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THE VICTORY IN EUROPE—AND AFTER.

IN his broadcast to his people on the Day of Victory in Europe, His Majesty the King reminded them of what had upheld them through nearly six years of suffering and peril:

> The knowledge that everything was at stake—our freedom, our independence, our very existence—but the knowledge also that in defending ourselves we were defending the liberties of the whole world, that our cause was not the cause of this nation only, not of this Empire and Commonwealth only, but also of every land where freedom is cherished and law and liberty go hand in hand.

In those words, His Majesty expressed the application of the rule of law to international as well as in national affairs.

By the rule or supremacy of law in international affairs is meant the recognition of certain fundamental obligations as binding upon nations in their dealings with one another. The tragedy that led to the European and Japanese wars was not the absence of international law, but the fact that both Germany and Japan were prepared to rely on force rather than on the accepted methods prescribed by international law for the settlement of questions involving other nations. Professor Brierley, Chichele Professor of International Law and Diplomacy at Oxford, in his recently published book *Outlook for International Law*, says:

> If order cannot be secured by the action of any single State, and if the responsibility for it cannot be divided between a few great States on international lines, it must succeed, if at all, by a sufficient number of States being willing to combine together to establish and maintain it.

The present conference at San Francisco is aimed at the restoration of the rule of law, as well as the creation of the means for maintaining it, in the international sphere.

The rule or supremacy of law when applied within the boundaries of a civilized nation is the recognition by its Government and people of the impartial administration of the law by tribunals independent of any control or interference, subject only to the law of the land. The rule of law is, therefore, in essence, the peoples' bulwark of liberty against the arbitrary exercise of power.

In Great Britain, and in the United States of America and in the British Dominions, which have inherent British traditions, the rule of law connotes the supremacy of the common law administered by an independent Judiciary, which interprets statute law by means of rules of construction that preserve individual rights so far as they are not expressly or by necessary implication curtailed by the lawful authority of the people as a whole acting through their central Government. In this sense, the rule of law is based upon the impartial public administration of the common law, with some reconciliation of the supremacy of the common law with the claims of Parliament. In this narrower sense, the rule of law implies the supremacy of certain fundamental statutes such as Magna Carta, the provisions of the Bills of Rights and the Act of Settlement, which are accepted in British lands as the basis of our national constitutions, and the Habeas Corpus Act. In this sense, the rule of law has become what Holdsworth calls "the common law of the constitution," with special reference to personal liberty. The control by Parliament of the armed forces; the protection afforded by an independent Judiciary against the excesses of administrative officials, and the illegality of acts which curtail the doctrines of freedom of speech, of religious worship and belief, and of free association and assembly—are all part of this reconciliation. Its purpose, the rule of law, is the security to the nation's citizens as a whole, by the medium of the ordinary Courts of law, of the rights of individuals equal before the law.

The rule of law means equality before the law, or, to quote Dicey, "the equal subjection of all classes to the ordinary law of the land, administered by the ordinary law Courts; excluding any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals." The rule of law, in practice in Great Britain and the Dominions, led Dicey to say, "the principles of 1689 have become part of the accepted theories of democracy."

Whether the rule or supremacy of the law is viewed internationally, or in national affairs as binding both the Executive and individual citizens, it can be described as ordered liberty under the law.

When His Majesty spoke of law and liberty going hand in hand in every land in which freedom is

cherished, he reminded us that the maintenance of the rule of law was the ultimate stake for which we and our allies fought. For it is the reservoir of that right to personal liberty and those natural freedoms of the people for which the British as a nation have ever striven; and from it flow all the freedoms which we have enjoyed, the freedoms that through the long years of recent sacrifice and struggle we fought to preserve. We never lost hope of the ultimate triumph of justice, because we never faltered in our trust in the force that such liberty inspired. *Virtus ipsa nititur armis suis fortissime.*

The legal profession in this Dominion was second to none in its determination to do everything in its power to expedite the successful issue of the European war, as well as of the war nearer home that has still to be won. In our gallant expeditionary forces overseas, practitioners, both as leaders and as those who were led, took no small part in the victorious issue of our arms. In the Navy and in the Air Force, too, New Zealand practitioners and law-clerks served in all the theatres of war, in all ranks, many with distinguished records to their credit. In enlistments in the armed forces and in achievement, theirs is a record of which a profession of our limited numbers has reason to be proud.

There is good reason for the prominence of our profession in helping to win the victory in Europe. As New Zealanders its members loved freedom; and, from the very nature of their training and experience, they appreciated that, in a very literal sense, liberty, both national and individual, was at stake. They knew that all our cherished principles of justice and freedom would perish if the enemy were to prevail. *The rule of law had to be maintained*: to defeat tyranny and oppression wherever it arose; to secure our own independence as a nation in the international arena; to retain our individual liberties as citizens at home. They were well aware that the price to be paid for victory would be a heavy one; but its members, one and all, were prepared for great sacrifices if only the moral values could be saved. They knew (as Lord Macmillan puts it) "the greatest injustice in the world is the unjust deprivation of liberty." "We have fought the war for great principles," said Mr. Churchill, "and in satisfaction of those principles we shall find our reward."

The recollection of the principles of liberty and justice for which we, as a nation, have successfully fought abroad, should be an added incentive against our losing the peace at home by reason of inertia or complaisance. Now, as never before, we, as lawyers, must be ever vigilant in promoting the subsistence of the rule of law in our midst, so that the rights and liberties of our fellow-citizens may not be infringed or curtailed; and the rule of law may be maintained against encroachments from whatever direction they may come. We have a duty in this respect above that of the laymen; because we are nearer to a practical everyday realization of the truth of the aphorism that "eternal vigilance is the price of liberty," in the sphere of ordinary legislation, as well as of economic and national life.

It is conceded that the traditional liberty of the subject has still the protection in a general sense afforded by an independent Judiciary. Freedom from dictation by the Government and freedom from control by Parliament is still maintained in relation to the officers of our Judiciary of all ranks. It is still an accepted doctrine that Ministers of the Crown do not tamper with the administration of justice in our superior or inferior Courts. But—as Dr. E. C. S. Wade, Principal of the Law Society's School of Law in London, has pointed out—indirectly the sphere of judicial independence that safeguards the rule of law has been reduced by the character of much modern legislation. The socialization of the activities of the people, a process which has been in evolution for a considerable time, has meant (he has said) the restriction of individual rights by the conferment of powers of a novel character upon Government officials.

In the past, our people prided themselves on their liberty; because they believed in human liberty as an attribute of the dignity of man, and they trusted its capacity to work out its own regeneration. On this concept, the common law rests. But the modern growth of State social services, the control of economic conditions, and the regulation of the activities of the people as a whole, tend to sacrifice the rights of the individual to the welfare of the community. This, in itself, may not, or need not, be a bad thing, so long as the safeguards of the individual's liberty are preserved. This aspect of the rule of law may be maintained by making sure of the independence of the Judiciary in all spheres as a fact, and the abolition of discretionary powers conferred on non-judicial persons in determining private rights *vis-a-vis* State claims, so that arbitrary rule by administrative officials may be halted; and by placing emphasis on the personal liability of State functionaries for unlawful acts.

Again, in so far as the rule of law connotes the absence of arbitrary power, it implies that the individual should have the law ascertained and administered with reasonable certainty. Apart from the uncertainty that arises out of the bulk and detail of delegated legislation, by regulations and orders promoted by departmental officials, there is the impossibility of predicting how a ministerial discretion conferred by that kind of legislation will be exercised. This is no less dangerous because the purpose and extent of such regulations are shrouded from the public in obscurity; and because the unchallengeable ministerial discretion is exercised in decisions that are evolved in the silent forum of the Minister's inner consciousness.

At the ending of a war, there are inevitable tendencies towards continuance of the exercise of arbitrary power. Emergency authority is given in time of war to officials who must exercise, as best they can, power of which they have had little experience. Those to whom such emergency powers are given in times of stress are not themselves necessarily vicious by instinct; but they can none the less become highly dangerous if practice in power to which they have accustomed themselves during the duration of a long war is carried by them into the period of peace; or if they do not readjust their sense of authority to the claims of normal times. In the ordinary nature of things, a taste of arbitrary power too often creates an appetite that grows to unexpected proportions; and it may well be a matter for great concern if it remains unsatisfied when the plea of national emergency is no longer available. War-time controls are fundamentally inconsistent with our traditions and customs as a peace-loving people. Here, the lawyer can help in the winning of the peace. He must strive, without delay, to inform public opinion of the dangers that may lie ahead by this natural continuance of an arbitrary

exercise of power, so that the control and modifications of rights and liberties that were necessary during the height of war-danger may be abolished as speedily as is consistent with the national safety and well-being.

But it is in the larger peace-time sphere that danger to the rule of law principally lies. Our remarks are not merely of local significance. This danger is inherent in all Governments; and it is the duty of lawyers everywhere to continue their vigilance against it. Such a warning is expressed by Sir Henry Slesser, formerly a Lord Justice of Appeal, and earlier the standing counsel of the Labour Party and the Trades Union Conference in Great Britain, in a recent article in the *Fortnightly Review*, under the heading, *The Jeopardy of the Law*. Here, he discusses the growing tendency to preclude Courts of law from the determination of the rights of individuals claiming, in one form or another from the State. In this class of case, at best there may be an appeal to a tribunal, itself usually appointed by the Minister. This, says Sir Henry, makes "the power of the edict, emanating from the camera of Whitehall or a provincial office, one which makes the Court of Star Chamber or High Commission (which affected only the powerful) comparatively innocuous." The fact that this state of affairs has been accepted with comparative complacency by social reformers is due, it is suggested, to their feeling that in the past the law has largely been used by the wealthy for purposes of obstruction. We cordially agree with Sir Henry that this is a superficial attitude. He warns the reformers that once the rule of law is superseded under the plea of urgency, the day may come when the power of the Executive will be used against them, by which time all sense of legal right may be so lost that such dictatorial activity as has recently prevailed in Europe will appear to be normal and without objection.

It is, indeed, plain that if Parliament places practically unlimited power in the hands of the Executive, and by statute or regulation denies the individual the right of questioning in the Courts the acts of the Executive or its officers as they affect him, a serious encroachment is made upon the liberty of the individual citizen. That this is the present tendency can hardly be denied; and that it has been allowed to go as far as it has done at present in a freedom-loving nation is an indication of a general failure to appreciate as essential what Sir Henry Slesser calls "a permanent presiding justice, founded in the Law of Nature and sustained by that of God."

The root cause of this failure in appreciation of the rule of sovereignty of law in a free society lies, Sir Henry suggests, in an inability to distinguish between the regulation of things and interference with the dignity of persons:

> In the past the Law has too often treated all rights, personal, civic and proprietary, as standing upon a common foundation. Though in the interests of society individual claims to the possession or control of material things may properly be curtailed, controlled, or abolished, there never can be any justification, save in grave emergency for judicial interference with the liberty of opinion and its expression, or with the voluntary actions of men.

What we have to do is to restrict adjudication upon personal rights, where State interests are concerned, within proper limits; and, to use Sir Henry's words,

> recapture the notion that, without Law, certain, impartial and universal, no system of government, however immediately attractive, can result in anything but a despotism, albeit a kindly one.

He makes a few concrete suggestions as well as proposing an exhaustive inquiry into the prevailing methods of administrative law; among them that the privilege of Government departments sheltering themselves from the consequences of wrong-doing under the mantle of the Crown should be abolished; that every recipient of benefit who receives it as a consideration for contributions paid, whether compulsory or not, should have the same rights of legal remedy as is given to any one having rights under a contract of insurance; that Magistrates should cease to receive hortatory communications from the Home Office; and that crimes should, so far as possible be limited to cases where there is moral turpitude or a real potential danger to the State. His paper is a notable contribution to the discussion of a matter of the greatest importance to us all.

Everything that Sir Henry has said in his article may be applied *mutatis mutandis*, to our local conditions. We know that the remedy for the infringements of the rule of supremacy of the law by the obscure administrative tribunals is the open Court administered by an impartial Judiciary. As we have already said, lawyers are particularly conversant with the dangers to the infringement of individual liberty inherent in an administrative system that tends to grow rather than to remain static. Bureaucrats hate lawyers as we know. But that should not deter us from making our voices heard in the interests of the community at large. Our brethren on many foreign fields have endured great hardships, and have made great sacrifices so that the rule of law, and all that it connotes and implies, should not vanish from our midst. It is now our duty to preserve those principles for which they have suffered, and many have died, so that, to use the words of His Majesty the King, in this and "in every land where freedom is cherished, law and liberty may go hand in hand."

THE NEW SOLICITOR-GENERAL.

Announcement of the appointment of Mr. H. E. Evans, B.A., LL.M., of the firm of Messrs. Bell, Gully, Mackenzie, and Evans, Wellington, as Solicitor-General, in succession to Mr. Justice Cornish, was made just before this issue went to press.

Mr. Evans's selection as a Law Officer is one upon which the Hon. the Attorney-General, and the Government, are to be congratulated. The country is indeed fortunate in their having secured Mr. Evans as administrative head of the Crown Law Office, because he is a sound lawyer and an experienced man of affairs.

With Mr. Evans's brother practitioners, who well know his fine qualities of character and his wide knowledge of law, we join in wishing him many years of success in his new field of duty. His appointment has given his fellow-lawyers great satisfaction, as they know that he will give to the affairs of State entrusted to him the most careful and industrious attention. For him they have the highest regard, on personal grounds as well as on account of his extensive legal erudition; and they most cordially welcome him as the new practising head of the New Zealand Bar.

SUMMARY OF RECENT JUDGMENTS.

DEVONPORT BOROUGH v. CANDY FILTERS (N.Z.), LIMITED.

COURT OF APPEAL. Wellington. 1945. March 26, April 27. JOHNSTON, J.; NORTHCROFT, J.; CORNISH, J.

Contract—Frustration—Implied Term—Borough supplying Water from Lake to Itself and other Boroughs—Contract for Construction of Additional Plant for Purification of Water from Lake at Borough's Pumping-station—Work commenced thereunder—Contract rendered Nugatory and Completion of Work valueless to Borough by Adoption of Scheme directed by Act of Parliament whereby Boroughs obtained their Water-supply from City Corporation and took over Certain Waterworks and Pumping-stations but not the said Additional Plant or the said Contract for its Construction—Repudiation of Contract by Borough—Obligations under Contract—Whether Contract frustrated by impossibility of Performance—Whether implied Term that Contract should be at End—North Shore Boroughs (Auckland) Water-supply Act, 1941, ss. 3 (1), 4.

For many years the borough had supplied its residents with water taken from Lake Takapuna (hereinafter called "the lake"). The water had become unpalatable owing to the presence in it of a certain organism. The borough took expert advice on the best means of eliminating this offensive element, and as a result contracted with Candy Filters (N.Z.), Ltd. (hereinafter called "the company") for the construction and installation of a filtration plant.

After the contract had been substantially performed by the company the borough was obliged by requisition made by the Board of Health under the authority of s. 3 (1) of the North Shore Boroughs (Auckland) Water-supply Act, 1941, to enter into a contract with the Auckland City Corporation to take from it all supplies of water sufficient for all the normal requirements of the inhabitants of the borough during the next twenty-one years. A second requisition made by the Health Board some months later under s. 4 of the same statute required the borough (with other North Shore boroughs) and the Auckland City Corporation to enter into a contract for the acquisition by the City Corporation of such of the waterworks of the borough as should be agreed upon, or settled by the Board of Appeal set up under the statute. Thereupon, the borough tried to get the City Corporation to take over the plant that the company was then constructing, but without success. The borough was thus left (as all the parties including the other North Shore boroughs and the Health Board knew) saddled with a contract that would be of little if any use to it when completed. The borough repudiated the contract.

In an action by the company against the borough for damages, the borough contended that the contract with the company had been frustrated by the first requisition mentioned above. The learned trial Judge, *Fair*, J., decided that this contention of the borough was wrong.

On appeal from such decision,

Held, by the Court of Appeal, 1. That, if there was a common contractual purpose, it was the creation within a given time and at a given price of an instrument, apt for cleansing the lake water, and that nothing had happened to prevent this from being carried into effect.

2. That the company's contract never warranted that the lake water would continue to be available to the borough, nor could there be read into the contract an implied term that the contract should be at an end if the borough were prevented from using the lake water.

Scanlan's New Neon, Ltd. v. *Toohey's Ltd.*, (1942) 43 N.S.W. S.R. 2, rev. on app. (1943) 67 C.L.R. 169, applied.

Joseph Constantine Steamship Line, Ltd. v. *Imperial Smelting Corporation, Ltd.*, [1942] A.C. 154, [1941] 2 All E.R. 165, and *Krell* v. *Henry*, [1903] 2 K.B. 704, referred to.

The judgment of *Fair*, J., was accordingly affirmed, and the appeal therefrom dismissed.

Counsel: *Martin*, for the plaintiff in the Court below; *Rogerson*, for the appellant; *Prendergast*, for the defendant in the Court below, and for the respondent.

Solicitors: *Nicholson, Gribbin, Rogerson, and Nicholson*, Auckland, for the plaintiff; *Brookfield, Prendergast, and Schnauer*, Auckland, for the defendant.

LOGIE v. UNION STEAM SHIP COMPANY OF NEW ZEALAND, LIMITED.

COURT OF APPEAL. Wellington. 1945. March 20, 21; April 27. MYERS, C.J.; JOHNSTON, J.; FAIR, J.; NORTHCROFT, J.; CORNISH, J.

Workers' Compensation—Jurisdiction—Commutation of Weekly Payments for Lump Sum—Effect on Right of Action at Common Law—Whether such Commutation authorized by s. 62 of the Statutes Amendment Act, 1938—"Agreement for a weekly payment of compensation"—Whether mere Voluntary Payments of Weekly Compensation constitute such an "Agreement" so as to give the Compensation Court Jurisdiction for such Commutation—Whether Worker receiving Lump Sum under Order for Commutation precluded from maintaining Action for Damages at Common Law—"Judgment has been recovered"—Workers' Compensation Act, 1922, ss. 29, 49 (4)—Statutes Amendment Act, 1938, s. 62.

The plaintiff was injured by accident arising out of and in the course of his employment by the defendant company and thereafter received weekly payments of compensation. His solicitors wrote to the defendant intimating that he intended to claim on the defendant for his loss and damages.

The defendant subsequently filed in the Compensation Court a motion, purporting to be under s. 62 of the Statutes Amendment Act, 1938, for an order terminating the compensation payable to the plaintiff. The learned Judge, on the hearing of the motion, holding that where an accident occurs and the appropriate weekly compensation is paid, there was an "agreement" within the meaning of that word in s. 62, and expressing the opinion that the payment of such a lump sum would not preclude the plaintiff from bringing an action for damages at common law, made a minute on the motion paper ordering that weekly payments be terminated.

The defendant thereupon paid a lump sum, in addition to the amount already paid. Such sum was duly paid by the defendant to the plaintiff's solicitors, who at the hearing of the motion had asked that the weekly payments be continued for sufficient time to enable the common-law action to be disposed of.

The plaintiff subsequently began an action in the Supreme Court claiming damages for negligence in respect of his injuries and giving credit for such lump sum "received as commuted compensation under the Workers' Compensation Act in respect of such injury." The defendant pleaded that the plaintiff was precluded by s. 49 (4) of the said Act from maintaining such action.

An order for argument before trial on the question of law whether or not the plaintiff was so precluded, was by consent removed into the Court of Appeal.

Held, by the Court of Appeal, That the plaintiff was not so precluded for the following reasons:—

Per *Myers*, C.J., *Johnston*, *Northcroft*, and *Cornish*, JJ., 1. That s. 62 of the Statutes Amendment Act, 1938, does not authorize the commutation of weekly payments: it does no more than authorize the ending or diminishing of such weekly payments and neither directly nor indirectly does it authorize the Compensation Court to make an order commuting weekly payments into a lump sum.

2. That the mere voluntary payment by an employer of weekly compensation to a worker after an accident to him does not constitute "an agreement for a weekly payment of compensation" within the meaning of that phrase in s. 29 of the Workers' Compensation Act, 1922. The agreement that section contemplates is an agreement based upon consideration, something more than a discharge *pro tanto* of a statutory debt.

3. That, in the ordinary case, the amount paid would be subject to review when the matter is finally disposed of either in the Compensation Court or by agreement without resort to the Court. Payments meanwhile would be treated as no more than payments, on account of what might be paid or agreed to be done under the statute.

Bowley v. *W. Booth and Co., Ltd.*, [1918] N.Z.L.R. 77, G.L.R. 72, approved.

Way v. *Penrikyber Navigation Colliery Co., Ltd.*, [1940] 1 K.B. 517, [1940] 1 All E.R. 164, applied.

4. That there was therefore no jurisdiction under s. 29 of the Workers' Compensation Act, 1922, to make the order relied upon to bar the claim at common law, and the plaintiff was not precluded in the circumstances by the award of a lump sum by the Compensation Court from maintaining his action.

The reasoning in *Speed* v. *Horne*, [1944] N.Z.L.R. 678, whereby the same result was arrived at, disapproved.

5. That the phrase "judgment has been recovered" in s. 49 (4) of the Workers' Compensation Act, 1922, means judgment has been recovered in a Court of competent jurisdiction; and, if the Compensation Court had had jurisdiction to make the order relied on, the plaintiff had "recovered judgment."

Per *Fair*, J., That the decision of *Callan*, J., in *Speed* v. *Horne*, [1944] N.Z.L.R. 678, and the stated reasons upon which it was based were conclusive of the present case.

Counsel: *O. C. Mazengarb*, for the plaintiff; *Virtue*, for the defendant.

Solicitors: *Ongley, O'Donovan, and Arndt*, Wellington, for the plaintiff; *C. G. White*, Wellington, for the defendant.

O'BRIEN v. BURTON.

SUPREME COURT. 1945. February 27. CALLAN, J.

Offences—Premises kept as Place for Consumption for Liquor—Licensing—Unlicensed Club with Dance-hall let for Bona Fide *Social Function at which Intoxicating Liquor brought into Club by Hirer—Liquor served at Bar-counter by Waiter provided by Proprietor of Club—Whether "Premises . . . kept as a place of resort for the consumption of liquor"—Licensing Amendment Act, 1910, s. 37 (1)—Licensing Act Emergency Regulations, 1942 (No. 2) (Serial No. 1942/186) Amendment No. 3, Reg. 6 (6) (a)—Justices of the Peace Act, 1927, s. 303.*

It cannot be postulated, as a matter of bare law, from mere presence of a bar-counter in a lounge, together with the provision of a waiter, that the premises of an unlicensed social club, containing lounges, dance-hall, restaurant, and kitchen, leased for *bona fide* social functions to lessees and their guests, were so used for the consumption of intoxicating liquor as to bring the owner thereof within the penal provision of s. 37 (1) of the Licensing Amendment Act, 1910, as amended by the Licensing Act Emergency Regulations, 1942 (No. 2), for keeping the premises as a resort for the consumption of liquor.

Each case must be determined on its own facts, and those facts, before a conviction can be entered, must be such as to convince the Magistrate that an offence has been committed.

The functions of the Supreme Court on an appeal under s. 303 of the Justices of the Peace Act, 1927, discussed.

McLeod v. *Bardswell* ([1931] G.L.R. 327) referred to.

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

Solicitors: *Crown Solicitor*, Auckland, for the appellant; *Wilson, Henry, and McCarthy*, Auckland, for the respondent.

CORONERS' INQUESTS.

Suggested Amendments to the Law.

In the course of time certain statutory provisions once of paramount importance become obsolete or can no longer be regarded as serving any useful purpose.

As illustrating such a change, the following passage may be cited from the judgment in *R.* v. *Divine, Ex parte Walton*, [1930] 2 K.B. 29, 34:—

> Originally the Coroner's duty was to go to the place where a death which was to be inquired into had occurred, to summon the inhabitants of the neighbourhood, and inquire of them upon oath what they knew of the matter. Every one of twelve years old or upwards in the townships summoned was bound to attend: see the statute De Officio Coronatoris (4 Edw. I) and the statute of Marlebridge, c. 25 (52 Hen. 3), both now repealed. Gradually no doubt . . . the function of jurors and witnesses were distinguished.

Now it seems that there are certain matters relating to our laws regarding Coroners that are no longer fulfilling any useful object, and, while they are compulsory under the statutes at present in force, they should be abolished by Parliament.

IS A VIEW NECESSARY?

The first of such matters is concerned with the viewing of the bodies of deceased persons, in respect of whose death an inquest is necessary. One may well ask, What is the use of such view; what useful or practical purpose does it serve?

To answer this question, the purpose of a view, as indicated by authority, must be considered.

In 2 *Hawkins' Pleas of the Crown*, (1795) Ch. 9, s. 23, it is said:

> It is clearly agreed by all the books that a Coroner has no manner of power to take an inquisition without a view of the body, and that any such inquest taken by him without such view is merely void. Also it has been resolved that a Coroner may lawfully within convenient time, at the space of fourteen days after the death, take up a dead body out of the grave in order to view it, not only for the taking of an inquest where none hath been taken before, but also for the taking of a good one, where an insufficient one has been taken before.

In *Reg.* v. *Ferrand*, (1819) 3 B. & Ald. 260, 106 E.R. 658, Best, J., says:

> He goes to the church, causes the body to be disinterred, just looks at the face of deceased, and then orders the corpse to be again covered up. This was not a sufficient view of the body to give him authority to proceed. He should have had an opportunity of seeing whether there were any marks of violence, and of ascertaining, from the appearance of the body, what was the occasion of the death of the deceased.

In the same case it is also pointed out by Holroyd, J.:

> Though the statute De Officio Coronatoris does not expressly say that the Coroner shall take his inquest on the view of the dead body, and that an inquest otherwise taken by him shall be void, yet it is clearly laid down by all the books that a Coroner has no manner of power to take an inquisition of death without a view of the body. . . Unless it be an inquest *super visum corporis* it is wholly an extra-judicial proceeding.

And in the judgment of Bayley, J., it is said that the words of the Statute "are very emphatical," and the Coroner is to go to the dead body, and the jury are there to be sworn to inquire into the cause of the death.

It is settled law that an inquest by a Coroner held without view of the body is wholly irregular and extra-judicial, and any inquisition founded thereon is void: 7 *Halsbury's Laws of England*, 2nd Ed. 660, para. 1038, and see the cases cited in note (*s*). Under our statute such a view is clearly implied.

Certain exceptions from this obligation concerning the viewing of the body are provided in our own legislation relating to this phase of our law. Thus under s. 5 (2) of the Coroners Amendment Act, 1908, no view is necessary in the case of a person who is certified to have died from an infectious disease. Again, under

s. 2 (3) (*b*) of the Coroners Amendment Act, 1920, where application is made to the Court for the holding of an inquest or further inquest, a view in the case of death is not necessary unless the Supreme Court otherwise orders. And under s. 3 of the same amendment, where a body is destroyed or irrecoverable, a view is not necessary.

The main ground for the removal of this obviously disagreeable duty of viewing dead bodies—some in an advanced stage of decomposition—is that in our day we have an excellent Police Force; and our present purpose must be to see in what manner the activities of the Force obviate the necessity for a view by the Coroner. When a dead body is found, the Police make a short preliminary investigation and report to the Coroner, who then views the body. A doctor is invariably called in to examine the body. Surely in view of these examinations, the purpose of the view by the Coroner, as indicated in *R.* v. *Ferrand* (*supra*) is no longer necessary; this matter of the view could well be left to the doctor and the Police, and evidence subsequently given on oath by both as to having made such view, and particularly by the former of the result of his examination. No doubt in earlier times such view was necessary because there was no highly organized Police Force such as we possess today. But in these modern times, with the regular technique observed on occasions concerning which an inquest is necessary, the view by the Coroner is clearly superfluous.

There is, too, the matter of internal injuries, which perhaps no external examination by a Coroner would reveal. In any event the examination by the doctor is the material one.

More could be said upon this point, but it is hoped that what has been stated is sufficient to indicate that the very unpleasant task referred to devolving upon Coroners in consequence of the existing law should be abolished. Its abolition would have the added advantage of saving the very considerable annual cost incurred in such views throughout the Dominion.

Finding as to Negligence.

Another matter upon which it is unnecessary, or even perhaps undesirable, for a Coroner to express an opinion or make a finding is one concerning negligence.

In *Calmenson* v. *Merchants' Warehousing Co.*, (1921) 90 L.J. P.C. 134, 135, Lord Dunedin in the course of his judgment had this to say:

> The primary object of an inquiry before a Coroner is not to fix responsibility upon any one; the parties to the action at law are not necessarily represented at the inquest, and attention is not directed by examination and cross-examination to many points which may be of importance in the action. The expression of opinion by the Coroner's jury cannot, even if it touches the question of responsibility, be made evidence in the action by admission. Evidence given at an inquest may be used legitimately for the purposes of cross-examination of a witness at the trial.

There is the further consideration that such a finding of negligence may unconsciously bias a jury at a criminal or civil proceeding arising out of the case upon which such has been given.

Another point that suggests itself is one concerning the scope of the evidence admissible at a Coroner's inquest. As was said in the judgment of the Divisional Court in *R.* v. *Divine* (*supra*), at p. 36: "it is clear law that a Coroner's inquest is not bound by the strict law of evidence." And the following pertinent observation on this head appears in the Preliminary Note to the subject of "Coroners" in *3 Halsbury's Complete Statutes of England*, 757:

> The ordinary rules of evidence do not apply to an inquest, and the effect of this is twofold: it enlarges the scope of the inquiry but may detract from the value of the verdict.

And, again to quote from the judgment in *R.* v. *Divine* (*supra*), at p. 38:

> It is of course no more possible at a Coroner's inquest than at a trial, either criminal or civil, to secure absolutely that jurymen will not be influenced by things which they have heard or seen outside.

It is, it seems, a very material consideration to be taken into account in reviewing the question whether or not there should be any finding of negligence that such finding may be based upon evidence not strictly legal; and it is easily conceivable that a specific finding of negligence by a Coroner may exercise an influence, unconscious may be, over a jury concerned with the investigation of negligence in a Court of law; and "it has been said over and over again that it is hardly more important that justice should be done than that it should appear to be done": *R.* v. *Divine* (*supra*), at p. 38.

It is a factor, too, worthy of consideration that in New Zealand there is no distinction between negligence as the foundation of criminal liability and negligence as the foundation of civil liability: *R.* v. *Storey*, [1931] N.Z.L.R. 417.

Finding as to Manslaughter or Murder.

Then there is the question of whether there should be in the finding of a Coroner any reference to manslaughter or indeed of murder.

In this connection reference may be made to *Garnett* v. *Ferrand*, (1827) 6 B. & C. 611, 626, 108 E.R. 576, 582, where appears the following statement by Lord Tenterden, L.C.J., when speaking of a Coroner's inquest, "it is a preliminary inquiry, which may, or may not end in the accusation of a particular individual." His Lordship then proceeds, thus:

> It may be requisite that a suspected person should not in so early a stage be informed of the suspicion that may be entertained against him, and of the evidence on which it is founded, lest he should elude justice by flight, tampering with the witnesses, or otherwise.

In *R.* v. *Graham*, (1905) 21 T.L.R. 576, it was contended by the Attorney-General that until the evidence was tendered, it would be impossible to say whether the Director of Public Prosecutions ought to launch a prosecution for manslaughter. The ruling of the Divisional Court (Lord Alverstone, C.J., Kennedy and Ridley, JJ.) on this submission was that "there was not any right on the part of persons responsible for prosecution to have the assistance of a preliminary inquiry by a Coroner."

In New Zealand, it is the law that no one is to be tried upon a Coroner's inquest (s. 6 of the Coroners Act, 1908); and this position is in contrast with that obtaining in England under s. 5 of the Coroners Act, 1887.

It should also be borne in mind that, from the earliest moment following upon the discovery of a body, the Police are on the scene; and if the circumstances are such as to indicate foul play, then they take appropriate measures, including the apprehension of the

person responsible, should his identity be known. In view of this circumstance, s. 19 of the Coroners Act, 1908 (requiring a copy of the depositions to be sent to the Attorney-General in certain specified cases), can no longer be viewed as serving any useful purpose, and could therefore well be repealed.

The object and purpose of a Coroner's inquest is well set forth in the following citation from the *Preliminary Note* (*cit. sup.*) :—

> Though it must always be borne in mind that the Coroner's inquisition amounts to no more than the finding of a true bill of indictment by a Grand Jury ; it is not conclusive, and it leads simply to the proper investigation of possibly suspicious circumstances. It must be conceded that much of its object in this direction is now dealt with by the Police in their ordinary duties, but, at the same time, an inquest affords a ready means of public investigation in cases of suspicion of crime or cases affecting the public at large.

The suggestions that have been made above are based essentially upon the part the Police play in connection with matters that form the subject of coronial inquiries. Investigations are made by the Police in the course of their duties, and, in all cases, the conduct of the inquiry (under, of course, the guidance and direction of the Coroner) falls on the Police.

Therefore, in view of the change of circumstances and of the developments that have occurred since they were first introduced, the matters mentioned no longer occupy the importance they once did, and accordingly should be relegated to the limbo of repealed legislation.

RESERVATION OF WATER RIGHTS TO VENDOR ON SUBDIVISION.

By E. C. Adams, LL.M.

Explanatory Note.

A registered proprietor, A.B., has divided his land into two lots, Lots 1 and 2, on the former of which there is an artesian well, which is intended in future to be for the common benefit of both lots ; as A.B. has sold Lot 1, the intention as to the easement is achieved by A.B. reserving an easement in favour of Lot 2, in his transfer of Lot 1 to C.D.

The transfer has correctly been executed by both A.B. and C.D. ; when the easement is perfected by registration, it will be a *legal* easement, operating as a grant from C.D. to A.B., and C.D. should obviously execute such grant : *Durham and Sunderland Railway Co.* v. *Walker*, (1842) 2 Q.B. 940, 114 E.R. 365 ; *Re Rutherford's Conveyance, Goadby* v. *Bartlett*, [1938] 1 All E.R. 495 .

Unless the conveyancer takes care, the owner of the servient tenement, subject to a grant of water rights, is liable to suffer inconvenience from the operation of the rule of law that a grantor cannot derogate from his grant. In the following precedent the draftsman appears to have amply safeguarded C.D. : " Provided always that nothing hereinbefore contained is intended to or shall restrict the rights of the purchaser and other the registered proprietor or proprietors of the servient tenement and his and their tenants to the natural and reasonable user of the water from the said well for all reasonable purposes in connection with the use and enjoyment of the servient tenement."

Note the provision that the cost from time to time of any necessary cleansing, renewing, and/or repairing of the said well shall be borne and paid for by the registered proprietors for the time being of the dominant and servient tenements respectively in equal shares. There are technical difficulties in the way of enforcing these provisions against the assigns of A.B. and C.D. : *Cator* v. *Newton and Bates*, [1939] 4 All E.R. 457 (discussed in *164 Law Times*, 165). Nevertheless, in the circumstances of this case, it is not clear how these technical difficulties may be surmounted ; but perhaps they are more technical than substantial.

The fencing covenant is in the usual and orthodox form : as to its effect, see the leading case, *Nunn* v. *McGowan*, [1931] N.Z.L.R. 47.

As *ad valorem* conveyance duty has been paid on the prior agreement (called memorandum of sale in the precedent). the transfer is liable to 3s. duty only. The reservation of the water rights in favour of A.B., the vendor (which of course should have been expressed in the prior agreement), does not attract any further duty (although the grant of the easement comes within the definition of " license " in Part VI of the Stamp Duties Act, 1923), because in substance the reservation is a subtraction from what A.B. has sold, the fee-simple of Lot 1 ; for stamp-duty purposes the right to use the artesian well is regarded as merely something which A.B. has not sold to C.D.

The registration fee is 10s., and the new title fee is £1 ; if A.B. desires a new title for the residue (Lot 2), it will cost him £1.

Memorandum of Transfer.

WHEREAS A.B. of Napier widow (hereinafter referred to as " the vendor ") is registered as the proprietor of an estate in fee-simple subject however to such encumbrances liens and interest as are notified by memorandum underwritten or endorsed hereon in all that piece of land situated in the Borough of containing be the same a little more or less being part of Block and being Lot One (1) on Deposited Plan No. and part of the land comprised and described in Certificate of Title Vol. folio subject to the fencing covenant contained in Transfer No. AND WHEREAS by memorandum of sale bearing date the day of one thousand nine hundred and forty-three the vendor sold the said piece of land to C.D. of Napier gardener (hereinafter referred to as " the purchaser ") at or for the price of four hundred and fifteen pounds (£415) NOW THIS MEMORANDUM OF TRANSFER WITNESSETH that in pursuance of the said memorandum and IN CONSIDERATION of the sum of four hundred and fifteen pounds (£415) paid to the vendor by the purchaser (receipt whereof is hereby acknowledged) the vendor DOTH HEREBY TRANSFER to the purchaser all her estate and interest in the said piece of land (hereinafter referred to as " the servient tenement ") BUT RESERVING NEVERTHELESS to the vendor her heirs executors and administrators and other the registered proprietor or proprietors from time to time of all that piece of land situate as aforesaid containing be the same a little more or less being part of Block and being Lot

Two (2) on the said deposited plan No. and the residue of the land comprised and described in the said Certificate of Title Vol. Folio (hereinafter referred to as "the dominant tenement") and her his and their tenants at all times hereafter in common with the purchaser and other the registered proprietor or proprietors for the time being of the servient tenement and his and their tenants the full free and uninterrupted right and liberty to take convey and lead water in free and unimpeded flow (except during any periods of necessary cleansing renewing and/or repairing) from the artesian well on the servient tenement as the same is more particularly shown on the said Deposited Plan Number by means of the existing pipes and each of them or by any pipe or pipes substituted therefor such pipes and each of them to have a bore not exceeding one-half (½) inch in diameter and taken from the said well and led along the respective lines coloured blue on the said plan to the intent that the same shall forever be appurtenant to the dominant tenement and also the full and free right and liberty from time to time and at all reasonable times hereafter to enter upon the servient tenement by herself or her agents servants or workmen and with all necessary tools and implements for the purpose of cleansing repairing renewing or inspecting the said well and/or pipe or pipes and so far as the same shall reasonably be necessary in connection with the premises to break up the surface of the servient tenement in the vicinity of the said well and/or pipe or pipes and/or to enter any building standing or being on the servient tenement through which the said pipe or pipes may pass PROVIDED ALWAYS that such cleansing repairing renewing and inspecting and any necessary breaking up of the surface of the servient tenement shall be done with as little damage as possible to the servient tenement and all the soil broken up shall again be properly filled in and PROVIDED FURTHER that the purchaser his heirs executors and administrators and other the registered proprietor or proprietors from time to time of the servient tenement and his and their tenants shall not nor will (except as hereinafter provided) do anything whereby the free and unimpeded flow of water through the said pipe or pipes will in any way be interrupted or restricted PROVIDED ALWAYS that nothing hereinbefore contained is intended to or shall restrict the rights of the purchaser and other the registered proprietor or proprietors of the servient tenement and his and their tenants to the natural and reasonable user of the water from the said well for all reasonable purposes in connection with the use and enjoyment of the servient tenement PROVIDED FURTHER that the cost from time to time of any necessary cleansing renewing and/or repairing of the said well shall be borne and paid for by the registered proprietors for the time being of the dominant and servient tenements respectively in equal shares PROVIDED ALWAYS AND IT IS HEREBY AGREED AND DECLARED that the vendor shall not be liable to contribute to the cost of the erection or maintenance of any dividing fence between the said piece of land and any other land owned by her adjacent thereto but this provision is intended for the benefit of the vendor and of her heirs executors administrators and devisees only and shall not enure for the benefit of any other person or persons whomsoever.

IN WITNESS WHEREOF these presents have been executed this day of one thousand nine hundred and forty- .

SIGNED by the said A.B. in the presence of— } A. B.

E. F.,
Solicitor, Napier.

SIGNED by the said C.D. in the presence of— } C. D.

G.H.,
Law Clerk, Wellington.

NEW ZEALAND LAW SOCIETY.

Annual Meeting of Council.

The Annual Meeting of the Council of the New Zealand Law Society was held at the Supreme Court Library, Wellington, March 16, 1945.

The following Societies were represented: Auckland, Messrs. A. H. Johnstone, K.C., J. B. Johnston, L. P. Leary and A. Milliken; Canterbury, Messrs. E. A. Lee and R. L. Ronaldson; Gisborne, Mr. R. F. Gambrill; Hamilton, Mr. A. L. Tompkins; Hawkes Bay, Mr. H. W. Dowling; Marlborough, Mr. G. M. Spence; Nelson, Mr. W. V. R. Fletcher; Otago, Messrs. A. J. Dowling and J. C. Rutherford; Southland, Mr. J. Tait; Taranaki, Mr. G. Macallan; Wanganui, Mr. A. B. Wilson; and Wellington, Messrs. H. F. O'Leary, K.C., G. G. G. Watson and H. R. Biss.

The President (Mr. H. F. O'Leary, K.C.) occupied the chair.

An apology for absence was received from Mr. H. W. Kitchingham (Westland). Before commencing the ordinary business the President welcomed all those who were attending the meeting of the Council for the first time.

Obituary.—Reference was made to the sudden death of Mr. Gordon Reed, of Invercargill, and the following resolution was passed, members standing in silence as a mark of respect:—

"The Council of the New Zealand Law Society expresses its regret at the death of Mr. Gordon Reed of Invercargill, a former member of the Society, and tenders the sympathy of the members to his relations."

The Hon. Mr. Justice Cornish.—The President referred to the recent judicial appointment and the following resolution was carried unanimously:—

"The Council tenders to Mr. Justice Cornish its congratulations on his appointment to the Supreme Court Bench and trusts that he will have a long and useful period of judicial service."

Annual Report and Balance-sheet.—In formally moving the adoption of the Annual Report and Balance-sheet the President stated that the legal offices had as yet experienced little relief from the acute conditions that had prevailed since the beginning of the war due to principals and clerks enlisting with the forces.

The records of the Society showed that there were some 701 members still serving with the forces, of whom approximately 350 were qualified men. The outlook, so far as the war situation was concerned, appeared considerably brighter in the European theatre of war, and it was hoped that before the end of the year we would at least see the cessation of hostilities in Europe.

The President thought the Society had reason to be proud of the contribution made by the legal profession. Many had been decorated for conspicuous bravery. Some, it was regretted, had made the supreme sacrifice. To the relatives of these members deepest sympathy was extended. Also to the many who had been wounded, the Society sent its best wishes for a speedy recovery, and to those who had returned to New Zealand a warm welcome was extended. It was hoped that not only would the men be welcomed by the District Societies but that practitioners would see that the men received all possible assistance and help not only by way of advice but also in a practical way by directing work to them.

The Post-war Aid Committees in Wellington and other centres were dealing with the matter of refresher lectures, and in Wellington these had been in progress for some months, and many men from various districts had participated in the benefits therefrom.

The Report and Balance-sheet were formally adopted.

Election of Officers.—The following officers, the only nominees for the positions mentioned, were elected: *President*: Mr. H. F. O'Leary, K.C. *Vice-President*: Mr. A. H. Johnstone, K.C. *Hon. Treasurer*: Mr. A. T. Young. *Management Committee of the Solicitors' Fidelity Guarantee Fund*: Messrs. E. P. Hay, A. H. Johnstone, K.C., H. F. O'Leary, K.C., D. Perry, and A. T. Young. *Audit Committee*: Messrs. H. E. Anderson and J. R. E. Bennett. *Library Committee*: *Judges' Library*: Messrs. T. P. Cleary and G. G. G. Watson. *Disciplinary Committee*: Messrs. H. F. O'Leary, K.C., A. H. Johnstone, K.C., C. H. Weston, K.C., A. N. Haggitt, J. D. Hutchison, J. B. Johnston, R. H. Quilliam, and G. G. G. Watson. *New Zealand Council of Law Reporting*: It was pointed out that the appointments to this Council were for a period of four years and that under this arrangement Mr. H. P. Richmond and the Hon. W. Perry retired on 5th March, 1945, as set out in 4 (*h*), minutes of 12th March, 1943. Unfortunately the resignation of the Hon. W. Perry had been received, but Mr. Richmond was eligible for re-election. Mr. H. E. Evans of Wellington was elected to take the place of Mr. Perry, and Mr. H. P. Richmond was re-elected. *Conveyancing Committee*: Messrs. C. H. Weston, K.C., H. E. Evans and E. F. Hadfield.

The President referred to the excellent work carried out by all Committees during the year and thanked the members for their services.

(To be concluded.)

LAND AND INCOME TAX PRACTICE.

Ministers of Religion.—The following notes apply to Ministers of all denominations. The following items should be returned as income :—

(1) The amount of stipend, before deduction of social security charge and national security tax.

(2) Where a free house is provided, the rental value thereof, calculated as follows :—

(*a*) Where the Church owns the house and provides it free of cost to the minister, the rental value for taxation purposes is one-sixth of the gross stipend as in (1) above.

(*b*) Where the Church pays the rent of a house provided for the minister, the actual rent paid is ignored, and the rental value for taxation purposes is one-sixth of the stipend as in (1) above.

(*c*) Where the Church provides an allowance towards the cost of a house owned by the minister, or gives an allowance towards rent payable by a minister, the actual allowance is assessable in full.

(*d*) Where the minister rents the house and pays rent out of his stipend, the rental value is not assessable and is ignored altogether ; but one-sixth of the actual rent paid is allowable as a *deduction* from income and the amount of the deduction should be claimed in the income-tax return form. See also under " Special Deductions " below.

(*e*) Where the minister owns the residence occupied by him, the rental value is not assessed, but a claim may be made by way of a deduction for one-sixth of the actual outgoings by way of interest, rates, repairs, and also depreciation, *provided* the claim for depreciation on the return form is properly completed.

(*f*) Ministers not in parishes—*e.g.*, administrative officials or ministers without a charge—must include the full amount of any house-allowance actually received and may *not* claim one-sixth thereof as a deduction.

(3) The fees received from the solemnization of marriages.

(4) The fees for the conduct of funerals and christenings. If such payments are accepted by a minister for his personal use, they constitute assessable income.

(5) Easter offerings.

For social-security-charge and national-security-tax purposes income from the sources mentioned in (3), (4), and (5) above should be declared as income other than salary or wages.

Special Deductions.—The following items are permitted as deductions from the assessable income of ministers :—

(1) Car expenses in excess of the allowance, if any, provided for that purpose. Where the car is provided and maintained by the Church, the minister does not incur expense, but when the car is provided by the congregation and an allowance is made to cover upkeep and running expenses and such allowance is insufficient to cover the expenses, then the minister may claim the difference between the allowance and the actual expenses. This would apply also where the minister owned the car. It must be pointed out that the deduction may be claimed only in respect of travelling-expenses actually incurred in congregation work. No private running should be included.

(2) *Car Depreciation* at the rate of 20 per cent. of the diminishing value. This would not apply in the case of a minister owning a car and in receipt of an allowance which is intended to include depreciation, unless such allowance was in fact insufficient to meet full running-costs and depreciation at the rate of 20 per cent. of the diminishing value of the car.

(3) *Petty Expenses*, including telephone, toll charges, stationery, postages, lighting, and heating of study.

(4) The cost of periodicals purchased for use in the profession. Also the cost of books, *not exceeding* 10*s. in respect of any one book* being new religious or philosophical books purchased during the income year for use by the minister in his work, but not including standard works and books of reference, such as commentaries, concordances, dictionaries, &c. In the case of standard works and books of reference, such as commentaries, concordances, dictionaries, &c., the cost of new books will not be allowed, except where such books are purchased for replacement purposes, in which case the full cost of replacement is allowable.

(5) One-sixth of the wages and keep of a maid or other help.

(6) One-sixth of the rental value of the house provided (computed as above) or one-sixth of the actual rental, or outgoings as the case may be, may be claimed as a deduction.

In lieu of and in order to obviate keeping a detailed record of the actual expenses incurred under the headings of items (1) to (5) above, the Commissioner is prepared to allow as a deduction for income-tax purposes and social-security-charge and national-security-tax purposes a specified sum arrived at in the following manner : The Church officials may, by resolution duly passed at a regular meeting, resolve that part of the stipend, a sum named, is intended to cover allowable expenses for taxation purposes. The sum must not be an arbitrary one, but must bear a close relation to the amount of the expense actually incurred for the purposes set out. The Church treasurer is required to satisfy himself that any expenses claimed are fair and reasonable and are actually and necessarily incurred by the minister in the service of his congregation. The amount so agreed on may be reviewed from year to year.

No deduction is permissible for out-of-pocket expenses in providing assistance to charitable objects or to needy persons, whether they be parishioners or strangers. Payments to any patriotic fund or donation to the war expenses are not allowable as a deduction for taxation purposes.

Social Security Charge and National Security Tax.—The Church treasurer is responsible for the deduction of social security charge and national security tax on the amount of stipend paid by the congregation and the rental value of a house provided—*i.e.*, five-sixths of the rental value for income-tax purposes, computed as explained above.

The general treasurer is required to deduct social security charge and national security tax on all grants made from Church funds to make up the stipend payable to a minister—*e.g.*, where a congregation pays, say, £260 and the minister receives by way of grant £70, the tax deductible by the congregational treasurer would be based on the amount paid by his Church (£260) and five-sixths of the rental value of the house provided, less the appropriate amount to cover expenses. The general treasurer would deduct the wage tax on the £70.

The minister himself is responsible for the payment of social security charge and national security tax on fees received from the solemnization of marriages, the conduct of funerals, and christenings and Easter offerings, provided, of course, that such fees are received by him for his personal use. He should declare such income as " income other than salary or wages."

Defaulting Taxpayers and Holiday Pay.—Section 7 of the *Finance Act*, 1944 (providing for the deduction of outstanding tax from wages), cannot be applied to moneys held by an employer to purchase holiday stamps in accordance with the Annual Holidays Act, 1944.

A notice under s. 7 would not be effective in the case of an employee in arrears with his tax, whose services were being dispensed with and who had been paid all the wages to which he was entitled, with the exception of, say, £3 which, as he had been employed for less than three months, was being held to purchase holiday-pay stamps. The amount so held by the employer does not represent an amount payable by the employer to the employee.

If the employee had been employed for more than three months so that he received the actual holiday pay in cash instead of stamps being purchased, then the holiday pay would have represented moneys payable to the employee and would have been subject to s. 7 accordingly. As holiday pay is deemed to be salary or wages, the rate of deduction is limited to one-twentieth per week of the income-tax outstanding and payable by the taxpayer or to one-fifth of the wages or salary whichever is the less.

Other notes on the application of s. 7 of the Finance Act, 1942, may be found in (*1944*) *20 New Zealand Law Journal*, 255.

Industrial Union Subscriptions.—Subscriptions, levies, or dues paid by a member of an industrial or trade union to such union cannot be allowed as a deduction in calculating the member's assessable income as such payments do not represent expenditure exclusively incurred in the production of the assessable income.

Although it may become unlawful to employ a person who is not a member of any particular union, there is no legal duty imposed on any person actually to join a union. Consequently the expenditure incurred on or after becoming a member of a union is incurred not in earning his salary or wages, but to qualify or to continue to qualify him for payment.

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. 41.—W. to E.

Rural Land—Value—Two Areas connected by Right-of-way—Independent Frontages—Prices paid for Properties in Locality—Whether Indicative of Value of Property under Notice.

Appeal from the determination of a Land Sales Committee.

The Court said: "This case presents two unusual features which are of considerable, if not decisive, importance. The first is that an area of 22 acres which fronts the main road is connected by a right-of-way some 15 chains in length with a rear area of approximately 69 acres. This latter area has, however, an independent frontage to a subordinate road. The whole area is being and has for some time been used as one unit for grazing purposes in conjunction with another property.

"The case for the appellant was not seriously presented on the footing that the property constitutes an economic unit. In this respect the parties were not in difference. The basic value has therefore to be determined on the basis of what a willing purchaser would have paid for the property on December 15, 1942. Due allowance will, of course, have to be made for any additional value created since the latter date by the expenditure of money upon the property.

"In conformity with this appreciation of this position, the appellant relied upon the prices paid by purchasers and allowed by the Committee for several properties in the same locality as the land now in question. For the purpose of the comparison the appellant notionally disassociated the front area from the back portion by referring to certain sales as reasonably indicative of the value of the front portion and other sales as reasonably indicative of the value of the rear area.

"In respect of the 22-acre area, particular reference was made by the appellant or his counsel to several sales as follows: First, the sale in November, 1944, of a farmlet of 5 acres from one S. to one M. at £675, or at £135 an acre; secondly, the sale in July, 1944, of a farmlet of 10 acres from S. to S. at £775, or £77 10s. an acre; thirdly, the sale in September, 1942, of a farmlet of 13 acres 3 roods 1 pole from S. to F. at £700, or £50 an acre; fourthly, the sale in August, 1944, by C. J. D. to C. R. R. of a farmlet of 13 acres 3 roods at nearly £47 an acre.

"The first and third sales mentioned present difficulty as a basis of comparison because of the existence of buildings upon the land sold and the absence of any evidence as to the value of those buildings. The fourth sale also presents a little difficulty, as the land sold had a two-roomed cottage and another erection, both of undefined value, upon it. On a property of so small an acreage a building of any real value would add considerably to the per-acre price. For instance, if the cottage were worth only £90 it would represent £7 per acre which would have to be deducted from the sale price of £47 an acre. Equally, if the buildings upon the land thirdly mentioned were only worth £135, it would reduce the per-acre price of the land alone to £40 an acre.

"The value of the buildings upon the land first mentioned must be considerable to justify the land commanding a price of £135 an acre, for this price far exceeds any other mentioned. The presence of buildings upon the lands thirdly and fourthly mentioned and the effect upon the per-acre price of their value, even if low, suggest that the price paid for the land in each instance was somewhere in the region and not in excess of £40 an acre. Such a suggestion is, however, too insecurely established to be of any value as proof. The only proper course in the circumstances is to dismiss those sales and the sale first mentioned from consideration, and this the Court has done.

"That leaves for consideration in this relation only the sale secondly mentioned. As a singular instance its probative value is not great. There is too wide a scope for the interplay of particular and special circumstances where only one sale is sought to be used as a basis. Probative force and conviction lie in a multiplicity of instances. At this point it can therefore be said that there is no cogent proof of the value of the front area as a separate unity.

"The rear area, it was tacitly conceded, is not of the same value as the front portion. Its value, it was said, was indicated by the sales of three properties in an allegedly rough state: one a sale of 27 acres in December, 1938, from S. to M. at nearly £20 an acre; one a sale by S. to M. of 15 acres in July, 1944, of 15 acres at nearly £24 an acre, and one a sale of 18¼ acres in December, 1944, at a permitted price of £23 an acre. The appellant used the latter price as an indication of the minimum value of the back portion of his property by assuming that his land there, before he improved it, was at least of equal value to the land last referred to and then adding to £23 an acre the sum of £5 per acre, being the per-acre average of his expenditure over the back 70 acres.

"There is always scope for invalidity when the value of a considerable property is sought to be established on the basis of prices realized for small ones. The invalidity is in one respect apparent here with respect to the sales from S. and from S. to M. Both areas have a frontage to Orion Road and lie near the main road: The appellant's 70-acre area fronts a back road and is not yet, it is said, ready for use for subdivisional purposes. No subdivided area in fact fronts this back road anywhere in the locality. It seems a fair conclusion, therefore, that the back 70 acres either because of its location or because of its condition, or for both reasons conjointly, is not yet susceptible of subdivision. Until it is subdivided it is difficult to see how the appellant can profitably subdivide the front 22 acres. Without that area or most of it, for it is the best of the land, the back could not be profitably, or even perhaps usefully, employed.

"At this stage, therefore, it is fallacious to compute the value of the property upon a subdivisional basis. The fallacy would be still greater as at December, 1942, when, having regard to the work done by the appellant, the back area must have been in a rough state—too rough to allow of the possibility of subdivision. Any attempt therefore to infer the value of the property as at December, 1942, from the sales quoted cannot but be a matter of uncertainty and highly speculative. Fortunately there is a simpler and more direct method of assessment.

"The appellant bought the property in April, 1942, for the sum of £1,547. That is the price at which it was quoted on the market. Since then he has spent £650 on it, and has done other work beyond that effected by the expenditure of this sum. In all it is said his improvements have cost him about £700. Assuming all this expenditure was on effective capital improvements, the property would appear to be of a basic value of £2,247. Mr. W. and Mr. S. who were called by the Crown do not value it so highly. However, the Committee, after protracted consideration of the whole case, came to the conclusion that the front area should be assessed as of a value of £40 an acre, and that, having regard to every relevant circumstance, the basic value of the property should be fixed at £2,500.

"It is impossible in the circumstances for the Court to say that the Committee in so doing erred to the detriment of the appellant. The appeal is therefore dismissed."

No. 42.—P. Co., Ltd. to H.

Urban Land—House Property Value—Ascertainment of Value—Replacement Cost, less Depreciation—Readiness of Sale as Factor—Whether Maintainable—Proper Method of Computing Value—Nearness to Railway—Susceptibility to Fire.

The Court said: "At the root of this appeal lies a difference in outlook and method between the directors of the S. Building Society, on the one hand, and the representative of an important Department of State and private valuers, on the other.

"This is well exemplified by the evidence of the secretary, and a director, of the building society who was the sole witness called in opposition to the appeal. His method of valuation can be gathered from the fact that he rejects the replacement cost less proper deductions or, as he called it, the 'per-foot-value' method of valuation as unsound and bases his conclusions on what he describes as 'experience.' By this method

he claimed to have become so expert that he can almost fix the value of a house property before he goes in.

" His outlook can be gathered from the fact that readiness of sale is a predominant factor in his mind when assessing a value. It is this point of view which prompted him to say, in effect, that the Land Sales Committee is acting on a fallacy in regarding a seven-roomed house, generally speaking, as worth more than a five-roomed house because it is hard to sell a seven-roomed residence as compared with a five-roomed one, the latter class being readily saleable. In the result, he values this property (inclusive of the value of the land) at £625. The land he valued at £100, and was in substantial agreement in that respect with all the other witnesses.

" Called by the appellant, Mr. L. and Mr. H. valued the property as at December 15, 1942, at £779 and £815 respectively.

" Mr. S. of the Lands and Survey Department who was called by the Crown, not as a party but solely that his evidence might be available for the better instruction of the Court, valued the property as at the same date at £782.

" All these latter witnesses based their valuation of the house upon replacement cost, less depreciation. In addition to substantial agreement between all the witnesses as to the value of the land, there was also substantial agreement as to the character and state of the house. The latter contains six rooms with four open fireplaces and an H.P. range. The conveniences include hot and cold water, electric light, and sewer drainage. All the windows have been flashed with sheet lead.

" Mr. L. said of its condition that it was ' sound and in a good state of repair ': Mr. H. that it was ' a very good house for its age, exceptionally well built with exceptionally good materials in it.' Mr. S. said, ' it is a very youthful house for its age.' He also said in this relation, ' the condition of this house is as sound, if not sounder, than any house of its age I have inspected at Invercargill.' Mr. R. said, ' house is in fairly good condition for its age. It has been fairly well maintained. It does not give the impression of being particularly well built, but it is quite well built as houses go.' "

" This substantial measure of agreement between the parties on what are often disputed major topics clarifies the question calling for decision as exclusively one demanding consideration of which method of valuation has the greater probative value. That question can best be determined by maintaining a sustained appreciation of the fact that what has to be ascertained is what a willing purchaser would pay for the house on December 15, 1942. What such a purchaser would pay must necessarily depend, broadly speaking, upon what real value he could see in the building. That value can surely be best ascertained by deciding what it would cost to erect the house at that date, and then deducting all proper allowances, including, of course, an allowance for depreciation.

" This is the method adopted by the appellant's witnesses and by Mr. S. It aims at the achievement of a logical conclusion by steps each susceptible of more or less definitive proof. Its probative value can be judged by an examination of the validity of the factors on which the conclusion is based. On the other hand, the evidence of Mr. R. is, in a sense, impressionistic. It depends for its validity upon his opinion only. No confirmatory factors were adduced in evidence or were in fact in any sense relied upon by him.

" As was pointed out frequently by Pike, J., when he was Judge of the Land and Valuation Court of New South Wales, and particularly in *Reading* v. *Valuer-General*, 6 L.G.R. 132, the probative value of such evidence is meagre. It affords no scope for critical examination. As Pike, J., said: ' One might just as well ascertain the market value for butter by going to some one who might say " it is worth 2s. 6d. per pound. I do not know what it is selling for, I have not inquired; but, in my opinion, it is worth that ".'

" As a test of the soundness of Mr. R.'s opinion of selling value at any given date, the fact that the building society has not made any losses is neither appropriate nor apt. It is, on the contrary, more confirmatory of a conservative outlook. This finds some confirmation in Mr. R.'s view of the relative values of a seven-roomed and a five-roomed house, because the latter is more readily saleable.

" It is obvious that, other things being equal, a seven-roomed house is worth more than a five-roomed house, and to suggest that on the score of readiness of sale the latter is worth more than the former is clearly fallacious. It confuses the factor of the relative range of buyers with value. So long as there are buyers for a seven-roomed property the value of that property is determined by what that range of buyers will pay for it. The range may not be as numerous as the range of buyers for properties of another type; but so long as there are in fact potential buyers, what those buyers will pay is decisive of value. The absence of a conception of this principle is indicative of at least the possibility of error in the opinion with which such lack of conception is associated.

" On that account and because it is, in any event, constrained by authority and conviction to accept as of greater probative value the method of valuation adopted by Messrs. L., H., and S., the Court accepts their testimony as to value in preference to that of Mr. R.

" Two detrimental features affect the property, its proximity to the railway and, by reason of that proximity, its susceptibility to fire. Making due allowance for these features, the Court has reached the conclusion that the property was reasonably worth £780 on the crucial date. The appeal is therefore allowed to that extent. The basic value of the property is fixed at £780 and consent to the sale at that price in lieu of the sale price of £800 is given."

A NEW MAGISTRATE.

Mr. S. I. Goodall Appointed.

Mr. S. I. Goodall, of Auckland, has been appointed a Magistrate. He was expected to take up his new duties in Auckland, on June 1. Mr. Goodall has been chairman of the North Auckland Land Sales Committee since its inception and is a partner in the legal firm of Goodall and Kayes.

Born in Kaikoura, Marlborough, Mr. Goodall was educated at the District High School there and Wellington College. He was engaged in farming and served as clerk of a Road Board before entering camp in the last war. He served in New Zealand, and on being discharged he returned to Wellington and continued his education at Victoria University College in 1919.

In 1921 he was admitted as a solicitor, and in the following year he was admitted as a barrister. In 1923 he gained his master's degree in law and was awarded the Jacob Joseph Scholarship in Law and the Senior Scholarship in Law for New Zealand.

In Wellington Mr. Goodall was a member of the staff of Messrs. Meek and von Haast; and, on his removal to Auckland he was with the firm of Messrs. Stanton, Johnstone, and Spence. He went into practice on his own account in Auckland in 1927, and his present partnership was formed in 1929. For about eighteen years he lectured in Law at Auckland University College.

A member of the Council of the Auckland District Law Society for about five years, Mr. Goodall was Crown representative in an Auckland and a Whangarei Armed Forces Appeal Board until these were reconstituted. He was a member of the Mount Roskill Road Board for some years.

In addition to being a regular contributor to this JOURNAL for a number of years, Mr. Goodall is the author of *Conveyancing in New Zealand*, and the editor of the Third Edition of *Garrow's Real Property*. He was the author of the *New Zealand Supplement*, in two volumes, of *Butterworth's Encyclopaedia of Forms and Precedents*. This *Supplement* is a monument to his industry and his knowledge of New Zealand law. It took him two years to prepare, and the result of his work brings the whole twenty volumes of the *Encyclopaedia of Forms and Precedents* into ready adaptability to New Zealand conditions, as is shown by practitioners throughout the Dominion in their innumerable expressions of appreciation of the *Supplement*.

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

Challenge.—In a recent action at common law for £1,500 damages for the loss by a photographic technician of his right eye, counsel for the defendant in his address to the jury challenged counsel for the plaintiff to point to any case in which more than £800 had been awarded for such an injury. The trial Judge, Findlay, J., took exception to this procedure which he described as a device intended to suggest the maximum that could be awarded. He recommended that the jury "treat it with the contempt that it deserved" by dismissing it entirely from consideration. It seems to Scriblex that these strictures were somewhat severe, and that the matter could well have been met in the circumstances by the jury being informed that in the assessment of damages it should have regard solely to the evidence and not to the verdict of some other tribunal, particularly where there was no evidence before the Court to show that the sum mentioned had in fact ever been exceeded. In *Cunningham* v. *Australian Woollen Mills Pty., Ltd.*, (1944) 62 W.N. (N.S.W.) 69, in which plaintiff's counsel had commented that certain remarks had been made by defendant's counsel "in order to save his client a few thousand pounds or whatever the amount may be," the Full Court in dismissing an application for a new trial relied upon the general rule that "it is improper for counsel, directly, or indirectly, expressly or by suggestion, to say or do anything in the trial of an action which is likely to cause improper prejudice to the opposing party; and if this rule is infringed the Court will take any steps which it thinks necessary to prevent or remove the prejudice."

Capital Punishment.—The recent rider of the Grand Jury at Wanganui requesting reinstatement of the death penalty recalls a story that Darling, J., was fond of telling. A woman called on the jury-panel requested exemption upon the ground that she was opposed to capital punishment. "My good woman," said the Judge, "this is a civil case, a claim to recover moneys alleged to be due for an expensive fur coat and various frocks and hats. The defendant sets up that his mistress ordered the goods in the name of his wife and that she had no authority to pledge his credit." "Oh!" replied the prospective juror after an ominous pause. "Well, I'm quite willing to serve and my views on capital punishment are rapidly changing anyway."

Judicial Ingenuity.—Now to be used extensively in the war against Japan is the rocket-propelled bomb, the world's largest armour-piercing projectile designed specially to be fitted to Flying Fortresses. Captain Edward Terrell, R.N.V.R., its inventor, is the Recorder of Newbury and a son of Thomas Terrell, K.C., author of one of the leading books on patents. The co-editor of the last edition, Sir Courtney Terrell, Chief Justice of Patna, India, is another member of this distinguished legal family. Edward Terrell's inventions comprise also a successful plastic armour and a smoke elimination method for convoys; and his *Law of Running-down Cases* is an early and lucid excursion into the field of motor-accidents. Inventive Judges are rare. At the moment, Scriblex can recall only two: in England, Lord Fletcher Moulton and, in New Zealand, Blair, A.C.J., whose patents extend from hand wrenches to flax strippers and railway couplings.

Artemus Jones.—Published this year, *Without My Wig*, is a volume of essays by the late Sir Thomas Artemus Jones, a Judge of County Courts in Wales, who died in 1943. Its author has several claims to be remembered. As junior counsel for Sir Roger Casement on his trial for treason he was called upon to carry on for his leader, Sergeant Sullivan of the Irish bar, who broke down during the case. A journalist at sixteen, he took silk in 1919, without ever going to college, and when appointed to the North Wales Circuit, he declared that he proposed to ignore the Statute of Henry VIII which forbade the use of the Welsh tongue in Courts of law. No doubt, he was best known as the plaintiff in *Jones* v. *Hulton*, which disclosed that a bright feature-man in a newspaper story on *Motor-mad Dieppe* described, amidst scenes of wine, women, and song, one "Artemus Jones with a woman who is not his wife, who must be—you know—the other thing . . . the life and soul of a gay little band that haunts the casino and turns night into day, besides betraying a most unholy delight in the society of female butterflies." The plaintiff who had never been to Dieppe and was a bachelor received £1,750 from the newspaper which declared that it had published nothing concerning him and did not even know that he was alive. To those, however, who care for the literature, Artemus Jones will be longest remembered for those excellent studies of famous trials (including those of John Bunyan and Roger Casement), of the early history of the Tudors, and of various current matters of legal and social importance.

The Value of Lawyers.—As it rarely happens that a man is fit to plead his own cause, lawyers are a class of the community who, by study and experience, have acquired the art and power of arranging evidence, and of applying to the points at issue what the law has settled. A lawyer is to do for his client all that his client might fairly do for himself, if he could. If, by a superiority of attention, of knowledge, of skill, and a better method of communication, he has the advantage of his adversary, it is an advantage to which he is entitled. There must always be some advantage, on one side or other; and it is better that advantage should be had by talents than by chances. If lawyers were to undertake no causes till they were sure they were just, a man might be precluded altogether from a trial of his claim, though, were it judicially examined, it might be found a very just claim.—Dr. Johnson.

It Can't Happen Here.—Can a Divisional Enforcement Officer of a Ministry never turn a blind eye to anything?: Lord Chief Justice in *Cox* v. *Greenham* . . . A Judge may, by descending into the arena and so having his vision clouded by the dust of the conflict, deprive himself of the advantage of calm and dispassionate observation: Lord Greene, M.R., in *Yuill* v. *Yuill* . . . It is because I have thought that a wig is only a masculine fashion and not part of the forensic uniform, that I have never felt any scruple upon a very hot day, in removing my wig and inviting counsel to do the like: MacKinnon, L.J., in the *Law Quarterly Review* (January, 1945).

PRACTICAL POINTS.

This service is available free to all paid annual subscribers, but the number of questions accepted for reply from subscribers during each subscription year must necessarily be limited, such limit being entirely within the Publishers' discretion. Questions should be as brief as the circumstances will allow; the reply will be in similar form. The questions should be typewritten, and sent in duplicate, the name and address of the subscriber being stated, and a stamped addressed envelope enclosed for reply. They should be addressed to: "NEW ZEALAND LAW JOURNAL" (Practical Points), P.O. Box 472, Wellington.

1. Companies.—*Debenture affecting Land—Caveatable Interest under the Land Transfer Act.*

QUESTION: My client is the holder of a debenture issued by a company registered under the Companies Act. The debenture generally is in the form set out in *Morison's Company Law*, 2nd Ed. 921. "The company as beneficial owner hereby charges with such payment its undertaking . . . and all its property and assets whatsoever and wheresoever and uncalled capital (including reserve capital) both present and future."

The mortgagor company is financially shaky and my client does not trust its directors: among its assets is a parcel of land subject to the Land Transfer Act. Can my client caveat the title? Your attention is drawn to s. 89 (6) of the Companies Act, 1933.

ANSWER: Section 89 (6) of the Companies Act, 1933, is really not in point, for that section provides that *for the purposes of s. 89 of the Companies Act* the holding of a debenture shall not be deemed to be an interest in land. The section has no application to the Land Transfer Act and as to what constitutes a caveatable interest thereunder.

As there is present the element of valuable consideration, it is clear that the debenture creates a good equitable mortgage as to the land under the Land Transfer Act: see *Taylor* v. *Commissioner of Stamps*, [1924] N.Z.L.R. 499. It is considered that the Court would not have ordered the withdrawal of the caveat in *Branigan* v. *Official Assignee*, [1926] N.Z.L.R. 423, had the caveat in that case been restricted to the sum of £250 mentioned in the letter dated December 11, 1919, and had that sum still been owing.

If the debenture creates a good mortgage in equity, then the leading case as to what constitutes a caveatable interest is distinguishable: *Guardian, Trust, and Executors Co. of New Zealand, Ltd.* v. *Hall*, [1938] N.Z.L.R. 1020.

The lodging of the caveat is necessary in your client's interest to prevent a subsequent equitable mortgagee or holder of another equitable estate or interest from gaining priority: *Abigail* v. *Lapin*, [1934] A.C. 491.

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2. Land Sales.—*Surrender of Equity of Redemption by Mortgagor to Mortgagee—Consent of Land Sales Court—Mortgages Extension Regulations—Stamp Duty.*

QUESTION: A. some years ago mortgaged a parcel of land under the Land Transfer Act to B.; A. has got into arrears. A. and B. have agreed that A. should surrender the equity of redemption to B., in consideration of B. releasing him from all liability under the mortage. This will involve a transfer of the fee-simple from A. to B. and a discharge or merger of the mortage.

1. Will the transaction require the consent of the Land Sales Court? Attention is drawn to the exemption in s. 43 (2) (*d*) of the Servicemen's Settlement and Land Sales Act, 1943.

2. Will the transaction be affected by the moratorium provisions now in force?

3. Will *ad valorem* conveyance duty be payable by B?

ANSWERS: 1. The consent of the Land Sales Court will be necessary. The exemption referred to reads: "Any contract or agreement for the transfer of any estate or interest in land by way of security only, or for the retransfer of property so transferred on the discharge of the security." The proposed transfer from A. to B. will not be a retransfer of any property previously transferred. The words "the retransfer of property so transferred on the discharge of the security" have been inserted to meet the case of a reconveyance by the mortgagee to the mortgagor of Deeds system land on the discharge of a mortgage. The exemption is similar in effect to s. 81 (*b*) of the Stamp Duties Act, 1923. In both exemptions due effect must be given to the prefix "re."

2. The transaction will not be affected by the provisions of the Mortgages Extension Emergency Regulations, 1940 (Serial No. 1940/163), because, in essence, this is an agreement for the sale and purchase of land from A. to B.: *Gossip* v. *Wright*, (1869) 32 L.J. Ch. 648, and *Melbourne Banking Corporation* v. *Brougham*, (1882) 7 App. Cas. 307. It is not the exercise by B. of any power conferred on him by the mortgage. Therefore the Mortgages Extension Emergency Regulations, 1940, do not apply.

3. *Ad valorem* conveyance duty will be payable: *Montefiore* v. *Minister of Stamp Duties*, [1922] N.Z.L.R. 1017, and *City Mutual Life Assurance Society, Ltd.* v. *Commissioner of Stamp Duties*, [1943] St.R.Qd. 59.

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3. Administration.—*Partial Intestacy — Legacy to Widow — Failure of Trusts of Remainder—Incidence of Legacy—Widow's Share in Estate.*

QUESTION: A. dies leaving personal chattels valued at £500, and cash in bank amounting to £3,500. By his will, he bequeaths to his wife a legacy of £2,000, and directs the residue of his estate to be held upon trusts which have failed. He is, therefore, intestate as to his residue. He died in March of this year, leaving a wife and three children surviving him. What is the incidence of the legacy of £2,000 as regards the personal chattels and cash in bank? The matter is of importance, because, under the intestacy, the widow receives personal chattels and £1,000.

ANSWER: The question, like so many that may arise under the Administration Amendment Act, 1944, is one for the opinion of counsel. It is suggested, however, that there are assets amounting to £4,000 available for payment of the legacy to the wife. The personal chattels are in value one-eighth of the value of the whole estate, and must bear one-eighth of the £2,000 legacy, which is charged on the whole estate. Consequently, under the will, the widow takes personal chattels to the value of £250 and £1,750 in cash. Under the intestacy, she takes the balance of the personal chattels, and £1,000 and interest charged on the residue, and one-third of the remainder. In value, the widow is, therefore, entitled absolutely to the whole of the personal chattels and £1,750, £1,000 (with interest), and £250 in cash. The three children, between them, are entitled to £500 to be held on the statutory trusts.

RULES AND REGULATIONS.

Zinc Control Notice Revocation, 1941. (Factory Emergency Regulations, 1939.) No. 1945/55.

Delegation by Oil Fuel Controller to Police of Power to require Information. (Supply Control Emergency Regulations, 1939.) No. 1945/56.

Delegation by Oil Fuel Controller to District and Sub-district Controllers of Power to require Information. (Supply Control Emergency Regulations, 1939.) No. 1945/57.

Education Regulations Revocation Order, 1945. (Education Act, 1914.) No. 1945/58.

Education Amending Regulations, 1945. (Education Act, 1914.) No. 1945/59.