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DEATH DUTIES: INTERESTS PROVIDED BY THE DECEASED.

III.

There were several features in *Craven* v. *Commissioner of Stamp Duties*, [1948] N.Z.L.R. 550, which resembled those in *Russell's* case, to which we have already referred, *ante*, p. 167. This was a case stated under s. 62 of the Death Duties Act, 1921, removed by consent into the Court of Appeal.

The facts may be summarized as follows:

Leslie Duckworth (the deceased) died domiciled in New Zealand at Marton on December 15, 1942. By deed of settlement dated March 25, 1936, made between William Duckworth (the deceased's father) of the first part, the deceased of the second part, and trustees of the third part, the deceased declared that the trustees should hold a policy of assurance on his life so soon as it was transferred to the trustees upon trust to collect the moneys payable under the policy and to hold the moneys received in respect of the policy upon trust to divide the same equally among the children (other than the deceased) of William Duckworth living at the time when those moneys should be received by the trustees; and it was provided that, if any of the children (other than the deceased) of William Duckworth should die before the receipt by the trustees of the moneys, then the issue of such deceased children should take and if more than one equally *per stirpes* the share in such moneys which their parent would have taken had such parent survived the period of distribution.

By the deed William Duckworth for himself and his executors or administrators covenanted with the deceased to pay any further premium or premiums in respect of the policy which might be or become due in respect of it until the same should be fully paid; and it was provided by the deed that such premiums might be a charge on the policy.

The surrender value of the policy at the date of the deed was £5,001 8s., and the policy was duly transferred by the deceased to the trustees upon the trusts declared by the deed in respect of such policy.

By his will, the deceased, in exercise of a power of appointment given to him by the deed, appointed an annuity of £500 to his wife, Eveline Frances Duckworth, and gave to her the whole of his estate for her own use and benefit absolutely.

On the death of the deceased, the insurers paid to the trustees the sum of £15,818 1s. due pursuant to the policy. At that time, there was due and owing to William Duckworth the sum of £5,570, payment of which was secured on the policy. The deceased was survived by several brothers and sisters, and the sum of £15,818 1s., less £5,570, was distributed by the trustees equally between such surviving brothers and sisters.

The deed of mortgage, dated March 11, 1931, remained continuously in existence until the date of the deceased's death. On October 29, 1931, the premiums on the policy were altered to make the policy fully paid up on payment to the society of six annual premiums of £790 13s. 4d. each. The endorsement on the policy signed by the actuary and secretary of the assurance company states that that alteration was done "at the request of the parties interested." The father provided the funds to make the policy fully paid up, and the providing of those six annual payments of £790 13s. 4d. would cost £4,744. An account relating to the father's mortgage was put in during the hearing, and the balance owing to the father on the mortgage at the son's death was £5,569 16s. 10d.

At the date of the deed of settlement, dated March 25, 1936, the amount owing under such deed of mortgage was £4,775 7s. 11d., which sum represented the amount of the original advance and premiums paid by William Duckworth under the power contained in para. 4 (3) of the mortgage.

William Duckworth paid one premium due under the policy of insurance of £790 19s. 4d. subsequent to the date of the settlement, and the sum of £790 19s. 4d. is included in the sum of £5,570.

The insurers, at all material dates, did not have any office or place of business in New Zealand.

In computing the dutiable estate of the deceased, the Commissioner of Stamp Duties included therein the sum of £12,810 1s. 3d., representing the value in New Zealand currency of the proceeds of the policy after deducting the sum of £5,570.

The appellant objected to the assessment of the estate of the deceased for death duty in so far as the assessment included the sum of £12,810 1s. 3d. and contended:

(i) That upon the law and facts the sum of £12,810 1s. 3d. did not form part of the notional estate of the deceased under any of the paragraphs of s. 5 (1) of the Death Duties Act, 1921, and the sum was not assessable either for estate or succession duty, and, alternatively,

(ii) If, by reason of the foregoing matters set forth in the case stated, any sum fell within any of the provisions as claimed by the respondent, the same had (in the inclusion of the sum of £12,810 1s. 3d.) been calculated or included in the estate upon an incorrect basis, and should be amended.

The Commissioner contended that the sum of £12,810 1s. 3d. was properly included in the dutiable estate of the deceased pursuant to s. 5 (1) (*g*), or, alternatively, pursuant to s. 5 (1) (*j*), of the Death Duties Act, 1921.

The question for determination was whether the respondent rightly included the sum of £12,810 1s. 3d. in assessing the estate of the deceased for purposes of death duty. It was not disputed by the Commissioner of Stamp Duties that the principal amount of the mortgage to the father must be deducted in the computation of the final balance of the estate of the deceased.

Section 5 (1) (*g*) of the Death Duties Act, 1921, which is the first section of the Death Duties Act relied upon by the Commissioner, provides that:

> In computing for the purposes of this Act the final balance of the estate of a deceased person his estate shall be deemed to include and consist of the following classes of property . . .
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> (*g*) Any annuity or other interest purchased or provided by the deceased, whether before or after the commencement of this Act, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased, if that annuity or other interest is property situated in New Zealand at the death of the deceased.

In his judgment, Mr. Justice Blair said that the Commissioner's claim involved the proposition that the deceased "*purchased or provided*" within s. 5 (1) (*g*) of the Death Duties Act the relevant interest in this case, which was the life policy on his (Leslie Duckworth's) life. His Honour continued:

> In my view, it is clear that all that the son brought into or provided for the trust was a mere nominal interest by reason of the fact that the policy was in the son's name. Leslie Duckworth did not bring that nominal interest in as an addition to the funds of the deed of settlement, but by reason only of the fact that, as indicated in the recital relevant to this point, it paid him most handsomely to do so. The father really purchased the policy from the son, and it was in truth and fact the father who "*purchased or provided*" that policy for the benefit of the trust.
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> If the father, who really provided all the assets in the trust, had done as the son did—changed his domicil from England to New Zealand—and had died here, then the effect of s. 5 (1) (*g*) of our Act would notionally convert all the father's contributions to the settlement into property situated in New Zealand. What the Commissioner is contending for is that the whole proceeds of the policy, less the mortgage on it, become notionally the son's property situated in New Zealand. It seems to me that we must look at the real substance of the transaction as between the father and the son, and, on that test, it is clear to my mind that the son, if he contributed anything to the trust, contributed a nominal item only.

His Honour came to the conclusion that, upon the merits of this case, Leslie Duckworth did not "provide" the policy for the purposes of the settlement. As the policy was provided by the father, s. 5 (1) (*g*) did not apply.

As regards s. 5 (1) (*g*), Mr. Justice Smith said that in *Commissioner of Stamp Duties* v. *Russell*, *Ante*, p. 168, he had expressed his views upon the construction of s. 5 (1) (*g*) and upon the way in which he thought it should be applied. In the present case, he thought that the proper inference from the facts was that, down to the date of the mortgage of the policy to his father, the son, Leslie, was the legal and beneficial owner of the policy. From the date of the mortgage to the date of the settlement, the father was the legal owner of the policy, subject to the son's equity of redemption. During this period, the father advanced the premiums to the son. It is not disputed that those premiums were chargeable under the mortgage and payable by the son. During this period, the relationship between father and son was that of mortgagee and mortgagor. Although the father paid the premiums, he was entitled to reimbursement from the son. When the deed of settlement was made in March, 1936, a new situation arose. The offer made by the father was that, if the son would settle his policy in favour of his brothers and sisters upon the terms that his father would pay any further premiums until the policy was fully paid up, but subject to a right to deduct the same and all premiums previously paid by the father at a reduced rate of interest (5s. per annum) from the moneys payable under or in respect of the policy, the father would settle on the son and his issue a sum of £20,000. The son accepted the offer. In order to carry it out, on his part, he must have transferred his equity of redemption in the policy to the trustees. Thereafter, the trustees held the equitable rights in the policy for the son's brothers and sisters. Thereafter, the trustees were also in the position of mortgagors, or indemnifiers of the son, Leslie, as mortgagor, in relation to the father as a mortgagee who might, and did, charge all the premiums paid by him against the policy moneys when they became payable. Thereafter, the liability, or the ultimate liability, for the payment of the premiums was transferred from the son Leslie to his brothers and sisters, the beneficiaries of the rights in the policy. His Honour continued:

> Having regard to the whole transaction, I think that the son Leslie received full consideration for the transfer of his rights in the policy to the trustees. At the time of the settlement, the surrender value of the policy was £5,001 8s., and the difference between that amount and the sum of £4,775 7s. 11d., then owing upon the mortgage of the policy, was only £226. There was a further payment of premium, to be paid after the settlement, amounting to £790 19s. 4d., a sum more than three times the amount he could have obtained on his policy, and there is no evidence that Leslie could have paid it. On this view, his life interest in the £20,000, which at 3 per cent. would have been £600 per annum, was more than full consideration for the transfer of his rights in the policy. Accordingly, applying the principle of *Lethbridge* v. *Attorney-General*, [1907] A.C. 19, the son did not provide the policy for the purposes of the settlement; and s. 5 (1) (*g*) does not apply.
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> Alternatively, the son Leslie did not provide the whole interest under the policy. After the settlement, he did not pay, and was not responsible for payment of, the last premium of £790 19s. 4d. in order to make the policy fully paid up. He provided no means for making that payment. Upon the view which I have expressed in *Commissioner of Stamp Duties* v. *Russell*, *Ante*, p. 169, s. 5 (1) (*g*), being part of a taxing statute, applies only where the whole interest under the policy is provided by the deceased, either alone or in concert or by arrangement with any other person. Here the interest under the policy, subject to the settlement, represented by the difference between the policy as partly paid up and as fully paid up, was not provided by the deceased, either alone or in concert or by arrangement with any other person. It was provided by the beneficiaries, his brothers and sisters, who repaid the premium advanced by the father. On this ground also, I think that s. 5 (1) (*g*) does not apply.

Mr. Justice Kennedy held similarly. After setting out the salient facts, he said that from them it appeared that, before the assignment, some premiums were paid by the father, but they were provided by the son; for the premiums were repayable by the son, who had mortgaged the policy to his father to secure a specific sum, and the instrument of mortgage provided that, if the borrower should at any time make default in payment of any of the premiums, it should be lawful for the lender to pay the same. The pre-settlement premiums were so paid by the father, and, at the date of settlement, the sum secured by the deed of mortgage was £4,775 7s. 11d., which sum included the amount of the original advance and the premiums

paid by the father under the power contained in the mortgage, together with interest. All such moneys were repayable, and, although the premiums were paid out of moneys advanced by the father, repayment was ultimately at the expense of the son, so that, for the premiums paid by the father, the son was debtor and the father creditor.

The policy, therefore, up to the date of the settlement, was the property of the son, but, burdened with the accumulated charges, it had small value, as its surrender value was only £226 or thereabouts. His Honour proceeded:

> The benefits offered to the son by the proposed settlement were very considerable, and one may ask the question: Did the son get full consideration for parting with his policy of insurance, and disposing of it as the father required by settling it on terms required by him? I think the answer must be "Yes." It follows that the son, in settling the policy, did not provide the policy, for he received full consideration for it. It was not made available as his gift, or at his cost, or by some expenditure by him, and he therefore in substance did not provide the policy: *cf. Lethbridge* v. *Attorney-General*, [1907] A.C. 19. In no way did the son by this transaction subtract money or money's worth from his estate.
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> Moreover, after he had parted with the policy, and had no further interest in it, future premiums were to be paid, and a commuted premium was in fact paid, by the father, but with a right to charge this payment against the policy moneys or moneys received from the insurance company, and the case states that, at the death of the deceased, a sum of £5,570 was due and owing to the father on the security of the policy. This sum includes the post-settlement premium paid by the father. Subsequent to the transfer, no premiums were paid by the son, and the policy was not in any way kept up by him. The general result of these considerations is that the son himself never in any appropriate sense "provided" the policy which was settled, and the policy moneys are not to be deemed dutiable estate by virtue of s. 5 (1) (*g*).

Mr. Justice Blair concurred with the reasoning and the conclusion expressed by Mr. Justice Smith on the Commissioner's claim under s. 5 (1) (*j*). On that part of the case, Mr. Justice Smith said:

> Mr. *Sim* submitted that the transaction was a commercial one of bargain and sale, and, therefore, outside s. 5 (1) (*j*). I have dealt with the matter in my judgment in *Commissioner of Stamp Duties* v. *Russell, Ante*, p. 169. It is sufficient here to say that I do not consider the settlement in the present case was a commercial transaction for value, and that it is not necessary to decide whether such a transaction is outside the scope of s. 5 (1) (*j*). In my opinion, the transaction in the present case is not such a transaction as would have been made between strangers. It was a settlement entered into because of the father's desire to make provision for a son who did not, and probably could not, give anything like full consideration for the benefits conferred upon him. The motive of the settlement was family regard, and there was nothing like adequate consideration for the provision made by the father as settlor. I think, therefore, that the settlement is within the class of settlements dealt with by para. (*j*).
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> It is clear that subpara. (i) of para. (*j*) does not apply. No interest in the son's equity of redemption in the policy was reserved to the son under the settlement.
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> On the other hand, I think that subpara. (ii) of para. (*j*), which does not occur in the English legislation, does apply. The son's settlement of the equity of redemption in the policy was accompanied by his life interest in the settlement of the £20,000. It was so accompanied because the transfer of the equity of redemption was in consideration of that settlement. This connection of the two dispositions clearly brings the transaction within the meaning of the word "accompanied" taken by all the members of the Court of Appeal in *Commissioner of Stamps* v. *Begg*, [1916] G.L.R. 534. On this view, the value of the property which was transferred by the son under the settlement—*i.e.*, the policy, subject to the charges, which he then transferred, but not the full policy moneys—is taxable. Its value would seem to be market value, if there were a market, but, if the parties do not agree upon value, it may be determined in an appropriate way.

Mr. Justice Kennedy came to the same conclusion on s. 5 (1) (*j*). He said that the relevant transactions obviously had their foundations in the father's desire to provide for his children, and were not of the kind which would take place between strangers. They were not in essence ordinary commercial transactions. But, as to s. 5 (1) (*j*) (ii), which apparently has no English parallel, the settlement made by the son was accompanied by the provision of a life interest in the sum of £20,000 settled by the father, with the result that, not the whole policy moneys, but the policy as encumbered, transferred by the son, formed part of the dutiable estate.

The appeal was allowed, and it was declared that the respondent had wrongly included the sum of £12,810 1s. 3d. in assessing the estate of the deceased for the purposes of death duty, and that only the value of the deceased's interest in the policy which he transferred to the trustees of the settlement was to be so included.

It is a matter of interest that, instead of the sum of £12,810 1s. 3d. included by the Commissioner of Stamp Duties in the accounts of the Duckworth estate, the surrender value of the policy, as encumbered—assessed as at the date of the settlement, in terms of the judgment—was determined by agreement between the Commissioner and the trustees at £49.

In our next issue, we propose to show the features common to both *Russell's* and *Craven's* cases, and to comment on the fixing by the Court of Appeal of the value of the policy in the latter case as at the date of the settlement, and not as at the date of the deceased's death.

ANNUAL MEETINGS.

Canterbury District Law Society.

The President, Mr. W. R. Lascelles, presided over a meeting of fifty members. He reviewed the work of the Council during the year, and paid a special tribute to the Wellington practitioners who during the past year had served on the various standing Committees of the Law Society. A motion conferring this tribute was passed by the meeting.

The Annual Report and Balance Sheet was adopted and passed.

Election of Officers.—President: Mr. L. J. Hensley; *Vice-President*: Mr. E. S. Bowie; *Council*: Messrs. E. C. Champion, A. I. Cottrell, T. A. Gresson, A. L. Haslam, W. R. Lascelles, A. C. Perry, P. Wynn-Williams, and one Timaru representative; *Members of the Council of New Zealand Law Society*: Messrs. W. R. Lascelles and L. J. Hensley; *Auditor*: Mr. Denys Hoare.

The benevolent fund levy and annual subscription were both fixed at 10s. 6d.

A suggestion of shortening the Easter vacation received little sympathy. The President and others emphasized that the Clerks' Agreement stipulated certain annual holidays, which could not be varied or reduced.

It was decided to send a message of good wishes from the meeting to His Honour Mr. Justice Northcroft, who is expected to return from Japan about the middle of the year.

SUMMARY OF RECENT LAW.

ARBITRATION.

Award—Validity—Damages—Mercantile Contract—Expert Evidence—Duty to hear—Arbitrator with Special Knowledge of Subject-matter. Buyers of textile goods refused to accept them on the ground that they were not up to sample, but were unmerchantable and unfit for the purpose for which they were supplied. The dispute was referred to arbitration in accordance with the rules of a chamber of commerce which provided for the determination of such disputes "by commercial men of experience and special knowledge of the subject-matter." The parties submitted statements to the arbitrator in accordance with the rules, but neither of them called expert evidence or had professional representation at the hearing. The sellers claimed that there had been a breach of contract and asked for an award of £2,455 2s. 6d., the price of the goods, plus interest. The arbitrator found for the sellers, and, as the property in the goods had not passed to the buyers, awarded £796 13s. 11d. damages. *Held*, (i) The arbitrator, having had all disputes referred to him and having found for the seller, had jurisdiction to award the damages properly recoverable notwithstanding the wrong basis of the sellers' claim. (ii) The arbitrator, having been appointed because of his knowledge and experience of the trade, was entitled to fix the damages without hearing expert evidence thereon. (Dicta of *Lord Esher*, M.R., and *Lopes*, L.J., in *Wright* v. *Howson*, (1888) 4 T.L.R. 386, 387, *Lord Cranworth*, L.C., in *Eads* v. *Williams*, (1854) 4 De G.M. & G. 674, 687, and of *Branson*, J., in *Jordeson and Co.* v. *Stora, &c. Aktiebolag*, (1931) 41 Lloyds' L.R. 201, 203, applied.) (*Owen* v. *Nicholl*, [1948] 1 All E.R. 707, distinguished.) *Mediterranean and Eastern Export Co., Ltd.* v. *Fortress Fabrics (Manchester), Ltd.*, [1948] 2 All E.R. 186 (K.B.D.).

As to Duty to Hear Witnesses and Validity of Award, see *1 Halsbury's Laws of England*, 2nd Ed. 653, 663, paras. 1105, 1118; and for Cases, see *2 E. and E. Digest*, 441–445, 471–513, Nos. *911–937*, *1155–1519*.

COMMON LAW.

Points in Practice. *98 Law Journal*, 355.

COMPANY LAW.

Company incorporated in Victoria—Debenture Stock—Trustees in England—Debenture Stock secured on Property in Australia—Redemption of Debenture Stock—Payment to Trustees—Australian or English Currency—Money of Account. In 1893 the plaintiff company was formed, and it issued debentures in respect of the liabilities of an earlier company whose affairs were being wound up. These debentures were secured by certain trust deeds. In 1895, these debentures were cancelled, and in lieu thereof debenture stock was issued and was secured by a supplemental trust deed. From time to time further supplemental trust deeds were executed. The original contract whereby it had been agreed that the plaintiff company be formed to take over the affairs of the earlier company was negotiated and executed in England; the bulk of the creditors were English; the trustees had at all times been English trustees, and the trust deed provided that interest on the debentures was to be paid, at the option of the plaintiff company, to the shareholders or the trustees, and, in the event of the securities becoming enforceable, payment was to be made to the trustees who were in England. The plaintiff company carried on business in Victoria; the property charged by the debenture stock was situate in Australia; the security was registered under Victorian law, and the scheme had been approved by the Supreme Court of Victoria. The trust deeds provided for the redemption of the debenture stock on certain conditions, which had been fulfilled. In 1895, when the debenture stock was issued, the pound had the same value in both Australia and England, but on January 1, 1948, on which date the plaintiff company intended to redeem the debenture stock, the value of the pound in Australia was less than the value of the pound in England. *Held*, That, in determining whether the debenture stock should be redeemed in English or Australian currency, regard must be had to the substance of the obligation incurred, which was to be decided as a matter of construction of the contract between the parties; that the only money of account by reference to which it was possible to regard the parties as contracting was a money of account which had its basis in English law at a time when there was no relevant Victorian legislation upon currency, coinage, and legal tender; that, from the whole of the circumstances, it appeared that the parties intended to contract by reference to an English money of account; and, therefore, that the company owed in English pounds, and was required to pay, in whatever country payment was made, a sum of money calculated by reference to the English pound and by application of the appropriate rate of exchange. *Goldsbrough Mort and Co., Ltd.* v. *Hall*, [1948] V.L.R. 145.

CRIMINAL LAW.

Drunk in Charge. *92 Solicitors Journal*, 240.

Police Traps. *98 Law Journal*, 369.

DAIRY INDUSTRY.

Dairy-produce Regulations, 1938, Amendment No. 2 (Serial No. 1948/102), substituting new Reg. 4 (18).

DAIRY SUPPLY CONTROL.

Dairy Supply Control Revocation Order, 1948 (Serial No. 1948/100). Revocation of the Dairy Supply Control Order, 1945 (Serial No. 1945/83) and Amendment No. 1 (Serial No. 1946/117).

DEATH DUTIES.

Points in Practice. *98 Law Journal*, 369.

DIVORCE.

Condonation—Husband and Guilty Wife living together in same House, but with no Marital Intercourse—Husband desirous of Reconciliation, but Wife's Refusal—Parties continuing to live together as before—Revival of Husband's Condoned Adultery by Subsequent Act of Adultery disclosed in Discretion Statement—Discretion of Court—Exercise in Wife's Favour. A husband and wife, who were married in 1931, had become estranged by 1939, and, although they continued to live together in the same house and the wife did the housekeeping, they had no marital intercourse, hardly spoke to each other, and had their meals separately. In 1942, the husband went to the Far East in the Royal Air Force, and was taken prisoner by the Japanese. On his return to England in 1945, the parties resumed the same kind of relationship as had existed before the husband went away. In November, 1945, the husband discovered a letter to the wife from the co-respondent, and suspected that she had been guilty of adultery. On December 9, while away from home, the husband wrote a letter to the wife asking her to make it up with him and to give up the co-respondent. When the husband returned home on December 11, the wife confessed that she had committed adultery with the co-respondent while the husband was a prisoner, and she said that she still loved the co-respondent and refused the husband's attempt at reconciliation. On learning this, the husband took no action of any kind, and the husband and wife continued to live together, in the same way as they had been doing hitherto, until July, 1946, when the husband left the wife. The husband then brought a petition for divorce on the ground of the wife's adultery, but the wife contended that he had condoned her adultery and there had been a complete reinstatement of the wife by the husband. The husband claimed (*a*) that, as there had been no displacement by him of the wife, there could be no replacement, and (*b*) that, on the facts of the case, there was no condonation, since both husband and wife must be parties to a condonation. In 1936, the husband had committed adultery, which had been condoned by the wife. In 1938, he again committed adultery, but this fact was not disclosed until the discretion statement was filed in his petition. *Held*, (i) Where a husband and wife were together when the confession or discovery of adultery was made, there could be a merely notional displacement, which might be immediately made good by condonation or reinstatement. (*Fearn* v. *Fearn*, [1948] 1 All E.R. 459, distinguished.) (ii) There was no authority for the proposition that there could be no condonation unless the guilty party consented to being condoned, and, on the facts, the husband had reinstated the wife in her position in the household and in the state of conjugal cohabitation after he became fully aware of her adultery and had condoned it. (iii) The fact that the wife's adultery had been condoned did not affect the exercise by the Court of its discretion in her favour, and, although she could not rely on the husband's adultery in 1938 as a ground for divorce, it was sufficient to revive the previous condoned adultery, and she was, accordingly, entitled to a divorce. *Wilmot* v. *Wilmot and Martin (Day Intervening)*, [1948] 2 All E.R. 123 (P.D. & A.).

As to Condonation, see *10 Halsbury's Laws of England*, 2nd Ed. 679–682, paras. 1004–1009; and for Cases, see *27 E. and E. Digest*, 336–341, Nos. *3161–3213*.

Desertion—Constructive Desertion—Husband and Wife sharing Same House and living Separate Lives—Time from which Desertion commenced—Divorce and Matrimonial Causes Act, 1928, s. 10 (b). There can be desertion when the only element of the spouses' living together is that they were actually residing in one house with no physical separation between the parts of the house in which they were living respectively. There must be more than "disagreeable conduct" on the part of the wife, and more than refusal of marital intercourse. (*Smith* v. *Smith*, [1939] 4 All E.R. 533, *Angel* v. *Angel*, [1946] 2 All E.R. 635, and *Littlewood* v. *Littlewood*, [1942] 2 All E.R. 515, followed.) (*Wenbon* v. *Wenbon*, [1946] 2 All E.R. 366, and *Shilston* v. *Shilston*, (1945) 174 L.T. 105, applied.) Where, as in the present case, the circumstances since the return of the husband to his home from active service in October, 1944, were a negation of all that married life stands for, and they were attributable to the wife, it was held that she, without just cause, commenced to desert her husband from May 8, 1944, when she expressed by letter to him, when he was on active service, a direct and unequivocal expression of her intention no longer to recognize her obligations as a wife; and that without just cause she had left him continuously so deserted for upwards of three years. (*Pulford* v. *Pulford*, [1923] P. 18, followed.) *Dempster* v. *Dempster*. (Auckland. June 28, 1948. Gresson, J.)

Desertion—Deed of Separation—Agreement to live together again—Whether Refusal by one Spouse to carry out such Agreement constitutes Desertion. Where spouses who have parted pursuant to a deed of separation subsequently agree to live together again, but cohabitation is not resumed owing to the refusal of one of them to carry out the agreement, desertion does not arise, the matrimonial relationship never having been re-established. (*Tulk* v. *Tulk*, [1907] V.L.R. 64, and *Bailey* v. *Bailey*, [1909] V.L.R. 299, followed.) (*Pardy* v. *Pardy*, [1939] P. 288, not followed.) *Martin* v. *Martin*, [1948] V.L.R. 134.

Separation—Agreement for Separation—Necessity for Mutual Agreement on Precise Subject upon which Agreement is sought to be established—Divorce and Matrimonial Causes Act, 1928, s. 10 (i). An agreement to separate, within the meaning of s. 10 (*i*) of the Divorce and Matrimonial Causes Act, 1928, requires that the parties should mutually agree on the precise subject upon which agreement is sought to be established. There was no such discussion as would indicate a contractual state of mind in the parties. They had a quarrel founded upon the ultimatum of the wife that, if the husband did not give up his playing in an orchestra, she would leave him, and the subsequent incidents deposed to might well be consistent with the husband's acceptance of the inevitability of her threatened departure, whatever he might say short of giving up his musical engagements, as with his having in fact agreed to a separation with its implications. As the wife had left her husband pursuant to her ultimatum, and not by agreement, the petition was dismissed. *Pitcaithly* v. *Pitcaithly*. (Auckland. June 8, 1948. Finlay, J.)

EARTHQUAKE AND WAR DAMAGE.

Earthquake and War Damage Regulations, 1944, Amendment No. 1 (Serial No. 1948/105). Amendments as from June 1, 1947: Regulation 5 (*j*) amended by inserting after the word "water-tank," the words "other than a water-tank installed as part of the water-supply system of any dwelling or farm building)"; Clause 20 of the Schedule is omitted, and a new Cl. 20 is substituted (providing for a franchise, calculated on the classification of buildings into three classes: those with a good measure of earthquake resistance, those with a fair measure of earthquake resistance, and those with little resistance to earthquake shock.

FAMILY PROTECTION.

Discovery of Documents—Practice—R.S.C., Ord. 54F, rr. 1, 14. R.S.C., Ord. 54F, dealing with applications under the Inheritance (Family Provision) Act, 1938, provides by r. 1 that an application to the Court under s. 1 of the Act shall be made in the Chancery Division by originating summons *inter partes*, and r. 14 provides that the ordinary practice and rules in the Chancery Division, in so far as they are not inconsistent with the Act or R.S.C., Ord. 54F, shall apply to proceedings under the Order. The widow and infant child of the testator had issued an originating summons under the Act and applied for discovery of various documents relating, *inter alia*, to the net value of the estate. *Held*, A plaintiff on an originating summons is not entitled as of right to discovery, but the Court has jurisdiction to order discovery. The cases in which the jurisdiction ought to be exercised are, however, rare, and, in such exceptional cases, the plaintiff's proper course is to make a special application, supported by affidavit, showing the particular special circumstances in which the application is made. In this case, no special circumstances had been disclosed justifying the making of an order for discovery. *Re Borthwick (deceased), Borthwick and Another* v. *Beauvais and Others*, [1948] 2 All E.R. 179 (Ch.D.)

For R.S.C., Ord. 54F, see *The Yearly Practice of the Supreme Court, 1940*, 1096–1099.

HEALTH.

Drainage and Plumbing Extension Notice, 1948, No. 2 (Serial No. 1948/109).

HIRE-PURCHASE.

Collateral Agreement—Abrogation—Parol Warranty during Negotiations of "roadworthiness" of Motor-car—Subsequent Formal Document excluding Warranties. In the course of negotiations for the purchase of a second-hand motor-car on hire-purchase terms, the vendor's agent told the purchaser that, if he bought the car, the vendor would guarantee that it was in good condition and that he would have no trouble with it. The purchaser signed a hire-purchase agreement which contained, *inter alia*, the following clause: "The hirer is deemed to have examined (or caused to be examined) the vehicle prior to this agreement and satisfied himself as to its condition, and no warranty, condition, description or representation on the part of the owner as to the state or quality of the vehicle is given or implied . . . any statutory or other warranty, condition, description or representation whether express or implied as to the state, quality, fitness or roadworthiness being hereby expressly excluded." *Held*, The wording of the clause in the hire-purchase agreement was not sufficiently clear to abrogate the separate collateral agreement constituted by an offer of a guarantee and the signing of the hire-purchase agreement by the purchaser. *Webster* v. *Higgin*, [1948] 2 All E.R. 127 (C.A.).

As to Construction and Effect of Conditions and Warranties, see *29 Halsbury's Laws of England*, 2nd Ed. 52–56, paras. 64–68; and for Cases, see *39 E. and E. Digest*, 414–422, Nos. *480–546*.

HOSPITALS.

Hospitals Employment Regulations, 1948, Amendment No. 1 (Serial No. 1948/108).

HUSBAND AND WIFE.

Maintenance—Cessation of Order—Resumption of Cohabitation—Order obtained while Wife living apart from Husband—Wife's Return to Husband's House to live in Separate Rooms as Tenant—Summary Jurisdiction (Separation and Maintenance) Act, 1925 (c. 51), s. 2 (2). A wife, who had obtained a separation order from her husband while living apart from him, returned to the husband's house with her child and was allowed by him to live in part of the house. There was no resumption of cohabitation, the husband and wife occupying separate parts of the house and an arrangement being made that the wife should pay 10s. a week rent by allowing the husband to deduct that amount from the maintenance due to her under the order. On appeal by the husband against a committal order made by Justices on his default in making payments under the separation order: *Held*, Under the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 2 (2), where a wife had obtained a separation order while living apart from the husband, the order ceased to have effect only if the wife resumed cohabitation with the husband, and not if she merely resumed residence at the same address; on the facts of the case, the wife had not resumed cohabitation; and, accordingly, the order was enforceable. (*Evans* v. *Evans*, [1947] 2 All E.R. 656, distinguished.) *Thomas* v. *Thomas*, [1948] 2 All E.R. 98 (K.B.D.).

For the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 2 (2), see *9 Halsbury's Statutes of England*, 415.

IMMIGRATION.

Immigration Restriction Regulations, 1930, Amendment No. 5 (Serial No. 1948/104). A new cl. 10 is added to Reg. 18.

INCOME TAX.

Double Taxation Relief (Canada) Order, 1948 (Serial No. 1948/98). Income-tax (Canadian Traders) Exemption Order, 1946 (Serial No. 1946/71), is revoked.

LANDLORD AND TENANT.

Disappearing Tenants and Estoppel. *92 Solicitors Journal*, 241.

LICENSING.

Masterton Licensing Trust (Travelling Allowance) Regulations, 1948 (Serial No. 1948/103).

MARKETING.

Bobby Calf Marketing Regulations, 1947, Amendment No. 2 (Serial No. 1948/101), amending Reg. 33 (1) by substituting a new price for vells for year ending on April 30, 1950.

NEGLIGENCE.

Duty to Invitees—Duty of Shipowners to Stevedores—Beam left Insecure by Shipowners—Effect of Failure to examine Beam by Stevedores or their Employers—Factories Act, 1937 (c. 67), *s. 60—Docks Regulations, 1934* (*S.R. & O., 1934, No. 279*), *Duties, para.* (*d*), *reg. 42.* Under the heading "Duties" in the Docks Regulations, 1934, para. (*d*) provides: "It shall be the duty of every person who by himself, his agents, or workmen carries on the processes, and of all agents, workmen, and persons employed by him in the processes, to comply with Part IV of these regulations." In Part IV, reg. 42 states: "The beams of any hatch in use for the processes shall, if not removed, be adequately secured to prevent their displacement." The plaintiffs were stevedores employed by the defendants to load cargo into the hold of a ship owned by the third parties. In accordance with the practice of the port, the crew of the ship had removed the necessary beams and hatch covers prior to the loading, but they failed to secure adequately, so as to prevent its displacement, one of the beams which had not been removed. Neither the plaintiffs nor the defendants' foreman examined this beam to see whether it had been secured, but relied on the assurance of the ship's officer in charge. While the cargo was being loaded, the beam fell into the hold, injuring the plaintiffs. *Held*, (i) The regulations did not impose on every employee a duty to examine personally every beam if he was assured by the foreman that all was in order; even if the plaintiffs were technically in breach of the regulations, no duty under the regulations was imposed on them towards the defendants; and, therefore, there was no contributory negligence on the part of the plaintiffs. (ii) Even if there were a duty, as the employers had accepted the responsibility of directing the men when it was safe to begin work, the employers could not rely on a breach of the regulations by the plaintiffs. (iii) The third parties had undertaken the duty of securing the beam, and they owed a duty to the plaintiffs, as invitees on board the ship, to see that that duty was properly discharged; the regulations did not create a duty towards the third party by the plaintiffs or by the defendants to make sure that the beam was secure; and the third parties' responsibility for the accident and the negligence of the third parties was the effective cause of the plaintiffs' accident. (*Heaven* v. *Pender*, (1883) 11 Q.B.D. 503, applied.) (*Hillen and Pettigrew* v. *I.C.I.* (*Alkali*), *Ltd.*, [1934] 1 K.B. 455; [1936] A.C. 65, *M'Alister* (*or Donoghue*) v. *Stevenson*, [1932] A.C. 562, and *Haseldine* v. *Daw and Son, Ltd.*, [1941] 3 All E.R. 156, distinguished.) *Jerred and Others* v. *T. Roddam Dent and Son, Ltd.* (*Glen Line, Ltd., Third Party*), [1948] 2 All E.R. 104 (K.B.D.).

As to Duty to Invitees, see *23 Halsbury's Laws of England*, 2nd Ed. 600–609, paras. 851–858; and for Cases, see *36 E. and E. Digest*, 35–45, Nos. *208–281.*

Res ipsa loquitur—*Dentist—Extraction of Tooth—Fracture of Jaw.* In an action for damages for negligence against a dentist, a patient proved that, in extracting a wisdom tooth, he had left part of the root of the tooth in her jaw and had fractured the jaw. *Held*, This fact alone was not sufficient evidence of negligence on the part of the dentist, and the doctrine of *res ipsa loquitur* did not apply. *Fish* v. *Kapur and Another*, [1948] 2 All E.R. 176 (K.B.D.).

As to Doctrine of *Res ipsa loquitur*, see *23 Halsbury's Laws of England*, 2nd Ed. 671–675, paras. 956–958; and for Cases, see *36 E. and E. Digest*, 88–92, Nos. *589–607.*

POST AND TELEGRAPH.

Postal Amending Regulations, 1948 (Serial No. 1948/107).

PRACTICE.

Appeal to Supreme Court—Appeal on Fact—Principles applicable. It is not the function of the Supreme Court, on an appeal from the decision of a Magistrate on a question of fact, to weigh the conflicting evidence and to come to an independent conclusion upon matters of fact, except on the rarest occasions and in circumstances where the Supreme Court is convinced by the plainest considerations that it would be justified in finding that the Magistrate had formed a wrong opinion. (*Thomas* v. *Thomas*, [1947] 1 All E.R. 582, followed.) *Kilpatrick* v. *Hall.* (Wellington. July 13, 1948. Christie, J.)

Jury—Verdict—Special Verdict—Nature of Special Verdict—Right to return. A jury have a right, if they wish, to find the facts specially and to refuse to return a general verdict, and no objection by any party can deprive them of this right. A Judge may ask a jury questions at his own discretion without anyone's consent and without telling them that they may return a general verdict, and, having received their answers, may enter whatever verdict is appropriate. Each party to a trial by jury is entitled to a general verdict, subject to the following exceptions: (i) The jury has been given by statute the right to return a special verdict, and, if the jury prefers to return a special verdict, neither party can insist upon a general verdict. (ii) The parties may, by agreement, accept anything less than a general verdict. Where the trial Judge, without objection from either party, simply asks questions of the jury and then enters the judgment which follows from the facts found by the jury's answers, the parties are taken to have consented to dispense with a general verdict. (iii) The trial Judge may, without the consent of the parties, in the first instance ask the jury to answer questions and say nothing to them about a general verdict; but, if he does so, the jury may refuse to answer the questions and return a general verdict, and there is no reason why counsel should not invite them to do so. If the jury answers the questions and one or both parties have reserved their right to a general verdict, the Judge cannot accept the answers to his questions as a verdict, but should then direct the jury to bring in a general verdict in such manner as the case requires. The jury may at this stage decline to bring in a general verdict and exercise its privilege of returning a special verdict. *Russell* v. *Victorian Railways Commissioners*, [1948] V.L.R. 118 (F.C.).

Particulars—Defence—Forfeiture of Lease—Onus on Plaintiff to prove Case—Defendant's Denial involving Double Negative—Lease—Forfeiture—Breach of Covenant alleged—Onus of Proof. The plaintiffs let certain premises to the defendants for a term of years from October 25, 1945, the defendants covenanting that they would use the demised premises only as offices in connection with their business of engineers and with other businesses in which they or their subsidiary or associated companies might be interested. The lease provided that the user of part of the premises as offices by the defendants' subsidiary or associated companies should not be deemed an underletting or parting with possession within cl. 2 (17) of the lease, which contained the usual lessee's covenant against underletting or parting with possession without consent. The plaintiffs brought an action for forfeiture of the lease, alleging, by para. 5 of the statement of claim, that the defendants had used the premises or permitted them to be used for the purpose of their businesses by certain companies and persons, or, alternatively, that the defendants had underlet or parted with possession to the same persons. By para. 7, the plaintiffs alleged that the cpmpanies and persons mentioned in para. 5 "are not subsidiary or associated companies of the defendants and the businesses carried on by such companies and persons are not businesses in which the defendants and their subsidiary or associated companies are interested." The defendants in their defence in substance admitted that the companies mentioned in para. 5 of the statement of claim had used part of the demised premises as offices by their (the defendants') permission, but they denied underletting or parting with possession. Paragraph 4 of the defence stated: "The defendants deny each and every allegation in para. 7 of the statement of claim." The plaintiffs applied for particulars of the implied positive allegation in para. 4 of the defence. *Held*, (i) *Prima facie* the burden was laid particularly on the plaintiffs to prove that the defendants had permitted user by persons not associated in business with the defendants, and the burden remained on the plaintiffs in spite of the admission in the defence. (*Doe d. Bridger* v. *Whitehead*, (1838) 8 Ad. & El. 571, and *Toleman* v. *Portbury*, (1870) L.R. 5 Q.B. 288, applied.) (ii) Although the defendants' denial in para. 4 involved a double negative, it did not necessarily involve an affirmative allegation. The area of controversy was clear, and, especially having regard to the fact that this was a forfeiture action, it was for the plaintiffs to prove their case, without assistance, and particulars would not be ordered. (*Pinson* v. *Lloyds and National Provincial Foreign Bank, Ltd.*, [1941] 2 All E.R. 636, distinguished.) *Duke's Court Estates, Ltd.* v. *Associated British Engineering, Ltd.*, [1948] 2 All E.R. 137 (Ch.D.).

As to Particulars, see *25 Halsbury's Laws of England*, 2nd Ed. 275–282, paras. 465–467; and for Cases see *E. and E. Digest*, Pleading, 193, 194, 197–205, Nos. *1634–1638, 1660–1710.*

Parties—Substitution of Plaintiff—Claim of Executrix to be substituted as Plaintiff—Writ issued in Trading Name of Deceased Person—Deceased trading as a Firm, but without Partners—R.S.C., Ord. 16, r. 2. A.M. was the sole proprietor of a business which he carried on under the name of "A.M. & Co." After

his death, his executrix, who continued to carry on the business under the same trading name, brought an action in the name of "A.M. & Co. (trading as a firm)," the action being on a contract made by A.M. during his lifetime. On an application to amend the writ by substituting the executrix as plaintiff, *Held*, There was no power under R.S.C., Ord. 16, r. 2, to amend the writ by substituting the executrix as plaintiff. (*Tetlow* v. *Orela, Ltd.*, [1920] 2 Ch. 24, followed.) (*Hill and Son* v. *Tannerhill*, [1944] K.B. 472, distinguished.) *Alexander Mountain and Co.* v. *Rumere, Ltd.*, [1948] 2 All E.R. 143 (K.B.D.).

As to Substitution of a Plaintiff, see *26 Halsbury's Laws of England*, 2nd Ed. 20, 21, para. 17; and for Cases, see *E. and E. Digest*, Practice, 404, 405, Nos. *1051–1057*.

PRICE CONTROL.

Exceeding Maximum Price—Penalty—Minimum Penalty—Offender to derive "no benefit from the offence"—Deduction of Tax paid on Excessive Profit—Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927), reg. 55AB (4) (a). During the twelve months ending December 19, 1946, a manufacturing company received by the sale of its goods £33,353, which exceeded its permitted maximum charge by £3,789. The company was liable to pay £3,293 in income tax and excess profits tax on the excess. In assessing the minimum amount of the fine to be imposed under the Defence (General) Regulations, 1939, reg. 55AB, which provides by para. 4 (*a*) that "the minimum amount [of the fine] shall be such amount as will, in the opinion of the Court, secure that the offender derives no benefit from the offence." *Held*, On the construction of the regulation, the company should be fined the amount by which it had, in fact, profited, and, in arriving at that amount, it was proper to deduct the amount of the tax from the total amount of illegal profit. *Betteley, Addyman, and Jalland, Ltd.* v. *Sington*, [1948] 2 All E.R. 81 (K.B.D.).

For the Defence (General) Regulations, 1939, reg. 55AB, see *39 Halsbury's Statutes of England*, 992–994.

PROBATE AND ADMINISTRATION.

Points in Practice. *98 Law Journal*, 369.

RABBIT NUISANCE.

Rabbit-destruction (South Head Rabbit District) Regulations, 1948 (Serial No. 1948/106).

RATING.

Sanitary Rate—Rate imposed by Council Resolution—Whether Duly levied—Counties Act, 1920, s. 122 (2), 123—Health Act, 1920, s. 140. On August 3, 1945, the County Council resolved "in terms of the Health Act, 1920, and s. 123 of the Counties Act, 1920, to make and levy a uniform charge or separate rate of £1 8s. for service in respect of such property in the sanitation area constituted by by-law in the Takapuna Riding, as has a house erected thereon." The defendant contended that the charge was a separate rate, and could not, by reason of s. 122 (2), be made or levied except on a petition signed by a majority of the ratepayers in the riding. It was common ground that no petition had been signed in accordance with s. 122 (2). *Held*, That, as the uniform annual charge which, by s. 123 (2) of the Counties Act, 1920, a County Council is authorized to make for sanitary services is deemed for all purposes to be a separate rate, the rate in question was duly levied in accordance with the powers conferred on the Council by s. 140 of the Health Act, 1920. *Waitemata County* v. *Cholmondeley-Smith*. (Auckland. June 26, 1948. Luxford, S.M.)

RENT RESTRICTION.

Possession—House destroyed by Enemy Action—Contractual Tenancy not determined—House rebuilt—Tenant refused Possession by Landlord—Notice to Tenant to quit—Claim by Tenant for Possession—Lease—Impossibility of Performance—Frustration. A dwellinghouse, subject to the Rent Restrictions Acts, and let on a monthly tenancy, was destroyed by enemy action in 1940. The landlord erected a new house on the site of the old one, and on February 17, 1948, when the house was fit for occupation, the tenant attempted unsuccessfully to get the keys from the landlord, who denied him possession of the premises. On March 9, 1948, the landlord served on the tenant a notice to quit, determining the contractual tenancy on April 30, 1948. The tenant claimed possession. *Held*, (i) On the facts, there had never been an abandonment or surrender of the contractual tenancy by the tenant, who was, therefore, entitled on February 17, 1948, to possession, and the Court would not permit the landlord to exclude the tenant from the protection of the Rent Restrictions Acts by taking advantage of his own wrongful act in refusing the tenant physical occupation, but would order that the tenant be put into possession. (ii) The contract of tenancy was not terminated under the doctrine of frustration, which had no application to a demise of real property. (*Leightons Investment Trust, Ltd.* v. *Cricklewood Property and Investment Trust, Ltd.*, [1943] 2 All E.R. 97, considered.) *Denman* v. *Brise*, [1948] 2 All E.R. 141 (C.A.).

As to Restrictions on the Landlord's Right to Possession, see *20 Halsbury's Laws of England*, 2nd Ed. 329–334, paras. 392–399; and for Cases, see *31 E. and E. Digest*, 575–581, Nos. *7226–7297*.

Protected Person—Application for Delivery of Possession—Dwellinghouse "unoccupied"—What constitutes a dwellinghouse—National Security Act, 1939–1946—Defence (Transitional Provisions) Act, 1946—National Security (War Service Moratorium) Regulations, reg. 30A. Premises are not a dwellinghouse within the meaning of reg. 30A of the National Security (War Service Moratorium) Regulations unless at the material time they are possessed of the characteristics ordinarily found in buildings used or let for human habitation as homes. *Bakes* v. *Huckle*, [1948] V.L.R. 159.

"Separate dwelling"—Exclusive Letting of Room with User, in common with other Tenants, of other Rooms, including Kitchen—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 16 (1). Where the landlord grants to the tenant (*a*) exclusive possession of a room or rooms in a house with (*b*) the user, jointly with someone else—whether the landlord or another tenant—of another living room or rooms, the tenant is not the tenant of a "part of a house let as a separate dwelling" within the meaning of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 16 (1), and so is not protected by the Rent Restrictions Acts. A tenant had been given, under his tenancy agreement, the exclusive possession of certain rooms plus the user, jointly with other tenants, of a bathroom, water-closet, and kitchen. *Held*, The kitchen being a living-room, the tenant had not been let "a part of a house let as a separate dwelling" within the meaning of s. 16 (1) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. (*Neale* v. *Del Soto*, [1945] 1 All E.R. 191, *Sharpe* v. *Nicholls*, [1945] 2 All E.R. 55, *Cole* v. *Harris*, [1945] 2 All E.R. 146, *Kenyon* v. *Walker*, [1946] 2 All E.R. 595, applied.) *Llewellyn* v. *Hinson*, [1948] 2 All E.R. 95 (C.A.).

"Separate dwelling"—Rooms let for Extra Bedroom Accommodation for Adjoining Hotel—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (2). The landlord claimed possession of two rooms let to the tenant for use as extra bedroom accommodation for the hotel which the tenant conducted on adjoining premises. The rooms were usually occupied by guests, but also on occasion by members of the tenant's family or staff. *Held*, The rooms were not let as a "separate dwelling" within the meaning of s. 12 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and the landlord was entitled to an order for possession. (*Vickery* v. *Martin*, [1944] 2 All E.R. 167, distinguished.) (*Richmond (Duke)* v. *Dewar*, (1921) 38 T.L.R. 151, criticized.) *Curl* v. *Angelo and Another*, [1948] 2 All E.R. 189 (C.A.).

As to "Separate dwelling," see *20 Halsbury's Laws of England*, 2nd Ed. 312, para. 369; and for Cases, see *31 E. and E. Digest*, 557, Nos. *7044–7046*.

Subtenants and the Rent Acts. *92 Solicitors Journal*, 242.

ROAD TRAFFIC.

Motor-vehicles—"Driving"—Steering Lorry down Incline without Engine running—Road Traffic Act, 1930 (c. 43), s. 7 (4). On December 10, 1947, the respondent, who was then disqualified from holding a license to drive a motor-vehicle, released the brake of a lorry which he owned and which was standing at the head of an incline and steered it down the road into his garage, a distance of about 100 yards. The engine was not started, and there was no petrol in the tank. *Held*, The respondent was guilty of driving a motor-vehicle while disqualified for holding a license, contrary to the Road Traffic Act, 1930, s. 7 (4). *Saycell* v. *Bool*, [1948] 2 All E.R. 83.

For the Road Traffic Act, 1930, s. 7 (4), see *23 Halsbury's Statutes of England*, 616.

WATERFRONT INDUSTRY.

Waterfront Industry Emergency Regulations, 1946, Amendment No. 4 (Serial No. 1948/99). Amending Reg. 5 (2) (5), and providing that at all meetings of the Commission three

members to form a quorum, the chairman to have a deliberative and a casting vote.

WILL.

Absolute Gift with Trusts engrafted—Engrafted Trusts failing—Clear Words of Donation necessary to enable Legatee to take absolutely—Appropriation of a Share and Payment during Life of Income thereout not sufficient. A testator bequeathed £5,000 in trust to his daughter for life and thereafter as such daughter should appoint. The daughter by her will directed trustees to hold the £5,000 in trust for her three daughters in equal shares, to appropriate one share to each daughter, to pay to each daughter during her lifetime the income from the share so appropriated to her, and after the death of each daughter respectively to hold her appropriated share upon trust for her issue, or, if none, upon certain other trusts. One daughter died without issue, and the other trusts failed. *Held*, That such daughter took only a life, and not an absolute, interest in the fund, the rule in *Lassence* v. *Tierney*, (1849) 1 Mac. & G. 551, not applying, inasmuch as there was no clear absolute gift to daughters followed by words which affected to divest such gift, but merely a direction to appropriate a share and to pay the income from such share, which was insufficient to convey an absolute interest. *In re Panter, Equity Trustees Co.* v. *Marshall*, [1948] V.L.R. 177.

SUCCESSION DUTY: COVENANTS TO LEAVE PROPERTY BY WILL.

Alteration of Successions by Contingencies.

By E. C. Adams, LL.M.

There has been decided recently no more interesting a death-duty case than that of *Commissioner of Stamp Duties* v. *Loughnan*, [1948] N.Z.L.R. 626. This is a decision of the Court of Appeal dealing with the liability to succession duty of property left by deceased in accordance with a covenant by him in a daughter's ante-nuptial marriage settlement.

The deceased had covenanted in this marriage settlement to leave her by will at least an equal aliquot part of his residuary estate, according to the number of his children living at his death or dying in his lifetime leaving a wife, husband, or issue living at his death. The daughter under the terms of the marriage settlement assigned to the trustees thereof the share she was to take under her father's will on trust to pay her the income for life, then to the husband if surviving for his life, and, after the death of both, to hold both capital and income "for all or such one or more exclusively of the other or others of the children or remoter issue of the said intended marriage . . . as the husband and wife shall by deed or deeds . . . jointly appoint and in default of such appointment and subject to any such appointment as the survivor may make . . . in trust for all or any of the children or child of the said intended marriage who attain the age of twenty-one years or marry under that age and if more than one in equal shares."

The daughter's husband predeceased the deceased, but deceased was survived by his said daughter, another daughter, and the husband of a deceased daughter. There was issue of the marriage only one child, who also survived deceased.

Deceased by his will left all his estate to his two living daughters in equal shares. It is opportune to point out here that, in accordance with his covenant in the said ante-nuptial marriage settlement, deceased was required (in the events which happened between the dates of the settlement and of deceased's death) to leave her only one third. Therefore (apart from any additional claim she might have had under the Family Protection Act), she received by the will one sixth more than deceased was bound to leave her.

The joint power of appointment conferred on the daughter and her husband by the settlement was not exercised, and, up to the date of stating the case for the opinion of the Supreme Court, the daughter had not exercised her special power of appointment.

The date of the marriage settlement was 1912, and the deceased died domiciled in New Zealand in 1944. The final balance of deceased's estate was certified at £72,671, and the Commissioner of Stamp Duties assessed for succession duty on the basis that, on the death of the deceased, the said daughter acquired under the will of the deceased one half of the deceased's residuary estate. The tax-payer, on the other hand, contended that, as regards this one-half share in deceased's estate, it should be assessed for succession duty on the basis that the daughter had only a life interest therein and her only child an estate in remainder on her death.

The marriage settlement is closely analysed in several of the judgments in the Court of Appeal. If it is closely examined, it appears that the treaty for this marriage was a tripartite one, and not merely bilateral: the three parties were the deceased (who was the father of the lady about to be married), the intended husband, and the deceased's daughter. Another material factor was that the only property settled by the daughter on herself, her husband, and her issue was the benefit of her father's covenant to leave her by will an aliquot share in his estate. To the writer, the covenant by the father and the settlement by the daughter on the declared trusts of the benefit of that covenant were indissolubly connected; they were embodied in the one and the same instrument and formed parts of the one transaction, the marriage treaty. It leaves an irresistible inference that, had it not been for the intended marriage and the trusts declared by the daughter, the father (whose estate fell to be assessed for duty twenty-two years later) would not have covenanted to leave an aliquot part of his estate to his daughter. The matter may be viewed from a different angle: on the making of the covenant by the deceased, the benefit thereof immediately became impressed with the trusts of the marriage settlement. The settlement was not revocable, and both father and daughter were bound by it. That is to say, if he did leave her an aliquot share, such share was subject to the trusts of the settlement. It appears to the writer, therefore, that, once it is established that the covenant was binding on the father, any succession, which the daughter might get from her father's will in pursuance of that covenant, would have to be assessed for succession duty in terms of the settlement. On principle, the matter appears to be identical

with a succession subject at the acquisition thereof to a *secret* trust. In a particularly forceful judgment, Blair, J., laid down that, in assessing for succession duty, the Commissioner must take into consideration a secret trust: *Williams* v. *Commissioner of Stamp Duties*, [1943] N.Z.L.R. 88. Although no authorities are cited in that judgment, the better opinion appears to be that the Irish case of *Cullen* v. *Attorney-General for Ireland*, (1866) L.R. 1 H.L. 190, which holds to the contrary, is not an authority on that point, either in England or New Zealand; see the judgment of Fair, J., in *Loughnan* v. *Commissioner of Stamp Duties*, [1948] N.Z.L.R. 626, 644.

The Court of Appeal had no hesitation in holding that the covenant was binding on the deceased. Although marriage is no consideration in money or money's worth, nevertheless it is valuable consideration: *Coverdale* v. *Eastwood*, (1872) L.R. 15 Eq. 121. The interest which was created by the covenant was an equitable charge, and, accordingly, the better opinion appears to be that the covenant was a voluntary covenant under s. 16 (1) (*d*), which renders liable to succession duty any person who on the death of the deceased:

> is beneficially entitled under a voluntary bond or covenant, or in any other manner whatever, to any debt which is payable out of the dutiable estate of the deceased, and the payment of which by the deceased himself would have constituted a gift within the meaning of Part IV of this Act.

As pointed out by Sir Humphrey O'Leary, C.J., "debt" is defined in s. 2 as including any pecuniary liability, charge, or encumbrance, and appears apt to cover the equitable charge created by the covenant at present under consideration.

There is to be particularly noted in s. 16 (1) (*d*) the word "beneficially." Callan, J., approached the problem from this angle, at p. 645:

> Whether the solution be sought by considering s. 16 (1) (*a*) or s. 16 (1) (*d*) of the Death Duties Act, 1921, it is plain that we are concerned only with *beneficial* interests coming to the daughter, and with *beneficial* interests coming to her from her father. We are not to be concerned with bare legal estates as distinguished from *beneficial* interests, nor with situations created only by the act of the daughter herself. We are only to discover what *beneficial* interest the father left the daughter.

(The italics are mine, and not His Honour's.)

It will be remembered by the reader that all the deceased covenanted to leave to this daughter was, in the events which happened, *one third* of his estate. In actual fact, he left her *one half*. Accordingly, the Court of Appeal by a majority decision (Smith, J., dissenting) held (varying slightly the decision of Fleming, J., in the Supreme Court) that succession duty should be assessed as to (*a*) the one-third share in deceased's estate which was subject to deceased's covenant in the marriage settlement, on the basis of a life estate only to the daughter and of remainder to her son, duty on such remainder constituting a contingency being subject to revision under s. 21 of the Act, if the daughter later exercised her power of appointment in favour of her remoter issue, and as to (*b*) the one-sixth share which was not subject to the deceased's covenant, as an absolute beneficial interest to the said daughter.

It may be stated in passing that any appointment which the daughter may make in favour of her remoter issue must be in accordance with the rule against perpetuities: for the purpose of this rule, the crucial date is 1912, the date of the settlement, and not 1944, the date of deceased's death: *Re Legh's Resettlement Trusts, Public Trustee* v. *Legh*, [1937] 3 All E.R. 823.

Now, what would have been the position if deceased had not carried out his covenant, and had left this daughter by will, say, nothing? Despite deceased's covenant, deceased could, it is true, have dissipated his estate in his lifetime, and the daughter and the trustees and beneficiaries of the marriage settlement would have had no redress. But, as Smith, J., points out, deceased could not have defeated his covenant by any testamentary disposition: *29 Halsbury's Laws of England*, 2nd Ed. 565, para. 825. But, as Fair, J., points out, failure to carry out his obligations under the marriage settlement would have resulted in his estate being bound, after his death, at least to make compensation in damages to the extent of the loss suffered by the parties entitled to such provision owing to such omission: *In re Dillon, Dillon* v. *Dillon and Public Trustee*, [1939] N.Z.L.R. 550, 558, 567, approved by the Privy Council in *In re Dillon, Dillon* v. *Public Trustee*, [1941] N.Z.L.R. 557, 562.

What would have been the position if this daughter had predeceased deceased? Section 33 of the Wills Act would have applied, and the testamentary gift to her *nominatim* would have taken effect as if she had died immediately after him. Her constructive interest in deceased's estate would have been subject to death duty: *Perry's Executors* v. *The Queen*, (1868) L.R. 4 Exch. 27. But, as it was only a life interest, it would have been valueless, and, accordingly, her son would have been liable for succession duty as to the whole of the half-share coming to his mother's estate by virtue of s. 33 of the Wills Act. Obviously, in such an event an actuarial valuation (on the basis of the expectation-of-life tables) of the daughter's share would not have been permissible, for, as at deceased's death she being in fact dead, she would have had no expectation of life. The principle of *Trustees, Executors, and Agency Co., Ltd.* v. *Commissioner of Taxes (Victoria)*, (1941) 65 C.L.R. 33, would be applicable to the assessment of such constructive and valueless life interest.

During the course of the argument in the Court of Appeal, Mr. Loughnan, counsel for the tax-payers, made a noteworthy admission. In emphasizing that the destination of the fund of the testator, the persons to receive it, the times when it should come to them, and the shares in which they took were set irrevocably and immutably as long ago as 1912, and that nothing that the testator or his daughter or anyone else could do could alter it, because an indelible mark had been set on the testator's estate, counsel added: "I would not wish to be understood as contending that the incidence of duty is to be shifted by reason of some independent action by the daughter, as, for instance, by her having at some time *independently of the covenant* made a declaration of trust." In the writer's opinion, counsel's observation was aptly made. Thus, if A gives B a gift within three years of A's death, and B before A's death gives or sells the same property to C, the person who is liable to succession duty in respect of the gift *re* A's estate is B, and not C.

The decision in *Commissioner of Stamp Duties* v. *Loughnan* appears consistent with the Privy Council case above cited, *In re Dillon, Dillon* v. *Public Trustee*, [1941] N.Z.L.R. 557, which deals with the statutory priority conferred by the Family Protection Act over the rights of persons claiming under a contract made for valuable consideration by which deceased binds himself to leave property by his will. Now, what is the importance of *In re Dillon, Dillon* v. *Public Trustee* as regards death duty? I think it is this. Persons

in whose favour such contracts are made are not creditors. Therefore, their claims could not be deducted for death-duty purposes under s. 9. On the contrary, such persons are successors for the purposes of succession duty, being caught by s. 16 (1) (*a*). (Possibly in *Loughnan's* case the share of the beneficial covenantees could also be brought under s. 16 (1) (*a*) as well as s. 16 (1) (*d*).)

A similar position prevails with regard to successful claims under s. 3 of the Law Reform Act, 1944 (which enables the Court to compensate persons who give their services free in expectation of a legacy which does not eventuate). Such successful claims are deemed to be legacies, and, consequently, they are liable to succession duty accordingly.

With regard to successful claims under the Family Protection Act, express provision has also been made. It is provided that, where an order has been made by the Court under that Act, all duties payable on the transmission of the estate under the will of the testator shall be computed as if the provisions of the order had been part of the will. That means that, if the estate has been previously assessed, it must be re-assessed after the order has been made and the necessary adjustments made: either a refund must be granted or extra duty paid: *Public Trustee* v. *Minister of Stamp Duties*, [1925] N.Z.L.R. 328.

As all these are cognate matters, one effect of the decision in *Commissioner of Stamp Duties* v. *Loughnan* will be to make the liability to succession duty uniform. The decision will also be welcomed for another reason. It avoids all suggestion of double taxation, although, as pointed out by Channel, J., in *Attorney-General* v. *Chamberlain*, (1904) 90 L.T. 581, 586: "The amount of duty that people have to pay when they get benefits from their deceased relations or friends depends upon what may be called an an accident as to the mode in which they take it." A decision wholly in favour of the Crown in *Loughnan's* case would have appeared rather hard on the daughter. As Fleming, J., said in the Supreme Court, [1947] N.Z.L.R. 519, 522: "To assess a life-tenant as if she took the capital, instead of the income on it for her life, would be a violation of the spirit of the Act, and of natural justice." It appears to the writer that indeed will be the position as to one-sixth share, but that is due to "an accident": at the marriage settlement it was not noticed that no provision had been made to meet the event of deceased giving by his will more than he was bound to under his covenant; the draftsman did not bring his mind to this contingency.

THE LAND SALES ACT.

Position of Unconditional Contracts.

By C. STANLEY BROWN, LL.B.

In an interesting article in this JOURNAL, Mr. Warrington Taylor put forward the view that it was desirable to have an amendment to s. 45 of the Servicemen's Settlement and Land Sales Act, 1943, to clarify the position of the parties to a contract for sale or lease of land, pending the disposal by the Land Sales Court of the relative application for consent: see (1947) 23 NEW ZEALAND LAW JOURNAL, 263, 275. It is submitted that the terms of the section in question might well be reconsidered in respect of another matter also—namely, the situation that arises when parties enter into a contract that requires the consent of the Land Sales Court, but without expressly making it subject to such consent. The contention of this article is that, under the Act as it now stands, such a contract is incurably bad. It is further contended that Parliament cannot have intended such a result to arise from its legislation, as it is unnecessary for the declared purpose of the Act, and may well be made an instrument of dishonesty, if not of fraud.

It is true that the point in issue is not likely to arise frequently. Any agreement prepared by a solicitor will, of course, be expressed as subject to the consent of the Land Sales Court, and the standard forms used by land agents will contain a similar provision. But there are many cases in which a contract is made by correspondence between the parties themselves, without reference to the matter of consent of the Court. In most of these cases, no doubt, the solicitor acting would see that a proper contract in the usual form is drawn up, and signed by the parties before anything further is done. But there will still be some instances in which, for one reason or another, it is difficult or impossible to obtain a fresh signature—for example, in case of supervening incapacity through illness, or departure overseas—and there is no alternative but to act on the absolute contract already signed. What will be the position in such cases?

The object and purpose of Part III of the Servicemen's Settlement and Land Sales Act, 1943, as set out in the long title of the Act itself, is "to provide for the control of sales and leases of land." Following what is now a very familiar pattern, the draftsman has adopted the method of prohibiting (in s. 44) all such transactions (except with the previous consent of the Court), and then (in s. 45) exempting from such prohibition all such transactions as come within the terms of the latter section. Any transaction not so exempted remains unlawful and void (s. 46).

Now, the terms of s. 45 are as follow:

> Where a transaction to which this Part of this Act applies has been entered into subject to the consent of the Court, the transaction shall not be deemed to have been entered into in contravention of this Part of this Act if an application for the consent of the Court is made within one month after the date of the transaction, but the transaction shall not have any effect unless the Court consents to it and the conditions upon or subject to which the consent is granted are complied with.

There are, therefore, two pre-requisites to the effective consent of the Court, to enable a transaction to escape the prohibition of s. 44. They are:

(i) The transaction must have been entered into subject to the consent of the Court.

(ii) Application must have been made for the consent of the Court within one month after the date of the transaction.

In *In re A Proposed Sale, Nutter to Fowler*, [1947] N.Z.L.R. 237, it was held that failure to lodge an application within a month of the date of the transaction precluded the granting of consent by the Court. Equally, therefore, failure to comply with the first of the two foregoing conditions must have the same effect. Hence the contention put forward above that the unconditional type of contract now under discussion is incurably bad. Under s. 44, it was conceived in sin, and shapen in iniquity; and not even the baptism of the Land Sales Court itself can redeem it from perdition. In *Brunskill* v. *Tringham*, (1945) 4 M.C.D. 140, Mr. A. M. Goulding, S.M., said, at p. 143:

> If a contract is drawn and is not expressed to be subject to the consent of the Court, then it is forbidden under s. 44, and, being illegal, is void *ab initio*.

To be quite accurate, no doubt this statement should be qualified by the opening words of s. 44 itself: "Unless the consent of the Court has first been obtained." However, we are not here concerned with the very limited class of case that is protected by this exception.

But, it will be said, is not this an unduly narrow and technical interpretation of the section? The Act does not in terms require that the subjection of the contract to the consent of the Court must appear from the contract itself. Why should it not be capable of proof *dehors* the contract? And, if it is so capable, what better proof could there be than the fact that the parties themselves, forthwith on signing the contract, joined in submitting it to the Court for approval? Part III of the Act is concerned throughout with "transactions," not documents.

This argument is attractive, but (it is submitted) fallacious. It overlooks the principle of interpretation of statutes: "that words are not used in a statute without a meaning, and so effect must be given, if possible, to all the words used, for the Legislature is deemed not to waste its words or say anything in vain": *31 Halsbury's Laws of England*, 2nd Ed. 503. If it were held that the concurrence of the parties in lodging an application for consent itself shows that the transaction was "entered into subject to the consent of the Court," then the use of those words in the early part of s. 45 becomes mere surplusage; the Legislature would be deemed to have wasted its words, and to have said something in vain. One is therefore forced to the conclusion that the words in question add some further requirement to enable a dealing to escape from the prohibition of s. 44; and the only possible meaning of this nature that can be given to them is that they require the actual contract relating to the transaction to show on the face of it that it is subject to the consent of the Court.

If the foregoing argument is sound, then, if the magic words "subject to the consent of the Court," or words of equivalent effect, happen to have been omitted from a contract, whether by accident, through ignorance or carelessness, or through any other cause, either party can with impunity repudiate his bargain before the ink is dry on his signature; he can go through the form of applying for the Court's consent, and then repudiate; and, if the Court should (rightly or wrongly) deal with the application, and grant its consent, he can still repudiate, for the Court cannot give itself a jurisdiction that is not conferred by the Act. Further comment seems superfluous.

The restriction in question is not necessary to attain the purpose of the Act, which is to control transactions coming within its scope, not to lay a trap for the unwary. Would it not be better for the Legislature to say directly what everybody knows it meant to say—namely, that all such transactions should be subject to the consent of the Court, whether the parties say so in their agreement or not? Alternatively, should not s. 45 be amended by deleting the words "subject to the consent of the Court"?

LAND SALES COURT.

Summary of Judgments.

No. 137.—*In re* T. AND T.

Rural Land—Property without Buildings or Water-supply and Deficient in Fencing—Deductions to be made for such Deficiencies—Proper Allowance for Income from Pigs.

Appeal relating to an area of 97 acres of farm land in the Eltham district which had been taken by the Crown for soldier settlement. The property was without buildings or water supply, and was deficient in fencing. For the purpose of valuation, budgets were prepared both by the Crown and by the claimants on the basis of a single-unit dairy farm, and the Committee, after making allowance for deficiencies, assessed compensation upon a basic value of £3,175.

Against this decision, appeals were lodged both by the claimants and by the Crown. The issues raised on appeal were limited to four matters. The principal issue related to the proper allowance for income from pigs. Subsidiary matters in dispute were as to the proper deductions to be made for deficiencies in buildings, water supply, and fencing.

The Court said: "In assessing revenue from pigs, we find that all the valuers agreed that production of pig meat should be on the basis of one sow to sixteen cows, but the Crown claimed that net income from pigs should be calculated at .75d. for each pound of butterfat (for cheese-factory supply), while the vendors claimed that net income should be calculated at 1d. per pound of butterfat. The question whether .75d. or some other sum should be allowed in the case of dairy farms supplying cheese factories was one of the subjects considered by the Court in *No. 123.—H. to H.*, (1948) 24 N.Z.L.J. 25. Quoting from an unreported decision *In re J. T. Hawke* (Unreported), the Court there said: 'As in the case of labour and management the Court is prepared in appropriate cases to agree to a variation in the standard return from pigs. To justify such a variation, however, it must be proved that the particular farm or the district in which it is situated has special characteristics which justify the expectation that an average efficient farmer will secure more than the average return from pigs in addition to an average production of butterfat.'

"The case for an increase above the usual allowance of .75d per pound was ably argued by Mr. *Hessell*, appearing with Mr. *Burns* for the claimants, but we see no reason to modify in any way the general statement which is quoted above. Mr. *Hessell* presented detailed and voluminous figures in relation to pig production throughout New Zealand since before the adoption of the guaranteed price formula in 1938, but he fairly acknowledged that such figures as were available were so difficult of interpretation as to render them of little value in determining at any particular time the true ratio between the income of an average efficient farmer from pig production and his income from butterfat. The Court is accordingly confirmed in its view that the most reliable assessment of this ratio—and, indeed, the only reliable assessment which has so far been established—is that contained in the guaranteed price formula—namely, that an average farmer should receive 1.54d. from pigs for every pound of butterfat supplied to butter factories, or .75d. for every pound of butterfat supplied for the manufatcure of cheese.

"The general survey presented by Mr. *Hessell* was intended to show a general trend towards increased returns from pigs since the year 1938, and his object was to persuade the Court that it would be reasonable to increase the allowances made in the guaranteed price formula in 1938 when assessing a

productive value as at December, 1942. It is significant, however, that, although from time to time the guaranteed price for butterfat has been increased, the allowances of 1.54d. and .75d. per pound respectively for pig meat have never been varied in the assessment of the price, and even to-day, when the price paid to dairy farmers is substantially greater than in 1942, that price is assessed with the concurrence of the representative of the dairy industry on the basis that an average farmer's net return from pigs has remained constant over the intervening years. The reason for this is that increases in the guaranteed price have been intended merely to cover increases in costs, while the allowances for revenue from pigs were intended to represent net revenue after all costs had been taken care of. We must accordingly hold that the onus remains upon a party claiming more than 1.54d. or .75d., as the case may be, for pigs to justify his claim by proof of a special suitability for pig production either in his particular land or in the district on which it is situated.

"The evidence produced by the present appellants was in part directed to the proof of special suitability in the farm in question and in part to proof that the better class of dairy land in Taranaki enjoys in general a special suitability for pigs. The special advantages claimed for this particular farm were that it is in close proximity to the cheese factory and within some three miles of a bacon factory. Its proximity to the cheese factory was no doubt taken into account in the respective budgets as a factor affecting labour and cartage costs, but we are unable to appreciate that it will substantially affect the net return from pigs in relation to butterfat. The comparative proximity of the farm to a bacon factory may effect some small saving in cartgage costs, but the evidence fails to convince us that any prospective saving will be sufficiently certain or substantial to justify an alteration in the basis of calculating net revenue. The appellants acknowledge that in all other respects this farm is neither better nor worse than the average Taranaki dairy farm, and, accordingly, we are unable to find that it has any characteristics entitling it to more than the normal allowance for pigs.

"The contention that dairy lands in Taranaki have in general a special suitability for pig production appears to be based in the main upon a practice of allowing 1d. per pound instead of .75d. per pound adopted by Taranaki valuers prior to our decision in *No. 123.—H. to H.*, (1948) 24 N.Z.L.J. 25. It is acknowledged by the Crown that such a practice exsited by common consent of the valuers and that in the allocation of capital stock it was customary to allow one sow to sixteen cows. The appellants contend that this apparent concensus of opinion among valuers establishes that 1d. per pound is the correct allowance for Taranaki farms, and that Taranaki must accordingly be deemed to have special advantages over other districts, where .75d. has been allowed. This argument would be entitled to great weight if the evidence established that 1d. per pound had been adopted by Taranaki valuers as the result of a complete examination of the facts, and having due regard to the allowance of .75d. per pound in the guaranteed price formula. The evidence of the valuers called before us satisfied us, however, that the valuers adopted 1d. per pound as a basis without any adequate investigation of actual returns from pig production in Taranaki, and without due consideration of the proper relationship between the returns secured from pigs in Taranaki and that secured by farmers in other parts of New Zealand. The 1d. per pound basis was adopted in the very early days of valuation under the Land Sales Act, and as part of an agreement on a large number of matters on which it was properly deemed desirable that valuers should, if possible, be in general agreement. The valuers called before us were unable to satisfy us that average dairy land in Taranaki has such advantages over similar lands in other parts of New Zealand as to justify an allowance for pigs above that normally made in other dairying districts. Mr. *Hessell* was unable to produce evidence of a specially high average production or of specially high average profits from pig production in the Taranaki district. He admitted, moreover, having sought to secure such evidence, and that the results of his inquiries had been entirely inconclusive, while he had to acknowledge that the proportion of sows to butterfat produced was lower in Taranaki than the New Zealand average. In view of this fact, and in the entire absence of statistics or other evidence to show that pig production in Taranaki is more profitable or more extensive than the average for New Zealand, we are of opinion that the local valuers erred in adopting a figure of 1d. per pound prior to our decision in *No. 123.—H. to H.*, (1948) 24 N.Z.L.J. 25, and we find that the appellants have failed to justify the allowance in respect of Taranaki land generally of more than the usual allowance of .75d. per pound. It follows that the allowance made by the Committee at the rate of .75d. per pound must be confirmed, and the appeal in this regard fails.

"It is convenient to consider next the claim by the Crown that the Committee misdirected itself as to the proper basis of assessment of the amount to be deducted for deficiency in buildings. The 1942 cost of the buildings required but lacking upon the farm was assessed by the Committee at £1,560, and the amount deducted for building deficiency was two-thirds of this amount, or £1,040. From the Chairman's report we gather that the Committee is of opinion that, having regard to recorded decisions of the Court, a deduction of two-thirds of the 1942 cost of new buildings is a reasonable deduction in cases where there are no buildings on the land sold. It is true that the earlier decisions of the Court gave little guide to Committees as to the proportion of the 1942 cost which should be deducted, but in *D. to W.* (Unreported, Blenheim, October 21, 1947) the Court said: 'We take the view that in general where there are no buildings at all the purchaser is entitled to an allowance equal to four-fifths, or thereabouts, of the cost of the necessary buildings in lieu of the two-thirds value which he would be entitled to expect in actual buildings if such were upon the land. This is not intended to be an inflexible rule, and it may be varied for good reason in particular cases.' The reasons for this departure from the two-thirds basis were set out in *No. 88.—In re B.*, (1946) 22 N.Z.L.J. 75, and the statement above quoted represents the Court's considered opinion in the matter. As the present case appears to have no exceptional features justifying a departure from the four-fifths basis of assessment, we are of opinion that the Crown is justified in its contention that the deficiency should have been assessed at four-fifths of £1,560, instead of at two-thirds of that amount.

"We now come to the remaining issues raised by the claimants. which concern deficiencies in water supply and fencing, as to both of which the Crown's figures were adopted by the Committee. The evidence as to fencing deficiency fails to satisfy us that the Crown's assessment was too high, and in this respect, accordingly, the appeal is disallowed. As to water supply, the Crown valuers admitted that the water supply for which they had allowed would be superior to the average found on similar farms, and that a purchaser having the benefit of such a water supply would accordingly enjoy advantages over a purchaser taking over the farm with a normal supply. The installation was estimated to cost £350 as at December, 1942, and the deduction made by the Committee was £292. This sum is greatly in excess of the amount usually deducted where a farm is sold without water supply, and we are of opinion that a deduction of approximately £100 less would have been sufficient in the circumstances. An adjustment to this extent involves a consequential amendment of the budget in respect of maintenance and depreciation, and results in an increase in the basic value of about £200.

"To sum up the position, we find that the claimants' appeal in respect of revenue from pigs and deductions for fencing fails, but on the question of water supply they are entitled to succeed to the extent of approximately £200. The Crown, on the other hand, is entitled to succeed on its appeal in respect of the building deficiency, and to ask, in consequence, for a reduction of £200 or thereabouts in the basic value. In the result, these adjustments substantially offset each other, and we are therefore of opinion that the award of compensation made by the Committee should not be disturbed. Both of the appeals will accordingly be dismissed."

No. 138.—K. to B.

Rural Land—Taking by Crown for Settlement of Ex-Servicemen—Objection—Joint Owners having Interests other than Farming—Owners' Development Work, Ages, and Family Responsibilities considered—Servicemen's Settlement and Land Sales Act, 1943, ss. 23, 26.

Objection by the appellants, as owners of an area of farm land, proposed to be taken by the Crown for the settlement of ex-servicemen, raising interesting questions concerning the rights of joint owners having other interests besides farming in respect of the retention of their farm lands.

The Court said: "Section 23 of the Servicemen's Settlement and Land Sales Act, 1943, as amended by s. 4 of the Amendment Act, 1945, provides that no land shall be taken under Part II of the Act unless, in the opinion of a Land Sales Committee, it is suitable or adaptable for the settlement of discharged servicemen, and that in any case where the owner is himself farming the land for the support of himself and his dependants he shall have the right to retain an area sufficient to support

the average efficient farmer and his dependants, or at his option any smaller area, the area so retained in either case to contain the homestead if the owner so desires. It is further provided that the provision entitling an owner to claim a retention area shall not be applicable in any case where the owner is farming other land sufficient, if properly utilized, to support an average efficient farmer and his dependants. The term 'owner' is defined as meaning the legal owner, or all the legal owners, of the land.

"In addition to his rights above referred to, an owner whose land is sought to be taken by the Crown has a general right of objection to a Land Sales Committee and on appeal to this Court, by virtue of s. 26 of the Land Sales Act, which provides that, after hearing any such objection, the Committee may make an order allowing the objection or disallowing it either conditionally or upon or subject to such conditions (whether as to the date of vesting or as to the area of land to be taken or otherwise) as the Committee thinks fit, but provided that the area of land taken shall not be varied by the inclusion of additional land without the consent of the objector.

"The legal issues in the present case arise from the fact that the land concerned is owned in common by the two appellants, who, in addition to their interest in this and in other farm lands, have a substantial business as sawmillers. It will be necessary at a later stage to refer in more detail to the relevant facts, but it is first desirable to direct our attention to the legal position in general of joint owners of land having other business interests.

"Mr. *North*, for the appellants, contends that, where the land to be taken is held in joint ownership, each owner engaged in farming the land for the support of himself and his dependants has a statutory right by virtue of s. 23 (as amended) to retain an area sufficient for the support of himself and his dependants. He contends further that an owner is entitled to a retention area notwithstanding that he may have other business interests and that his family may not be exclusively supported by his farming operations, and that it is immaterial whether his farming operations be conducted through the agency of share-milkers or by the owner in person. He further contends that, before the right to a retention area can be lost, it must be proved by the Crown that the owner has other land sufficient, in its existing state and with its existing improvements and amenities, to support the owner and his dependants. Finally, Mr. *North*, submits that the Court has an unfettered discretion to give weight to all the circumstances, and to make such order as it may think proper.

"Mr. *Kay*, for the Crown, contests the view that owners in common are entitled to separate retention areas, or that, under s. 23, a retention area is to be determined by reference to the specific needs of the owner and his dependants. He contends that the section is intended to give to an owner or owners coming within its ambit the right to retain an economic unit, being an area sufficient to enable a farmer of average efficiency to support himself and a family of average size. He also contends that, upon the facts, the present appellants were not entitled to retain any part of the land proposed to be taken.

"We are of opinion that the rights of owners to a retention area under s. 23 are entirely distinct from their rights of objection under s. 26. Section 23 as now amended gives to the owner or owners of land proposed to be taken by the Crown a statutory right (provided they come within the ambit of the section) to a retention area as therein provided. We think the right intended to be conferred is limited to the retention of an economic unit, by which is meant an area which, in the hands of an average efficient farmer, would be sufficient to support an average family. An owner within the ambit of the section is entitled to retain an economic unit notwithstanding that he may have no dependants, or less than the average number of dependants, but he is not entitled to more than an economic unit merely because his family responsibilities may be above the average. Section 23 provides, moreover, that the owner must himself be farming the land for the support of himself and his dependants. The section as a whole, however, should be given a beneficial construction, and it would, in our opinion, be improper to interpret it so narrowly as to deprive a farmer of the right to claim a retention area merely because he has other interests or income, or because he farms through the agency of managers, servants, or share-milkers. An owner is entitled to the benefit of s. 23 if he satisfies the Court that in substance he is farming the land and that his farming operations are a material, though not necessarily the only, source of support of himself and his dependants.

"What has just been said relates exclusively to the statutory right of an owner to claim a retention area by virtue of s. 23. The limitations imposed thereby upon the area which an owner may claim as of right to retain do not, in our opinion, limit the powers vested in the Court by s. 26. Upon an objection under s. 26, the Court may impose such conditions, as to the area of land to be taken or otherwise, as it thinks fit. It follows that, while an owner or two or more joint owners are not entitled as of right to more than one economic unit as a retention area under s. 23, it is competent for the Court, on proof of hardship or of other relevant circumstances, to enlarge the area to be retained, or, indeed, to permit the retention of the whole of the land in question where such a course is shown to be justified. In the final result, therefore, we are in agreement with Mr. *North* that the Court's discretion is fettered only to the extent that it must be exercised judicially, and having regard to the purposes, as well as to the specific provisions, of the Land Sales Act.

"The facts in the present case are somewhat unusual, and were traversed in great detail. In substance, however, there was general agreement as to the facts, which may be summarized as follows. The appellants were originally sawmillers, but in or about 1941 they decided to acquire farm land in partnership with a view ultimately to transferring their energies from sawmilling to farming. The appellant Khan has taken no active part in the sawmilling business since 1941, and since that date has devoted himself actively and efficiently to farming the land now under consideration and other lands later to be referred to. He has nine children, and seeks to encourage some at least of his sons to take up farming in due course. The appellant Boreham is still actively engaged in the sawmilling business, but he says, and we see no reason to disbelieve him, that, owing to his age and health, and to the fact that the best areas of bush have been cut out, he is desirous in the near future of going onto the land. Boreham has four children. The eldest son, who is an ex-serviceman, proposes to marry and settle down on part of the partnership lands, and there are two younger boys, who have just left school and may ultimately decide to take up either farming or sawmilling. The appellants have been successful sawmillers, and the whole of their investment in farm lands, which has involved a substantial outlay of capital, has been made possible by their sawmilling ventures. They are financially independent, and could not successfully object to the Crown taking part of their lands upon grounds of financial hardship alone.

"The first farm acquired by the appellants comprised 306 acres at Ngongotaha. This is good heavy dairying land, and at present carries two dairy herds managed by share-milkers. The appellants state that their ultimate intention is to divide this property into two farms, one for Khan and one for Boreham, and, in anticipation of this being done, they have erected houses and outbuildings considerably in excess of the needs of the property while run as a single farm. The appellants then bought an area of 370 acres at Dalbeths Road, some three miles from Ngongotaha. This land was bought in the rough, and a great deal of development work has been done by Mr. Khan personally and under his supervision. The Dalbeth Road property is at present of some value as a run off, but it will be from five to ten years before it will be fully developed. It may then be capable of subdivision into two economic units. At present, however, it must be classed as only partially developed land. The appellants then acquired a third property of 490 acres at Te Matai Road, which is sixteen miles from Ngongotaha, and situated in a district described by a Crown Valuer as a very backward district and bordering upon the bush country. This farm is carrying sheep and a small dairy herd under a share-milker, but it is described by the Crown as being on the edge of the 'sick country,' and in an exceptionally bad district for ragwort, and, therefore, as requiring special treatment by someone with experience in the district.

"The land which is proposed to be taken by the Crown, and which is subject to the present objection, comprises 282 acres out of the Ngongotaha farm. On the area proposed to be taken there are two substantial houses, two cottages, and the whole of the farm buildings, with the exception of the house occupied by Mr. Khan, which the Crown proposes to leave him, with the balance of 24 acres of land. The appellants seek to retain the whole of the 306 acres at Ngongotaha, but have offered to transfer to the Crown the 490 acres at Te Matai Road or the 370 acres at Dalbeth Road, or, as a last resort, both of these areas.

(To be concluded.)

HIS MAJESTY'S JUDGES.

A Layman looks at the New Zealand Bench.

Addressing the Justices' Association in Wellington the other day, the Attorney-General, the Hon. H. G. R. Mason, K.C., said that "in administering the law in a Court the man on the Bench must be a gentleman. If the Bench were churlish to anyone, that was an impediment to the presentation of the case. If a person were not put at his ease to tell his case clearly, then the case was not properly heard, and, therefore, could not be properly judged." I wonder if Mr. Mason has heard of the saying attributed to the late Sir Francis Bell, statesman and leader of the New Zealand Bar: "First, a Judge should be a gentleman; secondly, he should be a man of the world; and if he knows a little law, that will do no harm."

The saying is not to be taken literally. A man is not on his oath in a witticism. Like so many epigrams, this embodies a truth in a wrapping of exaggeration. A Judge is expected to be learned in the law, but character is more important than learning, and nowhere is it more necessary than in the man, Magistrate or Judge, who directs the course of law. It is desirable that every man should be a gentleman and every woman a lady, but in some callings particularly so. These may be described roughly as those which have close contact with the public. A scientist's boorishness won't lessen his efficiency in research, unless he upsets a team by throwing bad manners into the works. But in certain professions, such as the Church, the Law, Medicine, and teaching, where the practitioner is dealing with human beings in matters vital to individual and general interest, the gentlemanly qualities—patience, courtesy, and consideration—are extremely important.

I recall, too, that when the founders of Otago University sought their first professors in Britain, they stipulated, in a long list of qualifications, that they should be "catholic in spirit, irreproachable in moral character"; "gentlemen in all respects—in appearance, in manner, and in feeling"; men of "generous instincts, and of amiable and attractive dispositions." Otago got what it asked for. I don't know whether in the choice of professors now it is specifically set out that they shall be gentlemen, but we may take it the condition is borne in mind.

Judges are the highest embodiment of the principle that distinguishes true democracy from all totalitarian regimes—the reign of law. It is vital to the health of democracy that they should be men of the highest grade, and remain independent. They should be more than lawyers. In an address to Canadian lawyers some months ago, Sir Norman Birkett, of the King's Bench, one of the Judges at the Nuremberg trials, pleaded eloquently for a liberal education for Bar and Bench. "Don't rely too much upon the law books," he said. "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."

Though the only method of removing a Judge, an address by both Houses of Parliament, has never been invoked, the judicial bench in New Zealand has not been quite untouched by scandal. But the judiciary has served the country well. The respect in which it is held has never been seriously threatened. We are deeply indebted to those who in a new land laid the foundations of a legal system on the English model. There was Sir William Martin, our first Chief Justice, who arrived in 1841, and brought to the task of making something where there was nothing, the highest integrity and strongest sense of public service. Like Selwyn, Martin walked great distances in the course of his duties.

Later, there was Christopher William Richmond (appointed a Judge in 1862) of whom it has been written that the independence and purity of the Bench were a passion to him, and (by a political critic) that "no New Zealander has ever yet shone with more intelligonce, more gentleness, or more justice." Later still there was Sir Joshua Williams, a great lawyer, whose reputation went abroad, and a great gentleman. Williams was noted for his consideration not only to counsel but to prisoners. He had the culture which Mr. Justice Birkett holds to be so important. Among other things, he was a life-long student of Dante. If you want a heartening biography to read in these troublous times, I recommend Mr. Downie Stewart's little *Life of Williams—Portrait of a Judge.*

Judges, however, are human. They are drawn from the Bar, and no more than other men do barristers grow into plaster saints. At one time the grave and reverend figure on the Bench may have heard the chimes at midnight and found the habit of silken dalliance not altogether disagreeable wear. He may not be above a joke about his brothers or himself. "Conscious as we are of our own shortcomings," said the Judges in an address to Queen Victoria, upon which Lord Bowen made the suggestion that it should be "conscious as we are of one another's shortcomings." "My Lords, this is an appeal from a judgment of Mr. Justice ———," began counsel in the English Court of Appeal. That Judge was notorious for upset decisions. "Is that the only ground for the appeal?" interposed the President of the Court.

A Judge's is a secure position, invested with dignity and honour, but his daily work is very exacting. In Court he cannot let his attention wander for a moment. He is like a cricket nmpire, but at stake are the liberty (though, in New Zealand, uo longer the life), reputation, and property of citizens. Moreover, in his social contacts and general interests he is restricted. From the freedom he enjoyed at the Bar, he passes into a measure of segregation. "If in walking to Court in the morning," sighed a New Zealand Judge, "I meet and talk with a member of the Bar, someone may interpret this wrongly."

The story goes of another Judge that, taking the train to town of a morning, he travelled in the guard's van to keep himself aloof. I do not vouch for the story, but this Judge may have had in his mind a painful experience of a predecessor, who also used a daily train. This Judge would talk with the manager of a large city business. The day came when the manager crashed in embezzlement, and the Judge had to sentence him. The Bench is not always a bed of ermine.

—CYRANO, in the *Auckland Star.*

LEGAL LITERATURE.

New Books and Publications.

Words and Phrases Judicially Defined, by Sir Roland Burrows, K.C. Supplement, 1947. Supplied in Five Pocket Supplements, for Insertion at End of Each Respective Volume. Whole Work in Five Volumes. London and Wellington: Butterworth & Co. (Aus.) Ltd. Price, per volume (including Supplements), £3 17s. 6d.

This Supplement brings this important work up to date, and it includes all the judgments of the higher Courts in Great Britain and in the Dominions, interpreting, not only the words and phrases supplementary to those appearing in the main volumes, but also a considerable number of new words and phrases which have been judicially interpreted since the appearance of those volumes. It is noticeable that the New Zealand Supreme Court and Court of Appeal have contributed a large share of the material used in the Supplement, thus making it of additional value to New Zealand users of the work. They have not only the main interpretations of their own Courts easily available to them, but they have also a wealth of other interpretations (sometimes of the same word or phrase) by Courts of higher or of co-ordinate jurisdiction throughout the British Commonwealth.

The merits of the main work need no stressing. It has taken its place in the list of necessary works for consultation whenever the judicial interpretation of words or phrases used in statutes, but not defined therein, or in conveyancing documents, is under notice. The new Supplement brings up to date in every respect this five-volume work as a work which gives, verbatim, the judicial definition of each word or phrase under notice. Every known word which has been subject to judicial interpretation down to the publication date of the Supplement has been carefully considered (the New Zealand extracts having been compiled in the Dominion), and all New Zealand Law Reports have been thoroughly considered in preparing them. The arrangement in the Supplement is the same as that in the original volumes, and full cross-references are included.

Introduction to Criminal Law, by Rupert Cross, M.A., B.C.L., and P. Asterley Jones, LL.B. Pp. 322 + xliii. London: Butterworth & Co. (Pub.) Ltd. Price 28s., packing and postage 1s. extra.

The form of this Introduction is similar in arrangement to *Stephen's Digest of Criminal Law*; that is to say, it is arranged in 187 "Articles" printed in large type, each of which is followed by a detailed "Explanation" in smaller type. Its main subdivision comprises the Nature, the Machinery, and the Content of Criminal Law, and Evidence in Criminal Cases. It is easily readable, and contains much in small compass.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Lyrical Side of Divorce.—Proceedings taken by disillusioned war-brides, in the first instance under the Matrimonial Causes (War Marriages) Emergency Regulations, 1946, and later under the 1947 Act, which granted relief but doubled the period of disenchantment, have become relatively commonplace in our Courts. Dashing and flower-laden suitors have proved supine respondents, distance failing to lend any enchantment to the general view. One variant from the usual type came within the notice of Scriblex recently. Stung into activity by service upon him of a petition, notice, and order, he has invoked s. 92 of the Civil Code of the State of California, permitting him, as plaintiff, to charge his wife, as defendant, that she has "wilfully disregarded the solemnity of her marriage vows, has treated plaintiff in a cruel and inhuman manner and has subjected him to a course of cruel treatment and has thereby wrongfully inflicted upon plaintiff grievous bodily injury and grievous mental suffering, humiliation and embarrassment, whereby his health was seriously impaired, his happiness destroyed, and his life rendered so miserable and unendurable that he was forced to cease cohabiting and living with defendant on or about the 10th day of December, 1947." As if to soften the blow, the registered package which holds the summons (sent to the defendant with the greeting of the People of the State of California) is a minor document, described as the defendant's answer to the plaintiff's complaint. Now comes the said defendant, it lyrically proclaims, answering the plaintiff's complaint, admitting, denying and alleging as follows: and, on a more prosaic note, it ends: "wherefore defendant prays that the plaintiff take nothing by his said complaint and that she be hence dismissed with costs."

Lord Thankerton.—Many New Zealand practitioners will learn with regret of the death last month in London of the Rt. Hon. William Watson, P.C., LL.D., Lord Thankerton of Thankerton, in the County of Lanark, senior Lord of Appeal in Ordinary, at the age of seventy-four. Both he and his father, Lord Watson, held the high office of a Lord of Appeal in Ordinary for the long term of nineteen years, the latter from 1880 to 1899, and the former from 1929 (when he was appointed in succession to Lord Shaw) to the date of his death. He gave great service as a member of the Judicial Committee of the Privy Council, his judgments making a particularly valuable contribution to the constitutional law of the Commonwealth and to that relating to the complex problems of India. Among the earlier cases from New Zealand with which he was concerned were *Scales* v. *Young*, (1931) N.Z.P.C.C. 313, in which, at one stage, our licensing laws were described as a "jungle of legislation," and *Aspro, Ltd.* v. *Commissioner of Taxes*, (1932) N.Z.P.C.C. 630, in which the directors of the appellant company had given the respondent a major headache by fixing the fee for their services at about two-thirds of the company's not inconsiderable profits.

Judicial Titles.—A confused "pommie" plaintiff, who the other day addressed a deputy Judge of the Court of Compensation as "my lord," recalls the fact that, although all the High Court Judges of Englany are now entitled to this form of address, it was formerld the exclusive right of the Lord Chancellor, the three "Chiefs," and the puisne Judges of King's Bench, Common Pleas, and Exchequer. Surprisingly enough, the Vice-Chancellor had to content himself with "your Honour." It is recorded that Mr. Sergeant Williams, grandfather of Lord Justice Vaughan Williams, when interrupted during his argument by a question from a puisne Judge, used to reply: "Sir, I will answer your observations after I have replied to 'my lord.'"

Women Jurors.—There was a preponderance of opinion at a Citizens' Forum debate on the air a month or so ago that women's service on the jury should be compulsory in this country. Scriblex has an open mind upon the matter, but cannot help recalling a recent American cartoon of a mixed jury whose verdict is being delivered by a large and determined forewoman. "We find the defendant," she informs the Registrar, "very, very guilty!"

The Merit of Card-playing.—Author of works on criminal law and the law of coroners and author, also of the epoch-making Summary Jurisdiction Act, 1848, Sir John Jervis held the office of Chief Justice of the Common Pleas for six years. His judgments were reported to be "models at once of legal learning, accurate reasoning, masculine sense, and almost faultless language, and the memory he displayed, as well in summing up the details of evidence as in reviewing the cases quoted before him, was quite surprising." Of his worldliness, the following story is told: "A young man of large property had been fleeced on the turf and at cards. A private note-book, with initials for names, and complicated gambling-accounts, was found on one of the prisoners. No one seemed able to make head or tail of it. The Chief Justice looked it over and explained it all to the jury. Then there was a pack of cards which had been pronounced by the London detectives to be a perfectly fair pack. They were examined in Court; everyone thought them to be so. They were handed to the Judge. When the charge began, he went over all the circumstances till he got to the objects found upon the prisoners. 'Gentlemen,' said he, 'I will engage to tell you, without looking at the faces, the name of every card upon this pack.' A strong exclamation of surprise went through the Court. The prisoners looked aghast. He then pointed out that on the backs, which were figured with wreaths of flowers in dotted lines all over, there was a small flower, the number and arrangement of the dots on which designated each card."

Rent Increase.—Howard Brubaker in the *New Yorker* informs us that a Brooklyn Judge has decided that the arrival of a new baby in a flat does not constitute ground for an increase in rent. The Judge holds, he says, that the event is a blessed one for the parents, not for the landlord.

Memo. of Transfer.—Owing to petrol shortage, an elderly English solicitor has purchased a rickshaw to take him to his work. *London Opinion* inquires whether his junior partner is to "draw the conveyance."

PRACTICAL POINTS.

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

1. Land Transfer.—*Mortgage — Mortgagee defunct Building Society—Mortgage paid off—Procedure to clear Title.*

QUESTION: A has sold his land, but a search in the Land Transfer Office discloses that it is subject to a mortgage to a building society. Upon searching in the Companies office, it is discovered that this building society has been dissolved. A has evidence that he paid this mortgage off ten years ago. How can A clear his title so as to give the purchaser an unincumbered title?

ANSWER: Petition the Supreme Court for a vesting order under s. 11 of the Trustee Act, 1908, vesting the mortgage in A: see *In re J. J. Craig's Contract*, [1928] N.Z.L.R. 303, *In re a Mortgage, McDonald to Martin, Ex parte McDonald*, [1933] N.Z.L.R. 602, and *In re H.W.*, [1942] N.Z.L.R. 462, 465.

A can then register the vesting order after stamping it, and can then either discharge the mortgage or apply to the District Land Registrar for a merger. If A has not possession of the outstanding duplicate of the memorandum of mortgage, efforts will have to be made to trace it; and the District Land Registrar will require a statutory declaration as to its loss. X.1.

2. Land Sales.—*Local Bodies Leases—Glasgow Lease Substituted for Existing Lease—Necessity for Consent of Land Sales Court.*

QUESTION: A local body has leased a parcel of land to A for a term of twenty-one years from April 1, 1940. The local body is a leasing authority under the Public Bodies Leases Act, 1908. So that A may obtain a better tenure, it has been arranged by the parties that A should surrender his existing lease and obtain a Glasgow lease for the residue of the term of the existing lease. Will the new lease require the consent of the Land Sales Court?

ANSWER: The consent of the Land Sales Court will be necessary. Section 43 (2) (c) of the Servicemen's Settlement and Land Sales Act, 1943, does not appear applicable, as the case of *Dunedin City Corporation* v. *Commissioner of Stamp Duties*, [1944] N.Z.L.R. 851, appears distinguishable. In that case, the landlord was obliged to put the land up for auction for another lease at the expiration of the lease. Here, the lessee has no right to compel the local body (the lessor) to grant him another lease. The new lease has for its foundation an entirely new contract; it is not compulsory on the landlord and tenant, nor is it at the tenant's option. X.1.

3. Death Duties.—*Gift to a Church—Reservation of Income to Donor—Whether Gift Duty payable.*

QUESTION: My client desires to make a gift of a considerable sum to the building fund of a Church, reserving, however, for his life the income thereof, which he really requires for his continued support. Will such gift be liable to gift and/or death duty? Will it make any difference if the donor survives the date of the gift for three years or more?

ANSWER: If the intended gift is for a Church *outside* New Zealand, it will be liable for both gift and death duty: *Commissioner of Stamp Duties* v. *Perpetual Trustees, Estate and Agency Co. of New Zealand, Ltd.*, [1927] N.Z.L.R. 714. Assuming that the intended gift is for the building fund of a *New Zealand* Church, the gift will be exempt from gift duty: Death Duties Amendment Act, 1923, s. 2 (*a*); *Adams's Law of Death and Gift Duties in New Zealand*, 205.

The property comprised in the gift will be liable to estate duty under s. 5 (1) (*c*) and s. 5 (1) (*j*) of the Death Duties Act, 1921: *Weston* v. *Commissioner of Stamp Duties*, [1945] N.Z.L.R. 183, and *In re Bethell (deceased)*, *Bethell* v. *Commissioner of Stamp Duties*, [1946] N.Z.L.R. 49; unless the donor effectively releases his life interest more than ten years before his death.

No succession duty will be payable: Death Duties Act, 1921, s. 18.

X.1.

POSTSCRIPT.

The Old Old Bailey. Curiosity has occasionally led us into both Courts at the Old Bailey. Nothing is so likely to strike the person who enters them for the first time as the calm indifference with which the proceedings are conducted; every trial seems a mere matter of business. There is a great deal of form, but no compassion; considerable interest, but no sympathy. Take the Old Court for example. There sit the Judges, with whose great dignity everybody is acquainted, and of whom therefore we need say no more. Then, there is the Lord Mayor in the centre, looking as cool as a Lord Mayor *can* look, with an immense bouquet before him, and habited in all the splendour of his office. Then, there are the Sheriffs, who are almost as dignified as the Lord Mayor himself; and the barristers, who are quite dignified enough in their own opinion; and the spectators, who, having paid for their admission, look upon the whole scene as if it were got up especially for their own amusement. Look upon the whole group in the body of the Court—some wholly engrossed in the morning papers, others carelessly conversing in low whispers, and others, again, quietly dozing away an hour—and you can scarcely believe that the result of the trial is a matter of life or death to one wretched being present. But turn your eyes to the dock; watch the prisoner attentively for a few moments; and the fact is before you, in all its painful reality. Mark how restlessly he has been engaged for the last ten minutes, in forming all sorts of fantastic figures with the herbs which are strewed upon the ledge before him; observe the ashy paleness of his face when a particular witness appears, and how he changes his position and wipes his clammy forehead, and feverish hands, when the case for the prosecution is closed, as if it were a relief to him to feel that the jury knew the worst.—Charles Dickens, *Sketches by Boz.*

Reverie on a Legal Relic. There's another: why may not that be the skull of a lawyer? Where be his quiddits now, his quillits, his cases, his tenures, and his tricks? Why does he suffer his rude knave now to knock him about the sconce with a dirty shovel, and will not tell him of his action of battery? H'm! This fellow might be in's time a great buyer of land, with his statutes, his recognizances, his fines, his double vouchers, his recoveries: is this the fine of his fines, and the recovery of his recoveries, to have his fine pate full of fine dirt? Will his vouchers vouch him no more of his purchases, and double ones too, than the length and breadth of a pair of indentures? The very conveyance of his lands will hardly lie in this box; and must the inheritor himself have no more, ha?—Shakespeare: *Hamlet*, Act V, Sc. I.