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PRACTICE: APPEAL ON FACT FROM JUDGE ALONE.

WHEN there is an appeal against the verdict of a jury, the Court of Appeal will set that verdict aside if the evidence was such that no jury, properly directed, could reasonably have found the verdict in question. In those circumstances, the function of an appellate tribunal, to use the words of Smith, J., in *Brott* v. *Allen*, [1939] N.Z.L.R. 345, 360, l. 6, is limited to the revising function of seeing whether there is any evidence in support of the jury's finding; and this—as His Honour said—is a more limited function than that of hearing an appeal from a Judge sitting without a jury on a question of fact.

I.

There have been a number of pronouncements of the House of Lords to guide an appellate Court where the matters in question are matters of fact in an appeal from a Judge sitting without a jury. We may refer to the speech of Lord Sumner (which was the opinion of their Lordships' House) in *Hontestroom (Owners)* v. *Sagaporack (Owners)*, [1927] A.C. 37; to the several speeches in *Powell* v. *Streatham Manor Nursing Home*, [1935] A.C. 243, with its comprehensive review of all the earlier authorities; and to the latest enunciation of the principles which should guide an appellate Court hearing an appeal on fact from a Judge alone, contained in the case of *Thomas* v. *Thomas*, [1947] 1 All E.R. 582. Reference should also be made to the judgment of Lord Greene, M.R., in *Yuill* v. *Yuill*, [1945] P. 15, 17, which Viscount Simon said in *Thomas's* case, admirably stated the limitations to be observed in such appeals.

To indicate how apposite is the application of all these judgments to appeals on fact from a New Zealand Judge sitting without a jury, we quote R. 2 of the Court of Appeal Rules, which begins:

> All appeals to the Court of Appeal shall be by way of rehearing.

These words are identical with the opening words of O. 58, r. 1, of the Rules of the Supreme Court (England), in which, said Lord Wright in *Powell's* case, the essence of the matter is now contained. In *Powell* v. *Streatham Manor Nursing Home*, Viscount Sankey, L.C., at p. 249, comments on this rule. He said:

> It is perfectly true that an appeal is by way of rehearing, but it must not be forgotten that the Court of Appeal does not rehear the witnesses. It only reads the evidence and rehears the counsel. Neither is it a reseeing Court. There are different meanings to be attached to the word "rehearing." For example, the rehearing at Quarter Sessions is a perfect rehearing because, although it may be the defendant who is appealing, the complainant starts again and has to make out his case and call his witnesses. The matter is rather different in the case of an appeal to the Court of Appeal. There the onus is upon the appellant to satisfy the Court that his appeal should be allowed.

The Lord Chancellor went on to say that there have been a very large number of cases in which the law on this subject has been canvassed and laid down. On an appeal against a judgment of a Judge sitting alone, the Court of Appeal will not set aside the judgment unless the appellant satisfies the Court that the Judge was wrong and that his decision ought to have been the other way. Where there has been a conflict of evidence, the Court of Appeal will have special regard to the fact that the Judge saw the witnesses. He referred to *Clarke* v. *Edinburgh and District Tramways Co., Ltd.*, [1919] S.C. (H.L.) 35, where Lord Shaw said, at pp. 36, 37

> When a Judge hears and sees witnesses and makes a conclusion or inference with regard to what is the weight on balance of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the Judge makes any observation with regard to credibility or not. I can of course quite understand a Court of appeal that says that it will not interfere in a case in which the Judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a Court of justice. In Courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate Court? In my opinion, the duty of an appellate Court in those circumstances is for each Judge of it to put to himself, as I now do in this case, the question, Am I—who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case—in a position, not having those privileges, to come to a clear conclusion that the Judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

His Lordship added that the consequences which follow from the application of those relevant principles are

most fully stated by Lord Sumner, in delivering the opinion of the House of Lords in *Hontestroom (Owners)* v. *Sagaporack (Owners)*, [1927] A.C. 37, and, though that was an Admiralty case, the principles there stated apply in an ordinary common-law case—*e.g.*, *Clarke* v. *Edinburgh and District Tramways Co., Ltd.*, [1919] S.C. (H.L.) 35.

Lord Wright, after referring to the words of the rule, "All appeals to the Court of Appeal shall be by way of rehearing," said, at p. 263:

> These words apply to an appeal from the decision of a Judge sitting without a jury. The position is different when the trial has been with a jury. Where the trial has been before a Judge alone the rehearing is had on the evidence given before the Judge, except in the rare cases where further evidence has been permitted to be called before the Court of Appeal: that may be done under r. 4, which enables this course to be taken on "special grounds only, and not without special leave of the Court." In effect, therefore, the rehearing is very different from the original hearing: it is a rehearing on documents, including the Judge's notes and sometimes as in this case, also the shorthand notes, whereas the Judge who originally heard the case both saw and heard the witnesses, and during an examination and cross-examination, often prolonged and searching, had abundant opportunity of forming an opinion as to their relative trustworthiness or the reverse.

His Lordship then referred to a rehearing which takes place on a general appeal, as under our Magistrates' Courts Act, 1928, or our Justices of the Peace Act, 1927. On such an appeal, the witnesses are called and give their evidence afresh, as if there had been no previous trial; and there is also this further difference, that the appellant does not open the appeal, but the complainant, even though respondent on the appeal, begins: the hearing on the appeal proceeds on the same course as the original hearing. His Lordship continued:

> On a rehearing by way of appeal under Order 58, r. 1, the order of opening the case may be transposed: the appellant even if defendant below opens the appeal and develops his case, putting together such select passages from the Judge's notes or documents, or shorthand notes as appear helpful to him and adopting what arrangement he chooses: he naturally seeks to create at the outset a sentiment in favour of the appellant.
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> But the appeal under Order 58 is still a rehearing and as such differs from appeals from judgments of Judges of County Courts or upon cases stated by Justices under certain statutes; as to these latter, reference may be made to what was said by Lord Atkinson in *Folkestone Corporation* v. *Brockman*, [1914] A.C. 338: in these latter cases the Court of Appeal is not a Judge of fact in any sense: its powers of review are limited to cases where judgment has been given without evidence and therefore without jurisdiction or under error in law. The case of an application for a new trial or to set aside a verdict after trial with a jury, again involves different considerations and need not be considered here. In all these latter cases the Court of Appeal is not the judge of fact.
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> But under Order 58 the Court of Appeal is the judge of fact. Here, however, arises the crucial circumstance that the Court is the judge of fact with what may be a vital difference as compared with the trial Judge, since the rehearing which it conducts is under the different conditions which have been explained.

In *Powell's* case, Lord Macmillan, at p. 256, said that, in an appeal from a Judge sitting alone, where the question is one of credibility, where either story told in the witness-box may be true, where the probabilities and possibilities are evenly balanced and where the personal motives and interests of the parties cannot but affect their testimony, the House of Lords has always been reluctant to differ from the Judge who had seen and heard the witnesses, unless it can be clearly shown that he has fallen into error. He added that the reasons for that reluctance are founded on common sense, and they are nowhere better stated than by Lord Loreburn, L.C., in the case of *Kinloch* v. *Young*, [1911] S.C. (H.L.) 1, from whose speech he quoted the following passage:

> Now, your Lordships have very frequently drawn attention to the exceptional value of the opinion of the Judge of first instance, where the decision rests upon oral evidence. It is absolutely necessary no doubt not to admit finality for any decision of a Judge of first instance, and it is impossible to define or even to outline the circumstances in which his opinion on such matters ought to be overruled, but there is such infinite variety of circumstances for consideration which must or may arise, and it may be that there has been misapprehension, or that there has been miscarriage at the trial. But this House and other Courts of Appeal have always to remember that the Judge of first instance has had the opportunity of watching the demeanour of witnesses—that he observes, as we cannot observe, the drift and conduct of the case; and also that he has impressed upon him by hearing every word the scope and nature of the evidence in a way that is denied to any Court of Appeal. Even the most minute study by a Court of Appeal fails to produce the same vivid appreciation of what the witnesses say or what they omit to say.

Lord Macmillan added that he himself had had an uneasy feeling, as he listened to the able arguments of counsel in the appeal before their Lordships' House, that he was remote from the poignant realities of the case, and that he was being asked, as it were, to dispose of the fate of the parties in their absence. It was only the written evidence which reached their Lordships; the other evidence which the Judge of first instance told them that he had relied upon, could not be reproduced or subjected to review there; and he had never felt more conscious of the disability imposed by the absence of this aid to judgment.

In *Thomas's* case, at p. 590, Lord Macmillan made clear the difficulties confronting an appellate Court when hearing an appeal on fact from a Judge sitting without a jury, when he said:

> The appellate Court had before it only the printed record of the evidence. Were that the whole evidence it might be said that the appellate Judges were entitled and qualified to reach their own conclusion upon the case, but it is only part of the evidence. What is lacking is evidence of the demeanour of the witnesses, their candour or their partisanship, and all the incidental elements so difficult to describe which make up the atmosphere of an actual trial. This assistance the trial Judge possesses in reaching his conclusion but it is not available to the appellate Court. So far as the case stands on paper, it not infrequently happens that a decision either way may seem equally open. When this is so, and it may be said of the present case, then the decision of the trial Judge, who has enjoyed advantages not available to the appellate Court, becomes of paramount importance and ought not to be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgment of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved, or otherwise to have gone completely wrong.

Lord Thankerton, in his speech in *Thomas's* case, at p. 587, reduced the matter under discussion to a series of propositions, with which Lord Macmillan and Lord du Parcq concurred. It seemed to him that the principle embodied in the many decisions of the House of Lords is a simple one, and may be stated thus:

> I. Where a question of fact has been tried by a Judge without a jury and there is no question of misdirection of himself by the Judge, an appellate Court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard

the witnesses could not be sufficient to explain or justify the trial Judge's conclusion.

II. The appellate Court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.

III. The appellate Court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate Court.

His Lordship went on to say that it is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question.

(Since the above was in print, and as we are going to press, the judgment of the Court of Appeal in *Earl* v. *Earl* has been delivered (March 22). This was an appeal from the decision of a Judge alone, who, on an opposed petition by a wife for restitution of conjugal rights, ordered the respondent husband to return to cohabitation. The three propositions stated by Lord Thankerton in *Thomas* v. *Thomas, cit. supra,* are set out in the judgment of Mr. Justice Smith, who, with Mr. Justice Fair, came to the conclusion that the appeal fell within the third of those propositions. On the other hand, Mr. Justice Callan, in dissenting from the majority, observed in respect of matrimonial cases :

> It is probably difficult to mention any class of case in which greater advantages are possessed by the tribunal which sees and hears the witnesses over a tribunal which merely reads the record.)

Lord Thankerton found it well to quote the passage from the opinion of Lord Shaw in *Clarke* v. *Edinburgh and District Tramways Co., Ltd.,* [1919] S.C. (H.L.) 35, which was quoted with approval by Viscount Sankey, L.C., in *Powell* v. *Streatham Manor Nursing Home,* [1935] A.C. 243. Lord Shaw said :

> In my opinion, the duty of an appellate Court in those circumstances is for each Judge of it to put to himself, as I now do in this case, the question, Am I—who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case—in a position, not having those privileges, to come to a clear conclusion that the Judge who had them was plainly wrong ? If I cannot be satisfied in my own mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

Lord Shaw had already pointed out that these privileges involved more than questions of credibility :

> witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page.

Lord Thankerton added that, after it became usual to have the printed transcript of the evidence in place of the Judge's notes, it was argued in at least one case that, having the verbatim transcript of the evidence, the matter was more at large for the appellate Court ; but he said that it was undoubted that the principle had not been relaxed—if, indeed, it had not been tightened—by the later decisions. He was aware that this contention was put forward in the House of Lords in 1911 in *Kilpatrick* v. *Dunlop* (reported [1916] S.C. (Ct. of Sess.) 631*n*.) In reference to this contention, Lord Halsbury said :

> I am unable to determine one thing or the other, namely, whether the appellant or respondent was worthy of credit. It is a question of credit, where each gives a perfectly coherent account of what he has done and said, and contradicts the other. Under these circumstances it is impossible that the Court of Appeal should take upon itself to say, by simply reading printed and written evidence, which is right, when it has not had that decisive test of hearing the verbal evidence and seeing the witnesses, which the Judge had who had to determine the question of fact, and to determine which story to believe.

But, to put this plainly, it meant, in Lord Thankerton's view, that, whereas you might formerly find in the Judge's notes some indication of the impression made on his mind by the witnesses, no trace of any such impression was to be found in the cold, mechanical record of the evidence.

In our next issue, we propose to consider the circumstances in which an appellate Court may be justified in taking a view on the facts different from that of the trial Judge.

SUMMARY OF RECENT LAW.

AIR NAVIGATION.

Offences—Using Unlicensed Aerodrome as Place of Landing and Departure of Aircraft Carrying Passengers for Hire or Reward—Payment by Passenger for Flight Ticket purporting to admit him to Membership of Aero Club as "Flight Member" —Pilot not holding Prescribed Certificate of Competency and License to carry Passengers for Hire or Reward—Mens rea *"Hire or Reward"—Air Navigation Regulations, 1944 (1933 New Zealand Gazette,* 1473), *Regs. 2, 5 (1) (iii), 10 (1) (4), 31.* An aero club, an incorporated society, during a drive for membership made its aircraft available for short passenger flights, each piloted by a club pilot. Any member of the public intending to be a passenger was required to pay 10s., and he received a "flight ticket" entitling him to membership rights as a "flight member," restricted to the right of entry to the aerodrome and to one free flight, which might be given by a Club endorsed "A" pilot, and he could visit the club-house within a limited period, but only if accompanied by a "flying" or "associated" member of the club. One C., on payment of 10s., received a "flight ticket," and was taken for a flight in a club aircraft piloted by the club's pilot, who held an "A" license endorsement, which did not permit him to carry passengers for hire or reward but enabled him to carry club-members as passengers. There was nothing in the defendant club's rules regarding the creation of flight members. On informations charging the club with using an unlicensed aerodrome, or a field not licensed for the purpose, as a place of landing and departure of aircraft carrying passengers for hire or reward, and with utilizing the services of a pilot to fly an aircraft to carry passengers for hire or reward, such pilot not being provided with the prescribed certificate of competency and license, in breach of the Air Navigation Regulations, 1933 ; and on an information charging the pilot with flying an aircraft carrying passengers for hire or reward, not being provided with the prescribed certificates of competency and license in breach of Reg. 5 (1) (iii) of those regulations, *Held,* 1. That, as the method of creating "flight members" adopted was *ultra vires* the defendant club, and void as being in contravention of s. 6 (1) (*e*) of the Incorporated Societies Act, 1908, and as its purpose was to avoid the restrictions imposed by the Air Navigation Regulations, 1933, any person carried as a passenger on such conditions did not become a "member of the club" within the meaning of those words as used in the provisos to Reg. 2 ; and the payment of 10s. entitling him to one flight made him a passenger carried for hire or reward. (*Ashbury Railway Carriage and Iron Co.* v. *Riche,* (1875) L.R. 7 H.L. 653, followed. *Irvine* v. *Union Bank of Australia,* (1877) 2 App. Cas. 366, distinguished.) 2. That, as the aerodrome was not licensed,

and as the pilot did not have the necessary qualification to carry passengers for hire or reward, the club, as owner of the aircraft in question, was guilty of a breach of Reg. 5 (1) (iii), and, also, as proprietor of the unlicensed aerodrome, of a breach of Reg. 10. 3. That the provisions of Reg. 31, and the general purport of the regulations, excluded the doctrine of *mens rea*, and placed the onus on the pilot of showing that the offence with which he was charged took place without his actual fault or privity. *Police* v. *Hawke's Bay and East Coast Aero Club (Inc.)*; *Police* v. *Ingram*. (Hastings. March 9, 1948. H. Jenner Wily, S.M.)

COMPANY LAW.

Contingent Claims in a Winding-up. *92 Solicitors Journal*, 7, 36.

CONFLICT OF LAWS.

Contract—Legality—*Lex loci contractus* and *lex loci solutionis*—Both in Foreign Country—Foreign Exchange Control Regulations—Customer's Debentures in Foreign Company deposited by Foreign Bank in Bank's name at London branch—Bretton Woods Agreements Order in Council, 1946 (S.R. & O., 1946, No. 36), art. 3, sched., pt. I (Fund Agreement, art. VIII, s. 2 (*b*)). *Frankman* v. *Anglo-Prague Credit Bank (London Office)*, [1948] 1 All E.R. 337 (K.B.D.).

CONVEYANCING.

Some War-time Contracts. *92 Solicitors Journal*, 21.

COSTS.

Solicitor's Costs : A New Basis. *92 Solicitors Journal*, 5, 19, 34.

CRIMINAL LAW.

Legal Import of Watermarks in Paper. (T. Linley Crosseley, F.C.I.C., M.E.I.C.) *17 Fortnightly Law Journal (Canada)*, 181.

Taking Witnesses' Statements. *92 Solicitors Journal*, 20.

DESTITUTE PERSONS.

Maintenance—Agreement for Separation providing for Amount of Maintenance to be fixed by Magistrate—Order made for same—Term of Agreement that if Parties Divorced Payment of Maintenance should cease—After Divorce, Application by Husband for Cancellation—Order cancelled—Domestic Proceedings Act, 1939, s. 9—Divorce and Matrimonial Causes Act, 1928, s. 33. Section 9 of the Domestic Proceedings Act, 1939, is not applicable where cancellation of a maintenance order is sought not only by reason of the dissolution of the marriage of the parties, but also by reason of an express bargain between them. (*Burke* v. *Burke*, [1934] N.Z.L.R. 978, referred to.) *Semble*, Such a cancellation does not affect the jurisdiction of the Supreme Court under s. 33 of the Divorce and Matrimonial Causes Act, 1928, to fix the permanent maintenance of the former wife. *Stevens* v. *Stevens*. (New Plymouth. March 11, 1948. Cornish, J.)

DIVORCE.

Discretion—Relevant Considerations—Desire of Respondent to Remarry—Bigamy of Petitioner. *Redman* v. *Redman*, [1948] 1 All E.R. 333 (C.A.).

Maintenance—Variation of Order—Remarriage—Appeal—Discretion—Administration of Justice (Miscellaneous Provisions) Act, 1938 (c. 63), s. 14 (2). *Bellenden (formerly Satterthwaite)* v. *Satterthwaite*, [1948] 1 All E.R. 343 (C.A.).

Recent Decision on Practice. *92 Solicitors Journal*, 6.

Restitution of Conjugal Rights—Conduct of the Spouses. This was an appeal from the judgment of Fleming, J., ordering the respondent husband to return to cohabitation in a wife's suit for restitution of conjugal rights, from which the husband appealed. The Court of Appeal (Callan, J., dissenting) held that the husband had just cause for leaving his wife, in view of her conduct, and that her petition should be dismissed. In the view of Callan, J., there was evidence which justified the learned Judge in the Court below in holding that the conduct of the wife, though she was admittedly a difficult type of woman, did not justify the husband in leaving her. The appeal was allowed and the decree rescinded. The judgment in both Courts is on the facts. *Earl* v. *Earl*. (Court of Appeal. Wellington. March 22, 1948. Smith, J., Fair, J., Callan, J.)

Variation of Post-nuptial Settlement—Jurisdiction to Vary Exercisable once and for all—Power to Vary only where Continuance of Settlement rendered Unjust by Divorce or Conduct occasioning Divorce—Divorce and Matrimonial Causes Act, 1928, s. 37. The Court of Appeal, in an appeal from Johnston, J., held, *per totam curiam*, allowing the appeal, as follows:—A separation deed between husband and wife whereunder maintenance is payable by the husband to the wife is a "post-nuptial settlement" within the meaning of that term as used in s. 37 of the Divorce and Matrimonial Causes Act, 1928. (*Worsley* v. *Worsley and Wignall*, (1869) L.R. 1 P. & D. 648, and *Soler* v. *Soler*, (1898) 17 N.Z.L.R. 49, followed.) The question whether one or other, or both, of the parties to the settlement has been guilty of misconduct is not a condition of the jurisdiction of the Court. The jurisdiction under s. 37 to vary a settlement must be exercised once and for all. Once an order has been made under that section, there is no power to revise it or to make a further order on the ground of what has happened since the order was made. There can be no reservation in the order for further review, with the possible exception that facts which then existed were not brought to the notice of the Court when the order was made. (*Gladstone* v. *Gladstone*, (1876) 1 P.D. 442, and *Benyon* v. *Benyon*, (1890) 15 P.D. 54, followed.) When the learned Judge varying a settlement under s. 37 exercises his discretion upon a wrong principle, either on erroneous reasons for the reduction granted by him in the amount of maintenance payable, or by reserving leave to apply in the event of any sudden improvement in the husband's circumstances, the exercise of that discretion may be reviewed by the Court of Appeal. So Held by the Court of Appeal. Per Sir Humphrey O'Leary, C.J., Callan and Cornish, JJ. (Smith, J., dissenting), (1) That the power to vary under s. 37 should be exercised only where it is shown that the unvaried continuance of the settlement has been rendered unjust by the divorce or the conduct which occasioned the divorce. (*Clifford* v. *Clifford*, (1884) 9 P.D. 76, applied.) (2) That, when a reduction of the amount of maintenance is granted for reasons which have no causal connection with the divorce or with what gave rise to the divorce, the Judge granting such reduction has made an error in principle which would entitle a wife appealing against such reduction to succeed in her appeal. *Coutts* v. *Coutts*. (Court of Appeal. March 12, 1948. Sir Humphrey O'Leary, C.J., Smith, J., Callan, J., Cornish, J.)

FACTORIES.

Factories Act Extension and Modification (Revocation) Order, 1948 (Serial No. 1948/38). Revocation of the Factories Act Extension and Modification Order, 1939 (Serial No. 1939/61), made under s. 47 of the Factories Act, 1936, and enuring under s. 31 of the Factories Act, 1946.

Factories Act Modification (Revocation) Order, 1948 (Serial No. 1948/31). Factories Act, 1946, Modification Order, 1947 (Serial No. 1947/201), revoked.

Removal of Dust — Metal grinding — Tool sharpening — "Wholly or mainly employed in such work"—Modification of Factories Act by Regulations—Employers' Common Law Liability—Factories Act, 1937 (c. 67), s. 47 (1)—Grinding of Metals (Miscellaneous Industries) Regulations, 1925 (S. R. & O., 1925, No. 904). *Franklin* v. *Gramophone Co., Ltd.*, [1948] 1 All E.R. 353 (C.A.).

FOOTWEAR.

Industrial Efficiency (Footwear) Regulations, 1948 (Serial No. 1948/33). Replacing Industrial Efficiency (Footwear) Regulations, 1941.

GIFT.

Deed "allocating" Liberty Bonds among Specified Grandchildren found among papers of Deceased Testator—Will executed before Deed—No reference in such Will to Government Bonds—Deed neither Valid Gift nor valid Declaration of Trust. The will of a testator, made on April 3, 1941, made no reference to Liberty Bonds of the New Zealand Government or to any other class of Government Bonds. After his death in 1946, among his papers was found the following typewritten document signed by the testator on March 1, 1945, and attested as a deed: "Whereas I have purchased certain Liberty bonds of the New Zealand Government and I hereby allocate the same in equal shares to and amongst my seven grandchildren namely the three children of my daughter I. E. S. and the three children of my son B. N. W. and the son of my daughter E. G. W. and should any of my grandchildren die before attaining the age of twenty-one years then the share of any child dying as aforesaid then the same share as would have gone to them shall pass to the surviving children so that each grandchildren shall receive an equal share thereof." On an originating summons to ascertain whether the deed operated as a valid gift, or, alternatively, as a valid declaration of trust, and, if it operated as either, which of the bonds possessed by the testator fell within the scope of its operation, *Held*, 1. That, if the document were intended as a gift, it was not an absolute one, and therefore could not take effect; and (as conceded) it could not operate as a valid declaration of trust. 2. That, assuming there were a valid gift, there was a specific asset to which the words "Liberty bonds" applied, and such a gift must be restricted to such Liberty bonds as were owned by the testator at the date of the deed. (*In re Price, Trumper* v. *Price*, [1932] 2 Ch. 54, and *In re Gifford, Gifford* v. *Seaman*, [1944] Ch. 186, [1944] 1 All E.R. 268, distinguished.) *In re Wylie (Deceased), Sinclair and Another* v. *Sinclair and Others*. (Wellington. 1948. Sir Humphrey O'Leary, C.J.)

HUSBAND AND WIFE.

Title to Property—Matrimonial Home—Both Parties contributing to Purchase—Intention of Parties—Married Women's Property Act, 1882 (c. 75), s. 17. *Re Rogers' Question*, [1948] 1 All E.R. 328 (C.A.).

INDUSTRIAL LAW.

Strike and Lockout Emergency Regulations, 1939, Amendment No. 5 (Serial No. 1948/30). Regulations 4B and 4C added. (Each industrial union or association is deemed to be a body corporate for the purposes of these regulations. On any conviction for an offence under these regulations, an order for payment of any sum of money, for fine or costs, is enforceable in the same manner as a judgment for a penalty under the Industrial Conciliation and Arbitration Act, 1925 (see s. 135), excluding the last proviso and in no other manner. Every conviction for such an offence or order for payment of a fine, &c., is deemed to be a judgment of the Magistrates' Court.)

INNKEEPERS.

Duties and Responsibilities. *92 Solicitors Journal*, 4.

MUNICIPAL CORPORATION.

Liability for Fault of Statutory Agent. *17 Fortnightly Law Journal (Canada)*, 183.

NEGLIGENCE.

My Neighbour on the Road. *92 Solicitors Journal*, 18.

PRACTICE.

Payment into Court—Acceptance in Error. The plaintiffs brought an action against the defendants claiming damages for breach of contract, and subsequently amended their statement of claim by adding after the claim for damages, " or alternatively £7,600 as money had and received by the defendants to the use of the plaintiffs." Both parties admitted that the amendment was erroneously phrased, since the plaintiffs intended the claim for money had and received to be alternative to part only, and not to the whole, of the claim for damages. The defendants paid into Court in respect of the alternative cause of action £7,600 and the plaintiffs accepted it in satisfaction thereof. Thereafter the plaintiffs realized that, owing to their mistaken view of the meaning of the amended statement of claim, they had elected to accept the sum paid into Court in satisfaction of a claim which was alternative to the whole of their claim for damages, thus bringing an end to the entire proceedings; and they sought to restore the original position by repaying the money into Court, with a view to amending their statement of claim and proceeding with the remainder of their claim for damages. An order to this effect having been made by the Judge in Chambers, the defendants appealed, contending that the Judge had no jurisdiction to make such order, since the plaintiffs, by taking the money out of Court, had made an irrevocable election; and reliance was placed on the words of Lord Blackburn in *Scarf* v. *Jardine*, (1882) 7 App. Cas. 345, 360. The Court of Appeal rejected this contention, since, even if there was an election, which once made could not be revoked by a party of his own motion, that fact would not deprive the Court of its power to intervene and grant relief. Accordingly, it was held that in a proper case and on proper terms the Court may, in its discretion, grant relief to a party, who comes quickly, from the effect of his mistake or that of his legal advisers, in order to prevent a possible injustice; the order of the Judge was, therefore, rightly made. *S. Kaprow and Co., Ltd.* v. *Maclelland and Co., Ltd.*, [1948] 1 All E.R. 264 (C.A.).

PUBLIC SERVICE.

Public Service Amending Regulations, 1948 (Serial No. 1948/37).

QUARANTINE (AIR).

Quarantine (Air) Regulations, 1948 (Serial No. 1948/29). Commencement date: April 1, 1948.

RENT RESTRICTION.

Service Contract—Stable Hand—Free House provided so long as Employment Continued—Contention that such Contract in Breach of Minimum Wage Act, 1945—Question not before Court—Evidence of Terms of Contract admissible. On an appeal from a Magistrate: The defendant's contention that the agreement was in breach of the Minimum Wage Act, 1945, could not be considered, as the question of such a breach was not before the Court, and had not been before any Court; and it could not be assumed against the respondent that he had been guilty of an offence under that statute. Even if he had been guilty of such an offence, that fact would not of itself transform a contract of service entered into for a proper and lawful purpose into an illegal contract, so as to render inadmissible evidence as to the terms of the contract. It was held that the contract was a service contract, and no tenancy under the Fair Rents Act, 1936, existed. Appeal dismissed. *Doyle* v. *Farrell.* (New Plymouth. March 10, 1948. Christie, J.)

SHARE-MILKING AGREEMENTS.

Share-milking Agreements Order, 1946, Amendment No. 1 (Serial No. 1948/36). Clause 42 of Part II of Schedule amended by substituting " 3s. 1½d." for 2s. 9d." : as from March 1, 1948.

VENDOR AND PURCHASER.

Agreement for Sale and Purchase of Land—Unpaid Purchase-money—Specialty Debt—Payment of Interest thereon. The plaintiff claimed the balance of purchase-money outstanding under an agreement for the sale of land, and interest on such unpaid purchase-money. It was admitted by the plaintiff at the hearing that the requirements of the Mortgages Extension Emergency Regulations, 1940, had not been complied with, and he elected to be nonsuited in respect of that claim. An agreement made between the parties was executed by the plaintiff company by affixing its seal in the presence of a director and the secretary, and by the defendant who signed it in the presence of a witness who added to his signature his occupation and address. *Held*, 1. That the document was a deed, so that the principal debt created thereby was a specialty debt, and accordingly that the Statute of Limitations (21 Jac. 1, c. 16) pleaded by the defendant was not available to him. (*Domb* v. *Owler*, [1924] N.Z.L.R. 532, followed. *Wellington City Corporation* v. *Commissioner of Taxes*, [1931] G.L.R. 333, distinguished.) 2. That, in the circumstances of the case, the remedy of the plaintiff company was limited, so far as the present action was concerned, to the recovery of interest at the contractual rate from February 1, 1932 (when the latest instalment of purchase-money and interest was paid), up to the due date for payment of the purchase-money, November 8, 1932. (*Ruddenklau* v. *Charlesworth*, [1926] N.Z.L.R. 16, applied.) *Stellin Contruction, Ltd.* v. *Carr.* (Wellington. March 18, 1948. Christie, J.)

WHEAT AND FLOUR.

Board of Trade (Wheat and Flour) Regulations, 1944, Amendent No. 2 (Serial No. 1948/32). Amendments: Regs. 66 (" 1d." substituted for " ½d."); 67 (" ¾d." substituted for " ½d."); 125 (word " transport " inserted after word " purchase " where first used); 228 (" 2s. 1d." substituted for " 1s. 1d."); and 229 (para. (ii) revoked and new para. (ii) substituted: " Flour sold otherwise " than in sacks containing 160 lbs.).

WORKERS' COMPENSATION.

Assessment of Compensation—Two Accidents for which Compensation paid—Resulting Incapacity fitting Worker for Light Work only—Principles on which Compensation for such Permanent Incapacity Assessed. The plaintiff was paid compensation in respect of two accidents, but not for any permanent incapacity arising therefrom. He claimed that he was fit for light work only and that his earning-capacity had been permanently reduced by £3 a week. The plaintiff had a slight curvature of the spine, causing some back weakness; the injuries he suffered in January, 1944, and in June, 1945, were strained or sprained back muscles; he recovered full working-capacity after the first accident, and there was no incapacity due to either accident ascertained in December, 1945; but the plaintiff feared recurrence and the plaintiff had been advised, and wished, avoidance of risk of further injury. He left his employment in October, 1945, and went into business on his own account in selling motor-car parts, and he employed labour to do the heavy work. *Held*, 1. That the amount of compensation payable to the plaintiff was to be ascertained from the amount the plaintiff would be able to earn in a business of his own, and that should be arrived at by considering what services he actually performs in the business, and what those services would be worth if, instead of serving himself, he was serving an employer, or, put in another way, what he would have to pay another for those services. (*Calico Printers' Association, Ltd.* v. *Higham*, [1912] 1 K.B. 93, 5 B.W.C.C. 97, followed.) 2. That, on the evidence, at the time when the plaintiff left his employment in October, 1945, he would not be readily employable, because he had had two back accidents and he was looked upon as fit for light work only because of that condition and of the risk of recurrence; and the defendants were not prepared to keep him on indefinitely in view of his then condition and having regard to the work he was considered fit to do. 3. That the plaintiff was entitled to three months' compensation to give him time to get over any pain still remaining, and to regain his confidence. *Browne* v. *W. J. Butler and Co.* (New Plymouth. March 10, 1948. Ongley, J. (Comp. Ct.))

PROMISES TO MAKE TESTAMENTARY PROVISION.

The Hurdles raised by Judicial Interpretation.

By H. F. VON HAAST, M.A., LL.B.

In 1944, the Law Revision Committee, having in mind the numerous cases of persons working for others relying on promises to remunerate them therefor by will, recommended an amendment of the law, making the estate of a deceased person who had had the benefit of such work and made such a promise liable to remunerate the promisee for such work.

That amendment, drawn in simple untechnical language, was enacted as s. 3 of the Law Reform Act, 1944, and the course of the claimant seemed clear. But critical judicial analysis of this section is already beginning to strew booby-traps in the way of the credulous claimant. In *McAllister* v. *Public Trustee*, [1947] N.Z.L.R. 334, Smith, J., expressed the *obiter dictum* that the wording of the section seemed inappropriate to the case of the promise of a devise of land. In *Nealon* v. *Public Trustee*, (*Ante*, p. 46,) Fleming, J., held that s. 4 of the Statute of Frauds has not been expressly or impliedly repealed by the said section, and that, therefore, a claimant who relied upon a verbal promise to remunerate him by a devise of land could not succeed in an action under s. 3 of the Law Reform Act, 1944, because it did not comply with s. 4 of the Statute of Frauds.

Incidentally, he expressed the view that a promise to remunerate by legacy for a definite sum could be given effect to under s. 3, and could not be void under the Statute of Frauds as an agreement not to be performed within the space of one year from the making thereof, "because there would be a possibility that it could be performed within one year." But what if, as might well happen, the promisor were to reward by a legacy the performance of services rendered for at least two years? A testator frequently makes the amount of a legacy to a servant depend upon the number of years the latter has been in his service.

With great respect to the learned Judges, it seems to me that the interpretation of s. 3 so far has been upon too rigid technical lines, and that there has not been a sufficient consideration of the questions what was the mischief or defect for which the law had not provided, what remedy Parliament had provided, and the reason for the remedy.

Bearing in mind the evil that s. 3 was intended to remedy and the actual language of the section, none of the relevant words of which has any technical signification, it is submitted that :

(i) Testamentary provision is broad enough to include devises of land, and that there should be no difficulty in ascertaining the amount payable to the claimant in view of the subsequent specification of the way in which the amount due to the claimant is to be ascertained. *There is nothing* in s. 3 to indicate that the section was enacted merely to meet cases of a promise to remunerate by a legacy only. The language throughout is perfectly general. Subsection 4 does not support the opinion of Fleming, J. The reason for that subsection is that, as the claimant relied on provision by the will of the promisor, he is not to be placed on the same footing as creditors of the deceased, but in the same class as legatees, both for death duties and the distribution and administration of the estate.

(ii) In considering whether the Statute of Frauds should apply to claims under s. 3, not only should the evil to be remedied by Parliament be considered, but also the phrases that indicate an implied repeal of the Statute of Frauds—*e.g.*, "Whether or not a claim for such remuneration could have been enforced in the lifetime of the deceased," which is wide enough to include claims unenforceable solely by reason of the Statute of Frauds—and the words upon which Fleming, J., relies—eroneously, in my view—for holding that the Statute of Frauds made the contract unenforceable.

Those words are that the claim based on a promise to make testamentary provision for the claimant "shall . . . be enforceable against the personal representatives of the deceased in the same manner and to the same extent as if the promise of the deceased were a promise for payment by the deceased in his lifetime of the amount specified in the promise or, if no amount is specified, of such amount as may be reasonable . . ."

The learned Judge holds the words "in the same manner and to the same extent" to be vital, so as to import the Statute of Frauds into the matter. They are, I submit, but with just the opposite effect. What follows? Not as if the promise were a promise to devise land, but as if the promise were "a promise for payment by the deceased in his lifetime of the amount specified in the promise or, if no amount is specified, of such amount as may be reasonable." That is to say, whatever the form of the testamentary provision, the promise is to be construed exactly as if it were a promise made by the promisor in his lifetime to pay either a specified sum or a reasonable amount for work performed. Such promise, too, may be *implied*, just as, where one person requests another to do work for him, there may be inferred from such request an offer to pay a reasonable sum for the work if done, the offer being accepted by the performance of the work.

The perusal of those words should have indicated to the learned Judge (*a*) that he was to enforce the promise as if it were a promise by deceased to pay *money* in his lifetime to the claimant, and (*b*) that, having decided on the amount to which the claimant was entitled, such amount should, under subs. 4 of s. 3, be treated as a legacy given by deceased to the claimant. So that here all reference to land is again negatived.

I venture with the greatest respect to suggest that a broader interpretation of the section would be more in accordance with the intention of the Legislature, and would carry out its purpose of remedying the evil sought to be cured by the section.

But, by way of abundance of caution, it might be advisable to amend the section by providing that (*a*) the term "testamentary provision" shall include a devise of land, and (*b*) s. 4 of the Statute of Frauds shall not apply to claims under s. 3.

THE ART OF ADVOCACY.

By the Rt. Hon. Sir Norman Birkett, of the King's Bench Division.*

I must begin my observations to you tonight, as I have begun every speech I have made in Canada, by trying to express to you the sense of pride and honour I experience in being allowed to come amongst you once more. And, of course, that sense of pride and that sense of honour are deepened and intensified a thousandfold by the too kind observations which have just fallen from the lips of my dear friend Lally McCarthy. I confess, Mr. President, when he began I detected what I thought to be a most ominous note in his voice when he said he proposed to present me, not as my kind friends have done at other meetings, but as I am. And inside me I trembled at the revelations that were to come. But I must say that for the leader of a trade union he has displayed that tact and reserve which has probably prevented a strike in this gathering here tonight; and I can only say to you that every meeting with my friend Lally McCarthy has deepened and ripened in me a clearer and still clearer discernment of all his very great qualities as a lawyer, and as a man, and as a very great friend. It is impossible for me to do more than to acknowledge with a full and thankful heart the very kind observations he has been pleased to make.

For ten years Lally McCarthy has been my guide, and my counsellor, and my friend. When people do me the honour of saying, " Well, I don't think you have put a foot wrong in Canada," it is no virtue of mine. I owe it wholly and unreservedly to the wise and kind and patient counsellor he has always been. And although we are not being broadcast, and although she can't hear it, Lally McCarthy wouldn't be the man he is if it were not for that sweet little cherub that sits up aloft in the person of Mary McCarthy; and I dare say he would be the first, and certainly I would be the second, to acknowledge all that he owes to her. And so, gentlemen, you will permit me to express the gratification which I feel.

It is now ten years since I first came to Toronto as a member of the English Bar, and upon that occasion I brought the cordial greetings of my colleagues working at the English Bar. Now, by an accident arising out of and in the course of my employment, I come as one of His Majesty's Judges, but I feel no essential difference. And whilst I bring the cordial greetings tonight of the Bench and Bar of England I bring them with no less fervour than I brought them ten years ago.

And that, sir, illustrates the most important factor in any community of lawyers, the fact that whether you come from the Bar or whether you come from the Bench you share the same cordial feelings. It may serve as an illustration of the greatness of the work which was done, first of all, in our own country in the twelfth century, when, for the very first time the lawyers became a self-conscious community; when, for the first time men who were not in Holy Orders were permitted to practise at the English Bar. And from that early date in the twelfth century the promotion has always been from Bar to Bench. And by that simple thing, dependent upon the reforms of Henry II, the great community of lawyers within the community was formed; those traditions which we value so much were formulated and through all the centuries they have been in operation.

It is quite true that if you have been at the Bar you know what the Bar thinks about the Bench. As Mr. McCarthy illustrated tonight, when you are at the Bar you don't always present the members of the Bench as they are, but it is a kindly criticism. We in England treasure very much the freedom of the Bar in the various messes on circuit and elsewhere to speak their minds about the Bench, and so the tradition grows from day to day. Mr. Justice Field, one of our old justices of days past, was so deaf that when he sat in the court he once mistook a clap of thunder for an interruption by the witness. And in Mr. Justice Field's day one barrister would say to another, " How are things in Field's Court? " And the answer invariably was, " Part heard."

And, speaking of the tradition that the Bar should have the licence to speak freely among themselves about the judges, I was interested, when searching in the Greek anthology the other night for a particular quotation, unconnected with the law, to find there the story which still circulates in England about the deaf judge, the deaf plaintiff, and the deaf defendant. They were all deaf. The judge took his seat upon the Bench, the plaintiff and the defendant came before him and the judge said, " You will begin."

And the plaintiff, who had never heard a word, neither had the defendant, seeing that the judge's lips had stopped moving, said, " My Lord, my claim is a claim for rent."

Of course, the defendant never heard a word about this and neither did the judge, but the plaintiff's lips had stopped moving, and the judge turned to the defendant and said: " What do you say to that? "

So the defendant, who had never heard a word, said, " My Lord, how can that be when I grind my corn at night? "

Of course, the plaintiff never heard a word about this and neither did the judge but he saw his lips had stopped moving, and the judge pulled himself together and said, " Well, I think this is a most difficult case but I see no useful purpose in reserving my judgment. As I have formed a clear opinion I propose to give expression to it. I have come to the conclusion that she is your mother and you will both maintain her." So the licence to speak freely of judges is pretty ancient.

Then we had a perfectly delightful case of a very pleasant judge indeed who was trying a very complicated financial case. And he came finally to deliver his judgment and he said, " And so I come to the conclusion that I must find for the plaintiff, and I find for the plaintiff in the sum of 25,452 pounds, 16 shillings and 11 pence, but of course, if my figures aren't quite right, no doubt the counsel for the plaintiff and the counsel for the defendant will check me and correct me." Whereupon, the counsel for the plaintiff said to the counsel for the defendant in a loud whisper, " Why the damn old fool has added the date in." And the kindly judge, overhearing, said " So I have."

Those are the kind of things which are only permissible and permitted when the community of interest between

* A speech delivered to the Lawyers Club of Toronto, September 10, 1947. (*25 Canadian Bar Review*, 1039).

Bench and Bar is founded not upon the ephemeral things but upon something much more deep and much more lasting. And between the Bench and Bar in England, and I am sure between the Bench and Bar in Canada, there is that community of interest which is based upon one thing, namely, that our profession is devoted to the administration of the greatest thing in any civilized community, the administration of justice. And we in England pay great attention to tradition and to ceremonial. When the judge is going upon circuit, let us say to York to attend service in the Minster, he goes arrayed in full scarlet and ermine, and the stately procession through the ancient city of York brings all the populace to the street sides, and they see the visible embodiment before them of the King's Justice being brought to every part of the community. And though it is not for me to make suggestions with regard to procedure in Canada or anywhere else, I can only say that the habiliments, the trappings, the ceremonial which is attendant upon the procession of the judges through the cities of our land, the pomp with which justice is administered, does certainly give not merely dignity to the Bench, but gives to the populace throughout our land a deep seated admiration, which almost on occasion approaches reverence, for the value that the King's Justice represents.

And, Mr. President, in these days of change when the cherished institutions are in some danger from revolutionary hands, it is vital that that upon which everything else depends, the respect for law, for its administration, should be preserved: and the ceremonial and the tradition extending down through the ages, in my judgment, tend greatly to that end.

Well now, Mr. President, the links between Canada and Great Britain, and the links between the lawyers, are deep and lasting. I said that we were members of a great profession, and indeed we are, with a great history and with a great responsibility. Every civilized community must—it is imperative—have within its borders a body of men trained in the law, whose purpose is not merely to make money, not merely to seek and to win honour—though these things are not to be despised—but their purpose, the purpose of the community of lawyers within the community, is that the ordinary citizens shall always have at their disposal the man who can protect them, who can defend them, who can stand up before arbitrary power from whatever quarter it may come and assert the inalienable rights of the individual to the eternal freedoms. That is the centre of all the lawyer's work and the lawyer's ambition. And indeed, if you reflect upon it, the lawyer himself is never likely to be a greatly beloved figure, and the real reason is because of one of the greatest virtues of our system.

We in England have an unwritten law—the unwritten law is frequently much more powerful than the written—that no counsel, whoever he may be, has a right to decline any brief that may be offered to him except for good and sufficient reason. In my own practice at the English Bar I have frequently had to undertake murder cases of the greatest complexity and difficulty, not because I wanted to but because of the unwritten law that I could not refuse them. It was Lord Erskine, perhaps the greatest advocate who ever trod Westminster Hall, the great Erskine, who when he undertook the defence of Tom Paine—and you may read it in the State Trials—was the subject of the fiercest criticism by political parties in England. And on that memorable occasion in Westminster Hall, Erskine laid down the first rule with regard to the English advocate. "When the day comes," said Erskine in the course of that magnificent defence, "when the day comes that the advocate in England is permitted to choose whom he will and whom he will not defend, and becomes not the advocate but the judge in the cause, at that moment the liberties of the citizens of England are at an end."

And that quality, the result of the unwritten law, that the advocate trained in the law to defend the citizen shall be available to the citizen, is one reason why the lawyer in England is unpopular. Why, it is said, does the lawyer affect views in which he does not believe? He puts forward to the court submissions which he may or may not think sound, but that is the role of the advocate. What the public will never understand is that the man who stands there to plead is not pleading his own view. He may be putting forward a view of which he profoundly disapproves, but he is putting forward, for the client, the view of the client.

We had a famous case in England of an advocate appearing for a prisoner, who in the midst of an impassioned speech to the court stopped and said, "Now Milord I will lay aside the role of the advocate and I will assume the role of the man." And Milord upon the Bench said, "You have no right to do any such thing. The only title by which you may be heard in this court is that you speak as an advocate."

And the great Lord Brougham in his famous defence of Queen Caroline carried the doctrine to an extreme length when he asserted before the court that the duty of a counsel to his client was so deep and so strong that it in fact over-rode his duty to his country. That is a proposition, I am quite sure, to which the Bar of Canada would not agree; but it is an illustration of the length to which the doctrine of the advocate speaking for the client may go.

And when you find great prose writers like Swift saying of advocates that they are men bred in the art of proving "that white is black and black is white, according as they are paid," it is because of the great virtue of the advocate that he is there to present the view of the client. And because of that duty, because of that responsibility, there are certain qualities of the advocate about which I hope you will allow me just to say a word or two tonight.

Now just let me say, before I do it, that I don't come here to try and pretend for one moment to give anybody advice about advocacy. I expect there are plenty of people who now hear me speak who are quite as competent to talk about the elements of advocacy as I am, but it is a subject in which we are all interested and therefore, perhaps, with humility and with deference, you will allow me to make just one or two observations about it.

I have now been at the Bar and upon the Bench for thirty-four years and I have seen almost every type of advocate in almost every type of court. And I know at once there are no standards that you can lay down and say, if you want to be a great advocate, there is the pattern. It can't be done. There are diversities of gifts but the same spirit; and I have known in my time men who could scarcely string a sentence together, who lacked all graces, and yet impressed the court so that the court strained to listen and to catch every word that was said. And I have known the impassioned orator who swept juries off their feet. I was in the chambers of Marshall Hall and I shall never forget that great man. There were times when Marshall Hall

had very great failures, very great failures, and there were times when he had the most resounding triumphs. Marshall Hall coming into the court surrounded by a retinue of people carrying pencils and air cushions and all sorts of things was an art in itself. Marshall Hall would sit there and he was not above certain, shall I call them, small tricks. This air cushion which he had, if the cross-examination of his client was getting pretty severe he would put the air cushion under his arm and go, fsh ! fsh ! fsh !, so that the cross-examining counsel was very greatly disconcerted. But I have heard Marshall Hall on some of the big cases, the defence of Fahmy at the Old Bailey, the defence of Greenwood, when Marshall Hall quoted to the jury that wonderful thing from Othello, " Put out the light, put out the light." And to hear Marshall Hall on the full tide of his forensic oratory was a thing never to be forgotten.

Of course, these were great figures in my very early days. Edward Carson, the finest cross-examiner within my recollection at the English Bar, had a very attractive Irish brogue. You all know the famous stories of Carson ; you read them, of course, in the Press. " Do you drink ? " And the witness says, " That is my business." And Edward Carson says, " Have you any other ? " But to hear it in the brogue, " Do you drink," " Have you any other? " ! The effect was indescribable. Rufus Isaacs was a great cross-examiner with an extraordinarily simple method of opening in his cross-examination. In the Seddon case, as you know, Seddon was charged with the murder of an old lady named Miss Barrow. On the opening of it in that crowded court—Seddon, the little, composed, ready, versatile prisoner ; Rufus Isaacs at his very best, and he begins, " Seddon, did you like Miss Barrow ? " And Seddon, surprised by the opening question, said, " Did I like her ? " Said Rufus Isaacs, " That was the question." And in that simple, incisive, forcible, direct way one of the most wonderful cross-examinations in the world was begun.

Lord Hewart, a dear friend of yours, was a very dear friend of mine. Lord Hewart had an inimitable way with him. I remember a Greek witness called Pappinockulous, a very undesirable man with a very bad character, and he was going to give evidence—at least, it was said that he was going to give evidence. And he used to come in at one door of the court, and probably leave by the other one. Upon one occasion he tried to push his way in to the front row of counsel which, as you know, in England is absolutely sacrosanct, and the usher put him out. All that went on under the observant eyes of Hewart. And at the supreme moment he came to the jury and he said, " Members of the jury, then there was the witness, the Greek Pappinockulous, sometimes coming through that door, sometimes going out through this other door ; occasionally trying to push his way into the ranks of counsel—here, there and everywhere." And then, pointing to the witness box, " but never there, never there." The effect upon the jury of course was profound beyond all words.

And I once heard one of the most moving things I have ever heard in a murder trial by the advocate for the defence, words that I knew by heart, and yet the effect upon the jury was quite startling :

The Moving Finger writes ; and, having writ,
Moves on : nor all thy Piety nor Wit
Shall lure it back to cancel half a Line,
Nor all thy Tears wash out a Word of it.

And that leads me to say that while there are no fixed standards for forensic oratory, and there are no patterns and no types to which the advocate must conform, yet I have found that it is simple speech that makes the most powerful appeal. Now when you think of it, you take the Gettysburg address, perhaps the greatest speech that ever fell from the lips of man. " Fourscore and seven years ago our fathers brought forth upon this continent a new nation, conceived in liberty, and dedicated to the proposition that all men are created equal." Nothing could exceed it for simplicity. Take the Authorized Version of the Bible and pick where you will. Take the great stories of the Bible, such as the story of the Prodigal Son, and note their essential simplicity. It is the simple, direct, incisive speech that wins the great victories. And so it is in the court. My experience has always been with regard to the great advocates I have known, that it was the element of direct, forceful, lucid, vivid speech, in all its simplicity, that gave them their strength.

But now, Mr. President, the things that I want to say about the advocate must be general. You see, my own private view is that most cases are won before you go into court. It is the preliminary, the preparatory work, the mastering of the brief so that every fact and every figure is in your head, that is all-important. I always found it most useful to have the essential things on a little sheet of my own, so that they could be referred to instantly at any critical moments in the case. The conference, as we call it in England, when you have your discussion with the experts, is of the utmost importance. For example, in the great murder trials it was often necessary to understand the effects of arsenic on the human body and to discover matters which were simply of vital importance as the case proceeded. One of the cases that I had to defend, a case which came from the West Country, concerned a woman who was charged with the administering of arsenic to various people. It was necessary from the point of view of the defence that we should understand, in every detail, the effect of the administration of arsenic upon the human body. And, as you probably know, arsenic taken into the body has certain well-known pathological effects, but one thing is of the greatest importance : it comes down through the strands of the hair from the inside, from the inside. And your expert by taking the strand of hair can tell you when the arsenic was first administered and in what probable strength. In this particular case it so happened that the body of one of the victims was exhumed in the Lewannick Churchyard and they decided to conduct the post-mortem in the churchyard. And by the strangest circumstance, the soil of that Cornish churchyard at Lewannick was charged and impregnated with arsenic, and it was the easiest thing therefore for the cross-examiner to say to the pathological expert from the Home Office, and to tell the jury, that in these organs of the body there were so many grains of arsenic, which might have come from the soil. How are you to know some of that arsenic was not deposited from the soil of the Lewannick Churchyard ? That was easy, but the strands of hair, nothing would avail to say that the arsenic found there came from the outside. That came from administration from within. And so you perceive how in a case of that nature, and indeed in all cases, the preliminary work of conference, of understanding details that may perhaps never be used in the case, is of the utmost importance.

As I said before, all that side of the work of advocacy is an integral part of the mastering of the brief, the assimilation of the expert's knowledge in the conference room, then into the court and the presentation of the case. We begin, as you know, by the leading counsel for the Crown, or leading counsel for the plaintiff, making a short opening statement to the jury in a jury case. And again, it would be almost a truism to say that more cases are won by a proper presentation of that opening statement than in any other way. The jury, fresh to the court, fresh to the case, hear a presentation, and they are never, never likely to forget. Shaken they may be by cross-examination, by subsequent witnesses, but that first, clear, incisive impression made upon the jury is beyond all price.

Then there is the calling of witnesses, what we call the examination-in-chief, a most delicate and difficult task. And I have always found for my own part that, if you can so conduct your examination-in-chief that your opponent must sit still, that is a very great triumph; but if you so conduct yourself that you give your opponent the opportunity of protesting against leading questions or other irregularities your influence begins to go, your control over the jury begins to vanish. And I can not emphasize as much as I would wish the importance of paying attention to the proper examination-in-chief. Indeed, I would lay down for myself that a very sound working rule is so to conduct your case that the interruptions of your opponent are matters that will be frowned on by the court.

And then cross-examination, the thing which everybody thinks he can do so well and the thing that is rarely so very easy to do well. Sometimes you have a moment of inspiration. At one of our big murder cases, which is now fairly well known as the "Blazing Car Murder," a man called Rouse was accused of burning the body of his victim at a little village called Hardingstone in Northamptonshire in the middle of the night. It was a most remarkable case. I wish I had time to tell you about it. The victim was never identified, although the case was discussed from one end of our land to the other. Nobody ever came forward anywhere to say they had ever known this unknown man, and there were all sorts of features of that kind. The question before the jury, raised by the defence, was whether the burning was accidental. There had been a joint—it was a Ford car—and there had been a joint where it was said that the petrol leaked and the heat of the car had made this joint much looser. That was the line upon which the defence was run. I was the counsel for the Crown and a man came in to the box for the defence who called himself an expert witness. As you probably have it in Canada and as we have it in England, any case, of what I will call notoriety, always brings people from all parts of the land volunteering to give evidence because of the kudos that their presence in the box gives them.

This was a man exactly of that type. And there was I rising to cross-examine him, and whether it was inspiration or what it was I don't know, but my first question in the cross-examination of the man certainly wasn't in the brief. I said, "Tell me, sir, what is the coefficient of the expansion of brass?" And he didn't know. I am not sure that I did, but he couldn't ask me questions and I could ask him, and he didn't know. And from that moment, of course, it was easy.

And the cross-examination to a very large extent must depend upon the kind of man you are. You can't get it from your brief, you must use your judgment. And above all don't ask the one question too many. They tell a grand story about a bastardy case in England, where in the old days they used evidence of association as tending to show that the man accused was the father of the child. And in one of the country assize towns there was an old farmer called to give evidence. He was cross-examined, and the cross-examination proceeded upon these lines:

"Well, sir, I suppose you were young once yourself?"—"Yes sir," he says, "I was young once myself." "And I suppose you used to go walking through the lovely lanes and fields?"—"Oh yes," he says, "I walked the lanes and fields, all right." "And I suppose there were occasions when you went in those lanes and fields in the moonlight?"—"Oh yes," he said, "I went in the moonlight." "I suppose there were occasions when you had a girl with you?"—"Yes," he said, "there were occasions, I will admit, in these fields and lanes on moonlight nights when I had a nice girl with me." "Well," said the counsel, "I suppose there were occasions when you used to sit down on the hedge bottom on these moonlight nights with this nice girl?"—"Oh yes," he said, "we did that."

Now there he should have stopped. Instead of that he asked one question too many and he said to the old man, "Well now, tell me, there was nothing wrong about that, was there?" and the old man said to the judge, "*Am I bound to answer that question?*"

No doubt, there are many classical illustrations of the man who in cross-examining gets all that he can ever wish to have, and who cannot restrain himself, and asks the one question too many.

Then we have, of course, the final address to the jury when all the evidence is over, when everything is presented in its final form. All these things about which I do not presume to speak at any length are essential parts of the work of the advocate, but the matters that I did just want to speak about in a general way, before I sit down, about advocacy are these—they are quite general. The first quality beyond all others in your advocate, whatever his type, the first quality is that he must be a man of character. Without that in the long run all else fails. The court must be able to rely upon you. Your word must be your bond, and when you assert, as a matter of fact, to the court those matters which are within your personal knowledge the court must be able to know that you in your integrity, on your responsibility as a member of a great profession, are being loyal to the court.

You will forgive me saying it, but I am jealous of the very great reputation of the law. Its future is in your hands and it is a solemn responsibility and duty cast upon every member of the practising profession that in all he does, in his duty to the client, in his duty to the court and in his duty to the State, he shall be above and beyond all other things a man of complete integrity. Whatever gifts or attributes he may possess, he shall have this supreme qualification, that he is a man of integrity and a man of honour.

The second general observation I would like to make with regard to the advocate is this. I think he must be not only a man of character but a man of culture. You may remember in Sir Walter Scott's *Guy Mannering*, the figure of Counsellor Pleydell, who went into his room and there were all the great poets and writers on the shelf and, pointing to the books, he said, "These are my stock in trade."

There can be no doubt that whilst the knowledge of law and the training in law is essential, of itself it is insufficient. There must be the cultural background out of which springs the serene mind, the subtle understanding, the insight, that which differentiates man from man.

Two men look out through the same bars :
One sees the mud, and one the stars.

That cultural background is open to everybody. It may very well be that there are some here who have not had the opportunity of a classical education and been made familiar with all the great ancient writers ; it may very well be so. We are not all so fortunate as to be born in circumstances which permit it. It may be, I do not know, that many were unable, as indeed they were in England, to go to universities like Oxford and Cambridge and to spend the leisure years reading, absorbing and imbibing. These are very great advantages but they are not possible for all. But what is possible for all is that there should be a cultural background created by themselves. Take the whole field of literature and what a repository, what a treasure we have there. Take the Authorized Version itself of King James's Bible. Why, there are some men who have achieved great fame who had little more cultural background than that very great book. Some of the greatest examples of oratory in our land and in our speech were given by John Bright, and if you will examine that oratory you will find it derives from the Authorized Version. The very great speech in the House of Commons on the Crimean War owed its power to the narrative of Herod's slaying of the First Born. Lincoln, President Lincoln, too, owed much to the same source. And to familiarize yourself with that great repository of English prose is in itself an education.

Shakespeare ! Even a nodding acquaintance with Shakespeare is of the greatest possible advantage to the advocate, for there speech has reached the highest form that we have ever known or are ever likely to know. And if we can get just a touch of historical background with it, it becomes most moving and most magical.

A very few months ago I was privileged to be in Shakespeare's birthplace, Stratford-on-Avon, and I reflected that it was to Stratford-on-Avon that Shakespeare came at the end of his short and crowded life, and it was at Stratford-on-Avon that he penned those memorable words in which he took farewell of all the imaginative beauty which he had created. For it was there that he wrote *The Tempest* and into the mouth of Prospero he put perhaps the greatest form of speech we are ever likely to know :

You do look, my son, in a mov'd sort,
As if you were dismay'd : be cheerful, Sir.
Our revels now are ended. These our actors,
As I foretold you, were all spirits, and
Are melted into air, into thin air :
And, like the baseless fabric of this vision,
The cloud-capp'd towers, the gorgeous palaces,
The solemn temples, the great globe itself,
Yea, all which it inherit, shall dissolve,
And, like this insubstantial pageant faded,
Leave not a rack behind. We are such stuff
As dreams are made of, and our little life
Is rounded with a sleep..

To be familiar even for a moment with the greatest expression of that kind is, I think, not only a valuable addition to the advocate's art but an indispensable addition ; and you no doubt have your own favourite passages in Shakespeare. The only other one I will quote is where the loveliness I think is still as perfect :

Sit Jessica : look, how the floor of heaven
Is thick inlaid with patines of bright gold :
There's not the smallest orb which thou behold'st,
But in his motion like an angel sings,
Still quiring to the young-ey'd cherubins,—
Such harmony is in immortal souls ;
But whilst this muddy vesture of decay
Doth grossly close it in, we cannot hear it.

Well now, Mr. President, I cite that merely to illustrate the admonition, if you will allow me to use that word : don't rely too much upon the law books. Our very dear friend George Pepper the other night made a beautiful speech at Osgoode Hall and in the course of it he said, " If I were pressed I could tell you of every form of dower, dower at common law and all the rest of it." And I said to George this morning, " My dear George, it was lovely to hear you, but let me tell you that in thirty-four years at the Bar I have never had one single case in which dower ever came into it."

And whilst these things are essential and training is invaluable, my advice is, let your advocate not merely be a man of law, let him be a man of letters. Let him love the humanities, and from that springs the insight, the understanding and the judgment.

The last thing that I would like to say to you, as a third matter for the advocate, is to cultivate the love of words. You know the greatest tribute that was ever paid to any speaker that I know was the tribute paid by John Aubrey in the *Brief Lives* to Francis Bacon, the Earl of Verulam. He said of Bacon these memorable words, " It was the fear of all that heard him that he would make an end."

I mean it, Mr. President, in no vulgar sense, but it is important to cultivate words, to select the right words, to put them in the right order, to know something of their meaning, of their association, of their sound. You know, it is a most fascinating, fascinating world. Again take Shakespeare—" The *uncertain* glory of an April day." Now nobody but a Shakespeare could have used the word " uncertain " to convey everything. Just think of it, " The uncertain glory of an April day." It is perfect.

And if you examine your Shakespeare you will find that is what Shakespeare was. He was a word lover.

And that love of words, that discrimination in the use of words, is all essential to the advocate. The presentation of your case in the appropriate language, in the inimitable language, is part of the art of persuasion, and persuasion is the whole end of it, as I understand it.

Now, Mr. President, I have kept you a very long time and I propose to come to an end, and I will end as I began, by thanking you for allowing me to come here. I think that the Bar is the source and guardian of the virtue of the Bench. It is the good Bar that makes the good Bench. There is no doubt whatever about it. And therefore it is the greatest possible pleasure to feel I have spent my life at the Bar and now when I sit upon the Bench, with occasionally a strong yearning to get back into the arena, nothing gives me greater joy than to see the young advocate presenting his case to the very best of his ability. Immature it may be, but with all the signs of promise. And if I find, as I do find, an advocate with a nice sense of words who presents the argument in an attractive form, my heart warms to the advocate and I do my best to encourage and to help him on his way.

LAND SALES COURT

Summary of Judgments.

The summarized judgments of the Land Sales Court, which appear as under, are published for the general information and assistance of practitioners. They are not intended to be treated as reports of judgments binding on the Court in future applications, each one of which must be considered on its own particular facts. The reasons for the Court's conclusions in any one appeal may, however, be found to be of use as a guide to the presentation of a future appeal, and as an indication of the Court's method of considering and determining values.

No. 127.—L. to H.

Practice—Directions to Committee—Duty of Committee seeking Directions—Scope of Inquiry to be made by Court.

In this matter the North Auckland Land Sales Committee sought directions, in terms of s. 17 of the Servicemen's Settlement and Land Sales Amendment Act, 1946, as to whether or not the Committee might, in these particular cases, properly give decisions in the absence of evidence of the productive value of the properties ascertained in terms of s. 53 of the Servicemen's Settlement and Land Sales Act, 1943.

The Chairman's statement of facts indicated that both applications related to the sale between the same parties of substantial areas of farm land which were intended to be farmed together. Doubt appeared to exist as to whether or not the property as a whole was an economic unit. As to this, the Chairman expressed no final opinion, and suggested that the valuers left the Committee in a state of doubt. It seemed clear, however, that the purchaser intended to farm the land as a separate unit, and it was significant that the Crown sought a declaration under s. 51 that the land was suitable or adaptable for the settlement of a discharged serviceman or servicemen.

The Committee's difficulty arose from the fact that the valuers, both for the vendor and for the Crown, presented valuations upon a "sight" basis instead of on the usual "productive" basis. There being no great difference between the valuations, the Committee was concerned as to whether it might properly fix a basic value in accordance with such sight valuations, or whether it had the power, or was under a duty, to require that evidence of productive value be tendered.

The Court said: "In argument before the Court, some doubt was raised by counsel for the vendor as to the precise object of this application. He suggested that the Committee, being in a state of doubt, desired the Court to decide whether the property was an economic unit, and then to direct whether or not a productive value should be called for. He also questioned the accuracy of the Chairman's report on the evidence as to whether the property was an economic unit, and invited the Court to hear further evidence thereon.

"The power to give directions, which is vested in the Court by virtue of s. 17 of the amending Act of 1946, is in terms a discretionary power. It is the Committee alone which may apply for the direction of the Court, but, although there is express provision for the Court, if it thinks fit, to take evidence and to hear the parties, there is no procedure whereby the Committee itself may be heard or may indicate its views save as set out in the application itself. It is therefore desirable that, when seeking directions under s. 17, a Committee, through its Chairman, should appraise the Court fully of the facts on which the application is based; and it is conceived that the Court must, for the purpose of the application, conclusively presume the facts so stated to be correct.

"We are of opinion that the section was intended primarily to facilitate the determination of questions of law (including, of course, questions of procedure) which may arise during a Committee's deliberations, and that only in exceptional cases, if at all, should the Court agree to determine, for the purpose of a direction under s. 17, matters of fact properly within the jurisdiction of the Committee. To do so would be to confuse the discretionary jurisdiction of the Court under s. 17 with its ordinary appellate jurisdiction, and might well embarrass the parties in the subsequent exercise of their rights of appeal.

"The Court must, therefore, refuse to embark upon an inquiry as to whether or not the property now under consideration is an economic unit, which is a question of fact for the Committee's consideration and determination in the ordinary way.

"It may well be, however, that what the Committee seeks is to be advised in principle as to its powers and duties in law, in the rather unusual circumstances which have arisen. The legal position is clear, and is implicit in the terms of s. 53 of the Servicemen's Settlement and Land Sales Act, 1943. A strict construction of the section would seem to impose on Committees the duty in all cases relating to farm land of ascertaining a productive value and thereafter of increasing or reducing the productive value where necessary in order to arrive at a fair value for the purposes of the Act. In certain cases, however, it may be foreseen in advance that the assessment of a productive value would be of no practical assistance in the ascertainment of a 'fair value,' and in such cases it has been deemed proper to dispense with the preparation of a budget, and to rely upon other methods of valuation. This is usually the position in the case of land which is not an economic unit, and in the class of case of which *No. 114.—J. to J.*, (1947) 23 N.Z.L.J. 279, is an example.

"It is for the Committee to decide whether any particular case falls within the limited class where the ascertainment of a productive value may properly be dispensed with. As to this, no doubt the Committee will give due weight to the submissions of the parties and to the evidence of valuers, but the final responsibility for sanctioning a departure from the productive method of valuation is that of the Committee. Subject only to the Act and Regulations, and to the direction of the Court, we are of opinion that the Committee has an absolute discretion to call for a productive value, and, indeed, ought to do so in all cases where it is of opinion that a productive value will be of assistance to it in reaching a fair value.

"In respect of ordinary farm land which is or which may readily be developed into an economic unit, it is conceived that the budgetary system of valuation must always be adopted. In the case of land which, to the satisfaction of the Committee, is not an economic unit, the acceptance of sight valuations has the sanction of long practice both before Committees and before this Court. Where a Committee is in doubt as to whether or not the land is an economic unit, it is conceived that it should require evidence of productive value in accordance with s. 53 of the Act. It is only when the Committee is entirely satisfied that the land is not an economic unit that it may properly dispense with the productive method.

"In the present case, we are in some doubt as to whether or not the Committee is in a position to determine into which category the land properly falls. If it considers that further evidence would assist it in determining whether or not the land is an economic unit, then it is suggested that such further evidence be taken. The ultimate decision must, however, be that of the Committee, which is not, in a matter of this character, bound by an agreement between the parties or their valuers.

"The Court's directions to the Committee are as follows:—

"(1) Inasmuch as the matter may be dependent upon disputed questions of fact, which are for the Committee to decide, the Court is unable to give a specific direction as to whether, in these particular cases, the Committee may properly give decisions in the absence of evidence of productive value.

"(2) If the Committee is satisfied that the land is not an economic unit, and cannot, within a reasonable time and with a reasonable capital outlay, be made into an economic unit, it may properly assess a basic value upon sight valuations, and may determine the applications accordingly.

"(3) Unless the Committee is satisfied that the land is not an economic unit and cannot, within a reasonable time and with a reasonable capital outlay, be made into an economic unit, it is entitled to require, and ought to require, that the valuations placed before it be prepared upon a productive basis in accordance with s. 53 of the Servicemen's Settlement and Land Sales Act, 1943, notwithstanding that the parties or their valuers may have concurred in tendering sight valuations only."

No. 128.—G.T. & E. Co. of N.Z., Ltd., to F.

Urban Land—Sale by Trustees—Special Valuation for Death-duties purposes—Appeal against Assessment—Amount of Assessment increased by Assessment Court and Death Duties paid thereon —Property sold at that Sum—Reduction by Committee—Appeal.

Appeal relating to a property at the corner of The Terrace and Church Street in Wellington. The property was sold by the vendor company as trustees of a deceased owner for £2,880. The circumstances leading to the fixing of the sale price were unusual. In the course of administration of the late owner's estate, a special valuation for death-duty purposes was recently made and disclosed a capital value of £2,375, being £1,995 for the land and £380 for the improvements. Death duties would, in the normal course, have been assessed in accordance with this valuation, but the appellant company, having in mind, no doubt, an early application to the Land Sales Court in respect of the sale of the property, and having been advised by a private valuer that the assessment of £2,375 was too low, deemed it to be its duty to appeal against the assessment with a view to having it increased. The appeal came before the Assessment Court in due course, and, after a hearing and an inspection of the property, the assessment was increased to £2,880, being £2,500 for the land and £380 for improvements. Death duties were accordingly assessed and paid upon that figure. The property was then sold for £2,880, and an application for consent to the sale came before the Wellington Urban Land Sales Committee The Government Valuer who had made the death duty valuation of £2,375 came before the Committee to support a valuation of the same amount, and, after hearing evidence and inspecting the property, the Committee adopted this valuation and consented to the sale, subject to a reduction in the price to £2,375 accordingly. The present appeal sought to restore the full sale price of £2,880.

The Court said: "Counsel for the appellant company very properly admitted that the decision of the Assessment Court is not binding upon this Court, and it is, in our opinion, clear that the two Courts have entirely separate and independent jurisdictions, and that, accordingly, it may well follow that different results may be reached by the two Courts when, as in the present case, each is called upon in the course of its duty to determine the value of the same piece of land. It is proper, however, that either Court, when called on to value a piece of land which has already been the subject of a decision by the other, should accord to that decision due consideration and substantial weight.

"Counsel for the appellant submits that the estate, having paid death duties on the basis of an assessment of £2,880, should not now be prevented from selling the property at that figure. We are of opinion, however, that the appellant trustee must itself take some responsibility for the situation in which the estate now finds itself. The assessment of death duties is primarily the responsibility of the Crown, and the Crown throughout has consistently claimed the value of this property to be £2,375 and no more. The vendor company might quite properly have paid duty on the basis of £2,375 while expressly reserving its right to claim a higher value before the Land Sales Court. As an alternative, it might have requested an adjournment of its appeal to the Assessment Court until such time as the price at which the land might be sold had been determined by this Court. We are informed that such a procedure was suggested by the Crown, but that the appellant insisted, as was its legal right, on having the appeal to the Assessment Court determined without delay. The appellant company is itself responsible for the course of action which has resulted in the estate being assessed for death duty on £2,880, notwithstanding that it should have well known that this Court might not consent to the sale of the land at that figure. It is perhaps desirable to place on record that we do not consider a vendor should be prejudiced before the Land Sales Court by failure to appeal against a prior valuation of his land for rating or death-duty purposes. Any positive action by a vendor in respect of such a valuation is, of course, a proper matter for comment in this Court, but a mere failure to appeal should not be held against him. We have given due weight to the opinions of the Assessment Court, as is reflected in our decision on this appeal, but, subject thereto, we deem it to be our duty to apply to this application the ordinary principles which have been applied to the valuation of land for the purposes of the Land Sales Act in the past. That in the final result we differ somewhat from the Assessment Court shows how, on difficult questions of valuation, it is not merely possible, but likely, that impartial investigators will arrive at somewhat different conclusions.

"Coming now to the question of value, we find that the sum of £380 for the improvements is agreed to by all parties. The only matter in issue, therefore, is the value of the land. The property is on the east side of The Terrace and commands one of the finest views in Wellington. On the part of the land adjacent to The Terrace there is room for the erection of a block of four or five flats without serious constructional difficulties, but the balance of the land falls away too steeply to be of substantial value. Both parties quoted numerous sales of properties upon The Terrace for the purpose of arriving at a basic value per foot of frontage. The figure of £35 per foot was adopted by the Crown, after making allowance for the physical advantages and disadvantages of the section, including its contour and view, but without taking into account any additional value or 'corner influence' resulting from its situation at the corner of Church Street. Mr. Renner, for the appellant, valued the frontage at approximately £41 per foot, to which he added a further £10 per foot for corner influence. The decision of the Assessment Court indicates that that Court arrived at a figure of £35 per foot for the frontage, but added £10 per foot for corner influence, view, and suitability for flats. After a careful consideration of all the comparable sales, and an inspection of the property, we agree that £35 per foot is the fair basic value for this property as at December, 1942, subject to a proper allowance for corner influence. We differ, however, from the Assessment Court to the extent that, while it was of opinion that the basic rate of £35 per foot should be increased on account of view and suitability for flats, as well as for corner influence, we think that the basic rate must be deemed to include the value of the view and to take into account the suitability of the land for flats. We find, therefore, that the only additional value which we require to consider is that afforded by corner influence.

"The assessment of 'corner influence' is always a matter of difficulty. On this account, Mr. Renner added £10 per foot. The Committee allowed 5 per cent., equivalent to £1 15s. per foot only. The appellants claim that the value of the corner situation in this case is much greater than allowed by the Committee. In support of this view, they contend that, because of the situation of the land in relation to the corner, they will be able to obtain a permit for five flats, whereas otherwise they would be limited under the Town-planning Regulations to four. Evidence given by an officer of the Wellington City Council appeared to justify this view. We gather from the file that this evidence was not available to the Committee, and that the Committee accordingly gave no consideration to the advantages accruing from the opportunity of erecting a fifth flat on the property. The weight of evidence before us is that, because of its situation in respect of the corner, five flats can be built upon this land, whereas, if it were not adjacent to the corner, four only could be built. We think that this is an advantage which substantially increases the value of the land, and, as the Committee in assessing corner influence at 5 per cent. does not appear to have taken this attribute of the land into account, we think that the appellants have *pro tanto* established their case.

"The evaluation of this advantage in money presents considerable difficulty, and we know of no formula by which it may be determined. The effect, and consequently the value, of 'corner influence' must in every case be dependent upon the particular circumstances of the property under consideration. In the present case, the advantage conferred is somewhat unique, and it follows that the allowance for corner influence which may properly be made does not establish a basis for the assessment of corner influence in other circumstances. It is clear, in our opinion, that, to a purchaser intending to build flats, the possibility of erecting an extra flat is a substantial consideration. We are also satisfied that this land is particularly suitable for flats. The particular attribute which enables five flats to be erected instead of four must, therefore, be taken into account. A further factor, however, affecting the value of the property as a whole is that the existing buildings which have been assessed at their full present value of £380 will have only a nominal or demolition value if flats are to be erected. The amount claimed by the appellants on account of corner influence amounts to £550, whereas the Committee allowed £100. The sum claimed by the appellants amounts to 30 per cent. of the basic or frontage value of the land. We are of opinion that, taking all the relevant factors into consideration, the amount claimed is too high, and that justice will be done if we increase the capital value of the property as a whole from £2,375 to £2,600. The appeal will accordingly be allowed, and consent will be granted subject to a reduction in the price to £2,600 accordingly."

No. 129.—S. TO McK.

Jurisdiction—Evidence—Order for Specific Performance by Vendor —Vendor later applying to Committee to hear Evidence of her Alleged Breach of Statutory Provisions—Refusal to Admit such Evidence—Appeal therefrom—Evidence relevant only to Questions outside Court's Jurisdiction—Servicemen's Settlement and Land Sales Act, 1943, ss. 19 (2), 50 (1).

Appeal arising in the following circumstances. In October, 1946, the appellant, Mrs. S., signed an agreement to sell a property at Remuera to one McK. for £1,450, or such lesser sum as might be fixed by the Land Sales Court. Subject to the consent of the Land Sales Court, the agreement appeared to have all the requisites of a valid and enforceable contract. Mrs. S. duly filed her application for consent, and made the customary declaration that no other agreement in writing or otherwise had been made between the parties. Before the application had been dealt with, however, Mrs. S. purported to rescind the contract, and in consequence refused admittance to the Crown Valuer on his seeking to inspect the property. The purchaser subsequently brought an action in the Supreme Court, and, in default of appearance by the vendor (who entirely ignored the proceedings), he secured an order for specific performance of the agreement. A sealed copy of the order disclosed that Mrs. S. was enjoined by the Supreme Court to carry out the terms of the agreement, and in particular to do all such acts and things as might be necessary for the purpose of obtaining the consent of the Land Sales. Court, to appear before the Land Sales Court on the hearing of her application and to prosecute such application to obtain its consent, to sign any further document which might be rendered necessary in the event of the Land Sales Court reducing the selling price of the property, and, upon consent being given, to execute a memorandum of transfer, to settle with the purchaser, and to give vacant possession of the property.

In pursuance of this order, Mrs. S. permitted valuers to inspect her property, and subsequently appeared before the Auckland Urban Land Sales Committee. Two valuers, one for the vendor and one for the Crown, concurred in valuing the property at more than the purchase price. There being no further obstacle to the grant of consent, the application would have been granted forthwith but for the fact that counsel for Mrs. S. then sought to lead evidence to prove:

(1) That, notwithstanding the terms of the agreement which she had signed and of her declaration made in support of the application before the Committee, Mrs. S. had not in fact agreed to sell her property for £1,450, but had at all times stipulated for, and expected to receive, the sum of £2,000.

(2) That in addition to the deposit provided for in the agreement a sum of £350 had been paid to her by the purchaser, and that this sum was intended to be paid in addition to the price disclosed, and in breach of the provisions of the Land Sales Act.

The Committee refused to admit this evidence, and ruled that, as the transaction was already the subject of an order for completion by the Supreme Court, it would be improper for it to hear evidence calling in question the validity or enforceability of the contract. The appellant now contended that this refusal was wrong in law, and that it was beyond the jurisdiction of the Committee to make an order consenting to the transaction without hearing the appellant upon these matters.

The Court said: "In support of the appeal, Mr. *Wilson* relies upon s. 19 (2) of the Servicemen's Settlement and Land Sales Act, 1943, which provides that every party to a transaction shall be entitled to appear at a hearing and to be heard and to produce evidence. He acknowledges, however, that evidence is admissible only if it is shown to be relevant to the matters in issue before the Committee. We think moreover, that it is clear that s. 19 must be construed to be subject to the provisions of s. 50 (1) of the Act, by which consent may be granted in certain circumstances without a hearing, and subject also to the principles laid down by the Court in *No. 120.—A. to F.*, (1947) 23 N.Z.L.J. 308. The substantial issue is whether, in the circumstances, the evidence tendered by Mrs. S. was relevant to any of the issues then properly before the Committee. The Committee was dealing with an application duly completed and supported by statutory declarations, whereby the parties sought the consent of the Court to an agreement in writing which, from a perusal of its terms, appeared to be valid and enforceable. It had also before it an order of the Supreme Court disclosing that the validity of the agreement had been put in issue in that Court and had been upheld therein. It is true that the existence of a transaction within the ambit of s. 43 (1) of the Servicemen's Settlement and Land Sales Act, 1943, is a necessary prerequisite to the exercise by this Court of its jurisdiction under the Act, and that the Court is entitled to refuse its consent to a contract which is clearly unenforceable or void: *No. 108.—B. to R.*, (1947) 23 N.Z.L.J. 267. We are of opinion, however, that an application duly filed in respect of a contract having the appearance of validity should be dealt with on the assumption that the contract is in fact valid, and that it would be undesirable for this Court to inquire into alleged grounds of invalidity which are not apparent from a perusal of the document itself. This Court has already held that its proper course in dealing with an application relating to such a contract, the validity of which is called in question by either party, is to consent to the transaction (if satisfied on those topics upon which, in terms of the Land Sales Act, it is required to be satisfied), so as to leave the contracting parties free, if necessary, to litigate the question of the validity of the contract in the appropriate Court: *In re A Proposed Sale, Hendry to Weir*, [1945] N.Z.L.R. 744, and *In re A Proposed Sale, Brown to Addison Brothers*, [1947] N.Z.L.R. 688.

"Let us now consider the purpose for which the evidence in question was tendered by the appellant. Her counsel, Mr. *Wilson*, gave as her reasons, first, that Mrs. S. was under a duty to correct a misstatement in her statutory declaration by making a full disclosure to the Committee of the true facts, and, secondly, that the facts proposed to be disclosed would establish that the agreement had been entered into in contravention of Part III of the Servicemen's Settlement and Land Sales Act, 1943, and that, accordingly, by virtue of s. 46 of the Act, the transaction was unlawful and of no effect.

"If Mrs. S. has in fact made a false declaration, as stated by her counsel, it must be conceded that she is under a continuing duty to remedy the matter, so far as may be, by a full disclosure of the true facts to the Court. In so far, however, as such disclosure may have effect in mitigation of the appellant's wrongdoing, its purpose has been achieved by the disclosure made by her counsel. The enforcement of the penal clauses of the Land Sales Act is beyond our jurisdiction, and the question whether Mrs. S. has been guilty of an offence under the Act, though unquestionably a proper matter for inquiry by the appropriate authorities, was not strictly in issue before the Committee. There may well be cases where a Committee, being satisfied that the parties to a contract have been guilty of breaches of the Act, would be justified in refusing consent to a transaction tainted by such breaches, but this does not entitle one of the parties to a transaction to demand as of right to be allowed to call evidence incriminating himself, for the purpose of invalidating his contract and so benefiting from his own wrongdoing.

"As to the appellant's contention that the irregularities which she seeks to prove were such as to render the agreement unlawful under s. 46 of the Servicemen's Settlement and Land Sales Act, 1943, we are of opinion that the determination of this question, in common with all other questions as to the validity or enforceability of a contract which appears upon its face to be a valid contract, is outside the jurisdiction of the Land Sales Court and solely within the jurisdiction of the Supreme Court or other appropriate Court. In so far, therefore, as the evidence tendered by Mrs. S. was intended to prove the invalidity of her agreement with Mr. McK., it related to an issue not before the Committee.

"We think the appellant's main purpose in seeking to place this evidence before the Committee was neither to relieve her conscience nor to minimize her risk of prosecution, but to establish a means of escaping from her obligations under the agreement which she undoubtedly signed and from the effects of the order of the Supreme Court directing her to perform that agreement. While a Committee may in its discretion and in a proper case receive evidence to show that breaches of the Act have been committed, we think that, in the circumstances of the present case, the Committee was right in refusing to embark upon an inquiry as to Mrs. S.'s conduct. Had the validity of the contract been called in question before the Committee prior to proceedings being taken in the Supreme Court, it would have been the Committee's duty in accordance with our decisions in *In re A Proposed Sale, Hendry to Weir*, [1945] N.Z.L.R. 744, and in *In re A Proposed Sale, Brown to Addison Brothers*, [1947] N.Z.L.R. 688, to have consented to the transaction so as not to prejudice the contractual rights of the parties. The appellant's position can be made no stronger by the unusual circumstance that the validity of the contract has already been the subject of proceedings in the Supreme Court. The order of that Court is perfectly plain, and directs the appellant not merely to prosecute her application for the consent of this Court but to do everything necessary to obtain that consent. In seeking to introduce this evidence so as to lead the Committee to refuse its consent to the transaction, the appellant is acting in direct contravention of the order

enjoining her to seek and to secure consent. The fact that the order of the Supreme Court was obtained by default cannot avail the appellant so as to extend the jurisdiction of this Court. If the appellant neglected to raise defences available to her in the Supreme Court, and permitted an order to be obtained against her which she might successfully have resisted, her remedy, ifany, must be sought in the Supreme Court or Court of Appeal.

"The only substantial issue before the Land Sales Committee related to the price provided for in the agreement exhibited to the application. We are satisfied that the evidence proposed to be led by the appellant was relevant only to questions outside the jurisdiction of this Court. It follows that the Committee acted rightly in refusing to admit the evidence in question. This appeal is accordingly dismissed.

"Both the Crown and the purchaser have asked for costs. It has not been our practice to award costs against any appellant appearing to have reasonable and *bona fide* grounds of appeal, and notwithstanding that the appeal may have been unsuccessful. In the present case, however, it is clear that the appellant has adopted an obstructive and an unreasonable attitude throughout the whole course of these proceedings, and we are satisfied that she has instituted this appeal for the sole purpose of escaping from the effects of the judgment given against her in the Supreme Court. In the circumstances, we annot hold that the appellant had reasonable ground to appeal, and we accordingly direct her to pay to the Crown and to the purchaser respectively the sum of £3 3s. each towards their costs."

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Size of Juries.—The writer in an English non-legal periodical expresses regret on seeing the wartime practice of only seven jurymen instead of twelve still going on, and expresses himself as far from convinced that the other five are doing anything more useful. Most probably, he suggests, they are at the back of the Court as spectators, for the Courts of Justice "are frequented by large numbers of elderly educated men, living modestly on pensions or savings, who have discovered what a wonderful free entertainment justice provides, and who delight to study the form of Judges and counsel." In New Zealand, counsel have still to face from time to time the ordeal of addressing a jury of four—one of the most unpleasant experiences ever devised by law. A great deal can be said for the common jury of twelve, in civil as well as criminal cases, but for its pigmy companion there has ever been dissatisfaction, and a sense of false perspective. What merit it possesses that is not possessed to a far greater extent than a Judge alone, Scriblex has never been able to discover. Its verdict is almost invariably an echo of the opinions of the foreman, who makes up in strength of character what in many instances he lacks in perspicacity.

Shinwellian Slip.—Speaking to the second reading of the Army and Air Force (Women's Service) Bill on February 13, Mr. Shinwell said: "So far we appear to have reached agreement on the main principle underlying the Bill, which is that in the Army and in the Royal Air Force the women members should be integrated with the male members of those Services. So far, so good." The comment of the *Law Journal* (London) is: "to 'integrate,' says the *Shorter Oxford Dictionary*, is 'to complete (what is imperfect) by the addition of the necessary parts.'"

Wife's Maintenance.—Despite *Clarke* v. *Clarke*, [1942] 2 All E.R. 274, Magistrates in New Zealand are constantly invited in fixing maintenance due to a wife to apply the "one-third rule"—*i.e.*, to allow the wife for her own use one-third of the joint income. In its day, like the hansom cab, it has had its advantages; but it seems now to have outlived its usefulness: in fact, it may operate most oppressively. In *Ward* v. *Ward*, [1947] 2 All E.R. 713, Lord Merriman, P., said that it was absurd to apply automatically, especially to working-class wages, a standard which applied in the days of small income tax and large rent-rolls and incomes. The Justices had to make a reasonable award, having regard to the means of the parties. Wallington, J., added that he would strongly deprecate the suggestion that there ought to be any definite standard by which Justices should act. Practitioners, especially in the larger centres, often find that the maltreated wife is earning more than the hunted quarry of a husband. Tell such a complainant that, while she employs her talents so profitably, anything other than a nominal order is unlikely, and she will expound at great length upon her continual fight against ill-health, although in most cases she has never felt better or happier in her life.

Bias.—"I could wish that the use of the word 'bias' should be confined to its proper sphere," says Lord Thankerton in *Franklin* v. *Minister of Town and Country Planning*, (1947) 111 J.P., at p. 505. "Its proper significance, in my opinion, is to denote a departure from the standard of even-handed justice, which the law requires from those who occupy judicial office, or those who are commonly regarded as holding a quasi-judicial office, such as an arbitrator." To Sir Philip Sidney "the indifferent Judge between the high and low" was a warm tribute to the administration of justice, but the adjective "indifferent" has lost its standing in the world of words. Used nowadays in such a context, it would indicate a Judge who didn't give a tinker's damn what happened. In the same way, "bias," which commenced as a term used in the cutting of cloth, has now found a more modern home in the game of bowls. It is fitting that the House of Lords should remind us that one who has to adjudicate between parties must bring to his task an independent mind, bearing neither to one side nor to the other. But how far does personal taste or inclination or upbringing taint even the most conscientious with an aroma of bias? How much does he deviate towards the lady elector who said, "I'm going with a perfectly open and unbiased mind to listen to what I'm convinced will be pure unadulterated rubbish"?

From John Aubrey (c. 1680).—"He had a trick sometimes to goe into Westminster Hall in a morning in Terme time, and tell some strange story (sham) and would come hither again about 11 or 12 to have the pleasure to heare how it spred; and sometimes it would be altered, with additions, he could scarce knowe it to be his owne": *Brief Lives*: Thomas Chaloner.

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. Mortgage.—*Mortgages Extension Emergency Regulations (now revoked)—Mortgagee proposing to exercise Power of Sale—Consent of Magistrate obtained—Further Notice to Mortgagor.*

QUESTION: Just prior to the repeal of the Mortgages Extension Emergency Regulations, 1940 (Serial No. 1940/163), by Revocation Notice Serial No. 1947/185, our client, a mortgagee, had obtained the consent of a Magistrate to the exercise of his power of sale, the mortgagor being well in arrears. No contract was entered into between the mortgagee and a purchaser before November 21, 1947, being the date of the revocation of the said regulations. Is there any further formality before the mortgagee can exercise power of sale, a suitable purchaser having now been found? The mortgage is in no way affected by the Mortgagors and Lessees Rehabilitation Act, 1936.

ANSWER: Before exercising power of sale, the mortgagee must now give the month's notice to the mortgagor as prescribed by s. 3 of the Property Law Amendment Act, 1939. The position would have been different if the mortgagee had entered into an enforceable agreement for sale and purchase with a purchaser before the said November 21, 1947. An Act is always deemed to be speaking: s. 5 (*d*) of the Acts Interpretation Act, 1924. Although the better opinion appears to be that, during the currency of the Mortgages Extension Emergency Regulations, the operation of s. 3 of the Property Law Amendment Act, 1939, became suspended, its operation was immediately revived by the repeal of the Mortgages Extension Emergency Regulations, 1940. It appears to us that a case somewhat in point is *H. and Another* v. *I.*, [1940] N.Z.L.R. 235, where Ostler, J., granted permission to a mortgagee under the Courts Emergency Powers Regulations, 1939, but directed that notice must be given by the mortgagee under s. 7 of the Mortgagors and Rehabilitation Act, 1937, before power of sale could be exercised. Your mortgagee appears now to be in exactly the same position in which the mortgagee was in that case, except that the statutory provision which you must now comply with is s. 3 of the Property Law Amendment Act, 1939.

X.1.

2. Procedure.—*Summary Penalties Act, 1939—Imposition of Fine—Subsequent Bankruptcy of Defendant before Issue of Warrant.*

QUESTION: If, subsequent to a fine being imposed, the defendant becomes bankrupt, is that a factor to be taken into account by a Magistrate when considering the issue of a warrant of commitment under s. 12 of the Summary Penalties Act, 1939?

ANSWER: Yes: see *R.* v. *Woking Justices, Ex parte Johnstone*, [1942] 2 All E.R. 179. Although the language of our statute and the statute there under consideration may not be entirely identical, yet there is sufficient identity to warrant the application of that decision to our own statute. There can be no question that the purpose of the two statutes is the same—namely, "to amend the existing law in the direction which habits of thought of these times increasingly have demanded, namely, not to send people to prison in large numbers for mere failure to pay debts." As Lord Caldecote, L.C.J., also said, at p. 182: "I think the intention of the section was . . . to prevent a person being committed to prison in the circumstances stated in the subsection if the Magistrates were satisfied or found that he had no means to enable him to pay." Again, Magistrates should not ignore the result of the inquiry as to the means of a defendant (*ibid.*). Under s. 3 of our statute, the means of a defendant must be taken into account in fixing the amount of a fine. Then, when application is made for the issue of a warrant, a Magistrate must consider the report made under s. 11 by the Police as to the means of a defendant. Under subs. 2 (*d*) of s. 12 a Magistrate may direct that no warrant issue; and the effect of such a direction is for all practical purposes the remission of the fine (subs. 4).

C.1.

POSTSCRIPT.

The Ladies' Jubilee.

The party arranged at the Old Bailey to celebrate the Silver Jubilee of the calling of women to the English Bar suggests too many reflections for orderly precision in a short space. The actual date of the great event was May 10, 1922, and the place was the Inner Temple. Since then, the ladies have certainly established themselves. They have appeared in every description of Court and case, and both with and without leaders they hrve addressed the House of Lords with undisputed competence and charm. Their admission to practice had been long anticipated even as far back as mid-Victorian days. Sir Frank Lockwood, in his sketch-book, pictured (not without some degree of prescience) four imaginary types of woman barrister: "An able conveyancer-ess," "Nisi Prius," "Criminal," and the inevitable charmer—"This style very good with a jury." Shortly before the innovation took effect, one County Court Judge welcomed it on rather special grounds. In the sort of cases, he said, where a lady refused to pay for a costume alleging that it made her look a perfect fright, retired to put it on, and returned to Court looking perfectly charming, a male Judge was in a difficulty whether to agree that she looked a perfect fright or to disbelieve her and give judgment against her. But a lady Judge would be quite at home. "She would entirely agree that the lady looked a fright; she would convey to her in delicate but unmistakable language that it was not due to the dress, and, without a single pang, would give judgment against her."

To the Woolsack.

Though women have sat in the judgment seat, they have not yet attained the higher tribunals in a judicial capacity—except in the pages of fiction. Admirers of Hilaire Belloc will remember that the hearing of the great appeal to the House of Lords, which is the climax of *Mr. Petre*, was presided over by Ermyntrude, First (and last) Viscountess Boole, Lord Chancellor of England, "a squat, alert little woman with grinning eyes and queer fin-like movements of the hands," who, delivering her opinion "in a beautifully distinct, silvery articulation, spoke for some hours words meaningless to mortal man. But it was one of the great judgments of our time." Georgina Lady Slate, the Lady Chancellor in Sir Alan Herbert's immortal reports, was a very different type, and in the case recorded she thus delivered herself: "I have climbed to this giddy height by hard work and hypocrisy . . . pretending to respect your man-made customs in the administration of man-made laws. I have quoted your musty precedents, defended your pompous principles, and plentifully imitated that masculine logic of which you are so proud. But all the time I was laughing up my capacious sleeve, and, now that I am at last high priestess of the law, there is going to be an alteration." How near will we be to that by the Golden Jubilee of the first call?—*Solicitors Journal.*