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# "THE END OF THE WAR."

II—In Commercial Documents.

THE word "war," or the phrases, "the duration of the war," or "the end of the war," have no precise technical meaning when used in a commercial document. "A business sense will be given to business documents," as Lord Halsbury said in *Glynn* v. *Margetson and Co.*, [1893] A.C. 351, 359.

In England, during the war of 1914–1918, the position was complicated by the intervention of the Legislature by s. 1 of the Termination of the Present War (Definition) Act, 1918, whereby His Majesty in Council was empowered to declare what date should be treated as the date of the determination of the war; and the war was to be treated as having continued to and having ended on that date for the purpose of any Act of Parliament, Order in Council, and Proclamation, (and it proceeded:)

> and, except where the context otherwise required, of any provision in any contract, lease, or other instrument referring expressly or impliedly in whatever form of words to the present war or the present hostilities.

Notwithstanding the fact that the statute was passed when, for all practical purposes, the war had ended, some of the Judges found themselves bound by it when they had to construe commercial contracts into which the parties had entered without any knowledge that an artificial date for the ending of the war would subsequently be fixed by statute. Fortunately, the Legislature has been silent as to the termination of the recent war in relation to contracts, and has not repeated the ill-timed formula which proved such an uncertain guide to the determination of contracts. As we shall show, it required the robust common sense of McCardie, J., to overcome the difficulties arising from the application of that ready-made statutory interpretation to commercial documents.

The wording of the statute was ill-advised, as subsequent litigation showed, because it could never have been the intention of a man in business that a contract referring to the duration of "the war" would linger on not only beyond the cessation of hostilities, but also for nearly three years after that date—as the official declaration of the end of the war in August, 1921, was later to prove.

In *Kotzias* v. *Tyser*, [1920] 2 K.B. 69, an action was brought on August 21, 1919, on a contract under which the defendant had agreed in terms of a policy of insurance issued on November 2, 1918, to pay the plaintiff a sum of money in the event of peace between Great Britain and Germany not being "concluded" on or before June 30, 1919. Roche, J. (as he then was), rejected the contention that because the plaintiff was a man of business, insuring himself against a business risk, a special meaning must be given to the expression "in the event of peace not being concluded"; and held that the matter in issue depended on the statute to which we have referred, and that peace had not been concluded on or before June 30, 1919, (or at the later date on which the action was brought) by a declaration by Order in Council as to the date of the "conclusion" of peace.

The case of *Kotzias* v. *Tyser* was followed in the same year in *Lloyd* v. *Bowring*, (1920) 36 T.L.R. 397, where a sum was to be paid if peace was not "declared" by a certain date, and it was held that peace was not declared until a treaty of peace had been ratified. Again, in *Rattray* v. *Holden*, (1920) 36 T.L.R. 798, the plaintiff sought to recover a certain sum under an agreement made on June 21, 1917, that it was to be repaid "six months from the date of the signing of peace between Great Britain and Germany." In giving judgment for the defendant, Darling, J., held that there was no peace with Germany until January 10, 1920, which was fixed by Order in Council, as the official date of the ending of the war, and that that was the date with regard to which the contract was made, and not the date of the signing of the Treaty of Peace which took place on June 28, 1919.

In the later case of *Ruffy-Arnell and Co.* v. *The King*, [1922] 1 K.B. 599, the meaning of the term "duration of the war" had to be construed where it appeared in a contract made with the War Office by persons carrying on a school of aviation for the training of flying pupils. On June 24, 1918, the Government determined the contract as from July 1, 1918. McCardie, J., began by construing the word "context" in s. 1 of the Termination of the Present War (Definition) Act, 1918, as the context of the whole of the contract, and he considered the subject-matter and the whole provisions of the bargain and its objects as thereby shown. After referring to Lord Halsbury's dictum in *Glynn* v. *Margetson and Co.* (*supra*), he recalled the words of Mellish, L.J., in *The Teutonia*, (1872) L.R. 4 P.C. 171, 182:

A mercantile contract, which is usually to be construed fairly and liberally, and leaves much to be understood, ought to be construed fairly and liberally for the purpose of carrying out the object of the parties.

His Lordship said that, in his view, the parties could not have intended, having regard to the nature, object, and terms of the contract, that the obligations of the Government should have continued to such a stage as that represented by the official termination of the war in August, 1921. He held that the parties were contemplating as the "duration of the war," the substantial continuance of hostilities. He further held that the proper and just date to take was December 14, 1918 (the date of the end of the Armistice granted on November 11, 1918), as, at that date, the military power of Germany had been broken; with Germany had fallen also the effective power of the countries associated with her, and all that remained was the framing of the terms on which we should give peace; and, consequently there had been a cessation of active hostilities.

The same principle of interpretation of commercial documents was applied by Goddard, J. (as he then was), in *Kawashi Kisen Kabushiki Kaisha of Kobe* v. *Bantham Steam Ship Co., Ltd.*, [1938] 3 All E.R. 80. The question of the meaning of the word "war" was in doubt in the clause of a charter-party which provided for cancellation "if war breaks out involving Japan." On September 18, 1937, the shipowners, contending that war had broken out involving Japan in respect of the Chinese forces, cancelled the charter-party. At that time there had been no formal declaration of war, and diplomatic relations had not been broken off between China and Japan. His Lordship applied the same rule of construction as Pickford, J., did in *Bolivia Republic* v. *Indemnity Mutual Marine Assurance Co., Ltd.*, [1909] 1 K.B. 785, where the word "pirate" was to be construed, when he said the act under notice might be piracy by international law, but it was not piracy within a policy of insurance, because the popular or business meaning must be attached to the word. His judgment was affirmed on appeal: *ibid.*, 796.

So, too, Goddard, J., in dealing with the word "war" said that one is not to go into the niceties of writers on international law, but that one is to look at it in the broad sense, or in the coarser sense, which is one expression used, and find whether commercial men, using that expression in a commercial document would mean, or would visualize, a state of affairs which was there found to exist.

On appeal, the reasoning and conclusion of the judgment was affirmed by the Court of Appeal (Lord Greene, M.R., MacKinnon and Finlay, L.JJ.). The learned Master of the Rolls said that he did not propose to be the first to lay down a definition of "war" in the so-called technical sense; and he could not accept the suggestion that there was any technical meaning of the word "war" for the purpose of construing the clause in the charter-party. He expressed agreement with the view of the learned Judge in the Court below—namely, that in the particular context in which the word "war" was found in the charter-party, that word must be construed, having regard to the general tenor and purpose of the document, in what may be called a commonsense way. He added that it seemed to him that to suggest that, within the meaning of the charter-party, war had not broken out involving Japan on the relevant date was to attribute to the parties to it a desire to import into their contract some obscure and uncertain technicalities of international law, rather than the commonsense of business men.

In our next article, we propose considering leases "for the duration of the war," and cases relating to wills in which the ending of the war becomes a material factor in construction.

# THE CHIEF JUSTICE.

## Extended Term of Office.

The profession generally learned with much satisfaction that the term of the Chief Justice, Sir Michael Myers, is to be extended for one year. He is the first Chief Justice to come under the statutory provision for the vacation of office by Judges of the Supreme Court on reaching the age of seventy-two years. Sir Michael will attain that age within the next few days.

The Rt. Hon. the Prime Minister in announcing, on August 23, the Government's intention of extending His Honour's term of office for another year, said that legislation was necessary to give effect to this decision and a Bill would be introduced immediately in Parliament accordingly. "This," said Mr. Fraser, "follows a precedent that occurred in Canada where, as in New Zealand, there is a retiring age for Judges, but where, upon the attainment of that age by the Chief Justice (Sir Lyman Poore Duff, C.J.) the occupant of the position was, by legislation, confirmed in his office for an additional fixed term.

"Events arising from the termination of the war and consequent questions relating to overseas relationships," continued Mr. Fraser, "have been a primary cause in leading to the decision to confirm Sir Michael Myers in office for a further 12 months. It is well known that at San Francisco Sir Michael Myers was eminent among the jurists there in the deliberations which instituted the International Court of Justice as well as making valuable contribution to the work of the New Zealand delegation in other spheres.

"Upon the cessation of military activity throughout the world, there is the prospect of conferences in one or other of which it is probable that there may be some continuity of the work in which Sir Michael was engaged in San Francisco. In that case it may be convenient again to call upon Sir Michael Myers's services. Indeed, the experience at San Francisco gave every indication that Sir Michael's services were appreciated internationally and there might well be a desire for his services which would bring honour not only to Sir Michael personally but to New Zealand.

"In addition to such matters, there are, of course, many matters in hand in New Zealand, the completion of which will be all the more conveniently disposed of by one already acquainted with them; and, in the

complex and difficult circumstances that doubtless will attend the transition from war to peace after so exhausting a struggle as the nation has gone through, the Government feels that it is likely to be advantageous to have as Chief Justice a man of the exceptional experience of the present Chief Justice."

# SUMMARY OF RECENT JUDGMENTS.

## THE KING v. BROOKS.

COURT OF APPEAL. Wellington. 1945. June 26, 27, 28, 29; July 27. MYERS, C.J.; KENNEDY, J.; CALLAN, J.; FINLAY, J.

*Criminal Law—Capacity—Child over Seven Years and Under Fourteen Years of Age—Presumption against Criminal Responsibility—Knowledge of Accused that Act committed was wrong—Onus of Proof upon the Crown—Irrelevance of Issue of Insanity in respect of a Child of that Age—Crimes Act, 1908, ss. 41, 42.*

*Criminal Law—Insanity—Insanity as a Defence—Onus of Proof—Duty of the Crown as to Evidence of Insanity in its Possession—Special Verdict of Insanity—Limitation to Persons of, or over Age of Fourteen Years accused of Crime—"No person"—"Sane"—"On the grounds of his insanity"—Crimes Act, 1908, s. 43—Mental Defectives Act, 1911, s. 31.*

The effect of ss. 41 and 42 of the Crimes Act, 1908, is to lay down a presumption against criminal responsibility in favour of the child: the difference is that under s. 41 (relating to a person under the age of seven years) the presumption is absolute, while under s. 42 (relating to a person of the age of seven years but under the age of fourteen years), it is rebuttable, and the onus of rebutting it is upon the Crown.

In the case of a child of the age of seven years, and under the age of fourteen years charged with a crime, the Crown may call medical evidence for the purpose of proving knowledge on the part of the accused that what he did was wrong, but not for the purpose of inviting the jury to find a verdict of Not Guilty, on the ground of insanity. If it should appear that the child is mentally defective, that should be weighed and considered with every consideration relevant to determine whether, at the time of the offence, he had knowledge that he was doing wrong.

If the Crown fails to satisfy the jury that a child of the age of seven years but under the age of fourteen years knew that the act or omission charged against him was wrong, the only course open in law to the jury is to find a verdict of Not Guilty.

Section 31 of the Mental Defectives Act, 1911, is limited to cases to which s. 43 of the Crimes Act, 1908, applies—namely, only to persons of or over the age of fourteen years.

*So held* by the Court of Appeal, *Myers*, C.J., and *Kennedy* and *Callan*, JJ., *Finlay*, J., dissenting, on a case stated by *Blair*, J., pursuant to s. 442 of the Crimes Act, 1908.

Per *Myers*, C.J.: That the proper direction to be given in such a case is the same as was given in *R.* v. *Owen*, (1836) 4 C. & P. 236, 172 E.R. 685.

*R.* v. *Owen*, (1845) 1 Cox C.C. 260, followed.

*R.* v. *Smith*, and *R.* v. *Gorrie*, (1918) 83 J.P. 136, referred to.

2. That a person who is of, or is over, the age of fourteen years, and who is charged with the commission of a crime is presumed to be sane (that is, criminally responsible) at the time of doing or committing any act until the contrary is proved. Consequently, in view of the provisions of s. 43 of the Crimes Act, 1908, the Crown is not required to prove the sanity or criminal responsibility of such an accused person.

*Reg.* v. *Adams*, (1882) N.Z.L.R. 1, C.A. 311, referred to.

3. That, if in the case of a person of or over the age of fourteen years, insanity be relied upon as a defence, it must be established by the defendant. It is contrary to law for the Crown to call evidence of insanity; but any evidence in the possession of the Crown should be placed at the disposal of the prisoner's counsel to be used by him if he thinks fit.

*R.* v. *Oliver Smith*, (1910) 6 Cr. App. R. 19, followed.

*Woolmington* v. *Director of Public Prosecutions*, [1935] A.C. 462, referred to.

Counsel: *C. H. Taylor*, for the Crown; *O. C. Mazengarb*, for the accused.

Solicitors: *Crown Law Office*, Wellington, for the Crown; *Mazengarb, Hay, and Macalister*, Wellington, for the accused.

## WELLINGTON COLLEGE AND GIRLS' HIGH SCHOOL GOVERNORS v. GUARDIAN, TRUST, AND EXECUTORS COMPANY OF NEW ZEALAND, LIMITED.

SUPREME COURT (FULL COURT). Wellington. 1945. July 2, 3, 30. MYERS, C.J.; KENNEDY, J.; CALLAN, J.; FINLAY, J.

*War Emergency Legislation—Economic Stabilization—Glasgow Lease—Rent for Renewed Term to be fixed by Arbitration—Lessee's Option to accept Renewal at such Rent—Award made in November, 1942, fixing Higher Rent for Term of Renewal—Acceptance of such Renewal by Lessee in February, 1943—"Basic rent"—Economic Stabilization Emergency Regulations, 1942 (Serial No. 1942/335), Reg. 14.*

*Contract—Frustration—War Emergency Legislation—Lease providing for Renewal at Option of Lessee—Agreement by Lessee after November 1, 1942, to pay Higher Rent for Renewed Term—Whether Contract to grant New Lease incapable of Performance through Operation of Economic Stabilization Emergency Regulations, 1942—Emergency Regulations Amendment Act, 1940, s. 4 (1).*

Where, under terms of a lease granted under the provisions of the Public Bodies Leases Act, 1908, perpetually renewable on the notification by the lessee of his desire for a renewed term at the rental fixed by arbitrators, and higher than that payable under the original lease, a lessee, in February, 1943, notified such desire to renew, the new rental, though fixed pursuant to the terms of the original lease became payable pursuant to the notification by the lessee of such desire to renew, and, consequently, the proviso to Reg. 14 (1) of the Economic Stabilization Emergency Regulations, 1942, did not apply and the basic rent was accordingly the rent fixed by the original lease.

*Dunedin City Corporation* v. *A. Taylor and Sons, Ltd.*, [1945] N.Z.L.R. 123, applied.

The doctrine of frustration does not apply to the operation upon the terms of a lease of the Economic Stabilization Emergency Regulations, 1942, which could not in law be regarded as other than temporary; and, during the currency of those regulations, unless some different amount be fixed as a "fair rent" thereunder on application in that behalf, the lower rental should be paid and accepted, but in all other respects the agreement for lease could be performed.

*Trustees of Fountain of Friendship Lodge Friendly Society* v. *Tait*, [1939] N.Z.L.R. 571, G.L.R. 422, applied.

*Cricklewood Property and Investment Trust Ltd.* v. *Leighton's Investment Trust, Ltd.*, [1945] 1 All E.R. 252, considered.

*F. A. Tamplin S.S. Co., Ltd.* v. *Anglo-Mexican Petroleum Products Co., Ltd.*, [1916] 1 A.C. 397, *Joseph Constantine Steamship Line, Ltd.* v. *Imperial Smelting Corporation, Ltd.*, [1942] A.C. 154, [1941] 2 All E.R. 165, and *Matthey* v. *Curling*, [1922] 2 A.C. 180, referred to.

Counsel: *Hislop*, for the plaintiffs; *Virtue*, for the defendant.

Solicitors: *Brandon, Ward, Hislop, and Powles*, Wellington, for the plaintiffs; *Young, Bennett, Courtney, and Virtue*, Wellington, for the defendant.

## BURNS v. THE KING.

SUPREME COURT. Auckland. 1945. July 23; August 3. CALLAN, J.

*Crown Suits—Practice—Suppliant with Consent filing Petition in Magistrates' Court for Damages within Jurisdiction of that Court—Suppliant electing, after Evidence heard, to be non-suited—Action commenced in Supreme Court on same Cause of Action—Damages claimed not within Jurisdiction of Inferior Court—Whether Suppliant may proceed with such Action—Crown Suits Act, 1908, s. 36.*

A suppliant under the Crown Suits Act, 1908, who, with the consent of a Law Officer, had filed a petition in the Magistrates'

Court claiming damages within the jurisdiction of that Court, and who after evidence had been heard elected to be nonsuited is not prevented by s. 36 of that statute from filing in the Supreme Court (after due notice) a claim that differs only from the former claim in the fact that higher damages not within the jurisdiction of the Magistrates' Court are claimed.

*Rush* v. *Mornington Tramway Co., Ltd.*, (1891) 10 N.Z.L.R. 38, and *Green* v. *Lord Penzance*, (1881) 6 App. Cas. 657, distinguished.

Counsel: *V. R. S. Meredith*, for the Crown, in support of the motion; *Henry*, for the suppliant, to oppose.

Solicitors: *V. R. S. Meredith*, Crown Solicitor, Auckland, for the respondent; *J. F. W. Dickson*, Auckland, for the suppliant.

### CULPAN DRY CLEANERS, LIMITED v. BOWKETT.

SUPREME COURT. Auckland. 1945. April 24; June 15. CORNISH, J.

*Practice—Appeals to the Supreme Court—Negligence—Essential Issue not adjudicated—Assumption by Magistrate that Matter in Dispute was Common Ground—Case referred back for Complete Adjudication—Magistrates' Courts Act, 1928, s. 164.*

In an action for damages in the Magistrates' Court it was proved that the plaintiff's light motor-van, driven by W., and defendant's heavy motor-truck, driven by H., collided on a steep road near a bend. W. was proceeding uphill, and H. was coming downhill. W. alleged that he had kept well on his correct side of the road but that H. had cut the corner and come downhill on W.'s side of the road, and that to avoid a collision W. had at the last moment gone to the right because H. had not left him enough room to go further to his left, and he was struck by H.'s truck after going 7 ft. or 8 ft. to the right.

The learned Magistrate found that both parties were *in pari delicto*, in that the collision was due to the failure of each driver (*a*) to keep as close as practicable to the left-hand side of the road, and (*b*) to observe the "half-distance" braking rule, and he gave judgment for the defendant. In his judgment, he stated that "the witnesses, including the truck driver, place the course of the truck as on its correct half of Newton Road." This statement was incorrect, as the witnesses were not so agreed.

On appeal, under s. 164 of the Magistrates' Courts Act, 1928, on the ground that the incorrect statement vitiated the whole of the judgment.

*Held*, sending the case back to the Magistrate for a complete adjudication, That the Magistrate's inquiry was incomplete on an essential issue, the course of the defendant's driver as he came downhill, owing to his erroneously assuming to be common ground what was really in controversy; and it was, therefore, impossible for an appellate tribunal to say whether his result was right or wrong.

Counsel: *Richmond*, for the appellant; *Terry*, for the respondent.

Solicitors: *Buddle, Richmond, and Buddle*, Auckland, for the appellant; *Nicholson, Gribbin, Rogerson, and Nicholson*, Auckland, for the respondent.

### HANNA v. AUCKLAND CITY CORPORATION.

COURT OF APPEAL. Wellington. 1945. June 25, 26; July 27 MYERS, C.J.; KENNEDY, J.; CALLAN, J.; FINLAY, J.

*By-law—Municipal Corporation—Construction and Repair of Buildings at estimated Cost exceeding £2,000—Supervision and Preparation of Plans by Registered Architect or Registered Civil or Structural Engineer—Limitation to such Registered Architect or Engineer, "who is in the opinion of the City Engineer properly qualified to prepare the plans for and supervise the execution" of such Work—Whether* Ultra Vires—*Reasonableness—"Sanitary and other works"—"Discretion . . . is so great as to be unreasonable"—Municipal Corporations Act, 1933, ss. 346, 364 (20) (22), 367 (c)—By-laws Act, 1910, s. 13 (2)—New Zealand Institute of Architects Act, 1913, s. 27 (5).*

An Auckland City by-law was, in part, as follows:—

"(*a*) No person shall erect any new building or structure or make any addition, alteration or repair to, or renewal of, any building or part of a building already erected or hereafter erected, where the estimated cost of the work exceeds £2,000 except under the supervision of and in accordance with plans prepared by a registered architect, and/or registered civil or structural engineer *who is in the opinion of the City Engineer properly qualified to prepare the plans for and supervise the execution of the said building or structural work* provided that, in exceptional circumstances, the City Engineer may authorize the proposed work without requiring the employment of a registered architect or registered civil or structural engineer, when, in his opinion, such special qualifications for the preparation of plans for the said building or structure or such special supervision are not necessary."

On appeal from the judgment of *Northcroft*, J., reported *sub nom. In re Hanna*, [1945] N.Z.L.R. 10, which held the above by-law, with the exception of the italicized words, to be valid.

*Held*, per *totam curiam*, That the by-law was *ultra vires*, and should be quashed, as ss. 364 (20) and 367 (*c*) of the Municipal Corporations Act, 1933, do not authorize the making of such a by-law.

*Toronto City Corporation* v. *Virgo*, [1896] A.C. 88, and *Mayor, Etc., of Dunedin* v. *Baird*, (1913) 33 N.Z.L.R. 149, 16 G.L.R. 269, applied.

*Poole* v. *Rennie*, (1908) 28 N.Z.L.R. 73; 11 G.L.R. 299, distinguished.

*Held, also*, per *Myers*, C.J., and *Kennedy*, J., That the by-law was invalid on the ground of unreasonableness.

*Jack* v. *Palmerston North Borough*, (1909) 28 N.Z.L.R. 469, 12 G.L.R. 238, considered.

Appeal from the judgment of *Northcroft*, J., [1945] N.Z.L.R. 10, allowed.

Counsel: *Cleary* and *W. W. King*, for the appellant; *Stanton*, for the respondent.

Solicitors: *Wilson, Henry, and McCarthy*, Auckland, for the appellant; *Earl, Kent, Stanton, Massey, North, and Palmer*, Auckland, for the respondent.

# A TRAP FOR TESTATORS.

## "Probate Policies."

Many testators take out life policies expressly for the purpose of paying death duties. Such policies are often referred to as "Probate Policies," and some contain a provision that payment will be made to the Stamp Duties Department on proof of death and without production of probate.

There is a trap here into which testators can easily fall. Suppose the will to contain a number of specific and general devises and bequests and a gift of residue, and no direction as to payment of duties, and the testator later takes out a "Probate Policy" without altering his will. There is little doubt that the testator would die under the impression that the policy-moneys would constitute not only the immediate but the ultimate fund from which payment of duties was to come. The residuary legatee could, however, contend that s. 31 of the Death Duties Act, 1921, applied, and insist on each beneficiary bearing his share of estate duty and the succession duty on his succession. There would seem to be no answer to this contention, and the result would be the same if the will were made after the policy was taken out.

# THE INTERNATIONAL COURT OF JUSTICE.

## 2.—Status and Organization.

By C. C. AIKMAN, LL.M.

At the time the London Inter-Allied Committee was at work on its Report* on the future of the Permanent Court of International Justice (referred to in these articles as "the old Court") it was not clear what shape the General International Organization contemplated in the Moscow Declaration of October, 1943, would take. The Inter-Allied Committee therefore devoted some attention to the relationship that should exist between a future International Court and any General International Organization.

### RELATION OF COURT TO THE UNITED NATIONS ORGANIZATION.

The connection between the old Court and the League of Nations was such that the Report described it as "organic." This relationship is illustrated by the terms of Article 14 of the Covenant of the League, which, besides providing for the establishment of the old Court, enabled the latter to give advisory opinions "upon any dispute or question referred to it by the Council of the Assembly." Again, under the Statute of the old Court its members were elected by the Assembly and Council of the League. Expenses were met by the League and appeared in the League Budget.

The inter-Allied Report gave reasons for its recommendation that there should in future be no organic connection between an international court and a General International Organization. It was felt that the old Court had suffered because its prestige was to some extent dependent upon the varying fortunes of the League. Moreover, in the opinion of the inter-Allied Committee, it was desirable that adherence to the Statute of an international court should be universal and not necessarily identical with the possibly restrictive membership of a General International Organization. Organic connection, to be satisfactory, would demand the same, or practically the same, membership of each body.

On the other hand, the Report did not go so far as to suggest that the judicial independence of Judges would be in any way prejudiced by close connection between international court and General International Organization. The Report says—

> . . . it does not appear that the independence of the Judges of the Permanent Court of International Justice (as distinct from the prestige of the Court as a whole) was ever regarded as affected by its organic connection with the League . . .

The Powers responsible for the formulation of the Dumbarton Oaks Proposals left no doubt as to their views on the relationship of the proposed International Court of Justice (referred to as "the new Court") of the United Nations Organization. They dealt with it in Chapters IV and VII of the Proposals. The new Court was to be a principal organ of the Organization and its Statute was to be annexed to and be a part of the Charter of the Organization.† All members of the Organization were to be *ipso facto* parties to the Statute of the new Court, but non-members might be admitted by the General Assembly upon the recommendation of the Security Council.

These provisions of the Dumbarton Oaks Proposals were accepted by the Washington Committee and by the San Francisco Conference as determining the relation that was to exist between the new Court and the United Nations Organization. The provisions are reproduced almost identically in Articles 7, 92, and 93 of the United Nations Charter.

When we come to discuss the election of Judges, advisory opinions, amendments to the new Statute, and the jurisdiction of the new Court in relation to the pacific settlement of disputes, the closeness of the relationship between the new Court and the United Nations Organization will become more evident. As regards the financing of the new Court, there is as yet no decision, but there is little doubt that provision will be made in the Budget of the United Nations.

### OLD OR NEW COURT?

The Dumbarton Oaks Proposals acknowledged the general esteem in which the Permanent Court of International Justice was held. They provided that the Statute of the International Court of Justice should be either the old Statute continued in force "with such modifications as may be desirable," or a new Statute in the preparation of which the old Statute should be used as a basis.

The Washington Committee was faced with an early decision as to whether an answer on the issue "old or new Court" was necessary before it could proceed with its work. It was decided that the Committee could use the old Statute as a basis for its discussions without prejudging the question whether any draft Statute resulting from the discussions was to be regarded as an amended Statute of the old Court or the Statute of a new Court.

The Committee therefore examined the old Statute article by article, and the draft Statute finally referred to San Francisco left the old or new Court issue undetermined.

The many countries supporting the old Court argued in favour of maintaining the continuity of jurisprudence of a Court that had functioned with success over a period of years and had accumulated valuable experience. Furthermore, provisions in many international treaties and conventions referring disputes to the old Court had extended its jurisdiction. Hudson‡ estimates that some five hundred instruments—many with countries which are not United Nations—have been concluded relate in some way to the jurisdiction of the old Court.

There were serious difficulties facing the supporters of the old Court. A large number of States parties to the old Statute—Germany and Spain are significant examples—are not United Nations. It followed that the approval of these States would be necessary before the old Statute could be amended. And they would

* February 10, 1944, Cmd. 6531.

† Article 92 of the United Nations Charter is even more decisive. It says that the annexed Statute " . . . forms an integral part of the present Charter."

‡ Manley O. Hudson, *International Tribunals*, Washington, 1944, p. 10.

continue to be parties to the Statute of the Court. On the other hand, there were some United Nations, such as the United States and the U.S.S.R.,§ which were not parties to the old Statute.

When "the old or new Court" question came up at San Francisco a comprehensive Report on these various factors was prepared by a sub-committee and its recommendation that there should be a new Court was accepted unanimously by Committee IV/1. This decision made necessary some action with regard to references to the old Court in treaties or conventions. Article 37 of the new Statute therefore provides—

> Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice.

It is clear that States not parties to the new Statute are not subject to the jurisdiction of the new Court under treaties which oblige them to refer disputes to the old Court.

The problems of formally bringing the life of the old Court to an end and of arranging for succession to its property still remain. It is understood that they will be considered by the Preparatory Commission of the United Nations which is to meet in London as soon as possible after the United Nations Charter comes into effect.

### Number and Terms of Judges.

The old Statute, as amended by the Revision Protocol of September 14, 1929, provided that the old Court should consist of fifteen Judges, each elected for contemporaneous terms of nine years. Members elected to fill a vacancy held office only for the remainder of the predecessor's term.

The new Court, despite efforts by the United Kingdom and other delegations to have the number reduced, will continue to have fifteen Judges, each holding office for nine years. However, the nine-year terms will no longer be contemporaneous, since provision is made for a rotating election under which five Judges are elected each three years. In order to establish this system of rotation, fifteen Judges will be elected at the first election to the Court. It will then be decided by lot as to which Judges are to retire at the end of the third and sixth years of the new Court's existence.

The desirability of ensuring continuity by overlapping terms had been considered during the preparation of the old Statute, and the views of those States which argued that a general election every nine years gave more opportunity for equitable distribution of seats had prevailed. This argument was not strongly urged against the change made in the new Statute and it remains to be seen how the rotating election will work in practice.

### Ad Hoc Judges.

There was one respect in which the old Court did not conform to the ideal of a purely judicial tribunal. It was admitted that where a party to a case before the Court was not represented on the bench by one of its own nationals it could nominate an *ad hoc* Judge.

This procedure is preserved unchanged in the new Statute. Any justification for it must be found in the inherent differences between national and international tribunals. The parties before the International Court of Justice will be sovereign States, and if its decisions are to be effective they must be acceptable to the public conscience and opinion of the countries concerned. The presence of national Judges will contribute to this end and will enable the point of view of the States they represent to be fully presented and understood.

### Nomination of Judges.

Under the old Statute candidates for election as members of the Court were nominated by the national groups in the Permanent Court of Arbitration—*i.e.*, by members of that Court appointed under Article 44 of the Hague Convention No. 1 of 1907. This Article provided for the appointment by each State party to the Convention of a national group of four persons of recognized competence in questions of International Law. Under Article 4 of the old Statute similar national groups were to be appointed by those parties to the Statute which, like New Zealand, were not parties to the Hague Convention. It is interesting to note that in the past New Zealand's national group has consisted of the Chief Justice, the Attorney-General, the Solicitor-General, and the Dean of the Faculty of Law at Victoria University College.

Each national group might nominate four candidates, of which two only could be of the nationality of the group.

The inter-Allied Report of 1943 recommended the adoption of the simpler procedure of nomination of one candidate by each of the Governments concerned. This recommendation was sponsored by the United Kingdom at the Washington meeting and received a good deal of support, but when the issue went to a vote, there was no clear majority either for the new or for the old procedure. The issue therefore became one of the outstanding questions referred to San Francisco.

At San Francisco, Committee IV/I decided, with little hesitation, in favour of the retention of the existing system of nomination by national groups. Such a decision was to be expected, since it was generally recognized by both the Washington and San Francisco Committees that where provisions of the old Statute had worked to reasonable satisfaction they should so far as possible be preserved.

### Election of Judges.

Efforts before 1920 to form an International Court had foundered on the question of the method of election of Judges, but in 1920 a procedure was evolved which was acceptable to all States in that it effectively protected the interest of both Great and Small Powers in representation on the Court. The procedure provided for independent and simultaneous elections by both the Council and the Assembly of the League of Nations. Those candidates securing an absolute majority of votes in the Assembly and Council were to be considered elected. Repeated elections and, if necessary, a joint conference of representatives of the Assembly and Council were to be held until all seats were filled.

The Washington Committee devoted little time to discussion of methods of election, and the Washington draft Statute embodied the old procedure with the substitution of the General Assembly and Security Council of the United Nations for the Assembly and Council of the League of Nations.

§ It will be remembered that the U.S.S.R. was admitted to the League of Nations in 1934 and expelled in 1939. The U.S.S.R. was at no time a party to the Statute of the Permanent Court of International Justice.

At San Francisco the Latin-American States led an attempt to make the General Assembly of the United Nations the sole electoral body. It was argued that no other procedure was consistent with the equality of States. The proposal was strenuously opposed by the Great Powers and by a number of other countries, including New Zealand, which felt that a more balanced Court would be obtained by the dual election. Just when the issue threatened to reach a deadlock it became apparent that the attitude of the Latin-American States was, in part, the result of fear that the Great Power veto would operate in elections by the Security Council. Accordingly, amendments were made in the Washington draft to ensure that the Great Power veto did not apply in the election of Judges to the Court. The draft as so amended secured the necessary majority in Committee IV/1.

The provisions of the old Statute as to the qualifications of Judges and their privileges and immunities remain in the new Statute: as do those articles designed to ensure the independence of the Bench—Judges are not permitted to exercise any political function, to act as agent or counsel in a case, or to sit in a case in which they are themselves interested.

### Nationality of Judges.

Article 10, paragraph 2, of the old Statute provided that "In the event of more than *one national of the same member of the League* being elected, . . . the eldest of these only shall be regarded as elected." A previous draft of the paragraph had read thus: "In the event of more than *one candidate of the same nationality* being elected . . . " and the change was made as the result of fears expressed by the Canadian Delegation that the earlier wording was open to the interpretation that a Canadian could not sit in the Court at the same time as a Judge of the United Kingdom. Hudson records that a suggestion that a general definition of "national" for the purpose of the Statute be inserted was not approved.‖

At that time, no British Dominion had a nationality status of its own—Canadians, Australians, and New Zealanders were alike British nationals and not Canadian, Australian, or New Zealand nationals. Hence the doubt as to the position of the Dominions in an election of Judges to a Court on which it was desired to have not more than one representative "national" from any one country. The difficulty arose again in connection with Article 31 dealing with the right of a party in a case to nominate an *ad hoc* Judge—could a Dominion make a nomination under the Article if there was already a United Kingdom Judge on the Court?

‖ Manley O. Hudson, *The Permanent Court of International Justice, 1920–42*, New York, 1943, p. 159.

Canada regarded her position as still so uncertain that in 1921, in her desire to nominate candidates for the old Court, she ascribed Canadian nationality to any British subject who was a Canadian citizen. Eire and South Africa, but not Australia and New Zealand, have also adopted nationality legislation of their own.

In 1929, when a Committee of Jurists sat to consider the revision of the old Statute, Sir Cecil Hurst, representing the United Kingdom, was unsuccessful in obtaining the inclusion in the Committee's report of an interpretation of the term "nationality" with reference to the British Empire.

The Australian and New Zealand representatives at Washington were faced with a decision as to whether another attempt to obtain a clarification of this issue was timely. It was agreed to defer the matter to San Francisco.

When Committee IV/1 considered Article 3 of the Washington draft—the Washington Committee had included a provision in this Article to the effect that no two members of the Court should be nationals of the same state—Professor Bailey, the Australian representative, asked for permission to introduce at a later date an interpretative amendment to the draft. The Chairman of Committee IV/1, Dr. Gallagher, Peruvian Minister of Foreign Affairs, in giving the permission sought, made it clear that in his view the now recognised status of the British Dominions left no doubt as to the position.

The Australian and New Zealand representatives devoted some attention to the difficult task of drafting an appropriate interpretative amendment. The problem was to find a form of words which avoided the ambiguities and uncertainties attached to words such as "citizen," "resident," and the French "*ressortissant.*" It was also desirable that any drafts should omit specific reference to British nationality. Finally, the following addition to Article 3 was submitted by Professor Bailey to the Committee and accepted with little opposition:

> A person who for the purposes of membership of the Court could be regarded as a national of more than one State shall be deemed to be a national of the one in which he normally exercises civil and political rights.

The amendment received general support because its terms were wide enough to cover not only the particular problem affecting Australia and New Zealand, but also any case of double nationality that might arise. Nevertheless, the ready acceptance of the amendment by the Committee was a gratifying recognition of the international status the several members of the British Commonwealth have now earned for themselves.

## CORRESPONDENCE.

### The Status of Stipendiary Magistrates.

The Editor,
New Zealand Law Journal,
Wellington.

Sir,—

In the concluding instalment of my summary on "The Status of Stipendiary Magistrates in New Zealand," appearing in the issue of the New Zealand Law Journal of August 21, there appears the words "Ministers of the Crown (and the Minister of Justice who claims to control the Magistrates is no exception)."

This is intended to be a purely abstract proposition and has no reference to the present Minister of Justice nor any particular Minister of Justice.

I shall be pleased if you will publish this explanation as I may seem unintentionally to have cast an unmerited reflection on a friend of long standing.

Yours faithfully,
S. L. Paterson.

Hamilton,
August 27, 1945.

# MR. JUSTICE O'REGAN.

## Law Society's Complimentary Dinner.

Mr. Justice O'Regan, who has resigned his appointment as Judge of the Compensation Court, was the guest of the Council and members of the Wellington District Law Society on August 2.

The large attendance included the Attorney-General, Hon. H. G. R. Mason.

### The Guest of Honour.

The President of the Wellington Law Society, Mr. H. R. Biss, said that he had the honour of extending to their guest, Mr. Justice O'Regan, the Society's felicitations and good wishes on his retirement from the Bench. The members of the Bar in Wellington deemed it an honour and a privilege to have His Honour with them as their guest; but their pleasure in having him with them was tinged with very real regret that they were bidding him farewell as the Judge of the Compensation Court. His Honour had lived a long and very useful life, but the unrelenting combination of length of years and the rules attaching to appointments to the Judiciary in New Zealand, brought about his retirement from a position which he accepted with reluctance, and which members of the profession in Wellington with profound regret now saw him vacate.

"Throughout his long career, Mr. Justice O'Regan has stepped forward, frequently against conditions almost of adversity, from one success to another," the speaker continued. "His early years were spent in what we of this age, with its softening comforts and conveniences, are inclined to regard as the hard life of the West Coast. In those days, I believe, His Honour accepted as a normal part of his daily life what we would probably regard as unbearable hardships. But such were the conditions which faced the generation into which he was born some seventy-six years ago. I think I am right in saying that no schooling, as we understand it, was available to him in his childhood; but I also think I am right in saying, Sir, that from you came the rather cynical suggestion that, on reflection on that circumstance, you realized you had had a lucky escape.

"Such early disadvantages, however, were not to daunt His Honour, and I cannot help feeling that, during the years spent at farm-work and bush-work, he had visions of activities farther afield. If he did not have such visions, then I can only say that it was a lucky turn of the wheel of fate that forced him into the profession.

"It was characteristic of the nature of the man that his first public appearance, if I may call it such, was as a correspondent to the local Press in defence of the rights of some workmen on the Coast. His eager reading of history and political economy early qualified him for his first appointment, when still only twenty-one years of age, as editor of the *Reefton Guardian*. From there it was a natural step to the editorship of the *Inangahua Times*, but I have no doubt that when he made that change back to the district where he had spent his very early youth he did not anticipate the exciting events of the next few years.

"It was in 1893 that political events on the West Coast led to Mr. O'Regan making his first attempt at Parliamentary honours. His opponent was none other than the redoubtable Sir Robert Stout, and I make bold to say that had it not been for the advent of the heavy artillery of the Liberal Party at the election, we might have seen our latest Judge of the Compensation Court the victor over our former Chief Justice. However, the experience gained in that campaign clinched the result later in the same year when our guest became Mr. P. J. O'Regan, M.H.R. for Inangahua, when still under the age of twenty-five years.

"His success in the House of Representatives was a good omen for the profession, which he later entered; and personally I cannot regret his defeat after six years of Parliamentary life, for it gave him the opportunity of achieving his long-cherished ambition to study law. And so, in his early thirties, he set about the self-imposed task of qualifying for the profession in which he was later to achieve such success.

"In 1905, he was admitted as a solicitor of the Supreme Court, but continued to burn the midnight oil with such effect that he was admitted as a Barrister in 1908.

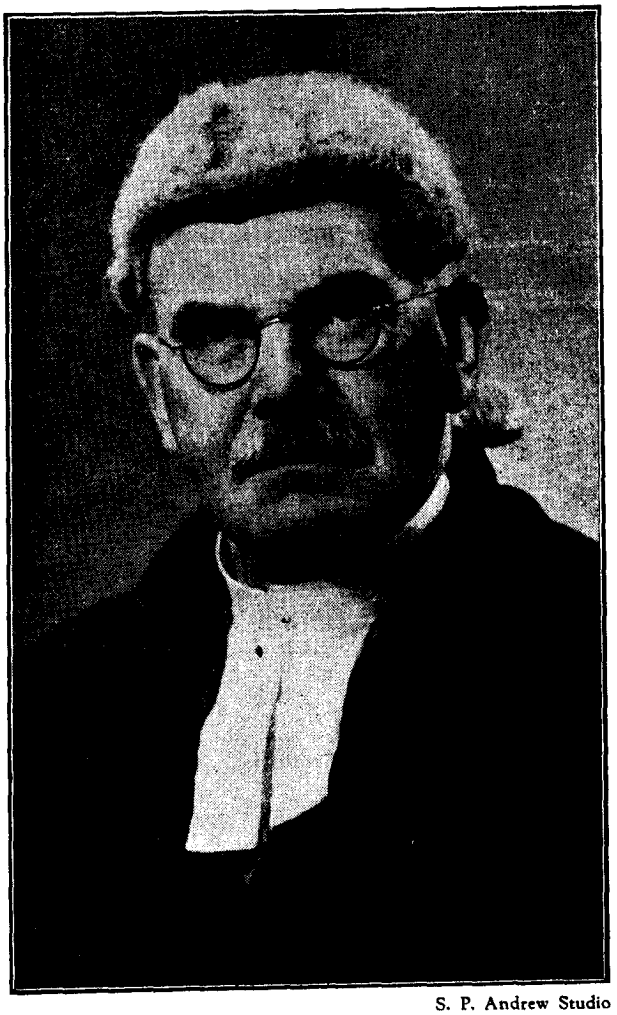
"Looking back now, we can see how well his knowledge of men and his great practical experience fitted him for the prominence he was to achieve in common-law actions. Particularly was he qualified to handle, and, in fact, to specialize in, claims under the Workers' Compensation Court; and no member of the profession had that robust knowledge of that difficult branch of the law that was His Honour's particular perquisite. Many notable successes rewarded his efforts in that field, and if I should be asked to name one for which particular credit and praise is due to him as counsel engaged therein, I should unhesitatingly name the group of Napier Earthquake cases, in which their Lordships of the Judicial Committee upheld the view for which he had contended in our Courts in New Zealand.

"I think, however, any reference to his work at the Bar would be incomplete were I not to mention his success in *Faulkner's* case. Members present will remember that that action arose out of the bursting of a drum of sulphuric acid on the Auckland Wharf with resulting injury to a number of workmen. His Honour, acting for five of the workmen, with great courage, I thought, threw over the right of action under the Workers' Compensation Act and proceeded at common law against the manufacturers of the acid. The result was a complete justification of the discrimination he had shown, and established the liability of persons sending forth inherently dangerous goods to third parties likely to handle them. The congratulations of the late Sir John Salmond on his having clarified a difficult legal subject were well merited. The members of the profession, too, remember that it was due very largely to his efforts and to his advocacy that the rule of common employment was abolished.

"In 1937, there came the great reward to one who had done so much in the particular branch of the law in which he specialized, of appointment to the Supreme Court Bench, and for eight years our guest to-night has presided over the Court adjudicating on cases under the Worker's Compensation Act, before which he had made such frequent appearances. I do not want to-night to traverse in detail His Honour's work as a Judge of that Court. Far be it from me in this company to discuss the distinction between coronary insufficiency and coronary occlusion; but the record as found in the *Law Reports* is sufficient proof of the forthright manliness, learning, and impartiality which His Honour has brought to bear on the matters that have come before him for decision.

"Your Honour, on the occasion eight years ago when the profession in Wellington extended to you its felicitations on your appointment to the Bench, you jocularly referred to the proposal that had once been made that Judges and Magistrates should be chosen by an electoral college appointed by the legal profession. Let me assure you, Sir, that had such a proposal been given effect to before 1937, we would still have had Mr. Justice O'Regan presiding in the Compensation Court.

"Your Honour, the members of the profession in Wellington will ever be mindful of your great work among them while at the Bar, and of the unfailing courtesy and consideration which you have shown them since your elevation to the Bench. Your time to lay aside your Judicial duties has unfortunately arrived; but the profession expresses to you its very sincere personal regard, and its hope that you may long be spared to enjoy in good health the retirement to which your honourable and busy career has so fully entitled you."



S. P. Andrew Studio

**Mr. Justice O'Regan.**

The toast of His Honour Mr. Justice O'Regan, was then enthusiastically honoured.

### Mr. Justice O'Regan.

In his reply, Mr. Justice O'Regan said that he was at a distinct disadvantage in attempting to acknowledge the compliments expressed, but he could not plead that he was unaccustomed to public speaking. It was an open secret that he had been in hospital for a fortnight owing, so he was assured, to a temporary indisposition; and the Lewisham Sisters had been at pains to enable him to attend that evening, and thanks to their attention he felt equal to the effort.

"First, let me say that I am rather at a loss to understand, Mr. President, how you became so familiar with my life history," the learned Judge proceeded. "I must say that you have given a very accurate epitome of it. It is long since I first saw the light—on February 6, 1869, to be correct; and, although only a few weeks over three years of age when the O'Regan family removed inland from Charleston, I recognized my birthplace when I revisited it twenty-one years later. I remember clearly the journey up the Buller River in one of the barges, called a cargo boat, built specially for the days when there was no other means of travel in that peculiarly wild and inhospitable part of New Zealand. We settled in the Inangahua Valley sixteen miles from Reefton, a great distance in those days of the most primitive roads when there were rivers to ford."

In the result, His Honour continued, he had never been at school until he had turned fourteen when, for eight months he attended a boarding school at Ahaura in Grey Valley in charge of a very worthy French priest, Father Rolland. His parents had taught him to read and write, however, and certainly he could not have learned these necessary arts earlier even had he attended school. At any rate, he could well recollect reading in the local newspaper of Captain Webb swimming the Channel in 1875; of the invention of the telephone in 1876; of Colonel Fred Burnaby crossing from Dover to Caen in a balloon in the same year; of the death of Pius IX and the accession of Leo XIII in 1878; of the deaths of Victor Emmanuel and of Lord John Russell the same year; of Disraeli in 1881; of the assassination of President Garfield in 1881; of the deaths of Darwin, Longfellow, and Emerson in 1882, and of Karl Marx in 1883.

The first war of which he had recollection was that between the Russians and Turks in 1877–78, and he was ashamed to say that he was a strong partizan of the Turks, mainly, he believed, for the reason that

a circumstantial story went the rounds of the Press that Sulieman Pasha, the hero of Shipka Pass, was an Irishman named Tom Sullivan who had joined the Turks during the Crimean War (*Laughter*).

Early in life, His Honour continued, he had evinced a keen interest in public affairs, and soon became a contributor to the local Press. Reefton once had three papers (all dailies), the *Inangahua Herald*, commencing as a tri-weekly in 1872; the *Inangahua Times*, started in 1875, and the *Reefton Guardian*, which appeared first in 1887. This reminded him that one of the greatest changes incidental to improved transport was the virtual disappearance of the country Press. His earliest letters were to the *Guardian* in defence of some Cape Foulwind quarry-workers who had gone on strike. He chose the nom-de-plume of "Horny Hand," but the name of the writer soon leaked out, and he became a popular figure — and would confess that he enjoyed the experience.

### Editor at Twenty-one.

As the result of visiting the Magistrate's Court, when it was held in Reefton, he acquired a keen desire, to study law; but the ambition seemed impossible of realization. Destiny beckoned him unsuspectingly on however, in that, shortly before his twenty-second birthday, he was offered the position of editor of the *Guardian*, and no persuasion was necessary to induce him to accept the offer.

His Honour said that he was a supporter of the Ballance Government, then just in office; and one of his earliest editorials was a criticism of the Governor, Lord Onslow, who, on the advice of the defeated Atkinson Government, had appointed Sir Harry Atkinson and four of his supporters to the Legislative Council. Six months later, he became editor of the *Inangahua Times*, a position he held for nearly two years. He could honestly say that, on entering journalism, he had no political ambitions; but his numerous friends confidently named him as a candidate for Inangahua when the election fell due at the end of the year 1893. "With equal candour," continued His Honour, "I tell you that I was a very willing horse."

### In Parliament.

Early in 1893, having left the editorial chair, he paid his second visit to the North Island. John Ballance, the Premier, died at the end of April; and at or about the same time there appeared in the Press a message intimating that the Inangahua seat was vacant, the sitting member, R. H. J. Reeves, having become bankrupt.

"Thus there were impending two by-elections, and I, who had planned to stand at the general election at the end of the year, was not a little embarrassed," His Honour said. "Sir Robert Stout had been out of Parliament since 1887; but he had revisited his friend Ballance during the latter's illness, and had agreed to his request to re-enter public life.

"Presently it was announced that a requisition to Sir Robert was being signed in Inangahua, and the news soon followed that Sir Robert had accepted on condition that he was not required to visit the district. Next, I returned to the West Coast forthwith and announced my candidature, to the surprise alike of friend and foe, and addressed the first public meeting at Cape Foulwind. Strange as it may appear nowadays, Sir Robert's name was not then associated with Prohibition. Knowing his views, however, I determined to get in early and declared in favour of popular control of 'the trade.' The meeting was so successful that Sir Robert felt obliged to reconsider his decision not to revisit the district, and he soon put in appearance. Incidentally it may be added that for several years afterwards he was twitted by Frank Lawry, a supporter of the trade who sat for an Auckland electorate, that he had driven to portions of the electorate in a carriage and pair provided by Nahr, the Westport brewer. For my part, I was unable to see how he could have refused Mr. Nahr's offer.

"There was no Seddon-Stout feud in those far-off days, and presently the Premier—we did not say Prime Minister then—appeared in the Inangahua in support of Sir Robert's candidature, as well as Reeves (the late member), A. R. Guinness (Grey) and Eugene O'Connor 'the Buller Lion,' who sat for Buller. Nevertheless, I was not without friends; and, in the face of much discouragement, persisted in going to the poll. The election took place on June 8, when I was defeated by 636 votes, the figures being: Stout 1,476, O'Regan 840. Of course, I had at least received abundant publicity, and I determined to offer myself somewhere at the general election. With that end in view, I embarked on a lecturing tour throughout the North Island, my subject being an increase in the land-tax and the placing of all local taxation on the unimproved value of land. I made a shilling charge for admission, and nearly everywhere had a good audience, probably the best at Wanganui. There I had strong inducements to offer myself at the coming election.

"By this time the Seddon-Stout feud was in full blast, and Sir Robert had announced his candidature for Wellington City. Of course, I followed with an intimation that I would again be a candidate for Inangahua. Now let me curtail the story. I was successful at the general election, held on November 28, 1893, thus becoming a Member of the House of Representatives before my twenty-fifth birthday; and in that and the following Parliament I had the honour of being the youngest member. I had the honour of seconding the Address-in-reply in 1894, when I proclaimed myself a Freetrader and an advocate of land value taxation, singling out for special attack 'the vacant lot industry.' I had 'a good Press.' In those far-off days the editor of the *Evening Post* was E. T. Gillon, a staunch Freetrader, who made the paper a brilliant exponent of fiscal freedom; and my speech pleased him well. Both the *Post* and the *New Zealand Times*, however, were equally generous in their comments, and I had reason to fear that the public expected too much of me."

### Beginings in the Law.

His Honour then epitomized his political career. Before the election of 1896, there was a census and a redistribution of seats, and Inangahua was merged in the neighbouring electorates of Grey and Buller. He chose to contest Buller, and won by a handsome majority. He was defeated, however, at the general election of 1899; and, though he was disappointed at the time, his friends felt the reverse more severely. In fact, it was a piece of real good fortune in that he was now free to study for the law. He was half-way through his thirty-second year, had not passed even the general knowledge examination, and was married and had a growing family. By 1904 he had passed the general knowledge and solicitors' examination, and was

admitted as a solicitor in 1905. Thereafter he " burned the midnight oil " in his office, and by 1907 had passed in all the subjects for the LL.B. degree.

Clients did not rush him at once; but, in 1908, out of a case at first unpromising he was placed " on the map," when he won a compensation case on which the papers wrote editorials. The case as *Whiteford* v. *The King*, (10 G.L.R. 150), the first in which it was decided that a worker who collapsed and died while working, had died as the result of injury by accident, although he suffered from heart disease. Two years later, the House of Lords took the same view in *Clover Clayton and Co., Ltd.* v. *Hughes*, [1910] A.C. 242. Sim, J., then President of the Court of Arbitration, was pardonably proud of *Whiteford's* case, but he generously congratulated the speaker, who had seen that the principle of *Fenton* v. *Thorley and Co., Ltd.*, [1903] A.C. 443, the famous hernia case, applied equally to heart cases.

### The Doctrine of Common Employment.

His Honour went on to say that during his law-studies the doctrine of common employment had filled him with indignation. He had early been appointed solicitor to the Miners' Federation, and one of his first self-imposed tasks was to prepare a circular to the Miners' and Watersiders' Unions explaining the doctrine, and suggesting its abolition. The circular met with ready and indignant response; and in 1908 he appeared before the Labour Bills Committee, to which a Bill consolidating and amending the workers' compensation legislation had been referred. He submitted to the Committee a clause ordaining the abolition of the defence of a fellow-worker's negligence when damages were sought for death or injury.

" The Hon. J. A. Miller, then Minister of Labour, intimated his acceptance of my proposed amendment, and I felt that my objective had been virtually achieved," the speaker continued. " Next I submitted another clause providing that where an injured man had a personal accident policy, the amount thereof should not be set-off against the employer's liability, but that the worker should have the benefit of the policy as well as compensation. Curiously enough, though the proposed amendment was taken by the Minister, who promised to consider it, there was no appearance of it in the Bill as reported. When the measure was in the Legislative Counsel, however, I saw Dr. (later Sir John) Findlay, the Attorney-General, who agreed to accept it, and in fact proposed it himself: see now s. 14 of the Workers' Compensation Act, 1922.

" When the Bill was reported to the House I did not know my clause abolishing common employment. Clause 62 contained three subclauses the effect of which was to abolish the defence indeed, but to limit the amount recoverable in non-fatal cases to £500. Since 1874 the defence had been abolished in connection with mining accidents; but to these, too, the limitation applied. I was furious, but powerless to effect any change. I made the fullest use of my right to criticize, however. In 1911, the Government fathered an amending Bill ordaining *inter alia*, the repeal of the second subsection providing for the limitation, and enacting instead that no servant in an action founded on the negligence of a fellow-servant should recover a greater amount by way of damages than £500.

" Presently, I issued a writ claiming £1,000 damages by a daughter for the death of her father, owing to the alleged negligence of a fellow-servant: see *Robin* v. *Union Steam Ship Co. of New Zealand, Ltd.*, [1920] A.C. 654, N.Z. P.C.C. 131. Before filing a defence, the defendant company summoned me to show cause why the claim should not be limited to £500 in virtue of the amendment of 1911. For the plaintiff, it was submitted that the subsection applied to non-fatal cases, in which the plaintiff had been injured by the negligence of a fellow-servant. This seemed self-evident to me, but the defendant strenuously contended otherwise. However, Hosking, J., gave a reserved decision in favour of the plaintiff. Then the case was taken to the Supreme Court, and by consent was removed into the Court of Appeal. There, Sir John Findlay spoke for two hours in support of the defendant's view. The plaintiff's counsel not less strenuously maintained what I called the 'self-evident view.' In their reserved judgment, their Honours were equally divided, Chapman and Denniston, JJ., holding for the plaintiff, and Sir Robert Stout, C.J., and Cooper, J., for the defence. Thus, the plaintiff succeeded, but could be allowed no costs.

" Then," continued His Honour, " the Lord delivered the enemy into my hands, for he appealed to the Privy Council where the respondent had an easy win. The amendment had restored the *status quo* as far as mining accidents were concerned, and by subsequent legislation the limitation was raised first to £750, then to £1,000; and to the present Minister of Justice, Mr. Mason, belongs the honour of making an end completely of the defence of common employment, thus finishing the work I had begun in 1908."

### Some Leading Cases.

" In practice " said His Honour further, " one is suddenly confronted with a problem at times." He related how one day an insurance manager entered his office, cheque-book in hand, and explained that he was just about to write a cheque on the advice of eminent counsel for the amount prescribed by the Second Schedule to the Act of 1908, for the loss of an arm; and he explained that while the injured man was receiving weekly payments he had died, but not as the result of the accident. Was the executor of the deceased's estate entitled to the amount prescribed by the Schedule? The reply was an emphatic negative; and, by arrangement, counsel gave an opinion in writing expressing the view that in a non-fatal case a lump sum was never payable save by agreement of the parties or by judgment of the Court. Counsel for the executor remained obdurate, however. The case was contested and the Court (Stringer, J.) decided against the executor: *Hodge* v. *Alton Co-operative Dairy Factory Co., Ltd.*, (1914), 17 G.L.R. 139.

Mr. Biss's reference to the earthquake cases and to the earlier one of *Faulkner* and four other men who had been injured while working at the Auckland waterfront, owing to the bursting of a sulphuric-acid drum made it unnecessary for His Honour to review them. In the *Faulkner* case, he had maintained a view, not so well ascertained then as later, that the consignor of a chattel owed a duty of care to those of the general public who might in the course of business come in proximity thereto, and the Appellate Court of Victoria had upheld the judgment of Mr. Justice Cussen awarding the five men an aggregate sum of £6,750. " That

was my best case from the point of view of costs," added His Honour.

Finally, he would refer to *Logan* v. *Waitaki Hospital Board*, [1935] N.Z.L.R. 385, into which he had put more work than any other case he had. The Court of Appeal held that the relation between a hospital authority and the nursing staff was that of master and servant, and that the Board was not immune from responsibility for a nurse's negligence causing damage as it was in respect of the medical staff; and so the plaintiff recovered substantial damages. More important still, from the public point of view, was the fact that that case had led to a statutory amendment of the law in that the Hospitals and Charitable Institutions Amendment Act, 1936, had made Hospital Boards liable for the negligence of members of the medical and nursing staff alike.

His Honour concluded by saying that he had all his life been engaged in strenuous battle; that he had always maintained pleasant relations with those with whom it was his fortune to contend, and he could assure those present that he appreciated beyond expression their kindness in honouring him with one of the pleasantest functions of his long life.

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# STAMP-DUTY LAW: RECENT AMENDMENTS.

**Part II of the Finance Act, 1945.**

By E. C. ADAMS, LL.M.

(*Concluded from p. 204.*)

VOLUNTARY CONVEYANCES: FURTHER DECENTRALIZATION.

It has been previously stated that one of the purposes of the Stamp Duties Acts of 1922 and 1923 was to prevent leakages of revenue.

Previous to January 1, 1924 (being the date of the coming into operation of the Stamp Duties Act, 1923), a conveyance evidencing a gift of *unencumbered* land was liable merely to fixed deed not otherwise charged duty of 12s. 6d., if the value of the gift did not exceed £1,000. (Any gift, the value of which exceeded £1,000 or which together with the value of other gifts made within twelve months previously or subsequently exceeded that amount, was liable to gift duty which was at a much higher rate than stamp duty.) But curiously enough a gift of *encumbered* land was liable to *ad valorem* conveyance duty computed on the amount of the encumbrance assumed by the donee. Thus, unless gift duty was also payable, the donee who got the greater benefit paid by the lesser duty. To protect the revenue and to remedy this anomaly, s. 79 of the 1923 Act provided that instruments of conveyance should be liable to *ad valorem* duty, which in the case of conveyances on sale was to be computed on the value of the consideration, and in the case of *voluntary* conveyances —*i.e.*, conveyances of property otherwise than for *adequate* valuable consideration—*on the value of the property* conveyed. But s. 74 of the Act provided (and still provides) that where the value of any land is to be determined for stamp-duty purposes such value shall be deemed to be the capital value as appearing in the district valuation roll in force under the Valuation of Land Act, save that the Commissioner may require the Valuer-General to make a *special* valuation. But, if such a valuation is made, the cost thereof must be borne by the parties liable to the duty payable on the instrument.

It is well known to every conveyancer that Government Valuations are often obsolete, and that the cost of a special valuation is not always an agreeable item to add to the client's bill of costs. Where, therefore, in a *bona fide* sale between a willing buyer and a willing seller the consideration was less than the existing Government valuation, a hardship was caused: the purchaser either had to pay stamp duty on an inflated and obsolete valuation or incur the cost of a special Government valuation. The Commissioner and the Assistant Commissioners had no discretion in the matter until the coming into operation of the Stamp Duties Amendment Act, 1927, s. 3 of which reads as follows:—

> For the purposes of section seventy-eight of the principal Act, and notwithstanding anything to the contrary in section seventy-four thereof, a conveyance of land shall not be deemed to be made for an inadequate consideration merely because the amount of the consideration may be less than the value of such land as appearing in the district valuation roll or in a special valuation made by the Valuer-General pursuant to the said section seventy-four, if in any such case the Commissioner is satisfied that the actual consideration is not less than the fair market value of the property transferred.

Thus, a remedy was provided; and in practice this section has been benevolently administered. But any application thereunder had to be referred by a District Office to Head Office: this entailed delay and probably the parties were anxious to effect a speedy settlement. The effect of s. 12 of the Finance Act, 1945, however, is that all Assistant Commissioners have now the same authority as the Commissioner to stamp a constructive voluntary conveyance on sale of land at less than the basis of the existing Government valuation, without ordering a special valuation; and applications hereunder can now be speedily dealt with by the District Stamp Offices.

# IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

**The Fallen.**—In the war effort of this Dominion, the learned professions must be given an outstanding place. None has demonstrated greater qualities of leadership than the legal profession. The ability to weigh up a situation and to come quickly and incisively to a judgment, the courage to accept responsibility for the conclusion reached and to carry it forthwith into action—qualities that mark alike the valiant soldier and the successful lawyer—have characterized the work of our colleagues in arms, from brigadiers to humble "non-coms." To-day we mourn those who, before the outbreak of war, had already achieved distinction and those who only had sufficient time to show early signs of distinction and to confirm by their war-service the impression they had made. The tribute of proud and grateful admiration is due to these young men who have died for their country in the many and diverse areas of struggle. At the conclusion of the last war a vast assemblage gathered in the Abbey of Westminster to do honour to those of the legal profession who had fallen in the 1914–1918 conflict. In the prayer of the Dean, written by him for the occasion, are words that can truly describe our feelings now: "They laid not down their lives in vain. They purchased for us the joys of victory. They have wrought a great deliverance for the liberties of mankind."

**War Criminals.**—Wrote Hugo Grotius at Senlis in 1623: "I, for the reasons which I have stated, holding it to be most certain that there is among nations a common law of rights which is of force with regard to war and in war, saw many and grave causes why I should write a work on that subject. For I saw prevailing throughout the Christian world a license in making war of which even barbarous nations would have been ashamed; recourse being had to arms for slight reasons or no reason; and when arms were once taken up all reverence for divine and human law was thrown away just as if men were thenceforth authorized to commit all crimes without restraint."

**The Sleepy Motorist.**—Where *mens rea* is an ingredient of the offence a man in a state of somnambulism would not be answerable criminally for his acts; but, where no specific intent is involved, he has to answer for such criminal offences he may commit while asleep if he continues a dangerous course of conduct when he knows that there is a danger of being overcome by sleep. Thus in *Kay* v. *Butterworth*, heard in the Divisional Court, Humphreys, J., remarked that if the defendant elected to drive a motor-car while he was asleep he was at least guilty of driving without due care and attention for it was his duty to keep awake. He rejected the view of Justices that they ought not to convict of dangerous driving a motorist who was overcome by drowsiness and had run into a number of men because he was unconscious of what he was doing But for the offender, afflicted with "drowsy numbness" that pains the sense, even though this state has been induced by alcohol, Scriblex feels a measure of sympathy when he curls himself up, in the back seat of his car, to sleep off its effects. Technically, he may be guilty of intoxication while in charge of a motor-vehicle, but for a Magistrate to inflict a heavy fine and suspend the driving license seems to indicate an inability to recognize, and give credit for, a conscious act to dissipate the consequence of approaching unconsciousness.

**Counsel and Elections.**—That one tribunal should show immediate respect to the views of a higher one is an important, if not an essential ingredient, in our system of justice. An interesting example of this quick recognition is afforded by a difference of judicial opinion shown in England over the question of postponing cases where counsel engaged in them were candidates at the general elections. Applications made on May 29 were refused with regret by Cassells, J., upon the ground that if these cases were postponed because of the difficulty in which counsel found themselves, other such applications would follow, with the result that Judges would be left without work. On the following day, Scott, L.J., who stressed that he was speaking only for the Court of Appeal, remarked that fundamentally for the sake of the parties, as well as the convenience of counsel, who must take second place, the Court had to keep in mind the great importance of saving clients the necessity of change of counsel which might cause much more harm than was generally known. When this view was brought to the attention of Cassells, J., he immediately suggested that an application be renewed and recalling that, earlier in the day, the Court of Appeal had said that members of the Bar might have cases postponed when they were engaged at the general elections, it would not be right that the decision which he had given on the day before, refusing the application, should stand, as the King's Bench Division was only too anxious to bring itself into line with the Court of Appeal.

***On Solicitors.***—"'Touting' for clients is, like advertising, fundamentally inconsistent with the interest of the public and with the honour or the profession. The function of a solicitor is to advise or negotiate or fight for a client, but only if retained."—Scott, L.J., in *Re A Solicitor*, [1945] 1 All E.R. 445.

"To say of a solicitor that a reference from him is worthless, and that his very training makes him, in common with other solicitors, likely to fail in this general duty, is to charge him with misconduct, not as a solicitor, but as a citizen and a man."—Du Parcq, L.J., in *Hopwood* v. *Muirson*, [1945] 1 All E.R. 453.

"To seek to docket all the spheres of a solicitor's duties would mean compiling a dictionary of transitive verbs the list of which increases as civilization extends. To be successful he must be an urbane philosopher with some knowledge of law or an accurate ability of knowing where to find law, and apply it with quick appreciation of the surrounding circumstances of the client's successes or troubles."—Edward Bell, in *These Meddlesome Attorneys.*

**It Can't Happen Here.**—"I am sometimes a little puzzled by the want of appreciation shown by some members of the Bar for the number of hours of work which the Council spends in trying to solve the difficulties of the profession": Sir Herbert Cunliffe, K.C., at this year's Annual General Meeting of the Bar.

# PRACTICAL POINTS.

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**1. Husband and Wife.**—*Deed of Separation—Matrimonial Home transferred to Wife for Life with Contingent Remainder to each Spouse—Land under Land Transfer Act—Procedure—Liability to Gift and Stamp Duty.*

QUESTION: H. (husband) and W. (wife) have quarrelled and agreed to separate: one of the terms of the separation is that H. should transfer the matrimonial home to W. for life; H. does not desire to relinquish all his rights therein, but is willing that W. should become the absolute owner thereof only should he predecease her. The title is under the Land Transfer Act. How can the intention of the parties be carried out? What will be the liability to stamp and gift duty? Will the matrimonial home be an asset in H.'s estate for death-duty purposes?

ANSWER: (1) H. should execute and register a memorandum of transfer in accordance with s. 84 of the Land Transfer Act, 1915. After brief recitals as to the facts the operative part of the transfer could read as follows: "NOW THEREFORE IN CONSIDERATION of the premises and pursuant to the said agreement for separation the transferor (H.) DOTH HEREBY TRANSFER unto the transferee (W.) an estate for life in possession in the said land above described with the remainder in fee-simple to himself the transferor should the transferor survive the transferee and in the event of the transferor predeceasing the transferee then with the remainder in fee-simple to the transferee."

(2) The instrument will be exempt from gift duty: *Commissioner of Stamp Duties* v. *Pearce*, [1924] G.L.R. 338.

(3) Stamp Duty (*ad valorem* conveyance) will be payable based on the value of the land.

(4) It is considered that, if H. predeceases W., the home (*less* the value of W.'s pre-existing life estate therein) will be liable to death duty under s. 5 (1) (*g*). W.'s previous contingent estate in remainder becomes then on H.'s death a vested remainder: therefore the last words of s. 5 (1) (*g*) are satisfied "to the extent of the beneficial interest accruing or arising by survivorship on the death of deceased": see the leading case of *Attorney-General* v. *Adamson*, [1933] A.C. 257, and s. 27 of the Finance Act, 1937 (N.Z.). It is also thought that the estate in remainder would be an interest purchased or provided by deceased alone or in concert or arrangement with W. It is submitted that for a transaction to come under s. 5 (1) (*g*), *ibid.*, it is not necessary that it should be by way of gift. The cases holding that provisions in partnership articles are caught by s. 5 (1) (*g*) seem to show that: see *Adams's Law of Death and Gift Duties in New Zealand*, 58. X1

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**2. Mortgage.**—*Joint Tenancy—Mortgage by a Joint Tenant of Land under the Land Transfer Act.*

QUESTION: H. (husband) and W. (wife) are the registered proprietors of a parcel of land under the Land Transfer Act. They are joint tenants but not trustees, holding the land beneficially. H. desires to raise some money on the security of his share. I have a client who is willing to lend the money. Is it safe to do so? Would the District Land Registrar register such a mortgage?

ANSWER: The District Land Registrar would be bound to register such a mortgage if otherwise in order. There is nothing in the Land Transfer Act preventing a joint tenant from dealing with his interest except "No Survivorship" titles and this is not such a title. But such a memorandum of mortgage would be risky, for if H. predeceased W., by operation of the *jus accrescendi* W. would become entitled to the whole of the land freed from the mortgage by H. The point is that, as under the Land Transfer Act, a mortgage operates merely as a charge and not as a transfer of the legal estate, a mortgage by a joint tenant of his interest does not cause a severance of the joint tenancy: *Lord Abergavenny's Case*, (1607) 6 Co. Rep. 78 b, 77 E.R. 373, and 27 *Halsbury's Laws of England*, 2nd Ed. 663, n. (1).

In *Kerr's Torrens System*, para. 784, it is suggested that such a transaction could be carried out by absolute transfer from H. to the mortgagee accompanied by a deed of defeasance, explaining that as between the parties the real nature of the transaction is a mortgage and not a transfer. If such a memorandum of transfer were duly registered that, it is submitted, would effect a severance of the joint tenancy and thereafter H. and W. would hold the land as tenants in common in equal shares. X1

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**3. Economic Stabilization.**—*Lease — Assignment — Goodwill — Whether Transaction affected by Economic Stabilization Emergency Regulations*, 1942.

QUESTION: A. is the lessor and B. is the lessee. C. approaches B. and an agreement is reached under which C. pays B. £100 for his goodwill and the transaction is completed on that basis. Does this transaction make B. and C. liable under Reg. 20 (2) and (3) of the Economic Stabilization Emergency Regulations, 1942 (Serial No. 1942/335)?

ANSWER: So long as A., the lessor, is not pecuniarily interested in the assignment, it seems that the transaction is not within Reg. 20.

If the property concerned comprises hotel premises, reference should be made to Reg. 20 (1A), which was added by Amendment No. 3 (Serial No. 1944/9). O2

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**4. Executors and Administrators.**—*Glasgow Lease—Renewal in Name of Executor—Limitation of Personal Covenant.*

QUESTION: A. died owning a Glasgow Lease which is just about to expire. B., his executor, is taking a new lease in pursuance of the covenant for renewal. Can you suggest a simple clause, limiting B.'s pecuniary liability to the assets in A.'s estate?

ANSWER: The following clause which has been used in practice appears to be suitable: "PROVIDED ALWAYS and IT IS HEREBY DECLARED AND AGREED that the liability of B. hereunder shall be limited to the assets in the hands of B. as executor of the estate of the said A. deceased the former lessee of the said lands and available for payment in the ordinary course of administration of the rents rates taxes charges assessments or other moneys or outgoings now or at any time hereafter to be become due or payable under these presents when payment thereof is formally demanded in writing by the lessor but this limitation shall not extend to any transferee or assignee of this lease." X1

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## RULES AND REGULATIONS.

**Crown Suits (Service Aircraft) Emergency Regulations, 1945.** (Emergency Regulations Act, 1939.) No. 1945/104.

**Meat Marketing Order, 1942, Amendment No. 3.** (Marketing Act, 1936.) No. 1945/105.

**Fair Rents Emergency Regulations, 1945.** (Emergency Regulations Act, 1939.) No. 1945/106.

**Mining Regulations, 1926, Amendment No. 10.** (Mining Act, 1926.) No. 1945/107.

**Oil Fuel Emergency Regulations, 1939, Amendment No. 10.** (Emergency Regulations Act, 1939.) No. 1945/108.

**Factory Controls Revocation Notice, 1945 (No. 2).** (Factory Emergency Regulations, 1939.) No. 1945/109.