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FAIR RENTS: LANDLORD'S REFUSAL OF CONSENT TO ASSIGNMENT.

A JUDGMENT of the English Court of Appeal which, in certain circumstances, might be useful in New Zealand is *Lee* v. *K. Carter, Ltd.*, [1944] 2 All E.R. 690.

By a lease dated March 1, 1940, the plaintiff, Lee, let to the defendants, K. Carter, Ltd., for seven years from March 28, 1940, at £275 a year a flat at No. 3, Cavendish Court, London. It was a term of the lease that the company would not without the landlord's previous consent in writing assign or sub-let the flat, *the consent not to be unreasonably withheld*. It was provided that the use of the flat by the defendant, Mrs. Kate Bowman, the secretary and a director of the company (who guaranteed the lease), and her family, or by any director of the company, was not to be taken as a breach of that covenant. On January 30, 1947, the company, without the landlord's consent, purported to assign the remainder of the term of the lease to Mrs. Bowman. The landlord refused to acknowledge the assignment, or to accept rent from Mrs. Bowman. He claimed possession of the flat, on the ground that the lease to the company had expired on March 25, 1947, and that Mrs. Bowman was in unlawful possession of the flat.

It was alleged for the defendant, Mrs. Bowman, that the premises were within the Rent Restriction Acts; that, when the lease was granted, she and the company had both produced references, which the landlord had presumably considered satisfactory; that she had lived in the flat with her family since the beginning of the lease; that on March 8, 1946, and January 17, 1947, the company asked, and the landlord unreasonably refused, permission to assign the lease to Mrs. Bowman; that the company therefore assigned the lease to her on January 29, 1947, and notified the landlord of the assignment; but that he refused to acknowledge the assignment, or to accept rent from her. She contended that, as the lease had expired, she occupied the flat as a statutory tenant under the Rent Restriction Acts.

Before proceeding further, it should already be clear that this judgment is not applicable, in New Zealand, to business premises, of which, under the Economic Stabilization Emergency Regulations, 1942, a company may become a statutory tenant.

Apart from the Fair Rents Act, a company can, of course, become the tenant of a dwellinghouse. It cannot, however, become a statutory tenant of a dwellinghouse, since, even if it could itself have physical occupation of a house "let as a separate dwelling," it could not resist a claim for possession after the expiry of its lease on a ground of hardship, which is related to physical occupation, which a company could not enjoy.

Since the decision in *Bilderdeck* v. *Manson and Barr, Ltd.*, [1948] N.Z.L.R. 58, it is clear that an assignment by a contractual tenant of a dwellinghouse—whether before or after his tenancy has been determined by notice—does not, in the absence of consent by the landlord, bring the assignee within the provisions of the Fair Rents Act, 1936. If, therefore, the landlord in *Lee* v. *K. Carter, Ltd.*, had given his consent to an assignment of the tenancy to Mrs. Bowman, she would have become his tenant, in the place of the company; and she would, at the expiry of the contractual tenancy, have been protected from an order for possession. This follows from the fact that, if the contractual tenancy had been assigned to Mrs. Bowman with the consent of the landlord, she would have remained the contractual tenant on the expiry of the term of the lease by effluxion of time; and, if the landlord had then determined her tenancy by notice to quit, she would, on the expiry of that notice, and while she occupied the premises, be protected (if in New Zealand) by s. 13 (1) of the Fair Rents Act, 1936, from an order for possession, except on the ground of one or more of the special exemptions contained in that section.

In the case under notice, since the landlord refused to consent to the assignment by the company to Mrs. Bowman, the company remained his tenant during the term of the contractual tenancy, and nothing could have prevented him from getting possession of the premises at the end of the lease. The whole question for decision was whether the fact that the proposed assignee could, at the expiry of the lease, become a statutory tenant provided a valid ground for refusing consent to the assignment. In other words, on the principle of *Bilderdeck's* case, the landlord refused his consent to the assignment to a person likely to become a statutory tenant, and thereby barred her chance

of remaining in possession as a protected person. By refusal of his consent, he guarded himself against what our Court of Appeal in *Cameron* v. *The King*, [1948] N.Z.L.R. 813, 820, termed "the statutory protection which the landlord is powerless to terminate."

The learned County Court Judge, before whom the landlord's application against the company for possession had come, after having had all the relevant authorities before him, came to the conclusion that the landlord was not unreasonable in withholding his consent, and that, accordingly, the purported assignment was unlawful and the landlord was entitled to possession. In his reasons for holding that the landlord was justified in his refusal, he said:

> I held that K. Carter, Ltd., had no right to assign to Mrs. Bowman and the landlord was within his legal rights in refusing to consent to such assignment. The premises let to K. Carter, Ltd., were not controlled by the Rents Acts in view of their being a limited company, whereas Mrs. Bowman was a person who, if she became tenant, would be protected by the Acts and the whole nature of the tenancy would be changed. I consider the facts of the case of *Re Swanson's Agreement, Hill* v. *Swanson*, [1946] 2 All E.R. 628, were not comparable with the facts of the present case in view of the difference in the legal entities of the assignor and assignee in the present case. I held that the objection by the landlord to the assignee in the present case was reasonable within the principles of *Re Gibbs and Houlder Brothers and Co., Ltd.'s, Lease, Houlder Brothers and Co., Ltd.* v. *Gibbs*, [1925] Ch. 575, and *Tredegar* v. *Harwood*, [1929] A.C. 72.

In *Re Gibbs and Houlder Brothers and Co., Ltd.'s, Lease, Houlder Brothers and Co., Ltd.* v. *Gibbs*, [1925] Ch. 575, 584, Warrington, L.J. (as he then was), said:

> The question whether a particular act is reasonable or unreasonable cannot be determined on abstract considerations. An act must be regarded as reasonable or unreasonable in reference to the circumstances under which it is committed.

In other words, as Tucker, L.J., pointed out in the case under notice, in approaching that case, and in approaching all other cases where the question is whether or not the withholding of consent was, in the particular circumstances, reasonable or unreasonable, it must always depend on the facts of the particular case. Here, His Lordship considered that the particular circumstances included the fact that the result of the assignment, if consented to, would have been to alter the legal relationship between Mrs. Bowman and the landlord, to put her in the position of a tenant, with the result that at the end of the lease the landlord would have been unable to enforce the provisions of the clause of the lease containing the tenant's covenant to give up possession at the termination of the lease. Furthermore, at the termination of the lease, he would have found himself faced with a statutory tenant who could have been evicted only on the special grounds contained in the Rent Restrictions Act. It was obvious, His Lordship added, that that was the whole reason why the landlord refused to give his consent.

It had been argued that the learned County Court Judge had failed to apply the principle stated by Tomlin, J. (as he then was), in *Houlder Brothers'* case at p. 209:

> that it is by reference to the person or personality of the lessee or the nature of the user or occupation of the premises that the Court has to judge the reasonableness of the lessor's refusal.

Tucker, L.J., in his judgment, said that that statement and the language used by the Lords Justices when the case went to appeal ([1925] Ch. 575, 583, 585, 587, 588) must be considered in the light of the facts of that particular case. He did not think that Tomlin, J., was purporting to lay down any principle of universal application. He certainly had not in mind any such situation as had arisen in the present case—*viz.*, the results which might follow at the end of a lease from the acceptance of a particular assignee for the termination of that lease.

His Lordship thought that the case fell within the language used by all the Judges in *Houlder Brothers'* case, and that the landlord's refusal of consent was connected with the person or personality of the proposed assignee and the use to be made of the premises. True, the consequences of the assignment would not show themselves until the expiration of the lease some months later, but the new contractual relationship which would be substituted would be pregnant with future possibilities, which would not have resulted from the previous contractual relationship between the landlord and the tenants.

A decision much relied upon by counsel for the tenants was the judgment of Evershed, J., in *Re Swanson's Agreement, Hill* v. *Swanson*, [1946] 2 All E.R. 628, where the following questions were raised by an originating summons:

> (1) Whether according to the true construction of the tenancy agreement and in the events which had happened the refusal of the landlord to grant a license to the tenant to assign the premises was unreasonable; (ii) whether, notwithstanding such refusal, the tenant was at liberty to assign the premises without any such license.

Of this judgment, Tucker, L.J., said:

> In the course of the examination of the facts of that case *Evershed*, J., eventually came to the conclusion that at the time of the assignment in question the contractual tenancy was not subsisting and, therefore, the question whether consent to the assignment could or could not be reasonably withheld did not arise and everything *Evershed*, J., said in his judgment on that part of the case was really *obiter*. None the less he dealt with the question at some length and it is necessary to observe that in that case, assuming the contractual tenancy to have been subsisting, the proposed assignor was a person who, if he had remained the tenant, would have become a statutory tenant at the termination of the agreement; and the proposed assignee was in a similar position. But the tenant, the assignor, was minded to go out and to assign to the tenant who would come in. The landlord desired to obtain possession of the premises when his tenant went out and preferred to have possession rather than a statutory tenant, which would result from the assignment. That was a case where the landlord's real objection to the assignment, if there had been a contractual tenancy subsisting, was that he would have been thereby deprived of his opportunity of getting possession of the premises before the expiration of the lease, and therefore the case would have been almost identical with *Bates* v. *Donaldson*, [1896] 2 Q.B. 241, where *A. L. Smith*, L.J., held that that was not a good reason for a landlord to refuse consent to the assignment. For those reasons I do not think the observations of *Evershed*, J., on this point in *Re Swanson's Agreement*, [1946] 2 All E.R. 628, are conclusive in any way of the matter which comes before us, because I think that on the facts of *Swanson's* case, assuming a subsisting agreement, the reasons for the landlord's refusal were unreasonable having regard to the decision of *Bates* v. *Donaldson*. If the observations of *Evershed*, J., go beyond that and are inconsistent with the view I take of the present case, then I must respectfully differ from him; but for the reasons I have indicated I think that *Swanson's* case was an altogether different one from the present.

The other members of the Court of Appeal, Bucknill and Somervell, L.JJ., concurred with the reasons given by Tucker, L.J., for dismissing the appeal. Somervell, L.J., added some observations as to the difference of the circumstances in the present case and in *Houlder Brothers'* case. He agreed that the circumstances which clearly actuated the landlord's mind were circumstances which the learned County Court Judge was entitled to consider in deciding whether or not the landlord acted reasonably. He had not misdirected himself on what was primarily a question of fact,

and he had applied the correct principles of law. His Lordship made it clear that he was not suggesting that there is any principle under which, in all cases and in all circumstances, a lease which is originally a lease to a company may not be assigned by that company to an individual, or, perhaps, to put it more accurately, that the landlord would always be held to be reasonable if he refused his consent to an assignment. He agreed with Tomlin, J.'s, observation that "it is impossible to give an exact definition which will fit all cases" ([1925] Ch. 575, 594). He added that it was a most important circumstance, and a relevant circumstance in the present case, that the assignment to which the landlord was asked to assent lacked the normal circumstance in which a request for an assent to an assignment is put forward—because the tenant no longer desires the use of the premises and he has found someone anxious to enter and occupy them.

The learned Lords Justices, in their judgment, emphasize the correctness of Mr. Justice Gresson's judgment in *Bilderdeck's* case, to which special reference has been made in this place (*Ante*, p. 137), as they apply the actual principle enunciated by that learned Judge—namely, that an assignment by a contractual tenant—whether before or after his tenancy has been determined by notice—does not, *in the absence of consent by the landlord*, bring the assignee within the provisions of the Fair Rents Act. They extend the application of that principle further, by holding that, if a landlord refuses his consent to an assignment of the contractual tenancy to a proposed assignee because that person, on the expiry of a notice to quit, could invoke the protection of that legislation, that is a reasonable ground for his refusal.

SUMMARY OF RECENT LAW.

CONFLICT OF LAWS.

Renvoi. (J. H. C. Morris.) *64 Law Quarterly Review*, 265.

CONTRACT.

Severance of Illegality in Contract. (N. S. Marsh.) *64 Law Quarterly Review*, 230, 347.

CONVEYANCING.

Agreement for Walk-in, Walk-out Sale of Farm: Purchase-money to be paid by Instalments. *1 Conveyancer and Solicitors Journal*, 118.

Re Diplock. *92 Solicitors Journal*, 438.

Recent Cases. *1 Conveyancer and Solicitors Journal*, 142.

CRIMINAL LAW.

Larceny: The Lost Golf Ball. *92 Solicitors Journal*, 432.

Trial—Summing-up—Murder—Direction on Manslaughter—Issue to be left to Jury. Where there is evidence upon which a jury could find manslaughter in lieu of murder, that opportunity should be afforded to the jury. It is incumbent on the Judge to leave this issue to the jury, because a verdict of manslaughter is, as a matter of law, a verdict which they can return if they take the view that the intention to kill was not beyond reasonable doubt. *The King* v. *Stuck*. (C.A. Wellington. October 12, 1948. Kennedy, Finlay, Gresson, and Hutchison, JJ.)

DIPLOMATIC PRIVILEGES.

Diplomatic Privileges (International Civil Aviation Organization) Order, 1948, extending the immunities and privileges set out in the Second Schedule of the Diplomatic Privileges Extension Act, 1947.

DIVORCE AND MATRIMONIAL CAUSES.

Collusion. *92 Solicitors Journal*, 436.

Nullity of Marriage. (E. J. Cohn.) *64 Law Quarterly Review*, 324.

Refusal of Sexual Intercourse and the Law of Desertion. (Jasper Ridley.) *64 Law Quarterly Review*, 207.

EXECUTORS AND ADMINISTRATORS—ADMINISTRATION.

Personal Chattels of Intestate—Intestate killed in Collision while driving his Motor-car—Car regarded as Total Loss—Insurance Moneys not Payable to Widow—Widow entitled to Ascertainable Value of Damaged Car at Moment of Deceased's Death—Administration Amendment Act, 1944, s. 6 (1) (a). The personal chattels which pass to the widow of a deceased intestate by s. 6 (1) (*a*) of the Administration Amendment Act, 1944, are such personal chattels as they existed at the moment of his death. When a husband, who died intestate, was killed in a collision in which the motor-car which he was driving was damaged, only a badly damaged car passed to his widow under s. 6 (1) (*a*) of the statute; and the facts that such car was insured and that the insurance company treated the damaged car as a total loss did not affect the position of the widow, who was entitled to the ascertainable value of the car at the time of her husband's death. Consequently, the balance of the insurance moneys—after deduction of the ascertained value of the damaged car and payment of same to the widow—was attributable to her husband's estate, and estate duty payable under s. 13 of the Death Duties Act, 1921, was assessable accordingly. *Wilson* v. *Commissioner of Stamp Duties*. (Wellington. September 20, 1948. Christie, J.)

FISHERIES.

Fresh-water Fisheries (North Canterbury) Regulations, 1946, Amendment No. 1 (Serial No. 1948/152).

Fresh-water Fisheries (Ashburton) Regulations, 1946, Amendment No. 1 (Serial No. 1948/153).

Fresh-water Fisheries (South Canterbury) Regulations, 1946, Amendment No. 1 (Serial No. 1948/154).

Quinnat Salmon Regulations, 1940, Amendment No. 3 (Serial No. 1948/155).

Fisheries (General) Regulations, 1947, Amendment No. 2 (Serial No. 1948/156), revoking Part VIII of the principal regulations and substituting a new Part VIII relative to crayfish.

HIRE-PURCHASE AGREEMENTS.

Action by Purchaser against Vendor after Repossession of Goods—Purchaser not entitled to Claim Cost of Improvements and Repairs—Onus on Vendor to Prove Actual Value of Goods at Date of Repossession—Hire-purchase Agreements Act, 1939, ss. 3, 5. A purchaser under a hire-purchase agreement is limited to the rights conferred on him by s. 3 of the Hire-purchase Agreements Act, 1939, and he is not entitled to add to the purchase price any part of the money spent by him on improvements and repairs, thereby adding to the value of the goods in any action he may bring under s. 3. In an action brought by the purchaser under s. 3, the onus, in the first instance, is on the purchaser to prove the amount of the money he has paid, and the fact that the goods have been repossessed by the vendor, and no more. The onus is then on the vendor to prove that, at the time of retaking possession, the goods have depreciated in value, and the extent of such depreciation. *Semble*, The purchaser's notice under s. 3 is to be treated as an objection to the vendor's estimate of the goods under s. 5, and to place on the vendor the onus of proving that their value is less than the purchase price agreed to be paid by the purchaser. *Quaere*, Whether, in addition to the rights conferred on a purchaser by s. 3, he has the right to recover any balance shown to be due to him in the statement rendered by the vendor in accordance with s. 3 (5). *Carter* v. *Leech*. (Auckland. September 23, 1948. Luxford, S.M.)

INCOME TAX.

The Income Tax Commissioners. (A. Farnsworth, LL.D.) *64 Law Quarterly Review*, 372.

INDUSTRIAL CONCILIATION AND ARBITRATION — PRACTICE.

Action for Recovery of Penalty in Court of Arbitration—Time for Commencement—Statement of Claim filed within Twelve Months after Day when Moneys became Payable—Notice of Action to Defendant given after that Period—Action commenced in Time—"Commenced"—Industrial Conciliation and Arbitration Act, 1925, s. 136—Industrial Conciliation and Arbitration Amendment Act, 1943, s. 4 (1)—Industrial Conciliation and Arbitration Regulations, 1927 (1927 New Zealand Gazette, 9), *Regs. 56, 57, 58.* An action for recovery of penalties in the Court of Arbitration under s. 136 of the Industrial Conciliation and Arbitration Act, 1925, and consequently under s. 4 (1) of the Industrial Conciliation and Arbitration Amendment Act, 1943, must be commenced within twelve months after the day on which the moneys became due and payable by filing with the appropriate Clerk of Awards a statement of claim in the prescribed form. Such an action is governed by a special code—Regs. 56, 57, and 58 of the Industrial Conciliation and Arbitration Regulations, 1927—which is in no way associated with, or related to, the procedure laid down for actions in the Magistrates' Court. Thus, where the earliest date on which any portion of the moneys claimed became due and payable was September 26, 1944, and a statement of claim in the action for recovery of such moneys was filed with a Clerk of Awards on September 26, 1945, the requirements of s. 4 (1) of the Industrial Conciliation and Arbitration Amendment Act, 1943, were met, although the Clerk of Awards did not send a notice to the defendant in terms of Reg. 58 until April 2, 1947. *Hopper* v. *International Paints of New Zealand, Ltd. (No. 3).* (Ct. of Arb. Wellington. September 17, 1948. Tyndall, J.)

INDUSTRIAL UNION.

Membership—Member's Name removed on purging of Membership Register—Such Removal not amounting to Expulsion—Circumstances in which Action for Damages for Wrongful Removal lies—"Sickness." The removal of a name from a Union's membership register, under a rule of the Union regulating the purging of that register, which does not amount in law to expulsion, is proper and justified whether the displaced member has been notified and heard or not, if the party responsible for the removal of the name on a loss of qualification for membership sees that the facts warrant and justify the action taken, and, if they do not, the displaced member has his remedy at law. (*Gould* v. *Wellington Waterside Workers' Industrial Union of Workers,* [1924] N.Z.L.R. 1025, followed.) To succeed in an action for damages for wrongful removal of his name from the Union's membership register, the displaced member must either establish that, on the facts and in the circumstances, the rule did not apply to him; or, if the rule applied to him, that he was entitled to be excused under some excusatory provision in it. Where, in a Union rule, disablement by "sickness" for a period of two months was the basis of the loss of the right of membership, the meaning of the term "sickness" must be determined in relation to the terms of the rule, which envisaged disablement for a somewhat temporary period, and it cannot be interpreted as extending to the case of a man disabled from work in such a way that his recovery is problematical, and is in any event certain to be protracted to some indefinite date in the future. (*Burton* v. *Eyden,* (1873) L.R. 8 Q.B. 295, applied.) *James* v. *New Zealand Waterside Workers' Industrial Union of Workers.* (Auckland. September 13, 1948. Finlay, J.)

INTERNATIONAL LAW.

International Law Association: Brussels Conference, 1948. *98 Law Journal,* 539.

JUDICIAL CHANGES.

Rt. Hon. J. S. Cumberland Reid, K.C., LL.D., F.R.S.E., M.P., formerly Solicitor-General for Scotland and Lord Advocate, appointed as Lord of Appeal in Ordinary in succession to Lord Thankerton.

LIMITATION OF ACTIONS.

Limitation of Actions. *92 Solicitors Journal,* 432.

MEAT.

Meat Regulations, 1940, Amendment No. 3 (Serial No. 1948/157) amending Reg. 12 of the principal regulations (as amended), and revoking Amendment No. 1 (Serial No. 1941/193).

MOTOR-VEHICLES.

Illegal Parking—Notice to Owner informing him of Offence and asking for Information as to Driver's Identity—Notice sent by Registered Acknowledgment Receipt Letter—No Reply or Information supplied—Signature on Receipt not proved to be Signature of Owner—Offence not proved—Motor-vehicles Act, 1924, s. 32 (2). Before a conviction under s. 32 (2) of the Motor-vehicles Act, 1924, can be entered against the owner of a motor-vehicle for failing to give all the information in his possession which may lead to the identification and apprehension of a driver who has committed an offence under the statute, there must be clear proof that the notice was received by him, and that a reasonable time thereafter in which the information could have been given has elapsed. The production of a receipt given for a registered letter to a postal officer purporting to be signed by the person to whom the letter was addressed is not *per se,* in the absence of statutory authority, proof that the person received the letter. It is necessary to prove that the signature on the receipt is the signature of the person to whom the letter was addressed. *Semble,* The authority of a traffic officer, under s. 32 (2) of the Motor-vehicles Act, 1924, and under Reg. 3 (2) of the Traffic Regulations, 1936, to enforce the provisions of that statute or those regulations cannot be exercised anywhere except upon a road, or unless at the time he so exercises his authority he is carrying his warrant of appointment. *Quaere,* Whether the making of a request by a traffic officer under s. 32 (2) of the Motor-vehicles Act, 1924, by letter sent in the ordinary course of the post is valid. *Bland* v. *Brooker.* (Auckland. September 22, 1948. Luxford, S.M.)

Motoring Offences and Penalties. (C. K. Allen, K.C.) *64 Law Quarterly Review,* 207.

NEGLIGENCE.

Liability for Domestic Animals. *92 Solicitors Journal,* 440.

PERSONAL.

Mr. G. C. Powles, of the New Zealand Bar, has been appointed Governor-designate of Western Samoa.

PRACTICE—INJUNCTION.

Nuisance from Factory Smoke and Soot—Nuisance discontinued before Hearing—Remedy Damages, not Injunction. Where it is established that there has been a nuisance, but it has been discontinued before the issue of a writ claiming an injunction and damages, there is no justification for the granting of an injunction; and damages can be given in respect of the nuisance before its discontinuance. (*Shelfer* v. *City of London Electric Lighting Co.,* [1895] 1 Ch. 287, applied.) (*Crump* v. *Lambert,* (1867) 17 L.T. 133, distinguished.) *Gibbs* v. *New Zealand Chenille Tufting Co., Ltd.* (Wanganui. September 30, 1948. Hutchison, J.)

PRACTICE—JUDGMENT.

Motion for Judgment on Admissions—Action for Possession of Land—Defendant admitting Expiry of Lease but claiming Right to Purchase or Reimbursement of Moneys expended—Procedure inapplicable—Code of Civil Procedure, R. 297. In an action for possession of farm land, the defendants in their statement of defence admitted that the plaintiff was the owner of the land, and that the term of the lease had expired. The defendants claimed that the land was the subject of an agreement between the parties whereby the defendants were to be entitled either to purchase the land at a fair valuation or to be reimbursed for their expenditure upon it. On a motion under R. 297 of the Code of Civil Procedure for judgment on the defendants' admissions, *Held,* That the procedure under R. 297 was inapplicable, as it was intended to apply only to cases where the admissions clearly entitled the plaintiff to the relief asked for; and it was impossible to say, until the agreement was investigated, that it could not justify the retention of possession by the defendants or that there was no serious question of law to be argued. (*Gilbert* v. *Smith,* (1876) 2 Ch.D. 686, followed.) *Head* v. *Dysart and Another.* (Auckland. October 12, 1948. Stanton, J.)

Motion for Judgment on Admissions—Compromise of Action for Removal of Trustees and Appointment of Trust Company—Motion for Judgment on Ground that Compromise was Admission that Plaintiff entitled to have Trustees removed and to have Trust Property vested in Trust Company—Compromise not "Admission" or "Result of proceedings"—Code of Civil Procedure, R. 297—Infants and Children—Compromise of Action signed by Counsel for All Parties—Infant Plaintiff not Bound—Compromise to be Approved by Court before Action Enforcing its Terms. The Court will grant relief under R. 297 of the Code of Civil Procedure only when the admissions relied upon were clear and unambiguous. An application was made by

an infant plaintiff under R. 297 of the Code of Civil Procedure for judgment on an admission made by the defendants, the relief asked being for an order removing the defendants as trustees and appointing a trust company in their place, in terms of a memorandum of terms of settlement of an action signed by counsel for all the parties, including the term that the defendant trustees should forthwith voluntarily retire and vest the whole of the trust property in a specified trust company. *Held*, 1. That the undertaking of the defendants to retire could not be treated as an "admission" or "the result of any proceedings" within R. 297, which would entitle the plaintiffs to apply under the Rule for an order to have the defendants removed by the Court. 2. That the compromise must be approved by the Court if it were to bind the infant plaintiff, and, if he wished to rely on it and endeavour to enforce it, he must proceed, subject to its approval by the Court, by an ordinary hearing in the action. *Shalfoon* v. *Potts*. (Auckland. September 15, 1948. Stanton, J.)

PRACTICE—THIRD-PARTY NOTICE.

Costs—Application for Directions—Third Party brought in by Defendant—No Directions asked for by Third Party—No Issue put to Jury as to Third Party's Responsibility—Plaintiff successful against Defendants—No Costs allowed Third Party against Defendants—Code of Civil Procedure, RR. 99G, 99K. An order for costs against the defendant in favour of the third party should not be made where the plaintiff succeeds in an action, in which the defendant had brought in a third party from whom he claimed indemnity against the plaintiff's claim, but neither the defendant nor the third party had made an application under R. 99G of the Code of Civil Procedure for directions as to the mode of having the matters put in issue in the third-party notice determined, and no issue between the defendant and the third party was decided. (*Balting* v. *Sharp* (*Adams, Third Party*), (1909) 11 G.L.R. 703, applied.) *McMillan* v. *Myers* (*Andrews, Third Party*). (New Plymouth. September 29, 1948. Hutchison, J.)

PROBATE AND ADMINISTRATION—LETTERS OF ADMINISTRATION.

Attorney of Executor and Sole Legatee obtaining Grant of Letters of Administration with Will annexed, and Filing Inventory of Assets—Death of Attorney before Filing Accounts—Probate of his Will granted to his Executor—Cessate Probate granted to Executor of First-named Will—Claim for Accounts against Attorney's Executor—Claim maintainable in Proper Proceeding—Administration Bond not assigned to Claimant—Proceedings by Action—Practice—Originating Summons—Claim against Trustee for Accounts—Proceedings by Action and not Originating Summons—Code of Civil Procedure, R. 538 (c). N. died in January, 1931, leaving a will under which the plaintiff was the sole executor and universal legatee. The plaintiff, who was out of New Zealand at the time of N.'s death, appointed C. his attorney; and, as such attorney, C. applied for, and was granted, letters of administration with will annexed of the estate and effects of N. until the plaintiff should appear and apply for probate. C. filed in the Supreme Court an inventory of N.'s assets, but did not file any further accounts. C. died in 1936, probate of his will was granted to the defendant. In 1937, the plaintiff applied for probate of N.'s will, and the grant thereof was delayed by the intervention of a claim by N.'s widow, who accepted a compromise by deed. In 1947, cessate probate of N.'s will was granted by the plaintiff. By originating summons, the plaintiff asked for an order that the defendant, as trustee under the will of C., should furnish accounts for such assets in N.'s estate as had come into the possession of C., the deceased administrator of N.'s estate. In answer, the defendant claimed the benefit of the Statute of Limitations. *Held*, 1. That a person in the position of the defendant in a proper proceeding might be ordered to furnish accounts. (*Taylor* v. *Newton*, (1752) 1 Lee 15; 161 E.R. 7, and *In the Goods of Jenkins, Jenkins* v. *Jenkins*, (1897) 76 L.T. 164, followed.) 2. That a claim in respect of trust moneys converted by a trustee to his own use may not be determined on originating summons, but must be brought in a properly constituted action. (*Beadle* v. *Perpetual Trustees Estate and Agency Co. of New Zealand, Ltd.*, (1912) 32 N.Z.L.R. 92, applied). 3. That the matter could not be dealt with as if the claim were made under the administration bond, as it had not been assigned to the plaintiff. (*In re Page, Jones* v. *Morgan*, [1893] 1 Ch. 304, referred to.) *In re Nana Chhiba (deceased), Bhikha Chhiba* v. *Unka Ranchhod*. (Wanganui. September 21, 1948. Hutchison, J.)

RATIONING.

Meat Rationing Revocation Order, 1948 (Serial No. 1948/159), revoking the Meat Rationing Order, 1944, and the Bacon and Ham Curing Order, 1943 (as from September 27, 1948).

Butter Rationing Order, 1948 (Serial No. 1948/160), revoking, as from October 25, 1948, cl. 5 of the Butter Rationing Order, 1943, which required consumers of butter and margarine to be registered.

RENT RESTRICTION—DWELLINGHOUSE.

Gas Company's House let to Employees—Premises occupied by Former Employee as Tenant—Premises required for Occupation by Present Employee—Company and Employee both entitled to plead Hardship—"Hardship"—"Any other person"—Fair Rents Act, 1936, s. 13 (1) (e)*—Finance Act, 1937, s. 63* (b)*—Fair Rents Amendment Act, 1947, s. 12.* There is nothing in s. 63 (*b*) of the Finance Act, 1937, to exclude a limited company, which is a landlord, from any of its provisions. (*North Auckland Farmers Freezing Co., Ltd.* v. *Roger*, (1947) 5 M.C.D. 72, not followed.) Where such a company requires under s. 13 (1) (*e*) of the Fair Rents Act, 1936, a dwellinghouse owned by it for the occupation of a person in its regular employment, the issues to be decided are (*a*) whether that requirement is reasonable, and (*b*) if so, whether the hardship of the company or any other person is greater than that of the tenant or any other person. On the question whether a company landlord reasonably requires a dwellinghouse for the occupation of one who is in its regular employment, all the relevant circumstances (including financial hardship) must be taken into account as they exist at the date of the hearing. (*Rhodes* v. *Cornford*, [1947] 2 All E.R. 601, followed.) (*Williamson* v. *Pallant*, [1924] 2 K.B. 173, applied.) The hardship referred to in s. 63 of the Finance Act, 1937, covers a wider field than matters affecting residence only, and extends to cover all matters relating to the status of landlord and tenant, and, if such or similar matters create a proved financial hardship to the landlord, then such matters are relevant to the consideration of hardship caused him. (*The King* v. *Rayner*, (1947) 5 M.C.D. 137, distinguished.) Where possession of a dwellinghouse is required by a landlord company for its occupation by an employee who cannot get any other accommodation in the locality where his work requires him to be, the employee is included in the term "any other person" where first used in s. 63 (*b*) of the Finance Act, 1937 (as amended); and his greater hardship, if an order were not made against the tenant for possession, is a relevant matter. (*The King* v. *Rayner*, (1947) 5 M.C.D. 137, followed.) *Semble*, The term "any other person" in s. 63 (*b*) does not include the consumers of the company landlord's gas supply, as they are not within the boundaries of the tenancy relationship and affected directly thereby. (*Harte* v. *Frampton*, [1947] 2 All E.R. 604, applied.) *Auckland Gas Co., Ltd.* v. *Williams*. (Auckland. October 1, 1948. Wily, S.M.)

SALE OF FOOD AND DRUGS.

Spirits—Sale of Spirits not complying with Prescribed Standard—Mens rea—*Evidence required to prove Absence of* Mens rea—*Aiding and Abetting Commission of such Offence—Carelessness and Ignorance of Breaking-down Process no Defence*—Mens rea *not Ingredient of Aiding and Abetting—Sale of Food and Drugs Act, 1947, ss. 6* (2) (a), *7—Justices of the Peace Act, 1927, s. 54.* Where there has been a sale of spirits which did not comply with the prescribed standard of strength—namely, less than 65 per cent. of proof spirits—in breach of s. 6 (2) (*a*) of the Food and Drugs Act, 1947, the defence of absence of *mens rea* is not open to the seller unless he proves affirmatively that in terms of s. 7, all reasonable steps had been taken by him to avoid an offence; and the onus is on him to show that, within practicable limits, no other steps could have been taken. (*Wellington Fresh Food and Ice Co.* v. *Jones*, (1911) 31 N.Z.L.R. 192, followed.) The licensee of an hotel, charged with an offence under s. 6 (2) (*a*) of the statute, did not discharge that onus when evidence showed that he was content to receive, from a person who had not been thought a fit and proper person to have granted to him a publican's license, for re-sale to his own customers such spirits as that person chose to pass on to him, after being broken down, without taking any steps to ascertain if they were up to the prescribed standard and on the mere assumption that they were. (*City Milk Supply, Ltd.* v. *Rawlinson*, [1918] N.Z.L.R. 679, applied.) The person who did the breaking-down of the spirits afterwards sold in breach of s. 6 (2) (*a*) of the statute is guilty of aiding, assisting, committing, and procuring the commission of that offence if he did not possess the necessary specialized knowledge or the care and skill required for such breaking-down, and was either careless or ignorant in his use of the hydrometer or in the knowledge that other factors

entered into the breaking-down of which he was, on account of inexperience, unaware, as *mens rea* is not an ingredient of the offence of aiding and abetting under s. 54 of the Justices of the Peace Act, 1927. (*Van Chu Lin* v. *Brabazon*, [1916] N.Z.L.R. 1095, followed.) *Police* v. *Taylor : Police* v. *Dalliessi*. (Dunedin. 1948. October 4. Willis, S.M.)

SALES TAX.

Sales Tax Exemption Order, 1948 (Serial No. 1948/161), exempting goods in respect of which the Collector of Customs is satisfied that they are *bona fide* presents sent from abroad to persons in New Zealand.

SHOPS AND OFFICES.

Wages—Exemption by Magistrate from Opening and Closing Hours fixed by Award—Shop accordingly closed on Wednesday and Open on Saturday—Shop-assistant properly paid Ordinary Rates of Pay for Saturday Work—Shops and Offices Amendment Act, 1927, s. 19—Shops and Offices Amendment Act, 1945, s. 3 (3). If an employer secures an exemption under s. 19 of the Shops and Offices Amendment Act, 1927, as amended by s. 3 (3) of the Amendment Act, 1945, from the opening and closing hours fixed by an award—which hours correspond with the hours of work prescribed for workers in the same award—the exemption carries with it the right to conduct the particular shop or business with the assistance of employees, if any, in the same way as if the award had prescribed the hours prescribed by the exemption. Consequently, notwithstanding the fact that the relevant awards respectively provide that "no work shall be performed on Saturday," or that "a week's work shall not exceed forty hours to be worked on five days of the week from Monday to Friday," the order of exemption which enables employers to open their shops on the Saturday, but precludes them from opening their shops on the Wednesday, gives the right to employ shop-assistants on the Saturday at ordinary rates of pay. *Weir* (*Inspector of Awards*) v. *Paraparaumu Co-operative Dairy Co., Ltd.* (Ct. of Arb. Wellington. September 13, 1948. Tyndall, J.)

WORKERS' COMPENSATION—ACCIDENT ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT.

Loss of Eye—Detachment of Retina—Myopic Worker after Lifting and Carrying Boulders noticing Loss of Sight of One Eye—Permanent Injury by Detachment of Retina—Such Detachment either Spontaneous or Traumatic—Workers' Compensation Act, 1922, s. 3. The suppliant had been short-sighted for a long time. While in the course of his employment, he was gathering boulders on a sea beach. He lifted the boulders and laid them on a wall. On going to light a cigarette, he found he could not see it, and that he had lost the sight of his left eye by reason of the detachment of its retina. The medical evidence was to the effect that myopia predisposes people to detachment—some of the medical evidence was that such was only a probability—and that such detachment might be traumatic, associated with some form of strain (such as the effort described), or spontaneous (as on coughing or sneezing). *Held*, 1. That, on the balance of probabilities consequent on the medical evidence, the detachment was caused by the work that the suppliant was doing before discovering the loss of vision. 2. That suppliant was entitled to compensation in a lump sum for the loss of one eye at 50 per cent. of full compensation up to the date of hearing, and at 50 per cent. of full compensation commuted as from the date of hearing, less any payments received by him on account of this injury. *Smith* v. *The King*. (Comp. Ct. Wellington. September 23, 1948. Ongley, J.)

WILLS.

Matters of Interest in Construction of Wills. *1 Conveyancer and Solicitors Journal*, 131.

OPTIONS TO PURCHASE PROPERTY.

By E. C. Adams, LL.M.

As a conveyancer may at any time be asked to advise on the legal effect of an option to purchase property, and as this important topic does not appear to be discussed at length in any one text-book readily available to the New Zealand practitioner, it is thought that a short article, together with a few precedents, dealing with options in a practical rather than an academic manner, may be of some interest and assistance to many readers of this Journal.

Testamentary options and options *inter vivos* require separate and independent treatment, and their incidence to taxation and legal requirements as to validity are worthy of some mention. A comparison of English and New Zealand law is also essential, as, in the writer's opinion, the two systems are not identical as regards options *inter vivos*.

Testamentary Options.

There was for long a marked divergence of opinion between two leading text-books on wills on the important point as to whether or not options created by testators were *prima facie* personal to the grantee, and thus neither assignable nor transmissible. *Theobald on Wills*, 9th Ed. 189, says :

> Testators sometimes give options of purchasing a part of their property. Such an option may be personal to the beneficiary or it may be transmissible.

1 Jarman on Wills, 7th Ed. 73, however, citing as authority *In re Cousins, Alexander* v. *Cross*, (1885) 30 Ch.D. 203, stated on the contrary :

> An option of purchase given by will to A.B. is *prima facie* personal to him and does not pass to his executors on his death.

This divergence of opinion was settled by the decision of the House of Lords, *Skelton* v. *Younghouse*, [1942] 1 All E.R. 650, which shows that in this respect *Jarman* was wrong, and that the broader but balder statement in *Theobald* was the more correct.

It may be stated that *Jarman's* dictum appeared to be inconsistent with the New Zealand case of *Wright* v. *Morgan*, [1926] A.C. 788 ; N.Z.P.C.C. 678, which went to the Privy Council, but, on the point whether the option in *Wright* v. *Morgan* was assignable or not, it is stated by Viscount Maugham in *Skelton* v. *Younghouse* that the Privy Council's opinion (as delivered by Lord Dunedin) that it was assignable was merely *obiter*, and that the precise point was never in fact argued before the Board.

The English Court of Appeal (*In re Sykes, Younghouse* v. *Sykes*, [1940] 4 All E.R. 122) dealt with *Wright* v. *Morgan* somewhat similarly. Scott and Clauson, L.JJ., said, at p. 127 :

> Our attention was drawn to *Wright* v. *Morgan*, [1926] A.C. 788, where the Judicial Committee of the Privy Council had to construe a clause directing certain trustees to offer certain land at a valuation to a named person before selling it elsewhere. Their Lordships construed the clause as creating a vested interest in the named person—that is to say, as we understand it, a vested interest in equity in the land—and pointed out that such an interest would be assignable. However, in the view their Lordships took of the case as a whole, the point became academic, since it was held that the person [a trustee] who claimed to be the assignee of the option was in any event precluded in equity from becoming transferee of the property. We cannot deduce from this decision any guiding principle to assist us in construing the will of the present testator.

The rule to be deduced and digested from *Skelton* v. *Younghouse* is that whether an option in a testa-

mentary instrument is to be construed as assignable and transmissible, or, on the contrary, as purely personal, and thus neither assignable nor transmissible, *depends on the true construction of the will in the light of any surrounding circumstances which may be properly admissible*. The House of Lords, after examining the will and the surrounding circumstances, unanimously came to the conclusion that the option was intended to be personal to the testator's son, and thus died with the son. It is to be observed, however, that the omission of the words "executors administrators and assigns" will not *per se* prevent an option from being assignable and transmissible. But since this case the careful draftsman will insert them when applicable. If, on the other hand, an option is intended to be personal, it should so be stated. Only by careful drafting of wills in this respect will litigation be avoided in the future, for the rule laid down by the House of Lords in *Skelton* v. *Younghouse* is broad and general, and admirably lends itself to forensic argument—*e.g.*, Lord Wright, employing a vivid metaphor, said that in that case the issue was on "a razor's edge." In the following Precedent No. 1, the draftsman has very prudently expressed the option to be personal. Readers will observe that Lord Maugham expressly approved of *In re Madge, Pridie* v. *Bellamy*, (1928) 44 T.L.R. 372. That was an interesting case, which greatly intrigued the writer, because some ancient text-books as to the effect of a grant were cited. The testator bequeathed to his wife such articles usually in his dining or billiard room as she should select within two months. She died five days after the testator without having made any selection. It was held that the right of selection did not subsist in favour of her executors.

Options to purchase property (as in *Skelton* v. *Younghouse*) may be, and usually are, beneficial to the grantee. Thus, if a testator gives his son an option to purchase a parcel of land, valued by the Valuer-General at £5,000, for £3,000, he has in effect made his son a testamentary gift equal in value to £2,000, and in the first instance the son will be so assessed for succession duty accordingly: *Harrison's Death Duties*, 19, *Dymond's Death Duties*, 10th Ed. 181. If the option is not in actual fact exercised, the estate will be re-assessed for duty, the £2,000 presumably being treated as enuring for the benefit of the residue. An option, however, to purchase on a genuine valuation, arrived at by valuators, will usually be disregarded for death-duty purposes, for the grantee really has to pay full value for what he receives. Thus in Precedent No. 1, at the end of this article, the option would be disregarded for death-duty purposes. On the acceptance of the option, the legatee or devisee must pay *ad valorem* stamp (conveyance) duty on the amount of the consideration he gives for the property: *Commissioner of Stamp Duties* v. *Schultz*, [1934] N.Z.L.R. 652, unless of course the property is transferable by delivery merely, and thus exempt from *ad valorem* conveyance duty.

Options created by Instruments Inter Vivos.

It is submitted that the rule in *Skelton* v. *Younghouse* does not apply in its entirety to grants of options *inter vivos* for valuable consideration. Unlike wills, they belong more to the world of commerce, and the average company promoter, for example, would gasp with surprise, if told that his hard-won option was not assignable. Nevertheless, an examination of the authorities will show that it is always prudent for the draftsman either to make an option in favour of the grantee, his heirs, executors, administrators, and assigns, or to limit it expressly to the grantee personally, according to the ascertained intention of the grantor.

Under this heading, not only must there be considered the assignability and transmissibility of an option, but also whether or not an option to purchase is binding not only on the grantor but also on the grantor's assigns. Again, it may be remarked that the company promoter would be very surprised to learn that his option was not binding on the grantee's successor in title to the land affected.

We shall take the second point first by considering *In re Hunter's Lease, Giles* v. *Hutchings*, [1942] 1 All E.R. 27, where Uthwatt, J., points out that, although the statute, Grantees of Reversions and Lessees, 1540, which is also in force in New Zealand (*Hutchison* v. *Ripeka Te Peehi*, [1919] N.Z.L.R. 373), provided in substance that lessees were to have the like remedies on covenants and conditions contained in the lease against assignees of the reversion as they had against the original grantor of the lease, there still arises that old question, which has always plagued the life of every student of real property, Does the covenant in question touch and concern the thing demised? It appears to the writer that an option to purchase contained in an instrument other than a lease can be in no better position. As pointed out by Uthwatt, J., the nature of an option to purchase contained in a lease was examined by the Court in the leading and much-discussed case of *Woodall* v. *Clifton*, [1905] 2 Ch. 257, as follows, at p. 279:

> The covenant is aimed at creating, at a future time, the position of vendor and purchaser of the reversion between the owner and the tenant for the time being. It is in reality not a covenant concerning the tenancy or its terms. Properly regarded, it cannot, in our opinion, be said to directly affect or concern the land, regarded as the subject-matter of the lease, any more than a covenant with the tenant for the sale of the reversion to a stranger to the lease could be said to do so.

A recent writer in (*1946*) *96 Law Journal* (Eng.), 668, speaking of an option to purchase contained in a lease, says:

> The burden of such an option does not run with the reversion, but the option can be, and normally is, so worded as to be made exercisable by the assigns or successors in title of the original lessee.

But it has been held both in England and in New Zealand that an option to purchase land for valuable consideration creates an equitable interest in the land: *Morland* v. *Hales and Somerville*, (1910) 30 N.Z.L.R. 201, and *Oppenheimer* v. *Minister of Transport*, [1941] 3 All E.R. 485. Therefore, it appears to the writer that such an option to purchase is binding on all persons who have notice of it. Under our system of Land Transfer registration, it would be difficult for the assignee of the reversion to argue that he had no notice of the option contained in a lease which had not expired at the date he got on to the Register Book. Moreover, there is to be considered s. 94 of the Land Transfer Act, 1915, which provides that an option to purchase may be embodied in a Land Transfer lease, and it has been held that such right, when the lease is registered, is *indefeasible* (like any registered estate or interest), even though given by a trustee in breach of trust: *Fels* v. *Knowles*, (1906) 26 N.Z.L.R. 604. Therefore, when placed on the Land Transfer Register, no doubt it binds every registered proprietor of the reversion for the time being: see (1939) 15 New Zealand Law Journal, 304. Nevertheless, it is still only a *right*

to purchase which is State-guaranteed, and it appears to the writer that an optionee should caveat the fee-simple in order to be perfectly safe, and to guard against the possibility of the reversioner contracting adversely with a stranger on the termination of his lease. There does not appear to be any duty imposed on a person proposing to deal with the registered proprietor to search an expired lease: *Gallagher* v. *Thomson and Allen*, [1928] G.L.R. 373. Of course, the position may possibly be different where the Registrar has noted the purchasing clause in the memorial of the lease, and no new title has issued since the expiry of the lease.

As regards the second point, as to whether, in the absence of any words to guide us, an option to purchase is assignable and transmissible, the answer must be in the affirmative when there has been valuable consideration given for the grant of the option, for in that case an equitable interest in the property has been created. If the option is contained in a registered lease under the Land Transfer lease, the position is as stated in (1939) 15 NEW ZEALAND LAW JOURNAL, 304:

> Unless the benefit of a purchasing clause is made available for the lessee in person exclusively, it passes to the assigns of the lease and probably passes upon a registered transfer of lease without being specially mentioned; but a carefully prepared transfer of lease will include an express assignment of the benefit of the purchasing clause.

This interpretation appears to be aided by s. 222 of the Land Transfer Act, 1915, which, so far as material, provides that in any form under the Act the description of a person as a lessee shall be deemed to include the heirs, executors, administrators, and assigns of such person.

Under the general law, unless the exercise of the option is expressly made contingent on the faithful performance by the lessee of the covenants of the lease, it can be exercised by him notwithstanding that he has been in default. The draftsman, therefore, usually alters this by express provision in the instrument, and this rule of the general law is also altered as to leases registered under the Land Transfer Act, by s. 94 of that Act. But in New Zealand a lessee in default may obtain relief against forfeiture by applying to the Supreme Court under s. 94 of the Property Law Act, 1908. There is no doubt that in this respect s. 94 of the Land Transfer Act, 1915, would have to be read subject to s. 94 of the Property Law Act, 1908.

The stamp duty on a grant of option (no matter what the consideration therefor) is 15s. if by deed, and 1s. 3d. if not by deed. On the acceptance by the grantee (unless the property is transferable by delivery merely), *ad valorem* conveyance duty is payable on the *total* consideration passing, or which has passed, from the grantee to the grantor. That is to say, the amount of the consideration for the option, if any, is added to the other amounts payable under the contract of sale.

OPTIONS TO PURCHASE GRANTED BY TRUSTEES.

We have already noticed the far-reaching effect of *Fels* v. *Knowles*, *supra*, but it should be mentioned here that, if the purchase proved a bad bargain for the vendor, the beneficiaries would have an action for damages against the trustees for breach of trust.

An extremely useful decision in practice is *Meek* v. *Bennie*, [1940] N.Z.L.R. 1, where the Supreme Court held that trustees, who are under a duty to get the best price for property, have an inherent authority to grant short-period options. As the Court pointed out, many properties in New Zealand would be virtually unsaleable unless short-term options were given to prospective purchasers to enable them to make the necessary financial arrangements. But a person in a fiduciary capacity, with a power of sale, cannot, in the absence of express authority in the trust instrument itself, grant a long-term option—*e.g.*, an option to purchase at any time during the period of twenty-one years: *Clay* v. *Rufford*, (1852) 5 DeG. & Sm. 768; 64 E.R. 1337. For a long-term option fetters the exercise of the power of sale and prevents the trustee from getting the best possible price for the property during the term of the option. This disadvantage of an option is also emphasized by the Privy Council in *Wright* v. *Morgan*, and is really one of the grounds of the decision in that case.

Meek v. *Bennie* is also useful as containing a minute analysis of what an option really is. It is, in short, an irrevocable offer, unilateral in its nature, binding on the offeror but not on the offeree.

Meek v. *Bennie* was followed by Johnston, J., in *Rotorua and Bay of Plenty Hunt Club (Inc.)* v. *Baker*, [1941] N.Z.L.R. 669, and applied to an attorney, who had express powers of leasing and selling, but no express power to grant options.

Although *Meek* v. *Bennie* and *Rotorua and Bay of Plenty Hunt Club (Inc.)* v. *Baker* are both convenient decisions in practice, and founded on sound common sense, they have not yet become hallowed by time, and could not be supported on the *stare decisis* principle. Therefore, the prudent conveyancer, in drawing powers of sale in trust instruments and powers of attorneys, will *expressly* confer power to grant short-term options. Moreover, it has been held in New Zealand that an executor has no power to grant an option to purchase during the currency of a lease at a price fixed at the date of the lease: *Re McFarland*, [1916] G.L.R. 699. And further, although a mortgagee can grant a lease with a compulsory purchasing clause, it is submitted that a mortgagee entitled to exercise power of sale cannot grant an option to purchase unless expressly so authorized by the mortgage instrument: *Public Trustee* v. *Morrison*, (1894) 12 N.Z.L.R. 423. A mortgagee's power of sale depends on the original *contract* between the mortgagor and the mortgagee: *Wright* v. *New Zealand Farmers' Co-operative Association of Canterbury, Ltd.*, [1936] N.Z.L.R. 157; affirmed by the Privy Council, [1939] N.Z.L.R. 388.

OPTIONS TO PURCHASE AND THE RULE AGAINST PERPETUITIES.

It has already been pointed out that an option to purchase creates an equitable interest in the property concerned. As a corollary to this, it follows that an option to purchase comes within the rule against perpetuities: *Woodall* v. *Clifton*, [1905] 2 Ch. 257, and *Hutton* v. *Watling*, [1947] 2 All E.R. 641; aff. on app., [1948] 1 All E.R. 103. Thus, to be valid as creating an interest in property, an option must be kept within the rule against perpetuities. If, on its true construction, it could be exercised at a time beyond the period allowed by this rule, it is bad as an interest in that property. Therefore, it is one which must be limited in its exercise to a period of an existing life or lives and twenty-one years after, or, if there are no lives mentioned, it must be limited in its exercise to a period of twenty-one years from the date of the creation of the option. Thus, an option contained in a lease of land for any time exceeding twenty-one years

and expressed to be exerciseable " at any time during the said term " is bad. And an option to purchase is usually expressed in this form in a lease. I have never seen one where a life or lives were mentioned. Thus, Precedent No. 2 was copied from a lease for a term of twenty-one years. Therefore, if the term had exceeded this period, the option to purchase would have been bad under the general law.

There has been much debate as to whether or not the rule against perpetuities applies to an option included in a memorandum of lease registered under the Land Transfer Act. As the Land Transfer Act is not intended to alter the substantive law of property more than is necessary to effect the purposes of the Land Transfer Act, it is submitted that the rule does apply. And, as it has been held that it is the duty of the District Land Registrar to decline to register instruments which *ex facie* are in breach of the general law, it is also submitted that options to purchase infringing the rule against perpetuities should not be registered. But, if such an option should slip past the District Land Registrar, it appears that the lessee would get an *indefeasible* right of purchase: *Pearson* v. *Aotea District Maori Land Board*, [1945] N.Z.L.R. 542. Until the lease was transferred by the lessee, or otherwise dealt with, the District Land Registrar might have the right to cancel registration of the instrument under s. 74 of the Land Transfer Act, 1915: see the judgment of Sim, J., in *Boyd* v. *Mayor, &c., of Wellington*, [1924] N.Z.L.R. 1174, 1194, and *Horne* v. *Horne*, (1906) 26 N.Z.L.R. 1208, 1220. But it is not probable that any District Land Registrar would seek to cancel registration in such circumstances.

But, although a purchasing clause may contravene the rule against perpetuities, a personal action for damages is open to the original lessee against the original lessor: *Worthing Corporation* v. *Heather*, [1906] 2 Ch. 532, and *Hutton* v. *Watling*.

The Grant of a First Refusal.

Precedent No. 3 evidences what is commonly known as the right of a " first refusal ": it is doubtful whether s. 94 of the Land Transfer Act, 1915, really contemplates registration of such an inchoate right, but the practice of registering such rights without question appears to be strongly established in New Zealand. In *Scott* v. *Skinner*, [1947] N.Z.L.R. 528, Johnston, J., deals with the " first refusal " of the grant of a lease for a further term of five years. By analogy, can we say that the right of a first refusal to purchase is as follows? The covenant on the part of the lessor is to grant the first refusal of an agreement for sale and purchase, and the lessor's obligation must be limited to that. If there is no evidence that the lessor intended to sell the freehold during the currency of the lease, the optionee has no enforceable rights. But, if the lessor during the currency of the lease wants to sell, the lessee is entitled, if he has performed the conditions of the lease, to first refusal on the terms mentioned. A refusal connotes an offer. If the lessor does not propose to sell during the currency of the lease, and he makes no offer to the lessee or to any other person, then there can be no refusal.

It appears that the right of a " first refusal " does not create any interest in the land itself: see, for example, a very careful and able article by I. D. Campbell, LL.M., in (1943) 19 New Zealand Law Journal, 260. No interest in the land would be created until the lessor had made an offer to sell to the lessee.

Options to Purchase and the Servicemen's Settlement and Land Sales Act, 1943.

An option *inter vivos* to purchase a legal or equitable freehold requires the consent of the Land Sales Court; also an option to purchase a leasehold interest where the term of the lease, added to the term of any right of renewal, if any, equals or exceeds two years. It may be a moot point as to whether or not the acceptance of a testamentary option requires the consent of the Land Sales Court. The writer is inclined to think that it does not, s. 43 (2) (*f*) of the Act apparently applying. A first refusal would not presumably require such consent, because it does not *per se* confer any interest in the land itself, but, as it is usually incorporated in a lease which does require such consent, the point does not appear to be of much practical importance.

Precedent No. 1.

Grant of Option in Will for Son to Purchase Farm.

I DIRECT my trustee as soon as possible after my death or the death of my said wife whichever event shall last happen to give to my said son the option of purchasing my farming lands situate at aforesaid at a price to be assessed by two private valuers one to be appointed by my trustee and the other to be appointed by my said son or in the event of such valuers failing to agree by an umpire to be appointed by such valuers in writing previously to entering on such valuation such valuers and umpire to be appointed and such valuation to be conducted in the same manner as provided for in the case of arbitration under the Arbitration Act 1908 or any Act amending modifying or replacing the same AND I FURTHER DIRECT that my said son shall be required to notify my trustee within the space of two months after such option is communicated to him whether or not he accepts such option AND I DECLARE that the decision of the said valuers or the said umpire as the case may be shall be final and binding on all persons beneficially interested under this my will AND I FURTHER DIRECT my trustee to allow my said son a period not exceeding seven (7) years from the date of the acceptance of such option in which to pay the purchase-money payable in respect of my said farming lands purchased by my said son as aforesaid subject to my said son executing such mortgages as my trustee thinks fit for the better securing of the said purchase-money including a second mortgage of the said lands subject only to any first mortgage which may be subsisting thereon at the date of the exercising by my said son of the said option and his paying interest as from the date of acceptance as aforesaid on the said purchase-money or so much thereof as from time to time remains unpaid at a rate to be fixed by my trustee PROVIDED HOWEVER that notwithstanding anything hereinbefore contained my trustee with the consent in writing of my said wife may give the said option of purchase to my said son during my said wife's lifetime AND I HEREBY FURTHER DIRECT that the said option to purchase shall be personal to my said son and shall not be assignable and shall not be transmissible to his executors or administrators for the benefit of his estate AND I HEREBY FURTHER DIRECT that the said option shall be exercisable in respect of the said farming lands only as a whole.

Precedent No. 2.

Right of Purchase in Memorandum of Lease under Land Transfer Act.

THAT the lessee his heirs executors administrators and assigns shall at any time prior to the expiration of the term hereby created have the option (provided that he has observed and faithfully performed all the foregoing covenants) to purchase the lands hereby demised at or for the price or sum of sixty pounds (£60) per acre payable as hereinafter mentioned provided that such right or option shall be exercised by giving to the lessors three calendar months' notice in writing (such notice expiring not later than the day prior to the expiry of the term hereby created). In the event of the lessee exercising the option to purchase hereinbefore granted all moneys paid by the lessee on account of principal moneys owing under the above-mentioned memorandum of mortage shall be credited to the purchase price and a further sum of five hundred pounds (£500) shall be payable in cash on the date of expiration of the notice above-mentioned and the balance shall remain on mort-

gage for a term of ten (10) years bearing interest at the rate of five pounds (£5) per centum per annum (lower rate) payable quarterly PROVIDED HOWEVER that in the event of the said lands being subject to the above-mentioned memorandum of mortgage or any other mortgage in substitution therefor the balance of purchase-moneys hereinbefore mentioned shall remain on second mortgage but otherwise the same shall remain on first mortgage upon and subject to the terms hereinbefore provided.

PRECEDENT No. 3.

RIGHT OF FIRST REFUSAL CONFERRED ON A LESSEE.

In the event of the lessor wishing to sell the demised premises during the term of the lease or any renewal thereof the lessee shall have the first option to purchase the said premises at a price to be agreed upon between the parties or failing agreement at a price to be fixed by two valuers one appointed by the lessor and one by the lessee and in the event of disagreement by an umpire appointed by the valuers.

THE PLACE OF LAW IN INTERNATIONAL RELATIONS.

By the RT. HON. SIR HARTLEY SHAWCROSS, K.C.,
Attorney-General of England.

Everybody in the United States, whether he is a lawyer or a layman, realizes the part which the National Law plays, not so much in obliging us to do this, or forbidding us to do that and punishing us if we do not, as in securing the peaceful and orderly conduct of our relations with each other, and in marking out the respective spheres of the different States individually, and of the Union as a whole. That is easy. What is more difficult to understand is the part which law can play and ought to play internationally. But this organization is called the United Nations League of Lawyers, and the very existence of such a body at once gives rise to the question—what is the place of law in international affairs ?

The function of law in the international field is really the same as in the national one : to regulate specific matters in a specific way by conventions and by treaties. And, over and above that, to secure peace and order in the general relations between the Nations of the world. In the last year or so, because of the catastrophic war from which we have just emerged, there has been a considerable revival of interest in the future course of international law. American and British lawyers, and—let it be remembered—Russian and French lawyers also, working in close association, have been engaged together at Nuremberg in a work which I hope will prove one of the milestones in the development of law and order in the international field. That was the purpose of the trial. I certainly should not have taken much interest in the business if its object had been simply to punish a score or so of wicked men.

The object of Nuremberg was much more far-reaching. They tell me that there is a certain amount of criticism of the legal basis of the Nuremberg Trial. People with nothing better to do write letters to the newspapers about it. They say it was *ex post facto* law. I dare say the first man to be punished for murder said very much the same thing. But this is not the occasion to justify the Nuremberg proceedings. The criticism about them is very sterile, anyway.

Ex post facto at the time or not, what is quite certain is that the Nuremberg Trial, to which twenty-three nations adhered, has laid down for the future, finally and conclusively, three vital principles of law. First, that to start a war of aggression is an international crime ; secondly, that the individuals who lead their countries into such a war are personally responsible ; and thirdly, and consequently, that individuals have international duties which transcend the national duty of obedience imposed by particular States where obedience would constitute a crime against the Law of Nations. We have got to build up, upon those principles, the rule of law in international affairs just as we have it in the affairs of our own country. Can we be more successful in that than we have been in the past ?

Now I know that there are some people, reasonable people, some of them lawyers and some of them laymen, who treat international law and the new United Nations Organization with cynicism, indifference, and even contempt. They say that whatever the academic, theoretical status of international law may be—sometimes they deny it has any—it does not work, and that the war demonstrated that it had failed as a method of ensuring order between the nations.

But, you know, it was not international law that failed, any more than a law against murder fails because occasionally a murderer succeeds in evading justice. It does happen sometimes that particular laws are not fully enforced by the Police, or supported by the Courts. But people do not on that account deny the very existence of law. Nor can one say that, because in these recent bitter, terrible years, the system of law and order in the world broke down and has not yet been fully restored, no such thing as international law exists. No doubt it does not yet even pretend to cover the whole field. But its failure has been that those, who, if they had chosen, could have used it and could have developed it for what must in future be its supreme purpose—which is just the same as in national law, that of marking out the limits within which a State may exercise its sovereign rights without trespassing on the rights of other States, so that all States, free and independent, may live together in the same world community—failed so to use it.

Why did they fail ? I think the failure was a two-fold one, and it had very understandable historical foundations, very much the same foundations as resulted in the inclusion of the so-called " veto " provisions in the Charter of the United Nations Organisation. If we appreciate that, we shall better understand all the controversy that is going on now about the veto. In the first place, the different States of the world would not in general consent to allow international law to be applied at all to really fundamental matters affecting themselves. They felt they could not risk it—they could not afford to let the law decide. They were content to allow smaller matters to be regulated by treaties and conventions and the other methods which give rise to rules of international law.

But they reserved their own freedom of action in regard to more important matters. And so, before the 1914–1918 War, it was the usual thing to find in International Treaties an exclusion clause which, quite openly, excepted what were called the " vital interests " of the parties from being submitted to judicial arbitration. And the State concerned decided for itself which of its interests it chose to regard as vital. The same idea was to some extent continued in what was called the optional clause in connection with the Permanent Court of International Justice, which was set up after the last war, and which resulted in certain matters not being referable to the Court if the parties objected. It is a very healthy sign of the developing belief in the importance of international law that we should be having all this discussion now about the veto in the Charter of the United Nations. But the veto provisions are really the result of exactly the same attitude towards a State's vital interests as passed without comment in the old days. The truth is that up to now, States have not been prepared to allow the rule of law to have the final say in the determination of matters of high importance. And they would not allow it, not so much because of any notions about national prestige or national sovereignty, as because they were afraid that some interest of theirs which they deemed it vital to preserve might suffer. They could not afford to risk that. How can we get over that in future ? I think the ultimate answer is pretty obvious, but its realization will be slow and difficult.

If the legitimate interests and needs of every State could be secured or protected by peaceful means—as, for instance, by a World Parliament—in the way that they can be in the case of individuals, there would be no more need for States to protect themselves from the rules of international law than there is for individuals to exclude themselves from the scope of national ones. A law against theft is acceptable to us because, ethical considerations apart, our general legal, political, and economic system enables us to obtain without theft those things which we need. But the truth is, of course, that that has not hitherto been the position in world affairs. Take an example. Populations have increased—there has been no legitimate way of finding outlets for them, and so territory has been grabbed in expansionist wars. Or another. Natural resources—oil, perhaps—have been inadequate. There has been no peaceful way of adding to them, and so raw materials have been stolen in aggressive wars. You will always have differences between nations, conflicts of interest, competing claims, just as in the case of individuals. Can they in the future be settled by the same kind of process as is applied to individuals ? Can they be submitted to the arbitrament of law, or must we still go on resorting to war ? That depends not merely on the law, but on the establishment of an ordered and secure community of Nations. And that is where the jurist and the statesman, the lawyer and the layman, must join hands. For law follows order : it does not precede it. In a world society where States are organized for war ; where the game of power politics is being played ; where the ultimate argument by which States promote their claims and secure their needs is the threat of war ; where no State enjoys security against that threat, each State has to be constantly concerned with its own strength and its own defence. It cannot afford to risk anything being given away or taken away by the operation of international laws, because the result would be to weaken its powers of defence, its economic strength, its territorial protection, and since its security depends on these things, it cannot risk their diminution. But once you establish a system of collective security ; once you really do have a system which makes war, if not impossible, at least very dangerous to the aggressors ; once you have machinery which can secure in an equitable way the legitimate needs of particular States, it may be for access to raw materials here, it may be for access to territory for expanding population there—a great many State interests will no longer be vital in the old sense, and in result States will be able with the less risk to themselves to press their economic or territorial needs before an international organization, and to submit to the arbitrament of international law. We have got to reproduce in the international field the conditions which secure common consent to be governed in the national one. That means that we have got to recognize the interdependence of all States, and to have means of satisfying the legitimate needs of each without the need to steal or fight. That is why individuals consent to laws. It is the same for nations.

And so the question of extending and developing international law is as much a matter for the politician as for the lawyer. There has been talk lately about codifying the law. This is an admirable project. Lawyers of all countries ought to join together, as we are doing in this organization, to codify and clarify the existing rules. With the increasing intercourse between the nations, the growing complexity and interdependence of world affairs, many fresh matters will have to be brought within the scope of international regulations. Aviation is obviously one of them. The drug traffic is another, with which we have been dealing ; and, in the field of private international law, the laws relating to marriage and nationality require co-ordination. There is also talk of an international penal code. Not in any sense to confirm or to ratify the Nuremberg decisions : the principles laid down there are the law already, and are clear enough. But to regulate the procedure by which they shall be enforced, and, I hope, in due time to extend and develop the idea that certain things are crimes against the laws of mankind. When at Nuremberg we condemned aggression, we condemned it not only in the Nazis, but wherever in the future it should appear : when we charged the Nazis for their crimes against humanity, we set our face equally against such crimes elsewhere ; when we deplored the way in which the Nazi State deprived men of their fundamental political, religious, or human liberties, we equally deplore such things wherever they arise. The law of nations must not interfere in matters which are the domestic concern of each State. But the fundamental dignity of man is something which transcends all States, and which the law of mankind must protect. In these and many other matters of civil or criminal concern, we must gradually extend, by the method of International Conventions, the general scope of international law.

That brings me to the second reason, which really follows from the first, why international law and international organization failed in their ultimate object of securing world peace. The law failed because the States of the world made no serious effort to enforce it. The nations in 1928, in the Pact of Paris, outlawed and forbade war. That is exactly what M. Molotov seems to have proposed in regard to the atomic bomb. It is manifestly not enough.

(*Concluded on p. 292.*)

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. 143.—K., Ltd., to N.Z.B., Ltd.

Urban Land—City Property—Potential Value—Land being acquired for rebuilding Adjacent Hotel—True Value of Land not affected—"Realized possibility" disregarded.

The appellant company, which owned the Royal Hotel on Lambton Quay, Wellington, sought the consent of the Court to its purchase of the adjoining property at a price of £20,000 for the purpose of enabling it at some future date to extend and rebuild its hotel premises. The Wellington Urban Land Sales Committee fixed the basic value of the property at £17,500 and refused to increase that amount by reason of any additional or "potential" value claimed by the appellants to be inherent in the land. The appellants contended that what, for want of a better term, may be called the normal value of the property in question was not less than £20,000, but that, in any case, it had an additional "potential" value of not less than £3,000. They accordingly claimed that, whether assessed on the ordinary or normal basis usually applied to city properties or having regard to special or potential value, the price of £20,000 should have been approved without deduction.

The Court said: "With regard to what may be called the normal value of the property, evidence was given for the appellants by Messrs. J. W. Gellately and J. G. Harcourt, both of whom valued the land and buildings at over £20,000. of which approximately £1,000 was apportioned to the buildings. This item is not disputed by the Crown. The land in question is situated in an old-established retail area, and there have been numerous sales in the fairly close vicinity during recent years, so that it should not be difficult by comparison with other sales to arrive at an accurate assessment of the land value. The evidence of the valuers called by the appellants and called by the Crown showed, however, some difference of opinion as to the precise gradation of values in different portions of Lambton Quay, and as to the effect upon the present land of the fact that it has a frontage to the Terrace as well as to the Quay. The Crown Valuers gave details of a considerable number of sales in the near vicinity. While existing Government roll valuations are not usually a reliable guide to values in December, 1942, it is significant that, of eight sales in the vicinity between the years 1937 and 1946, only one was at a price exceeding the 1935 Government valuation, and in that case the Government valuation was exceeded by only a small margin. In the other seven cases, the agreed sale prices were all substantially below the 1935 valuation. Where a number of sales in a particular vicinity bear such a consistent relationship to existing Government values, we are of opinion that the existing valuations should be some guide to the true value of any particular property in the same vicinity. In the present case, we find that the 1935 valuation for the property under consideration was £17,245, and *prima facie*, therefore, and having regard to the sales which have been referred to, we find it difficult to believe that the appellant's valuers can be correct in their valuations exceeding £20,000.

"The Crown's view that these valuations are excessive finds almost conclusive support in the history of the property itself. The property, or a part of it, was offered to the present appellant company by the then owner no less than three times in 1940. The price sought in April, 1940, was £22,000, but in September, 1940, the whole property was offered for £17,500, or half of it for £8,750. All of these offers were refused, and the owner, who was apparently in financial difficulties, sold the property to the present vendor in September, 1941, for £14,250. No substantial improvements have been effected since that date. In 1944, the present vendor offered the property to the appellants for £17,245, which was precisely the amount of the existing Government valuation, but once again the offer was refused. It is clear, therefore, that the appellants became interested in the purchase of this property only after 1944, and, indeed, there is no precise evidence that they were interested in its purchase until 1946. The appellants then approached the vendor, who at that stage refused to sell for less than £20,000. A contract at that figure was entered into, and an application came before the Land Sales Committee in October, 1946, but no evidence as to value was submitted by either vendor or purchaser. The Crown submitted a valuation of £17,345, and the Committee made an order consenting to the sale subject to a reduction of the price to £17,500. No appeal was lodged by either party. In June, 1947, however, a fresh contract was entered into between the parties at £20,000, and a similar order granting consent at £17,500 is now the subject of the present appeal.

"The foregoing history of this property satisfies us that in 1940, on what may have been a forced sale, the then owner was able to realize only £14,250 on the open market. In 1944, the present vendor was prepared to sell to the appellants for £17,250, the amount of the existing Government valuation, and a price therefore in line with, but proportionately somewhat greater than, the prices realized for a number of comparable properties in the vicinity. The Crown Valuer now assesses the value of this property as at December, 1942, at £17,345, and the Committee has fixed its basic value at £17,500. The relevant sales appear almost conclusively to support the Crown Valuer, and we are unable in the face of these admitted facts to accept the much higher valuations put forward by Messrs. Gellately and Harcourt. We accordingly find that, on the basis of normal value, the appeal is not entitled to succeed.

"We now come to the appellant's contention that, in addition to its normal value, the property has a potential value which would justify the allowance of an additional £3,000. We were at some pains to ascertain the basis on which counsel for the appellants and their valuers purported to assess this so-called potential value. We conclude that they contend that, as soon as it became known to the owner of the present property that the appellants were desirous of buying it so as to extend their hotel adjoining, he would have been justified in increasing his price by £3,000, and that it would amply pay the appellant company to give an extra £3,000 for the adjoining land in order to carry out its rebuilding plans.

"The added value, or potential value, which a property may derive from the fact that it is required or keenly sought after by an adjoining owner has been judicially considered both in this and in other Courts, and is the subject of well-defined principles. We are unable to find in the present case any grounds for extending or any necessity for further defining the principles which have already been laid down. In so far as the present land acquires potential value by reason of the mere fact it adjoins an hotel owned by N.Z.B., Ltd., it is to be noted that there has been no change of circumstances since 1940, when the then owner appears to have been forced to sell for £14,250, or since 1944, when the present owner was prepared to sell even to the appellants for £17,245. The general proposition that being adjacent to an hotel adds value to city property is not borne out by other sales in the vicinity. A small property adjoining the Royal Hotel on the other side was sold in 1943 for £5,250, being less than the existing Government valuation, which was £6,580. Only a few chains to the south of the Royal Hotel is the National Hotel, also owned by N.Z.B., Ltd. The property adjoining this hotel was sold in 1946, after being offered unsuccessfully to the appellants, for £13,500, being almost identical with the existing 1935 Government valuation of £13,270. These sales and the history of the present property appear to prove conclusively that a property does not gain in value merely because it adjoins an hotel.

"The appellants contend, however, that a change of circumstances occurred when they decided to rebuild their Royal Hotel premises and to acquire the adjoining property for that purpose. It is true, no doubt, that such a change of policy on the part of the appellants would result in their being prepared to pay a bigger sum for the adjoining property, and, indeed, would give it a greater value or a special value to them. Such a change, however, in the policy of the adjoining owner does not, in our opinion, affect the true value of the land, nor does it.

add potential value to the land in the sense in which potential value may properly be allowed under the Land Sales Act. A distinction has been drawn in previous decisions of the Court between factors affecting the land and increasing its value and factors affecting the purchaser only which have been described as giving to land a special value to the purchaser. In *No. 101—S. to A. Brothers, Ltd.*, (1947) 23 N.Z.L.J. 153, the Court said: 'It may also be desirable to point out that the added value attributable to a potentiality pertaining to land is not to be measured by an assessment of so-called "special value" to the purchaser nor by what a particular purchaser may be willing to pay for the land, save to the extent that such considerations add actual value to the land in the sense that they increase the amount, assessed as hereinbefore provided, which the land might reasonably be expected to realize. The Court can have regard only to "matters affecting the land" and the personal desires, needs, and circumstances of a purchaser, unless they, may fairly be deemed to affect the land, must be disregarded' (*ibid.*, 170). The authorities referred to in *No. 101.—S. to A. Brothers, Ltd.* establish that our duty in valuing land is to assess the amount which the land, if sold in the open market by a willing seller in December, 1942, might reasonably have been expected to realize. A seller at that date would have been entitled to assume that the appellant company owning the adjoining hotel property might have been a buyer, but he could not have been assured that the appellants would buy. The evidence shows that they were not then prepared to buy. It is quite clear that the present vendor had no expectation of receiving more than £17,245 even in 1944, when he offered to sell the land to the appellants for that amount. The mere fact that the appellants have now decided to buy does not, in our opinion, increase the true value of the land which the vendor has to sell, although it may, indeed, increase the amount which, on a free market, the vendor might be successful in securing. The distinction was drawn in the Privy Council between the 'possibilities' of land and its 'realized possibilities,' and it has been held that it is the possibilities of the land, and not its realized possibilities, which create the true measure of its value. We are satisfied that no reasonable vendor in 1942 would have cherished the possibility of realizing more than £17,500 for this property. The fact that the vendor has secured an offer of £20,000 to-day represents a 'realized possibility' which, in terms of the authorities, we must disregard.

"We are, therefore, unable to concede that the present vendor is entitled under the Land Sales Act to any greater sum than the basic value fixed by the Committee. This appeal must, accordingly, be dismissed."

THE LATE MR. M. J. GRESSON AND MR. F. W. M. COWLISHAW.

Tributes from Bench and Bar.

In the recent death of Mr. Maurice Gresson, the Christchurch Bar suffered the loss of one who for many years past had been its acknowledged leader. On the day following his death, they suffered another loss in the sudden death, in Court, of Mr. F. W. M. Cowlishaw. It was arranged, therefore, that the tributes to be paid in Court to both gentlemen should be made on the same occasion.

On September 16, His Honour Mr. Justice Fleming presided at the Supreme Court in Christchurch, where a very large gathering of practitioners met to honour the memories of their deceased brethren. There were also present in Court Judge Stevens of the Court of Arbitration, and the three Christchurch Magistrates, Messrs. F. F. Reid, S.M., Raymond Ferner, S.M., and Rex C. Abernethy, S.M.

The Canterbury Law Society.

The President of the Canterbury District Law Society, addressing His Honour, said: "It is with a profound sense of grief and loss that members of the profession are gathered here this morning to mourn the passing of the late Maurice James Gresson, and, in voicing our tributes to the memory of a much loved colleague, I am asked by the President of the South Canterbury Law Society to associate him and the members of the Timaru Bar with the remarks that I shall make.

"Some little time ago, we learned with dismay that Maurice Gresson was stricken by a mortal illness and that he would be with us for but a short time longer. It was characteristic of the late Mr. Gresson that until near the end he concealed the gravity of his illness, he sought no sympathy, but bore his affliction with that unselfish fortitude typical of him.

"His death at the comparatively early age of sixty-three leaves a gap in the ranks of the practising Bar that can never be filled.

"Maurice Gresson held a unique position in our profession. A grandson of Mr. Justice H. B. Gresson, he came of a family long associated with the law in this Province. He had, in fact, been nurtured in the law, and to his legal ancestry to some extent may be attributed that love and feeling for the law which he always displayed. He was a man of such consummate ability in his profession that it is difficult to single out particular instances. For over a generation he has been a leading counsel, not only in this district, but in the Dominion, and during his career he has not only appeared in many noteworthy cases in this Court, but frequently in the Court of Appeal, and, as will be remembered, before the Judicial Committee of the Privy Council. In fact, in reviewing his career at the Bar, one thinks first of his noteworthy array of cases before the Judicial Committee in 1926, and again in 1933, and then in very recent times of his succession of appearances before the Court of Arbitration, the Supreme Court, and the Court of Appeal in important litigation affecting the Harbour Boards.

"Maurice Gresson, however, did not merely typify the successful barrister. He stood for much more than that, and on an occasion such as this it is of the character of the man that I prefer to speak. No man will be more sincerely mourned than M. J. Gresson. We were proud of him during his life, and we feel a humble pride at the stoicism with which he faced and met death. Fair-minded and forthright, the soul of honour, and disdainful of meanness, a man who would never stoop to underhand methods, who would never seek an advantage to which he was not legitimately entitled, a man to whose nature intrigue and self-seeking were foreign—when to these virtues you add a profound knowledge of the law in all its branches, and forensic ability equal to any, you find, therefore, in Maurice Gresson, a man pre-eminent among his fellows and an acknowledged leader in his profession. He, if he were with us, would disclaim these encomiums. He would be the last to assert himself a paragon. He never sought nor wanted public adulation. He, however, set and followed his own standards, and those standards were high. He was always unselfconscious and of firm and independent views. He was, nevertheless, clothed with his own virtues. He could not discard them, even if he should ignore them. These things, I feel, were known and thought of him during his lifetime. They would not and could not be mentioned to his face, but I have humble pride in making inadequate mention of them now that he is gone.

"To these qualities he also added a genial and companionable nature and a lively wit. He was a man of wide reading, and for many years was a valued contributor of articles to the New Zealand Law Journal. He served the Law in all its many aspects. He was at one time President of the Canterbury Law Society, a member of the Council of the New Zealand Law Society, and for the last ten years a member of the Council of Law Reporting. His work in this latter sphere, though unostentatious, was very real; and I have been requested by the Hon. the Attorney-General, who is the Chairman of the Council of Law Reporting, and also by Mr. P. B. Cooke, K.C., the President of the New Zealand Law Society, to express their and the Council's regret at Mr. Gresson's untimely death, to make public acknowledgment of their appreciation of his services to the Council, and to extend their sympathy to the bereaved members of his family.

"Maurice Gresson filled an exceptional place in our legal fraternity, and was possibly the best example of a lawyer and gentleman that our generation could have. To him we went when difficulties of practice or of conduct beset us. We always met with a kindly and ready response, and were never sent away without wise guidance from one who was truly our profession's *arbiter morum*.

"I would most sincerely extend our sympathy to his sons and daughter, who have lost a loving and much loved father, and also to his brother, Mr. Justice Gresson. Their loss is so

much greater than ours; but we share their loss, because many here mourn the passing of an old friend, and all of us a leader who had always earned our admiration and respect. Maurice Gresson embodied in his own person the culture and traditions of the law; he was jealous of his profession and of its dignity; he fearlessly asserted its rights and privileges; he scorned those who besmirched its honour. Men like Maurice Gresson are unfortunately only too few, but we can be grateful that in Canterbury we have had his outstanding example before us for so long. He kept the faith; and it is for us, who follow, to continue to uphold the traditions and principles that he so jealously conserved."

Mr. Hensley then referred to Mr. Cowlishaw, and said there was another melancholy duty he had to perform: on behalf of those present, he had to make reference to the sudden and tragic death of yet another member of the profession, the late F. W. M. Cowlishaw, who died suddenly while conducting a case in the Magistrates' Court on the previous day.

He continued: "The late Mr. Cowlishaw, who was a comparatively young man, was well and favourably known to us all as a member of a very old firm, and bearing a name that again goes back to the early history of our Province. Mr. Cowlishaw, although he did not appear frequently in this Court, was a very sound conveyancer, and he and his firm acted for a considerable number of important institutions in this city. He was a popular man of pleasing personality, and his untimely death has deeply shocked the profession. On behalf of the members here assembled, I would extend to Mr. Cowlishaw's widow our deepest sympathy in the very sad loss that she has sustained."

TRIBUTE FROM THE BENCH.

His Honour Mr. Justice Fleming said that he desired to endorse the eloquent tribute which Mr. Hensley had paid to their late departed brethren in the law.

"I wish to refer first to the late Mr. M. J. Gresson," His Honour proceeded. "He has appeared before me on numerous occasions while I have been presiding here. I could not fail to note his lucidity of mind, his firm grasp of legal principles, and his wonderful knowledge of case law. But above and beyond these qualities was his deep-rooted love of justice. He would not wish to win a case by reason of his great forensic skill unless justice required that he should be successful.

"His fame as a lawyer, and advocate, was not confined to this country. I remember well the occasions on which he appeared on important cases before the Privy Council.

"On his return to New Zealand, he wrote an article for the NEW ZEALAND LAW JOURNAL in which he commented on their Lordships of the Privy Council. He referred to their erudition and greatness; but, most of all, he emphasized their kindliness and courtesy, not only to the giants of the profession, but to the humblest junior who appeared before them. This quality, which he admired so much in others, was well exemplified in himself.

"He was a man of great strength of character, but in the Courts was always courteous and respectful not only to the Bench, but also to counsel who were opposing him. These qualities do not always go together.

"To me, he seemed like a deeply flowing river, that required no turbulence to demonstrate its power.

"He was worthy of any preferment in the power of the Government to bestow. It must have been a joy to him to see his brother promoted to the judiciary, and his son, Mr. T. A. Gresson, taking up the family tradition and preparing to write a further chapter in the Gresson saga, which is one of the greatest in New Zealand legal history. He has left behind him a name, and an example, which will be an inspiration and a guide to those of the profession who remain, and who will follow him.

"I would refer, also, to the late Mr. F. W. M. Cowlishaw. He appeared before me quite recently, and it came as a great shock to me, as it did to all of you, to learn of his sudden death. It is, of course, a great shock to those who are bereaved when death comes so suddenly, but I am sure that all of us would like to die, as he did, in harness and in the performance of our duty.

"He, also, is one who lived up to the highest traditions of the profession, and he will be missed by all of us.

"All those associated with me on the Bench join with me and with you in expressing our deepest sympathy to the daughter and sons of the late Mr. Gresson, and to his brother, Mr. Justice Gresson, and to the widow of the late Mr. Cowlishaw, in their bereavement."

THE PLACE OF LAW IN INTERNATIONAL RELATIONS.

(*Concluded from p. 289.*)

But, vital to this whole process, is the firm establishment of an international organization to maintain order and to enforce the law. We must allow nothing to discourage our efforts—and there have been things which might have discouraged us—to build up the United Nations Organization. I do not say it is ideal. No doubt as time goes on it will improve. National organization was not built up from the family to the clan and the clan to the tribe and the tribe to the State in a day. So here. I do not myself think that the so-called veto will be fatal to the development of the organization. We have two rights of veto in the British Constitution: one in the hands of the King and the other in the hands of the House of Lords. They still exist, but gradually a convention has grown up that they should not be exercised save in the most extreme circumstances. I hope that, without the need for any formal action, a similar convention will gradually be built up in regard to the Security Council veto.

Soviet Russia is a country which is still very young in its experience of democracy. Unless she is bent on aggression, I think that she will gradually find that her interests are better served by a policy of give and take than by an irresponsible exercise of the veto, that antagonizes other Nations. If the rest of us go steadfastly on, undismayed by these present alarms and clamours; concerning ourselves, as your distinguished Senator Austin said, "with *what* is right, not who is right," I think that there is a prospect that the Slav Powers will see that it pays them to make some real contribution to the principle of unanimity of which they talk so glibly. But I am not concerned with the politics of the matter now. I am talking about the machinery. If the Slav Powers were animated by a desire to co-operate in a reasonable spirit of give and take, the veto would not prevent them. And if they are not yet so animated, the absence of the veto could not compel them. We have got to face realities. The United Nations is not yet a World Parliament; it cannot yet hope to settle all questions by the simple device of a majority vote.

The problem, then, is to secure the ordered application of a system of law which is largely there already. We must not let ourselves get cynical about this. We must not talk resignedly as if we were drifting towards another war. Unless hope is to perish from the earth, we must secure the rule of law in international affairs. Discarding those narrow ideas of State sovereignty and national prestige, which have served us so ill in the past, we must, individually and collectively, determine to build up this United Nations Organization into a real law-enforcing body. We must work towards the time:

When the war drums throb no longer;
When the battle flags are furled
In the Parliament of Man,
The Federation of the World.

That is the duty which lawyers, politicians, ordinary citizens of your country and of mine, owe, not only to your country and to mine, but to all mankind.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

Lawyers and Literates.—Has the legal profession always been regarded in New Zealand as one of the learned professions? The answer to this question is not altogether free from doubt. A rule under our Law Practitioners Act of 1861 provided that each Judge to whom a separate judicial district was assigned should act as examiner of all candidates for admission as barristers or solicitors applying within his district for admission. It proceeded: "He may associate with himself one law practitioner and one literate person, or either of such persons, if he shall think fit so to do, but such Judge shall himself decide the competency of such candidate." Records of those early days show that members of the Bar were infected by a rugged pioneer spirit, but the evidence is convincing that they could both read and write.

The Indoor Man.—In proposing this toast at the recent annual dinner of the Wellington District Law Society, the speaker said that he was unable to define the "indoor man" as necessarily being the practitioner who stayed indoors. Scriblex notices that Mrs. Joan Rosanove, who is probably the best-known divorce "specialist" in Victoria, has sold her extensive solicitor's practice—after twenty-six years, one of the biggest "one-man" practices in that State—and has announced that next year it is her intention to appear in the Courts exclusively as a barrister. "I'm leaving the vegetable garden of the law for the conservatory," she said to the *Argus*, in an interview.

Thankerton's Successor.—Appointed as a Lord of Appeal in Ordinary in succession to the late Lord Thankerton, the Rt. Hon. James Scott Cumberland Reid is a notable Scots scholar. He holds the degree and titles of K.C., LL.D., F.R.S.E., M.P., and, after sitting for four years as a Conservative Member of Parliament for Stirling and Falkirk Burghs, he was appointed in 1936 to the office of Solicitor-General for Scotland, although he did not have at the time a seat in Parliament. The following year he was returned as a Conservative member for the Hillhead Division of Glasgow, and has ever since represented this constituency. He was called to the Scottish Bar in 1914, took silk in 1932, was appointed Lord Advocate in 1941, and in 1945 was elected Dean of the Faculty of Advocates. He should grace the office no less than several of his countrymen have done in the past.

The Paradine Case.—A correspondent from Waikato has drawn attention to a public statement that: "Gregory Peck, who grew a moustache for his role as a London attorney in the new Selznick picture *The Paradine Case*, had to shave it off. It is an unwritten law in all English court procedure that Judges and counsel must be clean-shaven." This statement, like much other film-advertising, is open to question. Peck is not an attorney but a barrister in this picture, which, incidentally, is produced by Hitchcock, and is a very good one, that creates most realistically the atmosphere of an English criminal trial. To the lawyer, however, it is at least surprising that counsel for the defence puts his client in the box on a murder charge when there does not appear to be any case to answer; and more surprising still that he does so when he is unaware precisely what she is going to say. However, to revert to the "unwritten law" mentioned above, Scriblex challenges the assertion that grey beards are like grey trousers, and prevent the Court seeing their wearers. Was not Scrutton, L.J., a fiercely bearded Judge? And there must have been many others in England. The artist Bowring's famous caricature of our Supreme Court Bench of seven in 1913 shows five to be bearded (Stout, C.J., Chapman, Williams, Cooper, and Edwards, JJ.), and only two (Denniston and Sim, JJ.) to be clean-shaven. Salmond, J., later added to the former group, but, in the light of appointments in New Zealand during the last quarter of a century, he has been in a minority of one. Whiskered counsel are legion, but is it legal tradition or the safety-razor that has encouraged the great majority to resist hirsute adornment?

Remembrance of Things Past.—It was a habit of the late Sir Robert Stout, especially in his later years, to indulge from time to time in a bout of reminiscence while on the Bench. On one such occasion, counsel quoted *Roe* v. *Doe*, whereupon the Chief Justice pricked up his ears and remarked: "I knew Richard Roe in the early days of Otago. He would be a relative of the plaintiff, who must have been his grandfather or his grand-uncle. Or it may be his great-grandfather. No, I think it would be his grand-ather." After listening to a few more of these speculative whimsies, counsel said testily: "His great-great-grandfather, I should think, your Honour. These Roes all trooped to the House of Lords in 1684."

Court of Criminal Appeal.—In New Zealand, as in Australia and Canada, the Court of Criminal Appeal has power in appropriate cases to order a new trial. Various Judges of the Court of Criminal Appeal in England have made reference to the desirability of exercising there a similar power, looking upon this power as essential to the administration of justice. Views along such lines were expressed by the late Lords Hewart, Reading, and Caldecote, each a Lord Chief Justice in his time. In accordance with a previous undertaking, the Lord Chancellor introduced at the Report stage of the Criminal Justice Bill in the House of Lords on July 1 a clause (cl. 38) whereby the Court of Criminal Appeal is to be given power, instead of directing the entry of a judgment and verdict of acquittal, to direct the appellant to be re-tried upon the whole or any part of the indictment; but no such re-trial may be ordered on that part of the indictment on which he was acquitted; and, if an appellant, being convicted on the re-trial, again appeals against his conviction, the Court may not direct him to be tried a second time. Support to the clause was given by Lord Goddard, L.C.J., Lords Macmillan and Oaksey, and Viscount Maugham. On the other hand, Lord du Parcq and Viscount Simon considered that the clause contradicted a fundamental principle of law, in that a person who had been tried and convicted should in no circumstances be compelled to stand his trial the second time for the same offence. After a division, the clause won through by a majority of seventeen votes.

PRACTICAL POINTS.

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1. Gift Duties.—*Gift of Motor-car* inter vivos *within Three Years of Death—Liability of Donee to Gift Duty.*

QUESTION: Deceased gave a motor-car valued at £400 to his wife within the period of three years prior to the date of death. No gift Schedule was filed. In deceased's estate, the value of the gift (£400) was brought in. The widow of the deceased is the life tenant and receives the whole of the income from the deceased's estate. The trustee now seeks to recover from the widow death duty in respect of the gift. Can the trustee do this? Should not the death duty in respect of the gift be chargeable to the capital account of the estate and not the income?

ANSWER: The question does not state whether or not there are any special provisions in the will as to incidence of payment of death duty, but assuming that there are no such directions, or if there are, that they are in the usual form (*e.g.*, "I direct that death duties payable in my estate shall be payable out of the residue") and assuming that there are no directions to the effect (as in *In re Houghton, McClurg* v. *New Zealand Insurance Co., Ltd.*, [1945] N.Z.L.R. 639) that deceased's estate must bear the death duties payable in respect of his *notional* estate (such as gifts *inter vivos*) as well as his actual transmissible estate, the trustee can recover from the widow the amount of the death duty payable in respect of the gift of the motor-car: *Elder's Trustees* v. *Gibbs*, [1923] N.Z.L.R. 503, *In re Reid, Guardian, Trust* v. *Reid*, [1946] N.Z.L.R. 334, and see *Adams's Law of Death and Gift Duties in New Zealand*, 138, where other cases are cited.

As to what amounts to a sufficient direction that deceased's estate should bear death duty payable in respect of his notional estate, see articles in (1944) 21 N.Z.L.J. 267, and (1945) 22 N.Z.L.J. 118.

In the apparent circumstances outlined in the question, the death duty payable in respect of the gift should be charged neither to the capital nor income account of deceased's estate; the gift of the motor-car is in fact not part of the estate.

X.2.

2. Adoption of Children.—*Will leaving Residuary Estate to Son of Testatrix for Life and Division among his Children upon his Death—Child of Son after his Mother's Death adopted by Third Parties—Position of Child in respect of his Grandmother's Estate.*

QUESTION: A, a widow, died leaving a will made in 1941, whereby she *inter alia* left a share in her residuary estate to her son B upon trust to pay the income to him for life, and after his death to divide the capital equally between his children. After A's death, and during B's lifetime, a child of B's was adopted by C and D. Does the adoption order operate so as to take away the adopted child's rights under the disposition in the will as a child of B?

ANSWER: No, unless there is in the will any indication that the testatrix intended otherwise: see *In re Carter, Carter* v. *Carter*, [1941] N.Z.L.R. 33, and *Public Trustee* v. *Ferguson*, [1947] N.Z.L.R. 746. If the amount involved is substantial, it would be prudent to obtain a direction from the Court: see *Re Diplock's Estate, Diplock* v. *Wintle*, [1948] 2 All E.R. 318. W. 2.

3. Guardianship of Infants.—*Parents separated and Mother given Custody of One Boy—Application by her for Custody of Both Other Boys.*

QUESTION: Under a separation agreement entered into in 1946, the mother was given custody of one boy, then aged six years, and the father was given custody of the other two boys, then aged twelve and nine years respectively. Can the mother obtain custody of the other two boys?

ANSWER: The answer depends on the evidence available to the mother in support, as the only principle to be applied in relation to her application is that contained in s. 2 of the Guardianship of Infants Act, 1926: the welfare of the child—that is, his general well-being—is the first and paramount consideration: *In re Thain, Thain* v. *Taylor*, [1926] Ch. 676, 689; and see, for the application of the principle, *Parsons* v. *Parsons*, [1928] N.Z.L.R. 477, *In re H.*, [1940] G.L.R. 165, 168, *Reid* v. *Reid*, [1941] N.Z.L.R. 952, 957, *M.* v. *M.*, [1942] N.Z.L.R. 12, and *Re Hylton*, [1928] N.Z.L.R. 145. B.1.