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"The Navy, whereon, under the good Providence of God, the wealth, safety and strength of the Kingdom chiefly depend."

—THE NAVAL DISCIPLINE ACT, 1866 (29 & 30 Vict., c. 109), Preamble.

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WAR EMERGENCY LEGISLATION: INTERPRETATION.

III.—SOME RECENT JUDGMENTS ON CONSTRUCTION OF CURRENT REGULATIONS.

IN *Ronnfeldt* v. *Phillips*, (1918) 35 T.L.R. 46, 47, Lord Justice Scrutton said that "A war could not be carried on according to the principles of Magna Charta." This fact was emphasized by Mr. Justice Callan when he inferentially applied the principle, *Salus populi suprema lex*, in a recent appeal from a Magistrate's conviction for a breach of the Censorship and Publicity Regulations, 1939. In *Stevenson* v. *Reid* (p. 269 *post*), His Honour said that in the fight to preserve liberty we must be prepared, in the meantime, temporarily to surrender many of our liberties. He proceeded:

> One of the liberties which we enjoy in peace-time and exercise very readily, and, we hope, usefully and certainly to our very great individual pleasure, is the liberty of criticizing freely and publicly those persons whom the working of democratic machinery placed temporarily in positions of power and authority. It is one of our cherished possessions to be able to say about such persons at any time, with the utmost publicity, that in our opinion they are not performing their tasks properly. That is one of the liberties which may have to be curtailed in war-time if it is exercised in a manner which conflicts with a true view of the public good. And in war-time it really becomes the duty, both of the Legislature and of the Executive, to put for the time being the necessary curb upon the exercise of such liberties as that.

Further developing the proposition that regulations are enacted in war-time for public safety, and should be construed accordingly, His Honour said that it was worth remembering that such protective action by the Legislature and the Executive has to be directed to protecting the community as a whole, not merely from the deliberate wrongdoing of enemies without and within, but also from the indiscretions of perfectly loyal persons who, in one way or another, are mistaken. He added that the War Regulations Act, 1939, contains practically no limits to the powers that the Legislature has entrusted to the Executive. It becomes, therefore, a mere question in each case of determining what is the meaning of the regulations under notice, and then whether they cover the particular case before the Court.

Sympathetic construction of war emergency legislation was recently considered by Hope, J., in *Ex parte Sullivan*, [1941] 1 D.L.R. 676, 680. After quoting from the judgment of Scrutton, L. J., in *Ronnfeldt* v. *Phillips*, (*cit. supra*), the learned Judge went on to say that it was of particular application in the circumstances of the present war, where, it has been made abundantly clear that enemy operations are not confined to theatres of war. He added:

> In such circumstances, freedom of executive action in the interests of public safety requires that sympathetic construction be given to statutory authorization of delegated legislation, or, as expressed by Maclean, J., in the Exchequer Court of Canada in *Spitz* v. *Secretary of State of Canada*, [1939] 2 D.L.R. 546, 549:
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> "When you come to interpret . . . any other war measure, the objects of the same must be held strictly in mind, and such measures must be given that construction that will best secure the end their authors had in mind. One must consider not only the wording of the war measures but also their purposes, the motives which led to their enactment and the conditions prevailing at the time. In time of war particularly the substance of things must prevail over form, and usually all technicalities must be swept aside."

Another point of view has been expressed in relation to the construction of emergency regulations such as our Mortgages Extension Emergency Regulations and Debtors Emergency Regulations, which are framed to assist people on whom war conditions are financially oppressive. This principle of construction was recently enunciated by Lord Greene, M.R., in *Fishmongers' Co.* v. *Dorrington Finance Co., Ltd.*, [1941] 1 All E.R. 137, 140, when he said that emergency regulations—he was dealing with the Courts (Emergency Powers) Regulations Act, 1939 (Gt. Brit.)—should not be construed with a vigour and strictness most unsuitable for a rule and a set of forms to be read by, among other people, uneducated people who may find themselves evicted.

Although the public interest would appear to be paramount when interpreting emergency legislation, private interests may also have to be considered. In *Minister of Munitions* v. *Mackrill*, [1920] 3 K.B. 513, a case under the Defence of the Realm (Acquisition of Land) Act, 1916, the question arose as to the conditions under which the Crown, after taking temporary possession of the land of a private owner and erecting buildings for purposes connected with the war, was entitled to acquire the property by compulsory purchase. It was argued for the Crown that all the Commission had to consider was whether the conditions precedent to the making of the application had been fulfilled—namely, whether the Minister of Munitions was lawfully in possession and whether buildings of a permanent nature had been erected on the land—and, if the Commission were satisfied of those facts, they must exercise their discretion in favour of the Crown. Lush, J., said he entirely disagreed with that contention. He added:

> The Court is intended to protect the subject against any undue exercise of the power of the Crown to deprive him permanently of his property; and if we think, in our discretion, acting, of course, judicially, that the circumstances are such that the power ought not to be exercised, I feel no doubt that it is our duty to prevent its being exercised by withholding our consent . . .
>
> The view for which the Crown contend would enable a Department compulsorily to deprive an owner of land merely in order to make a profit out of it . . . On an application under the section, we must, I think, consider not only whether the proposed order is expedient from the public point of view, but whether it would work a hardship on the owner.

Here, the way was open for a just balancing of competing public and private interests; and consent to the forced sale was refused because, while a substantial loss to the State would admittedly have been avoided by a resale that would have followed the making of the order that was sought, its refusal obviated the serious hampering of the respondent's business, as he could acquire no other suitable land within a reasonable distance.

In passing, it may be noted that there are some of our current war regulations which render it an offence to do any act "likely to" or which might be "directly or indirectly calculated to" be useful to the enemy, or to impede the national war effort, and so on. The words "likely to" in such a regulation were held by the High Court of Australia, in *Catts* v. *Murdoch*, (1917) 24 C.L.R. 160, to have the same meaning as "calculated to." In dealing with an alleged offence under a war regulation so worded, the only question before the Court is one of fact, or what inference should be drawn from the facts: *Corbet* v. *Lovekin*, (1915) 19 C.L.R. 563.

If there is an omission in a regulation, the gap can be filled by the Court, within limits, by means of an order that does not infringe the regulation or its purpose. Such a gap was filled by Morton, J., in *In re Wood*, [1940] 4 All E.R. 306, where it was doubtful if a receiver could be allowed to realize property subject to a charge created by a debenture, without a further application for leave under the Courts (Emergency Powers) Act, 1939 (Gr. Brit.); and the Court when granting leave to appoint a receiver, inserted a restriction that the receiver would have to come back to the Court before selling, and thus provide an adequate safeguard for the company. So, too, in *In re A Mortgage, F. to State Advances Corporation*, [1941] N.Z.L.R. 5, where Sir Michael Myers, C.J., was bound to hold that the Mortgages Extention Emergency Regulations, 1940 (Serial No. 1940/163) (since amended), did not enable the Court on an application by a mortgagee of land for leave to exercise his remedies under his mortgage, to make an order joining a stock mortgagee as a party to the proceedings, or a further order binding the latter where there was no substantial application by the stock mortgagee. His Honour, under Reg. 7 (2) (a regulation similar to the section in the statute under which Morton, J., founded his order in *In re Wood* (*supra*)) achieved an equitable result, while bridging the gap in the regulations by making an order granting the mortgagee of the land leave to enter into possession, reserving for further consideration the question of granting leave to call up and demand payment of the principal sum and to exercise the power of sale.

The principle of natural justice was called in aid in *R.* v. *Leman Street Police Inspector, Ex parte Venicoff*, [1920] 3 K.B. 72, in reference to a deportation order under Art. 12 of the Aliens Order, 1919, made by virtue of the Aliens Restriction Act, 1914, and providing "if the Home Secretary deems it to be conducive to the public good," he could make a deportation order. It was contended that the order was invalid, first, because, on the true construction of Art. 12, the Home Secretary could not make an order without holding an inquiry; and, secondly, that if that construction were not right, Art. 12 was *ultra vires* because it was against natural justice. Lord Reading, L.C.J., said it was not for the Court to pronounce whether the order was for the public good. Parliament had expressly empowered the Home Secretary as an executive officer to make these orders and had imposed no conditions. He was not a judicial officer but an executive officer bound to act for the public good, and it was left to his judgment whether upon the facts before him it was desirable that he should make a deportation order. The responsibility was his. Once the Court came to the conclusion that this was an executive act left to the Home Secretary, and was not the act of a judicial tribunal, the argument based on the principles of natural justice failed. His Lordship with whom Avory and Roche, JJ., concurred, said that it was sufficient to say that this emergency legislation and the power given thereunder enabling the executive to act quickly, did not impose upon the executive the obligation to hold an inquiry. Parliament so enacted deliberately.

In view of the exclusive judicial or quasi-judicial powers granted to war-time tribunals, boards, committees, and other bodies, the presumption against ousting established jurisdictions, and creating new ones, is of importance to-day. There is extensive authority for this principle in interpreting statutes which set up new bodies. It seems to be the basis of the decision in *Mee* v. *Toone*, [1940] 2 All E.R. 155, where the respondent had failed to comply with a billeting notice and had appealed to the special tribunal set up by the Defence (General) Regulations, 1939; but, before her appeal could be heard, she was prosecuted before Justices who took the view that the regulations should not be read as compelling obedience to a notice before the tribunal had considered the case. The Divisional Court (Hawke, Charles, and Macnaghten, JJ.,) remitted the case to the Justices to determine, on the grounds that the billeting notice must be complied with irrespective of an appeal to the tribunal, and that the jurisdiction of the Justices had not been temporarily suspended. Charles, J., however, at p. 158, seemed inclined to the principle of the policy of the regulations, when he said the policy of these regulations is quite

clear. They were emergency regulations, and, although it might be that here and there there might be hard cases, yet, where one is dealing with these regulations, and with tens of thousands of young people, the object of the regulations was to put the children into safety.

An established jurisdiction was, however, held to be ousted in *Hulme* v. *Ferranti Ltd.*, [1918] 2 K.B. 462, where a principle other than the presumption mentioned above was applied in relation to war legislation. This principle was described by the Earl of Halsbury, L.C., in *Pasmore* v. *Oswaldtwistle Urban Council,* [1898] A.C. 387, 394, as follows :—

> The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law.

And he cited Lord Tenterden's accurate statement of that principle in *Doe d. Bp. Rochester* v. *Bridges,* (1831) B. & Ad. 847, 859 ; 109 E.R. 1001 :

> Where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner.

This principle seems to conflict with the presumption ; and it is difficult to forecast which of them will be applied by the Court in any given case.

An interesting decision regarding subordinate tribunals was given by a Divisional Court (Viscount Caldecote, L.C.J., and Humphreys and Singleton, JJ.), in *Minister of Agriculture and Fisheries* v. *Price,* [1941] 2 All E.R. 660, where a war agricultural executive committee, under powers delegated to them by the Minister of Agriculture under the Defence (General) Regulations, 1939, gave a direction to the respondent to cultivate his fields in manner set out in the direction. He failed to comply, and was charged with an offence under the regulations. The Magistrates took the view that the directions were not the right directions, and dismissed the charge. The Court held that the only matter which the Magistrates ought to have considered was, not the correctness of the view held by the agricultural committee, but the facts as to the giving of the directions, which was proved, and the failure of the respondent to comply with them, which was also proved. The case was remitted to the Magistrates with an expression of the Court's opinion that an offence had been committed.

The question may arise as to the proper person to be named as defendant in an action founded upon an excessive exercise of a power given by an emergency regulation. In *China Mutual Steam Navigation Co., Ltd.* v. *Maclay,* [1918] 1 K.B. 33, an emergency regulation was held not to be *ultra vires* the parent statute, but a requisition made in purported exercise of the power conferred by the regulation, was itself held to be *ultra vires* the regulation. In that case, Bailhache, J., adopted the observations of Romer, J., in *Raleigh* v. *Goschen,* [1898] 1 Ch. 77, 78, concerning the official person against whom action will be when statutory powers are exceeded. It had been contended that such an action should have been taken against the Attorney-General, as representing the Crown ; and was not maintainable against the Shipping Controller, a Departmental head. He said :

> If any person, whether an officer of State or a subordinate, has to justify an act alleged to be unlawful by reference to an Act of Parliament, or State authority, the legal justification can be inquired into in this Court ; and, in such a case, it does not matter whether the defendant is the head of a Department or not.

That statement of the law, said Bailhache, J., plainly contemplates that the officer of State whose conduct is in question would be the defendant to the action ; and he gave judgment against the Shipping Controller.

Although not strictly within our subject, we may note, in passing, that where there has been an illegal exercise of powers under a regulation, such as the making of an order that is *ultra vires* or otherwise illegal, an action for damages may lie against the Minister or authority so acting ; and the *dicta* of Tucker, J., in *Stuart* v. *Anderson and Morrison,* [1941] 2 All E.R. 665, 676, are interesting on this topic. His Lordship observed that, in such a case, the quantum of damages might depend upon whether the invalidity of the order was based on purely technical grounds or on grounds less technical. For instance, he thought that if the ground of invalidity was a defect in form, the damages would be nominal ; but, if the invalidity was that the Home Secretary (in this instance) had carelessly and negligently made the order without ever applying his mind to a necessary part of the case, the damages might be more.

Finally, there is the question whether *mens rea* is a necessary ingredient of offences under war emergency regulations. As was said by Stephens, J., in *Cundy* v. *Le Cocq,* (1884) 13 Q.B.D. 207, 210, " the substance of all the reported cases is that it is necessary to look at the object of each Act that is under consideration to see whether and how far knowledge is of the essence of the offence created." Subject to the language of any particular war regulation under notice, it is submitted that the generality of cases come within the second class referred to in *R.* v. *Ewart,* (1905) 25 N.Z.L.R. 709—namely, those in which, either from the language or the scope and object of the regulation to be construed, it is made plain that it was intended to prohibit the act absolutely, and the existence of a guilty mind is only relevant for the purpose of determining the quantum of punishment following the offence. These war regulations are made in the emergency of war that is in progress, and the warrant for making them is the public safety. They prohibit, in terms that are absolute, certain acts that may interfere with or prejudice the national efforts made for the successful carrying on of the war, or that may be prejudicial to the safety of the State. The acts prohibited are to be stopped. The only question then is, Did the accused person know what he was doing in fact ? If he thought that what he did was lawful, that is a misapprehension of the law, and is no answer. Consequently, as Channell, J., said in *Christie, Manson and Woods* v. *Cooper,* [1900] 2 Q.B. 522, 527, however innocently the forbidden act is done, the person doing it must be convicted, although he had no *mens rea* at all.

From the judgment of Callan, J., in *Stevenson* v. *Reid* (*supra*) it is also made plain that both the subject-matter and the purpose of war emergency regulations that are penal in character, show their prohibitions are absolute, and that it is not a defence in a prosecution for their breach to say that what was done was done in ignorance or without intending any harm. The Court's duty, in such a case, is to satisfy itself, with that degree of certainty necessary in criminal proceedings, that the conduct of the accused was within the act specified as being prejudicial to the safety of the State, and to test that question in the light of the regulation and the mischief it is sought to curtail, bearing in mind, at the same time, that it is of paramount importance to protect the State, not merely from positive injury but from the likelihood of it.

SUMMARY OF RECENT JUDGMENTS.

SUPREME COURT.
Napier.
1941.
Nov. 6, 21.
Myers, C.J.

HARPER
v.
COMMISSIONER OF STAMP DUTIES.

Public Revenue — Stamp Duties — "Agreement for Sale" — Whether instrument, in form an agency agreement but presented as an instrument of guarantee, an "agreement for sale" —Stamp Duties Act, 1923, s. 88—Stamp Duties Amendment Act, 1924, s. 20.

An instrument, presented for assessment as an instrument of guarantee was assessed by the Commissioner of Stamp Duties at Napier as three separate "agreements for sale."

On appeal from the Commissioner's decision,

A. L. Martin, for the appellant; *L. W. Willis*, for the respondent.

Held, allowing the appeal, 1. That there was no agreement by the appellant to purchase.
2. That if the contract were reasonably capable of being interpreted as either one of agency or of sale, the latter alternative could not be accepted as it involved an imputation of criminality.

Semble, that the instrument attracted no more than the duty payable on a mere agreement.

Hutton v. *Lippert*, (1883) 8 App. Cas. 309, and *Official Assignee of Bowen* v. *Watt and Lowry*, [1925] N.Z.L.R. 896, [1926] G.L.R. 53, distinguished.
Inland Revenue Commissioners v. *Duke of Westminster*, [1936] A.C. 1, referred to.

Solicitors: *Carlile, McLean, Scannell and Wood* for the appellant; *Kennedy, Lusk, Morling, and Willis* for the respondent.

SUPREME COURT.
Auckland.
1941.
Sept. 16, 17;
October 20.
Blair, J.

VALUER-GENERAL v. PUBLIC TRUSTEE.
VALUER-GENERAL v. CRAIG.
VALUER-GENERAL v. HUTCHINSON AND ANOTHER.

Government Valuation of Land—Lessor's Interest—Principles of Assessment—Whether "estimating" requires previous Valuations in accordance with prescribed statutory method—Valuation of Land Act, 1925, s. 54.

Before subs. (1) of s. 54 of the Valuation of Land Act, 1925, can operate, normal valuations must be in existence, and subs. (2) becomes operable only after valuations made in the normal way provided by the statute are in existence.
Subsection (2) of the section is not a code for ascertaining, *inter alia*, the interest of a lessor in land by a mathematical basis regardless of the real value of his interest in the land leased.

A lease for a long term conferred coal and fire-clay cutting rights with a complete range of all surface and under-surface rights and easements necessary to enable the coal and fire-clay under the surface of each area of land to be worked and removed. The lease conferred also the right to let down the surface on payment of certain compensation to the owners of the surface and contained provision for payment of a specified yearly rent with provision that "such rent to merge in the royalties hereinafter provided when and as often as such royalties shall amount to or exceed" a certain minimum. The royalty was payable at named amounts per ton.

All the coal and fire-clay from the areas mentioned in the lease had been removed by the lessee coal company but in terms of the lease the minimum amounts specified in the lease as payable remained payable by the lessee under its personal covenant for the remainder of the term of the lease, notwithstanding that, from a practicable point of view, no more coal or fire-clay remained upon the demised property.

The Valuer-General caused a valuation to be made of the lessor's interest in the lease. The Valuer made no attempt to value anything above or below the surface, but merely performed an arithmetical process of estimating the interest of the lessor under s. 54 (2) of the Valuation of Land Act, 1925, regardless of the fact that no coal or fire-clay remained upon the land.

V. R. S. Meredith, for the appellant; *F. L. G. West*, for the respondents.

Held, on appeal by the Valuer-General against a decision of the Assessment Court, 1. That before any resort could be made to s. 54 there should have been first of all a valuation of the land itself to which the whole lease appertained.
2. That no attempt had been made to value the "coal and fire-clay underlying the land," the capital value of which being "nil," there was no "land" left to value; a personal covenant, even if it at one time related to land, becoming a mere chose-in-action when the land to which it at one time related no longer existed.
3. That s. 54, therefore, had no application to the situation.

Solicitors: *Crown Law Office*, Wellington, for the appellant; *Jackson, Russell, Tunks, and West*, Auckland, for the respondents.

SUPREME COURT.
Wellington.
1941.
Nov. 14, 17.
Ostler, J.

PUBLIC TRUSTEE v. McARLEY.

Practice — Striking Out Pleadings — Statement of Claim — Evidentiary Matters—Claim that land purchased by A. and B. as partners—Allegation of partnership in Other Lands purchased Struck out as Evidentiary Matter only.

In an action claiming that A. and B. (deceased) were tenants in common in equal shares in a piece of land and that the transfer of such land had been in mistake made to them as joint tenants and the certificate of title issued to them as joint tenants, and there was an alternative claim that A. and B. had purchased the said land as partners:
In an amended statement of claim the plaintiff alleged the purchase by A. and B. as partners of three other properties as well as the property in question, and the resale of those other properties and the division of the profits in equal shares.

On a summons to strike out these allegations,

Tarrant, for the defendant; *White*, for the plaintiff.

Held, That, assuming that it were relevant to prove that A. and B. were in partnership in similar transactions (either to prove a consistent course of dealing or as part of the history of the question in issue), those facts were only evidentiary and in a statement of claim only the facts in issue could be stated.
They were therefore ordered to be struck out.

Kennedy v. *Dodson*, [1895] 1 Ch. 334, referred to.

Solicitors: *The Solicitor, Public Trust Office*, Wellington, for the plaintiff; *T. A. Tarrant*, Wellington, for the defendant.

SUPREME COURT.
Wellington.
1941.
Nov. 13.
Ostler, J.

BLAKE v. GRAHAM.

Police Offences—Possession of Liquor in Vicinity of Dance-hall— "Attending the dance"—Statutes Amendment Act, 1939, s. 59.

When a person who has paid for admission to a dance and has entered the dance-hall and joined in the dancing, comes out while the dance is in progress, and is found consuming liquor in close proximity to the hall where the dance is still going on, he is "attending the dance" within the meaning of s. 59 (3) of the Statutes Amendment Act, 1939, notwithstanding that he may decide when accosted by the Police, that he will not return to the hall. It is unnecessary, before a conviction can be entered, to prove that, after he is found in the vicinity of the dance-hall in the possession of liquor, he actually went back into the hall.

Counsel: *F. W. Ongley*, for the appellant; *Birks* for the respondent.

Solicitors: *Ongley, O'Donovan and Arndt*, Wellington, for appellant.

SUPREME COURT. Auckland. 1941. Nov. 20. *Callan*, J.

STEVENSON v. REID.

War Emergency Legislation—Censorship and Publicity Regulations—"Publication"—Information Useful to Enemy—Censorship and Publicity Emergency Regulations, 1939 (Serial No. 1939/121), R. 13.

The fact that information about a locality which would be a tempting target to an enemy was procurable by search and inquiry does not justify its publication for the purpose of endeavouring to procure better protection for the inhabitants of that locality.

A person who takes material to a printer with the request to print it for distribution among the residents of such locality publishes in a manner likely to prejudice the public safety information which could or might be directly or indirectly useful to any State with which His Majesty is at war, contrary to Reg. 13 of the Censorship and Publicity Emergency Regulations, 1939.

Counsel: *Haigh*, for the appellant; *G. S. Meredith*, for the respondent.

Solicitors: *F. H. Haigh*, Auckland, for the appellant; *Meredith, Meredith, and Kerr*, Auckland, for the respondent.

SUPREME COURT. Taranaki. 1941. Nov. 10. *Smith*, J.

M. v. M.

Infants and Children—Custody—Subsidiary rule giving Father Custody of Boy who has passed First Tender Years—When applied.

Where other things are equal, the subsidiary rule for determining what custody is best for the welfare of an infant—*viz.*, that the custody of a boy when he has passed the first tender years of life should be given to his father, should be applied.

In re Hylton, [1928] N.Z.L.R. 145; [1927] G.L.R. 492, applied. *M.* v. *M.*, [1941] G.L.R. 396; *In re H.*, [1940] G.L.R. 165, and *Reid* v. *Reid*, [1941] N.Z.L.R. 952; G.L.R. 404, referred to.

Counsel: *Croker*, for the petitioner; *Macallan* for the respondent.

Solicitors: *Croker and McCormick*, for the petitioner; *Govett, Quilliam, Hutchen, and Macallan*, for the respondent.

THE LATE SIR THOMAS BAVIN.

A Good and Great Citizen.

By W. DOWNIE STEWART.

A brief cable recently announced the death of Sir Thomas Bavin—one of Australia's most distinguished citizens. As I enjoyed the privilege of his friendship for many years, I venture to offer a short tribute to his memory. For he was my ideal of a good and great citizen in all the relations of life, both domestic and public. Had he lived in Wordsworth's day one might well have supposed that the poet had him in mind when he wrote his noble poem, *Character of the Happy Warrior*. For Sir Thomas was a fighter all his life. He fought his way through the stormy seas of politics in New South Wales against the powerful Mr. Lang till he became Premier. He fought his way as a barrister through the Law Courts till he became a Judge of the Supreme Court. During his later years he fought bravely against a mortal disease that caused him frequent bouts of terrible pain. I believe that he refused to take any drugs to alleviate his sufferings lest he might dull his faculties and imperil the high standard of his judicial work. In no part of his work more than this did he resemble the Happy Warrior.

> *Who, doomed to go in company with pain*
> *And fear and bloodshed, miserable train*
> *Turns his necessity to glorious gain;*
> *In face of these doth exercise a power*
> *Which is our human nature's highest dower.*

Although Bavin's public life was spent in Australia, he was born in Kaiapoi, New Zealand, in the year 1874 and received his early education in the Auckland Grammar School. His father, the Rev. Rainsford Bavin, was a distinguished Wesleyan minister, and his mother was the daughter of the Rev. Thomas Buddle, who was one of the scholars selected by the Bible Society to translate the Bible into the Maori language. All through his life Bavin retained a deep interest in the scenes of his early New Zealand life, and when he stayed with me on a visit to Wellington he was delighted to be entertained by the members of his father's old church in Taranaki Street. At that time he was Premier of New South Wales.

When the family moved to Sydney he attended Newington College and graduated at Sydney University. At the early age of twenty-six he became professor of law and modern history in Tasmania University; but, in the same year, when federation was carried, he was appointed private secretary to Sir Edmund Barton, the first Prime Minister of the Commonwealth.

When I first met Bavin about 1911 he had resumed his practice at the Bar, and his reputation was rapidly rising. Many grave questions of constitutional law arose out of the federal form of government, and Bavin's services were eagerly sought to argue cases in the High Court. To give the reader some idea of his busy life, I will relate the incidents I witnessed in the course of one day.

In the morning Bavin kindly invited me to be present in his chambers, where, with B. R. Wise, K.C., and other eminent counsel, he was engaged in conference for some hours discussing litigation affecting the American Meat Trust, the Colonial Sugar Company and other large corporations. From there we hastened to the High Court, where Bavin argued a case with a mastery and easy grace which was obvious even to an onlooker. Our next step was to pay a courtesy visit to various eminent Judges, such as Sir Isaac Isaacs, Sir John Higgins, and others. Each of them welcomed Bavin and treated him as if he were already a colleague and not merely a rising barrister.

It was now nearly 5 o'clock, and I thought we had spent a full day. But to my surprise Baving asked if

I would now care to listen to evidence being given to a Royal Commission on which he was the sole Commissioner. It appeared that some time before this the Government had set up a large Royal Commission to inquire into the food supply of Sydney. Its progress had been so dilatory, however, that Bavin tendered his resignation. But in lieu of accepting it, the Premier, Mr. Macgowan, disbanded the unwieldly commission and appointed Bavin as sole Commissioner! Bavin accepted on condition that he was permitted to sit at such hours as suited himself, and that he drew no pay. So after his Court work was finished he sat as Commissioner from 5 till 6.30 p.m. His method was most businesslike and practical. He concentrated on one item of the food supply at a time—the meat supply or fish or fruit, &c. But he was not content merely to listen to evidence. He would go in his spare time to sea with the trawlers and follow the catch of fish through every agency that handled it till it reached the market and the consumer. He thus discovered why the fisherman got so little and why the consumer paid so much. In like manner he patiently followed the meat and fruit from the grower on the farm to the consumer. In due course he presented a clear series of reports to Parliament on which remedies could be applied. His legal practice was by no means confined to wealthy capitalists, for I believe the waterside workers conferred on him the unique distinction of life membership of their Union for services rendered.

After my return from the war in 1917 I was in Sydney under a specialist for some months. In Bavin's hospitable flat I often met many eminent men, including, for example, Sir Edmund Barton, who had been first Prime Minister and later Chief Justice; Sir John Latham, now Ambassador to Japan, and on leave from his post as Chief Justice; Sir William Irvine, then a Federal Minister and later Chief Justice of Victoria; Sir F. W. Egglestone, recently appointed Australian Minister to China; and the present Mr. Justice Nicholas.

Bavin was the perfect host, and I enjoyed on these visits the privilege of listening to a flow of wit and wisdom that I have never heard excelled in any part of the world. On one occasion an argument arose about music, and each guest played records on the pianola to prove that Bach or Beethoven or Brahms or some other composer was the world's greatest master. My one regret was that I missed meeting the veteran Sir Samuel Griffiths, who was a close friend of Bavin's, but was too ill for us to visit him. All these eminent men regarded it as an honour to be Bavin's guest although he was not yet in Parliament, and was only elected later in that year.

But I must pass over many other examples of Bavin's incessant kindness in the midst of his busy life. On the very day he was sworn in as Attorney-General in 1922 he motored my sister and me for a week-end visit to "Camden Park," the most lovely historical station in Australia, and at that time the home of Miss Macarthur Onslow, a hostess of rare charm and culture. Nor have I space to describe his home life where the most perfect friendship and understanding existed between the members of his family. His rich humour seemed to fill the house with perpetual sunshine and laughter. He would look at me with twinkling eyes while one or other of his lovely daughters, still mere school-girls, whispered in his ear some new romance. He would try to look stern, but with not the least success, for they treated him as an older brother.

My last contact with him was in 1938, at the British Commonwealth Conference at Lapstone, near Sydney. Many eminent men, such as Mr. Ernest Bevin and Lord Lothian, attended. Bavin presided over the conference with conspicuous ability and was almost successful in hiding the fact that he was desperately ill and in constant pain. His personal kindness to me continued unabated. When a State banquet was given he seated me between the Prime Minister, Mr. Lyons, and the State Premier, Mr. Stevens, and insisted on my speaking. Last year he sent me his lectures on Sir Henry Parkes, which were published in book form. Some years ago Sir John Latham described Bavin as "a representative Australian whom it is a privilege to know as a friend. He is a good companion—a man of wide outlook, of cultured mind, of taste in literature and music—a man of whom any community may justly be proud." It is no wonder that the funeral of "Tom Bavin, as he was familiarly called, was one of the greatest that Sydney has ever seen.

"This is the happy warrior—this is he
Whom every man in arms should wish to be."

WHEN AMERICAN INDEPENDENCE WAS BORN.

The Influence of the Lawyers.

The Bostonian Society maintains its museum in the Old State House in Boston now. John Hancock's red velvet coat hangs in a glass case, Dorothy Q's fan is near by. All is old, all is placid, says Robert R. Mullen in the *Christian Science Monitor*. You can close your eyes to the automobile traffic down Washington Street outside, and your ears to the rumble of subway trains that run underneath the venerable "Towne House" which has stood at the head of State Street since 1659, though, of course, not always in its present form, and almost imagine you are back in those days when His Excellency the Governor of the Province heard the Honorable Representatives proclaim, "No taxation without representation!"

You can look out of the window and see the well-marked spot of the Massacre; you can stand on the balcony where Washington stood, and Lafayette, and old Sam Adams, and his country cousin, John. Or you can poke around the attic and see where some venturous son of Erin has carved "Terry '75" on a stanch old beam. The Old State House is like that, full of history, full of memories.

Several remaining structures have claims, and entirely proper ones, to having housed the burgeoning of freedom in the New World. Faneuil Hall in Boston is called, "the Cradle of Liberty"; Independence Hall, Philadelphia, of course, played its role. But John Adams, who as one of the principal actors in the great drama must have known something of its setting, credits the Old State House with being the "birthplace of the child Independence."

Many years after he had completed his term as

President and had retired to his home in Braintree he sat down and wrote a friend about it:

"The scene is the Council chamber in the old Town House in Boston. The date is the month of February, 1761. . . . That Council chamber was as respectable an apartment as the House of Commons or the House of Lords in Great Britain, in proportion, or that in the State House in Philadelphia, in which the Declaration of Independence was signed in 1776. In this chamber, around a great fire, were seated five Judges, with Lieutenant-Governor Hutchinson at their head as Chief Justice, all arrayed in their new, fresh, rich robes of scarlet English broadcloth; in their large cambric bands and immense judicial wigs.

"In this chamber were seated at a long table all the barristers at law of Boston and of the neighbouring county of Middlesex, in gowns, bands, and tie wigs. They were not seated on ivory chairs, but their dress was more solemn and more pompous than that of the Roman Senate, when the Gauls broke in upon them. . . .

"One circumstance more: Samuel Quincy and John Adams had been admitted barristers at that term, John was the youngest; he should be painted looking like a short, thick Archbishop of Canterbury, seated at the table, with a pen in hand, lost in admiration . . . now and then minuting notes. . . ."

It was a momentous day that Adams chose to report. James Otis, Jr., resigning a lucrative State position, had appeared before the Court to oppose the Writs of Assistance. Pitt, in England, had ordered strict enforcement of the Sugar Act. The royal customs collectors asked the Court for these writs of assistance to aid them in searching for evidence of violation.

Those "minuting notes of Adams's are all the fragments we have left of Otis's plea that stirred the Province. . . . "An act against the Constitution is void; an act against national equity is void; and if an act of Parliament should be made, in the very words of this petition, it should be void. . . . Taxation without representation is tyranny!"

There it was, the battle cry of the Tea Party, of Concord and Lexington, Bunker Hill, and the Fourth of July.

Adams said: "Otis was a flame of fire. . . .

"Every man of a crowded audience appeared to me to go away, as I did, ready to take arms against writs of assistance. Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born."

LEGAL LITERATURE.

Evidence before International Tribunals. *

A Review by the Hon. Mr. Justice Smith.

Though the war has dislocated much of the existing machinery for the pacific settlement of international disputes, the post-war years are sure to see a greater resort to methods of peaceful settlement than ever before. Indeed, in the long run, the main hope of bringing about an acceptable adjustment of differences between nations without resort to war lies in the adoption of the procedure which is applied to the settlement of differences between individuals, namely, the patient and often laborious investigation of fact by an impartial tribunal and the reasoned application to the conclusions of fact of the principles of law. This book deals with the practice adopted by international tribunals in ascertaining the facts. Though it was published before the war began, its usefulness is likely to increase with the passing years.

The author is an officer of the Department of State in Washington. While he was acting as assistant to Professor Hyde, the counsel for Guatemala in the Guatemalan-Honduran Boundary Arbitration, 1931–33, he was impressed by the fact that there was no guide-book to the practice of international tribunals in matters of evidence. Accordingly he undertook a comprehensive examination of all available records. His labours have been manifold, exacting, and deep. Sources which he has examined include the records and rules of *ad hoc* tribunals such as claims commissions, the permanent Court of Arbitration, and numerous other tribunals commencing with the French-British Boundary Arbitration of July, 1749, and ending with the Pugh case between Great Britain and Panama, in October, 1932. His sources include also the records of permanent tribunals such as the permanent Court of International Justice, and the permanent Joint Commissions between the United States and Mexico and the United States and Canada. He has also examined the European codes, and many treatises and much periodical literature. From all these, he has produced a very valuable and useful book. The numerous footnotes are in themselves informative, authoritative and illustrative in detail.

The book deals essentially with international tribunals of a judicial character. One may say generally that with the exception of the permanent Court of International Justice, these tribunals have been set up *ad hoc* for the trial of each dispute. The Governments concerned have either prescribed such rules of evidence as they have thought fit, or have left to the tribunal the task of regulating its own procedure. Where the latter alternative has been adopted, the composition of the tribunal has made itself felt in the views which its members have expressed upon the admission of evidence. If the jurists have been trained in a system based on the civil law, which makes no provision for a jury, they have tended to admit evidence freely and to give to that evidence the weight which it deserves by reason of its value in the eyes of the tribunal. If, on the other hand, the jurists have been trained in a system based on the common law, they have been apt to apply to questions of admissibility the strict doctrines of proof developed in an Anglo-Saxon system to prevent juries from taking into account matters which

* *Evidence before International Tribunals*, by Durward V. Sandifer, M.A., LL.B., Ph.D. Pp. 443. Foundation Press, Inc., Chicago, U.S.A.

are not strictly relevant to the issue. Where the tribunal has comprised jurists trained in both systems, the conflict of views has been in evidence; but, as there is no jury in an international tribunal, the general tendency has been to apply the principles of the civil law and to avoid the strict rules which are peculiar to the common law. This tendency has found expression in the rules of the permanent Court of International Justice. If that tribunal continues to function after the war, and there is every reason why it should, its rules are likely to have a standardizing effect upon the rules of evidence applied by *ad hoc* tribunals.

The author approves of the tendency to apply the principles of the civil law and he finds that it is justified because an international tribunal has sufficient competence and character to evaluate properly all the hearsay and other evidence which it admits. One result of interest to English and American lawyers is that an international tribunal is likely to pay much less attention to an affidavit prepared by a party or his legal adviser than it is to a deposition taken before a judicial officer according to the practice of a system based on the civil law.

The author has valuable chapters on the submission, the production, and the admission of evidence, and on documentary and testimonial evidence. He deals with the weight of evidence and of facts of which judicial notice would be taken; and also with the question of rehearings. The appendices include appropriate extracts from the statute of the permanent Court of International Justice and from the rules of that Court; also from the Hague Convention of 1907, and from other conventions including the convention for the establishment of an international central American tribunal.

The book is lucidly written and pains have been taken to secure exact statement. It is clearly printed and there is a good index. As reason asserts its sway in international affairs, this book will prove itself, I feel sure, a very valuable practical guide to all those who have dealings with international tribunals of a judicial character.

LONDON LETTER.

Somewhere in England,
November 20, 1941.

My dear EnZ-ers,

In the course of his recent address at the Annual Meeting of the Magistrates Association Mr. Osbert Peake, the Parliamentary Under-Secretary for Home Affairs, dealt with the difficult jurisdiction which falls to be administered in Petty Sessional Courts throughout the country with regard to war-time offences. Where these arise from wilful attempts to secure some private gain or selfish advantage by evading, say, price regulations or food regulations, severe penalties are obviously appropriate, and public criticism is more likely to be directed towards what is regarded as undue leniency than in the opposite direction. But in cases where the offence is a simple act of carelessness, as, for example, the failure to draw a curtain during black-out hours, the problem of the proper punishment is sometimes very difficult, and, as Mr. Peake observed, there are many cases in which a balance between the responsibility of the individual and the needs of the community is not easily drawn. Although there have been a number of cases in which representations have been made to the Home Office by public authorities suggesting that some benches of magistrates do not appear fully to appreciate the special gravity of particular war-time offences, the official view, which I think, coincides with public opinion, is that on the whole, Justices throughout the country are performing their invidious duties in this respect with care, with firmness, and with discretion.

Soldiers' Wills.—By s. 11 of the Wills Act, 1837, "any soldier being in actual military service . . . may dispose of his personal estate as he might have done before the making of" that Act. Until the Wills Act no formality was necessary to create a valid disposition of personalty; and a person entitled to the benefit of the section can therefore make a will either by writing unattested or by oral declaration to a third party. The basis upon which the privilege was given is said to derive from Roman Law under which a soldier *in expeditione*—which is said to be the equivalent of "in actual military service"—was regarded as being *inops consilii* and likely to be unable to obtain proper advice as to formalities. Whatever the basis of the provision in the Act of 1837, this view must have been to some extent artificial even a century ago when the Wills Act was passed, and it is even more artificial now. For the purpose of ascertaining whether the privilege applies or not, what has to be decided is whether, at the time of making his will, the soldier was "in actual military service." There is little, if any, doubt but that the mere fact that the man is a soldier is not enough for this purpose; "in actual military service" must mean "on active service," and the last phrase itself must mean something more than that the country is at war and that the soldier's unit has been mobilized. Until the present war it could be said with reasonable certainty that the soldier must either be overseas or under embarkation orders, but this war has raised the question of the position of soldiers serving in this country.

Soldiers in England Now.—Two cases on the point have recently been decided. In *Re Gibson*, [1941] 2 All E.R. 91, Henn Collins, J., held that an officer of the Army Dental Corps attached to Command Headquarters at Hounslow and living in his own house at Richmond was not entitled to the benefit of the section: whilst in *Re Spark*, [1941] 2 All E.R. 782, Hodson, J., held that a soldier who was killed by a bomb whilst in camp in England with his battalion was so entitled. Having regard to the fact that soldiers in England are liable to be attacked by the enemy from the air at any time, quite apart from the fact that they may find themselves repelling an invasion, it seems impossible to say that they are not "in actual military service" or "on active service" in the widest sense of either phrase; and when Hodson, J., had taken the view, as he did, that the question whether the man was *inops consilii* or not was in no way decisive, he could not well have decided the case before him otherwise than as he did. In *Re Gibson*, Henn Collins, J., said that the foundation of the rule was that the man was parted from civil surroundings; if that be the true test, few, if any, soldiers stationed

in England could meet it. It seems reasonably clear that on any possible construction of the phrase "in actual military service," the decision of Hodson, J., in *Re Spark* was right; whether s. 11 of the Wills Act requires amendment in present circumstances is another matter. It is not in the public interest that the simple formalities attending the making of an ordinary will should be dispensed with except for good reason; and, as civilians in England and soldiers in England, whether in their ordinary homes or not, are in much the same position as regards danger from the enemy, there seems to be no good reason why a soldier should be able to make a will without formality whilst a civilian cannot—though it is, no doubt, desirable that a soldier should be able to make a will before attaining twenty-one. It was announced in Parliament recently that the Lord Chancellor is considering whether any amendment of the law is desirable in the circumstances.

The "Frustration" Clause.—The principle of a contract being avoided by "frustration" was, perhaps, first applied in the case of *Taylor* v. *Caldwell*, (1863) 3 B. & S. 826; 32 L.J. Q.B. 164, which was preserved for readers of the Law Reports the memory of the famous tenor, Sims Reeves. Tradition says that he frequently found in the state of his throat a reason for not keeping his engagements. In *Taylor* v. *Caldwell* there was the compelling reason that the hall in which he was to sing had been burned down. The continued existence of the hall was an implied condition of the letting for a series of concerts, and the parties to the letting were excused from the contract. "Frustration" had not then been invented, but the ground for the decision was, of course, frustration of the contract and nothing else. But when, owing to war and other calamities, which seem to increase as time goes on, commercial contracts very often came to grief, the word "frustration" was invented, though "frustration of the adventure" was sometimes used instead of "frustration of the contract." Indeed, so popular did the expression become with people who wanted to shield themselves from loss, that underwriters took the alarm, and countered the invention of "frustration" by adding to maritime policies a "frustration clause." In three test cases on the effect of the clause which were heard in the House of Lords last week—it is sufficient to mention the first, *Rickards* v. *Forestal Land, Timber and Railways Co., Ltd.*—the House affirmed the decision of the Court of Appeal (Scott, MacKinnon and Luxmoore, L.JJ.) ([1940] 4 All E.R. 395), who had reversed the judgment of Hilbery, J. ([1940] 4 All E.R. 96). The insurance cases referred to arose on policies which included war risks but also contained the frustration clause, and since war has a way of frustrating contracts, it was a question how, if the frustration clause received its natural interpretation, there could be any war risk left for the policies to cover. At the outbreak of the war English cargoes, covered by English policies, were on the three German steamships in question. The captains of two of the ships scuttled them, in accordance with their instructions, since they could not get back to a neutral or a German port; the third got back to a German port but the English cargo was equally a total loss. The policies covered perils of the sea and contained the usual words, "restraint of princes," &c., for covering war risks, and also contained the frustration clause. The goods had been lost by a war risk; there had been frustration as well. How were the two parts of the policies to stand together? Had the underwriters contracted themselves out of liability altogether? That was an impossible conclusion and the House of Lords rejected it; it is a principle of construction that each part of an instrument must, if possible, receive a meaning. The Lord Chancellor said he agreed with the Court of Appeal in thinking that the proper interpretation of the frustration clause "free of any claim which on the facts might be based on loss of the insured voyage" was "free of any claim which is in fact based, because it can only be based, upon loss of the insured voyage." That, however, could have been more clearly expressed by saying that the frustration clause was subject to an implied exception of the risks specifically covered, and that is the real effect of the decision.

Careless Authorities.—On the subject of the liability of local authorities for careless acts we still adhere to the golden rule reiterated in *Geddis* v. *Bann, &c.*, (1878) 3 App. Cas. 430, and *Shoreditch Corporation* v. *Bull*, (1904) 2 L.G.R. 756. In two sentences—an action by the private citizen lies against the local authority if it does what it has power to do but does it negligently. And though there is no action against a highway authority for non-feasance, an action does lie if it creates a source of danger and leaves it unguarded. A correspondent now draws my attention to the House of Lords decision in *East Suffolk Rivers Catchment Board* v. *Kent*, [1940] 4 All E.R. 527. In that case the Catchment Board, who were found negligent below, succeeded in the highest Court. They tried to keep flood-water off land. The flood was due to the force of nature which the Board, albeit unskilfully, tried to counteract. The Lord Chancellor was even ready to accept the finding below that the methods and staff adopted and employed by the Board were "so inefficient" that repair which would, if reasonable steps and workmen had been taken and used, have been made good in fourteen days, was not completed for more than five months. Yet, in the House of Lords, the marshland grazier, who was so long flooded out, failed. The reason given was that the Board were doing their best, though an admittedly bad best, and that the farmer was no worse off than he would have been if they had done nothing at all. It seems therefore that we must now say that a Catchment Board is not liable to river frontagers for what it does unless it leaves them worse off than they were before it did anything. We live to learn.

Marine or War Risks.—Underwriters have for many years attempted to distinguish in policies of marine insurance between marine risks and war risks, but the recent case of *Yorkshire Dale S.S. Co.* v. *Minister of War Transport* in the Court of Appeal, shows that they have attained little success, and the Court held that a ship in a convoy which ran ashore owing to an unsuspected set of the tide was damaged by an ordinary marine risk and not a war risk. In thus holding the Court of Appeal (Scott, MacKinnon and Luxmoore, L.JJ.) reversed the decision of the Lord Chief Justice. The vessel in question, *The Coxwold*, had been requisitioned by the Minister of Shipping in September, 1939, and at the time of the accident was used for carrying a cargo of petrol to Narvik under a charterparty which covered war risks only. She stranded in May, 1940, on the west coast of Skye.

Stranding on account of an unsuspected set of the tide is ordinarily a marine risk, and the question therefore was, in substance, whether it ceased to be a marine risk and became a war risk because the ship was engaged in a warlike operation. As Scott, L.J., said, the issue was very nearly whether a loss during a warlike operation was therefore a loss by a warlike operation. But the issue in the case of *The Coxwold* seems to have raised, not very nearly, but exactly, the point stated by Lord Justice Scott. Certainly, if there had been no war, the vessel would not have been engaged in a warlike operation and the accident would not have happened. In that sense it happened through a warlike operation. It is equally clear that the accident itself was one which might happen whether the ship was engaged in a warlike operation or not. Viewed in that way, it was not necessarily connected with a warlike operation and was a marine risk. The Court of Appeal unanimously took this view, so that the Minister of War Transport was not liable. In this difference of opinion with the Lord Chief Justice the Court of Appeal were no doubt right, but Lord Justice MacKinnon added a caustic comment on the obscurity of the words "Warranted free from all consequences of hostility or warlike operations." For the extent to which mercantile law really depends on questions of construction reference may be made to the Lord Justice's interesting lecture on "Accurate Thought and Clear Expression" printed in his *Murder in the Temple and Other Holiday Tasks*—Tasks, be it noted, and not Recreation.

Conditions as to Religion.—In *Re Samuel's Will Trusts*; *Jacob* v. *Ramsden*, the Court of Appeal has, reversed the decision of Bennett, J., [1941] 1 All E.R. 539, on the effect of a condition in a will of forfeiture of a child's legacy on marrying "a person who is not of Jewish parentage and of the Jewish faith." That is a condition which according to current opinion ought, if possible, to be held void, and Mr. Justice Bennett held that it was void on the ground of uncertainty. Both phrases, the learned Judge said, when one comes critically to examine them, are of doubtful meaning. He elaborated this view in detail as regards Jewish parentage, and refused to discuss whether the daughter's husband was of Jewish faith, because that would require examination into the state of his mind. In the Court of Appeal the Master of the Rolls in whose judgment Clauson and Du Parcq, L.JJ., concurred, did not feel the same difficulty about these expressions and he held that the husband of the testator's daughter was neither of Jewish race nor of the Jewish faith, so that her legacy of £12,000 and share of residue were forfeited. He sympathized, however, with Mr. Justice Bennett's actual conclusion. The testator, he said, "had done what many testators had done, or had attempted to do—namely, to direct the lives of his children from the grave. Such a desire was distasteful to many people and he (the Master of the Rolls) could well understand the desire of a Court to escape from such a result if the language used, and the law applicable, so permitted." The law so permits merely because the Courts have not so far seen their way to declare any condition aimed at intolerance in the matter of religion to be void. And yet since tolerance has for a hundred years—as regards Dissenters for two hundred years—been a fundamental principle of national policy, the Courts might well have adopted the same rule in the construction of wills. Mr. Justice Bennett's decision was, of course, fundamentally right, though, it appears, technically wrong.

Yours as ever,
APTERYX.

GRANT OF AN EASEMENT TO LAY PIPES.

For a Term of Years over Land Transfer Land.

By E. C. ADAMS, LL.M.

1.—EXPLANATORY NOTE.

The easement in the following precedent may appear at first sight to be *in gross*, but, as it is obviously intended to be used in connection with a reservoir owned by the grantee, it is, on the contrary, an appurtenant easement: *Re Salvin's Indenture, Pitt* v. *Durham County Water Board*, [1938] 2 All E.R. 498. It may be compared with Easement No. 3, in *Goodall's Conveyancing in New Zealand*, 153, headed, *Agreement for Grant of Right to Lay and Maintain Water-Pipes and take Water* (*in gross*), cl. 6 thereof expressly stating that the rights thereby agreed to be granted are to be in the nature of an easement in gross. This precedent, being in the form of an *agreement*, would not be registrable under the Land Transfer Act; but, if couched (as the following one is) in the form of a memorandum of transfer with words of present operation—*e.g.*, do hereby grant—it could be registered under that Act, notwithstanding that it is an easement in gross and notwithstanding opinions to the contrary in certain text-books.

The easement in the following precedent, it will be observed, is granted in consideration of the grantee supplying to the grantor water from the water service free of all costs; it is to subsist only for so long as the servient land is not used by the grantee for any purposes inconsistent with its use as a pipe track, and it is for the purpose of carrying water mains from a road to the grantee's reservoir. If the first two conditions are not complied with, or if the dominant tenement ceases to be used as a reservoir, it is submitted that the grantor could get the easement removed from the Register Book under s. 3 of the Land Transfer Amendment Act, 1939. A grant of an easement may be made *conditionally*, (*Goddard's Law of Easements*, 8th Ed. 149), and this appears to be an easement of that nature.

An easement obtained by prescription must be, and one created by express grant usually is, in perpetuity, but a legal easement may, if conferred by express grant, be for a term of years. The relevant rule is stated thus in *11 Halsbury's Laws of England*, 2nd Ed. p. 277, para. 508:

> An easement may be created by express grant for interests analogous in their duration to an estate in fee simple, an estate for life, *an estate for years*, or even a smaller interest.

In *Goddard's Law of Easements*, 8th Ed. 134, the rule is stated as follows :—

> An easement may be acquired by grant for any period, either permanently or for a term of years, or until the happening of a particular event.

A feature of this easement is the lack of covenants, but the following rules set out in *Stroud's Law of Easements*, 199, appear applicable thereto :

> An easement to take water or drainage in pipes across the land of another not only confers upon the dominant proprietor a right but imposes upon him a duty to keep the pipes in repair.
>
> The dominant owner's right to repair affords sufficient reason for the Court to restrain by injunction the erection by the servient owner of any building over the pipe or drain which would seriously impede access to it.

As to the incidence of *stamp duty*, the easement is a " license " for the purposes of the Stamp Duties Act, and ss. 126 (1) and 124 (1), which read as follows, appear relevant :

> 126 (1). Every license shall for the purposes of this Act be deemed to be a lease by the grantor of the license to the grantee, and shall be charged with duty accordingly.
>
> 124 (1). Where in the opinion of the Commissioner or an Assistant Commissioner the amount of the consideration for a lease cannot be ascertained with reasonable accuracy, he may, in his discretion, either disregard that consideration in accordance with section eighty-four of this Act to the extent to which its amount is so deemed to be unascertainable and stamp the lease as if it were an instrument of voluntary conveyance of land accordingly, or he may assess the lease with a fixed duty of five pounds in respect of the consideration so far as it is so deemed to be unascertainable.

The probability is that the Stamp Office would assess an instrument of this nature with the fixed duty of £5.

The *registration fee* is only 10s. Although, as previously pointed out, the easement is appurtenant to the grantee's reservoir, the dominant tenement is not described with its official description, and in these circumstances it is not the practice of the Land Registry to enter a memorial against the title for the dominant tenement.

II.—Precedent.

Memorandum of Transfer.

I A.B. of *being registered as proprietor of an estate in fee-simple subject however to such encumbrances liens and interests as are notified by memoranda underwritten or endorsed hereon in that piece of land situated* in the Provincial District of containing by admeasurement : being [*Here set out official description of land*] IN CONSIDERATION OF the Body Corporate called the Mayor Councillors and Burgesses of the Borough of laying to the boundary of my property in which my present residence is situated a half-inch waterpipe AND IN CONSIDERATION OF the said Body Corporate during the currency of this easement supplying to me and my heirs executors administrators and assigns water from the water service free of all costs charges and expenses whatsoever which the said Body Corporate DOTH HEREBY UNDERTAKE so to supply to me in terms of a resolution bearing date the DO HEREBY GIVE GRANT and CONFIRM unto the said Body Corporate the full and free liberty license right power and authority from time to time and at all times but whilst and so long only as the land and premises comprised herein shall not be used by the said Body Corporate for any purpose inconsistent with the use of the said land as a pipe track to use the said land above-described as a pipe track for the purpose of carrying the watermains from Road to the reservoir of the said Body Corporate for a term of years from terminating on with full power right and authority to convey water by means of the pipes now laid thereon or to be hereinafter laid down beneath the surface of the said land with free and uninterrupted passage of such water conveyed as aforesaid AND ALSO the right to take and lay down repair and replace the said water mains at any and at all times during the currency of the easement and for the purposes hereof I HEREBY GIVE GRANT and CONFIRM unto the Body Corporate full and free liberty license power and authority from time to time and at all times as aforesaid to the said Body Corporate and its agents servants or workmen to enter upon the aforesaid land but not in any case beyond the boundary lines of the same for the purpose of examining repairing and relaying the said main or pipes or constructing any new or other mains or pipes in place of those previously laid down the said Body Corporate repairing and making good any damage done or occasioned to the said land by the exercise of such liberty TO HOLD the said liberties licenses grants rights powers and authorities unto the said Body Corporate for the said term of years hereinbefore provided.

IN WITNESS WHEREOF, &c.

RULES AND REGULATIONS.

Post and Telegraph Act, 1928, and the Statutes Amendment Act, 1941. Post Office Savings-bank Amending Regulations, 1941. No. 1941/223.

Transport Licensing Act, 1941, and the Statutes Amendment Act, 1941. Transport Organization Membership Regulations, 1941. No. 1941/224.

Emergency Regulations Act, 1939. Electoral Emergency Regulations, 1941. No. 1941/225.

Industrial Efficiency Act, 1936, and the Board of Trade Act, 1919. Industrial Efficiency (Pharmacy) Regulations, 1938. Amendment No. 2. No. 1941/226.

NEW BOOKS AND PUBLICATIONS.

Moriarty's Police Law, 7th Ed. Price 9s.

Butterworth's Workmen's Compensation Cases, Vol. 33, 1941. Price 44s.

Excess Profits Tax. By King and Moore. Price 63s.

Brewing Trade Law Reports. Price 12s.

Butterworth's Yearly Digest, 1940. Price 31s. 6d.

Stone's Justices Manual, 73rd Ed. Price 58s.

War Damage Act, 1941. By G. Granville Slack, B.A., LL.M. Price 22s.

Butterworth's Twentieth Century Statutes, Vol. 37, 1940. Price 55s.

Butterworth's Workmen's Compensation Cases, Supplement 10. 1940. Price 13s. 6d.