New Zealand
Law Journal

Incorporating Butterworth's "Fortnightly Notes"

VOL. XXVIII. TUESDAY, SEPTEMBER 23, 1952. No. 17.

INCOME TAX: TWO CASES OF INTEREST TO PRACTITIONERS.

BEFORE considering two recent income-tax cases in England, in which practitioners were seeking deductions relating to the exercise of their profession from their assessable income, it may be well to compare the relevant English and New Zealand sections of the respective income-tax legislation.

I.

The relevant parts of r. 3 of the Rules Applicable to Cases I and II, Schedule D, in the First Schedule to the Income Tax Act, 1918 (Gt. Brit.), are as follows :

> 3. In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of—
>
> (*a*) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment, or vocation :
>
> (*c*) the rent or annual value of any dwelling-house or domestic offices or any part thereof, except such part thereof as is used for the purposes of the trade or profession : Provided that where any such part is so used, the sum so deducted shall be such as may be determined by the commissioners, and shall not, unless in any particular case the Commissioners are of opinion that, having regard to all the circumstances, some greater sum ought to be deducted, exceed two-thirds of the annual value of the rent *bona fide* paid for the said dwelling-house or offices.

The relevant and corresponding provisions in the Land and Income Tax Act, 1923, are s. 80 (1) (*f*) and s. 80 (2), which are as follows :

> 80. (1) In calculating the assessable income derived by any person from any source no deduction shall be made in respect of any of the following sums or matters . . .
>
> (*f*) Rent of any dwellinghouse or domestic offices, save that, so far as such dwellinghouse or offices are used in the production of the assessable income, the Commissioner may allow a deduction of such proportion of the rent as he may think just and reasonable.
>
> (2) In calculating the assessable income of any person deriving such income from one source only, any expenditure or loss exclusively incurred in the production of the assessable income for any income year may be deducted from the total income derived for that year . . . Save as herein provided, no deduction shall be made in respect of any expenditure or loss of any kind for the purpose of calculating the assessable income of any taxpayer.

The two cases have a familiar ring. One involved solicitors and the entertainment of their clients in town at lunch while discussing the matters in which their clients were concerned. The other was a barrister's claim for deduction of an amount representing travelling-expenses between his chambers in town and his home in the country where he kept his law reports and other works of reference to assist him in doing his work there. It will be seen that, in the latter case, the tax authorities did not quibble at permitting, as a deduction from the barrister's assessable income, a "study allowance" in respect of the use of the portion of his home in which he did his work in the evenings during his vacation. And that is something in which many of us are interested and which we would like clarified in relation to s. 80 (1) (*f*).

II.

In *Bentleys, Stokes and Lowless* v. *Beeson* (*Inspector of Taxes*), [1952] 2 All E.R. 82, there was an appeal from an order of Roxburgh, J., allowing the appeal of a firm of solicitors practising in London from a decision of the Special Commissioners. This appeal related to the disallowance of a claim by the firm that they were entitled to a deduction under r. 3 (*a*) (as already set forth) in computing their profits and gains for the purposes of income-tax for the year ended April 5, 1950, in respect of certain entertainment expenses. There were two partners in the firm, Mr. B. H. Dulanty and Mr. R. L. Williams, and for the year of assessment 1949-50, based on the firm's accounts for the year ended December 31, 1948, the amount claimed as a deduction was £539, this sum being apportioned as to £430 expended by Mr. Dulanty and as to £109 by Mr. Williams.

So far as material, the facts which the Special Commissioners found, in their Case Stated, as established were as follows :

It had been the custom for some years past for the partners, acting on behalf of the firm, to incur expenses in entertaining existing clients. The nature of the entertainment was all in connection with lunches to existing clients, apart from one or two dinners. These took place at the Thatched House Club, an ordinary social club, in St. James's Street, of which Mr. Dulanty was a member, or at restaurants. The firm had a number of clients in the West End of London and in the country, and it was more convenient for business interviews to be held in the West End. By giving these clients lunches, during which the business in hand was discussed, the remainder of the day could be devoted to the firm's routine work by the partners at the office. Mr. Dulanty attended to the commercial work and Mr. Williams to the Admiralty side of the firm's business. If the partners had decided to hold interviews solely in the office at Bishopsgate,

certain clients might have been lost. The entertainment was confined to existing clients, who alone were present. The firm's three largest clients were three companies whose total fees brought in more than £3,000 of profit costs in a year. Directors of those three companies, whose offices were in the West End, were entertained at lunch from time to time in the West End for the sake of convenience.

The amounts claimed included the cost of the partners' entertainment while entertaining clients. Some of the persons entertained were professional clients from the country for whom the firm acted. In all cases, the legal advice given to clients at lunch was charged to them in the normal way; but the cost never included the expenses in question, which were charged as an expense of the firm's profit-and-loss account under the heading: "Expenses incurred not directly chargeable to clients."

Clients were sometimes entertained at the Palmerston Restaurant, which was close to the firm's office in Bishopsgate. The expenses claimed were primarily and principally, but not purely, for business purposes. Mr. Williams, who dealt exclusively with the Admiralty side, and also with some general clients, had to meet in London foreign marine underwriters, mainly from Scandinavia, Germany, Holland, and France. They were only in London for a brief time, and telephoned their arrival. They were usually only free at lunch-time or night-time. Meetings were usually fixed for lunch-time. The same underwriters would visit London on several occasions. Foreign underwriters often had agents in London, and these agents would bring their foreign employers with them to lunch. Mr. Williams entertained at various restaurants, not at any club.

Evidence, which the Special Commissioners accepted, was given on behalf of the Law Society to the effect that the entertainment by solicitors of existing clients, whether with a view to retaining them as clients or with a view to obtaining new business, was not unprofessional, and that it was not uncommon for a solicitor to entertain a client at lunch and discuss business with him, as many solicitors were pressed for time. Copies of entertainment expenses incurred by each of the partners for 1947 onwards were annexed to and formed part of the Case, and it was said by counsel that the detailed record of expenditure subsequent to the relevant year (1948) were treated at the hearing before the Commissioners as representative of the entertainment expenses incurred in that year.

The Special Commissioners held that the sum claimed was not money wholly and exclusively laid out or expended for the purposes of the firm's profession, and that the appeal by the solicitors accordingly failed. The firm's appeal from the decision of the Special Commissioners was allowed by Roxburgh, J.

The learned Judge said that the reasons on which the Commissioners had founded their decision were, first, that the expenses in question had not been proved to be necessary for the carrying on of the firm's profession, and, secondly, that the entertainment had the complexion, at least partially, of private and social hospitality. His Lordship held that neither of these reasons was sufficient to sustain the Commissioners' decision—as to the first reason, because it was not a valid reason in law, and, as to the second, because there was no evidence to support it. In the course of his judgment, he also considered the finding by the Commissioners that "the amount claimed included the cost of the partners' entertainment while entertaining clients"; but he came to the conclusion that that element did not, in itself, prevent the cost of the entertainment from being allowed as a proper deduction. "I accept," he said, "the submission that this is really a single transaction in which the partner's lunch is an essential ingredient."

The Crown appealed to the Court of Appeal on two grounds. As to the one just mentioned, the Court of Appeal said that the learned Judge's view on this point was clearly right; and, inasmuch as no argument to the contrary was presented to the Lords Justices, they did not need to consider it further.

The Crown also appealed to the Court of Appeal from the decision of Roxburgh, J., on the ground that, apart from the question of the necessity of the expenditure in question, there is a personal relation between solicitor and client, and there are strict rules governing their relations which do not exist in trade.

For the Crown, it was argued, without imputing in the slightest degree any sort of impropriety in providing the entertainment in question, that there are elements of personal contact existing between a solicitor and his client which tend to distinguish such entertainment from the hospitality which a business man extends to a customer. Then, against this background, the Crown contended that the Special Commissioners had found as a fact that, in the lunches which the partners gave to their clients, there was, in part, a social element; that this element formed a part of the motive in providing the hospitality; and that, on these findings, the Commissioners were right in holding that the expenses of the meals were not exclusively incurred for the purposes of the firm's profession.

Counsel for the Crown argued that, if hospitality is inspired by a double motive—*viz.*, the furtherance of professional interests and the entertainment of friends—the Court was not concerned to ascertain which was the dominant motive; since, he contended, the presence in itself of the personal motive disqualified the expenditure as a whole from the category of permissible deductions for income-tax purposes.

In delivering the judgment of the Court of Appeal, Romer, L. J., at pp. 84, 85, said:

> The relevant words of r. 3 (*a*) of the Rules Applicable to Cases I and II—"wholly and exclusively laid out or expended for the purposes of the . . . profession"—appear straightforward enough. It is conceded that the first adverb—"wholly"—is in reference to the quantum of the money expended and has no relevance to the present case. The sole question is whether the expenditure in question was "exclusively" laid out for business purposes, that is: What was the motive or object in the mind of the two individuals responsible for the activities in question? It is well established that the question is one of fact: and again, therefore, the problem seems simple enough. The difficulty, however, arises, as we think, from the nature of the activity in question. Entertaining involves inevitably the characteristic of hospitality: giving to charity or subscribing to a staff pension fund involves inevitably the object of benefaction: an undertaking to guarantee to a limited amount a national exhibition involves inevitably supporting that exhibition and the purposes for which it has been organized. But the question in all such cases is: Was the entertaining, the charitable subscription, the guarantee, undertaken *solely* for the purposes of business, that is, solely with the object of promoting the business or its profit-earning capacity?

That, their Lordships said, was a question of fact. And, they added, it was quite clear that the purpose

must be the sole purpose: the paragraph said so in clear terms. They went on, at p. 85, to say:

> If the activity be undertaken with the object both of promoting business and also with some other purpose, for example, with the object of indulging an independent wish of entertaining a friend or stranger or of supporting a charitable or benevolent object, then the paragraph is not satisfied though in the mind of the actor the business motive may predominate. For the statute so prescribes. *Per contra*, if, in truth, the sole object is business promotion, the expenditure is not disqualified because the nature of the activity necessarily involves some other result, or the attainment or furtherance of some other objective, since the latter result or objective is necessarily inherent in the act.

The matter, the judgment proceeded, may be illustrated by simple cases which were given in argument. A London solicitor may hear that an old friend and client whom he has not for a long time seen has arrived in London. He says to himself: "I would like to see my friend again, and I know he may wish to talk business with me. I will ask him to have lunch with me, and then we can discuss any business he has at the same time. I can kill two birds with one stone." A London solicitor may hear from the representative of a foreign firm, old clients of his own, that the representative is in London and urgently desires to see him on some matter of business, but that his time is very short—he cannot come to the solicitor's office, and is only free at lunch-time. The solicitor, to enable the client to get his advice, asks him to lunch at his club or a restaurant. In the first case, it appears to us clear that the expenditure could not be justified under the paragraph even though it turned out that the friend spent the whole of the lunch-time seeking the solicitor's advice on his private affairs. On the other hand, it would appear to us reasonably clear that, in the second case, the expenditure (so far, at any rate, as reasonable) must be allowable. The difficulty, of course, arises in the large area between the two examples when it is a question of fact in each case to determine what was the real motive or purpose of the entertaining. But in both examples we have given there is present inevitably the motive or purpose of hospitality—that is, the solicitor, in inviting the friend or the foreign representative to lunch, does so with the purpose of giving him lunch. That motive is unavoidably involved in the activity itself.

So much, indeed, counsel for the Crown conceded, for otherwise it would follow that all entertaining-expenses, all charitable donations, would be necessarily excluded. It was admitted that in such a case as this there must be a deliberate and independent wish or motive—that is, independent of the business purposes to be served—to entertain the guest, and, for simplicity, Crown counsel described this independent motive as "private hospitality".

In dealing with those submissions, their Lordships, at pp. 85, 86, said:

> In the case before us, was this element of private hospitality in some degree present? Many cases we e properly cited to us, but on such a matter we cannot th nk that, by and large, they are of much assistance. It is not relevant to the present matter that the business purpose must be related to its profit-earning capacity: *Strong and Co., Ltd.* v. *Woodifield* ([1906] A.C. 448). Nor are we assisted by cases in which there is involved, not so much duality of purpose, as duality of capacity—cases, for example, where the question has been, whether the activity is at least in part attributable to the doer's character, not as proprietor of, or partner in, a business, but to his character as an ordinary citizen—cases relating to the costs of litigation, like *Smith's Potato Estates, Ltd.* v. *Bolland*: *Smith's Potato Crisps (1929), Ltd.* v. *Inland Revenue Commissioners* ([1948] A.C. 508; [1948] 2 All E.R. 367) or *Spofforth and Prince* v. *Golder* ([1945] 1 All E.R. 363), and cases of particular charitable donations such as *Bourne and Hollingsworth, Ltd.* v. *Ogden* ((1929) 14 Tax Cas. 349). If we have correctly analysed the problem, then the present question remains one of fact to be determined in the light of its own circumstances.

Their Lordships agreed with the Crown's contention that it is for the taxpayer to satisfy the tribunal of fact on his claim. More important (they added), it is a firm rule in tax cases that, if the tribunal of fact has found the fact, the Court will not disturb its conclusion unless it is clear either that the tribunal has misapplied the law to the facts found or that there was no evidence whatever to support the finding. The first essential question, then, in this case was: What had the Special Commissioners found? It was here that their Lordships said that they had experienced the greatest difficulty from the form of the Case itself.

The Commissioners' decision that the expenditure in question was not money wholly and exclusively laid out or expended for the purposes of the solicitors' profession appeared at the end of para. 11 of the Case Stated, and was expressed to be "for the above reasons". Those reasons were, in effect, that, although the provision of meals to existing clients was convenient, customary, and a matter of good policy, and was not contrary to professional etiquette, the Commissioners were unable to say that it was necessary or that the expenditure on the meals was incurred solely for the purposes of the profession and was entirely divorced from the element of hospitality and the relationship of host and guest. The judgment proceeded, at p. 86:

> Such being the reasons for the decision of the Commissioners, the Court is entitled to review them and to ascertain whether they are sufficient in law to support the decision itself: *Margerison* v. *Tyresoles, Ltd.* ((1942) 25 Tax Cas. 59). In our opinion, if one takes the reasons which we have above summarized by themselves, they cannot validly support the decision at which the Commissioners arrived.

Their Lordships first considered the Commissioners' view that the expenditure (although convenient and customary) was not "necessary". As to this, the Crown had contended that the Commissioners were using the word "necessary" in some special sense, and were not intending to convey that the necessity or non-necessity of any particular expenditure was a criterion by which to test its admissibility as a deduction. Their Lordships did not accept this contention, for that was precisely, they thought, on the plain meaning of the language used, what the Commissioners were intending to do. They were saying that one reason for refusing to accept the expenditure as a permissible deduction was that it was not necessary for the purposes of the solicitors' business; and their Lordships could find no reason for supposing that they were using the word "necessary" in any sense other than that which it ordinarily bears. If so, this reason was clearly a bad reason. Expenditure is permitted as a deduction under r. 3 (*a*) if it is "wholly and exclusively laid out or expended for the purposes of the trade, profession", &c.; and that language makes no reference to the necessity of the expenditure.

On this point, the Court of Appeal, at p. 86, said:

> If any particular expenditure is necessary for the purposes of a profession it presumably satisfies the test laid down by the rule, but there is no warrant for saying that the absence of necessity automatically prevents it from doing so. It is not for the Commissioners to prescribe what expenditure is or is not necessary for the conduct of a profession or business

and they should not, in our judgment, have applied their minds to that question in the present case. The first reason, accordingly, on which the Commissioners based their decision was wanting in the requisite element of relevance.

It was, as their Lordships thought, possible that the Commissioners' second reason was so bound up with the first that it could not possess any independent validity of its own. This would be so if the Commissioners were intending to say that, because there was an element of hospitality in the lunches, therefore the expenditure incurred could not be regarded as necessary, with the implication that they would have regarded the expenditure as necessary, and therefore permissible, but for the presence of this consideration. On this view, the element of hospitality was being treated, not as a ground in itself for rejecting the claim, but as a test of necessity, which, as the Court said, was an irrelevant and immaterial criterion. However, this would involve the factor of non-necessity being the only reason for the Commissioners' decision, and, as they referred to " reasons " in the plural, the Court assumed that the element of hospitality constituted a separate ground in their minds for rejecting the claim which was before them. The judgment continued, at p. 87 :

> Does, then, an " element of hospitality and the relationship of host and guest " to which the Commissioners refer in para. 11 of the Case prevent the cost of the lunches from being regarded as money exclusively laid out for the purposes of the firm's profession ? At first sight this question would require a negative answer, for (as already indicated) if A pays for B's lunch A cannot be altogether divested of the role of host nor can the element of hospitality be wholly wanting, however businesslike the occasion may be in every other respect. If the presence of this element, in however small and subordinate a degree, is fatal to a claim for deduction under r. 3 (*a*), then no money spent by, for example, a manufacturer in entertaining a prospective or existing customer could ever be allowed. Nevertheless, such would apparently be the result of the Commissioners' second reason for their decision if the language of para. 11 of the Case be taken by itself and given its natural interpretation.

Counsel for the Crown was not disposed to contend that such a result could be defended ; indeed, he said that it would be so absurd that the Commissioners could not be taken to have said what, on the face of para. 11, they did say, and, in referring to hospitality, they must have had private or social hospitality in mind. Their Lordships commented on this contention, at p. 87 :

> Now, if the Commissioners had been considering a similar claim by a business man we think there might possibly have been some force in this contention, but they were not ; they were applying their minds solely to the question of entertainment given by professional men to their clients, which might very well have given rise in the minds of the Commissioners to a different conception from that relative to business hospitality and leading to a different result. It does not appear to us that this conception (although, in our opinion, quite unjustified) is so inherently ludicrous as to require the addition of the word " private " or " social " as a qualification of the word " hospitality " when the Commissioners themselves did not think proper to use it.

Their Lordships concluded that the reasons for the Commissioners' decision were solely those mentioned in para. 11 of the Case ; that each of those reasons was insufficient in law to justify the Commissioners in rejecting the taxpayer's claim ; and that, as no other reasons for rejecting it were advanced before the Commissioners or before the Court of Appeal, the claim for allowance of the deductions succeeded, and the appeal, accordingly, failed.

In dismissing the appeal however, their Lordships added, at p. 89, the following observations :

> Once it is established that the Commissioners rejected the claim on the single ground that in every case there was present the element of hospitality, it necessarily follows from the course taken in the present case that the whole of the expenditure must be allowed. We are satisfied that in the circumstances it would not be just to send the case back to the Commissioners for further findings, for, as we have said, the various items were clearly treated as all standing or falling together. Further, it would be extremely difficult after this interval of time to expect either partner to give evidence as regards the particular circumstance of every instance.

Their Lordships made it clear that their decision was given, generally, in relation to the facts before them. They said they must not be taken as even deciding that on its particular facts every instance was, in fact, proved to be justifiable. They considered that on any future claim for deduction it would be proper to inquire into the special circumstances of any item in the claim, and on such an inquiry the true answer would depend on the application of the principles they had tried to state to the facts of each instance or (if agreement to that effect could be reached) of any case which would be treated for the purposes of the claim as typical of the whole.

It follows from this judgment that any claim for the cost of entertaining clients must be tested in the manner adopted by the Court of Appeal. If the sole object incurred in the expenses of entertaining a client at lunch at the solicitor's club or at a restaurant is the promotion of the solicitor's business, they are moneys " exclusively incurred in the production of the assessable income " for that year within s. 80 (2) of the Land and Income Tax Act, 1923 ; and that is so notwithstanding that there is an element of hospitality inherent in what is done. In such a case, the expenses are a proper deduction in computing the amount of the solicitor's assessable income.

In view of their Lordships' observations, and the well-known vigilance of the revenue authorities, it would be advantageous if a solicitor made diary entries of the occasions on which he had a client to lunch with him for business purposes, and the reason for so doing, together with a note of the expense incurred.

In our next issue, consideration will be given to the other case to which we have referred.

SUMMARY OF RECENT LAW.

ACTS PASSED, 1952.

No. 9. Maori Land Amendment Act, 1952 (*August 29*).
10. Amusement Tax Act, 1952 (*August 29*).
11. Massey Agricultural College Act, 1952 (*August* 29).
12. Scientific and Industrial Research Act, 1952 (*August 29*).
13. Sovereign's Birthday Observance Act, 1952 (*August 29*).
14. Police Force Amendment Act, 1952 (*August 29*).
15. Forest and Rural Fires Amendment Act, 1952 (*August 29*).

AGED AND INFIRM PERSONS PROTECTION.

Protection-order—Application for Order continuing Protection-order after Death of Protected Person—Protection-order ceasing to operate at Such Death—Aged and Infirm Persons Protection Act, 1912, s. 7 (2). A protection-order made under s. 4 of the Aged and Infirm Persons Protection Act, 1912, cannot be continued in force after the death of the protected person, notwithstanding s. 7 (2) of the statute, as s. 28 (2) indicates that the estate ceases to be under the administration of a manager on the death of the protected person. *In re Cryer (deceased).* (S.C. Auckland. September 1, 1952. Finlay, J.)

ATTACHMENT.

Garnishee Proceedings—Subdebtor Purchaser of Land from Debtor for Cash—Attachment of Part Purchase-money—Purchase-money Payable on Exchange for Transfer and Title—No "debt owing or accruing to judgment debtor"—Subdebtor discharged—Magistrates' Courts Act, 1947, s. 96—Magistrates' Courts Rules, 1948, rr. 271 (2) (a), 327 (b). T., a purchaser of land from R., had contracted to pay an amount in cash in exchange for the executed transfer and the certificate of title thereto. C. was a judgment creditor in relation to R., and he served garnishee proceedings on T. to satisfy, out of the moneys payable to R., a sum sufficient to satisfy R.'s debt to C. T. was ready and willing to pay the purchase-money on getting title in exchange, but, if he withheld payment of part of the purchase-money, R., as vendor, would not give him title, and he might lose the benefit of his purchase. On notice by T., as subdebtor, under r. 271 of the Magistrates' Courts Rules, 1948, that he disputed liability, *Held*, 1. That the purchaser of the land had not fallen into debt to the vendor (the judgment debtor) at any time, since he had been given no credit by the vendor, and there was, accordingly, no "debt owing or accruing to the judgment debtor" within the meaning of s. 96 of the Magistrates' Courts Act, 1947. 2. That, alternatively, as the amount payable by the purchaser was conditional on the exchange of the purchase-money for the documents of title, the purchase-money did not constitute a "debt owing or accruing to the judgment debtor", and the amount was not attachable. (*Howell* v. *Metropolitan District Railway Co.*, (1881) 19 Ch.D. 508, and *Public Trustee* v. *Polson*, [1931] N.Z.L.R. 321, followed.) 3. That, accordingly, since no part of the purchase-money constituted "any debt owing or accruing to the judgment debtor" from the subdebtor within the meaning of s. 96 of the Magistrates' Courts Act, 1947, the subdebtor must be discharged. *Curry* v. *Ralfe* (*Trevor, Subdebtor*). (Napier. April 23, 1952. Harlow, S.M.)

CRIMINAL LAW.

Costs against The Police. *26 Australian Law Journal*, 193.

Bail and Personal Liberty. (A. M. Qasem.) *30 Canadian Bar Review*, 378.

CONSTITUTIONAL LAW.

Change of Sovereignty and Doctrine of State. *26 Australian Law Journal*, 201.

CONVEYANCING.

Powers: Time when Appointed Interests take effect. *96 Solicitors' Journal*, 437.

CROWN PROCEEDINGS.

Statement made to Police—Production in Civil Action between Members of Public—Minister in Charge of Police certifying Production of Statement Prejudicial to Public Interest—Minister's Certificate Conclusive—Crown Proceedings Act, 1950, s. 27 (1) (b). A certificate by the Minister in Charge of Police that the production in a civil action of a statement made by the defendant to a Police constable after an accident would be prejudicial to the public interest is conclusive. (*Duncan* v. *Cammell Laird and Co., Ltd.*, [1942] 1 All E.R. 587, followed.) (*Robinson* v. *State of South Australia* (*No. 2*), [1931] A.C. 704, and *Gisborne Fire Board* v. *Lunken*, [1936] N.Z.L.R. 894, not followed.) Observations on possibility of injustice to litigants flowing from the Minister's objection to production in civil action of statements made to Police. *Carroll* v. *Osburn*. (S.C. Christchurch. August 20, 1952. Northcroft, J.)

DIVORCE AND MATRIMONIAL CAUSES.

Desertion—Separation Order in Force—Such Order not discharged by Subsequent Cohabitation—Spouse not guilty of Fresh Desertion by again deserting—Divorce and Matrimonial Causes Act, 1928, s. 10 (b)*—Destitute Persons Act, 1910, ss. 18 (2), 21.* A return to cohabitation does not discharge or nullify a separation order, the cancellation of which must be made by the Court. Consequently, a spouse cannot, while a separation order is undischarged, be guilty of a fresh desertion in the event of his or her resuming cohabitation and then again deserting. (*Jones* v. *Jones*, [1924] P. 203, followed.) *Sefton* v. *Sefton*. (S.C. Auckland. September 11, 1952. Stanton, J.)

Insanity—Respondent a Person of Unsound Mind and "Unlikely to recover"—Continuously of Unsound Mind for Seven Years immediately preceding Filing of Petition and confined in Mental Institution during Final Three Years of That Period—"Unlikely to recover"—Divorce and Matrimonial Causes Act, 1928, s. 10 (g). The words "unlikely to recover" in s. 10 (*g*) of the Divorce and Matrimonial Causes Act, 1928, are susceptible of meaning a complete return to mental health with a mind no longer impaired by any unsoundness or disease (*i.e.*, the perfect restoration of mental health); and they are also susceptible of meaning such a degree of recovery as to render confinement in a mental hospital unnecessary and to make practicable the return of the individual to his or her home, with, perhaps, a resumption of his or her former occupation (*i.e.*, a lower standard of no longer being certifiable). (*Davis* v. *Davis*, [1943] S.A.S.R. 203, referred to.) The petitioner sought a dissolution of his marriage based on s. 10 (*g*) of the Divorce and Matrimonial Causes Act, 1928. The petition was filed on February 14, 1952. There was evidence of the respondent's irrational conduct and of delusions as early as 1944. From February 12, 1945, to March, 1945, when her condition was then one of well-developed paraphrenia, she was a patient in a private hospital devoted entirely to the care of psychiatric cases; and she returned there for treatment from March 11 to March 29, 1945, when she was certifiably insane. On January 20, 1948, she went as a voluntary boarder to a mental hospital under the Mental Defectives Act, 1911, and became the subject of a reception order made on April 20, 1948. She was still a patient in that hospital at the time of the hearing of the petition. The uncontradicted medical evidence was to the effect that any complete recovery of the respondent, who was suffering from paraphrenia, in cases of which the prognosis is poor, was unlikely. The evidence was not so conclusive as to whether there might not be a more limited form of recovery—that is to say, an improvement in mental health to such a degree as to make practicable the respondent's discharge from a mental hospital and the resumption of her former mode of life. *Held*, 1. That, on the evidence, the respondent at the commencement of the seven-years period was certifiably insane, and, during the three and a half years preceding her committal to a mental hospital and since her committal, she was "a person of unsound mind" within the meaning of those words in s. 10 (*g*) of the Divorce and Matrimonial Causes Act, 1928; and, accordingly, the requirement that she should have been a person of unsound mind for the statutory period of seven years immediately preceding the filing of the petition had been fulfilled; and that she had been confined as a person of unsound mind in that institution continuously for the final three years of the seven-years period. (*Johnston* v. *Johnston*, [1921] N.Z.L.R. 1054, and *S.* v. *S.*, [1940] N.Z.L.R. 98, applied.) 2. That, on the evidence, it was unlikely that the respondent would ever recover to the extent of requiring less oversight, care, and control than at the time of the hearing of the petition; and that, even adopting the "lower standard" of recovery above referred to, it had been proved that the respondent was "unlikely to recover", and the petitioner was entitled to a decree *nisi*. *W.* v. *W.* (S.C. Wellington. September 8, 1952. Gresson, J.)

Lump Sum Alimony. (P. E. Joske.) *26 Australian Law Journal*, 198.

Petition—Petition for Divorce on Ground of Adultery—Petitioner previously obtaining Decree of Judicial Separation—Petitioner not precluded from Decree of Dissolution if Good Reason shown for Change of View. The choice of the remedy of judicial separation does not preclude a wife from later invoking the greater remedy of a dissolution of marriage if she shows good reason for a change of view, and it is not due to mere caprice, or vexatious, or such a proceeding as it would be unfair or unjust to allow her to invoke after she had proceeded in the alternative way that was open to her. (*Mason* v. *Mason*, (1883) 8 P.D. 21, and *Fullerton* v. *Fullerton*, (1922) 39 T.L.R. 46, applied.) If the respondent has not complained that the second proceeding should not have been brought, and has filed no answer to the petition for dissolution, the Court is not required to consider the maxim *Nemo debet bis vexari*. *Semble*, It is doubtful, in any case, whether the maxim applies, because the remedy of divorce is a different one from judicial separation previously claimed. *Price* v. *Price*. (S.C. Wellington. July 30, 1952. Fair, J.)

HUSBAND AND WIFE.

Purchase of A Vendor's Matrimonial Home. *214 Law Times* 33.

The Wife's Rights in The Matrimonial Home. *102 Law Journal*, 395.

INTERNATIONAL LAW.

Territorial Waters: *Anglo-Norwegian Fisheries* Case. *102 Law Journal*, 397.

JOINT FAMILY HOMES.

Dwellinghouse built and equipped as Family Home—Use of Room therein for seeing Clients on One Day in Each Week and occasionally at Other Times—Notice on Gate giving Firm Name and Hours for Transaction of Business—Dwellinghouse and Land used "principally" as Family Home—Owner entitled to have Same registered as Joint Family Home—Joint Family Homes Act, 1950, s. 3 (1) (b)—Joint Family Homes Amendment Act, 1951, s. 3 (a). By s. 3 (1) (*b*) of the Joint Family Homes Act,

1950, as amended by s. 3 (*a*) of the Joint Family Homes Amendment Act, 1951, a husband and wife or either of them may settle any land on the husband and wife as a joint family home under the statute where (*inter alia*): "(*b*) The dwellinghouse and land are used exclusively or principally as a home for the husband and wife and such of the members of their household (if any) as for the time being reside in the home." The plaintiff, a solicitor and partner in a firm of city solicitors, when a law clerk, had purchased his home in a suburban area. He saw some of his clients at his home on one day in the week, and occasionally saw some at other times as well. A small room at the back of the house, formerly a coalshed, was converted into a study, and, when it was not required by the plaintiff for business purposes, it was used by his family. To encourage local clients to see him at his home, he put a notice on his front gate, giving the name of his firm and the hours on one week-day when he could be seen by clients. The District Land Registrar refused to register the land and dwelling as a joint family home. In an action for mandamus to compel him to register the land and dwellinghouse as a joint family home under the Joint Family Homes Act, 1950, *Held*, 1. That the essential question for decision in relation to s. 3 (1) (*b*) of the Joint Family Homes Act, 1950 (as amended), in every case where it is sought to register a dwellinghouse and land as a joint family home, having regard to the purposes of the statute, is: Are this land and dwellinghouse by and large being used as a home, so that any reasonable person would say that was the primary and fundamental use? (*Berthelemy* v. *Neale*, [1952] 1 All E.R. 437, and *Houston* v. *Poingdestre*, [1950] N.Z.L.R. 966, applied.) 2. That, applying that test, where a dwellinghouse and land are used principally by its registered proprietor as a home for himself, his wife, and his household, and were purchased, built, and equipped for that purpose, and comprised his permanent home, they are used "principally" as a home within the meaning of s. 3 (1) (*b*) of the Joint Family Homes Act, 1950 (as amended), notwithstanding that he uses them at times for business purposes; and he is entitled to have such land and dwellinghouse registered as a joint family home under the statute. *Fairmaid* v. *Otago District Land Registrar*. (S.C. Dunedin. August 25, 1952. North, J.)

MAGISTRATES' COURT.

Jurisdiction—Collision between Launches—Action claiming Damages for Negligence—Common-law Action within Magistrates' Court Jurisdiction—Launches not "ships"—Magistrates' Courts Act, 1947, s. 29—Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict., c. 27), s. 2. The Magistrates' Court has jurisdiction to determine an action for damages arising from a collision between two motor-launches on Lake Karapiro, because damages arising from negligence are the subject-matter of a common-law action in tort, whether on water or on land; and, in any case, the vessels concerned were not "ships" as that word is used in Admiralty law, since they were not "used in navigation". (*Tuff* v. *Warman*, (1857) 2 C.B. (N.S.) 740; 140 E.R. 607, *Reg.* v. *Southend County Court (Judge)*, (1884) 9 Q.B.D. 142, and *Reg.* v. *City of London Court (Judge)*, [1892] 1 Q.B. 273, applied.) (*Powell* v. *M. Galbraith, Ltd.*, (1950) 6 M.C.D. 371, not followed.) (*Gosling* v. *Johnston and Co.*, (1916) 11 M.C.R. 112, *Mayor, &c., of Southport* v. *Morris*, [1893] 1 Q.B. 359, *Weeks* v. *Ross*, [1913] 2 K.B. 229, and *The Champion*, [1934] P. 1, referred to.) *Phairn* v. *Deed*. (Cambridge. August 8, 1952. Paterson, S.M.)

MAORI LAND.

The Maori Land Amendment Act, 1952, which takes effect from September 30, 1952, abolishes all District Maori Land Boards, and their rights, duties, powers, and liabilities are transferred, with minor exceptions, to the Maori Trustee. All communications and payments to the Maori Trustee should now be made to the District Officers of the Department of Maori Affairs as local representatives of the Maori Trustee. There are District Offices of the Department in Auckland, Rotorua, Gisborne, Wanganui, and Wellington.

MUNICIPAL CORPORATION.

By-law—Boarding-house Licence issued for Three Morths instead of Normal Term of Twelve Months—Council's Decision founded on Fire Prevention By-law requiring Brick Buildings in Specified Area—Misuse of Powers relating to Supervision of Boarding-houses—No Sufficient Ground for Refusal under Relevant By-law—Court's Discretion exercised in Favour of Boarding-house Keeper—Council ordered to issue Full-term Licence without Prejudice to Any Rights to have Premises demolished. A City Council refused to issue a boarding-house licence to the plaintiffs for the usual period of twelve months, but issued one which was limited to three months. The reason given was the undertaking to the Council, given on April 16, 1946, by the plaintiffs and their landlord, that, in consideration of the Council's permitting temporary repairs to be done to the boarding-house, they would demolish it, or permit it to be demolished, at the expiration of three months' notice from the Council to that effect. The undertaking was given, not in relation to the conduct of the premises as a boarding-house, but as a condition of the Council's consent to repairs and alterations to the premises, which were necessary after a fire had destroyed a good deal of the interior, in material of a more combustible or less permanent nature than that which the by-laws might have required. The evidence showed that the premises comprised a well-conducted boarding-house, serving a useful purpose in the City. On a notice of motion for a writ of mandamus to issue to the Corporation ordering the issue to the plaintiffs of a boarding-house licence for twelve months, *Held*, 1. That, as the purpose of the Council in limiting the term of the boarding-house licence was to enforce compliance with the agreement of April 16, 1946, relaring to fire prevention, such limitation was a misuse of its powers in respect of the control of boarding-houses; because the Council, by limiting the licence to three months, used powers given to ensure proper management and accommodation in boarding-houses to enforce what was really a fire-prevention by-law. (*Quinlan* v. *Mayor, &c., of Wellington*, [1929] N.Z.L.R. 491, applied.) 2. That, as the Council had not exercised the duty for which the power in relation to boarding-houses was entrusted to it, the limitation of the term of the licence could not be justified in the circumstances; and, having regard only to the Council's duty with regard to the supervision of boarding-houses, there was no sufficient ground for refusing a full-term licence. 3. That, assuming (but not deciding) that the Court had a discretion to refuse the order, it should exercise it in favour of the plaintiffs, for the reason that they were in a different position, owing to the change in the housing situation in New Zealand, from that when the agreement as to demolition on three months' notice was entered into in April, 1946, and owing to the intervention of the Legislature to protect tenants although their leases have expired; and for the further reason that their appearance of refusing to adhere to their undertaking was not blameworthy to the degree that it might appear to be, having regard only to the terms of that undertaking. (*Searl* v. *South British Insurance Co., Ltd.*, [1916] N.Z.L.R. 147, distinguished.) *Quaere*, Whether the powers given in the defendant Corporation's By-law No. 1, cl. 171, allowing the City Council to waive compliance with its by-laws in certain conditions, extended to imposing a limitation on the term of a boarding-house licence, or whether the by-law was valid. (*Waldegrave* v. *Mayor, &c., of Palmerston North*, (1909) 29 N.Z.L.R. 223, referred to.) *McKenna and Gifford* v. *Palmerston North City Corporation*. (S.C. Wellington. August 14, 1952. Fair, J.)

POLICE OFFENCES.

Frequenting Public Place with Felonious Intent—Ingredients of Offence—"Frequenting"—Police Offences Act, 1927, s. 52 (1) (j). If the facts of any particulare case warrant it, one visit to a street may amount to "frequenting a public place, with felonious intent" within the meaning of s. 52 (1) (*j*) of the Police Offences Act, 1927; and it is not necessary, for the purposes of establishing the offence, to prove that the frequenting of the street was for the purposes of committing the act of the felonious intent in that street, it being sufficient if it is shown that the accused's purpose in being in the street was with a felonious intent. If it is proved that the accused was in a public place long enough to establish his felonious intent, that would amount to "frequenting". (*R.* v. *Child*, [1935] N.Z.L.R. 186, *Reg.* v. *Brown*. ((1852) 17 Q.B. 833; 117 E.R. 1500, and *In re Jones*, (1852) 7 Ex. 586; 155 E.R. 1082, followed.) (*Airton* v. *Scott*, (1909) 25 T.L.R. 250, applied.) (*Clark* v. *The Queen*, (1884) 14 Q.B.D. 92, distinguished.) *Police* v. *Hartneady*. (Auckland. August 28, 1952. Wily, S.M.)

PRACTICE.

Appeals to Court of Appeal—Application for Leave to appeal from Judgment of Supreme Court on Appeal from Magistrates' Court—Jurisdiction to grant Leave after Transmission to Magistrates' Court of Memorandum of Decision—Interest, Public or Private, beyond Applicant's Interest and of Sufficient Importance to outweigh Cost and Delay involved in Appeal to Court of Appeal—Leave granted on Terms of Hearing at Earliest Court of Appeal Sittings—Judicature Act, 1908, s. 67—Magistrates' Courts Act, 1947, s. 78 (1). The transmission to the Magistrates' Court of a memorandum of the decision of the Supreme Court under the provisions of s. 78 (1) of the Magistrates' Courts Act, 1947, before a notice of motion for leave to appeal from that decision has been filed in the Supreme Court does not deprive the

Supreme Court of jurisdiction to grant leave to appeal to the Court of Appeal under s. 67 of the Judicature Act, 1908. (*Lazarus* v. *Morrison* (*No. 2*), (1906) 8 G.L.R. 719, distinguished.) (*C. Dickinson and Co., Ltd.* v. *Herdman*, [1929] N.Z.L.R. 795, and *Young* v. *Hall*, [1929] N.Z.L.R. 804, referred to.) The list of instances of classes of cases in which leave to appeal should be given under s. 67 of the Judicature Act, 1908, set out in *Rutherfurd* v. *Waite*, [1923] G.L.R. 348, is not exhaustive, as it merely contains examples of cases in which interests beyond the money value of the subject-matter of the particular case are involved. The leave applied for in the present cases was granted because they fell in substance within the second class of illustrations given in *Rutherfurd* v. *Waite*, as, in both cases, there was involved some interest, public or private, which was beyond the mere direct interest of the applicants for leave, and which was of sufficient importance to outweigh the cost and delay that would result from further proceedings in the Court of Appeal. Leave to appeal granted was subject to the condition that the appeal be set down for hearing, and the hearing proceeded with, at the next ensuing sittings of the Court of Appeal. (*Rutherfurd* v. *Waite*, [1923] G.L.R. 34, and *Park Davis Trading Co., Ltd.* v. *Morrow*, [1940] G.L.R. 379, applied.) *Quaere*, Whether jurisdiction can be given to the Supreme Court by consent where it is asked to grant leave to appeal under s. 67 of the Judicature Act, 1908. *The Queen* v. *James: The Queen* v. *King* (*No. 2*). (S.C. Wellintgon. August 26, 1952. Cooke, J.)

Rehearing—Application by Successful Defendant—Defendant considering His Conduct and Courtesy brought into Question in Judgment—Evidence sought to be given not affecting Determination—Rehearing refused—Magistrates' Courts Rules, 1948, r. 230. When an action has been disposed of by judgment, then that judgment should not be set aside except on proper legal grounds; and the onus is on the applicant to satisfy the Court that the grounds of his application are such as, if established, will or may materially affect the decision already made. A rehearing should be granted where there has been a miscarriage of justice; but, where substantial justice has been done, then the rehearing should be refused. (*Munro* v. *Middleditch*, (1912) 32 N.Z.L.R. 140, followed.) Where new evidence is sought to be given, then it must be shown that such new evidence, if adduced at the trial, would materially have affected the issue. *Cullington* v. *Johnston* (*No. 2*). (Auckland. August 26, 1952. Wily, S.M.)

Stay of Proceedings. *102 Law Journal*, 383.

PROBATE AND ADMINISTRATION.

Composite Wills. *102 Law Journal*, 382.

RATES AND RATING.

Urban Farm Land—Farm-land List—Test of Inclusion of Land in List Its Dominant Use—Likelihood of Land being required for Business Purposes—Possible Completion of Harbour Bridge disregarded—"Urban farm land"—Urban Farm Land Rating Act, 1932, ss. 2, 13. The test to be applied to the inclusion of land, which is not exclusively used for agricultural purposes, in an urban farm-land roll is its dominant use; before it can be so included, it must be used principally for agricultural purposes in terms of the definition of "urban farm land" in s. 2 of the Urban Farm Land Rating Act, 1932. (*In re Boyd's Estate and Mt. Roskill Road Board*, (1947) 5 M.C.D. 174, distinguished.) While the definition of "urban farm land" in s. 2 of the statute excludes land which is "likely", in the opinion of the Court, "to be required for building purposes within a period of five years from the date on which such opinion is expressed", the Court, in considering whether certain land might be so required, disregarded, so far as these proceedings were concerned, any question of the immediate commencement and completion of the Auckland Harbour bridge. *In re Northcote Borough Urban Farm Land Assessments.* (Auckland. August 27, 1952. Kealy, S.M.)

SERVICEMEN'S SETTLEMENT AND LAND SALES.

Farm Land taken by Crown—Compensation—Basis of Assessment—Heads of Compensation to which Award restricted—Claim in respect of Depreciation of Currency since 1942 not Maintainable—Servicemen's Settlement and Land Sales Act, 1943, ss. 28 (3), 53—Servicemen's Settlement and Land Sales Amendment Act, 1945, s. 6. Compensation may be awarded for farm land taken by the Crown under the Servicemen's Settlement and Land Sales Act, 1943, only in respect of (*a*) the productive value of the land, assessed in accordance with ss. 28 (3) (as amended) and 53 of the statute, (*b*) any additional sum which may properly be added to the productive value to make it a fair value, and (*c*) the amount of any special loss incurred by the claimant in his farming operations; and there is no other ground on which compensation may be allowed. Consequently, a claim for a sum on account of depreciation in the currency since 1942 is not maintainable, as it is not a matter affecting the productive value of the land, and does not come within either of the other heads of compensation to which an award is restricted. General principles in relation to assessing compensation for land used for sheep farming discussed and applied. *In re Bowling and Others.* (L.V.Ct. Gisborne. August 22, 1952. Archer, J.)

SHIPPING AND SEAMEN.

Shipping Casualty—Appeal from Decision of Court of Inquiry—Limitation on Functions of Supreme Court on Such Appeal—Shipping and Seamen Amendment Act, 1909, s. 39. The Supreme Court, on an appeal pursuant to s. 39 of the Shipping and Seamen Amendment Act, 1909, from a Court of investigation or inquiry into a shipping casualty under Part VIII of the principal Act, can interfere only if it is shown that the decision of the Magistrate was initiated by error in law or by misunderstanding or misapplication of a regulation or local rule or by erroneous drawing of an inference from insufficient factual material or by erroneous refusal to draw an inference compelled by facts accepted below or by acceptance of evidence of so unreasonable and improbable a nature that even a Court which did not see or hear the witnesses would say that such evidence should not have been accepted. In the result, the function of the Supreme Court on such an appeal is, first, to see what decisions have been made by the Court of inquiry, and, secondly, to ascertain whether there was evidence before that Court which might reasonably be accepted as justifying those decisions. (*The Broompark*, (1949) Auckland; Callan, J.; Unreported, followed.) (*Thomas* v. *Thomas*, [1947] A.C. 484; [1947] 1 All E.R. 582, referred to.) The Supreme Court may, however, admit further evidence on what it is satisfied is a crucial topic and one not explored, or, at best, not more than faintly mentioned in the proceedings before the Court of inquiry. The judgment is reported on this point only. *Hazeldine-Barber* v. *Superintendent of Mercantile Marine and Another.* (S.C. Auckland. August 25, 1952. Finlay, J., with Assessors.)

TENANCY.

Dwellinghouse—Possession—Magistrate's Refusal of Order for Possession—Such Refusal not operating to estop Landlord from commencing Similar Action in Supreme Court—Exclusive Jurisdiction of Magistrates' Court under Tenancy Act, 1947, confined to Fixing, at First Instance, Fair Rent of Premises—"Court"—Magistrates' Courts Act, 1947, s. 31—Tenancy Act, 1948, ss. 2, 23, 24, 25. Under the Tenancy Act, 1948, the Magistrates' Court has exclusive jurisdiction at first instance to fix the fair rent of premises, there being a right of appeal to the Supreme Court where the fair rent so fixed, or the basic rent, exceeds £525 per annum; but the definition of "Court" in s. 2 of the statute has no application to claims for possession, as the jurisdiction to make an order for possession comes from the jurisdiction that the particular Court otherwise has. A landlord is not estopped by the judgment of a Magistrate refusing him an order for the possession of a dwellinghouse from commencing an action for possession in the Supreme Court, since the Magistrate's decision was made under the Magistrates' Courts Act, 1947, though, in arriving at his decision, he necessarily had to have regard to the provisions of ss. 23, 24, and 25 of the Tenancy Act, 1948. These sections do not operate to restrict the general powers of a Court (which, in the case of a Magistrates' Court, come from the Magistrates' Courts Act, 1947), and do not operate by themselves to confer jurisdiction on a Court. (*Bydder* v. *Bethune*, [1937] N.Z.L.R. 704; aff. on app., [1938] N.Z.L.R. 1, followed.) (*Saraty* v. *Morice*, [1923] N.Z.L.R. 728, and dictum of *Salmond*, J., in *Aitken* v. *Smedley*, [1921] N.Z.L.R. 236, 239, applied.) (*Richardson et Ux.* v. *Yates*, [1944] N.Z.L.R. 413, referred to.) *McDougall* v. *Davidson.* (S.C. Auckland. September 1, 1952. Hutchison, J.)

Dwellinghouse—Possession—Non-payment of Rent—Question whether Rent lawfully payable Determinable as at Commencement of Proceedings—Jurisdiction not ousted by Payment of Rent into Court—Tenancy Act, 1948, s. 24. Where a landlord has taken proceedings under the authority of s. 24 of the Tenancy Act, 1948, on the ground that the tenant has failed to pay rent, the payment of rent into Court does not oust the jurisdiction to make an order for possession. (*Brewer* v. *Jacobs*, [1923] 1 K.B. 528, followed.) (*Dellenty* v. *Pellow*, [1951] 2 All E.R. 716, applied (but distinguished on the facts).) The question whether there was rent lawfully payable has to be determined as at the date of the commencement of the proceedings. (*Bird* v. *Hildage*, [1947] 2 All E.R. 7, followed.) *Shadbolt* v. *Fox.* (S.C. Auckland. September 1, 1952. F. B. Adams, J.)

Dwellinghouse—Possession—Relative Hardship—Tenant Executor of Deceased Tenant—Dwelling occupied by Sister-in-law of Deceased Tenant, Sole Beneficiary under His Will, and residing with Him at Time of His Death—Hardship of Such Occupant to be weighed with regard to Her Status as "any other person"—Test of Proximity of Occupant to Tenant and Extent to which Hardship to Occupant would be Hardship to Him—No "proximity" to Executor-Tenant so as to affect Him adversely if Order for Possession made—"Any other person"—Tenancy Act, 1948, s. 24 (1) (f), (2). The defendant was the executor of the will of a deceased person who, until his death, was the tenant of a dwellinghouse in which he resided, at the time of his death, with a sister-in-law, Mrs. H., who was the sole beneficiary under his will; and she still resided in the dwellinghouse. After the deceased's death, the tenancy had devolved on the defendant, as his executor, who desired that Mrs. H. should be allowed to continue to occupy the tenement. In an action by the landlord for possession pursuant to s. 24 (1) (*f*) of the Tenancy Act, 1948, the learned Magistrate held that the premises were not required "for occupation as a dwellinghouse by the tenant", but that greater hardship would be suffered by Mrs. H. if an order for possession were made against the defendant than would be suffered by the plaintiff if he were refused possession. On the question whether Mrs. H. qualified as being "any other person", within the meaning of s. 24 (2) of the statute, whose hardship had to be taken into consideration in applying the provisions of that subsection, *Held*, 1. That, in order to determine whether Mrs. H. was "any other person" within the meaning of s. 24 (2), the Court had to consider her "proximity", or financial and natural relationship with the tenant, and the extent to which hardship to her would consequently be a hardship to the tenant. (*Harte* v. *Frampton*, [1947] 2 All E.R. 604, applied.) (*The King* v. *Osmond*, (1948) 5 M.C.D. 476, and *Auckland Gas Co., Ltd.* v. *Williams*, (1948) 5 M.C.D. 588, mentioned.) 2. That any hardship Mrs. H. might suffer if an order for possession were made would not create any hardship, as tenant or otherwise, to the defendant, who was a professional man acting as executor of the deceased tenant, and whose association with Mrs. H. was entirely a professional one which would come to an end in two or three months' time, neither being financially dependent on the other or linked by any ties of blood relationship. 3. That, although Mrs. H. was a beneficiary under the will of which the defendant was the executor, there was merely a professional relationship between them, and not such a "proximity" to the tenant as would affect him adversly if an order for possession were made; and, consequently, an order for possession should be made. *Bates* v. *Willis*. (Wanganui. July 2, 1952. Coleman, S.M.)

TRANSPORT.

Offences—Failure to give way at Intersection—Junction of Driveway to Sanatorium with Main Road an "Intersection"—"Road"—"Intersection"—Transport Act, 1949, ss. 2, 40, 58, 59, 169 (3)—Traffic Regulations, 1936 (Serial No. 1936/86), Reg. 14 (6). The appellant was driving a small truck from the driveway, or road, leading to Mill Road from the Otaki Sanatorium (an institution under the Hospitals and Charitable Institutions Act, 1926, and controlled jointly by two Hospital Boards). As he came on to Mill Road, he collided with a taxi driven on that road and approaching from his right. Mill Road had on it a strip of bitumen 19 ft. wide; on the side next to the Sanatorium grounds, there was a strip of gravel, and then an unformed grass strip. There was no gate at the Sanatorium entrance. From the Sanatorium entrance to the gravel of Mill Road there was a piece of formed road across what would otherwise be a grass verge. The land over which the driveway led from the entrance gateway to the Sanatorium buildings was land belonging to the institution. The Justices found as a fact that the road leading to the Sanatorium was a road to which the public had access and was in general use for vehicular traffic. The appellant was convicted of the offence of failing to give way at an intersection to another motor-vehicle approaching from his right. On the appeal, the point of law in issue was whether the junction of the Sanatorium road, or driveway, with Mill Road was an intersection for the purposes of Reg. 14 (6) of the Traffic Regulations, 1936. *Held*, 1. That the road leading to the Sanatorium, to which the public had access, and which was in general use by vehicular traffic, was within the meaning of the definition of the term "road" in Reg. 2 of the Traffic Regulations, 1936, which, by virtue of s. 169 (3) of the Transport Act, 1949, is *intra vires* that statute. 2. That, under the provisions of the Transport Act, 1949, and the Traffic Regulations, 1936, the junction of the Otaki Sanatorium driveway with Mill Road was an "intersection" within the meaning of Reg. 14 (6) of those Regulations. (*Wallace* v. *Muir*, [1933] N.Z.L.R. 131, distinguished.) 3. That, since the "lateral boundary-lines" referred to in the definition of "intersection" in Reg. 2 of the Traffic Regulations, 1936, are the normal lateral boundary-lines of each of two roadways for a reasonable distance back from where they join, the junction with the usable portion of a road of the few feet of roadway crossing the grass verge from a gateway does not form an "intersection" within the meaning of the definition. (*Lee* v. *Madge and Cole*, [1943] N.Z.L.R. 569, applied.) *Jones* v. *Hobbs*. (S.C. Palmerston North. August 27, 1952. Hutchison, J.)

VALUATION OF LAND.

Value for Death-duty Purposes—Residential Property—Fair Market Value to be ascertained—Replacement Cost merely Factor in assessing Fair Market Value—Costs—Order for Payment by Valuation Department of Part of Objector's Costs—"Price"—"Capital value"—Death Duties Act, 1921, s. 70 (5)—Valuation of Land Act, 1951, s. 2—Land Valuation Court Act, 1948, s. 32. The definition of "capital value" in s. 2 of the Valuation of Land Act, 1925, which relates capital value to saleability at a hypothetical sale, is not intended to create a new standard of valuation for rating and duty purposes, but is intended to apply to valuations made for those purposes the established conception of "fair market value," which is assessed by reference to a hypothetical sale between a willing seller and a willing buyer. (*Duthie* v. *Valuer-General*, (1901) 20 N.Z.L.R. 585, *Thomas* v. *Valuer-General*, [1918] N.Z.L.R. 164, and *Valuer-General* v. *Wellington City Corporation*, [1933] N.Z.L.R. 855, followed.) (*In re Oriental Hotel, Muir to Niall*, [1944] N.Z.L.R. 512, and *Spencer* v. *Commonwealth of Australia*, (1907) 5 C.L.R. 418, applied.) The "replacement cost" method of valuation should be regarded, not as an alternative to market value, but as a factor to be considered in the assessment of a fair market value. (*Valuer-General* v. *Wellington City Corporation*, [1933] N.Z.L.R. 855, followed.) (*D. to E.*, (1944) (No. 1) 20 N.Z.L.J. 155, and *R. Estate to B. Co., Ltd.*, (1947) (No. 103) 23 N.Z.L.J. 183, referred to.) Sales at excessive prices, and appearing to be attributable only to the whim, extravagance, or compelling needs of individual purchasers, should be disregarded in the assessment of market value. There is, however, a distinction between an individual case where an excessive price is paid for personal reasons (since the price paid is out of line with market prices) and a general situation where the prices of houses are found to exceed replacement costs in consequence of an insistent and unsatisfied demand for homes (the price level being constituted by actual sales and following naturally from an excess of demand over supply). Supply and demand are factors, in the determination, not only of price, but also of value; and the effect of demand upon the property market is not to be disregarded merely because it reflects in varying measure the needs of prospective buyers. In 1940, a house was built at a cost of £1,134 9s. 5d., the section costing the further sum of £425. It was occupied by the owner and her family until her death on May 18, 1951, when the existing Government valuation was £1,760. The property was valued on a special valuation for death-duty purposes by the Valuation Department at £3,125. The value, for the purposes of s. 70 of the Death Duties Act, 1921, was found by the Land Sales Committee to be the "replacement value" of the property—namely, £2,980 (allowing £840 for the land): *sub nom. In re Manning*, (1952) 7 M.C.D. 479. That figure, merely as "replacement cost", was upheld by the Land Valuation Court. The Valuer-General appealed from the Committee's decision, on the ground that the amount so found was not the true value of the property, and was not, in the circumstances, in conformity with the value required to be found under the Death Duties Act, 1921. More comprehensive evidence as to the selling value of the property at the date of the deceased's death was given before the Court than was given before the Committee. *Held*, 1. That, although at the material date the replacement value of the property was £2,980, it could have been sold at that date at £3,125. 2. That the replacement value could not be accepted, as the evidence showed that a higher figure could have been obtained at the relevant date in the open market, since, both on principle and by virtue of the definition of "capital value" in s. 2 of the Valuation of Land Act, 1925, market value must take precedence over replacement value where there is shown to be a divergence between them. 3. That the unanimous agreement of the valuers that the deceased's property could have been sold at the date of death for £3,125 was conclusive evidence that that was the capital value of the property for the purposes of s. 70 of the Death Duties Act, 1921. 4. That, in view of the Valuation Department's method of assessment, and of its unusual course in presenting its case, the estate of the deceased should be reimbursed in part for its costs. *Valuer-General* v. *Manning*. (L.V.Ct. Auckland. August 4, 1952. Archer, J.)

PEDESTRIAN CROSSINGS.

Duties of Motorists.

By R. T. Dixon.

An interesting recent decision in England on the above subject is that of *Leicester* v. *Pearson*, [1952] 2 All E.R. 71. In this case, it was decided that the duty of a motorist to give way to a person using a pedestrian-crossing was not absolute, and that a finding that the driver was not negligent was conclusive that that was no breach of the Regulation. The following observations of the learned Judges indicate that they were aware of the difficulties likely to accrue to enforcement authorities arising out of the decision. Devlin, J., at p. 73, said :

> it would only, I imagine, be in an exceptional case that the Magistrate would be able to find that a failure to see a foot-passenger was not due to some failure on the part of the driver to keep a proper look-out.

Lord Goddard, L.C.J., at p. 74, said :

> I am conscious that the decision we have given may cause difficulties in administering the Regulation.

The facts in brief were that it was a wet night, the lighting was poor, the injured pedestrian was crossing from a tree-shadowed side of the road towards the lighter side, and the motorist first saw the pedestrian when seven or eight yards distant, but, on application of the brakes, the car skidded and struck her. On these facts, the Magistrate held that the motorist was not negligent, and therefore dismissed the prosecution under the Regulation. The appeal by the Police was dismissed in the Queen's Bench decision.

An important question is whether the case has application to the New Zealand law. The English Regulation concerned in this case was Reg. 4 of the Pedestrian Crossings (London) Regulations, 1951, and reads as follows :

> Every foot-passenger on the carriageway within the limits of an uncontrolled crossing shall have precedence within those limits over any vehicle and the driver of the vehicle shall accord such precedence to the foot-passenger, if the foot-passenger is on the carriageway within those limits before the vehicle or any part thereof has come on to the carriageway within those limits.

The New Zealand Regulation is Reg. 14 (7) of the Traffic Regulations, 1936 (Serial No. 1936/86), which provides as follows :

> Every driver of a motor-vehicle shall yield the right of way to a pedestrian engaged in crossing the roadway within any authorized pedestrian-crossing upon the half of the roadway over which such vehicle is lawfully entitled to travel, and when approaching such crossing the driver shall reduce his speed so as to be able to stop before reaching the crossing if necessary.

The Court's argument was on the lines that the Regulation does not impose *prohibition* of a particular sort of driving—a type of provision which generally is construed as carrying an absolute obligation—but, as Devlin, J., said, at p. 73, it " means that reasonable steps must be taken to accord precedence ". Hilbery, J., at p. 73, said :

> it is just such a Regulation, as my Lord pointed out in *Harding* v. *Price* ([1948] 1 All E.R. 283) [*Cf. Chalmers and Dixon's Road Traffic Laws of New Zealand*, 2nd Ed. 50], as requires one to construe it as though qualifying words were written into it.

This statement appears to imply that *mens rea* is an essential ingredient of the offence. Thus examined, and comparing the wording of the English and New Zealand Regulations, it appears that the general legal principles set forth apply fully to the first part of the New Zealand Regulation, which also contains no absolute prohibition, but sets out the order of precedence. The English Regulations states that the motorist " shall accord . . . precedence ". The New Zealand Regulation uses the words " shall yield the right of way ". The only difference—but it is an important one—is that the later part of the New Zealand Regulation imposes an additional obligation which would create a separate offence : "the driver shall reduce his speed so as to be able to stop before reaching the crossing if necessary." If this obligation had been contained in the English Regulation and made the basis of a charge on the facts in *Leicester* v. *Pearson*, it is difficult to understand how the defendant could have escaped a conviction, as the facts show that he failed so to reduce his speed. The bad lighting, the wet road, and other circumstances are all reasons for proceeding with great care and at a slow speed, rather than excuses for failing to stop in time to avoid the collision.

It will be observed that the Regulation which formed the basis of the charge in *Leicester's* case was one having local application to the London area, and that, in addition, England has the Pedestrian Crossing Places (Traffic) Regulations, 1941, which provide in Reg. 3 that the driver must so contain his speed when approaching a pedestrian-crossing as to be able to stop for a pedestrian if necessary. This Regulation was construed as follows in *London Passenger Transport Board* v. *Upson*, [1949] 1 All E.R. 60, 65 :

> I think the true position is that the motorist must be able to see whether the crossing is clear or not up to the time when, going at the speed he is going, provided it is a reasonable speed, he would still be able to stop before reaching the crossing.

This was a civil action for recovery of damages, in which the defendant driver, with the crossing-lights in his favour, was still held to be negligent (see the remarks of Lord Morton, at p. 75), because he did not sufficiently reduce his speed and take care. In New Zealand, there is no distinction between civil liability and criminal liability for an act of negligence : see *R.* v. *Storey*, [1931] N.Z.L.R. 417, and notes thereon in *Chalmers and Dixon's Road Traffic Laws of New Zealand*, 2nd Ed. 472.

It is now possible to venture an opinion on the application of *Leicester's* case to New Zealand.

First, it may be stated with respect and with some confidence that, so far as the first part of the New Zealand Regulation is concerned (" shall yield the right of way ", &c.), the case would have application, and, if the Court found no negligence on the part of the defendant, a prosecution under this part of the Regulation only would probably fail. It is to be observed again, however, that negligence sufficient to support a civil claim for damages is, in New Zealand, sufficient to support a prosecution : *R.* v. *Storey*, [1931] N.Z.L.R. 417 ; and, therefore, it is unlikely that the facts in *Leicester's* case would be accepted by the New Zealand Courts as supporting an argument that there was no

negligence. In this connection, reference may be made to the facts in the case of *Bailey* v. *Geddes*, [1938] 1 K.B. 156, and *Upson's* case, [1949] 1 All E.R. 60, in both of which the facts were held sufficient to support a claim for damages based on negligence.

It is suggested that the second part of the New Zealand Regulation (" shall reduce his speed so as to be able to stop ") amounts to a prohibition, and, therefore, that any attempt to prove absence of negligence would be abortive. The driver is prohibited from travelling at such a speed as to be unable to stop before reaching the crossing, if necessary, and, therefore, if in fact he was unable to stop in compliance with the Regulation, any mitigating circumstances would have bearing only on the penalty, and would not justify a dismissal of the charge.

DEATH DUTIES: INTERESTS IN LAND ABROAD.

Liability to Death Duty in New Zealand.

By E. C. Adams, LL.M.

The recent judgment of F. B. Adams, J., in *New New Zealand Insurance Co., Ltd.* v. *Commissioner of Stamp Duties*, [1951] N.Z.L.R. 912, is not only of great practical importance, as it determines the liability to gift duty or death duty in New Zealand of an interest in land situated in England of a person domiciled in New Zealand (such interest corresponding to a beneficial tenancy in common in New Zealand), but also of intense theoretical interest to the student of real property and conflict of laws, because of the thoroughness of His Honour's treatment of the technical problems presented.

Deceased, before the coming into operation of the Law of Property Act, 1925 (Gt. Brit.), owned a beneficial interest as *tenant in common* of certain freehold lands situated in England. Had deceased died before the coming into operation of that Act, it is quite clear that, whether he had died domiciled in or outside of New Zealand, his tenancy in common in the freehold lands in England would not have been liable to death duty in New Zealand. Real property (including leaseholds) situated abroad is not taxed in New Zealand; it is subject to the *lex loci rei sitae* by the comity of nations: *Straits Settlements Commissioner of Stamps* v. *Oei Tjong Swan*, (1933) 49 T.L.R. 428. But what appears at first sight to be real property may be personal for death-duty and gift-duty purposes in New Zealand, and liable to duty in New Zealand wheresoever situated, if deceased or the donor has a New Zealand domicil. This most interesting judgment of F. B. Adams, J., cannot be fully appreciated unless one realizes this fact. Thus, where real or leasehold property is subject to an imperative trust for conversion (with or without a power to postpone conversion), the interest of a deceased beneficiary or of a donor therein will be personalty, as constituting an equitable chose in action: *Re Stokes, Stokes* v. *Ducroz*, (1890) 62 L.T. 176, *Duke of Marlborough* v. *Attorney-General (No. 2)*, [1945] Ch. 145, *Stannus* v. *Commissioner of Stamp Duties*, [1947] N.Z.L.R. 1, and *Green's Death Duties*, 2nd Ed. 25. And every student of conflict of laws will realize that the question whether property is " real " or " personal " for the purposes of the Death Duties Act, 1921, must be determined in accordance with New Zealand law: *Green's Death Duties*, 2nd Ed. 595.

The position, therefore, was that, as deceased died domiciled in New Zealand, if his beneficial interest in these English freehold lands were " personal property ", as comprehended by the New Zealand taxing statute, it was caught for death duty in New Zealand by ss. 5 (1) (*a*), 16 (1) (*a*), and 7 as being *notionally* property of the deceased which is situated in New Zealand.

Section 5 (1) (*a*) reads as follows:

> In computing for the purposes of this Act the final balance of the estate of a deceased person his estate shall be deemed to include and consist of the following classes of property:—
>
> (*a*) All property of the deceased *which is situated in New Zealand* at hs death, and to which any person becomes entitled under the will or intestacy of the deceased, except property held by the deceased as trustee for another person

Section 16 (1) (*a*) reads:

> In this Act the term " successor " means, with respect to any deceased person, any person who on the death of the deceased—
>
> (*a*) Acquires under the will of the deceased, whether by way of pecuniary legacy, the exercise of a power of appointment, or otherwise howsoever, a beneficial interest in the dutiable estate of the deceased.

Section 5 imposes estate duty, and s. 16 imposes succession duty, both included in the term " death duty".

Section 7 provides that, *where the deceased was domiciled* in New Zealand at the date by reference to which the local situation of any *personal* property forming part of his dutiable estate is to be determined, such personal property shall be deemed, for the purposes of the Act, to be situated in New Zealand at that date.

In practice, it is usually quite easy to determine whether property of a deceased person or of a donor is real or personal property for the purposes of our Act. Occasionally, as in this case, the definitions have to be carefully examined and considered before it is possible to determine liability.

A study of this case shows how widely the technical rules of our New Zealand law of real property now differ from the English. To the New Zealand real-property lawyer, accustomed as he is to the certainty and comparative simplicity of the Torrens system, some of the changes which have been effected in the English law of real property since 1842, the date of our first Conveyancing Ordinance—especially those made by Lord Birkenhead's Acts—have been unnecessarily complicated and roundabout. When the Birkenhead reforms were introduced into England in the twenties of this century, there were suggestions put forth that New Zealand should follow suit. Most fortunately for posterity, sound real-property lawyers like the late Sir Francis Dillon Bell (who was then Attorney-General) were fully aware of the wide differences which had already taken place in the two different jurisdictions. Instead of introducing the Birkenhead Acts into New Zealand, he very courageously sponsored the Land Transfer (Compulsory Registration of Titles) Act, 1924, which instructed District Land

Registrars to bring under the Land Transfer Act, 1915, of their own motion all land alienated from the Crown for an estate in fee simple, which had not up to that time become subject to that Act. It is to be borne in mind that at that time there was much privately-owned land in New Zealand still held under the " old system " of registration of deeds. The ameliorating effect of the " compulsory " Act, therefore, has been to simplify, as well as to make more certain, thousands of titles to land in New Zealand.

It comes as rather a surprise, if not a shock, to the New Zealand lawyer, accustomed to searching Land Transfer Maori titles, with their numerous owners, all holding as tenants in common—and perhaps especially to one of my generation and of prior generations, nurtured as we were on early editions of *Williams on Real Property*—to learn that in England a *legal* tenancy in common in land cannot now exist. *Legal* tenancies in common were abolished in England by s. 1 (6) of the Law of Property Act, 1925. In England now, a tenancy in common in land can exist only in equity and behind a trust for sale: *27 Halsbury's Laws of England*, 2nd Ed. 618.

Where, as in this instant case, a legal tenancy in common existed at the commencement of the Law of Property Act, 1925, the transitional provisions converted the existing legal interests into corresponding equitable interests. F. B. Adams, J., at p. 914, said:

> In this case, it appears that para. 1 (4) of Part IV was applicable, with the result that, on January 1, 1926, the entirety of the lands became vested in the Public Trustee upon the statutory trusts, but subject to a proviso enabling persons interested to appoint new trustees holding upon the statutory trusts in the place of the Public Trustee.

This power of displacing the Public Trustee was availed of, and ultimately by conveyance the land became vested in deceased and three others as legal *joint* tenants, subject to the statutory trusts for sale. After a careful examination and analysis of these statutory trusts for sale, His Honour, at p. 916, said:

> It will be seen that, while the dominating feature is undoubtedly the trust for sale, the statute is so framed that owners of undivided shares are left, except as to the nature of their title and the manner in which the land may be administered and disposed of, very much in the same position as such owners formerly occupied. Their rights are equitable rights behind the trust for sale, but they are not entirely at the mercy of the trustees for sale, and their wishes as to indefinite retention of the land and enjoyment of the rents and profits are likely to be effective.

The object of the Law of Property Act, 1925, was to provide improved machinery, and not to affect more than necessary the *beneficial* interests of landowners. After that Act, the owner of an undivided share in real estate still had an interest in the real estate under the statutory trusts for sale, which are, after all, only a conveyancing device for avoiding the complication of partition actions: *In re Harvey, Public Trustee* v. *Hosken*, [1947] Ch. 285, 288; [1947] 1 All E.R. 349, 352, and *Re Viscount Galway's Will Trusts, Lowther* v. *Viscount Galway*, [1949] 2 All E.R. 419, 421. It may be observed here that the Death Duties Act, 1921, is not very much concerned with *legal* estates as such unless accompanied with beneficial interests. It is only *beneficial* estates or interests in property which are taxed by that Act. His Honour, in considering deceased's interest in the land, summed the matter up thus ([1951] N.Z.L.R. 912, 920):

> No matter what changes were effected by the English statute, neither lawyer nor layman would say that the deceased Stanley Arthur Bull had ceased to have any " interest " at all in the land from which sprang all his proprietary rights.

I have previously pointed out that, had deceased died before the coming into operation of the Law of Property Act, 1925, his interest as a tenant in common in the English freehold lands would not have been liable to death duty in New Zealand. It would, therefore, have been rather a curious result if an English Act, designed to simplify technical rules of English real-property law, had also altered the incidence of liability to death duty and gift duty in New Zealand of land situated in England. But it would have had that result had the New Zealand statute followed implicitly the distinction drawn by the common law of England between real and personal property, for the statutory trusts for sale above referred to undoubtedly had the effect of constituting deceased's beneficial interest in the English freehold lands personal property and not real property. In the course of his judgment, His Honour, at pp. 919, 920, said:

> There is in my opinion, as indicated above, no doubt that the property here in question is, in English law, personal property in the usual sense of that term: *In re Price* ([1928] Ch. 579) . . . The doctrine of conversion is as much a part of our law as of the law of England, and a New Zealand Court must apply the same principle as the English Courts. If the property were situated here, the rights of the deceased therein being the same as they now are in England, our law would regard it as personalty, just as it would so regard the interests of a beneficiary under a will in the proceeds of sale of New Zealand real estate subjected to an imperative trust for sale. In such cases, there is, as was said by *Jenkins*, L.J., in *Bradshaw's* case ([1950] 1 All E.R. 643), " an immediate conversion of the land in equity from realty to personalty " (*ibid.*, 651).

The matter essentially fell to be determined in accordance with the provisions of the Death Duties Act, 1921. As previously stated, s. 7 of the Act provides that, where deceased (as in the instant case) was domiciled in New Zealand at the date by reference to which the situation of any *personal* property forming part of his dutiable estate is to be determined (in this case, the date was the date of deceased's death, for the share in the property in question was owned by deceased at his death), such *personal* property shall be deemed for the purposes of the Act to be situated in New Zealand at that date. To be liable to death duty in New Zealand, therefore, deceased's interest in the English lands would have to be *personal* property within the meaning of our Death Duties Act, 1921.

The Act does not exactly define " personal property ", but s. 2 provides as follows:

> " Personal property " does not include leaseholds or other chattel interests in land:
> " Real property " includes leaseholds and other chattel interests in land.

As His Honour pointed out, at p. 917, there being nothing to suggest a contrary suggestion, s. 7 must be read as referring to personal property *exclusive of leaseholds and other chattel interests in land.* If, then, deceased's beneficial equitable tenancy in common in the English freeholds constituted a chattel interest in land, it was not liable to death duty in New Zealand, for it would be deemed to be realty, and not personalty. His Honour came to the conclusion that deceased's interest, if it was not an actual chattel real, was at least a chattel interest in land, and, therefore, realty for the purposes of our death-duty law.

After quoting from *Blackstone* and from *25 Halsbury's Laws of England*, 2nd Ed. 190, 191, His Honour, at p. 922, said:

In my opinion, the words " chattel interests " extend, unless limited by their context, to every interest which is not realty. The characteristic of a chattel interest, or of a chattel in the widest sense, is that, even apart from modern legislation, it devolves on the personal representative, and not on the heir. That is true of the interest now under consideration, and, as it is an interest in land, and is not realty but personalty, it must, in my opinion, be a " chattel interest in land."

The question immediately presents itself: What about mortgages of land? A mortgage of land is an interest in land. Are mortgages of land also realty for the purposes of our Death Duties Act, 1921? Perhaps it is permissible in this connection to consider para. (*h*) of s. 8, which reads as follows:

> Subject to the provisions of the last preceding section [set out in the beginning of this article], the local situation of property shall be determined for the purposes of this Act in manner set forth in this section, in respect of the classes of property hereinafter in this section referred to . . .
>
> (*h*) Notwithstanding anything hereinbefore in this section contained, a debt which is secured by mortgage, charge, or otherwise on any property situated or deemed to be situated in New Zealand shall itself be deemed to be property situated in New Zealand; but if the value of the security is less than the value of the debt, the debt shall not by reason of the existence of the security be deemed to be situated in New Zealand except to the extent of the value of the security.

I see no reason why the phrase " any property " in para. (*h*) should be restricted to moveable property. If this viewpoint is correct, then a mortgage of land securing a debt must be personal property and not real property for the purposes of the Death Duties Act, 1921.

The New Zealand practice, I think, has been to treat mortgages of land (except rentcharges) as personal property. The case of *New Zealand Insurance Co., Ltd.* v. *Commissioner of Stamp Duties*, [1951] N.Z.L.R. 912, discussed in this article, does not appear to throw any doubt on this practice, except as expressed in the last sentence of the following quotation from p. 922 of His Honour's judgment:

> The view I have taken is not in conflict with *In re Balmforth, Public Trustee* v. *Richards* ([1934] N.Z.L.R. 190), where it was held by the majority of the Court (*Reed* and *MacGregor*, JJ., being in doubt) that a Land Transfer mortgage is not within the definition of " real estate " in s. 2 of the Administration Act, 1908, which contains the words " any estate or interest in [lands, &c.], whether the same are freehold or chattel interest." As *Sir Michael Myers*, C.J., pointed out (*ibid.*, 209, 210), such a mortgage may, in a different context, be regarded as an estate or interest in the land. But a mortgage of land presents peculiar difficulties, owing to its double quality as a debt combined with a security. Mortgages of lands in New Zealand are " *mobilia* " for the purposes of intestate succession: *In re O'Neill, Humphries* v. *O'Neill* ([1922] N.Z.L.R. 468). Whether mortgages of lands abroad are also " personal property " within the meaning of the Death Duties Act, 1921, is a question that does not arise here, and it is sufficient to say that, in my opinion, neither of the last-mentioned cases assists in this case.

As to the British practice, *Green's Death Duties*, 2nd Ed. 595, states that a mortgage of land outside Great Britain is assumed to be moveable property, unless the contrary is proved. In *Johnson* v. *Commissioner of Stamp Duties*, [1941] G.L.R. 99, the Crown's claim to death duty on a mortgage of Australian land under the Torrens system owned by a deceased mortgagee, who died domiciled in New Zealand, was upheld by the Supreme Court. But apparently this precise point was not taken by counsel for the taxpayer, for, at p. 101, Northcroft, J., stated: " It was common ground that if the deceased's interest was still that of a mortgagee, then it must be regarded as personalty." Earlier in his judgment, at p. 101, His Honour had said: " If it were personalty, then s. 7 applied and the value of the interest should be included in the dutiable estate."

It is a point of interest to the conveyancer that the acquisition of and the devolution of the *legal* title to a mortgage of land is in accordance with the *lex situs*.

In *In re O'Neill, Humphries* v. *O'Neill*, [1922] N.Z.L.R. 468, Salmond, J., delivering the judgment of the Full Court, at pp. 477, 478, said:

> There is no doubt that for many purposes a mortgage [of land] is an immoveable governed by the *lex situs*. If, for example, the question is whether a mortgage over land in Canada has been validly constituted so as to confer on the mortgagee a legal interest in that land, the question must be determined by Canadian law. So also if the question relates to the nature of the powers conferred on him with respect to the land. So also the law that determines the proper form and method of transfer or reconveyance is doubtless the *lex situs*.

As a final topic, it may be stated that in *New Zealand Insurance Co., Ltd.* v. *Commissioner of Stamp Duties*, [1951] N.Z.L.R. 912, F. B. Adams, J., has some interesting comments to make concerning the application to death-duty and gift-duty law in New Zealand of that well-known maxim *Mobilia sequuntur personam*. Sim, A.C.J., in *Brasch* v. *Commissioner of Stamp Duties*, [1921] N.Z.L.R. 1038, 1041, expressed the opinion that the object of s. 7 was to make the principle expressed by that maxim applicable in every case where deceased was domiciled in New Zealand. It also followed, if that opinion were correct, that the maxim was also applicable to every gift made by a donor domiciled in New Zealand at the relevant date. This decision was followed in effect, and again the maxim was quoted, by Blair, J., in *In re MacEwan, Guardian Trust and Executors Co. of New Zealand, Ltd.* v. *Commissioner of Stamp Duties*, [1945] G.L.R. 92, 94. But it was not the intention of their Honours to define the words " personal property " in the special sense in which they are used in s. 7, as meaning the same thing as " *mobilia* " in the sense in which that term is used in private international law. This maxim, as applied to New Zealand death-duty and gift-duty law, is true only in a general sense. The meaning of " personal property " in s. 2 of the Death Duties Act, 1921, approximates closely to the meaning of " *mobilia* " in private international law, but the two expressions are not synonymous. The distinction cannot be ignored where one is dealing with an interest which is an immoveable and at the same time personalty.

WELLINGTON DISTRICT LAW SOCIETY.

Legal Golf Tournament, 1952.

The annual golf tournament of the Wellington District Law Society was held at the Miramar Golf Links on September 3. There were thirty competitors, including Mr. Justice Cooke and Judge Stilwell. The winners of the various events were as follows: Four Ball Best Ball Bogey, Messrs. A. H. Hornblow and B. Cahill; Stableford, F. J. Kember, with A. M. Hollings runner-up, after a count back with N. Robieson, who acted as organizer.

After the game, the competitors had afternoon-tea at the club house, when Mr. Rothwell, as Vice-President of the Society, apologized for the absence of the President, who was out of Wellington, and introduced Mrs. Gledhill, who presented the prizes. Trophies were donated by Messrs. Butterworth and Co., Ltd., and Ferguson and Osborne, Ltd.

CRIMINAL LAW: ONUS OF PROOF.

The Question of Reasonable Doubt.

By J. E. FARRELL, LL.B.

The onus of proof in criminal cases, except in the special cases exempted by legislation, is on the prosecution. This is a familiar general statement, and does no more than follow the general rule that he who affirms must prove.

In criminal trials, jurors are counselled that the prosecution must prove its case beyond all reasonable doubt. This is explained to them by the Crown Prosecutor, it is canvassed by counsel for the accused, sometimes *ad nauseam*, and finally it is reiterated by the Judge in his summing-up, and Judges have been concerned that their direction in this respect should be clear and unequivocal, to avoid an appeal for misdirection. The relevant part of the summing-up in *R.* v. *Horry*, [1952] N.Z.L.R. 111, was as follows (p. 127):

> It is not for the accused to prove anything. It is for the Crown to prove everything that is necessary to establish its case. On every doubtful point that arises in the course of your deliberations it is your duty to resolve the doubt in favour of the accused, never in favour of the Crown.

This appears to go further than the law requires, but it illustrates the pattern of such directions. The Court of Appeal did not consider that this was a misdirection.

Most text-books and many authorities refer to the necessity for proof beyond all reasonable doubt. In *Garrow's Criminal Law in New Zealand*, 3rd Ed. 120, the following authorities are quoted:

> "If the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted": per *Viscount Sankey*, L.C., delivering the opinion of the House of Lords in *Woolmington* v. *Director of Public Prosecutions*, [1935] A.C. 462, 482; 25 Cr.App.R. 72.
>
> As was pointed out in *Mancini* v. *Director of Public Prosecutions*, [1941] 3 All E.R. 272; 28 Cr.App.R. 65, the words "the prisoner is entitled to be acquitted" at the end of the above passage should be understood as meaning "the prisoner is entitled to the benefit of the doubt."

The familiar pattern of these directions is to be disturbed by the judgment of the Court of Criminal Appeal in *R.* v. *Summers*, [1952] 1 All E.R. 1059. That case has decided:

> In summing up a criminal case to the jury it is advisable not to direct them that, if they have a "reasonable doubt" about the guilt of the prisoner, they should acquit him.

The judgment of the Court was delivered by Lord Goddard, L.C.J., and (*inter alia*) he said, at p. 1060:

> I have never yet heard any Court give a real definition of what is a "reasonable doubt", and it would be very much better if that expression was not used. Whenever a Court attempts to explain what is meant by it, the explanation tends to result in confusion rather than clarity. It is far better, instead of using the words "reasonable doubt" and then trying to say what is a reasonable doubt, to say to a jury: "You must not convict unless you are satisfied by the evidence given by the prosecution that the offence has been committed". The jury should be told that it is not for the prisoner to prove his innocence, but for the prosecution to prove his guilt, and that it is their duty to regard the evidence and see if it satisfies them so that they can feel sure, when they give their verdict, that it is a right one.

We may then expect some changes in the usual form of summing up and the usual form of counsel's addresses, and a certain variety of expression is to be expected. It is difficult to see how the word "reasonable" can be wholly eliminated from such directions. A jury may convict in a criminal trial on circumstantial evidence. The usual statement of the law on this is to be found in *9 Halsbury's Laws of England*, 2nd Ed. 449, para. 769:

> In murder, as in other criminal cases, a jury may convict on purely circumstantial evidence, but to do this they must be satisfied not only that the circumstances were consistent with the prisoner having committed the act, but also that the facts were such as to be inconsistent with any other rational conclusion than that he was the guilty person.

The keynote to this statement is the word "rational", which is almost synonymous with "reasonable". It appears that counsel and Judges will be at pains to avoid the danger referred to by Lord Goddard, L.C.J.

The burden of proof is discussed in *9 Halsbury's Laws of England*, 2nd Ed. 182 *et seq.*, and there is no reference in that volume to the cases quoted in *Garrow's Criminal Law in New Zealand*, 3rd Ed. 120, and referred to above, and the expression "reasonable doubt" does not obtrude itself in the text of that volume. The "standard of proof" is discussed in *Munkman's Technique of Advocacy*, 136, where he says:

> in a criminal case the probabilities must converge to establish the guilt of the prisoner with complete moral certainty.

This is an attractive and simple statement of the law, but it may be an over-simplification for a direction to a jury.

Whatever form of direction is now adopted, there will be no relaxation in the burden of proof, but some interest will attach to the ingenuity of Bench and Bar in endeavouring to avoid the now objectionable words "reasonable doubt".

OBITUARY.

Mr. C. A. Stringer (Christchurch).

The death occurred recently of Mr. Cyril Alexander Stringer, a prominent Christchurch solicitor. He was sixty-nine.

Mr. Stringer was a son of the late Sir Walter Stringer, and was educated at Nelson College, Christ's College, and Canterbury University College. He commenced his professional career as junior clerk with his father's firm. In 1910, he resigned, and started business on his own account by forming a partnership with Mr. S. G. Raymond, K.C. With the admission to partnership of Messrs. A. T. (now Sir Arthur) Donnelly and W. M. Hamilton in 1919, the firm became known as Raymond, Stringer, Hamilton, and Donnelly, the name which it bears to-day.

Mr. Stringer enlisted with the 2nd Company, 1st Battalion, Canterbury Regiment, in 1916, and served in France until November, 1918. He was a member of the Canterbury Club and of the Christchurch Golf Club, and his principal recreations were golf and tennis.

He was survived by his widow and a son and daughter.

FIVE-YEARS VALUATIONS.

What Use Are They?

By ADVOCATUS RURALIS.

In the country, farmer clients have formed the opinion that a legal office is a wonderful place to express their opinions of Governments (all Governments), hoping to glean in return some pearls of wisdom which they may later fire off as their own at the Federated Farmers' meeting. The discussion turned on the numbers required to run the Civil Service of the Dominion. Advocatus pointed out that it was given to very few of us to leave our place of business two or three times a week, leaving a business theoretically worth many thousands in the hands of employees who the farmers themselves declared were quite incompetent. This was a comparatively normal opening gambit, and from there the conversation drifted to rates. A new valuation was hurting the farmer, and he was very keen to obtain a sympathetic listener. Advocatus explained to the farmer that his rates were a mere flea-bite in comparison with his spending powers. Advocatus told of a County Clerk who, some ten or fifteen years ago, prepared a brilliant set of statistics showing exactly how much money was spent by the County. Unfortunately, the information was too complete, with the result that a little investigation showed that, of the total amount spent by the County, only 2s. 1d. in the £ was collected by direct rates, the rest coming from petrol-tax, heavy-traffic tax, highway and road subsidies, bridge subsidies, timber thirds, and other payments beyond the comprehension of man.

The farmer then wanted to know why it was necessary to have new valuations every five years, and Advocatus ventured the opinion that this was a matter understood only by the highest Government Departments.

Advocatus remembered in 1924 dealing with a South Island wheat-growing property which was then selling at the same price as in 1878. He remembered in 1934 North Island town sections which were selling at the same price as in 1879, and these prices were later avidly seized on by valuers before Land Sales Courts.

Advocatus was able to remember the trends of values for land since 1905, and he pointed out to the farmer that, if a valuation had been made every five years from 1905 onwards, it would in most cases have been wrong. In 1910, there was a building boom all over the country, and sections were steadily going up in price. The cities were no real guide to valuations, but it is interesting to remember that in 1910 sections in Wellington at Hataitai and Kelburn were selling for £200, and houses were being built for £800.

By 1915, we were in the second year of the war, and sales outside the cities were made only of necessity, and these at 1908 prices, so that a valuation then would have been useless as a guide in 1918 and 1919, when the returned soldiers were looking for homes. In 1920, the prices for farms, sections, and houses had reached a peak nearly equal to 1950, so that a valuation then would have been useless in the slump which commenced in January, 1921. By 1925, the country had settled down, and perhaps for the next five years a 1925 valuation would have been equitable.

At the beginning of 1930, valuations were still being considered in terms of 1925, but these values were discarded by mortgage relief commissions from 1931 to 1935. Landlords were in 1931 devalued 20 per cent., and, the landlords being few, this devaluation was carried on till 1952. The next five years brought us to 1935, March 31 of which year saw the lowest point of the slump; but within three months the slump was passing, so that a 1935 valuation would have been out-of-date immediately.

In 1940, valuations were pinned, bringing almost as much evil as the open days of 1918-1920. The value of money continued to change, and widows and orphans who were compelled to sell estate lands at fixed prices were possibly the greatest financial sufferers of this period. In 1945, we had the curious position of a new house of green timber with no extras valued at £1,700, with the ten-years-old house next door with fences, garage, and concrete paths valued at £900. In 1950, the lid was off, and for a short time inflation spread to houses. A valuation in 1950 at then current prices would have been quite useless, for at the end of 1951 a rise of ½ per cent. in the English bank rate set back by £500 values for old houses in New Zealand.

By this time the farmer was feeling out of his depth. As he groped for the door, Advocatus felt that even an unwilling listener was entitled to some word for his next meeting, so he suggested that the farmers adopt as their slogan: "Back to Massey."

This seemed beyond the comprehension of the farmer, so Advocatus explained that in Massey's time the farmers paid no income-tax and no land-tax. The farmer, however, had the last word: an hour later a packet of little liver pills was delivered to Advocatus.

The Charity of The Lawyer

It is impossible in the profession of the law but that many opportunities must occur for the exertions of charity and benevolence: I do not mean the charity of money, but the charity of time, labour and attention; the protection of those whose resources are feeble, and the information of those whose knowledge is small. In the hands of bad men, the law is sometimes an artifice to mislead, and sometimes an engine to oppress. In your hands it may be from time to time, a buckler to shield, and a sanctuary to save: you may lift up oppressed humility, listen patiently to the injuries of the wretched, vindicate their just claims, maintain their fair rights, and show, that in the hurry of business, and the struggles of ambition, you have not forgotten the duties of a Christian—and the feelings of a man. It is in your power, above all other Christians, to combine the wisdom of the serpent with the innocence of the dove, and to fulfil, with greater energy and greater acuteness, and more perfect effect, than other men can pretend to, the love, the lessons, and the law of Christ.—Sydney Smith, *The Lawyer that Tempted Christ* (1824).

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Approaching the Bench.—During the last Wellington Supreme Court Sessions, the Chief Justice at the beginning of a criminal trial called the Crown Prosecutor and the counsel for the accused to the front of the Bench and proceeded to inform them that he had recognized the accused as a temporary guest at the hotel at which he himself was then staying. He asked counsel, whether, in the circumstances, they would prefer another Judge to deal with the matter. They didn't; but the incident reminded Scriblex of one mentioned by Lord Alverstone in his *Recollections* in a patent case dealing with telephones, at that date new-fangled gadgets in their swaddling clothes. Lord Alverstone (then Sir Richard Webster) was defending the patent in the Court of Appeal, and claimed that he could hear perfectly the message from the receiver. To test the statement, Sir George Jessel, who was presiding, invited Webster up on the Bench to conduct the experiment there. It was quite successful. Jessel, it will be remembered, is said never to have reserved a judgment when a first instance Judge, and only twice to have done so in the Court of Appeal—at the request of his colleagues there. On one occasion, when asked to verify that he had actually said, "I may be wrong, and often am, but I never doubt", he replied, mildly: "I am quite sure that I never said 'often wrong'".

The Lord Chancellor's Delays.—In his acidulous comment in *The Last Sergeant* upon the late Mr. Justice McCardie (to which a passing reference was made in this column (*Ante*, p. 223)), Sergeant A. M. Sullivan failed to mention one outstanding instance of McCardie's determination to preserve his individuality. His success as a commercial advocate led him as a young man in his early thirties to leave the Birmingham Circuit and acquire Chambers in London, and here he soon built up a reputation as the busiest junior in the Temple. He applied for silk, but the then Chancellor, Lord Loreburn, at the time of application had formed a habit of pondering so long and so carefully on such matters that it took him up to two years to make up his mind. News having leaked out that McCardie had applied for the patent, solicitors hesitated to deliver junior briefs which his appointment at any moment might compel him to return. His large practice showed the most marked signs of diminishing, so that the applicant announced not only his withdrawal but also the reasons why the ranks of K.C. would have to close without him. The Press took up the cudgels on his behalf, a strong controversy followed, and Lord Loreburn shortly afterwards published his list. To this list, without any renewed application on his part, McCardie's name was added. He refused, however, to become a K.C. against his will, and a junior counsel he remained, until, a few years later, he was promoted to a vacancy in the King's Bench Division.

Judicial Salaries.—In the early part of English legal history, and down to the Stuart régime, Judges drew their remuneration both from salary and from earned fees. A Judge of the superior Court would draw about £1,000 in salary and make another £1,000 in fees. This put him in a reasonably comfortable position, as money was worth a great deal more than it is to-day, and he did not have to keep a motor-car for the use of his children. In 1826, salaries were fixed at £5,500 per annum free from tax, and the payment of fees to Judges was abolished. In 1873, when income-tax had sky-rocketed to the iniquitous sum of 3d. in the £, the "free from tax" clause was dropped; and, in England, the figure of £5,000 as then fixed remains to-day that paid to High Court Judges. As amended by s. 4 of the Judicial Offices Act, 1952, the Supreme Court of Judicature of Northern Ireland Act, 1926, fixes the salaries of Judges in Northern Ireland at £4,500 for the Lord Chief Justice and £3,500 for the Judges of both the Court of Appeal and the High Court, plus an allowance for going Circuit. A visiting Irish lawyer recently told Scriblex that the best hotel accommodation at the present time in Ireland is no more expensive than in New Zealand. "And that," he added, with the customary Irish charm, "is a subject on which I have little or no knowledge, indeed."

The Vagrant Comma.—The ubiquitous comma, that suffers a judicial rebuke every now and again when it strays from its proper context, is the subject of a story by Sir William Valentine Ball in an article upon the value of shorthand notes in Court. It concerns an old lady who instituted 400 libel actions. By profession, she was a nerve specialist, and had her own advertised panacea for the cure of headaches and major ills of like description. In litigation arising from her business, she was cross-examined by Sir Edward Carson. He said to her: "Now, ma'am, will you tell me this: how many people have you killed with this nostrum of yours?" She relied: "No one." All the papers reported her as having answered: "No, one." She then proceeded to sue the whole lot of them for damages for libel, alleging that the report was not fair and accurate, in that it gave the impression (as it certainly did) that one at least of her patients was slain by her. All the papers had to pay her damages, and these, it seemed, worked out about £10 per paper. "I know of this," writes Sir William, "because I acted for one of the papers, but, as (according to her) I treated her decently in the course of the interlocutory proceedings, she let me off on payment of costs."

Jottings.—In the year ending March 31, 1951, the cost of administration of the Legal Aid Scheme in England was £183,006. The salaries, wages, and other expenses of the Law Society's Divorce Department (which conducts matrimonial cases where the assisted person's determined contribution is not more than £10) took up £116,346 of this sum. It also included the sum of £255 for counsel's fees.

To obtain damages for loss of *consortium*, the loss must be entire; and when as the result of a train accident a husband alleged that he had lost a good, active and useful companion and now had instead one who was depressed, inactive and hysterical, with whom he could not enjoy life and who could attend to limited household duties only, it was held that he could not succeed to recover under this head of claim: *Adams* v. *Railway Executive*.

PRACTICAL POINTS.

1. Death Duties.—*Married Man effecting Insurance on His Life for Benefit of His Wife and Children under Married Women's Property Act, 1882—Policy taken out in England—Reservation by Husband of Special Power of Appointment among His Wife and Children—Death of Husband in New Zealand—Liability to Death Duty in New Zealand of Moneys Payable under Policy—Death Duties Act, 1921, s. 5.*

QUESTION : X, who died in New Zealand, took out a life policy on November 9, 1893, on his life under the Married Women's Property Act, 1882, in trust for his wife and children. There was a special power of appointment in his favour among his wife and children, which he did not exercise, and he made no reference to the policy in his will. Is this liable for death duty ?

The policy was taken out in England, but it is deemed a New Zealand policy. Our provisions are contained in the Married Women's Property Act, 1884 (and repeated in the consolidation Act). Under this, the Stamp Office assesses the proceeds of the policy as part of his estate. Our contention is that, in the words of the statute, " any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured ". We contend, therefore, that this prevents its being part of the testator's estate, and so it is not liable for duty ; more particularly because the Married Women's Property Act was enacted first. Their contention is that the Married Women's Property Act relates to an estate from the administration point of view.

Unfortunately, the only reference in *Adams's Law of Death Duties* is to *In re MacEwan*, [1945] G.L.R. 92, which does not decide the point (though all parties appear to support the official attitude). The judgment makes no reference to it, the decision as reported being on a different point. We have examined the authorities and text-books and have found nothing on the point. *Houseman's Law of Life Insurance* makes passing references to it, without citing authority or making a direct statement of the law on insured's estate. In this connection, it has to be noticed that s. 3 of the Death Duties Amendment Act, 1950, uses the term " dutiable estate " where the Married Women's Property Act uses " estate " merely, but the latter Act was passed before the days of dutiable estate.

ANSWER : There is no doubt that death duty is payable in New Zealand in respect of the insurance moneys payable if deceased (the life insured) died domiciled in New Zealand, and if he paid the premiums during his life time in respect of the policy. Although the question states that deceased died in New Zealand, it does not say specifically that he died *domiciled* in New Zealand. If he died whilst domiciled outside of New Zealand, then the insurance policy is not caught for death duty in New Zealand, unless, by some arrangement with the insurer made subsequent to the taking out of the policy, it became payable in New Zealand.

Provided deceased died domiciled in New Zealand, then the policy is liable for death duty under s. 5 (1) (*f*) and s. 16 (1) (*e*) of the Death Duties Act, 1921, provided also (as stated above) that deceased paid the premiums. With all due respect to the inquirer, this precise point is implicit in the very careful judgment of Blair, J., in the case cited : *In re MacEwan*, [1945] G.L.R. 92. The facts in that case are more fully set out in *In re MacEwan*, [1942] N.Z.L.R. 81.

The Married Women's Property Act, in enacting that the policy shall not form part of the life-insured's estate, is referring to transmissible estate. The Death Duties Act, 1921, however, deals not only with a deceased person's transmissible estate but also with other classes of property which are, for the purposes of the Death Duties Act, 1921, *fictionally* the property of the deceased. This fictional or notional estate is created by paras. (*b*) to (*j*) of s. 5 (1) of the Death Duties Act, 1921. With all due respect, the fact that the Death Duties Act, 1921, is later in date than the Married Women's Property Act in force when the policy was effected weakens, rather than strengthens, the correspondent's opinion. Section 5 (2) of the Death Duties Act, 1921, provides that the estate of a deceased person computed and constituted as provided in that section is in that statute referred to as his *dutiable* estate.

It is submitted that, as deceased reserved to himself a special power of appointment among his wife and children, the insurance policy is also caught by para. (*b*) of s. 5 (1), provided that deceased paid, or made provision for the payment of, the premiums. This appears to be so, because, until deceased died, the beneficiaries and the quantum of their respective shares were not certain : see the leading case, *Adamson* v. *Attorney-General*, 1933] A.C. 257.

If deceased paid none of the premiums, the policy is not liable to death duty under para. (*f*) ; nor is it liable under para. (*g*) unless he made provision for payment of the premiums.

If deceased paid some of the premiums, death duty is payable on so much of the proceeds as is proportionate to the premiums paid by deceased. For example, if deceased has paid three-fifths of the premiums, then three-fifths of the insurance moneys are liable to estate and succession duty in New Zealand, if deceased died domiciled in New Zealand, or if the insurance moneys were payable in New Zealand.

X.2.

A Thought on Judgments

One of the regrettable consequences of the doctrine of following precedent is to encourage the recapitulation of the terms in which the views of Judges have been expressed in earlier cases. A judgment is not made a better judgment—nor an opinion a better opinion—by containing a mass of quotations from the judgments of others or from the headnotes of reports. To reach a legal decision on a dispute, the essentials, perhaps, are to determine the facts, excluding those that are irrelevant, to find the correct principle of law, and, elucidating the issue, to apply the law to the facts. We do not suggest that a judgment should always be confined to the barest statements of these essentials, for one of the highest achievements of a Judge, when a civil dispute is before him, is by his impartiality, his wisdom, and his clearness of mind to convince the litigant who is found to have been in the wrong that he was in the wrong. Thus is justice seen to have been done beyond further question. For this, a discussion of submissions made in argument, for example, may be necessary, although not needed for the bare purpose of stating the true principle of law. One of the greatest compliments was paid many years ago to Mr. Justice North when, at the end of a long action before him, the party who had lost said to his advisers : " When I came into this Court, I was sure I was right ; but that old man up there has convinced me that I was wrong." Our occasion for writing this plea for economy in recapitulating material from earlier cases is the report of a recent decision, where the principle could be—and, indeed, was—rightly and clearly stated in ten lines, but where the judgment included also recapitulation of headnotes of or extracts from earlier reported cases and judgments amounting to substantially more than ten pages. We do not name the case, because this paragraph is not a criticism of a particular judgment ; it is rather a plea for watchfulness against a particular tendency. The number of reported cases in each year is considerable, and, as the complexity of the law increases, it becomes increasingly expedient to exercise restraint in quoting extracts from earlier judgments. It may nevertheless be necessary to indicate what cases have been cited and considered, but for this purpose taken by itself the giving of extracts from headnotes or judgments is not needed.—*Law Journal*, (London), May 9, 1952.