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THE PRINCIPLES OF NATURAL JUSTICE.

AT the present day, there are many bodies, associations, and the like, of an official, social, or sporting character that touch the lives of citizens at many points. Very often these bodies have domestic tribunals, which have to act in a quasi-judicial manner in determining questions that arise in relation to those with whose interests and conduct they are concerned. The manner in which they reach their conclusions affecting individuals is of general moment. It is always a matter of general interest whether or not, in appropriate cases, the decisions of these bodies or tribunals have been reached fairly, and, in the broadest sense, justly. One test in finding an answer in such circumstances is to inquire whether they have been reached in accordance with the principles of natural justice, especially in those cases where the domestic tribunals holding an inquiry have no statutory or other guide as to the precise manner in which they should function in order to do justice between the parent body and the individual concerned.

This topic arose for consideration in the recent case, *Campbell* v. *Holmes*, [1949] N.Z.L.R. 949, to which we shall refer later. It is our purpose here to give some consideration to the meaning of the term "natural justice," and to indicate briefly how the principles of natural justice are to be applied, and the types of tribunal (using this word in a wide sense) to whose decisions this test properly applies.

I.

There has sometimes been a tendency to criticize the employment of the term "natural justice," and Judges have occasionally deplored its vagueness. In *Local Government Board* v. *Arlidge*, in the Court of Appeal, [1914] 1 K.B. 160, Hamilton, L.J. (as he then was), called it, at p. 199: "an expression sadly lacking in precision," while Lord Shaw, in the House of Lords, [1915] A.C. 120, 138, was even less complimentary, his epithets varying from "harmless" to "vacuous." But, despite these derogatory expressions, "natural justice" is none the less real, and is a phrase which has often been used with effect judicially to express the sense of fairness that is innate in the common law. Its main features can be deduced from the decided cases with reasonable precision; in essence, it means that there should be a fair and full hearing before an impartial Judge: *Leeson* v. *General Council of Medical Education and Registration*, (1889) 43 Ch.D. 366, 383, and per Henn Collins, J., in *Franklin* v. *Minister of Town and Country Planning*, [1947] 1 All E.R. 396.

In *Local Government Board* v. *Arlidge* (*supra*), Lord Shaw of Dunfermline examined the term "natural justice." At p. 138, he said:

> The words "natural justice" occur in arguments and sometimes in judicial pronouncements in such cases. My Lords, when a central administrative board deals with an appeal from a local authority it must do its best to act justly, and to reach just ends by just means. If a statute prescribes the means it must employ them. If it is left without express guidance it must still act honestly and by honest means. In regard to these certain ways and methods of judicial procedure may very likely be imitated; and lawyer-like methods may find especial favour from lawyers. But that the judiciary should presume to impose its own methods on administrative or executive officers is a usurpation. And the assumption that the methods of natural justice are *ex necessitate* those of Courts of justice is wholly unfounded. This is expressly applicable to steps of procedure or forms of pleading. In so far as the term "natural justice" means that a result or process should be just, it is a harmless though it may be a high-sounding expression; in so far as it attempts to reflect the old *jus naturale*, it is a confused and unwarranted transfer into the ethical sphere of a term employed for other distinctions; and, in so far as it is resorted to for other purposes, it is vacuous.

In the course of his judgment in the recent case, *Russell* v. *Duke of Norfolk*, [1949] 1 All E.R. 109, 118, in the Court of Appeal, Tucker, L.J., said that there are, in his view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice, His Lordship added, must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, he did not derive much assistance from the definitions of natural justice which have from time to time been used, but, whatever standard is adopted, it is essential that the person concerned should have a reasonable opportunity of presenting his case.

II.

It follows that it is difficult to lay down any helpful general definition of what constitutes a fair and full hearing, for, as Lord Atkin pointed out in *General Council of Medical Education and Registration of the United Kingdom* v. *Spackman*, [1943] 2 All E.R. 337, 341:

> the procedure which may be very just in deciding whether to close a school or an insanitary house is [not] necessarily right in deciding a charge of infamous conduct against a professional man.

But it seems that the first basic requisite is that the parties affected should have fair, adequate, and sufficient notice of the hearing and of the question to be

decided. This principle is of general application: *cf. Spackman* v. *Plumstead District Board of Works*, (1885) 10 App. Cas. 229.

A second, and perhaps the most important, constituent of a fair hearing is that the tribunal must give " a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view ": *Board of Education* v. *Rice*, [1911] A.C. 179, 182. It is thus improper for the tribunal to receive representations of evidence from one party without disclosing it to the other and inviting a reply: *Stafford* v. *Minister of Health*, [1946] K.B. 621.

Though natural justice requires that a party to a dispute must be allowed to put forward his case, and to meet the case against him, no hard-and-fast rule can be laid down as to the procedure by which the tribunal is to hear the cases of the parties or to inform itself upon the question in issue. A principle can, however, be deduced that a fair hearing implies that the procedure and methods adopted by the tribunal must not manifestly depart from the procedural standard appropriate to the tribunal of its kind.

Thus, the appropriate standard depends upon the nature of the tribunal and of the inquiry; frequently, of course, the standard is prescribed by statute, as in *Campbell* v. *Holmes* (*supra*), or by some domestic regulation such as the rules of a club prescribing the procedure of its committee. It is clearly inappropriate to attempt to apply to one kind of tribunal the procedure of another. In the case of a regular Court of law, for example, a gross violation of the legal rules governing the admissibility of evidence and the onus of proof, or of the form of legal justice, may amount to a departure from natural justice: *Vaithinatha Pillai* v. *King-Emperor*, (1913) L.R. 40 Ind. App. 193, and *Lawrence* v. *The King*, [1933] A.C. 699. Other tribunals which are not Courts of law are, generally speaking, not bound by the laws of evidence, and are under no obligation to conduct their proceedings like a Court of law: *General Council of Medical Education and Registration of the United Kingdom* v. *Spackman* (*supra*). It is thus no violation of natural justice if the tribunal of this kind departs from the disputative procedure of a law Court and bases a decision on its own observation, skill, and knowledge (provided the parties have had an opportunity to be heard); indeed, where an expert is appointed to determine technical matters, it is often expected that he shall use his own expert knowledge rather than receive evidence on them in the same way as a Court of law: *Bristol Corporation* v. *John Aird and Co.*, [1913] A.C. 241, 259, and *Mediterranean and Eastern Export Co., Ltd.* v. *Fortress Fabrics* (*Manchester*), *Ltd.*, [1948] 2 All E.R. 186. It is in order to emphasize that compliance with the rules of evidence and procedure used in Courts of law is not an invariable requisite of natural justice that the term " ' Natural justice ' seems to be used in contrast with any formal or technical rule of law or procedure ": *General Council of Medical Education and Registration of the United Kingdom* v. *Spackman*, [1943] 2 All E.R. 337, 343.

There are similar variations between the standards of different tribunals which are not Courts of law. Thus, the General Medical Council, when determining a charge against a doctor, must, both by its own standing orders and in accordance with the requirements of common sense, hear oral evidence from any witness tendered by a person appearing before it: *General Council of Medical Education and Registration of the United Kingdom* v. *Spackman* (*supra*). On the other hand, a Minister or Government Department may satisfy its obligations to give a party a " hearing " by receiving representations in writing; apart from statute, there is in such a case no obligation to hear him or his witnesses *viva voce*: *Local Government Board* v. *Arlidge* (*supra*). Similarly, a Minister or Government Department must necessarily collect the material upon which the decision is made vicariously, and the decision itself may properly be the product of several minds and opinions (*ibid.*); such conduct on the part of an arbitrator subject to the Arbitration Act, 1908, would amount to misconduct, for he is under a duty to hear and determine the question personally.

The principles of natural justice are not infringed when a person is not condemned unheard by a domestic or other tribunal. For instance, a committee of a club does not conduct a formal trial. It must respect the club's rules, and it must see that an accused person is given fair play; but this, in the opinion of Herdman and Adams, JJ., in *Feilding Club Inc.* v. *Perry*, [1929] N.Z.L.R. 529, 545, it does when it affords a member accused of misconduct an opportunity of answering a charge the particulars of which have been made known to him. Mr. Justice Herdman, in delivering the judgment of himself and Mr. Justice Adams, on pp. 543, 544, said:

> This was the view taken in a South African case, *Johnson* v. *Jockey Club of South Africa* ([[1910] W.L.D.S.Af. 136), cited in *E. and E. Digest* (Vol. 8, p. 510). The plaintiff, a trainer of racehorses, sued the defendant club for £1,000 damages, claiming that the stewards of the club had wrongfully caused him to be warned off all courses under their jurisdiction, whereby he lost the benefit of an unexpired licence as a trainer and of all claims to benefits from the Trainers' and Riders' Benevolent Fund. The plaintiff was subject to the rules and regulations of the Jockey Club and the rules of racing. It was proved that the Jockey Club held an inquiry, and that Johnson was given an opportunity of meeting a charge the particulars of which he well understood. On Johnson's behalf it was contended, as was done in the present case, that he had a right to be present during the whole of the inquiry held by the Jockey Club, and that he was entitled to cross-examine witnesses; but *Mason*, J., who tried the case, rejected the argument. He said, " I do not think this argument is tenable. These are rights which apply in a trial in a Court of law, but I do not know of any rule that makes them applicable at an inquiry of this nature."
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> A search through cases has failed to reveal any authoritative statement of law which requires this Court to interfere because a club member whose conduct has been investigated was denied an opportunity of cross-examining witnesses who testified against him or of listening to witnesses when they gave their evidence. Every case of this kind must, of course, be judged in the light of its special circumstances. It is not for us to formulate a set of rules for the guidance of such institutions as the appellant club, but we are, at any rate, able to say that in this case, throughout its investigation into the conduct of respondent, the committee acted properly.
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> In some of the authorities bearing upon the matter we have to decide, reference is made to what are termed the rules of natural justice. To this phrase Pollock, in his *Law of Torts*, (12th Ed.), has given a meaning. On p. 126 he says: " The rules of natural justice appear to mean, for this purpose, that a man is not removed from office or membership, or otherwise dealt with to his disadvantage, without having fair and sufficient notice of what is alleged against him, and an opportunity of making his defence; and that the decision, whatever it is, must be arrived at in good faith with a view to the common interest of the society or institution concerned. If these conditions be satisfied, a Court of justice will not interfere, not even if it thinks the decision was in fact wrong.

In the same case, Blair, J., at pp. 546, 547, said:

> This Court can interfere with the affairs of a social club only when its conduct of its own affairs transgresses what has been called natural justice, but which might better be called the fundamental rules of justice. This cannot mean

that the inquiry must be conducted according to the procedure of a formal Court. It can mean no more than that the accused person in the circumstances of the case is given a fair and reasonable opportunity to answer the charge. And there might be a case where the circumstances are such that the denial of an opportunity to confront some or all of his accusers may be evidence of want of natural justice.

III.

The second requirement of natural justice—that the judge (using the word in its widest sense) should be impartial—has been thus expressed: "he must act honestly and impartially and not under the dictation of some other person or persons to whom the authority is not given by law. There must be no malversation of any kind": *Spackman* v. *Plumstead District Board of Works*, (1885) 10 App. Cas. 229, 240. Furthermore, appearance is almost as important as reality: "Judges, like Caesar's wife, should be above suspicion": *Leeson* v. *General Council of Medical Education and Registration*, (1889) 43 Ch.D. 366, *per* Bowen, L.J., at p. 385. A number of decisions of the Courts have defined the circumstances in which such an inference of dishonesty, partiality, or dependence on the part of a judge has arisen that it would be contrary to natural justice to require a person to submit to his arbitrament.

The first of these circumstances is where the judge has had an undisclosed direct personal pecuniary interest in one of the parties, or in the subject-matter of the dispute: *Dimes* v. *Grand Junction Canal Proprietors*, (1852) 3 H.L. Cas. 794; 10 E.R. 315. In such circumstances, an irresistible inference of bias arises, and it is immaterial that the judge was not in fact influenced by his interest. An interest as a trustee, however, gives rise to no inference of partiality: *Reg.* v. *Rand*, (1866) L.R. 1 Q.B. 230. It is, of course, open to any party to waive obligation to a judge of whose disqualification on the grounds of interest he knows; in some cases, such a disqualification is removed by statute.

Second, even if the judge has no pecuniary interest in the issue, he will be disqualified if he has so identified himself with one of the parties as to raise a reasonable suspicion of partiality or bias. Thus, persons who have promoted the proceedings against a party, or have so promoted them before some other tribunal, are disqualified. *A fortiori*, a party cannot act as judge: *Arnold* v. *King-Emperor*, [1914] A.C. 644, 650, and *Law* v. *Chartered Institute of Patent Agents*, [1919] 2 Ch. 276. Moreover, a judge will be disqualified if he is the principal witness for one of the parties upon a contentious point: *Bristol Corporation* v. *John Aird and Co.* (*supra*). But a suspicion of bias will not arise merely because the judge holds strong opinions on a topic which will be relevant to the decision, as, for instance, a general animosity against speeding motorists: *Ex parte Wilder*, (1902) 66 J.P. 761; nor if he is merely a member of a body the object of which is to prevent the commission of the offence which is alleged against one of the parties, provided that he has not personally authorized the prosecution: *Leeson's* case (*supra*).

Third, it is the duty of the judge to be independent and not to act so as to give rise to a reasonable suspicion that he is being influenced by a party or by an outsider. Thus, the proceedings of Magistrates have been set aside when they admitted their Clerk to their deliberations and he was acting for one of the parties: *R.* v. *Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256; and see *R.* v. *Bodmin Justices, Ex parte McEwen*, [1947] 1 All E.R. 109. The mere fact that the judge is a servant of one of the parties gives rise to no presumption that he will not act independently: *Spackman* v. *Plumstead District Board of Works* (*supra*); but, if he, in fact, allows himself to be instructed by his master in regard to his judicial duties, he forfeits his independence, as in the case of *Hickman* scale and approximating closely to the regular Courts, that, in regard to the inquiry and the consideration of deceptive inquiry, such as that considered in the *Franklin and Co.* v. *Roberts*, [1913] A.C. 229, where an architect who was placed by a building contract in the position of an arbitrator allowed his judgment to be influenced by the building owners to delay the issue of his certificates.

Further consideration will be given to the application of the principles of natural justice in the next issue.

SUMMARY OF RECENT LAW.

ATTACHMENT.

Attachment of Debts and the Empty Till. *99 Law Journal*, 591.

BRITISH NATIONALITY AND NEW ZEALAND CITIZENSHIP.

British Nationality and New Zealand Citizenship Regulations, 1949, Amendment No. 1 (Serial No. 1949/154). Regulation 4 revoked, and new Reg. 4 substituted. Regulation 6A added.

BUILDING.

Building Construction Control Notice No. 30 (Serial No. 1949/166). As from November 8, 1949, imposing controls on the use of galvanized steel or iron sheets, ridging, &c., aluminium sheets, &c.

CHARITY.

Charitable Gifts for Religious Purposes. *23 Australian Law Journal*, 259.

COAL-MINES.

Coal Valuation Regulations, 1949, Amendment No. 1 (Serial No. 1949/151). Regulations 12 and 13 (2) amended.

CONVEYANCING.

Benefit of Covenants Running with the Land. *99 Law Journal*, 563.

CRIMINAL LAW.

Absentees and Deserters from the Armed Forces. (Alan Garfitt.) *113 Justice of the Peace Journal*, 552.

Recognizance—Inferences against and in favour of Surety—Test to be applied—Satisfaction entered for Full Amount of Bail—Crown Suits Act, 1908, s. 7. In exercising its jurisdiction under s. 7 of the Crown Suits Act, 1908, the Court should have regard to the test that the recognizance should not be estreated if it is satisfied that the surety has taken all reasonable steps to secure the attendance of the defendant. This practical test must, however, be governed by the considerations set forth in s. 7—namely, whether, "according to equity and good conscience and the real merits and justice of the case" as between the defendant and the Crown, the defendant ought not to be required to satisfy the judgment. (*R.* v. *Sangiovanni*, (1904) 68 J.P. 55, *R.* v. *Ingram and Pearcey*, Unreported; Auckland; May, 1946; Callan, J., and *In re Fox and Fox*, [1949] N.Z.L.R. 722, referred to.) *R.* v. *Michael.* (Auckland. October 17, 1949. Smith, J.)

DESTITUTE PERSONS.

Children—Custody—Maintenance Order in force in respect of Child—Custody given by Decree Absolute to Mother, since Deceased, with Leave to Father to Apply—No Declaration that Father Unfit Person to have Custody—Application by Maintenance Officer for Order giving Maternal Grandmother Exclusive Custody—Applica-

tion Opposed by Father—Father entitled as of Right to Custody upon Mother's Death—Destitute Persons Act, 1910, s. 32—Infants Act, 1908, s. 8—Guardianship of Infants Act, 1926, s. 4. The effect of s. 8 of the Infants Act, 1908, and s. 4 of the Guardianship of Infants Act, 1926, is that, upon the death of a parent who had been granted the custody of a child by a decree absolute, the surviving parent becomes entitled as of right to the custody and guardianship of the child, unless the decree has declared that such surviving parent is an unfit person to have custody of the child. This right will be disturbed only if it is in the best interests of the child. The reservation in the decree absolute expressly giving the father leave to apply for custody had not been settled finally or upon its merits. Accordingly, an application by the Maintenance Officer for an order under s. 32 of the Destitute Persons Act, 1910, giving to the maternal grandmother exclusive custody of a child in respect of whom a maintenance order was in force was refused. *In re C. (An Infant).* (Hamilton. October 14, 1949. Paterson, S.M.)

DIVORCE AND MATRIMONIAL CAUSES.

Separation (as a Ground for Divorce)—Husband's Petition—Failure by Petitioner to pay Maintenance under Deed of Separation—Such Failure Matter for Court's Consideration in exercising Discretion—Divorce and Matrimonial Causes Act, 1928, s. 18—Practice—Appeal from Exercise of Judge's Discretion refusing Decree—Principles Applicable—Circumstances in which Court of Appeal entitled to disturb Decision. Where there is an appeal from the exercise of a Judge's discretion under s. 18 of the Divorce and Matrimonial Causes Act, 1928, the question is, not what order the Court of Appeal would have made if it had to decide the point, but whether, in dismissing the petition and finding in favour of the respondent, the learned Judge in the Court below was guilty of a wrong exercise of his judicial discretion; whether he acted on a wrong principle of law; whether he took into account matters which were irrelevant; whether he had left out of account matters which were relevant; or whether his decision was calculated to work a manifest injustice, or was otherwise plainly wrong. Only in those cases is the Court entitled to disturb his decision. (*Charles Osenton and Co.* v. *Johnston*, [1942] A.C. 130; [1941] 2 All E.R. 245, *Blunt* v. *Blunt*, [1942] 2 All E.R. 613, and *In re Taupo Totara Timber Co., Ltd.*, [1943] N.Z.L.R. 557, applied.) (*Whittaker* v. *The King*, (1928) 41 C.L.R. 230, *Roxburgh* v. *Roxburgh*, [1930] G.L.R. 34, and *Christen* v. *Goodacre and Ministry of Health*, [1949] W.N. 234, referred to.) *So held, per totam curiam*, on the question whether the exercise of discretion by the learned Judge in the Court below under s. 18 could be reviewed by the Court of Appeal. On a petition by a husband for divorce on the ground set out in s. 10 (*i*) of the Divorce and Matrimonial Causes Act, 1928, any failure by the petitioner to pay the maintenance payable by him under the agreement for separation on which he relies can properly be considered by the Court for the purpose of determining how the discretion conferred upon the Court by s. 18 of the statute should be exercised. *So held*, by the Court of Appeal (*O'Leary*, C.J., and *Finlay* and *Hutchison*, JJ., *Gresson* and *Hay*, JJ., dissenting) dismissing an appeal against the judgment of *Fair*, J., refusing a decree to the husband petitioner. Per *Finlay*, J., 1. That the principles which are applicable, in terms of the opinion expressed, though *obiter*, by the Court of Appeal in 1921 in *Mason* v. *Mason*, [1921] N.Z.L.R. 955, and the reason given for that opinion by *Salmond*, J., in *Lodder* v. *Lodder*, [1921] N.Z.L.R. 876, and upon which the Courts have so long acted, are: (*a*) performance of an obligation to pay maintenance under a deed of separation is a fit subject for consideration by the Court when determining, in proceedings based upon the deed, how the discretion vested in it should be exercised; (*b*) the discretion should be exercised against a petitioning husband who has wilfully and persistently disregarded his obligations under the agreement for separation on which he relies; and (*c*) in the exercise of its discretion, the Court must weigh the private benefit to the parties against the possibility of public mischief. 2. That those principles are unimpaired by legislation subsequent to their enunciation—namely, s. 2 (1) of the Divorce and Matrimonial Causes Amendment Act, 1921-22, now re-enacted in s. 18 of the Divorce and Matrimonial Causes Act, 1928—except that the statutory limitation first imposed on the right of an erring spouse to divorce by s. 4 of the Divorce and Matrimonial Causes Amendment Act, 1921-22, may, in some respects, invite a more stringent exercise of discretion against petitioner in default. (*Blunt* v. *Blunt*, [1942] 2 All E.R. 613, and *Roxburgh* v. *Roxburgh*, [1930] G.L.R. 34, referred to.) Per *Hutchison*, J., That the observations of the Court of Appeal in *Mason* v. *Mason*, [1921] N.Z.L.R. 955, as to the Court's exercise of the statutory discretion conferred by s. 4 of the Divorce and Matrimonial Causes Amendment Act, 1921-22, must be read in the light of s. 18 of the Divorce and Matrimonial Causes Act, 1928, which has made it clear that the point of view of the respondent is now of greater weight than it was under the legislation that existed at the time when *Mason* v. *Mason*, [1921] N.Z.L.R. 955, was heard. (*Bennett* v. *Bennett*, [1936] N.Z.L.R. 872, followed.) Per *Gresson* and *Hay*, JJ., That there is nothing in s. 18 of the Divorce and Matrimonial Causes Act, 1928, to indicate that the discretion of the Court must be exercised against a petitioner who has himself been guilty of matrimonial misconduct, or that, where there has been such misconduct, the petitioner must show special circumstances. (*Dobbs* v. *Dobbs*, [1921] N.Z.L.R. 562, *Hargreaves* v. *Hargreaves*, [1921] N.Z.L.R. 864, *Holloway* v. *Holloway*, [1921] N.Z.L.R. 920, and *Southee* v. *Southee*, [1947] N.Z.L.R. 378, referred to.) Appeal from the judgment of *Fair*, J., dismissed. *Davis* v. *Davis*. (S.C. Auckland. April 11, 1949. Fair, J. C.A. Wellington. September 2, 1949. O'Leary, C.J., Finlay, Gresson, Hutchison, Hay, JJ.)

The Initiation and Carrying through of Divorce Proceedings. (P. E. Joske, K.C.) *2 Australian Conveyancer and Solicitors Journal*, 129.

ELECTORAL.

Electoral (Postal Voting) Regulations, 1949 (Serial No. 1949/155).

Electoral Regulations, 1928, Amendment No. 4 (Serial No. 1949/165). Forms Nos. 6, 7, and 8 in the Schedule revoked and new Forms substituted. Regulation 6 amended.

GIFT.

Transfer of Leasehold—Memorandum of Transfer executed by Donor and Donee—Same Solicitor acting for Both Parties—Constructive Delivery of Transfer and Lease to Donee—Subsequent Death of Donor before Registration of Lease—Complete Gift at Time of Donor's Death. In August, 1946, a father, since deceased, instructed his solicitor to transfer a lease held by him to his son by way of gift. After some delay, due to discussions with the Valuation Department and with the lessor relative to the lessor's consent to the transfer, the deceased instructed his solicitor to defer completing the gift until March 19, 1947, a rent day. On March 3, 1947, he told his solicitor to proceed, and the latter prepared a memorandum of transfer of the lease to the son by way of gift; and, on May 12, the deceased executed the memorandum of transfer and completed the gift statement required by the Death Duties Act, 1921. On May 19, the son, as transferee, executed the memorandum of transfer. The solicitor, at that time and subsequently, held the lease on behalf of the deceased for safe custody. On May 21, 1947, the solicitor sent the transfer for endorsement of the lessor's consent, and, on this being obtained, he sent it to the Stamp Duties Department for assessment of duty. The son, meanwhile, went into possession of the leasehold property, paid the rates, and appeared as lessee in the lessor's records and in the records of the local rating authorities. Objections were made to the special valuation of the lessee's interest ordered by the Stamp Duties Department, and there were various delays regarding the assessment of gift duty, and on account of discussions with the son as to purchasing the stock subject to the deceased's liability thereon. On March 12, 1948, the solicitor wrote to the son saying that the father wanted to go ahead with the transfer of the leasehold, subject to the son's paying the gift duty relative to that transaction and his assuming the liability on the stock; and that, if the son were satisfied to proceed on those lines, he (the solicitor) would "go straight ahead." On April 8, the son told the solicitor that the proposition as outlined in the letter was satisfactory to him, and he was prepared to go ahead in accordance with the letter. The deceased died on April 9. An appeal by the deceased against the assessment of gift duty was pending on that date. The son claimed against the executors and trustees of the deceased's estate, and sought a declaration that he was entitled to be registered as lessee of the property the subject of the gift, and an order directing them to hand over the lease to him and to do all such other acts and things as might be necessary to enable him to complete his title as lessee. *Held*, 1. That it was the intention of the deceased to make the son a gift of the leasehold, and this was at all times disconnected from the taking over of the stock; and, if the memorandum of transfer and the lease had been delivered by the deceased to the donee, or to someone on his behalf, the deceased had done everything which, according to the nature of the property comprised in the gift, was necessary to be done in order to transfer the property and render the gift binding on him. (*Milroy* v. *Lord*, (1862) 4 DeG. F. & J. 264; 45 E.R. 1185, and *Scoones* v. *Galvin and Public Trustee*, [1934] N.Z.L.R. 1004, followed.) 2. That, on the facts, there was a constructive delivery of the memorandum of transfer and the lease to the

solicitor, who, from April 8, 1948, was acting for both the deceased and his son with respect to the gift transaction. (*Wadsworth* v. *Wadsworth*, [1933] N.Z.L.R. 1336, distinguished.) 3. That the appeal by the deceased against the assessment of gift duty pending on April 8, 1948, would necessarily lapse on the solicitor's paying the gift duty as arranged, without any action on the part of the deceased. 4. That the gift of the leasehold to the son was complete at the time of the deceased's death, and the son was entitled to the declaration and order sought by him. *Kennedy* v. *Tickner*. (S.C. Palmerston North. August 31, 1949. Hutchison, J.)

INCOME-TAX.

Damages and Income-tax. *99 Law Journal*, 592.

LAND VALUATION.

Land Valuation Court Rules, 1949, Amendment No. 1 (Serial No. 1949/160), amending Form No. 2 in the Schedule to the Land Valuation Court Rules, 1949, and substituting the words:

"Attached hereto is a statement showing—

"(*a*) The class of farming carried on for past three seasons:

"(*b*) Stock carried during past three seasons:

"(*c*) Actual production during past three seasons."

LANDLORD AND TENANT.

National Expenditure Adjustment—Relief from Reduction of 20 per cent. of Rent—Contract made in 1927 for Lease to be effective from 1929—Rent under Such Lease subject to Reduction—Calculation of Return from Property—Land exempted, as Charitable Trust, from Land-tax—Inclusion in Such Calculation of Land-tax notionally payable—Relief from Reduction granted—National Expenditure Adjustment Act, 1932, s. 32 (1). The contract for a lease (registered No. 9208) was entered into in February, 1928, although it was not to take effect until the year 1949. Another lease (which was effective as from 1929 and was entered into at the time when the contract for lease 9208 was entered into in February, 1928) had come within the provisions of Part III of the National Expenditure Adjustment Act, 1932, and the reduction of 20 per cent. had been made in the rent reserved thereby. On an application for an order determining whether the reduction in rent provided by that statute applied to lease No. 9208, and, if it should be held to be subject to the statute, for relief against the reduction on the ground that such reduction would impose undue hardship on the persons entitled to the rent, *Held*, 1. That, when the National Expenditure Adjustment Act, 1932, came into force, there were, in fact, two contracts which became subject to its terms, one having effect from 1929, and lease No. 9208, which had effect from 1949 onward, and the reduction of rent required by the statute applied to that lease. (*Auckland Harbour Board* v. *Northern Roller Milling Co., Ltd.*, [1946] N.Z.L.R. 701 applied.) 2. That the fact that land-tax was not payable, because the land was subject to a charitable trust, is not a consideration that should be taken into account on behalf of the lessees, as it was a benefit to the charitable trust as such; but that, in estimating the fairness to the lessor of the return from the property, the notional amount of the land-tax, had it been payable, should be included. 3. That, for the reasons given in the judgment, the rental payable under the lease No. 9208 was fair, and should prevail, notwithstanding the reduction of 20 per cent. which would apply were relief not allowed. 4. That relief from the reduction of 20 per cent. should be granted to the lessor to the full extent thereof, as from the commencement of the term of the lease. *Public Trustee* v. *Godby*. (S.C. Christchurch. Northcroft, J.)

MAGISTRATES' COURT.

Third-party Notice—Application for Leave to issue and serve Notice on Proposed Third Party—Enlargement of Time sought—Proposed Third Party appearing to oppose—Objection to his appearing and being heard—Action part heard when Application made—Refusal on Ground of Unfairness to Proposed Third Party—Magistrates' Courts Rules, 1948, r. 138. A proposed third party is entitled to appear and be heard on applications to enlarge the time within which to give notice of application to issue and serve a third-party notice, and for leave to issue and serve it upon him. (*Zimmerman* v. *The King*, [1927] N.Z.L.R. 114, and *Mitchell* v. *Walpole and Paterson, Ltd.*, [1945] N.Z.L.R. 565, referred to.) In the present case, no order had been made, or applied for, for the delivery of any statement of defence, but the pleadings had been closed and the case had been part heard. The proposed third party had had no opportunity of cross-examining the witnesses who had given evidence before leave was sought to issue a third-party notice and serve it upon him. *Held*, That the applications for enlargement of time and for leave to issue and serve the third-party notice should be refused, as it would be unjust to enlarge the time within which a third-party notice might be filed and served. (*Martin* v. *Russell*, (1914) 17 G.L.R. 94, applied.) *Findlay* v. *Bellve*. (Marton. October 7, 1949. Coleman, S.M.)

PRACTICE.

Action on Guarantee—Counterclaim by Plaintiff—Submission at Close of Defendant's Case of No Case to Answer—Whether Plaintiff should be put to Election or not—Discretion of Judge—Principal and Surety—Non-disclosure of Material Facts—Whether Contract of Suretyship thereby invalidated. It is now established as a general rule of practice in civil actions that a decision will not be given on a submission that there is no case to answer unless the party making the submission announces his intention not to call evidence. This rule of practice applies whether the trial is before a Judge and jury or before a Judge alone; but it is not an inflexible rule. A contract of suretyship is not a contract which is invalidated by mere non-disclosure of any material fact and, *semble*, it is now well settled that a non-disclosure to avoid a guarantee must amount to misrepresentation. The effect of the dissolution of a company upon the liability of a person who has become surety for a debt of the company considered. *Union Bank of Australia, Ltd.* v. *Puddy*, [1949] V.L.R. 242.

PRINCIPAL AND AGENT.

Commission—Agent instructed to obtain £7,000 net—Sale at less than £7,000—Special Employment not carried out—Failure of Claim for Commission. An estate agent, on receiving permission to bring a buyer to inspect a business, was told by his principal: "I want £7,000 net." The agent was the effective cause of a sale, which subsequently took place at a lower price than £7,000. *Held* (*Dean*, J., dissenting), That having regard to the agent's instructions, commission was payable to him only so far as payment would still leave £7,000 in his principal's hands. *Sanders* v. *Joseph*, [1949] V.L.R. 235 (F.C.).

TENANCY.

Front-of-the-House Rights—Contract for Use of Stall in Theatre for Sale of Sweets therein—Construction—Licence not Tenancy—Economic Stabilization Emergency Regulations, 1942 (Serial Nos. 1942/335, 1946/184), Reg. 21B (1). In 1931, the appellants let to the respondent, without any agreement as to the duration of the tenancy, a shop in the vicinity of the appellants' theatre, and granted to her the exclusive right to sell ice-cream and confectionery in the theatre, which was effected by sending in boys with trays. The arrangement was a verbal one; the respondent was tenant of the shop at £3 10s. per week, and she paid £2 per week for the sweets rights. In June, 1942, the appellant company constructed a stall in a passage within the theatre premises. The respondent, who occupied the stall under a verbal contract, had the only key to the Yale lock giving access to the stall. In the Supreme Court, the respondent claimed an injunction requiring the present appellants to prohibit and to cease the sale of confectionery, &c., in the theatre by persons other than the respondent. On appeal from the order granting the respondent the injunction sought, *Held*, 1. That the true intention of the parties and the nature of the resulting contract between the appellants and the respondent with respect to the refreshment stall in the theatre were that the respondent was to enjoy the amplified selling-rights in the theatre which the stall would make possible, as the respondent's occupancy of the stall was appendant to the sweets rights, so that, upon a construction of the whole contract, the use of the stall as a means of giving effect to such amplification was a right of user only, and, therefore, a licence, and not a lease; and, consequently, the respondent was not protected by the provisions of Part III of the Economic Stabilization Emergency Regulations, 1942. (*Edwardes* v. *Barrington*, (1901) 85 L.T. 650, followed.) (*Bartulovich* v. *John Fuller and Sons, Ltd.*, [1947] N.Z.L.R. 427, and *Joel* v. *International Circus and Christmas Fair*, (1920) 124 L.T. 459, distinguished.) (*Morrish* v. *Hall*, (1863) 8 L.T. 697, *Holmes* v. *Eastern Counties Railway Co.*, (1857) 3 K. & J. 675; 69 E.R. 1280, *Waimiha Sawmilling Co., Ltd.* v. *Howe*, [1920] N.Z.L.R. 681, and *Clore* v. *Theatrical Properties, Ltd., and Westby and Co., Ltd.*, [1936] 3 All E.R. 483, referred to.) 2. That the respondent's answer to the questions asked by the learned Judge left unimpaired the significance of her evidence in examination-in-chief that it was because she had the selling-rights that she would "naturally take over the stall." 3. That the possession by the respondent of the sole key to the stall was no evidence of a tenancy, but was susceptible of satisfactory explanation. *So held* by the Court of Appeal (*O'Leary*, C.J., *Finlay*, *Hutchison*, and *Hay*, JJ.), allowing an appeal from the judgment of *Gresson*, J. *John Fuller and Sons*,

Ltd. v. *Brooks.* (C.A. Wellington. September 2, 1949. O'Leary, C.J., Finlay, Hutchison, Hay, JJ.)

Possession — Dwellinghouse — Landlord receiving Age-benefit under Social Security Legislation—Dwellinghouse owned by him for Two Years preceding Claim for Possession—Proof of Alternative Accommodation not required—Onus on Tenant to prove Greater Hardship—Tenancy Act, 1948, ss. 24 (1) (g) (2), 25 (1). A landlord who reasonably required a dwellinghouse for his own occupation was in receipt of an age-benefit under the Social Security Act, 1938; and he had owned the dwellinghouse for upwards of two years immediately preceding the date of the claim for possession. The landlord was not required to prove that suitable accommodation would be available to the tenants. *Held*, That, under s. 24 (2) of the Tenancy Act, 1948, the onus was on the tenants to prove that their hardship, if an order for possession were made, would exceed that of the landlord or any other person, if the order were refused. *Nisbett* v. *Morrow et Ux.* (S.C. Gisborne. February 23, 1949. O'Leary, C.J.)

TRANSPORT.

Transport (Auckland Harbour-ferry Services) Order, 1949 (Serial No. 1949/168), declaring the Auckland Harbour to be a harbour-ferry service district, and specifying the harbour-ferry services subject to Part VI of the Transport Act, 1949.

Transport Goods-service Districts Order, 1949 (Serial No. 1949/169), specifying the Licensing Authorities for the goods-service districts.

VENDOR AND PURCHASER.

Options. (L. A. Harris.) *2 Australian Conveyancer and Solicitors Journal*, 144.

WILL.

Construction—Bequest of "any jewellery and all articles of personal use or ornament"—Piano and Interest in Motor-car not included in Bequest—"Personal use or ornament." A testatrix, by her will, made a bequest in the following words: "I give and bequeath free of duty any jewellery and all articles of personal use or ornament unto my daughter." On an originating summons to determine whether the piano owned by the testatrix, and her half-interest in a motor-car, or either of these items, passed under the bequest, or formed part of the residuary bequest contained in the will, *Held*, That the piano and the testatrix's share in the motor-car did not pass under the bequest of "articles of personal use," which bore some due relation to the jewellery and articles of personal adornment with which she associated them in the context of the bequest. (*Northey* v. *Paxton*, (1888) 60 L.T. 30, followed.) (*Willis* v. *Curtois*, (1838) 1 Beav. 189; 48 E.R. 911, and *Seale-Hayne* v. *Jodrell*, [1891] A.C. 304, applied.) (*Bloyce* v. *Hodson*, (1903) 20 N.S.W. W.N. 81, *In re McLuckie, Perpetual Executors and Trustees Association of Australia, Ltd.* v. *Honeycombe*, [1943] V.L.R. 137, *McCorquodale* v. *Watson*, (1919) 36 N.S.W. W.N. 78, and *In re White, White* v. *White*, [1916] 1 Ch. 172, distinguished.) *In re McFetridge, Speakman* v. *McFetridge.* (S.C. Auckland. October 14, 1949. Finlay, J.)

WORKERS' COMPENSATION.

Charging Order and Receiving Order under Destitute Persons Act, 1910—Charge on Moneys payable under Workers' Compensation Act, 1922—Such Charging Order and Consequent Receivership Order not maintainable—Workers' Compensation Act, 1922, s. 60. Section 60 of the Workers' Compensation Act, 1922, is a complete prohibition against the charging, for any purpose, of moneys payable under that statute. (*In re McMahon* (*A Bankrupt*), [1932] N.Z.L.R. 1196, applied.) Consequently, a charging order under the Destitute Persons Act, 1910 (whereby maintenance moneys were charged upon moneys payable under the Workers' Compensation Act, 1922, to the defendant in the maintenance proceeding), and a receivership order pursuant to it, were discharged. *Re Howley, Ex parte State Fire Insurance General Manager.* (Hamilton. October 7, 1949. Paterson, S.M.)

NOTICE TO QUIT IN PERIODIC LEASES.

A Recent Important Statutory Amendment.

By E. C. Adams, LL.M.

The Statutes Amendment Act, 1949, consists of sixty-two sections, dealing with many diverse topics, from damage to workers' teeth to the exclusion of undesirable immigrants. But the only section dealing with a substantive rule of real property law is s. 48, amending s. 16 of the Property Law Act, 1908.

Before the recent amendment, s. 16 of the Property Law Act, 1908, read as follows:

> No tenancy from year to year shall be created or implied by payment of rent; and if there is a tenancy and no agreement as to its duration, then such tenancy shall be deemed to be a tenancy determinable at the will of either of the parties by one month's notice in writing.

As a result of the amendment effected by s. 48 of the Statutes Amendment Act, 1949, s. 16 now reads as follows:

> No tenancy from year to year shall be created or implied by payment of rent; and if there is a tenancy it shall be deemed *in the absence of proof to the contrary* to be a tenancy determinable at the will of either of the parties by one month's notice in writing.

The amendment, therefore, expresses where the *onus probandi* lies. The burden of proof, therefore, will lie, not on the party who sets up s. 16 of the Property Law Act, 1908, but on the party who alleges that the tenancy is not one under s. 16. The law in this respect has been made more certain, and, in conveyancing matters, certainty is the main desideratum.

Why was the amendment necessary? It was necessary because of the rather surprising ruling of the Supreme Court in *Hodge* v. *Premier Motors, Ltd.*, [1946] N.Z.L.R. 778, which, if allowed to stand, would have considerably weakened in practice the intended beneficial effect of s. 16. The amendment was necessary also because the rule in *Hodge's* case had already been abrogated as to actions in the Magistrates' Court, and, therefore, there was a real probability that the Supreme Court would have followed the ruling, whereas the Magistrates' Court had been forbidden by the Legislature to follow it. Thus, the amendment also secures uniformity of administration, which is another desideratum of real property law. Subsection 2 of s. 48 of the Statutes Amendment Act, 1949, reads as follows:

> The Magistrates Courts Act, 1947, is hereby amended as follows:—
>
> (*a*) By repealing subsection two of section thirty-one:
>
> (*b*) By omitting from subsection one of section thirty-two the words "A tenant holding land on any tenancy shall, for the purposes of this section, be deemed to be holding the land on a monthly tenancy unless he proves that there is an agreement for a tenancy of some other duration."

What was the intended beneficial effect of s. 16 of the Property Law Act, 1908, and its statutory predecessors? What was the above-mentioned ruling in *Hodge* v. *Premier Motors, Ltd.* (*supra*)?

In *Sewell* v. *Donald and Sons, Ltd.*, [1917] N.Z.L.R. 760, Chapman, J., said, at p. 765:

> Disputes had arisen from a very early date as to the effect of the first Conveyancing Ordinance on the tenure of persons

holding land under irregular agreements: *Young* v. *McKinnon* (Mac. 164). In the course of time the Legislature decided to put an end as far as was reasonable to such disputes by fixing the tenure of a person who had no fixed agreement as to its duration.

And in *Tod* v. *McGrail*, (1899) 18 N.Z.L.R. 568, 572, Edwards, J., said:

> It appears to me, however, that the object of the statute was to abolish all tenancies by implication of the law save that created by the statute itself, and to substitute one definite uniform rule for the determination of the nature of all indefinite tenancies, for the more difficult and complicated rules which prevail at common law.

And what was the ruling in *Hodge* v. *Premier Motors, Ltd.*? It was that the onus of proving that there was no agreement as to the duration of a tenancy lay upon the person setting up the statute. Thus, according to this ruling, in the case of a notice by the lessor to quit, the lessor had to prove that there was no agreement as to the duration of the tenancy; in such a case, it was not for the lessee to prove that there was an agreement as to its duration. And why should a landlord giving a notice to quit in a periodic lease desire to set up s. 16 of the Property Law Act, 1908? It is for this reason. With regard to a tenancy coming within the operation of s. 16 of the Property Law Act, 1908, a calendar month's notice may be given at any time, and, unlike a notice under a periodic lease not coming within the statute, *its validity is not affected if the notice does not expire at the end of a periodic period from the commencement of the tenancy*: *Heron* v. *Yates*, (1911) 31 N.Z.L.R. 197.

Therefore, as amended by s. 48 of the Statutes Amendment Act, 1949, s. 16 of the Property Law Act, 1908, is really a rule of evidence; it creates a legal *presumption* that a tenancy comes within the section, unless it can affirmatively be proved otherwise. But, like all presumptions, it may be rebutted by evidence to the contrary. As to this evidence to the contrary, it is not necessary that it should be express. This evidence may be inferred from the circumstances; I suppose the criminal lawyer would call it circumstantial evidence: *Wellington Rugby Football Union (Inc.)* v. *Nathan*, [1946] N.Z.L.R. 725. And in *Ormond* v. *Portas*, [1922] N.Z.L.R. 570, Reed, J., held that s. 16 cannot be interpreted so as to have the effect that, in the mere absence of a deed rendering a lease valid at law, a lease must be deemed to be determinable upon the will of the parties. Therefore, the evidence to the contrary may be merely oral. Nevertheless, the burden of proving that s. 16 does not apply will not be a light one where there is no written instrument evidencing or creating the tenancy.

In conclusion, it may be pointed out that s. 16 of the Property Law Act, 1908, does not apply to a tenancy of Maori land: *McGregor* v. *Hartwell*, (1912) 32 N.Z.L.R. 184, 186. Nor does it apply to a lease by the Public Trustee.

BREACH OF CONTRACT.

Light on Hadley v. Baxendale.

By J. GLASGOW.

The two rules in *Hadley* v. *Baxendale*, (1854) 9 Ex. 341, 354; 156 E.R. 145, 151, are given in Baron Alderson's judgment as follows:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally—*i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

The rules are clear and reasonable; the difficulty, of course, lies in applying them to any particular facts.

Generations of law students (and possibly some lawyers of riper years) must have been puzzled by the fact that it was the first, and not the second, rule that was applied in *Hadley* v. *Baxendale*, for both the headnote and the statement of facts (*ibid.*, 344; 147) state that the defendants' clerk was told that the mill was stopped and that the shaft must be sent immediately, and, when the shaft was taken by the defendants' clerk, he was told that a special entry, if required, should be made to hasten its delivery. In the face of this, how could it be said that the parties had not contemplated the stoppage of the mill and consequential loss of profits?

The explanation (or at least an explanation) is given by Asquith, L.J., in *Victoria Laundry (Windsor), Ltd.* v. *Newman Industries, Ltd.* (*Coulson and Co., Ltd., Third Party*), [1949] 1 All E.R. 997. The learned Lord Justice points out that, if the Court of Exchequer had accepted the facts as stated in the headnote, he would have expected that the case would have been decided the other way round; but he goes on to say that it is reasonably plain from the judgment of Alderson, B., that the Court rejected this evidence, for the judgment says ((1854) 9 Ex. 341, 355; 156 E.R. 145, 151):

> We find that the only circumstances here communicated by the plaintiffs to the defendants at the time the contract was made, were, that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of that mill.

It is, therefore, reasonably clear to anyone reading Baron Alderson's judgment carefully and noting the contents of the above paragraph why the first, and not the second, rule was applied. At the same time, it is difficult to understand how he came to reject the evidence, for the plaintiffs' counsel before the Court of Exchequer referred to this evidence, and defendants' counsel did not attempt to deny it, but argued (*ibid.*, 352; 150) that mere notice to the clerk could not make the defendants, as carriers, liable as upon a special contract. The judgment does not refer to this argument, but it does say (*ibid.*, 346; 147, 148) that the special circumstances were never communicated by the plaintiffs to the defendants.

Whatever the explanation may be regarding this particular evidence, it is a relief to find an explanation of a difficulty that must have puzzled many, and to know that the judgment did not rest, as has been more than once suggested, on the fact that the defendants were common carriers, and hence not susceptible to the ordinary rules as to damage for breach of contract.

The case is also a warning against placing too much reliance on headnotes.

LAWYER AND SOLDIER.

General Kippenberger's Appealing Narrative.*

In this book, our most distinguished civilian soldier writes the story of the war as he saw it from the day of its outbreak till it ended for him with a crippling wound at Cassino in 1944. The name, occupation, and address of General Kippenberger over the past ten years are sufficiently known to every reader of this JOURNAL, but not all members of the profession know the man himself. A clear picture of him in his days of practice between the two wars, and of the view he took of his obligations in September, 1939, is given by Mr. Oliver Duff in his book *New Zealand Now*, written in 1941 :

> He was a small-town lawyer within big-town range, and clients therefore could not be neglected. He had a wife and a young family, and life for him began at home. It is in fact certain that his wife and children were always half his story. The other half was conscience and romance. War was madness and had some day to be ended, but marching feet were music. A patrol moving off at dusk or dawn tightened his muscles and took all his words away. So drill was never tedious, routine never meaningless. When war broke out in 1914 he was only seventeen. His brother went away, but he had to wait two years. The day he reached the trenches in 1916 his brother was killed. A year later he was severely wounded himself. It was the end of one war for him, and the beginning of another. He returned to New Zealand convinced that the struggle was not over and felt sick inside when he saw us throwing away our rifles and our uniforms . . . He held on to the few men who still paraded, and countered his own depression by reading and hard study . . . Long before Munich he was an authority on all the campaigns that have changed the world since Napoleon, and more familiar with Alexander, Caesar, Hannibal, and Scipio Africanus than most readers of war books are with Foch, Haig, and Joffre. Military history was a passion, but it was also a preparation, and when the day came that he had so long brooded over, he just put on his uniform and walked into camp.

He just walked into camp, a man already over forty, putting aside, for his heavier responsibilities, the care of his wife and three young children, his practice, and his livelihood.

This simple sense of duty runs through *Infantry Brigadier*. It is a book which unwittingly mirrors its author : it shows all the strength of the military virtues, and also complete sincerity, abiding loyalty, and a humility which at first seems strange in a soldier. For this reason, it is pleasanter to read, though no less absorbing, than the autobiographies of some other great soldiers. With such a man, there could be no seeking after effect. His language is simple, almost austere. He sets down the facts to speak for themselves, but his gift for description touches them to life in the reader's mind. (It is a gift which may surprise the author himself, if ever he re-reads his work.) Though the narrative is personal, it is written with modesty and quiet humour, yet with a strong pride in the Division, which every New Zealander who reads the book will find himself sharing.

The book covers the campaigns from the Aliakmon round the Mediterranean to Cassino, during all of which time the author commanded fighting troops. In World War II, and especially after Montgomery arrived, this period of three years was a long time for a British Brigadier to hold his command. In reading it, and especially in following the march from Alamein to Tunis, the reader can easily fail to note the careful training and planning and the depth of military knowledge which lay behind the mounting of each attack. Here, indeed, was the fruit of the work and study at Rangiora. But no one will fail to observe the continuous concern and affection of the Brigadier for his troops, or to admire the calm detachment—a result, one may hope, of his legal training—with which, amid the clamour of the battlefield, he appraises a tactical situation or the worth of another soldier or military formation.

The author began his soldiering as an infantryman ; and, though his Brigade command included all kinds of supporting weapons, the book shows that he remains an infantryman at heart, and bears witness to his conviction that it is the infantryman who in the end wins the battle.

Lawyers and old soldiers will be interested in his ideas on discipline. A British officer is said to have remarked that the New Zealander was a good fighter, but did not understand that an order was meant to be obeyed, and regarded it only as a basis for discussion. Kippenberger would have seen the strength as clearly as he would have recognized the weakness in this situation. His soldiers were treated as intelligent people, told what they were doing in battle, and trusted to behave themselves out of it. But he also knew that command in war requires an element of discipline suited to the character of the particular troops, and he understood exactly how much value there is in guard mounting and ceremonial parades. The military wisdom in this book will stand us in good stead if ever we have to fight again.

It is difficult to imagine any reader for whom *Infantry Brigadier* will not have its appeal. A reader who wants excitement only will find plenty in the author's escapades when he found himself on the wrong side of the front in the confusion of the early fighting.

For the more serious reader, who endeavoured at home to follow the Division's campaigns from newspaper reports, there is an absorbing and candid account, written with authority and in true perspective, and well-documented with maps and photographs. The gallantry on Crete, the high confidence of the march into Libya, the comradeship and resolution of the desert battles, and the dour slogging through the Italian winter are vividly recorded. The perfect little sketches of well-remembered characters and incidents will intrigue those who were not there, and delight those who were. The accounts of the Maoris before their raid into the El Mreir depression and of the 23rd Battalion on the night of Alamein will surely find a place in our national literature.

Perhaps the greatest value of the book is its historical worth. For, whether they knew it or not, those who fought with Kippenberger were making history, and his book is a piece of New Zealand history. On the battles it describes our fate is said to have depended, and on the men here so faithfully portrayed posterity can base its judgment of the New Zealander of the time.

H. R. C. WILD.

* *Infantry Brigadier*, by Major-General Sir Howard Kippenberger, K.B.E., C.D., D.S.O. and Bar. London : Oxford University Press. Pp. 360 and Index.

WELLINGTON DISTRICT LAW SOCIETY.

Annual Bar Dinner.

The Annual Bar Dinner of the Wellington Law Society was held on October 12. The attendance was to full capacity. Among those present were the Chief Justice, the Rt. Hon. Sir Humphrey O'Leary, Mr. Justice Gresson, Mr. Justice Hutchison, Mr. Justice Hay, the Hon. Sir David Smith, the Attorney-General, the Hon. H. G. R. Mason, K.C., and all the local Magistrates. The Under-secretary of Justice, Mr. S. T. Barnett, was also a guest.

Practitioners from other Law Societies included Mr. J. H. Holderness, Mr. A. E. Lawry (Hawke's Bay), Mr. G. M. Spence (Marlborough), and country practitioners of the Wellington District were represented by Mr. J. Macfarlane Laing (Masterton), Mr. D. C. Cullinane (Feilding), and Mr. G. I. McGregor (Palmerston North). The President, Mr. W. E. Leicester, presided.

"The Judiciary."

The President, Mr. W. E. Leicester, proposed the toast of "The Judiciary." He said that over the last few years it had been his lot, at dinners such as these, to provide some of the lighter touches, and he was not at all certain that one could readily achieve the transition from such legal buffoonery to that Crippsian austerity so much more in keeping with his weightier subject. Nevertheless, he hoped that no Crippsian addict present on that occasion had thought it necessary unduly to limit his international expenditure: if the pound were to be devalued, let it be other than the fleshy symbol of outward prosperity so often confused by their clientele with less conspicuous signs of a solid sagacity.

He proceeded: "At the outset, I am going to ask our guests to take judicial notice of the fact that in this year of 1949, despite the shattering impact of two world wars, the chaos they created, and the changing values they have occasioned, our respect for the judiciary, for its maintenance of those standards of independence, courage, probity, and learning, has remained unshaken and undiminished. None of us claims that our British system of law and justice is flawless, but we do claim that it is our finest heritage, and towards those who have been entrusted with its administration, and who have preserved it so well for us, we feel a deep and abiding gratitude.

Distinguishable.

"So much has been said—and well said—by my predecessors of the work of the judiciary that, were I to add measurably to such encomiums of praise, I should merely be piling the Pelion of flattery upon the Ossa of post-prandial expansiveness. I am therefore going to take the liberty, by way of illustration, of citing an instance of something that our judicial system is not. I refer to the trial of Alger Hiss, formerly a Judge's Associate, and at one time secretary to the famous Mr. Justice Holmes. He was charged with perjury, allegedly arising out of certain trials for espionage. The case, which was conducted before Judge Samuel Kaufman, an eminent jurist, began on June 1, 1949, and ended on July 8. Some seventy-three witnesses were called, 257 exhibits were put in, and the testimony ran into nearly 3,000 foolscap pages. The jury spent many hours in the final stages of their deliberations upon the question of the identity of the person who operated a certain typewriter, no expert evidence having been introduced upon the point, and this led ultimately to a disagreement. Apparently the foreman, unlike the foreman in *West* v. *C.M.B. Construction Co., Ltd.* ([1949] N.Z.L.R. 927), did not think of consulting any expert on his own.

"The disagreement gave rise to a storm of newspaper comment, columns of space being given to the views of Congressman Nixon of California, a member of the House Committee of Un-American Activities, the gist of *his* complaint being that the failure of the jury to convict anyone whom his Committee disliked could indicate nothing but prejudice on the part of the Judge towards the prosecution. The *Journal-American*, which carried large headlines 'Hiss Judge Probe Demanded,' had permitted its columnist Westbrook Pegler to complain during the trial of the Judge's refusal to dismiss the jury upon the unsubstantial basis of a public statement that the foreman's wife had told a friend in hospital that her husband did not believe Hiss to be guilty. The foreman was himself permitted by the Press to make a public statement, also during the trial, to the effect that he was an executive of General Motors Acceptance Corporation, and to suggest bias in these circumstances was altogether absurd. After the disagreement, the *World-Telegram* for five successive days had front-page stories by jurors who had valiantly fought for a conviction. One of these, an accountant in a shipping office, told that paper that 'the four acquittal jurors were so stubborn you could have knocked their heads against the wall and it would have made no difference. The foreman was emotional, two were blockheads, and one was a dope. Eight of us pounded the hell out of the four since Thursday night, but we couldn't get anywhere.'

"Another of the conviction jurors, a Mrs. Sweatt, by occupation a land and estate agent, stated that she disagreed with several of the Judge's rulings on points of law, particularly as to the rejection of certain medical evidence just at the point where it had become interesting. Her worst complaint, however, was a personal one. The Judge, she said, kept looking at the jurors, and that made them nervous. A joint statement by two other conviction jurors was to the effect that they had been antagonized by the long procession of character witnesses for the defence, including Mr. Justice Frankfurter and Mr. Justice Reed, both of the Supreme Court Bench. 'We consider,' the statement concluded darkly, 'that upon the retrial it would be as well if these witnesses were dropped.' In fact, the whole position was summed up with consummate logic by the *Herald-Tribune*: 'Five jurors have said the Judge was prejudiced in favour of the defendant. How then can it be argued that the trial was other than unfair?'

"All of us, I suggest, have at some time or another wondered what it feels like to be a Judge, delivering from his Olympian heights some Dominion-shattering pronouncement, counsel quivering anxiously between victory and defeat, and the tongues of the reporters hanging out at the thought of headlines bigger than those which announced the choice of Miss New Zealand. The nearest that I personally have ever attained to such exaltation is a few weeks ago, when, as I was speaking to the Chief Justice in the street, a passer-by took off his hat to me. It would be a mistake, however, to conclude that, if the judicial life has its exciting cycles, these are always at the manic rather than the depressive stage. The late H. B. Irving used to relate with relish his thumb-nail sketch of the young and nervous counsel who, despite the greatest patience and assistance from the Judge, remained tongue-tied. 'I appear,' he burst forth, at long last, 'for a Mrs. Winterwoman, who is a washerbottom.' 'Ah,' replied the Judge, 'a dreary name and a dreary profession.'

"Advice to the Bench."

"Many of you will remember that at the 1938 Legal Conference at Christchurch, presided over by Mr. (now Mr. Justice) Hutchison, Sir Humphrey, in proposing this toast, said that he was writing a book, to be entitled *Advice to the Bench*. Whether the period between 1938 and his own appointment in 1946 was a bit short for the average printer, or whether he deferred the work to the 'lean and slippered years' of Shakespeare's Seven Ages, Schedule 6, I do not know; but the fact is that it has not yet appeared—on Butterworth's list or elsewhere. In his first chapter, he would, I feel sure, have stressed the Bench's tradition of extending a courteous hearing. This is perhaps more important to younger than to older counsel, because, as we get older, it is not so much courtesy we need as good advice.

"From his wide store of legal anecdotes, he would no doubt have recounted how the biographer of Mr. Justice Cardozo once asked a member of the Court of Appeals whether he had ever seen his fellow-Judge angry. 'Well,' he replied, 'on one occasion we were listening to the arguments of opposing counsel. One of the two lawyers had interrupted Cardozo several times while he was expressing his opinion upon a point of law, whereupon Cardozo took the little blotter in front of him and with it tapped gently on the desk. "When Court and counsel wish to speak at the same time," he said, "it does seem to me that the Court should have precedence."'

"Sir Humphrey also might have recalled the occasion when Lord Justice Collins was sitting as Master of the Rolls. The time was approaching the rising hour of 4 p.m., when, senior

counsel having concluded his argument, his junior, with some little difficulty, rose to support him. He was far from being a teetotaller, and had slipped outside several times during the afternoon to fortify himself against the ordeal to come. His opening remarks consisted of a series of 'hics,' each one a trifle louder than the last. After five minutes of this forensic backfiring, Lord Justice Collins interrupted him: 'The Court will rise now,' he said, 'and will look forward to hearing the remainder of your interesting argument in the morning.' In passing, I might mention that this particular Judge was once paid a great compliment, not by counsel or litigant, but by a hardened old lag who had expected six months on sentence but had received only six weeks. On his way back to the cells, the warder congratulated him on his good fortune. 'He's a dear old Judge, he really is,' replied the prisoner, 'an' I do 'ope as 'ow he 'as a son to follow 'im, for 'is breed is too good to be lost.'

"But there is one story that would have been included, if only for the spirit-lovers at the end of the room. It is one that Lord Dunedin often recounted of Lord Kinross, his predecessor in the office of President of the Court of Session, a most amiable host and a great connoisseur of claret. Amongst his guests at a dinner-party at his country seat was a Captain Clark, who imbibed large quantities of excellent claret, passed through a boisterously entertaining stage, and finally slid slowly but inexorably under the table, unable to stir. He was to have returned to Edinburgh that night, but this was obviously impossible, as he had become, as it were, the still life of the party. Lord Kinross rang the bell and said to his butler: 'Please make up a bed in the Blue Room. Captain Clark has very kindly consented to stay here for the night.'

"The last chapter of the book would have had something to say about judgments. It would have told how one Judge of a slowly contemplative nature will arrange for their delivery to correspond with a Nostradamus-like point in the dim and distant future, while another Judge, with a mercurial swiftness of mind and a passion for first impressions, will permit his Associate to offer her wares for sale—or perhaps I should say a carbon copy of her wares—almost as soon as counsel have emerged from their customary post-mortem in the robing-room. Counsel would have been instructed that what appears during argument at the Bar to be kindly support, and even encouragement, is in reality no more than the luring of the non-swimmer over the edge of the wharf. A proper warning would have been given to those who listen to judgments being read, that, if they hear their names mentioned at least twice during the first page, it is clear that they have lost the case.

"The unpredictability of Judges would have had a chapter to itself, but, by analogy, I can deal with it shortly. It seems that recently Joseph Stalin was inspecting a crack regiment in Red Square. At the height of the inspection someone sneezed. 'Who sneezed?' asked Stalin. No one answered. 'Shoot down the front rank,' he ordered. When that was done, he again demanded: 'Who sneezed?' There was still no answer. 'Very well, dispose of the second rank.' 'Now,' he said, 'perhaps the man who sneezed will speak up.' From the end of the rear rank came a terrified whisper: 'I sneezed, Comrade Stalin.' 'Well, well,' said the Soviet Premier, beaming upon him, 'bless you, comrade, bless you!'

"For myself, I have only one suggestion that I timidly proffer—this is, that the Bench be equipped with a red light, that could be turned on when counsel's conduct of his case was likely to get him into a zone of danger. At criminal trials, it could be left on continuously, which would have the added advantage of enabling many of the lady clients of my friends Mr. Stacey and Mr. Joseph to feel more at home when escorted to the Court.

"Finally, I call attention to the fact that we are delighted and honoured to have with us to-night five members of the Supreme Court Bench—the Chief Justice, Mr. Justice Smith, Mr. Justice Gresson, Mr. Justice Hutchison, and Mr. Justice Hay—the last-named of whom, to our relief and pleasure, is now restored to better health. We have all our sitting Magistrates—Mr. McLachlan, whose broad humour enlivened this gathering last year, Mr. Jim Hanna, so well known to all of us, his military perspicacity enabling him to tear camouflage from a case in large strips, and Mr. Hessell, who has brought into this urban stronghold a breath of bucolic Eltham air. To all three we extend a hearty welcome.

"In conclusion, may I say that, while on occasions such as this custom allows us to have a few thrusts at the judiciary, we do not for one moment blind ourselves to the difficulties that confront it. As recently as July last, in an address upon "Law and the Citizen," Sir John Latham, Chief Justice of the High Court of Australia, pointed out that there are signs today of the re-emergence of privilege conditioned upon adherence, direct or indirect, to a political party or to some particular form of political or economic doctrine and organization of society. If such can be said of this country, then our real safeguard lies in the responsibility of the Courts to apply the law without fear or favour, affection or ill-will, and to do right to all manner of people according to law. There is not a single one of us who does not believe that the judiciary will face this responsibility unperturbed, and continue to show to the full the measure of its traditional independence."

Mr. Justice Gresson.

In reply, Mr. Justice Gresson, who was warmly received, said:

"I need not tell you that this is the first time that I have responded to such a toast as this, and, not unnaturally, I find myself somewhat overwhelmed, the more so as it has been prefaced by a most entertaining address by your President. What prompted those who organized this function to invite me to give the response to this toast has had me wondering somewhat. I dismissed as unworthy the thought that perhaps I might have decided some matter in their favour and so merited the compliment of being invited to do so. Then I entertained the idea that perhaps, contrariwise, I might have decided some matter against them, and had been allotted this task as somewhat of a penance and to cloud my enjoyment of the dinner. On further thought, and having placed myself in the President's armchair in the best judicial manner, I came to the conclusion that the intention was that this should be for me a sort of new boy's concert; that, though I was not able to be with you last year, I was not to escape on that account. So, with the traditional trepidation of the new boy, I shall attempt it, but the effort is likely to be stolid and unimaginative. I welcome it, however, because it gives me the opportunity to say how much your cordial and helpful welcome meant to me when I came amongst you two years ago.

"I think there is no more valuable tradition in our profession than that which demands that every member of the Bar shall come to the aid of a new Judge when he takes his first faltering footsteps. So long as I can remember, that has been the example of the leaders of the Bar; however much they may have felt themselves to be, or in fact have been, his superior in knowledge of law or in appreciation of fact, that is the example they have set to the younger members of the profession. The value to the baby Judge is inestimable. You will understand that it was somewhat of an upheaval for me to quit the South and transfer my life to this Island. My roots were deep in what there is authority for calling "the Mainland," but I hope now that I am in the course of becoming a good Wellingtonian. Perhaps sometimes, when judicial life is more than ordinarily exacting, I think wistfully of the world I quitted—busy but happy practice, with its many contacts and its fun. That is understandable, because it has been exchanged for a semi-cloistered life in those hallowed precincts not far from here.

Trustee "Law."

"May I illustrate that by telling you of an experience I had in practice not long before I came here. I was a trustee of an old lady, and had as co-trustees her brother, an elderly farmer, and an elderly retired accountant, who proved themselves to be quite unnecessarily assertive as trustees. We met to discuss estate matters. An offer of purchase had been made by the tenant of one of her properties before her death, and at a price much beyond that at which the Land Sales Court would pass it. There was nothing left to do but complete a sale. My co-trustees took a contrary view, however; they wanted to put the property up for auction, or at least to seek from agents better offers. I told them that that was just silly—perhaps too bluntly, as they ranged themselves in opposition, and pointed out that they were two to one. When I told them that there was no such thing as majority rule amongst trustees, they looked sceptical, but were not prepared to argue that point. One of them then asked me what happened if there was an impasse. I told them that in that event application had to be made to the Court, and the Judge would give directions, whereupon my retired accountant asked: 'When can we go up and see him?' I explained that the approach even to a Judge in Chambers required certain formalities, and I exaggerated somewhat the expense of taking that course, in the hope of making them more amenable. Then the discussion adjourned

to the following week. When they came the following week, I hoped there would be no further opposition, but I was soon disillusioned. My retired accountant friend came in bearing a brown paper parcel, and, fumbling with it, said: 'Mr. Gresson, I have been reading up, and in *Pitman's Commercial Encylopaedia*, Vol. S–Z, it says . . . —and he then read from the article on Trustees a passage which had little relevance, and, of course, took no account of Land Sales legislation. All the Celt in me was rising to the surface, but I took a firm grip of myself and, picking up a pencil, said: 'Would you give me that reference again?' Beamingly he did so, whereupon I said: 'Mr. A, I have noted that reference, not because I am impressed, but because I want to tell the story correctly over the teacups. It will be told wherever lawyers gather, and, if you only knew it, it's a scream.' I thought that that should have crushed him, but no. Fumbling again with the brown paper parcel, he extracted another book, and said, 'Well, what about this, *Barton's Company Secretary*? He's a good man.' Far be it from me to disagree with that, but I just got up and threw them out. At the door he turned to me and said in a perplexed voice: 'What do we do now?' I said, 'Go into any office in Hereford Street and tell them that you have been trying to teach me Trustee Law out of *Pitman's Commercial Encylopaedia*, and see what they say.' A week later, they came back, and, to cut a long story short, with a bad grace they made themselves more amenable.

"That is the life I have left behind. Here, at least, I am treated with a proper deference. What I say goes, at any rate until the Court of Appeal lays mischievous fingers on it.

"New Boys."

"I think perhaps I have disregarded the appropriate subject of the response to this toast, but, if I recall my school days aright, a new boy was entitled to choose his own song, and, if mine has been too personal, I have only exercised the right of the new boy.

"I can only say, in conclusion, and I say it also for my brethren of the Bench, that we appreciate your goodwill towards us. We can but simply and diligently try to do what we have sworn to do, and your support, and the example of illustrious predecessors whom we can all recall, will enable us to do it the better.

"For a more adequate response to this toast, I suggest you look to the distinguished Member of the Magistracy who is to address you later, himself, I understand, somewhat of a new boy. He may, on this occasion, review my effort and pronounce something more appropriate to the case. And that is as it should be, because, in the administration of justice in this country, surely it is the Magistrates who bear the heat and burden of the day, dealing with a multifarious mass of unrelated matters, cases of all kinds, with scant time for deliberation, and certainly none at all for research. In what is known, and appropriately known, as the People's Court, they embody and personify Justice to the man in the street, and do so admirably.

"Now, I do not need Bacon to remind me that 'An overspeaking Judge is no well-tuned cymbal,' written—feelingly, no doubt—when he was a young man and a rising lawyer, echoed since, doubtless, by successive generations of lawyers, and very likely expressing your own sentiments to-night. In conclusion, I thank you for your recognition of all that the judiciary stands for, for your goodwill towards us, and for the regard you have expressed for us, the present-day, perhaps somewhat unworthy, representatives, and say for us that, mindful of our high office, we shall strive, fortified by your support, to maintain the traditions of that office, and shall hope that in convivial gatherings such as this we shall continue to be welcome guests."

THE MAGISTRATES.

Replying on behalf of the Magistrates present, Mr. Hessell thanked the President for his appreciative remarks and the Society for inviting them to the dinner.

Referring to the President's reference to the Bench from the point of view of the Bar, Mr. Hessell said he would reply with references to the Bar from the point of view of the Magistrates' Bench. And he added: "Your President suggested that I might bring a breath of bucolic atmosphere to Wellington from the country—I hope that I am not expected to provide all the bull for this gathering!"

Approaching the matter "indirectly," as he put it, Mr. Hessell recalled how he had asked Mr. Jim Garbett, who had taken over his practice, what the Wellington Bar was like. The reply was immediate, the speaker said, "You will like them immensely; they are a very, very happy family." "And that," said Mr. Hessell, "is what I have found, together with the greatest courtesy and friendliness, from the moment I came to Wellington. That is a happy atmosphere to work in, and with it goes a marked respect for the Court."

In the short time he had been in Wellington, Mr. Hessell said, he had been able to listen to many interesting cases argued with skill by counsel whose names were well known in the profession, and also by younger men who were up-and-coming. He added that he had had some most ingenious propositions put up to him, "usually put up with the greatest urbanity; and, when such a proposition is not accepted, they pass on unabashed to the next idea, feeling that it was worth trying, even if it did not come off."

"In addition to the very good relations between Bench and Bar," said the speaker, "the happy relations between counsel are most noticeable." On occasions there might be some asperity, but seldom "more serious than was to be expected by clients expecting to see revealed the fighting qualities of the counsel they had engaged."

Concluding, His Worship said: "These are the first brief and totally inadequate impressions of one who feels he is receiving very great help in his work from the friendliness and co-operation of the Wellington Bar. I thank you all again, and wish you all fruitful litigation."

"THE CLIENT."

Mr. C. J. O'Regan proposed the toast, "The Client." He said:

"It is only fitting that at a function such as this we should not forget absent friends, who, in the language of the Schools, are logically antecedent to the turtle soup and other incidentals of a Law Society Dinner. Problems of time and space, not to mention personal characteristics, which have entitled some of them to the larger hospitality of His Majesty, prevent their attendance to hear their just, and I am afraid inadequate, tribute. Again, they have not passed the necessary exams, and the difficulties mentioned prevent their admission by the back door. Nevertheless, these disabilities should not prevent us from making some suitable acknowledgement. And you will agree that our organizers are to be commended for providing for a reference to that multiform person, 'The Client.'

"Our predecessors of ancient Egypt never held a function of this sort without exhibiting a skeleton at the feast. We no longer follow that cheerful usage; but perhaps we may instead conjure up, as a sort of prime mover or presiding genius of the occasion, a ghostly visitant who may be imagined as resembling Mr. Pickwick or Dr. Johnson or Simon Stylites, as you prefer, or, perhaps, as having features suggestive of Sir Galahad or Mr. Micawber. Some may prefer that this genial ghost should resemble John D. Rockefeller or the Finance Guarantee Corporation. If so, you can easily supply any deficiencies. But the idea, you will agree, is a powerful one. It has only to be mentioned and the ideal client springs to the mind fully equipped, like Pallas from the front of Jove.

"Whatever his characteristics, good or bad, the client is one person whom we cannot do without. No matter how learned in the law we may be, however indifferent on occasion to the paltry subject of costs and disbursements, the fact is that all of us, young and old, learned and unlearned, would be in a sorry case if Simon Stylites did not at times descend from his pole into the market place, or if Mr. Pickwick did not on occasion show a little malice. And so our ghostly visitant, who even now flits behind the Presidential chair, may be heard by the attentive ear to murmur as he overlooks the scene: 'Alone I did it.' And so it is fitting that we should make some reference to our universal provider. But dependence on others is not peculiar to us. It is the common lot of the professions, except perhaps in the case of our friends and allies the doctors. Whilst we lift grateful and hopeful eyes to Heaven, they rely, let us hope, with no more certainty on the Consolidated Fund.

"Of course, it could be shown that the relation is not without benefit to the client, that sometimes he exhibits characteristics which fall short of perfection, that sometimes he bites the hand that promotes his cause, and that sometimes strenuous exertions go unrequited. But, in a spirit of charity, and with due regard to this cordial occasion, I forbear at the moment. To-night we feel even better disposed than usual to our client. We hope that he will prosper and live long, and that, when he dies, as die he must, he will leave a substantial estate, that the spirit of litigation may possess him, that he will scorn compromise as

the unpardonable sin, and that it will never enter his head to conduct his own case or to sue *in forma pauperis*."

THE CLIENT REPLIES.

The task of replying to the toast was in the capable hands of Mr. R. E. Pope. He said :

" The burden of this toast rests heavily upon me, because I have only just realized what it embraces. It seems to cover all persons in all stages, from *en ventre sa mere* to *in sepulchro*, although, as you will doubtless agree, our preference is for the client *in sepulchro*. After all, the first stage is a very transitory matter, and not nearly so permanent and profitable as the later stage. This may account for the fact that the proposed motto for the Public Trust Office is : *De mortuis nihil nisi bonum*. This toast, gentlemen, covers a wide variety of persons, from the King to his most humble subject—the millionaire to the bankrupt—the Church to the criminal. Of these, you will no doubt agree that the King is our best client, but even he is open to criticism. He has that nasty habit of prescribing the fees of those who appear for him, and, whenever he can, he places them on a salary basis. In addition to this, he retains the cream of the Bar and gives them the title of King's Counsel. In spite of this, he seldom briefs these gentlemen, but rather instructs the Solicitor-General or one of his salaried satellites.

" Personally, I have received only one brief from His Majesty, and that, I may say, over a period of over twenty-five years. I would not have received that brief had it not been for a difference of opinion between an official in the Justice Department and a Wellington Magistrate over a question relating to a *nullius filius*, or, as Mr. Justice Darling said, ' an orphan *ab initio*.' This question of pure bastardy, which was decided against me by a member of the Magistrates' Court Bench, did not concern me greatly, as I had an alternative remedy by way of adoption ; but it did concern the official in the Justice Department. He thought that the matter should be tested. I explained to him that my client did not have the necessary funds to experiment in the law, but, if His Majesty was prepared to meet the expense, I would do my best. To this course he agreed. He invited me to pursue some extraordinary remedy—namely, mandamus. The remedy was all the more extraordinary as the King was also on the other side. When we found that we were both acting for the same client, we pooled our resources. I went through all the authorities at one end of the Library and he went through all the authorities at the other. We went through all the authorities, from the Magistrates' Court reports to the sayings of Confucius. In the latter, we thought we had something, but ultimately had to discard it, as being more relevant to adultery as a ground for divorce than a question of pure bastardy. However, we argued the matter at great length, and in due time the Judge delivered his judgment. He disregarded the arguments on both sides, but fortunately decided the case in my favour. He had something we didn't have, and I understand he found it in the Judges' Library. I then advised His Majesty, through the Justice Department, that the case had been successful. Since then, I have not received a brief from His Majesty, and I gather that somebody must have read the arguments of counsel. However, buoyed up with that success, I hoped to extend my Crown practice ; but the cancellation of the Royal visit has put a stop to that. I think I can leave the King now, and refer to other clients.

Women and the Law.

" The first class I want to refer to is women. They have never been properly recognized by the Law. It may be, as Dr. Johnson said : ' Nature gave them so much power that the law very wisely gave them little more.' However that may be, they have been outrageously treated for a long time. To illustrate, I go back to 1770, when a Bill was introduced into the House of Commons forbidding any woman ' to impose upon, seduce, or betray into matrimony any of His Majesty's subjects by means of scent, paints, cosmetic washes, artificial teeth, Spanish wool, iron stays, hoops, high-heeled shoes, or bolstered hips.' Any marriage so contrived was to be null and void. Under present conditions, such a provision would produce matrimonial chaos. So far as the law of Torts is concerned, woman again received a serious affront. The chapter dealing with married women follows those pages dealing with lunatics, idiots, and criminals. In addition to this, in the law of Negligence, as you know, there exists that fictitious individual, the reasonable man : what of the reasonable woman ? In the eyes of the law, she apparently does not exist. I feel sure that that is a matter which Mr. Attorney will have rectified. It would undoubtedly be interesting to know what a reasonable woman might do.

" Gentlemen, there are further injustices to women : one is the growing practice of raising the defence of contributory negligence in actions for seduction. I have also heard it suggested that the high cost of loving might be pleaded in mitigation of damages in breach-of-promise suits.

" Before leaving the married women, there is one matter to which I wish to refer—namely, the case of the wife who had to divorce her husband for income-tax purposes. She was a film star earning £500 a week, and he was a school teacher earning £500 a year. He was liable for income-tax on their aggregate incomes, and such tax exceeded his own salary. From this impossible position the Divorce Court released him, as, for tax reasons, he could not afford to render conjugal rights. Two days after the decree absolute, the husband returned to his wife and they lived happily ever after. On their saving in income-tax they were able to send their three children to boarding-school, and also to spend their holidays in Switzerland. I think at this stage I should leave women.

Practical Experience.

" As far as men are concerned, one of their chief complaints is the uncertainty of the law. I acted for a man who used to be my client. He asked for counsel's opinion on a certain matter. Counsel's opinion was that *Res ipsa loquitur* applied, or, in other words, ' it was a sitter.' When the decision was given, counsel murmured something about ' *non est factum*,' from which the client assumed that it was not a sitter. Counsel advised that he should take action in another form, and it was then decided against him on the grounds of *res judicata*. The client would not accept counsel's advice to appeal.

" I think you will agree that this use of Latin phrases causes confusion not only among our clients but also among students. Only the other day, I was talking to a student who was under the impression that ' *en ventre sa mere* ' and ' *in loco parentis* ' were synonymous, but that in the latter case it was more usually confined to legitimate children.

" I refer now to a criminal case, a case of theft. The accused at first pleaded guilty, and conducted his own defence. By some feat of legal gymnastics, he reversed his plea before trial. Although there was convincing evidence of guilt, the jury acquitted him. In discharging the prisoner, the Judge said : ' You say you are a thief ; the jury say you are a liar ; and, accordingly, I am bound to discharge you.' There is a story of an overseas Judge who, while visiting New Zealand, called on one of our Judges. Mr. Justice X was explaining how he wrote his judgments. By way of comparison, he said that the Chief Justice pored over the authorities and then pored over the evidence, but did not start his judgment before he had reached a conclusion. For his part, Mr. Justice X explained that he certainly pored over the authorities and the evidence, but did not necessarily reach a decision before writing his judgment. He wrote the first page and the plaintiff was winning ; he then wrote the second page, and the defendant was winning ; and, when he came to the end of the third page, he was damned if he knew who was winning.

" We look forward to better times, and the dawn of a new era. We look forward to the day when that misnomer the Land Valuation Court will cease to exist. We look forward to those days when conveyancing transactions will be completed in the twinkling of an eye, instead of waiting for the Crown Valuer to return from his holiday. We shall be in a position to pass money over the table, under the table, or around the table ; and, when any visiting practitioner attends a dinner at Palmerston, the fact that he passes under the table will not cause any comment. The dawning of this new day after the darkness of present restrictions has received poetic recognition. I cannot remember it all, but I can remember the first verse :

> ' *When lovely Morning lifts her head*
> *And laughing flashes on the light,*
> *We see her rising from the bed*
> *Of that old blackguard Night.*'

A propitious start, you will agree, on an inspiring theme.

" I have had a most unhappy experience to-day. I have been engaged in a long fencing dispute which I thought was settled, but I have received this cutting by post : ' There was a broken fence between Heaven and Hell. The Devil sent a note to the angels saying : " Have taken legal advice. The repair is your responsibility." Heaven replied, " Cannot get legal advice. Will repair fence." '

" In conclusion, I am grateful to you all for the way in which you have honoured the toast to our Universal Provider."

At the conclusion of the dinner, which was one of the most enjoyable held by the Society, the members were the guests of the Wellesley Club, whose amenities were placed at their disposal,

LAND VALUATION COURT.

Summary of Recent Judgments.

No. 14.—*In re* D.-C.; *In re* L. AND I.

Land taken by Crown—Land-tax—Crown agreeing to Apportionment of Rates and Insurance but refusing Apportionment of Land-tax—Application for Supplementary Order—Value of Land taken including Proper Apportionment of Outgoings—Land-tax apportionable—Land and Income Tax Act, 1923, s. 170—Land and Income Tax Amendment Act, 1940, s. 12.

Application for a supplementary order.

In each of these cases, counsel for the claimants had moved for a supplementary order of the Court directing that an appropriate apportionment of land-tax be paid by the Crown. In each case, the Crown had agreed to an apportionment of rates and insurance up to the respective dates of possession, but had refused, without the authority of an order of the Court, to apportion the land-tax payable by the respective claimants.

October 26, 1949. The Court said: "The first question is whether the Court has any power to make such a supplementary order when it has already made a final order fixing the compensation payable under the respective claims. There is no doubt, however, that it was the intention of the Court that outgoings should be apportioned as between the Crown and the claimants as at the respective dates of possession, and the omission to provide expressly for such apportionment may be properly corrected so as to give effect to that intention. The question whether land-tax should be included as an apportionable outgoing has not previously received the attention of the Court, and is one of some interest.

"It is clear that, by virtue of s. 162 of the Land and Income Tax Act, 1916, any agreement to alter the incidence of land-tax or income-tax was declared to be void, and in *Charles* v. *Lysons*, [1922] N.Z.L.R. 902, the apportionment of land-tax was held to be prohibited by virtue of this section. The question whether land-tax would have been apportionable under an agreement to apportion rates, taxes, and other outgoings, and had it not been for the section referred to, was not decided.

"By s. 12 of the Land and Income Tax Amendment Act, 1940, the corresponding section in the Act of 1923 (s. 170) was amended by omitting the reference to land-tax.

"Having regard to the application of the section to the apportionment of land-tax in *Charles* v. *Lysons*, [1922] N.Z.L.R. 902, we are of opinion that the amending provision of 1940 must be deemed to remove any legal obstacle to such apportionment but to leave open the question whether land-tax is apportionable under the terms of any particular contract. It is not necessary for us to consider the latter question in the present instance, which relates, not to the interpretation of a contract, but to the assessment of reasonable compensation for the taking of land under Part II of the Servicemen's Settlement and Land Sales Act, 1943. By s. 28 (3) of the Act, the amount of compensation to be awarded is to be assessed at the value as at the date of vesting (which is also presumably intended to be the date of possession) of the claimant's estate or interest in the land. We think that the value of land so taken as at the date of vesting must be deemed to include a proper apportionment of outgoings as at that date, and that, as between a claimant and the Crown, land-tax accruing for the current year should be deemed to be an apportionable outgoing.

"We therefore direct that (the amounts having been agreed upon) the sum of £68 5s. 6d. be paid by the Crown in the case of L. and I. and the sum of £20 3s. 4d. in the case of D.-C., in addition to the compensation and interest awarded by the Court and the appropriate apportionments of rates and insurance, which have, we understand, already been the subject of settlement."

No. 15.—B. TO K.

Urban Property—Two Sales of Same Property—Competing Applications for Consent—Consents given to Both Sales—Appeal by First Purchaser against Consent to Second Purchaser—Vendor's Refusal to complete First Sale, but willing to complete Second One—Transaction tainted by Bad Faith on His Part—Land Valuation Court without Jurisdiction to punish Offenders or to compel Sale to Particular Purchaser—Appeal dismissed—Parties left to their Common-law Remedies—Costs against Vendor—Servicemen's Settlement and Land Sales Act, 1943, ss. 37, 61.

Appeal by purchasers, to whose purchase the Land Valuation Committee consented, against the consent given to another sale of the same property.

The facts relating to this appeal involved two sales of a house and furniture, the first being from A.T.B. and his wife M.I.B. to the appellants P.C.K. and his wife, and the second from the same vendors to J.F.B.

The sale to Mr. and Mrs. K. was made on July 27, 1948, and that to J.F.B. on August 11, 1948. Between these dates, an application had been made for consent to the first sale, and the Committee had indicated that it would approve of the sale at the price of £1,660 for the house and £869 for the furniture. This involved a reduction of £140 in the price of the house, and the solicitor for the vendors intimated to the Committee that his clients would accept the reduced amount. The purchasers, Mr. and Mrs. K., however, were approached on three separate occasions by A.T.B. and invited to pay the difference "under the table." They refused to agree, and also questioned the price to be paid for the chattels, which they claimed should have been determined by an independent valuation. On August 10, Mr. and Mrs. K. were advised that their contract had been cancelled, and on the next day the property was sold again to J.F.B. An application for consent was then filed in respect of the second sale, the first application still not having been finally disposed of. After further consideration and hearings by the Committee, orders were ultimately made consenting to both sales at prices for the land and chattels of £1,660 and £551 14s. respectively.

October 25, 1949. The Court said: "No appeals were lodged against the order consenting to the first sale, and the order was duly sealed. This appeal is by the purchasers under the first sale, and is against the grant of consent to the second. The appellants seek the revocation of that consent by virtue of the Court's powers under s. 37 of the Land Valuation Court Act, 1948, and in accordance with the principles defined in *In re A Proposed Sale, Hendry to Weir*, [1945] N.Z.L.R. 744. This case is authority for the proposition that the appellants, as parties to the first of two successive sales of the same land, are entitled to be heard in respect of the second application and to prosecute an appeal against the Committee's decision thereon. It is also authority for the proposition that proof of bad faith against the second purchaser would justify the Court in allowing the appeal and refusing the application.

"Before the Court on appeal, both appellants gave evidence and were cross-examined as to the conduct of the vendors, and in particular of A.T.B. in respect of the first sale of the property. Evidence as to the second sale was given by the wife of J.F.B., while J.F.B. was in attendance but was not called on to give evidence. A.T.B. and M.I.B. were represented by counsel, who stated that they had left for Australia on the day following the second sale, and that they were, therefore, unable to give evidence. It is significant, however, that, although the allegations of soliciting a black-market payment were made against A.T.B. in the proceedings before the Committee, and could have been refuted by affidavit, no attempt was made to deny these allegations. Nor was the land agent concerned, or the valuer who valued the furniture for the vendor, called to give evidence on his behalf. The evidence of the appellants, who were not shaken in cross-examination, therefore stands uncontradicted, and must be accepted.

"The Court accordingly holds it to be proved that the vendors purported to sell their property to the appellants for £1,800, that, on ascertaining that the Committee would reduce the price to £1,660, the vendor A.T.B. approached the appellants on three occasions and solicited the payment of £140 'under the table,' and that, consequent on their refusal to make this payment, the vendors purported to cancel the sale and to resell the property to J.F.B.

"As to the second sale, the evidence disclosed nothing to the discredit of J.F.B. The Court was invited to draw an unfavourable inference from the fact that J.F.B. had been a client of A.T.B.'s solicitor, and was introduced by him as an alternative purchaser immediately A.T.B. determined to cancel the first sale. There is no evidence, however, that either the solicitor or J.F.B. was aware of the black-market proposals made directly by A.T.B. to Mr. and Mrs. K., or that either of them was a party to any such proposals. It was admitted that, before the hearing of the appeal, J.F.B. had been let into possession of the property as a tenant, and that he had purchased the furniture at the price fixed by the Committee, and counsel for the appellants characterized this conduct as improper, and as a contempt of Court. The propriety or otherwise of these transactions is, however, entirely dependent

upon the validity of the purported cancellation by A.T.B. of his contract with Mr. and Mrs. K. If that contract had been cancelled, there was no legal obstacle to A.T.B.'s admitting J.F.B. as a tenant or to his selling him the furniture. If, on the other hand, Mr. and Mrs. K. can establish the continuing validity of their contract, they are entitled to redress in appropriate proceedings. For the purpose of these proceedings, however, it is clear, as was fairly acknowledged by counsel for the appellants, that there is no evidence of improper conduct or of bad faith on the part of J.F.B. or his wife.

"The question for us to decide is whether, in these circumstances, the Court may, or ought to, refuse its consent to the second sale.

"The appellants rely principally upon dicta to be found in *In re A Proposed Sale, Hendry to Weir*, [1945] N.Z.L.R. 744, and in particular upon a dictum of *Finlay*, J., at p. 747, to the effect that, in the case of two competing applications, consent may properly be refused to a party affected by bad faith. We are of opinion, however, that in *In re A Proposed Sale, Hendry to Weir*, as in the cases concerning Native lands which are cited therein, the Court's consideration was directed to the possibility of bad faith as between the respective purchasers, rather than to bad faith on the part of the vendor. It may be supposed that there is usually bad faith on the part of a vendor who, after contracting to sell his property to one person, proceeds without justification to sell it again to another. On the analogy of the Native land cases, however, it would appear that in such a case consent should be granted in each instance, so as to preserve the rights of the respective purchasers both *inter se* and as against the vendor. The conduct of the vendor A.T.B. appears to have ben unconscionable, and he appears to have offended against the penal provisions of the Land Sales Act. Whether, however, he effectually cancelled his contract with Mr. and Mrs. K. is a matter for another Court, and the appellants' right to pursue their civil remedies is protected by the order of consent already given in this Court. The substantial concern of both purchasers is as to which is entitled to the property. That also must, if necessary, be determined in another Court, and it was the view of the Committee that, in the circumstances, both purchasers should be granted consent, so that they might be enabled, if they thought fit, to take appropriate proceedings elsewhere.

"The appellants ask the Court to deny the second purchaser that right, and say that it should do so on grounds of equity and good conscience. We are not satisfied, however, that any equity exists in favour of the appellants as against the second purchaser. The real complaint of the appellants is as to their treatment by the vendors, and their belief, which seems amply justified, that the vendors' refusal to sell to them was attributable to their refusal to make a black-market payment. The object of the appellants is no doubt to coerce the vendors into selling to them or to obtain some satisfaction against them in respect of their unconscionable conduct. The wide powers vested in the Court by s. 37 must be exercised, however (to quote from the section), 'in order that full effect may be given to the intent and purpose of the Act.' It has been held that the Act does not empower the Court to compel a vendor to sell to any particular purchaser: *No. 74.—G. to B.*, (1946) 22 N.Z.L.J. 120; and that it is improper for a Committee to attempt by indirect means to compel a vendor to sell to a particular purchaser: *No. 76.—B. Estate to T. Co-op. Co., Ltd.*, (1946) 22 N.Z.L.J. 120.

"It is clear, moreover, that the punishment of persons guilty of offences under the Land Sales Act is not within the jurisdiction of this Court.

"For these reasons, we are of opinion that it would be improper, notwithstanding the conduct of the vendors, for the Court to attempt, by virtue of its powers under s. 37, either to compel them to sell to the appellants or to punish them for apparent offences under the Act. If the appellants have contractual remedies against the vendors, it is competent for them to exercise their rights in another Court, while the question of proceedings for breaches of the Act will no doubt receive the attention of the proper authorities. The appeal, therefore, cannot succeed.

"The Court has power under s. 61 of the Servicemen's Settlement and Land Sales Act, 1943, to award costs in favour or against any of the parties to the proceedings. In appropriate cases, it is proper for costs to be awarded against a successful party and in favour of a party who has not been successful, and, in our opinion, this is such a case. On the evidence, the conduct of the vendors appears to have been unconscionable, and tainted with serious breaches of the penal provisions of the Act. We think the appellants were amply justified in seeking to have the circumstances of the second sale inquired into by the Court. It appears clear, moreover, that, before the Committee, the vendors attempted to secure consent to the sale of their furniture at an excessive price, and, in consequence, both the appellants and the Crown were put to substantial and unnecessary expense. We therefore order the vendors A.T.B. and M.I.B. to pay for costs, to the appellants the sum of thirty-five guineas, to the respondent J.F.B. the sum of ten guineas, and to the Crown the sum of fifteen guineas, such sums to be deemed in each case to be inclusive of witnesses' expenses and disbursements."

UNIVERSITY OF NEW ZEALAND.

Special March Examinations for Ex-Servicemen.

The University Senate has resolved that, for those ex-servicemen who were mobilized for more than three full years, special examinations will be held in March, 1950, in subjects of the Accountancy Professional and the Solicitors' Professional, Divisions II, III, and IV.

For information concerning the detailed conditions and dates of the examination, apply to the Registrar, University of New Zealand, Wellington.

LEGAL LITERATURE.

Motor Insurance.

Shawcross on the Law of Motor Insurance, 2nd Ed., by CHRISTOPHER SHAWCROSS and MICHAEL LEE. London: Butterworth & Co. (Publishers), Ltd. 1949. Pp. lxxviii + 751 and Index. Price 97s., post free.

When the First Edition of this work appeared in 1936, it was welcomed by practitioner and layman alike as being an admirably lucid presentation of the salient views of a special branch of the law that has grown up in comparatively recent times. It was welcomed for its pleasant and readable style, for the thorough research its pages revealed, and for the competent manner in which the author dovetailed the peculiarities of motor insurance into the wider pattern of general insurance law.

Since 1936, motor insurance law has been materially affected in England by three important statutes—the Law Reform (Contributory Negligence) Act, 1945, the National Insurance Act, 1946, and the Law Reform (Personal Injuries) Act, 1948—by the Compulsory Policy resulting from the Governmental and insurance company agreement, and by the resolving by the Courts of many problems posed in the First Edition. Of the three statutes, the Law Reform (Contributory Negligence) Act, 1945, is of interest in this country, because of its having been largely repeated by our Act of 1947, and questions arising hereunder have been found of difficulty by Bench and Bar alike. Although there are portions of this book which pertain only to English conditions, many chapters, including those covering the general principles applicable to motor-insurance law, are exhaustive in content and invaluable as a storehouse both to the practitioner and to the motorist in this country.

It is difficult from such a wealth of material to pick out any particular instance of the thoroughness with which this work has been prepared, but Chapter X, on the position of parties in regard to legal proceedings, is of special value, being, as it is, largely universal in application. Here, set out in clear detail, each point authoritatively supported by copious references, the practitioner, the motorist, or the insurer will find a mine of information on important topics.

The high standard set by Mr. Maxwell-Fyfe (now the Rt. Hon. Sir David Maxwell-Fyfe, K.C., M.P.) in his introduction to the First Edition has been maintained in this Second Edition. No New Zealand practitioner whose work brings him into touch with motor insurance in any of its complex phases—policies, hospital charges, settlement of third-party claims, contribution, counsel's duty at trial, and a dozen other allied topics—can afford to be without the latest Shawcross, unrivalled as a monument of industry in this sphere of law.

W.E.L.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Canadian Appeals.—News from overseas informs us that a Bill making the Canadian Supreme Court the final Court of Appeal for Canadian actions, and abolishing appeals to the Privy Council, has passed both Houses of the Canadian Parliament and now awaits Royal Assent. The late Sir Robert Stout was strongly of the opinion that no Dominion, if asked to abolish the appeal to the Privy Council, would ever agree to the suggestion. Time, as so often happens, has proved him wrong. This attitude in the matter is to be admired, since, even after the famous judgment of the Privy Council, delivered by Lord Macnaghten, in *Wallis* v. *Solicitor-General*, (1903) N.Z.P.C.C. 23, in which there was more than a suggestion that our Court of Appeal had been subservient to the Executive Government, Stout was able, in his protest, to bring himself to say :

> A great Imperial judicial tribunal sitting in the capital of the Empire, dispensing justice even to the meanest of British subjects in the uttermost parts of the earth, is a great and noble ideal.

And he had the support of Williams, J., who said :

> That the decisions of this Court should continue to be subject to review by a higher Court is of the greatest importance. The knowledge that a decision can be reviewed is good alike for Judges and litigants.

In a paper delivered at the 1930 Auckland Legal Conference, and described by the English *Law Journal* in terms of great praise, J. B. Callan (as he then was) argued that every change which weakened the position of the Privy Council and reduced its jurisdiction was a blow for those Dominions that valued the connection and deserved to retain it. "The weakening of the ties," he observed, "that bind together widely severed peoples that lean on each other for support is involved." These views, which found support from all who attended the Conference, were to some extent anticipated by the then Chief Justice (Sir Michael Myers) in his inaugural address, when he pointed out that there was no desire in New Zealand to get rid of the Privy Council, and he hoped that it would remain in its present form.

Keeping Order.—In proposing the toast of the Judiciary at the Annual Dinner of the Wellington District Law Society earlier this month, the President referred to some of the extraordinary features of the trial of Alger Hiss (former secretary of Mr. Justice Holmes) for perjury allegedly arising from evidence given in espionage proceedings. The five-weeks trial finished in July last, and resulted in a disagreement. Counsel for Hiss, one Lloyd Paul Stryker, has recently published a 624-page biographical study (entitled *For the Defence*) of that famous advocate Thomas Erskine, regarded by many writers as the greatest of all legal orators. Certain Americanisms obtrude themselves into the text, as, for instance, the suggestion that to preserve order in Court Lord Mansfield used "the gavel." The point of some of his remarks from the Bench was emphasized by Lord Russell of Killowen by tapping smartly with the end of his pencil, but the use of any more lethal weapon by the judiciary is open to doubt. Scriblex is reminded of the story of the after-dinner speaker, so long and tedious that the chairman, to maintain quiet, rapped the table so hard that the head of his gavel hit one of the dinner guests on the head and rendered him unconscious. On being brought round a few minutes later, he asked : "Is he still speaking ? " He was assured that the speaker, undeterred by the untimely incident, was still carrying on with his speech. "Hit me again," he said.

A Frolic of Her Own.—It is interesting to ponder over the proposition that human omniscience on the part of the negligent must be greater than on the part of the infallible. By mistake, a firm of carriers delivered five wooden cases of cellulose film scrap—dangerous, inflammable, and explosive material—to the wrong premises, the right ones being 150 yards away. One of the cases was opened by the plaintiff's employees, who examined its contents, took out some scrap, and were proceeding to repack it when a fun-loving typist, bored by the interval between her customary moments of leisure, applied the glowing tip of her cigarette to a pile of scrap, lightly observing that it would make a good bonfire. Her prophecy was correct : a serious explosion occurred, and the factory was partially destroyed by fire. In these circumstances, Jones, J., has held that the typist's behaviour was not such a conscious act of volition as to break the chain of causation and relieve the carriers from liability for failing to contemplate the possibility of what, in fact, happened : *Philco Radio and Television Corporation of Great Britain, Ltd.* v. *J. Spurling, Ltd.*, [1949] 2 All E.R. 129. Scriblex confesses to a strong sympathy for the author of a caustic comment upon this case in *23 Law Institute Journal* (Australia), 156, wherein it is said that "for the purpose of establishing *novus actus* a female typist is not to be regarded as having any more sense than a boy of nine."

From My Notebook.—"It is one thing for the law to refuse to assist either party in their folly, if they will bet ; it is quite another to forbid the loser to keep his word. Lost bets are still regarded as debts of honour ; in other words, all honourable men regard the payment of money lost on a bet as a duty of imperfect obligation, and the payment of bets is indirectly enforced by the social stigma attaching to a defaulter " : *per* Farwell, J., in *Hill* v. *William Hill* (*Park Lane*), *Ltd.*, [1949] 1 All E.R. 452.

"As a general proposition of law, a husband cannot be guilty of a rape on his wife, but where Justices have made an order containing a provision that a wife be no longer bound to cohabit with her husband, the consent to marital intercourse given by the wife at the time of marriage is revoked thereby, and the husband is not entitled to have intercourse with her without her consent, with the result that he can be guilty of a rape " : *per* Byrne, J., in *R.* v. *Clarke*, [1949] 2 All E.R. 448.

"My Lord, I suggest that my friend made this submission for one reason only, and that was with the object of drawing a red herring across the trail so as to throw dust in your Lordship's eyes, and prevent your Lordship from seeing the wood for the trees " : example of mixed metaphor from a *nisi prius* action, cited in (1949) *99 Law Journal*, 450.

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: "THE NEW ZEALAND LAW JOURNAL" (Practical Points), P.O. Box 472, Wellington.

1. Death Duties.—*Mortgage from Son to Father—Covenant to pay Interest—No Interest ever demanded or paid—Liability of Unpaid Interest to Death Duty in Father's Estate.*

QUESTION: In a small estate of some £2,700, the main asset is a mortgage of £2,300. This mortgage is from a son to a father, given for the purpose of protecting the son's farm property from an attack by his former wife. The lower rate of interest is 6½ per cent., presumably less the 20 per cent. I am instructed that it was never the intention for the father to collect interest from the son, and, in fact, no interest was ever paid. The father never expected any, as he had a life interest in his late wife's property. The small estate is now faced with the usual claim by the Stamp Department that deceased's intention to forgive the interest was never satisfactorily completed, and that the interest for the past twenty-two years will require to be brought into account. *Chambers* v *Commissioner of Stamp Duties*, [1943] N.Z.L.R. 504, is relied upon by the Department. In this case, and in other similar cases referred to therein, interest was paid for certain periods, and then, later, the mortgagee intimated that the mortgagor need not pay further interest. But, in the estate now in question, no interest was ever paid at any time. It is submitted, therefore, that this case is different from the other cases, in that it was never intended to collect. I have no instructions as to why the covenant to pay interest was included in the mortgage. (*a*) Does the fact that it was never the intention to collect interest place this estate in a more favourable position than in the other cases? (*b*) Is there any method or rule of law by which this small estate may be released from the apparent excessive duty which it is intended to levy? The beneficiaries are grandchildren.

ANSWER: (*a*) The answer is "No," because it would be very difficult to prove such intention. The fact that no interest was ever collected or demanded does not appear to favour the taxpayer: *Re Cochrane (deceased), Cochrane* v. *Turner*, [1945] 1 All E.R. 660.

(*b*) Death duty must be paid on the total amount of unpaid interest for twenty years preceding deceased's death, unless it can be proved that:

(i) During the deceased's lifetime, the Supreme Court would have *rectified* the deed by deleting the covenant as to interest. This is not likely, as the covenant was probably inserted advertently to avoid operation of s. 49 of the Death Duties Act, 1921, as at the date of the mortgage: *Commissioner of Stamp Duties* v. *Card*, [1940] N.Z.L.R. 637, had not been decided. Or

(ii) The deceased was *estopped* from collecting interest—*e.g.*, *Coles* v. *Topham*, [1939] G.L.R. 485 (cited in *Adams's Law of Death and Gift Duties in New Zealand*, 148), *Lewis* v. *Levy*, (1876) 2 V.L.R. (Eq.) 110, cited and explained in *Chambers* v. *Commissioner of Stamp Duties*, [1943] N.Z.L.R. 504, 529. It would be difficult to prove estoppel, as it does not appear that the son acted to his detriment as the result of any representation by deceased. Or

(iii) The value of the land plus the value of the son's personal covenant is less than the amount owing under the mortgage: see *Beamish* v. *Commissioner of Stamp Duties*, [1937] N.Z.L.R. 217.

X. 2.