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DIPLOMATIC IMMUNITY FROM COURT PROCESS: RESIDENT FOREIGN LEGATIONS.

WE have now stated the principles by which public ministers, their families, staffs, and servants are entitled to exterritoriality, since, for the purpose of performing the duties entrusted to public ministers by their respective Governments, they must be independent of the civil and criminal jurisdiction of the Courts of the receiving State.

We hope that we have already made it clear that, in order to claim immunity from criminal or civil process, a member of a legation staff, or a servant or domestic servant of the public minister, must show that his service was *bona fide*, and in fact, at the time of the act in respect of which immunity is claimed, necessary for the interest or convenience of the minister.

British subjects, who are "domestics or domestic servants of a minister," must have first been accepted as such by their own Government in agreement with the foreign Government whom they are serving in their own country, before diplomatic privilege from legal process can be claimed on their behalf. Consequently, with regard to a local national, each case must be carefully examined; and it must be ascertained whether the receiving Government has accepted him so as to give him privilege: see per Lord Phillimore in *Engelke* v. *Musmann*, [1928] A.C. 433, 450 (*cit. ante* p. 100). His Lordship added that once the British subject is tendered as a domestic or as a domestic servant, and the tender is accepted (in England, by the Foreign Office), the status is created and the privilege attaches.

In the case of civil process, on the analogy of *Sloman* v. *Governor and Government of New Zealand*, (1876) 1 C.P.D. 563, no order can be made for substituted service unless there is some person upon whom there can be effectual original personal service.

VI.—Immunity from Giving Evidence.

Another privilege of public ministers, their families, staffs, and servants (or those of them who are entitled to diplomatic immunity from criminal or civil process) is exemption from subpoena as witnesses in any of the Courts of a receiving State.

Moreover, the common-law principle of the exterritoriality of an embassy, or legation, or of the residence of a public minister (whether it belongs to his Government, or is his own, or is rented), requires that no police officer, or officer of a Court of law, may make his way into those premises for the purpose of serving a subpoena, or into the residences of those of the minister's official staff who are entitled to immunity: in England at least, according to the statement in *1 Wheaton's International Law*, 6th Ed. 455, this immunity is regarded rather as one of courtesy than of absolute right; but, according to the statement in *1 Satow's Diplomatic Practice*, 3rd Ed., 329, the rule is more rigid.

From a practical viewpoint, service of a subpoena is valueless; since, if diplomatic immunity can properly be claimed in respect of the person subpoenaed, there is no means, in view of the fact that the privilege of immunity from Court process attaches to that person, of compelling his attendance to give evidence.

This immunity from giving evidence in the Courts of the receiving country has another practical basis: We have already observed that the fiction of exterritoriality treats the legation buildings or office, or the minister's residence, as forming part of the legation's or minister's own country, and, therefore, as being without the territory of the receiving State in which, in fact, it lies. Consequently its situation at common law is outside the jurisdiction of the Courts of that territory; and, for the purposes of the statutes governing service of legal process (including subpoenas), it is treated, as a matter of comity, as notionally outside the jurisdiction. In other words, "the person immune from giving evidence is not conceived so much as being privileged as being outside the jurisdiction of the local Courts": *Hall's International Law*, 5th Ed. 174.

It follows that, at common law and also under the declaratory sections of the Diplomatic Immunities Act, 1708, that no person entitled to diplomatic immunity from judicial process, civil or criminal, can be obliged, or even subpoenaed, to appear as a witness in a civil or criminal or administrative Court, and no such person is obliged to give evidence before a commissioner sent to his house. But if he chooses himself to appear as a witness, the Courts can make use of his evidence: *1 Oppenheim's International Law*, 5th Ed. If he voluntarily appears, or if immunity be waived in his regard, he would be subject to cross-examination in the usual way.

When a crime has been committed in the house of a diplomatic agent, or by a person in his employment, it may occur that his evidence or that of one of his family or suite is necessary for the purposes of justice. In such cases the State has no power to compel the person

invested with immunity to give evidence, and still less to make him appear before the Courts for the purpose of doing so. It is customary, therefore, for the Minister of Foreign Affairs to apply to the diplomatic agent for the required depositions, and though the latter may in strictness refuse to make them himself, or to allow persons under his control to make them, it is the usage not to take advantage of the right. Generally, the evidence wanted is taken before the secretary of the legation or some official whom the minister consents to receive for the purpose. When so taken it is, of course, communicated to the Court in writing. But where, by the laws of the country, evidence must be given orally before the Court, and in the presence of the accused, it is proper for the minister or the member of the mission whose testimony is needed to submit himself for examination in the usual manner: *Hall's International Law*, 6th Ed., 182; and Calvo was of opinion that the principles of the law of nations do not allow him to refuse to appear in Court and give evidence in the presence of the accused, where the laws of the country absolutely require this to be done: see, also, *1 Satow's Diplomatic Practice*, 3rd Ed. 281, 308.

A remarkable case of this kind is that of the Dutch envoy, Dubois, in Washington, which happened in 1856. A case of homicide occurred in the presence of M. Dubois, and, as his evidence was absolutely necessary for the trial, the Foreign Secretary of the United States asked Dubois to appear before the Court as a witness, recognizing the fact that Dubois had no duty to do so. When Dubois, on the advice of all the other diplomatic envoys in Washington, refused to comply with this desire, the United States brought the matter before the Netherlands Government. The latter approved of Dubois's refusal; but authorized him to give evidence under oath before the American Foreign Secretary. As, however, such evidence would have had no value at all according to the local law, Dubois's evidence was not taken; and, according to some authorities (but not all) the Government of the United States asked the Dutch Government to recall him.

The United States rule requires the President's permission for a minister to give evidence. The minister may, however, permit members of his staff to do so, though, in practice, he often gets permission from the State Department. At the trial of Guiteau for President Garfield's murder, in 1881, the Venezuelan envoy, Señor Comancho, was allowed by his government to give evidence.

We now propose to give some actual cases of United States diplomatic practice in relation to the giving of evidence in the local Courts of members of its embassy and legation staffs in foreign countries. They are taken from *4 Hackworth's Digest of International Law*, pp. 551 *et seq*. It will be observed that the permission is given or withheld according to the particular circumstances, and there seems no clear principle to be deduced from the examples as a whole, apart from the general acceptance of the doctrine of immunity in international law.

In a memorandum transmitted to the Treasury Department of the United States on June 15, 1939, the Department of State, referring to the instructions to diplomatic officers of the United States contained in Executive Order 4605-A, of March 8, 1927, which states that a diplomatic representative cannot be compelled to testify in the country of his sojourn and that this right is one of which he cannot divest himself except by the consent of his Government, said:

> It should be stated that these instructions are not international law. They are merely standing instructions by the Executive to our diplomatic officers in foreign countries. The instructions relate to a situation where it is sought to "compel" the diplomatic representative to testify, or where he is called upon to testify. It is well settled that diplomatic representatives may not be compelled to testify before the Courts of the receiving State.
>
> Moreover, the instructions relate to the relationship existing between the Government of the United States and the diplomatic representatives of this Government. They are not intended to affect the competency of the representative's testimony in the event of his ignoring the instructions and testifying.

The Department of State, in 1909, upon the recommendation of the Ambassador to Italy, refused to permit a member of an American Embassy to give evidence in the Courts of the receiving country, in the case of the secretary of the United States military attaché at Rome, who was asked to respond to letters rogatory issued by an Italian court in a penal case and received through the Italian Foreign Office. In 1931, the commercial attaché of the United States Embassy at Lima was asked to answer a list of questions received through the Peruvian Foreign Office for use in a civil case before a Peruvian Court: permission was refused. However, in a case, in 1932, where the Peruvian Foreign Office forwarded to the United States Embassy in Lima a request of a Peruvian military court for the appearance of the assistant commercial attaché as a witness, the Department of State authorized him to present a statement to the court as a courtesy to the Peruvian Government, provided that the Embassy saw no objection and the case had no political aspect.

In December, 1914, the German Ambassador to the United States, Count von Bernstorff, called the attention of the Secretary of State to the fact that an office attendant and messenger of the German commercial attaché in New York had been subpoenaed by the Federal grand jury of New York. He gave the Secretary, Mr. Lansing, the names of three other persons employed in the attaché's office "as his assistants and secretaries" in order "to prevent a recurrence of such incidents." The Secretary replied that, as the person had already appeared and testified, it was not necessary to discuss his immunity from subpoena. He pointed out, however, that according to his information, the employee spent only a small part of his time in the employ of the German attaché, and that if that was true, it would be difficult for the Government of the United States "to afford the same immunities as those enjoyed by regular employees of your Embassy." The Secretary continued:

> I understand that diplomatic privilege is not that of employees and domestics of an embassy, but that of the head of the mission, and that they are clothed with diplomatic immunity so that his personal comfort and state may not be affected by their arrest.

In 1916, the Attorney-General of the United States, through the State Department, inquired of the German Ambassador whether certain members of the German Embassy in Washington would be permitted to testify at a hearing on a criminal charge against a person who had allegedly attempted to extort money from one of them. The permission was granted by the Ambassador, Count von Bernstorff, on behalf of the German Government "in this special case by way of exception."

In 1922 a telegram was sent to Mr. Bakhmeteff by the Sergeant-at-Arms of the United States Senate,

asking him to appear before the Committee on Education and Labour and saying that the notice should be considered as service of subpoena. The Department of State wrote to the Vice-President pointing out that since 1917 the Government of the United States had recognized Mr. Bakhmeteff as the Ambassador Extraordinary and Plenipotentiary of Russia, and that under ss. 4062 to 4064 of the Revised Statutes he was not required to respond to process.

In a letter from the Under-Secretary of State of the United States to the United States Minister to Poland (Mr. Gibson) in 1922, he said :

> It appears that the Ministry of Foreign Affairs stated, in its note verbale to the Legation of May 20, 1922, that the "Polish law does not go to the extent of establishing that a diplomat may not be cited as a witness in a lawsuit," and that the Ministry of Foreign Affairs therefore considers that it is proper for it to transmit to your Legation any process issued by a Polish Court, summoning a member of the Legation's staff to appear as a witness. It seems, however, that it is admitted by the Polish Government that in such cases the person summoned would not, because of his diplomatic immunity, be compelled to respond to the summons.
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> It is suggested that you inform the Ministry of Foreign Affairs that under the generally recognized principles of international law the registered personnel of a foreign diplomatic mission are exempt from judicial citation, and that this Government considers that the course followed by the Polish Government in transmitting to the Legation processes issuing out of Polish Courts, summoning members of the Legation's staff to appear as witnesses, is not in accord with these principles. You may add, however, that in appropriate cases where the testimony of a member of the Legation's staff is desired in furtherance of the administration of justice you will, upon the receipt of a communication from the Ministry of Foreign Affairs requesting that the question of waiving immunity be considered, take up the matter with your Government.

The Department of State transmitted to the Attorney-General of the United States in 1923, a summons commanding the Secretary of the Peruvian Embassy in Washington to appear in a Court of the District of Columbia to testify on behalf of the United States. The Department pointed out that the Secretary's name appeared on the list of diplomatic officers furnished to the marshal of the District of Columbia and said that in view of the immunity of foreign diplomatic officers from the jurisdiction of local Courts it was evident that the summons should not have been served. The Attorney-General was requested to bring the matter to the attention of the United States district attorney in order to prevent the service of such papers thereafter on foreign diplomatic officers.

Permission was given by the Department of State, in 1933, to the ambassador to Brazil to waive the immunity of the commercial attaché of the Embassy at Rio de Janiero and to permit him to give evidence in proceedings against a former clerk of the office charged with the embezzlement.

In 1933, the commercial attaché to the United States Embassy at Brussels was requested to give evidence in an automobile accident; permission was given to him to submit his deposition as a witness of the accident. In the same Embassy, in 1928, a clerk was asked, through the Belgian Foreign Office, to testify as a witness to an accident. The Department of State granted permission on the understanding that the business of the mission was not concerned, *and that the Belgian Government would reciprocate should a similar case arise in the United States.*

In the civil case, *Banco de Espana* v. *Federal Reserve Bank of New York*, (1939) 28 F. Supp. 958, an action in replevin to recover certain silver in the United States Assay Office, the plaintiff objected to the receipt in evidence of an affidavit of the former Spanish Ambassador to the United States on the ground that it did not appear that the Ambassador's Government authorized him to make the affidavit and to waive his immunity from testifying. The District Court of the United States for the Southern District of New York found that all the surrounding circumstances seemed to indicate that he made the affidavit with the full knowledge and approval of his Government. The Court, at p. 972, said :

> The immunity from testifying is something to be claimed by an ambassador. If he testifies voluntarily, without the authorization of his Government, that is a matter between him and his Government. "It deprives him neither of his competency, nor of his credibility." *United States* v. *Ortega*, 4 Wash. C.C. 531, 27 Fed. Cas. 359, 361, No. 15,971. The third party has no right to assert it for his own benefit.

A public minister, of course, is not subject to process in a foreign Court, and there are, perhaps, some matters in respect of which an ambassador's certificate might not be admissible; but, when he certifies to the law of his country or to the personnel and authority of officials of his government, such certificate is clearly admissible as proof of the facts therein set forth : *Agency of Canadian Car and Foundry Co., Limited, et al.* v. *American Can Co.*, (1918) 253 Fed. 152, 157.

In another kind of case, in 1936, the Second Secretary of a United States Embassy was requested by an attorney in New York to testify as to an execution before him of a release of a dower while he was on duty in the United States Consulate-General in Paris. The Department of State said that it saw no objection to his so testifying in the interests of justice, since the evidence appeared to relate only to the execution of the instrument mentioned and to the identification of his signature.

In all the examples given above where the State Department was asked to advise whether or not a person having diplomatic immunity from Court process should, in the particular case, waive his immunity, the status of the member of the United States embassy or legation was not in question.

The difficulties that may arise in New Zealand *regarding prospective witnesses in civil or criminal* proceedings begin with the ascertainment if that person is entitled, in New Zealand, to claim diplomatic immunity and refuse to give the evidence that is required.

We have not overlooked this initial difficulty; but so far we have endeavoured to state the principles, and, where possible, the practice, applicable when a person claiming diplomatic immunity is sought as a witness. As that immunity is the same in principle as that referable to any proceedings in the Courts of the receiving country, we have had first to state those principles.

In our final article, we shall explain how the right to diplomatic privilege from Court process may be ascertained in New Zealand by any practitioner whose instructions involve the taking of process or the issuing of a subpoena against some person, who is, officially or otherwise, connected with a foreign legation in this country. And, in concluding this series of articles, we hope to set out in detail the steps that should be taken to obtain final and authoritative information on the point in relation to any relevant circumstances that may arise.

SUMMARY OF RECENT JUDGMENTS.

NELSON HOSPITAL BOARD v. COOK.

COURT OF APPEAL. Wellington. 1946. March 6; April 17. MYERS, C.J.; BLAIR, J.; KENNEDY, J.; CALLAN, J.

Hospital and Charitable Institutions—Limitations of Action—Board's Liability for Acts done by Persons not engaged in Professional or some Analogous Capacity—Notice of Action—Application of Ejusdem generis *Rule—"Or other person"—Hospitals and Charitable Institutions Amendment Act, 1936, s. 2.*

Section 2 of the Hospitals and Charitable Institutions Amendment Act, 1936, has relation only to such persons as are employed or engaged by a Hospital Board in the capacity of "medical practitioner, dentist, matron, nurse, midwife, or attendant," or in some analogous capacity—namely, persons who in the course of their duty come into immediate contact with patients and are in some way associated with the treatment of patients.

Sluggish River Drainage Board v. *Oroua Drainage Board*, [1944] N.Z.L.R. 445, applied.

Auckland Hospital and Charitable Aid Board v. *Lovett*, (1892) 10 N.Z.L.R. 597, and *Logan* v. *Waitaki Hospital Board*, [1935] N.Z.L.R. 385, referred to.

So held, by the Court of Appeal, affirming the judgment of Finlay, J., reported [1945] N.Z.L.R. 110.

Quaere, per Myers, C.J., Whether the action was one for damages for breach of contract, and if so, whether s. 2 of the Hospitals and Charitable Institutions Act, 1936, applied.

Vincent v. *Tauranga Electric-power Board*, [1933] N.Z.L.R. 902, aff. on app. [1936] N.Z.L.R. 1016, referred to.

Council: *Fell*, for the appellant: *Cleary* and *Arndt*, for the respondent.

Solicitors: *Fell and Harley*, Nelson, for the appellant; *O'Donovan and Arndt*, Wellington, for the respondent.

GREAR v. COMMISSIONER OF STAMP DUTIES.

COURT OF APPEAL. Wellington. 1946. March 12; April 17. MYERS, C. J.; BLAIR, J.; KENNEDY, J.; CALLAN, J.; FINLAY, J.

Public Revenue—Death Duties (Estate Duty)—Deduction of Duty payable on Property situated out of New Zealand—"Country in which it is situated" at Deceased's Death—Company Shares—Shares owned by Deceased in Company registered in one Australian State and transferable there—Death Duty paid in that State—Same Shares attracting Death Duty in another Australian State—Both Payments of Duty deductible in New Zealand—Death Duties Act, 1921, s. 32.

Where property is situated in a constituent State of a federal State, such as the Commonwealth of Australia, it is the whole area of the federal State and not the constituent State that is the "country" in which such property is "situated" for the purpose of s. 32 of the Death Duties Act, 1921.

A person, who died domiciled in New Zealand and who appointed residents of New Zealand to be her executors, owned at her death shares some of which were situated in Victoria and the remainder situated in New South Wales. Some of the companies in which such shares were held carried on business in Queensland; and, on the deceased's death, the shares owned by the deceased in such companies were by a statute of the Queensland Legislature deemed to be situated in Queensland and in respect of such shares, duty was declared by such statute to be payable in Queensland in like manner as if such companies were incorporated and registered under the law of Queensland. Another company in which such shares were held also carried on business in Western Australia, and, by virtue of a statute of the Western Australian Legislature, duty on the shares owned by the deceased in such company was declared to be payable in Western Australia.

The executors paid the duty claimed by the State of Queensland and Western Australia respectively, and claimed that they were entitled to the benefit of s. 32 of the Death Duties Act, 1921, in respect of such duty as well as in respect of the duty paid to the Revenue authorities of the Commonwealth and of Victoria and New South Wales.

On appeal from the judgment of Johnston, J., reported [1945] N.Z.L.R. 708,

Held, That the duty lawfully payable in Queensland and Western Australia came within the provisions of s. 32.

Attorney-General v. *Australian Agricultural Co.*, (1934) 34 N.S.W. S.R. 571, *R.* v. *Williams*, [1942] A.C. 541, *Brassard* v. *Smith*, [1925] A.C. 371, and *Eric Beach Co., Ltd.* v. *Attorney-General for Ontario*, [1930] A.C. 161, referred to.

Appeal from the decision of Johnston, J., reported [1945] N.Z.L.R. 708, allowed.

Counsel: *G. G. G. Watson*, for the appellants: *Byrne*, for the respondent.

Solicitors: *Pringle and Gilkison*, Wellington, for the appellants; *Crown Law Office*, Wellington, for the respondent.

THOMSON v. THOMSON.

SUPREME COURT. Auckland. 1946. April 11. FAIR, J.

Divorce and Matrimonial Causes—Separation (as a Ground of Divorce)—Separation Agreement—Separation implied by Course of Conduct—Discretion—Whether Something short of Wrongful Conduct justifies Exercise of Court's Discretion to refuse a Decree when Wife Opposes same—Divorce and Matrimonial Causes Act, 1928, s. 18.

A course of conduct may show an intention to separate temporarily and then continue for such time as to show an implied agreement to the permanent separation of husband and wife.

The language of s. 18 of the Divorce and Matrimonial Causes Act, 1928, which gives the Court in certain cases "a discretion as to whether or not a decree shall be made," indicates that something short of wrongful conduct justifies the exercise of that discretion where a respondent opposes.

The petitioning husband was fifty-four and the wife seventeen, when they were married. The husband left his wife from ten to twelve years before he petitioned for a divorce upon the grounds of an agreement for separation. The ages of the children varied from nine to four years. After his departure, the wife had the whole burden of bringing up the children. During the separation the petitioner paid her for maintenance an amount that necessitated her restricting her own personal expenditure to a minimum.

In view of the fact that the wife's position might be seriously prejudiced if the petition were granted, as the petitioner might marry again, and her rights under the Family Protection Act, 1908, in the event of his death would be lost, and her right to maintenance might be endangered,

Held, That, assuming there was an agreement, tacit or express, for permanent separation, the Court should exercise its discretion and dismiss the petition.

Counsel: *Holland* and *Lennard*, for the petitioner: *Cooney*, for the respondent.

Solicitors: *W. S. Holland*, Tauranga, for the petitioner: *D. J. Thomson*, Whangarei, for the respondent.

WOOD v. BARBER.

SUPREME COURT. Hamilton. 1946. February 12; April 15. BLAIR, J.

Rent Restriction—Boarding-house of Thirty Rooms let to Tenant who occupied One Room and his Housekeeper Another—Whether "let as a dwellinghouse"—Whether application of Principal Act excluded—Fair Rents Act, 1936, ss. 2, 15—Fair Rents Amendment Act, 1942, ss. 3, 6.

A thirty-roomed building known as the Midland Private Hotel, and built for a boarding-house or private hotel, which at the time of the lease to the defendant was used as a private hotel or boarding-house, was let on December 12, 1943, to the defendant by a lease in which he was described as boarding-house keeper and which contained no covenant requiring the lessee to carry on the boarding-house business or any covenant

relating to the purpose for which the premises might or might not be used. He conducted the premises as a boarding-house during the term of his lease, himself residing upon the premises and occupying one bed-sitting room. His housekeeper, who assisted in the conduct of the boarding-house also had a room on the premises.

On the expiry of the term of the lease, the defendant refused to vacate the premises. In an action for possession by the purchaser of the premises,

Held, 1. That the premises were not "let as a dwellinghouse" within the meaning of s. 3 of the Fair Rents Amendment Act, 1942, but for purely business premises as a boarding-house.

2. That s. 6 (1) of that statute did not apply, as the occupation of the premises by the tenant and his housekeeper was for the purpose of his business.

Epsom Grandstand Association, Ltd. v. *Clarke*, (1919) W.N. 170; 35 T.L.R. 525, *Hicks* v. *Snook*, (1928) 93 J.P. 55, and *Vickery* v. *Martin*, [1944] 2 All E.R. 167, distinguished.

Counsel: *Tompkins*, for the plaintiff: *Dickson*, for the defendant.

Solicitors: *Tompkins and Wake*, Hamilton, for the plaintiff: *J. F. W. Dickson*, Auckland, for the defendant.

In re REID (DECEASED), GUARDIAN, TRUST, AND EXECUTORS CO. OF N.Z., LTD. v. REID AND OTHERS.

SUPREME COURT. Wanganui. 1945. November 8. 1946. March 29. FINLAY, J.

Public Revenue—Death Duties (Estate and Succession Duties)—Will—Construction—Dutiable Estate—Direction by Will to pay out of Proceeds of Realization of Residue "all my just debts funeral and testamentary expenses including death duties"—Whether Direction sufficient to Displace Statutory Incidence of Liability—Gift made by Testator in his Life-time notionally included in Estate for Death-duty Purposes payable—Whether Succession Duty thereon payable out of Estate or by Donee—Death Duties Act, 1921, ss. 5 (1) (b), 28, 29, 30, 31 (2).

In his lifetime a testator made a gift to R., which gift, owing to the provisions of s. 5 (1) (*b*) of the Death Duties Act, 1921, was notionally included in the estate of the deceased for death-duty purposes. By his will the testator gave the residue of his estate to his trustee to realize and stand possessed of the proceeds thereof upon trust to pay thereout "all my just debts *funeral and testamentary expenses including death duties*," and to divide and pay the residue as directed.

On an originating summons for the interpretation of the said will the question (*inter alia*) was asked whether the amount of death and succession duties on the said gift was payable by the estate of the deceased testator or by R.

Held, That, whether a clear and explicit direction is necessary, or whether the test is the expression of a clear intention, or there is a need for clear and explicit language, or whether it is sufficient if the intention can merely be made out from the will, there was clearly insufficient in the said will to justify the displacement of the statutory incidence of liability, and death duty was payable by the beneficiary.

Hill v. *Hill*, (1936) 49 C.L.R. 411, applied.

In re Houghton, McClurg v. *New Zealand Insurance Co., Ltd.*, [1945] N.Z.L.R. 639, distinguished.

In re Gollan, [1935] G.L.R. 48, *O'Grady* v. *Wilmot*, [1916] 2 A.C. 231, *Permanent Trustees Co.* v. *Weekes*, (1929) 47 N.S.W. W.N. 86, and *Perpetual Trustees Co., Ltd.* v. *Luker*, (1932) 33 N.S.W. S.R. 85, referred to.

The case is reported on this question only.

Counsel: *A. G. Horsley*, for the plaintiff company; *C. P. Brown*, for testator's daughters; *G. W. Currie*, for the defendants, M. M. Reid and C. K. Reid; *C. F. Treadwell*, for the children of E. B. Reid; *Hussey*, for J. L. Higgins, and W. H. Moore; *M. J. Burns*, for L. R. W. Reid, in his personal capacity.

Solicitors: *H. G. and A. G. Horsley*, Wanganui, for the plaintiffs; *Watt, Currie, and Jack*, Wanganui, for the defendants, M. M. and C. E. Reid; *C. P. Brown*, Wanganui, for the defendants, the testator's three daughters; *Treadwell, Gordon, Treadwell, and Haggitt*, Wanganui, for the children of E. B. Reid, in his personal capacity; *Horner and Burns*, Hawera, for the defendant, L. R. W. Reid; *J. M. Hussey*, Wanganui, for J. L. Higgins and W. H. Moore.

A. E. POTTS AND CO., LTD. v. UNION STEAM SHIP CO. OF NEW ZEALAND, LTD.

SUPREME COURT. Auckland. 1945. October 10, 12. 1946. March 20. FINLAY, J.

Shipping and Seamen—Bill of Lading—Clear Bill of Lading except for endorsement "Packages insufficient"—Pillage not Cause of Loss or Damage arising or resulting from "insufficient package"—Inadmissibility of Evidence designed to show the contrary—"Any other cause"—Rule 2 (q) of Article IV of Rules in Schedule to Sea Carriage of Goods Act, 1940—Whether ejusdem generis rule applies—"Fault or neglect"—Avoidance by Carrier of Liability for Loss by Pillage—Sea Carriage of Goods Act, 1940, Schedule Art. IV, RR. 2 (i), (n), (q).

Under a through bill of lading twenty-five bales of Indian cotton towels were initially consigned from Bombay to the plaintiff at Auckland. The bales were transhipped at Sydney and were there, with other goods, consigned by Burns, Philp, and Co., Ltd., to Auckland, under a shipper's receipt (which is in character a bill of lading and was issued by the defendant company). It covered in all one hundred and eighty-six packages of which the said twenty-five bales found part.

The shipper's receipt was clear except for the indorsement "packages insufficient." The endorsement was apparently intended to apply to all the one hundred and eighty-six packages. The explanation was that, under war conditions, shippers had been unable to secure wooden casing and had been compelled, in consequence, to resort to the use of fabric materials as coverings. In the shipper's receipt, there was an express recital that "except as otherwise noted on the bill of lading the goods specified on the face hereof are received in apparent good order and condition." The shipper's receipt was expressed to be subject to the rules in the Schedule to the Sea Carriage of Goods Act, 1924 (Australia), (which rules are identical with the New Zealand Sea Carriage of Goods Act, 1940), upon which the learned Judge for purposes of reference was invited to found his consideration.

The plaintiff company in due course, following payment by them, took up the necessary documents and obtained possession of the twenty-five packages. It was then found that some of them had been pillaged.

Rules 2 (*i*), (*n*) and (*q*) relating to Bills of Lading in the Schedule to the Sea Carriage of Goods Act, 1940, are as follows:—

"2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:

"(*i*) Act or omission of the shipper or owner of the goods, his agent or representative:

"(*n*) Insufficiency of packing:

"(*q*) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier: but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

At the request of all parties, in an action by the plaintiff company against the defendant company, the Court ordered four questions to be argued before the trial of the action, with the object, *inter alia*, of obtaining a decision as to the rights of the defendant company to call evidence to show that the pillage had occurred before the goods were accepted by the defendant company. Those questions were as follows:—

1. Upon the true interpretation of Art. IV, R.R. 2 (*i*) and (*n*) of the Schedule to The Sea Carriage of Goods Act, 1924 (Australia), do the words "insufficiency of packing" under any circumstances confer on the shipowner an immunity from liability for loss or damage by pillage?

2. Having regard to the endorsement "packages insufficient" appearing on the bill of lading, the subject of this action, can the defendant in an action by an endorsee for value of the said bill of lading adduce evidence tending to show that any pillaging of the goods comprised in the said bill of lading arose or resulted from the inherent nature of the envelope or container or from damage or injury which the said envelope or container may have sustained?

3. Having regard to the endorsement "packages insufficient" appearing on the bill of lading, the subject of this action, is the defendant in an action by an endorsee for value of the said bill of lading estopped to any extent from relying upon evidence as to damage or injury to the container or envelope itself (including evidence of prior pillaging) which would have been apparent on reasonable examination?

4. Upon the true interpretation of the bill of lading, the subject of this action, is the shipowner liable for loss occasioned by thieves after the goods have come into his care, but arising without the actual fault or privity of the shipowner and without the fault or neglect of his agents or servants?

Held, 1. That the phrase "insufficiency of packing" in R. 2 (*n*) of Art. IV in the said rules has relation solely to results attributable to such causes as the wear and tear of stowage and the strains and stresses incident to transportation and that pillage is not a source of loss or damage which can properly be said to arise or result from insufficient packing.

Paterson Steamships, Ltd. v. *Canadian Co-operative Wheat Producers, Ltd.*, [1934] A.C. 538, and *Dunham* v. *Clare*, (1902) 71 L.J.K.B. 683, applied.

Hence the answers to the first and second questions were, No.

2. That the defendant having given a clear bill of lading except for the endorsement "packages insufficient," it could not merely, on that account, contradict its own representation by calling evidence to show that the goods or some of them had then already been pillaged if such damage was obvious or was such as reasonable examination would have shown.

Silver v. *Oceanic Steamship Co., Ltd.*, [1930] 1 K.B. 416, *Compania Naviera Vasconzada* v. *Churchill and Sim*, [1906] 1 K.B. 237, *Evans* v. *James Webster and Bros., Ltd.*, (1928) 34 Com. Cas. 172, and The *Skarp*, [1935] P. 134, applied.

Hence the answer to the third question was, Yes, to the extent that such evidence is designed to establish a condition at variance with the condition represented by the bill of lading.

3. That, in the interpretation of the said R. 2 (*q*), the *ejusdem generis* rule does not apply, as there is no class common to all the exceptions; and the words "any other cause" therein must be given their ordinary and natural meaning and the words "fault or neglect" in that rule are not definitive of the scope of the words "any other cause," they are employed for a different purpose—namely, to prescribe a condition upon which certain of the causes comprehended in the expression "any other cause" are not to result in liability upon the part of the carrier.

A carrier can, therefore, avoid liability for loss by pillage under the said R. 2 (*q*), provided he can show that there was neither actual fault nor privity in him nor fault or neglect in his servants or agents.

Hence, the answer to the fourth question was, No.

As to *ejusdem generis* rule: *National Association of Local Government Officers* v. *Bolton Corporation*, [1943] A.C. 166, [1942] 2 All E.R. 425, *Anderson* v. *Anderson*, [1895] 1 Q.B. 749; and *S.S. Magnhilde (Owners)* v. *McIntyre Bros. and Co.*, [1921] 2 K.B. 97, applied.

As to the avoidance of liability for loss or pillage: *Heyn* v. *Ocean Steamship Co., Ltd.*, (1927) 137 L.T. 158, and *Brown and Co.* v. *T. and J. Harrison*, (1927) 96 L.J.K.B. 1025, applied.

Paterson's Steamships, Ltd. v. *Canadian Co-operative Wheat Producers, Ltd.*, [1934] A.C. 538, and *Shaw* v. *Great Western Railway Co.*, [1894] 1 Q.B. 373, distinguished.

Counsel: *Richmond* and *West*, for the plaintiff; *Burrowclough* and *Hamer*, for the defendant.

Solicitors: *Jackson, Russell, Tunks, and West*, Auckland, for the plaintiff; *Russell, McVeagh and Co.*, Auckland, for the defendant.

DIRECTIONS IN WILL AS TO PAYMENT OF DEATH DUTY.

Incidence of Liability of Successors inter se.

By E. C. ADAMS, LL.M.

The recent judgment of Mr. Justice Finlay in *In re Reid deceased*), *Guardian, Trust, and Executors Co. of New Zealand, Ltd.* v. *Reid* (*ante*, p. 117), abundantly justifies the criticism of the learned Editor of this JOURNAL, in his leader in (1945) 21 N.Z.L.J. 267, of last year's majority decision of the Court of Appeal in *In re Houghton, McClurg* v. *New Zealand Insurance Co., Ltd.*, [1945] N.Z.L.R. 639.

The Editor, in the course of a comprehensive review of the authorities, dwelt on the fact that an important decision of the highest Court in Australia, *Hill* v. *Hill*, (1933) 49 C.L.R. 41, had not been cited in *In re Houghton* (*supra*). Finlay, J., applying the principle laid down in *Hill* v. *Hill*, and distinguishing *In re Houghton*, held that a testamentary gift in these words, "Upon trust to pay thereout all my just debts funeral and testamentary expenses including death duties and to divide the residue." &c., were not sufficient to throw the burden of death duty payable in respect of deceased's notional estate (a gift *inter vivos*) on to the residue. His Honour said:

> As it is, the sole subject of inquiry to whether there is any direction in this particular will which would justify the Court in holding that the testator intended to vary the statutory incidence of duty. That, as has been said, is tantamount to giving Lionel Roy William Reid [the donee under the gift *inter vivos*] a legacy equal in amount to the rateable proportion of the duty which is chargeable on the gift to him. At best, the expression "including death duties," standing alone as it does in this will, is equivocal. It might refer to all the duties payable both on the actual and the notional estate, or it might refer only to the duties payable on the actual estate. There is nowhere in the will, nor in any circumstance to which the Court can have regard, any indication of which of these meanings expresses the testator's intention.
>
> The literal meaning, in short, is ambiguous. To hold that it is not so would require that the judgments of the majority in *Hill* v. *Hill* should be completely disregarded. This, as I understand the judgments in *In re Houghton*, I am not constrained to do. If my view in this is not correct then it follows that every testator who wishes to limit the payment of duty out of his estate to gifts made by his will must avoid the simple and commonly adopted words here employed and must either expressly declare that the duty is to be paid only on the gifts made by the will or, alternatively, expressly provide that duty is not to be paid on the notional estate. This is a perversion of the statutory rule which is that there must be a direction if the statutory incidence of duty is to be altered.

There is no doubt that this is a very common clause in a will, and I think that until *In re Houghton* (*supra*) cast its dubious shadow, it was the universal opinion of conveyancers and draftsmen of wills in New Zealand that *prima facie* a direction by a testator "to pay *my* death duties" or to pay "death duty payable in respect of *my* estate," did not embrace duty payable in respect of deceased's notional estate. There must be hundreds of wills in New Zealand which have been drafted on this assumption.

The present position, however, is not very satisfactory; for the crucial words in *In re Houghton*, were really not so very different from those in *In re Reid*. The most that can be said is that there is more "breadth of language" in the words in *In re Houghton*. It is therefore to be hoped that, if a similar question

comes before our Court of Appeal, the question will be argued before *both* Divisions. It is often more important that the law should be certain, than that it should be strictly logical. It is submitted that in these matters the principle of *stare decisis* should apply. With the very high rates of death duty now prevailing, it is often a most serious thing to throw the burden of *all* the death duty on to the residue: there may be very little left for the residuary legatee—a result which the testator may not have intended. It should not be inferred or assumed that he intended, to the detriment of the residuary legatee, to make a legacy to the beneficiary of the notional estate, for that is its actual effect if the direction embraces notional estate.

The writer ventures to predict that *In re Houghton* will be applied by our Courts as a binding authority only for what it actually decides: see *Quinn* v. *Leatham*, [1901] A.C. 495, 506.

If possible, a Court of first instance will distinguish it, and follow the principles as laid down in *Hill* v. *Hill* (*supra*), and by the House of Lords in *O'Grady* v. *Wilmot*, [1916] 2 A.C. 231. It is respectfully submitted that Mr. Justice Callan in the Court of first instance correctly explained and applied previous New Zealand cases, and that the dissenting judgment of His Honour the Chief Justice was correct.

In re Houghton, however, will be a useful authority in at least two respects: (1) It authoritatively determines that a testator by the use of apt words may throw the burden of the death duty payable in respect of his notional estate on to his free or transmissible estate. His Honour Mr. Justice Johnston, literally interpreting a provision in our Act, had held to the contrary in *In re Mathias*, *Johnstone* v. *Laurence*, [1934] N.Z.L.R. 424.

(2) It shows that in considering whether or not apt words have been used to produce that effect, the surrounding circumstances will be looked at.

INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST.

The Judges and Prosecutors.

The following Judges constitute the International Military Tribunal for the Far East:

Commonwealth of Australia: The Hon. Sir William Webb, Chief Justice of the Supreme Court of Queensland, and maker-designate of the High Court of Australia, President.

Dominion of Canada: The Hon. Mr. Justice E. Stuart McDougall, Court of King's Bench, Montreal, Quebec, Canada.

Republic of China: The Hon. Ju-Ao Mei, Acting Chairman of Foreign Affairs Committee, and Legislative Yuan.

Republic of France: The Hon. Henri Bernard, Advocate-General Première Classe.

United Kingdom of Great Britain and Northern Ireland: The Hon. Lord William Donald Patrick, Senator of His Majesty's College of Justice in Scotland and Judge of Court of Session in Edinburgh.

Kingdom of the Netherlands: The Hon. Mr. Justice Bernard Victor A. Roling, Judge in Utrecht Court and Law Professor at the University of Utrecht.

Dominion of New Zealand: The Hon. Mr. Justice E. H. Northcroft, of the Supreme Court of New Zealand.

Union of Soviet Socialist Republics: The Hon. Mr. Justice I. M. Zaryanov, Major-General of Justice, of Military Collegium of Supreme Court of Soviet Union; and

United States of America: The Hon. Mr. Justice John P. Higgins, Chief Justice of the Superior Judicial Court of Massachusetts.

International Prosecution Panel.

The International Prosecution Section comprises Mr. Joseph B. Keenan, Chief of Counsel; and the following associate prosecutors:

Commonwealth of Australia: Mr. Justice Mansfield, Judge of the Supreme Court of Queensland; and assistant, Mr. Alistair Rose Macdonald.

Dominion of Canada: Brigadier Henry Grattan Nolan, C.B.E., M.C., K.C., Vice Judge-Advocate-General at National Defence Headquarters, Ottawa.

Republic of China: Judge Che-Chun Hsiang, Chief Prosecutor, Shanghai High Court, and assistant, Mr. Henry Chiu, Lawyer and Law Professor.

Republic of France: M. Jean Oneto, Procureur of the Republic, of Melum.

United Kingdom of Great Britain and Northern Ireland: Mr. A. Comyns Carr, K.C., British Associate Prosecutor, and the following assistants: Mr. T. Christmas Humphreys, Crown Prosecutor at the Old Bailey, London; Mr. Reginald Spencer-Davies, of the English Bar and formerly an Army Officer; and Mr. Maurice Reed, Legal Adviser of the Attorney-General's Office, who was a member of the War Crimes Commission at the Nuremberg trials.

Kingdom of the Netherlands: Dr. W. G. F. Borgerhoff Mulder, Justice in the Special Court for War Criminals in The Hague.

Dominion of New Zealand: Brigadier R. H. Quilliam, of the New Zealand Bar.

Commonwealth of the Phillippines: Pedro Lopez, Lawyer, member of Philippine Congress, and head of Philippines United Nations Organization delegation in London; and

Union of Soviet Socialist Republics: Minister S. A. Golunsky, Director of Judicial Science.

LAND SALES COURT.

Summary of Judgments.

The summarized judgments of the Lands Sales Court, which appear as under, are published for the general information and assistance of practitioners. They are not intended to be treated as reports of judgments binding on the Court in future applications, each one of which must be considered on its own particular facts. The reasons for the Court's conclusions in any one appeal may, however, be found to be of use as a guide to the presentation of a future appeal, and as an indication of the Court's method of considering and determining values.

No. 74.—G. to B.

Urban Land—Civil Purchaser applying for Consent to Sale to him—Returned Servicemen intervening and asking Consent to Sale to him—Value not in Dispute—Consent given subject to Condition—Excess of Committee's Jurisdiction.

Under an agreement dated August 1, 1945, the vendor agreed to sell to the purchaser a house property situated in Dunedin for £1,050. The purchaser was a Police constable and a civilian. One, H. of Dunedin, a dental mechanic and a serviceman who had seen service overseas, wished to buy the property and appeared at the hearing before the Otago Land Sales Committee as an interested party.

There was no dispute as to value and the Committee made an Order granting consent to sale in the following terms:—

"Granted subject to the condition that H. of Dunedin, dental mechanic, become the purchaser under contract dated August 1, 1945, made by the applicant as vendor at £1,050 and that applicant take necessary steps to amend such contract in accordance with this order."

The purchaser, B., appealed against the Committee's decision.

The Court said: "The decision of the Committee in this case is founded upon a jurisdiction which the Servicemen's Settlement and Land Sales Act, 1943, does not confer.

"There is nothing in the statute which entitles a Committee to force upon a vendor a purchaser selected by it. A person wishing to sell is entitled to choose his own purchaser, and the Committee is concerned under Part III of the Act solely with the terms of the bargain made between the vendor and his accepted purchaser.

"Having regard to its novelty and far-reaching effect, a right entitling a Committee to compel a vendor to accept a purchaser selected by it would need to be clearly conferred by legislation. Until it is so conferred, the Supreme Court could and, if its aid were invoked, would doubtless interfere by *certiorari*.

"This absence of jurisdiction is fatal to the Committee's decision. The case is therefore referred back to the Committee. As no question of price seems to be involved, the Committee will no doubt consent to the sale to the appellant".

No. 75.—C. Estate to M.

Rural Land—Undue Aggregation—Application for Consent to Agreement for Sale at Auction—Intervention by Two Unsuccessful Bidders claiming Undue Aggregation by Applicant—No Status—"Or otherwise"—Servicemen's Settlement and Land Sales Act, 1943, s. 19 (2).

The property the subject of this application was situated at Matarua Island, and comprised 126 acres 3 roods 13 perches. It was sold at auction to the purchaser at a price of £1,997 11s. 10d., or approximately £15 15s. per acre. The purchaser already owned a farm property, and wished to acquire this additional property for winter grazing his stock.

Messrs. S. and H. were unsuccessful bidders at the auction. Mr. S. was the owner of a farm of 227 acres contiguous to the property the subject of the application. Mr. H. had no land but did farm work in the district.

At the hearing before the Invercargill Land Sales Committee Messrs. S. and H., as objectors, were represented by Mr. Alan Smyth, who, on their behalf, opposed the grant of consent to sale to the purchaser, M. The Committee refused its consent on the ground of undue aggregation.

The vendor appealed to the Land Sales Court.

The Court said: "Neither Mr. S. nor Mr. H. had any right to appear as parties or to be heard. Section 19 (2) of the Servicemen's Settlement and Land Sales Act, 1943, postulates that to have such a right a person must have some interest arising out of a legal or quasi-legal relationship; the phrase 'or otherwise' cannot be construed as entitling any one at all to appear and be heard. There cannot be a unilateral 'proposed transaction' for a proposed tranaction is necessarily bilateral in character.

"Neither can the Committee force any particular private purchaser upon a vendor.

"Messrs. H. and S. and their circumstances were, at most, elements in the general body of factors to be considered by the Committee in relation to the question of 'undue aggregation.'

"The most that could be said of Messrs. H. and S. in this relation is that the former might become a purchaser if the Committee, on Mr. M.'s application, fixed a price which he (H.) considered acceptable to him, whilst the latter would buy at any price up to £13 12s. 6d. per acre, that being, he said, £2 per acre too high, but representative of the value of the land to him.

"'Undue aggregation' cannot be determined in relation to the desires of one or two individuals. The question envisages a wider view, as is enforced in several of the Court's decisions.

"Judged from that wider view, there seems no evidence of undue aggregation here. The Crown does not even so suggest. Mr. M. appears to need this land for the full development and more efficient farming of his present property. The area he seeks to acquire is by common consent an uneconomic unit and in the public interest some one should get it who will use it to its best advantage. Mr. H. does not appear to propose or to be able to do that.

"The appeal is allowed and the case referred back to the Committee to deal with the question of price and any other questions which may arise.

"On the question of price, the Committee will, it is assumed, keep 'potential value' in mind. The trustees are entitled to a fair price and that can only be secured to them if regard is paid to the fact that their land is so situate and is of such a character that it is of particular value to neighbouring property owners. The contest between Mr. S. and Mr. M. at the auction is indicative of the reality of the potential value".

No. 76.—B. Estate to T. Co-op. Co., Ltd.

Urban Land—Sale at Auction—Returned Serviceman's Unsuccessful Bid—Successful Bidder refused Consent at Auction Price—Recommendation by Committee to sell to Returned Serviceman—Sale to Highest Bidder by Private Contract at Basic Value—Consent refused on new Application—Excess of Jurisdiction of Committee.

This application related to the sale of a house property at Rangiora.

This property had been the subject of a previous application, between the same parties in respect of the sale of the property at auction for £1,300. That application was refused on the ground that the price was excessive and unreasonable. At the previous hearing it appeared that a returned soldier suffering serious war disabilities, and his sister, an airman's widow, had been bidders at the auction and were still anxious to purchase the property at their bid of £1,000 or at any lesser sum fixed by the Committee. The value of the property was not in excess of £965. In refusing the original application, the Committee intimated that, while it had no jurisdiction to compel the trustee to sell to the returned soldier, it considered he should give favourable consideration to so doing. The trustee, however, resold by private contract to the original purchaser, the T. Co-op. Co., Ltd., for £965.

The Christchurch Land Sales Committee held that in all the circumstances it had jurisdiction to refuse consent to this second application, and so refused accordingly. At the same time it expressed the view that, whilst it had no power to direct the vendor to sell to the returned serviceman, yet it, in effect, felt that the sale to him should be made.

The purchaser, the T. Co-op. Co., Ltd., appealed.

The Court said: "The Court is already bound by two judgments recently given by it. The substance of the first is that a vendor has an absolute right to select any purchaser he chooses, and that a purchaser selected by a Committee cannot be forced upon him. The point of the second is that only persons who

have a legal or quasi-legal status are entitled to appear and be heard.

"Two features relevant to the present proceedings evolve. In the first place, it is consonant with principle that what cannot be done by direct means cannot be done by indirect. The Committee cannot therefore deliberately create a condition purposely designed to compel or induce a vendor to sell to some purchaser other than the purchaser of his choice. Then, finally, the interveners for whom Mr. Lascelles appeared had no status.

"A recognition of the foregoing conceptions reduces the issues properly determinable by the Committee to such issues as arise in a transaction between the vendor and the T. Co-op. Co., Ltd.

"This raises the question whether the T. Co-op. Co., Ltd., could be regarded as in some sense disqualified as a purchaser by its having made an excessive bid at the auction. The application based on the contract made at the auction having been dismissed, it is difficult to see how any further disqualification could attach to the T. Co-op. Co., Ltd. On a new application based on a new contract, it had to submit to the complete jurisdiction of the Committee, and could gain no advantage from the preceding null and void contract.

"The case is remitted to the Committee for the consideration of all such questions as properly arise upon such an application. That is, of course, subject to the foregoing directions as to the special topics dealt with in this memorandum."

FAIR RENTS: DWELLINGHOUSE LET WITH FURNITURE.

After Letting without Furniture.

The decision in *Sail* v. *Taigel* (*ante*, p. 103) heard in Christchurch, on appeal, by Mr. Justice Johnston, is of considerable interest to landlords. The judgment appears to open the way for further judicial elaboration of the principles applicable to dwellinghouses let with the use of furniture.

It will be recalled that the definition of dwellinghouse in s. 2 of the Fair Rents Act, 1936 (as amended), includes both furnished and unfurnished houses.

> "Dwellinghouse," means any house or any part of a house . . . and includes any furniture that may be let therewith.

The questions have arisen, first, whether or not the same basic rent* applies to the letting without furniture as to a subsequent letting of the same premises with furniture; and secondly, whether or not the same basic rent applies to a letting with furniture as to a subsequent letting with new and additional furniture. In other words, is the Fair Rents Act to be so interpreted that once a dwellinghouse is let, its basic rent becomes determined irrespective of the subsequent installation (or removal) of furniture?

The cases reported turn upon the question whether or not the installation or removal of furniture effects a change in the character or identity of the dwellinghouse. As under the English Rent Restriction Acts, so in New Zealand, the conception of "identity" is in the words of McCardie, J., "a judicial innovation": *Darrall* v. *Whitaker*, (1923) 92 L.J.K.B. 882. The word does not occur in the statutes.

In *Collins* v. *Reid*: *Collins* v. *Billens*, (1944) 3 M.C.D. 443, two informations were heard together, in which each of the defendants was charged with accepting from a tenant on account of the rent of a dwellinghouse a sum irrecoverable by virtue of the Fair Rents Act, 1936, and its amendments in breach of Reg. 26 (*c*) of the *Economic Stabilization Emergency Regulations*, 1942 (Serial No. 1942/335, Reprint 1944/36). In *Billens's* case, a flat had been let unfurnished and later relet partly furnished. In *Reid's* case, it was a matter of substituting new and additional furniture upon a second letting. Each of the defendant landlords had increased the rent upon the second letting without obtaining a determination of a "fair rent." The ground of defence common to both cases was that the installation of furniture so operated as to change the identity of the dwellinghouse, and English cases were cited in support. In the course of his judgment Mr. H. P. Lawry, S.M., said:

> I find it impossible to see how in the circumstances of this case the decisions referred to [under the English legislation] can avail the defendant. Here there is no question of reconstruction of the dwellinghouse: and I fail to discern any analogy between the facts of those cases and those obtaining here. I do not see how the introduction of furniture can amount either in fact or in principle to a reconstruction of the premises; and, accordingly, I must hold that those decisions have no application to these cases. Moreover, our statute refers to a house, whether it is furnished or unfurnished: whence I deduce the house itself is the dominant element even in the case of a furnished house—the furniture itself constituting only a minor or subordinate ingredient. In my view, it is immaterial insofar as the application of the Act to particular premises is concerned whether furniture is added or removed. I repeat it is the house that determines whether or not the Act applies: because the Act relates to a house with or without furniture, but not to furniture with or without a house.
>
> I think, however, that a comparison of the English statute with our own gives the clue to the correct interpretation to be given to the language of our own regarding the premises covered by the legislation. In England a furnished house is excluded altogether from the provisions of the Act, while the opposite position obtains here. The terms of our own definition of "dwellinghouse," particularly those mentioning "furniture," do not convey any further meaning than the obvious natural meaning—namely, that a furnished house is within the purview of the Act. Even if furniture is introduced that fact does not and cannot so operate to remove particular premises from the scope of the statute. The house remains the same; its "identity" has not been destroyed . . .
>
> I would say that subs. (2) of s. 7† is a landlord's protective clause; it was enacted clearly in the interests of landlords, so that when on the evidence adduced by the landlord it appears to be fair and equitable that the basic rent should be exceeded, a Magistrate would have power to fix a rent in excess of the basic rent to a degree commensurate with the exigencies of the case.

Disagreement with this view of the law was expressed by Mr. W. H. Woodward, S.M., in *Butler* v. *Anderson*, (1944) 3 M.C.D. 539. Here the facts were that a flat which had been let unfurnished for 8s. 6d. a week as at September 1, 1942, was relet fully furnished on March 12, 1943, for 15s. a week. The learned Magistrate held that for the purposes of the Act the unfurnished flat was not the same dwellinghouse as the furnished flat. "I think," he said, "that, as a 'dwellinghouse' by the definition includes furniture, the addition or subtraction of furniture results, for the purposes of the Act, in a change in the identity of the dwellinghouse." Referring to that portion of the judgment in *Collins* v. *Reid*: *Collins* v. *Billens* (*cit. supra*), *dealing with a landlord's right to apply for an order* fixing a fair rent and alleging special circumstances under subs. (2) of s. 7, Mr. Woodward said:

* Fair Rents Amendment Act, 1942, s. 4 (1).

† (2) Subject to any regulations as aforesaid, the fair rent fixed as aforesaid shall not exceed the basic rent . . . unless the Magistrate is satisfied, by evidence produced by the landlord, that in the special circumstances of the case it is fair and equitable that the fair rent should exceed such basic . . . rent.

But it is also competent for a tenant to apply for such an order if the landlord asks too high a rent for the dwelling with furniture, and as the statute is one that invades the common-law rights of landlords I think that in the absence of an indication to the contrary the burden of making the application falls more justly on the tenant.

In *Sail* v. *Taigel* (*supra*) the facts closely resembled those in *Butler* v. *Anderson*. In the Court of first instance, the learned Magistrate (Mr. G. G. Chisholm, S.M.) found as a matter of fact that a flat when furnished had lost the character under which its previous rental was paid; and decided that the landlord, when he relet it as a furnished flat, was entitled to determine the new rent unhampered by the Act. On appeal in the Supreme Court, Johnston, J., (in an oral judgment), upheld the learned Magistrate's decision, and said:

> Our [New Zealand] provision that furniture let with a dwellinghouse comes within the Act is but a way of saying that it is subject to the Act. It is the case of furniture that is let with a house that is brought in. And such a case is distinct from a letting without a contemporaneous letting of furniture. The Act not only does not refuse to recognize the distinction between the subject-matter of a letting without or with furniture, it expressly recognizes it. But bringing both under the Act does not, in my opinion, lead to the conclusion that the basic rental must be for ever determined by the first letting whether that was with or without furniture, and irrespective of change from furnished to unfurnished or *vice-versa*. In short, the insertion of furniture does not close the well-established distinction between a lease of unfurnished premises and furnished premises.

In reference to the use of the words "let as such" in paras. (*a*) and (*b*) of subs. (1) of s. 4 of the Fair Rents Amendment Act, 1942, His Honour said:

> In my opinion, under s. 2 of the Fair Rents Act, 1936, a dwellinghouse means any house let as such; and when furniture is included the premises referred to are those let with furniture.

The learned Judge does not appear to have considered the judgment in *Collins* v. *Reid*: *Collins* v. *Billens*, or that in *Butler* v. *Anderson*, which were cited to him.

It is somewhat difficult to found propositions properly deducible from this decision. It may, however, be said, tentatively, first, that the addition of furniture between any two lettings of a dwellinghouse may, for the purposes of the Fair Rents Act, result in a change in the identity of the dwellinghouse; secondly, such a change, if it occurs, will justify the landlord in determining a new rent which will be the "basic rent" of the premises in their altered character; thirdly, the same principle will be applicable upon a removal of furniture in the same circumstances.

This view of the law has the virtue, as was said in His Honour's judgment, of retaining for the purposes of the Act "the well established distinction between a lease of unfurnished premises and furnished premises." And where furniture is inserted upon a second letting and a higher rent demanded, strict logic may forbid that this rent be termed an increase, for an increase is incompatible with the notion of a "basic rent."

On the other hand the decision leaves open the question how much furniture need be added or removed from a dwellinghouse in order to effect a change in identity. Under the English Rent Restriction Acts, which in general exclude dwellinghouses let "with the use of furniture," the position, judicially ascertained prior to 1939, was that any portion of furniture would satisfy the law unless the quantity was so negligible as to be ignored under the maxim *de minimis non curat lex*. (*Vide, e.g., Wilkes* v. *Goodwin*, (1923) 2 K.B. 86; 92 L.J.K.B. 580; 129 L.T. 44.) In *Reid's*, *Billens's and Anderson's* cases (*supra*) the learned Magistrates held that the furniture concerned was by no means negligible. Whether or not it should be held that the addition of a relatively small portion of furniture is sufficient to entitle the landlord to determine a new basic rent, the result of *Sail* v. *Taigel* will doubtless be to decrease landlords' pleas of "special circumstances" due to furniture added or removed when orders for fair rents are sought. At the same time, the revealed scope for landlords to determine new basic rents must be reflected in a general increase of rents for furnished houses, the burden being laid on tenants to challenge the rents fixed.

Initially, the Fair Rents Act was not a stabilizing measure. It was passed "to make temporary provision for the restriction of increases in the rent of certain classes of dwellinghouses" (*vide* the Preamble to the Act). But the measure had a stabilizing influence. For this reason, when the economy of the country was deemed to require it, the currency of the Act was extended, and the principle was extended by Emergency Regulations to cover other classes of premises.

It now appears that while the Court is restrained by the Fair Rents Act, 1936, from fixing a fair rent beyond the basic rent except where it considers that course warranted by "special circumstances," a landlord can bypass the express restrictions in the Act by determining a "basic rent" dependent, at his own valuation, on the factor of furnishings.

C

LAND AND INCOME TAX PRACTICE.

Standard Values of Live-stock.

The following statement of interest to practitioners, is supplied by the Land and Income Tax Department.

An opportunity for adjustment of taxation in cases where farmers bring the standard value of their live-stock to nearer actual market values is provided for in the Land and Income Tax Amendment Act, 1945. Before the passing of the amendment, no adjustment of this nature could be made except on the disposal of the whole or substantially the whole of a farmer's live-stock, but now, whether the live-stock is disposed of or not, the farmer has the right to write up the value of his stock and apply for relief in his income-tax assessment, provided he does so before June 30, 1946.

The effect of the legislation is best understood in relation to the general conditions under which farmers have adopted standard values for their stock. A general review of the position and of the effect of the new legislation is provided.

The amendment was made necessary because some farmers, when first they became liable for income-tax, adopted standard values which were below the real value of their stock at that time. In many cases that undervaluation has continued throughout the years up to the present time.

The amendment provides that the Commissioner of Taxes may grant appropriate relief in circumstances where it appears that the effect of having adopted such a low standard value at commencement may be to unduly increase the income upon which tax will be payable in the event of increase in standard values or on realization of the stock.

Any farmer who considers that the circumstances in his particular case come within the scope of the section may make formal application for relief and request particulars as to the extent to which relief may be available, and the nature of adjustments to standard values which may be necessary to obtain relief in the particular circumstances.

Application for relief must be made *not later than June 30, 1946*, otherwise no relief on these grounds can be granted.

F. G. OBORN,
Commissioner of Taxes.

How Standard Values work.—For income-tax purposes every farmer deriving income from live-stock is required, in computing his income, to take into account the value of his stock at the beginning and end of each year. In his return he deducts the cost of stock purchased and includes as income the amount realized on sale of stock. Any amount by which the amount realized on sale exceeds the cost, is profit which is correctly treated as income. If the end of a year comes between the dates of purchase and sale, it is necessary to place a value on the stock at the end of the year, otherwise one year's income would bear the whole of the purchase while the next year's would include the whole of the sale.

While fresh purchases are being made each year and the flock or herd is being maintained at a fairly constant level, the effect on income of the operation of this principle is negligible, but it is an important factor in a year when abnormal sales cannot be offset by equivalent purchases.

If stock is undervalued at the end of one year then additional income (to the extent of that undervaluation) is thrown into a subsequent year when the stock is sold, and unless the value adopted is kept in reasonable relation to average market values an inflation of the income of the final year is inevitable.

The stock on hand at the end of a year may be returned either at true (or market) values or at standard values. Owing to market fluctuations the true value of stock, particularly stock which has been reared and not acquired by purchase, may be difficult to ascertain. Another disadvantage in using true values is that when prices at the end of an income year are temporarily high the income is inflated by an amount which may not be ultimately realized.

As an alternative to the use of market values for tax purposes, provision was made for the use of standard values. Standard values are *not* merely nominal values with very little significance. They are in fact provisional values adopted to avoid the necessity for a complete revaluation of stock each year, and to smooth *temporary* fluctuations in market values.

The adoption of standard values has always carried the following conditions:—

(1) That if the stock is sold at prices in excess of the standard value the difference is assessable income.
(2) That if the stock is sold at prices less than the standard value, the difference reduces the assessable income.
(3) That a taxpayer who has adopted standard values may at the end of any subsequent year change over to market values.
(4) That the Commissioner of Taxes may, at the end of any year, require true values to be returned in lieu of standard values.
(5) That the Commissioner must concur with the original adoption of standard values and with any subsequent change in standard values.
(6) Any change in standard values or any change from standard to true values must first take effect at the *end* of an income year, as the stock on hand at the beginning of any year must be the same as the value adopted at the end of the preceding year.

To meet all possible contingencies the standard values should bear reasonable relation to actual values of the particular classes of stock carried, actual values being based on an average at March 31 (or other balance date) over a number of years.

It should be noted that a standard value, although fixed to smooth out temporary fluctuations, may be altered from time to time if there is a change in the class or quality of the stock, or if prices become more or less stabilized at figures which make the standard values previously adopted unreasonable. For example, standard values fixed in 1931 to 1933, which may have been reasonable in those years, may now be much too low. On the other hand, values adopted during war years may, in later years, be found to be too high.

Effect on Tax Position.—From these facts it will be seen that any farmer who in making his first return of income deducted the actual cost of his stock and has since written the value down, is justly liable for tax on the additional income arising from the disposal of his stock at high prices. Such an assessment of the whole of the income in one year is due to failure to raise his standard values in line with the increase in true values.

When making their first return for income-tax purposes some farmers used standard values much lower than true values, and consequently did not deduct the actual original cost. Instead, they included their stock on hand at the beginning of the year at the same values per head as the standard values adopted at the end of the year. In many cases these standard values were much lower than the true values which they were entitled to deduct, and this original undervaluation has been carried forward. When such a farmer dies, or sells out, or has to return market values, his income for the final period is inflated due to the fact that normally the valuation of commencing stock operates as a deduction from the proceeds of the ultimate realization of such stock. Where that commencing valuation is lower than true values, the result is that the net proceeds of the realization, being assessable as income, are increased by the amount of the initial undervaluation. Section 7 of the Land and Income Tax Amendment Act, 1940, enabled the Commissioner of Taxes to grant some relief from the assessment of tax on the amount of the original undervaluation in certain circumstances, and a large number of claims have already been dealt with. It has been found in the administration of this section that the various conditions contained in the section have, because of their inflexibility, created some anomalies. This section has now been repealed and a new provision for relief has been made in s. 17 of the Land and Income Tax Amendment Act, 1945.

Terms of Present Amendment.—The new section, by giving the Commissioner a wider discretionary power, enables him to avoid the anomalies created by the operation of the original section.

The wording of s. 17 (1) of the Land and Income Tax Amendment Act, 1945, is as follows:—

"Where it appears to the Commissioner that the income derived by the taxpayer has been *or may be* unduly increased upon the sale or other disposition of any live-stock by reason of the adoption by the taxpayer of a standard value in respect of the live-stock that was less than the true value thereof, the Commissioner, upon application in that behalf made in writing by or on behalf of the taxpayer not later than the thirtieth day of June, nineteen hundred and forty-six, may, for the purpose of calculating income-tax, social security charge, and national security tax or any one or more of those taxes, reduce the assessable income of the taxpayer for any income year or years by such amount and upon or subject to such conditions as he thinks just and equitable, and may amend accordingly any assessment or assessments of the income of the taxpayer."

The words "*or may be*" in this section introduce an entirely *new provision. Previously relief under s. 7 of the 1940 Amendment* could be granted only where the whole or substantially the whole of the live-stock had been disposed of. Under the new provision, however, any person whose standard values are unduly low may now voluntarily increase his standard values to reasonable figures and obtain relief to the same extent as if he had sold out at the amended standard values, *provided he makes application not later than June 30, 1946.*

The necessity for the new provision in the law has arisen from the fact that at several dates on which farming income became liable for tax, there was general misconception in the minds of farmers of the purpose and effect of standard values. The principle of standard values has been given considerable publicity in recent years and it should now be more clearly understood. Farmers who do not now take the opportunity of adjusting their values to reasonable figures will themselves have to accept the responsibility if they incur additional taxes later.

A Final Opportunity.—The new provision gives to all farmers who have been using unduly low standard values an opportunity to adjust those values to a reasonable basis. It provides for relief *now*, and there is no provision for any subsequent relief when the taxpayer dies or when the stock is disposed of.

There may be some cases where standard values are low, but where, due to particular circumstances, it is not possible to afford relief on an adjustment of values. Such cases should not be allowed to drift, and the full circumstances should be placed before the Commissioner to enable consideration to be given to an adjustment by way of a gradual increase in values, so that the additional income may be spread over a period of years.

Examination of the table below will enable farmers to determine the class into which their particular cases fall:—

Particulars Required.—When applying for adjustment the following particulars should be supplied:—

(*a*) The numbers and values of live-stock actually entered as commencing figures in the returns of income derived during the years commencing on the following dates:—

Unimproved value of land farmed	Date
£14,000 or over	1/4/1928
£7,500 and under £14,000	1/4/1929
£3,000 and under £7,500	1/4/1931
Others regardless of unimproved value	1/4/1939

(b) Actual market values of similar live-stock at the same dates, certified, if possible, by a stock firm.
(c) Numbers, also standard values, and actual values in respect of live-stock on hand at April 1, 1930, from which date income became liable for social security charge. (This information is necessary in order to determine the amount of original undervaluation in respect of income for social security charge purposes.)

Some Questions Answered.

QUESTION :
Who is affected by s. 17 of the Land and Income Tax Amendment Act, 1945 ?

ANSWER :
Every farmer who is using standard values which are lower than the average, over a number of years, of the market values of the class and quality of stock he runs.

QUESTION :
What is a reasonable standard value ?

ANSWER :
This depends on the class, quality, and average market value of the stock run by each individual farmer. There are no fixed values. Standard values should be determined in relation to the individual herd or flock and should not merely be average prices at sale yards or averages for a district, although such information may be of considerable assistance in fixing the values.

QUESTION :
The effect of unduly low standard values is now well known, is the effect of standard values which are too high ?

ANSWER :
If standard values are too high the income will be unduly inflated in any year when there is an increase in the number of stock on hand. The income will be reduced, however, when the numbers are reduced, but in neither case will the income returned be the true income. It may happen that the additional tax payable when the numbers are temporarily increased will exceed the subsequent reduction in tax when the numbers decrease.

QUESTION :
If a farmer's standard values are reasonable, although they are less than market values at the present time, does he have to increase his standard values ?

ANSWER :
No. If a farmer is satisfied that his standard values bear reasonable relation to average market values he will not be compelled to raise them to present market values. He must understand, however, that if he sells at prices in excess of his standard values such excess will increase his income. His choice is whether to pay additional taxes now on increasing his values or to risk additional taxes later. He may also increase the values to figures somewhere between his present standard values and the present market values.

QUESTION :
Can an increase in standard values be made without incurring additional taxes ?

ANSWER :
Yes, but only in certain circumstances. If the increase in standard values is not more than the amount of the original undervaluation of live-stock when liability for tax began, then the Commissioner may grant relief from the additional tax incurred.

QUESTION :
If a farmer who originally undervalued his stock has increased the numbers of his stock since liability for tax commenced, will he be entitled to partial relief ?

ANSWER :
Yes. The relief will be limited to the amount of the undervaluation of the original stock. Any additional stock will have been reared on the farm or acquired by purchase. The costs of rearing or the purchase price will have been deducted, but the additional asset acquired will have been accounted for in returns of income only to the extent of the standard value. Had true values or higher standard values been used, the income of some previous year when the increase in stock took place would have been higher. The increase in value of the additional stock acquired since commencement is therefore income which should have been but was not returned in previous years.

QUESTION :
A farmer who has substantially increased his stock since he originally adopted low values now writes up his standard values, but finds that the additional tax he will incur will exceed the maximum relief which may be granted in respect of the original numbers. Can any further relief be obtained ?

ANSWER :
Yes. If the full facts are submitted the Commissioner of Taxes may agree to the increase being spread over several years. Each case will be considered on its merits.

QUESTION :
Will consideration be given to applications for relief in cases where stock was realized, say, five years back, and the difference between the standard value and the proceeds of realization was assessed as income ?

ANSWER :
It is not proposed generally to reopen assessments which have already been finalized, but special circumstances may justify the reopening of an assessment which has been finalized in recent years. If relief has already been granted under s. 7 of the Land and Income Tax Amendment Act, 1940, and the amount of such relief is considered reasonably adequate, then no further relief will be granted under s. 17 of the Land and Income Tax Amendment Act, 1945.

OBITUARY

Mr. H. W. Kitchingham (Greymouth).

The death occurred at Greymouth, on April 21, of Mr. Henry William Kitchingham, senior member of the firm of Messrs. Guinness and Kitchingham of Greymouth, of which he had been a partner for seventy years. He was admitted to the Bar in June, 1883, and, after six months in Hawera, he went to Greymouth, where he had lived continuously since. He had lived on the same section in Tainui Street, Greymouth, for seventy-five years. His only son, Mr. F. A. Kitchingham, the surviving member of the firm, has been Crown Solicitor in Greymouth for some years, and is at present, Mayor of Greymouth.

Mr. Kitchingham, who was in his 85th year, was born at Greymouth, and in many ways took part in its early moulding, particularly in the provision of recreational facilities and sporting amenities, while his interest as one of the founders of the West Coast Agricultural and Pastoral Association, of which he was President for some years, had a lot to do with the introduction of pedigree stock, and the commencement on the right lines of stock-breeding and raising in the Province. He was one of the prime movers in having Victoria Park reclaimed and converted into the fine trotting-track and sports ground that it is to-day.

One of the best-known trotting officials in the Dominion, Mr. Kitchingham, as a foundation member, was associated with the Greymouth Trotting Club for more than fifty years, and guided the destines of the club as a committeeman and later as President for a long period. He had been a member of the New Zealand Trotting Association for thirty-five years, and until a short time ago held the office of President. Although trotting was his main sporting interest, he was also the oldest member of the Greymouth Jockey Club, attending his first meeting at Omoto, in 1884.

His long association with trotting has been responsible for many reforms and laws which have stood the test. It was Mr. Kitchingham's ambition to breed a New Zealand Trotting Cup winner, but in this he was unsuccessful, though Jingle ran third to Country Belle in 1915. In recent years, Mr. Kitchingham's association with trotting was entirely on the administrative side, as a member of the New Zealand Trotting Association; but he owned several star performers besides Jingle, whose victories included the Forbury Cup.

He is survived by his son, Mr. F. A. Kitchingham, two brothers, Mr. T. G. Kitchingham (Christchurch), and Mr. A. E. Kitchingham (Wellington), and two sisters, Miss A. Kitchingham (New Plymouth) and Mrs. T. Jamieson (Greymouth).

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

Blair, J. and the Middle Temple.—One of the failings of Scriblex is that, as age creeps upon him, he assumes at times an air of judicial infallibility. That he is lacking in this quality is amply shown by his lapse in the last issue when, in writing of Knights Bachelor, he said that Blair, J. was called to the Bar by the Middle Temple in 1890. In making this statement, he had placed reliance upon such august papers as the English *Law Journal* and *Law Times*, both of which asserted it without turning a hair. Scriblex blushes to confess that arithmetic is, and has always been, his Achilles heel. Were it not so, he would have realised that, even had Blair, J., been in 1890 a mere stripling of twenty-one, he would now be no less than seventy-seven years old, and his present activities as our senior puisne Judge a trifle irregular, unless, Heaven forbid, one turns a blind eye upon the statutory retiring age for Judges. Actually, the arch-criminal of the piece is the English *Law List* which lists one "Archibald Warden Blair" as "Middle Temple, 1890" and then blandly proceeds to declare him a Judge of the Supreme Court of New Zealand! *Quandoque bonus dormitat Homerus.*

Time, gentlemen, please!—When the Court of Appeal in the *Mareo* case permitted R. E. Harding to appear as third counsel and argue the point as to whether it was competent for that Court to take into adverse account the failure of the prisoner to give evidence, it put him on terms as to the length of his address. Meeting with the usual barrage of questions from the Bench, Harding submitted whimsically that he was entitled to "time off" if he had to answer these questions, since they were not "part of the contract" he had with the Bench. This situation recalls an experience that once befell the Scots Advocate, Condie Sanderson, when addressing the Second Division of the Court of Session. He had been subjected during the afternoon to almost incessant interruption from the Judges; and, when the Court resumed the following morning, the Lord Justice Clerk asked Sanderson how long he expected to speak. His reply was one hour. The interruptions beginning once more, the Lord Justice Clerk remarked that it would hardly be fair to hold him down to the hour, whereupon Sanderson answered suavely: "Oh, that's quite all right—I allowed for the interruptions!"

All the Trimmings.—A New Zealand practitioner who left recently to appear in the Privy Council was asked whether he had remembered to take a plentiful supply of towels and soap with him and replied: "I've not forgotten to do that, nor to send my relatives a number of food parcels so that I won't have to hang hungrily about the Inns of Court." In his *Lives of the Chancellors*, Lord Campbell refers to the fact that the old Benchers of the Inner Temple had reached their then dignity without the necessity of doing more than eating a certain number of dinners in public, their principal occupation apparently consisting of ordering for their own table all the choice delicacies of the season under the name of "exceedings." On one occasion, a lean student complained to a stout Bencher of the starved condition of those who were forced to dine in the lower part of the hall. He received this answer: "I assure you, sir, we all fare alike; we have the same commons as yourselves." The lean and hungry one replied: "All I can say is that we see pass by us savoury dishes on their way to your table, of which we enjoy nothing but the smell." "Oh," exclaimed the well-fed Bencher, "I suppose you mean the 'exceedings,' but of these the law takes no cognizance."

Irony.—One of the classic examples of misdirected irony concerns the burglar of whom Lord Bowen caustically observed to the jury: "If, gentlemen, you think it likely that the accused was merely indulging an amiable fancy for midnight exercise on his neighbour's roof; if you think it was kindly consideration which led him to take off his boots and leave them behind him before descending into the house; and if you believe it was the innocent curiosity of the connoisseur which brought him to the silver pantry and cause him to borrow the teapot, then you will acquit him." Bowen's dismay at an instant acquittal may have been recollected by Johnston, J., who, at the recent Wellington sessions, had a case of a man charged with robbing a bank and found shortly afterwards with several hundred pounds worth of notes strewn in bundles about his room. He attributed his possessions to successful gambling. The jury might think, said Johnston, J., that the accused had chosen an early hour in which to have a private exhibition of his wealth. As the verdict was one of acquittal, the jury must have felt itself in sympathy with the aesthetic leanings of the accused; and the Judge is left to reflect upon the definition of "irony" given by H. W. Fowler in his *Dictionary of Modern English Usage*. It is, he says, "a form of utterance that postulates a double audience, consisting of one party that hearing shall hear and shall not understand, and another party that, when more is meant than meets the ear, is aware both of that more and of the outsider's incomprehension."

The Law Journal.—The new features starting in the English *Law Journal* in February last, refute the old joke that the law lags considerably behind popular taste. Little surprise may be occasioned by information on the progress of all public Bills in Parliament, the weekly review of recent cases, rules, and orders, and the seven-week cycle of articles from common law to divorce. The conservative eye-brow may be lifted slightly by the weekly financial column with its discussions of practical problems of speculation and its tables of selected investments. A somewhat astonishing departure from precedent, however, is provided by the week-end page compiled by Caliban (formerly of *The New Statesman*) and consisting of the popular quiz items; problems, bridge and otherwise; puzzles and anniversaries. As the New Zealand LAW JOURNAL usually makes its appearance early in the week, and not at the end of it, it is possible that a page of brain-teasers would not be found a suitable substitute in this country for our week-end radio broadcastings on racing and rationing. Many of the questions of Caliban seem to provide little difficulty to the well-informed practitioner, but when Scriblex found "What are the approximate length of the courses over which the Derby, Ascot Gold Cup, St. Leger, and Grand National are run?" it seemed to him that any adoption of a similar type of quiz by this journal had better stand adjourned until after the Gaming Commission.

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. Land Sales.—*Agreement for Sale and Purchase—Validity pending Consent of Land Sales Court.*

QUESTION: The necessity of making agreements for sale and purchase of land subject to the consent of the Land Sales Court as required by the Soldiers' Settlement and Land Sales Act, 1943, renders all such agreements conditional until consent is granted.

In view of the decision of Mr. A. M. Goulding, S.M., in *Brunskill* v. *Tringham*, (1945) 4 M.C.D. 140, it appears that all agreements for sale and purchase, being conditional as stated above, can be cancelled by either the vendor or purchaser at any time before consent is granted.

We are acting for a vendor who has sold his property and application for the Land Sales Court's consent has been filed but not yet dealt with. The purchaser has notified us that he does not intend to proceed with the purchase: and has requested the return of his deposit.

Is the purchaser entitled to withdraw from the sale on account of the agreement being conditional upon the consent of the Land Sales Court? If this position is correct it means that every agreement for sale and purchase of land is not binding on the parties until the application for consent has been granted.

ANSWER: It is not thought that *Brunskill* v. *Tringham* (*supra*) justifies the statement that all agreements for sale and purchase, being additional, can be cancelled by either party at any time before consent is granted.

It is suggested that too much has been read into so much of the judgment as is *obiter* or deals with circumstances peculiar to the facts of the case, and that the learned Magistrate hints at the law ordinarily applicable where application for consent is pending when he says: "It appears to me that the transaction is in the same position as any transaction which is made subject to a condition determinable by a third party."

Where a contract is entered into subject to the consent of the Court, then, until the expiration of one month without application being made, or until the Court has declined an unqualified consent, the contract appears to be potentially binding on both vendor and purchaser. The parties should ensure by their conditional contract that application is made: see *Ball's Land Sales Legislation*, 32, for suggested terms. The continued binding effect of the contract is then dependent on consent being given in accordance with its terms: *cf. Worsley* v. *Wood*, (1796) 6 Term Rep. 710: 101 E.R. 785. A2.

2. Landlord and Tenant.—*Notice to Quit—Determination "on or before"—Specified Date—Whether Valid.*

QUESTION: I am appearing in an action for recovery of possession of a tenement. The tenancy was sought to be determined by notice to quit "on or before" a specified date. The question is, Is such notice valid. Can you please advise?

ANSWER: This was the very point in issue in the very recent case of *Dagger* v. *Shepherd*, [1946] W.N. 5; [1946] 1 All E.R. 133. There the facts were the plaintiff's solicitors gave notice in the following form:

> "On behalf of our client, ... , we hereby give you notice to quit 'Kenwood' on or before the 25th March next . . ."

The defendant failed to give up possession, and an action was brought to recover possession and mesne profits. At the hearing in the county court it was contended that the notice was bad for uncertainty, and the county court Judge upheld this contention, observing that he and others had decided that point before.

On appeal to the Court of Appeal, the appeal was allowed. Evershed, J., in reading the judgment, said that the question whether a notice to quit on or before a certain date was (in the absence of any special context), a valid notice was one of general importance. It was settled law that a notice to quit must conform strictly to the legal requirements of the contract and be in plain and unambiguous words. It was a technical document. The Court would lean towards giving validity to such a document, but it would not correct an inaccuracy, even though occasioned by a slip. The question, which was solely one of interpretation, was whether the tenant would be left in doubt as to the intended effect of the notice. In the judgment of the Court the true effect of the notice in the present case was to give the tenant irrevocable notice to determine the tenancy on March 25, 1945, and at the same time to make an offer to accept a determination on any earlier date on which the tenant chose to give up possession. It followed that a notice to quit on or before a fixed date was *prima facie* valid and effective. C1.

3. Evidence.—*Police Statements—Availability in Running-down Action—Privilege—Practical means of receiving Information.*

QUESTION: There has been a street accident, arising out of the collision of two motor-vehicles. There was a policeman present at the time of or shortly after the mishap, and it is desired to obtain production of his report and the names of witnesses. The question then arises whether I, as the prospective plaintiff's solicitor, can obtain production of the report.

ANSWER: Such statements are privileged on the ground of public policy. The matter is admirably treated in the case of *Duncan* v. *Cammell Laid and Co., Ltd.*, [1942] A.C. 624, [1942] 1 All E.R. 587. On page 636, 592, the Lord Chancellor in his speech in that case says: "Another example is the view which has been taken that reports made by a Police officer to his superior as to a street accident are protected from production though requested by a party to subsequent litigation for fixing liability between private individuals: see *Hastings* v. *Chalmers*, (1890) 18 R. (Ct. Sess.) 244, *Muir* v. *Edinburgh and District Tramways Co., Ltd.*, [1909] S.C. (Ct. Sess.) 244, *Spigelmann* v. *Hocken*, (1932) 50 T.L.R. 87."

He then observes: "The practice in the metropolitan police district is, I believe, in the case of a street accident where no criminal proceedings are being taken, to provide, on the application of persons interested in a possible civil claim, an abstract of any report that has been made by the policeman on the spot to his superiors, including the names of witnesses so far as known to the police."

The Lord Chancellor then comments on this practice as follows: "This seems an admirable way of reconciling the requirements of justice with the exigencies of the public service." It may be that the Police would supply an abstract of the report, together with the names of the witnesses. In view of the remarks of the Lord Chancellor, it is not thought that the Police authorities would refuse such abstract or the names of the witnesses. C1