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THE PRINCIPLES OF NATURAL JUSTICE.

IV.

In the first place, the regular Courts of law act in accordance with the requirements of natural justice. The formal procedure prescribed for the Courts usually ensures that the requirements of natural justice are complied with, and there is seldom, therefore, need to use the term " natural justice " in relation to a regular Court of law. Occasions for its use have arisen principally upon criminal appeals to the Privy Council, which has held that one of the few circumstances in which it will interfere with a conviction is when " there has been a violation of the natural principles of justice . . . demonstratively manifest " : *Arnold* v. *King-Emperor*, [1914] A.C. 644, 648. The spirit of the rule also falls to be applied upon the Crown side of the King's Bench Division, where certain deviations from natural justice are also grounds upon which the decision of an inferior Court will be quashed by an order of certiorari : *cf. R.* v. *Sussex Justices, Ex parte McCarthy* (*supra*).

Second, the rule requiring compliance with natural justice applies to those persons and bodies who, though not forming part of the regular system of Courts, " occupy judicial office or those who are commonly regarded as holding a quasi-judicial office, such as an arbitrator " : *Franklin* v. *Minister of Town and Country Planning*, [1947] 2 All E.R. 289, 296. The notorious difficulty about this wide category is that it merges almost imperceptibly into the important class of authorities who take purely administrative decisions, involving no obligation to obey the rules of natural justice. In the former category, at the head of the scale and approximating closely to the regular Courts, are the tribunals set up by statute to adjudicate upon specific subjects, a recent example of which is the Government Service Tribunal set up by the Government Service Tribunal Act, 1948.

Next come those special bodies which administer discipline in various professions by statutory authority, such as the Medical Practitioners Disciplinary Committee under this year's statute : *cf. General Council of Medical Education and Registration of the United Kingdom* v. *Spackman* (*supra*). Analogous to these, and under a similar obligation to observe the requirements of natural justice, are the disciplinary bodies of voluntary associations, such as the committee of a club or a professional association deciding upon the expulsion of a member : *Wood* v. *Wood*, (1874) L.R. 9 Exch. 190, and *Law* v. *Chartered Institute of Patent Agents* (*supra*). Again, if an arbitrator appointed by persons who are, or may be, in dispute to decide between them (including a person such as an architect appointed by a building contract to certify the amount due to a builder) departs from standards which embrace the requirements of natural justice, he may be removed for misconduct or his award may be set aside or treated as a nullity : *cf. Bristol Corporation* v. *John Aird and Co.* (*supra*) and *Steele* v. *Evans* (*No. 2*), [1949] N.Z.L.R. 548.

The position of a standing committee of a municipal corporation, acting in pursuance of powers conferred upon it when conducting an inquiry, is stated in *Williamson* v. *Mayor, &c., of Auckland*, [1925] N.Z.L.R. 96, where Stringer, J., said, at pp. 98, 99 :

> It was contended, in the first place, that the inquiry by the Finance and Legal Committee was not conducted in a judicial manner, in that the plaintiff was not given a proper opportunity of knowing and meeting the allegations against him. That such an inquiry was one of a judicial character was not contested, and has been established by numerous authorities. The general principles applicable to such cases are stated in *Lord Loreburn's* judgment in *Board of Education* v. *Rice* ([1911] A.C. 179, 182) in the following passage, which has been repeatedly approved and adopted in subsequent cases : " In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add, in doing either, they must act in good faith and fairly listen to both sides, for that is a duty lying on everyone who decides anything. But I do not think they are bound to treat such a question as if it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view . . . If the Court is satisfied that the Board have not acted judicially in the way I have described, or have not determined the question which they are by the Act required to determine, then there is a remedy by mandamus and certiorari."
>
> In the present case I have no doubt whatever that the committee acted in perfect good faith, but a careful consideration of the facts as disclosed by the affidavits satisfies me that they failed to conform to the principles laid down by *Lord Loreburn* in the case cited.

Sports bodies or associations come within this category. The judicial committee of a racing or trotting club is an example. The committee of the Auckland Trotting Club and the judges of the New Zealand Trotting Conference came under notice in *Morten* v. *Nicoll*, [1932] N.Z.L.R. 685, where Adams, J., in finding that substantial justice had been done to the plaintiff, said, at p. 691 :

> The principles upon which the Court proceeds in relation to arbitral tribunals having no judicial status have been discussed in many cases. In this country the last is, I think, *Feilding Club, Inc.* v. *Perry* ([1929] N.Z.L.R. 529). The latest case in England to which I have been referred is *Mac-*

Lean v. *Workers' Union* ([1929] 1 Ch. 602). In that case *Maugham*, J., says: "A person who joins an association governed by rules under which he may be expelled—*e.g.*, such rules as in the present case exist in RR. 45 and 46 [of the Rules of Trotting (N.Z.)]—has, in my judgment, no legal right of redress if he be expelled according to the rules, however unfair and unjust the rule or the action of the expelling tribunal may be, provided that it acts in good faith. It is impossible to doubt that, if the rules postulate an inquiry, the accused must be given a reasonable opportunity of being heard. The phrase, the 'principles of natural justice,' can only mean in this connection the principles of fair play so deeply rooted in the minds of modern Englishmen that a provision for an inquiry necessarily imports that the accused should be given his chance of defence and explanation" (*ibid.*, 624, 625).

The position is seen even more clearly in the case of *Franklin* v. *Minister of Town and Country Planning*, [1947] 1 All E.R. 396, decided upon the New Towns Act, 1946 (*39 Halsbury's Complete Statutes of England*, 661). Schedule 1 of that Act provides that, if any objection is made to a scheme, the Minister shall cause a public local inquiry to be held, and shall consider the report of the person holding it before he makes his final order. It was assumed by the lower Courts that, in regard to the inquiry and the consideration of its report, the Minister was required to act quasi-judicially and in accordance with the principles of natural justice.

The House of Lords, however, made it clear that this was not so, and that the Minister was entitled to act administratively throughout, the public local inquiry being, despite its quasi-judicial form, a mere step in an administrative process; as Henn Collins, J., said, at p. 397:

> If that is the true view of this regulation, the result . . . is that an objector, who may have everything at stake, has legislative permission to fulminate, but can do no more.

If a rule of a club or association gives a committee a discretion to do something, and to come to a decision without stating reasons, the committee is not under a duty to hold an inquiry before exercising its discretion, and it cannot be implied that the inquiry, if held, should be conducted in accordance with the principles of natural justice. The general principles are enunciated by Lord Goddard, L.C.J., in the recent case of *Russell* v. *Duke of Norfolk*, [1948] 1 All E.R. 488, 491, which had reference to the withdrawal of a trainer's licence. The Lord Chief Justice said:

> I can find no contract here under which the stewards were under any duty to the plaintiff to hold an inquiry. It is said that they did hold an inquiry, and, therefore, that they must hold it honestly, fairly, and in accordance with natural justice. That seems to me to be a fallacy. If there was no contractual duty to hold an inquiry, how can there be a breach of contract in withdrawing the licence, however the inquiry was conducted? It is admitted that the licence might have been withdrawn without any inquiry. I can see no ground for implying any condition, nor any evidence of a breach of contract . . . I may say that I have had an opportunity of considering all the cases referred to by counsel, and I can find nothing in them which leads to another conclusion. If it is part of a contract that expulsion from a society or the withdrawal of a licence can only follow on an inquiry, or if a statute obliges a professional or other domestic tribunal to make due inquiry, as in the case of the General Medical Council, different considerations at once arise, but I desire to express my respectful agreement with what *Maugham*, J., said in *MacLean* v. *Workers' Union* ([1929] 1 Ch. 602, 623): "If, for instance, there was a clearly expressed rule stating that a member might be expelled by a defined body without calling upon the member in question to explain his conduct, I see no reason for supposing that the Courts would interfere with such a rule on the ground of public policy."

(This was affirmed on appeal: [1949] 1 All E.R. 109.)

V.

Where a decision is administrative, and not quasi-judicial, it is well settled that "the Minister" (or other authority making the decision) "is governed by considerations of expediency only . . . No principle of natural justice as between any individual and the Minister of the Crown has any place": *Miller* v. *Minister of Health*, [1946] K.B. 626, 628, adopted in *B. Johnson and Co. (Builders), Ltd.* v. *Minister of Health*, [1947] 2 All E.R. 395, 403. The Minister is under a constitutional duty to perform his functions honestly and fairly and to the best of his ability, but that is a duty which he owes to the King. If he fails in this duty, his failure, speaking generally, is not a matter with which the Courts are concerned; the remedy is to challenge the decision in Parliament: *Ibid.*, 400. The ultimate safeguard against an unjust administrative decision is, therefore, the political control which Parliament and, in the last resort, the electorate exercise over the Executive. It may well be argued that one of the chief effects of an ineffective quasi-judicial interlude in the administrative process, such as was considered in the *Johnson* case (*supra*), or of a deceptive inquiry, such as that considered in the *Franklin* case (*supra*), is to obscure the fact that the Minister is acting administratively. Thus, the procedure which should be a protection to individual rights may therefore, in such cases, be something of a trap, by deluding persons into trusting that such decisions will be arrived at in accordance with the established principles of natural justice; consequently, they may place unwarranted trust in the fairness and efficacy of the procedure provided to enable them to put forward their views, and may neglect to use with full advantage the political weapons which are, in many cases, the best and the most proper to resist arbitrary or unjust administrative decisions.

The same body may have authority to act either administratively or in a quasi-judicial capacity, according to the authority given to it by statute or the powers conferred on it. The nature of the function it is exercising in any given case must be sought in the statute itself. If the statute directs the body, in certain circumstances or towards certain persons, to act in a ministerial capacity, then it will exercise its discretion, and *prima facie* its action will not be open to review. If the same body bound by the statute is required in other circumstances to act in a quasi-judicial capacity, it must function in consonance with the principles of natural justice. An example of such a body is the Public Service Commission.

Unless the Public Service Act, 1912, provides the procedure for the dismissal of a public servant—as it does in the case of an "officer" of that service, as that term is defined in s. 3 of the statute—it is an implied term in the engagement of every person in the Public Service that he holds office during the pleasure of the Crown, unless the contrary appears by statute: *The King* v. *Power*, [1929] N.Z.L.R. 267, and *Ryder* v. *Foley*, (1906) 4 C.L.R. 422. Consequently, unless the person concerned is an "officer," as defined, then, since no inquiry need be held before the dismissal of a public servant, the principles of natural justice are not infringed if he is dismissed without an inquiry. The principles of natural justice do not, therefore, seem applicable (*a*) to the dismissal of anyone who is not an "officer," and (*b*) *prima facie* to the case of an "officer," as statutory provisions (s. 11 *et seq.* of the

Public Service Amendment Act, 1927) provide for an inquiry into a complaint or charge made against him.

Although not decisive of the eventual result, the application of the principles of natural justice in relation to the Public Service came up for consideration in the recent case of *Campbell* v. *Holmes*, [1949] N.Z.L.R. 949. Mr. Justice Gresson, in the Supreme Court, found that the plaintiff was not an "officer" within the meaning of that term as used in the Public Service Act, 1912; and he held that the action of the Public Service Commission in dismissing him, as a probationer, without any inquiry was contrary to the principles of natural justice. His Honour considered that the Commission was not justified, without holding a judicially conducted inquiry, in coming to the conclusion that the plaintiff had shown an attitude of gross disobedience to authority. He said that the Commission was bound to do its best to act justly, and to reach just ends by just means; if the statute prescribes the means, the Commission must employ them; if it is left without express guidance, it must still act in accordance with the fundamental principles of justice.

In the Court of Appeal, the test as to whether or not the plaintiff's dismissal was contrary to natural justice did not come up for final consideration. It was held that, under s. 39 of the Public Service Act, 1912—which is merely declaratory of the rights of the Crown generally in respect of its servants—the Public Service Commission is entitled to dismiss summarily a probationer in the Public Service after the expiration of a probationary period of six months, just as an ordinary employer may dismiss an employee for any reason which seems to the employer to be sufficient. The majority of the Court of Appeal held, contrary to the view expressed in the Court below, that the respondent was an "officer," and that the Public Service Act, 1912, and its Amendment Acts, provide the procedure for holding an inquiry before dismissing an officer. As the Commission had treated the respondent as a probationer, and not as an officer—and so had not adopted the proper procedure before his dismissal—the majority of the Court held that he was entitled to an injunction restraining the Commission from annulling his appointment. Consequently, as the majority of the Court held that the plaintiff was, at all material times, an "officer," anything said in the Court of Appeal regarding Mr. Justice Gresson's finding that the Commission had acted in a manner contrary to the principles of natural justice is *obiter*.

While the learned Chief Justice agreed with Gresson, J., that the plaintiff was a probationer, and had not ceased to be that on the date of his dismissal from the Public Service, he disagreed with Gresson, J.'s, view that the Commission was required to give notice or details of charges, and have a hearing, such as was held by Gresson, J., to be necessary on the grounds of natural justice.

Finlay, J., disagreed with the judgment of the learned Judge in the Court below as to the rights that the plaintiff would have had had he been a probationer. Those rights are specifically defined in s. 39 of the Act, whereby he was subject to summary dismissal after the expiry of a probationary period of six months by the annulment of his appointment, and the Commission was entitled so to dismiss him for any reason, good or bad, which seemed to it sufficient. On the other point, His Honour, in company with other members of the Court other than the Chief Justice, held that the Commission was obliged, before dismissing an officer, to carry out the requirements of the statute as to an inquiry, &c., in such a case.

The question whether the dismissal of the plaintiff was, as held by Gresson, J., contrary to the principles of natural justice did not, in the opinion of Hutchison, J., call for decision. His Honour, however, on p. 996, went on to say:

> I am inclined to the view that the annulment of an appointment under s. 39 at the end of a period of probation is a matter of complete discretion on the part of the Commission, which is not bound to hold any inquiry or hear a probationer. In this matter, the Commission acts in a "high administrative capacity," to quote the words of *MacGregor*, J., in delivering the judgment of the Court of Appeal as to the powers of the Commissioner of Police in *The King* v. *Power* ([1929] N.Z.L.R. 267, 282). The only consideration for the Commission on this matter is the good of the Service.

His Honour then referred to the words of Lord Goddard, L.C.J., in *Russell* v. *Duke of Norfolk* (*cit. supra*), which, he said, appeared to him to be apt. He added that the decision of the Lord Chief Justice in that case was affirmed on appeal: [1949] 1 All E.R. 109.

Mr. Justice Hay, in his judgment, held that the plaintiff was, when his appointment was annulled, an officer within the meaning given to that term by s. 2 of the Public Service Act, 1912. In those circumstances, His Honour added, it became unnecessary to consider whether the power of annulment under s. 39 of that Act is an absolute one, to be exercised at the sole discretion of the Commission, or one the exercise of which can be restrained where the principles of natural justice are violated. He concluded, at p. 1005:

> I agree, however, with the contention of the *Solicitor-General* that the power of annulment under s. 39 is a purely administration function, and is incompatible with a right of appeal. This seems to me to be the only reasonable interpretation to be given to the statute, as there would be no real purpose in providing a period of probation if the probationer were to be held entitled to the rights of an officer.

VI.

Finally come the cases where there has by statute been imposed "upon Departments or officers of State the duty of deciding or determining questions of various kinds": *Board of Education* v. *Rice*, [1911] A.C. 179, 182. There have always been difficulties here. In the earlier cases on the statutes then in force, such as *Board of Education* v. *Rice* (*supra*) and *Local Government Board* v. *Arlidge* (*supra*), it was common ground that the Department was acting quasi-judicially, the question being whether or not the requirements of natural justice had been met. The problem in more recent times has been to decide whether a Department is or is not required to observe those requirements at all. Thus, for instance, under the Housing Act, 1936 (*29 Halsbury's Complete Statutes of England*, 565), the Minister of Health is charged with the duty of deciding whether to confirm compulsory-purchase orders; if objection is made to the order, he is required to hold a public local inquiry and consider the report of the person who held the inquiry and the objection. The nature of the Minister's obligations has been explained by the Court of Appeal in *B. Johnson and Co. (Builders), Ltd.* v. *Minister of Health*, [1947] 2 All E.R. 395, 399. It seems that, after the objection has been made, the Minister is for a short time required to act quasi-judicially in receiving representations in support of

and against the objector and the authority propounding the order. But, before entering upon the quasi-*lis*, and in making the actual decision as to confirmation, the Minister acts administratively, uninhibited by considerations of natural justice. As Lord Greene, M.R., said in the above case, at p. 399: "in the operation of hybrid functions of that kind, no perfectly logical result is to be expected"—an observation which may respectfully be said to put the matter very moderately.

VII.

Is it a question of law or a question of fact in any case whether the principles of natural justice have been violated? In *Russell* v. *Duke of Norfolk* (*supra*), Tucker, L.J., at p. 116, said:

> The Lord Chief Justice, no doubt as a precaution and pressed by counsel so to do, left that question to the jury in the form to which I have referred, but here again I derive considerable assistance from the language which was used by *Black*, J., in *Green* v. *Blake* ([1948] I.R. 242), to which I have referred, where he is dealing with this matter and the function of the jury in this connection. He says: "Moreover, I think he never had those materials even at the last moment when the jury answered his questions other than that of malice. What materials did the Judge require? In my opinion he required to know the truth about what took place at and in connection with the investigation and having found that out, it was for him to say whether that did or did not amount to a disregard of the essentials of justice. How was he to find out what took place? In my opinion he had to find that out from the jury; for it was a pure question of fact and of the credibility of the witnesses. I should deem it most unsafe to ask a jury to say whether the facts they had found did or did not amount to a disregard of the essentials of natural justice. I do not think the term is suitable for laymen to decide about" (*ibid.*, 242). I am inclined to the view that this question whether or not an inquiry has been conducted in accordance with the principles of natural justice is really one of law for the Judge rather than for the jury. No doubt it is for the jury to find the facts, as *Black*, J., indicated, but, when once the facts are found, I am disposed to the view that it is really a matter of law for the Court.

On this topic, Denning, L.J., at p. 120, said that the issue whether the plaintiff was properly dismissed depended on whether the inquiry was held in accordance with the essentials of justice. He continued:

> That, in my opinion, is a conclusion of law. It would be no easy matter for a jury to distinguish between the question whether there was a proper inquiry, and the question whether the decision of the stewards was right or wrong, whereas a Judge is able to put aside the correctness of the decision as irrelevant.

His Lordship added that he was entirely in agreement with the other members of the Court that there was only one conclusion possible on the evidence—namely, that the inquiry as held (though there was no obligation to hold it) was in accordance with principles of natural justice.

SUMMARY OF RECENT LAW.

ADOPTION.

Adoption of Adults. *93 Solicitors Journal*, 505.

BANKRUPTCY.

Official Assignee as Successor in Title. *93 Solicitors Journal*, 609.

BOARD OF TRADE.

Board of Trade (Wool Packing) Regulations, 1948, Amendment No. 1 (Serial No. 1949/171). Regulation 5A added.

COMPANY LAW.

Conflict of Laws—Company incorporated in Victoria—Debenture Stock—Trustees in England—Debenture Stock secured on Property in Australia—Redemption of Debenture Stock—Payment to Trustees—Australian or English Currency—Money of Account. In 1893, the plaintiff company was formed, and it issued debentures in respect of the liabilities of an earlier company whose affairs were being wound up. These debentures were secured by certain trust deeds. In 1895, these debentures were cancelled, and in lieu thereof debenture stock was issued and was secured by a supplemental trust deed. From time to time, further supplemental trust deeds were executed. The original contract whereby it had been agreed that the plaintiff company be formed to take over the affairs of the earlier company was negotiated and executed in England; the bulk of the creditors were English; the trustees had at all times been English trustees, and the trust deed provided that interest on the debentures was to be paid, at the option of the plaintiff company, to the shareholders or the trustees, and, in the event of the securities becoming enforceable, payment was to be made to the trustees who were in England. The plaintiff company carried on business in Victoria; the property charged by the debenture stock was situate in Australia; the security was registered under Victorian law, and the scheme had been approved by the Supreme Court of Victoria. The trust deeds provided for the redemption of the debenture stock on certain conditions, which had been fulfilled. In 1895, when the debenture stock was issued, the pound had the same value in both Australia and England, but on January 1, 1948, on which date the plaintiff company intended to redeem the debenture stock, the value of the pound in Australia was less than the value of the pound in England. *Held* (*Latham*, C.J., and *Starke*, J., dissenting), That from the whole of the circumstances it appeared that the parties intended to contract by reference to the English pound, and, therefore, the company was required to pay a sum calculated by reference to the English pound in order to redeem the debenture stock. Decision of the Supreme Court of Victoria ([1948] V.L.R. 145) affirmed. *Goldsbrough Mort and Co., Ltd.* v. *Hall*, [1949] V.L.R. 308 (H.C. of A.).

CONFLICT OF LAWS.

Points in Practice. *99 Law Journal*, 621.

CONTROL OF PRICES.

Price Tribunal—Jurisdiction—Absence of Associate Members from Tribunal's Sittings—Associate Members not then appointed—Price Order valid—Control of Prices Act, 1947, ss. 3, 5, 6. The Price Tribunal has jurisdiction to make a Price Order, notwithstanding the fact that, at the times relevant to its being made, no associate member had been appointed in terms of s. 3 of the Control of Prices Act, 1947, as the words "shall "consist of" in s. 3, which must be read with ss. 5 and 6, are directory only, and not mandatory. *Tilbury and Lewis Pty., Ltd.* v. *Marzorini*, [1940] V.L.R. 245, applied.) (*The Queen* v. *Todmorden Overseers*, (1841) 1 Q.B. 185; 113 E.R. 1101, and *In re Davis*, (1947) 75 C.L.R. 409, referred to.) (*The King* v. *All Saints, Derby*, (1810) 13 East 143; 104 E.R. 323, distinguished.) *Semble*, Any defect in the constitution of the Price Tribunal when making a Price Order is cured by s. 6 (3) of the statute; so that, where at least two member (other than associate members) are present, the sitting is deemed to be one of a validly constituted body. *Jackson and Co., Ltd.* v. *Price Tribunal.* (S.C. Wellington. October 5, 1949. Hay, J.)

CONVEYANCING.

Costs: Scale or Detailed Charges. *93 Solicitors Journal*, 606.

Infant Settlements: Some Further Aspects. (Desmond C. Miller.) *13 Conveyancer and Property Lawyer*, 184.

Marriage Settlements: Provisions for Separation or Dissolution. *208 Law Times Jo.*, 160.

CRIMINAL LAW.

Autrefois Convict. *208 Law Times Jo.*, 158.

The Broom's Progress. (C. K. Allen.) *65 Law Quarterly Review*, 337.

DEATH DUTIES.

Points in Practice. *99 Law Journal*, 608.

DIVORCE AND MATRIMONIAL CAUSES.

Adultery and the Privilege against Self-crimination. (Zelman Cowan.) *65 Law Quarterly Review*, 373.

Practice Notes. *93 Solicitors Journal*, 508, 559.

ECONOMIC STABILIZATION.

Pelt Regulations, 1949, Amendment No. 1 (Serial No. 1949/173). Regulations 2 and 15 amended.

Sheep-skin Emergency Regulations Revocation Order, 1949 (Serial No. 1949/172). Regulations 5-13 revoked from November 17, 1949, and remainder from March 31, 1950.

LANDLORD AND TENANT.

Damages for Failure to Reinstate. *93 Solicitors Journal*, 493.

The Leaseholder and the Law of Restrictive Covenants. (A. K. R. Kiralfy.) *13 Conveyancer and Property Lawyer*, 173.

Service Tenancy and Service Occupancy. *99 Law Journal*, 564.

Sub-letting at an Inequitable Profit. (Ernest F. Byron.) *23 Australian Law Journal*, 353.

Tenant's Rights of Covenant made with Landlord's Predecessor. *93 Solicitors Journal*, 584.

LEGAL EDUCATION.

Utility and Elegance in Civil Law Studies. (Prof. H. F. Jolowicz.) *65 Law Quarterly Review*, 322.

LIFE INSURANCE.

Assignment and Mortgages of Policies of Life Insurance. (M. H. Allen.) *2 Australian Conveyancer and Solicitors Journal*, 134.

MONEY HAD AND RECEIVED.

Money had and Received—Payment under Protest—Threat to withhold that to which Party legally entitled—Whether Payment voluntary or compulsory—Whether recoverable. Where a person threatens to withhold something to which another party is legally entitled unless he is paid a price which he has no right to receive, and payment is made under protest, the money so paid is not paid voluntarily, and is recoverable on a count for money had and received. (*Donaldson* v. *Gray*, [1920] V.L.R. 379, distinguished.) *In re Hooper and Grass's Contract*, [1949] V.L.R. 269.

MOTOR-VEHICLES.

Motor-vehicles Registration and Licensing Regulations, 1949 (Serial No. 1949/170), revoking Motor-vehicles Registration Regulations, 1946.

MUNICIPAL CORPORATIONS.

Municipal Corporations Amending Regulations, 1949 (Serial No. 1949/174). Regulation 40 (2) revoked.

NEGLIGENCE.

Invitees and Unusual Dangers. *23 Australian Law Journal*, 580.

Risks Incident to Games and Entertainments. *208 Law Times Jo.*, 179.

POLICE OFFENCES.

Obstruction of Police Officer in Execution of His Duty—Police Entry into House to arrest Wanted Person suspected to be therein—Refusal of Admittance—Obstruction by Lie told to Police Officer to facilitate Escape of Suspected Criminal—Police Offences Act, 1927, s. 76—Justices of the Peace Act, 1927, ss. 266, 267, 268. A false answer to a constable's inquiries whether a suspected person was on the private premises, to the effect that he had not been there that day or night—when the fact was that he had left the premises five minutes previously to the constable's inquiry—amounts to obstruction of a Police officer in the execution of his duty. In New Zealand, the Police have no statutory authority, and no right at common law, to enter private premises forcibly in order to effect the arrest of a suspected offender upon a mere suspicion, however well based, that such person is upon the premises. Where a Police officer has a warrant, issued under ss. 266 and 267 of the Justices of the Peace Act, 1927, for the arrest of a person liable to arrest, he may enter and apprehend him if he is then on private premises, whether a dwellinghouse or otherwise. A constable entering upon private premises to execute a warrant of arrest of an individual is justified in insisting on remaining, and endeavouring to see for himself, after being asked to leave, only if the wanted individual be there. If, in fact, that person is not there, and the constable, against the will of the owner or occupier of the premises, persists in remaining, and endeavours forcibly to make a search, and is obstructed, that is not obstruction of a Police officer acting in the execution of his duty, for he has neither duty nor right to search the premises. (*Davis* v. *Lisle*, [1936] 2 K.B. 434; [1936] 2 All E.R. 213, applied.) (*Thomas* v. *Sawkins*, [1935] 2 K.B. 249, considered.) (*Rossiter* v. *Conway*, (1893) 58 J.P. 350, and *Ex parte Hendry, Re von Weissenfeld*, (1892) 36 Sol. Jo. 276, referred to.) The respondent constable went to the front door of the appellant's house, stated who he was, that he held a warrant for the arrest of one Land, and that he had reason to believe Land was in the house, and sought to enter the house. The warrant which the respondent was endeavouring to execute was one issued under ss. 266 and 267 of the Justices of the Peace Act, 1927, and was authority to apprehend the person charged. Section 268 enacts that it may be executed by apprehending the person against whom it is issued at any place. The appellant argued with the constable that the latter had no right to come in without a search warrant, but the constable asserted a right to enter to arrest a suspect, and stepped inside. There was a tussle, some vehement language was used by the appellant, and violent attempts were made to eject the constable and another constable who had arrived. A window was broken, and eventually the constable desisted and withdrew, with his clothes torn. His torch had been snatched from him and thrown outside. In the course of questioning, the appellant denied that Land had been in the house that night or that day, which was untrue as Land had left a few minutes before the constable's arrival. The appellant, who claimed that his conduct was justified, was convicted of wilfully obstructing a Police constable in the lawful execution of his duty: (1949) 6 M.C.D. 79. On appeal from the conviction, *Held*, 1. That the appellant, in seeking to prevent the Police constable from proceeding down the passage of the house, was not obstructing a Police officer while in the lawful execution of his duty. 2. That the answer of the appellant to the Police constable that the wanted man had not been in the house that night or that day was false and misleading, and amounted to obstruction. *Semble*, The appellant's having pushed, or attempted to push, one of the Police officers, who had actually left the house, down the steps of the veranda might well be obstruction. The appeal was dismissed, though not upon the ground upon which the learned Magistrate had based his decision. *Mathews* v. *Dwan*. (S.C. Auckland. October 12, 1949. Gresson, J.)

PRACTICE.

Ratio decidendi in Appellate Courts. *23 Australian Law Journal*, 355.

PROBATE AND ADMINISTRATION.

Points in Practice. *99 Law Journal*, 607.

PUBLIC AUTHORITIES.

Liability of Public Authorities as Occupiers of Dangerous Premises to Persons entering as of Right. (E. P. Wallace-Jones.) *65 Law Quarterly Review*, 367.

QUARANTINE.

Quarantine Regulations, 1921 (Reprint) (Serial No. 1949/176).

ROAD TRANSPORT.

Taxicab—Taxi-driver refusing to accept Hiring when on Duty and disengaged—Passenger alighting from Train and endeavouring to engage Taxicab for Himself and Two Other Passengers—Driver bound to accept Offer—Elements of Contract of Hiring Taxicab—Taxicab Regulations, 1939 (Serial No. 1939/218), First Schedule, cl. 4. A train-passenger arrived at the Auckland railway station, in company with two acquaintances. When the train pulled up at the station, he alighted from a carriage which was opposite a taxicab alongside the station platform, and said to the defendant taxi-driver: "I want you to drive three of us to the city." In reply, the taxi-driver said: "I won't accept an engagement until the other passengers and your luggage arrive." An argument ensued, but the taxi-driver maintained his refusal to accept the hiring of his taxicab. Another person arrived, engaged the taxi-driver's taxicab, and was driven off by him. On appeal from the dismissal of an information charging the respondent taxi-driver that he had failed, in breach of his licence, to accept a hiring of his taxicab at a time when on duty and disengaged, *Held*, allowing the appeal, 1. That, although the statement made by the hirer was made

informally, it was sufficiently clear to be an offer to hire the taxicab, and the respondent taxi-driver was required, by Condition 4 (1) of the "Special Conditions of Licence," set out in the First Schedule to the Taxicab Regulations, 1939, to accept it, the other conditions in Condition 4 being conditions subsequent. 2. That an offence was committed when the taxi-driver said to the hirer: "I won't accept an engagement until the other passengers and your luggage arrive." *Bland* v. *Parsons*. (S.C. Auckland. October 19, 1949. Smith, J.) (Revsg. *Ante*, p. 246.)

RULE AGAINST PERPETUITIES.

Rule against Perpetuities and Age of Marriage. (J. H. C. Morris.) *13 Conveyancer and Property Lawyer*, 289.

SALE OF GOODS.

The Passing of Property and Risk in Sale of Goods: A Comparative Study. (Prof. F. H. Lawson.) *65 Law Quarterly Review*, 352.

SETTLEMENT.

Marriage Settlement—Construction—Insurance Policies vested in Trustee to pay Income to Husband during Life and then to Wife for Life—Corpus to Children of Marriage as Parents or Survivor of them appointed—Parties divorced and Wife, on Remarriage, executing Surrender of Life Interest in Settled Property—Effect of Such Deed—Destination of Surrendered Life Interest—Wife's Power of Appointment remaining operative—One Child of Marriage—Death of Husband—Daughter's Interest under Settlement—"Surrender." There is no technical meaning attached to the term "surrender" as used in a deed, and it is an appropriate word to effect a transfer or assignment of a life interest in personalty, since no particular words are necessary to transfer or assign a cause in action. (*Re Drury Lowe's Marriage Settlement, Ex parte Sitwell*, (1888) 21 Q.B.D. 466, referred to.) A husband executed a deed of marriage settlement, whereby certain insurance policies were vested in a trustee upon trust to pay the income to the husband for life, and thereafter to his intended wife, and, after the death of the husband and the wife, the corpus was to go to children or issue of the marriage as the parents or the survivor of them might appoint, and, in default of appointment, to the child or children of the marriage who should attain the age of twenty-one years, or marry; and, if none, then to the husband. The husband and wife had issue of their marriage one daughter. They were divorced, and entered into a deed of settlement of permanent maintenance, whereby it was agreed that, if the wife remarried, she would surrender her life interest in the settled property. The wife remarried, and then executed a deed of surrender, the operative clause of which was as follows: "AND THIS DEED FURTHER WITNESSETH that in consideration of the premises and in pursuance of cl. 7 (*a*) of the said deed of settlement of permanent maintenance the said Dorothy Gollin Baron DOTH HEREBY SURRENDER unto the said Trevor Moss Davis and the trustee ALL THAT her life interest under cl. 10 of the said deed of marriage settlement in the proceeds of the life insurance policies referred to in such cl. 10." The husband died, and the question arose as to who was entitled to the benefit of the life interest of the wife, the subject of that deed. *Held*, 1. That the deed of surrender effected the transfer or assignment of a life interest in personalty to a settlor who had created out of his property that life interest, but still retained the beneficial reversionary interest in the property. 2. That the husband became entitled to the life interest of the wife, and that interest passed, under the will of the husband, as part of his estate. 3. That the wife's power of appointment remained operative by her, notwithstanding the divorce and the surrender of her life interest. Consequently, in the events that had happened, the estate of the husband was entitled to the income of the marriage settlement funds during the lifetime of the former wife, who had a power of appointment of the capital of the marriage settlement funds in the manner set out in the deed of marriage settlement. As no appointment had been made, the only child of the marriage, having attained the age of twenty-one years, had a vested interest in the whole capital of the marriage settlement funds, subject to the interest of the husband's estate, as above, and subject to being divested by the exercise of her mother's power of appointment. If the latter should exercise her power of appointment in favour of the child of the marriage, that child would have a vested interest in the whole capital of the marriage settlement funds, subject to the interest of the husband's estate therein. The vested interest of the child of the marriage is not an estate in possession, but its possession is postponed in any event to the death of the former wife. *In re Davis's Settlement Trusts*. (S.C. Auckland. October 31, 1949. Stanton, J.)

SOLICITORS.

Costs: Solicitor and Client and Other Bases. *93 Solicitors Journal*, 558, 581.

TENANCY.

Dwellinghouse—State Rental House—Covenant against Assignment—Tenant purporting to assign—State Advances Corporation giving Receipts in Tenant's Name for Payments of Rent by Assignee—Refusal of Consent to Assignment—Notice to Assignee to quit—Onus of Proof of Waiver by Corporation—No Unequivocal Act recognizing Assignee as Corporation's Tenant—No Waiver by Corporation. Clause 5 (*a*) of an agreement dated April 4, 1946, whereby the State Advances Corporation let a dwellinghouse to P. and his wife, provided: "The tenant shall not assign this tenancy either in whole or in part." Clause 10 (*a*) of the agreement provided as follows: "If at any time the rent is in arrear or if the conditions of the tenancy are not complied with to the satisfaction of the Corporation, the tenancy may be determined by the Corporation at any time by seven days' notice in writing." On May 5, 1948, P. executed what purported to be an assignment of his tenancy to S. (the appellant), and P.'s wife later signed a consent to the assignment. The appellant went into possession on May 6, 1948. On May 12, S. paid four weeks' rent to the Corporation, which stated that it had received from P. the rent to June 3. By letter of May 28, S.'s solicitors sent a copy of the assignment to the Corporation, and asked for its formal consent. The Corporation then knew that S. was in possession. On June 2, S. made another payment of rent, and received a similar receipt. On June 15, the Corporation wrote refusing its consent to the assignment, and saying that it would take action against the appellant as a person who had got into possession through an unauthorized dealing with a State rental property. On June 30, S. paid another instalment of rent, receiving a similar receipt as for rent to July 29, 1948. On July 9, the Corporation served on S. a notice requiring him to give up possession of the dwellinghouse at the end of the week of the tenancy next after the expiration of seven days from the service of the notice. At some later date, the Corporation repaid to P., and P. accepted, the amount of rent which had been paid for the period from July 9 to July 29. In the Magistrates' Court, an order was made against S. for possession. On appeal from that order, *Held*, dismissing the appeal, 1. That the appellant had not discharged the onus on him to show that the Corporation, with knowledge of the material facts, had done some unequivocal act or acts which recognized the appellant as its tenant, in lieu of the original tenant, or which recognized the appellant as assignee of the original tenant. (*Matthews* v. *Smallwood*, [1910] 1 Ch. 777, applied.) (*Fuller's Theatre and Vaudeville Co., Ltd.* v. *Rofe*, [1923] A.C. 435, referred to.) *Aliter*, If the receipts for rent had been given to the appellant as tenant. (*Mulcarry* v. *Eyres*, (1638) Cro. Car. 511; 79 E.R. 1041, and *Dowell* v. *Dew*, (1843) 12 L.J. Ch. 158, followed.) (*Purchase* v. *Lichfield Brewery Co.*, [1915] 1 K.B. 184, *The King* v. *Paulson*, [1921] 1 A.C. 271, and *Levy* v. *Kesry*, [1945] N.Z.L.R. 209, referred to.) 2. That, consequently, on the facts, the Corporation had not, by the receipt of rent with full knowledge of the purported assignment of the original tenancy, waived its right to determine the tenancy claimed by the appellant. *Strong* v. *Ball*. (S.C. Wellington. October 6, 1949. Smith, J.)

TOBACCO-GROWING.

Tobacco-growing Industry Regulations, 1945, Amendment No. 4 (Serial No. 1949/175). Regulations 25, 49, 51, 53, and 59 amended. Amendment No. 1, Reg. 4 (*e*), and Amendment No. 2, Reg. 3 (1) (*b*), revoked.

TRUSTS AND TRUSTEES.

Can a Trustee sell to His Wife? (J. G. Fleming.) *13 Conveyancer and Property Lawyer*, 248.

VENDOR AND PURCHASER.

Apportionment of Rates—Water Rate—Charge on Land—Adjustment at Settlement—Basis for Apportionment—Whether based on Period of Time or Amount of Water consumed—Transfer of Land Act, 1928 (No. 3791), Table A, cl. 10. A contract of sale of land incorporated as part thereof the provisions of cl. 10 of Table A of the Transfer of Land Act, 1928, which provides for the apportionment of outgoings between vendor and purchaser as from the date on which the purchaser became entitled to possession. The land was subject to an irrigation charge imposed by a by-law made under s. 66 of the Water Act, 1928. *Held*, That the effect of cl. 10 was that the amount of the charge should be apportioned on the basis of time and not on the basis of water consumed. *In re Hooper and Grass's Contract*, [1949] V.L.R. 269.

WAGES PROTECTION AND CONTRACTORS' LIENS.

Contractor—Subcontractor—Head Contract for Lump Sum—Abandonment of Contract by Head Contractor before Completion of Work—Moneys under it irrecoverable under Subcontracts for Supply of Materials—Wages Protection and Contractors' Liens Act, 1939, ss. 20, 21, 24, 26, 28, 31, 32—Statutes Amendment Act, 1940, s. 59. The Wages Protection and Contractors' Liens Act, 1939, creates no charge in favour of any worker or subcontractor except upon moneys actually payable to the contractor under the contract. Where, therefore, the contractor fails to complete the work: (*a*) If the contract is for a lump sum, there can be no charge at all in favour of any worker or subcontractor. (*b*) If the contract is for progress payments, the worker's or subcontractor's charge is limited to moneys not required to be retained under s. 32 (as amended by s. 59 of the Statutes Amendment Act, 1940). Moneys so retained are not payable until thirty-one days after the completion of the work; therefore, *ex hypothesi*, they never become payable; and, consequently, they never become chargeable. (*Taupo Totara Timber Co., Ltd.* v. *Smith and Egden*, (1910) 30 N.Z.L.R. 77, approved.) (*Waters* v. *Gunn*, (1910) 29 N.Z.L.R. 468, distinguished.) *So held*, by the Court of Appeal (*O'Leary*, C.J., *Northcroft* and *Stanton*, JJ., *Kennedy* and *Cornish*, JJ., dissenting), allowing an appeal by special leave from the judgment of *Christie*, J., reported [1949] N.Z.L.R. 60. *Stern and Another* v. *J. A. Redpath and Sons, Ltd.* (C.A. Wellington. August 4, 1949. O'Leary, C.J., Kennedy, Northcroft, Cornish, Stanton, JJ.)

WASTE.

The Strict Common-law Rules of Waste. (M. E. Bathurst.) *13 Conveyancer and Property Lawyer*, 278.

THE CO-OPERATIVE DAIRY COMPANIES ACT, 1949.

Some Far-reaching Departures from Company Law.

By E. C. ADAMS, LL.M.

Perhaps to the practising lawyer the most interesting piece of legislation passed by the Parliament which has just been dissolved during its last session is the Co-operative Dairy Companies Act, 1949. This novel statute demands careful study, not only by every student of company law, but also by every lawyer and accountant practising in a dairy district in New Zealand.

To the writer of this article, it is rather a pity that, from the very beginning, the dairy industry in New Zealand was based on *share capital* in a company. The true capital of a co-operative dairy company is its daily supply of dairy produce from its members. However, the position has so developed that to divorce the industry from share capital would now be impracticable; dairy companies have been registered under the Companies Acts since about 1871, and all that the Legislature can do now is to adapt the Companies Act, 1933, to the special problems of the dairy industry—and that is what the Legislature has endeavoured to do in the Co-operative Dairy Companies Act, 1949.

There have been two classes of shares in dairy companies—not separate classes from a legal point of view, but separate from a practical angle—*dry* shares and *wet* shares. Dry shares are the shares of those members who do not supply dairy produce to their company, or the excess shares of those members whose supply is less in proportion to their shareholding. Wet shares are the shares of those members who do supply to their company, and who, in accordance with the articles of association, take up the necessary shares. Every dairy farmer knows that the interests of the "drys" and the "wets" are naturally antagonistic; the dry shareholder would like the payment of the highest possible dividend, whereas the wet shareholder is concerned only with the highest pay-out for his butterfat, and, the greater the dividend, the less will be the final bonus for the wet shareholder. The dairy farmer will always call them "wets" and "drys," but the Law Draftsman, with more elegance of diction, calls them the *supplying* and *non-supplying* shareholders respectively, and they are described as such in the statute.

In February, 1948, the Government set up a representative Committee with the following order of reference:

(*a*) To inquire into the desirability of amending existing legislation in relation to dry shareholding in dairy companies.

(*b*) To ascertain the adequacy of existing articles of association to provide for immediate and future developments of the industry and, if necessary, to prepare a model set of articles of association for the industry.

Before summarizing the recommendations of the Committee, which sent in its report on January 31, 1949, it will be convenient at this stage to consider the legal position of a co-operative dairy company before the passing of the Co-operative Dairy Companies Act, 1949.

As pointed out by Smith, J., in *Eltham Co-operative Dairy Factory Co., Ltd.* v. *Johnson*, [1931] N.Z.L.R. 216, 262, it is frequently overlooked that a co-operative dairy company in New Zealand is but a company registered under the Companies Act, 1933. It has, however, certain additional powers if registered under Part III of the Dairy Industry Act, 1908, as it usually is. These advantages are summarized by Reed, J., in *Macdonald* v. *Normanby Co-operative Dairy Factory Co., Ltd.*, [1923] N.Z.L.R. 122, 139:

(i) It may buy its own shares from a shareholder by private treaty at any price *to be agreed upon* by the company and the shareholder.

(ii) It may *force* a surrender of its shares, but must pay par value therefor.

(iii) It may permit the transfer of shares on which calls are due and unpaid.

(iv) Certain restrictions upon directors as provided by ss. 147 and 148 of the Companies Act, 1933, do not apply.

Upon the advantages (i) and (ii) above, however (the voluntary and involuntary surrender of shares), a serious limitation was placed by s. 52 (1), which provided that the number of shares so surrendered to the company and not reissued should not at any time exceed one-fifth of the total number of shares issued by the company, exclusive of the said shares so surrendered and not reissued.

Some of the ordinary principles of company law, to which a co-operative dairy company is subject, have in the past proved most embarrassing and crippling. Principles which may be excellent for a trading company are not always suitable for a co-operative dairy company, where shareholding should (and usually is) based on the amount of butterfat a shareholder supplies, and where the continued loyalty of the shareholders one to another is necessary for the efficient functioning of the company and for its ability to compete success-

fully with its competitors, although, since zoning was introduced (first, I think, as a war measure), the element of competition is not so pronounced in certain districts as formerly.

One of these crippling provisions of company law is the limited right of the majority to alter the articles of association. Literally construed, s. 23 of the Companies Act, 1933, gives the majority the right to alter the articles, but this statutory provision has been whittled down somewhat by judicial interpretation, and is subject to the limitation imposed by s. 35 hereinafter mentioned.

The power of the majority to alter the articles must be exercised *bona fide* for the benefit of the company as a whole: *5 Halsbury's Laws of England*, 2nd Ed. 410. The articles, for instance, cannot be altered so as to increase the liability of a member to contribute to share capital: *Macdonald* v. *Normanby Co-operative Dairy Factory Co., Ltd.*, [1923] N.Z.L.R. 122, and *Johnson* v. *Eltham Co-operative Dairy Factory Co., Ltd.*, [1931] N.Z.L.R. 216; unless the member agrees in writing: s. 35 of the Companies Act, 1933.

Thus, also, under general company law, a company which has a compulsory-dividend clause in its articles cannot, by altering its articles, reduce or abolish the dividend. In *Geary* v. *Melrose Co-operative Dairy Co., Ltd.*, [1930] N.Z.L.R. 768, 773, the company had rescinded an article, whereby the "dry" shareholders were entitled to interest on their share capital, and substituted another, which purported to deprive the "dry" shareholders of interest. It was held that the substituted article was invalid.

Many a dairy company has failed in its attempt to make the articles do the work of contracts: *Shalfoon* v. *Cheddar Valley Co-operative Dairy Co., Ltd.*, [1924] N.Z.L.R. 561, and *Johnson* v. *Eltham Co-operative Dairy Factory Co., Ltd.*, [1931] N.Z.L.R. 216. Although a company has power to make contracts with its members in the same manner and to the same extent as it has power to make contracts with strangers, and although the terms of such contracts may be embodied in the articles, such contracts cannot be varied by an alteration to the articles, unless the member agrees to such alteration—*i.e.*, by voting for the alteration or otherwise assenting to it.

As pointed out by Smith, J., in *Otaraia Co-operative Dairy Co., Ltd.* v. *Flynn*, [1930] N.Z.L.R. 197, a contract to supply milk cannot be attached by articles of association to shares in a co-operative dairy company so that the contract will derive its force solely from the articles, although the articles may be evidence of a contract to be proved *aliunde*. Yet continuity of supply is necessary for the continued existence of a co-operative company, as pointed out, for instance, by Ostler, J., in *Johnson* v. *Eltham Co-operative Dairy Factory Co., Ltd.*, [1931] N.Z.L.R. 216, 221.

Articles of association of many dairy companies are unenforceable for another reason—*i.e.*, that they are in unreasonable restraint of trade within the meaning of the common law. I refer to articles purporting to compel a shareholder to supply *all* his dairy produce to his dairy company. A careful analysis of the legal position in this respect was made by Smith, J., in *Otaraia Co-operative Dairy Co., Ltd.* v. *Flynn*, [1930] N.Z.L.R. 197. His Honour held that the contract of supply was unenforceable as being in restraint of trade; it was so in respect of *time* and as to *space*. The Courts, for instance, will not enforce any contract which, if construed literally, would have the effect of holding the supplier in thraldom for life. Thus, also, a man owning cows, say, in Taranaki cannot be compelled to supply a factory in Martinborough (which is in the Wairarapa) with the milk from those cows.

With this background as to the legal position existing before the passing of the Co-operative Dairy Companies Act, 1949, we shall be in a better position to appreciate and understand the recommendations of the Committee.

After a very careful investigation of the conditions existing in the dairy industry, the Committee in due course made the following recommendations:

(*a*) DRY SHARES.

That the Dairy Industry Act, 1908, be amended to provide—

(1) That the holder of shares in a co-operative dairy company may demand resumption thereof, provided he has not supplied that company for a period of not less than five years prior to such demand.

(2) That a co-operative dairy company may demand the surrender of any of the shares of any of its members who have failed to supply the company with milk, cream, or butterfat for a continuous period of twelve months prior to such demand for surrender.

(3) That a co-operative dairy company may demand the surrender of any of the surplus shares of any member, such surplus shares being those shares not used by that member in respect of his maximum supply in any of the five years immediately prior to such demand.

(4) For the setting-up of a Tribunal of three persons, one to be nominated by the New Zealand Dairy Board, one by the Minister of Agriculture, and one by the Minister of Stamp Duties as being in charge of Part III of the Dairy Industry Act, 1908, for the purpose of—

(*a*) Authorizing co-operative dairy companies, if they think fit, to resume the shares of their members in excess of the limitations imposed by the present provision of the Act.

(*b*) Fixing a fair or just resumption value (not exceeding par) to be paid by any company on any resumption or surrender of shares in the event of the holder and company being unable to agree upon such value.

(*c*) Fixing the terms of payment by a co-operative dairy company of any amount it is required to find on any such surrender or resumption as above, provided that no payment shall be extended beyond ten years from date of application.

(5) For the purpose of arriving at a fair or just value of dairy shares the subject-matter of any such surrender or resumption, the above Tribunal shall take into consideration—

(*a*) The present-day worth of the shares, on the assumption that the company goes into ordinary liquidation.

(*b*) The value of the shares, on the assumption that the company continues as a going concern.

(*c*) The market value, if any, of the shares.

(*d*) The rates, if any, which have been paid by the company in the past on any resumptions it may have voluntarily made.

(*e*) The future prospects of the company, with particular reference to the continuance in the normal course of a satisfactory quantum of butterfat.

(*f*) The ability of the company to meet the cost of resumption and its effect on the remaining suppliers.

(*g*) Whether the applicant for resumption has been a disloyal supplier or whether the withdrawal of his supply was detrimental to the interests of the company.

(*h*) Any other matters whatsoever that the Tribunal considers have a bearing on the fair value of the shares.

(*i*) Whether, owing to the imminence of the failure of the company, any order should be made.

(6) Upon any order by such Tribunal as to resumption or surrender as above, the sums fixed by the Tribunal to be paid by the dairy company to the holders of the shares the subject-matter of the application to be deemed to be unsecured debts due by that company to those holders and to be immediately payable unless the Tribunal otherwise directs—the company's share register to be thereupon amended accordingly.

(7) Where any co-operative dairy company has issued shares to separate groups or sections of its suppliers, resumption or surrender of any shares issued in respect of any such group or section may, if the Tribunal thinks fit, be determined

in all respects as if such group or section were a separate and distinct co-operative dairy company.

(8) That the present provisions of the Act as to surrender or resumption of shares be retained so as to permit companies to continue the present system within the limitations therein set out.

(9) That, in order that the creditors of companies might be protected, all rights to demand surrender or resumption of shares within the provisions above set out shall be contingent upon the approval of the Tribunal to surrenders or resumptions in excess of the 20-per-cent. limitation at present imposed by the Act. The company to make immediate application for such consent, following upon an otherwise lawful demand by a shareholder for resumption. Upon failure by a company to take such action within two months of such a demand, the holder of the shares may make application direct to the Tribunal.

(*b*) ARTICLES OF ASSOCIATION.

That the Dairy Industry Act, 1908, be amended to provide—

(1) For the inclusion in a Schedule thereto of a table of articles of association in the form set out in [the report].

(2) That the only members of a co-operative dairy company who shall be entitled to vote at any meeting upon any show of hands or poll or ballot of the co-operative dairy company shall be the *bona fide* [supplying members or wet shareholders].

(3) That the articles of association of any co-operative dairy company may be altered or added to by special resolution—that is to say, by a three-fourths vote of that company. Any such alteration or addition is to be as valid as if originally contained in the articles and to be binding upon all members of the company, notwithstanding that there may be created or evidenced by the articles so altered or added to a contractual obligation as between that company and any of its members. Nothing herein, however, shall require any member of that company to underwrite at any time a greater share responsibility in respect of a similar supply of milk, cream, or butterfat to the company than his existing obligation—*i.e.*, the share standard when he joined the company—plus a 25-per-cent. increase thereon, and nothing herein shall vary any express contract (not created or evidenced by the articles) entered into between a company and any of its shareholders.

(4) That a co-operative dairy company shall be a company having firstly as its principal objects those now set out in section 48, and secondly having adopted articles of association in the form set out in the Schedule to the Act or to the like effect, subject to any subsequent variation therein authorized by the supplying members of that company.

(5) That if there should be any conflict as between the provisions of these articles and any existing memorandum of association, the articles in the form set out in [the report] shall prevail.

(6) That no company failing to so comply with this altered definition within, say, two years of the passing of this amendment shall be entitled to be regarded as being registered under Part III of the Act.

(*c*) UNTRACEABLE SHAREHOLDERS.

(1) That after due notice has been given companies be empowered to forfeit the share of untraceable shareholders for the benefit of the company.

The purpose of the Co-operative Dairy Companies Act, 1949, is to carry out these recommendations.

The First Schedule to the Act comprises a model set of articles for a co-operative dairy company; certain of these must be adopted if a company is to continue to enjoy the benefits of registration as a co-operative dairy company. Take, for instance, the following model articles, which are compulsory, and which deal with terms of supply, and shareholding by suppliers. I refer to Arts. 132 to 136, which read as follows:

Terms of Supply.

132. All dairy produce supplied to the company by any person shall, except as may otherwise be agreed upon in writing, be deemed to be supplied upon the terms set out in these articles.

Shareholding by Suppliers.

133. Subject to the provisions of the *last preceding* regulation, the supply by any person of dairy produce to the company shall in itself be deemed to be an irrevocable application by that person to become a member of and to accept such shares in the company as he shall be required to hold in accordance with these articles, and it shall be lawful for the directors, without any other application therefor, to allot immediately such number of shares as they think will be required by him on their estimate of the probable quantity of his supply of dairy produce, or the directors may in their discretion, defer the allotment of those shares until the quantity so supplied for the particular financial year is ascertained; and those persons shall be entitled to the allotment of shares accordingly: Provided that no person shall be so entitled to the allotment of shares should his supply or estimated supply of dairy produce be less than the equivalent of lb. of butterfat in the financial year in question or should he, in the opinion of the directors, be unlikely to become a supplying shareholder of the company.

134. Each person supplying dairy produce shall, in respect of the financial year of the company in which he is so supplying, be required to hold such number of shares as may from time to time be fixed by the directors, but being not more than one share for every lb. of butterfat obtained or obtainable from the dairy produce or, alternatively, for every gallons or lb. of milk supplied by him or which in the estimation of the directors he will supply during that financial year.

135. If on the last day of any financial year of the company it appears by the books of the company that any member has held a smaller number of shares in the company than is required to be held by him in terms of the *last preceding* regulation, it shall be lawful for the directors immediately to allot to him, without any application therefor by or on behalf of that member, such further number of shares as shall be required to bring the number of shares held by him up to the number required to be held by him in terms of these articles.

136. In lieu of allotting the full number or estimated number of shares required to be held by any member under regulations 133, 134, and 135 hereof, the directors may at any time and from time to time, until the member has been allotted the total number of shares which he is required to hold under those regulations, apply any amounts payable to that member under regulation 140 (1) hereof in the payment in full of such number of fully-paid shares as can be paid up in full out of those amounts, and may apply any remaining part of the said amounts in part-payment of another share in the company; and the directors shall allot the said fully paid shares and any such partly-paid share to the member accordingly.

It will be seen that model Art. 133 enables a company, should it so desire, to accept butterfat from a non-shareholder, thus meeting the case of the conscientious objector, whose religion will not permit him to become a shareholder in a profit-making company. It also enables a company to exclude from membership the very small supplier, who throughout the industry is called the "billy-canner."

Section 9 of the Act provides that no shareholder of a company which is registered under the Act who is not for the time being a *supplying* shareholder of the company shall be entitled to vote at any meeting of the company or on any postal ballot conducted by the company. In future, therefore, the control of a co-operative dairy company will be in the hands of the *wets*; the drys will have the right to be paid compensation for their shares, but only after they have been dry for five years. It would appear that, unless prevented by the operation of some zoning order, there will be nothing to prevent a shareholder from ceasing to supply his company and supplying another; but, if he does so, he will have to wait five years before the company which he has left can be compelled to pay him any compensation; in the meantime, he may decide again to send his butterfat to the company.

Section 7 provides that, where a company registered under the Act has adopted regulations in the form of any of the regulations in the model articles of association set out in the First Schedule to that Act, *the memorandum of association of the company shall be read subject*

to the provisions of the regulations so adopted. This is, indeed, a complete reversal of one of the leading principles of company law, for, as Ostler, J., said in *Best* v. *Newton King, Ltd.*, [1942] N.Z.L.R. 360, 362: "The memorandum is the charter of the company." It is, as was said by *Lord Sand* in *In re Scottish National Trust Co., Ltd.*, [1928] S.C. (Ct. of Sess.) 499, 502, "a peculiarly sacred document in the constitution of a company." Thus, the proviso to para. (*d*) of subclause 1 of model Art. 138 provides that nothing contained in that paragraph shall authorize the payment of any dividend on shares out of returns arising from or in relation to dairy produce supplied to the company.

It would appear, therefore, as if a co-operative dairy company may now liberate itself from the shackles of *Geary* v. *Melrose Co-operative Dairy Co., Ltd.* (*supra*), and so get rid of a compulsory-dividend article. As if to clinch the matter, s. 25 provides that, except where the Act expressly provides to the contrary, the foregoing provisions of the Act shall take effect notwithstanding anything contained in the Companies Act, 1933, or in any rule of law, or in the memorandum or articles of association of any company.

Again, s. 8 expressly provides that alterations of articles of association may, within prescribed limits, affect contracts contained in or evidenced by the articles. It reads as follows:

> Notwithstanding that the articles of association may constitute a contract or provide evidence of the terms of a contract between the company and the shareholders or any of them, any alteration or addition lawfully made in the articles of association of any company registered under this Act shall be as valid as if originally included therein, and shall be binding on all the members of the company, and every such contract shall be read subject to that alteration or addition:
>
> Provided that no such alteration or addition shall affect any contract between the company and any shareholder which is not created or evidenced by or in the terms of the articles of association, or impose on any shareholder who has not voted for the resolution to alter or add to the articles an obligation to hold shares in respect of his supply from time to time of milk, cream, or butterfat to the company which exceed by more than twenty-five per centum the number of shares which he would be obliged to hold in respect of a similar supply immediately before the passing of that resolution.

Finally it may be pointed out that the new Act establishes a special tribunal, to be known as the Co-operative Dairy Companies Tribunal, with the far-reaching functions as recommended by the Committee.

CHARITABLE TRUSTS IN SOCIAL SURVEY.

By BERTRAM B. BENAS.

It is not often that one finds legal problems discussed with historical perspective in any detail among the many matters considered in the numerous contemporary works relating to social science. However, in Lord Beveridge's *Voluntary Action: A Report on Methods of Social Advance*, a whole chapter is devoted to "Charitable Trusts," and in addition there is an Appendix entitled "Charitable Trusts: A Charities' Chamber of Horrors and Other Notes." The reader can be assured that the *ejusdem generis* rule of interpretation must not be applied to the title of the Appendix, but rather the clause in *Cotman* v. *Brougham*, [1918] A.C. 514, which, notwithstanding serious animadversions on its merits, coming from the highest level, still finds its way into the memoranda of association of countless limited companies.

That Lord Beveridge should survey a subject in the light of law is no surprise to those who recall his distinguished record at Oxford in legal studies and the fact that he is a member of the Bar.

The historical sketch of the background which forms the setting of the Statute of Elizabeth (43 Eliz., c. 4) contained in the above-mentioned chapter is graphic as well as masterly, and the footnotes, with the cases cited, relate the Statute to the application in nineteenth and twentieth century law. There follows a section on "The Doctrine of *Cy près*" historically illuminating and similarly annotated, with a brief but excellent note on the use of *Income Tax Special Purposes Commissioners* v. *Pemsel*, [1891] A.C. 531, in relation to the Statute.

While the learned author is fair in his recognition of some of the difficulties which beset the Judges in their interpretations of this branch of the law and of their methods of meeting them, there is no reference to the valuable work of the Attorney-General, who plays so important and, in practice, so helpful a part in the effective solution of so many of the problems.

On the other hand, one is bound to join issue, with great respect to Lord Beveridge, in regard to his statement in Appendix B (p. 374):

> The tendency shown by the Judges, both in the *Anti-Vivisection* case (*National Anti-Vivisection Society* v. *Inland Revenue Commissioners*, [1947] 2 All E.R. 217) and in *Re Compton*, [1945] 1 All E.R. 198, to narrow the definition of charitable purposes is clearly related in each case to the fact that with modern levels of taxation, the advantage given to any institution by regarding it as charitable and entitled to tax exemption is greater than in the past.

The whole nature of the judicial process as administered by the Judges of England is contrary to such tendencies, and it is believed that no sphere would give more cogent testimony to this fact than the Inland Revenue Commissioners. The bulk of charity cases comes on construction at the instance of personal representatives, and one might just as well say that, when a decision is against the charities, it betokened judicial tenderness towards next-of-kin or residuary legatees. The reports are living evidence to the contrary.

The note ends with a section entitled "A New Deal for Charitable Trusts," which sets out "a programme of reforms in regard to charitable trusts." The programme is full of interest, but manifestly incomplete, and does not attempt to grapple with the main problems which come before the Courts—namely, the definition of a charitable trust and the solution of the difficulties associated with the group of cases above cited. With the final sentence of the Second Section of Appendix B there will be general agreement:

> The law as well as the administration of charitable trusts calls for examination, with the possibility of suggesting a revision of the famous preamble to the Statute of Elizabeth.

This confirms the necessity expressed more than once. Lord Beveridge's book should have far-reaching effect in securing support from a wider range of readers than those devoted to the practice of the law for a legislative restatement now long overdue.

NEW ZEALAND LAW SOCIETY.

Meeting of Council.

A meeting of the Council of the New Zealand Law Society was held on Friday, September 9, 1949.

Apologies for absence were received from Messrs. W. E. Leicester and F. C. Spratt.

The President welcomed Mr. G. Currie, who had temporarily taken the office of President of the Wanganui Society. The President referred to the fact that Mr. Currie had been on the Council of the Wanganui Society since 1913, since which date he had held office either as President or as Honorary Secretary of the Society.

The President also welcomed Mr. W. J. King, who was attending the Council for the first time.

Dominion Legal Conference: Remits.—1. *The Conduct of Law Examinations.*

"This Conference recommends that the Council of the New Zealand Law Society take steps to ensure that effect be given to the views of the profession in regard to the New Zealand University Examinations in the subjects of the courses for LL.B., LL.M., and admission as barrister or solicitor."

It was resolved to refer this remit to the representatives of the Society who would be attending the forthcoming conference convened by the University to consider matters in connection with legal education.

2. *A Public Relations Organization.*

"That with the object generally of enhancing the prestige of the law and the profession it be a recommendation to the New Zealand Law Society that a sub-committee be appointed to investigate and report on Public Relations, the sub-committee's terms of reference to include the following:—

"(*a*) An investigation of public-relations systems in other parts of the British Commonwealth.

"(*b*) The question of bringing before the profession and the public important matters in which the New Zealand Law Society or its Standing Committees have taken action in the interest of the community.

"(*c*) General Press liaison and Press releases on questions involving fundamental principles of law and the administration of justice."

It was resolved that Messrs. I. H. Macarthur, G. C. Phillips, and A. T. Young be appointed a sub-committee for the above purposes.

Venue and Year of Next Conference.—It was resolved that Conferences continue to be held every two years, and that the next Conference be held at Dunedin in 1951.

Legal Education.—A letter was received from Canterbury supporting the action taken by the New Zealand Law Society concerning legal education.

The following letter was received from the University of New Zealand:

"Both the Senate and the Academic Board have approved the suggestion of the Council of Legal Education that a Conference be convened of the following to consider (*a*) control of legal education, and (*b*) examining in subjects of Divisions II and III of the LL.B. course:

"The Chairman of the Standing Committee of the Academic Board.

"The four Academic Heads of the constituent Colleges.

"The Deans of the Law Faculties.

"The representatives of the Law Society on the Council of Legal Education.

"The three representatives of the Council of the Law Society.

"The Chairman of the Academic Board is to be Chairman and convenor of the Conference.

"Will you please accept this as an invitation to nominate three representatives from the members of your Council.

"In order to be able to report to the October meeting of the Academic Board the Chairman proposes to call this meeting for 10 a.m. on September 21, 1949. The Conference will be held in Room 9, University House, Bowen Street, Wellington.

"Any expenses incurred by your representatives attending this conference will, of course, be met by the University of New Zealand. To cover hotel expenses the University allows a flat rate of £2 per day."

It was resolved that Messrs. P. B. Cooke, K.C., W. T. Churchward, and A. M. Cousins be appointed the three representatives of the Council of the Society at the forthcoming Conference, and that the President should have power to appoint a substitute if it was found that any of them were unable to attend.

Statute of Frauds.—The following letter was received from the Law Revision Committee:

"*Statute of Frauds, 1677, s. 4*; *Sale of Goods Act, 1908, s. 6*; *Judicature Act, 1908, s. 83*; *Share-milking Agreements Act, 1937, s. 7.*

"At its meeting yesterday, the Law Revision Committee had before it your letter of July 7, 1949, and the report which accompanied it.

"It was decided that no further action should be taken in the meantime with regard to the proposal to amend the first of the abovementioned provisions and to repeal the others."

Solicitors' Audit Regulations.—The following letter received from the Justice Department was also considered:

"When the Magistrates' Courts Rules, 1948 (Serial No. 1948/197), were prepared, it was not realized that r. 338 (2) was in conflict with Reg. 7 (8) and (9) of the Solicitors' Audit Regulations, 1938 (Serial No. 1938/37).

"The purpose of the Magistrates' Courts rule was to afford a further protection to solicitors to whom moneys are paid out of Court. Provision has been made that, where the Court posts cheques to solicitors, the special receipt provided for by Reg. 7 of the Solicitors' Audit Regulations shall be sent to the Court Office. In many cases, however, Law Trust moneys are uplifted over the counter at Court offices by solicitors' clerks. In these cases, the Court's Law Trust Pay-out receipt is signed by the clerk, but no corresponding voucher reaches the Court to evidence the fact that the moneys have been properly and punctually paid into the solicitor's trust account on the return of the clerk to his office. If r. 338 (2) remains, Registrars and Government Auditors will watch for the return of the solicitor's special receipt forms, and to this extent the chances of misappropriation will be considerably minimized.

"It is obvious that an amendment is required either to the rule or to the regulation, and I should be glad to know at your convenience which procedure the Society would prefer to have in operation."

The Joint Audit Committee reported as follows:

"That the Joint Audit Committee is of opinion that the present system which arises out of earlier deliberations is considered satisfactory and that r. 338 (2) of the Magistrates' Courts Rules should be amended to conform with Reg. 7 (8) (9) of the Solicitors' Audit Regulations, 1938."

The Council resolved to adopt the report and to inform the Justice Department accordingly.

Mortgagors and Lessees Rehabilitation Act, 1936.—The Conveyancing Committee reported as follows:

"The Conveyancing Committee do not support the suggestion of the Taranaki Society that s. 3 of the Land Transfer Amendment Act, 1939, authorizing the Registrar to note on the register the determination of extinguishment of easements and profits should be extended to authorize the Registrar to note on the register that a mortgage has been discharged.

"The Committee feels that any amendment of the existing law to cover the class of cases referred to in the Taranaki letter should be within the existing framework of the Land Transfer Act, which requires that a release of mortgage shall be executed. This can be done at the present time by the Court of Review which is authorized by s. 72 of the Mortgagors and Lessees Rehabilitation Act, 1936, to direct any person to execute any document necessary to effect the intention of the Court.

"The proposal to extend the powers of the Registrar under s. 3 of the Land Transfer Amendment Act, 1939, would throw on the Registrar the duty of interpreting the order of the Court of Review, and cases might easily arise in which he had doubt as to the intention of the Court and in which he would probably refuse to act.

"The same difficulties might arise as when it becomes necessary to apply to the Public Trustee to act under s. 117 and discharge a mortgage to a deceased or absent mortgagee. He will usually not act unless the mortgagor can produce every receipt for interest.

"The meaning of the orders of the Court of Review is not always clear as shown by s. 49 of the Statutes Amendment Act, 1939, giving power to the Court to make an order interpreting its order.

"The Committee considers that the Court of Review should be kept alive after December 31, 1949, by repealing s. 45 of the Statutes Amendment Act, 1947. The Committee are of opinion that cases requiring the assistance of the Court of Review not only in the release and variation of mortgages but also in the vesting of the fee simple of land in mortgagees are likely to occur for some years to come."

It was resolved that the report of the Conveyancing Committee be adopted and that a copy of it, together with a copy of the letter from the Taranaki Society, be sent to the Hon. the Attorney-General with a request that legislation be introduced to keep the Court of Review alive by repealing s. 45 of the Statutes Amendment Act, 1947.

Draft Orders in Supreme Court: Filing Fees.—The following letter was received from the Under-secretary of Justice:

"I have your letter of July 5 forwarding a copy of a letter dated June 10 from the Otago District Law Society.

"My view is that no fee is payable on a draft order submitted for the approval of the Court or Judge irrespective of whether the order is 'consented to,' 'approved,' or 'agreed to' and signed by counsel. Registrars of the Supreme Court have been advised of this ruling, with which the Audit Office concurs."

International Bar Association.—The President drew attention to the fact that the next Conference of the International Bar Association is to be held in London during the last week or weeks of July, 1950. He also read the following letter, dated August 26, 1949, from the Chairman of the Programme Committee:

"The Penal Law Committee intends to appoint a corresponding member in each country, and I would appreciate it if you would give the name of a man of the legal profession with experience in the field of international criminal law who would be willing to serve as correspondent of the International Penal Law Committee, if your country is not already represented on the working committee."

It was suggested that names of any suitable correspondents should be sent to the Standing Committee.

Property Law Act, 1908: Land Transfer Act, 1915; Rehabilitation Amendment Act, 1944, s. 17.—The following letter was received from the Secretary of the New Zealand Law Revision Committee:

"At its meeting yesterday, the Law Revision Committee, after considering your letter of July 5, resolved to take no further action in connection with the proposal to amend the general law so as to give a married minor capacity to contract in circumstances connected with the establishment of a home."

Retirement of Mr. B. L. Dallard as Under-secretary of Justice.—The President reported that representatives of the Society had joined with the Wellington Society on September 1 in holding an informal farewell to Mr. B. L. Dallard on his retirement as Under-secretary of Justice.

LEGAL LITERATURE.

Contract.

Joint Obligations, by Glanville L. Williams, LL.D. (Cantab.). London: Butterworth and Co. (Publishers), Ltd. Pp. 179 + Index. Price 27s. 6d., post free.

This work is described on the title page as being a treatise on joint and joint and several liability in contract, quasi-contract, and trusts in England, Ireland, and the common-law Dominions. It thus deals with a branch of the law which is constantly cropping up in practice but with regard to which there has been no modern monograph.

Professor Glanville Williams, in the preface to this new work, says:

"This book discusses a difficult and seriously defective part of the common law. Considering its practical importance, the subject of joint promises has received surprisingly little attention. Nothing is commoner than for a contractual promise to be made by more than one party; yet the rules relating to joint promises are accorded little space in the English text-books on contract, even where they are not entirely ignored. Partial expositions are to be found in works on partnership, bankruptcy, suretyship, negotiable instruments, executors, and procedure, but there is no modern monograph devoted to the subject as a whole. It is hoped that the present work will fill this gap."

The law as regards joint and several obligation is well covered. The work is divided into nine chapters, which in turn are divided into numbered paragraphs, making reference easy. The first chapter begins with the creation of joint and several contracts, successive chapters deal with joinder of parties, survivorship, procedure in an action, bankruptcy, extinction of the cause of action on joint and several contracts, and the right of contribution. There is a short chapter on co-trustees and co-executors. The work thus brings together in one slim volume the whole law on joint and several promises in connection with partnership, bankruptcy, suretyship, negotiable instruments, executors, and procedure law, which the practitioner has heretofore had to dig out of a number of text-books dealing with these different branches of the law. This work, therefore, does what few new legal works do to-day—it fills a real gap in the practitioner's library. It is a pity that the author has stayed his hand where he has, and limited his task to the law of contract; it would have been convenient if he could have dealt completely with the subject by extending it to include the law of torts.

PRACTICE: NONSUIT.

Defendant putting in Document in Cross-examination.

By W. V. GAZLEY.

In *Boracure (N.Z.), Ltd.* v. *Meads*, [1946] N.Z.L.R. 192, at p. 198, Sir Michael Myers, C.J., said :

> On the trial of this action the defendant (now appellant) at the close of the plaintiff's case moved for a nonsuit. Just exactly what was done is not plain from the learned trial Judge's notes, but it would appear that the application for nonsuit was argued, and I gather from the course that the case subsequently took that the application was provisionally overruled, with leave reserved to renew it later. According to the notes, counsel for the defendant said that he was calling no evidence. But in truth he had already adduced evidence in that he had placed before the plaintiff, cross-examined him upon, and put in, a document which the plaintiff had signed and upon which the defendant endeavoured to place some reliance. By so doing the defendant lost its right of . . . moving for a nonsuit. This seems to have entirely escaped the notice of counsel on both sides and also of the learned Judge.

Is it correct that a defendant who puts in a document in cross-examination of a plaintiff's witness loses his right to apply for a nonsuit ?

There would appear to be nothing in R. 272 of the Code of Civil Procedure to justify such a conclusion in respect of a Supreme Court claim. That Rule (*Stout and Sim's Supreme Court Practice*, 8th Ed. 220), so far as material, provides :

> The plaintiff in any action may, at any time before a verdict or judgment has been given, elect to be nonsuited, and the Court may nonsuit the plaintiff without his consent.

Nor did s. 105 of the former Magistrates' Courts Act, 1928, impose any such restriction in the case of proceedings in the Magistrates' Court, that section merely stating, so far as relevant :

> If at the time and place of hearing, or at any continuation or adjournment of the Court or action, the plaintiff appears but does not make proof of his demand, or of some part of it, to the satisfaction of the Court, the Court may nonsuit the plaintiff as to the whole or a part of his claim.

And now by the Magistrates' Courts Rules, 1948 (Serial No. 1948/197), made under the Magistrates' Courts Act, 1947, it is provided (by r. 204 (1)) simply that :

> Where the plaintiff appears but does not prove his claim to the satisfaction of the Court, the Magistrate may either nonsuit him, or give judgment for the defendant.

Further, if the learned Chief Justice's statement of the law be correct, it would mean that a nonsuit was wrongly granted in *Davis* v. *Caird*, [1948] N.Z.L.R. 837. In this case, the defendant undertook to procure for the plaintiff, a hotel licensee, ten cases of whisky at £18 per case and seven cases of rum at £15 per case, and the plaintiff gave the defendant £285 to cover the cost. The spirits were not supplied, and the defendant repaid to the plaintiff £85 and promised to pay the balance of £200, which he failed to do, and action was brought. The defendant's counsel, in cross-examining the plaintiff, put to him a letter which showed that the prices paid by the plaintiff to the defendant for the cases of whisky and rum were in excess of those permitted by Price Control legislation. Plaintiff admitted he was perfectly aware that he was paying a price exceeding that permitted. At the conclusion of the plaintiff's case, the defendant applied for a nonsuit, alleging that the transaction was illegal as being contrary either to the licensing law or to the Price Control legislation. In a reserved judgment, the learned Magistrate allowed the defendant's application, and the plaintiff was accordingly nonsuited. On appeal, the judgment of nonsuit was upheld.

However, it is respectfully suggested that the statement by the learned Chief Justice cannot be correct in view of the Privy Council decision of *Giblin* v. *McMullen*, (1868) L.R. 2 P.C. 317. Lord Chelmsford, delivering the judgment of the Judicial Committee, said, at p. 339 :

> " But the Judge having refused to nonsuit, the defendant thereupon went into his case and called witnesses, and having done so the counsel for the appellant contend that there being evidence on both sides the question could not be withdrawn from the jury, and that as the Judge could not have nonsuited at that stage of the trial it was not competent to the Supreme Court to give a judgment of nonsuit. *It is not, however, correct to say that the Judge could not have nonsuited the plaintiff after the defendant had entered upon his case*, as it was decided in the case of *Davis* v. *Hardy* ((1827) 6 B. & C. 225 ; 108 E.R. 436), that the evidence given by a defendant may be used for the purpose of a nonsuit." The italics are mine.

The writer is, of course, aware that in England in more recent times the judgment of nonsuit has been abolished, and, consequently, modern English practice cases are of no assistance.

A Point of Etiquette.—Younger members of the Wellington District Law Society are to be congratulated upon their initiative in commencing a series of informal lectures on the more practical aspects of professional work. Their idea is to encourage the older members to pass on the benefits of experience not readily found recorded in text-books. In the first of the series, held on November 20, 1949, the President spoke on " The Ethics and Etiquette of the Profession," and T. P. Cleary on " Preparing a Banco Case for Argument." There was a large audience present. The President gave a number of examples of what he considered would amount to breaches of etiquette, using that term as a species of conventional law in the Salmondian sense of " any rule or system of rules agreed upon by persons for the regulation of their conduct towards each other." These breaches are not always committed by the ill-informed. Henry Matthews, K.C., afterwards raised to the peerage as Viscount Llandaff, once, during consultation with his junior (later a distinguished Judge), was referred to a point with which he had not dealt. He denied peremptorily that it arose. " Excuse me," interposed the client, " but I think that point does crop up in the case." " Is that so ? " replied the irate K.C. " Then you find it ! " And he tossed the papers of his brief into the air, leaving them to flutter down over his client's head.—SCRIBLEX.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

New Zealand Appeals.—It is exactly a century since the first appeal from New Zealand, *The Queen* v. *Clarke*, went from the Supreme Court to the Privy Council, although it was not until 1851 that their Lordships, through the Rt. Hon. Dr. Lushington, advised the Sovereign that she should allow the appeal. In the interval, cases from this country have provided briefs for almost all the great figures at the English Bar—Haldane (in at least a dozen cases), Davey, Hannon, Warrington, Tomlin, Parmoor, Farwell, Asquith, Blanesburgh, Sumner, Phillimore, Stephen, Romer, Cozens-Hardy, Boyd Merriman, Cockburn, Isaacs, Simon, and Wilfrid Greene. Standing in lone splendour as an exception is Lord Birkenhead, who never lent the familiar F. E. Smith name or personality to any of our causes. Of the three New Zealand members of the Judicial Committee, neither Stout nor Williams ever appeared before it, but Myers still holds a record that will be hard to beat—five successful appearances in 1926. He is the only member of the New Zealand Bar to have appeared before the Privy Council and later to have become a member of it.

Custody Applications.—Before the passing of the Statutes Amendment Act, 1949, the only procedure for the custody of children was by way of application for a writ of *habeas corpus*, a process described by the Law Draftsman as lengthy, complicated, and expensive, and often, by reason of delay, leading to evasion by the person having possession of the children. Section 20 (1) now provides (in cases not falling under the Divorce and Matrimonial Causes Act, 1928, or the Destitute Persons Act, 1910) a simple procedure for obtaining a Court order, and provisions for its enforcement by a constable or Child Welfare Officer; and, under subs. 2, fathers are given the same rights as those given to mothers to make application for custody under s. 6 of the Infants Act, 1908, the effect being that the Magistrates' Courts can now deal with applications by either party. The history of this substantial and beneficial alteration of the law is of interest as showing the liaison between District Law Societies and the Legislature. The question was raised some two or three years ago by the Hamilton District Law Society in a temperate and well-reasoned commentary upon the existing position. The matter then went to the New Zealand Law Society, and from there to the Law Revision Committee, whose suggestions went back to the New Zealand Law Society for settlement and approval. Work of this kind, faithfully performed by zealous practitioners, is not always fully recognized by the public at large.

Golden Silence.—A Magisterial contributor is good enough to refer to an article by Professor R. M. Jackson in the *Modern Law Review*, in which the author says:

> Snmmary jurisdiction is irritating work. In fact one of the weak points of paid Magistrates is that few men have the ability to remain good-tempered and patient when they take courts day after day. The sheer boredom of much of the work sooner or later produces foolish remarks and if the particular Magistrate is not on good terms with the Press his momentary lapse gets much publicity. . . . The Stipendiary will go on being a Stipendiary until he retires or dies and any attempt to step up his work is fatal to its quality.

With respect, Scriblex differs from these views, and they are not borne out by the cases of Frazer, J., and Page, J., who both went from the magistracy to the Court of Arbitration, and did excellent work there. The former was naturally unruffled and urbane, while the latter made no secret of what he called "his judicial card"—a slip he kept before him, and upon which were written the words: "Don't talk!" "Whom the disease of talking once possesseth," observed Ben Jonson, "he can never hold his peace." And there is that character of Charles Eliot's whose "loquacity, like an over-full bottle, could never pour forth in small doses." Irritating and boring as judicial work can be, and so often is, the fact remains that it is the over-talkative who mostly get into trouble.

Shavian Note.—*Shakes* v. *Shav* is not the latest addition to the All England Law Reports, but the name of the latest play of George Bernard Shaw. In it he refers to Adam Lindsay Gordon, the famous Australian poet, and invites us to hear his "mighty lines":

> "*The beetle booms adown the glooms*
> *And bumps among the clumps.*"

The great merit of the play is that it is his shortest, taking up three pages only—about one-tenth of his usual prefaces. Is any further finding required?

Driving Note.—Scriblex passes on the story of the man, wearing a hearing aid, who recently engaged a taxi. The driver displayed considerable interest in the gadget. "Are those things any good?" he inquired. The passenger declared that he would be lost without it. "It must be rotten to be hard of hearing," said the driver sympathetically. "Oh, well," he added with a touch of philosophy, "nearly all of us have got something wrong, one way or the other. Take me, for instance; I can hardly see."

Here and There.—"I find the words of a South Australian Judge appropriate to such conditions on a busy road: 'A motor-driver must keep a lookout commensurate with his speed and not act on the idea everyone for himself and Providence for us all (as the elephant said when he danced among the chickens)'": Stanley, J., in *Smith* v. *Pike*, [1949] St.R.Qd. 132, 139.

"I hold that the declaration as to paternity made by the wife when registering the child's birth is not admissible in evidence and cannot be used as an admission of adultery in this suit. If I am wrong in this view it would be necessary to consider whether the Court should grant a decree solely on the admission of the wife with no corroboration of any kind. Before acting on an admission the Court would require to be satisfied of its truth": Judge Done (sitting as a Commissioner in Divorce) in *Perring* v. *Perring and Simpson*, (1949) 113 J.P. 417.

"I am prepared, in suitable cases, to sanction the payment of rewards for information which, on investigation, proves to be of value in detecting or preventing evasions of the Act [Exchange Control Act, 1947]": The Chancellor of the Exchequer, in answer to a question in the House of Commons on October 31, 1949.

PRACTICAL POINTS.

This service is available free to all paid annual subscribers, but the number of questions accepted for reply from subscribers during each subscription year must necessarily be limited, such limit being entirely within the Publishers' discretion. Questions should be as brief as the circumstances will allow; the reply will be in similar form. The questions should be typewritten, and sent in duplicate, the name and address of the subscriber being stated, and a stamped addressed envelope enclosed for reply. They should be addressed to: "THE NEW ZEALAND LAW JOURNAL" (Practical Points), P.O. Box 472, Wellington.

1. Incorporated Societies.—*Amendment to Rules—Notice of Motion—Amendment at Meeting of Members—Whether permissible.*

QUESTION: A notice of motion has been given to amend one of the rules of an association incorporated under the Incorporated Societies Act, 1908. The rules of the association require twenty-one clear days' notice to be given of any proposed amendment to the rules. The notice of motion is in order, and has been duly circulated to members of the association in the notice convening the meeting at which it is to be moved, and no notice of any proposed amendment has been received.

Can the wording of the motion of which notice has been duly given be amended at the meeting, or must it be carried or rejected without amendment in the exact form set out in the notice, and as moved pursuant thereto?

ANSWER: The provisions of the Incorporated Societies Act, 1908, are rather sketchy, but, as neither the Act nor the rules of the particular society concerned require a second confirmatory meeting, it would seem, by analogy with company law, that no amendment is permissible if members have not received due notice of it: *Re Teede and Bishop, Ltd.*, (1901) 84 L.T. 561, and *Wall* v. *London and Northern Assets Corporation*, [1898] 2 Ch. 469.

If any amendment is permitted, how can it be said that every member of the society has had an opportunity of determining whether or not it is in his interest to attend the meeting?

Therefore, it would appear as if the meeting's power is restricted to saying "Aye" or "Nay" to the proposed resolution of which members have received due notice. In other words, the *ipsissima verba* of the proposed resolution must be adhered to.

X. 2.

3. Statute.—*New Remedies given by Legislation coming into force between Date of Hearing and Delivery of Judgment—"Pending or in progress"—Court's Power to give Effect to Such Remedies—Tenancy Act, 1948, s. 54 (5).*

QUESTION: Can you refer us to the authorities as to the effect of legislation coming into force between the date of hearing of a case and delivery of judgment? Our query is based on s. 54 (5) of the Tenancy Act, 1948, and can be shortly stated as follows: Do the words "and pending or in progress" allow judgment to be given under the Tenancy Act, 1948, where the hearing is before, but judgment after, the commencement of that Act?

ANSWER: Apart from *Humphreys Furniture Warehouse, Ltd.* v. *Cuthbert*, [1949] N.Z.L.R. 913, and *Jewellers' Chambers, Ltd.* v. *Red Seal Coffee House, Ltd.*, [1949] N.Z.L.R. 204, no case has been traced where the question of giving effect to legislation coming into force between the date of hearing and that of delivery of judgment has specifically arisen. However, it is submitted that the principle laid down in *Quilter* v. *Mapleson*, (1882) 9 Q.B.D. 672 (*31 Halsbury's Laws of England*, 2nd Ed. 515 (*u*)) (that an appellate Court is able, and bound, to give effect to new remedies introduced by an enactment passed after the judgment appealed from was made by the Court of first instance, and having a retrospective operation), would apply also to enable the Court of first instance to give effect to such remedies where they come into operation after the date of hearing but before the date of delivery of judgment of that Court. As to the Court's inherent powers to withdraw its order before the judgment or order being entered or drawn up, so that the decision may be reconsidered, see *19 Halsbury's Laws of England*, 2nd Ed. 261, para. 560; and as to the interpretation of the expressions "pending" and "cause . . . pending," see *Words and Phrases Judicially Defined*, Vol. 4, 205, and Vol. 1, 405.

U.2.

POSTSCRIPT.

The Elusive Quotation

"A long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done":—*R.* v. *Sussex Justices*, [1924] 1 K.B. 256, 259, per Lord Hewart, L.C.J.

The Application of American Decisions

"Decisions of the United States Courts, even the Supreme Court, are not of coercive, but only of persuasive, force on the Courts of this country. It is certainly desirable that, so far as possible, there should be uniformity between the law merchant as administered in the United States and in Britain. The origin and foundation of the law in both countries are the same, but as time goes on and cases arise individual differences emerge and accumulate. Even the general principles of the law of carriage by sea do not receive identical expression or development in the Courts of the two countries. That same phenomenon may be observed even in comparing the laws of the different States and the Federal Courts. Instances must be familiar to lawyers. There is a further difficulty in that the British lawyer cannot be familiar with the American decisions. He has not access to the reports, and, indeed, the American reports have reached such dimensions that they are quite beyond the capacity of a British lawyer. Even the American lawyer has to avail himself of the extraordinarily efficient and comprehensive system of indexing and reference which has been developed. This is quite beyond the reach of the British lawyer. It is the great development of case law on the other side of the Atlantic, coupled with a similar though lesser development on this side, which has discouraged the practice, at best rare, followed up to the middle decades of last century by British Judges to cite American cases. I am not disparaging or discouraging the fullest possible interchange and reciprocity between American and British lawyers, but I cannot help recognizing how difficult, and, perhaps, dangerous, it may be to ask a British Judge to rely on a particular United States decision torn from its setting in the totality of United States case law and statutes, simply because of some partial similarity in the facts":—Lord Wright in *Monarch Steamship Co., Ltd.* v. *A/B Karlshamns Oljefabriker*, [1949] 1 All E.R. 1, 18.