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INDUSTRIAL MAN-POWER REGULATIONS: EFFECT ON THE DEFENCE OF VOLENTI NON FIT INJURIA.

It is possible that an interesting judgment given recently by Cassels, J., in *Norah Read* v. *J. Lyons and Co., Ltd.*, [1944] 2 All E.R. 98, might have considerable local application. The plaintiff had been "man-powered" under the Essential Work (General Provisions) (No. 2) Order, 1942, which is similar to our Industrial Man-power Emergency Regulations, 1944, in that she had been directed to work in an essential undertaking—namely, a factory where high-explosive shells for use in the war were filled. By the explosion of a shell in the course of filling, the plaintiff was seriously injured. She sought to recover damages for her personal injuries. She based her claim on the sole ground that the defendants carried on the manufacture of high explosive shells, which to their knowledge were dangerous things, and that, while employed by them, she had suffered damage and loss. The plaintiff was directly in the employment of the Ministry of Munitions, the defendants being the occupiers of the factory which they conducted as agents of the Ministry of Supply.

The Solicitor-General, Sir David Maxwell Fyfe, K.C., raised, as a defence to the claim, the allegation that the plaintiff had voluntarily incurred the risk of the explosion as a risk incidental to her employment. In other words, he relied on the defence—though it was not the only defence—of *volenti non fit injuria*. In view of the circumstances that the plaintiff had been "man-powered" into an explosive factory, this defence seemed somewhat remarkable; and, from the facts, it appeared to be foredoomed to failure.

At the time the plaintiff had been directed by the Minister of National Service in exercise of his powers under the National Service Acts, she had been employed as a stores accountant in a brick-making company. She protested when directed to a munitions factory, and asked if she could have any other work. She was told that she could not, without a doctor's certificate that her health would not allow her to work in the factory to which she had been directed. As her health was good, she considered it useless to apply for such a certificate. She was put to work in the inspection department of the factory, and received some training for her duties there. She asked for clerical work in the factory; but was told that there were no vacancies. There was no reason, other than the Order under the National Service Acts, compelling her to remain in employment in the factory. The learned Judge accepted her evidence that she would not have remained there unless compelled to do so.

Counsel for the plaintiff met the defence of *volenti non fit injuria*, with *Smith* v. *Baker and Sons*, [1891] A.C. 325, *Williams* v. *Birmingham Battery and Metal Co.*, [1899] 2 Q.B. 338, and *Baker* v. *James*, [1921] 2 K.B. 674, which decide that the real question is whether the plaintiff voluntarily undertook a risky employment with a knowledge of its risks, or, in other words, contracted, or consented, or undertook to accept the risks.

The learned Judge said he need only cite the latest pronouncement on the point, the judgment of Scott, L.J., in *Bowater* v. *Rowley Regis Corporation*, [1944] 1 All E.R. 465, where he said:

> In regard to the doctrine *volenti non fit injuria*, I would add one reflection of a general kind. That general maxim has to be applied with especially careful regard to the varying facts of human affairs and human nature in any particular case, just because it is concerned with the intangible factors of mind and will. For the purpose of the rule, if it be a rule, a man cannot be said to be truly "willing," unless he is in a position to choose freely; and freedom of choice predicates, not only full knowledge of the circumstances upon which the exercise of choice is conditioned, in order that he may be able to choose wisely, but the absence from his mind of any feeling of constraint, in order that nothing shall interfere with the freedom of his will.

His Lordship said he was satisfied that the plaintiff had not voluntarily undertaken the work on which she was engaged; and, accordingly, he held that her claim did not fail by reason of the maxim, *volenti non fit injuria*.

As regards persons, who have not been directed to a particular employment, but who are compelled, by virtue of the Man-power Regulations to remain in an essential undertaking, the judgment in *Read's* case is confirmed, in its essentials, by a majority of the Court of Appeal in *Alexander* v. *Tredegar Iron and Coal Co., Ltd.*, [1944] 1 All E.R. 451. In this case it was put to the Court that the doctrine of common

employment cannot arise in the case of any employment to which the Essential Works Order applies. We are fortunately not concerned with the question of common employment (regarding which Goddard, and du Parcq, L.JJ., in a joint judgment, took the opportunity to be severely critical), but the case has interest for us in so far as it dealt with a worker in an essential undertaking, who had been employed there before the passing of legislation and the issuing of an Order, with an effect that is similar to our Industrial Man-power Emergency Regulations, 1944. The workman had not been directed to the particular employment; he had, in fact been in the service of the defendants for many years and had never applied to leave it. That, in their Lordships' view, was immaterial. They saw no difference, in law, between a man who is directed to work for a particular employer, and one, who being in the service of an employer, cannot leave without permission (here, of a Man-power Officer). Their Lordships pointed out that it would be possible to escape from the rule (as to common employment) only were it to be held that the Essential Work Order destroyed the contract of service. They proceeded:

> In our opinion, it is impossible so to hold. The Order imposes certain conditions and restrictions on the contract. It makes it an offence for a man to refuse to enter into a contract of service with an employer to whom he is directed, or for an employer to refuse to employ a man whom he is directed to employ; equally it makes it an offence for a man to leave his employment, or, with certain exceptions, for an employer to discharge him without the permission of an official of the Ministry of Labour. But once a workman is working for an employer he must, in our opinion, be considered as working under a contract of service, and the ordinary terms of such a contract must apply thereto, except in so far as they are abrogated by the Order.

It may be observed that *Read's* case and *Alexander's* case are interlocking in that they establish that a contract of service in an essential undertaking is subject to the usual incidence of the law of master and servant, subject, however, to such special terms, imported therein by the Industrial Man-power Regulations, as may negative or modify the application of the common law to such a contract.

The judgments quoted are, we think, authority for saying that whether a person is directed involuntarily to an essential undertaking, or whether he was an employee of that undertaking when it was declared essential, the defence of *volenti non fit injuria* cannot prevail against him if he has a right of action for damages arising out of injury occasioned by the nature of the work to which he was directed or in which he has been compulsorily retained. The question may at any time arise here; and, where people are directed to essential undertakings under the Industrial Man-power Emergency Regulations, evidence of their unwillingness to engage in the class of work to which they are directed, by reason of the risks incidental to such an undertaking, may be material to them if they should have the misfortune to suffer personal injury as the result of the nature of such work.

SUMMARY OF RECENT JUDGMENTS.

In re **BAYLY (DECEASED), BINNIE v. BAYLY.**

SUPREME COURT. Auckland. 1944. August 24. FAIR, J.

Divorce and Matrimonial Causes—Alimony and Maintenance—Deed of Settlement—Petitioner ordered on Decree Absolute to pay Respondent Maintenance according to attached Deed—No express Provision in Deed that Payment be made by Petitioner himself—Death of Petitioner—Whether Obligation for Payment passed to his Personal Representatives—Divorce and Matrimonial Causes Act, 1928, s. 33.

Trusts and Trustees—Donations and Gifts—Investments in War Loans—Whether Court empowered to authorize Trustee of Deceased Estate to make Donations and Gifts to Charitable and Local Organizations and Committees—Statutes Amendment Act, 1936, s. 81.

A deed of settlement, intended to operate as such under the Divorce and Matrimonial Causes Act, 1928, between a husband (petitioner) and wife (respondent) and trustees, followed on, and took the place of, a deed of separation, which provided that the husband should yearly during the wife's life pay or cause to be paid to her an annuity of £350. While the recital of the deed referred to the settlor's "continuing" to pay the said annuity, and the settled shares were referred to as "security for the payment of the said sum of £350," the body of the deed did not impose on the petitioner any direct obligation to make any payment at all, but was concerned only with security for payment, the method of investing, the shares given as a security, and what was to be done when the income from the shares fell below the amount of £350, that was settled as the annual amount to be paid to the respondent, and the petitioner did not himself make up the deficiency. The deed provided that in this event the capital, the shares, might be realized, and by cl. 7 of the deed the deficiency so caused had to be made good if the respondent so desired, and she might apply for any further or additional security.

Later, the decree absolute granted to the husband in a divorce suit in which he was the petitioner, concluded: "By consent this Court doth order that the Petitioner pay to the Respondent maintenance in accordance with the deed a copy of which is attached hereto." The husband subsequently died.

On an originating summons for interpretation of the said deed,

Held, That the deed imposed an obligation on the husband to pay the wife the annual sum of £350 during her lifetime, and that that obligation passed to the executors and administrators and trustees of the estate; and therefore, the husband's estate was liable to pay the former wife the annuity in the event of no dividends coming in from the shares referred to in the deed, and to pay the difference where the income from the shares was insufficient to make the annuity up to the amount of £350.

Kirk v. *Eustace*, [1937] A.C. 491, applied.

The Court was also asked to empower the trustees to make donations and gifts to charitable and local organizations and committees, to an amount not exceeding £100 per annum.

Held, That s. 81 of the Statutes Amendment Act, 1936, gave the Court power to authorize the trustees for the sake of the reputation of the family and the estate of the said deceased to make donations and gifts to charitable and local organizations and committees to an amount not exceeding £100 per annum.

Observations on the exercise by trustees of discretion to invest estate moneys in war loans, and the effect of such investments on the welfare of the estate as a whole.

Counsel: *Callaghan*, for the plaintiffs; *Johnstone*, K.C., and *Rutherfurd*, for the first defendant; *West*, for certain of the second defendants; *Fawcett*, for certain others of the second defendants.

Solicitors: *Young and Callaghan*, Stratford, for the trustees; *Rutherfurd and Macalister*, Stratford, for M. O. Bayly; *Dufaur, Lusk, Biss, and Fawcett*, Auckland, for E. F. Matthews, G. N. L. Bayly, and F. T. Bayly; *Jackson, Russell, Tunks, and West*, Auckland, for E. J. Mather and others.

In re TE KUMI LAND COMPANY, LIMITED, WILLIAMS AND ANOTHER v. TE KUMI LAND COMPANY, LIMITED.

SUPREME COURT. Wellington. 1944. August 29; September 1. JOHNSTON, J.

Company—Winding-up—Preference Shareholders—Special Resolution regulating their Rights—Interpretation—Extent of Preference on Winding-up.

A preference to dividends can be absolute or conditional, absolute in the sense that they are a first charge on profits of the company, conditional in the sense that they are a charge only on such profits as are made available for dividends, and that if profits are not made available for dividends while the company is carrying on business the conditional preference does not relate to assets in winding-up.

Without express words or interpretation of an article by reference to the memorandum of association or other circumstances, the assets of a company in liquidation are not available for undeclared cumulative dividends.

In re Holben, Hubbard, and Co., Ltd., [1938] N.Z.L.R. 54, [1937] G.L.R. 23; *In re Finance Corporation of New Zealand, Ltd.*, [1940] N.Z.L.R. 419, G.L.R. 270; *Best* v. *Newton King, Ltd.*, [1942] N.Z.L.R. 360, G.L.R. 270; *In re Crichton's Oil Co., Ltd.*, [1902] 2 Ch. 86; and *Re W. Foster and Son, Ltd.*, [1942] 1 All E.R. 314, applied.

A company arranged with several creditors to accept preference shares in lieu of repayment. A special resolution was then passed, which after setting out an increase of capital, and the issue of preference shares, provided as follows: "The holders thereof to receive out of the profits of the company available for dividends, before any dividend is paid to the holders of shares in the now existing capital of the company a cumulative preferential dividend at the rate of six pounds (£6) per centum per annum but to no further share in the profits of the company and also entitling the holders thereof on a winding-up to a preferential claim on the distribution of the assets of the company remaining after paying the debts and liabilities of the company and the costs of winding-up."

On an originating summons for a declaration determining the rights of the preference shareholders on a winding-up of the company,

Held, That such preference shareholders were entitled—

(*a*) To receive payment of all arrears of cumulative preference dividends declared before the commencement of the winding-up before any capital is returned to ordinary shareholders:

(*b*) To a return of their capital in priority to ordinary shareholders;

(*c*) To share *pari passu* with ordinary shareholders in any assets remaining after the return of capital to ordinary shareholders; but they were not entitled to any preference for cumulative preference dividends not declared before winding-up, whether or not the assets include undistributed profit.

Counsel: *Spratt*, for the plaintiffs; *C. G. White*, for a preference shareholder; *C. H. Croker*, for the defendant.

Solicitors: *Morison, Spratt, Morison, and Taylor*, Wellington, and *C. G. White*, Wellington, for the plaintiffs; *Croker and McCormick*, New Plymouth, for the defendant.

MORGAN v. WESTPORT-STOCKTON COAL COMPANY, LIMITED.

COMPENSATION COURT. Westport. 1944. June 22, 26; August 25; September 22. O'REGAN, J.

Workers' Compensation—Accident Arising out of and in the Course of Employment—Buerger's Disease (Thrombo angiitis obliterans)—Worker pushing Derailed Truck feeling intense Pains in Leg—Accident causing Intermittent Claudication—Onus of Proof upon Defendant to Show Effect of Accident as Transient Occurrence—Workers' Compensation Act, 1922, s. 3.

A worker while trying to push a derailed truck into position, on October 30, 1942, felt intense pains in his right leg. After being totally disabled for three weeks he resumed work, and continued at work for about ten months; but his condition worsened, and he was eventually found to be suffering from thrombo-angiitis obliterans, usually known as Buerger's disease. He died suddenly on January 20, 1944, from pulmonary embolism, blood clotting being a characteristic of that disease when it has reached a certain stage.

In an action by his widow claiming maximum compensation for herself and three children, the medical witnesses were divided in opinion as to whether death was accelerated by the accident, or whether the accident was merely a transient occurrence having no effect on the disease. The medical referee, appointed pursuant to s. 58 of the statute, considered that the straining of the worker's muscles necessarily involved in the effort, damaged, if it did not destroy, the collateral circulation; and so caused the onset of intermittent claudication, a typical manifestation of Buerger's disease; and that it was important that that condition coincided with the worker's effort, and that thereafter the symptoms were more or less continuous.

Held, 1. That, where the worker's disablement has occurred while he was actually exerting himself, the onus of proof is shifted from the plaintiff to the defendant; that therefore it was for the defendant to prove that, though the accident caused intermittent claudication, its effect was transient and that the condition would have occurred at or about the same time, had there been no accident.

Gibbs v. *Thompson and Hills*, (1907) 10 G.L.R. 150, applied.

2. That as such onus had not been discharged, the plaintiff was entitled to compensation.

Counsel: *W. D. Taylor*, for the plaintiff; *Hannan*, for the defendant.

Solicitors: *Joyce and Taylor*, Greymouth, for the plaintiff; *Hannan and Seddon*, Greymouth, for the defendant.

BLAKEY AND OTHERS v. BRENNAN.

SUPREME COURT. Auckland. 1944. July 10; August 8; September 20, 29. FAIR, J.

Rent Restriction—Apartment House—Whole of rented House subdivided into Flats and sublet—Whether a "Dwellinghouse"—One Flat reserved for Tenant's Manageress—Whether Status of House thereby affected—Fair Rents Act, 1936, s. 2.

A leased house, the whole of which has been subdivided into flats and sublet by the lessee, is not a "dwellinghouse" within the meaning of that term in s. 2 of the Fair Rents Act, 1936.

The fact that, as in this case, one flat in a house, so subdivided into flats and let as an apartment house, was occupied by the manageress of the tenant who did not himself reside upon the premises, did not bring the building within the statute.

Observations on the consideration of the amount of the head rent on a subtenant's application to fix the fair rent, and on the effect of an order for possession of the premises on furniture owned by the tenant and let to a subtenant.

Counsel: *Richmond*, for the plaintiffs; *Milne*, for the defendant.

Solicitors: *Johnston, Coates, and Fee*, Auckland, for the plaintiffs; *Milne and Meek*, Auckland, for the defendant.

In re OLSON (DECEASED), TREADWELL v. PUBLIC TRUSTEE.

SUPREME COURT. Wanganui. 1944. May 26; September 4. SMITH, J.

Family Protection—Further Provision to Husband—Order to pay Lump Sum "out of the proceeds and realization of the [Wife's] Estate"—Delay in payment owing to Economic Depression and Difficulty of Realization—Whether Order a "Judgment debt" so as to carry interest until Lump Sum paid—Code of Civil Procedure, RR. 305, 542.

An order made, in favour of the husband of the testatrix, under the Family Protection Act, 1908, "that out of the proceeds of the realization of the estate" of the deceased "the Public Trustee do pay to the said plaintiff a lump sum," was, in the circumstances in which it was made, conditional upon the said proceeds being in the hands of the executor of the wife's estate, and, therefore, the order did not constitute a judgment debt within R. 305 of the Code of Civil Procedure, so as to entitle the husband's estate to interest thereon.

Garner v. *Briggs*, (1858) 4 Jur. (N.S.) 230, and *Gibbs* v. *Flight*, (1853) 13 C.B. 803, 138 E.R. 1417, applied.

Counsel: *B. C. Haggitt*, for the plaintiff; *Keesing*, for the defendant.

Solicitors: *Haggitt, Gordon, Treadwell, and Haggitt*, Wanganui, for the plaintiff.

INTERNATIONAL SECURITY THROUGH THE EVOLUTION OF LAW.

III.

By PROFESSOR A. L. GOODHART, K.C., D.C.L., LL.D.*

No one will dispute Air Vice-Marshal Bennett's statement in his valuable article on "International Security Through the Evolution of Law" (*ante*, p. 101) that "the last war and this war have between them created a demand for international law and order, and for international security so that national crime will be forcibly prevented from now onwards." But unfortunately there is less agreement concerning the practical steps that can and ought to be taken to satisfy that demand. Too often the advocates of peace —and there is not a single right-thinking man who would not consider that he was enrolled in their number— seem to assume that it is sufficient for them to express their belief in law and order while leaving it to the experts on international law to create the necessary machinery. That, however, is placing too great a burden on the lawyer, for it is a demand that he should perform a task which does not properly fall within his function. Just as in ordinary life a lawyer cannot frame a contract unless the parties have already agreed on the terms which it is to contain, so the international lawyer can only put into legal form those practical terms to which the statesmen of the world, and the people whom they represent, have agreed as the basis of the new order. It is therefore a most welcome augury that such a distinguished officer as Air Vice-Marshal Bennett should concern himself with the practical problems which will have to be solved before a firm and lasting international structure can be built.

His own plan involves, as he recognizes, the creation of what is, in effect, a super-State, with a Supreme Congress empowered to declare law which will be binding on all the States of the world. This law will be interpreted by a Court with compulsory jurisdiction and will be enforced by an International Police Force against any recalcitrant member of the international society. There can be no question that if the nations of the world were prepared to accept this plan they would be taking a decisive step towards the abolition of war—the greatest curse from which mankind has suffered throughout the centuries. But will the nations take this step? This question, which is the crucial one in this connection, is not one which lawyers can answer *qua* lawyers, for it is a problem of practical politics. Unfortunately, looking at it from the latter standpoint, I must agree with Sir Cecil Hurst (*ante*, p. 188) that "there is no evidence so far that public opinion would be ready to accept anything so far-reaching." *The Times* expressed a similar view in its leader on "Organizing For Peace" (May 22), when it said: "Can it seriously be believed that either the United States or Soviet Russia or Great Britain or the members of the British Commonwealth are prepared to make formal surrender of their right of ultimate decision in unknown contingencies on the issue of war or peace?" Unless each of these great Powers is prepared to agree to such a scheme, it must be doomed to failure at birth.

But even if the nations of the world are not prepared at present to go as far as Air Vice-Marshal Bennett wishes them to go, we need not feel discouraged provided they are prepared to take certain constructive steps in the direction he desires. It is here that the international lawyer can play an important part, for his experience of legal history may enable him to indicate what are the necessary steps which will ultimately lead to this goal.

In discussing the evolution of law, Air Vice-Marshal Bennett has taken as his first analogy the final establishment of the King's Peace in this country—a peace which became a reality when the King "prohibited the retention of liveried retainers" by the barons. But, like Sir Cecil Hurst, I have some doubt whether this analogy is applicable to the present international situation. The King's Peace was based on the acceptance of the principle that the King was entitled to enforce the peace, and that the barons, and all other subjects, owed obedience to his commands. No one disputed this theory, so the only problem was to give to the King sufficient power to carry the principle into effect against anyone who might feel himself sufficiently strong to oppose his authority. But in international society to-day there obviously is no body which is recognized in theory as being comparable to the medieval sovereign, and there seems to be no likelihood that the various States are prepared to acknowledge such a sovereign power at the present time. The odd thing is that in international affairs the States are willing to go further in practice than in theory, for they insist on the retention of the term *sovereign* in such documents as the Atlantic Charter and the Moscow Declaration while, at the same time, expressing the intention to be bound by the rules of international law. But no State can be regarded as completely sovereign if its actions are subject to law. If only it were recognized that the claim to absolute sovereignty is the negation of law and is incompatible with any legal system, then it would be less difficult for the States to take the necessary steps to ensure peace. Dr. A. J. Carlyle, in his great work, *Mediaeval Political Theory in the West*, has pointed out that in medieval times practice fell behind theory; to-day in the international sphere the difficulty is that our theory has not developed sufficiently to enable practice to advance. Therefore I am doubtful whether the analogy of the King's Peace can be safely applied to the present international situation.

Nevertheless, I believe that Air Vice-Marshal Bennett's method of approach to the problem is a sound and valuable one, provided we can find the fitting analogy. This, I believe, is to be found in the frontier conditions of the West, when the frontiersmen established their own rules, set up their own courts, and carried their

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judgments into execution. Air Vice-Marshal Bennett refers to this frontier system in these words: "When the horse thieves or other outlaws were at large in the Western States of America, the peaceful settlers had to join together, in the absence of a properly constituted arm of the law, in order to apprehend the criminals." This analogy is, I believe, a more accurate one, when applied to the international situation, then the one based on the King's Peace.

This frontier system of justice, which was remarkably efficient in many ways, depended on two essentials: (*a*) the recognition that certain acts were criminal, and (*b*) the determination by the community to stamp them out. The first step was not a difficult one to achieve, for the community soon recognized that certain acts were criminal. These were murder, robbery, rape and the violation of boundaries. It was recognized that unless these acts were prevented then there could be no decent life. These were not acts which could be left for settlement between the parties themselves, the neighbours remaining neutral; they were wrongs against the community itself and must be dealt with by the community as such.

The second essential step was for the community to act together as a body to put down these recognized crimes. There was no elaborate machinery, nor was this necessary. The group, when acting together as a posse, was stronger than any individual wrong-doer, however well armed, and could enforce order against anyone who acted as an outlaw. Nor was it fatal to this system of justice that there was not an elaborate system of courts, for the problems to be determined were not intricate questions of law, but the comparatively simple problem whether the accused person had committed the crime with which he was charged. Obviously this method of enforcing justice was a rough and ready one, but it was a great step forward from the anarchical conditions which had preceded it.

From frontier justice to the enforcement of law by the State was a comparatively easy step. In many cases the transition from the one to the other was hardly perceptible, and sometimes the two were functioning side by side until State justice had become firmly established. Both the group and the State were concerned with the same purpose—the maintenance of peace and order through the enforcement of justice. The major difference between the two lay only in the method of administration.

The difficulty we are faced with to-day in international relations is due, I believe, to the fact that we have not as yet progressed as far as frontier justice between the States. We have not as yet attained either of the two essentials, for (*a*) we are not as yet clear in our minds what international acts are criminal, and (*b*) we have not as yet achieved a sense of international community responsibility. Until we have progressed at least as far as this, it will be premature to discuss the further and final step of creating an international super-State.

If we accept the analogy of frontier justice as being a sound one, then the first essential step in the creation of practical international justice is to determine what acts are criminal. We must regard aggressive wars in the same way as a frontier community regarded deliberate murder. Air Vice-Marshal Bennett says that "war is a simple process of multiple crime," but unfortunately the problem is not quite so simple as he suggests. As Sir Cecil Hurst has pointed out, in the past war was regarded as an inevitable evil, but it was not regarded as a crime against the international community. Grotius, following the medieval theory, drew a distinction between just and unjust wars, but this distinction proved of no practical value, and it was discarded in the nineteenth century. At the end of the last war an attempt was made to introduce a new principle, for the Covenant of the League of Nations recognized that war between any two States concerned the League as a whole, but it remained doubtful to what extent it could be said that aggressive war had been made criminal. A further step was taken by the Pact of Paris, but this General Treaty for the Renunciation of War was, on the part of some of the signatories, hardly even the declaration of a pious hope: it might almost be described as a trap for the more optimistic and the unwary. In commenting on the Pact, Professor Lauterpacht has said (*2 Oppenheim's International Law*, 6th Ed. (1940), p. 161): "The fact that within a short period after the conclusion of the Pact its provisions were repeatedly violated cannot properly be regarded as detracting from its legal significance." The layman may be excused if he accepts the view that a rule, which was disregarded in practice as completely as was the Pact, has no meaning for him as a practical man, whatever may be its legal significance. It is, of course, true that an occasional breach of a law does not invalidate the law, but a total disregard of its provisions, as happened in the case of the Pact, will leave it a mere collection of empty words. This is as true in international law as it is in civil law. No positive improvement in international justice can, therefore, take place until the nations not only say that all aggressive wars are criminal, but also recognize that any State which violates this rule is a criminal. We cannot outlaw war unless we also outlaw the war criminal.

To say that all aggressive wars must be regarded as crimes is comparatively easy; the difficult problems arise when we consider how this rule is to be put into practice.

The first difficulty is, How are we to determine what constitutes an aggressive war? If each side declares that the other has attacked first, how are we to decide which is the aggressor? It is true that in the case of the German attack on Poland and in that of the Japanese attack on the United States the facts were too clear for any argument, but this may not always be true. It will be necessary, therefore, to devise some machinery, comparable to but less complicated than that contained in the Covenant of the League, by which it can be established that that nation which refuses to arbitrate will be regarded as the aggressor. As Professor Lauterpacht has said (*op. cit.* p. 151) in speaking of the Paris Pact: "This absence of any provision for binding pacific settlement and for the enforcement of the decisions rendered in pursuance thereof constitutes one of the principal defects of the Pact from the point of view of its ultimate effectiveness." Unless the nations are prepared to accept some such provision in the future, it will be futile to talk about international law or about the criminality of war. A rule which can be obeyed or transgressed at will is no law.

(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. 21.—F. TO S.

Aggregation—Urban Property—"Undue aggregation"—Meaning and Application.

Consent to the sale was refused by the Committee on the ground that if consent were given undue aggregation would result. The vendor appealed.

The facts are simple and were not disputed. The proposed purchaser was a builder, who for some years had made it his business to buy building sites and either sell them to purchasers who would contract with him for the erection of houses upon them, or himself build houses on the sites and sell them. At the date of his application for consent, the appellant, in addition to his residence, owned five vacant building sites in a district known as Lindisfarne in East Invercargill. He also owned five vacant lots in J. Street, South Invercargill.

Since the Committee's decision was given, the appellant had sold two of the Lindisfarne lots. Upon one he had nearly completed the erection of a house; upon the other he had constructed the foundations and had contracted to complete the erection of a house. Another of the Lindisfarne sections was, and had at all material times, been used by the appellant as a yard in connection with his business as a builder. This latter section, or some section equally conveniently situated, the appellant claimed, doubtless with propriety, that he must retain for the purposes of his business.

The Court said: "For the purposes of the appeal, the sales since the date of the Committee's decision must be disregarded, for all questions arising on the appeal must be determined as at the date of the hearing which preceded the decision appealed against. Subsequent events can, however, no doubt be regarded as confirmatory or otherwise of the appellant's definition of the extent of the public demand for his activities and of the measure of his capacity to satisfy that demand. In the result, the appellant must be regarded as having, for the purposes of these proceedings, four vacant lots at Lindisfarne available for sale or use as building sites, and five vacant lots in Jenkins Street. The latter lots have for some years been on the market for sale, but have proved unsaleable.

"It appears that if houses were erected upon the Jenkins Street lots the houses might be saleable, but if they were so it would be solely by reason of the acute demand for housing accommodation and not by reason of any willingness on the part of buyers to acquire properties in the locality. Having regard to the nature of the appellant's business, it is understandable that he would be reluctant under the circumstances to build on the Jenkins Street lots, for sales might be difficult to effect and his financial position might well become strained and his ability to erect more houses restricted, if completed houses or if even possibly one completed house, were left on his hands unsold. It seems just, therefore, that the Jenkins Street sections should be left out of account when considering the question of aggregation, they being apparently unwanted by anyone and more of a burden than a benefit to the appellant.

"In consequence of this analysis of the factual position, the question presents itself whether it is undue aggregation for a man engaged in the class of business in which the appellant is engaged, to acquire an additional building lot, when he already owns four. On this question the Committee has, in reality, not expressed any opinion by its decision or otherwise, for, at the date of the hearing before it, the desirability—to say nothing of the inutility—of the lots in Jenkins Street was not adverted to and the Committee took those Lots into consideration in consequence in reaching its conclusion. Had the attention of the Committee been drawn to the true character of the Jenkins Street sections the application would have been presented in a light more favourable to the appellant and, as the Chairman comments in a supplementary report, the Committee might have arrived at a different conclusion.

"A proper understanding of what the Legislature intended to convey by the phrase 'undue aggregation' when applied to urban lands necessitates an appreciation that the primary purpose the Legislature sought to achieve by the Act—the facilitation of the settlement of discharged servicemen—has no application to such lands. With respect to them the interpretation is therefore relieved of any limitation or restriction attributable to a consideration of the relationship of the phrase to any such purpose, and the phrase must, in consequence, be interpreted solely in the sense conveyed by the ordinary grammatical meaning of the words constituting it.

"So regarded, it is apprehended that the phrase will extend to cover the ownership of such a number of properties as, judged by ordinary and reasonable standards, would be considered excessive or inordinate, or such number as would be contrary to the public interest. What would be regarded as ordinary or reasonable must necessarily be determined in relation to the whole body of circumstances attendant upon each particular application.

"It will involve a consideration of the nature and extent of the demand for the property in question, the particular circumstances and needs of the proposed purchaser, the nature of the use to which the purchaser proposes to devote the area, and his competence or ability to achieve that purpose. These specific phases are mentioned, not with any conception that they are an exhaustive summary, but more by way of illustration of the kind of circumstance that will call for consideration.

"From the point of view of the public interest each application must be considered from the point of view of the benefits or detriments which will accrue to the public generally from the grant of consent. This will involve a consideration of the advantage or utility to the public of the use which it is proposed to make of the land, as well as of all other features which may in any proximate way affect the public at large. The circumstances which may influence a decision are, from every point of view, so general and so incapable of anything even approximating precise definition by reason of their infinite variety, that it is impossible to anticipate or summarize them. Any attempt to do so, even generically, must obviously be foredoomed to failure.

"Despite the difficulties, however, a decision on the subject has to be made on every occasion when undue aggregation is alleged. The question must be determined reasonably, as must all questions of fact.

"The Court has felt it necessary to say so much because this is the first case of alleged urban aggregation to present itself for consideration. In approaching an application of the tests here enunciated to the facts of the present case, a number of dominant features appear. These may be summarized as follows:—

"(1) That retention of ownership, or in other words, aggregation, is not the purpose of the appellant in acquiring the land he now seeks to purchase; on the contrary, diversity of ownership is the necessary result of the successful prosecution of his activities.

"(2) That selling land, either on which he hopes to obtain a contract to build a house or on which he has already built a house, demands that the appellant must take into account the varying preferences of potential purchasers as to site. Appellant's counsel phrased this aspect of the case by saying that building sites 'are the appellant's stock-in-trade.' He must, it is conceived, have sufficient lots of diverse character to ensure that he will not lose a potential purchaser, from the class for which he caters, by reason of his inability to satisfy some preference a possible purchaser may have.

This may well require the ownership by him of lots in various localities. It will also doubtless require that he should have sufficient lots in each locality to answer such current or reasonably anticipated demands as his building capacity will extend to satisfy.

"(3) That the appellant must have a wide enough range of choice available to purchasers to ensure a reasonable certainty of sales at appropriate times, the continuity of his work as a builder being dependent upon his ability to make such sales when he is free to proceed with building construction on any land sold.

"(4) That there is an abundance of equally desirable land available at East Invercargill, so that the appellant is not, by his activities, sensibly reducing the desirable areas available to intending purchasers generally.

"(5) That there is an urgent demand for house properties in and about the City of Invercargill.

"From this statement of the position it appears that the appellant may reasonably have need of the land which he is now seeking to acquire, and that any aggregation which may result by his acquisition of it would probably be of but temporary duration. It also appears that the acquisition of the area by the appellant will not prejudice, but may subserve, the public interest, in that his activities in relation to it may result in one more house being added to the total number of houses available to answer a public demand, which is urgent.

"The sole remaining question which emerges is whether the appellant's needs do, in fact, extend to a necessity for the acquisition of this area. On this phase of the matter the Crown representative contended that, on the basis of his capacity to build, the appellant has already sufficient lands available to assure him of one year's work. This, it was contended, was sufficient in the circumstances. Upon the whole, however, the Court is of opinion that the appellant might, with reasonable justification, expect to be assured of work for some period in excess of a year, and the acquisition of this particular area is necessary to afford that assurance.

"The Court, for the reasons given, is of opinion that undue aggregation in terms of the Act would not result from the grant of consent to the proposed sale. From the nature of the Chairman's supplementary report it appears not improbable that the Committee would take a similar view.

"It is only necessary to comment in conclusion that no question was raised as to this land being acquired for speculative purposes, and on that topic the Court expresses no opinion.

"As the Court does not regard the proposed acquisition by the appellant as constituting undue aggregation, the Appeal is allowed as to that ground.

"The Court has no indication, however, that the Committee dealt with or considered any of the other questions involved in the application, such as the propriety of the consideration. The case is therefore referred back to the Committee for consideration under s. 21 (3) of the Act."

No. 22.—N.Z. I. Co., Ltd. to H.

Urban Land—Residential Property—Price reduced by Committee—Further Reduction by Court—Calculation of Depreciation, Repairs, and Replacement Cost.

This was an appeal by the vendor of a property which was sold on April 17, 1944, for £900. The Committee consented to the sale, subject to the consideration being reduced to £850.

The Court said: "Having regard to the circumstances, the appellant can only be said to have exhibited great courage in appealing, as an examination of the evidence adduced by it will disclose.

"The appeal was based upon the evidence of two expert witnesses, Messrs. H. and M. The former valued the property on June 20, 1944, obviously for the purposes of proceedings under the Act, at £871. The latter, for the purposes of the appeal, valued them at £954, but agreed that a calculation of depreciation at his adopted rate over the proper life of the building would reduce his value to £900.

"A proper adjustment of both valuations establishes that the property on December 15, 1942, was not only not worth the sale price, but not worth the sum to which the Committee reduced the consideration.

"If Mr. H.'s assessment of value be taken, it will be found that he calculated his replacement costs at £1 7s. a square foot 'for the whole sweep of the house,' as he phrased it. This he agreed should not perhaps be done. His assessment of the replacement cost is obviously excessive. This is demonstrated by the fact that both Mr. M., and Mr. I. who was called for the Crown, based the cost at £1 4s. a square foot. This assessment is obviously the proper assessment. If Mr. H.'s assessment of this item be recalculated at £1 4s. per square foot, it has the effect of reducing his aggregate value, if every other item of his assessment be accepted as correct, to £748 as compared with the value allowed by the Committee of £850.

"On the other hand, Mr. M. allowed for the cost of repairs at £25 only. This sum he said would not put the place into good order, but would merely make it 'useable.' Against the allowance on this account of £25 must be brought in contrast the sum of £120 allowed by Mr. H. for repairs, and the sum of £118 allowed on the same account by Mr. I. Clearly, to put the property into a state of repair sufficiently good to warrant the calculation in respect of it of depreciation at the rate uniformly adopted by all the valuers, requires an immediate expenditure of certainly not less than £100. Mr. M. has allowed £25, so that at his value of £900 a further sum of £75 must be deducted from his assessment of value, leaving it at £825, which is £25 less than the value allowed by the Committee.

"Mr. I., in the course of his careful and well confirmed testimony, assessed the total value at £765. The Court is inclined to the opinion that Mr. I.'s assessment of value is the more correct, but a careful consideration of all the valuations suggests that the basic value of the property should be £800.

"The basic value is fixed at that sum accordingly and consent to the sale given conditional on the price being reduced to £800. The appeal otherwise is dismissed."

RULES AND REGULATIONS.

Employment Restriction Order No. 5. (Industrial Man-power Emergency Regulations, 1944.) No. 1944/148.

Purchase of Scheelite Order, 1944. (Marketing Amendment Act, 1939.) No. 1944/149.

Public Service Amending Regulations, 1944. (Public Service Act, 1912.) No. 1944/150.

Fat-stock Disposal Order, 1944. (Primary Industries Emergency Regulations, 1939.) No. 1944/151.

Motor-vehicles Emergency Regulations, 1940, Amendment No. 2. (Emergency Regulations Act, 1939.) No. 1944/152.

Oil Fuel Emergency Regulations, 1939, Amendment No. 8. (Emergency Regulations Act, 1939.) No. 1944/153.

Sea-fisheries Regulations, 1939, Amendment No. 15. (Fisheries Act, 1908.) No. 1944/154.

Electricity Control Order, 1943, Amendment No. 3. (Supply Control Emergency Regulations, 1939.) No. 1944/155.

Electric Water-heating Order, 1943, Amendment No. 2. (Supply Control Emergency Regulations, 1939.) No. 1944/156.

NEW BOOKS.

Garrow and Willis's Principles of the Law of Evidence in New Zealand. (30s.)
Annual Practice, 1944. (82s.)
Slack's Liability for National Service, Second Edn., 1944. (26s.)
Paterson's Licensing Acts, 52nd Ed., 1944, (Thin Paper Ed. 48s. 6d.)
Interpretation of Documents, by Roland Burrows, K.C. (16s.)
Yearly Supreme Court Practice: Supplement 1944. (48s. 6d.)
New County Court Practice: Supplement 1944. (48s. 6d.)
Bells' Food and Drugs, 11th Ed., 1944. (31s.)
Bellamy's Workmen's Compensation Tables, 2nd Ed., 1944. (11s. 6d.)
Collier's Valuation for War Damage, 1944. (16s. 6d.)
Ryde on Rating, 3rd Supp., 7th Ed., 1944. (11s. 6d.)—Book and Supplement: £5 5s.)
Butterworth's Yearly Digest of Cases, 1943. (41s. 6d.)
Rent and Mortgage Interest Restrictions Act, 1920–1939, 19th Ed., 1943. (Law Notes). (26s.)
Jacob's Bills of Exchange, 4th Ed., 1943. (31s.)
Wheaton's International Law (War), 7th Ed., 1944. (71s. 6d.)

AGREEMENTS FOR SALE AND PURCHASE OF LAND.

By E. C. ADAMS, LL.M.

(*Concluded from p. 143.**)

PRECEDENT NO. 5.

ASSIGNMENT OF UNPAID PURCHASE-MONEY UNDER AGREEMENT FOR SALE AND PURCHASE OF LAND.

THIS DEED made the day of one thousand nine hundred and BETWEEN C.D. of (hereinafter together with his executors administrators and assigns called "the assignor") of the one part and G.H. of (hereinafter together with his executors administrators and assigns called "the assignee") of the other part WHEREAS by agreement for sale and purchase dated the day of one thousand nine hundred and forty made between A.B. of as vendor of the one part and E.F. of as purchaser of the other part for the considerations therein appearing the vendor agreed to sell to the purchaser and the purchaser agreed to purchase from the vendor the lands more particularly described in the schedule hereto at or for the price or sum of one thousand and fifty pounds (£1,050) whereof one hundred pounds (£100) was paid by way of deposit and the balance of nine hundred and fifty pounds (£950) was to be paid by annual payments of one hundred pounds (£100) on the first day of June in each and every year with a final payment of fifty pounds (£50) AND WHEREAS by deed of assignment bearing date the day of one thousand nine hundred and forty made between the said A.B. as assignor of the one part and the above-named C.D. as assignee of the other part the said A.B. absolutely assigned to the said C.D. all his right title and interest in the moneys payable to him as vendor under the said agreement for sale and purchase AND WHEREAS the balance of the purchase-money owing under the aforesaid agreement for sale and purchase as at the first day of June one thousand nine hundred and forty was two hundred and fifty pounds (£250) all interest whereon has been paid down to the first day of December one thousand nine hundred and forty AND WHEREAS the assignor has agreed with the assignee for the sale to him of his interest in the said agreement for sale and purchase at or for the price or sum of two hundred and fifty pounds (£250).

NOW THIS DEED WITNESSETH that in consideration of the sum of TWO HUNDRED AND FIFTY POUNDS (£250) on or before the execution hereof paid to him by the assignee (*the receipt whereof is hereby acknowledged*) *he the assignor* DOTH HEREBY ABSOLUTELY ASSIGN TRANSFER AND SET OVER unto the assignee all his right title and interest in and to the moneys still payable under the aforesaid agreement for sale and purchase bearing date the day of one thousand nine hundred and forty and all other the rights of him the assignor as vendor under the said agreement for sale and purchase AND FOR THE CONSIDERATIONS AFORESAID the assignor DOTH HEREBY COVENANT AND AGREE with the assignee that the said agreement for sale and purchase and the said deed of assignment thereof are good valid and subsisting documents in nowise void or voidable and that the assignor has good right and title to the moneys thereby secured and hereby assigned AND FOR THE CONSIDERATIONS AFORESAID the assignee DOTH HEREBY COVENANT AND AGREE with the assignor that he will save harmless and keep indemnified the assignor from and in respect of any claims suits and demands arising out of the aforesaid agreement for sale and purchase.

IN WITNESS WHEREOF these presents have been executed the day and year first before written.

THE SCHEDULE.

[*Set out here official description of land.*]

SIGNED by the said C.D. as assignor in the presence of—

T.U.
Solicitor, Auckland.

SIGNED by the said G.H. as assignee in the presence of—

Y.Z.
Law Clerk, Auckland.

PRECEDENT NO. 6.

SPECIAL CLAUSES IN AGREEMENT FOR SALE AND PURCHASE OF LAND SUBJECT TO A MORTGAGE: PURCHASE-MONEY TO BE PAID IN WEEKLY INSTALMENTS.

1. THE VENDOR shall sell and the purchaser shall purchase [*Set out here description of land*] subject to mortgage No. to securing the principal sum of six hundred pounds (£600) at or for the price of nine hundred pounds (£900) which sum is inclusive of the said mortgage debt.

2. The said purchase-money of nine hundred pounds (£900) shall be paid as to the sum of thirty-five pounds (£35) in cash by way of deposit (the receipt whereof is hereby acknowledged) as to the sum of one hundred pounds (£100) in cash on the date of possession and as to the balance in manner hereinafter provided.

3. The purchaser shall pay to the vendor the sum of thirty shillings (30s.) per week during the term hereof the first payment to be made on the day of 194 and such payments shall be used by the vendor to pay first the interest payable under the said mortgage No. secondly the rates and insurance premiums payable in respect of the said property thirdly in payment of interest at the rate of five per centum per annum at quarterly rests as from the day of 194 on the balance of the purchase-money payable by the purchaser over and above the said mortgage debt fourthly in payment of a quarterly accountancy fee of five shillings (5s.) and the balance shall be applied at quarterly rests in reduction of the said balance of such purchase-money, such payments of thirty shillings (30s.) per week shall be made by the purchaser to the vendor until the principal sum payable thereunder is reduced to the principal sum of six hundred pounds (£600) being the amount secured on said mortgage No. .

4. The purchaser shall have the right at any time to pay any instalment of any amount on account of the said balance of purchase-money and interest and any payment so made shall cease to be payable as from the next quarterly date for adjustment of interest.

5. When the purchaser shall have paid to the vendor the excess of purchase-money over and above the said mortgage debt of six hundred pounds (£600) he shall be entitled to a registrable transfer of the interest of the vendor in the said piece of land subject only to the said mortgage No. .

PRECEDENT NO. 7.

SPECIAL CLAUSE IN AGREEMENT FOR SALE AND PURCHASE OF LAND SUBJECT TO A MORTGAGE.

(N.B.—*The term of the agreement was three years and excepting interest on unpaid purchase-money, no purchase-money was to be paid until expiration of term: not even a deposit was paid.*)

THAT the said lands are at present subject to mortgage number and the vendor doth hereby undertake and agree that she will duly and punctually pay the principal and interest moneys secured by the said mortgage as they respectively come due and payable thereunder and that she will on or before the completion of the sale and purchase hereby evidenced in accordance with clause 7 hereof and at her own expense obtain and register a proper release of the said mortgage.

(N.B.—*Clause 7 provided for a transfer free of encumbrances on payment of the purchase-money.*)

PRECEDENT NO. 8.

SPECIAL CLAUSE IN AGREEMENT FOR SALE AND PURCHASE OF LAND SUBJECT TO A MORTGAGE.

THE PURCHASE PRICE for the said property shall be the sum of (inclusive of the sum secured by mortgage as *hereinafter set out*) which shall be payable by the purchaser to the vendor as follows:—

(*a*) The sum of as a deposit and in part payment of the said purchase-money on or before the execution of these presents (the receipt whereof the vendor doth hereby acknowledge);

(*b*) The sum of shall be deemed to have been paid by the purchaser taking over and assuming liability for that sum secured by mortgage over the said property to the ;

(*c*) The balance or sum of shall be paid on the day of .

* Owing to pressure of space, there has been unavoidable delay in concluding this article, which appears on pp. 113, 126, and 142, *ante*.

PRECEDENT No. 9.

SPECIAL CLAUSE IN AGREEMENT FOR SALE AND PURCHASE OF LAND SUBJECT TO A MORTGAGE.

1. THE SAID LAND is subject to Mortgage No. to therein described securing the sum of bearing interest at per centum per annum reducible to per centum per annum payable half-yearly which mortgage becomes repayable on the day of and the vendor hereby covenants that she will pay all principal interest and other moneys payable under the said mortgage at the times and in the manner therein provided for payment thereof.

2. Notwithstanding anything hereinbefore contained the purchaser shall have the right at any time during the currency hereof to pay to the vendor so much of the balance of the purchase-money as represents the vendor's share and equity in the said purchase-money over and above the amount of due and owing under the said registered mortgage number and upon payment thereof the vendor will at the sole cost and expense of the purchaser transfer to the purchaser the said land subject to the said mortgage the liability for which will then be taken over by the purchaser but otherwise free from encumbrances (except as set out in the schedule hereto) and interest under the said mortgage shall be adjusted between the parties as at the date of such transfer.

PRECEDENT No. 10.

SUPPLEMENTARY AGREEMENT TO AGREEMENT FOR SALE AND PURCHASE: CAPITALIZING ARREARS OF INTEREST.

[*Recital that there is now owing under the agreement the sum of £800.*]

IT IS HEREBY AGREED AS FOLLOWS:—

1. That the sum of eight hundred pounds (£800) is now owing by the purchaser to the vendor as aforesaid AND IT IS HEREBY AGREED that so much of the said sum of eight hundred pounds (£800) as is comprised of interest payable under the said annexed agreement is hereby capitalized and consequently the principal moneys now secured and payable by the said annexed agreement and these presents is eight hundred pounds (£800).

2. That from and after execution hereof the said annexed agreement shall be read and construed and take effect so that the balance of purchase-money now payable thereunder in respect of the premises therein described shall be the sum of eight hundred pounds (£800) in lieu of the purchase-money therein actually mentioned.

3. That the said principal sum of eight hundred pounds (£800) together with interest thereon shall be paid by three hundred and six monthly instalments of four pounds thirteen shillings and two pence (£4 13s. 2d.) each throughout a period of twenty-five years and six months computed from the day of 1943 the first of such monthly instalments being payable on the day of 1943 and the remainder of such instalments to be made respectively on the first day of each successive month throughout the said term.

4. That the aforesaid monthly instalments are calculated with interest computed at five per centum per annum (with half-yearly rests) upon the balance of the said principal sum for the time being owing.

[*Then follows a provision that all the provisions of the principal agreement shall remain operative and of full force and effect except so far as the same are varied to give effect to this agreement.*]

LAND AND INCOME TAX PRACTICE.

Defaulting Taxpayers.—Where a taxpayer has made default in the payment of *any* income-tax owing by him, the Commissioner may, by notice in writing, require any person to deduct from any amount payable or to become payable to the defaulting taxpayer such sum as may be specified in the notice and to pay the amounts so deducted to the Commissioner: Finance Act, 1942, s. 7.

In the case where s. 7 is applied to salary or wages the amount to be deducted shall be one-twentieth per week of the income-tax due and payable at the date of the notice or 20 per cent. of the salary or wages whichever rate is the less.

Although a free house or other allowance is deemed to be salary or wages for the purposes of income-tax (s. 3 of the Land and Income Tax Amendment Act, 1932–33) such benefits are not "amounts payable or to become payable" within the meaning of s. 7 (1) of the Finance Act, 1942, and, consequently, cannot be taken into account in fixing the rate of deduction. Section 7 in this case can be applied only to salary or wages payable in cash.

Social security charge and national security tax deducted by the employer and paid to the Commissioner is deemed under s. 118 (5) of the Social Security Act, 1938, to have been paid to the taxpayer. The whole amount of the salary or wages payable in money, must therefore, notwithstanding the deduction of social security charge and national security tax be included in the salary or wages in calculating the twenty per cent. deduction.

Deduction of arrears of income-tax should not be made from compensation moneys paid to an employee, but should be continued when the employee resumes employment.

A notice given under s. 7 may be revoked at any time by the Commissioner by a subsequent notice to the person to whom the original notice was given and to the defaulting taxpayer. The notice must be revoked at the request of the taxpayer at any time when the Commissioner is satisfied that all income-tax then due and payable by the taxpayer has been paid, *and* a sum is held to the credit of the taxpayer of an amount not less than the amount of the income-tax to become due and payable for the then current year of assessment.

The sum deducted from any amount pursuant to a notice under this section shall be deemed to be held in trust for the Crown and, without prejudice to any other remedies, shall be recoverable in the same manner in all respects as if it were income-tax payable by the employer or other person on whom the notice was served.

Although s. 7 refers to income-tax, nevertheless, by virtue of s. 109 of the Social Security Act, 1938, the provisions of s. 7 of the Finance Act, 1942, may be invoked for collection of social security charge and national security tax.

Where a will provides that an annuity "shall not be alienated or pass by bankruptcy or be liable to be seized, sold, attached or taken in execution by process of law," such restraint upon alienation is effective only by reason of the operation of s. 24 of the Property Law Act, 1908. It is not expressly stated in such Act that the provisions of the Act are binding on the Crown, and accordingly the restraint upon alienation is not effective as against the Crown. Notwithstanding such restraint upon alienation, action may therefore be taken under s. 7 of the Finance Act, 1942, to recover arrears of tax from annuity moneys payable to the taxpayer.

If a taxpayer, who is in arrears with payment of tax, is a partner in a farming partnership, notice under s. 7 may be sent to the dairy company which the partnership supplies, requiring the company to make deductions out of the dairy cheques payable to the partnership. Any notice issued would require deductions to be made out of the defaulting taxpayer's share of the cheques only.

Section 7 may be applied to a taxpayer who is temporarily absent from New Zealand, but who is deemed to be ordinarily resident for social security charge and national security tax purposes—*e.g.*, a taxpayer is detained abroad for an extended period on account of war-conditions and in the meantime a considerable amount of social security charge and national security tax became due on income derived from rents. Section 7 may be invoked requiring the arrears of charge to be deducted from the rents payable to the taxpayer. Although s. 120 (3) of the Social Security Act, 1938, provides that the 10 per cent. penalty for late payment is not to be charged, unless the charge remains unpaid after the expiration of one month from the date of his return, this does not mean that the taxpayer is not in default in payment of the charge until he returns. It merely extends the period in which payment may be made without penalty, but the original due date still stands and the taxpayer "has made default" within the meaning of s. 7.

Property held for Sale: Deduction of Outgoings.—A taxpayer successfully farmed his property for a number of years, but then, owing to circumstances entirely outside his control—old age and inability to obtain labour—he was compelled to sell the stock and put the property on the market for sale. It was some years before he was able to sell it, and each year the

outgoings far exceeded the income derived from grazing and the sale of hay. In these circumstances the Commissioner permitted the loss each year to be set off against other income derived, as the property was originally held by the taxpayer as an income producing asset and pending the sale of the property, as much income as possible was derived therefrom. These circumstances are distinguishable from a case in which premises had never been held as a revenue producing asset, but had always been held for the purpose of resale. In this latter case, the excess of outgoings over and above any incidental income derived while the property is so held, is not allowable against income from another source.

Alimony or Maintenance.

1. Section 14 of the Finance Act, 1939, exempts from income-tax and social security charge and national security tax, income derived by a woman in the form of payments in the nature of alimony or maintenance made to her *by her husband or former husband out of moneys belonging to him.*

2. The question whether a woman is assessable on alimony or maintenance is one of fact depending upon whether such moneys are paid by her husband out of moneys belonging to him or are paid by trustees out of moneys belonging to them and held as security for payment of alimony.

3. Where a trust has been created for payment of the alimony the provisions of s. 102 (2) of the Land and Income Tax Act, 1923, as amended by s. 27 (6) of the Land and Income Tax Amendment Act, 1939, apply. Thus, any amounts paid by the trustees out of non-assessable income still remain non-assessable income in the hands of the beneficiary, notwithstanding *that they form part of the alimony.*

4. If, however, the alimony or maintenance is paid by the trustees out of capital of the trust fund, the provisions of s. 102 (*a*) do not apply, and the sum so received by the wife or former wife must be treated as alimony or maintenance and therefore assessable (as an annuity payment under s. 79 (1) (*g*) of the principal Act), although paid out of capital.

5. The husband is not entitled to deduct maintenance payments made by him from his assessable income, but he may claim the special exemption of £50 in respect of his wife. In the case of alimony he may, if he has remarried, claim a special exemption of £50 in respect of his former wife, as a dependent relative under the provisions of s. 11 of the Land and Income Tax Amendment Act, 1939.

6. If a husband enters into a deed of separation under which he covenants to pay maintenance to his wife during her life, the covenant is binding on his executors and administrators and payments made by the executors after his death to the wife are not exempt income in her hands. Such payments are no longer payments made by the husband out of moneys belonging to him and s. 14 of the Finance Act, 1939, does not apply.

7. In terms of a deed of settlement a husband settled certain assets upon trust to pay the net annual income therefrom to his wife by way of alimony. Provision was made in the deed for payment to the wife of a certain net sum annually, and if the income of the trust proved insufficient to pay such amount, the trustee had power to sell sufficient assets to cover the deficiency or the settlor could voluntarily make good the amount. The trust income proved insufficient to meet the amount payable annually and the deficiency was made good out of his own pocket. The payments made by the settlor to make up the difference between the trust income and the annual amount payable by way of alimony would be exempt in the wife's hands as such payments are payments in the nature of alimony made by her former husband out of moneys belonging to him (s. 14, Finance Act, 1939).

Estates: Absentee Trustee.—The Commissioner states that the liability of trustees who are not ordinarily resident in New Zealand for social security charge and national security tax on income derived from New Zealand is the same as that of trustees resident in New Zealand.

For example:—

1. Where the income is being accumulated on behalf of a beneficiary not ordinarily resident in New Zealand, who has a *vested* interest therein, but who, for some reason, is not receiving payment thereof—*e.g.*, a beneficiary under twenty-one years of age, such income is *not* liable for the charge.

2. Where the income is income in which a beneficiary, resident in New Zealand, has a vested interest, such income is chargeable, provided the beneficiary is not under sixteen years of age.

The income is chargeable when it is assessable as trustees' income, such as—

(*a*) Income accrued at the date of death.
(*b*) Income used to pay debts and liabilities and assessed under s. 102 (*b*) of the Land and Income Tax Act, 1923.
(*c*) Income to which a beneficiary is only contingently entitled (no vested interest).

Insurance Recoveries.—An insurance recovery in respect of an asset (other than stock-in-trade) in excess of the depreciated value is not assessable as depreciation recovered in terms of s. 80 (1) (*a*) of the Land and Income Tax Act, 1923. For this section to be applied the asset must have been realized by *sale* and an insurance recovery is not sufficient for the section to operate.

CORRESPONDENCE.

The Word "Integritous."

THE EDITOR,
NEW ZEALAND LAW JOURNAL.

SIR,—

I see that "Scriblex" objects to the use of the word "integritous" in a recent judgment. I do not think that is very much to complain of. I have seen many more objectionable words, also not to be found in the dictionaries, in judgments—*e.g.*, "ballotee" and "amputee"; horrible words, beastly words, uncouth alike, to eye and ear, and of very doubtful parentage. Those words are even more offensive than the use of "contact" as a verb, and it is generally admitted that a person who says "contact" when he means "see" or "meet" is utterly beyond redemption. I had always understood that "ee" termination denoted the idea of receiving or holding something; a mortgagee holds a mortgage, a lessee holds a lease. But obviously a ballotee and an amputee are in a contrary position. Further research inclined me to the thought that possibly the element of some suffering or loss was the foundation of the termination, convincingly exemplified in the case of a mortgagee, any one of whom, I imagine, would willingly change places with a mortgagor, and this seemed a fruitful avenue of inquiry until I recollected that in the case of "lessee" it is the lessor who does the suffering or sustains the loss. As for "donee," in view of the scale of gift duties, future editions of dictionaries will, no doubt, tag that word as obsolescent, if not archaic. It is all very confusing.

To return, however, to "integritous," I think it suggests exactly what it means, a man of honour, a man of integrity, in short, an integritous man. It has a mellifluous sound and is easy to look at. I like it. I have seen the word before and had thought it commonplace enough, but only after ransacking my brains for a couple of days—memory is such a fickle jade—could I recall where. It is used, and more than once, by Ernest Bramah in his Kai Lung series, and, I think, by other writers. Now Bramah is an author of outstanding quality, and his writings are warmly praised by such eminent literary critics as Mr. Belloc and Sir John Squire, so that anyone sinning by the use of the word integritous sins in very good company. It was, by the way, to a very great lawyer that I owe my introduction to Kai Lung, the late Professor Adamson, then Dean of the Faculty of Law at Victoria College, and the imperturbable Chinese philosopher has ever since been an abiding joy. How many of the cheap Penguin editions have I lent to my friends—and not seen again! Those friends, by the way, might therefore say of themselves, as Kai Lung makes the Mandarin Teen King plead of himself, "With the exception of "ordinary business transactions the one before you has led an "integritous life. Why then should the path of his endeavour "be edged with sharp afflictions?"

I am, &c.,

INTEGER.

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

Pioneers, Pulpit, Police, and Press.—In his book *On Circuit*, MacKinnon, L.J., says:

> In the course of centuries charges to Grand Juries may have contained much wisdom; but I suspect they also produced a good deal of rubbish.

None would suggest that the mere suspicions of an English Lord Justice of Appeal have any extra-territorial operation; but, nevertheless, occasions sometimes arise in New Zealand when this or that passage in a charge to a Grand Jury seems to contain a somewhat debatable statement or inference. In Auckland, recently, Fair, J., told the Grand Jury that notwithstanding the increase in population in the last twenty years the amount of crime which had to be dealt with by the Courts remained much the same, and the number of very grave offences had steadily decreased for the past ten years at least. From this state of affairs the learned Judge drew the following inference:—

> It seemed that the *standard of self-respect and good character*, which had always been high in this country, *had been maintained or even increased*.

Many who come into close contact with the affairs and ways of this world would feel some difficulty in drawing the same inference as the learned Judge. Further, if the report in the *Auckland Star* is correct, Fair, J., went on to mention, in the following order, four of the many factors "contributing to this happy result": (i) "the example and tradition of the pioneers in the past"; (ii) "the teaching of the Churches"; (iii) "the efficiency and devotion to duty of the Police"; (iv) "the high standard of the Press." Whatever may be said of the others of these factors, the first—"the example and tradition of the pioneers in the past"—seems of somewhat doubtful validity. Is it to be inferred that the influence of the pioneers increases with the passing of time?

Lord Romer's Death.—Lord Romer, who resigned office last April, is now dead. A son of Sir Robert Romer, who was a Lord Justice of Appeal from 1899 to 1906, he was a Judge of the Chancery Division from 1922 to 1929, and a member of the Court of Appeal from 1929 until 1938, when he was promoted Lord of Appeal in Ordinary. When Lord Romer entered the House of Lords he was introduced by Lord Russell and Lord Maugham. The ceremony had a unique feature—the three Lords were brothers-in-law. Lord Maugham had married Lord Romer's sister, and Lords Russell and Romer had married daughters of the first Lord Ritchie.

Acquisition of Land by Aliens.—The Under-Secretary of Justice recently sent to the Wellington newspapers a long statement replying to Scriblex's criticism of the policy adopted by the Minister of Justice under the Aliens Land Purchase Regulations. Nowhere in his reply does the Under-Secretary appear to challenge Scriblex's view that the regulations would not authorize the Minister to attach to his consent a condition requiring the alien to subscribe a named sum to War Loan. The effect of the Under-Secretary's reply would seem to be that the Minister does not actually attach any condition to his consent; but that, where consideration of the case shows that all considerations are favourable to the granting of consent except that "the alien has not recognized his obligation to assist in the war effort to a reasonable extent," the Minister simply "indicates" to the alien that should he "be willing to repair a deficiency in this respect"—*i.e.*, of course, by subscribing a named amount to War Loan—the Minister "would be prepared to take it into consideration in the exercise of his discretion." In Scriblex's view that does not really alter the matter. It is simply doing in an indirect way what the regulations would not permit to be done directly. Another comment ought to be added as to the Under-Secretary's reply. The reply is a defence and commendation of ministerial *policy*. The proper person to make a public statement defending and commending ministerial *policy* is the Minister, and not the Under-Secretary.

The Three Cases of Bad Law.—It is a commonplace that *hard* cases make bad law. But MacKinnon, L.J., has lately told us, and with truth, that there is another class of case which can make bad law—*good* cases. In *Lace* v. *Chantler*, [1944] 1 All E.R. 305, a County Court Judge's disapproval of the defendant's conduct had led him to make an order against the defendant on that ground. The Court of Appeal upheld the order on another ground, incidentally disapproving a decision given "by hook or by crook" by Rowlatt, J., during the last war. MacKinnon, L.J., observed:

> A hard case and a good case may equally lead to bad law.

And there is at least one other class of case which can make bad law—*great* cases. Forty years ago O. W. Holmes, J., of the Supreme Court of the United States, in *Northern Securities Co.* v. *United States*, 193 U.S., 197, 400, expressed that truth with his customary realism and robustness:

> Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well-settled principles of law will bend.

The Old Hand's Point of View.—It was July, 1925, and the Court of Appeal was about to begin the hearing of one of the most important cases of that year—the *Flourmillers'* case. Counsel engaged in the appeal were standing in front of the fire in the Supreme Court Library, discussing some of those matters and personages always discussed in front of the fires of Supreme Court Libraries, and waiting for the hour of 10.30 a.m. Ostler, J., appointed to the Bench only some few months earlier, and the youngest of its then members, was to have been one of the Court to hear the appeal; but his youthful associate came into the Library and, singling out Sir Francis Bell, K.C., from the group, announced in tones suitable for important news: "I am sorry to say, sir, that Ostler, J., has had to go to bed with the 'flu and will be unable to sit." Sir Francis's reply was as brief as it was prompt: "*De minimis non curat lex.*"

PRACTICAL POINTS.

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1. Destitute Persons.—*Maintenance—Amount—Matters to be considered.*

QUESTION: In fixing the amount of maintenance for a wife, must a Magistrate take into account the income of the wife?

ANSWER: Yes: see, for example, *Bond* v. *Bond*, (1939) 34 Tas. L.R. 52; *Beddington* v. *Beddington*, (1922) 127 L.T. 755, 38 T.L.R. 743.

2. Discovery.—*Summons under Married Women's Property Act, 1908—Whether Discovery of Documents obtainable.*

QUESTION: A summons under the Married Women's Property Act, 1908, for determination of questions as to property between husband and wife has been issued. For the defendant it is desired to issue an order to the plaintiff for discovery. Is it possible to do this in such a proceeding?

ANSWER: Yes, discovery can be had in such proceedings. In an application, which recently came before the Chief Justice at Wellington, an order for discovery had been issued, and the plaintiff moved for an order that he be not bound to make discovery. The grounds of the motion were that the proceedings did not constitute an "action" within the meaning of s. 2 of the Judicature Act, 1908, and of RR. 161 and 161A of the Code of Civil Procedure; or, alternatively, upon the grounds that the order for discovery was issued and served as of course before any statement of defence had been filed by the defendant contrary to the provisions of R. 161A of the Code of Civil Procedure. The motion was dismissed, the plaintiff to have ten days in which to file discovery.

3. Divorce.—*Service—Respondent Husband a New Zealander serving with Royal Navy.*

QUESTION: Divorce proceedings are to be commenced by a wife against a husband, who is a New Zealander serving with the Royal Navy overseas. What practice is adopted in such case in effecting service?

ANSWER: Of course, it is necessary in these cases to apply to the Court on motion for an order fixing the time within which the respondent may file an answer, and a memorandum lodged with the papers should suggest a suitable mode of service.

In an application in similar circumstances heard recently, an order was made fixing ninety days after service as the time within which the respondent might file an answer. Personal service is to be effected through the Secretary of the Admiralty, London, and the respondent, in addition to the divorce petition and notice is to be also served with a sealed copy of the order, and two forms, as in *A.* v. *A.*, [1940] N.Z.L.R. 394, for the purpose of his intimating whether or not he intended to defend.

The papers for service on the respondent are to be forwarded by registered letter to the Secretary of the Admiralty, London, the letter containing a request, settled by the Registrar, that the Secretary arranage for delivery of the papers to the respondent personally by his Commanding Officer, and for the Commanding Officer to sign a certificate, to be settled by the Registrar, as to service of the individual papers, and the date of such service. The certificate must be eventually returned to New Zealand through the Secretary of the Admiralty, London.