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NEW LEGISLATION IN 1946.

ALTHOUGH the statute-book for the present year will contain forty-six new statutes, the legislative crop does not contain much of special every-day interest to practitioners. The notable exception is the Trustee Amendment Act, 1946. Conveyancers will be concerned with the Land Subdivision in Counties Act, 1946.

The Trustee Amendment Act, 1946, which is necessary for the effective working of the Administration Amendment Act, 1944, reproduces the appropriate sections of the Trustee Act, 1925 (Eng.) (15 Geo. 5, c. 19), as they confer on trustees the power to apply income for infants' maintenance, education, advancement, or benefit, including the power to make advances out of capital. This was promised at the time of the passing of the Administration Amendment Act, 1944. The necessity for this legislation was set out in detail in this place in a series of articles on the Administration Amendment Act, 1944: see, in particular, 21 NEW ZEALAND LAW JOURNAL, pp. 85–87. It is unnecessary to recapitulate the reasons here. The new provisions are by no means easy to understand without some careful study, and this was found to be the case when the corresponding sections became law in England and Wales. Their purpose and effect will accordingly be fully dealt with in a future issue of this JOURNAL, and their impact on the Administration Amendment Act, 1944, and the interpretations and applications given to them by the Courts in England will there be considered.

Another amendment of the Administration Act, 1908, appears as s. 2 of the Statutes Amendment Act, 1946, which, read with the Administration Amendment Act, 1944, extends the application of the statutory trusts to certain illegitimate issue. The need for this amendment was stressed in the series of articles to which we have already referred: see 21 NEW ZEALAND LAW JOURNAL, p. 44. Section 7 (1) (*a*) of the Administration Amendment Act, 1944, now reads as follows:

> Where under this Act the estate of an intestate, or any part thereof, is directed to be held on the statutory trusts for the issue of the intestate, the same shall be held upon the following trusts, namely:—
>
> (*a*) In trust, in equal shares if more than one, for all or any the children or child of the intestate, living at the death of the intestate, who attain the age of twenty-one years or marry under that age, and for all or any of the issue living at the death of the intestate who attain the age of twenty-one years or marry under that age of any child of the intestate who predeceases the intestate, such issue to take through all degrees, according to their stocks, in equal shares if more than one, the share which their parent would have taken if living at the death of the intestate, and so that no issue shall take [whose parent takes an absolutely vested interest]:
>
> [Provided that if any female capable of taking under this paragraph (including this proviso) dies before taking an absolutely vested interest leaving any illegitimate child or children who shall be living at the expiration of twenty-one years from the death of the intestate or who shall sooner attain the age of twenty-one years or marry under that age, that child or those children shall take, in equal shares if more than one, the share which his or their mother would have taken if she had not so died.]

The Land Subdivision in Counties Act, 1946, to which we have referred, is of real importance. Its purpose and effect will be dealt with in an article by Mr. E. C. Adams in our next issue.

The Fair Rents Act, 1936, has been extended by s. 27 of the Statutes Amendment Act, 1946, to premises occupied by several persons for residential purposes. The new provisions are contained in subss. (2) and (3) of that section, and are as follows:

> (2) Notwithstanding anything in the principal Act, where two or more persons are severally granted the right to occupy for residential purposes any premises that form part of a house or building, then for the purposes of the principal Act the premises shall be deemed to be a dwellinghouse, and those persons shall be deemed to occupy the premises as tenants under a tenancy subject in all respects to the provisions of the principal Act, and the total of the several amounts payable by those persons shall be deemed to be the rent of the premises.
>
> (3) The basic rent of any premises under an arrangement deemed pursuant to the last preceding subsection to be a tenancy shall be the rent payable in respect of such premises on the first day of October, nineteen hundred and forty-six, if the premises were then occupied under such an arrangement, or, if they were not then so occupied, then the rent payable when they were first so occupied after the first day of October, nineteen hundred and forty-six.

The next section, s. 28, extends the application of the Fair Rents Act, 1936, to any premises that form part of any house or building let to a tenant for residential purposes where the landlord provides any meals or food, unless the value of the meals or food or the cost thereof to the landlord (whichever is the less) forms a substantial proportion of the total amount payable by the tenant to the landlord as rent or otherwise. This is designed to overcome what has popularly become known as "the breakfast-tray racket," which was

employed by some landlords, in rooming-houses to circumvent the definition of "dwellinghouse" in the statute.

We do not propose to go into any detail concerning the amendments made to the Servicemen's Settlement and Land Sales Act, 1943, by the Amendment Act, 1946. Suffice it to say that the Servicemen's Settlement and Land Sales Emergency Regulations, 1946 (Serial No. 1946/90), are revoked. With the able assistance and sound advice of the Standing Committee of the New Zealand Law Society, the new statutory provisions are more reasonable, and, accordingly, more workable, than those misconceived regulations. The other principal features of the Amendment Act, 1946, are the application of Part III of the principal Act to any contract or agreement, entered into by the parties to the transaction, for the sale, transfer, hiring, or delivery of any personal property (inclusive of any debt, chose in action, and any other right or interest), or for the execution of any works or the erection of any building, or for the granting of an option in relation to any such matter. Such an application of Part III is made with respect to any such contract or agreement as well as to the rest of the transaction of which it forms part, whether entered into before or after the rest of the transaction. The purpose is to bring into the one transaction all contracts or agreements entered into by the same parties, by including, as parts of that transaction, all incidental or collateral contracts or agreements as if, subject only to proof to the contrary, they had been entered into on the same date or on dates within six months of each other. The Land Sales Court is given power to treat as part of the consideration any moneys paid within two years before the date of the consent to the transaction before it. These sections should be carefully studied in detail.

Section 11 obviates the duplication of applications for consent. It leaves to the Land Sales Court alone the giving of consent where the approval, consent, or permission of the Minister of Lands would ordinarily be required. To prevent duplication in respect of transactions affecting Native Land, s. 12 removes from the operation of the principal Act any transaction which is effected by an order of the Native Land Court or of the Native Appellate Court, as well as any transaction for which is required the approval, consent, or permission of the Native Minister, or of the Board of Native Affairs, or of both that Minister and that Board.

Special consideration should be given to ss. 14 and 15 of the Amendment Act. Section 14 is important, as it enables trustees to apply for consent to prospective sales or leases although the name of the prospective purchaser or lessee is not known. Section 15 enables the Court to consent to sales by mortgagees for a consideration less than the minimum required by statute. Sales under the Rating Act, 1925, are also dealt with, and there is power to consent to the recovery of the balance of arrears of rates not covered by the proceeds of the sale.

An interesting addition to our criminal law has been made by the Justices of the Peace Amendment Act, 1946. The principal innovation is the granting of a general right of appeal to the Supreme Court without any limitation as to the term of imprisonment imposed or the amount of money ordered to be paid. The appeal may be against the conviction and sentence passed on the conviction, or against the conviction only, or against the sentence only. In the case of a complaint, the appeal may be against the order or only against the amount of the sum ordered to be paid.

The same statute amends the provisions regarding security on appeal. The substituted subs. (1) of s. 305 of the Justices of the Peace Act, 1927, is as follows:

> The appellant, at the time of making application, and before a case is stated and delivered to him by the Justice, shall in every case enter into a recognizance before that Justice or some other Justice, in such sum as the Justice thinks fit, conditioned to prosecute the appeal with diligence and to pay such costs as may be awarded by the Supreme Court, or shall instead of that recognizance deposit in the hands of the Clerk of the Magistrates' Court such sum as the Justice thinks fit on like condition: Provided that—
>
> (*a*) Every such recognizance shall be without surety unless the Justice in any case, at the request of the respondent, requires a surety or two or more sureties:
>
> (*b*) The sum to be fixed as aforesaid in any case shall be the sum (not exceeding twenty-five pounds) estimated by the Justice to be the amount of the costs likely to be awarded in respect of the appeal in the event of its being dismissed.

Two new provisions in the Justices of the Peace Amendment Act, 1946, for which the profession is indebted to the initiative of the Law Revision Committee, provide procedural facilities for easy approach to the Supreme Court, without the necessity, as heretofore, of first submitting to a hearing and then, if there is dissatisfaction with the judgment, appealing to the higher Court. The first of these provisions empowers a Justice, on the hearing of an information or complaint which he has power to determine summarily, to state a case for the opinion of the Supreme Court on any question of law arising in the matter. The Supreme Court, in turn, may remove any such case stated, as well as any case transmitted to it under s. 303 of the Justices of the Peace Act, 1927, into the Court of Appeal. In any such circumstances, the decision of the Court of Appeal will be final as regards the Courts in this country; but leave may be given by the Court of Appeal to either party to appeal to the Privy Council. Subject to this right of appeal, the decision of the Court of Appeal is to be entered in the Supreme Court, and the usual consequences of a Supreme Court decision then apply.

The British Nationality and Status of Aliens (in New Zealand) Act, 1928, affects the national status of married women. In particular, it makes provision for the retention of her British nationality by a woman who, at the time of her marriage to an alien, was a British subject, whether or not, by reason of her marriage, she became, under the law of her husband's State, a subject of that State also. Conversely, where a woman marries a British subject and is not at the time of her marriage a British subject, she is not to be deemed a British subject by reason only of her marriage. If, on October 9, 1946, the date of the passing of the statute, any woman was a British subject, nothing in it affects her status as a British subject.

Attention is drawn to the fact that the contents of the Marriage Emergency Regulations, 1944, dealing with Service marriages solemnized outside New Zealand, have now become statutory by reason of ss. 2 to 8 of the Marriage Amendment Act, 1946. A re-statement of the marriages which are forbidden by law, by reason of consanguinity or affinity, is contained in ss. 9 and 10 of the same statute. Proper care is taken to validate marriages that would have been valid under the existing statutory provisions before September 26, 1946, the date when the amendments became effective;

and also to provide, in a comprehensive savings clause, the preservation of existing property rights and the effect of proceedings commenced in any Court before that date.

Students of international law will be interested in the United Nations Act, 1946, which gives power to make statutory regulations to enable New Zealand to fulfil the obligations undertaken by this country under Article 41 of the United Nations Charter, signed at San Francisco in June of last year, which is as follows:

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

The new Act will enable this Dominion to fulfil its obligations under the Article.

The Emergency Regulations Act, 1939, has been extended by this year's Amendment Act to expire on December 31, 1947, and all regulations made before the passing of the latter statute are validated as from the time of their making.

SUMMARY OF RECENT JUDGMENTS.

TOLLAN v. WELLINGTON HARBOUR BOARD AND PORT LINE LIMITED.

WELLINGTON HARBOUR BOARD v. TOLLAN AND PORT LINE LIMITED.

SUPREME COURT. Wellington. 1946. February 7, 8, 11, 18. JOHNSTON, J.

COURT OF APPEAL. Wellington. 1946. June 20, 21, 24, 25; September 27. BLAIR, J., FAIR, J., CORNISH, J.

Master and Servant—Negligence—Transference of Employment—Crane-driver—Hiring of Crane and Driver—Negligence of Driver—Injury thereby caused to Third Person—Whether Regular Employer or Hirer liable—Test applicable—Respondeat Superior.

In applying the doctrine of *respondeat superior* where a vehicle or other instrument is let out on hire with the service of its driver or operator and an accident occurs through the negligent act of the driver or operator causing personal injury to a third person, *prima facie* the responsibility for such negligence is on the general and permanent employer, who engages and pays the driver or operator. The burden of proving that the responsibility had shifted to the hirer rests on such general employer, and it can be discharged only by positive proof of the assumption of such responsibility by the hirer.

One test in considering who is the *superior* of the negligent workman for the purpose of the application of the doctrine of *respondeat superior* is the answer to the question whether, in the doing of the negligent act, the workman was exercising the discretion given to him by his regular or general employer or whether he was obeying or discharging a specific direction of the hirer for whom, upon his employer's direction, he was using the vehicle or other instrument. The power of control of the new *superior* must be present in connection with the doing of the particular act which proves to be tortious, and so gives the injured party a right of action. No other control is relevant.

The application of the doctrine of *respondeat superior* to each particular case depends upon facts, and is a question of fact, and the facts of one case are useful only in so far as a similarity of facts is a help or guide to a decision.

So held by the Court of Appeal (*Blair* and *Cornish*, JJ., *Fair*, J., dissenting) that on the facts of this case, the control had not shifted to the hirer, thus dismissing an appeal from the judgment of *Johnston*, J.

Century Insurance Co., Ltd. v. *Northern Ireland Road Transport Board*, [1942] A.C. 509, [1942] 1 All E.R. 491, *Dowd* v. *W. H. Boase and Co., Ltd.*, [1945] 1 K.B. 301, [1945] 1 All E.R. 605, *Nicholas* v. *F. J. Sparkes and Son*, [1945] 1 K.B. 309*n*, *Cairns* v. *Clyde Navigation Trustees*, (1898) 25 R. (Ct. of Sess.) 1021, and *M'Cartan* v. *Belfast Harbour Commissioners*, [1911] 2 I.R. 143, applied.

Donovan v. *Laing, Wharton, and Down Construction Syndicate, Ltd.*, [1893] 1 Q.B. 629, *Bain* v. *Central Vermont Railway Co.*, [1921] 2 A.C. 412, *A. H. Bull and Co.* v. *West African Shipping Agency and Lighterage Co.*, [1927] A.C. 686, and *Hunia* v. *Winstone Ltd.* (*infra*), distinguished.

Counsel: *J. F. B. Stevenson*, for the appellant; *Mazengarb*, for the first respondent: *Watson* and *Shorland*, for the second respondent.

Solicitors: *Izard, Weston, Stevenson and Co.*, Wellington, for the appellant: *Hay and Macalister*, Wellington, for the first respondent; *Chapman, Tripp, Watson, James and Co.*, Wellington, for the second respondent.

HUNIA v. WINSTONE LIMITED.

COURT OF APPEAL. Wellington. 1939. April 26, 27, 28; June 7. SIR MICHAEL MYERS, C.J., OSTLER, J., SMITH, J.

Master and Servant—Negligence—Transference of Employment—Lorry-driver—Arrangement by Employer for Driver to take part with Customer's Servants in Unloading and Stacking Goods delivered—Third Person Injured by Driver's Negligence—Respondeat Superior—*Test to be Applied.*

Where a carrier who collects and delivers goods for a customer on his lorry, driven by his driver, makes an arrangement with the customer that the driver shall take part with the customer's servants in the operation of unloading and stacking the goods delivered, and an accident occurs owing to the driver's negligence, causing injuries to a third person, the test to be applied, in considering who is the superior of the negligent driver, for the purpose of the application of the doctrine of *respondeat superior*, is the same as that applied when a vehicle is let out on hire with the services of a driver. One test in such consideration is the answer to the question whether, when the negligent act was done, the general employer or the customer to whom the goods were delivered had control of the driver in the doing of such act, or, putting it another way, whether it was the driver who was transferred for such operation or only the use and benefit of his work.

Donovan v. *Laing, Wharton, and Down Construction Syndicate, Ltd.*, [1893] 1 Q.B. 629, applied.

M'Cartan v. *Belfast Harbour Commissioners*, [1911] 2 I.R. 143, distinguished.

Bain v. *Central Vermont Railway Co.*, [1921] 2 A.C. 412, *Societe Maritime Francaise* v. *Shanghai Dock and Engineering Co.*, (1921) 90 L.J.P.C.C. 85, *Union Steamship Co., Ltd.* v. *Claridge*, [1894] A.C. 185; *N.Z.P.C.C.* 432, *Wyllie* v. *Caledonian Railway Co.*, (1871) 9 Macph. (Ct. of Sess.) 463, *A. H. Bull and Co.* v. *West African Shipping Agency and Lighterage Co.*, [1927] A.C. 686, *Moore* v. *Palmer*, (1886) 2 T.L.R. 781, and *Clelland* v. *Edward Lloyd, Ltd.*, [1938] 1 K.B. 272; [1937] 2 All E.R. 605, referred to.

Where the driver is proved to be under the complete control of the customer in such operation, he is *pro hac vice* the servant of the customer, although remaining the general servant of the carrier.

So held by the Court of Appeal affirming the judgment of *Fair*, J., reported [1939] G.L.R. 66.

Per *Ostler*, J. That it is always a question of fact and degree whether the control exercised by the temporary master of a negligent servant of a general master is sufficient to render the former liable under the doctrine of *respondeat superior*.

Semble, per *Myers*, C.J. That, in the ordinary case of a cartage contract under which the carter collects and carries goods for a merchant, and delivers them at the merchant's premises, the true relation between the carrier's servant and the merchant's servants is that the one is giving and the others are taking delivery under a contract of carriage and each servant remains throughout the servant of his own employer, but, in special cases, under the terms of the contract or arrangement between two parties for the purpose of and during some particular

operation, the servant of the one may, *quoad* that particular operation, become the servant of the other.

Counsel: *Hanna*, for the appellant; *Leary*, for the respondent.

Solicitors: *V. N. Hubble*, Auckland, for the appellant; *Bamford, Brown, and Leary*, Auckland, for the respondent.

MERCURY BAY CO-OPERATIVE DAIRY COMPANY, LIMITED v. LILLEY AND OTHERS.
ALBERTLAND CO-OPERATIVE DAIRY COMPANY, LIMITED v. BIDDLE AND OTHERS.
RODNEY CO-OPERATIVE DAIRY COMPANY, LIMITED v. HAWKEN AND OTHERS.

SUPREME COURT. Auckland. 1946. June 25; July 3. CALLAN, J.

Company Law—Memorandum and Articles—Co-operative Dairy Company—Construction of Memorandum—Proposal to pay out of Company's profits to Provincial Farmers' Union Annual Sum per head of all Suppliers in Specified Month—Whether Prohibited by Memorandum—Effect of Declaration thereon—Practice—Originating Summons—Questions of Fact and Construction involved—No Suggestion of Further Litigation—Hearing by Consent of Parties—Limited effect of Determination—Declaratory Judgments Act, 1908, s. 10.

A proposal that the directors of a co-operative dairy company should, out of the profits payable annually during the month of May, donate to the New Zealand Farmers' Union (Auckland Province) Inc. a sum equal to £1 10s. per head of all persons who during the previous month of January supplied milk and cream to the company, is prohibited by the memorandum of association of such a company when the only object in its memorandum of association upon which the company could rely was as follows:—

"(i) The doing of all such other things as are necessary, incidental, or conducive to the attainment of the above objects"

and the uncontradicted affidavits filed in support of the originating summons raising questions as to the proposal did not go further than saying that a strong Farmers' Union might, not necessarily must, be helpful to the financial interests of the company.

Tomlinson v. *South Eastern Railway Co.*, (1887) 35 Ch.D. 675, applied.

Evans v. *Brunner Mond and Co.*, [1921] 1 Ch. 359, distinguished.

So held on an originating summons by the company under the Declaratory Judgments Act, 1908.

Aliter, Where the memorandum of another co-operative dairy company contained the following clause:

"3 (x) To support and subscribe to or establish or aid associations, institutions, funds, trusts, societies or clubs which may be for the benefit of the company, its members, employees, or ex-employees, or which may be connected with any place where the company carries on business, and to give pensions, gratuities or assistance to any person or persons who have served the company or any member or members of the company or their relatives or dependants"

and the uncontradicted affidavits filed in support of a similar originating summons showed that the said Union was an "association or institution" which might be "for the benefit of the company and its members."

Likewise, where the memorandum of a third co-operative dairy company contained the following clause:

"2 (p) To support and subscribe to any schools, hospitals, dispensaries, dining-rooms, baths, places of recreation, and any national, educational, scientific, literary, religious, or charitable institutions or objects, or trade societies, whether such societies be solely connected with any trade or trades carried on by the company or not"

and the uncontradicted affidavits filed in support of a similar originating summons showed that the said Union was a "trade society connected," though not solely, "with a trade carried on by the company."

Observations as to the limited effect of the decision determining the answers to the questions raised in the several originating summons under the Declaratory Judgments Act, 1908, before the Court.

Counsel: *Sexton*, for the three plaintiff companies; *Hubble*, for all three sets of defendants.

Solicitors: *Sexton, Manning, and Fortune*, Auckland, for the three plaintiff companies; *V. N. Hubble*, Auckland, for all three sets of defendants.

SCANLAN v. HUTCHISON.
SCANLAN v. McFARLANE.

SUPREME COURT. Greymouth. 1946. July 15, 16. BLAIR, J.

Licensing—Offences—Refusal to Supply Meal—Evidence—Onus of Proof of Valid Reason for Refusal to Provide Meal—Defendant setting up prima facie Case—Onus Shifting to Crown to prove No Valid Reason for Refusal—Licensing Act, 1908, s. 165.

In a prosecution of an innkeeper for refusing, without valid reason, to supply a meal to a traveller, there is an onus on the innkeeper to set up a *prima facie* case of valid reason for such refusal—*viz.*, to establish a reasonable probability of the existence of some valid reason for refusing to supply a meal; but when that has been done, the onus shifts to the Crown to prove beyond reasonable doubt that no valid reason existed.

R. v. *Carr-Braint*, [1943] 2 All E.R. 156, applied.

Counsel: *Kitchingham*, for the appellant; *W. D. Taylor*, for the respondents.

Solicitors: *Guinness and Kitchingham*, Greymouth, for the appellant; *Joyce and Taylor*, Greymouth, for the respondents.

TANSEY v. RENOWN COLLIERIES, LIMITED.

COMPENSATION COURT. Auckland. 1945. November 15; 1946. August 5. ONGLEY, J.

Worker's Compensation—Accident arising out of and in the course of employment—Coronary Thrombosis—Effect of Effort considered—Change leading to Coronary Occlusion—Whether initiated by Effort—Conflict of Medical Opinion regarding Coronary Disease—Differentiation between Coronary Insufficiency and Coronary Occlusion—Whether assented to by Authoritative Opinion Conflict in Expert Medical Evidence—Submission to Medical Referee for Report—Whether Court entitled to infer from Facts that Thrombosis precipitated by Worker's Earlier Unusual Exertion—Workers' Compensation Act, 1922, ss. 3, 58.

There are two schools of thought in the medical profession as to whether effort in some cases may initiate the changes that lead to coronary occlusion by thrombosis; in other words, whether effort may, in certain cases, be a factor in the production of haemorrhage into the wall of a coronary artery.

Quaere, Whether the suggestion that in coronary disease there may be on the one hand "insufficiency" and on the other "occlusion" has received the assent of medical opinion.

In an action for compensation where, as in the case under consideration, both experts agreed that the most likely diagnosis was infarction of the heart due to coronary occlusion by thrombosis, but differed as to whether effort might precipitate such a haemorrhage, and the learned Judge hearing the case submitted it to a medical referee for report, pursuant to s. 58 of the Workers' Compensation Act, 1932.

Held, That, where the plaintiff had established a *prima facie* case that he suffered some cardiac deterioration at the time of the accident, and that case had not been displaced, the Court is entitled, after consideration of the whole of the medical evidence, to infer on the preponderance of probabilities that the thrombosis was precipitated as the result, in part, of some unusual exertion undertaken by the worker.

Adelaide Stevedoring Co., Ltd. v. *Forst*, (1940) 64 C.L.R. 538, followed.

Charlton v. *Makara County*, [1945] N.Z.L.R. 335, referred to.

In the present case, the learned Judge held that the facts showed that the plaintiff suffered from some deterioration at the time of the accident, being affected by arteriosclerosis and then followed the sequence of accident, extra effort, pain and disability due to thrombosis. The plaintiff had thus established a *prima facie* case, which had not been displaced; and he was entitled to compensation.

Counsel: *W. J. King*, for the plaintiff; *Hore*, for the defendant.

Solicitors: *King, McCaw and Smith*, Hamilton, for the plaintiff; *Buddle, Richmond, and Buddle*, Auckland, for the defendant.

THE RULE OF LAW.

The Future Course of International Relations.*

By the Rt. Hon. Sir Hartley Shawcross, K.C., M.P., Attorney-General of England.

I wondered if you would allow me to take the opportunity afforded by this meeting of saying a few words about the future of International Law, a matter about which I think we all ought to feel concerned both as lawyers and as citizens—to say nothing of the interest which those of us have who are also politicians.

When one surveys the world to-day, and particularly Europe, one sees that what characterises international relations is a complete lack of order and security which is the very antithesis of law. Law can only flourish where there is order. Now I suppose there are several ways in which, theoretically, some measure of security and order and regulation could be restored. There are certainly three. One would be—do not think I am advocating it—the complete domination of Europe and eventually of the world by a single sovereign power. I do not mean a European Federation in which the separate States maintained their individuality: there is much to be said in favour of that, but the time for it is not yet, and cannot come unless the third method which I am going to develop is adopted. I mean a European dictatorship: a world dictatorship. That was, no doubt, at one time Hitler's ultimate intention. And if you can maintain a dictatorship you can at least avoid international war. But you avoid it at the expense of those things in which most of us still passionately believe: liberty, freedom, the right to follow our own way of life. And unless you have a benevolent dictatorship, which seems more possible in theory than it has ever been in practice—for "absolute power corrupts absolutely"—in the long run you merely substitute civil war for international war, for the different peoples of the world will always strive towards a realisation of their independence. I do not imagine that there is anyone here—or I hope elsewhere—who would advocate the introduction of world dictatorship as the best method of securing world peace, and I will leave that possibility. The second method is by establishing a system of alliances or blocs between associations of different States, where you have one powerful, influential, dominant Power at the head of each bloc of satellite or protectorate States. No doubt that system at the cost of their own freedom and independence secures for a time the absence of war between the States in each particular bloc and, for a time, it may secure international peace. That is really the Grossraum doctrine which some of the Nazi philosophers and politicians developed. It really substitutes for the sixty or so Sovereign States that existed before the war three or four giant super-Powers. There are some who think that that is the kind of organisation towards which the world is moving or drifting to-day, and certainly there are tendencies towards a bloc or satellite system to which we cannot shut our eyes. But that system avoids war only so long as the Great Powers, with their satellites revolving round them, maintain a nice balance of power. But they look at their counterparts with jealous eyes, they build up their armaments against each other, and eventually, when one of the bloc leaders thinks his bloc is strong enough to conquer the others so that he may move nearer to world dictatorship, war occurs. As Hitler told one of his staff conferences shortly after entering into a non-aggression pact with some minor State, "Do not think that I am building up this Army in order that it shall not fight." Englishmen, and I believe every man who knows—and by no means all men do know—what true liberty and freedom mean, emphatically reject the bloc theory: we are not content to go back to power politics in the hope of securing a precarious peace and order by that means.

There is only one method left, and that is to restore, or, if you prefer, to create the rule of law in international affairs.

I know that there are some lawyers who say that there is no such thing as international law. I know that there are others who contend that the war demonstrated at least that it has failed. I repudiate both propositions. The legal purists and the analytical jurists will assert that nothing is law which is not imposed and enforced by a sovereign body and that is not the case in the international realm. It would be a presumption on my part to question the teachings of the analytical school, but I have always felt that they were inadequate in the international field and that even in the municipal one they tend to over-emphasise the element of enforcement and to neglect both the historical origins of law and the ideas of justice and order on which most laws ultimately depend and from which they spring. Whilst it may be necessary to combine the two elements of a rule of conduct and of the enforceability of that rule in order to secure a definition of positive municipal law, that process is, as it seems to me, wholly inappropriate when one considers the rules affecting the community of States, for in the present system of international relationships there is no sovereign body which can at the same time legislate and enforce. Where you have a body of rules which by the common consent of a given community are obligatory upon its members, those rules are, I would have said, the laws of that community although the consent has not been obtained by force and although there may be no direct external sanction. The existence of law is not dependent on the existence of a correlated sanction external to the law itself. It may be—indeed that is my theme here—that eventually we shall develop some better form of international organisation which will provide means for enforcing the rules which the nations accept as binding upon them, but I draw a distinction between the two things. The idea of a rule based on common consent is one thing. The idea of external enforcement is another and is not essential to give the character of law to the first. That is certainly true in the inter-

*Translation of an address delivered on June 20, 1946, by the Rt. Hon. Sir Hartley Shawcross, K.C., M.P., in the First Chamber of the Supreme Court of France to an audience including the leading French Judges and lawyers, the British Ambassador, and others.

national field, and as a matter of fact it daily becomes more true in the case of national laws where in civilised society we see more and more that the law derives its strength not from the possibility that some external sanction may be enforced against the law-breaker, but from its foundation in the consciousness of the people as to what is just. But I will not take up more time by an academic discussion of definitions. And it is academic, because the notable thing is that no State has ever denied the existence of international law. Many have broken it, I dare say, but in their very breaches of it they have often sought to fortify themselves by asserting that the law was on their side or at least was silent.

Nor is it true to say that international law has failed—any more than a law against murder fails because a murderer sometimes defies it with success. It does occasionally happen that particular laws are not fully enforced by the police or supported by the courts. But no one on that account denies the existence of law. Nor can any serious student either of law or of international relations really deny that international law exists. Its failure has been that those who, if they had chosen, could have used it to achieve what must be its supreme purpose for the future—namely that of so marking out the limits within which each State may exercise its power without trespassing upon the rights of other States so that all States, free and independent, may live together in the same world community—failed so to employ it.

That failure was a twofold one and it had very understandable historical foundations. In the first place, the various States of the world did not in general consent to allow international law to be applied at all to really fundamental matters affecting themselves. They felt that they could not afford to. They were content to allow small matters to be dealt with, but they reserved to themselves freedom of action in regard to large ones. And so, before the 1914–1918 war, it was common to find in international treaties an exclusion clause which quite frankly excepted the "vital interests" of either party from being remitted to arbitration. And the State concerned decided for itself which of its interests it chose to regard as vital. The same idea was to some extent continued in the Optional Clause, which provided that certain matters were not referable to the Permanent Court of International Justice unless the parties agreed. And so States would not allow the rule of law to have the final say in the determination of matters of high policy and they would not allow it, not because of any notion of national prestige or sovereignty, but because they were afraid that some interest of theirs which in the existing state of world society they deemed it vital to preserve might suffer. And that they could not afford to risk. If the legitimate interests of every State could be secured or promoted by peaceful means—as, for instance, by a World Parliament—as they can in the case of individuals, there would be no more need for States to protect themselves against the operation of world laws than there is for individuals to exclude themselves from the scope of municipal laws. But the truth is that that has not hitherto been the position. In a world society where States were organised for war, where the game of power politics was being played, where the ultimate argument by which States promoted their claims was the threat of war, and where no State enjoyed security against that threat, each State had to be constantly concerned with its own strength and its own defence. It could not afford to risk anything being given away or taken away by the operation of International Law because the result would be to diminish its security, its power of defence; and its security depended upon itself alone. If you succeed in establishing a system of collective security, if you really do set up an organisation which makes war, if not impossible, at least very dangerous, a great many State interests will no longer be vital at all in the old sense, and in the result States will be able with less risk to themselves to submit to the arbitrament of International Law. You must reproduce in the international sphere the conditions which induce common consent to be governed by the rule of law in the national one.

That brings me to the second reason why International Law failed in its ultimate purpose of securing world peace, and the two reasons are closely connected. It failed because the States of the world made no adequate effort to enforce it. The Pact of Paris of 1928 constituted a law—and it still does, for I emphasise as strongly as I can that the Pact of Paris is still the law—by which the States of the world did submit a vital interest of all of them to International Law. They outlawed and forbade war. But having done so they failed to enforce what they had done. It is idle to say that the League of Nations failed. As a piece of machinery it was admirable. The member States failed to use it. They thought it was enough to have paper laws, to say that war was illegal without taking effective measures to enforce what they said. The policemen allowed themselves to be bullied and blackmailed into inactivity by the lawbreakers. You can have laws, but you cannot have fully effective laws unless you are prepared to enforce their operation. History will, I think, make clear that in 1933, 1936, possibly in 1937 or 1938, strong and effective action through the League would have prevented war. It was not the law which failed. It was the policeman.

And so what? Now we have set up another organisation. The United Nations. It is not all that eventually it may become. Yet, as a mere piece of machinery its constitution does, I think, show a marked advance on the Covenant of the League. Municipal law was not built up from the family to the clan, and the clan to the tribe, and the tribe to the State, in a day. So here I do not believe that the right of veto possessed by the Great Powers on the Security Council need in any way be fatal to its development. We must move by stages. Majority decisions of the Assembly will carry enormous and increasing weight. So far as Great Britain is concerned, in matters dealt with by the Assembly we shall abide by majority decisions in accordance with the terms of the Charter even if they go against our view. There will be no walking out. I believe that if each State can be induced to base its foreign policy on the United Nations Organisation rather than on blocs and power politics—and that is certainly the attitude of Great Britain—we can build U.N.O. into a powerful machine capable of securing world order and maintaining collective security. And once you have the policemen available no one will doubt the existence of the law. And once you obtain collective security, vital interests cease to be vital. The problem, then, is to secure the ordered application of a system of law which is there. At present there is chaos. A year after the end of fighting there is still no peace. Expressing a purely personal view, I think myself that if the Great

Powers cannot very soon produce peace treaties the United Nations must see whether they cannot assert their influence. But however that may be, I am certain that unless freedom and civilisation are soon to perish from the earth we must restore the rule of law to international affairs. And that we can only do if, discarding those narrow ideas of State Sovereignty and national prestige which have served us so ill in the past, we determine, individually and collectively, to build the United Nations Organisation into a real law-enforcing body. The International Court is there; the International Law is there; let us see to it this time—and quickly—that the International Police Organisation is there also to carry it out. That is the message which the lawyers must surely bring to the politicians and the statesmen—and the people of the world.

TERMINATION OF WARTIME LEASES.

The Application of the Regulations.

The recent case, *Mrs. Levin, Ltd.* v. *Wellington Co-op. Book Society, Ltd.* (to be reported), is the first in which the Validation of Wartime Leases Emergency Regulations, 1945 (Serial No. 1945/197), have been considered. The English enactment, the Validation of Wartime Leases Act, 1944, of which the Regulations are a copy, with only the necessary alterations, had been considered in two cases of which reports are to hand, and the English Judges appear to have found as much difficulty in its interpretation as Mr. Justice Fair has with our Regulations.

In *Lace* v. *Chantler*, [1944] 1 K.B. 368, [1944] 1 All E.R. 305, the Court of Appeal adopted the passage in *Fox on Landlord and Tenant*, as to the duration of the term, as a correct exposition of the law, and stressed that a lease must be for a term certain, or, if the term be fixed by reference to some collateral matter, that matter must either be itself certain or capable before the lease takes effect of being rendered so. As very many tenancy agreements had been entered into in which no specified term had been provided, and in which the *habendum* was fixed only by some general reference to the duration of the war, in reliance on the decision in *Great Northern Railway Co.* v. *Arnold*, (1916) 33 T.L.R. 114, the Legislature stepped in to validate them, and provided that these agreements were to take effect as if they had been for a term of ten years, but determinable on the happening of the named contingency.

In the interpretation of these enactments, points which appear not to be sufficiently appreciated are:—

(1) Their effect is to validate certain void agreements, and there is no interference in any manner with agreements already valid.

(2) They are intended to apply to all void agreements in which an attempt was made to fix the term of a tenancy by reference to the duration of the war or some like reference.

That valid agreements are not affected would appear from the following considerations:—

(*a*) The regulations are intituled the *Validation* of Wartime Leases, etc.

(*b*) The specific inclusion of various forms of invalid agreement by Reg. 2 (3) and the express exclusion by the same regulation of agreements for a specified term, subject to a right on the part of the landlord or the tenant to determine the tenancy if the war ends before the expiration of that term, by notice after the end of the war.

(*c*) The fact that the regulations do not expressly validate any form of agreement but provide that the agreements to which they refer shall be construed as if providing for a tenancy of ten years subject to a right, etc.—a form which makes them valid.

(*d*) Regulation 4 (2) (*c*) provides that the regulations shall not apply where "The parties have agreed, before the commencement of these regulations . . . to substitute for their existing agreement a valid tenancy."

That all invalid agreements in which the term is fixed by some reference to the duration of the war are intended to be included within the scope of the regulations would appear from the following provisions:—

(*a*) Regulation 2 (2) defines the expression "the duration of the war" as meaning:

> . . . a period which, on the proper construction of the words used . . . *whatever they may be*, ends with . . . one of the following events:—
>
> (*a*) The end of the war or of hostilities in respect of . . .
>
> (*c*) The end of the emergency . . .
>
> (*e*) Any event likely to occur on or in connection with any of the events aforesaid.

(*b*) Reg. 3 (1) provides: "Where any tenancy agreement uses . . . the expression "the war . . ." or "the emergency" or *any similar expression* . . ."

Unfortunately the judgment in the *Mrs. Levin, Ltd.* case does not state the manner in which the term was fixed, and it is difficult to reconcile the statement in the first paragraph of the judgment, that it was "for a fixed term, determinable automatically three months after the cessation of active hostilities," with the later statement:

> By the joint operation of cls. 2 (2) and 2 (3), the regulations, read literally, apply to this lease, with the exception that the regulations apply to leases the terms of which are dependent on the cessation of hostilities and the term of this agreement is dependent on the cessation of "active" hostilities.

Regulation 2 (3) (*a*) refers to agreements "for a specified term or for the duration of the war, whichever is the shorter" (or the longer), which are equally as void as those in which no specified term is provided, as they are not for a term which is made certain *before they take effect*.

The application of the regulations to a particular agreement depends, not on whether the word "hostilities" is qualified by the addition of "active" or any

other adjective, but on whether it is a valid or a void agreement in accordance with the principle defined in *Lace* v. *Chantler*. In this connection, *Eker* v. *Becker*, [1946] 1 All E.R. 721, appears valueless as an authority, as in that case Charles, J., displays a complete misunderstanding of the principle underlying the decision in *Lace* v. *Chantler*. The agreement he was construing differed from the one considered in *Lace* v. *Chantler* only in that it provided expressly that the termination of fighting was to be treated, for the purpose of the agreement, as the end of the war. Its duration was equally uncertain *at the time it took effect*. It is seldom a Judge of a Superior Court goes so completely astray as to the *ratio decidendi* of a case directly in point in the problem before him.

Confusion as to the date which is to be taken for the termination of an agreement to which the regulations apply is likely to arise through Reg. 3 (3) (*a*) authorizing the Governor-General to declare by Order in Council what date is to be treated as the " end of the war *and* of hostilities," as though there is no distinction. Elsewhere in the regulations, reference is made to the war *or* hostilities. This difficulty did not arise in England, as the respective dates in the Orders in Council relating to the war in Europe and to the war in the East were the dates of the cessation of hostilities. The New Zealand regulations were not made until several months after the cessation of hostilities.

Fortunately, however, many agreements can be adjudicated on independently of an Order in Council, as the regulations make it quite clear that the Court should, as a paramount consideration, give effect to the meaning of the particular expression used in the agreement defining the date of its termination as the parties intended or as the context requires. For example, Reg. 3 (1) provides that where an agreement uses, for the purpose of defining the term of the tenancy, or for any other purpose, the expression " the war," or " hostilities," or the " emergency," or *any similar expression*, such expression shall be construed as referring to those States with which His Majesty was at war at the date when the agreement was made " unless it is shown that the parties intended that the expression should be otherwise construed."

Regulation 3 (2) provides that the Court may admit any evidence which in its opinion may throw light on the intention of the parties as to the meaning of the said expression.

Regulation 3 (3) provides that agreements shall be construed in accordance with the various dates which may be declared by Orders in Council as to the war generally or any theatre of war, " unless the context requires, or it is shown by admissible evidence, that it should be otherwise construed."

The use of the adjective " active " with reference to hostilities, therefore, must be of assistance to the Court in determining the date of termination of an agreement as emphasising the intention to limit the term by reference to the period of actual fighting as opposed to the duration of a technical state of war. " Active " or " actual " hostilities are terms to which one naturally resorts to make the distinction, and these terms have been used for that purpose in reported cases.

In *Ruffy-Arnell and Baumann Aviation Co., Ltd.* v. *The King*, [1922] 1 K.B. 599, 613, Mr. Justice McCardie stated: "Whilst fully aware of all the difficulties from any point of view, I shall hold that the parties here were contemplating as the 'duration of the war' the substantial continuance of active hostilities. I hold that the proper and just date to take is December 14, 1918."

Sir Michael Myers, C.J., in *In re Hourigan*, [1946] N.Z.L.R. 1, decided that a state of war still existed for the purposes of that case " *though actual hostilities* may be taken to have ceased with each of the enemy countries when that country made an unconditional surrender or the equivalent thereof."

SUMMARY TRIAL OF INDICTABLE OFFENCES.

Further Incongruities.

By I. D. CAMPBELL.

In an article, p. 79, *ante*, on the extent of the jurisdiction under Part V of the Justices of the Peace Act, 1927, there is a discussion of the decisions in *McDonald* v. *Dyer*, [1917] N.Z.L.R. 793, and *Police* v. *Murray*, (1939) 1 M.C.D. 146. The conclusions reached by the learned contributor seem to the present writer to be fully justified. But he has by no means exhausted the incongruities of the legislation, which is undoubtedly one of the less attractive portions of our heritage from the past. The present article deals with s. 239 of the Act of 1927.

By s. 238, an adult charged before justices with theft of property valued at over £2 but not more than £20 (or with certain kindred offences) may be tried summarily if the Court thinks fit and the accused consents. By s. 239, an adult " charged as mentioned in the last preceding section " may be tried summarily if the Court thinks fit and if the accused pleads guilty, but not otherwise.

Divergent views have been taken of the scope and meaning of s. 239. *Garrow*, it is true, in his *Crimes Act, 1908 (Annotated)*, 2nd Ed. 320, throws together both the equivalent sections of the Act of 1908, and apparently discerns no difficulty in reconciling them. However, as no explanation of the need for two provisions is offered, this is perhaps not very significant. The two viewpoints generally held seem to be well represented in *Luxford's Police Law in New Zealand*, 250, and *Maunsell's New Zealand Justice of the Peace and Police Court Practice*, 103. Mr. Luxford treats s. 239 as being subject to the same limitation of value that applies to s. 238, for he says that s. 239 is merely supplemental to s. 238: " Section 238 presupposes that the accused denies his guilt; s. 239, that he admits his guilt." On the other hand, Mr. Maunsell holds that s. 239 purports to give jurisdiction regardless of the amount involved.

No other alternatives are open, yet both views lead to a conflict with other sections of the Act. If ss. 238

and 239 are subject to the same limitation of value, they are plainly contradictory. Under s. 238, a person who has elected summary trial may plead not guilty, be tried, found guilty and sentenced. Under s. 239, a person charged with an identical offence can be tried summarily only if he pleads guilty. Should he not plead guilty, there is no jurisdiction to deal with the case summarily even with his consent. Moreover, Mr. Luxford's interpretation is open to the objection that s. 239 includes express provision for the situation where the accused pleads not guilty.

On the other hand, Mr. Maunsell's explanation leads to an equally patent inconsistency, as he himself observes. He writes:

> The section cannot be acted on safely, and is not acted on in practice. It is in conflict with s. 188 (*e*) which purports to place a limit on the jurisdiction of Magistrates under that section, as well as under s. 238, up to an amount not exceeding £50 . . . The position is therefore anomalous.

The dilemma arises, as it so often does, from the successive amendments, consolidations and re-enactments from which these provisions have suffered. The history of ss. 238 and 239 shows beyond any shadow of doubt that they are derived from two distinct procedures applicable to two different situations, and that the present *impasse* results from "improvements" introduced by the Legislature.

If we go back eighty years, we find that, under the Justices of the Peace Act, 1866, charges of larceny could be dealt with summarily where the value of the property stolen did not exceed £5, but, if the person charged confessed his guilt, summary jurisdiction could be exercised in cases up to £10. The Justices of the Peace Act, 1882, ss. 178 and 179, made more elaborate provisions, which may be summarized thus: Larceny, embezzlement, receiving and kindred indictable offences specified in a schedule to the Act were to be triable summarily if the Court considered it expedient and the accused consented. If the property did not exceed £2 in value, the case could be tried summarily whether the accused pleaded guilty or not guilty. If, however, the value of the property was more than £2, the case could not be tried summarily unless the accused pleaded guilty. No upper limit was imposed in this event.

Apparently this was found to have several disadvantages. In the first place, the accused might elect jury trial where the value of the property involved was very small. Secondly, if the accused pleaded not guilty in a case involving, say, £3, he had to go before a jury, even thought the Court thought the case suitable for summary trial and the accused desired to be tried summarily. Consequently, by an amendment in 1885, the Court was given jurisdiction to try summarily without the consent of the accused if the property did not exceed £2 in value. In cases up to £5, there could be summary trial with the consent of the accused, whether he pleaded guilty or not guilty, and in cases over £5 he could be tried summarily with his consent only if he pleaded guilty.

The Indictable Offences Summary Jurisdiction Act, 1894, repealed all the foregoing provisions and enacted new clauses which are, in the main, identical with provisions now contained in Part V of the Justices of the Peace Act, 1927. No change was made in regard to cases involving up to £2. They remained punishable summarily without the consent of the person charged, and regardless of the nature of his plea. But the Legislature played havoc with the system which had been evolved for cases involving over £2. There had been two clear and distinct rules: from £2 to £5 there could be summary trial with consent on a plea of either guilty or not guilty; over £5 there could be summary trial with consent only on a plea of guilty. The Act of 1894 retained, in s. 51, the summary jurisdiction that previously existed in cases up to £5. But s. 52, instead of being made to apply to cases involving over £5, was made to apply to cases where the value exceeded £2 but did not exceed £5—*i.e.*, to exactly the same offences dealt with in s. 51. Two systems which had previously been applicable to cases distinguished by the value of the property concerned were *both* made applicable to cases of the same value. Consequently, by s. 51, summary jurisdiction could be exercised with consent from £2 to £5 whether the accused pleaded guilty or not guilty, and, by s. 52, summary jurisdiction could be exercised in the *same* cases only if the accused pleaded guilty. The sum of £5 has now been raised to £20, but the blunder of 1894 has passed on through intervening legislation to form ss. 238 and 239 of the Act of 1927. The only difference in this connection is that an alteration of phrasing in the opening words of s. 239 (and its predecessor in 1908) has veiled the fact that in 1894 the section was expressly subject to the same restriction in value as the preceding section—a fact that Mr. Maunsell appears to have overlooked.

Sections 238 and 239 are themselves both in conflict with s. 188 of the Act in regard to obtaining by false pretences. By s. 188, a charge of false pretences involving property of a value exceeding £2 but not exceeding £50 must be dealt with by a Magistrate, not by Justices. But, by ss. 238 and 239, Justices may deal with such cases from £2 to £20. Moreover, if s. 239 is regarded as ousting summary jurisdiction where the accused pleads not guilty, there will be a further conflict with s. 188. But this is not all. Under s. 52 of the Act of 1894, if the accused pleaded guilty, he could be sentenced to a term of imprisonment *not exceeding six months*. This was too verbose for the draftsman in 1908. In the consolidating Act of that year, s. 227 (reproducing s. 52 of the earlier Act) closed with the words:

> . . . if he says he is guilty the Court *shall* thereupon cause a plea of "Guilty" to be entered and *adjudge him to be imprisoned with or without hard labour for six months.*

This is still the wording of s. 239 (1) of the Act of 1927. But for the tacit agreement of Magistrates to turn a blind eye to the section, there would be an irreducible penalty fixed by law for any offender rash enough to plead guilty to a charge of stealing property to the value of £2 1s.—a mandatory sentence of six months' imprisonment.

The Justices of the Peace Amendment Act, 1946, has now become law. May one plead for a further amendment to remove these anomalies? Section 239 is either obscure and in conflict with other sections of the Act or else it is entirely unnecessary. It is submitted that its early repeal would be an advantage. In view of the differences of opinion as to the meaning of other parts of the Act, the unsatisfactory state of affairs disclosed in *Police* v. *Murray* (*supra*), the confusing condition of the provisions relating to children (many of the sections being obsolete), and other unsatisfactory features of the Act, the whole statute could with great advantage be remodelled. In the meantime, however, this excrescence (s. 239) at least could be removed.

IN YOUR ARMCHAIR—AND MINE.

By SCRIBLEX.

Judicial Admissions.—Amongst the Judges present at one meeting of the Hardwicke Society was Mr. Justice Bigham, who had, a few weeks before, been raised to the Bench. In replying to the toast of "His Majesty's Judges," he expressed the hope that, in carrying out his judicial functions, he would never forget that he was once at the Bar. "I hope," he said, "to remember the difficulties which beset the advocate when the Judge is impatient and troublesome. If I am ever impatient or wrong in my law, I hope you will never hesitate to tell me so." At a later stage of the evening, a youthful orator, emboldened by a more plentiful supply of good liquor than is nowadays to be found at a law dinner, took it upon himself to say: "If all the Judges on the Bench were what Mr. Justice Bigham is going to be, the difficulties of young barristers would be greatly diminished." A judicial confession of mistake is not unique, even if rare. Downie Stewart speaks of one in his biography of Sir Joshua Strange Williams. The case was a long and complicated one which had been through various stages over many months, and, on a particular application being made to him, the Judge objected that one statement was inconsistent with what had been said at an earlier stage. Counsel, somewhat annoyed, answered that he had not overlooked anything and that "the facts are *not* as Your Honour remembered them." An awkward silence followed as Williams, J., looked through the large file, and then, finding what he sought, he looked at counsel and said, "I find that you are absolutely right and I was quite wrong. Will you please accept my profound apologies? To have pitted my memory against yours was particularly inexcusable when I had the papers before me at the moment. I should have consulted them first. They entirely support what you say!"

Nuremberg Note.—In a remarkable article published in the *New Yorker* on the Nuremberg trials, the well-known writer, Rebecca West, pays tribute to the efficacy of the English method of cross-examination of witnesses, particularly as exemplified by Sir David Maxwell Fyfe, who "never exempts himself from the discipline of fairness, drives witness after witness backward, step by step, till on the edge of some moral abyss they admit the truth." When the Nuremberg tribunal was first set up, the government in power was that formed by Winston Churchill from the Conservative Party to function while the general election was fought, and, as Attorney-General in that government, Maxwell Fyfe became chief prosecuting attorney; but on the formation of the Labour Government he was supplanted by Sir Hartley Shawcross and volunteered to assist as second-in-command. As a contrast to the type of cross-examination to which we are accustomed in our Courts, and which has so impressed both American and continental critics of the trials, Miss West observes: "It is impossible to guess why a Russian lawyer should step up to the rostrum to cross-examine a witness, and, squaring his shoulders as if he were going to address himself to an athletic feat, should shout words which it would be fair to quote as 'Did you conspire to wage an aggressive war against the peace-loving democracies? Answer, yes or no.' Or, why, on receiving the inevitable answer 'No,' he should continue, 'I accept your answer.'"

What is Hosiery?—The Court of Arbitration has recently had to decide as to whether workers in knitting-mills engaged in the cutting, making up and pressing of men's and women's underwear and of cardigans and pullovers came under the Woollen-mills and Hosiery-factories Employees' Award, the New Zealand Shirt White and Silk Workers' Award or the New Zealand (except Nelson and Westland) Clothing-trade Employees' Award. The solution of this problem involved detailed consideration of the trade meaning of "hosiery," and this crucial question led the Court to seven sources of enquiry: *Webster's International Dictionary*, the *Oxford English Dictionary*, the *Standard Dictionary of the English Language*, *Funk and Wagnalls Dictionary*, the *Large-Type Concise English Dictionary*, the *Textile Mercury and Argus* and the fourteenth edition of the *Encyclopaedia Britannica*. The conclusion reached was that men's and women's underwear, cardigans and pullovers manufactured of knitted fabrics fall within most of the up-to-date definitions of hosiery. During the course of the hearing, Tyndall, J., observed: "My wife tells me that if she wanted to purchase underwear she would not go into the hosiery department of the D.I.C." "Of course," he added, with a smile, "she is not going to decide the case." "Possibly not," replied counsel, dryly, "but she would not be the first judge's wife who did!"

Oath Fees.—A practitioner briefed to appear at one of the circuit towns of the North Island tells Scriblex that he was sitting in the Supreme Court library there waiting the finish of the case preceding his when a local law-clerk approached him with a bunch of affidavits which required to be sworn. In the course of completing the affidavits and their various exhibits, he turned over in his mind the best way to give the young man half the fee without making the recipient feel that he was the deserving object of some legal charity. However, nothing more substantial than thanks being proferred, the visiting barrister gently reminded the law-clerk that he had overlooked the matter of oath fees. "Oh," replied the young man, blandly, "here, we charge them up, but not against each other!" The painful recital recalled a story, told by the late Mr. Justice Alpers in his *Cheerful Yesterdays*, of an old firm of London solicitors, who, over a century ago, were tendered a spurious shilling in payment of an oath fee. To guard against the occurrence of such a calamity in the future, he says, they amended the formula by an addition which ever since was used in their office: "You swear that this is your proper name and handwriting; that the contents of this your affidavit are true; *and that the shilling you now tender is a good shilling*—so help you God."

On Speedy Legislation.—"That is all right for a sausage factory, but not quite the same in regard to matters which affect the lives and happiness of vast numbers of people."—Winston Churchill in the House of Commons.

LAND SALES COURT.

Summary of Judgments.

The summarized judgments of the Land 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. 89.—O. TO P.

Rural Land—Citrus Orchard—Value of Fruit-trees and Shelter Belt—Basis of Valuation.

Appeal on three main grounds: (1) The unimproved value of the land. (2) The *lawsoniana* shelter belt. (3) The value of the lemon and grapefruit trees. The appellant contended that the value fixed by the Committee was too low.

The Court (per *Ongley*, J.) said: "So far as the land value is concerned, the appellant's contention is based on the value fixed on land in the same district as this land in a sale, No. 73, *P. T. to S.* In that case the Court inspected the land and fixed a value of £300 per acre. It is said that this land is worth up to £100 per acre more than that land. What is overlooked in that contention is that the basis of valuation is not the same in that case as in this, because that sale was land for a residence site, and many special features were involved. The site was selected by the purchaser because of its excellent view and general attributes as a site for a home. Moreover, the land was not on the market, the owner was not desirous of selling, and the purchaser "picked the eyes out of the farm" to get the site. In fixing the value, the Court took these special factors into consideration, made provision to prevent this view every being built out, and fixed a price accordingly. The value was not based on the productive value of the land either for citrus-growing or otherwise. It may be true that this land is better for citrus-growing than the land in *P.T. to S.*, but the land in *P.T. to S.* was not valued on that basis, and therefore forms no basis of value in this case, because this is a commercial citrus-growing proposition, and has to be valued accordingly. This land does contain a desirable building site, but not as good as the site in *P.T. to S.* To base the value of a citrus orchard on the value of a residence site would be somewhat like valuing a farm on the basis of the value of city sections. The Court takes the view that the proper basis of value in this case is the sale of the adjoining land (McK.'s), because it is adjoining land similar in contour and equal in quality. That land was sold and passed at an unimproved value of £300 per acre. The fairness of that value is borne out by other sales quoted. We therefore fix the unimproved value of this land at £300 per acre.

"That leaves the value of the fruit-trees and the shelter belt for consideration. The Court holds that the fruit-trees should be valued on their value as a factor in the fruit production of the trees. On that basis, the value of the shelter belt is contained in the productive value of the trees. What the shelter belt is worth is the amount by which it increases production. Production is greater with the shelter belt than without it, and value based on production is, therefore, the value of the trees, including the extra production obtained by virtue of the shelter belt. The appellant relied on the evidence of Mr. C. and Mr. S. Mr. C. said: 'It is largely a question of personal opinion as to the value of the shelter,' and that he personally would pay £250 for it. He considered it would cost this to establish the shelter belt. He valued the citrus trees at £7, on the basis of another sale with which he was conversant, but said he was not an expert in valuing trees. Mr. S. said the trees had been neglected and had suffered in consequence, but he saw no reason why they should not be restored with good treatment. He based his value on a production of eight bushels for the good trees and four bushels for the others, and on that production he valued the trees at £8 and £4 respectively. That works out at £1 per bushel produced. Mr. S. valued the shelter belt on the basis of what it would cost to establish it. Both Mr. C. and Mr. S. added their value of the shelter as a separate item, and did not include it in the value of the trees, but both agreed that the production would not be got without the shelter. The Court holds that this method results in double-banking the value of the shelter. The Crown relied on the evidence of Mr. J.H. and Mr. R.H. They agree that the orchard has been neglected and that it can be restored by reasonable attention, but this will take two to three years. Their estimate of present production is six bushels. They take the view that the value of the shelter is included in the production value. Mr. J. H. says that, if the trees get treatment by a good average orchardist, they will go up to eight or ten bushels, and that, if a man bought at the neglected price, he would be getting something more than he was paying for. Both Mr. J.H. and Mr. R.H. say that 12s. per bushel is the proper basis for valuation, and that £1 per bushel is too high. They give reasons for their 12s. basis. Mr. R.H. says: 'We arrived at that 12s. purely as a result of our experience in valuing trees for a great number of years. We have been called on long ago to assist growers and produce budgets for them and assess the value of property to enable them to make a living. We work back from the budgetary basis. It is a guide. We allow a higher figure for grapefruit. That operates over the whole of the orchard. We do a lot of valuations in Auckland and Keri Keri and they have been generally accepted, by both sides and by growers.' On the evidence, the Court accepts the 12s. per bushel basis for valuing the trees.

"The Committee fixed the unimproved value of the land at £300 per acre, and the trees at £5 each. This is equal to eight and one-third bushels on the 12s. basis. In addition to this, the Committee allowed £108 for the shelter, which is roughly equal to another bushel per tree on the 12s. basis. Bearing in mind that it will be two to three years before the orchard will be restored to a reasonably good condition, we think the Committee's valuation is fair. The appeal is accordingly dismissed."

No. 90.—*In re* H.

Rural Land—Acquisition by Crown—Objection by Owner—Matters for Court's Consideration—Capability of Subdivision into one or more Economic Holdings—Whether Objection allowable, unconditionally or otherwise—Servicemen's Settlement and Land Sales Act, 1943, ss. 23, 26 (3).

Appeal by the owner of a farm property of 1,145 acres near Pahiatua. By *Gazette* notice dated March 20, 1945, the Minister of Lands gave notice, in pursuance of s. 24 of the Servicemen's Settlement and Land Sales Act, 1943, of his intention to take the land. The appellant duly gave notice of objection. The case was heard by the Wellington Rural Land Sales Committee on November 28, 1945, and an order was made "that the objections by the appellant are disallowed." At that hearing it was conceded by counsel for the appellant that the land was suitable for subdivision under the Act. The appellant appealed against the order. On January 14, 1946, the Minister gave the appellant notice of the passing of the Servicemen's Settlement and Land Sales Amendment Act, 1945. The appellant then gave notice that, in the event of his appeal being dismissed, he claimed to retain certain of the land, which he set out in his notice. On March 19, 1945, the Minister gave notice that he did not agree to the retention area claimed by the appellant, and offered as a retention area certain land which the Minister specified. Substantially, the Minister wanted to take the land that the appellant wanted to keep, and *vice versa*.

The Court (per *Ongley*, J.) said: "The appeal came on for hearing before this Court on May 27, 1946. At the appeal hearing, counsel for the Crown reduced the Crown's claim to 134 acres 3 roods 3 perches of flat land, plus a run-off of 75–100 acres on the hill country adjoining.

"That is how the case stood when the appeal was heard by this Court. The evidence was lengthy. It was in many respects conflicting. It was therefore essential to make an inspection of the property. The appellant bought the property in August 1943, and he is farming it for stud-breeding purposes wit

Romney sheep and polled Angus cattle. There is about 1,145 acres in the property, and it consists of two distinct areas and two distinct types of land. First, there are some 217 acres of flat land on the western side of the road. This land is subject to flooding. Then there are some 928 acres of undulating, hilly and broken country on the eastern side of the road. The Crown originally sought to acquire all the land, but, as already stated, this claim was reduced when the retention offer was made, and was further reduced at the hearing. So far as the flat land is concerned, the final claim was limited to the 134-odd acres. The Crown claimed that two economic dairy farms could be established on these 134 acres, each one to have a portion of the hill land as a run-off. In considering the evidence, the Court feels that irrelevant matters raised by both parties, such as the sacrifice made by the appellant in selling his Greytown property and thereby making it available for settlement of servicemen, and the fact that the appellant was exempt from active military service, should and can properly be completely disregarded. What the Court must concern itself with is (i) whether the land is capable of subdivision into two or more economic holdings in terms of s. 23 of the Act, and (ii) whether the appellant's objection should be allowed or disallowed, unconditionally or otherwise, as set out in s. 26 (3). On the first question, there can be no doubt whatever that the land is capable of subdivision into at least two economic holdings. That was, in fact, conceded. The Minister, by the notice of March 19, 1946, offered the appellant approximately half the farm as a retention area. The appellant in turn offered the Crown that portion, but this was not acceptable to the Crown, presumably because of its poorer quality and contour. The real issue before the Court was the merit of the appellant's objections to the taking by the Crown of what he claimed was, and what undoubtedly was, his best land.

"There is little doubt that the land which would be left to the appellant if the claim of the Crown (as amended at the hearing) succeeded would be sufficient for an economic unit as an ordinary commercial sheep farm, but the appellant is not farming in that manner. He is, and since 1937 has been, a stud breeder, and claims that he should not be forced to give up that method of farming and go over to ordinary sheep-farming. The evidence for the Crown supports the appellant's claim that crops must be grown for the successful carrying on of stud breeding in that district, whereas ordinary sheep-farming can be carried on without cropping. There is a very definite difference of opinion between the parties as to where these crops can be grown, and it is mainly on this issue that the whole contest centres. The appellant claims that the 134 acres of flat land which the Crown is claiming is necessary to his continuation as a stud breeder for the purposes of growing 35 acres of crops each year and having early feed for the "bringing out" of his stud stock for sale purposes. The Crown, on the other hand, claims that the area of hilly land, which the Crown proposes to leave to the appellant, contains suitable areas of undulating land, estimated by their witnesses at approximately 125 acres, on which to grow the necessary crops besides the area of flat land the appellant was being allowed to retain. The appellant claimed that this latter area of flat land was completely unsuited for cropping because of the flood hazard it is subject to.

"Our inspection of the property leaves no doubt as to which evidence should be accepted on this issue. There was ample evidence at the time of our inspection to support the appellant's evidence regarding the flood hazard on the flat land being left to him under the Crown's claim. Some areas which could be ploughed and cropped do exist on the land being left to the appellant under the amended claim, but, in the main, these areas are, with one exception, small and isolated, and not easily accessible. We have doubts whether the total ploughable areas would be as extensive as suggested by the Crown witnesses, and agree with the appellant's witnesses, who claimed that for cropping purposes they would be much inferior to the flat land which the Crown proposes to acquire. The fact that none of these areas has in the past been ploughed and cropped suggests that they have been considered uneconomic for that purpose because of their size, isolation and contour. Actually, these areas are mainly in the area which the Crown was proposing to acquire when the retention area was offered to the appellant. The proposal to leave him these areas was made by the Crown at the hearing of the appeal when the claim was finally amended.

"One other factor, not stressed in evidence, but which common justice demands should be taken into consideration, was obvious on inspection of the property. It is that the easiest access to the areas on the eastern side of the road, which the Crown claimed as suitable for cropping, is gained through the area of land which the Crown claimed for a run-off in its finally amended claim. To deny the appellant this access to the back portion would reduce the value of the retained portion of his property by making it harder to work. It is evident from the foregoing recital of facts and the conclusions we are forced to arrive at that, if the appellant is to be allowed to continue as a stud breeder, either to his present extent or to his extent while at Greytown, then the Crown's claim must be further amended.

"On the question of the appellant's right to remain as a stud breeder and not be forced to turn to ordinary sheep-farming, there is no specific direction in the Act, nor was the Crown's evidence directed to force the appellant to change his method of farming. In fact, it is plain that the Crown's case suggested that the appellant should be left to carry on his stud-breeding operations, but on a reduced scale. The Court considers that, in all the circumstances, the appellant should be allowed to continue as a stud breeder, but we do not agree that the retention of the whole of the 1,145 acres of land is essential for that purpose. We do, however, agree that he is entitled to retain part of the 134 acres of flat land which the Crown has claimed, so that he can grow crops and continue stud breeding on a reduced but economic basis, and that the easiest access route to the back of the property should be left to him. With these two safeguards to his position, we are of opinion that the appellant can carry on with his stud-breeding enterprises. He could even give up some of the hilly land that it is proposed to leave him and still have an economic unit for stud breeding. The Court cannot consent to what the Crown is asking, but would consent to the acquisition by the Crown of an area of flat land on the western side of the road, not exceeding 80 acres, bounded on the north by the adjoining property, on the west by the river, and on the east by the road, and a suitable area on the opposite side of the road for a run-off, provided such area does not include the formed access route from the road to the back of the appellant's property.

"The Court consents to acquisition by the Crown of the aforesaid 80 acres of flat land together with a suitable area for a run-off. Failing agreement between the parties on the area and location of the run-off, the matter can be referred to the Court for determination."

No. 91.—B. TO J.

Urban Land—Subdivision into Sections—Fair Value of Sections—Directions as to Determination—Incidence of Subdivisional Cost.

The Court (per *Ongley*, J.) said: "The question that arises in these appeals has recently come before the Court in other cases of new subdivisions. It arises because subdivisional costs have increased, due to present-day conditions and present-day local body requirements. No difficulty arises where the value of all the sections in a new subdivision assessed by the usual method of comparable sales enables the vendor to recover the fair value of the property as at December 15, 1942, and his cost of subdivision, including a reasonable profit. Where, however, the total value of all the sections assessed in this manner will not enable the vendor to do this, a question of public interest arises, because an owner will not subdivide unless he can recover the value of his property and his cost. The Act was intended to promote settlement, not to retard progress. Even the settlement of discharged servicemen will be prejudiced if new subdivisions are prevented by reason of vendors not being able to recover their outlay. Clearly this would be contrary to the spirit and intention of the Act. It therefore becomes a question of primary importance in each case to determine whether or not it is in the public interest to consent to sales of sections in a new subdivision at amounts higher than the basic values fixed by the usual method, so that the subdivision can proceed on a basis that will enable the owner to recover the value of his property as at December 15, 1942, plus fair and reasonable subdivisional costs and a fair and reasonable margin of profit, according to the circumstances of each particular case. Although the point does not arise in this case, it will be necessary to consider and determine in some cases which sections in a new subdivision should bear the subdivisional costs, because in some subdivisions some sections are cut to existing roads or streets. Generally speaking, no part of the subdivisional cost should be loaded on to such sections, because no part of the cost is required for their subdivision. There are no such sections in this subdivision.

"The Court holds that the question of determining the fair value of the sections affected by these appeals and in this sub-

division should be remitted to the Land Sales Committe with the following directions :

(*a*) That the Committee shall first fix the total value of all the sections in the subdivision in accordance with the provisions of the Act and upon the basis that the roading, filling, excavating and all other works required for the subdivision have been completed and that the requirements of the local and all other authorities have been complied with.

(*b*) That the Committee shall then determine the reasonable cost of the subdivision, including survey and legal costs, on the basis that the requirements are to be complied with and that a reasonable profit on the subdivision is to be allowed to the vendor.

(*c*) That the difference between the reasonable cost so determined and the total value of the sections be divided among the sections in proportion to the value of each.

(*d*) That the Committee shall fix the fair value of each section for the purpose of s. 54 of the Act by adding to the value of each section its proportionate part of the subdivisional costs as determined by cl. (*c*) hereof.

(*e*) That the additions allowed in cl. (*d*) hereof shall be disregarded in fixing the value of any section not in this subdivision."

NEW ZEALAND LAW SOCIETY.

Meeting of Council.

A Meeting of the Council of the New Zealand Law Society was held on Friday, September 20, 1946.

Societies Represented : Auckland, represented by Messrs. A. H. Johnstone, K.C., M. R. Grierson (proxy), J. B. Johnston, and L. P. Leary ; Canterbury, Mr. L. D. Cotterill ; Gisborne, Mr. J. G. Nolan ; Hamilton, Mr. W. Tanner ; Hawke's Bay, Mr. W. G. Wood ; Marlborough, Mr. W. Churchward ; Nelson, Mr. V. R. Fletcher ; Otago, Mr. I. B. Stevenson ; Southland, Mr. L. F. Moller ; Taranaki, Mr. R. J. Brokenshire ; Wanganui, Mr. R. S. Withers ; and Wellington, Messrs. P. B. Cooke, K.C., W. P. Shorland and G. G. G. Watson.

The Vice-President, Mr. A. H. Johnstone, K.C., occupied the Chair. Mr. A. T. Young (Treasurer) and Mr. J. R. E. Bennett were also present.

His Excellency the Governor-General :—The following letter was received from the Military Secretary to His Excellency the Governor-General :

"I duly laid before His Excellency Sir Bernard Freyberg your letter of yesterday's date enclosing a resolution passed at the recent quarterly meeting of the New Zealand Law Society in connection with his assumption of office as Governor-General.

His Excellency wishes me to thank your Council sincerely for its kindly welcome and good wishes to Lady Freyberg and himself and to say that he greatly appreciates the friendly terms of the resolution which are most encouraging to him."

Major-General Kippenberger :—The Vice-President reported that Major-General Kippenberger had been recently entertained by representatives of the New Zealand Law Society.

Sir Michael Myers, G.C.M.G. :—In connection with the retirement of the Chief Justice, the following resolution was carried unanimously :—

"The Council of this Society desires to express its appreciation of the great services tendered to this Dominion by the Right Honourable Sir Michael Myers during his tenure of the high office of Chief Justice, to wish him every happiness in his well-earned leisure, and to assure him that he takes with him to his retirement the respect and goodwill of every member of the Society."

President :—The following letter was received by the Secretary from the Hon. H. F. O'Leary, C.J. :—

"I respectfully tender my resignation as President of the New Zealand Law Society, also as a member of the Management Committee of the Guarantee Fund and as a member and Chairman of the Disciplinary Committee.

I would take this opportunity of recording my great appreciation of the help and loyalty of the many practitioners throughout New Zealand with whom I have been associated whilst holding the above offices. They have been splendid and I will never forget them nor their work which helped me so much.

I would add, too, an appreciation of the work and loyalty of yourself and your predecessor during the periods that you and he acted as Secretary. You in particular did indeed lighten the burden."

The following resolution was carried unanimously :—

"The Council of this Society places upon record its deep appreciation of the signal service rendered by the Hon. H. F. O'Leary to the Society over the long period of twenty-five years during eleven of which years he filled with distinction the office of President.

The Council tenders its sincerest congratulations upon his elevation to the high office of Chief Justice of this Dominion, and wishes him all possible happiness in such office."

The office of President being vacant, the Vice-President called for nominations for the position.

Mr. P. B. Cooke, K.C., was nominated for the position of President.

Mr. J. B. Johnston, in seconding the nomination, stated that he did so with great pleasure, but at the same time he desired to make a few observations which he felt Mr. Cooke would fully appreciate. He said there were in his opinion two members of the Council who had outstanding claims to the Presidential office. The first was Mr. A. H. Johnstone, K.C., who had been a member of the Council for a great number of years and was and had been for a very considerable period its Vice-President. He had rendered yeoman service to the Society and had fully merited the high honour of being its President. Unfortunately, on account of his present state of health, he was not prepared to accept nomination. This all members would regret. The second was Mr. G. G. G. Watson, who also had been a member of the Council for a very considerable period. For years past the Society had leaned heavily upon Mr. Watson, and a great burden of work and responsibility had been placed upon his shoulders. In all important deputations and negotiations he had taken a leading part, and much of the success that had been achieved lay to his credit. It would be regretted that Mr. Watson was not available for office. Nevertheless the Society was indeed fortunate in obtaining for its new President a man of the outstanding distinction of Mr. Cooke.

Mr. Cooke was unanimously elected, and, in returning thanks, assured the members that he would do his best to carry out efficiently the duties of President.

The suggestion made by the Wellington Society that the term of office of President should be restricted to not more than four consecutive years was not adopted.

The Wellington Society also recommended that the Council of the New Zealand Society give consideration to the question of appointing a second Vice-President resident in Wellington, so that in the absence of the President there was in Wellington a person holding the status of an office-bearer of the New Zealand Law Society.

It was decided to take no action in the matter.

Disciplinary Committee :—Mr. P. B. Cooke, K.C., was elected a member of the Disciplinary Committee.

Distribution of Statutes and Annual Bound Volumes :—The Under-Secretary of Justice wrote as follows :—

July 30, 1946.

"I am taking this matter up with the Government Printer with a view to having an improvement effected. You will of course appreciate that in recent years the delay in printing and distributing the annual volumes was the result of a very acute staffing position in the Printing Office. It is hoped that these delays will be obviated in future."

It was decided to adjourn the matter until the March meeting for further consideration.

Servicemen's Settlement and Land Sales Act, 1943 :—It was pointed out that the representations by the Society on the question raised by the Wellington Society at the June meeting had now been met by the provision contained in Section 11 (1) of the present Amendment.

(*To be concluded*).

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 Transfer.—*Witness to a Land Transfer Document an Interested Party—Refusal of Registrar to register.*

QUESTION: A.B. has transferred a parcel of land to C.D., a solicitor, who has himself witnessed the transfer, because A.B. lives in rather a remote locality, and it is difficult to secure an independent official witness. The Registrar has declined to register the instrument. Is he justified in so declining to register?

ANSWER: Yes, the Registrar is justified in declining to register: *Baird's Real Property*, 153, 154, 155; *Ex parte Davy, District Land Registrar, Wellington*, (1888) N.Z.L.R. 6 C.A. 760. If the purpose of attestation by a witness is realised, it is obvious that a party to a deed cannot be an attesting witness. The object is to have someone to see that the execution is a voluntary one.

It may also be pointed out that, although in practice it is required only in exceptional cases (*e.g.*, where the attesting witness is not of a class recognised by the Registry Office, or where the alienor apparently requires protection), the District Land Registrar can always require a signature to be proved under ss. 169–171 of the Land Transfer Act, 1915, Sched. 7, Forms 1, 2, of the Act: *Martin's Conveyancing in New Zealand*, 38. It may also be mentioned, in passing, that a husband should never witness his wife's signature.

X.I.

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2. Vendor and Purchaser.—*Subdivision of Land in Borough—Consent of Local Authority not obtained by Vendor—Whether Ground for Rescission of Sale and Purchase Contract.*

QUESTION: I am acting for the purchaser of a piece of land in a Borough, such sale constituting a subdivision of land as provided in s. 332 of the Municipal Corporations Act, 1933. The sale is now awaiting consent of the Land Sales Court, and it has been ascertained that the vendor has not obtained the consent of the local authority to such subdivision as provided in the above section of the Act.

The question now arises as to whether, on account of this breach by the vendor, the purchaser can rescind the contract and obtain a refund of his deposit or what other remedies the purchaser is entitled to on account of such breach.

ANSWER: This question involves a consideration of the conditions of sale and particularly the conditions as to time for completion. As the terms of the preliminary agreement are not stated, the question can only be answered in general terms. The crucial date is the date of completion. On that date the vendor must hand to the purchaser a registerable transfer.

If time has been made the essence of the contract, the vendor will be unable to complete the transfer unless he has, at the time fixed for settlement, obtained the consent of the local authority to the subdivision: Municipal Corporations Act, 1933, s. 332 (8). In this event the purchaser may rescind the contract and claim *restitutio in integrum*: see *Tasker* v. *Dodd*, [1922] N.Z.L.R. 994. If the contract contains no provision as to the time of completion, reasonable time will be implied: see *Peddle* v. *Orr*, (1906) 16 N.Z.L.R. 1240. In this event, the purchaser may give the vendor notice requiring completion within a specified time, and if the time allowed is reasonable within the circumstances, he will be entitled to rescind the contract, if it is not completed within the time specified: *Stickney* v. *Keeble*, [1915] A.C. 386. If the vendor fails to complete the transfer the purchaser will not be entitled to damages unless the failure to complete the contract is due to fraud or misrepresentation on the part of the vendor or to a defect in conveyancing as opposed to a defect in title. In the present case, if the local authority refused to consent to the subdivision and that refusal was upheld by the Board set up under subsection (4) of s. 332, the purchaser would not be entitled to recover damages. This is known as the Rule in *Flureau* v. *Thornhill*, (1776) 2 Wm. Bl. 1078: 96 E.R. 635, and is enunciated in the case of *Bain* v. *Fothergill*, (1874) L.R. 7 H.L. 158, 201, where Lord Chelmsford says, "the rule established by *Flureau* v. *Thornhill* is, that upon a contract for the purchase of real estate, if the vendor, without fraud, is incapable of making a good title, the intended purchaser is not entitled to any compensation for the loss of his bargain." If, however, the failure to complete was due to the failure of the vendor to apply for the necessary consent or to comply with any reasonable conditions of consent imposed by the local authority, the purchaser would be entitled to damages: *Day* v. *Singleton*, [1899] 2 Ch.D. 320. Apart from a case where damages could be claimed, the purchaser would be entitled to recover the deposit with interest and costs; and see, generally, *29 Halsbury's Laws of England*, 2nd Ed. 374–394.

J.2.

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3. Death Duties.—*Gift of Shop by Father to son—Reservation of Right to Father—Liability to Death Duty.*

QUESTION: A. owns shop premises in a small country town, and desires to make a gift of the same to B., his son. He is desirous of reserving to himself the right to use the premises during his lifetime free of rent, so that, if necessary, he may continue to carry on his business thereon. In the event of A.'s death more than three years after the gift, would the shop premises be liable to death duty?

ANSWER: Yes. Even if he never exercised the right during his lifetime, the gift would be caught under s. 5 (1) (*c*) or s. 5 (1) (*j*), or both, of the Death Duties Act, 1921: *Grey* v. *Attorney-General*, [1900] A.C. 124, *Revenue Commissioners* v. *O'Donohoe*, [1936] I.R. 342.

X.I.

RULES AND REGULATIONS.

Control of Prices Emergency Regulations, 1939. (Reprint) (Emergency Regulations Act, 1939.) No. 1946/169.

Price Stabilization Emergency Regulations, 1939. (Reprint) (Public Safety Conservation Act, 1932.) No. 1946/170.

Forest (Fire-prevention) Regulations, 1940. (Reprint) (Forest Act, 1921–22.) No. 1946/171.

Meat Regulations, 1940, Amendment No. 2. (Meat Act, 1939.) No. 1946/172.

Noxious Weeds Act Extension Order, 1946. (Noxious Weeds Act, 1928.) No. 1946/173.

Merchant Shipping (Registration of New Zealand Governmen. Ships) Order, 1946. (Merchant Shipping Act, 1906.) Not 1946/174.

Wool Packing Control Order, 1946. (Primary Industries Emergency Regulations, 1939.) No. 1946/175.

Camping-ground Regulations Extension Consolidation Notice, 1946. (Health Act, 1920.) No. 1946/176.

Pharmacy Regulations, 1944, Amendment No. 2. (Pharmacy Act, 1939.) No. 1946/177.

Transport (Goods) Controlled Areas Order, 1946. (Transport Licensing Act, 1931.) No. 1946/178.

Electoral (Postal Voting) Regulations, 1946. (Electoral Act, 1927.) No. 1946/179.

Cook Islands Councils Regulations, 1946. (Cook Islands Act, 1915.) No. 1946/180.

Customs Import Prohibition Order 1946, No. 3. (Customs Act, 1913.) No. 1946/181.

Apple and Pear Marketing Regulations, 1942, Amendment No. 1. (Marketing Act, 1936, and Agriculture (Emergency Powers) Act, 1934.) No. 1946/182.