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"THE END OF THE WAR."

IV. LEASES.

IN *Lace* v. *Chantler*, [1944] 1 All E.R. 305, the Court of Appeal had to consider the validity of a lease of a dwellinghouse let "for the duration of the war." The question arose whether a tenancy for the duration of the war created a good leasehold interest.

In his judgment, Lord Greene, M.R., with whom Mackinnon and Luxmoore, L.JJ., agreed, said that a a term created by a leasehold tenancy agreement must be a term which is either expressed with certainty and specifically, or is expressed by reference to something which can, at the time when the lease takes effect, be looked to as a certain ascertainment of what the term is meant to be. At p. 306, he continued:

> In the present case, when this tenancy agreement took effect, the term was completely uncertain. It was impossible to say how long the tenancy would endure. Counsel for the tenant in his argument has maintained that such a lease would be a good lease; and that, even if the term is uncertain at the beginning of the term, when the lease takes effect, the fact that at some future time it will be made certain is sufficient to make it a good lease. In my opinion, that argument is not to be sustained.

His Lordship said that he did not propose to go into the authorities on the matter; but in *Foa on Landlord and Tenant*, 6th Ed. 115, the law is stated in this way and, in his opinion, correctly stated:

> The *habendum* in a lease must point out the period during which the enjoyment of the premises is to be had; so that the duration as well as the commencement of the term must be stated. The certainty of a lease as to its continuance must be ascertainable either by the express limitation of the parties at the time the lease is made, or by reference to some collateral act which may, with equal certainty, measure the continuance of it, otherwise it is void. If the term be fixed by reference to some collateral matter, such matter must either be itself certain (*e.g.*, a demise to hold for "as many years as A. has in the manor of B.") or capable before the lease takes effect of being rendered so (*e.g.*, for "as many years as C. shall name"). Consequently, a lease to endure for "as many years as A. shall live," or "as the coverture between B. and C. shall continue," would not be good as a lease for years; although the same results may be achieved in another way, by making the demise for a fixed number (ninety-nine, for instance) of years determinable upon A.'s death or the dissolution of the coverture between B. and C.

The learned Master of the Rolls went on to say:

> It is important to observe that where the term is capable of being rendered certain, it must be so "before the lease takes effect." In the present case, in my opinion, this agreement cannot take effect as a good tenancy for the duration of the war. Can it take effect in any other way? It was suggested that the difficulty would be got over by construing the document—thus making it a good tenancy—as an agreement for a long period, for instance, ninety-nine years, determinable on the termination of the war. In my opinion, it is quite impossible to construe this agreement in that way.

And he also said:

> Lastly, counsel for the tenant argued that the agreement could be construed as an agreement to grant a license. In my opinion, it is quite impossible to construe it in that sense. The intention was to create a tenancy and nothing else. The law says it is bad as a tenancy. The Court is not then justified in saying: "We will treat this contract as something quite different from what the parties intended, and regard it merely as a contract for the granting of a license." That would be setting up a new bargain which neither of the parties ever intended to enter into and would be quite illegitimate.

The result was that the relationship between the parties had to be ascertained on the footing that the tenant was in occupation and was paying a weekly rent: therefore, the relationship must be the relationship of weekly tenant and landlord and nothing else.

The effect of the judgment of the Court of Appeal was to overrule the decision of Rowlatt, J., in *Great Northern Railway Co.* v. *Arnold*, (1916) 33 T.L.R. 114, and to cast doubts upon *Swift* v. *Maclean*, [1942] 1 All E.R. 126. In the former case, the lease, entered into in March, 1916, was for a term lasting "for the period of the war," the rent being payable weekly. The learned Judge, who expressly said that his judgment was arrived at "by hook or by crook" rather than upon legal principles, found it possible to treat the tenancy as though a lease for 999 years had been created terminable on the conclusion of the war. Since the intention of the parties was that the tenancy should be for the period of the war, this intention could have been carried out by a lease extending over a long period, but terminable at the end of the war, and effect should be given to that intention. The case, if it could be supported, could, in the opinion expressed by Lord Greene, M.R., in *Lace's* case, only be supported on the ground that the term of the agreement that the landlords said they did not intend that the tenant should be subject to a week's notice, justified the rather strained construction which the learned Judge put upon the agreement.

In *Swift* v. *Maclean* (*supra*), there was an agreement, made on August 30, 1939, to lease premises in St. Ives,

Cornwall, for a term commencing upon the date of war being declared between Great Britain and Germany, but not before September 16, 1939, and terminating upon the date on which hostilities ceased. *Arnold's* case was referred to as not rendering the lease void for uncertainty, but Birkett, J., doubted if that case was directly in point, and did not, in the circumstances of the case, find himself called upon to express a final view on the matter.

A result of *Lace* v. *Chandler* was to render void a number of tenancy agreements created before the decision in February, 1944. The Legislature stepped in, and, in Great Britain, all tenancies rendered void for uncertainty of term because of definition by reference to the uncertain date of the end of the war have been validated by the Validation of War-time Leases Act, 1944 (7 & 8 Geo. VI, c. 34). By s. 1 of this statute, subject to certain provisoes, any lease, &c., whether entered into before or after the passing of the Act (August 3, 1944), which purports to grant or provide for the grant of a tenancy for the duration of the war in which His Majesty was engaged at that date shall have effect as if it granted or provided for the grant of a tenancy for a term of ten years, subject to a right exercisable either by the landlord or the tenant to determine the tenancy, if the war ended before the expiration of the term, by at least one month's notice before the end of the war. The expression " the duration of the war " is defined, and attention is given to the application in tenancy agreement of the meaning of the expression " the war " or " hostilities " or " the emergency " or any similar expression not referable to the war generally or to the war or to hostilities as respects any particular State or States or theatre or theatres of war. (By a recent Order in Council, the date of the termination of the War in Europe, for the purposes of this statute only, has been fixed as May 9, 1945.)

III.—Wills.

Two cases will suffice to indicate the effect of the use of words such as " the end of the war " in wills.

In *In re Rawson, Rigby* v. *Rawson*, (1920) 90 L.J. Ch. 304, a testator who died in April, 1917, bequeathed to his son a legacy of £10,000, and directed his trustees to accumulate the interest on such legacy given to his son, and to continue such accumulation,

> Until six months after the declaration of peace terminating the present war or the expiration of twenty-one years from my death whichever shall be the shorter period.

and he further directed that if his son should not return and claim the legacy during that period, then the legacy and the accumulations of income should fall into residue. The son was officially reported to be missing or killed at the battle of Loos, in September, 1915. The will was made eighteen months afterwards.

The trustees of the will asked, in November, 1920, whether the trust for accumulation had come to an end, or whether the fact that no general declaration of the termination of the war had been made required the accumulation of interest to go on until six months after such general declaration and termination of the war with the last belligerent enemy state.

Eve, J., after referring to s. 1 of the Termination of the Present War (Definition) Act, 1918 (*supra*), said that if this were the case of a contract there might be some difficulty in holding that the context required the expression " declaration of peace terminating the present war " to be read as any other date than that fixed by Order in Council as the termination of the war generally. In the circumstances in which the will was made, and having regard to the testator's knowledge, and to the eventuality for which he was expressly providing, as also to the fact that his son's military services were wholly confined to the Western Front, the conclusion was almost irresistible that he was considering only the state of war with Germany, and that, when he spoke of peace terminating the present war, he meant the war between His Majesty and that country, and not the war generally. His Lordship held, on the whole, although not without some hesitation, that the time had arrived when the trust for accumulation had come to an end, and the trustees could deal with the legacy on the footing that the legatee had predeceased the testator.

The rule against perpetuities is in point where a will provides for a gift to vest in interest, where no life is mentioned, with reference to the termination of the war. The question of the application of the perpetuity rule in such circumstances arose in *Re Engels, National Provincial Bank, Ltd.* v. *Mayer*, [1943] 1 All E.R. 506. The testator, by his will dated November 19, 1939, bequeathed a sum of War Loan to the endowment fund of the German Evangelical Church, Bradford, " provided that after the termination of the present war with Germany services in the German language be held in the said church," with a gift over in favour of residue " if the said gift shall fail." One of the regulations annexed to the Church's trust deed provided that the German language was to be used in all services. During the war of 1914–1918 such use was discontinued, and no doubt the testator's recollection of that fact induced him to put the particular condition in his will.

In construing the will, Uthwatt, J., said that if the gift over were in favour of another charity the rule against perpetuities would not operate ; but he had to consider the period fixed by relation to the termination of the war. It could not be said at the time of the judgment whether it was necessarily the fact that the interest of the residue would vest within twenty-one years. In all probability, his Lordship added, the war might well be over before that period, but as a practical certainty (and that is what the rule implies) one could not say that it would. The gift over was, therefore, held to be bad for perpetuity, and the bequest was held to be a gift to the trustees of the Church's endowment fund to be held as a capital sum, the interest of which was applicable to the purposes of the trust at the date of the testator's death.

From that judgment it follows that any gift which is to vest on the termination of the war is contrary to the rule against perpetuities, unless the gift divests the property from one charity to another. That, however, is not to say that every such gift made by a testator now living is bad ; because, since a will operates from the testator's death, the termination of the war may at the date of his death be a certain and ascertained fact. But where there is a gift by will that does not vest until the termination of the war, and the testator dies at a time when it cannot definitely be said when the war will precisely terminate, such a gift made without reference to a life will fail as contrary to the rule against perpetuities, except as to charities (as above).

SUMMARY OF RECENT JUDGMENTS.

CLOSE AND OTHERS v. MAXWELL AND OTHERS.

COURT OF APPEAL. 1944. March 22, 23, 24; April 5. MYERS, C.J.; BLAIR, J.; KENNEDY, J.; CALLAN, J.; NORTHCROFT, J.

Military Law—Desertion—Physical Absence an Essential Ingredient—Court-martial—Charge-sheet—Particulars negativing Offence charged—Effect—Certiorari—Prohibition—Army Act, 1881 (44 and 45 Vict., c. 64), s. 12—Defence Act, 1912, s. 27.

The offence of military desertion, within the phrase "deserts His Majesty's service" in s. 12 of the Army Act is constituted when a man absents himself physically from the control of duly constituted army authority, with the intention either of not returning or of avoiding some important service or duty.

The Westmorland, (1841) 1 Wm. Rob. 216, 166 E.R. 553, and *The Two Sisters*, (1843) 2 Wm. Rob. 125, 166 E.R. 702, applied.

The particulars of a charge on the charge-sheet of a Court-martial form part of the charge, and the whole charge must be read in order to ascertain what is the offence charged.

Where the particulars contained in the charge-sheet are destructive of the offence, and in the result the offence charged is not an offence known to or recognized by the Army Act, a Court-martial acting upon such a charge-sheet acts without jurisdiction. In such a case, the Supreme Court has the power and the duty (notwithstanding s. 27 of the Defence Act, 1912) to issue a writ of certiorari or prohibition, or both, as the case may require.

Ex parte Daisy Hopkins, (1891) 61 L.J. Q.B. 240, referred to.

Counsel: *G. G. G. Watson and Kent*, for the plaintiffs; *W. H. Cunningham and Biss*, for the defendants.

Solicitors: *E. G. Webb*, Wellington, for the plaintiffs; *W. H. Cunningham*, Wellington for the defendants.

NOTE.—The report of this case was delayed owing to the operation of the Censorship and Publicity Emergency Regulations, 1939.

In re HOUGHTON (DECEASED), McCLURG AND OTHERS v. NEW ZEALAND INSURANCE COMPANY, LIMITED, AND OTHERS.

SUPREME COURT. Auckland. 1944. December 15. 1945. January 22. CALLAN, J.

COURT OF APPEAL. Wellington. 1945. March 23; August 7. MYERS, C.J.; FAIR, J.; NORTHCROFT, J.; CORNISH, J.

Public Revenue—Death Duties (Estate and Succession Duties)—Will—Construction—Dutiable Estate—Direction by Will to pay Duties on Testator's Notional Estate out of his Actual Estate—Whether Testator so entitled—Language necessary to achieve this Result—Whether Direction for payment of "Death succession and other duties" sufficient—"My duties"—Death Duties Act, 1921, ss. 5 (b), 28, 29, 30, 31 (2).

Section 31 (2) of the Death Duties Act, 1921, does not prohibit a testator from directing by his will that his *actual* estate shall bear the duties on his *notional* estate—*i.e.*, assets with which he has parted, but which, owing to the operation of s. 5 (*b*) of the statute, are notionally included in his estate.

So held, by the Court of Appeal, per *totam curiam*.

Whether the testator has achieved this result by his will is to be decided by considering whether the directions of the testator are adequate to comprehend duties on notional as well as actual estate.

A direction for payment of "my just debts funeral and testamentary expenses *death succession and other duties*" includes the payment of duties on testator's notional estate.

In re Holmes, Beetham v. *Holmes*, (1912) 32 N.Z.L.R. 577, 15 G.L.R. 226, *Re McMaster, Perpetual Trustee, Estate, and Agency Co. of New Zealand, Ltd.* v. *McMaster*, [1916] N.Z.L.R. 56, G.L.R. 82, *Chisnall* v. *Macfarlane*, [1923] N.Z.L.R. 558, G.L.R. 227, *Brown* v. *Brown*, [1924] N.Z.L.R. 427, [1923] G.L.R. 576, *In re Mathias, Johnstone* v. *Lawrence*, [1934] N.Z.L.R. 424, G.L.R. 353, *In re Gollan*, [1935] G.L.R. 48, and *Permanent Trustee Co.* v. *Weekes*, (1929) 47 N.S.W. W.N. 86, considered.

So held, by the Court of Appeal, *Fair, Northcroft, Cornish*, JJ., (*Myers*, C.J., dissenting).

Per *Myers*, C.J. 1. That the principle to be applied in determining whether or not the testator's direction includes duties on the notional estate is that, unless there is to be found a sufficient unambiguous direction in the will to the contrary, the estate and succession duties in respect of the notional assets are payable out of those assets and not out of the testator's actual estate disposed of by his will.

2. That there was in the will no such sufficient unambiguous direction to the contrary, as the words "death succession and other duties" were primarily referable to the testator's actual estate.

O'Grady v. *Wilmot*, [1916] 2 A.C. 231, *In re Holmes, Beetham* v. *Holmes*, (1912) 32 N.Z.L.R. 577, G.L.R. 226, *Perpetual Trustee Co., Ltd.* v. *Luker*, (1932) 33 N.S.W. S.R. 85, *Public Trustee* v. *Canterbury College*, [1924] N.Z.L.R. 942 *sub nom. Re Roper*, [1924] G.L.R. 209, and *In re Gollan*, [1935] G.L.R. 48, applied.

Permanent Trustee Co. v. *Weekes*, (1929) 47 N.S.W. W.N. 86, distinguished.

In re Pimm, Sharpe v. *Hodgson*, [1904] 2 Ch. 345, and *Ashby* v. *Hayden*, (1931) 31 N.S.W. S.R. 324, referred to.

Appeal from the judgment of Callan, J., allowed.

Counsel: *Richmond*, for the plaintiff; *Martin*, (in the Supreme Court) and *Rogerson* (in the Court of Appeal), for the first and second named defendants; *Hubble*, for the third, fourth, fifth, sixth, seventh, and eighth named defendants; *Stanton*, for the ninth-named defendants.

Solicitors: *Buddle, Richmond, and Buddle*, Auckland, for the plaintiff; *Nicholson, Gribbin, Rogerson, and Nicholson*, Auckland, for the second-named defendants; *V. N. Hubble*, Auckland, for the third, fourth, fifth, sixth, seventh, and eighth named defendants; *Earl, Kent, Stanton, Massey, North, and Palmer*, Auckland, for the ninth-named defendants.

In re THE ROYAL COMMISSION ON LICENSING.

COURT OF APPEAL. Wellington. 1945. July 10, 11, 12; August 13. MYERS, C.J.; KENNEDY, J.; CALLAN, J.

Commissions of Inquiry—Evidence—Questions to Witnesses—Relevance—Scope of Inquiry—"Inquiry into working of any existing law" and "regarding the necessity or expediency of any proposed legislation"—Whether Questions relating to the Affairs of Individual Companies, Firms, Persons, or Associations may be asked—Admissibility—Construction of Terms of Warrant appointing Commission—Commissions of Inquiry Act, 1908, s. 9.

If it can be said in advance that questions proposed to be asked of witnesses before a Commission of Inquiry are clearly outside the scope of the inquiry, they are irrelevant and cannot be permitted.

Attorney-General for the Commonwealth of Australia v. *Colonial Sugar Refining Co., Ltd.*, [1914] A.C. 237, referred to.

Whether or not such questions are within the scope of the inquiry is a matter of construction of the Warrant or instrument appointing the Commission; for the Commission, as such, should limit its inquiry and investigation into matters within the scope of its appointment as laid down in the instrument itself according to the true interpretation of its terms.

It is not beyond the power of the Crown to issue a Commission in terms which would permit questions relating to the conduct or affairs of individual persons, firms, or companies in the course of or as incidental to its inquiry and investigation into the matters generally referred to it. Where a Commission is not set up for the purpose of such inquiries, such questions are not necessarily to be excluded as inadmissible simply because they relate to the affairs of individual persons, firms, or companies, as some such inquiries may necessarily arise in the course of the authorized investigation.

Cock v. *Attorney-General*, (1909) 28 N.Z.L.R. 405, 11 G.L.R. 543, *Ex parte Walker*, (1924) 24 N.S.W. S.R. 604, and *McGuinness* v. *Attorney-General of Victoria*, (1940) 63 C.L.R. 73, mentioned.

The direction given in the common form of Warrants of Commission in New Zealand,—

"And generally to inquire into and report upon such other matters arising out of the premises as may come to your notice in the course of your inquiries and which you consider should be investigated in connection therewith, and upon any matters affecting the premises which you consider should be brought to the attention of the Government"—

does not extend the scope of the Commission's authority so as to add to the task defined by the earlier words another task of a fundamentally different nature, but it is not ineffective. It operates as an "omnibus" paragraph intended generally to gather up previously unspecified matters arising out of or affecting the premises and to confer upon the Commission a power to inquire into matters, such as allied and related incidental topics, which power would not otherwise have existed or the existence of which might at least have been open to doubt.

So held, by the Court of Appeal, on a case stated by the Royal Commission on Licensing pursuant to ss. 10 and 13 (3) of the Commissions of Inquiry Act, 1908, disallowing certain questions, as set out in the case, proposed by the Commission to be asked of witnesses before it.

Counsel: *Solicitor-General* (*H. E. Evans*) and *Willis* (as *amici curiae*), for the Crown; *O' Leary*, K.C., *Cooke*, K.C., and *Macarthur*, for the National Council of the Licensed Trade of New Zealand; *Hardie Boys* (as *amicus curiae*), for the New Zealand Alliance.

CROSLAND v. O'BRIEN.

SUPREME COURT. Auckland. 1945. August 27. CALLAN, J.

Gaming — Offences — Exhibiting Document containing Betting Advertisement—Nothing to show on whose Behalf an Advertisement—Identification by Conduct—"Publicity exhibits . . . advertisement"—Gaming Act, 1908, s. 30 (1).

The requirements of s. 30 (1) of the Gaming Act, 1908, are complied with if there is a document which is within the section in all respects, except that it cannot be said from reading the document on whose behalf it is an advertisement or notification, and, if, by clear conduct, a particular individual, who publicly exhibits it to some of the public, also, by his manner of so exhibiting it, identifies it to them as his, just as clearly as if it had his name upon it.

Wildey v. *Gibson*, (1911) 14 G.L.R. 308, referred to.

The phrase, "publicly exhibits any . . . document which contains any advertisement," in s. 30 (1), refers to advertising that is addressed to the eye, that is shown to more than one person—not to all the public, but at least to some of them—who must gather the business proposed to be done from the use of their eyes, from reading what is shown to them.

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

Solicitors: *J. Terry*, Auckland, for the appellant; *Crown Solicitor*, Auckland, for the respondent.

THE INTERNATIONAL COURT OF JUSTICE.

3.—Organisation and Competence.

By C. C. AIKMAN, LL.M.

The new Court will have its seat at The Hague, the headquarters of the old Court, but the relevant article now permits the Court, if it thinks fit, to sit and exercise its functions elsewhere (Article 22).

The old Statute enabled the establishment of Chambers of the Court to deal with labour cases, and transit and communications cases. Although no cases were ever brought before these Chambers, the Washington Committee of Jurists felt that recourse to the jurisdiction of a new Court might be facilitated by widening the provisions. Under the new Statute, Chambers of three or more Judges may be established to deal with particular categories of cases—*e.g.*, labour cases—while a Chamber of any number of Judges may be appointed to deal with a particular case. Also, the article of the old Statute enabling a Chamber of five Judges to be formed annually for the exercise, at the request of the parties, of summary jurisdiction has been preserved with minor amendment. (Articles 26 and 29).

The judgment given by a Chamber is to be considered a judgment of the Court; and the Chambers may, with the consent of the parties, sit and exercise their functions elsewhere than at The Hague. (Articles 27 and 28).

It is difficult to foresee just how these extended provisions of the new Statute will work in practice, but it may be that the Court or its Chambers will become peripatetic. We may yet see the whole Court travelling to South America to decide a boundary dispute in a case in which the parties cannot agree that a Chamber of the Court will suffice. Such a development would be interesting in view of attention paid prior to the Washington meeting to the desirability of establishing a regional system of International Courts.

The value of regional Courts having special qualifications to deal with disputes peculiar to a particular area is at once apparent. On the other hand, it is argued that the international judicial order is not yet ready for a regional system. Problems relating to conflicts of jurisdiction would arise, the uniformity and continuity of international justice and jurisprudence would be endangered, and facilities for appeal would be necessary.

The expected debate by the United Nations Jurists on this question of regional Courts did not materialize—no doubt because the decisions made by the Committees at Washington and San Francisco as to the seat of the Court, and as to the Chambers of the Court, satisfactorily met, for the time being at least, the objects of those representatives who would have supported a regional system.

THE STATUS OF PUBLIC INTERNATIONAL ORGANISATIONS.

Article 34 of the new Statute is emphatic that only States may be parties to cases before the Court. Ordinarily, the States concerned will be the parties to the new Statute, but the Court will be open to such other States as comply with conditions to be laid down by the Security Council of the United Nations.

The growing realization of the need for social and economic co-operation in the international field has already led to the establishment of a number of specialized international organizations, such as the I.L.O. and the United Nations Food and Agriculture Organization; and the question of their status before the Court arose.

It was generally agreed that the time had not yet come for these and similar bodies to be given the status of parties. The second and third paragraphs of Article 34

of the new Statute do, however, facilitate their co-operation with the Court. For example, organizations are to supply information to the Court, and the Court is to communicate copies of written proceedings to interested organizations.

We shall see later that specialized international organizations can now be given the right to go direct to the Court for advisory opinions.

Jurisdiction of the Court.

In our municipal Courts we are accustomed to being able to take proceedings against a party without obtaining the consent of that party, and it is in this respect that International Courts fall so far short of our ideal conception of Courts of law. But no fair analogy can be made between the legal system operating within a State and that operating between States. In the one there is the power to confer jurisdiction upon, and to impose resort to, a tribunal: in the other, jurisdiction can exist only where there is consent on the part of the parties who resort to the tribunal.

The jurisdiction of the new Court must be considered in the light of this distinction. To what extent are the "sovereign" United Nations willing to consent to the judicial settlement of their disputes? In answering this question, we must remember that the competence of an International Court should be confined to matters which are really "legal" or "justiciable," and should exclude "political" cases which are more appropriately dealt with by political decision than by reference to a Court of law. As to what disputes constitute legal disputes, the classification given in the "optional clause" definition, discussed below, is perhaps the best available.

Article 36 of the new Statute deals with the jurisdiction of the new Court:—

(*a*) "The Jurisdiction of the Court comprises all cases which the parties refer to it . . ."

The consensual nature of the jurisdiction is here recognized—a particular dispute may be submitted to the Court *ad hoc* after the dispute has arisen.

But Article 36 goes on to provide two methods by which States can agree *in advance* to confer jurisdiction upon the Court in disputes that may arise between them.

(*b*) " . . . and all matters especially provided for in the Charter of the United Nations or in treaties and conventions in force."

In our discussion of "the old or new Court" question, we referred to the large number of treaties and conventions which confer jurisdiction upon the old Court, and to the provisions of Article 37 of the new Statute which endeavour to preserve so far as is possible this jurisdiction for the new Court.

In considering what jurisdiction the United Nations Charter confers upon the new Court, we must, if we except advisory opinions, look at the chapter of the Charter dealing with the pacific settlement of disputes.

Under Article 33 of the Charter judicial settlement is one of the several methods of peaceful means of their own choice by which the parties to a dangerous dispute undertake to seek a solution to their dispute; and the Security Council "shall, when it deems necessary" call upon the parties to settle their dispute by one of these means. Article 36 of the Charter enables the Security Council, in the event of a dangerous dispute or situation, to recommend appropriate procedures or methods of adjustment, and then goes on in paragraph 3 to say:—

> In making recommendations under this article the Security Council should also take into consideration that legal disputes should *as a general rule* be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.

The phrase "as a general rule" has been shown in italics because the provisions of the Charter and of the new Statute as to the jurisdiction of the new Court really resolve themselves into this—that many of the United Nations, including all the Great Powers with the possible exception of China, were prepared to go no further than to accept judicial settlement of disputes "as a general rule."

(*c*) The Optional Clause.

The provisions of paragraph 2 of Article 36 of the old Statute represented the furthest the signatories were prepared to go in the direction of compulsory jurisdiction for their International Court—that is, in the direction of a general convention conferring in advance jurisdiction upon the Court to entertain all disputes that might arise between them.

The "optional clause"* enabled States to accept *voluntarily* the compulsory jurisdiction of the Court:—

> . . . in all or any of the classes of legal disputes concerning—
>
> (*a*) The interpretation of a Treaty.
> (*b*) Any question of International Law.
> (*c*) The existence of any fact which, if established, would constitute a breach of an international obligation.
> (*d*) The nature or extent of the reparation to be made for the breach of an international obligation.

Although as large a number as forty-seven States at one time or another made declarations under the Clause, many of the declarations were made subject to reservations, for instance, New Zealand accepted compulsory jurisdiction in 1929 by a declaration which included, *inter alia*, the following reservations:—

> . . . disputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method of peaceful settlement; and
>
> disputes with the Government of any other member of the League which is a member of the British Commonwealth of Nations, all of which disputes shall be settled in such manner as the parties have agreed or shall agree; and
>
> disputes with regard to questions which by international law fall exclusively within the jurisdiction of the Dominion of New Zealand.

Exactly similar reservations were made by the United Kingdom, Canada, Australia, India, and the Union of South Africa.

At San Francisco, the Australian and New Zealand delegations led a determined attempt to obtain a provision in the Statute conferring compulsory jurisdiction upon the Court. It was soon apparent that compulsory jurisdiction *simpliciter* was unlikely to be acceptable, so the New Zealand representative submitted to Committee IV/1 at San Francisco a draft which provided for compulsory jurisdiction with a list of specified reservations. This draft became the basis of the debate for and against compulsory jurisdiction in both Committee IV/1 and in the Sub-committee appointed to consider the question, but was finally rejected because of strong opposition from the United States and the U.S.S.R. A Canadian proposal for the retention of the optional clause, but with a list of specified reservations, was also unsuccessful.

* The "optional clause" by which compulsory jurisdiction might be accepted was actually attached to the Protocol of Signature of the old Statute.

So it was that Committee IV/1 finally agreed upon the optional clause, which, it must be admitted, had operated with some success in the case of the old Court. There are, however, two alterations in Article 36 of the new Statute which should be noted—

(i) The words "all or any of the classes of legal disputes" in paragraph 2 have been replaced by "all legal disputes." This alteration brings the paragraph into accord with the practice adopted by States of making their declarations applicable to all the types of legal disputes named.

(ii) Paragraph 5 of Article 36 provides that declarations made under Article 36 of the old Statute shall operate under the new Statute for the period they have still to run. New Zealand renewed her declaration in 1940, but this declaration expired on April 1, 1945. Thus, if New Zealand is to accept compulsory jurisdiction, a new declaration will be required.

Advisory Opinions.

In our consideration of the relation of the old Court to the League of Nations we saw that the Covenant of the League authorized the Court to give an advisory opinion on any "dispute" or "question" referred to it by the Council or the Assembly.

To the English lawyer the giving of these advisory opinions would not seem to be the true function of the Court of law, which is to hear and decide disputes. The legal systems of some countries do, however, recognize that certain matters can be referred to Courts for an opinion, or for a declaration of what the law is, or what the status of the applicant is or would be in a given set of circumstances. Extension of this procedure into the field of international law has been most successful, and the advisory jurisdiction of the old Court comprised an important part of its work. In particular, it became evident that the procedure facilitated the functioning of international organizations by providing a ready means of obtaining authoritative legal advice on points affecting their constitutions and the rights and obligations of member States.

An advisory opinion differs from a judgment of the Court in that the opinion can claim no legal binding force. In fact, advisory opinions have been regarded as judicial pronouncements creating a strong moral obligation, and it would have been difficult for the Council or Assembly to disregard entirely one of these pronouncements.

At San Francisco, Committee IV/1 readily accepted provisions in both the new Statute and in the Charter which would allow the Security Council and General Assembly of the United Nations to request advisory opinions of the new Court. But some States wished to extend the jurisdiction. One suggestion—that the opinions should be available to two or more States, acting in concert—found little support. A second suggestion was that public international organizations should have direct access to the Court and not, as in the case of the old Court, have to rely on requests by the Security Council or the General Assembly. There was some opposition to the proposal, which was discussed both by Committee IV/1, and by the Committee of the San Francisco Conference dealing with the powers of the General Assembly. As a compromise, the United Kingdom representative was able to obtain a provision in the Charter enabling "specialized agencies, which may at any time be so authorized by the General Assembly" to request advisory opinions on legal questions arising within the scope of their activities (Article 96 of the Charter).

Execution of Judgments.

It will be no part of the new Court's task to see that its judgments are carried out. Nevertheless, a party before the Court will clearly have a legal obligation to execute a judgment. This obligation is recognized in the undertaking, contained in Article 94 of the Charter, that each member of the United Nations will comply with decisions of the Court to which it is a party. The Article goes on to provide that whenever one party fails to perform its obligations the other party may have recourse to the Security Council. This body may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

The somewhat similar provisions of Article 13 of the Covenant of the League of Nations were not invoked with reference to any judgment of the old Court. Indeed, no case arose in which a State refused to carry out a judgment calling for the performance of a specific act by one of the parties.† This happy position was but a reflection of the limitations on the jurisdiction of the old Court. So long as States are free to deny an International Court jurisdiction in cases in which they have reason to fear an adverse decision, then so long will the question of the enforcement of judgments present little difficulty.

Procedure.

Articles 39 to 64 of the new Statute deal with the procedure of the Court and related matters. There are few changes from the provisions of the old Statute.

Decisions of the Court are given by a bare majority, the President of the Court or his Deputy having a casting vote in the event of an equality of votes. In the past the opinions of the majority were combined into one judgment, while dissenting judgments appeared as the individual opinion of their authors. Article 57 now enables any Judge to deliver a separate opinion.

Article 59 provides that the decision of the Court has no binding force, except between parties and in respect of that particular case. It is clear that this does not mean that decisions will not have authority as precedents. Indeed, it will be one of the new Court's most important functions to build up a coherent international jurisprudence by means of its decisions. And when it was decided to establish a new Court the intention was that it should continue the jurisprudence of the old. Article 59 means no more than it says—a given decision is not as a matter of legal obligation binding upon States other than the immediate parties, and even upon them only in respect of the particular case.

Amendment of the Statute.

One of the difficulties facing the Committee of Jurists, which sat in 1929 for the purpose of revising the old Statute, was the question of the formalities of amendment, a matter which was not covered in the old Statute. This omission has been met in the new Statute and Article 69 provides that amendments to the Statute are to be effected by the same procedure as is provided

† Manuel O. Hudson, *The Permanent Court of International Justice, 1920–42*, New York, 1943, p. 596.

for amendment of the Charter of the United Nations. States which are parties to the Statute, but not Members of the United Nations, may participate in amendments upon conditions to be laid down by the General Assembly upon the recommendation of the Security Council.

CONCLUSION.

Our discussion of the more important matters which came before the United Nations' Jurists at Washington and San Francisco suggests that, although the International Court of Justice is a " new Court," it follows very closely the pattern set by the Permanent Court of International Justice.

The change with regard to the rotating election, the decision that the Court need not necessarily sit at The Hague, the extended provision for chambers of the Court, and the provisions relating to public international organizations and amendment of the Statute, all represent advances. Furthermore, although little change has been made in the vital matter of jurisdiction, the experience of the operation of the optional clause suggests that the constitution of the new Court will have sufficient flexibility to enable it to meet increased responsibilities as the United Nations Organization achieves its declared purpose of bringing about " by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."

The really significant achievement of the United Nations jurists at Washington and San Francisco lies in another direction. The jurists were able to draft a Statute which obtained approval of all the United Nations, in particular of the two great Powers, the United States and the U.S.S.R., which were not associated with the old Court.

EASEMENTS OF LIGHT AND AIR.

The New Zealand Law of "Ancient Lights."

By E. C. ADAMS, LL.M.

As I have been recently asked, by a law student from Victoria College and by an Englishman totally unconnected with the law, to explain the New Zealand law as to " ancient lights," it has occurred to me that possibly the topic might interest readers of the NEW ZEALAND LAW JOURNAL.

Every New Zealand student of the English law of easements will agree, I think, that the Light and Air Act, 1894 (N.Z.), was a wise and necessary provision for the conditions then prevailing in the Colony, and that it was more in harmony with the mental and ethical outlook of the colonists than the English common and statutory law which it superseded. As one wades through a textbook on the law of easements (and very few lawyers perform the wearisome duty oftener than strictly necessary) there is revealed the truly amazing amount of litigation which has resulted when a landowner has sought to build on his vacant land or increase the height or size of buildings on his land already built on. The neighbouring landowner has often claimed easements of light and air, or of light or air in favour of buildings erected on his own land, and then the fun has commenced, if almost ruinous litigation can be called fun. Let us take for example the case of *Chastey* v. *Ackland*, [1895] 2 Ch. 389, on app. [1897] A.C. 155, which, as appears in *Stroud's Law of Easements*, 156, was taken to the House of Lords, but with an " inconclusive result " ; it concerned a urinal, the exhalations from which caused a nuisance to the plaintiff, when defendant built a new building and raised the height of an existing one on his land, thus causing an unaccustomed and naturally unpleasant stagnation of air. And what happened when the case eventually reached the House of Lords ? After hearing a lengthy argument from counsel, their Lordships suggested that the parties might properly come to an arrangement. Finally counsel agreed that plaintiff should be awarded £300 damages, and that the defendant should pay the costs in all three Courts.

One wonders what the landowner, who had the temerity to build on his own land, finally thought of the proceedings, and the English law as to ancient lights. True, for the student of law the case is important for one principle. As is observed in *Stroud's Law Easements*, 159—

> The importance of the case lies in the recognition of the right attaching to an ancient house to have the accustomed flow of pure and salubrious air as apart from light to its windows uninterrupted, and anything (whether a building upon the adjacent owner's land or not) which interrupts such flow of air so as substantially to interfere with the health and comfort of the occupiers of such house, or prevents them from using their rooms for the purposes of trade, as before, is an actionable wrong.

As Griffiths, C.J., pointed out in *Commonwealth* v. *Registrar of Titles for Victoria*, (1918) 24 C.L.R. 348, easements of light have mostly been based on prescription and not on express grant. The dominant tenement, by means of the doors, windows, or other apertures or channels in the buildings erected thereon, has had long and uninterrupted enjoyment of light and air, or light or air, from over the alleged servient tenement, and the law assumes the possibility of a valid grant. The Prescription Act, 1832 (including s. 3 thereof dealing with the access of light) was in force in New Zealand in 1894, and with regard to these prescriptive easements of light and air, or light or air, the then existing law, if allowed to remain unaltered, would have caused intolerable conditions for progressive landowners, who desired to make more use of their lands, as the Colony increased in population, commerce, and importance. Section 3 of the Prescription Act, 1832, (*5 Halsbury's Complete Statutes of England*, 825) reads as follows :—

When the access and use of light to and for any dwellinghouse, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

Note well the period; after twenty years' uninterrupted enjoyment of the right the easement of light is indefeasible unless it has its origin in the written consent of the servient owner. A New Zealand case on s. 3 of the Prescription Act, 1832, is the *New Zealand Loan and Mercantile Agency, Co., Ltd.* v. *Wellington Corporation*, (1890) 9 N.Z.L.R. 10, where it was held that in order to establish a right to light, it is sufficient, if the parties claiming the right and their predecessors in title have actually enjoyed the light in the character of an easement for more than twenty years before the commencement of the proceedings, occupying the land on which the buildings stand, as of right, during that period: and it is immaterial whether they have a good title to the land throughout the period. Unlike the Real Property Limitation Act, 1833 (dealing with the acquisition of title to land by adverse *possession*), we need not concern ourselves as to whether or not the owner of the servient tenement is under any legal disability: twenty years' enjoyment of the right (and not forty years as under that statute) is sufficient to make the right indefeasible.

The nature of the right to light acquired by s. 3 of the Prescription Act, 1832, is explained by Maugham, J. (as he then was), in *Sheffield Masonic Hall Co., Ltd.* v. *Sheffield Corporation*, [1932] 2 Ch. 17. The nature of the right so acquired was precisely the same as the one acquired before the Prescription Act, 1832, came into force; s. 3 made no difference to the right conferred: it merely altered the mode of proof. Those who still remember their Latin may also glean something of the nature of the right from the ancient form of the action—*quod messuagium horrida tenebritate obscuratum fuit*. Maugham, J., thought that the right conferred was analagous to the Roman law servitude of *ne facias*. The dominant tenement was entitled to the benefit of a quasi-covenant by the owner of the servient tenement precluding him from building in the normal case in such a way as to obscure the plaintiff's rights to a degree which would interfere with the comfortable enjoyment of the premises, according to the habits and requirements of ordinary people, or, in such a way as would cause a nuisance to the plaintiffs in the enjoyment of their premises: *11 Halsbury's Laws of England*, 2nd Ed., 338, 339, paras. 595, 596. It appears to have been laid down in many English cases that, if forty-five degrees of sky are left unobstructed, in ordinary circumstances the dominant owner cannot complain: *Stroud's Law of Easements*, 140; *cf. 11 Halsbury's Laws of England*, 2nd Ed. 340, para. 597.

It is true that in 1894 s. 3 of the Prescription Act, 1832, would have had to be read subject to s. 57 of the Land Transfer Act, 1885, which provided that after land had become subject to that Act, no title thereto, or to any right, privilege, or *easement* in, upon, or over the same should be acquired by possession or user adversely to or in derogation of the title of the registered proprietor. But at that time much of the privately-owned land in the Colony was not under the Land Transfer Act, and moreover an easement which existed against the servient land on its being brought under the Act still subsisted after the land was brought under, even though it was not noted against the certificate of title: *Carpet Import Co., Ltd.* v. *Beath and Co., Ltd.*, [1927] N.Z.L.R. 37. *The New Zealand Loan and Mercantile Agency Co., Ltd.* v. *Wellington Corporation (supra)*, is an example of this rule applied with respect to an easement to light acquired by prescription before the servient tenement was brought under the Land Transfer Act, which easement was held not to have been extinguished thereby, although no action to establish the prescriptive easement to light had been launched until after the bringing of the servient tenement under the Land Transfer Act.

There was thus a real need for the passing of the Light and Air Act, 1894. That Act provided that on and after July 27, 1894, except as therein provided, no tenement should by prescription, grant, or otherwise, become servient to any other in respect of the access of either light or air.

Existing easements were saved, and, as at that time the Colony had been established for fifty-four years, there must be still extant in the older-settled urban parts of New Zealand many of these prescriptive rights to ancient lights, perhaps in many cases without the owner of the dominant tenement being aware of his rights.

An example of a prescriptive right existing at the date of the coming into operation of the Light and Air Act, 1894, is *Westney* v. *Hahn*, (1907) 26 N.Z.L.R. 1396, where there was twenty years' uninterrupted user of light before that date, but action to establish the action was not begun until 1907. As Denniston, J., pointed out (at p. 1402), despite the repeal of s. 3 of the Prescription Act, 1832, the prescriptive right to light remained what it would have been had the 1894 Act not been passed. His Honour thought that *the object of the Act was to stereotype the position and rights of any person* to or for whose dwellinghouse, workshop, or other building the access and use of light was at its date being enjoyed. Thereafter no fresh rights were to be acquired; any then existing rights (notwithstanding action had not up to then been brought to establish them) were to continue by virtue of the Act. See also *Stevens* v. *National Mutual Life Association of Australasia, Ltd.*, (1913) 32 N.Z.L.R. 1140, a decision of the Court of Appeal which would support the *ratio decidendi* of *Westney* v. *Hahn* (*supra*); this case also establishes the important principle that there is nothing in the Land Transfer Act preventing land under the Land Transfer Act from acquiring by prescription an easement over land not under that Act.

From July 27, 1894 to November 24, 1927 (being the date of the coming into operation of the Property Law Amendment Act, 1927), a valid grant of access of light or air had to be made by deed duly executed and had to provide that the benefit thereof should inure for a term not exceeding twenty-one years, and no longer. It was held by the Supreme Court that after July 27, 1894, no valid easement of light or air could be acquired by presumed or implied grant: *Mackechnie* v. *Bell*, (1909) 28 N.Z.L.R. 348. The principle of that case (a decision of the late Sir Joshua Williams) would still apply, and to land not under the Land Transfer Act, as well as to land under that Act.

The Light and Air Act, 1894 (later enacted as Part XVIII and s. 113 of the Property Law Act, 1908), although a great improvement on the previous law as

outlined above, in the course of time became too "stereotyped" (to employ Mr. Justice Denniston's apt word) for modern conditions. Our fathers and grandfathers may have possessed certain estimable qualities, such as thrift and physical endurance in a high degree, but in certain respects they had serious limitations: for example, they built buildings which lacked adequate sunshine and light: they preferred even for writing and reading purposes that "dim religious" light, as Milton calls it, to a good clear natural light. As the growth of our larger cities demanded larger and still larger buildings, and as the social conditions of the employee class slowly improved, there came the need and the reasonable demand for the adequate lighting of such buildings and this *desideratum* could not always be attained by an easement over adjoining land to inure for only twenty-one years. What was suitable law for the Colony in 1894 was no longer satisfactory by the 'twenties of this century. Hence the passing of s. 3 of the Property Law Amendment Act, 1927, which whilst retaining the main policy of the Light and Air Act, 1894 (the prevention of the acquisition in the future of *prescriptive* rights to light and air), and thus reducing litigation in these matters to a minimum, enabled *perpetual* easements of light and air, or light or air, to be granted subject to certain conditions as to form and registration. It was considered by the Legislature that *perpetual* easements were necessary and more appropriate for the type of large and more permanent buildings then being erected in the metropolitan centres, than easements limited to a period of twenty-one years.

(To be concluded.)

NEW ZEALAND LAW REVISION COMMITTEE.

Twelfth Meeting.

The Twelfth Meeting of the New Zealand Law Revision Committee, held at Parliament Buildings, Wellington, on Thursday and Friday, August 9 and 10, 1945.

The members present were the Hon. H. G. R. Mason (Attorney-General), Chairman; Hon. F. W. Schramm, M.P. (Chairman of the Statutes Revision Committee); Mr. H. E. Evans (Solicitor-General); Mr. W. J. Sim, K.C., and Mr. K. M. Gresson (representing the New Zealand Law Society); Mr. B. L. Dallard (Under-Secretary of Justice) and Mr. H. D. C. Adams (Parliamentary Law Draftsman).

Apologies for non-attendance were received from the Hon. Mr. Justice Cornish, and from Mr. A. C. Stephens (representing the Public Teachers of Law).

Evidence Act, 1908.—The Committee considered a draft of the Evidence Amendment Bill, (*a*) adopting (with the exception of s. 5) the provisions of the Evidence Act, 1938 (Gt. Brit.) (*31 Halsbury's Complete Statutes of England*, 145); (*b*) enacting the abrogation of the Rule in *Russell* v. *Russell*, and (*c*) enacting certain rules for proof of formal documents. It was decided to adopt the Bill with certain omissions.

Infanticide Act, 1938 (Gt. Brit.) (*31 Halsbury's Complete Statutes of England*, 87).—It was resolved to submit the proposal to adopt this Act (with modifications) to the Law Society for their views, and to ask Dr. T. G. Gray and Dr. J. Russell (Director-General and Deputy Director-General of Mental Hospitals) to attend the next meeting of the Committee to give oral opinions.

Justices of the Peace Act, 1927.—(*a*) It was resolved that s. 315 should be amended so as to give the right of general appeal against all convictions. It was also recommended that the form of appeal (Form 52) should be amended so that the appellant should require to show whether the appeal was against conviction, or against sentence only. (*b*) The question of attention to the form of jurat in statutory declarations as suggested was stood down for further consideration: see O. 38, r. 13, of the English Rules.

Juries Act, 1908.—(*a*) It was agreed that the present age-limit of sixty years, contained in s. 3 of the Juries Act, 1908, should be raised to sixty-five years. (*b*) The matter of revision of existing exemptions from service was stood down for further inquiries. (*c*) It was decided that no action be taken in the matter of the suggestion that majority verdicts be accepted in criminal cases.

Damage by Wandering Stock.—After consideration of the letter from the Hon. the Minister of Agriculture on the question of placing the onus of disproving negligence on owners of wandering stock, it was decided that no action should be taken.

Family Protection Act, 1908.—The question of bringing the children of a deceased child of a testator within the protection of the Act was discussed, and it was resolved that the New Zealand Law Society be asked for an opinion.

Deaths by Accidents Compensation Act, 1908.—It was decided (*a*) that the Committee confirm the clause originally settled for the Law Reform Bill, 1944, and (*b*) that it be a recommendation that s. 32, 33, 36, and 60 of the Workers' Compensation Act, 1922, be made to apply to the Deaths by Accidents Compensation Act, 1908, provided that the Law Draftsman finds that there is nothing to prevent their application.

Arbitrations.—It was decided that, since it was possible to sue in the Magistrates' Court and obtain judgment upon an arbitrator's award, no action need be taken.

Workers' Compensation Act, 1922.—It was resolved that no action should be taken in the way of amend-

ment to cover the decision in the case of *Rothwell* v. *Caverswall Stone Co., Ltd.*, [1944] 2 All E.R. 350, in which it was held that a worker had no claim against an employer for a *novus actus interveniens* aggravating his illness.

Administration Amendment Act, 1944.—Mr. J. H. Carrad, by invitation, attended before the Committee; and, after discussion of proposed amendments, he was asked to report in writing on the points raised by the New Zealand Law Society and others, and also on the question of a suggested amendment to s. 21 of the Infants Act, 1908, to bring the status of adopted children more into line with present-day policy.

Infants Act, 1908.—It was resolved to amend the Act in order specifically to provide that the consent of the father of an illegitimate child shall not be necessary before an adoption order may be made.

Life Insurance Act, 1908.—It was decided to have the draft amendment to Part II amended in accordance with Mr. J. Glasgow's suggestions and printed for circulation and consideration at the next meeting. It was also agreed that the leading life insurance offices should be asked to comment upon the draft.

Justices of the Peace Act, 1927: Publication of Evidence in Lower Court.—It was decided to have the draft section printed for circulation, and to ask for the opinions of the Law Societies on it.

Legal Aid Act, 1939.—Mr. Sim and Mr. Gresson were appointed to approach the Law Society, to represent the urgency of this matter, with a view to settling at the earliest possible moment the draft rules under the statute for presentation to the Minister for enactment, in order that the scheme may now operate as soon as possible.

Damages: (a) Adoption of Maritime Rule as to Apportionment.—It was decided that this matter be referred to a sub-committee consisting of Dr. O. C. Mazengarb (who has already reported) and Messrs. W. E. Leicester, T. P. Cleary, and J. H. Jerram, for consideration of advisability of adopting in New Zealand the Law Reform (Contributory Negligence) Act, 1945 (Gt. Brit.).

Trustee Act, 1908.—It was resolved that an amendment should be enacted upon the lines of s. 161 of the Supreme Court of Judicature Act, 1925 (Eng.) (*8 Halsbury's Complete Statutes of England*, 372), to empower such trust companies as are at present authorized to be granted probate to take out letters of administration without the necessity for the appointment of a syndic.

Companies Act, 1933.—It was agreed that the Law Draftsman prepare a clause, in conference with Mr. S. G. Castle and Mr. H. A. Anderson, to provide for registration with the Registrar of Companies of partial discharges of single debentures.

Divorce and Matrimonial Causes Act, 1928.—It was decided that a draft Bill, based on the Matrimonial Causes (War Marriages) Act, 1944 (Gt. Brit.), but with the omission of the proviso to s. 1 (2), be approved, and that a copy be sent to England to ascertain if this omission will affect the arrangement to be made under the two statutes for reciprocal recognition of decrees made in pursuance thereof.

Destitute Persons Act, 1910.—Blood Tests in Affiliation Proceedings.—It was agreed to adopt the Bill introduced in 1940 into the Parliament at Westminster, but to include provision that an adjudged father of an illegitimate child shall have the right only until the child attains the age of five years to apply for tests to be taken with a view to possible discharge of the affiliation order: see Bastardy (Blood Tests) Bill (Gt. Brit.) and s. 120 of the Child Welfare Act, 1939 (N.S.W.).

Law Reform, 1944.—(*a*) It was resolved to take no action on the suggestion that the time within which claims under s. 3 (1) can be made should be extended. (*b*) It was not considered necessary to make any amendment to provide for the effect of the Statute of Frauds or the Statute of Limitations upon possible claims under the Section.

Settlement of Claims by Infants for Damages, &c.—It was decided to adopt a draft clause providing for (*a*) approval of compromise without commencement of an action, and (*b*) for a valid discharge to be given for infants' claims with the sanction of the Court.

Criminal Appeal Bill, 1945.—Mr. C. E. Evans-Scott attended by invitation, and explained the provisions of the Bill and took part in the discussion. After lengthy consideration, it was decided to adopt the Bill, with "sentence fixed by law" substituted for "sentence of death" in parentheses in cl. 17.

It was agreed that meetings of the Committee should be held three times a year, and that the months of October, March, and July were suitable months for holding them.

RULES AND REGULATIONS.

Revocation of the Oil Fuel (Horse Transport) Control Notice, 1944. (No. 2). (Supply Control Emergency Regulations, 1939, and the Oil Fuel Emergency Regulations, 1939.) No. 1945/110.

Central Milk Council (Fees and Travelling-allowances) Regulations, 1945. (Milk Act, 1944.) No. 1945/111.

Licensing Act Emergency Regulations, 1942 (No. 2), Amendment No. 4. (Emergency Regulations Act, 1939.) No. 1945/112.

Fresh-water Fisheries (Otago) Regulations, 1945. (Fisheries Act, 1908.) No. 1945/113.

Fresh-water Fisheries (Southland) Regulations, 1941, Amendment No. 3. (Fisheries Act, 1908.) No. 1945/114.

Fresh-water Fisheries Regulations, 1936, Amendment No. 5. (Fisheries Act, 1908.) No. 1945/115.

Trout-fishing (Wellington) Regulations, 1941, Amendment No. 2. (Fisheries Act, 1908.) No. 1945/116.

Quinnat Salmon Regulations, 1940, Amendment No. 1. (Fisheries Act, 1908.) No. 1945/117.

Trout-fishing (Auckland) Regulations, 1937, Amendment No. 8. (Fisheries Act, 1908.) No. 1945/118.

Trout-fishing (Ashburton) Regulations, 1941, Amendment No. 3. (Fisheries Act, 1908.) No. 1945/119.

LAND AND INCOME TAX PRACTICE.

Excess Profits Tax: Period for which this Tax can be levied.—Now that hostilities have ceased with Germany, the question has arisen as to the period for which excess profits tax can be assessed.

The Excess Profits Tax Act, 1940, provides that the last year in which excess profits tax can be levied is the year of assessment which commences not later than one year after the termination of the present war with Germany.

The unconditional surrender of Germany and the acceptance of the surrender by the Allied Powers does not terminate the war with Germany, a state of war still exists between New Zealand and Germany, and a Proclamation published in the *Gazette* is necessary to fix the termination of the war for the purposes of the Excess Profits Tax Act, 1940: see the *Finance* Act, 1945, s. 16. Even if this is done before April 1, 1946, excess profits tax can be collected on income derived during the year ended March 31, 1946.

"Serving Employee."—Section 3 of the Finance Act, 1943, permits of a deduction being allowed in arriving at an employer's assessable income in respect of payments made to an employee who is on active service (called a "serving employee"), provided the deduction is not in excess of the rates of the wages, salary, allowance, or other remuneration payable to the serving employee at the time when he was called up, or in excess of the rate of £4 a week, whichever is the less.

A "serving employee" is defined by s. 3 (2) (*a*) as a person called up for service "who when he was so called up was employed by his employer."

If an employer, who is conducting his business as a sole trader, converts it into a limited company during the absence of an employee on active service, the company cannot be allowed a deduction under the said s. 3 in respect of any amounts paid to the employee. The employee is not a "serving employee" of the company, when he was called up for service he was in the employ of the sole trader and not the company, and although the company would have obligations to him under the Occupational Re-establishment Emergency Regulations, 1940, the fact remains that he has never been in the employ of the company.

"Serving Employee": Supplementary pay when released from the Armed Forces to work in an Essential Industry.—Many members of the armed forces have been released on indefinite leave without pay to engage in essential industries, and in cases where the former employers of such "serving employees," as defined by s. 3 of the Finance Act, 1943, continue to supplement the pay earned by the former employees while they are engaged in essential work, the question arises as to whether the former employers are entitled to claim such amounts as a deduction in arriving at their assessable income.

The former employees, now engaged in essential work, are only on leave without pay from the armed forces and are still members thereof. Accordingly they are still "serving employees" as defined by the said s. 3, and if any of their former employers continue to supplement their pay while they are engaged in essential work, they are entitled to claim such amounts as a deduction, provided the statutory limits are not exceeded.

Bad Debts: Treatment in Returns furnished by the Trustees of an Estate.—The following rules apply where the trustees of an estate either write certain debts off as irrecoverable, or recover debts previously written off as bad:—

(*a*) Debts which were owing to the deceased at the date of death and which subsequently prove to be irrecoverable cannot be written off by the trustees and claimed as a deduction from the estate income derived by them. Such bad debts are losses of capital.

(*b*) Debts due to the deceased, which can be proved to be irrecoverable at the date of death, may be written off by the trustees and claimed as a deduction in the return, furnished by them, of income derived by the deceased to the date of death, as the trustees are required, by s. 21 of the Land and Income Tax Act, 1923, to make the same returns as the deceased taxpayer ought to have made or would have been bound to make if he had remained alive. The fact that the debts were not recovered on subsequent realization is not sufficient to justify them being written off in the return of income derived to the date of death, it must be established that they were irrecoverable at the date of death, and in this connection the death-duty accounts may be some guide as to what amount was irrecoverable at the date of death.

(*c*) Debts which were written off by the deceased in his lifetime and by the trustees in the return of income derived to the date of death and which are subsequently recovered are assessable as trustees' income in the year of receipt in accordance with the provisions of s. 28 of the Land and Income Tax Amendment Act, 1939.

Deceased Solicitors: Return of Income to Date of Death: Position *re* Costs rendered by Trustees since Death, and Costs Written-off by Trustees as Irrecoverable.—Solicitors are required by the Commissioner of Taxes to furnish their annual income-tax returns on an earnings basis, and not on a cash basis, except that the value of uncompleted work at balance date may be ignored. The question arises, on the death of a solicitor, as to how the costs, which he has not rendered prior to death, are to be treated, particularly where the trustees have to get certain work completed by another solicitor before the costs can be rendered. A further question also arises as to the allowance of a deduction in respect of any costs rendered by the deceased or the trustees, which prove to be irrecoverable.

The position is—

(*a*) Returns should be furnished in respect of a deceased solicitor, as follows:—

(i) The return of income to the date of death should include:—

(*a*) All costs rendered by deceased during the period from April 1 to the date of death.

(*b*) All costs rendered by the trustees in respect of work *actually completed* by the deceased, but for which he did not render the costs prior to his death.

(ii) The returns of income furnished in the name of the estate, in respect of income derived by the trustees since the date of death should include all costs rendered by the trustees during the year, in respect of work which was uncompleted at the date of death and which they have had completed.

(*b*) Bad debts written off by trustees of the estate of a deceased solicitor are deductible as follows:—

(i) In the return of income derived to the date of death, the trustees are not obliged to include such costs as are obviously irrecoverable, and may write off as bad debts any costs previously returned by the deceased as income for income-tax purposes, but which have proved to be irrecoverable prior to the date of death.

(ii) In the returns of income by the estate subsequent to the date of death, the trustees cannot write off as bad debts against costs rendered by them for work *completed* since the date of death any costs which were included in the returns made by the deceased or in the return of income derived to the date of death. The trustees are different taxpayers from the deceased and they are not entitled to deduct from the income derived by them bad debts written off in respect of the incomes derived by the deceased. If, however, any of the costs rendered in respect of work which the trustees have had completed, and returned as trustees' income subsequently prove to be irrecoverable, such costs may then be written off as bad debts by the trustees and claimed as a deduction against the assessable income derived by the trustees in the year such debts are written off.

Compensation for Failure to Reinstate a Former Employee who has been serving in the Armed Forces.—Under the Occupational Re-establishment Emergency Regulations, 1940, an employer has a statutory obligation to reinstate a former employee and employ him for at least six months.

If an employer does not wish to reinstate a former employee and, in lieu thereof, pays him six months' salary, the question arises as to whether such a lump-sum payment is assessable to

the recipient or deductible by the employer making the payment.

The position would be as follows :—

(i) The amount would be assessable in the hands of the recipient. The circumstances in question are distinguishable from those of the decided cases where lump-sum payments for wrongful termination of employment have been held to be non-assessable. In those cases the contracts of employment had several years to run and the amount was regarded as compensation for the loss of a right of a capital nature. In the present circumstances, however, there is not a long-term period of service involved, at the most the employer can only be required to employ the former employee for a period of six months, and the payment is more in the nature of a payment of salary in discharge of the statutory obligation to employ the former employee. Such a payment is analogous to the position where an employee is dismissed and paid salary in lieu of notice, which is assessable.

(ii) In determining whether such a payment is deductible by an employer, the particular circumstances of each case must be taken into account, but in general, as the payment is made in satisfaction of a statutory duty of the employer and is made to avoid interference with existing employees, or for other goods business reasons, such expenditure would normally be regarded as exclusively incurred in production of the taxpayer's assessable income, and deductible accordingly.

Special Exemption: Life Insurance Premiums payable on a Deferred Endowment Assurance Policy on the Life of a Child.—Policies of this type are issued in respect of children. The purchaser of the policy is the parent, who pays the premiums, and the child is shown as the nominee. The insurance is on the life of the child, and the policy is taken over by the child on attaining twenty-one years of age, unless the child at that time elects to accept a lump-sum payment in satisfaction of the policy. A condition is sometimes inserted in such policies to the effect that if the parent dies before the child attains twenty-one years of age, no further premiums will be payable until that age is attained. In such cases the parent has to undergo a medical examination, and a slightly higher premium is payable. Nevertheless, the insurance is still on the life of the child and not on the parent's life.

The parent is not entitled to a special exemption, under the provisions of s. 77 of the Land and Income Tax Act, 1923, in respect of the premiums paid under any of such policies, as the insurance is not on the life of the parent.

Assessment of Income in Intestate Estates: Administration Amendment Act, 1944.—The law relating to the distribution of estates of persons dying intestate has recently been altered by the Administration Amendment Act, 1944, which came into force on January 1, 1945, and applies to the estates of all persons dying intestate after that date. Before this Act, the next-of-kin (including minors) were entitled to absolute vested shares in the intestate estate and the income of such minors was, in pursuance of s. 7 of the Land and Income Tax Amendment Act, 1941, assessed to the trustee as agent for such minors and the usual personal exemptions were allowable as a deduction. Under the new Act the next-of-kin who are minors and who are children, descendants of children, brothers, sisters, uncles, or aunts of the intestate deceased person, are entitled only to contingent shares in the estate, their shares being contingent on their attaining twenty-one years or marrying under that age, and the trustees have in the meantime discretionary power to apply income for the maintenance, education, or benefit of any such contingent beneficiary. If the income derived in any income year or part thereof is applied during such year for the benefit of any such minor beneficiary, the income so applied will, in accordance with s. 27 (*b*) of the Land and Income Tax Amendment Act, 1939, be assessable to the trustee as agent for such minor beneficiary and the usual personal exemptions will be allowable accordingly. Any income accumulated and not so applied will, except in the income year in which the infant attains twenty-one years or marries, be assessable under s. 102 (*b*) as trustees' income and no special exemptions will be allowable.

The position with regard to social security charge and national security tax is also altered by the new Act. Before such Act the share of a minor beneficiary in an intestate estate was absolutely vested and his share of the income was not liable for the charge while he was under sixteen years of age, or was not ordinarily resident in New Zealand. Under the new Act, however, the shares of minor beneficiaries who are children, descendants of children, brothers, sisters, uncles, or aunts of the deceased intestate are not vested but are contingent on their attaining twenty-one years or marrying under that age; and the income of such shares, in so far as it is not applied for their benefit during the income year, will be liable for charge irrespective of the age or residence of the contingent beneficiary. If the income derived by the trustee in any income year or part thereof is, during such year, applied for the maintenance, education, or benefit of the contingent beneficiary, the income so applied will, however, not be liable for charge if such contingent beneficiary is under the age of sixteen years, or is not ordinarily resident in New Zealand.

"DEVIL'S OWN" GOLF TOURNAMENT.

Palmerston North.

The Palmerston North Law Society announce the holding of the Eleventh "Devil's Own" Tournament (for the relaxation and rejuvenation of the Legal Profession), to be played on the Manawatu Golf Club's Links at Hokowhitu, on Saturday, September 22 to Monday, September 24, 1945 (Dominion Day).

The Management Committee comprises Messrs. L. M. Abraham, H. R. Cooper, W. L. Fitzherbert, J. A. Grant, B. J. Jacobs, A. M. Ongley, S. W. Rapley, P. W. Dorrington (Dannevirke), John Graham (Feilding), A. E. Lawry (Napier), G. C. Phillips (Wellington), C. C. Marsack, S.M., T. M. N. Rodgers, and the Hon. Secretary, Mr. G. I. McGregor, Box 170, Palmerston North.

The Programme is as follows :—

September 22: *Morning*: **1. "Guarantee Fund" Handicap (18-hole Stroke Paralytic)**. *Afternoon*: **2. Stabilization Handicap (18-hole Stroke)**. The best 16 aggregate net scores in events Nos. 1 and 2 to qualify and play for the Devil's Own Cup on Handicap. The next 16 to play off for the Ancient Lights' Stakes. The Third 16 to play off for the Paupers' Appeal Stakes.

September 23: *Morning*: **3. The Certiorari Handicap (18-hole Bogey)**. And 1st Round of Devil's Own Cup, Ancient Lights, and Paupers' Appeal. *Afternoon*: **4. Public Trust Bogey Handicap (18-hole)**. And 2nd Round of Devil's Own Cup, Ancient Lights, and Paupers' Appeal.

September 24: *Morning*: **5. Semi-final Devil's Own Cup and Ancient Lights.** 18-hole Distress Foursome (Medal Handicap). (Choose partners). *Afternoon*: **6. Final Devil's Own Cup and Ancient Lights (18-hole)**. Butterworth's Hurdle Four Ball (Bogey Handicap). **Teams' Match**: To be played in conjunction with Stabilization Handicap. Post Entries. Net medal scores. Teams of four to be entered in accordance with nearest Supreme Court Registry of individual members.

Conditions of entry, etc., are as follows :—

1. Open to any occupant of the Bench (High or Low), or to any qualified K.C., Barrister, or Solicitor of any age, belonging to affiliated Clubs.

2. Entry fee 30s., to include green fees from September 21 to September 24 (inclusive).

3. Entries must be made to Hon. Secretary, and must be accompanied by competitors' handicaps and par of their course. Entries to be received by the Secretary. Post entries accepted.

4. Opponents for each event will be drawn, and the Committee reserves the right to adjust handicaps.

5. The Rules of Play shall be those of "The Royal and Ancient Golf Club of St. Andrew's," except as varied by the local rules of the Manawatu Golf Club (Incorporated).

6. The decisions of the Management Committee on any point shall be final. Any protest must be lodged with the Secretary or a member of the Committee by 6 p.m. on the day on which the dispute has arisen, failing which the information will be dismissed with costs.

7. The Committee reserve to itself the right to alter the programme times and date—by orderin' Counsel.

8. Ties will be decided in such manner as the Management Committee may direct.

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

Lawyers in Public Life.—"We also have cast upon us a very grave and serious responsibility. We are not, and we ought not ever to be, people who merely know the Law and appear in Courts and plead cases. We ought to be, and our historical role has always made us, far more than that. We are the people who not merely administer the Law, but who ought to shape and help to make the Law. No lawyer ought to exclude himself utterly and entirely from the great public life of which he forms a part. He, beyond all other men, is bound to use his energies for the public good, because he knows the way in which the Law can be altered and framed for the benefit of all mankind."—Lord Buckmaster, in a speech delivered to the Canadian Bar Association at Winnipeg, on August 27, 1925.

Harold J. Laski.—A storm-figure in English politics, this remarkable man had a profound admirer in the late Mr. Justice Holmes, who wrote of him as "diabolically clever and omniscient," spoke often of his phenomenal memory, and regarded him as a devoted scholar with an independent mind. For many years Professor of Political Science in the University of London, Laski was educated at Oxford and later lectured at Harvard, where he became a sort of protégé of Mr. Justice Frankfurter who brought him under the notice of Holmes. Readers of the *Pollock–Holmes Letters* will find many flattering references to him made by the American; but Pollock accepts his friend's testimony to the prodigy with reserve, and seems chary about expressing an opinion upon such devastating versatility. In one of his letters, written in 1924, Pollock refers to the libel action of *O'Dwyer* v. *Sankaran Nair*, in which Sir Michael O'Dwyer (assassinated some five years ago by an Indian nationalist) sought damages for defamatory allegations in regard to excesses said to have been committed in repressing disorder in the Punjab, under his general instructions as Lieutenant-Governor. The evidence against him was apparently very unsatisfactory and unreliable and there was a verdict in his favour, one juryman dissenting. This juryman was Laski; and Pollock observes, with some acidity, that he does not understand in what school (of historical learning) he learnt to give a verdict dead against the evidence. But whatever Laski may lack in his capacity as a judge of fact, there is no doubt that he has published an impressive array of books, amongst them the *History of Liberalism* and *Parliamentary Government in England*, which reveal great clarity of statement, a marked sense of style, and outstanding intelligence.

Enticement.—The recent decision in England in *Lough* v. *Ward* draws attention to the fact that at common law the father is still the head of the family, and until his children cease to be minors or marry he has control over them. Here, the plaintiff was the father of a girl in her seventeenth year, and claimed damages against the defendants for enticing her into, and harbouring her in, a communal establishment called an "abbey" in which the male defendant was the "father superior" and the female "mother superior." It was held that, if they persuaded or induced or incited her to leave home, there was enticement; and, on the facts, enticement was found. She had been useful to her father at home, and, although she had handed over no property to the establishment, she had by reason of the enticement transferred her life and services in return for her keep. It was also held that there had been harbouring, since, if the girl had remained at the defendants' premises of her own will, it was certainly against the will of her father, and it afforded no defence that she was over sixteen. The Court could not compel her to go back home. Even with a girl of this age, a stranger was not entitled to come between father and daughter and induce her to go away. The test was whether the plaintiff had lost his daughter's services by reason of the action of the defendants; and, as she had left home as the result of a state of mind induced by them, the Court considered that there had been a violation of the plaintiff's right as a parent, and awarded £500 damages "to indicate the Court's disapproval of the defendants' conduct." The basis of damages in cases of alienation, as in those of seduction, is *per quod servitium amisit* upon which there is an interesting discussion in *National Insurance Co., Ltd.* v. *Joyes*, [1932] N.Z.L.R. 802.

The Voluble Witness.—Any counsel of experience can recall some embarrassing moments when he has been mildly rebuked by the Bench for allowing his witness to forge ahead of the typewriter or for himself cross-examining at such a rate that he is several questions in front. Little attention, however, is paid to the plight of the unfortunate witness who is probably terrified by the majesty of the Judge, the persistency of counsel, and the proximity of the associate, who, if an attractive female, distracts him or, if a grim male, adds to his general feeling of awe. At a recent well-attended Law Dinner in Wellington, one practitioner related this story to those seated near him. A witness was told by his counsel to tell his story in his own words. At a remarkable speed, he proceeded to give his testimony, prefacing each item of conversation with "I says to him" or "he says to me" with the result that the typist rattled away at his machine in a valiant attempt to record a series of jumbled phrases and half-completed phrases. Finally, the witness, red in the face with his effort, paused for breath, and then, turning to the presiding Judge, gasped pleadingly, "Can you get him to slow his machine down a little, Your Honour. I just can't keep up with him!"

Definitions.—

Appeal, v.t.	In law, to put the dice in the box for another throw.
Consult, v.t.	To seek another's approval of a course already decided on.
Court Fool, n.	The plaintiff.
Litigant, n.	A person about to give up his skin for the hope of retaining his bones.
Positive, adj.	Mistaken at the top of one's voice.

—AMBROSE BIERCE, *The Devil's Dictionary.*

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. Natives and Native Land.—*Land Transfer—Instrument of Alienation and Certificate of Title of Native Land—Lost before Registration—Registration required—Procedure.*

QUESTION: About two years ago my client purchased a parcel of land from an aboriginal Native of New Zealand. The transfer was duly confirmed by the Native Land Court and stamped at the Stamp Duties Office. But before it was registered it and the relative certificate of title went astray: they cannot be found, although every effort has been made to find them. How can my client become registered as proprietor?

ANSWER: (1) Apply to the Native Land Court for a vesting-order under s. 28 of the Native Land Act, 1931.

(2) Apply to the District Land Registrar for the issue of a provisional or new certificate of title under s. 80 of the Land Transfer Act, 1915. For a precedent, see (1942) 18 N.Z.L.J. 237.

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2. Gift Duty.—*Lease of Farm and Bailment of Stock for Adequate Consideration—Option to purchase at Inadequate Consideration—Rise in Values on Exercise of Option—Improvements effected by Lessee—Liability to Gift Duty.*

QUESTION: A. leases his farm and bails his stock to his son B. at an adequate rental at least 5 per cent. on the Government valuation and the stock valued by a valuer approved by the Stamp Duties Department. Embodied in the lease and bailment is an option conferred on B. to purchase at any time during the currency of the term at a price somewhat less than the value ascertained as aforesaid. The inadequacy is less than £500, and I understand will not *per se* render the instrument liable to gift duty. B. proposes to effect considerable improvements during the currency of the lease and bailment. Will that render the transaction liable to gift duty when the option is exercised on the grounds that the improvements are legally the property of the lessor A. until the option is exercised? Will a rise in value of the property during the currency of the lease and bailment and before the option is exercised also render the transaction liable to gift duty?

ANSWER: (*a*) The fact that B. had effected improvements would not attract gift duty. The improvements would be referable to the lease and option vested in B: per Sir Charles Skerrett, C.J., in *Commissioner of Stamp Duties* v. *Finch*, [1927] N.Z.L.R. 807, 808, 809, affirmed by the Privy Council, (1929) N.Z. P.C.C. 600.

(*b*) A general rise in values during the currency of the lease would be irrelevant for gift duty purposes. This is because the grant of an option creates an immediate equitable interest in the property: see *Adams's Law of Death and Gift Duties in New Zealand*, 156, citing *Morland* v. *Hales and Somerville*, (1910) 30 N.Z.L.R. 201; and see, also, the recent English case, *Oppenheimer* v. *Minister of Transport*, [1941] 3 All E.R. 485.

It is conceived, however, that the transaction would be liable to gift duty if A. took a mortgage back for the unpaid purchase-money, or reserved some other future benefit. Section 49 of the Death Duties Act, 1921, could not, it is thought, be evaded by couching the transaction in the first place in the form of an option.