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HOTEL LICENSE AND GOODWILL: ENHANCEMENT OF VALUE TO LAND.

A QUESTION of great importance to the owners and licensees of hotel properties, and, in fact, to owners of any property to which a goodwill value may attach, came before the Land Sales Court in Dunedin recently. The judgment, *In re the Oriental Hotel, Muir to Niall*, has interest that extends beyond the interpretation of sections in the Servicemen's Settlement and Lands Sales Act, 1943. At the same time, it is of importance with relation to that and other statutes whereunder valuation must be made of the land, premises, license, and goodwill of a hotel property. And, as we have indicated, it will be of value wherever consideration is being given to the value of any property or premises to which a goodwill attaches.

I.—Whether an Interest in Land.

Before referring in detail to the *Oriental Hotel* case, it may be well to refer to *In re Gilmer, Public Trustee* v. *Commissioner of Stamp Duties*, [1929] N.Z.L.R. 61. There, in valuing licensed hotels in a deceased person's estate, the Commissioner took their value as ascertained by a valuation made under the Valuation of Land Act, 1921. This valuation did not include any sum in respect of the licenses or in respect of the goodwill of the hotels as licensed premises. To the amounts shown in the Government valuations, the Commissioner added in respect of each hotel a sum for goodwill. Objection was taken on the ground that the Commissioner was not entitled to make any such addition for goodwill. Sim, J., said that the first question to be considered was whether or not the Commissioner was entitled to treat either the deceased's interest in the licenses or the goodwill of the business of an hotel as "property" within the meaning of s. 5 of the Death Duties Act, 1909. That question, the learned Judge answered in the affirmative. He followed the decision of Cooper, J., in *In re Jacob Joseph*, (1905) 25 N.Z.L.R. 225, where it was held that the interest of a deceased owner in the licenses in connection with two hotels and in the goodwill of the business carried on in each such hotel was "property" upon which death duty was payable. He said that since *Joseph's* case, it was settled law in New Zealand that the interest of the owner in an hotel license, and in the goodwill of the business carried on in the licensed premises by virtue of such license, is property apart from the land. He added that the decision was supported by the case of *Cox* v. *Harper*, [1910] 1 Ch. 480, decided by the English Court of Appeal, in which it was held that the goodwill of the business of a licensed house was not part of the land on which the business was carried on.

Turning to the Valuation of Land Act, Sim, J., said that the interest of the owner in the license and goodwill cannot be included in the unimproved value of the land for the purposes of that statute, as it is not an "improvement" within the meaning of that statute. The unimproved value of the land and the value of the improvements taken together make up the capital value of the land, nothing can be included in the valuation under the statute in the case of a licensed house as representing the value of the license. But the position was not the same under the Death Duties Act, as the interest of the deceased in the licenses and the goodwill of each business is "property" within the meaning of (now) s. 5 (1) (*a*) of the Death Duties Act, 1921. As to the ascertainment of the value of goodwill, see, in addition to the cases cited *supra*, *Toogood* v. *Commissioner of Stamps*, (1906) 25 N.Z.L.R. 471; *In re Fulford*, (1908) 10 G.L.R. 515; *Re Paul*, (1907) 9 G.L.R. 631; and *Adams's Law of Death and Gift Duties*, 189.

In *Heel* v. *O'Neill*, [1936] N.Z.L.R. 319, Ostler, J., in delivering the judgment of himself and Reed, J., and Smith, J. (with the conclusions and reasons of which the learned Chief Justice agreed), said:

> In enacting the Stamp Duties Act, 1923, it was clearly present in the mind of the Legislature that the goodwill of a business was not an interest in land.

Reference was then made to ss. 120 and 127 of that statute. Section 107 of the Land and Income Tax Act, 1923, is to the like effect. The judgment proceeded:

> These provisions show clearly that the Legislature was aware that the goodwill of a business is something quite different from an interest in land. The intention of the Legislature can be gathered only from the words which it has used, and in our opinion it has not used apt words to show [in the National Expenditure Adjustment Act, 1932, then under

notice] that a payment for goodwill shall be deemed to be a premium on the lease . . .

The case of *The King* v. *Bradford*, (1815) 4 M. & S. 316, 105 E.R. 852, which was referred to in argument, in our opinion does not touch the question which is to be decided here. An authoritative line of cases since that decision has established the proposition that the goodwill of a publican's business is not an interest in land and is to be legally regarded as separate from rent.

As Mr. Justice Finlay said, in the *Oriental Hotel* case, having regard to the legal character of rent, the word "land" can be substituted for "rent" in the last quotation, without doing any violence to the sense or meaning of the quotation.

From the foregoing, it follows that, under the statutes to which we have referred, licenses granted under the Licensing Act, 1908, and its amendments, and the goodwill of publicans' businesses conducted pursuant to such licenses, are not "land" and do not constitute legal or equitable interests in land; but that they are, under the general law of New Zealand, property apart from the land on which stands the premises to which they relate.

The Servicemen's Settlement and Land Sales Act, 1943, applies to every contract or agreement for the sale or transfer of any freehold or leasehold estate or interest in land, whether legal or equitable, with a limitation in respect of leasehold interests where a period of not less than three years is unexpired: s. 43 (1) (*a*) (*b*). In other words, jurisdiction is given under that statute solely and exclusively in respect of dealings in land and in legal and equitable interests in land.

The question before the Land Sales Court in the *Oriental Hotel* case—where there was in issue an agreement for the sale of the land and buildings comprising a licensed hotel at the sum of £2,750, and of the license at £19,250—was thus posed by the learned Judge: Whether the Committee was originally, and the Court is now, constrained to limit inquiry, in such circumstances, to the value of the land and buildings, and without regard to the fact that a license is enjoyed in respect of them, and that a goodwill value may attach to them; or, whether the Committee could, and, in its turn, the Court can consider to what extent, if any, the value of the land and buildings is enhanced by the fact that a license in respect of them exists, and that a goodwill value may attach to them from the fact that they have been, and are, the site upon which a lucrative business has been, and is being, conducted?

The manner in which this question was determined will be the subject of our next article.

SUMMARY OF RECENT JUDGMENTS.

In re GODFREY (DECEASED).

SUPREME COURT. Christchurch. 1944. May 23. NORTHCROFT, J.

Probate and Administration—Mariner's Will—War-time Conditions—"Mariner being at sea"—Letter by Marine Engineer to Wife—Whether Testamentary Disposition—Whether whole Letter should be put on Record—Letters of Administration with Will annexed—Wife sole Beneficiary—Sureties—Wills Act, 1837 (7 Will. IV & 1 Vict., c. 26), s. 11.

A marine engineer who was drowned at sea when his ship was torpedoed, wrote from his ship in the Suez Canal on August 19, 1941, a letter containing the following passages:—

"About that insurance of mine . . . I don't want you to use up your interest money for that. I'll send it if you want me to . . . I only meant you to pay it out of your account there so that you would get more interest on the money in the Coy. Bank. Don't be scared to tell me what you think . . . I'll do whatever you say or would like, the money I save is all yours any way . . . so it's as broad as it's long."

Held, 1. That the writer was a "mariner . . . being at sea" and that, therefore, if the said passage was a will, it did not require the formalities otherwise required by the Wills Act, 1837.

In the Goods of Hayes, (1839) 2 Curt. 338, 163 E.R. 431, and *In re the Will of Helgeson*, (1890) 9 N.Z.L.R. 167, applied.

2. That the letter was a testamentary disposition, and letters of administration with the will annexed should be granted to his widow.

Gattward v. *Knee*, [1902] P. 99; *In re Stable, Dalrymple* v. *Campbell*, [1919] P. 7; and *Selwood* v. *Selwood*, (1920) 125 L.T. 26, applied.

3. That, as considerations of military security did not arise, the whole letter should be on record in order to reveal the context in which occurred the passage relied on.

In the Estate of Heywood, [1916] 1 P. 47, distinguished.

4. That as there might be a doubt whether the whole estate of the deceased was disposed of by the letter, sureties should not be dispensed with.

Counsel: *A. D. Harman*, for the applicant.

Solicitor: *T. D. Harman and Son*, Christchurch, for the applicant.

RADIATION LIMITED v. COMMISSIONER OF PATENTS.

SUPREME COURT. Wellington. 1944. May 1; June 12. SMITH, J.

Patent—Extension—Application on Ground of War Loss—Principles applied in Calculation of Loss and Period of Extension—Loss arising "by reason of hostilities"—Patents, Designs, and Trade-marks Act, 1921–22, s. 20 (6)—Patents, Designs, and Trade-marks Amendment Act, 1943, s. 3.

The term "by reason of hostilities" as used in s. 20 (6) of the Patents, Designs, and Trade-marks Act, 1921–22, mean actual hostilities, and not the threat or fear of hostilities.

In considering an application for the extension of a patent under s. 20 (6) of the Patents, Designs, and Trade-marks Act, 1921–22, and s. 3 of the Patents, Designs, and Trade-marks Amendment Act, 1943, on the ground that, by reason of hostilities, the patentee, as such, has suffered loss or damage, to which solely the Court should have regard in considering its decision, the Court should proceed upon the following principles:—

(*a*) The peace-time benefit of the patent to the applicant continues up to the commencement of the war, and the applicant cannot ask the Court to make allowance in his favour for any reduction of useful life of the patent which was due to the mere anticipation of hostilities.

In re Brackensey's Patent, (1942) 59 R.P.C. 167, followed.

(*b*) An extension should in general be made by reference to the number of articles which have been sold during the war compared with the average sold before the war.

In re Yates, Bowlett and Co., Ltd., and James Dolphin's Patents, (1943) 60 R.P.C. 203, followed.

(*c*) When an extension is sought during the continuance of the war, the approximate period for the extension may be estimated by subtracting the yearly average of post-war sales from the yearly average of pre-war sales and by ascertaining the period in which before the war the difference between the two averages would have been sold.

An illustration of such ascertainment of the period for the extension is as follows: If the pre-war sales averaged, per annum, 1,000, and the post-war sales averaged, per annum, 500, the loss of sales per annum would be 500, and the approximate period of extension would accordingly be six months.

Counsel: *C. A. L. Treadwell*, for the applicant; *Prendeville*, for the Registrar of Patents.

Solicitors: *Treadwells*, Wellington, for the applicant; *Crown Law Office*, Wellington, for the Registrar of Patents.

In re WELLINGTON CITY CORPORATION.

COURT OF APPEAL. Wellington. 1944. June 15. MYERS, C.J.; SMITH, J.; JOHNSTON, J.; FAIR, J.; NORTHCROFT, J.

Industrial Conciliation and Arbitration—Practice—Counsel's Appearance—Award—Amendment—Whether on Application to Court to amend Award Party may appear by Barrister or Solicitor without the Consent of all the Parties—Industrial Conciliation and Arbitration Act, 1925, ss. 79, 92 (1) (a), 93 (1).

The prohibition contained in s. 79 of the Industrial Conciliation and Arbitration Act, 1925, against a party to the proceedings before the Court of Arbitration appearing by barrister or solicitor, except with the consent of all parties, applies also to proceedings to amend the provisions of the award under s. 92 (1) (*a*) and s. 93 (1) of that Act.

Mangahina Miners, Industrial Union of Workers v. *Consolidated Goldfields of New Zealand*, (1899) 1 G.L.R. 152, and *Christchurch United Furniture Industrial Union of Workers* v. *Strange and Co.*, (1901) 3 G.L.R. 372, distinguished.

Counsel: *O'Shea and Earle*, for the Wellington City Corporation; *Cleary*, for the Wellington, &c., Local Bodies' Industrial Union of Workers.

Solicitors: *J. O'Shea*, Wellington, for the Wellington City Corporation; *Barnett and Cleary*, Wellington, for the Wellington, Nelson, Westland and Marlborough Local Bodies, Other Labourers, and Related Trades' Industrial Union of Workers.

In re AN ARBITRATION, FLETCHER HUMPHREYS AND COMPANY, LIMITED, AND ANOTHER AND MIDDLETON AND ANOTHER.

SUPREME COURT. *Christchurch.* 1944. June 6; June 23 NORTHCROFT, J.

Company Law—Shares and Shareholders—Private Company—Restriction on Transfer of Shares—Governing Director's Right to Purchase any Shares at the "Fair value" fixed by Auditor—Reference to Arbitration—Basis upon which Arbitrator should proceed in ascertaining "Fair value"—Arbitration Amendment Act, 1938, s. 11.

The articles of a private company contained restrictions as to transfers to persons who were not shareholders and gave the governing director of the company the absolute right to purchase from any shareholder (other than the trustees of an estate specified) the whole of any portion of the shares held by him at such price as might be agreed upon by the governing director and the shareholder, and in default of agreement "at the fair value" as fixed by the auditor for the time being of the company. The governing director notified shareholders (trustees) that he desired to purchase their shares. The parties, being unable to agree upon the price, agreed that the price of the shares be referred to the award, order, and final determination, of K., who stated a special case under s. 11 of the Arbitration Amendment Act, 1938, for the Court's decision upon the basis on which the arbitrator should proceed in the valuation of the said shares.

Held, 1. That what was a *fair value* was not, in the circumstances, what a man desiring to buy the shares would have had to pay for them to a vendor willing to sell at a fair price, but not desiring to sell.

Tremaine v. *Commissioner of Stamp Duties*, [1942] N.Z.L.R. 157, G.L.R. 121, distinguished.

2. That the question should be answered as follows:—

The basis upon which the arbitrator is to proceed in the valuation of the 4,000 shares in question is that he will decide what he considers to be the fair value of the shares having regard to—

(*a*) The assets of the company including goodwill.

(*b*) The past earnings of the company and the present prospects of future earnings.

(*c*) The possibility that all future profits may not be distributed as dividends but may be retained and become additional assets.

(*d*) The fact that in this case the purchaser is the governing director who has special privileges in relation to dividends.

The arbitrator will ignore all the special provisions of the articles relating to transfer, and will value the shares as if they were not subject to any such provision.

Counsel: *Champion*, for the arbitrator; *C. S. Thomas*, for the company and for the governing director; *Hutchison*, for the estate of Charlewood.

Solicitors: *White and Champion*, Christchurch, for the arbitrator; *Duncan, Cotterill, and Co.*, Christchurch, for the company and for the governing director; *Harper, Pascoe, Buchanan, and Upham*, Christchurch, for the Estate of Charlewood.

JACKSON v. DE HAVILLAND AIRCRAFT COMPANY OF NEW ZEALAND, LIMITED.

SUPREME COURT. Wellington. 1944. March 3; April 19. SMITH, J.

Inspection of Machinery—"Persons . . . in the vicinity" of Machinery, moving Parts of which inadequately guarded—Phrase not limited to Workers—Inclusion of Persons rightfully in such Vicinity, but not Trespassers—Inspection of Machinery Act, 1928, s. 16.

The phrase "Persons . . . who may be in the vicinity thereof"—*viz.*, of the machinery required to be guarded—in s. 16 of the Inspection of Machinery Act, 1928, is not limited to workers in the vicinity, but includes persons who have a right to be in such vicinity.

A member of the public who is rightfully in the vicinity of machinery, the moving parts of which are not adequately guarded as required by the section, has a civil right of action for damages if he is injured in consequence of such inadequate guarding. A trespasser has no such right.

Caswell v. *Powell Duffryn Associated Collieries, Ltd.*, [1940] A.C. 152, [1939] 3 All E.R. 722, applied.

Public Trustee v. *Higgins*, [1927] G.L.R. 334, considered.

Bourke v. *Butterfield and Lewis, Ltd.*, (1926) 38 C.L.R. 354; *Horne* v. *Dalgety and Co., Ltd.*, (1913) 33 N.Z.L.R. 405, 16 G.L.R. 202; *O'Halloran* v. *Chambers and Son, Ltd.*, (1914) 33 N.Z.L.R. 643; *Phillips* v. *Britannia Hygienic Laundry Co.*, [1923] 2 K.B. 832; *Brady* v. *Rowe*, [1922] G.L.R. 62; and *Mackintosh* v. *Metcalfe*, [1943] G.L.R. 22, referred to.

Counsel: *O. C. Mazengarb*, for the plaintiff; *G. G. G. Watson* and *Shorland*, for the defendant company.

Solicitors: *Mazengarb, Hay, and Macalister*, Wellington, for the plaintiff; *Chapman, Tripp, Watson, James, and Co.*, Wellington, for the defendant.

WHITE v. CARRARA CEILING COMPANY, LIMITED.

SUPREME COURT. Wellington. 1944. May 10. MYERS, C.J.

Practice—Joinder of Parties—Application by Defendant for Joinder of Further Defendant—Plaintiff objecting thereto——Whether Liability of proposed Defendant a "Question involved in the action"—Whether proposed Defendant's "Presence before the Court . . . necessary"—Code of Civil Procedure, R. 90.

The plaintiff brought an action to recover damages under the Deaths by Accidents Compensation Act, 1908, against the defendant company in respect of the death of her husband, an employee of that company. She alleged that his death was due to the company's negligence in connection, *inter alia*, with defects in lighting, power arrangements, neglect of fencing, and inspection of the machinery which caused his death.

The defendant applied for the B. Co. to be added as a defendant, on the ground that, at the request of the Army Depart-

ment of the New Zealand Government, it permitted the B. Co. to use the fire-room in which the deceased was killed and to install the said machinery; and that the proper installation, condition, and protection of the said machinery and warnings in respect of the use thereof were matters within the province of the B. Co. In its statement of defence, the defendant company alleged contributory negligence on the part of the deceased that the B. Co. was the occupier of the premises comprised by the said machinery, and that any liability arising as set out in the statement of claim was the liability of the B. Co. and not of the defendant company. On a summons to add the B. Co. as a further defendant, the plaintiff objected to such joinder.

Held, That the liability of the B. Co. was "not a question involved in the action" within the meaning of R. 90 of the Supreme Court Code of Civil Procedure, and that the presence of that company before the Court was not "necessary" within the purview of that rule.

McCheane v. *Gyles*, [1902] 1 Ch. 911, and *Horwell* v. *London General Omnibus Co.*, (1877) 2 Ex. D. 365.

Counsel: *Burnard*, for the defendant, in support; *O. C. Mazengarb*, for the plaintiff, to oppose.

Solicitors: *Mazengarb, Hay, and Macalister*, Wellington, for the plaintiff; *Leicester, Rainey, and McCarthy*, Wellington, for the defendant.

AFTER-ACQUIRED PROPERTY.

And the Rule in Cohen *v.* Mitchell.

By J. D. Willis, LL.M.

It is provided by s. 61 of the Bankruptcy Act, 1908, that the property of the bankrupt passing to the Assignee and divisible amongst his creditors comprises, *inter alia*, property acquired by or devolving upon him before his discharge. In the well-known case of *Cohen* v. *Mitchell*, (1890) 25 Q.B.D. 262, the Court of Appeal in England decided that, despite the wording to the like effect of the Bankruptcy Act in force there in 1890, "Until the trustee intervenes, all transactions by a bankrupt, after his bankruptcy, with any person dealing with him *bona fide* and for value in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee": per Lord Esher. That rule of Judge-made law was confirmed and extended in statutory form in England by s. 47 of the Bankruptcy Act, 1914. In New Zealand there is no similar statutory provision; but the rule enunciated in *Cohen* v. *Mitchell* applies here: see *Official Assignee of Moffatt* v. *Prentice* [1933] N.Z.L.R. s. 87.

It will be observed that the rule is merely to the effect that transactions by an undischarged bankrupt with third persons in relation to the bankrupt's after-acquired property have a measure of protection. Putting it in another way, third persons who acquire property in a transaction of the kind described have a good title to it which cannot be impugned by the Official Assignee.

But it seems that it has often been also thought that the after-acquired property of a bankrupt does not vest in the Official Assignee until he actually intervenes and claims it. This view is to be found either expressed or implied in various textbooks and in certain of the decided cases. Consequently, the recent decision of the Court of Appeal in England in *Re John Pascoe, Ex parte the Trustee in Bankruptcy and Northumberland County Council*, [1944] 1 All E.R. 281, which shows this to be an incorrect statement of the law, is of considerable importance. It was there contended that, as between the bankrupt and the trustee, after-acquired property belongs to the bankrupt until the trustee claims it. But the effect of the decision is that after-acquired property vests in the trustee as soon as it is acquired by the bankrupt, though the trustee's interest is liable to be divested prior to intervention by some transaction which falls within the rule established in *Cohen* v. *Mitchell* (now confirmed in England by s. 47 of the Act of 1914).

Lord Greene, M.R., said that he could find no support for the proposition that the cases establish that, as between the bankrupt and the trustee, after-acquired property belongs to the bankrupt until the trustee claims it. After referring to the statement by Lord Esher in *Cohen* v. *Mitchell*, quoted above, the Master of the Rolls said that it was to be noticed that the thing which is valid is the *transaction*, and to validate a transaction by an undischarged bankrupt comes nowhere near saying that the title to after-acquired property remains in the bankrupt. The old exception, stated in *Cohen* v. *Mitchell*, which is now statutory in England under s. 47 of the 1914 Act, dealt with transactions and had nothing to do with the title to property as between the bankrupt and the trustee. It had merely to do with the title to property as between the trustee, on the one hand, and the third person with whom the transaction was carried out, on the other. Earlier in his judgment, Lord Greene said that the proposition that such property is in the bankrupt until the trustee intervenes not only does not find any authority but is quite contrary to the clear language of the statute. Regarding s. 38 (*a*) of the English Act, corresponding with our s. 61, he saw no ground whatsoever for writing into that the clause that the property is only to vest in the trustee if and when the trustee intervenes. In short, the trustee's property is qualified, but is qualified only to the extent of protecting those transactions. Subject to that the property is in the trustee.

Contrary views had been expressed in certain New Zealand cases. Thus, in *Messiter* v. *Wollerman*, (1908) 27 N.Z.L.R. 589, Cooper, J., said: "Wollerman's interest in any amount recoverable from the appellant was therefore an interest which was in the nature of after-acquired property, and after-acquired property continues in the bankrupt until the Official Assignee interferes to claim it." This cannot now be accepted as a correct statement, being based apparently upon a misinterpretation of the rule in *Cohen* v. *Mitchell*. See also the remarks of the same Judge in *Hutchison* v. *Benge*, (1908) 27 N.Z.L.R. 1060, 1063, and the judgment of Denniston, J., in *Anstee* v. *Spring*, (1913) 32 N.Z.L.R. 966.

On the particular point under discussion, therefore, it would appear that the two earlier New Zealand decisions of *In re Peacock*, (1886) 4 N.Z.L.R. S.C. 76, and *Wilkinson* v. *Johnston*, (1889) 7 N.Z.L.R. 369, are to be preferred.

NEW ZEALAND AND THE STATUTE OF WESTMINSTER 1931.

By A. E. Currie.

In this series of articles Mr. Currie sets out to explain precisely, but at the same time readably, exactly what adoption of the Statute of Westminster will do, and what it will not do. Incidentally to the explanation it gives a picture of the present constitutional position of New Zealand, and of the organs by which the various functions of Government, supreme and subordinate, are exercised.—Ed.

VI.—Restrictions on the Powers of the General Assembly. (*Continued from p. 142*).

3. *Repugnancy.*—A New Zealand Act is void if it is repugnant to a United Kingdom Act in the sense set out in the Colonial Laws Validity Act 1865. Two tests of repugnancy have been proposed. One is incompatibility, according to which an Act is only repugnant to another if a person, by obeying the one, must necessarily offend against the other, or if the one takes away rights which the other confers. The other test is coverage, according to which if the superior Act effectively "covers the field" another Act covering the same field, though in different terms, is repugnant to it; as where each imposes a system of registration (though the subject could register under both), or a minimum rate of wages (though payment of the higher minimum would satisfy both Acts). The latter test has been preferred in Australia.

In practice, this restriction has chiefly come before the Courts in connection with shipping legislation, the powers of the legislature of a British possession to modify the Merchant Shipping Act 1894 of the United Kingdom being extremely limited. It is of course capable of arising in connection with any United Kingdom Act in force in New Zealand except the "inherited Acts."

4. *Disallowance.*—By section 58 of the Constitution Act, an Act of the General Assembly may be disallowed by His Majesty at any time within two years of its enactment. It is proper to observe that this power has at all times been most sparingly exercised, five times in all, the last time in respect of an Act of 1867. Even in the early youth of the General Assembly, the more diplomatic course was usually taken of intimating an objection and delaying disallowance to enable the General Assembly itself to replace the Act with one not giving rise to the objection. In later years an Act appearing to be *ultra vires* for extra-territorial operation has not even been objected to, but left to its fate in the Courts. It was formally resolved by the Imperial Conference of 1926 that the power of disallowance was obsolete. According to present convention, such a power could now in any case be exercised only on the advice of Dominion Ministers. So long as the existing conventions are respected, the restriction is accordingly a purely theoretical one.

5. *Reservation.*—By section 56 of the Constitution Act the Governor must reserve for the Royal Assent any Bills that he may by His Majesty be instructed to reserve. The power to withhold assent to a reserved Bill has also been sparingly exercised; in eight cases altogether, of which only one, that of the Shipping and Seamen Bill 1910, belongs to the twentieth century. The last Royal Instructions that directed bills of certain classes to be reserved were those of 1892, revoked in 1907, and the list of classes had shrunk to the following: (1) divorce, (2) grants to the Governor, (3) currency, (4) differential duties, except those allowed by the Australian Colonies Duties Act 1873, (5) conflict with treaty obligations, (6) discipline of Royal Forces, (7) extraordinary prejudice to the prerogative, to the rights of absentee British subjects, or to British trade and shipping, (8) Bills to the effect of Bills previously disallowed or not assented to. The occasion for the issue of fresh Royal Instructions in 1907 was the adoption of the style "Dominion" for the Islands of New Zealand, and directions for reservation of Bills were omitted, following the precedents of the Dominion of Canada since 1878 and the Commonwealth of Australia from its inception. It is believed that no special instructions on the matter have ever been given. Section 56 is therefore now a dead letter through having nothing to work on. Moreover, as long as existing conventions are respected, a recommendation to reserve, and any consequential withholding of the Royal Assent, must be on the advice of Dominion Ministers. Nevertheless (*a*) the convention has not been translated into statute law, and it is unlikely that, if the convention were departed from, the New Zealand Courts could legally disregard a Royal Instruction purporting to be advised by United Kingdom Ministers, and (*b*) the legal possibility of the exercise of the power, supposing it exercised on the advice of Dominion Ministers, gives the executive a certain nominal control over the General Assembly, contrary to the constitutional position that this control is the other way round.

6. Another provision about reservation is contained in section 56 of the Constitution Act, under which the Governor-General, acting nowadays on the advice of Ministers, may at discretion reserve a Bill. This power has occasionally been exercised since 1907 presumably on grounds of policy, as apparently there has been no legal need for reservation. The exercise of the power lies in the hands of the executive, but gives no greater control over the Legislature than the executive in other cases enjoys by the power of

advising the Governor-General not to assent to a Bill that has passed both Houses.

7. Apart from the Constitution Act, reservation may be required under some other United Kingdom Act forming part of the law of New Zealand, notably the Merchant Shipping Act 1894 and the Colonial Courts of Admiralty Act 1890. Adoption of sections 2, 5, and 6 of the Statute of Westminster will abrogate such requirements. The extent to which the restriction at present operates is indicated by the fact that it was thought proper to reserve such an Act as the Sea Carriage of Goods Act 1940, presumably because it might at some time be held by the Courts to need a reserved assent for its validity under the Merchant Shipping Act 1894.

VII.—Bodies exercising Executive Powers for New Zealand.

Partly parallel with the several bodies that exercise legislative powers, the bodies that exercise executive powers are the following:—

(i) The Crown, in exercise of the prerogative.

(ii) The Governor, in exercise of such prerogative powers as are delegated to him by the Royal Letters Patent.

(iii) His Majesty in Council and other authorities in the United Kingdom, in exercise of statutory powers conferred by Acts of the United Kingdom in force in New Zealand.

(iv) The Governor in Council and other authorities in New Zealand, in exercise of statutory powers conferred by Acts of the General Assembly.

In New Zealand, as in other British countries, executive powers of government are vested in the King, and there they remain, except so far as delegated by His Majesty, and except so far as other provision has been made by competent authority. Subject to overriding restrictions upon its own powers, any British legislature may legislate so as to modify within its jurisdiction the prerogative (or common-law) powers of the Crown. Some executive powers are exercisable by the King in Council, some by instrument under the Great Seal of the United Kingdom, some under the signet seal or the Royal Sign-manual; but all of them on the advice of a Minister responsible to Parliament. The legal rule that makes this more than a convention is the requirement, as the case may be, of the signature of the Clerk to the Privy Council, the presence of the Great Seal, or the counter-signature of a responsible Minister.

Where executive powers are bestowed by statute, in the more important cases the same methods are provided for their exercise; in less important matters Ministers, ministerial bodies like the Admiralty or the Board of Trade, or minor Crown functionaries, may be authorized to act in their own names. As a small instance it may be noted that the Archbishop of Canterbury, acting under a statute of Henry the Eighth, is the only authority with power to make notaries public in New Zealand. Where His Majesty in person is concerned, the same legal rule applies to distinguish the public from the private actions of the Sovereign.

A constitutional convention arrived at by the Imperial Conference of 1926 is as follows: "Apart from provisions embodied in constitutions or in specific statutes expressly providing for reservation, it is recognized that it is the right of the Government of each Dominion to advise the Crown in all matters relating to its own affairs. Consequently, it would not be in accordance with constitutional practice for advice to be tendered to His Majesty by His Majesty's Government in Great Britain in any matter appertaining to the affairs of a Dominion against the views of the Government of that Dominion." It will be noted that reservation—*i.e.*, of Bills passed by the General Assembly—is excepted; also that the declaration is framed in negative terms, and does not say that in the cases referred to advice should be tendered by His Majesty's Government in the Dominion.

On one point the Imperial Conference of 1930 reached a more positive conclusion. With particular reference to the appointment of a Governor-General, it is declared that the responsible Ministers on whose advice His Majesty acts are His Majesty's Ministers in the Dominion concerned, who tender their formal advice after informal consultation with His Majesty, the Government of the United Kingdom acting as a channel of communication if the Dominion Government so desires. A decision reached at the Imperial Conference of 1926 was that on the exequatur enabling a consul of a foreign power to exercise his office in New Zealand the counter-signature should be that of a New Zealand Minister—in practice, the Minister of Internal Affairs.

It is apprehended that if the matter came before the Courts the legal rule would be held to be satisfied by the counter-signature of a New Zealand Minister; but equally that the Courts, under existing law, could not withhold credence from a document countersigned only by a United Kingdom Minister, even if it were suggested that there was some non-compliance with the convention declared in 1926. There are, of course, many actions affecting the whole Empire where concerted action may be agreed upon, but a corresponding amplitude of formalities be practically impossible; for instance, in instruments under the Foreign Jurisdiction Act 1890 (U.K.), where, however, the practice has recently been introduced of reciting the request and consent of dominion governments: see, for instance, the Ethiopia (Renunciation of Jurisdiction) Order 1942 (*Gazette*, p. 2811). For the validity of the instrument in South African law, such a recital is necessary under the Union legislation mentioned below, and presumably the mention of other dominions is for uniformity. Even in matters solely affecting New Zealand, the negative form of the convention may be a convenience; for instance, in connection with the Order in Council by which a judgment of the Privy Council is formalized.

The last Governor-General whose Commission was countersigned by the British Secretary of State for Dominion Affairs was Sir Charles Fergusson, appointed in 1924 (*Gazette*, p. 2946). The first whose Commission (as published) was countersigned by a New Zealand Minister was Sir Cyril Newall, appointed in 1941 (*Gazette*, p. 350). It is an indication of the little importance attached to the views that led to the determinations of the Imperial Conference of 1930, and to those determinations, when made, that, although in the Commissions of Lord Bledisloe, appointed in 1930 (*Gazette*, p. 782), and Viscount Galway, appointed in 1935 (*Gazette*, p. 1030), the British counter-signature was scrupulously omitted, they appeared in the *Gazette* with no counter-signature at all; and that the omissions attracted no public notice. Whether Acts

of Parliament were valid the assent to which was given by a Governor whose appointment was on the face of it irregular is a question that might at the time have raised some argument, but which is however now settled, no doubt, as to all of them by the inferential ratification of many of them by means of references contained in later Acts.

The Letters Patent constituting the office of Governor-General may be viewed as a delegation of such prerogative powers as it is thought proper to confer to enable the affairs of government to be carried on. They include power to appoint to every kind of public office, to alienate Crown land (for which however the aid of an Act of Parliament is also required), and to grant pardons. No power to create corporations is conferred, an omission met by special Acts, as well as by several general Acts under which the benefit of incorporation can be obtained. No power is given to confer titles or dignities, this being a matter on which the personal wishes of the Sovereign are understood to be particularly deferred to. The University has however been given by royal charter the power of conferring certain academic degrees, which rank in their order like other honours. (It also by authority of Act of the General Assembly confers other degrees, which, in British countries outside New Zealand, are entitled to courtesy recognition only.) The creation by the Governor of the New Zealand Cross was ultimately ratified. The omission in the Letters Patent which is most significant at the present day is that of all reference to foreign affairs. For instance, declarations of the existence of a state of war purport to be made by the Governor-General under special authority from His Majesty. The position as regards exequaturs for foreign consuls has been met by the procedure mentioned above. For conventions expressed to be made between national governments, credentials from the Governor suffice. Credentials of a New Zealand diplomatic representative, or full powers to participate in negotiating a treaty expressed to be made between heads of states, require to be issued by His Majesty. (Documents of this type never come before the Courts, and the practice is for them to bear no ministerial countersignature; but they require the Great Seal: for an example, see App. to Jour., H. of R., 1922, A.–5, p. 1.)

Executive powers confided to the Governor are exercised either in council or otherwise upon the advice of a responsible Minister. This convention, like that relating to actions of His Majesty, receives legal force from the rule requiring either the signature of the Clerk of the Executive Council or the counter-signature of a responsible Minister. This rule applies alike to delegated prerogative powers and to powers exercised under the authority of statute. Where the Crown acts in its corporate capacity, as upon a grant of lands, the Public Seal is used, and it is also affixed to all Proclamations.

Under Acts of the General Assembly, executive powers regarded as of the most important character are nowadays usually confided to the Governor-General in Council; if of the second order of importance, to the Governor-General (to whom, of course, advice of a Minister is tendered). Statutory functions regarded as of less importance are frequently confided directly to a Member of the Executive Council as Minister, or to some other authority. Several Acts authorize Ministers to enter into contracts, and whether it is expressly required to be so stated or not, they do so on behalf of His Majesty. Under the Public Service Act 1912, appointments to office are made by the Public Service Commissioner.

Cabinet is an institution not formally recognized by the constitution. It is known that documents to be presented in Executive Council are first considered by Cabinet, so that the Council has substantially lost the character of a deliberative body. (In Crown Colony days it was otherwise; see, for instance, extracts from minutes printed in British Parliamentary Papers, Report of Select Committee on New Zealand, 1844, No. 556, Appendix, pp. 457–464.) It is for the Ministry to decide, whether by standing Cabinet instruction or at the discretion of the Minister contemplating action, what matters (including public expenditure over a specified amount) shall be referred to Cabinet; but to the legal validity of any formal action when taken the matter of Cabinet approval is (except within the departments of state) immaterial.

The terms "Government of New Zealand" and "Executive Government of New Zealand" therefore mean, in their most formal sense, the Governor-General in Council; in a slightly less formal sense, the Governor-General; in matters outside the constitutional sphere, the Cabinet of Ministers generally, or the Prime Minister or other Minister entrusted with some particular matter; whilst actions of other authorities may at times be the actions of the Government, and those other authorities may be within New Zealand or in the United Kingdom.

The conclusion is that it is in the case where action must be that of His Majesty or some functionary of government in the United Kingdom, whether or not the Great Seal be required, that the executive independence of New Zealand is nominally not complete, but depends on observance of the recent convention already referred to.

South Africa has met the position by passing the Royal Executive Functions and Seals Act 1934, which contains provisions to the following effect:—

(i) The King's sign-manual is to be countersigned by a Union Minister, and a Union Seal or Signet is to be affixed where required, these Royal Seals taking the place of the Great Seal and Signet of the United Kingdom.

(ii) In exigency the Governor-General has power to execute instruments for His Majesty.

(iii) Statutory powers of the King in Council are exercisable for the Union by the Governor-General in Council. Statutory powers conferred by a United Kingdom Act in force in the Union and vested in a British Minister or United Kingdom Board or functionary are, in the Union, vested in such Ministers and functionaries as the Governor-General in Council decides.

This provision appears to be adequate to the case of statutory powers, though perhaps it may not extend to prerogative powers. Where these provisions are not made use of, and the older procedure is followed, it is made necessary to the validity of the document in South African law, at least in the particular case of an Order in Council, that it should expressly declare that it is made at the request and consent of the Union. This is a procedure parallel, in the fields of subordinate legislation and executive action, to that required by

section 4 of the Statute of Westminster in the field of supreme legislation.

VIII.—The Immediate Effect of Adopting the Statute.

Section 2 of the Statute.—Subsection (1) of section 2 reads thus: "The Colonial Laws Validity Act 1865 shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion." Taken by itself, this provision would put the General Assembly back in the more restricted position it was in before 1865. Taken with what follows, however, it is merely a technical introduction, necessary to avoid conflicts of construction, to the wider emancipations set out in subsection (2) of section 2 and in section 3.

Subsection (2) of section 2 provides, in effect, that no law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, and that the Parliament of any Dominion may repeal or amend any United Kingdom Act in so far as the same is part of the law of the Dominion. This provision removes entirely (except in respect of the Constitution Act) the restriction of the powers of the General Assembly arising on the score of repugnancy.

The subsection relates only to Acts of the General Assembly to be made "after the commencement of this Act"—or, in the case of Australia, New Zealand, and Newfoundland (see section 10), "such later date as is specified in the adopting Act." It does not by itself cure any earlier New Zealand Acts infected with the vice of repugnancy. This, however, could, after adoption, be done by a further New Zealand Act declaring that for purposes of interpretation the earlier Acts should be construed as if passed after the date (or constructive date) of commencement of the Statute of Westminster.

Section 3 of the Statute.—Section 3 reads thus: "It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation." This provision removes the existing restriction arising on the score of extra-territorial operation. Though the wording is not quite parallel with that of section 2, it seems certain that the adoption of section 3 will not automatically cure earlier Acts infected with the vice of extra-territorial operation; the earlier-passed Acts must still be measured with the earlier yardstick. They could, however, be re-enacted so as to have full validity, or, as in the matter of repugnancy, an Act could be passed subjecting them to a fresh rule of interpretation.

Section 4 of the Statute.—Section 4 reads thus: "No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof." "Commencement of this Act," in the case of adoption may mean pursuant to section 10 of the Statute, December 11, 1931, or any later date specified in the adopting Act. The section contains two seeds of difficulty, one legal, the other political.

If a retrospective date of adoption be specified, difficulty will almost certainly arise about the continuing effect of United Kingdom Acts passed after that retrospective date. A list of United Kingdom Acts passed since 1931 and, at the present time, apparently part of the law of New Zealand, is set out in Appendix B. In only one of these is it expressly declared that New Zealand has requested and consented to the enactment thereof. Unless their continued applicability to New Zealand is expressly declared by some Act of the General Assembly, the formal test of applicability imposed by section 4 is one that the Courts can hardly refuse to apply; and the result must be that the Acts in question will automatically cease to be part of the law.

The political difficulty arises from the ambiguity of the term "Dominion" as an entity that must be declared to have requested the enactment of the United Kingdom Act. This does not affect the Courts, which are concerned only to see that the prescribed declaration, whatever it means, appears in the Act in question. In the House of Commons Sir John Withers proposed that the words "that Dominion" should be replaced by the words "the Parliament of that Dominion." The amendment was rejected on the ground that the wording of the Bill was what the Dominion representatives had themselves asked for. In the case of Australia, section 9 (3) of the Statute expressly says that the request and consent referred to in section 4 mean the request and consent of the Parliament and Government; but it is unlikely that this explanation can be invoked as a clue to what is meant in the case of New Zealand. There are two grounds for saying that the request and consent should be those of the General Assembly. First, that is the way in which the enactment of the Statute itself was promoted, and is what Dominion does mean in the Fifth Preamble, and therefore what the term should be taken to mean in the Third Preamble and in section 4. Secondly, since the whole Statute is clearly directed to securing legislative supremacy for the Dominion Legislature, it would be clean contrary to that intention if the Executive Government could go behind the back of its own Legislature, and, without consulting it, obtain from another legislative body legislation to become part of the New Zealand law. Nevertheless the latter construction is that which, in fact, and without expostulation from the General Assembly or (it is believed) any individual member, has consistently been placed on the Third Preamble since 1931, alike by the Executive Government of New Zealand, by that of the United Kingdom, and by the United Kingdom Parliament; because the Journals of neither House of the General Assembly contain any record of a request or consent to the enactment of any of the United Kingdom Acts that have, since 1931, been passed so as to be part of the law of New Zealand. Since, as already mentioned, the matter is outside the concern of the Courts, the same position is capable of obtaining when section 4 is adopted.

South Africa has appreciated and clarified the position by providing, in the Status of the Union Act 1934 of that jurisdiction, that no Act of the United Kingdom Parliament passed after 11th December, 1931, shall extend to the Union as part of the law of the Union unless extended thereto by an Act of the Union Parliament. Such an extending Act, of course, comes to the same thing as if the request and consent of the legislature were required to be given, and also to be declared by, the United Kingdom Act in question.

(To be continued.)

LAND SALES COURT.

Summary of Judgments.

The summarized judgments of the Lands Sales Court, which appear as under, are published for the general information and assistance of practitioners. They are not intended to be treated as reports of judgments binding on the Court in future applications, each one of which must be considered on its own particular facts. The reasons for the Court's conclusions in any one appeal may, however, be found to be of use as a guide to the presentation of a future appeal, and as an indication of the Court's method of considering and determining values.

No. 1.—D. to E.

Evidence—No Sales at Material Time—Opinion Evidence as to Value contradictory—Replacement Cost indicative of Basic Value.

In the absence of any sales on or about December 15, 1942, of similar or sufficiently similar properties in the same or any like locality, the value of the property in question could not be determined by any satisfactory comparison. The only basis afforded by the evidence upon which a conclusion could be based was evidence of opinion as to sale value divorced from replacement costs, and the evidence of replacement costs. In saying this the Court was not overlooking the price paid by the vendor. It was not, however, prepared to accept that as of much value having regard to his inexperience in dealing in land and his perhaps too great readiness to purchase, as evidenced by his failure to make any attempt to get the quoted price reduced. For the rest, the evidence of opinion as to value divorced from any consideration of replacement costs was very contradictory.

The Court proceeded: "The safer and better course is to employ the basis of replacement cost, paying due regard to the fact that a calculation of such costs is necessarily only approximate and is at most an indication of the value which the Court has to determine. Broadly speaking, the view of the Court on this basis when translated into figures does not, in the main, differ from the view of the Committee as expressed in its decision. However, closer investigation of the property and its history by the witnesses on both sides when preparing for and during the hearing of the appeal disclosed that some material alterations should be made in the basic value as fixed by the Committee."

No. 2.—D. to P.

Evidence—Replacement Cost unascertainable with Accuracy—Preference for Evidence of Witness with Knowledge of Costs on Material Date.

On the hearing of this appeal one witness only was called by each party. The monetary measure of the difference between them was small in that they differed only in the following respects: (1) As to a sum of £5 in respect of fencing; (2) as to a sum of £78 on the replacement cost of the building, and (3) as to a sum of £25 in the unimproved value of the land. The total sum in difference was therefore £108.

The Court said: "Having regard to the fact that no computation of the replacement cost of buildings can, as both parties agreed, be regarded as completely and conclusively accurate, no good purpose would be served by any close analysis of the assessments of the respective witnesses with a view to eliciting the points of difference and determining which is the more correct.

"What we are primarily called upon to determine is what the value of the property was on December 15, 1942. In that relation we were impressed with the wide and accurate knowledge of costs on or about the material date possessed by Mr. B. This knowledge was acquired by him at first hand and by experience in relation to the erection of many houses. He was thus enabled in this regard, as well, indeed, as with respect to the unimproved value of the land, to establish his assessments upon the basis of sound comparison. Whilst, therefore, we are anxious not to disparage in any way the evidence, much less the integrity or reliability of Mr. W., we cannot resist the conclusion that whilst his assessments were in all respects the reflection of honest conviction based on a reasonably wide experience, yet he has not in the same full measure as Mr. B. that intimate and accurate knowledge of those topics which are so material to a proper determination of the issues involved in this appeal.

"This being so, the Court feels constrained to prefer and accept Mr. B.'s evidence. The Court is further satisfied that the Committee allowed a reasonable margin to cover any inconclusive factors involved in the acceptance of Mr. B.'s assessment of value and is not disposed, therefore, to alter the Committee's findings except in the comparatively minor respect now about to be mentioned.

"Discussion during the hearing of the appeal disclosed that a sum of £20 on account of the additional value given to the house by the incorporation in it of a garage was not drawn to the attention of the Committee, and so was not taken into consideration. This additional sum should, in the opinion of the Court, be allowed, so that in its judgment the value of the property as at December 15, 1942, was the sum of £1,170."

No. 3.—P. T. to P.

Farm Land—Dilapidated House—Assessment of Demolition Value—Land needing Restoration—Regrassing Cost—Water-supply problematical—Assessment of Basic Value.

By common consent of most of the witnesses, the property involved in this appeal was, as to the house, ruinous, and as to the land, in need of restoration and the provision of an adequate water-supply. Whether it was, in fact, possible to provide, by boring, the water, without which the property is valueless for dairying purposes, was not entirely certain.

Apart from the unqualified condemnation of the place by Mr. O., who was disinterested and spoke from wide experience, and authoritatively, there was much in the evidence of the appellant's witness, Mr. H., which went to suggest that the price proposed to be paid was excessive, and that the Committee's decision to approve at £490 generous. He fixed the value of the property at £676 1s. He arrived at this figure by allowing £272 as the value of the house as it stood. But he agreed that the house was uninhabitable and that some of the timber it it was rotten, and said that £200 must be spent upon it to make it "a reasonably habitable farm homestead."

The Court said: "It is difficult—having regard to the totality of the evidence—to understand how any value per square foot could properly be attached to such a building as this. The better view seems to be that a demolition value only should be assessed.

"When such a deduction as this would entail is made from Mr. H.'s aggregate assessment of value it will leave the property, on the basis of the value as otherwise assessed by Mr. H., as probably little, if any, more than the Committee was prepared to say was the basic value.

"Another conclusion detrimental to the appellant's case which can reasonably be drawn from Mr. H.'s evidence has relation to the value of the grass. Mr. H. allows £6 an acre for grassing of what he describes as the better area of 23 acres, and £3 an acre for the grassing of a poorer area of 6 acres. Mr. H., however, clearly envisages the necessity for the discing and regrassing of both these areas in so far as such discing is possible. It is evident that by this process of discing and regrassing much of the value represented by the £6 an acre and £3 an acre respectively would have to be eliminated. This, again, would materially affect Mr. H.'s assessment of total value.

"Another factor which requires to be taken into account is the provision of a permanent water-supply. Without such a supply it is, by common consent, agreed that dairying on the property is impossible, and no attempt has been made to value the property otherwise than for dairying. There is no certainty of the depth at which water will be obtained and, in fact, no certainty that water will be obtained at all, for none of the witnesses had any knowledge of the existence of any bores anywhere in the district.

"There are other views detrimental to the case of the appellant to which it is not necessary to advert. It is sufficient to say that in the main the Court accepts the evidence of Mr. O., as giving the best general indication of value. This being so, it cannot disturb the decision of the Committee, and the appeal is dismissed.

"It has been suggested that the Court might express willingness to approve of a sale at £490. Having regard to the fact

that the rights between the parties may be involved and to other considerations, this course, apart from any question of the jurisdiction of the Court (as to which no opinion is expressed) does not seem desirable."

No. 4.—B. TO A.

Residential Property—"Site value"—Leasehold Interest—"Goodwill of site value" rejected as element in Assessment of Basic Value—Inclusion in Unimproved Value of Freehold.

This appeal had relation to a leasehold interest in a residential property in Salamanca Road, Wellington. The fee-simple estate in the land was owned by the Wellington Hospital Board; the leasehold estate was vested in the present vendor. The property comprised an area of 25·5 perches, the frontage to Salamanca Road being 55 ft. and the average depth 115 ft. There was a right-of-way access at the rear of the property. The land was on the east side of Salamanca Road; from it there was an excellent but not an unequalled view. Besides the view, the property had several additional advantages. It was near a point where the cable tram stops; the house was built upon a level area; the land beyond the area where the house is erected sloped gradually from front to rear and was all easily usable. On the eastern portion, which was in vegetable garden, there were brick paths and brick retaining walls. The house was of two stories and contained nine rooms, two of which had bay windows. There were the usual amenities, such as built-in wardrobes and cupboards, linen-press, large gas stove, bricked-in Ideal heater, and Ascot gas hot-water service. Outside the house proper there was a small building containing wood and coal sheds and a workshop.

The land was held under a lease which, after an initial term of twenty-one years was designed to continue in perpetuity by successive terms of fourteen years. The current term will expire on January 1, 1953. During the subsistence of this latter term the rental payable was £35 a year. At the end of each term of fourteen years the rental payable during the next succeeding term was fixed, in default of agreement, by arbitration. The Court said that this feature of the lease was of importance because it imported that as from January 1, 1953, the lessee would have to pay the full rental value of the land at that date, as fixed by agreement or by the determination of an impartial tribunal.

It was also observed that the Court was advised that, so long as the lessee performed the covenants upon his part in the lease including the covenant to accept renewals, the improvements remained the sole property of the lessee.

The contract for sale in respect of which the application for consent of the Committee was made provided for a sale of the whole of the vendor's interest in the property for a sum of £3,000, payable wholly in cash and at once. The Committee consented to a sale at £2,500 only.

The Court said: "In support of the application the Committee was afforded the evidence of Mr. G., a land valuer of standing and long experience. Mr. G. valued the improvements, including, of course, the dwelling, at £2,189. He, however, overestimated the true size of the house to an extent which, upon the basis of the valuation he adopted, requires a reduction in his valuation of £202 10s.

"As the Committee accepted the value of the improvements as being £2,000, it adopted a value exceeding that established by the appellant's only witness as to that value. No question was raised, in consequence, during the appeal proceedings as to the value attached by the Committee to the improvements.

"This limited the issue, and was treated throughout as limiting the issue, to the sole question of the value of the lessee's interest in the land.

"Mr. G. approached the ascertainment of that value in three stages. In the first stage, he fixed the unimproved value of the land as a freehold: then, on the basis of that value, he, in the second stage, determined what he considered the true value of the lessee's interest in that unimproved value: then finally, he added to this true value a sum of £400 which he described 'as a goodwill of site value.'

"In fixing the unimproved value of the freehold of the land, Mr. G. followed the usual process. He first expressed an opinion based upon his judgment and experience, and then supported that opinion by an analysis of actual transactions in reasonably comparable properties at relevant times.

"The Court cannot escape the conclusion that Mr. G.'s assessment of the unimproved value of the freehold was and is an accurate and proper assessment. To this extent the Court accepts, in its entirety, the evidence given by Mr. G. for the appellant. It prefers that evidence to the speculative inferences as to the unimproved value which are deducible from Mr. H.'s evidence as to the rental which could now be got for the property as a whole.

"This acceptance of Mr. G.'s evidence invites consideration as to whether Mr. G. is right or wrong in his conclusion that there is, in respect of this property, 'a goodwill of site value' which attaches, as Mr. G.'s evidence necessarily implies, to the lessee alone. For his conclusion in this respect Mr. G. relies upon an analysis of various comparable transactions: That the existence of such an element of value is unusual and anomalous. Mr. G., when giving his evidence, agreed. What he said, in effect, was that he was satisfied, despite all argument to the contrary and all suggestions of self-contradiction in his reasoning, that such a value did exist. That it can exist, the Court is not by any means satisfied.

"What, during the hearing was called 'site value,' must, it is thought, be an element inherent in the unimproved value of the freehold, and an element necessarily constituting part of that unimproved value. That being so, two irresistible conclusions emerge—

"1. That Mr. G. has already taken the full 'site value' into account in fixing the unimproved value of the freehold at £35 a foot; and

"2. That his assessment of the true value of the lessee's interest in the unimproved value of the freehold Mr. G. has fairly and properly ascertained and apportioned to the lessee the proper proportion of that value which should be attributed to the lessee.

"It might, in some circumstances, be possible to suggest that in his assessment of the unimproved value of the freehold Mr. G. did not allow enough for 'site value,' but this he will by no means concede, and having regard to the conclusiveness with which he established that value, he was clearly right in not conceding it. For the same reason he was equally right in refusing to concede that there was any error in his assessment of the true value of the lessee's interest in the unimproved value of the freehold as fixed by him. His justified refusal to make these concessions, however, only serves to establish that no such 'goodwill of site value,' such as that for which Mr. G. contends, in fact exists.

"In saying that, however, the Court has no desire to cast any reflection upon Mr. G., in whose capacity and integrity it has complete confidence. Neither has it lost sight of the incidents of the transactions upon which Mr. G.'s conclusions were based.

"In each instance, however, the existence of the 'goodwill of site' value which Mr. G. assumes, can be explained by other and more logical inferences.

"For instance, Mr. G. may well have attributed too low a value to the unimproved value of the freehold in [another property in] Salamanca Road and [a property in] Talavera Road transactions. The former he assessed at £20 per foot and the latter at £32 a foot, one very much below and the other substantially below the value he established in respect of the vendor's property. No evidence was, of course, led to confirm Mr. G.'s conclusions as to the unimproved value of the freehold of the land concerned in either of these transactions, and he may very possibly have assessed too low a value in each case. This would have the effect, when analysing the terms of an actual sale on the basis of the method adopted by Mr. G., of creating a surplus of value in the lessee, which surplus Mr. G. calls 'the goodwill of site value.' Equally, the rental payable under the leases of the Salamanca Road and Wesley Road properties may, even initially, have been in fact too low, so that even before the commencement of the periods of the leases, the respective lessees may have appreciated that they were going to acquire at once, under their respective leases, goodwills for which they could afford to pay in effect by paying too much perhaps for the existing buildings.

"These cases again were not made the subject of inquiry, so that no definitive conclusion can be reached concerning them. The same uncertain factors apply to the sale of Kelburn Parade [property].

"The existence of such a value as that for which Mr. G. contends seems opposed, not only to all current conceptions, but also to fairness as between lessor and lessee. It also appears to be opposed by sound reasoning. Until, therefore, its existence is clearly and unequivocally proved, it cannot be accepted.

"This being so, Mr. G.'s assessment of the value of the vendor's interest must be reduced by the £400 he has added to his valuation of the interest the vendor is selling. This deduction, together with the necessary deduction of £202 10s. previously mentioned, brings Mr. G.'s assessment of value to £2,419 10s., a sum less than that at which consent to the sale was given by the Committee.

"No reference has been made to the evidence given by Mr. T. for the Crown, as any such reference is, in the circumstances, unnecessary.

"The appeal must, for the reasons given, be dismissed."

(*To be continued.*)

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

Roman Law.—This year there takes effect the decision of the Senate of the University of New Zealand, acting on the recommendation of the Council of Legal Education, acting on the recommendation of the New Zealand Law Society, to shorten the course for the solicitors' examination by removing therefrom some five subjects of an academic nature which were added to the course in an excess of zeal some years ago. Among the now deleted subjects is Roman Law. But it is still a compulsory subject for the barristers' examination and the LL.B. degree. Yes, still, in this year of grace 1944! If one were to ask the legal members of the University Senate and the members of the Council of Legal Education to name the three greatest Judges of the Supreme Court of the United States it is a safe bet that the list of none would omit the name of the late O. W. Holmes, J. Accordingly it may be worth while reprinting here Holmes's views on Roman Law as he expressed them during an address which he once gave at the Boston University School of Law:

> The advice of the elders to young men is very apt to be as unreal as a list of the hundred best books. At least in my day I had my share of such counsels and high amongst the unrealities I place the recommendation to study the Roman Law. . . . I assume that if it is well to study the Roman Law it is well to study it as a working system. That means mastering a set of technicalities more difficult and less understood than our own, and studying another course of history by which even more than our own the Roman Law must be explained. . . . No. The way to gain a liberal view of your subject is not to read something else, but to get to the bottom of the subject itself.

Judicial Heredity.—On our Supreme Court Bench we have had only one instance of judicial heredity—the late Sir Frederick Chapman, J., a son of H. S. Chapman, J., who was a Judge of the Court for two periods, the first from 1843 to 1852, and the second from 1864 to 1875. But in England there have been many cases of sons following their fathers to high judicial office. Without delving into the past, eight such cases can be pointed to in 1944. Lord Romer, who recently retired from office as a Lord of Appeal in Ordinary, is the son of the late Sir Robert Romer, who was a Judge of the Chancery Division and later a Lord Justice of Appeal. Lord Russell of Killowen is a son of the well-known Lord Chief Justice of that name. Henn Collins, J., is a son of that great Judge who went to the House of Lords as Lord Collins. The present Lawrence, J., is a son of Lord Trevethin, L.C.J. Charles, J.'s, father was a Judge of the High Court. Finlay, L.J., is a son of the late Lord Finlay, L.C. Macnaghten, J., son of Lord Macnaghten, and Lord Thankerton, son of Lord Watson, had for their fathers Law Lords whose names will long be remembered in English law.

Microscopically Speaking.—In the recent case of *In re Paterson*, [1944] N.Z.L.R. 104, where a will bequeathed "free of duty and income tax" annuities to persons living beyond New Zealand, one of the debated questions was whether the words "income tax" referred to the tax on income imposed by our Land and Income Tax Act, 1923, or whether the words referred to income taxes generally. Kennedy, J., dealing with this point in the Supreme Court, drew attention in his judgment to the fact that our statute uses the word "income-tax" and not the words "income tax." With all due deference to a Judge of the learning of Kennedy, J., Scriblex would venture the comment that the law ceases to accord with realities when Judges begin to give weight to hair-splitting refinements about hyphens.

Judge as Witness.—A dispute having arisen as to whether an action being tried before Asquith, J., last February had or had not been settled by discussions between counsel and the parties during an adjournment, the Judge heard counsel, decided that there had been a settlement, and gave judgment in accordance therewith. The matter subsequently came before the Court of Appeal, which ordered that the issue whether the action had been settled or not should be tried "by a Judge of the King's Bench Division other than Asquith, J." The issue came on for trial last April before Wrottesley, J., and evidence as to the circumstances of the settlement as he knew them was given by Wallington, J., who, prior to his recent appointment to the Bench as a Judge of the Probate, Divorce, and Admiralty Division, had acted as leading counsel for the defendant. The *Solicitors' Journal* (London), in its note of the matter, says:—

> His lordship, *who was accommodated with a seat on the Bench,* was cross-examined by Mr. N. C. L. Macaskie, K.C., who now represented the plaintiff in the action.

If there was precedent for accommodating Wallington, J., with a seat on the Bench, the precedent seems to have little to commend it. When a Judge gives evidence there is not the slightest reason why he should be treated differently from any other witness. On the contrary, there is every reason why there should be no such differentiation.

Questions Beginning with "Why"?—Blair, J., enlivened his recent visit to Auckland with a homily on the subject of the art of cross-examination. As was to be expected, the Judge put in the forefront his favourite precept, "Never ask a question beginning with 'Why'." Times without number Scriblex has witnessed the breaking of this rule—but almost always to the disadvantage of the cross-examiner. The reason is, of course, that the question allows the witness an opportunity of making an explanation. Bruce Graeme's *Cardyce for the Defence*, a fairly recent light novel of the barrister-cum-detective type written around a divorce suit, contains an excellent illustration of the dangers of such a question. Cardyce is cross-examining the petitioner as to his having selected a particular girl as his private secretary without having interviewed any of the thirty or forty other applicants for the post. His introductory questions are all excellent and elicit answers that raise an atmosphere of suspicion. But then he asks, "Why?" and receives an explanation which destroys entirely the effect of the previous questions. Like most fiction concerning the Law Courts, *Cardyce for the Defence* is not free from errors of procedure, but its lapses, in this respect, are fewer and less egregious than is often the case.

PRACTICAL POINTS.

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1. Recognizance.—*Breach—Estreat—Application to Court.*

QUESTION: Upon the complaint of my client, defendant was called upon to enter into recognizance under s. 13 (*b*) of the Justices of the Peace Act, 1927. Defendant has committed a breach so that the recognizance may be estreated under s. 31 of that Act. What procedure should be adopted to bring the application in the Supreme Court?

ANSWER: The application for an order estreating the recognizance is an application to the Court, and may be made by notice of motion. Rule 394 of the Code of Civil Procedure states that any application to the Court not required to be made by petition may be made by motion. A supporting affidavit would be necessary setting out the various details, and in proof of the matters mentioned in s. 31 of the Justices of the Peace Act, 1927.

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2. Divorce.—*Petition—Service—Wife Respondent an Inmate of a Mental Hospital in England.*

QUESTION: A divorce petition is to be filed, and as the respondent wife is an inmate of a mental hospital in England—the ground of the divorce petition being that the respondent is a person of unsound mind—it is necessary to file a motion for directions as to service and for an order fixing the time for the respondent to file an answer. Is there any form of special notice provided in such a case for service on the respondent?

ANSWER: Rule 58 of the Matrimonial Causes Rules, 1943, provides for the mode of service. Rule 9 provides for further information or matter to be stated in a notice to a respondent, and see the cases referred to in *Sim on Divorce*, 5th Ed. 120.

In a similar motion upon which an order was made recently at Wellington, a notice as provided in *Bennett* v. *Bennett*, [1931] N.Z.L.R. 38, *mutatis mutandis*, was approved.

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3. Divorce.—*Petition—Soldier-respondent Overseas—Leave to proceed to hearing.*

QUESTION: Divorce proceedings by a wife against a husband, who is a soldier serving overseas, were commenced, and an order for service made as in *A.* v. *A.*, [1940] N.Z.L.R. 394. The respondent was served overseas, and at the time of service he signed a form intimating that he did not intend to defend the suit. The period of four months allowed for filing an answer has not expired; but, as the respondent has signed the form intimating that he does not intend to defend, is it possible to proceed now with the hearing?

ANSWER: In *A.* v. *A.*, [1940] N.Z.L.R. 394, it was held that application to the Court for leave to proceed with the hearing is necessary in these cases. However, in an application made recently at Wellington in similar circumstances, where the respondent had signed a form intimating that he did not intend to defend the suit, the Chief Justice refused an order giving leave to proceed until the time for filing an answer had expired.