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HOTEL LICENSE AND GOODWILL: ENHANCEMENT OF VALUE TO LAND.

II.—ENHANCEMENT OF VALUE.

IN our last issue we showed that, in respect of hotel premises, the license and the goodwill of the business carried on therein, are not, in law, either "land" or "legal or equitable interests in land." And we made special reference to those terms in s. 41 (1) (*a*) of the Servicemen's Settlement and Land Sales Act, 1943, which is as follows:—

> 43. (1) Subject to the provisions of this section, this Part of this Act shall apply to every contract or agreement—
> (*a*) For the sale or transfer of any *freehold estate or interest in land, whether legal or equitable.*

With such a limitation on the jurisdiction of a Land Sales Committee, or, on appeal, of the Land Sales Court, it is the duty of the tribunal to determine the "basic value" of the land in respect of the sale of which its consent is required. We are not concerned here with farm land, so the relevant provision is s. 54, which is as follows:—

> 54. (1) For the purposes of this Act the basic value of any land other than farm land shall be deemed to be the value thereof as at the fifteenth day of December, nineteen hundred and forty-two, as determined by the Land Sales Committee, increased or reduced by such amount as the Committee deems necessary to make it a fair value for the purposes of this Act.
> (2) In determining whether it is necessary to make any increase or reduction as aforesaid, the Land Sales Committee shall consider—
> (*a*) The nature and extent of the estate or interest of the vendor or lessor in the land:
> (*b*) Any increase or reduction since the fifteenth day of December, nineteen hundred and forty-two, in the value of the improvements on the land:
> (*c*) Such other matters affecting the land as the Committee considers relevant.

Now, to come to the facts in the *Oriental Hotel* case. The consent of the Land Sales Committee was sought to the sale of the hotel premises, in pursuance of an agreement for sale and purchase, which, so far as material, provided:

> The vendors agree to sell and the purchasers to purchase—
> (*a*) All that piece or parcel of land more particularly described in the schedule hereto.
> (*b*) The publican's license in respect of "the Oriental Hotel."
> (*c*) The furniture, chattels, fittings, bar-pumps, and stock-in-trade of an hotelkeeper used in connection with the said Oriental Hotel.
>
> The purchase price is to be paid as follows:—
> For (*a*) above the sum of £2,750.
> For (*b*) above the sum of £19,250.
> The price for (*c*) above shall be fixed by valuation . . . and shall be paid along with the purchase-money in respect of (*a*) and (*b*) above.

Further provisions regulated the manner in which the agreed aggregate price was to be paid for everything the subject of the agreement (the several prices being treated as one whole and composite sum), and set out the terms of payment and securing payment of the amount.

In these circumstances, the applicant-vendors contended before the Committee that it was concerned solely with the price expressed to be payable for the land; and that, while under certain specific provisions of the statute, the Committee was entitled to have regard to the price paid for the license, it could only do so to satisfy itself that the price expressed as payable for the license was *bona fide* intended to be paid for the license alone, and that that price did not, as to any part, represent a sum payable in respect of the land. The Crown, however, contended that the value of the license adhered to and enhanced the value of the land, and that the Committee was constrained to consider whether the whole or some part of the sum agreed to be paid in respect of the license was not, in fact, a part of the consideration agreed to be paid for the land.

The Committee, without deciding the difficult questions of law involved, took the view that the evidence before it was insufficient to enable it to form a proper conclusion on at least one of the major features, which it felt itself called upon to determine before it could with propriety grant its consent. It therefore refused its consent to the sale; and, from that refusal, the vendors appealed to the Land Sales Court. At the hearing of the appeal, a great deal of new evidence was presented, and legal submissions of the parties were made and extended.

The Court, in its judgment, after considering the questions of law to which we referred in our last issue, and posing the question we there set out, said that acceptance of the principle that the interest of an owner of an hotel property in the license granted in connection with the hotel, and in the goodwill of the business carried on in the hotel, is not "land" or an "interest in land,"

necessarily removed them, and any transaction exclusively involving them, or either of them, from the scope and operation of the Servicemen's Settlement and Land Sales Act, 1943; because that statute is, as has been already shown, exclusively concerned with transactions in land and in interests in land.

The separate and distinctive character thus ascribed to the license and the goodwill left undecided, however, the question whether, despite their separate and distinctive characters as a matter of legal conception, they do not by their mere existence, add to and enhance the value of the premises to which they are related.

The judgment proceeded:

> The question of enhancement of value by reason of the existence of a license or a goodwill has no relation, it is conceived, to the legal character of a license or of a goodwill, but to the effect of their existence upon the value of the land in relation to which the one was issued and upon which the other is based.
>
> This serves to distinguish this case from such cases as *In re Gilmer, Public Trustee* v. *Commissioner of Stamp Duties*, [1929] N.Z.L.R. 61, where it was held that the interest of an owner in the licenses of four hotels and in the goodwill of the businesses done in them constituted no part of the improved or unimproved value of the premises as those terms are defined in the Valuation of Land Act, 1908. It also serves to distinguish this case from *Heel* v. *O'Neill*, [1933] N.Z.L.R. 319, and *Cox* v. *Harper*, [1910] 1 Ch. 480, where the legal character of the sum paid for goodwill was the sole basis upon which the judgments of all the learned Judges concerned proceeded.
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> As was pointed out by the Court in *Duncan* v. *Mackie*, [1940] G.L.R. 226, 230, what is decisive of whether the value to the premises of the existence of a license with respect to them is to be taken into account or not, is whether the relevant statute or constating authority requires that the added value, if any, conferred by the license should be considered.
>
> It is apprehended that the addition to the value of premises conferred by the existence of a goodwill must also find its basis in a like origin.

If this view be correct, the judgment of the Court proceeded, then the primary subject of inquiry must be the nature of the value which has to be ascertained under the Servicemen's Settlement and Land Sales Act, 1943. Is that value the mere value of the land (a value shared, except for accidental circumstances, by the adjoining areas) together with what might be known, perhaps a little inaccurately, as the replacement value of the buildings, or is recognition to be given to the fact, and additional value assessed by reason of the fact, that the land and buildings, regarded as a whole, are licensed premises, that the buildings are specially adapted for a publican's business—as to which, see *In re Lucas and Chesterfield Gas and Water Board*, [1909] 1 K.B. 16—and that on those premises is centred and has for some considerable time been centred a prosperous publican's business?

The Court answered its own question, as follows:—

> That the additional value so postulated should be taken into account seems the only possible conclusion to be drawn from the fact that it is the basic value of the property—that is, the value as at December 15, 1942, which the Committee or the Court is primarily concerned to determine: s. 54, *cit. sup.* The basic value, with modifications, is to constitute the maximum permissible price. In other words, the vendor, on sale, is to be enabled to get "the value" as at December 15, 1942, of the land he is selling. "Value" in that sense, it is apprehended, means what the land was at that date worth to the vendor: *Stebbing* v. *Metropolitan Board of Works*, (1870) 40 L.J. Q.B. 1.
>
> Differently phrased, "value" means what, with all its advantages and disadvantages, the premises were worth to the owner on the critical date, assuming him to have been, at that date, a man of ordinary prudence and foresight, not anxious to sell for any compelling or private reasons, but willing to sell as one business man would to another, both of them being alike uninfluenced by any consideration of sentiment or need. This language is an adaptation of the words used in the judgment of Barton, J., in the course of his judgment in *Spencer* v. *Commonwealth*, (1907) 5 C.L.R. 418, 435, 436. That was, it is true, a compensation case, but the words, as adapted, seem apposite for all present purposes.

Regard being had to the fact that what the Committee and the Court have to consider is the value of the land sold, the Court said it must necessarily follow that everything which would have added to or would have detracted from the money value of the land if it had been offered for sale on December 15, 1942, must be considered, weighed, and assessed by any tribunal exercising jurisdiction under the Servicemen's Settlement and Land Sales Act, 1943.

The judgment continued:—

> To hold that the existence of a license with respect to premises constituted of land and buildings or that the existence of a goodwill in the business conducted in such premises does not enhance the value of the premises would negative the conception upon which a long chain of legal decisions has been based. These decisions may fairly be said to be declaratory of the result of an extensive human experience and, by their recognition of those results, to be confirmatory of them. Reference in this regard may be made to many cases.

The Court then examined the relevant judgments of the last sixty years, and concluded, from the authorities cited in its judgment, that the enhancement of value due to the existence of a license and the attachment of a goodwill must be considered by every Committee, and by the Court, constituted under the Servicemen's Settlement and Land Sales Act, 1943; and neither any such Committee nor the Court would appear to be bound by the disassociation effected by the form in which the parties elect to phrase their contract.

The judgment continued:

> As a matter of law, divorced altogether from the provisions of the Servicemen's Settlement and Land Sales Act, the transaction as a whole can, in the opinion of the Court, be considered and reviewed and that part of the goodwill payable which, in fact, fairly represents the enhanced value of the premises can be ascertained and treated as part of the price of the premises.
>
> It is considered that, in so acting, the Committee or the Court, as the case may be, will be doing no more than consider the substance of the transaction in conformity with the decisions in *Helby* v. *Matthews*, [1895] A.C. 471, and *Secretary of State for India* v. *Scoble*, [1903] A.C. 299, as interpreted and explained in this relation in *Inland Revenue Commissioners* v. *Duke of Westminster*, [1936] A.C. 1.

In the particular contract respecting the Oriental Hotel with which the Court was concerned, the parties had disassociated the value of the license from the premises to which it related and to which it added value; they had not disassociated, or even mentioned, the enhancement attributable to goodwill. In respect of the latter, therefore, the Committee and the Court, to ascertain the true value of the premises, must inquire and determine the extent to which the goodwill adds to the value of the premises. There was nothing, in so doing, which conflicted with the legal rights or obligations of the parties. In ascertaining and determining the sum which represents this enhancement, the Committee, and the Court, would not be embarking upon any interference with any legal rights and obligations whether regarded in a contractual sense or otherwise.

That, in the view of the Court, was the position at law and apart from the Servicemen's Settlement and

Land Sales Act, 1943. Under that Act the specific right of inquiry conferred by s. 50 (3) (*b*) seemed wholly to cover the case. Related transactions are declared to be "relevant circumstances" to be considered in determining whether consent to a sale should be granted or refused. This does not imply that the Committee or the Court has any jurisdiction over related transactions, but merely that such transactions can be considered as factors in determining whether or not consent should be given to a transaction which does come under the jurisdiction of the tribunal.

Finally, the Court observed that, in fixing the basic value which is, by virtue of s. 50 (4), such a vital factor, the responsible tribunal is required to consider under s. 54 (2) (*c*) "such other matters affecting the land as the Committee considers relevant." This provision is not, the Court thought, to be construed *ejusdem generis* if for no other reason than because the preceding provisions are not definitive of any genus. It added that the ascertainment of the sum by which the license and the goodwill enhance the value of the premises may be a matter of some difficulty, but the nature of that difficulty and the means by which it can be overcome can be gathered from *Simpson* v. *Charrington and Co., Ltd.*, [1934] 1 K.B. 64, and *Whiteman Smith Motor Co., Ltd.* v. *Chaplin*, [1934] 2 K.B. 35, 43, and from others of the authorities referred to in the course of its judgment.

The Court concluded its judgment with useful observations as to the method of assessing the value of an hotel license and goodwill as an enhancement of the value of the premises to which they attach.

On the evidence before it, the Court held the £22,000 agreed to be paid for the Oriental Hotel represented its market value, not only at the date of sale, but also at December 15, 1942; and, this being so, the Court granted consent to the sale.

It follows from this judgment that it is incumbent on a Land Sales Committee, which has to determine, under s. 54 of the statute, the basic value of an hotel property, sold as a going concern with its license and the goodwill of the business pursuant to such license, to what extent (if any) the value of the land and buildings is enhanced by the fact of the existence of the license in respect of them, and that a goodwill value may attach to them in view of the fact that they are the site upon which the publican's business is being conducted. (If other premises are of such a nature that, although they have not a publican's license attached to them, there is a goodwill value inseparable from the land by reason of the business thereon conducted, it is possible that the judgment in the *Oriental Hotel* case may be applicable on an application for consent to a sale of those premises.) In every case where the sale to which the consent of the Land Sales Committee is sought is one and indivisible, the enhancement value must be considered, notwithstanding that the parties in their contract for sale have fixed separate prices for (i) the land and buildings, and (ii) for the license (in the case of an hotel property) or goodwill, or both.

SUMMARY OF RECENT JUDGMENTS.

WESTFIELD FREEZING COMPANY, LIMITED v. HARWOOD.

COURT OF APPEAL. Wellington. 1944. April 3; June 20. MYERS, C.J.; BLAIR, J.; KENNEDY, J.; NORTHCROFT, J.

War Emergency Legislation—Industrial Man-power Emergency Regulations—Minimum Weekly Wages—Method of Computation—Whether Employer may apply Money earned as Overtime to Amount of Minimum Weekly Wage—Industrial Man-power Emergency Regulations, 1942 (Serial No. 1942/296), Reg. 13 (h) (i)—Minimum Weekly Wage (Essential Undertakings) Order, 1942 (No. 2) (Serial No. 1942/320), Cls. 4, 5.

The question in issue, on appeal from the judgment of *Callan*, J., [1943] N.Z.L.R. 681, was whether the Minimum Weekly Wage (Essential Undertakings) Order, 1942 (No. 2), fixes a minimum weekly wage only for work done within ordinary working-hours, or whether it fixes a minimum wage payable to the worker and receivable by him for all work done, including overtime, for that week. The question as to the effect of earnings within ordinary hours being on any day higher than ordinary time rates was not considered.

Held, by the Court of Appeal (*Blair*, *Kennedy*, and *Northcroft*, JJ., *Myers*, C.J., dissenting), That the Minimum Weekly Wage (Essential Undertakings) Order, 1942 (No. 2), fixes a minimum weekly wage payable to the worker and receivable by him in respect of all work done, including overtime, for the week.

The appeal is reported on the above point only. The question whether the order is *ultra vires* the powers conferred on the Minister by the regulations is dealt with in the several judgments, and answered by the majority in the negative.

Appeal from the judgment of *Callan*, J., [1943] N.Z.L.R. 681, allowed.

Counsel: *Sim*, K.C., and *Alderton*, for the appellant; *Cleary* and *Sullivan*, for the respondent.

Solicitors: *Lisle Alderton* and *Kingston*, Auckland, for the appellant; *J. J. Sullivan*, Auckland, for the respondent.

THE KING v. REID.

COURT OF APPEAL. Wellington. 1944. June 15; July 7. MYERS, C.J.; JOHNSTON, J.; FAIR, J.; NORTHCROFT, J.

Criminal Law—Reformative Detention—Habitual Criminal—Sentence—Declaration that Prisoner an Habitual Criminal made in Conjunction with Head Sentence of Reformative Detention—Whether such Sentence valid—Crimes Act, 1908, s. 29—Crimes Amendment Act, 1910, s. 3 (1).

Where under s. 3 (1) of the Crimes Amendment Act, 1910, the sole punishment imposed is a period of reformative detention, the offender must be sentenced to be forthwith committed to prison to be there detained for reformative purposes. A period of reformative detention can only commence *in futuro* when it is imposed as part of the sentence in respect of a particular offence, to commence on the expiration of the term of imprisonment then imposed in respect of that offence. A sentence of reformative detention cannot be imposed by itself as the sole punishment in respect of one offence to commence on the expiration of a term of imprisonment imposed in respect of a different offence.

In re Moulin, [1943] N.Z.L.R. 325; G.L.R. 20, approved.

Sentences of reformative detention cannot be cumulative.

Dictum of *Sir Robert Stout*, C.J., in *R.* v. *Crago*, [1917] N.Z.L.R. 863, 875; G.L.R. 607, 613, approved.

A declaration of a person as an habitual criminal cannot be made in conjunction with a head sentence of reformative detention. It can only be made as part of a sentence where what is called the head sentence is a term of imprisonment with hard labour.

So held by the Court of Appeal (*Myers*, C.J., *Johnston*, *Fair*, and *Northcroft*, JJ.), on an appeal against sentence, and quashing a declaration that the prisoner was an habitual criminal and confirming the head sentence of reformative detention.

Counsel: *C. H. Taylor*, for the Crown; *Hardie Boys*, for th appellant.

Solicitors: *Crown Law Office*, Wellington, for the Crown.

OTAGO HARBOUR BOARD v. MACKINTOSH, CALEY, PHOENIX, LIMITED (No. 2).

SUPREME COURT. Dunedin. 1943. August 26. 1944. April 26; June 6. NORTHCROFT, J.

War Emergency Legislation—Economic Stabilization Emergency Regulations—Lease—Application to fix "Fair rent"—Leases in same Class formerly subject to Reduction under National Expenditure Adjustment Act, 1932—Reduction restored in great Majority of such Leases—Whether Non-restoration in Lease of same Class a "Special circumstance"—Economic Stabilization Emergency Regulations, 1942 (Serial No. 1942/335), Reg. 16 (2).

The company held certain premises under a lease dated August 8, 1929, for the term of fourteen years, from July 1, 1929, at the yearly rental of £612, which was reduced by 20 per cent. under the National Expenditure Adjustment Act, 1932. The term of that lease expired on June 30, 1943. After valuations, made in accordance with the terms of the lease, the annual ground rent was fixed at £680 per annum; and a lease for a further fourteen years was put up to public auction at the upset annual rental of £680. The company purchased the new lease at the auction by bidding that upset rent. Notwithstanding the terms of the new lease, the basic rent under the Economic Stabilization Emergency Regulations, 1942, was the rent payable under the former lease—namely, £612 less 20 per cent., or £489 12s.

The parties agreed that the rent should be increased to £612, and applied to the Court to fix that sum as the "fair rent" under the regulations for the new term. It was shown by evidence that the Board had granted one hundred and fifty-nine leases similar to the company's former lease, all of which were affected by the National Expenditure Adjustment Act, 1932. Of these one hundred and forty-two had had the reduction of 20 per cent. restored completely and eleven had had the reduction restored in part; and in six only (including the company's former lease) was the reduction not restored.

Held, That the practice of restoring the reduction of 20 per cent. required by the National Expenditure Adjustment Act, 1932, in the rents of the majority of the Board's leases similar to the company's lease, and before the coming into force of the Economic Stabilization Emergency Regulations, 1943, and the fact that such reduction remained unrestored in only a few, of which the company's former lease was one, constituted a "special circumstance" within the meaning of Reg. 16 (2) of the regulations, and justified the Court in making the order sought, and in fixing the fair rent of the company's new lease at the increased sum agreed upon—namely, £612.

Otago Harbour Board v. *Mackintosh, Caley, Phoenix, Ltd.*, [1944] N.Z.L.R. 24, followed.

Counsel: *Stephens*, for the plaintiff; *Hanan*, for the defendant.

Solicitors: *Mondy, Stephens, Monro, and Caudwell*, Dunedin, for the plaintiff; *F. M. Hanan*, Dunedin, for the defendant.

SIEVWRIGHT v. WELLINGTON COLLEGE AND GIRLS' HIGH SCHOOL GOVERNORS.

SUPREME COURT. Wellington. 1944. March 15, 30, 31; May 11. SMITH, J.

War Emergency Legislation—Economic Stabilization Emergency Regulations—Lease—Application to fix "Fair rent"—Glasgow Lease—Application by Lessee during Currency of existing Contract—Principles on which "Fair rent" determined—"Relevant matters"—Whether Basic Rent may be reduced—Economic Stabilization Emergency Regulations, 1942 (Serial No. 1942/335), Reg. 6.

On an application under the Economic Stabilization Emergency Regulations, 1942, by a party to an existing lease to fix for the duration thereof a new "fair rent" in lieu of the existing rent to which the parties have already bound themselves by such lease, the following principles apply:—

(*a*) The existing rent is the "fair rent" unless matters which are relevant under the said regulations can be established that are so strong as to justify the breaking and varying of the contract.

(*b*) "Relevant matters" on such an application may be a depression or serious change in the economic conditions upon which the stabilization policy had been imposed resulting in a fall in values since September 1, 1939, if it had occurred.

Otago Harbour Board v. *Mackintosh, Cayley, Phoenix, Ltd.* [1944] N.Z.L.R. 24, followed.

Quaere, Whether a basic rent should be reduced because for the remainder of the term of the lease it appears to be anomalously high.

Semble, 1. Assuming that the applicant could show that his basic rent was anomalously high when compared with the standard of other rents with which it might reasonably be compared, he would have established a matter which is relevant to the consideration of the question, whether, in order to make his rent fair, the basic rent should be reduced during the term of the contract under which it was payable.

2. In the case of a Glasgow lease in perpetuity under the First Schedule to the Public Bodies' Leases Act, 1908, in which the annual ground rent for the first term is fixed by the highest bid at a public auction, but the annual rent for each subsequent term (therein termed "the fair annual rent") is fixed by the valuation of arbitrators, the rule laid down by law upon which the said arbitrators must proceed in the latter case—*viz.*, that the ground rental for a renewed term between a lessor and a building lessee should be represented by a moderate rate of interest on the capital value of the unimproved land—has no relevance to the question whether the highest rental bid at a public auction for the first term of a lease in perpetuity (which carries with it the right to hold the land in perpetuity) is or is not the "fair rent" for the purposes of the regulations during the continuance of the term.

Counsel: *Weston*, K.C., and *Heine*, for the applicant; *T. C. A. Hislop*, for the Governors of Wellington College.

Solicitors: *W. Heine*, Wellington, for the applicant; *Brandon, Ward, Hislop, and Powles*, for the respondents.

In re ORIENTAL HOTEL, MUIR AND ANOTHER TO NIALL AND ANOTHER.

LAND SALES COURT. Dunedin. 1944. March 20, 21; May 19. FINLAY, J.

Vendor and Purchaser—Land Sales—Basic Value—Hotel Premises—Sale of Land, License, and Goodwill—Separate Prices for Land and for License—Extent to which License and Goodwill an Enhancement of the Value of the Land—"Value"—Servicemen's Settlement and Land Sales Act, 1943, ss. 43 (1), 50 (3) (b), 54 (2) (e).

Under s. 43 (1) of the Servicemen's Settlement and Land Sales Act, 1943, jurisdiction is given solely and exclusively in respect of dealings in land and in legal and equitable interests in land; and licenses granted under the Licensing Act, 1908, and the goodwill of businesses as conducted pursuant to such licenses, are not land and do not constitute legal or equitable interests in land.

Nevertheless, in determining the "basic value" under s. 54 of the Servicemen's Settlement and Land Sales Act, 1943, of an hotel (sold as a going concern together with a publican's license and the goodwill of the hotel business pursuant to such license), the Land Sales Committee and, in its turn, the Land Sales Court, must 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.

This must be done in every case where the transaction is one and indivisible even if the parties have in their contract of sale fixed separate prices for (*a*) the land and the buildings, and (*b*) for the license or goodwill, or both.

In re Gilmer, Public Trustee v. *Commissioner of Stamp Duties.* [1929] N.Z.L.R. 61; *Heel* v. *O'Neill*, [1933] N.Z.L.R. 319, G.L.R. 395; and *Cox* v. *Harper*, [1910] 1 Ch. 480, distinguished.

Semble, The provision in s. 54 (2) (*d*) of the Servicemen's Settlement and Land Sales Act 1943, which requires the responsible tribunal in fixing the basic value to consider "such other matters affecting the land as the Committee considers relevant," is not to be construed *ejusdem generis* with the matters specified in paras. (*a*), (*b*), and (*c*), because those provisions are not definitive of any genus.

In the present case, it was held by the Land Sales Court, on appeal from the refusal of a Land Sales Committee to consent to an agreement for the sale of an hotel as a going concern, that the sale price must be taken to be the total purchase price payable for the land, license, and goodwill; and that that sum did not exceed the basic value of the premises—*viz.*, their value as licensed premises and the site of a prosperous business on December 15, 1942.

Counsel: *Sinclair*, for the vendor appellants; *F. B. Adams*, for the Crown.

Solicitors: *Ferens and Jeavons*, Dunedin, for the appellants; *Adams Brothers*, Dunedin, for the Crown.

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.

VIII.—The Immediate Effect of Adopting The Statute. (*Continued from p. 154.*)

Section 5 of the Statute.—Section 5 reads thus: "Without prejudice to the generality of the foregoing provisions of this Act, sections 735 and 736 of the Merchant Shipping Act 1894 shall be construed as though reference therein to the Legislature of a British possession did not include reference to the Parliament of a Dominion."

As the introductory words suggest, the effect of this section may already be covered by sections 2 and 3, but it makes the position doubly sure. Its appearance is no doubt due to the importance that shipping topics assumed at the Imperial Conference of 1926.

Section 735 of the Merchant Shipping Act 1894 of the United Kingdom (which is part of the law of New Zealand) enables the legislature of any British possession to repeal any of its provisions (except some relating to emigrant ships), so far as they relate to ships registered in that possession; but the repealing Act must be reserved for the Royal Assent. Seeing that a ship may ply all her life without revisiting the country in which her port of registry is situate, and that restrictive legislation of a Dominion limited to ships registered there would penalize their owners in competition with ships plying there but registered elsewhere, and merely drive them to another registry, the powers of this section are of little importance.

Section 736 of the same Act enables the legislature of any British possession to regulate the coasting trade of that possession; but the regulating Act must be reserved for the Royal Assent, must treat all British ships alike, and must preserve any coastal trading rights granted to a foreign power before 1869.

Section 6 of the Statute.—Section 6 reads thus: "Without prejudice to the generality of the foregoing provisions of this Act, section 4 of the Colonial Courts of Admiralty Act 1890 (which requires certain laws to be reserved for the signification of His Majesty's pleasure or to contain a suspending clause), and so much of section 7 of that Act as requires the approval of His Majesty in Council to any rules of Court for regulating the practice and procedure of a Colonial Court of Admiralty, shall cease to have effect in any Dominion as from the commencement of this Act."

This section probably appears for the same reason as section 5. The Court of Admiralty in New Zealand is the Supreme Court, by virtue of section 2 of the Colonial Courts of Admiralty Act 1890 of the United Kingdom, in force in New Zealand. Section 4 of that Act, cited above, enables the General Assembly to make other Courts of Admiralty, but only by an Act reserved for the Royal Assent; and, by similar reserved Act, to legislate for their jurisdiction and their practice and procedure. Section 7 refers to Court rules (as distinguished from Acts) about practice and procedure. Whoever makes either Acts or rules about Admiralty procedure, the main thing is that they be uniform; first, so that litigant parties (who in these cases are often resident outside the jurisdiction) and their oversea advisers may not be under the handicap of making decisions affected by unfamiliar procedure; and, secondly, so that the Court may, on points of procedure, have the assistance of precedents laid down where the volume of litigation is great enough to ensure that most debateable points arise and are settled.

IX.—The Statute and the Constitution Act.

Section 8 of the Statute of Westminster is already in force in New Zealand, and (omitting words referable only to Australia) reads as follows: "Nothing in this Act shall be deemed to confer any power to repeal or alter . . . the Constitution Act of the Dominion of New Zealand otherwise than in accordance with the law existing before the commencement of this Act." Whatever the motive that led to the insertion of this provision, it had one practical effect—the preservation of the rights of British investors referred to in Chapter X below.

A constitution is said to be "flexible" when the constitutional or "fundamental" laws can be altered by the same legislature as passes other legislation. That of the United Kingdom is the chief, if not the only, instance of a constitution completely flexible. One consequence is that the legal validity of an enactment can hardly be questioned, the only possible issue, and one not arising under modern methods, being whether something put forward as a piece of legislation was in fact enacted with the necessary formalities.

A constitution is said to be "rigid" when the constitutional laws, or a substantial portion of them, require special procedure for their alteration. Much of the constitutional law of the Commonwealth of Australia is contained in the constitution appended

to the Commonwealth of Australia Constitution Act (1900) of the United Kingdom, and can be altered only by a referendum, or (in theory) by the United Kingdom Parliament. The British North America Act 1867 can be altered only by Act of the United Kingdom Parliament (which has not infrequently been called upon for that purpose). The rigidity of constitutions of a federal type safeguards the rights of the constituent states. A consequence is that whether ordinary legislation infringes the constitutional law and is therefore invalid is an issue frequently arising in the Courts, giving rise to a branch of jurisprudence of which less is heard under constitutions of a unitary type, even though the latter may contain elements of rigidity.

The Constitution Act of New Zealand as originally enacted in 1852 was substantially rigid. Certain provisions about electoral districts, the franchise, the constitution of the House of Representatives, similar provisions touching the provinces and provincial councils, and the fixed appropriations for the Governor's salary and Native purposes could be altered by the General Assembly (but only by reserved Bill). Other alteration could be made only by the United Kingdom Parliament. The Constitution Amendment Act of 1857 gave power to the General Assembly to alter, suspend, or repeal all the provisions of the Constitution Act except certain "entrenched" sections; from that time the constitution has been describable as "semi-flexible." Virtually all the unentrenched sections have now been superseded by other legislation, principally the Civil List Act 1920, the Legislature Act 1908 (the unrepealed provisions of which relate to the Legislative Council and the privileges of Parliament), and the Electoral Act 1927 (relating to the House of Representatives).

The principal entrenched sections are those declaring that there shall be a General Assembly, and that it shall consist of the Governor, Legislative Council, and House of Representatives (section 32); conferring legislative powers on the General Assembly, subject to the restrictions about extra-territorial effect and repugnancy already noticed (section 53); making provision for assent, reservation, and disallowance of Bills (sections 56, 57, and 58); prohibiting duties on supplies for royal forces or contrary to a treaty between Her Majesty and a foreign power (section 61); requiring (as already mentioned) reservation of Bills to alter the Governor's salary, or the fixed appropriation for Native purposes (section 65); and forbidding an Act to diminish the salary of a Judge to take effect during the continuance in office of any person being a Judge at the time of the passing of such Act (section 65, proviso).

Section 5 of the Colonial Laws Validity Act, passed in 1865 by the United Kingdom Parliament, gives a representative colonial legislature "full power to make laws respecting the constitution, powers, and procedure of such Legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament"—*i.e.*, Act of the United Kingdom Parliament. It has been suggested that the Colonial Laws Validity Act strikes off the fetters retained by the Constitution Amendment Act. It may be observed, however, (1) that section 2 of the Statute of Westminster, if adopted, will in effect repeal the whole of the Colonial Laws Validity Act—unless section 8 of the Statute inferentially revives it; (2) that even if it be regarded as so revived, "manner and form required by any Act of Parliament" may, when applied to the intendment of the Constitution Act and Constitution Amendment Act, mean that the manner and form required are those of an Act of the United Kingdom Parliament; (3) that there is much in the entrenched sections covering wider topics than the "constitution, powers, and procedure of the Legislature": reservation and disallowance, for instance, are a matter of the powers of the Crown, and only in a negative sense a matter of the powers of the Legislature; and (4) that twice since the Act of 1865 was passed—*i.e.*, by two Acts of 1868, both now superseded and repealed—the United Kingdom Parliament has come to the assistance of New Zealand by passing constitutional enactments, a course that would hardly have been justified if the Act of 1865 had then been thought to have the force that has more recently been ascribed to it. The better opinion to hold, and obviously the safer view for the General Assembly to adopt, if possible litigation is to be averted, is that if the General Assembly is to be free to deal with the Constitution Act, it must first, presumably in a manner similar to that which was followed in promoting the Statute of Westminster, prefer its request to His Majesty that the United Kingdom Parliament shall be asked to pass another Constitution Amendment Act by which all the remaining sections of the Constitution Act shall become disentrenched.

As has been indicated, the effect of the Colonial Laws Validity Act 1865, which on adoption of section 2 of the Statute will not apply to future New Zealand Acts, is to extend the powers of the General Assembly under the Constitution Act. Its most important provisions, sections 2 and 3, will be replaced, and in ampler form, by section 2 of the Statute. Nevertheless section 4 of the Act of 1865, which prevents a New Zealand Act from being void for non-compliance with Royal Instructions, is not so replaced; and in view of the complication introduced by section 8 of the Statute it is not clear that substituted legislation to the same effect could be made in New Zealand. Without adjustment of the Constitution Act it may be that the immediate effect of adoption of the Statute would on this point be to narrow, rather than enlarge, the powers of the General Assembly.

X.—New Zealand Loans.

Section 32 of the New Zealand Loans Act 1932 reads thus: "If at any time hereafter any Act of the General Assembly is passed which in the opinion of the Imperial Government in any way injuriously affects the rights or remedies of the holders of New Zealand Government securities, or alters the terms of the contract under which such securities were created or issued, then that Act may properly be disallowed by His Majesty."

The circumstances leading to the passing of this section, and corresponding sections of earlier Acts, are these. It has been regarded as essential to the successful flotation of a British possession's loan on the London market that it should be available as an investment for trustees under United Kingdom law. Prior to 1934, this required compliance with conditions prescribed by the British Treasury under section 2 of the Colonial Stock Act 1900. One of the conditions so prescribed (on 6th December, 1900) reads thus: "The Colonial Government shall place on record a formal expression of their opinion that any Colonial legislation which appears to the Imperial Government to alter any of the provisions affecting the stock to the injury of

the stockholder, or to involve a departure from the original contract in regard to the stock, would properly be disallowed." New Zealand's compliance with this condition is now contained in the section of the New Zealand Loans Act 1932 set out above.

If the provisions of the Constitution Act about disallowance were removed from the statute-book, section 32 would cease to have any legal effect, and there would be no means of offering effective compliance with the Treasury condition set out above. To assist a Dominion to achieve the somewhat difficult task of both eating its cake and having it—of assuming legislative independence by removal of the power of disallowance, and yet of retaining the favourable position of having its loans rated as trust investments—the United Kingdom Parliament came to the rescue, in connection, it is believed, with the legislative changes pending at the time in South Africa. By the Colonial Stock Act 1934 an alternative method was offered (in the case of a British possession being a Dominion) of complying with the condition set out above; it was provided that the condition should be deemed to be satisfied if the Dominion Government undertook that possibly deleterious legislation should not receive the Royal Assent except after agreement with the United Kingdom Government, and if this undertaking were confirmed by an Act of the Dominion Parliament. A somewhat disconcerting result of removing the formal power of disallowance has thus been obviated.

XI.—Nationality.

Nationality is a topic on which adoption of the Statute can have no bearing. It is sufficient to say that there is a general status of "British subject," and most persons who are British subjects anywhere are British subjects everywhere. There are, however, people who are British subjects in one jurisdiction but not in others. For instance "British subject according to the law of the United Kingdom" includes persons who were naturalized in the United Kingdom under the laws providing for naturalization with locally-restricted effect which were superseded by the British Nationality and Status of Aliens Act 1914. The term excludes persons who obtained locally-effective naturalization in the dominions under corresponding local laws; unless (in either case) they have obtained fresh certificates of naturalization under the current law; probably it also excludes persons naturalized in South Africa or New Zealand without being required to possess an adequate knowledge of the English language, a requirement which the United Kingdom Act of 1914 expressly stipulates. So "British subject according to the law of New Zealand" includes persons naturalized in New Zealand under laws superseded by the British Nationality and Status of Aliens (in New Zealand) Act 1928 (unless their status has been subsequently enlarged), and Samoans naturalized notwithstanding non-residence on British soil and inadequate knowledge of the English language, and the issue of such persons; but excludes persons possessing only locally-effective naturalization granted in other jurisdictions; whilst a woman who is a British subject, marries an alien, and thereby acquires her husband's nationality, becomes entitled, if she makes the prescribed declaration, to retain in New Zealand all the rights of a British subject, though technically she does not possess the status of a British subject.

Some of the Member States of the British Commonwealth (Canada, South Africa, and Eire) have created and defined the status of citizen or national of that State, a species of sub-nationality usually falling within the wider British nationality—though there may be cases of admission to the former and not to the latter. In international relations, it is probable that all the Member States have their own nationality, whether formally defined or not; because in modern conditions it is difficult to conceive of a state enjoying international recognition without having (1) a defined territory in which the state enjoys jurisdiction and (2) people who are associated with it in the accepted relationship of sovereign and subject, and who thus "belong" to it in a way in which they do not belong to any other community.

The position remains that where domestic rights or liabilities depend on national status, the relevant status is that of British subject according to the law of New Zealand.

XII.—The Judiciary.

Judicial functions of government were not affected by the enactment of the Statute of Westminster and will not directly be affected by adoption of sections not now in force.

The principle of judicial independence, which means that members of the superior bench shall have nothing to hope and nothing to fear from the executive government, has long been substantially established. The fear of dismissal is met by the Judicature Act 1908, under which appointments are made for a term that lasts till the statutory retiring-age, a Judge being removable only on the address of both Houses of the Legislature. There is indeed provision for temporary acting-appointments, a power capable of misuse, but sparingly exercised. Questions of preferment are obviated by the law that all puisnes receive the same status and salary; by the circumstance that the personnel of the Court of Appeal is that of the Supreme Court; and by the convention that a puisne Judge never becomes Chief Justice. Financial independence is secured by the provision of the Judicature Act 1908 that the salary of a Judge shall not be diminished during the continuance of his commission. This provision virtually repeats the proviso to section 65 of the Constitution Act, that no Act of the General Assembly may make a diminution of a Judge's salary to take effect during the continuance in office of any person being "such" Judge at the time of passing of such Act; so long as section 65 is an "entrenched" section, its protection differs by the character of inflexibility from any that an Act of the General Assembly can confer. Financial independence is further promoted by the inclusion of Judges' salaries in the Civil List, so as not to be subject to annual appropriation; though an increase of salary upon a new appointment could hardly be withheld from existing Judges. Travelling-allowances, indeed, which in New Zealand are necessarily considerable, are in the discretion of the executive government. Moreover, additional remuneration has at times been received by a Judge serving upon a commission of inquiry.

Adoption of section 2 of the Statute will however indirectly affect the right of appeal to the Privy Council. This right was at one time regarded as depending on prerogative grant. It is, however, competent for any legislature to invade the field of the prerogative. The right of appeal is now regarded as depending on the Judicial Committee Acts passed by the United Kingdom Parliament in 1837 and 1844. A modification of the right of appeal by the General Assembly would therefore at present be void for repugnancy to the latter Act. With this bar removed the General Assembly would be free to modify or abrogate the right of appeal as it thought fit.

(To be concluded.)

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. 5.—I. S. P. Co., Ltd. to L.

Renovations and Reconditioning—Property purchased in Bad State of Repair in 1943—Reconditioning Cost—Extent of Additional Value—Estimate of Present Sale Value.

The vendor company in August, 1943, purchased an old house property, then in a bad state of repair, for £575. It then proceeded to recondition the house to a certain extent. The reconditioning was partial and not comprehensive in that only the work which was visibly necessary was done. No attempt was made to examine the building above the ceiling or under the floor.

On this work of reconditioning the company claimed to have spent a total sum of £286 6s. 2d. The expenditure of this amount was questioned by the Crown, and its contention was supported by Mr. S., a builder, who estimates that the work done by the vendor company could have been done for a total sum of £220.

The Court said: "The Committee in dealing with the application seems to have assumed that only that proportion of the expenditure incurred by the vendor company which could fairly be designated as expenditure by way of improvements should be allowed in addition to the purchasing price paid by the vendor company. As a result, the Committee assessed a sum of £120 as the only amount which the vendor company could properly claim to add to the price paid by it for the property. This showed the company entitled to sell for £695, which sum the Committee treated as £700 in the order granting its consent.

"The assumption thus made seems to the Court erroneous. The house was bought by the present vendor company as a dilapidated building and any sum spent by the company in the way of reconditioning must be regarded as *pro tanto* changing the character of the building by altering its condition. The company is entitled therefore to add to the price paid by it for the property the whole additional value created by its expenditure.

"The whole of the evidence leads the Court to the conclusion that the appellant company paid a reasonable price for the property. To that sum can properly be added the reasonable value of any restoration work done by the company, as well as the reasonable value of any improvements effected.

"The position is thus phrased because a considerable part of the work done by the appellant was done with the aid of the company's painting staff. It may well be, therefore, that the work as a whole cost more or is, perhaps, not as well done and so not worth as much as if journeymen carpenters had done all the work. However, despite his criticism of the quality of the work, Mr. S. agrees that it does represent value for an expenditure of £220; he has, however, expressly left out of account the cost of the Boracure spray, which came to £3, and the cost of applying the spray, which is given as £9 10s., so that his aggregate assessment of value should be £232 10s.

"A careful examination of Mr. S.'s details of costs has demonstrated to the Court that in several respects Mr. S.'s computation has not allowed a sufficient sum in respect of cost. In the first place he fixed his plumbing costs at £34 3s., whereas the plumbing accounts show that the actual cost was £44 3s. 7d. Mr. S.'s assessment under this heading was therefore,, £10 less than it should have been. Then, Mr. S. appears to have underestimated the timber somewhat. The actual cost of timber supplied is shown by the invoices produced by the appellant company to have been £43 2s. 4d. Mr. S. allowed £34 2s. only, so that his assessment, seeing that none of the invoiced timber was diverted elsewhere, will have to be increased by a further £9 on this account. It seems to the Court too that Mr. S. underestimated to some extent the carpenter's account. For the work done by the carpenter he allowed £25 only, but the company paid to a journeyman carpenter for work actually done by him the sum of £34 2s. It seems, therefore, that Mr. S.'s estimate should be increased by a further sum of £9 on this account. In addition Mr. S. apparently allowed for cartage on timber only, whereas Mr. M., the managing director of the appellant company, claimed there was £5 additional cartage above the timber cartage.

"Save in the respects to which specific reference has been made, the Court accepts the evidence of Mr. S. as correct and reliable. In the result, however, his estimate of £220 has to be increased in respect of the items expressly mentioned by an aggregate sum of £45 10s. or to a total of £265 10s. If this sum be added to the original cost of the house, the basic value would appear to be £840 10s.

"In a matter of this kind, it is difficult to determine values within narrow limits, and it may well be that the value of the improvements effected by the appellant company does, in fact, somewhat exceed what an analysis of the figures would appear to suggest. If it does exceed the figure mentioned above by the relatively small sum of £9 10s., the present value of the property as deposed to by the land-agent witnesses who were called by the appellant company would be fully substantiated.

"We think, in the circumstances, that, taking a broad view of the whole position, we should regard our computation of the value of the work more in the nature of a test than a definitive method of calculating the value, and as that test substantially confirms the testimony given by the appellant company's witnesses, we fix the basic value of the property at £850.

"Consent to the sale is given on condition that the price is reduced to that sum."

No. 6.—G. to M.

Farm Land—"Economic Unit"—Farming Policy—Differing Views of Witnesses—Suitability of Land—Dwelling—Relation to Property.

This appeal from the decision of a Rural Land Sales Committee related to the sale of a freehold farm of 150 acres situated in the foothill country some six and a half miles from Timaru. Consent was asked to the sale of the property at £2,850. Consent was given by the Committee subject to the consideration being reduced to £2,500. Against this decision the vendor had appealed, asserting that the basic value of the property in terms of the Servicemen's Settlement and Land Sales Act, 1943, was at least £2,850, if not more.

The evidence led for the Crown on the hearing of the Appeal was designed to establish that the property was not what is known as "an economic unit": by this it was suggested that the property was not one which, when farmed by a reasonably efficient farmer, would produce any adequate financial return after allowing for what may be compendiously defined as "reasonably necessary expenditure and reasonable remuneration for the work done by the farmer or other person engaged in the production of the income."

The appellant, on the other hand, led evidence which, if accepted, would not only establish that the farm was an economic unit but that its basic value, on the basis defined in s. 53 of the statute, was and is either £3,422 or £5,688 or £5,844, according to the particular witness called by the appellant whose testimony was accepted as correct.

Each of the appellant's witnesses, in order to increase the financial return from the property, relied to a very material extent upon the production of specific, but different, remunerative crops. Even where they relied upon the same kind of crop they differed materially as to the area to be devoted to that crop.

Thus Mr. C. suggested that 10 acres of linen flax be grown. This he expected to return £105. Then he suggested that, in addition, three further crops be sown. First, 10 acres of Montgomery clover, which he assumed would produce £250; secondly, 10 acres of grass seed, which he assumed would produce a return of £100; and, thirdly, 20 acres of wheat, to produce an estimated return of £201 5s. To enable the foregoing

policy to be followed, Mr. C. proposed that the stock on the place should be limited to 175 breeding ewes and 80 other ewes acquired for fattening only. If his policy of farming be followed in its entirety, Mr. C. expected a total gross income of £991 17s. 6d.

Mr. A., on the other hand, proposed that 30 acres of wheat be grown to produce an estimated return of £331 10s. The only other crops that he suggested should be sown were sufficient potatoes to produce 6 tons, which should, he said, return £48, and 5 acres of turnips which he said should return £20.

Mr. A.'s policy allowed sufficient scope for the property to carry many more breeding-ewes than Mr. C. proposed should be carried. In addition, Mr. A.'s policy allowed for the grazing of a number of milking cows from which income could be earned. Mr. C. did not envisage the use of the property for dairying purposes at all. Mr. A. expected an aggregate gross return of £1,013 3s. 4d.

Mr. O. proposed to devote 14 acres to the production of linen flax, 2 acres to the production of potatoes, and 21 acres to the production of wheat. He did not, however, propose to carry any dairy cows, and, according to his policy, the balance of the property outside the area used for the production of linen flax, potatoes, and wheat should be devoted to the carrying of mostly breeding-ewes. Mr. O., under his policy, expected a return of £981 11s.

The Court said: "No budget was submitted by either of the Crown witnesses. None produced by them would, of course, be of any use if, as they contend, the property is not an economic unit. Whether it is an economic unit or not is the primary question that calls for decision. If it is, then the method of assessing the value laid down in s. 53 of the Act must be followed; if not, then some other method must be employed.

"In this relation, one general comment, without reference to the evidence given by any particular witness, needs to be made. It is that it is a simple matter for witnesses to optimistically create returns by suggesting that particular crops, calculated to produce a high return, should be grown. Such anticipated crops always develop in remunerative quantities and to a reasonably good standard of quality. They never suffer setbacks from blight or disease, and always find a ready market. Such being the case, it is always essential to determine whether it is reasonably practicable to produce any suggested crop from any particular area of land.

"In this relation, it appears a fair assumption that any average efficient farmer will adopt as the basis for consideration of his own farming policy the established practice followed by farmers in his neighbourhood and vicinity. Such men know from experience the characteristics and peculiarities of the land, and are alive to its potentialities in some respects and its deficiencies in others. They know, too, the climatic conditions which can, with reasonable assurance, be expected at any given period of the year. They know market conditions. If, therefore, they are found not growing any crop which in itself is remunerative, then there is generally good reason for their failure to grow that crop. Either it will have been found from experience not to grow well in that district or the climate is in some respect unsuitable, or that particular crop in that district is peculiarly susceptible to disease or to deterioration from other causes.

"Then, too, market conditions may be in some respect difficult; but whatever the cause, it can generally be assumed, at least *prima facie*, that if farmers in any district do not grow any particular crop then there is some good reason why they do not do so.

"With this conception in mind, one cannot accept, without some degree of hesitancy, the suggestion that this particular property should be used to produce crops which neither the vendor himself nor any of his neighbours have produced in the past. It is suggested that one neighbour has, to some minor extent, grown some potatoes, but to what extent and with what financial result was not disclosed.

"However, the suitability of the land for such crops as was suggested was not made the subject of any adequate investigation by either party to this proceeding. This was no doubt due to the fact that this was the first case heard in the district, and the appellant was, therefore, at some disadvantage in that he had no clear knowledge of what evidence was required.

"The Crown representative, on the other hand, was presented with the suggestions in Court and had no opportunity of giving any adequate thought to the proposals and still less of calling evidence with respect to them. This lack of opportunity very largely accounts for the fact that the budgets produced by the various witnesses for the appellant were not made the subject of any pungent criticism of a general character by the Crown witnesses or by the Crown representative. They were criticized on points of detail, but not further or otherwise.

"The Court does not feel itself, therefore, in a position to express with confidence any concluded view as to whether the farm is an economic unit or not. There is much to suggest that it is not in the evidence of the Crown witnesses, and they are confirmed by the statement made by the proposed purchaser in his application that the 176 acres of similar land in the neighbourhood which he is now farming is such that, to use his own words, 'there is barely a living' to be made off it.

"However, having regard to the uncertainties which the evidence has failed to remove, and the importance of the case to both vendor and purchaser, the Court is of opinion that in the interests of justice the case should be referred back to the Committee for further consideration. This will not only conform with propriety, but also ensure that, on the hearing of the application, the parties will have the benefit of the local knowledge possessed by the members of the Committee as well as the benefit of their practical experience.

"There is another important factor calling for consideration, as to which the Court was afforded insufficient evidence. This has relation to the house upon the property. One witness for the appellant suggested that an expenditure of £50 upon the house will make it what he defined as 'livable.' Another said that something would have to be spent upon the house to make it what he called 'habitable.' The Crown witnesses, on the other hand, thought the house to be in a ruinous state.

"The condition of the house is material because, if the farm is an economic unit, the cost of providing a reasonable habitation for the farmer, whether by way of reconstruction or repair, must constitute a debit item in the computation of the basic value. If it should be determined that the farm is not an economic unit, then its value will have to be determined by other means than those applicable to an economic unit.

"Merely finding that the land is not an economic unit does not by any means imply that it has not a substantial value; it is of use and has a productive capacity, and a value of its own. There are doubtless people who could work it in conjunction with other land or in circumstances which would not involve the cost of erecting buildings. Fundamentally the productive value of similar areas adjoining or in the general vicinity will, in such cases, constitute the basis upon which any consideration of value in such a contingency will proceed, but the price at which it would sell is also a factor.

"It may possibly be saleable to persons wishing to reside upon it and farm it whilst earning an income from other sources. There may be other circumstances creating value beyond those specifically mentioned. All these will call for consideration. Suffice it, however, to say that in any assessment of value, regard will have to be paid to the fact that the land, by reason of its limited area, cannot be farmed profitably as a self-contained unit.

"It is at this point that the provisions of s. 53 (2) of the Act can with propriety be applied.

"These general comments are made with a view to facilitating the reconsideration of the application by the Committee in terms of the order now made. The application is referred back to the Committee for further consideration in terms of s. 21 (3) of the Act."

No. 7.—R. TO B.

Farm Land—Productive Value—Evidence of Carrying-capacity of nearby Farms—Variation in Quality of Land in District—Evidence of Practical Farmers and Valuers preferred.

The matters debated before the Court centred chiefly in the question of the productive value of the property. The evidence led may be divided into two classes. First, the evidence of the carrying-capacity of various properties in the district; and, secondly, the opinion of practical farmers and valuers in relation to this particular property alone.

The Court said: "Having regard to the fact that the quality of the land in the district admittedly varies considerably, the Court is not inclined to attach very much weight to evidence of the carrying-capacity of other properties. Then, too, in the case of immediately adjoining properties, there seems in every instance to be some feature of material importance which makes invalid any inference as to the carrying-capacity of Mr. R.'s farm. However, there naturally remains some residum in this evidence of probative value which might be regarded as affording a general indication of capacity.

"The direct evidence of the practical farmers and valuers was, however, of more weight and more convincing. The Court was particularly impressed with the evidence of Mr. P., and was driven to the conclusion that his assessment of the carrying-capacity at fifty cows without replacements—confirmed, as it was, by the testimony of numerous other practical men—provides the safest basis of assessment. It is probable that this basis, if it differs at all, does so but little from Mr. F.'s assessment of 45 cows with replacements.

"The next material question debated was the probable productive capacity of a herd of reasonable quality grazed on the land. On this topic the weight of evidence is in favour of an assumption that such cows may reasonably be expected to return 250 lb. of fat per cow. The considerable body of opinion testimony on this topic is supported by the returns actually obtained by both Mr. T. and Mr. R., particularly when allowance is made for unusually difficult seasons and for the fact that the returns obtained by them were obtained from herds below average quality. We think, therefore, that Mr. F. somewhat underestimated the probable return when he assumed a basis of 220 lb. of fat per cow.

"On the assumption that the property will carry 50 cows, each capable of producing 250 lb. of fat per cow, a readjustment of the budgets submitted, and particularly a readjustment of the budget submitted by Mr. H., whose computation the Court considers most nearly approached accuracy, shows that, when all proper income and debit items are taken into account, the productive value justifies the price of £35 an acre at which the property was sold."

Having regard to the conclusions to which the Court was driven, as here expressed, it fixed the basic value of the property at £3,500. Consent to the sale of the land at that price was given. This meant that consent to the completion of the contract of sale, including the chattel interests, was given.

No. 8.—W. TO W.

House Property—Value of Improvements—Replacement Value at Material Date—Deterioration and Repairs taken into Account.

In this case there seemed to be no uncertainty about the value of the land. All witnesses were agreed that it was worth £750, or, at least, were substantially agreed on that. This left for consideration only the question of the value of the improvements. What they were worth at December 15, 1942, was the crucial question. All the witnesses had taken into account the replacement cost at that date of a similar type of building as a fair indication of this value. The Court had, in this relation, the evidence of two material witnesses who were not called before the Committee and consequently was put in a better position than the Committee to form an accurate opinion.

The Court said: "Mr. H. [a valuer] assessed a value of £1 8s. per square foot, Mr. M. [a valuer] and Mr. L. [an architect] a value of £1 7s. per square foot, and Mr. T. [a valuer] a value of £1 3s. 6d. The latter based his view on £1 5s. a square foot, being the price at which a house is now being built at Wadestown. Having regard to the fact that Mr. T. based his conclusions on one house only, whereas Mr. L., in virtue of his profession, was able to speak and spoke in the light of experience extending over numerous instances and over a wide range, we have come to the conclusion that the evidence of Mr. L. affords the safer basis upon which to found a judgment. A computation based on Mr. L.'s figure of £1 7s. per square foot shows a value of £2,440 3s. 10d., from which must be deducted the sum of £852 for deterioration. The latter sum conforms in substance with the estimate of all the witnesses.

"In the result the house, as at December 15, 1942, is shown as worth £1,588. The garage, shed, fencing, paths, and the like can, we think be fairly assessed at £175. That leaves us in this position, the land was worth £750, the house £1,588, the other items £175, giving a total of £2,513. This leaves out of account repairs, repairs which Mr. L. says would cost £57. We were impressed, however, with the testimony of Mr. T., who says that one cannot say with certainty what the cost will be of correcting deterioration already caused by lack of ventilation. We think a lump sum of £100 might well be allowed to cover this work of restoration and the other repair work. That would leave the value of the improvements at £2,413 as the value of the property sold at £2,400.

"We therefore allow the appeal, fixing the basic value at £2,400. Consent to the sale at that price is given."

UNIVERSITY OF NEW ZEALAND.

Completion of Qualification as Barrister.

Attention is directed to the fact that as from January, 1945, the regulations appearing in the current *University Calendar*, p. 165, will be amended by the following addition:—

"XV. Notwithstanding anything contained in Section I hereof, any person who has qualified for admission as a solicitor by passing in or being credited with a pass in the subjects prescribed in Section III hereof may qualify for admission as a barrister by keeping terms in and passing the examination in the following subjects as defined in Section XIII of the Statute 'The Degree of Bachelor of Laws':—

"(1) Two of the units numbered 1 to 5 in Section II of the Statute, in which he has not passed in his examination for admission as a solicitor.

"(2) Roman Law.

"(3) Conflict of Laws.

"(4) International Law.

"XVI. A candidate who commenced his course before 1938 shall retain any rights given to him by Section IX of the Statute 'Examination of Candidates for Admission as Barristers and Solicitors of the Supreme Court of New Zealand' appearing in the University Calendar of 1943, and shall be entitled to complete the course by passing and being credited in the other subjects of Section III hereof with which he has not already been credited."

MISS MURIEL ADAMS.

Presentation on Retirement.

Miss Muriel Adams, on her retirement from the Stamp Duties Department at Auckland, was the recipient of a presentation from the legal practitioners.

At a large gathering of members of the profession, held on July 14, Mr. A. Milliken, President of the Auckland Law Society, in presenting Miss Adams with a substantial cheque, referred to her association with the one Department during the whole of her Public Service career, and mentioned that she had joined the office after a brilliant scholastic career at a time when the Auckland staff comprised the Deputy Commissioner and one assistant only. Miss Adams had seen the staff grow to its present strength and had for many years been the Senior Estates Clerk.

Mr. Milliken stressed the happy nature of the relations between the legal profession and Miss Adams, and her most helpful attitude at all times in estate matters. He wished her a happy retirement, and added that she took with her to her leisured days the best wishes of every practitioner and law clerk in the city whom she had helped in the course of her active years: and that meant all of them.

LAND AND INCOME TAX PRACTICE.

Sundry Notes and Rulings.

Pension payable out of Overseas Funds to an Absentee.—A former New Zealand resident was New Zealand manager of a company which is incorporated and registered in the United States of America, but which trades in New Zealand. On his retirement from office, the company paid the ex-manager a pension at the absolute discretion of the board of directors. The pension is regarded by the company and recipient as a voluntary payment in appreciation of faithful and efficient service. The ex-manager has left New Zealand permanently, and resides in the United States of America. The pension is in fact paid from the company's New York office, but is debited to the New Zealand branch.

The Commissioner considers that the fact of debiting the pension to the New Zealand branch office does not bring the pension within the scope of s. 84 (2) of the Land and Income Tax Act, 1923—*viz.*, "all income derived from New Zealand shall be assessable for income-tax whether the person deriving that income is resident in New Zealand or elsewhere." The pension is not "income derived directly or indirectly from any source in New Zealand" (*vide*, s. 87 (*n*)), for the reason that it is an amount payable by the company which is registered in the United States of America to a person resident in the United States of America and constitutes a debt situate in that country.

Legal Expenses.—It should be noted that legal expenses in connection with an application under the Economic Stabilization Emergency Regulations, 1942, for the fixing of a fair rent for premises used in the production of assessable income are allowable as a deduction. See also notes on p. 59, *ante*.

Discharged Servicemen: Rehabilitation Payments.—There are wide powers contained in the Rehabilitation Act under which payments are made to an ex-serviceman from the time of discharge until he obtains permanent employment.

It is understood that the payments are made on the following basis:—

Single man, £3 10s. per week.

Married man, £3 10s. per week plus £1 for wife and 6s. for each child under sixteen years of age, with a maximum limit of £6 per week.

Payments are limited to a period of thirteen weeks, and are subject to reduction in respect of amounts received as war pensions and casual employment.

The Commissioner considers that the amounts received are in the nature of gratuitous payments and are not liable for income-tax, social security charge, or national security tax. Rehabilitation payments should therefore be excluded from any taxation returns.

Trustees: Arrears of Annuity paid out of accumulated Trust Income.—Trustees of a deceased person's estate received income which, by reason of the existence of estate liabilities, was not applied in payment of an annuity in terms of the will. The income was therefore assessed under the provisions of s. 102 (*b*) of the Land and Income Tax Act, 1923—*i.e.*, without any deductions by way of special exemptions.

After a considerable lapse of time the trustees were enabled to pay the arrears of annuity in full. The Commissioner considers that in such a case the amount of arrears cannot be again assessed to the trustees under s. 102 (*a*) in the year when the accumulated arrears are paid to the annuitant. As a broad principle, income derived from estate assets by trustees must be assessed in the year in which it is derived either under s. 102 (*a*) or s. 102 (*b*). These paragraphs are mutually exclusive, and once income has been correctly assessed under s. 102 (*b*), it cannot again be assessed to the trustees as agent for the beneficiary receiving income, under the provisions of s. 102 (*a*).

The receipt of the arrears of accumulated annuity by the annuitant constitutes income derived during the year of receipt—*i.e.*, the total sum must be brought to assessment in the year in which the beneficiary actually receives the income, which is assessable in terms of s. 79 (1) (*g*) of the Land and Income Tax Act, 1923.

Trustees: Trustees' Remuneration.—A taxpayer was bequeathed shares valued at £250 in consideration of his agreeing to act as trustee under a will. The value of the shares is assessable under the provisions of s. 79 (1) (*b*) of the Land and Income Tax Act, 1923, in one sum in the year during which the shares were received or receivable, and it is not possible for any apportionment to be made so that the value of the shares is spread over a period of years as income received by way of anticipation.

Trustees: Infant Beneficiaries' Vested Interest.—Section 7 of the Land and Income Tax Amendment Act, 1941, provides that "Where the income of the trustee is also income derived by any beneficiary who is an infant, but whose interest in that income is vested, the beneficiary shall for the purposes of this section be deemed to be entitled in possession to the receipt of that income under the trust during the same income year."

The effect of the amendment is that the trustees are assessed with tax on such income, under the provisions of s. 102 (*a*) and not s. 102 (*b*) of the principal Act—*i.e.*, special exemptions are allowed against the infant beneficiary's share.

It should be observed that there is nothing in s. 7 (quoted above) which requires an infant beneficiary to have an absolute or indefeasible vested interest in the estate income, and the section applies notwithstanding that such interest is liable to be divested.

Trustees: Absentee Beneficiary deriving Dividends from Overseas.—An absentee is a life tenant in an estate, probate of which was granted in New Zealand. The estate in New Zealand derived a portion of its income from companies incorporated in the United Kingdom, and the dividends received from the United Kingdom are paid to the life tenant in the United Kingdom by the trustees.

The absentee life tenant does not derive her income direct from the companies incorporated in the United Kingdom, but derives them from the estate in New Zealand. The dividends concerned must therefore be treated as non-assessable income derived by the trustees as agent for the absentee beneficiary.

An English Note upon Revision of the Taxing Acts.—The following note which has been extracted from an article appearing in the Tax Supplement of *The Accountant*, dated April 1, 1944, may be of interest to those who press for a simplified revision of the tax legislation:—

"We sympathize very fully with those who advocate a complete rewriting of the Income-tax Acts in simple and commonplace English. We feel, however, that this object is unattainable to the extent usually suggested by its advocates. We agree that every attempt should be made to simplify language, but it must be realized that provision must be made for every eventuality, that so far as possible no loopholes for evasion must be left, and that the intentions of the Legislature must be fully and completely expressed in unmistakable language. It is for these reasons that we feel that simplicity for the man in the street is an unrealizable dream. What can be attained (and this has not always been achieved) is wording the meaning of which is clear, on a reasonably careful reading, to practitioners and others familiar with the subject. After all, familiarity with the immense mass of income-tax law cannot be obtained without long and close study, such as would be expected and required in any other branch of law or of any science."

RULES AND REGULATIONS.

Industry Notification (Fruit and Vegetable Retailing) Revocation Order, 1944. (Industrial Efficiency Act, 1936.) No. 1944/103.

Patriotic Purposes Emergency Regulations, 1939, Amendment No. 7. (Emergency Regulations Act, 1939.) No. 1944/104.

Social Security (District Nursing Services) Regulations, 1944. (Social Security Act, 1938.) No. 1944/105.

Meat Marketing Order, 1942, Amendment No. 2. (Marketing Act, 1936.) No. 1944/106.

War Pensions Emergency Regulations, 1944. (Emergency Regulations Act, 1939.) 1944/107.

Lighting Restrictions (Revocation) Emergency Regulations, 1944. (Emergency Regulations Act, 1939.) No. 1944/108.

PRACTICAL POINTS.

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1. Land Transfer.—*Undivided Shares in Land owned by Infants—Other Registered Proprietors of Age—Procedure for proposed Sale.*

QUESTION: A. died in 1937, owning *inter alia* a parcel of land under the Land Transfer Act. He died intestate, leaving his widow and four children, two of whom are still under age. His widow was the administratrix, and after due administration she transferred the land to herself and the four children in the appropriate shares. The age of each minor is noted on the Register-book on the memorial of the transfer. Would the District Land Registrar register a transfer signed by all five, without any Court order? If not, what is the correct procedure, for all members of the family desire to sell the land to a proposed purchaser?

ANSWER: The District Land Registrar would not register a transfer signed by the infant owners, for their disability is known to him, and the disability is noted on the title: s. 193 (*d*) of the Land Transfer Act, 1915.

The procedure to be adopted is set out in the Settled Land Act, 1908. Section 76 of that Act applies: the infants are deemed to be tenants for life for the purposes of Part II of that Act. Apply by petition to the Supreme Court under s. 77 for the appointment of persons to act thereunder: the persons so appointed will be deemed to be trustees of the settlements deemed to be existing under the said Act. Apply by petition to the Supreme Court for authority for the appointees to effect the proposed sale and to execute or join in executing any memorandum of transfer or other deed or instrument necessary to give effect to such sales. The consent of the Land Sales Court to the proposed transaction will also be necessary.

2. Trusts and Trustees.—*Land to be purchased by Two Trustees—Protection desired against possibility of Survivor alienating in Breach of Trust.*

QUESTION: A. and W. are the sole trustees under H.'s will, who was the husband of W. H. left a life-interest to W. with remainder to his children, some of whom are still under age. A. and W. pursuant to authority conferred by H.'s will have purchased a home for the family with the trust funds. A. is considerably older than W., and realizes that he will probably die before W.; on his death W. would be able to deal with the land which is registered under the Land Transfer Act by registering transmission by survivorship, and in so dealing with the land she might act to the detriment of the children. How can this risk be guarded against?

ANSWER: Have inserted in the memorandum of transfer from the transferor to A. and W. the words, "No Survivorship," pursuant to s. 131 of the Land Transfer Act. The District Land Registrar will then insert these words in the memorial. The effect will be that on the death of either proprietor no dealing (including a transmission by survivorship) with the land will be registered, until so authorized by the Supreme Court: see *In re Denniston and Hudson*, [1940] N.Z.L.R. 255, G.L.R. 171, and the article in (1941) 17 N.Z.L.J. 137. That will effectually prevent the survivor from alienating the land in breach of trust.