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EXECUTOR OR UNIVERSAL LEGATEE PREDECEASING TESTATOR: LETTERS OF ADMINISTRATION WITH WILL ANNEXED.

OVER the past forty years, the practice in New Zealand, when the executor has predeceased the testator, or the universal legatee has similarly predeceased the testator, has been to apply for letters of administration, as on an intestacy. The form of the resulting letters of administration has contained recitals of the will and the special facts, and, generally, it has been drawn in accordance with the grant made by Sim, J., in *In re Vogel*, (1910) 13 G.L.R. 117.

It has been found by Mr. Justice F. B. Adams that the foregoing procedure is not justified in law, and, in *In re Young* (to be reported), he has held that, in the circumstances of that case, and in like circumstances, the proper application is for the grant of letters of administration with the will annexed. Moreover, His Honour, as the result of inquiries, has been assured that the current English practice is to grant administration with the will annexed.

As His Honour has pointed out an important defect in probate practice in this country, we think it may be useful to practitioners to give in some detail the contents of the memorandum of the learned Judge, so that they may be able to consider in its light any application of the kind they may contemplate in the near future. We do so all the more readily by reason of the fact that His Honour remarked that the application in *Young's* case was one of three similar ones then receiving his attention.

Rule 531J of the Code of Civil Procedure is as follows:

> If there is a will, but no executor has been appointed thereby, or if the executor or executors thereby appointed shall have died in the lifetime of the testator, or shall renounce probate of the will, or shall be incompetent by reason of his or their minority, lunacy, residence out of the jurisdiction, or disability, letters of administration with the will of the testator annexed may be granted to such person or persons as under the practice of the Probate, Divorce, and Admiralty Division of the High Court of Justice in England would be entitled in similar circumstances in England.

In *In re Vogel*, (1910) 13 G.L.R. 117, which was an application for letters of administration with the will annexed, the testatrix died in June, 1910, leaving a will dated October 23, 1905, whereby she devised all her real and personal estate to her husband. Her husband predeceased her by one day, leaving a will, which had been proved before the application in the wife s estate. The memorandum in support of the motion raised the question whether the grant should be for administration as on an intestacy or administration with the will annexed, and counsel submitted that, as the deceased had left a will, it must be proved. Mr. Justice Sim held that, as the universal legatee and executor appointed by the will had died before the testatrix, he thought it was clear that she must be treated as having died intestate. His Honour directed that letters of administration should be drawn up so as to recite the fact that the testatrix died on June 15, 1910, having made a will on October 23, 1905; that the will should be set out; and that the fact that the universal legatee died on June 14, 1910, should be recited. The fact that the applicants were executors of the husband's will and the fact that, so far as could be ascertained, the testatrix left no next-of-kin in New Zealand should be recited. The letters of administration should then proceed according to Form No. 40 of the First Schedule to the Code of Civil Procedure (Letters of Administration without a Will). His Honour added that *Toomer* v. *Sobinska*, [1907] P. 106, was authority for adopting that form. He also said that " to grant letters of administration with the will annexed would imply that the will could operate in the same way as a testamentary disposition, which it clearly cannot do."

It is difficult to see the relevance of *Toomer* v. *Sobinska* (*supra*), in which the plaintiff, the husband of the deceased, claimed administration of her estate as upon an intestacy. The defendant set up a will of the deceased, under which she was entitled to a life interest in the income of the deceased's residuary estate. In reply, the plaintiff alleged that the will had been revoked by a subsequent paper writing duly executed as a testamentary document in accordance with s. 20 of the Wills Act, 1837, and dated May 25, 1905. Bargrave Deane, J., held that the document duly revoked the will; and he further held that the grant should go as upon intestacy without annexing the paper writing, but with a note that the grant was so made in consequence of the execution of the document of May 25, 1905, revoking the earlier will.

In discussing *Toomer's* case, His Honour Mr. Justice F. B. Adams said that it was not in point, as it dealt with an instrument of revocation, a document which

did no more than revoke an earlier will, and which, not being in itself testamentary, was not annexed to the grant. A revoked will is, of course, never the subject of a grant of probate or of administration with the will annexed; and it is not now the practice to annex instruments of revocation unless they do "something more than merely revoke the will" (*In the Goods of Hicks*, (1869) L.R. 1 P. & D. 683, 684), or are "also of a testamentary character" (*In the Goods of Durance*, (1872) L.R. 2 P. & D. 406, 408); but, His Honour added, none of these authorities throws any light on the question dealt with in *In re Vogel* (*supra*).

For the reasons given in his memorandum, His Honour dissented from *In re Vogel* (*supra*), and he was not prepared to make the grant applied for in *In re Young*; but he was prepared, on proper amendment of the motion, and on the proper oath being sworn and filed, to make an ordinary grant of administration with the will annexed.

After detailing the facts in *Young's* case, we shall set out His Honour's reasons for his dissent from *In re Vogel*.

In *In re Young* the question arose on a motion for grant of letters of administration as on intestacy, there being exhibited to the affidavit to lead grant a will dated April 21, 1908, by which testator gave, devised, and bequeathed all his real and personal property to his wife absolutely, and appointed her sole executrix. Apart from what is merely formal, that is a complete statement of the contents of the will. The testator died on October 5, 1949, his wife having died on June 20, 1943. A daughter claimed to be his sole next-of-kin, and she filed an affidavit exhibiting a consent to the grant. The applicant was a nephew of deceased; and, in effect, he was the daughter's nominee to take the grant.

Mr. Justice F. B. Adams, in his memorandum, mentioned that he had before him two other similar cases, distinguishable only on the grounds that, in one of them, the executor and the legatee were different persons, and that, in the other, there was a direction for payment of debts. He said that, when the matter first came before him, he had thought it strange that, on an application of this kind, the Court should be called upon to arrive at any decision as to the death of a donee under the will. He continued:

> It is true that the Court must necessarily decide whether an executor is alive or dead; and, in this case, proof that the executrix is dead also proves that the beneficiary is dead. But this will not always be the case, and is not so in one of the cases before me; and any question as to the survivorship of a donee as such seems foreign to an application of this kind. If, in this case, the will had appointed A as executor, and B as sole beneficiary, the Court must necessarily receive proof of the death of A; but is the death of B relevant? Has the Court jurisdiction to inquire into his survivorship, and what effect will its decision have? The question may be put more generally as being whether, the nominated executor having died before testator, the Court is concerned to inquire whether, by reason of lapse or on any other ground, the will is ineffectual to create any beneficial interests; and the case before me is only a particular instance of that problem. If a grant is to be made here as on intestacy, the same rule must be applicable wherever (i) the executor has died before testator, and (ii) the will is for any reason ineffectual to create any beneficial interests. The beneficial provisions may fail completely because of a breach of the rule against perpetuities; or there might be a lapsed gift to a charity without any general charitable intention such as would enable the fund to be applied *cy-près*.

His Honour then said that, to put it mildly, it is undesirable that a Court of Probate should be obliged to determine—and, perhaps, to determine *ex parte*—the questions of fact and of construction that may need to be determined in order to say whether any particular will does or does not create beneficial interests. On principle, he added, one would expect the rule to be that the Court, in its probate jurisdiction, will not inquire into questions of lapse or into any other matter bearing on the question whether or not a will, on its face capable of having legal operation, is operative to create beneficial interests.

The matter is not one of mere form, and the question whether a particular will, on its face inoperative, may not have some operative value is not so simple as may appear at first sight, said His Honour. If this will, instead of being in favour of a wife, had been in favour of a child or other issue, appointing such child or issue sole executor, and the executor-legatee had died leaving issue living at the death of testator, the will would have taken effect under s. 33 of the Wills Act, 1837. His Honour continued:

> Is the Court in such a case to receive evidence, on an application for administration, not only of the death of the executor-legatee, but also as to the existence or non-existence of issue surviving testator? Again, a will apparently inoperative may operate as an execution of a general power of appointment: Wills Act, 1837, s. 27; and, if the appointment made by it turns out to be ineffectual, there is a possibility, depending on nice questions of construction, that the property the subject-matter of the power may devolve, not under the settlement in default of appointment, but as part of testator's estate: *34 Halsbury's Laws of England*, 2nd Ed. 152. There is also the possibility that such a will may make the appointable property available for the payment of testator's debts: *25 Halsbury's Laws of England*, 2nd Ed. 563, and *34 Halsbury's Laws of England*, 2nd Ed. 153.

In one of the other cases before His Honour, there was a direction for payment of debts that would have that effect if there should happen to be a general power. Was he to inquire in that case as to the possible existence of such a power? And is the Court in such cases to construe the will in order to determine whether it is in such terms as might exercise a power? And, if so, is it to institute an inquiry as to the existence of a power?

His Honour did not doubt the jurisdiction to decide such questions; he doubted only the propriety of exercising it on an application of this kind: *In the Goods of Tharp*, *Tharp* v. *Macdonald*, (1878) 3 P.D. 76, 81; and, he added, it must be borne in mind that, if the jurisdiction is to be exercised, all interested parties should be before the Court. There are, of course, cases in which the Court, in the exercise of its probate jurisdiction, must determine what may be described as collateral questions; but this should be done only when necessary.

After stating the facts in *In re Vogel* (*supra*), His Honour said that it might be a question how, if at all, a grant so made differs in reality from an ordinary grant of letters of administration *cum testamento annexo*. It seemed to him, with all respect, to be the same thing in disguise, or, failing that, to be a new form of grant *cum testamento incorporato*, if that phrase might be coined to describe it. He continued:

> So far as I can find, *In re Vogel* has not been referred to in any subsequent reported case; nor have I found any English decision to the like effect, nor any support for it in any text-book. On the other hand, I have found no actual decision as to what should be done in such a case. The only clear statement I have found in any text-book is in

Tristram and Coote's Probate Practice, 19th Ed. 24, 25, where it is said that:

> "Every document purporting to be testamentary [and duly executed] is entitled to probate in the English Court if it contains a disposition, whether the disposition is operative or not . . . of property . . . Though a will contains no appointment of an executor, no revocation, revival or republication clause, and is entirely non-operative owing to the decease of the beneficiaries, so that the whole estate devolves as on an intestacy, it must be proved. The deceased died testate, though his whole estate may have to be distributed as in an intestacy."

This passage is precisely in point. It cites *In the Goods of Jordan*, (1868) L.R. 1 P. & D. 555, which dealt with a will disposing of realty only, at a time when a will of realty was not entitled to probate. The executor had renounced, and administration with the will annexed was granted to the next-of-kin, on the principle that the bare nomination of an executor made the document a will, "and as a will it is to be proved," and that the renunciation could not take away the effect of the nomination. The case is distinguishable on the ground that there was a surviving executor; but the grant was a grant of administration with the will annexed, notwithstanding his renunciation and the fact that the will was wholly inoperative as to the only class of property with which a Court of Probate was then concerned.

His Honour then considered *In re Ford, Ford* v. *Ford*, [1902] 1 Ch. 218, affirmed on appeal, [1902] 2 Ch. 605, in which the circumstances were exactly similar to those of *In re Young*, and *In re Cuffe, Fooks* v. *Cuffe*, [1908] 2 Ch. 500, where there was a complete lapse, by reason of the deaths of all legatees, of all beneficial interests under the will, and the person named as executor had predeceased the testator. In *Cuffe's* case, letters of administration with the will annexed had been granted to the attorney of testator's widow. Once again, there was no discussion as to the propriety of the grant, the only question dealt with being whether the widow was entitled to the first £500 out of the estate. Joyce, J., said, at p. 502, that deceased "died 'intestate' within the meaning of the Act," a more guarded expression than those used in *Ford's* case (*supra*).

His Honour then considered *Public Trustee* v. *Sheath*, [1918] G.L.R. 92, and gave particular attention to the dictum of Sir Robert Stout, C.J., at p. 97, where, after citing *In re Cuffe* (*supra*), he said:

> In New Zealand I apprehend the Court would grant administration with the will annexed: the will could not be ignored.

This, Mr. Justice Adams observed, was only a dictum; but it was the dictum of a Judge of long experience in such matters, and may be usefully contrasted with *In re Vogel* (*supra*), with which it is irreconcilable.

In a later memorandum, His Honour said that his attention had been drawn to the decision of Sir Robert Stout, C.J., in *In re Coleman*, [1920] G.L.R. 446 (a similar case), in which the learned Chief Justice granted administration as on intestacy. The decision did not mention his dictum relied on above, and there was no reference to *In re Vogel* (*supra*) and no suggestion that the grant should recite the will and the special facts, as required in that case.

Then His Honour said:

> In my opinion, while the two English cases just cited show that, in such circumstances, the deceased died "intestate" for certain purposes, they also give some support to the view that the proper grant to be made in those circumstances is a grant of administration with the will annexed. It can hardly be supposed that, if this were not so, the matter would have been allowed to pass without comment by *Buckley*, J., and the Court of Appeal in *In re Ford* (*supra*) and by *Joyce*, J., in *In re Cuffe* (*supra*). This has value when coupled with the fact that, so far as I can see, there is, apart from *In re Vogel* (*supra*), no authority for anything but an ordinary grant of administration with the will annexed.

His Honour made it clear that what he had already said had no application to cases where a purported will is inoperative owing to the absence of testamentary power; as, for instance, in the case of an infant not authorized to make a will, either by s. 75 of the Life Insurance Act, 1908, or by s. 14 of the Infants Act, 1908, or by the legislation dealing with the wills of infants in the armed Forces: *Garrow's Law of Wills and Administration*, 2nd Ed. 34, 35. In such cases, the collateral questions must be dealt with: *In re Houston*, [1928] G.L.R. 96; and the document is not a will at all unless they are answered in a certain way. On this ground are to be explained certain cases as to wills made by married women when their testamentary power was limited: *cf. In the Goods of Graham*, (1872) L.R. 2 P. & D. 385, 388, where the grant was one of "general administration, founded on an affidavit that the deceased left no will operative in law."

As to the form of the oath to be taken by the administrator: His Honour saw no difficulty arising from this. An executor to whom probate is granted is required to swear that he "will faithfully execute the said will by paying the debts and legacies of the said deceased so far as the property will extend and the law binds"; and the probate is worded accordingly (Forms Nos. 34 and 36). It frequently occurs that there is partial intestacy; and, even where the will, by lapse or for any other reason, leaves the whole estate to be distributed as on intestacy, the words of this oath will still be appropriate. Probate is proper and necessary even where the will does no more than appoint an executor: *Mortimer on Probate Law and Practice*, 2nd Ed. 205, 264, *Beard* v. *Beard*, (1744) 3 Atk. 72; 26 E.R. 844, *In the Goods of Lancaster*, (1859) 1 Sw. & Tr. 464; 164 E.R. 815, and *Brownrigg* v. *Pike*, (1882) 7 P.D. 61; and His Honour had found no reason to suppose that the executor's oath is to be modified in such a case. In the English practice, the form of oath is different, the executor swearing that he "will administer according to law all the estate which by law devolves to and vests in the personal representative of the said deceased": *Tristram and Coote's Probate Practice*, 19th Ed. 1100; and the oath of an administrator with will annexed is in similar form: *Ibid.*, 1110.

Under the Code of Civil Procedure, no form of oath is given for an administrator with will annexed; but the grant in Form No. 39 (as replaced), after empowering the administrator to "pay . . . the legacies contained in the said will, so far as such estate, effects, and credits extend," proceeds to recite that the administrator has been sworn "well and faithfully to execute the said will." I think this means no more than that, as in the case of probate, the administrator must execute the will "so far as the property will extend and the law binds." In other words, the will is to be executed in so far as there is anything in it calling for execution. The words clearly do not bind the administrator to pay lapsed or void legacies, or to refrain from distributing as on intestacy so much of the estate, whether part or whole, as is not effectually disposed of by the will. If there is nothing in the will that calls for execution, the oath may be inept, but will not be false. In His Honour's view, the question whether there is anything to be executed is one to be decided after the grant; and it is not the province of the Court to go into that question when making the

grant. He thought that it was perhaps unfortunate that the English form of oath had not been adopted here, as it is plainly appropriate in all circumstances.

In conclusion, His Honour said that, except for his reference to *In the Goods of Jordan* (*supra*), he had said nothing that was intended to refer to the position that arises where the nominated executor survives the testator, and renounces or dies before the grant. But the same reasoning will apply *a fortiori* if there be any need to apply it.

In his subsequent memorandum, the learned Judge said that in the interval he had caused inquiry to be made in London; and he was now assured, on what he believed to be the highest available authority short of judicial decision, that the current English practice is to grant administration with the will annexed.

SUMMARY OF RECENT LAW.

ACTS PASSED, 1950.

No. 47. War Pensions Amendment Act, 1950.
No. 48. War Pensions and Allowances (Mercantile Marine) Amendment Act, 1950.
No. 49. Social Security Amendment Act, 1950.
No. 50. Medical Practitioners Act, 1950.
No. 51. Transport Amendment Act, 1950.
No. 52. Machinery Act, 1950.
No. 53. Boilers, Lifts, and Cranes Act, 1950.
No. 54. Crown Proceedings Act, 1950.
No. 55. National Provident Fund Act, 1950.
No. 56. Mental Defectives Amendment Act, 1950.
No. 57. Hospitals Amendment Act, 1950.
No. 58. Deaths by Accidents Compensation Amendment Act, 1950.

CRIMINAL LAW.

Evidence—Confession—Allegation that Confession improperly obtained—Ruling in Absence of Jury on Admissibility—Right of Counsel at Trial again to cross-examine Police and examine Prisoner regarding Circumstances in which Confession obtained. On the trial of an indictment for felony, the only evidence proposed to be offered against the appellant was a confession made by him to the Police before his arrest. He alleged that the confession was not voluntary, having been made on a promise given to him by the Police, and that it was untrue. In the absence of the jury, the Recorder heard evidence from the Police and the appellant and held that the confession was admissible in evidence. Later, when evidence was being given before the jury at the trial, he ruled that counsel for the appellant could not again cross-examine the Police or re-examine the appellant regarding the circumstances in which the confession had been made. *Held*, That the weight and value to be given to the confession was a matter for the jury, and, in considering that matter, they were entitled to form their own opinion on the way in which it had been obtained, and, therefore, counsel for the appellant was within his rights in claiming that he should be allowed to examine and cross-examine to show, if he could, that the confession had been procured by means of a promise of favour. *R.* v. *Murray*, [1950] 2 All E.R. 925 (C.C.A.).

Evidence—Confession—When admissible—Discretion of Judge—Onus of satisfying Judge to exercise Discretion against Admission—Departure from Police Standing Orders—Effect—Evidence Act, 1928 (No. 3674), s. 141 (cf. Evidence Act, 1908 (N.Z.), (new) s. 20). In deciding whether there has been a non-direction by a trial Judge in his charge to the jury, the Court of Appeal should consider the matter against the background of the whole trial, and not merely by regarding the charge itself. Where several prisoners are presented together for a joint offence, if one prisoner calls evidence or puts in a document which relates favourably to the defence of his fellow-prisoners, the prosecution has, as a matter of general practice, a general right of reply. The rule is not inflexible; in exceptional circumstances, the trial Judge may exercise a discretion to vary the order of addresses. (*R.* v. *Canan*, [1918] V.L.R. 390, and *R.* v. *Orton*, [1922] V.L.R. 469, approved.) At common law, (i) a confessional statement is inadmissible in evidence unless shown to have been voluntarily made—*i.e.*, in the exercise of free choice, and not because the will of the accused has been overborne; (ii) the statement is not voluntary if preceded by an inducement held out by a person in authority and the inducement has not been removed before the statement is made. Section 141 of the Evidence Act, 1928, operates merely as a restriction, applicable in the particular cases specified therein, of the rules of the common law relating to the rejection of confessional statements; subject to that restriction, the rules of the common law continue to prevail. By a development which has taken place in recent times, the rules of the common law relating to the rejection of confessional statements have come to include a further rule, under which such statements are, in certain circumstances, rejected even though they have been voluntarily made. Per *Barry* and *Smith*, JJ., Under this further rule, the trial Judge has been said to have a discretion to reject such statements; but this so-called discretion rule, as it has now developed, requires that he should reject any such statement where it has been obtained by the Police by improper methods if it would, in all the circumstances, be unfair to the accused to use it in evidence against him. If the trial Judge is left in doubt as to the fairness of admitting the statement he should reject it, the onus of proof being upon the Crown, as it is when the issue is whether a statement has been made voluntarily. The English "Judges' Rules" and the Victorian Police "Standing Orders" should be taken as a guide by the Court in considering the propriety of the conduct of the Police towards the accused in the obtaining of confessional statements, and it is the spirit, and not the letter, of the "Judges' Rules" which so guides the Court. Per *O'Bryan*, J. (dissenting), Under the further common-law rule, the trial Judge has, and should exercise, a discretion to exclude confessional statements made to officers of Police if it is considered, upon a review of all the circumstances, that such statements have been obtained in an improper manner and that it would be unfair to the accused to permit them to be used as evidence against him. The fact that one or more of the Victorian Police "Standing Orders" has been broken immediately gives rise to the question whether such unfairness has not been done to the accused as to warrant the exclusion of the evidence of statements obtained as a result thereof. But mere error in offending against the spirit, if not against the letter, of the "Standing Orders" should not lead to a rejection of statements obtained which, if properly procured, may afford valuable evidence for the Crown. On the hearing of a criminal trial, the presiding Judge admitted evidence of statements made to the Police by each of the accused. *Held* (*O'Bryan*, J., dissenting), That, the Police having been guilty of improper conduct in obtaining admissions, then, in the case of one accused, it was not open to the trial Judge to find that the Crown had satisfied the onus which rested upon it to establish that, as a matter of fairness, her confession should be admitted, and, in the case of the other two accused, the trial Judge, in determining whether it would be unfair to them to admit their statements in evidence, adopted too narrow a test of unfairness and excluded from his consideration material aspects of the question he had to determine. Accordingly, all three convictions should be set aside and a new trial ordered. *R.* v. *Lee*, [1950] V.L.R. 413.

As to Confessions by Defendant, see *9 Halsbury's Laws of England*, 2nd Ed. 203-210, paras. 291-297; and for Cases, see *14 E. and E. Digest*, 410-421, Nos. *4303-4400*.

Evidence—Depositions—Evidence given in answer to Leading Questions—Validity of Committal—Indictable Offences Act, 1848 (c. 42), s. 17. The appellant was convicted at Quarter Sessions of robbery. He contended that before the examining Justices the depositions had been taken as a result of the witnesses' being asked leading questions, and that, in consequence, the committal was bad. *Held*, That the evidence had been taken from the witnesses and put into writing, as was required by the Indictable Offences Act, 1848, s. 17, and, though the practice of obtaining the evidence by asking leading questions was undesirable, the fact that it had been followed in the present case did not invalidate the committal. (*R.* v. *Gee*, *R.* v. *Bibby*, *R.* v. *Dunscombe*, [1936] 2 All E.R. 89, distinguished.) *R.* v. *Walker*, [1950] 2 All E.R. 911 (C.A.).

CROWN PROCEEDINGS.

Crown Proceedings Act, 1950, consolidates the provisions at present contained in the Crown Suits Act, 1908, and its Amendments, and makes substantial changes in those provisions. Most of the changes were made for the purpose of bringing the procedure in actions by or against the Crown into line with the procedure in actions between subjects. The Act will come into force on January 1, 1952. (In these pages next year consideration will be given to the new Crown procedure established by this Act.)

DEATHS BY ACCIDENTS COMPENSATION.

Deaths by Accidents Compensation Amendment Act, 1950, by s. 2, repeals s. 8 of the principal Act, and substitutes a new s. 8 and s. 8A, which extends the limitation period under the principal Act for actions (other than those against the Crown and public and local authorities) from one year to two years, and enables the Court, by means of an "escape clause," to extend the period to six years. Except in these respects, the effect of the section is unaltered. Section 23 of the Limitation Act, 1950, prescribes a limitation period of one year for the Crown and public and local authorities, with a similar provision for extension to six years. This amendment of the Deaths by Accidents Compensation Act, 1908, will come into force on January 1, 1952, the date upon which the Limitation Act, 1950, will also come into force.

DIVORCE.

Nullity—Impotence—Birth of Child to Petitioner—Application of Rule in Russell *v.* Russell—*Corroboration of Petitioner's Evidence—Evidence of Physician as to Characteristics observed during Consultation with Patient—Admissibility—Evidence Act, 1928 (No. 3674), s. 28 (cf. Evidence Amendment Act, 1945 (N.Z.), s. 15).* The rule in *Russell* v. *Russell*, [1924] A.C. 687, does not preclude a petitioner in a suit for nullity of marriage, on the ground of the respondent's impotence, from giving evidence that intercourse which resulted in the birth of a child to her was not intercourse with the respondent. (*Farnham* v. *Farnham*, [1937] P. 49, and *Burgess* v. *Burgess*, [1937] P. 60, followed.) The failure of a respondent to a suit for nullity of marriage on the ground of impotence to submit to medical inspection pursuant to order of the Court and to appear at the hearing of the suit may be accepted as corroboration of the evidence of the petitioner. The disclosure by a physician, without the consent of a patient, of information as to the patient's bodily characteristics, observed during consultation or treatment and not patent to the world, is prohibited in civil proceedings by s. 28 of the Evidence Act, 1928. *F.* (*otherwise M.*) v. *F.*, [1950] V.L.R. 352.

Points in Practice. *100 Law Journal*, 635.

EVIDENCE.

Some Further Thoughts on "Fresh Evidence." *94 Justice of the Peace Journal*, 551.

FISHERIES.

Offences — "Stalling" — Ingredients of Offence — Fisheries General Regulations, 1947 (Serial No. 1947/82), Reg. 15. The material parts of Reg. 15 of the Fisheries General Regulations, 1947, are as follow: "(1) . . . no person shall for purposes of taking fish set any net by the process known as 'stalling,' or use any net which is set by the process known as stalling. (2) For the purposes of these regulations the process known as stalling means the process whereby a net is staked or otherwise set across or within any bay, inlet, river, or creek in tidal waters in such a manner that fish enclosed by the net are or may be left stranded at low tide." The regulation is aimed at a "process," which involves much more than the mere setting of a net in one of the specified places. In order to obtain a conviction, the prosecution must prove either that the net was *in situ* at low tide and that at that time the tidal waters had receded beyond the whole or some part of the net, or that there were facts from which the Court may reasonably infer that the net would have been *in situ* at low tide and that the tidal waters would at that time have receded beyond the whole or some part of it. *Simpson* v. *Subritzky*. (Auckland. June 30, 1950. Luxford, S.M.)

JUSTICES OF THE PEACE.

Practice—Plea of Guilty—Constituents of Such Plea—Entry in Criminal Record Book not equivalent to Conviction—Justices of the Peace Act, 1927, ss. 72, 74 (3), 90—Magistrates' Courts Act, 1947, s. 28—Sentence—Accused charged with Common Assault and pleading Guilty—Magistrate finding Evidence pointing to Indecent Assault and stating he would deal with Matter on That Basis—Information charging Accused with Indecent Assault then laid and Accused arrested—Accused's Right to be dealt with as convicted of Common Assault—Magistrate sentencing Him to Month's Imprisonment—Appeal against Sentence—Proper Course in circumstances to proceed on Assumption that Act of Assault not in itself Indecent—Justices of the Peace Act, 1927, ss. 72 (2), 202, 205. The entry of the word "guilty" in the Criminal Record Book in the column headed "Plea" is no more than the record of the Registrar, and is not equivalent to a conviction, which, in terms of s. 72 of the Justices of the Peace Act, 1927, must be the judicial act of the Justices. *Semble*, 1. As a plea of guilty to a charge of common assault under s. 202 of the Justices of the Peace Act, 1927, does not preclude the Justices, in imposing sentence, from relying on s. 203 (aggravated assault), since that section does not create a separate offence, but permits increased punishment in certain circumstances, *prima facie*, s. 205 (indecent assault) should be equally available to them, and, in such event, s. 72 (2) may have to be construed as subject to it. (*Crocker* v. *Raymond*, (1886) 3 T.L.R. 181, referred to.) 2. Section 205 does not contemplate that a new information should be laid, but contemplates only that the Justices are, notwithstanding the form of the information, to proceed as on an indictment for an indictable offence. Where an accused person "pleaded guilty" (which words, though convenient to use, are not used in the Justices of the Peace Act, 1927) to the summary offence of common assault with which he had been charged under s. 202 of that statute, the learned Magistrate is reported as having said that he was prepared to deal with the matter and would invoke s. 205. An information on the indictable charge of indecent assault was then laid, and the accused was arrested, brought before the Magistrate and remanded, and released on bail. The Magistrate, finding that the accused had a right to be dealt with as already convicted on a summary charge, sentenced the accused to one month's imprisonment. The accused appealed, on the ground that the Magistrate, having convicted him of common assault, had, in effect, sentenced him for indecent assault. *Held*, That, in the circumstances of this case, the proper course was to proceed on the view that the appellant must be punished on the assumption that the act of assault was not in itself indecent. Observations on inadequacy of the maximum amount of the fine under s. 202 of the Justices of the Peace Act, 1927, under which a person who could be sufficiently punished by a substantial fine may be sent to prison because an adequate fine cannot be imposed. *Kelly* v. *Police*. (S.C. Wellington. November 8, 1950. F. B. Adams, J.)

MAGISTRATES' COURT.

Collision between Two Ships "at sea"—Action for Damages arising out of Such Collision—Admiralty Action—No Jurisdiction in Magistrates' Court to hear Action—Jurisdiction by Consent limited to Actions otherwise within Jurisdiction—Magistrates' Courts Act, 1947, ss. 29, 37—Colonial Courts Admiralty Jurisdiction Act, 1890 (53 and 54 Vict., c. 27), s. 2 (1). Section 29 of the Magistrates' Courts Act, 1947, does not confer on the Magistrates' Court jurisdiction to deal with any matters arising out of a tort in the course of a collision between two ships which occurred while they were at sea within the territorial limits of New Zealand, even though the action on which such matters arise has been brought as an action *in personam* and not *in rem*. Before jurisdiction in Admiralty can be given to the Magistrates' Court, special legislation is required making special provision for such jurisdiction (similar to that contained in ss. 55 and 56 of the County Courts Act, 1934 (England)). (*Aorere Steamship Co., Ltd.* v. *Colonial Sailing-ship Co., Ltd. (No. 1)*, (1906) 26 N.Z.L.R. 257, applied.) There is no power to give the Magistrates' Court jurisdiction by consent in an action where the subject-matter is outside its jurisdiction, as the consent to jurisdiction under s. 37 of that statute applies where the amount claimed or the value of the subject-matter is the only bar to an action otherwise within the jurisdiction. *Powell* v. *Galbraith, Ltd.* (Auckland. October 16, 1950. Jenner Wily, S.M.)

Practice—Execution—Application for Warrant—Judgment for Delivery of Specific Chattels or Payment of Sum of Money—Failure to obey Judgment—Proof of a Contempt necessary—Non-payment of Specific Sum named as Alternative—Judgment Summons Proceedings to be taken before Order of Imprisonment made—"Failure to obey"—Magistrates' Courts Rules, 1948, r. 262. An application under r. 262 of the Magistrates' Courts Rules, 1948, should not be granted if the Magistrate is not satisfied that the alleged failure to obey an order or judgment of the Court was deliberate, as such an order should be made only where there has been a contempt. Where the ground

of such an application is failure to adopt the alternative compliance with a judgment to deliver specific chattels—namely, the payment of a specified sum of money—no order for imprisonment should be made until proceedings have been taken under the Imprisonment for Debt Limitation Act, 1908. *Fafeita* v. *Stapleton*. (Pahiatua. October 11, 1950. Herd, S.M.)

MARKETING.

Apple and Pear Marketing—Offences—Sale of Apples not purchased from New Zealand Apple and Pear Marketing Board or Authorized Grower—Fruit-seller not retaining Dockets and Invoices relating to Apples Sold—Apple and Pear Marketing Act, 1948, ss. 10, 12 (1), 33 (2) (b)—Apple and Pear Marketing Regulations, 1949 (Serial No. 1949/159), Regs. 8 (1), 9 (2)—New-Zealand-grown Fruit Regulations, 1940 (Serial No. 1940/195), Regs. 6, 7, 22. In any prosecution for a breach of the Apple and Pear Marketing Regulations, 1949, the onus is on the prosecution to show that the fruit which is the subject of the information falls within the provisions of the Apple and Pear Marketing Act, 1948, and that the Regulations apply to it. *Ward* v. *Rama*. (Palmerston North. October 11, 1950. Herd, S.M.)

MEDICAL PRACTITIONERS.

Medical Practitioners Act, 1950, consolidates with amendments the Medical Practitioners Act, 1914, and its Amendments.

NATIONAL PROVIDENT FUND.

National Provident Fund Act, 1950, consolidates the National Provident Fund Act, 1926, and the sections of nineteen other Acts which have amended it. The new Act also contains some minor amendments.

SOCIAL SECURITY.

Social Security Amendment Act, 1950. Section 18 authorizes the Social Security Commission to refuse a benefit or to grant a reduced benefit where the applicant has failed to take appropriate proceedings for provision under Part II of the Family Protection Act, 1908, out of the estate of a relative of the beneficiary who has failed to make adequate provision for him under his will. Section 21 deals with the enforcement of maintenance orders in respect of deserted wives, and clarifies the right of the Commission and a deserted wife who is in receipt of a widow's benefit to take proceedings to enforce a maintenance order against the husband or for a cancellation, variation, or suspension of the order. Provision is also made as to the apportionment between the Commission in respect of arrears and the wife in respect of current maintenance of moneys paid under the order after the cancellation of the benefit. In computing the income of any woman, the Commission may take no account of her personal earnings from domestic service in a private home up to £78 a year. Section 20 provides that an age beneficiary, on attaining the age of sixty-five years, is to be entitled to an increase in his allowable income of 2s. 6d. a week for each complete year after he attained the age of sixty years and was qualified on residential grounds during which he did not receive an age benefit, irrespective of the reason of deferment. Appropriate adjustments are to be made to apply the same provision to a beneficiary whose benefit is reduced by reason of the possession of accumulated property so as to place him in the same position as one whose allowable income is to be increased under s. 20. The Act increases, as from May 8, 1950, the Social Security benefits by 2s. 6d. per week, and provides for an increase of 10s. a week in the allowable income of age beneficiaries, invalids, and persons entitled to sickness benefits, these increases to take effect from January 1, 1950. The reduction provided in the principal Act of £1 for every £10 of accumulated property for assessing the basic rates of age benefits and invalids' benefits is now to be £1 for every £15 of accumulated property.

TORTFEASORS.

Contribution between Tortfeasors. *94 Solicitors Journal*, 618.

TRANSPORT.

Offences—Intoxicated in charge of Motor-vehicle on Road—Defendant driving Truck on Highway—Accident to Truck occurring but Defendant then Sober—Defendant consuming Beer carried in Truck while Assistance being sought by Companion—Defendant Drunk when Help arrived—Truck immobile after Accident with No Opportunity for Defendant to drive—Driver not Guilty of Offence—Transport Act, 1949, s. 40. The defendant, who was on a journey and was driving a truck, called at an hotel, had one drink, bought twelve bottles of beer, and, with a companion continued on the journey. On passing over a culvert at one of the worst corners of the road, the defendant failed to take the bend properly and struck the bank, causing injury to his truck. He backed the truck on to the culvert, but went too far, and the rear right wheel went over the edge of the culvert into a depression and settled down at such an angle that the culvert was blocked for traffic. The learned Magistrate found as facts that, at the time the accident occurred, the defendant was sober and that he had not been injured. After the accident, the truck, with its rear wheel over the side of the culvert, was immobile, and could not be driven by the defendant until it could be pulled back on the road. He was unable to make the truck move, even if he wished to do so; and, before it was capable of movement, it had to be dragged on to the culvert, a task beyond the powers of the defendant and his companion combined. While his companion was away getting help, the defendant drank several bottles of beer. He was drunk when a Constable arrived, and he was arrested. He had not attempted to drive, and he had no opportunity of driving from that time onwards. The defendant was charged under s. 40 of the Transport Act, 1949, that he was intoxicated in charge of a motor-vehicle on the road. *Held*, dismissing the information, That at no stage, from the time of the accident until the defendant was arrested, was he in charge of a "live" vehicle, which could be driven to the danger of the public; and he had not remained at the driving-wheel while the truck was being pulled back on the road or attempted to drive away after the truck was on the road; and, consequently, at all material times he was not "in charge of a motor-vehicle while in a state of intoxication." (*Sandford* v. *Graham*, [1944] N.Z.L.R. 16, followed.) *Police* v. *Stretch*. (Blenheim. October 17, 1950. Thompson, S.M.)

Offences—Intoxicated in charge of Motor-vehicle on Road—Driver of Vehicle found beside it on Roadside in State of Intoxication—Wheel removed and taken away to have Tyre repaired—Truck operable when Wheel replaced—Actual or Potential Danger to Public—Transport Act, 1949, s. 40. A motor-truck was parked at the side of the road with one wheel missing, the axle being supported on a jack. The defendant, who was the owner and driver of the truck, was intoxicated on the grass bordering the road. The wheel had been removed and taken away to have the tyre repaired. On an information under s. 40 of the Transport Act, 1949, charging the defendant with being in charge of a motor-vehicle on the road while in a state of intoxication, *Held*, convicting the defendant, That it had not been proved that the truck, of which he was in charge, was not operable in any way by him and involved no danger, either actual or potential, to the public; and, as it would become operable as soon as the wheel, which had been removed for tyre-repair, was replaced, that, together with the intoxicated condition of the defendant, was an actual danger in the immediate future, or, in any case, a potential danger. (*Sandford* v. *Graham*, [1944] N.Z.L.R. 16, distinguished.) (*Quinn* v. *Leathem*, [1901] A.C. 495, referred to.) *Police* v. *Wedge*. (Hamilton. September 22, 1950. Paterson, S.M.)

Transport Amendment Act, 1950. The purpose of this Act is to provide a new method of fixing the charges for transport services under the Transport Act, 1949, and to make miscellaneous amendments to that Act. (The new amendments will be dealt with in detail in an article in these pages.)

WAR PENSIONS.

War Pensions Amendment Act, 1950, increases the rate of certain war pensions and allowances by 2s. 6d. a week as from May 8, 1950, as set out in the Act; and it also increases the allowable income of war veterans as from January 1, 1950, in most cases from £52 a year to £78 a year, and, in the case of an unmarried female war veteran, from £104 a year to £130 a year.

War Pensions and Allowances (Mercantile Marine) Amendment Act, 1950, increases by 2s. 6d. a week, as from May 8, 1950, the mother's allowance payable to widows of members of the Mercantile Marine, and also the pensions payable to the wives of members in respect of the members' disablement or detention.

WILL.

Emergency Force Active Service Order, 1950 (Serial No. 1950/203). The emergency military force raised under Part I of the Emergency Forces Act, 1950, or any portion of that force shall be on active service from the issue of a military order posting it for active service until the issue of a military order that it has ceased to be on active service.

THE TABULATED FORM OF MORTGAGE.

Under the Land Transfer Act.

By E. C. Adams, LL.M.

Section 101 of the Land Transfer Act, 1915, provides as follows:

> (1) Whenever any estate or interest under this Act is intended to be charged with or made security for payment of any money, the registered proprietor shall execute a memorandum in the Form E or F in the Second Schedule hereto as may be applicable to the case, and every such instrument shall contain a precise statement of the estate or interest intended to be charged, and shall, for description of the land, refer to the proper folium of the Register, and shall give such other description as may be necessary.
>
> (2) The Form G in the Second Schedule hereto may be used in lieu of the said Form E.

As to the memorandum of incumbrance in Form F in the Second Schedule, see *Ante*, p. 171. It is pointed out in that article that the usual form of memorandum of mortgage under the Land Transfer Act, 1915, in New Zealand is Form E. In this article, particular attention is drawn to subs. 2 of the section, which provides that Form G in the Second Schedule may be used in lieu of Form E.

Form F is in narrative form, beginning "I, A.B., being registered as proprietor of an estate," &c. Form G is in tabulated form, the necessary space being left for the entry of particulars as to name of mortgagor, estate, official description of the land, reference to the certificate of title, the name of the mortgagee, the amount of the sum, the date of advance, the rate of interest and how payable, and the date and manner of repayment of the principal sum. In both Forms, the operative clause (which is essential to every Land Transfer mortgage, as pointed out in *In re Goldstone's Mortgage, Registrar-General of Land* v. *Dixon Investment Co., Ltd.*, [1916] N.Z.L.R. 489, 500) is the same.

Provision is also made in Form G for the insertion of *special covenants or conditions*. Therefore, as is pointed out in *Martin's Property Law Act, 1905*, 183, this Form may be used with all the modifications and additions that may be made in a memorandum of mortgage in Form E. The drawing of a Land Transfer mortgage in Form G is conducive to concise and neat conveyancing, yet it is surprising how very few practitioners employ this Form. It may be observed here that the Land Transfer Act had been in force for thirty years before it was permissible to use this tabulated form of mortgage, it being first authorized by the Land Transfer Amendment Act, 1902, which came into operation on January 1, 1903. It is employed by some of the larger financial institutions and by some of the State lending departments. Perhaps practising solicitors dislike the Form because it may seem to savour too much of the mere filling in of a form—say, at the Post Office—but the provision for special covenants or conditions gives opportunity for the conveyancer to exercise his art. When this Form is being printed, it is customary to print also on the Form the covenants, conditions, and powers implied in mortgages as set out in the Fourth Schedule to the Land Transfer Act, 1915. If these are printed, care should be taken to exclude cls. 9, 10, and 11 (dealing with the insuring by the mortgagor of the mortgagee against any workers' charge obtaining priority over the mortgage under the Workers' Compensation Act, 1922), for these three clauses were repealed by s. 7 of the Mortgagees' Indemnity (Workers' Charges) Act, 1927, this liability now being undertaken by the State on payment of the small fee of 1s., which is paid when the mortgage is stamped at the Stamp Duties Office.

As pointed out above, provision is made in Form G for the insertion of special covenants or conditions. Thus, in practice, the implied power of sale is usually accelerated. And, since the case of *Ramsay* v. *Brown and Webb*, [1922] G.L.R. 71, there is almost certain to be inserted a covenant by the mortgagor that, in the event of his transferring the land during the subsistence of the mortgage, he will obtain from the transferee a covenant to pay the principal and interest and faithfully observe and perform the other covenants and conditions of the mortgage: see cl. 6 of the precedent herewith.

If there is more than one mortgagee, it should be made clear whether the mortgagees are to hold as tenants in common or as joint tenants. In this connection, s. 57 of the Land Transfer Act, 1915, must be borne in mind. It reads as follows:

> Subject to any Act of the General Assembly for the time being in force relating to the tenure of land by persons of the Maori race, any two or more persons named in any Crown grant or in any instrument executed under this Act as transferees, *mortgagees*, or proprietors of any estate or interest, shall, *unless the contrary is expressed*, be deemed to be entitled as joint tenants with right of survivorship, and such instrument, when registered, shall take effect accordingly.

If, therefore, a tenancy in common at law is desired, words expressing or imputing a tenancy in common should be included in the mortgage. And there is also the common case of a contributory mortgage, where the principal sum has been partly contributed by A and partly by B and C, B and C *inter se* holding jointly: see, for example, *Adams* v. *Registrar-General of Land*, [1946] N.Z.L.R. 243, 244. It is immaterial in what part of the mortgage the expression of the tenancy in common appears: in *Adams* v. *Registrar-General of Land*, it was in the operative clause; in *Drake* v. *Templeton* (*Registrar of Titles*), (1913) 16 C.L.R. 153, it was contained in one of the covenants in the mortgage. In the following precedent the mortgagees are joint tenants: see s. 76 of the Property Law Act, 1908, and s. 57 of the Land Transfer Act, 1915, above cited.

It will be observed that in the following precedent the principal is made payable on the first interest day. In *Martin's Conveyancing in New Zealand* (published in 1901), the learned and most experienced author says, at p. 84:

> The English method of making the principal sum payable, in the first instance, on the first interest day coupled with the usual "term certain" clause is now pretty generally adopted.

He gives at length his reasons why this method should be adopted. Sir Robert Stout, C.J., in *Hunt* v. *Hearn*, (1911) 30 N.Z.L.R. 501, 505, states that this method was not common in the South Island, but I do know that it was common forty years ago in several parts of the North Island. In *Martin's Property Law Act, 1905* (published in 1906), attention is drawn, at p. 172,

to cl. 8 of the Third Schedule to the Property Law Act, 1905, empowering the mortgagee to call up, on default, all moneys owing under the mortgage, notwithstanding that the time for payment may not have arrived. (This clause is similar to cl. 8 in the Fourth Schedule to the Land Transfer Act, 1915, which automatically applies to all Land Transfer mortgages, unless modified or negatived in the instrument itself.) *Martin*, however, still adheres to his opinion that the principal sum should be made payable on the first interest day.

> The English form, however, is still to be preferred, as, should the mortgage money be made payable *directly* at the end of the mortgage term, the mortgagor would, until then (unless he should make default in the meantime), have a *legal* and not merely an equitable right to redeem, and the Court therefore could not impose upon him any of the usual terms of redemption.

And he concludes thus:

> A mortgagee cannot, therefore, be advised to give up, for the sake of a few extra lines of drafting, a form of security of such long standing at Home.

Other writers (*Goodall* and *Garrow*) declare, however, that it is no longer necessary in New Zealand to make the principal sum payable on the first interest day: see, for example, *Goodall's Conveyancing in New Zealand*, 290. In *Garrow's Law of Property*, 2nd Ed. (the last edition prepared by Garrow himself), it is stated, at p. 434:

> There seems nowadays no special advantage in making the principal payable on the first interest day and thus putting the mortgagor technically in default on that date.

See also the rather caustic remarks of Sir Robert Stout, C.J., in *Hunt* v. *Hearn*, (1911) 30 N.Z.L.R. 501, 505. From my own observations, extending over a period of almost forty years, the method of making the principal sum payable on the first interest day gradually fell into desuetude, but recently I have noticed signs of a revival of this method.

In the following precedent, there is the usual provision for payment at a reduced rate of interest on punctual payment. In *Hardcastle* v. *Curlett*, (1903) 22 N.Z.L.R. 825, it was held that a mortgagee, by sending in interest accounts at the lower rate, may be held to have waived the higher rate. The remarks of Blair, J., in *Chambers* v. *Commissioner of Stamp Duties*, [1943] N.Z.L.R. 504, 521, are also, to say the least, interesting and instructive:

> Mr. *Willis* contends that the amount of the plaintiff's debt to his mother's estate should not be calculated at the respective lower rates mentioned in the mortgage, but should be at what is colloquially called the penal rate. It is so called because the framing of mortgages in this way is a device by conveyancers to get over the practice of the Chancery Courts of construing provision in a bond to pay at a higher rate if payment was delayed as a penalty and allowing liquidated damages only. One cannot overlook the fact that in the thousands of mortgages the enforcement of this penal rate is most unusual, and the exception instead of being the rule. The matter of strict compliance with interest payments in order to get the benefit of the lower rate is always treated as a waivable matter, and the right to recover the penal rate is treated as such. Mrs. Chambers [the mortgagee] never once raised the question of late payment of interest, and in that respect she did no more than was usually done. Indeed, the practice by mortgagees is to give notice that penal rates will be enforced before seeking to do so. I cannot overlook the common practice of mortgagees in respect of what is colloquially called enforcing the penal rate, and I shudder at the possibility of deciding that a man's executors or an inquisitive tax-gatherer could reopen all mortage transactions in his estate for the purpose of bringing into his estate a penal rate of interest on all interest payments that happen to have been a bit late. The wording of the proviso relating to reduction of interest in this mortgage follows the common form of an agreement by the mortgagee "*to accept*" interest at a lower rate if paid within a certain period after due date. To my mind, once a mortgagee "accepts" interest at the lower rate after the stipulated date, that waives his right to afterwards claim an addition to it at the higher rate.

As Denniston, J., pointed out in *Hardcastle* v. *Curlett*, (1903) 22 N.Z.L.R. 825, 827, the provision for payment of interest at the higher rate is in fact a *penalty*, and it is competent for the mortgagee to waive it, and accept, or agree to accept, the lower rate.

PRECEDENT.

MEMORANDUM OF MORTGAGE.

Mortgagor: A.B. of Palmerston North builder.

Estate: Freehold of inheritance in fee simple.

Land: [*Set out here area and official description of land mortgaged.*]

Reference to Title in Register: Certificate of Title, Volume , Folio .

Mortgagees: C. D. and E. F. both of Palmerston North spinsters.

Principal sum: £ advanced by the mortgagees out of money belonging to them on a joint account.

Date of advance: The day of 19 .

Rate of Interest: per centum per annum, subject as hereinafter appears. [*Insert here the penal rate.*]

How payable: The days of and in each and every year.

How and when principal sum to be repaid: The day of 19 subject as hereinafter appears (*i.e., the first term day*).

SPECIAL COVENANTS OR CONDITIONS.

1. That the mortgagor will, at [*his, her,* or *their*] own sole expense, keep the said lands free and clear of all noxious plants and weeds, and from rabbits and noxious vermin.

2. That the mortgagor shall and will duly and punctually pay all rates, taxes, assessments, and other outgoings from time to time payable in respect of the lands hereby mortgaged.

3. If the mortgagor shall on every half-yearly day hereinbefore appointed for payment of interest, so long as the said principal sum or any part thereof shall remain unpaid, or within fourteen days next after each of the said days respectively, pay to the mortgagees interest for the said principal sum, or for so much thereof as shall for the time being remain unpaid, at the rate of [*insert here the reduced rate*] per centum per annum, all interest and other moneys previously due having been duly paid, and all covenants and conditions herein contained or implied on the part of the mortgagor having been duly observed and performed up to the date of such payment, then the mortgagees will accept interest for the said principal sum, or for so much thereof as shall for the time being remain unpaid, at the rate of per centum per annum for every half-year for which such interest shall be paid to the mortgagees within the fourteen days aforesaid.

4. It is hereby further agreed and declared that, if the mortgagor shall on every half-yearly day hereinbefore appointed for payment of interest until the day of one thousand nine hundred and , or within fourteen days next after each of the said days respectively pay to the mortgagees interest for the said principal sum at the rate hereinbefore in that behalf mentioned up to the same half-yearly days of payment respectively, and shall perform and observe all the covenants and agreements herein contained or implied and on the part of the mortgagor to be performed or observed, except the covenant for payment of the said principal sum hereinbefore contained, then the mortgagees will not before the said day of , one thousand nine hundred and , call in the said principal sum or any part thereof:

Provided that, except as may be expressly provided herein to the contrary, the mortgagor shall not compel the mortgagees to receive the said sum or any part thereof before the said day of , one thousand nine hundred and .

5. And it is hereby expressly declared that the power of sale and incidental and subsidiary powers vested in mortgagees by law and implied herein shall be modified so that such power of sale and such incidental and subsidiary powers may be exercised by the mortgagees without making any demand, giving or leaving any notice, or waiting any period or periods whatsoever, or doing or seeing to the doing or happening of any other act or thing, anything implied by law to the contrary

notwithstanding, subject however to the provisions of s. 3 of the Property Law Amendment Act, 1939.

6. And it is hereby declared that, if the estate or interest of the mortgagor in the said lands shall during the continuance of this security be sold or cease to be the property of the mortgagor, then the mortgagor will forthwith, and before the transfer to the purchaser or new owner shall be registered, obtain execution by such purchaser or new owner of a deed of covenant by such purchaser or new owner and the executors, administrators, and assigns of such purchaser or new owner with the mortgagees to adopt and fulfil the covenants of this mortgage (but without releasing the mortgagor from the personal liability of the mortgagor hereunder), and further covenanting that, should such purchaser or new owner in turn sell the said lands or cease to be the owner thereof, he will procure from his purchaser or from such new owner the like deed of covenant with the mortgagees in every respect as is provided for by this clause, and so *toties quoties* the said deed of covenant and every succeeding deed of covenant to be prepared by the solicitors for the mortgagees at the cost in all respects of the mortgagor or other the person who shall be primarily liable to procure such deed of covenant.

7. And it is hereby declared that the mortgagor will not, without the consent in writing of the mortgagees first had and obtained, enter into any agreement with any municipal corporation or local authority for the payment by instalments of the cost of any drainage or sewerage connections on the said land or any part thereof, and will not without the like consent enter into any agreement with any electric-power board for the installation on the said land or any part thereof of any electric motor, electric wires, electric lamps, or other fittings.

And for the better securing to the said C. D. and E. F. as mortgagees the payment of the said principal sum interest and other moneys I HEREBY MORTGAGE to the mortgagee all my estate and interest in the said land above described.
As WITNESS [*my* or *our*] hand as mortgagor this day of 19 .

Signed by the said A. B. as mortgagor in the presence of: } A. B., Mortgagor.

G. H.,
Solicitor,

Correct for the purposes of the Land Transfer Act, 1915.

I. J.,
Solicitor for the mortgagee.

THE PATENTS COMMISSION.

Summary of Report.

The Rt. Hon. the Prime Minister has laid upon the Table of the House of Representatives the Report of the Patents Commission which was recently presented to His Excellency the Governor-General.

The Commission consisted of Mr. H. E. Evans, K.C., Solicitor-General (Chairman), Mr. G. W. Clinkard, Secretary to the Department of Industries and Commerce and now a Member of the Import Advisory Committee, Mr. A. J. Park, of Wellington, Barrister and Patent Attorney, Mr. S. W. I. Peterson, of Wellington, a member of the Manufacturers' Association and Vice-President of the Associated Chambers of Commerce of New Zealand, and Mr. J. R. Smith, of Wellington, retired Communications Engineer, formerly of the Post and Telegraph Department and New Zealand Broadcasting Service. Mr. A. B. Thomson, of the Department of Justice, acted as Secretary to the Commission.

The Commission was charged with the duty of reporting generally upon the working of the legislation relating to patents, designs, and trade-marks and the practice of the Patent Office and of the Courts in relation to matters arising therefrom, and whether, and, if so, what, changes in those Acts or that practice are desirable. In particular the Commission's attention was directed to the initiation, conduct, and determination of legal proceedings under those Acts, the provisions of those Acts for the prevention of abuse of monopoly rights, and any amendments of law or procedure designed to facilitate the expeditious settlement and the reduction of the cost of legal proceedings and to encourage the use of inventions and the progress of industry and trade.

The Report extends to 186 pages, and covers in considerable detail the matters referred to the Commission. The Commission first issued a questionnaire based upon that issued by a Committee known as the Swan Committee which in England investigated similar matters during the years 1945 to 1947. It then heard representations from counsel and some forty-three witnesses representing various interests. Its public sittings occupied in all forty-two days during a period of about fifteen months, after which a long period was spent in deliberations and in the preparation of the Report. The record of the proceedings of the Commission occupied 1,875 pages. At the conclusion of its Report the Commission has expressed its great indebtedness to counsel and witnesses for the assistance given by them. The proceedings were attended throughout by Mr. W. J. Sim, K.C., and Mr. R. E. Tripe, appearing for the New Zealand Radio Manufacturers' Federation, and Mr. H. R. C. Wild, for the Australian Radio Technical Services and Patents Co. Pty., Ltd. Mr. P. B. Cooke, K.C., appeared for the New Zealand Law Society, Mr. R. Hardie Boys, Mr. W. E. Leicester, Mr. Ian H. Macarthur, Mr. D. R. Richmond, and Mr. F. Campbell Spratt appeared for various other interested parties. The Commission also acknowledges the valuable contributions made by the Under-Secretary of Justice and the Commissioner of Patents, besides some thirteen Government Departments and many other persons and organizations. The Institute of Patent Attorneys had also gone to much trouble in presenting valuable material to the Commission.

The final preparation of the Report was held over for a time in order that the members of the Commission might study the consolidating and amending legislation introduced into the British Parliament and finally passed in December of last year. The three reports of the Swan Committee and the new British Acts have placed the Commission in a position to consider to what extent the British legislation should be reproduced in New Zealand, and what changes or additions are required in order to adapt it to the conditions of trade and industry prevailing in New Zealand. The Commission has borne in mind the advantages of uniformity of legislation throughout the British Dominions, and of keeping the legislation within the framework of current international arrangements.

Generally speaking, the Commission has recommended that the basic principles of the past New Zealand legislation, which are still reproduced in the new British legislation, should continue to be followed in New Zealand. At present, the New Zealand legislation comes under the one heading of Patents, Designs and Trade-marks, but the Commission has recommended that, as in Britain, each of those subjects should be covered by a separate Act, and that those provisions of the New Zealand Act of 1908 which have not been repealed by subsequent legislation should, with additions to incorporate the effect of certain British legislation of 1926, be enacted as a Merchandise Marks Act.

The recommendations of the Commission are numerous, and several of them are of a technical or procedural character. The main points of the recommendations may, however, be summarized as follows:

(i) That the definition of "invention" be amended to include any new method or process of testing applicable to the improvement or control of manufacture.

(ii) That, as the system of granting patents for specified types of plants has not yet been adopted in Britain, and is elsewhere still in an experimental stage, it should not for the present be adopted in New Zealand.

(iii) That a corporation be established by statute, with power to obtain and hold on behalf of the Crown patent, design, and trade-mark rights and other forms of property in New Zealand and in overseas countries.

(iv) That an Awards Committee be established to settle questions relating to inventions by employees of Government Departments, and that similar questions between private employers and their employees be determinable by the Commissioner of Patents or the Supreme Court.

(v) That the term of a patent should run from the date of filing of the complete specification.

(vi) That an inventor should be free to carry out tests in public for a given time, without losing the right to apply for a patent.

(vii) That the system of examination of patent applications in New Zealand be brought generally into line with that prevailing in Britain, but that the Commissioner should, for his assistance in examining applications, have power, as an alternative to complete search, to call upon the applicant to supply information as to prior art cited against any corresponding applications in Great Britain, Australia, Canada, or the United States of America, and that the present Reg. 13A be repealed.

(viii) That it should be made clear that the Commissioner has power to refuse a patent application for lack of novelty, and that he should be given power (but only in clear cases) to refuse on the ground of lack of inventive merit, but not (in the examination stage) on the ground of prior user.

(ix) That to ensure the secrecy of unaccepted applications the existing provision for publication of specifications before acceptance, introduced for the transitory purpose of overtaking arrears, be repealed.

(x) That it be made possible to obtain in opposition proceedings, as it is already in infringement proceedings, a certificate of validity of a patent, having the effect that the patentee may in any future legal proceedings based upon the patent recover his full costs as between solicitor and client.

(xi) That legislation similar to the British Act intituled the Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948, should be envisaged, and that a report of a Commission set up under such an Act should receive *prima facie* recognition under the Patents Act.

(xii) That the Court be given a discretion not to grant an injunction against a defendant while he has pending an application for a compulsory licence or while an inquiry into monopolies and restrictive practices is in progress.

(xiii) That legal proceedings be simplified by a procedure enabling questions of the issue of a compulsory licence and its terms to be disposed of (before the Commissioner or the Court) in one proceeding, notwithstanding that several patent rights held by several parties are together involved, and enabling the tribunal to take into account (without determining it) the possible invalidity of any patent.

(xiv) That the provisions against unlawful restrictive conditions in licences be made more stringent and effective.

(xv) That the registration of relevant documents be a condition of enforcement of remedies against infringers.

(xvi) That the right of the Crown to use patented inventions be extended so as to afford the full benefit of inventions useful to services conducted by the Government, but not so as to enable the Government to manufacture and sell under patents in normal times in competition with private enterprise.

(xvii) That a patent may be granted for a chemical product whatever the process of manufacture, but that a mixture may not be patented unless it results in more than an aggregation of the known properties of the ingredients.

(xviii) That the Commissioner be given a limited power to hear infringement cases, and to award damages, which, in the absence of agreement to the contrary, must not exceed £1,000.

(xix) That the remedy of account of profits as an alternative to damages be restored.

(xx) That the Court be empowered to declare in advance that a proposed manufacture or sale will not amount to infringement of a particular patent.

(xxi) That patent specifications receive a benevolent construction where they have been framed in good faith and with reasonable skill and knowledge.

(xxii) That decisions of the Supreme Court should in general be final, except in cases of revocation of a patent, adjudication between co-owners of a patent, and opposition proceedings involving refusal of a grant on the ground of prior user or lack of inventive step, and in certain other cases.

(xxiii) That on an application for a compulsory licence the Commissioner may with the consent of the parties invoke the help of a technical adviser.

(xxiv) That the Commissioner's jurisdiction in applications for extension of the terms of patents be widened to include all classes of such applications.

(xxv) That the power of the Attorney-General to intervene in patent matters in the public interest be made wider and more effective and applied also to design and trade-mark matters.

(xxvi) That the operations of the National Research Development Corporation in the United Kingdom be observed with a view to the possible establishment of a similar body in New Zealand.

(xxvii) That the Act to replace and amend the still unrepealed provisions of the Act of 1908 relating to merchandise marks be administered by the Department of Industries and Commerce.

(xxviii) That such of the Commission's recommendations regarding patent law as are applicable to designs and trade-marks be applied to them.

(xxix) That, as the New Zealand Act of 1939, so far as it consolidated and amended the law of trade-marks, is substantially the same as the present British law, little amendment is necessary, except one to prevent the unauthorized use of a trade-mark as part of the name of a company.

(xxx) That more adequate protection be given to the Royal Arms, the Governor-General's Arms, and the armorial insignia of New Zealand.

With regard to the Patent Office administration, the principal recommendations are as follow:

(xxxi) That adequate provision be made for office accommodation, library, indexing, searching, recording, and general equipment.

(xxxii) That there be a staff adequate in quality and numbers, and that the senior officers should possess appropriate technical, legal, and administrative qualifications.

(xxxiii) That the Patent Office be in two Divisions, the one for patents and designs and the other for trade-marks, with an Assistant Commissioner for each.

(xxxiv) That there be a Chief Examiner of Patents, possessing both technical and legal qualifications, who might be called upon to sit in an advisory capacity with the Commissioner or the Supreme Court.

(xxxv) That the examiners should be persons qualified in their particular technical branches and should also possess a reasonable appreciation of patent law.

(xxxvi) That encouragement should be given to junior officers to acquire the technical knowledge necessary for the higher positions.

(xxxvii) That the scale of remuneration be adequate to the qualifications required, with a recognition that the judicial duties of the Commissioner are comparable with those of the Magistrates, and that the remuneration of the Deputy and Assistant Commissioners should be on a basis relative to his.

(xxxviii) That in view of the greater cost involved in giving the proposed additional service to the public, particularly in patent matters, the fees for the obtaining and maintenance of letters patent should be increased.

(xxxix) That the Patent Office should remain attached to the Department of Justice, but that the Commissioner, in view of the intricacies of law and procedure regarding patents, designs, and trade-marks involved in his duties, should have direct access to the Minister of Justice.

OBITUARY.

Mr. C. B. Buddle (Auckland).

Mr. Charles Bell Buddle, a member of the firm of Messrs. Buddle, Richmond, and Buddle, died on November 18, aged sixty-six. He was born in Auckland and educated at Auckland Grammar School and Auckland University College, where he obtained his LL.B. degree. He was admitted in 1907, and in 1910 he went to British Columbia, where he practised until the First World War. On enlisting, he gained his commission, and later reached the rank of captain. During the war, he suffered a serious wound, from which he never properly recovered.

Mr. Buddle returned to New Zealand after the war, and in 1923 was admitted into partnership in the firm of Messrs. Buddle, Richmond, and Buddle.

He is survived by his wife, a daughter, and two grandchildren.

WELLINGTON DISTRICT LAW SOCIETY.

Annual Dinner.

The annual dinner of the Wellington District Law Society was a great success. Among the guests of the Society were the Rt. Hon. the Chief Justice, Sir Humphrey O'Leary, Mr. Justice Gresson, Mr. Justice Hutchison, Mr. Justice Hay, Mr. Justice Cooke, and Mr. Justice F. B. Adams, and the Magistrates resident in Wellington. The Attorney-General, the Hon. T. Clifton Webb, was also a guest.

The Judiciary.

Rising to propose the toast of "The Judiciary," Mr. Spratt said:

"I should first of all like to give you a message from our old friend Martin Luckie, who has sent an apology for not being here to-night. I am sure that we are conscious of a great loss. For years he has not missed such a gathering as this, and I know that he is with us in spirit to-night, and that we are all thinking of him with affection.

"Before proposing the toast of the evening, I should like to welcome those guests of ours who do not come within the general description of 'The Judiciary.' First, we have the Attorney-General, whom we are very glad to welcome. We have also our old friend and confrère, Mr. Solicitor. And then there is our friend and former President, Chief Judge Morison, of the Native Land Court. And with them we are very pleased to welcome Mr. Gifford, Acting Under-Secretary for Justice."

Addressing the Judges, Mr. Spratt continued:

"I would like to compliment your Honours on the fact that you now have what has been called a 'full Bench,' a full team, seven of whom are here to-night. As seven is a complete number, it is a tale of the Judges resident at least temporarily in Wellington.

"It has been represented that the Judges, after a period of great stress and heavy labour, have now entered a period of ease, with plenty of time for reflection, and that, as a result, we are beginning to see an improvement of output. It is said that the fewer hours a man works, the better his output. Of course, some of us were of the opinion that most of the work was done before the Judges.

"We like to know that we have the last returning prodigal, Mr. Justice Fair, with us. He has sampled the good things overseas. He would fain have filled himself, but he said: 'I shall arise and return unto my Chief.'

The New Judges.

"We are very pleased to welcome two new Judges and one new Magistrate since our last dinner. Of one Judge I need say little. He has been so closely knit with us that the only sign that he is different is that, instead of wearing a slouch hat, he now wears a black homburg. That is perhaps the only distinguishing mark of a Judge these days. There is perhaps one other. It arises at the opening of Parliament, I understand—a spectacle I have never seen, but which is attended by some of their Honours the Judges, and I understand their attire on that occasion has been irreverently described as a red bath-robe.

"It may be that there is a matter for criticism, a matter in the hands of the Chief Justice, that more is not made of the swearing-in of Judges. Recalling the past, I remember the swearing in of Mr. Justice Stringer before Mr. Justice Denniston. On that occasion, there was a full turn-out of Bar and solicitors and a most impressive swearing-in ceremony. Perhaps the only thing against it was a very voluble President. Where people are being appointed to high office, where they will be administering great responsibilities, even the power of life and death, it is well that the public should know by what authority they act.

"Then we are delighted to have with us one who is at present the 'new Judge.' Coming from Dunedin, in the past the cradle of Judges, himself the son of an honoured, able, and fearless Judge, we are very glad to see Mr. Justice Adams here. Everyone was very glad to see him at the Devil's Own Golf Tournament at Palmerston North.

"We are also pleased to welcome His Worship Mr. Scully from Westport, seated, as you will observe, beside another old Westport man, Mr. Justice Fair. One hears so much about the West Coast, one wonders why anyone leaves there. As a matter of fact, one Judge who was there, and who was due in Wellington for the opening of the Court of Appeal on Monday, found that there was trouble in getting the vessel over the bar. He therefore telegraphed the Court in Wellington as follows: 'Cannot arrive Wellington until Tuesday. Bar here impossible.' The Registrar showed the telegram to the Judges in Wellington, one of whom remarked, 'Just as my brother Denniston always used to say.' We would like to say this in favour of Mr. Scully: he is a reputable man. A curious thing is that there was one Commission which was run by the Chief Justice that never went to the West Coast—the Commission on licensing—and I understand Mr. Goulding's Commission seems to put off the evil day. Perhaps Mr. Scully will tell us why. However, I say that Mr. Scully is a reputable man for this reason—he is an angler, and, as a member of the Acclimatization Society of the West Coast, he was interested in the preservation of wild life. He seems to have been brought over here for the repression of the wilder life of the city. That an angler is a reputable person was affirmed during a colloquy when evidence was being given before the Licensing Commission, and Mr. H. F. O'Leary, K.C. (as he then was), was told: 'If you were a fisherman you would know that.' Mr. Scully, we welcome you, and perhaps you and your brother Magistrates will pardon me if I say nothing special about the Magistracy. Perhaps any words I may say are more needed by the Judges than the Magistrates.

Judges' Emoluments.

"There is one thing I would like to say which concerns the Judiciary. It is on the matter of emoluments. This may not be a matter of interest to the Judiciary, but there are many of us who take a serious view of the fact that the manager of a chain of gambling-shops is to be paid more than any of the Judges. And a money-lending establishment, of the kind described as a bank, has at its head someone who gets approximately half as much again as the emolument of any one of our Judges. I may say that I was going to make this comment before I knew that the Attorney-General would be here, but I am glad to say it when he is here.

"There is another matter—and I hope the most favourable construction will be placed upon my remarks. I refer to the disappearance of the practice by which reputable young men have been able to attach themselves to Judges and be known as their Associates, ultimately to the benefit of themselves and the profession. The present position is different. I am now not sure whether the term 'Associate' is appropriate. Some prefer the word 'Secretary.' But one wonders whether the new order is in the best interests of the profession, and one wonders whether it is in the best interests of the Judges. Is it not in the best interests of the profession, and ultimately of the Judges, that the Judges should be given reputable students as Associates? As with other questions I have propounded, I expect no satisfactory answer.

"All the good things that can be said about Judges have already been said. If it were possible to say anything else but good things, this would not be the place to say them, but I think I would like on the good side to direct your attention for just one minute to a statement made by Mr. W. L. Travers in 1903, at the famous protest of the Judges against the judgment of the Privy Council in *Wallis* v. *Solicitor-General*, not to question the judgment, but to repel the attack made on the integrity of the Bench in New Zealand. Mr. Travers then said: '[We state] our conviction that the feeling always entertained by the Bar of New Zealand as regards the superior tribunals before which they have the honour to practise is not likely to be, and has not in any degree been, shaken as to the integrity of the Bench.' We have not had occasion, happily, to repel any such attack, but we feel that now (as then) the Bench has merited, and still merits, the confidence, not only of us who practise before it, but also of His Majesty's Government and Parliament and the whole community at large.

"I do believe that the Executive Government will do nothing to diminish the prestige of the Bench as the guardian of the rights of the common man, or, more important, the rights of the uncommon man, because it is the rights of the uncommon man which are generally protected under the guise of those of the common man. I would submit that the Executive Government should at no time be tempted to use a Judge of the Supreme Court in matters of current political and controversial import. I have no doubt that Judges would resist it and that the profession would support them, because we realize that there are some arenas into which the Judiciary should not be brought."

THE CHIEF JUSTICE REPLIES.

After the toast had been honoured, the Rt. Hon. the Chief Justice, in acknowledging it, said:

"Last year, Mr. Justice Gresson replied to this toast. This year, I intended to get another Judge to reply. I thought that I was successful, but you can see that I was not. I had two motives in asking another Judge to reply. One, perhaps, you might call generous, and the other selfish. I think that, on occasions such as this, you should not hear the same representative of the Bench year after year. Each Judge should take his turn. However, I failed in attaining my object this year. The selfish motive is that it relieves me of the responsibility of speaking. It enables me to enjoy the splendid meal that has been supplied to-night more than I would if I did not have to speak. Even after all my years, I never feel comfortable until I have finished. However, I do say in all sincerity that I am proud and privileged to reply to this toast on behalf of the hardest-worked and poorest-paid, and at the same time the best, judiciary in the British Commonwealth of Nations.

"What a change from four years ago, when I addressed you first at such a gathering as this as Chief Justice! At that time, I was struggling to have the work done by seven Judges. To-day we are eleven, and we have no difficulty in disposing promptly, and, I claim, efficiently, of the work that is placed before us. I would add that the old excuse that there is no Judge available and that a case cannot be given a fixture will no longer be available to counsel. There was not much validity in that alibi even in years gone by. It was available, however, as an excuse for dilatoriness. I believe it was used as an excuse on occasions when the solicitor concerned had not even issued the writ.

A Changed Personnel.

"The personnel of the Judiciary has changed. I have been on the Bench just over four years. Six Judges have been appointed since then, and I am beginning to look upon them as 'my boys,' not because of any great disparity in ages, but because I have been there longer and, what is more, I am the boss. That reminds me of an anecdote that I read in a Canadian publication. There is an age-limit of seventy-five for Judges of the Supreme Court in Canada. In Ontario, there is no age-limit, and, frequently, a Judge of the Ontario Court is elevated to the Supreme Court of Canada. On one occasion, there was a vacancy, and apparently the local quidnuncs were speculating as to the new appointment, and the Chief Justice of Ontario thought it was likely that one of his puisne Judges, on whom he relied greatly, would be appointed. So he saw the Minister of Justice and implored him not to take his puisne: 'Please do not deprive me of my boy; he is my right-hand man.' On investigation, it was found that the 'boy' was already eighty years of age, and, therefore, five years over the Canadian age-limit, and there was no fear of his Chief Justice losing him. Actually, the Chief Justice of Ontario, Sir William Molock, was on the Bench well after he had passed seventy-five years of age, and he finally died at over one hundred.

"I should like to mention the latest appointments, Mr. Justice Cooke and Mr. Justice Adams. You in Wellington know both, but you know Mr. Justice Cooke the better. You know that they are both able and capable, and we can be certain that they will prove efficient and able Judges. I want to warn you, especially the dilatory ones, that you will not put anything over on these Judges. If you do not dot the i's and cross the t's, they will. They may not be quite so tolerant as other Judges. Myself, my mind runs on lines similar to those of Mr. Justice Boyd, the Judge referred to by Maurice Healey. He did not like technicalities, and is recorded as saying: 'I don't want evidence; I want the truth.' It is also said that, on hearing an appeal from some lower Court, he said: 'I will find for the appellant for the sum of £10.' Counsel for the respondent pointed out that that could not be done, as the claim was for only £5. To this the Judge replied: 'I will amend the proceedings.' Counsel said: 'You can't do that; there is no machinery.' The Judge replied, 'Do you see this pen? That is the machinery,' and he proceeded to amend the proceedings. There was then a discussion as to witnesses' expenses, 15s. being claimed. Counsel for the other side said it should be 10s. The Judge replied: 'As there is a dispute between you, I shall allow £1.' I assure you my mind does not run quite as far as that, so do not be under a misapprehension about me. I am just giving you that warning. If you try to get away with things before these two new Judges as you have been able to do with some of the simple ones, you may be in trouble.

"I do wish to pay a tribute to the worth of all the Judges, and to the pleasant co-operation and industry of a willing team. On their behalf, I would like to support you, Mr. President, in what you have said concerning the inadequate emoluments in comparison with the awards received in other countries. I can say without any qualms that this is a matter in which you are not unsupported. I said before that we are overworked. I repeat that we have been, but I hope that we shall not be in future. But we are overworked in comparison with the Judges in Australian States. Some years ago, the Attorney-General of an Australian State came over to look over our system. He saw me the day he was going away, and he said that the Judges in the State from which he came did not do half the work that was done by the Judges in New Zealand. When you learn that the Supreme Court Judges in New South Wales and Victoria do little or no criminal work, the reason is clear. There, the criminal work is done by District Court Judges or Chairmen of Sessions. They have a wide jurisdiction and do most of the work. In Sydney, two years ago, I was discussing this with some counsel, and I asked what work Judges did in criminal cases. The answer was about thirty cases in New South Wales. That would be the number of criminal trials presided over by all the Judges there. Compare that, not with Dunedin, but with Palmerston North or Wellington or Auckland. A Judge at one Sessions in Auckland may himself preside at thirty trials. In Australia, they were astounded that the Judges here do the probate work. In New South Wales, the Prothonotary does it. As far as emoluments go, there is only one State in Australia that pays its Judges less than we do, and that is Tasmania, although there the Chief Justice is paid the same as I am paid. In Victoria and New South Wales, the salaries of the Chief Justice and puisne Judges exceed ours by between £1,000 and £1,500 in most cases. These are facts, and you should know them.

"I would like to say one or two things about my experiences since I have been on the Bench. One of the most striking of these experiences concerns juries. I have always thought that trial by jury was best, and, having presided at jury trials, I am more than ever convinced about the great assistance that juries give in the administration of justice. It was R. W. Wise, K.C., who said: 'The more I see of trial by Judge, the more highly I think of trial by jury.' It has its defects, but, in dealing with questions of fact and the credibility of witnesses, I think anyone is safer if his case is in the hands of a jury rather than in those of a Judge alone, however experienced the Judge may be.

"Another matter that has been impressed on me is the great responsibility facing a Judge when he is sentencing prisoners. I am then most conscious of my power and my responsibility, and it is a situation that makes one reflect. It is, I assure you, a heavy burden. How one will face the position if, as seems likely, it will become necessary to sentence a man to death, it is difficult to say. I do not like looking forward to it, but I can assure you that, whatever the law, we will administer it as it is handed down to us.

"There is another matter, and I say this quite sincerely: we have an excellent lot of young counsel, who are efficient and courageous and should go very far. I say courageous. Indeed, on occasions, I have said to my brothers: 'I would never have dared to go into Court on this case.' Are they more courageous than we were, or is it that the Bench is more kindly disposed towards them than it used to be? I leave it to you to supply the answer that was given me.

Unnecessarily Long Arguments.

"There is one matter that I would mention, and it does not apply to juniors only—that is, the unnecessary length of arguments and addresses. I mean by that endless citation of authority instead of a good selection of authorities, and repetition in argument. We shudder when we see counsel coming into Court with piles of books. It may be that many of them are not opened or quoted, and that is all right; but, on the other hand, you do find some who give a number of citations, each deciding the same way, from the House of Lords down to the Magistrates. On one occasion, when assisting Mr. Martin Chapman, K.C., on an argument, I remember his saying: 'Look, O'Leary, if you have a House of Lords authority, that is enough. Don't trouble about any other.' That was very good advice, and I would like to commend it to you. Lengthy addresses and lengthy submissions sometimes defeat their aim. This point is well illustrated in the opening words of the judgment in the leading case of *Dawkins* v. *Antrobus*, (1881) 17 Ch.D. 615, 625.

"As to inappropriate authorities, I came across this in an Australian book of reminiscences. There was an elderly barrister in Melbourne who did only undefended divorce cases. He was a man who looked like Bismarck, the Iron Chancellor of Germany, and was dubbed the Bismarck of divorce. On

one occasion, he thought he had something unusual, and he came into Court armed with his authorities for this important matter. He was before A'Beckett, J.—a great Judge, but somewhat downright. The Bismarck of divorce quoted authority after authority, and A'Beckett, J., became restless. At last he said to counsel: 'Hand me that report.' The barrister was quite flattered that the Judge should be so interested in the case he was citing, and gladly handed it up. The Judge glanced at it, turned over some pages, handed it back, and said: 'Look at that next case.' The barrister did so, and said: 'But, sir, that case is a defamation case. It has nothing to do with the present one.' 'No,' said the Judge, 'but it has as much to do with it as the authorities you have been citing to me.'"

His Honour then delighted the assembly with some interesting reminiscences of his early days in the profession.

The Magistrates.

Replying to the toast of "The Judiciary" on behalf of the Magistrates in Wellington, Mr. Scully, S.M., said he found it difficult to make a speech after listening to the eloquence of the Chief Justice. He added that Mr. McLachlan had warned him not to work too hard that day, so that he would be able to prepare his speech, but unfortunately two practitioners present at the dinner had made certain, by prolonging their case, that he did not have time to prepare a speech.

Expressing appreciation for the welcome he had received in Wellington after coming from the "impossible Bar" on the West Coast referred to by the President, Mr. Scully said:

"I was most uneasy coming from the coal to the smoke, but it has been a most pleasant twelve months. The Bar in Wellington is most delightful, and I began to think I would never hear an unkind word. However, that proved to be undue optimism."

After following the Chief Justice's example with excerpts from Maurice Healey's store of reminiscences, His Worship concluded: "I want to express my thanks and the thanks of my brother Magistrates for your co-operation and good wishes, and to express in return our reciprocity of your good will."

Litigation.

Mr. T. P. McCarthy proposed the toast of "Litigation." He said that he was reminded of the remarks of the Rt. Hon. Mr. Asquith, as he then was, at a dinner at which members of the Judiciary were present, when he said that to speak in the presence of their Honours without the assistance of a brief or the consolation of a fee was an unfamiliar and, in some ways, a nerve-shattering experience. If it was nerve-shattering for Asquith, how devastating it was for him. "I am fortified," he continued, "by the knowledge that the object of my toast this evening is of more than passing interest to you all. The very mention of the word brings reactions to each and every one of you. To those confident *nisi prius* gentlemen whose careers are eased in leading for mysteriously injured plaintiffs, the word recalls memories of victories won and the very clever tactics which secured them. To the nervous, not-so-confident barrister, it brings chiefly memories of those moments of tension and strain which precede the entry into battle and those of depression which follow the announcing of the verdict. To the established and satisfied conveyancer, it brings a slight curling of the lips, as though there were associated with the word something slightly discreditable. To the younger conveyancer, it brings visions as romantic and unreal as Erewhon; it is a world beyond their ken.

"Most of you are animated by your own personal reactions to the word, and most of you forget that it is currently held that litigation was ordained, as was marriage, for more than one purpose. Over the last few days I have been investigating those purposes, and I will now give you the conclusions at which I have arrived.

The Purpose of Litigation.

"It was ordained in the first place, so Mr. Spratt assures me, to provide some form of activity for a class of gentlemen who for one reason or another would otherwise have very little to do. Those gentlemen we call our Judiciary, and the promotion of activity and enjoyment for them is, Mr. Spratt asserts, the primary object in the development of a form of ceremonial for the stimulation of disputes which, if unencouraged, might settle themselves. I hold this view to be somewhat cynical, as cynical as the description of a litigant as a person about to give up his skin in the hope of retaining his bones.

"Mr. Cleary, on the other hand, stresses the second purpose of litigation. He says it was ordained so that certain Police Constables might be rewarded for long and honest service in the preservation of peace by appointment to the office of orderlies, and for their enjoyment of that office litigation was designed to create perfect conditions for waxing fat and slumbrous. He says, moreover, that the proof of that pudding is in the seeing of it. I thought that that remark verged on the personal.

"Litigation was ordained, in the third place, to enable you and me to maintain our families in that meagre standard in which they have been maintained for so long. It is of some comfort in this connection to know that we Court men may now receive some assistance from our conveyancing brethren. One hears them chattering gleefully about an arrangement called 'the new scale,' and one gathers that, after a lapse of thirty years, the Law Society has taken strength to estimate the worth of its members higher than that of bus-drivers. I am told that this sudden burst of energy on the part of the Society is to be attributed to the influence of Mr. Blundell, whose acquisitive ability in certain table activities is celebrated, and who saw in an increase in the scale his sole remaining hope of recovering in the form of liquid assets his investments in his fellow-members. I have asked him if that is so, but he has claimed privilege, muttering something about wagering and the rules of racing.

"I personally lean to the fourth purpose of litigation. It was ordained, I believe, principally for our mutual enjoyment. You will see what I mean if you dwell for a moment upon the situation of my learned friend Mr. Perry being cross-examined before a perplexed Magistrate by my no less learned friend Mr. Pope, or if you think of Mr. Harding and his bundles of extraordinary remedies which have so entertained Mr. Treadwell and Mr. Stewart Hardy for the past few years.

"There are those who say that litigation may be likened to a whimsical lady. It is an advantage to have knowledge of her character, but her embraces are to be avoided, for they are apt to be both ill-timed and expensive. Such people as say this preach the advantages of settlement, stress the uncertainties of trial, and point to the vagaries of Judges. But how feeble, how unsatisfactory, is the settlement of actions to lawyers of mettle! You all know of the lawyer who took his son into partnership and then went on a holiday. On his return, the son told him that in his absence he had been able to settle a certain very difficult and involved action which had been worrying them all. 'You young fool!' said the father. 'The family's been living off that case for years, and now you've finished it.'

The Clients' Viewpoint.

"And, from the point of view of your clients, what litigant was ever satisfied with a settlement. How much more exciting and satisfying it is for him (carefully coached) to strut and limp his hour upon the stage, to seize the tide at the flood, and not to spend the remainder of his life in the shallows and miseries thinking of what he might have got had he gone on! I believe—and Mr. Spratt again assures me that this is so—that the New Zealander loves a gamble. Not for him the 2½ per cent. Post Office Savings-bank return, but rather the 5s. double on the tote at Otaki, with all its alluring possibilities. Which reminds me of Father Mathew's definition of 'horse sense' as being that which restrains horses from betting on people.

"I was reading the other day of some litigation in England arising out of the revival there of the play *Juno and the Paycock*, and that brought to mind the story of the "paycock" of whom it is told that his widow said very firmly that he was to be cremated, and was not to be allowed to rest in peace. 'When I've got his ashes,' she said, 'I'm going to put them in an hour-glass. He did no work all his life, but he's going to do some now.'

"I enquired of a very experienced member of the Bar how long I should speak, and I said that I was afraid that I might trespass on their time. He said: 'It doesn't matter about trespassing on their time, but for heaven's sake don't encroach on eternity.' I hope I may be permitted now to depart somewhat from tradition, and to be a little more serious. As I look around this room, I see, as I have seen here so often before at Bar dinners, men of different types, men of different backgrounds and tastes, men of different religions and philosophies, all mixing together in common harmony and exhibiting a friendship and an interest in one another which are obviously sincere, and deeper than the mere pleasantries of social behavior. I believe that this atmosphere is not to be encountered in other professions, where jealousies are deeper and gradings more pronounced. Is this spirit born of the drawing of conveyancers and the filling in of memoranda of transfer? We men of the Bar know that it is not, that it comes of the ceaseless striving between us which is the stuff of our very lives. The contest,

the blows given and taken, the sweet taste of victory, the gall of defeat, these things are our daily fare, and bind us together with respect for each other and establish that corporate character which we so prize."

LITIGATION'S LAST WORD.

After the toast had been honoured, Mr. E. F. Page replied. He said:

"I wish to thank Mr. McCarthy for his recital of the four conceptions of litigation, immaculate in their delivery, but one would have thought that, now that a benevolent Government and our governing body have permitted us to butter a little more thickly our conveyancing bread, any tribute to litigation would have been tempered with more restraint. But it must be assumed from his enthusiasm that there are many among that band of barristers who still cavil at the thought of those large estates—on which so many of us were educated—being frittered away on the undeserving beneficiaries.

"For a moment I would like to dispel those visions, both romantic and unreal, conjured up by the younger conveyancer. A warning note may decide him not to forsake his chosen path. Not all the aspiring juniors have the constant and genial, if misleading, advice of Mr. Dooley. Not for him will come immediately the fashionable coterie of beautifully-groomed women seeking freedom from their middle-aged business executives who forget their wedding anniversaries and their wives' birthdays and waste their time, energy, and fortunes offering inducements in the form of free flats, motor-cars, sables, and precious stones in their search for the solace of that business necessity—a competent shorthand typist.

"In his early struggles, the aspiring leader of the Bar will find that he has periods of feverish and intense activity followed by periods—varying in length with the disposition of the Judge—of comparative leisure. His busy periods come when his client is out of gaol and he is endeavouring to stave off the inevitable.

Bitter Moments.

"But, even when his practice has gained momentum, he still has his bitter moments. Quite recently one of the younger members of the Bar went into the Supreme Court office to get a letter from the Deputy-Registrar. The envelope indicated quite clearly that the letter had been censored at Mt. Eden. One of the several law clerks and less successful juniors present indicated that his friend seemed to be about to feature in another leading case in the Court of Criminal Appeal. The junior was not as discreet then as he is now. He started to read the letter aloud before he had gathered its import. He read:

'Dear Mr. Blank, I have been talking to some of my friends in here, all of whom are clients of yours.'

"But, even after success has crowned his efforts, the leading barrister's life is not always strewn with successful briefs and welcome, if unexpected, gratuities. He, too, has his disappointments. I am indebted to one of our learned leaders who related his dreadful fate. He appeared for a defendant on a large claim for negligence. The point was one of some complexity, but was of great importance to the insurers. In spite of a verdict in favour of the plaintiff, he succeeded in having judgment entered for the defendant. The insurance manager was obviously delighted to have the claim successfully defended and the difficult point established at a reasonable cost. At the termination of the case, he asked our friend if he could express his appreciation by sending a case of champagne, but, before the case of champagne arrived, a notice of intention to appeal was served. The majority of the Court of Appeal upheld the judgment of the Court below, but there was a dissenting judgment. Even so, the manager of the insurance company seemed favourably disposed. When the result was reported to him, he asked our friend if he could use a case of Australian sherry. Even at that no objection was raised. But a motion for leave to appeal to the Privy Council preceded the still-visionary case of Australian sherry. No doubt the litigious plaintiff decided, on the strength of the dissenting judgment, that, as the Privy Council had the last guess, it was always right. The Privy Council affirmed the judgment of the Court of Appeal. By this time, the plaintiff had spent all his money, and the costs against the company were enormous. At the conclusion of the conference reporting the result of the appeal, the manager said: 'Well, I suppose we had better go and have a beer.' We would ask those Judges who are blessed with a palate to dwell on the awful fate which overtook our friend, and reconsider the necessity of that dissenting judgment.

"The nervous tension and physical strain attendant upon a trial mentioned by Mr. McCarthy are particularly evident on a counsel's first appearance. One sympathizes with the nervous junior who was determined on his first appearance to address the Court as little as possible. He was appearing for the respondent husband in an adultery suit. An answer had been filed which raised technical difficulties. His instructions required him to offer no evidence in support of the answer. That he successfully accomplished. But, after the evidence was finished, the Judge asked what he proposed to do about such-and-such a point. After a moment's serious thought and a little prompting from his learned friends, he advised the Court that he was instructed by the respondent husband to waive that point. Very soon after, the Judge raised another difficulty. The junior was not going to be caught again. He said: 'If your Honour pleases, the respondent husband waives that point also. And, if there is any other point your Honour requires waived, the respondent would like to do it here and now.'

The Layman's Attitude.

"No reference to litigation would be complete without mentioning the attitude of the layman. One wonders whether it is adequately summed up by the Chicago gangster who was awaiting trial. He read of a novel and successful defence raised by an attorney in a neighbouring state, who had just defended one of his friends. He sent a telegram inquiring the fee for his defence. He received the answer of $10,000. His reply read: 'Offer accepted. Come at once and bring your witnesses.'

"Whatever the layman may feel about litigation and the rules relating to the admission of evidence, we take pride in the strict impartiality and fairness of our judicial tribunals. It can be said with absolute conviction that no better system has yet been devised to test the truth and justice of any cause. I do not cast any reflection on the gentlemen who bask in the reflected glory of the status of a Supreme Court Judge from whose decisions there is only too often no appeal, and against whom cannot be levelled the acid comment of one of the Law Lords: 'I understand you are citing a judgment of Mr. Justice Blank in support of your argument. I can only say that relying on one of his judgments is like putting out to sea in a boat on a Friday. It is unlucky, but not necessarily fatal.' But the growth of quasi-judicial bodies and tribunals, from which in some instances members of the Bar are excluded, and in many of which the rules of evidence are honoured more in the breach than in the observance, is a retrograde step in the affairs of democracy. The very fact that those seeking recognition of their rights are the most vociferous in their complaints is possibly the greatest tribute to our system of litigation as it is normally understood."

Mr. Page concluded by thanking everyone—the Judiciary, whose tenure of office would not become divested so long as the Bar could foster litigation, the conveyancers, whose standard of living had now been raised to become comparable with that of bus-drivers, and the members of the Bar, whether as barristers, solicitors, or witnesses—all with their friendships and great and glorious traditions. He thanked them all for honouring the toast of "Litigation."

Annual Golf Tournament.

The Wellington District Law Society held its annual tournament on the Miramar Golf Links on Wednesday, September 6. In the Four Ball competition, L. Castle, playing off a handicap of 24, went round in 83 gross. As the result of his phenomenal net score of 59, he and his partner (F. Parkin) won the event with a score of 8 up. G. C. Phillips and A. M. Hollings, and T. G. Taylor and A. H. Hornblow, came next with scores of 6 up. In the single Stableford Competition, G. C. Phillips, with 35 points, was first, W. H. Cudby and T. G. Taylor tying for second place with 33 points. Trophies were donated by Messrs. Butterworth and Co., Ltd., and Ferguson and Osborne, Ltd.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Ancient Writs.—Section 12 of the recent Crown Proceedings Act, 1950, abolishes proceedings by His Majesty by way of writs of *capias ad respondendum*, *fieri facias*, and *fieri capias*. What the last-named writs ever purported to do is obscure, since *capias* ("that you take") is the generic name for several writs directing the person to whom they were addressed to arrest the person named therein. Such writs included *capias ad respondendum*—a writ that could be issued for the arrest of a person against whom an indictment for a misdemeanour had been found in order that he might be arraigned. Every now and again, some Crown Prosecutor thinks this one up when an accused, tired of waiting for his case to be heard, fails to appear when it is finally called. It was also the writ by which an ordinary civil action was commenced, the defendant being required to appear and put in bail. The firm of Dobson and Fogg used this method:

> "The writ, sir, which commenced the action," continued Dobson, "was issued regularly. Mr. Fogg, where is the *praecipe* book?"
>
> "Here it is," said Fogg, handing over a square book, with a parchment cover.
>
> "Here is the entry," resumed Dobson. "'Middlesex, Capias *Martha Bardell* (*widow*) v. *Samuel Pickwick*. Damages, £1,500. Dobson and Fogg for the plaintiff. August 28, 1827.' All regular, sir, perfectly."

Fieri facias was a writ of execution directing the Sheriff to whom it was addressed to levy from the goods and chattels of the debtor a sum equal to the amount of the judgment debt and interest. This is followed by seizure and a sale by auction. It was usually abbreviated to *fi. fa.*, but it is doubtful whether a debtor ever regarded such porcine humour as other than in extremely bad taste. Even the *fi. fa.* was not the end of the matter, since on a *nulla bona* return an *alias fi. fa.* could be issued followed by a *pluries* or *testatum fi. fa.* if the debtor got bored with the whole thing and removed himself, bag and baggage, to another country.

The Uses of Counsel.—A member of the English Bar while recently in the United States met a Judge there, who said to him: "A prisoner was once put up for trial before me and had no one to defend him. I asked a young lawyer in Court to take it on, telling him to give the man the best advice he could. The case stood adjourned until later in the day. When it was called on, the prisoner was nowhere to be found. I called the young lawyer before me and asked what had happened. He replied: 'Your Honour told me to give him the best advice I could, so I advised him to beat it.'" Sir William Ball, who recounts the incident in some notes upon "Early Days on the North Eastern Circuit," caps it with a story of his own about a female prisoner who a year or two ago was put up to plead at the Old Bailey. As she was undefended, the Judge told her that she was at liberty to choose an advocate from those in Court. Her choice fell upon a lady barrister, who went to see her in the cells. Having taken the instructions, her curiosity led her to inquire why she in particular had been selected. "Well, miss," said the prisoner, "I thought you were the one most likely to have a bit of lipstick upon you!"

Contributions.—Recent fanmail of Scriblex includes contributions from practitioners at New Plymouth and the Lower Hutt and from "Verdent," a law student, who, as his examinations draw near, writes in haste, and as a temporary relief from his sufferings, that in *Garrow's Real Property*, 3rd Ed. 531, it is duly recorded, in reference to the covenant to repair in leases:

> If commercial aviation proves successful it may become necessary before long to make provision in leases in New Zealand for damage to land, crops, or buildings, arising from the crashing of aircraft.

He finds it hard to reconcile "successful" with "crashing." But the difficulty of our New Plymouth correspondent is what to do with a devil-may-care typist, who inserts in a power of attorney a provision that the powers "should be construed not narrowly but in the *wildest* sense." To the practitioner at the Lower Hutt a lady client, in a state of some distress, writes:

> I should very much like to have legal advice on matters which I have never been able to understand, and would you be so good as to give me that advice professionally.

These may be the sort of matters where, ignorance being bliss, it is folly to advise otherwise.

Citation of Authority.—If the unreliable memory of Scriblex is correct, it was the Chief Justice at a Bar dinner this year who appealed for mercy from counsel in the matter of the citation of innumerable legal authorities to the Courts. It is presumed, however, that this era of judicial relief will commence at a date subsequent to *Helson* v. *McKenzies* (*Cuba Street*), *Ltd.*, [1950] N.Z.L.R. 878, a large case about a small bag. In the Court below, Hutchison, J., on the cross-motions of plaintiff and defendant made forty-five references to appropriate legal authorities. On the argument presented to the Court of Appeal, counsel for the appellant, with his thirty-six, was overtaken by counsel for the respondent, with forty-two, of which, with becoming modesty, junior counsel contributed only one. Finlay, J.'s, review of the law of conversion and contributory negligence extends to seventy-five references, Gresson, J., following closely with sixty-seven. On the other hand, Northcroft, J., who presided, is content with one authority only and with one twenty-fourth of the total judgment space. The headnote, trapped between two schools of thought, emerges with a score of twenty-seven, with which future students of the subject will probably rest content.

From My Note-book.—"It is the paramount duty of the executor to avoid embarrassing the Court and to think carefully before allowing any part of the estate to be paid out to any beneficiary while any application under this Act [Inheritance (Family Provision) Act, 1938] is either pending or impending": Vaisey, J., in *Re Simson* (*deceased*), *Simson* v. *National Provincial Bank, Ltd.*, [1949] 2 All E.R. 826, 828.

The old story of the office boy who rang his employers to know how he was getting on appeared in a new guise at the Dinner of the popular "Devil's Own" Golf Tournament at Palmerston North (attended by practitioners from Auckland to Motueka), when the chairman (B. J. Jacobs) used it to score a topical hit by describing the employers as "Ongley, Ongley, Oram, Opie, and Ogilvie."

PRACTICAL POINTS.

1. Gift Duty.—*Gift to Grandchildren of Mortgage securing £1,000—Donees all Minors—Each Share to vest on Attainment of Majority—Liability to Gift Duty—Contingency of Resulting Trust to Donor.*

QUESTION: By a declaration of trust, the donor declares that he irrevocably holds upon trust the sum of £1,000 (the security being a first mortgage due in 1959) for his four grandchildren in equal shares, the shares to vest when the beneficiaries successfully attain the age of twenty-one years. The share of any grandchild who fails to attain a vested interest will be shared equally among the remaining grandchildren. All the donees will be minors in 1959, and there is an interval of at least one year between the birthdays of each of them.

The instrument has been assessed for gift duty as follows: Gift duty at 5 per cent. on £645 (present value of £1,000 payable in 1959), £32 5s.

Is this instrument not free of gift duty under the Death Duties Act, 1921, s. 46 (1) (*a*)?

ANSWER: The settlement is not exempt under s. 46 (1) (*a*) of the Death Duties Act, 1921. The correspondent has omitted to observe the words "by the same donor to the same or any other beneficiary" in the subsection. The fact that the gift is contingent makes no difference for gift-duty purposes, except as hereinafter mentioned.

The point is that the settlor has made a gift of this mortgage for £1,000, and the gift is liable to gift duty accordingly. The fact that the quantum of each grandchild's interest may vary according to subsequent events does not make the transaction any less a gift, so far as the donor is concerned. If there is a total failure by the four grandchildren to attain the age of twenty-one years, presumably there will be a resulting trust to the settlor, and he will then be entitled to a refund of the gift duty paid under ss. 21 and 47 of the Death Duties Act, 1921.

X.2.

2. Probate and Administration.—*Practice—Company's Application for Probate—Form of Affidavit to lead Grant—Code of Civil Procedure, R. 185.*

QUESTION: Does the affidavit in support of motion for grant of probate in *Rhodes's Practice Precedents*, First Series, p. 48, comply with the Rules of the Supreme Court?

ANSWER: The Form at p. 48 of Mr. Rhodes's work is appropriate for an application by a company; but paras. 2 and 3 do not comply with R. 185 of the Code of Civil Procedure, in that no grounds for belief are stated, and para. 5 of that Form must now include the additions set out in Reg. 5 of the Supreme Court Amendment Rules, 1940, No. 2 (Serial No. 1940/182), which is later in date than Mr. Rhodes's work. It is usual in such cases for some person other than the manager of the company to swear positively to the death of the deceased, and that person swears an affidavit as required by R. 518 containing the first two paragraphs of Form 34 of the First Schedule of the Code of Civil Procedure.

V.2.

CANTERBURY DISTRICT LAW SOCIETY.

Hunter Cup Competition.

Christchurch practitioners had a beautiful day for their annual bogey handicap competition for the Hunter Cup, played at the Shirley Golf Course. This competition was inaugurated twenty-five years ago; it lapsed for a few years during the war, but, after being revived a few years ago, has grown greatly in popularity. Last year's winner of the cup, Mr. E. W. Reeves, did not defend his title, as he was in England, and the winner was Mr. J. R. Woodward, who was square with bogey. The prize for the putting competition for the wives of members was won by Mrs. A. C. Fraser, of Rangiora.

During the afternoon, the wives of members of the District Law Society and several visitors arrived at Shirley Golf Course, where they and the players were entertained at tea by Mr. A. C. Perry (President of the Canterbury District Law Society) and Mrs. Perry.

After the match, the President, in welcoming Mr. Justice Northcroft and the other visitors, said that it was fashionable in Christchurch this year to talk in terms of the Centenary. "We cannot go as far as that, but we can at least talk about our quarter-century in our legal golf, for it is twenty-five years since Judge Hunter presented us with his cup and this competition was founded," he continued. "This year, therefore, marks twenty-five years of good companionship and friendly rivalry on the golf course for the Canterbury lawyers, who have "ironed out" many problems on the Shirley Links. It marks twenty-five opportunities of passing the time of day with people you normally see only in their offices; twenty-five times we have had the privilege of having our Judge and our Magistrates as our guests; we have had twenty-five opportunities for our wives to meet other wives, twenty-five excuses for a new frock or a new hat, and almost twenty-five occasions to blackguard the weather.

"I have been reading and enjoying a recent publication called *After Court Hours*, by Gilchrist Alexander. In his chapter on 'Golf and the Lawyer,' he asks: 'Why is it that of all games the game of golf should be most particularly associated with the profession of the law?' He supplies the answer: 'There is a deliberation and dignity about the whole technique of the proceedings which seem to make golf a recreation peculiarly fitting for elderly Judges and King's Counsel.' This is the author's idea of it, no doubt, formed after some years near the Equator as a Judge of the High Court of Tanganyika, but I prefer to believe that there are other reasons. One of them may be that our facility in speech is the link—the common bond between the lawyer and the golfer. Listen to counsel addressing the ball on the tee, his cajolings, his entreaties, and his prayers. How similar to the opening address of counsel for the plaintiff! Listen to his mutterings, his threats, and his disparagements to the ball in the bunker; have you ever heard the 'under-the-breath' remarks of the counsel who is having a sticky passage with the Judiciary? Or perhaps it is an account of the day's golf at the club-house, similar to the account, in the end room at the Amuri tea-rooms, of how I won my case.

"Then, too, there is a comparison between the unsportsmanlike golfer and the unsportsmanlike barrister. Treading on your opponent's ball so that no course of action is disclosed is like moving to strike out a writ on the ground that no cause of action is disclosed. Lifting yourself out of trouble in the bunker is like filing an amended statement of claim when all your original pleas have been effectively answered by the statement of defence. Kicking your ball on a bit is like moving to set down prematurely because the exigencies of the case demand it. Telling the story of your golf in the nineteenth hole and dropping a few strokes off your score is like telling your wife the sum for which you got judgment without telling her the sum you claimed."

The best scores in the match were as follow: J. R. Woodward, square; E. A. Cleland, 1 down; P. T. Mahon, 2 down; K. J. McMenamin and C. G. Penlington, 4 down.

Later in the afternoon, members of the District Law Society held a very enjoyable sherry party in the Mayfair. The arrangements were carried out by a sub-committee comprising Messrs. R. Austen Young (Chairman), E. B. E. Taylor, P. Wynn-Williams, C. G. Penlington, and I. D. Wood (Secretary).

Maurice Gresson Memorial Cup.

Members of the Canterbury District Law Society have decided to revive the annual tennis tournament fixture, which has lapsed for many years. Speaking at the Shirley Golf Links, Mr. A. C. Perry, President of the Society, made this announcement, which, he said, would be of particular interest to non-successful golfers. He added that Mr. Terence Gresson had given a cup for competition at the tennis tournament. The gift was made in memory of Mr. Gresson's father, and would be known as the Maurice Gresson Memorial Cup.

"It gives us great pleasure to receive this cup in memory of one of our members of whom we were fond and proud," said Mr. Perry. "It is fitting that the memorial should be given for some sport, as Mr. Gresson was a true sportsman in his profession and in his private life," he added.

The tournament will be played late in January or early in February each year.