At the hearing before the Court, the appellant vendor relied upon the same evidence as before the Committee, and the Crown offered no evidence in rebuttal, save to criticize the appellant's evidence in the same minor particulars as before the Committee. Substantially, the position is the same as it appeared before the Committee, and it is clear, therefore, that the Committee's order cannot stand.

" The Crown and the appellant differ only as to two minor matters. The Crown assesses the average annual rentals for the past eleven years at £640, but the vendor claims that an allowance should be made for interest upon two lump sum payments of rent in advance (or premiums paid for leases), and that the average rental should accordingly be assessed at £652. The amount in issue is so small that, without deciding upon the question whether interest should in principle be allowed, we are prepared to accept a gross average rental of £652.

" From this must be deducted a reasonable sum for depreciation. The Crown originally allowed the sum of £36, calculated to write off the estimated present value of the buildings in twenty-seven years. Mr. N., for the vendor, purported to accept this amount as fair, though in his initial valuation he made no allowance for depreciation at all. In cross-examination, however, Mr. N. admitted that he would be very surprised to see the present buildings in use as hotel premises for another twenty-seven years, and that probably they would have to be disposed of for demolition long before that. We are of opinion that a reasonably prudent buyer would be influenced by the necessity for setting aside as depreciation a larger sum than would be sufficient to provide a sinking fund for the replacement of the buildings at the end of twenty-seven years. He would assume that they will require replacement by reason of obsolescence at a much earlier date, and would allow a more substantial sum for depreciation accordingly. In a recent case, the Court assessed depreciation at the rate of 2 per cent. on replacement cost. Upon a similar basis, £60 should be allowed for depreciation upon the Exchange Hotel, and we think this is a fair sum to allow.

" We, therefore, assess the value of the hotel as follows:

Gross annual rental	£652
Less depreciation	60
Net rental value	£592

£592 capitalized at 8 per cent. — Capital value of £7,400.

" This figure, though slightly less than the valuation presented by the Crown, is supported by evidence, and is, therefore, within the competence of the Court. In view of the Crown's higher valuation, however, we think it proper to assess the fair value of the hotel at £7,500, which we find to be the basic value.

" The appeal will be allowed, and consent is granted, subject to a reduction in the price to £7,500, accordingly."

SUMMARY OF RECENT JUDGMENTS.

(*Concluded from p. 189.*)

MARK ET UX. v. GOULDING AND ANOTHER.

SUPREME COURT. Wellington. 1947. March 31, May 13. CHRISTIE, J.

Adoption of Children—Illegitimate Child—Application by Mother for Adoption—Whether Consent of Putative Father required—Infants Act, 1908, s. 18 (1) (e).

Practice—Mandamus—Wrong Decision on Preliminary Point—Refusal of Adoption Order on Erroneous Ground that Consent of Putative Father Required—Mandamus granted.

If the consent of any putative father to an adoption order in respect of an illegitimate child is necessary (which is doubtful), it can only be required where he has either been adjudged to be the father or has been registered as the father of an illegitimate child in accordance with the provisions of s. 25 of the Births and Deaths Registration Act, 1924.

Where, on the erroneous ground that the consent of the putative father of an illegitimate child, who had not been adjudged or registered as its father, was necessary, a Magistrate refused to make an order for its adoption, he had arrived at a wrong decision on a preliminary point; and a mandamus should be granted.

The Queen v. *Richards*, (1851) 20 L.J. Q.B. 351, applied.

Counsel: *McCarthy*, for the plaintiffs; *Thomson*, for the defendant Geary.

Solicitors: *Leicester, Rainey, and McCarthy*, Wellington, for the plaintiffs; *Harper, Atmore, and Thomson*, Levin, for the defendant Geary.

LOUGHNAN AND ANOTHER v. COMMISSIONER OF STAMP DUTIES.

SUPREME COURT. Christchurch. 1947. April 22; May 22. FLEMING, J.

Public Revenue—Death Duties—Succession Duty—Covenant by Father in Daughter's Marriage Settlement to leave her by Will certain Share of His Estate—Daughter in such Deed of Settlement Assigning to Trustees such Share to be held by them under Specified Trusts in which she took Life Interest only—Subject to Exercise of Power of Appointment, Trust Assets held for Children of Intended Marriage—Whether Succession should be assessed on Daughter's Share under Father's Will or on her Life Interest under Marriage Settlement, with Separate Assessment as to Remainder, Subject to Reassessment on Happening of Contingency—Death Duties Act, 1924, s. 16 (1) (a) (d), *(2)—Finance Act, 1940, s. 27.*

By a marriage settlement, a father covenanted with his daughter, B., and the trustees of the settlement, that in consideration of the intended marriage taking place, he would, by his will, give to B. at least an equal aliquot part of his residuary estate according to the number of his children living at his death, or leaving a wife, husband, or issue living at his death. The marriage duly took place, and the father, by his will, gave the whole of his estate to his two surviving daughters, of whom B. was one, in equal shares. The father, by his will, performed his covenant in the marriage settlement. By the marriage settlement B. had assigned to the trustees the share she was to take under her father's will pursuant to his said covenant.

Under the trusts established by the marriage settlement, the trustees were to hold the settled property for B. until the marriage, and thereafter to pay the income to B. during her life, then to B.'s husband, if surviving, for his life, and after the death of both the husband and B. to hold both capital and income "For all or such one or more exclusively of the others or other of the children or remoter issue of the said intended marriage . . . as the husband and wife shall by deed or deeds revocable or irrevocable jointly appoint." A similar power of appointment by will was given to B. and her husband, or the survivor of them, and in default of any such appointment the trustees were to hold in trust for all or any of the children or child of the marriage who attained the age of twenty-one years or married under that age and if more than one in equal shares. The husband predeceased the testator, but B. survived him, as did the only son of the marriage.

The Commissioner of Stamp Duties, on the ground that B. took under her father's will, assessed one-half share of the dutiable estate within the meaning of s. 16 (1) (*a*) of the Death Duties Act, 1921, and assessed succession duties on the basis that she took the full half-share. On an appeal against that assessment, the trustees of the settlement contended that the assessment should be made under s. 16 (1) (*d*), on the basis of the marriage settlement.

Held, 1. That the real question was whether B. should be assessed for the whole one-half of the assessable estate, or only for a life interest therein, with a separate assessment as to the remainder.

2. That the paragraphs of subs. 1 of s. 16 are not mutually exclusive and that subs. 1 (*a*) should, if necessary, be read together with subs. 1 (*d*).

3. That the Commissioner of Stamp Duties should consider the will as pursuant to the marriage settlement, and, if possible, assess the successors disclosed by both documents on the value of their respective succession.

4. That, when the will is read in conjunction with the marriage settlement, B. is merely a trustee for the purpose of the settlement, since the father's obligation under the marriage settlement was not performed until the gift by his will became operative on his death.

Elder's Trustee and Executor Co. v. *Gibbs*, [1923] N.Z.L.R. 503, distinguished.

5. That, accordingly, succession duty should be assessed as on a life estate to B., and on the remainder to her son, subject to revision under s. 21 of the Death Duties Act, 1924, in the case of the son marrying and having children and B. exercising her power of appointment in favour of those children.

Commissioner of Stamp Duties v. *Perpetual Trustees, Estate, and Agency Co. of New Zealand, Ltd.*, [1927] N.Z.L.R. 714, *Attorney-General* v. *Felce*, (1894) 10 T.L.R. 337, and *Attorney-General* v. *Jewish Colonization Association*, [1900] 2 Q.B. 556, distinguished.

Counsel: *R. J. Loughnan*, for the appellants; *A. W. Brown*, for the respondent.

Solicitors: *Izard and Loughnan*, Christchurch, for the appellants; *A. W. Brown*, Christchurch, for the respondent.

IN RE X.

SUPREME COURT. Christchurch. 1946. October 25; November 14. 1947. March 3. SMITH, J.

Law Practitioners—Admission—Barrister—Officer in State Department—Applicant a Supreme Court Registrar—Nature of Work and Experience qualifying such an Applicant for Admission—Law Practitioners Act, 1931, s. 4 (2) (e)*—Law Practitioners Amendment Act, 1935, s. 45—Statutes Amendment Act, 1942, s. 25.*

Upon the application of "an officer employed in any Department of State," who is a solicitor, such as a Registrar of the Supreme Court, for admission as a barrister under s. 4 (2) (*e*) of the Law Practitioners Act, 1931, as restricted by s. 25 of the Statutes Amendment Act, 1942, the following matters are important for consideration: the practice of sifting the facts of actual transactions, of advising on those facts, of drafting pleadings in the light of the issues of law and fact which arise, and in the practice of advocacy in the lower Courts or in Chambers.

In re Clay, [1938] N.Z.L.R. 1066, applied.

An applicant does not bring himself within s. 4 (2) (*e*) of the Law Practitioners Act, 1931 (notwithstanding his knowledge of the ordinary conveyancing documents required for conducting sales through the Registrar of the Supreme Court, and expert knowledge of what is formally required to ensure the correctness of papers in probate and administration and in divorce, and his competency and experience in the taxation of costs), if he has had little personal independent experience in marshalling the facts of transactions, in elucidating the issues of law which arise upon them, in advising upon those issues, in drafting pleadings upon them, or in presenting to a Court a case affecting persons with opposing interests.

Counsel: *Donnelly*, for the applicant; *Hensley*, for the Canterbury Law Society.

Solicitors: *Raymond, Stringer, Hamilton, and Donnelly*, Christchurch, for the applicant; *Livingstone and Hensley*, Christchurch, for the Canterbury Law Society.

IN YOUR ARMCHAIR—AND MINE.

BY SCRIBLEX.

Shrinking Violets.—In dismissing the petitioner's application for restitution of conjugal rights in *Hill* v. *Hill* (Unreported), Fleming J., finished on the horticultural note. "The respondent," he says, "is much too tender a plant to be ordered to return to this harsh and sadistic man." The respondent's evidence (which he accepted) is the mother earth from which this somewhat dubious metaphor has sprung. It seems that the petitioner frustrated his wife's hope of having a child by insisting upon her mustering sheep on his hill farm while she was pregnant; and that in the presence of various relatives he screwed her nose when asked to carry a heavy milk-bucket for her, kicked her shins, blackened her eyes, and, using oaths and obscene language, threw stones alike at her and his dogs. The relatives, affected by shock or in the exercise of their discretion, declined to interfere. The Judge refused to believe the petitioner when he testified that he still loved his wife and wanted her to return; and observed that she was justified in retorting, if her broken spirit permitted her so to do:—

"*It may be you're forced to dissemble your love,*
"*But why do you kick me downstairs?*"

On the other hand, the respondent's endurance (based upon her ideals about marriage) over a period of four years he described as a love that "suffereth long and is kind" and "that beareth all things, believeth all things, hopeth all things, endureth all things." As Mr. Squeers said of another matter, "There's richness for you!" Recommended to M. J. Gresson for his next article on literary allusions.

The Wallace Case.—The resignation of Lord Wright from his office of Lord of Appeal in Ordinary, after more than twenty years on the Bench, recalls the "perfect murder," the most famous criminal trial over which he presided. William Herbert Wallace, a district agent for the Prudential Assurance Company, was charged with the murder of his wife, who was found by him brutally battered to death in the front parlour of their house in Liverpool on the night of January 19, 1931. The crime rivalled the historic case of Mrs. Maybrick in the interest it aroused at the Liverpool Assizes. No reason was then, or has since been, advanced for it. The accused was three hours in the witness-box, made an excellent impression, and Wright, J., as he then was, referred to the absence of any inducement, pecuniary or otherwise, that Wallace had for desiring the death of his wife. Despite the observation from the Bench that there was insufficient evidence to point definitely to anybody as the criminal, the jury found a verdict of guilty. This aroused profound dissatisfaction throughout the whole of the British Isles. On the eve of the hearing of the appeal by the Court of Criminal Appeal, a special service of intercession was held in the new Anglican Cathedral, prayers being offered "that His Majesty's Judges might be guided in true judgment." It proved effective. Lord Hewart, L.C.J., and Bronson and Hawke, JJ., held that the case against Wallace had not been proved with that certainty which was necessary to justify a verdict of guilty. The conviction was quashed. Whoever killed Mrs. Wallace, says Winifred Duke, attained a distinction accorded to few murderers. His was the perfect crime, undetected, unexplained, motiveless, unavenged.

Impromptu Speeches.—The late Lord Hewart once observed that "ninety-nine out of one hundred impromptu speeches are not worth the paper they are written on." On occasions speakers, rising suddenly and with passion to the defence of some person or plan, give in effectiveness what they lose in ordered thought; but for the most part such occasions are rare, and the extempore effort tends to be repetitious and to finish on a note of pathos. Scriblex mentions this matter because he notes a reluctance on the part of the young practitioner to prepare the careful summaries and headings that in the past have formed the basis of many excellent speeches in our Courts. Such good orators as Burke and Gladstone did not disdain this method: indeed, biographers of both refer to their habit of committing portion of their speeches to memory. Originality of expression and attractive phrasing are the product of reflection rather than spontaneity. Quick thinking may be, and often is, an essential to an orderly domestic existence. It should not be made the main ingredient of an orderly public address.

Divorce Note.—Deeply disturbed at the large number of divorce cases that had to be provided for, Viscount Jowitt, L.C., pointed out in London this month that these cases, which numbered 10,000 annually before the First World War, looked like approaching 50,000 this year. From the *Times Magazine*, and described by the *New Yorker* as "a thought for the week," comes the following: if divorces continue to increase at the present rate, the day may come when there will be more divorces than marriages.

Jottings.—The Judicial Committee of the Privy Council resumed its sittings in April with a heavy list of fifty-nine appeals, of which thirty-five came from India, only one from New Zealand . . . A junior house surgeon who was an unqualified student misheard telephone instructions from a senior surgeon to supply 100 cc. of a solution of 1 per cent. procaine (which was a harmless local anaesthetic), and passed on the instructions as 100 cc. cocaine which was, to her knowledge, more than five times a lethal dose for injection. The patient died. The report describes this procedure as "an unsafe system of working": *Collins* v. *Hertfordshire County Council*, [1947] 1 All E.R. 633. . . . To proceed on the basis that any fundamental breach of the obligations contracted in holy matrimony, as laid down in the Book of Common Prayer, constituted desertion within the meaning of the Matrimonial Causes Act, 1937, is a dangerous and fallacious argument, since the law of the land could not be co-extensive with the law of morals, nor could the civil consequences be identical with its religious consequences: *Weatherley* v. *Weatherley*, [1947] 1 All E.R. 563.

MR. G. F. DIXON.

Retirement after Long Service.

Solicitors from all over New Zealand seeking an audience with the Attorney-General will miss the genial and co-operative presence of Mr. G. F. Dixon, Private Secretary to the Attorney-General, who retired on June 30. Mr. Dixon, who had a long and varied career in the service of the State, is best known to practitioners through his association with the Hon. Mr. Mason since he became Attorney-General and Minister of Justice; but in many other spheres he was also well known to members of the profession. No one seeking assistance from Mr. Dixon ever sought it in vain, and the help and courtesy that he extended in his office are deeply appreciated by Bench and Bar alike throughout the Dominion.

On his retirement, Mr. Dixon, with the warm endorsement of all who knew him, was honoured in the Birthday Honours List with a C.B.E. Later, he was the recipient of presentations from the secretarial corps attached to Parliamentary Buildings, of which he was the doyen, from the Justice Department, and (a domestic one) from the office of the Attorney-General. This function was attended by both the Attorney-General and the Solicitor-General, both of whom spoke with appreciation of the long and faithful services of Mr. Dixon to the Department. After Mr. S. Moynagh had joined in their tribute on behalf of the office staff, the presentation was made to Mr. and Mrs. Dixon by Mr. Mason. The profession generally will join in wishing Mr. Dixon a long and happy retirement.

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. Probate.—*Trustee Company—Application for Grant of Probate—Election—Form of affidavit.*

QUESTION: We are acting for a trustee company, which is empowered by statute to act as executor. Its statute provides:

> Whenever the company shall be named as executor in the last will and testament, or in any codicil to the last will and testament, of any testator, it shall be lawful for the company, if it shall elect so to do, to be and act as executor.

Is it necessary in the affidavit filed by the manager to lead grant of probate to give any information that the company has "elected" in terms of the section?

ANSWER: Since the statute in question prescribes a condition precedent to the grant of probate to the trustee company, it must be shown in the affidavit that the condition has been complied with. The information can be supplied in Form 34 of the Schedule to the Code of Civil Procedure, or a separate affidavit filed.

E.2.

---

2. Gift Duty.—*Married Man making Gift to Charity—Reservation of Benefit for Donor's Widow—Liability to Gift and Death Duty.*

QUESTION: A married man proposes to transfer his house to a charity, the only consideration being a covenant by the transferee to pay to the transferor's wife (when she becomes his widow) an annuity during her widowhood. Is the transaction liable to gift duty, and will it be liable to death duty on the transferor's death?

ANSWER: If the charity is one exclusively for the benefit of the people of New Zealand, then the transaction is exempt from gift duty by s. 2 of the Death Duties Amendment Act, 1923: *cf. Weston and Another* v. *Commissioner of Stamp Duties*, [1945] N.Z.L.R. 316.

On the transferor's death, the then actuarial valuation of the widow's annuity will form portion of deceased's dutiable estate: ss. 5 (1) (*g*) and 16 (1) (*h*) of the Death Duties Act, 1921, *Public Trustee* v. *Commissioner of Stamp Duties*, (1912) 31 N.Z.L.R. 1116, *Little* v. *Commissioner of Stamp Duties*, [1923] N.Z.L.R. 773, and s. 27 of the Finance Act, 1937. In the circumstances of the case, it may be exempt from death duty by s. 13 of the Death Duties Act, 1921, and s. 27 (2) and the Second Schedule to the Finance Act, 1940; its only practical effect may be to increase the *rates* of death duty payable by deceased's other successors, if any.

X.2.

3. Land Tax.—*Apportionment—Agreement—Agreement for Sale and Purchase—All "rates, taxes, assessments, and other outgoings" to be apportioned—Whether Land-tax included.*

QUESTION: In recent issues of the JOURNAL there have been references to the apportionment of land-tax where the agreement for sale provided for the apportionment of "rates, insurance premiums and *other outgoings*." Your answer stated that, on this wording, the question may be open to doubt, but that it would seem that the Court would construe it as covering land-tax.

We have a case in which the words used are "All rates, *taxes*, assessments and other outgoings in respect of the said property shall be apportioned." We contend that this renders land tax apportionable without question, but, in view of the above doubt, the solicitor for the purchaser has objected to do so. Would you be good enough to state whether you consider the contract in this case definitely requires the apportionment of land tax?

ANSWER: The word "taxes" in this instance would probably be construed by the Court to include land tax levied under the Land and Income Tax Act, particularly as the phrase also contains the word "rates," which presumably refers to rates levied by a local authority. The doubt to which solicitors refer apparently hinges on the question as to whether "other outgoings" would include land tax. In the particular case of this contract, where it appears that there are no other taxes in the general sense of the term which would be levied "in respect of the said property," apart from land tax, any doubt in this connection should be dispelled.

When the Land and Income Tax Act was enacted in 1923, it provided in s. 170 that any contract, agreement, or arrangement purporting to alter the incidence of land tax was absolutely void. Apportionment of land tax was therefore not possible. An amendment to s. 170 was made by s. 12 of the Land and Income Tax Act, 1940, the effect of which is to exclude land tax from the provisions of s. 170, the intention to permit land tax to be apportioned as between the vendor and purchaser of a property, in the same way as rates and other annual charges are customarily apportioned.

In the event of any disagreement as to the amounts of the apportionment, the Court would probably follow what it considered to be a reasonable and equitable apportionment of the land tax having regard to the facts of the case in question.

The contract mentioned appears to require an apportionment of land tax.

P.2