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THE IMPROVED STATUS OF MAGISTRATES.

AS our readers are aware, this JOURNAL, since its early beginnings, has consistently advocated an improvement in the status of our Magistrates. With the support of the profession generally, we have deprecated the position in which the Magistrates have found themselves inferior in status, but greatly superior in responsibility, to the Magistrates of earlier years.

With the enactment of the Magistrates' Courts Act, 1947, a very considerable advance has been made in the direction we have so long had in view. This may be gathered from a comparison of the relevant statutory provisions before the passing of the Magistrates' Court Act, 1947, with those in the succession of statutes which preceded it.

In *Hearn's Government in England*, 81, 89, the author lays down two essentials for securing the independence of judicial officers—fixed tenure and fixed salary. Both of these necessities, we are happy to say, have been placed on a more satisfactory basis in the new statute than ever before.

I.

The Governor-General, according to s. 5 of the new statute, may from time to time appoint fit and proper persons to be Stipendiary Magistrates to exercise civil and criminal jurisdiction in New Zealand.

Dealing with the tenure of Magisterial office, s. 7 (2) of the Magistrates' Courts Act, 1928, provided:

> All Stipendiary Magistrates shall hold office during the pleasure of the Governor-General.

But s. 7 of the new statute provides:

> (1) *The Governor-General may, if he thinks fit, remove a Magistrate for inability or misbehaviour.*
> (2) *Every Magistrate shall retire from office on attaining the age of sixty-eight years.*

The security of tenure of office for life or during good behaviour, subject to retirement on attainment of the prescribed age, brings the Magistrates closer to the essentials of the security of tenure enjoyed by the Judges of the Supreme Court, *se bene gesserint*, than has been the case for a long time in this country.

Section 15 of the Magistrates' Courts Act, 1893, provided, *inter alia*, as follows:

> All Magistrates appointed to exercise the extended jurisdiction of the Court shall hold office at the pleasure of the Governor.
>
> But the Governor may remove any such Magistrate who shall be absent from New Zealand without leave granted by the Governor, or who shall become incapable, or who shall neglect to perform the duties of his office or offices, or for misbehaviour, or upon the address of both Houses of the Legislature; and also the Governor may from time to time suspend any such Magistrate for good cause.

This provision remained in force until the consolidation of the statutes in 1908, when, for a reason never explained, the limitation contained in the second paragraph of the above extract from s. 15 was dropped; and the first paragraph was re-enacted, without more, as s. 9 (4) of the Magistrates' Courts Act, 1908, and it re-appeared in much the same form in s. 7 (2) of the Magistrates' Courts Act, 1928.

The new subs. 1 of s. 7 of the new statute gives every Magistrate an improved status, in that it limits the power of the Governor-General (in effect, the Cabinet of the Government of the day) to remove him, from the time of his appointment to the time of his reaching the retiring age fixed by s. 7 (2) as the attainment of the age of sixty-eight years. It states the specific grounds on which a Magistrate may be deprived of office; and, if an attempt were made to remove him from office, without reason or on a ground other than one of those stated in the subsection, the Magistrate would have his remedy.

Although it is a settled principle of law that public office is a distinctive thing, and not contractual in its nature, and a condition to that effect is an implied term of the contract of service with the Crown, the power of the Crown to dismiss at pleasure may be expressly or impliedly restricted by statute: see *Robertson's Civil Proceedings by and Against the Crown*, 359. By limiting to two grounds, inability or misconduct, the power of the Crown to remove a Magistrate from office s. 7 (1) is manifestly intended for the protection of the holder of Magisterial office, and is consequently inconsistent with importing into the contract of service the term that the Crown may put an end to it at its pleasure. If it were otherwise, s. 7 (1) would be superfluous, useless, and delusive: *cf. Gould* v. *Stuart*, [1896] A.C. 575, 578, where the Judicial Committee held that certain provisions of the New South Wales Civil Service Act, 1884, showed that it had been deemed for the public good that a Civil Service should be established under certain regulations with some

qualification of the members of it, and that some restriction should be imposed on the power of the Crown to dismiss them. So, too, s. 7 (1), being manifestly intended for the protection and benefit of the Magistrate, is inconsistent with an implied condition that the Crown could dismiss him at pleasure, and it consequently restricts the power of the Crown in that respect. It follows that a Magistrate, if removed from office without justification, could maintain an action against the Crown for wrongful deprivation of his office.

It may be that, if a Magistrate were adjudicated bankrupt, he could not continue to hold his office, as this might be a ground for his removal: see *In re Leonard, Ex parte Leonard*, (1896) 12 T.L.R. 257, where the debtor, who was a County Court Judge, said he would be obliged to resign if made a bankrupt.

II.

A further improvement of status is brought about by s. 6 of the new Act, which, after stating that every Magistrate is to be paid a salary at the rate of £1,250 a year, goes on to provide, in subs. 2:

> *All such salaries shall be paid out of the Consolidated Fund without further appropriation than this Act.*

A material factor in securing the independence of Magistrates is the provision for the payment of their salaries by a fixed grant charged on the Consolidated Fund without further appropriation. As it is put in *Kent's Commentaries*, 2nd Ed. 1627, 1628, unless the salaries can be drawn independently of the Legislature, a judiciary is not independent.

In *Attorney-General* v. *Edwards*, (1891) 9 N.Z.L.R. 321, Sir Robert Stout, who was senior counsel for the Crown, said, in the course of his argument, that there is a concurrence of constitutional writers as to what is necessary for the independence of the Bench. He added: "There is the same reason now why the Bench should be free from Legislative control as there was formerly to free it from the control of the Crown." He was, it is true, discussing the necessity for a fixed salary for Supreme Court Judges; but the principle he was enunciating and supporting with a wealth of authority applies, with equal force, to the Magisterial Bench.

Any arrangements other than provision for a fixity of salary were, in the view of Sir James Prendergast, C.J., clearly calculated to bring about not only a discreditable state of things, but a state of things inconsistent with the expectation that the duties of the office would be discharged with due regard to the public interest.

Now, up to the year 1913, Magistrates had been regarded as officers of the Public Service, and they appeared on the Civil Service Classification lists as salaried officers of the Department of Justice. Payment of their salaries thus depended on the annual vote of the Legislature in passing the year's Estimates. But, by virtue of s. 3 (2) of the Magistrates' Courts Amendment Act, 1913, it was provided:

> All such salaries shall be paid out of the Consolidated Fund without further appropriation than this Act.

On an increase of salaries in 1920, that section was repealed; and a new s. 3 was substituted by the Amendment Act of that year, subs. 3 being re-enacted (with the mere alteration of the word "Act" to "section") as subs. 4 of the new section; in the consolidation effected by the Magistrates' Courts Act, 1928, it was again re-enacted, this time as s. 8 (3).

It may be recalled here that the Hon. Mr. Herdman, as Minister of Justice, when introducing the Magistrates' Courts Amendment Bill, 1913, stated that the salaries of Magistrates had depended previously on the vote of the House, which had always seemed to him to place the gentlemen occupying those positions in a very invidious position; and the practice itself was objectionable. He thought it was a great step in advance to have their salaries fixed permanently by an Act of Parliament, thus placing them on the same footing as the County Court Judges in England, who exercised similar functions. He added that the Bill would improve generally the status of Magistrates throughout New Zealand, "and that means," he said, "that the administration of justice will be improved and the public generally will be better served." Mr. McCallum, M.P., for the Opposition, said that they welcomed the spirit of a Bill which endeavoured to give Magistrates a better status: *162 Hansard*, 652. Sir Francis Bell, in the Legislative Council, explained the effect of the permanency of salaries fixed by the Bill by saying Magistrates would have nothing to seek or gain by any act or refusal to act in their very laborious and responsible office: *163 Hansard*, 493.

All these good intentions, which, as s. 8 (3), remained in the consolidating statute in 1928, were frustrated by an amendment of that subsection, which was effected in an obscure and furtive way by s. 4 of the Finance Act, 1932, which declared as follows:

> Whereas the effect of the enactments mentioned in the first column of the First Schedule to this Act (hereinafter referred to as the said enactments) is that moneys may, without further authority or appropriation than the said enactments, be paid out of the Consolidated Fund for the purposes specified in the said enactments: and whereas it is desirable that no such payments should be made otherwise than out of moneys appropriated by Parliament for such purposes: Be it therefore enacted as follows:
>
> (1) In the financial year commencing on the first day of April, nineteen hundred and thirty-two, and in each financial year thereafter, moneys required for the purposes of each of the said enactments shall be expended and applied for such purposes only in accordance with appropriations by Parliament for such purposes. . . .
>
> (3) The said enactments are hereby consequentially amended to the extent set out in the second column of the First Schedule to this Act.

In the second column of the First Schedule to the Act, in a long list of statutes, s. 8 (3) of the Magistrates' Courts Act, 1928, was amended by omitting the words "the Consolidated Fund without further appropriation than this section," and substituting the words "moneys appropriated by Parliament for the purpose."

With the new Magistrates' Court Bill then in draft, s. 42 (1) of the Statutes Amendment Act, 1945, in increasing Magisterial salaries to £1,100 a year, repealed s. 8 of the then-current Magistrates' Courts Act, 1928, and so much of the First Schedule to the Finance Act, 1932, as related to it; but it did not make the increased salaries payable out of the Consolidated Fund, as s. 8 originally provided.* It left the matter alone, merely making provision for payment, whatever the effect of that may have been.

By enacting s. 6 (2) of the Magistrates' Courts Act, 1947, the Legislature has restored Magisterial salaries to the position created in 1913. That is a step in the right direction, and a worthy assurance to the Magistrates of their freedom from Parliamentary control,

* For example, Magistrates' salaries were provided in the Estimates of the Justice Department in the present year.

however indirect that control could have been. Their salaries are not subject to interference from year to year; and the Legislature, without abolishing their office, which would be an impracticable step, cannot, short of a repeal, withhold or reduce their remuneration for any reason at all.

It would be hard, in a search through English constitutional and political history, to find a period in which it was more important than in our own day to ensure, without any possibility of doubt, the independence of any judicial body or judicial functionary. In two respects, fixity of tenure and fixity of salary for those exercising the varied and important jurisdiction conferred on the Magistrates' Court, the framers of the Magistrates' Courts Act, 1947, have performed a national service of considerable importance to the liberty of our people generally.

SUMMARY OF RECENT JUDGMENTS.

In re **RAGLAN ELECTION PETITION (No. 4).**

ELECTION COURT. Hamilton. 1947. April 14–18, 21–24, 28–30; May 1, 2, 5–9; July 28. SIR HUMPHREY O'LEARY, C.J.; BLAIR, J.

Elections and Polls—Parliamentary Election—Objections to Votes—Ballot-papers—Variations in Striking out Names—Adding Written Words, and Initials—Absentee Votes—One Candidate's Name alone on Ballot-paper—Declaration not witnessed by Deputy Returning Officer, not signed, or in Different Writing—Absentee Votes and Postal Votes—No Electorate or Wrong Electorate filled in—Residential Qualification to Vote—"Resided"—Electoral Act, 1927, ss. 28, 31, 37, 41, 127, 136, 139, 140 (1) (2), 141, 149 (2) (a) (iii)—Electoral Amendment Act, 1940, s. 6—Statutes Amendment Act, 1946, s. 35—Electoral Regulations, 1928 (1928 New Zealand Gazette, *1183*), *Reg. 3 (4)—Electoral (Postal Voting) Regulations, 1946 (Serial No. 1946/179), Regs. 3, 13, 20–23.*

As to ballot-papers claimed to be informal by reason of non-compliance with the provisions of s. 149 (2) (a) of the Electoral Act, 1927:

A ballot-paper on which the voter had not struck out a name but had put a "tick" alongside a candidate's name did not clearly indicate the intention of the voter, and was disallowed.

A vote was allowed where the voter had at first struck out both names, but then had made a very determined effort to rub out the pencil-marks through a candidate's name, and succeeded to such an extent as to make his intention clear.

Where, in one case, the voter had, in addition to striking out one name, written the words "For Labour," and, in another case, the voter had written "Who else would I vote for?" the Court was satisfied from an inspection of the writing that the possibility of the voter being identified was remote, and it would be practically impossible to prove that it was the handwriting of a particular person; and the votes were allowed.

To come within the proviso to s. 149 (2) (*a*) (*iii*), either a name or initials which would lead to identification must be written, or the writing must be so unusual or remarkable or have such outstanding characteristics that it could be said without doubt that it was the writing of a particular person.

O'Brien v. *Seddon*, [1926] G.L.R. 141, applied.

As to absentee votes:

As the absentee voter is directed to mark the ballot-paper in the manner prescribed by s. 136, the appearance of only one candidate's name on the ballot-paper is a defect of substance as there cannot be compliance with that section unless all the candidates' names are on the paper; and ballot-papers with the name of only one candidate upon them were disallowed. Votes in respect of which the voter's declaration was not witnessed by the Deputy Returning Officer are invalid.

Hogan v. *Stewart*, [1932] N.Z.L.R. 714, followed.

A vote in respect of which the Deputy Returning Officer had placed his initials on the declaration—and it was not shown that he intended the initials to be his signature—was not sufficiently signed, and is invalid.

In the Goods of Maddock, (1874) L.R. 3 P. & D. 169, referred to.

Votes in respect of which the declaration was not signed by the voter are invalid.

The retention of cl. (*b*) in the application for a ballot-paper being necessary, a declaration in which cl. (*b*) was deleted was not made in the form required by Reg. 3 (4) of the Electoral Regulations, 1928, which is mandatory, and the vote was invalid.

Hogan v. *Stewart*, [1932] N.Z.L.R. 714, applied.

Where the petitioner objected to a vote on the ground that the signature on the declaration did not correspond with the writing on the registration card, and called a handwriting expert who gave it as his opinion that the signature on the registration card did not so correspond, the voter himself gave evidence that the writing on the declaration was his. On objection that this was extrinsic evidence,

Held, That, as the petitioner had called evidence on the question of identity, he could not object to the respondent doing likewise, and that meeting the disallowance of a vote by extrinsic evidence as to what happened when the vote was recorded is different from giving evidence to confirm the identity of a voter of whose identity, for reasons apart from handwriting, the Court has already been satisfied.

Hogan v. *Stewart*, [1932] N.Z.L.R. 714, distinguished.

The requirement in the prescribed form of the declaration, as in the printed form, that the correct electoral district is to be stated, is mandatory; and voting papers in which no electorate or the wrong electorate was filled in were disallowed.

As to postal votes:

Votes were disallowed where no electorate was filled in in the voter's declaration, where the declaration was not signed by the voter, and where the voter's signature was not witnessed by an authorized witness. Failure to complete the declaration in any of the foregoing respects left the declaration incomplete in an essential portion.

As to residential qualification for enrolment:

As to the word "resided" where used in s. 28 of the Electoral Act, 1927, "reside" means "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place," and only a settled residence (as opposed to a temporary residence) will be sufficient to forfeit the elector's qualification in his own district, and compel him to accept a qualification in a new district.

In considering where an elector "resided," the following principles apply: (*a*) Every elector must be entitled to claim a residential qualification in some electorate; (*b*) an elector can logically have only one residential qualification; (*c*) where the elector has a *bona fide* home in one electorate and a place of abode in another, he has the option of claiming a residential qualification for either electorate; and (*d*) where an elector is possessed of a residential qualification within the electorate and takes up temporary residence for more than three months outside the electorate, he acquires the right to claim the qualification in the electorate of his temporary residence if he chooses to do so, but unless he exercises that right he will not be held to have forfeited his old qualification.

Whether residence is temporary or not is a question of fact, and it may be held to be temporary when it has been taken up by an elector who is in transit from one settled home to another; and, though the elector may be entitled to claim an electoral qualification in the place of his temporary residence, it cannot be used to thrust a new qualification on him for that district at the expense of forfeiting his old qualification.

O'Brien v. *Seddon*, [1926] G.L.R. 141, and *Taumarunui Election Petition*, (1915) 34 N.Z.L.R. 562, applied.

In determining whether an elector who is registered as an elector in one electoral district has qualified to become registered as an elector in another district within the meaning of s. 41 of the Electoral Act, 1927, a useful test to apply is to consider whether his residence in the latter district could justify a prosecution against him under s. 38 of that Act for failing to register in the latter electoral district.

Counsel: *Sim*, K.C., *Tompkins*, and *Tripe*, for the petitioner; *Cleary* and *Hardie Boys*, for the respondent.

Solicitors: *Tompkins and Wake*, Hamilton, for the petitioner; *Barnett and Cleary*, Wellington, for the respondent.

THE KING v. VALLILLEY.

SUPREME COURT. Dunedin. 1947. April 17; May 14. KENNEDY, J.

Criminal Law—Justices of the Peace—Appeal against Sentence—Appeal against Conviction only or against Sentence only—Such Appeal when made Unamendable so as to transform it into Appeal against Conviction and Sentence—Justices of the Peace Act, 1927, s. 315—Justices of the Peace Amendment Act, 1946, s. 2 (2) (3).

An appeal under s. 315 (1A) of the Justices of the Peace Act, 1927 (inserted by s. 2 of the Justices of the Peace Amendment Act, 1946), against conviction only, or an appeal against sentence only, which has in fact been made, cannot be amended so as to transform it into a general appeal against both conviction and sentence.

Counsel: *F. B. Adams*, for the Crown; *Warrington*, for the appellant.

Solicitors: *Adams Bros.*, Dunedin, for the Crown; *J. G. Warrington*, Dunedin, for the appellant.

In re RAGLAN ELECTION PETITION (No. 5).

ELECTION COURT. Hamilton. 1947. April 14–18, 21–24, 28–30; May 1, 2, 5–9; July 28. SIR HUMPHREY O'LEARY, C.J.; BLAIR, J.

Elections and Polls—Parliamentary Election—Declaration on Application for Registration as Elector—Declarant not qualified to Vote at Time of Making Declaration but qualified at Date of Election—Whether Vote valid—Electoral Act, 1927, ss. 37, 206, 232.

Votes cast by six voters were claimed to be invalid because in each case the voter, at the time he made the declaration contained in the application for enrolment made pursuant to s. 37 of the Electoral Act, 1927, had not actually either (*a*) attained the age of twenty-one years, or (*b*) been resident in the electoral district for a period of not less than three months immediately preceding the date of his application. On objection to these votes, the Court was equally divided.

Per *O'Leary*, C.J. 1. That the vote of a person who has been placed on the roll of an electorate when he has been residing there for less than three months, but who is residing there in excess of three months at the time of the election, is a valid vote.

O'Brien v. *Seddon*, [1926] G.L.R. 141, followed.

Hogan v. *Stewart*, [1932] N.Z.L.R. 714, referred to.

McAulay v. *Rushworth*, [1929] N.Z.L.R. 149, distinguished.

2. That the same principle applies to the case of an infant declarant in anticipation of coming of age before the election.

Per *Blair*, J. That a vote cast by registration based on a declaration that the declarant actually was qualified at the date of the declaration, when, in fact, he possessed no such qualification, is invalid.

O'Brien v. *Seddon*, [1926] G.L.R. 141, not followed.

In re Hawke's Bay and Other Election Petitions, (1915) 34 N.Z.L.R. 409, referred to.

Counsel: *Sim*, K.C., *Tompkins*, and *Tripe*, for the petitioner; *Cleary* and *Hardie Boys*, for the respondent.

Solicitors: *Tompkins and Wake*, Hamilton, for the petitioner; *Barnett and Cleary*, Wellington, for the respondent.

ACE v. GUARDIAN, TRUST, AND EXECUTORS COMPANY, LIMITED.

SUPREME COURT. Auckland. 1947. July 1, 2. CALLAN, J.

Executors and Administrators—Claims—Work done under Promise of Testamentary Provision—Onus of Proof—Amount and Value of Services rendered—Inadequacy of Remuneration—Tests to be applied to Evidence of Claimant thereon—Law Reform Act, 1944, s. 3.

There is nothing in the language used in s. 3 of the Law Reform Act, 1944, to relieve a claimant under that section from the heavy onus cast on everyone when making a claim against a person's estate after his death.

The care, and even suspicion, with which the claim should be approached should also be exercised in regard to the plaintiff's evidence as to the amount and value of the services which are said to have been rendered, and the inadequacy of their remuneration.

Bennett v. *Kirk*, [1946] N.Z.L.R. 580, and *McAllister* v. *Public Trustee*, [1947] N.Z.L.R. 334, referred to.

On the facts of the present case, the learned Judge found that the continuance of the plaintiff in the performance of her services was induced by a sufficient promise, and the repetition of that promise by the deceased at intervals, to remunerate her by testamentary provision for work done, and that it was not necessary for the plaintiff to rely upon a promise made only after the services had been performed.

Counsel: *Henry*, for the plaintiff; *Trimmer*, for the defendant.

Solicitors: *Wilson, Henry, and McCarthy*, Auckland, for the plaintiff; *Trimmer and Teape*, Auckland, for the defendant.

In re PARKER (DECEASED), CROW v. WESTON AND OTHERS.

COURT OF APPEAL. Wellington. 1947. September 9. SMITH, J.; CALLAN, J.; CORNISH, J.

Practice—Appeals to Court of Appeal—Cross-appeal—Family Protection—Application for Further Provision refused in Supreme Court—Notice of Appeal therefrom out of Time—Notices of Cross-appeal lodged within Prescribed Period after lodging of Notice of Appeal—Such Notices of Cross-appeal invalid—Special Leave granted to all Appellants—Court of Appeal Rules, RR. 2 (a), 6, 19.

Practice—Appeals to Court of Appeal—Adjournment of Hearing—Retrospective Legislation of General Nature pending—Passing of such Legislation likely to affect Status of Appellants relative to Subject-matter of Appeal—Appeal against Order under Family Protection Act—Special Considerations—Adjournment granted.

A judgment refusing an application under the Family Protection Act, 1908, by C. for further provision out of the estate of a testator was delivered on December 15, 1944. Negotiations for settlement of the terms of the judgment were spread over the ensuing two years. Formal judgment was sealed on February 12, 1947, and notice of appeal was given by C. on May 27, 1947. Notices of cross-appeal under R. 6 of the Court of Appeal Rules were given on June 10 and on July 21, 1947, respectively, by two other parties to the judgment asking for its variation. As, under R. 19 of the Court of Appeal Rules, the time for lodging notice of appeal from the refusal of the application ran from the date of such refusal, the appeal was out of time.

On preliminary objection that the notices of cross-appeal were also out of time,

Held, 1. That the notices given by the other parties under R. 6 of the Court of Appeal Rules were given within the four-months period from the date of the lodging of the appeal, but, since there was no valid notice of appeal then subsisting, their notice were not of valid origin.

2. That special leave, in the circumstances disclosed in the judgment of the Court of Appeal, should be given to the appellant; and, as the appeal was from an order made under the Family Protection Act, 1908, the two parties who had given notices of cross-appeal should also have special leave to proceed with their notices.

3. That, as the Legislature contemplated passing legislation of a general character, which would have retrospective effect, thereby materially affecting the status of two of the parties appealing in relation to the subject-matter of the judgment appealed from, the appeal and the cross-appeals were adjourned to the next sittings of the Court of Appeal.

Counsel: *Ewart*, for the appellant; *Wild*, for the respondent trustees; *Arndt*, for Miss Z. Parker; *Sir William Perry*, for Mrs. Peters; *Tripe*, for New Plymouth Returned Soldiers' Association.

Solicitors: *Reeves and Ewart*, New Plymouth, for the appellant; *Grayling and Gilbert*, New Plymouth, for the respondent trustees; *L. E. Sowry*, Auckland, for Miss Z. Parker; *Perry, Perry, and Pope*, Wellington, for Mrs. Peters; *Nicholson, Kirkby, and Sheat*, New Plymouth, for A. R. Davy; *Standish, Anderson, and Brokenshire*, New Plymouth, for New Plymouth Returned Soldiers' Association.

WILKINSON v. ASSOCIATED CHEMISTS, LIMITED.

SUPREME COURT. Dunedin. 1946. December 13. KENNEDY, J.

Shops and Offices—Chemists' Shops—Closing Hours in Combined District—Order directing Closing of Shops at Specified Hours—One Shop exempted—Each Closed Shop to be treated as a Unit for Sharing in Profits of Exempted Shop—Chemist occupying more than One Shop entitled to more than One Share in such Profits—Minister to be "satisfied" as to equal opportunity to share therein—Satisfaction to be Subjective—Not examinable so long as he acts bona fide—*"Equal rights"—"Satisfied"—Shops and Offices Act, 1921–22, ss. 32, 35.*

The general effect of ss. 32 and 35 of the Shops and Offices Act, 1921–22, is that, after the fixed closing-hours for chemists' shops in a combined district, the exempted chemists' shop may still remain open. It will be open only for the purposes of the sale of medicines or surgical appliances that are urgently required. During such hours within a distance specified, not exceeding two miles and a half in any case, other chemists' shops are to be closed, and the occupiers may not supply medicine or surgical appliances, even though they are urgently required. But, beyond the limited area, the occupiers of chemists' shops are free, outside the specified hours, to supply medicines or surgical appliances that are urgently required at any time. In such case, however, there are certain restrictions, those being that the shop is (*a*) to be open for such purposes only, and (*b*) to be closed immediately the sale is effected, and (*c*) the door of the shop is kept locked except for the admission and exit of the customer. The proviso to s. 35 (1) is as follows:

> "The Minister shall not direct that any shop shall be so exempted unless he is satisfied that all the occupiers of the shops affected by this subsection have been afforded an equal right to share at a reasonable cost in the profits of the business carried on by such specified shop."

For the purpose of that proviso each chemist's shop should be treated as a unit, and all the occupiers thereof treated collectively as one unit, for the purpose of sharing in the business carried on by the exempted shop. When a person occupies two or more shops, he is, in respect of each, an occupier of a shop affected, and, as each such occupier, he is to be afforded an equal right to share in the profits of the business carried on by the shop exempted pursuant to s. 35 (1).

The term "equal rights" in the proviso to s. 35 (1) means that each occupier is to be placed on the same basis as to sharing with every other occupier, and that, in this context, the word "equal" is used with the meaning "of the same degree with another or with each other in magnitude, value, amount, or power, neither greater nor less." This does not refer to a just or proportionate share, but to an ultimately equal share—that is, each share is equivalent to the other.

The word "right" in s. 35 (1) refers to the opportunity. The Minister must be satisfied that this right or opportunity is afforded to each, no one being debarred and no one being treated differently from any other, and, in the case of each one, the right must, further, be at reasonable cost. The Minister's satisfaction under s. 35 (1) is subjective—*i.e.*, he has to have a certain state of mind and a certain belief—and, once he has this, he may give the notice, which is a delegation to him of a particular function, and his satisfaction is sufficient. Consequently, it is not a matter ultimately cognizable by the Court, as the intention was to confer on the Minister a function in the exercise of which he is not examinable, so long as he acts *bona fide*.

Liversidge v. *Anderson*, [1942] A.C. 206; [1941] 3 All E.R. 338, referred to.

Although s. 35 refers to a requisition under s. 32 in as far as it relates to the hours of chemists' shops, a provision that the Minister is not to direct that any shop is to be exempted unless he is satisfied that all the occupiers of the shops affected by the exemption have been afforded an equal right to share at reasonable cost in the profits of the exempted shop is not a matter stated in s. 32; and the Minister's notice is accordingly not conclusive evidence that the Minister was duly satisfied of those things of which he was to be satisfied before publishing his exemption notice.

The word "herein" in the term "stated herein" in s. 32 (11) refers to the whole of s. 32; and the notice, when published, becomes conclusive evidence of the existence of the conditions precedent to the publication of the notices directing closing. The word "therein" cannot be substituted for the word "herein" as used in s. 32 (11), because the word "herein" as so used cannot be rejected on the grounds that no sensible meaning could be given to it or that it would defeat the real object of the enactment.

Counsel: *Brash*, for the plaintiff; *Paterson*, for the defendant.

Solicitors: *Brash and Thompson*, Dunedin, for the plaintiff; *Paterson and Lang*, Dunedin, for the defendant.

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

COMPENSATION COURT. Wellington. 1947. June 19, 24; October 14. ONGLEY, J.

Workers' Compensation—Medical Examination—Employer telling Worker that, before any Further Payments would be made, he would have to produce a Further Medical Certificate—Whether a Requirement to submit to Medical Examination—Workers' Compensation Act, 1922, s. 57.

An employer's telling a worker that, "before any further payments could be made, you will have to produce a further medical certificate," is not requiring him to submit himself for examination by any registered medical practitioner nominated by the employer, within the meaning of s. 57 (1) of the Workers' Compensation Act, 1922, in that he was not "required," and a medical practitioner was not nominated.

Counsel: *Arndt*, for the plaintiff; *J. C. White*, for the defendant.

Solicitors: *C. J. O'Regan and Arndt*, Wellington, for the plaintiff; *Young, Courtney, Bennett, and Virtue*, Wellington, for the defendant.

THE REVOCATION OF WILLS BY SERVICEMEN AND EX-SERVICEMEN.

By I. D. CAMPBELL, LL.M.

(*Concluded from p. 306*). In *In the Goods of Parker*, (1859) 2 Sw. & Tr. 375; 164 E.R. 1041, it was help that a letter written by a seaman in the course of a voyage was effectual to revoke a legacy in a formal will made before he set out. In *Nixon* v. *Prince*, (1918) 34 T.L.R. 444, a soldier's informal will was held to have effected a partial revocation of a formal will made before the testator entered the Army. The Court of Appeal was not called upon to deal with a similar situation in *In re Gossage*, and there is no reason to suppose that the Court intended to disturb these authorities. Nor can the Court be taken to have decided to what extent formalities were necessary if a civilian wished to revoke a prior informal will made while he was a serviceman. That question did not arise in *Gossage's* case, but fell for decision later in *In re Booth*. The decision in *Gossage's* case must be considered in the light of its own facts.

The statement in *In re Gossage* that an instrument of revocation must be executed in the manner required for the execution of the will it is intended to revoke applies only to the situations which were being considered by the Court of Appeal when the statement was made—namely, the revocation of a civilian's will

by a civilian, or of a soldier's will by a soldier. If it be intended to apply to the revocation of a civilian's will by a soldier, or the revocation of a soldier's will by a civilian, it is inconsistent with earlier authorities which were not considered, has not been followed since' and is not law, as it goes far beyond the question which was then in issue.

The effect of the authorities can, it is submitted, be correctly expressed in one rational rule : the validity, in point of form, of a testamentary act depends on the status of the person at the time the act was done. Applying this to the question of revocation :

1. A formal will made by a civilian under s. 9 could be revoked by an expression of his intention to revoke, however informal, if the testator at the time of revoking was a person to whom s. 11 of the Wills Act, as extended, was applicable‡.

2. An informal will (or a will made in conformity with s. 9 by a testator who could have made an informal will) could be similarly revoked.

3. An informal will (or a formal will made by a testator who could have made an informal will) could not be revoked informally if the testator was not then a person to whom s. 11, as extended, was applicable ; but it could be revoked by a formally executed instrument of revocation.

Each of these propositions is supported by the authorities to which reference has been made.

In the third proposition, it is implied that the person executing a formal instrument of revocation is a person who could at that date have made a will. Effective revocation requires legal capacity and a sound disposing mind, no less than other testamentary acts. In England, as is pointed out by *Hayes and Jarman's Forms of Wills*, 16th Ed. 29, if an infant soldier in actual military service makes a will and afterwards ceases to be in actual military service while the will is unrevoked, it would seem that he cannot, until he attains the age of twenty-one, revoke the will except by marriage. A similar result would appear to follow if an infant seaman were to change his occupation or were no longer at sea. In New Zealand, the position is fundamentally the same, in that a person who has lost the power to make a will has no doubt equally lost the power to revoke a will already made (except indirectly by marriage). But apart from s. 11 of the Wills Act there are three other cases in New Zealand in which a minor can make a will. Under the Soldiers' Wills Emergency Regulations, 1939, Reg. 3, any member of the Armed Forces may *during any war* in which His Majesty the King may at any time be engaged make a valid formal will although the testator is under twenty-one, and this is not dependent on his being in actual military service. Under s. 14 of the Infants Act, 1908, a will may be made by a married man aged nineteen or a married woman aged eighteen (other than Natives). Under the Life Insurance Act, 1908, s. 75 (1), as amended by the Amendment of 1920, s. 4, a minor fifteen years of age or over, not being a Native, may with the approval of the Public Trustee dispose by will of a policy of insurance on his own life. If a serviceman or ex-serviceman is able to make a valid formal will under any of the above provisions, it is submitted that he could by such a will or by an instrument executed with the same formalities revoke any prior will, including any informal will made under s. 11 of the Wills Act. But except in these cases a serviceman ceasing to be in actual military service ceases to have the capacity to make a will while he remains under age, and could not revoke by his own act—not even by a formal attested instrument—a will which he had made while in actual service.

The results of these submissions (differing substantially from those of the previous articles in the JOURNAL.) may be expressed in this form :

(*a*) Any serviceman coming within the scope of s. 11 of the Wills Act, as extended, may revoke any will either formally—*i.e.*, by an instrument executed with the formalities of s. 9—or informally—*i.e.*, by any expression of intention to revoke, whether oral or written.

(*b*) Any other serviceman, and any ex-serviceman, may revoke any will formally but not informally if of full age, or if, though under age, he has testamentary capacity under the provisions previously mentioned.

(*c*) Any serviceman or ex-serviceman who is under age and does not come within the above categories has no power to revoke a prior will, either formally or informally.

‡ The effect of s. 11 of the Wills Act as extended by the amending legislation and the Emergency Regulations has been to enable a person of either sex who is a member of the Armed Forces in actual service or is a merchant seaman at sea to dispose of realty and personalty, exercise general or special powers of appointment, or appoint a guardian of the testator's infant children, by an informal will, and to do this although the testator is under twenty-one. (As to powers of appointment, see *In re Chichester's Will Trusts*, [1946] Ch. 289 ; [1946] 1 All E.R. 722.) Every soldier or airman who is a member of the Forces raised in New Zealand or has become a soldier or airman in New Zealand is deemed while outside New Zealand during war to be in actual service. Soldiers and airmen in New Zealand are in actual service if *in expeditione* or engaged in preparation to meet local attack : *In re Rumble*, [1944] N.Z.L.R. 94. Every member of the Naval Forces is able to make an informal will under s. 11 not only when he is at sea but also when he is so circumstanced that, if he were a soldier, he would be in actual military service. These provisions as to informal wills do not apply to Natives (Soldiers' Wills Emergency Regulations, 1939, Amendment No. 1), but the provision enabling formal wills to be made by servicemen under twenty-one does apply to Natives (Soldiers' Wills Emergency Regulations, 1939, Reg. 3). The will of a Native serviceman need not comply with the special formal requirements of s. 170 of the Native Land Act, 1931 (Soldiers' Wills Emergency Regulations, 1939, Amendment No. 1). In regard to merchant seamen, the provisions of s. 11 of the Wills Act as to informal wills are subject to very great modification in cases to which ss. 96 and 97 of the Shipping and Seamen Act, 1908, apply.

NOTE.

[The above article has been submitted to the learned author of the articles to which reference has been made in this article. He makes the following comments :

Section 11 of the Wills Act, 1837, is in form a proviso, and it has been held to be a proviso to s. 9. Section 11 does not positively enact that a " soldier " (to use a conveniently comprehensive term for soldiers and airmen in actual military service, and seamen being at sea) can make a " soldier's" will : it simply says that the former right is to remain in force. That right must be found in earlier legislation : see *20 Halsbury's Complete Statutes of England*, 442n.

Section 11 refers to a soldier as being entitled to *dispose* of his estate. Such a disposition could be made by a written document with many witnesses, or in the manner provided in s. 9, or merely by an oral declaration. Such a disposition could be made expressly ; or in a negative way, by revoking earlier wills by a s. 9 will, or otherwise, It follows that a s. 9 will could be revoked by a " soldier's will " ; but the revocation would be by way of such other dispositions.

A man who has ceased to be a soldier in actual military service could, of course, not make a " soldier's will " ; but, if he had the power to make a will, he could do so, and by it he could make dispositions of the portion of his estate disposed of by his earlier s. 11 will. To that extent, he could impliedly revoke that s. 11 will ; and, if he could impliedly revoke such s. 11 will, any Court would consider it farcical to hold that he could not expressly revoke a s. 11 will.

Section 20 mentions "burning, tearing, or otherwise destroying" a will or codicil; but this obviously refers to a written document being revoked by a document executed in the same manner as a s. 9 will. The implied revocation of a "soldier's will" by disposition may require consideration in a case such as the following: A. makes a s. 9 will by which he gives a legacy of his M. shares to B., and then disposes of the residue of his estate. Afterwards, by an oral statement (a "soldier's will") when going into action, he says that one-half of his M. shares are to go to C. C. predeceases A., and the "soldier's will" has therefore no disposing force. The question then arises whether one-half of the M. shares referred to by A. in his "soldier's will" go to B., or to the residuary legatee, or to neither.]

THE NEW ZEALAND LAW SOCIETY.

Council Meeting.

(*Concluded from p. 311.*)

Status of a Supreme Court Judge.—The following letter was received from the Attorney-General:—

July 10, 1947.

"I have to acknowledge receipt of your letter of June 26 referring to your previous letter of March 27, already acknowledged, which enclosed a report made by a Standing Committee and adopted by the Council of your Society, and conveyed the text of a resolution passed on March 14 last by the Council of your Society in the following terms:—

'That the Council further draws attention to the fact that those who have been given by statute the status of a Judge of the Supreme Court, while not in fact appointed to the Supreme Court, are not entitled to the title of "The Honourable".'

You now say: 'My Council should be glad if you would kindly advise whether you are in agreement with the submissions made concerning the status of a Supreme Court Judge.'

In view of your Council's insistence in this matter I have given it further consideration. I have some difficulty in appreciating that your letters and enclosures deal with anything that may properly be called 'status.' I note the general observations relating to the position as it stands under the prerogative of the Crown and under statute, which are contained in the Standing Committee's report. I understand the view put forward to be that subs. 2 of s. 64 of the Industrial Conciliation and Arbitration Act, 1925, and other enactments in similar words, are not to be construed as intending an invasion by the Legislature upon the field of the prerogative. With this view I agree.

I have, however, to call your Society's attention to the following enactments, two only of which are referred to in the report:—

The Finance Act, 1934-35, s. 5, mentioning 'The Honourable Francis Vernon Frazer, Judge of the Court of Arbitration.'

The Finance Act (No. 2), 1935, s. 28, mentioning 'The Honourable Edward Page, Judge of the Court of Arbitration.'

The Industrial Conciliation and Arbitration Amendment Act (No. 2), 1939, s. 7, 'The Honourable Patrick Joseph O'Regan.'

The Finance Act, 1940, s. 34, mentioning 'The Honourable Arthur Tyndall, Judge of the Court of Arbitration.'

These provisions are regarded as effective to confer by necessary implication upon the gentlemen mentioned the personal distinction of 'Honourable.' Although, unlike an honour conferred by prerogative power, an honour conferred by a legislature is not entitled to recognition outside the territorial jurisdiction of the legislature that confers it, it is nevertheless entitled to full recognition within that jurisdiction. I refer you to the opinion of my predecessor, Mr. James Prendergast, as he then was, given on November 23, 1871, dealing (*inter alia*) with degrees conferred by a University under legislative authority but not under a charter from the Crown, and published in the Appendix to the Journals of the House of Representatives in 1872, paper G.-45. From this opinion I see no ground for dissenting.

As you are no doubt aware, the same distinction was afterwards conferred by His Majesty on the gentleman first mentioned.

I observe that the style used in the Acts of Parliament that I have referred to above is supported, and may well have been prompted, by the prefatory matter appearing in the annual volumes of the New Zealand Law Reports for the year 1925 and subsequent years, and in the Digest of Cases for the years 1924 to 1938. These publications purport to be prepared under the editorship of members of the Bar, and under the supervision of the Council of Law Reporting, a majority of whose members were until 1938 appointed by District Law Societies, and have since then been appointed by your Society.

I find that the report you have communicated to me has been published in the issue of the NEW ZEALAND LAW JOURNAL dated June 3 last. In justice to the Honourable Sir Francis Frazer, as he now is, and to the Honourable Mr. Tyndall, and in justice to the memory of the Honourable Mr. Page and that of the Honourable Mr. O'Regan, I presume you will have a copy of this reply sent to the same journal."

Solicitors Audit Regulations, 1938.—The Hawke's Bay Society wrote as follows:

"My Council, in considering this subject and its effect upon the rising generation of solicitors, has formed the opinion based upon its experience of cases of defalcations of trust funds that not a few of them are appropriations of excessive sums claimed to have been earned as costs for which no bills have been or could properly be rendered. This, in my Council's opinion, is not infrequently due to the offender being ignorant of his duty under the Trust Account Audit Regulations, notably Reg. 6 (6A). But my Council holds the view that the regulations as a whole are of such importance in the practice of the profession that they should be included under a suitable head in the syllabus of the Law Professional Exams., whether for a degree or not. I am directed to ask that this proposition receive the consideration of the New Zealand Law Society."

On the motion of Mr. Lawry, it was resolved that the Solicitors Audit Regulations be included under a suitable head in the syllabus, and that this resolution should be communicated to the Council of Legal Education.

Legal Conference—The following resolutions passed at the Dominion Legal Conference had been referred to District Societies for their views:—

"That the necessary steps be taken to secure amendments to the Law Practitioners Act, 1931, providing as follows:—

(1) That no President of the New Zealand Law Society shall hold office as such for any continuous period of more than three years.

(2) That the next President shall be one whose work is mainly that of a solicitor and that thereafter the office of President shall be filled alternately by one whose work is mainly that of a solicitor.

(3) That there shall be three Vice-Presidents of the New Zealand Law Society, two being resident in the North Island and one resident in the South Island."

Five replies were received from District Societies.

It was resolved that no action should be taken in respect to the three resolutions.

Immigration Policy for New Zealand.—Mr. Bennett reported that he had attended the Conference which had been held to consider the immigration policy for New Zealand, but that the matters did not appear to call for any comment by the New Zealand Society.

The report was received, and Mr. Bennett was asked to circulate copies of the printed reports of the meeting to the Societies in due course.

Returned Servicemen—Special Examinations.—The following letters were received from the University of New Zealand:—

August 5, 1947.

"I have to advise that the full Committee of the Senate at its recent meeting resolved that March examinations for long term ex-servicemen be held again in 1948. It is to be announced that these will be the last such examinations for ex-servicemen. The conditions will be very similar to those of March, 1947. Full information and application forms for the candidates will be available from this office after mid-September."

August 7, 1947.

"In my letter of August 5, I mentioned that March examinations of 1948 would be similar to the March examinations of 1947. Rather than create any misunderstanding, I would stress that that similarity includes the range of subjects.

There will be examinations only in subjects of the Accountants' Professional and the Solicitors' Professional, Divisions II, III, IV, and Conveyancing."

At the request of the President, the Chairman of the Post-War Aid Committee of the Society, Mr. Treadwell, attended the Council meeting. He stated that a complaint had been made to the Committee by Wellington ex-servicemen who were debarred from sitting at the March examination their final LL.B. subjects—*i.e.*, International Law and Conflict of Laws—the examination being limited to the solicitors' professional subjects. It was ascertained that nine ex-servicemen were affected in Wellington.

Representatives of his Committee, he stated, had waited on Professor Gordon, who appeared to be in sympathy with the representations made.

Mr. Treadwell stated that in some cases these subjects had been already given as concession subjects, and it was therefore felt that it was not too much to ask that ex-servicemen should be allowed to sit in March for the examination without waiting until the end of the year.

Mr. Bennett read a letter received from an ex-serviceman law clerk in a country town to the effect that, if the March examinations ended in 1948, a grave injustice would be done to the ex-servicemen who were not demobilized until early in 1946, or even later, and who would have had the benefit of only two or even one March examination, whereas those ex-servicemen who were demobilized earlier may have the opportunity of four or even five March examinations.

A member pointed out that the War Concessions Committee of the University had dealt with this matter, and that many difficulties had to be overcome in order to facilitate this examination.

It was resolved to write to the University pointing out that, although it was realized that the examination was not an easy one to arrange, the Society desired the March examinations to be extended beyond 1948.

It was further resolved to request the University to permit ex-servicemen to sit in International Law and Conflict of Laws at the March examinations.

Magistrates' Courts Bill: Rules.—The following report was received from the President and Mr. Shorland:

September 8, 1947.

"(1) We collated the views of the District Societies on the above Bill and also gave the Bill a great deal of consideration ourselves. On two mornings (July 30 and August 13) the Statutes Revision Committee heard us in support of the representations that we thought it desirable to make.

(2) The main matters upon which we made representations were:

(*a*) That, if Magistrates did other work, they should receive no additional remuneration for it.

(*b*) That the New Zealand Law Society strongly opposed any extension of the jurisdiction of the Magistrates' Court unless

(i) Paragraph (*b*) were dropped from cl. 5 (3) of the Bill.

(ii) The word 'practice' were substituted for the word 'standing' in para. (*a*) of cl. 5 (3) of the Bill.

(*Note*: The provisions of cl. 5 (3) of the Bill were as follow:

'(3) A person shall not be appointed a Magistrate unless

(*a*) He is a barrister or solicitor of the Supreme Court of not less than seven years' standing or

(*b*) He has been continuously employed as an officer of the Justice Department for a period of at least ten years, and during that period has been employed for not less than seven years as the Clerk or Registrar of a Magistrates' Court and is a barrister or solicitor.')

(*c*) That a Magistrate who is removed for inability or misbehaviour should have a right of appeal to the Court of Appeal or to some other judicial tribunal. (The adoption of this representation would have necessitated the substitution of the words 'the Minister' for the words 'the Governor-General' in cl. 7 (1) of the Bill.)

(*d*) That discretionary jurisdiction to order transfer of actions to the Supreme Court in cases in which the amount involved does not exceed £100 be vested in a Judge of the Supreme Court (as it is at present in cases where the amount claimed is between £20 and £100) instead of in a Magistrate (as was proposed in cl. 43 (2) of the Bill).

(3) We also made representations on matter relating to cls. 10 (2), 12, 20, 42, 50 (2), 57 (2), 60, 73 (4), 77 (2), and 79 (4) of the Bill. We do not think it necessary to refer in this report to those representations in detail. Several of them were acceded to and appropriate alterations made in the Bill.

(4) The results of the representations referred to in para. (2) above were:

As to (*a*): No provision was inserted in the Bill.

As to (*b*): It was upon these representations that we laid the most emphasis, but the only result was that there were added to the end of the cl. 5 (3) (*b*) of the Bill the words, 'who has been qualified for admission, or admitted, as such for not less than seven years.'

As to (*c*): No provision was inserted in the Bill.

As to (*d*): The provision vesting discretionary jurisdiction in a Magistrate to order transfer to the Supreme Court in cases in which the amount involved does not exceed £100 was retained, but a provision was inserted vesting a discretionary jurisdiction in the Supreme Court to order transfer of any proceedings commenced in a Magistrates' Court.

(4) In the course of making our representations we were on August 13 asked our view as to the desirability of providing that all appeals to the Supreme Court should be by way of rehearing in the sense that the evidence would be heard in the Supreme Court *de novo*. We were surprised by the question. We replied that the matter had not been considered, but that our reaction was that we were opposed to that course. The reasons that we gave on the spur of the moment were:

(i) That we considered that the present system of appeal on the notes of evidence is on the whole satisfactory:

(ii) That we considered that a rehearing of the evidence would cause a more prolonged hearing of appeals and would therefore increase the cost of appeals:

(iii) That we considered a rehearing of the evidence would involve an abandonment of the present principle upon which the Supreme Court at present proceeds in determining whether it will interfere with a Magistrate's findings of fact and that a rehearing of the evidence would, therefore, increase the number of appeals.

It has since occurred to us that there are other objections to a rehearing *de novo*.

The new Act in effect provides for a rehearing *de novo* except in so far as the parties otherwise agree, although, notwithstanding any such agreement, the Supreme Court may in its discretion rehear the whole or any part of the evidence.

(5) **Rules**: We have been engaged collating the views of some of the District Societies on, and we have also ourselves considered, the proposed Rules.

We understand that the Special Committee referred to in the Under-Secretary's letter of July 4, 1947, has finished its work and that the Justice Department is engaged on the preparation of a fresh draft of the Rules. In those circumstances, the Department asked us to let it have the views so far expressed by the District Societies, and that we have done. We understand that the Department proposes to circulate the fresh draft of the Rules as soon as it is available, so we have suspended until that time our work on the collation of the views so far received from the District Societies."

Land Sales Committee.—On the motion of Mr. Bennett, it was resolved that Mr. F. B. Anyon of Wellington be appointed a member of the Land Sales Committee of the New Zealand Law Society in lieu of Mr. N. H. Mather.

Industrial Conciliation and Arbitration Amendment Bill.—The President reported that representations had been made to the Minister of Labour to have cl. 2 (5), which reads "The office of Deputy Judge may be held in conjunction with any other office which the Governor-General shall deem not incompatible," amended to read "The office of Deputy Judge may be held in conjunction with any other judicial office which the Governor-General shall deem not incompatible," and that the Act had been passed without the suggested amendment but with the addition of the following proviso to cl. 2 (5): "Provided that no additional salary shall be paid in connection with such other office."

Higher Appointments—National Service Employment.—The President said that he had attended the conference on Tuesday, July 22, 1947. He reported generally the views he had expressed to the Conference.

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. 121.—C. to Dunedin City Corporation.

Urban Land—Local Authority—Purchase of House Property for Road-widening Purposes—Amount for Disturbance agreed upon—Committee to be satisfied Land could be taken compulsorily—Onus of Proof as to Basis of Compensation—Relative Position of Compensation Court.

Appeal by the Crown against an order of the Otago Land Sales Committee consenting to the sale of a house property by one Kate Stella Stavely Carrodus to the Dunedin City Corporation for the purpose of road-widening, at a consideration of £1,075 for the land and buildings together with a further sum of £125 for disturbance.

The Court said: "We are satisfied from the evidence called before us and from the admissions of counsel that the land is needed by the corporation for road-widening and is being acquired by private contract as an alternative to the more cumbersome and expensive method of acquisition under the Public Works Act. We are satisfied further that the sum of £125 expressed to be paid for disturbance has been agreed upon as being equivalent to the amount which the vendor would have been entitled to claim for compensation (in addition to the basic value of the land) had the property been taken compulsorily under the Public Works Act, and that the sum so to be paid is reasonable. The Crown does not dispute the price to be paid for the land, nor does it deny that, if the property had been taken under the Public Works Act, the vendor would have been entitled to compensation for disturbance in addition to the basic value of the land, nor that £125 might not reasonably have been awarded to the vendor by a Compensation Court. The Crown claims, however, that the consideration of compensation claims is outside the functions of a Land Sales Committee, and relies upon a direction recently given by this Court to the Marlborough Land Sales Committee in the following terms:

> 'It is outside the functions of this Court or of a Land Sales Committee to consider the respective advantages to a local body of purchasing land by private contract or of taking it under the Public Works Act and the Committee should therefore refuse to embark upon an enquiry as to the probable cost of taking land under the Public Works Act or the compensation likely to be allowed thereunder and should refuse to take such matters into account in fixing the basic value of the land under the Land Sales Act.'

"We are of opinion that the present case may be distinguished from that which was the subject of the foregoing direction. That case related to the purchase of a section by the Blenheim Borough Council at a figure very much in excess of the Crown valuation. No evidence as to value was tendered by the parties, who asked the Committee to approve of the sale at the contract price on the ground that the taking of the land under the Public Works Act would involve the council in expense and would render it liable for compensation. The Committee was invited, in effect, to speculate as to the amount which the corporation might save by buying the land privately, and to add the amount so arrived at to the basic value of the land. It was in these circumstances that the Court directed the Committee that it was no part of its functions to attempt to assess the cost of taking land under the Public Works Act or the compensation which might be allowed on a claim for compensation thereunder.

"In the present case, the parties themselves have agreed on a price for the purchase of the land and a sum for compensation which they claim to be properly payable in addition thereto. The contract, although comprised in a single document, may properly be regarded as a sale of land with a collateral agreement for the compromise and settlement of the claim for compensation which would have arisen had the land been taken compulsorily. The Land Sales Act is not intended to affect claims for compensation otherwise properly recoverable for the compulsory taking of land, and we see no reason why claims to compensation should not be settled between the parties by agreement as in the past. The Committee must, of course, be satisfied that the price to be paid for the land is not in excess of its basic value in accordance with the Land Sales Act, and it must have regard to the terms of the agreement between the parties regarding compensation. If it were of opinion that the sum to be paid for compensation was unreasonable, or that, though expressed to be payable for compensation, it was in fact to be paid in whole or in part for the land itself, so as to increase the price for the land to more than its basic value, then the Committee should refuse the application or impose a condition requiring a reduction in the amount. If, however, it is satisfied that the compensation to be paid is reasonable, it may properly approve of the transaction in the same manner as a sale of land in conjunction with chattels or subject to any other collateral agreement.

"In considering the propriety of an agreement for compensation, the Committee is not called upon, as if it were a Compensation Court, to assess the value of the vendor's claim with meticulous accuracy. Its function is to consider and determine whether the amount to be paid represents a fair settlement made between the parties in good faith and upon a reasonable basis for the purpose of avoiding the cumbersome procedure of compulsory acquisition under the Public Works Act. It is only where the Committee has reason to suppose that, viewing the circumstances as a whole, the effect of the agreement is to give the vendor a price in excess of its basic value for the land itself that it is its duty to interfere with the transaction.

"The view propounded by the Crown would lead to the extraordinary situation that a public body could in no case, even of the most trivial character, settle a claim for compensation by agreement with the owners of the land to be taken, and in every case of compulsory acquisition of land it would be necessary to invoke the procedure of the Public Works Act. We see nothing in the Land Sales Act to justify a construction which would prevent the settlement of compensation claims by agreement between the parties concerned. The suggestion that on the same principle a vendor selling to a private person might properly stipulate for the payment of compensation for disturbance or for vacant possession is untenable. Compensation payable for disturbance by a public body is paid in pursuance of a right conferred on the vendor by statute, and which he is therefore entitled to compromise and settle for a reasonable sum. No such right is possessed by a vendor selling to a private individual.

"In order to be entitled to approval under the Land Sales Act, a transaction where compensation is to be paid by a public body should be so expressed as to set out clearly the amount to be paid for the land itself and the amount to be paid for compensation. The Committee must be satisfied that the public body concerned would be prepared to take the land compulsorily were the vendor not prepared to sell by agreement. A vendor of land is not necessarily entitled to compensation, or to anything above the basic value, merely because he happens to be selling to a public body, and the right to compensation arises only where the element of compulsion is present in the sale. The onus is upon the parties to satisfy the Committee on all relevant matters, and evidence may well be required from both parties as to the basis of assessment of the compensation to be paid. Should the Committee be left in doubt as to the propriety of a proposed settlement, or deem the matter to be one of such difficulty or magnitude that it would be more desirable to have the compensation assessed by a Compensation Court, consent to the transaction may properly be refused.

"In the present case, we are satisfied that the terms of the arrangement as a whole are reasonable and proper, and that the consent of the Court should be granted thereto. The appeal is therefore dismissed."

No. 122.—K. TO T.

Land Sales Committee—Jurisdiction—Committee's Revocation of Consent previously given—Rectification of its own Mistake —Order made consenting to sale Basis of Hypothetical Subdivision—Consent to Sales of Sections in Subdivision at Higher Price per Section than that fixed on above Basis—Order signed and filed—Whether Committee has Power to re-open Matter and revoke its Consent in Order to rectify its own Mistake.

Appeals against a decision of the Christchurch Urban Land Sales Committee. The facts and reasons for the decision of the Committee were fully set out by the Committee as follows:—

The Committee considered that it had jurisdiction in the circumstances of the present cases to re-open them under s. 52 [of the Servicemen's Settlement and Land Sales Act, 1943] and to revoke the consents given upon the ground that all the material facts had not been submitted to the Committee. The decision of the Committee and its view as to the facts was set out in the following terms:—

In each of the above cases the applicant was called upon under s. 52 of the Act to show cause why consents granted on November 22, 1945, in respect of the above applications should not be revoked on the ground that all the material facts in connection with the above transaction were not submitted to the Committee.

The applicant's solicitor, Mr. J. A. Kennedy, appeared to show cause on February 12, 1946, and contended that the Committee had no jurisdiction in the circumstances to revoke its consent. Mr. Kennedy called no evidence and submitted no other grounds in opposition to the consents being revoked save and except his objection on the ground of jurisdiction.

The facts are shortly as follows:— On September 18, 1945, in Application 45/3567, the Committee granted consent to the sale by one T. to K. of a rectangular piece of land in Horseshoe Lake Road, comprising 1 acre 2 roods, on condition that the price be reduced from £450 to £410. On that occasion Mr. J. A. Kennedy appeared for both parties. Mr. Kennedy called on behalf of the vendor a valuer who valued the property on the basis of a hypothetical subdivision and gave it as his opinion that the front sections were worth £125. The Crown valued the property on the basis of a hypothetical subdivision also but valued the front sections at only £100. As the Committee made a reduction in the price, it was quite obvious that the Committee held the front sections in the hypothetical subdivision to be of a value of something less than £125. This was known to Mr. Kennedy in his capacity as solictor for the purchaser, Mr. K., who is now the vendor in the present applications.

Mr. K. proceeded to subdivide the property, and on October 30, 1945, lodged the three applications now in issue, which related to two front sections and one rear section, the price being £165 for the front sections and £135 for the rear section. In his application, Mr. K. gave the number of the previous application, but neither he nor the Crown representative drew the Committee's attention to the fact that it was clear from the evidence on the previous application that the Committee could not, at least without further evidence, pass these sections at more than £125. For some reason unexplained, the Crown representative failed to recognize that the price of these sections had been, in effect, fixed by the Committee, and he did not oppose these sales at the contract price. Consent was therefore given without hearing in each case on November 2, 1945.

The full facts subsequently came to the Committee's notice before settlement had been effected in any of the cases. It is perfectly clear that, had the Committee's attention been drawn, not merely to the number of the previous application, but to the evidence called on that application, these present applications could not possibly have been granted without a hearing. It is also clear, in our opinion, that, in view of the reduction in price made in favour of the purchaser on the original application, it would be grossly unfair to the original vendor for the Committee to approve of the present application at the contract prices. In effect, a mistake has been made and we deem it our duty, if we have jurisdiction to do so, to rectify that mistake.

Mr. Kennedy relied upon *No. 63—F. to P.*, and contended that the present consents could not be revoked as no *mala fides* had been proved on the part of the vendor. We doubt whether the learned Judge's remarks on the subject of *mala fides* were intended to apply to a proposed revocation on the ground that all material facts had been submitted to the Committee. In any case, we feel that a grave injustice will be done to the original vendor and to other owners of land in the same district unless what appears to have been a mistake is rectified, and we think it our duty to revoke the consents granted unless the Court should rule to the contrary on appeal.

In each case, therefore, the consent granted on November 2, 1945, is hereby revoked and the applications will be set down for further hearing.

It is not intended to elaborate to any extent upon the foregoing statement, as the question is really a matter of law for argument upon the appeal. I would like, however, to make the following points which appear to me to be of importance:

(1) The decision in *No. 63.—F. to P.*, does not make clear whether the Court was considering an application under s. 52 (1) (*a*) or s. 52 (1) (*b*). In view of the discussion as to *mala fides*, it was assumed that that case related to a false or misleading statement in which case it would seem clear that *mala fides* would require to be proved.

(2) It does not seem to me, however, to follow that proof of *mala fides* is a necessary prerequisite to the revocation of consent under s. 52 (1) (*b*). It is possible to conceive of cases where material facts are innocently withheld from the Committee by a vendor and where in the interests of justice consent should be revoked notwithstanding that no *mala fides* on the part of the vendor could be proved.

(3) It is also my opinion that s. 52 (1) (*b*) should not be limited to cases where the failure to bring all the material facts to the notice of the Committee can properly be attributed to the vendor. The wording of the subsection is wide enough to cover a case where material facts which should have been known to the committee are in fact not known or overlooked, notwithstanding that the vendor himself was in no way blameworthy.

In the present case, we did not hold that *mala fides* had been proved against the vendor, nor did we consider that the vendor had intentionally withheld any facts from the Committee At the same time, neither the vendor nor the Crown representative drew the attention of the Committee to the very crucial fact that, in fixing the price for the whole block purchased by the vendor, the Committee had tentatively considered and arrived at prices for the sections of the proposed subdivision. The only reference to the prior proceedings in any of the present applications was the note typed after para. 5 on the Application Form: 'see Appln. 3567/45.' This should no doubt have been sufficient to bring the full facts of that application to the Committee's notice, but the Committee relies in these matters upon the Crown representative, and unfortunately the full significance of the previous case in relation to the present applications was not noted by the Crown representative or brought to the notice of the Committee.

The real issue in this case is whether the vendor, who stands to profit very substantially by a mistake either of the Crown representative or of the Committee, is to be allowed to retain the benefit of that mistake notwithstanding its discovery before any of the transactions have been completed.

In our opinion, it was our duty to rectify this mistake if at all possible, and, as we consider we have jurisdiction to rectify it by a revocation of the orders under s. 52, we revoked the orders accordingly If s. 52 does not give such power, then we feel that it is regrettable that apparently no such power is given under the Act; and, should our view be wrong, we would prefer to have the benefit of a ruling from the Court.

The Court (per *Ongley*, J.) said: "Mr. *Kennedy*, for the appellant, submitted that s. 52: (*a*) does not give to a Committee any general power to revoke orders; (*b*) is limited to the grounds set out in that section—*i.e.*, that a false or misleading statement has been made or that all material facts were not submitted; (*c*) that neither of these grounds exists in this case; and (*d*) that the Committee in revoking the orders exceeded its jurisdiction.

"Mr. *Rawson*, for the Crown, agreed that the vendor did not make any false or misleading statement, that the vendor did submit all material facts, and that the vendor discharged all obligations on him in that respect. He agreed that the question whether the first vendor is a loser in the subsequent transaction is immaterial, and whether the subsequent vendor stands to gain is also immaterial. He agreed that the Committee was not correct in invoking s. 52 of the Servicemen's Settlement and Land Sales Act, 1943, as this was a mistake made by the Committee, and submitted that the real question at issue was whether the Committee had any right to remedy its own mistake. He referred to s. 63 and to *No. 63.—F. to P.*

The real issue seems to be that put by Mr. *Rawson—i.e.*, has the Committee power to remedy its own mistake? It seems that the submissions of counsel in regard to s. 52 are correct—*i.e.*, that that section applies only when the grounds mentioned in the section exist. They do not exist here, and accordingly that section does not apply. Section 63 is a general jurisdiction section, giving power to the Court and every

Land Sales Committee (*a*) to deal with and determine matters coming before it, and (*b*) to make such order (not inconsistent with the Act) as it deems just and equitable in the circumstances of the case. The Committee exercised its powers under that section; that is to say, the Committee heard and determined the matter and made an order. (The sufficiency or otherwise of the hearing is not raised in these proceedings.) In the judgment delivered by *Finlay*, J., in *No. 63—F. to P.* (*supra*) the law, apart from s. 52, is stated as follows: 'Regard must be paid to the principle that knowledge of the state of the law as it subsisted when s. 52 was passed must be attributed to Parliament. As to that law, there is no uncertainty. Any judicial tribunal which has been misled by false or misleading statements or by the suppression of material facts has inherent power to review its decision up to the time at which its judgment or order is perfected, that is, filed and sealed. Once the order is perfected, however, the Court cannot alter a judgment or order even if it was procured by fraud. The law in this respect was laid down in *Preston Banking Co.* v. *William Allsup and Sons* ([1895] 1 Ch. 141): see the judgment of *Lord Halsbury*, at p. 143: also the judgment of *A. L. Smith*, L.J., at pp. 144, 145, where he said: "Lord Justice *Fry* put the law on the right foundation when he held, in *In re Suffield and Watts* (20 Q.B.D. 693), that so long as the order has not been perfected, the Judge has a power of reviewing the matter, but when once the order has been completed the jurisdiction of the Judge over it has come to an end."'

"It is pointed out in *No. 63.—F. to P.* that a Land Sales Committee is a judicial tribunal. Under s. 20 the order of the Committee is to be signed and filed. It then becomes appealable under s. 21, or may be revoked by the Committee under s. 52 if proper grounds for revocation exist (These grounds do not exist here.) The point is that the Committee has exercised its powers and has determined the matter. Its order has been signed and filed. No general jurisdiction has been given to the Committee to undo what it has done in exercise of its powers, except in cases where s. 52 applies. As it does not apply here, the appeals are allowed."

THE TRIAL OF MAJOR JAPANESE WAR CRIMINALS.

The International Military Tribunal for the Far East.

By Flight-Lieutenant Harold Evans, LL.B.*

VII.—Commencement of Proceedings.

The first public sitting of the International Military Tribunal for the Far East was held on Friday, May 3, 1946. The Judges having taken their places on the Bench, and the Marshal of the Court having declared the Tribunal to be "in session, and ready to hear any matter brought before it," the President (Sir William Webb) made a short opening statement. He announced that the Judges had, before assembling, signed a joint affirmation "to administer justice according to law without fear, favour, or affection." The Tribunal appreciated, he said, the great responsibility resting upon it. There had been no more important criminal trial in all history. To their task the Judges brought open minds, both on the facts and on the law, and the onus would be upon the prosecution to establish guilt beyond reasonable doubt.

The President then called upon Mr. Joseph B. Keenan, American Chief of Counsel for the Prosecution, who presented to the Court the Associate Prosecutors from the other nations represented. The official Court Reporters and Interpreters (American and Japanese), monitors, and arbiters were then sworn.

The Indictment was then read, the Defence being unwilling to waive this process. The reading was done by the Marshal of the Court—relieved from time to time by the Acting Clerk of the Court—and the Japanese translation was read over the sound system on the Japanese channel simultaneously. It lasted the rest of the day, and was resumed and completed the following morning. The reading of the appendices to the Indictment was waived by the Defence. After Japanese Defence counsel had been presented to the Court by Dr. Kiyose, counsel for the defendant Tojo, it was decided that the arraignment of the defendants should take place on May 6.

When the Court assembled on May 6, Dr. Kiyose stated that Defence counsel wished to challenge the appointment of each of the Judges. He began by challenging that of the President, who, he pointed out, had investigated Japanese atrocities in New Guinea and had submitted a report on the results of his investigations to the Australian Government. Dr. Kiyose evidently had objections that he wished to make to each Judge individually, but, before hearing these, the Tribunal decided to recess for a short time to consider the matter of challenge to members of the Tribunal in general. On their return to Court, the Judge from New Zealand (the Hon. Mr. Justice Northcroft) announced the Tribunal's decision. He said that the Judges had conferred upon the objection, in the absence of the President, and had come to the conclusion that no objection to the person of any member of the Tribunal could be sustained. The Charter prescribed that the Tribunal should consist of members appointed by the Supreme Commander for the Allied Powers. That being so, it did not rest with the Tribunal to unseat anyone appointed by the Supreme Commander. The President himself then added that, before he accepted his appointment, he seriously considered what effect his reports would have on his position as a member of the Tribunal. He had come to the conclusion without difficulty that he was eligible, his views being supported by the best legal opinion available to him in Australia.

Dr. Kiyose then stated that objections to jurisdiction were to be presented, and asked that the taking of the defendants' pleas be postponed. The Tribunal decided that the defendants must plead, though without prejudice to their objections to jurisdiction. The President then asked each defendant in turn how he pleaded, guilty or not guilty, and in each case the answer was "Not guilty." The proceedings were then adjourned for a week, in order to afford Defence counsel, many of whom had only recently arrived in Tokyo, time to prepare their arguments on jurisdiction.

The Tribunal devoted May 13, 14, and 15 to the hearing of argument from the Defence and the Prosecution upon the Defence's motions relating to jurisdiction. On May 17, the President announced that these motions were dismissed, and that the Tribunal would state its reasons for the decision later. An adjournment to June 3 was then taken, to give the Defence further time in which to prepare for trial.

* Secretary to the Hon. Mr. Justice Northcroft, New Zealand Representative on the International Military Tribunal for the trial of Far Eastern War Criminals.

VIII.—Opening Address by Chief Prosecution Counsel.

The Prosecution's opening address was delivered by the American Chief of Counsel, Mr. Joseph B. Keenan, on June 4. Its purpose was to present to the Tribunal the Prosecution's submissions on the law applicable to the case. and to outline the main facts intended to be given in evidence.

As the President had done before him at the opening session of the Court, Mr. Keenan began by stressing the importance of the trial. It was important, not only to the eleven nations taking part—representing orderly governments of countries containing much more than one-half of the inhabitants of the earth—but as well to the unborn generations of every nation, because the proceedings might have a far-reaching effect upon the peace and security of the world. Thus, the Prosecution's aim was not only to assist in the practical administration of justice, but also to contribute towards the prevention of aggressive war.

This was no ordinary trial, said the Chief Prosecutor; it was part of civilization's attempt to preserve the world and its inhabitants from destruction. The threat of destruction came, not from the forces of nature, but from the deliberate, planned efforts of individuals. It would be shown, he said, that the defendants, who were numbered among a very few throughout the world, decided to take the law into their own hands and force their will upon mankind. Regardless of the consequences to human lives and the resources of the earth, they schemed for domination and control of Eastern Asia and, as they advanced, ultimately of the entire world.

The first question that arose was, is civilization of our day compelled to stand idly by and permit these actions, with all their terrible consequences, without any attempt to punish those responsible. To those who demanded precise, well-established precedents for action, said Mr. Keenan, the Prosecution would point out that the notion of punishing the originators of war was not new. Aggressive war had always been recognized as wrong. What was new was the constituting of an international legal tribunal and affording to accused persons the right of defending themselves. This, the Prosecution contended, was a justifiable development of international law, even though a precise historical precedent did not exist for it.

The Charter of the Tribunal itself recognized and embodied the development which had taken place in the law of nations. It defined, as criminal, offences of the gravest character which had long been recognized as illegal in the mind and public conscience of the world. Some of the offences had been recognized as such in assemblies participated in by large numbers of nations. Others had been outlawed by treaties, declarations, and resolutions. Some of them had, in effect, been designated as criminal by assurances. However, by whatever means this law had been established or become crystallized, it was with full realization that the dictates of humanity and the requirements of civilization demanded that these offences be recognized as such, and placed beyond the pale of civilized conduct. Indeed, throughout the period of time during which the crimes charged in the Indictment were committed, it was firmly recognized by all nations that the continued existence of civilization required that acts such as those committed by the defendants should be brought to an end.

Mr. Keenan then outlined to the Court the Prosecution's legal submissions on the two subjects of aggressive war, and war in violation of international law, treaties, agreements, and assurances. He put before the Tribunal quotations from the writings of various recognized authorities on international law, among them the following passage from a judgment of the late Mr. Justice Cardozo of the United States Federal Supreme Court :—

> International law, or the law that governs between states, has, at times, like the common law within states, a twilight existence during which it is hardly distinguishable from morality or justice till at length the imprimatur of a Court attests its jural quality. The gradual consolidation of opinions and habits has been doing its quiet work.

Mr. Keenan said that, long before the occurrence of the acts charged in the Indictment (covering the period 1928 to 1945), aggressive warfare had been condemned as illegal. At the first Hague Conference, in 1899, the nations agreed to settle their disputes by "pacific means whenever possible." At the second Hague Conference, in 1907, the same policy was reaffirmed, and all the participating nations, including Japan, agreed that "hostilities must not commence without previous and explicit warning." By that agreement, said Mr. Keenan, undeclared wars and treacherous attacks were branded as international crimes.

The latter part of Mr. Keenan's address was a general outline of the main facts intended to be given in evidence by the Prosecution. It is not proposed to summarize these at the present stage, as they will be dealt with in later articles covering the various separate phases of the prosecution's case.

The Chief Prosecutor concluded that portion of his address which dealt with the law by referring to the matter of the individual responsibility of the defendants. For many years, he said, sober-minded and peaceful men and women all over the world had been puzzled in their search for the reason why transgressors in the high places of a nation, who brought about international tragedies, should remain unpunished. It was difficult for them to understand the logic and reasoning of those proponents of international law who concluded that such leaders were beyond the reach of the practical administration of justice. In the Prosecution's submission, said Mr. Keenan, the conspiracy of the defendants to commit the crimes charged was an offence in itself, and for conspiracy individuals were responsible. Secondly, all governments were operated by human agents, and all crimes were committed by human beings. Moreover, the assertion of the defendants that they were immune from punishment by reason of the offices they held was tantamount to saying that it was lawful and proper for the humbler members of their community, subject to their will, to have lost their lives and their properties, while they, the architects and perpetrators of those happenings, remained free. "We only need," said Mr. Keenan, "to take a few steps to the top of this building and look below us to see what destruction they have brought upon their own people. These events speak more eloquently than any human beings could achieve by way of description."

The question of the personal responsibility of the defendants was being squarely presented for decision, and the Tribunal should, Mr. Keenan submitted, recognize as law a principle that followed the needs of civilization and was a clear expression of the public conscience. These required that the positions held by the defendants should be no bar to their being considered as ordinary criminals and felons if the evidence proved beyond a reasonable doubt that they had been parties to crimes for which they should be punished.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Pills and Testamentary Capacity.—The vagaries of elderly testators have appeared once again in litigation, Fleming, J., having been required to hear all about them at Timaru. According to the oral judgment, *Hampton* v. *Moses*, the testator, although virile in mind and body, was illiterate and possessed in full measure an illiterate's suspicions of medicines given at hospitals and elsewhere.

> He states that these pills were given to the inmates, who were old, and died fairly fast, and he was not taking the risk of taking them. The old man may have been right in thinking he did not need them. There is no evidence that he was suffering pain. He got a reasonable amount of sleep. Why waste their good pills on a man who did not need them? That occurs to me, and I think I am still reasonably sane. It occurred to the old gentleman that he was better without pills, and I believe he was. He was not in pain, and got all the sleep he needed. Maybe they wanted to stop him from calling out "Hallelujah!" and "Praise the Lord!" I often hear perfectly sane persons use those expressions. I would not assume he was suffering from any delusion in that he preferred to have the pills in his pocket rather than in his stomach.

These sentiments will not find favour either with hospital boards or manufacturers of patent medicines, but the latter class may find solace in the reference in the judgment to historic cases of great men "whose minds were keen and at a high pitch of efficiency at very great ages. There is the example of the great Lord Halsbury, performing his dutics as a Judge in the ablest manner at the age of 97. There is also the case of George Bernard Shaw at the present time—still alive and still writing stuff that will probably be read hundreds of years from now."

Halsbury's abilities were great, but it is open to doubt whether they were as great as *that*. Even Holmes had to call a halt at 91. "I won't be down tomorrow," he said to his fellow-Judges.

The Nagging Wife.—Says Robert Burns:

> Curs'd be the man, the poorest wretch in life,
> The crouching vassal to the tyrant wife!

It seems, also, that he may be without legal remedy. In *Squire* v. *Squire*, [1947] 2 All E.R. 529, an Army officer petitioned for divorce on the ground of legal cruelty from a wife who for four years had suffered constant insomnia consequent upon various illnesses and serious operations, and who, in addition to insisting that he read her to sleep every night, dress, bathe, and otherwise nurse her, nagged him to such an extent that his health became affected and efficiency at his work impaired. It was argued on his behalf that the wife must have appreciated the natural consequences of her conduct and that her only defence must be that of insanity. *Finnemore*, J., however, considered that the authorities decide that cruelty must be deliberate, malignant, and intended. It was part of the marriage contract, and part of the marriage service, that the parties take one another for better or worse and undertake to cherish one another in sickness and in health. Where, owing to illness, in the course of illness, and arising out of illness, there were certain conduct and demands made on one partner to the marriage which were heavy and became impossible, the Court did not think there was deliberation, malignancy, or intention (or whatever might be the proper word) so as to amount to legal cruelty:

> After all, unfortunately, many husbands and wives get married and one of them develops some incurable disease—cancer, tuberculosis, arthritis—in which life becomes desperately difficult, and, perhaps, almost impossible, for the other spouse, because the one party needs almost constant attention of all sorts and kinds, but no one would dream of saying that that involves cruelty.

The view of Finnemore, J., in this case was that the married life became impossible because the wife was desperately ill and progressively getting worse, and the husband, to whom no blame was attachable, could no longer stand the strain which the illness of his wife and her demands arising out of that illness made upon him. Nevertheless, he did not think he was entitled to fix on the wife the matrimonial offence of cruelty. The petition was dismissed.

Viscount Caldecote.—The death of Viscount Caldecote, at the age of seventy-one, removes a picturesque personality from the legal scene. Better known as Thomas Inskip, he had the unusual distinction of filling in turn both the offices of Lord Chancellor and Lord Chief Justice; but, before so doing, he occupied the post of Attorney-General on two occasions and of Solicitor-General on three. He was also Leader of the House of Lords. One of the most interesting cases in which he appeared as Attorney-General was the charge of manslaughter against Lord de Clifford, internationally famous as a racing driver, whose case had to be removed by writ of certiorari to the House of Lords to be tried "by his peers" as a court of first instance. Lord Hailsham, the High Chancellor, presided, with four Judges of the High Court to advise on questions of law, while the "jury" consisted of the eighty-five Peers who were present. In 1922, he led the prosecution in the Allaway murder trial, in which, when Avory, J., rebuked the accused's counsel for an interminably irrelevant cross-examination, the Bench found support in several members of the jury who rose from their seats and shouted "Hear, hear!" in no uncertain tones.

Inducing Offences.—The employment of members of the Police Force as *agents provocateurs*, while justified from time to time on grounds of expediency, has always seemed to offend the average Englishman's sense of justice. The matter had to be considered recently by Lord Goddard, L.C.J., in a case where a plain-clothes officer of the Derby Borough Police Force, in order to detect an offence under the Street Betting Act, 1906, went to a public-house and committed the statutory offence himself. Strong disapproval was expressed in his judgment by Lord Goddard, who was concerned that a police authority should regard it as right to send a police officer into a public-house to commit an offence so as to obtain evidence against someone else. Unless an Act of Parliament provided that, for the purpose of detecting an offence, a police officer might be sent to commit an offence, it was in his opinion wholly wrong to allow a practice of that sort to take place. This is not the first time attention has been drawn to

the topic. In *R.* v. *Brickley*, (1909) 73 J.P. 239, the Court of Criminal Appeal quoted with approval *Connor* v. *The People*, (1893) 36 Amer. State Rep. 300, in which it was said :

> When in their zeal or under a mistaken sense of duty, detectives suggest the commission of a crime and instigate others to take part in its commission in order to arrest them while in the act, although the purpose may be to capture old offenders, their conduct is not only reprehensible but criminal, and ought to be rebuked rather than encouraged by the Courts.

Scriblex recalls listening to one case where a police spy persuaded a hotel-keeper to sell him after hours a half-bottle of brandy on the pretence that it was urgently needed for a sick friend. Dissimulation of this sort reflects no credit upon anyone connected with the administration of the criminal law.

PRACTICAL POINTS.

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1. Probate and Administration.—*All Executors deceased—Last Surviving Executor also Sole Beneficiary dying Intestate—Transmission to his Administrator.*

QUESTION : D died in 1936, leaving A and B his executors, who are on the Land Transfer Register Book by transmission. A died two years ago, and B, who was D's sole beneficiary, died two months ago intestate, and C has been appointed his administrator. Can C get on to the Register Book by transmission, or must letters of administration *de bonis non* be taken out *re* D's estate ? All the debts and death duties *re* D's estate have long since been paid.

ANSWER : Letters of administration *de bonis non* are not necessary, but C is entitled to be registered by transmission. Here, there has been a union of the legal and beneficial or equitable estate since A's death : see *In re Hodge*, *Hodge* v. *Griffiths*, [1940] 1 Ch. 260, *In re Martin*, [1912] V.L.R. 206, and articles in the NEW ZEALAND LAW JOURNAL, 1944, Vol. 20, 79, 1946, Vol. 21, 19 : *cf. Public Trustee* v. *Registrar-General of Land*, [1927] N.Z.L.R. 839.

X.1.

2. Gift Duty.—*Gift to Plunket Society—Whether exempt from Gift Duty.*

QUESTION : My client intends to make a gift to the local branch of the Plunket Society for its general purposes. It will exceed £500. Will it be exempt from gift duty ?

ANSWER : It would be exempt on the ground that such a gift would create a charitable trust for the benefit of the people of New Zealand : *Public Trustee* v. *Wanganui Borough*, [1918] N.Z.L.R. 646, *In re Smith, Walker* v. *Battersea General Hospital*, (1938) 54 T.L.R. 851, s. 2 (1) (*a*) of the Death Duties Amendment Act, 1925, and *Adams's Law of Death and Gift Duties in New Zealand*, 204–209.

X.1.

3. Land Transfer.—*Instrument executed in Western Samoa—Attestation.*

QUESTION : A is the registered proprietor of land in New Zealand held under Land Transfer title. He is at present resident in Western Samoa and has sold the land to B. A has left no attorney in New Zealand, and it is necessary that he should execute the memorandum of transfer conferring title on B. Upon looking into the question of attestation, we can find no provisions applicable. As Western Samoa is not a British Dominion, s. 176 of the Land Transfer Act, 1915, does not appear to be applicable.

ANSWER : Section 176 of the Land Transfer Act, 1915, is not applicable, and we do not know of any other statutory provision which could be availed of. We understand, however, that the Land Transfer Department would accept as witnesses any of the following officials of the Government of Western Samoa : (*a*) His Excellency the Administrator ; (*b*) His Honour the Chief Judge ; (*c*) the Registrar of Land ; or (*d*) a Commissioner of the High Court of Western Samoa.

X.1.

4. Trusts and Trustees.—*Appointment of New Trustee—Land subject to Land Transfer Act—Vesting of Legal Title in New Trustee.*

QUESTION : A., the sole executor and trustee of a deceased person's estate, has died. He is registered as proprietor by virtue of a transmission. The power of appointing a new trustee is conferred by the will of the original testator on the widow of A. A.'s widow has now, by deed, duly appointed C. trustee. Before the land can be transferred to C., will transmission have to be registered in favour of A.'s widow, or could the position be met by apt recitals in the transfer from A.'s widow to C. ?

ANSWER : Although all the relevant facts have not been stated, the question appears to be based on a misapprehension as to the ambit of a transmission under the Land Transfer Act. If A. has left an executor, then such executor, on proving A.'s will, should get on to the Register Book by transmission : *Drummond* v. *Registrar of Probates (South Australia)*, (1918) 25 C.L.R. 318, *Public Trustee* v. *Registrar-General of Land*, [1927] N.Z.L.R. 839. It would then be his duty to transfer to the new trustee, C. A.'s widow cannot transfer the legal estate to C. unless she is also A.'s executor, in which event she should first get on to the Register Book by transmission.

X.2.

RULES AND REGULATIONS.

Health (Bread-wrapping) Extension Notice, 1947, No. 4. (Health Act, 1920, and Health (Food) Amending Regulations, 1946.) No. 1947/176.

Notifiable Infectious Diseases Notice, 1947. (Health Act, 1920.) No. 1947/177.

Rehabilitation (Travelling-allowance) Regulations, 1947. (Rehabilitation Act, 1941.) No. 1947/178.

War Service Gratuities Emergency Regulations, 1947. (Emergency Regulations Act, 1939.) No. 1947/179.

Bobby Calf Marketing Regulations, 1947, Amendment No. 1. (Marketing Act, 1936.) No. 1947/180.

Dairy Products Marketing Commission (Travelling-allowance) Regulations, 1947. (Dairy Products Marketing Commission Act, 1947.) No. 1947/181.

Motor-drivers Regulations, 1940, Amendment No. 4. (Motor-vehicles Act, 1924.) No. 1947/182.

Public Service Salary Order, 1947. (Appropriation Act, 1920.) No. 1947/183.

Public Service Remuneration Order (No. 2), 1947. (Finance Act, 1938.) No. 1947/184.

Emergency Regulations Revocation Order, No. 7. (Emergency Regulations Act, 1939.) No. 1947/185.