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POWERS OF ATTORNEY: EXECUTION IN NEW ZEALAND AND OVERSEAS.

FROM time to time we have been asked by practitioners to bring together in one place the various provisions in our statute law regarding the execution of powers of attorney, and, in particular, the execution and verification outside New Zealand of powers of attorney for use in this Dominion.

In this, the last issue of the current year, it may be convenient to place on record, for future reference, the statutory provisions referred to and such case law thereon as is available.

I. GENERAL.

The law of England, in respect of powers of attorney, is generally applicable to New Zealand. The verification of the execution of a power of attorney executed out of New Zealand, for use in that Dominion, must, however, comply with New Zealand law.

The special provisions of New Zealand law in relation to powers of attorney, as contained in Part XI of the Property Law Act, 1908, are as follow:

General Power.

Section 100 (1) of the Property Law Act, 1908, provides that powers of attorney (whether executed in New Zealand or elsewhere) continue in force until notice of death or revocation. The subsection is as follows:

> (1) Where a power of attorney (whether executed in or out of New Zealand, and whether executed before or after the coming into operation of this Act) does not contain a declaration that such power shall continue in force only until the death of the person who executed the same or until other revocation thereof, such power shall, so far as concerns any contract entered into *bona fide*, and any deed or instrument *bona fide* made or signed thereunder, operate and continue in force until notice of such death or revocation has been received by the attorney named in the power.

Irrevocable Power for Value.

Section 101, which deals with an irrevocable power of attorney for value, is as follows:

> (1) Where a power of attorney given for valuable consideration (whether executed in or out of New Zealand) is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser:—
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> (*a*) The power shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor; and
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> (*b*) Any act done at any time by the donee of the power in pursuance of the power shall be as valid as if anything done by the donor without the concurrence of the donee, or the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor, had not been done or had not happened; and
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> (*c*) Neither the donee of the power nor the purchaser shall at any time be prejudicially affected by notice of anything done by the donor without the concurrence of the donee, or of the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor.
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> (2) This section applies only to powers of attorney created by instruments executed on or after the date mentioned in section fourteen hereof [January 1, 1906].

Power of Attorney for Fixed Time.

Section 102, which treats of a power of attorney made irrevocable for a fixed time, is as follows:

> (1) Where a power of attorney (whether executed in or out of New Zealand, and whether given for valuable consideration or not) is in the instrument creating the power expressed to be irrevocable for a fixed time therein specified, not exceeding one year from the date of the instrument, then, in favour of a purchaser:
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> (*a*) The power shall not be revoked for and during that fixed time, either by anything done by the donor of the power without the concurrence of the donee, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor; and
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> (*b*) Any act done within that fixed time by the donee of the power in pursuance of the power shall be as valid as if anything done by the donor without the concurrence of the donee, or the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor had not been done or had not happened; and
>
> (*c*) Neither the donee of the power nor the purchaser shall at any time be prejudicially affected by notice, either during or after that fixed time, of anything done by the donor during that fixed time without the concurrence of the donee, or of the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor within that fixed time.
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> (2) This section applies only to powers of attorney created by instruments executed on or after the date mentioned in section fourteen hereof [January 1, 1906].

A corporation does not come within the operation of this section. A company must on dissolution be considered as having ceased to exist for any purpose, and, in the absence of special statutory provision, an attorney cannot be an agent of something that does not exist: *Wellington Steam Ferry Co., Ltd.* v. *Wellington Deposit, Mortgage, and Building Association, Ltd.*, (1915) 34 N.Z.L.R. 913, where the plaintiff company (in liquidation) and its liquidator claimed to be interested in a power of attorney given by that company

to the defendant company, a purchaser for valuable consideration, and expressed to be irrevocable. It asked, by way of originating summons, whether, if its affairs were completely wound up, such dissolution would affect the powers conferred by the power of attorney on the defendant company to convey certain land to the purchasers named in it. It was held by Sir Robert Stout, C.J., that the words of s. 101 clearly showed that a corporation did not come within its operation, as the words were not sufficient to provide for what was desired—namely, that, in the name of the plaintiff company, the defendant company could execute a deed of conveyance or a transfer under the Land Transfer Act, 1915. The effect of this judgment was made statutory by s. 42 (3) of the Companies Act, 1933, which is set out below.

Companies.

The above-mentioned provisions apply, with the necessary modifications, to companies, as if the company were a person and the commencement of the winding-up were the death of the individual. This applies alike to companies registered in New Zealand under the Companies Act, 1933, and to companies incorporated outside New Zealand. Section 42 of that statute is as follows:

> (1) A company may, by writing under its common seal, empower any person, either generally or in respect of any specified matters, as its attorney, to execute instruments on its behalf in any place in or beyond New Zealand.
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> (2) An instrument executed by such an attorney on behalf of the company shall bind the company, and if executed as a deed shall have the same effect as if it were under the common seal of the company.
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> (3) The provisions of Part XI of the Property Law Act, 1908, shall, with the necessary modifications, apply with respect to any power of attorney executed by a company to the same extent as if the company were a person and as if the commencement of the winding-up of the company were the death of a person within the meaning of the said Part XI.

Section 333, after declaring that a company incorporated outside New Zealand has the same power to hold lands as if it were a company incorporated in New Zealand, goes on to provide as follows:

> (2) The provisions of Part XI of the Property Law Act, 1908, shall, with the necessary modifications, apply with respect to any power of attorney executed by a company to which this Part of this Act applies to the same extent as if the company were a person and as if the commencement of the winding-up of the company were the death of a person within the meaning of the said Part XI.

Executors and Administrators.

An executor or administrator of a will to be proved in New Zealand may appoint an attorney in New Zealand to whom letters of administration may be granted: Code of Civil Procedure, R. 531E, which is as follows:

> In the case of a person residing out of New Zealand administration or administration with the will annexed may be granted to his attorney acting under a power of attorney.

The practice in England is that, in the case of a person actually residing out of England, letters of administration may be granted to a person acting under a power of attorney: *In the Goods of Barker*, [1891] P. 251. Thus, in *Re Hutton*, [1916] G.L.R. 654, the facts were that a testatrix died, appointing by her will two executors both of whom were resident out of the jurisdiction, one residing in England and not returning to New Zealand for a year, and the other residing permanently in New South Wales. One of the executors had given a very full power of attorney to the applicant for letters of administration with will and codicil annexed, but it did not contain a power to apply for probate or letters of administration. Denniston, J., granted a motion for letters of administration with will annexed to the attorney, following the practice of the Probate, Divorce, and Admiralty Division of the High Court of Justice in England.

In *In the Estate of Tancred*, (1913) 32 N.Z.L.R. 991, 993, Denniston, J., said that the only person to whom an administrator, who is appointed upon an application made by him as the attorney for an executor or administrator absent from New Zealand, is liable to account is the executor or administrator whose attorney he was, or any person who, after his appointment as such attorney, is appointed executor or administrator of the same estate.

In *In re Wallen*, [1926] N.Z.L.R. 729, a judgment of Sir Charles Skerrett, C.J., which was submitted to and approved by Sim, Stringer, Reed, MacGregor, and Ostler, JJ., it was held that probate may legally be granted to the executrix named in a will, even though, at the date of the testator's death and the date of the application, she was resident out of the jurisdiction, or, at her option, to an attorney appointed by her to take the grant. The learned Chief Justice agreed that Mr. Justice Cooper's statement of the law in *In re Masters*, (1914) 33 N.Z.L.R. 1439, was correct.

Trustees.

As to the delegation of powers by trustees not resident in New Zealand, s. 103 of the Trustee Act, 1908, provides:

> Any trustee of real or personal property in New Zealand who for the time being is residing out of New Zealand, whether appointed by order of any Court, or by deed, will, letters of administration, or otherwise howsoever, and whether the order or instrument creating the trust or appointing the trustee is made or executed out of New Zealand or not, may, if not expressly prohibited by the instrument creating the trust, delegate by deed to any person residing in New Zealand all or any of the powers, authorities, and discretions vested in such trustee, so far as such powers, authorities, and discretions affect or are capable of being exercised over the trust estate in New Zealand.

The validity of deeds and acts under powers delegated by trustees is assured by s. 105 of the same Act, which is as follows:

> Every deed, act, matter, or thing done or executed by any person under such delegated powers, authorities, and discretions shall be as valid and effectual as if the same had been done or executed by the person who executed the deed by which such powers, authorities, and discretions were delegated.

Public Trustee.

The Public Trustee, Head Office, Wellington, may act as agent for the purpose of resealing in New Zealand any grant of probate or letters of administration granted outside New Zealand: Public Trust Office Amendment Act, 1921-22, s. 105.

The Public Trustee may also act as attorney for any person resident outside New Zealand desiring to appoint an agent in New Zealand: Public Trust Office Act, 1908, s. 12.

Maoris outside New Zealand.

A Maori, within the definition given in s. 2 of the Maori Land Act, 1931, who is outside New Zealand at the time of the execution of an instrument of aliena-

tion of land by Maoris, may execute such instrument by a European attorney in the ordinary manner, the power of attorney being executed and verified in the same manner as if it had been executed by a European: Maori Land Act, 1931, s. 269.

II. Powers of Attorney to Deal with Land.

As, for all practical purposes, all the land in New Zealand is now under the Land Transfer Act, 1915, the provisions of that statute must be complied with where a power is given to deal with land, mortgages, leases, &c. Sealing is unnecessary (s. 162). Section 159 provides as follows:

> The registered proprietor of land under this Act, or any person claiming any estate or interest under this Act, may by power of attorney in the form numbered (1) in the Third Schedule hereto or in any usual form, and either in general terms or specially, authorize and appoint any person on his behalf to execute transfers or other dealings therewith, or to make any application to the Registrar or to any Court or Judge in relation thereto.

Where a power of attorney gives general powers, the usual form will suffice, as provision is made in s. 160 for such a power of attorney, or a copy verified to the Land Registrar's satisfaction, to be deposited in the Land Transfer Office, because registration of the power of attorney is not necessary.

If, however, a special power of attorney is given to effect a particular dealing in land, Form No. (1) in the Third Schedule to the Land Transfer Act, 1915, may be used, though its use in New Zealand is infrequent.

Subject to the foregoing provisions, the sections of the Property Law Act, 1908, as above set out, apply to powers of attorney for use under the Land Transfer Act, 1915.

III. Execution of Powers of Attorney.

Sealing is not essential to the proper execution of a power of attorney for use in New Zealand. The requirements of New Zealand law as to execution are set out in s. 26 of the Property Law Act, 1908, which is as follows:

> (1) Every deed, whether or not affecting property, shall be signed by the party to be bound thereby, and shall also be attested by at least one witness, and, if the deed is executed in New Zealand, such witness shall add to his signature his place of abode and calling or description, but no particular form of words shall be requisite for the attestation.
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> (2) Except where the party to be bound by a deed is a corporation, sealing is not necessary.
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> (3) Formal delivery and indenting is not necessary in any case.
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> (4) Every deed executed as required by this section shall be binding on the party purported to be bound thereby.
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> (5) Every deed, including a deed of appointment, executed before the coming into operation of this Act, which is attested in the manner required or authorized by any enactment providing for the execution and attestation of deeds in force at the time of such execution, or at any time subsequent thereto, shall be deemed to be and to have been as valid and effectual as if it had been attested as required by this section.

In *Domb* v. *Owler*, [1924] N.Z.L.R. 532, 537, Salmond, J., said that s. 26 means that

> signature and attestation have been substituted for sealing and delivery as the essential attributes of a deed, and that everything which, but for this enactment, might have been done by an instrument sealed and delivered may now be done with equal validity and effect by an instrument signed and attested. It is not necessary that such an instrument so signed and attested should describe itself as a deed, any more than this was necessary at common law in the case of an instrument sealed and delivered. On the other hand, every instrument which is so signed and attested is not necessarily a deed, any more than every instrument under seal was necessarily a deed at common law. A testamentary instrument, though signed and attested, is not a deed under the Property Law Act, any more than a will sealed by the testator was his deed before that Act.

IV. Verification of Execution.

If a power of attorney is executed out of New Zealand for use in New Zealand, the signature of the witness or witnesses must be verified in accordance with New Zealand law if it is to be admissible in evidence in a New Zealand Court, or if it is to be used for purposes of the registration of dealings in relation to land. Section 119 of the Property Law Act, 1908, and s. 176 of the Land Transfer Act, 1915 (dealing with land under that statute), are in identical terms. Each is as follows:

> (1) Every instrument of any kind heretofore or hereafter duly executed out of New Zealand shall, so far as regards the execution thereof, be admissible in evidence in any Court of justice in New Zealand, and before any officer or person having by law or consent of parties authority to hear, receive, and examine evidence in New Zealand, if such execution is verified in any of the following ways, that is to say:
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> (*a*) Where the instrument is executed in any part of the British dominions other than New Zealand, then either—
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> (i) In accordance with the provisions in that behalf of the Imperial Act now known by the Short Title of the Statutory Declarations Act, 1835; or
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> (ii) In accordance with the law in force in that part of the British dominions where the verification takes place as to verifying the execution of instruments to be used abroad:
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> (*b*) Where the instrument is executed in any foreign country, then if it purports to have been executed before a British Minister or Consul exercising his functions in that country, and to be sealed with his seal of office (if any), or if there is indorsed thereon or annexed thereto a declaration of the due execution thereof purporting to be made by an attesting witness thereto before any such Minister or Consul as aforesaid, and to be sealed as aforesaid.
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> (2) It shall be presumed that any seal or signature impressed, affixed, appended, or subscribed on or to any document tendered in evidence under this section is genuine, and that the person appearing to have signed or attested any such document had in fact authority to sign or attest the same, and that any such document was in fact made in accordance with the law under which it purports to have been made, unless the party objecting to the admission of the document proves the contrary.
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> (3) In this section—
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> "Consul" includes a Consul-General, Consul, Vice-Consul, Acting-Consul, Pro-Consul, and Consular Agent;
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> "Minister" includes an Ambassador, Envoy, Minister, *Chargé d'Affaires*, and Secretary of Embassy or Legation.

Where a power of attorney is executed in terms of s. 176 (1) (*a*) (ii), it is a great convenience to a New Zealand practitioner if the overseas agent attaches a note setting out the law relating to the verification of instruments in the part of the British dominions in which it is executed.

Ireland and India: Although the Republic of Ireland has ceased to be part of His Majesty's Dominions, and India has become a republic while remaining a member of the Commonwealth, neither (so far as the operation of New Zealand law is concerned) is a "foreign country" for the purposes of subs. 1 (*b*) of the above-mentioned section: see the Republic of Ireland Act, 1950, and the Republic of India Act, 1950. (Both of these statutes are in force in the South Pacific territories of Cook Islands, Tokelau Islands, and Western Samoa.)

Western Samoa: The verification of documents in Western Samoa is in a peculiar position. That territory is not a "part of the British dominions" for the purposes of subs. 1 (*a*), and it is not a "foreign country" for the purposes of subs. 1 (*b*). In its regard, for the matter under consideration, the law is silent. In practice, as has been learnt from the Land Transfer Office, documents signed before the Chief Judge, Mr. C. C. Marsack, or before a solicitor of the Supreme Court of New Zealand resident in Samoa, are accepted for the purposes of the Land Transfer Act, 1915. No doubt they would be accepted for other purposes, as well.

Powers as to Notarial Acts outside New Zealand.

Section 21 of the Statutes Amendment Act, 1939, provides as follows:

(2) Every British representative exercising his functions in any place outside New Zealand may, in that place, administer any oath and take any affidavit, and also do any notarial act which any Notary Public can do within New Zealand; and every oath, affidavit, and notarial act administered, sworn, or done by or before any such representative shall be as effectual as if duly administered, sworn, or done by or before any lawful authority in New Zealand.

(3) Any document purporting to have affixed, impressed, or subscribed thereon or thereto the seal and signature of any person authorized by this section to administer an oath in testimony of any oath, affidavit, or act being administered, taken, or done by or before him shall be admitted in evidence without proof of the seal or signature being the seal or signature of that person, or of the official character of that person.

The terms used in the foregoing subsections are defined in subs. 1 as follows:

In this section, unless the context otherwise requires:—

"Affidavit" includes any affirmation, statutory or other declaration, acknowledgment, examination, or attestation or protestation of honour;

"British representative" means an Ambassador, Envoy, Minister, *Chargé d' Affaires*, Secretary of Embassy or Legation, Consul-General, Consul, Vice-Consul, Pro-Consul, Consular Agent, High Commissioner, Trade Commissioner, or Tourist Commissioner of a country within the British dominions (including New Zealand), and includes any person lawfully acting for any such officer:

"Oath" includes an affirmation and a declaration;

"Swear" includes affirm, declare, and protest.

Execution before New Zealand Solicitor practising Overseas: From a practical point of view, it may be possible to avoid notarial verification of the execution of a Land Transfer document that is to be executed overseas if the local District Land Registrar is approached and asked if he will accept execution before a solicitor of the Supreme Court of New Zealand under ss. 168 and 169 of the Land Transfer Act, 1915, notwithstanding the local application of those sections.

In London particularly, and in places such as Fiji and Western Samoa, there are New Zealand solicitors who are practising and paying their annual practising fees under the Law Practitioners Act, 1931. It may be well, however, before instructions are sent to an agent in any of these places where a New Zealand solicitor is practising as such, to approach the local District Land Registrar first and obtain his approval of the course suggested. If the District Land Registrar approves, then the overseas agent should be asked, when witnessing the Land Transfer document in question, to add to his signature the words "A Solicitor of the Supreme Court of New Zealand," and to add the place in which he practises.

SUMMARY OF RECENT LAW.

ACTS PASSED, 1950.

No. 59. Orchard and Garden Diseases Amendment Act, 1950.
No. 60. Municipal Corporations Amendment Act, 1950.
No. 61. Apple and Pear Marketing Amendment Act, 1950.
No. 62. Noxious Weeds Act, 1950.
No. 63. Naval Defence Amendment Act, 1950.
No. 64. Patriotic and Canteen Funds Amendment Act, 1950.
No. 65. Limitation Act, 1950.
No. 66. Stock Remedies Amendment Act, 1950.
No. 67. Rating Amendment Act, 1950.
No. 68. Annual Holidays Amendment Act, 1950.
No. 69. Waterfront Royal Commission Act, 1950.
No. 70. Death Duties Amendment Act, 1950.
No. 71. Government Railways Amendment Act, 1950.
No. 72. Education Lands Amendment Act, 1950.
No. 73. Supply Regulations Amendment Act, 1950.
No. 74. Public Service Amendment Act, 1950.
No. 75. Emergency Regulations Amendment Act, 1950.
No. 76. Marginal Lands Act, 1950.
No. 77. Education Amendment Act, 1950.
No. 78. Government Service Tribunal Amendment Act, 1950.
No. 79. Local Legislation Act, 1950.
No. 80. New Zealand University Amendment Act, 1950.
No. 81. Capital Punishment Act, 1950.
No. 82. Insurance Companies' Deposits Amendment Act, 1950.
No. 83. Crimes Amendment Act, 1950.
No. 84. Workers' Compensation Amendment Act, 1950.
No. 85. Board of Trade Act, 1950.
No. 86. Agricultural Emergency Regulations Confirmation Act, 1950.
No. 87. Land and Income Tax Amendment Act (No. 2), 1950.
No. 88. Shipping and Seamen Amendment Act, 1950.
No. 89. Reserves and Other Lands Disposal Act, 1950.
No. 90. Licensing Trusts Amendment Act, 1950.
No. 91. Statutes Amendment Act, 1950.
No. 92. Cook Islands Amendment Act, 1950.
No. 93. Finance Act, 1950.
No. 94. Superannuation Amendment Act, 1950.
No. 95. Police Offences Amendment Act, 1950.
No. 96. Land Amendment Act, 1950.
No. 97. Wool Proceeds Retention Act, 1950.
No. 98. Maori Purposes Act, 1950.
No. 99. Civil List Act, 1950.
No. 100. Appropriation Act, 1950.
No. 101. Auckland Harbour Bridge Act, 1950.

ARBITRATION.

Special Case for Court's Opinion on Question of Law—Statement of Special Case required by Unsuccessful Party to Award—Party's Conditional Request to Arbitrators to state Special Case—Disagreement of Arbitrators—Umpire expressly notifying Parties of Intention to make Award after Lapse of Fourteen Days—No Request to Umpire to state Case—Court's Refusal to interfere with Award—Reasons for Such Refusal—Question of Law referred to Arbitrators—Non-interference by Court with Consequent Award—Arbitration Act, 1908, ss. 11, 12 (2), 20—Arbitration Amendment Act, 1938, s. 12 (2). A dispute having arisen between partners as to the construction of certain clauses in the deed of partnership, a submission to arbitration, signed by the parties, set out the matters in dispute, the principal one being: "What is the true interpretation of cl. 6 of the said agreement?" The arbitrators appointed were both lawyers, and they appointed an umpire, also a lawyer; and, as a matter of convenience, the umpire and the arbitrators sat together to hear evidence. After the evidence had been taken, written submissions were made by counsel for both parties. The written argument for the respondent related principally to the interpretation of cl. 6, and was supported by authorities, and counsel included the statement: "I simply base my argument on the real intention of the parties as recognized by statute, and, if there is any doubt in the minds of the arbitrators as to the existence and effect of this overriding intention, I require them to state a case for the opinion of the Court." The arbitrators after they had received counsel's submissions, were unable to agree, and they notified the umpire accordingly. On July 21, 1948, the day after the umpire had

been informed of the arbitrators' disagreement, he notified the solicitors for both parties that the matter in dispute had been referred to him. He went on to say: "In the meantime, no report will be issued for a further period of fourteen days from the date hereof so that counsel may have an opportunity of conferring and making such submissions as they desire." In consequence of this memorandum, further submissions were made by counsel for the respondent. The umpire received no request to state a case, and, despite his statement that he was proceeding to an award, the application previously made to the arbitrators to state a case was not renewed. On the contrary, further submissions were made for his consideration in his task of interpreting cl. 6. In these circumstances, the umpire made his award on August 26, 1948, whereupon the respondent moved in the Supreme Court to have the award set aside. *Stanton*, J., in a written judgment, remitted the award to the umpire to be dealt with in terms of his judgment, reported [1950] N.Z.L.R. 520. (When the matter was argued before *Stanton*, J., the umpire's memorandum of July 21, 1948, warning the parties that he would proceed to an award after fourteen days, was not before the Court. The Court of Appeal, on the appeal from the learned Judge's judgment, gave leave for the production of this memorandum on the hearing of the appeal.) On the appeal from *Stanton*, J.'s, judgment, *Held*, by the Court of Appeal, allowing the appeal, That, in the circumstances, it should not interfere with the award, for the following reasons: 1. That there was, in fact, at most a conditional application made to the arbitrators to state a case. (*Fisher* v. *Matson and Co.*, [1918] N.Z.L.R. 1, and *In re Stokvis and South Australian Farmers' Co-operative Union, Ltd.*, [1931] S.A.S.R. 303, followed.) 2. That, after the umpire took the matter into consideration, he had expressly notified both parties that he intended to proceed to his award after fourteen days, and no application was then made to him to state a case, but respondent's counsel made further submissions to the umpire, including submissions upon cl. 6, as if he expected the umpire to make an award interpreting that clause. 3. That thereafter both the umpire and the appellant would be entitled to assume that the umpire was free to make his award without reference to the Court by way of case stated. 4. That, consequently, there was no misconduct, not even technical misconduct, on the part of the umpire. The order of *Stanton*, J., appealed from ([1950] N.Z.L.R. 520) was set aside; and the award was restored to its full effect. *Semble*, 1. Even had an application been made to the Court to require the umpire to state a case, the Court should not have granted the application, as the question of law, although arising in the course of the reference, was one which had been expressly referred to arbitration, and the arbitrators were competent to deal with it, because the Court will not interfere, even though it is manifest on the face of the award that the arbitrator has gone wrong in law, when that which is referred is some specific question of law in express terms, no fact being, *quoad* that submission, in dispute. (*F. R. Absalom, Ltd.* v. *Great Western (London) Garden Village Society, Ltd.*, [1933] A.C. 592, followed.) (*Carr* v. *Wodonga Shire*, (1924) 34 C.L.R. 234, distinguished.) (*Henry* v. *Uralla Municipal Council*, (1934) 35 N.S.W.S.R. 15, referred to.) 2. That, had the case been presented in the Supreme Court as it was in the Court of Appeal, and had the learned trial Judge had his attention drawn to the umpire's memorandum of July 21, 1948, issued a month before he published his award, the order appealed from would not have been made. *In re An Arbitration, Stevens* v. *Roke*. (C.A. Wellington. October 18, 1950. Fair, Northcroft, Gresson, JJ.)

CONTRACT.

Covenant in Restraint of Trade—Unenforceable unless Consideration—When Covenants unenforceable as being in Undue Restraint of Trade—Detrimental to Public—Onus of Proof—When Covenants unreasonable as between Parties—Price-fixing Agreement unlimited as to Space. Certain manufacturers entered into agreements with a company of which they were shareholders and covenanted that during a term of five years they would (i) not take away one another's customers, (ii) prevent any encouragement of outsiders to compete with the retailers to whom they sold, (iii) prevent competition amongst themselves, and (iv) fix wholesale and retail prices to prevent price-cutting competition among themselves and to avoid disorganization of their business generally by price-cutting competition between their retailers. The covenant in respect of price-fixing was not limited as to space. *Held*, That the covenant as to price-fixing, not being limited with regard to space, was void as being in restraint of trade, but that the other covenants were valid. *Associated Ice Manufacturers Pty., Ltd.* v. *A. Burriss Pty., Ltd.*, [1950] V.L.R. 394.

CONTROL OF PRICES.

Price Order—Price Order fixing Hotel Tariffs—"Blanket" Order providing for Revision of Tariffs on Application for Regrading of Hotels—Order valid—Tribunal's Observance of Principles relating to Notification of Its Intention to make Order—"Services customarily rendered"—Control of Prices Act, 1947, ss. 15, 16, 44—Price Order No. 1000 (1949 New Zealand Gazette, *1031, 1107*, 1950 New Zealand Gazette, *1137*), *cls. 6, 7 (2), 9.* Price Order No. 1000, which fixed hotel tariffs throughout New Zealand by grading hotels into different classes and fixing a scale of maximum daily charges according to grade, was within the ambit of the Control of Prices Act, 1947; and the fact that the Order in its terms provided for revision, on an application for the regrading of hotels, did not in any way contravene the statute. The performance of services to which s. 44 of the Control of Prices Act, 1947, applies, and all transactions which involve the sale of goods in conjunction with the performance of services, are put, for the purposes of that statute, upon a parity with the sale of goods, and the consideration validly receivable for them is subject to control in the same way as is the price of goods; and different considerations may accordingly be prescribed for such services and transactions as come within the scope of ss. 44 and 46. The relation of hotel-keeper and guest does not preclude the Price Tribunal from exercising its general functions as set out in s. 10, including the fixing of prices for goods and services, since the amenities provided by an hotel-keeper for his guests are the rendering of "services," even if that term be regarded in the narrowest way. The Order was not uncertain or unequal, for the reason that the method of prescribing charges per day collectively for hotels of each grade, and setting out charges for separate meals and referring to services "customarily rendered," came expressly within s. 15 of the statute. The Order was not unreasonable, as, in the absence of any indication to the contrary, it could only be assumed that all services customarily rendered had been taken into consideration in fixing the prescribed prices; and power was reserved in cl. 7 (2) of the Order to apply for permission to make an additional charge in respect of all extra services, or, alternatively, an hotel-keeper could make a special contract with the customer with respect to them. The principles relating to notification of the Price Tribunal's determination to make the Price Order relating to hotels were observed in the making of Price Order No. 1000. The Tribunal had given the appellant licensee sufficient opportunities to be heard, but he had not sought to be heard and did not tender evidence at the sitting relative to the making of the Order; and it was not bound to hear him orally. (*F. E. Jackson and Co., Ltd.* v. *Price Tribunal (No. 2)*, [1950] N.Z.L.R. 433, applied.) *So held* by the Court of Appeal, dismissing an appeal from the judgment of *Gresson*, J., and his order dismissing a motion for certiorari to quash Price Order No. 1000, and for an injunction against the Director of Price Control restraining him from proceedings with a pending prosecution against the appellant for breaches of the Order. *Dwyer* v. *Hunter*. (C.A. October 13, 1950. Northcroft, Finlay, Hutchison, JJ.)

CRIMINAL LAW.

Chemical Tests in Alcoholic Intoxication. (C. U. Letourneau.) *28 Canadian Bar Review*, 858.

DEATH DUTIES.

Estate Duty: Points in Practice. *100 Law Journal*, 648.

EMERGENCY REGULATIONS.

Emergency Regulations Amendment Act, 1950, continues in force until December 31, 1951, the following emergency regulations and their unrevoked amendments:

- Cargo Control Emergency Regulations, 1942 (Serial No. 1942/268);
- Cargo Control Emergency Regulations, 1947 (Serial No. 1947/159);
- Cinematograph Films Emergency Regulations, 1946 (Serial No. 1946/93);
- Civil Arrest of Soldiers Emergency Regulations, 1940 (Serial No. 1940/40);
- Coal Mines Council Emergency Regulations, 1940 (Serial No. 1940/135);
- Defence Emergency Regulations, 1941 (Serial No. 1941/130);
- Earthquake Damage Emergency Regulations, 1942 (Serial No. 1942/245);
- Egg Marketing Emergency Regulations, 1942 (Serial No. 1942/179);
- Egg Marketing Emergency Regulations, 1944 (Serial No. 1944/85);

Enemy Property Emergency Regulations, 1939 (Serial No. 1939/153);
Finance Emergency Regulations, 1940 (No. 2) (Serial No. 1940/118);
Honey Control Board Emergency Regulations, 1940 (Serial No. 1940/234);
Industrial Efficiency Emergency Regulations, 1943 (Serial No. 1943/32);
Labour Legislation Emergency Regulations, 1940 (Serial No. 1940/123);
Licensing Act Emergency Regulations, 1940 (Serial No. 1940/141);
Local Authorities (Temporary Housing) Emergency Regulations, 1944 (Serial No. 1944/164);
Patents, Designs, Trade-marks, and Copyright Emergency Regulations, 1940 (Serial No. 1940/60);
Payments without Probate Emergency Regulations, 1942 (Serial No. 1942/313);
Shipping Transfer Emergency Regulations, 1939 (Serial No. 1939/130);
Soldiers' Wills Emergency Regulations, 1939 (Serial No. 1939/276);
Strike and Lockout Emergency Regulations, 1939 (Serial No. 1939/204);
Transport Licences Emergency Regulations, 1942 (Serial No. 1942/43);
War Service Gratuities Emergency Regulations, 1945 (Serial No. 1945/172);
Waterfront Industry Emergency Regulations, 1946 (Serial No. 1946/102).

INFANTS AND CHILDREN.

Juvenile Courts. *100 Law Journal*, 633.

LANDLORD AND TENANT.

Destruction of Noxious Weeds. *94 Solicitors Journal*, 650.

Monthly Tenancy by Express Agreement of Parties—Notice to Quit—Onus on Tenant to prove Tenancy not determinable at Will on One Month's Notice—"Monthly tenancy"—Property Law Act, 1908, s. 16—Statutes Amendment Act, 1949, s. 48—Lease—Covenant to repair Old Buildings—Age and Character of Building to be regarded—Tenant's Duty to keep Premises in State of Repair proper to Them. A tenancy continuing after the expiration of a lease for a fixed term is *prima facie* a tenancy under s. 16 of the Property Law Act, 1908. (*Braidwood* v. *Dunn*, [1917] N.Z.L.R. 269, referred to.) In an action for recovery of possession by the landlord, the amendment of s. 16 of the Property Law Act, 1908, by s. 48 of the Statutes Amendment Act, 1949, throws on the defendant tenant the onus of proving that the tenancy is not one determinable at the will of either of the parties by one month's notice in writing as provided in that section. (*Precious* v. *Reedie*, [1924] 2 K.B. 149, and *Hodge* v. *Premier Motors, Ltd.*, [1946] N.Z.L.R. 778, distinguished.). The repair covenant in a lease must be given a reasonable construction, having regard to the age and character of the building at the commencement of the lease, the obligation in each case being to keep and deliver up the premises in a state of repair proper for such premises. The fact that the premises happen to be old in no way relieves the tenant from the burden of his covenant, but it is no part of his duty under that covenant to bring the premises up to date; provided that he keeps the premises in a habitable condition, he is not responsible for such deterioration as they may suffer as a result of the natural operation of the elements and the passage of time. (*Lurcott* v. *Wakely and Wheeler*, [1911] 1 K.B. 905, followed.) *Card* v. *Bilderbeck*. (S.C. Wellington. November 2, 1950. Hay, J.)

MUNICIPAL CORPORATIONS.

*Delay in commencing Action for Personal Injuries—Notice of Intended Action out of Time—Action not commenced within Six Months—Circumstances justifying Waiver of Lateness of Notice—Onus on Plaintiff to prove "reasonable excuse" for Delay in commencing Action—Onus not discharged—"Reasonable excuse"—Municipal Corporations Act, 1933, s. 361 (1) (2) (8)—Municipal Corporations Amendment Act, 1938, s. 35 (1).** On May 13, 1949, the plaintiff sustained personal injuries through a fall caused by a trailer alleged to belong to the defendant Corporation, against whom she claimed damages on the grounds of nuisance and negligence. The plaintiff was an in-patient at the Wellington Hospital for four days, and, on her discharge, she was under the care of a private nurse for eight weeks at her home, and received massage treatment. She was unable to attend to her normal duties for many months after the accident; but the evidence did not show that her incapacity to attend to business matters extended beyond a date in September or early in October, 1949. Shortly before October 13, the plaintiff called at the City Engineer's department of the defendant Corporation, and was informed that her accident would be investigated. On October 13, the plaintiff's daughter wrote to the Town Clerk, on behalf of her mother, a letter which was received at the Town Clerk's office on October 17, claiming compensation for the injuries sustained by her. The Town Clerk replied on October 18, stating that the Council did not accept liability but that inquiries would be made into the circumstances of the matter. There was no further communication between the plaintiff and the defendant Corporation. In April, 1950, the plaintiff consulted her solicitor, when she was informed for the first time that she should have commenced proceedings within six months of the date of her accident. The solicitor wrote to the plaintiff's medical adviser for a report, which he received on May 25. He then made inquiries of witnesses to the accident. On July 13, 1950, a writ was issued against the defendant Corporation claiming damages. On a motion for an order waiving non-compliance by the plaintiff with the provisions of s. 361 (1) and (2) of the Municipal Corporations Act, 1933, *Held*, That, while the requirements of subs. 1 of s. 361 of the Municipal Corporations Act, 1933, might be waived, as the notice was only slightly defective, and was out of time only about four days, to enable it to run a full month before the time arrived for the issue of a writ, the plaintiff had not discharged the onus resting on her to establish a reasonable excuse, as required by subs. 8, for the delay in not commencing the action within the last three weeks of the six-months period, and for the further delay that occurred after the expiration of that period. (*Wellington City Corporation* v. *Laming*, [1933] N.Z.L.R. 1435, *Young* v. *Mayor, &c., of Christchurch*, (1907) 27 N.Z.L.R. 729, and *Cerchi* v. *Mayor, &c., of Wellington*, (1913) 15 G.L.R. 626, applied.) (*Simpson* v. *Geary*, [1921] N.Z.L.R. 285, *Mahoney* v. *Thomas Borthwick and Sons (Australasia), Ltd.*, [1944] N.Z.L.R. 80, *Corrie* v. *Pithie and Ritchie*, [1920] G.L.R. 252, and *Boyd* v. *Sturm*, [1943] G.L.R. 305, distinguished.) *Calder* v. *Wellington City Corporation*. (S.C. Wellington. November 6, 1950. Hutchison, J.)

* See, now, s. 23 of the Limitation Act, 1950.

PARTITION.

Action for Possession—Court to direct Sale if Partition refused—Onus on Plaintiff to show Good Reason for Partition in preference to Sale—Property Law Act, 1908, s. 105. In an action for partition under s. 105 (1) of the Property Law Act, 1908, the onus lies on the plaintiff to establish that there is good reason for a partition in preference to a sale; and, if the Court does not order partition, it must direct a sale. (*Dew* v. *Riddler*, (1900) 19 N.Z.L.R. 281, and *Gray* v. *Dawson*, (1910) 12 G.L.R. 511, followed.) *Pillar* v. *John Odlin and Co., Ltd.* (S.C. Wellington. November 14, 1950. Hay, J.)

SUPPLY REGULATIONS.

Supply Regulations Amendment Act, 1950, continues in force until December 31, 1951, the following supply regulations and their unrevoked amendments:

Building Emergency Regulations, 1939 (Serial No. 1939/155);
Export Prohibition Emergency Regulations, 1939 (Serial No. 1939/151);
Supply Control Emergency Regulations, 1939 (Serial No. 1939/131).

TENANCY.

Lease—Licensed Premises—Tenant under Expired Lease—Effect of Tenancy Amendment Act, 1950—Notice to Quit unnecessary—Order for Possession—Tenancy Amendment Act, 1950, s. 16—Sale of Goods—Covenant in Hotel Lease—Lessee at End of Term to sell Furniture and Chattels to Lessor—Construction of Covenant—Lessee remaining on Premises after End of Term—Order for Possession given to Lessors—Postponement of Execution to enable Performance of Covenant—Sale of Goods Act, 1908, ss. 7, 10, 11, 30, 31 (1). Where the tenant of a property used as licensed premises was the tenant under a lease which expired in December, 1949, and was a statutory tenant at the time of the enactment of the Tenancy Amendment Act, 1950, he ceased to be a statutory tenant at that date, and he was then relegated to the same position as would have been his on the determination of the lease of the premises if the Tenancy Act, 1948, had not been in force, and, accordingly, he was not entitled to any notice to quit. (*Morrison* v. *Jacobs*, [1945] K.B. 577; [1945] 2 All E.R. 430, followed.) The following covenant was contained in the expired lease of the licensed premises: "That the lessee will at the end or sooner

determination by (*sic*) the term hereby granted sell to the lessor and the lessor will purchase all furniture chattels stock in trade live and dead stock in upon or about the said premises at a valuation to be made by two valuers one to be appointed by either party and in the event of disagreement by an umpire to be appointed by such valuers before entering on the valuation and the determination of such umpire shall be binding on the lessee and lessor providing that such umpire shall adjudicate only on items of valuation on which the valuers disagree and it is agreed that this clause shall enure for the benefit of any nominee by the lessor." In an action for possession, it was contended for the tenant that the covenant was a severable contract for sale and purchase, and that, if there was any condition precedent to the right of the owner to sue for possession, it was one requiring the defendant, if he wished to rely on the covenant, to give notice and take such other steps as might be necessary. *Held*, 1. That, on the true construction of the covenant, it was a contract of sale of future goods, and delivery of the goods and payment of the price were concurrent conditions; if the lessee fails to deliver possession of the premises, he fails equally in the delivery of the goods, it being implied that the place of delivery of the goods is on the premises, and the lessor must take possession of the goods there and nowhere else; no breach on the lessee's part of the duty to complete the sale of the goods could be regarded as giving the lessor the right to treat the term as still continuing, or to treat the lessee as continuing in possession of the premises after he had in fact vacated them; and, assuming the covenant to run with both the land and the reversion so as to bind the lessor and the lessee, it could not be construed as affecting in any way the right of the lessor to possession on the determination of the lease. (*Shale* v. *James Meehan and Son, Ltd.*, [1922] N.Z.L.R. 445, referred to.) 2. That, as the covenant contemplates performance contemporaneously with the delivery of possession, there was inherent power so to deal with the matter as to ensure that contemporaneous performance might take place. An order was made that the lessor recover possession of the demised premises, with *mesne* profits until the date on which the plaintiffs obtain possession, with postponement of execution to a stated future day (twelve days after the date of delivery of the judgment) on the lessee giving an undertaking within two days that he would deliver possession on or before the stated day, and would do without undue delay all things necessary on his part to perform on that day the covenant for sale of the chattels. (*Kirkpatrick and Barclay* v. *Hutchison*, (1904) 23 N.Z.L.R. 665, referred to.) *Dunnachie et Ux.* v. *Urwin*. (S.C. Palmerston North. November 15, 1950. F. B. Adams, J.)

Surrender of Statutory Tenancy. *94 Solicitors Journal*, 530.

TRANSPORT.

Is A Bicycle A Carriage? *210 Law Times*, 201.

TRUSTS AND TRUSTEES.

Referential Trusts. *100 Law Journal*, 607.

VENDOR AND PURCHASER.

Sale of Land—Contract—Time of the Essence—Failure to complete Purchase—Time not initially of the Essence—Subsequent Introduction of Term—"Impropriety" on part of Purchaser—Request for Delay—Right to forfeit Deposit and resell—Damages when Property wrongfully resold. On February 26, 1949, the purchaser signed a memorandum that she had on that day purchased a dwellinghouse from the vendor at the price of £3,000, and that she had paid £300 to stakeholders as a deposit. The special conditions of sale adopted the National Conditions of Sale, 15th Ed., so far as not inconsistent with the special conditions, and fixed April 4, 1949, as the date for completion. Condition 25 (1) of the National Conditions provides: "If the purchaser shall neglect or fail to complete his purchase according to these conditions, his deposit shall thereupon be forfeited (unless the Court otherwise directs) to the vendor . . . and the vendor may, with or without notice or without previously tendering a conveyance, resell the property at such time, in such manner and subject to such conditions as he shall think fit." The purchaser had difficulty in raising the balance of the purchase-money, and on March 29, 1949, the purchaser's solicitors wrote to the vendor's solicitors stating: "We understand that . . . it will not be possible to complete the purchase on the date fixed by the contract." The vendor thereupon instructed the estate agents that, in the event of the purchaser's not completing by April 19, 1949, they were to sell elsewhere, and, by a letter dated April 5, 1949, the vendor informed the purchaser that the vendor reserved all his rights under the contract, but was prepared without prejudice to delay exercising such rights until April 19. By a letter dated April 19, 1949, the purchaser was notified by the vendor's solicitors that "the deposit has become forfeited" and that the vendor was proposing to resell. On April 21, 1949, the house was resold. On May 2, 1949, the purchaser offered to complete, then having the money available. The purchaser now claimed the return of her deposit and damages. *Held*, (i) That, as time was not initially of the essence of the contract as regards completion, it was impossible for the vendor unilaterally to make it so in the absence of some impropriety on the part of the purchaser sufficient to entitle him so to do; the letter of March 29, 1949, did not constitute such an impropriety, but, even if it did, it did not entitle the vendor to treat the contract as repudiated as soon as two weeks after the original date for completion. (*Green* v. *Sevin*, (1879) 13 Ch.D. 589, applied.) (ii) That the right to forfeit the deposit under Condition 25 did not arise until the purchaser had deprived himself of his equitable remedy of specific performance, and the purchaser had not so deprived herself by April 5, and, therefore, the purported forfeiture was bad and the resale wrongful. (iii) That the purchaser was not entitled to recover as damages the expenses incurred in respect of fees of surveyors on behalf of building societies who were contemplated mortgagees. *Smith* v. *Hamilton*, [1950] 2 All E.R. 928 (Ch.D.)

Contract—Time of the Essence—Failure to pay Instalments and Interest on Appointed Days—Waiver—Notice of Rescission—Tender of Arrears—Property Law Act, 1928 (No. 3754), s. 49. A agreed to purchase certain land and premises from B. The contract provided that A should pay the purchase price of £1,200 by a deposit of £100 and "the residue by weekly payments of £3 payable on Monday in each and every week. The first of such payments to be made on August 15 next. The purchaser to pay interest on the unpaid balance at the rate of 4½ per cent. per annum calculated on quarterly balance on the first days of January, April, July, and October in each and every year. The whole of the purchase-money to be paid within five years." The contract embodied the 1949 copyright conditions of sale, Condition 14 of which reads: "Time shall be considered of the essence of this contract and all the conditions thereof." On August 31, October 5, and November 7, 1949, respectively, A paid cheques of £12 to B's solicitor, W. B died on December 18, 1949, and on January 4, 1950, A paid to W. the sum of £12, and on February 2, 1950, the sum of £17. On February 14, 1950, probate of B's will was issued and a week later W., upon the instructions of the executor, gave notice to A purporting to rescind the contract, on the ground that A was in arrears with the purchase-money and interest payable under the contract. On March 1, 1950, A's solicitors tendered W. the sum of £48 7s., the amount of instalments and interest in arrears. The tender was refused. *Held*, That, by reason of B's conduct in abstaining from availing herself of A's failure to pay the instalments on due date, time had ceased to be of the essence of the contract; and that, therefore, the notice of rescission was ineffective. *Bull* v. *Gaul*, [1950] V.L.R. 377.

WILL.

Gift by Will to W. (G. D. Kennedy.) *28 Canadian Bar Review*, 839.

WORKERS' COMPENSATION.

Accident arising out of and in the Course of the Employment—Heart Disease—Deceased Worker suffering from Coronary Disease and liable to Sudden Death—Death while sawing Wood—No Evidence of Unusual Effort—Absence of Pain indicative of Death from Disease, not from Effort—Workers' Compensation Act, 1922, s. 3. The deceased worker had had coronary occlusion in April, 1948. He was liable to die suddenly at any time. When he died suddenly on June 1, 1949, he was sawing wood, taking his time about it, not hurrying, and not showing any signs of overwork. His widow, in claiming compensation, alleged that this was not a case of thrombosis or coronary occlusion, but was a case of acute coronary insufficiency due to, or contributed to by, the sawing, in which the effort was unusual as to both quantum and attitude. *Held*, 1. That there was no evidence that the deceased had been engaged in strenuous, unusual, or extra effort at the time of his death; but there was evidence that he died without pain. 2. That, in accordance with the medical evidence, if the deceased had died of effort, he would probably have had pain, while, if he had died of disease, he would probably have died without pain. 3. That it had not been shown that effort caused the death of the deceased, or that death by effort was more probable than death by disease. *Mumm* v. *Motor Lines, Ltd.* (Comp. Ct. Palmerston North. August 4, 1950. Ongley, J.)

JUDGMENTS AS LITERATURE.

The late Lord Tweedsmuir (John Buchan) practised at the Bar as a young man, and in *Homilies and Recreations*: *The Judicial Temperament* he wrote the following:

> I have sometimes had an idea of compiling a legal anthology of those judgments which are good literature as well as good law. It would be a fascinating book, and it would put most professional stylists to shame . . . I am prepared to maintain that there is a surprising amount of fine literature in the Law Reports.

Unfortunately, that book was never compiled, interspersed as it might have been, after the manner of the late Lord Wavell, with the literary comment of a master of his craft. But it has occurred to the writer of this article that he might one day compile such an anthology (without the literary comment), and he has collected a large number of judgments containing passages of literary merit. A few of these passages are offered here, as being perhaps an interesting relaxation to read. The vast majority of judgments have no general literary appeal. They are, when they reach the Law Reports, grammatical; but they are usually dryly technical, interspersed with references, and often tediously long. A few Judges only can be relied on to produce every now and then that flash of colour, that vivid imagery or attractive phrase, which turns technicalities into literature. Seldom, too, is this level sustained for long. Too often the rhythm of the prose is interrupted by a reference to a reported case or a recital of facts or figures.

The passages quoted are taken from the judgments of some of the Judges best known for their sense of style. The passages are quoted purely as literature, irrespective of whether or not they are good law to-day. They are taken from law reports which are full and accurate, so that it can no longer be said, in the words of Lord Mansfield, C.J., in *Miller* v. *Race*, (1758) 1 Burr. 452, 457; 97 E.R. 398, 401:

> It is a pity that reporters sometimes catch at quaint expressions that may happen to be dropped at the Bar or Bench; and mistake their meaning.

Husband and Wife.

Lord Atkin delivered many great judgments. One of his best (and best known) is in *Balfour* v. *Balfour*, [1919] 2 K.B. 571, in the Court of Appeal, which was given extempore, and contains the following famous passage, at p. 579:

> Nevertheless they are not contracts, and they are not contracts because the parties did not intend that they should be attended by legal consequences. To my mind it would be of the worst possible example to hold that agreements such as this resulted in legal obligations which could be enforced in the Courts. It would mean this, that when the husband makes his wife a promise to give her an allowance of 30s. or £2 a week, whatever he can afford to give her, for the maintenance of the household and children, and she promises so to apply it, not only could she sue him for his failure in any week to supply the allowance, but he could sue her for non-performance of the obligation, express or implied, which she had undertaken upon her part. All I can say is that the small Courts of this country would have to be multiplied one hundredfold if these arrangements were held to result in legal obligations. They are not sued upon, not because the parties are reluctant to enforce their legal rights when the agreement is broken, but because the parties, in the inception of the arrangement, never intended that they should be sued upon. Agreements such as these are outside the realm of contracts altogether. The common law does not regulate the form of agreements between spouses. Their promises are not sealed with seals and sealing-wax. The consideration that really obtains for them is that natural love and affection which counts for so little in these cold Courts. The terms may be repudiated, varied or renewed as performance proceeds or as disagreements develop, and the principles of the common law as to exoneration and discharge and accord and satisfaction are such as find no place in the domestic code. The parties themselves are advocates, Judges, Courts, Sheriff's officer and reporter. In respect of these promises each house is a domain into which the King's writ does not seek to run, and to which his officers do not seek to be admitted.

Another great Judge with a strong sense of style was the Earl of Birkenhead, L.C. His judgment in the well-known case of *Russell* v. *Russell*, [1924] A.C. 687, contains the following passage, at pp. 700, 701:

> When we are told that a rule is founded upon public policy, decency, and morality, it would seem natural to propose it in all cases to which it applies verbally, provided that we are still able to bring ourselves within the public considerations which were the expressed basis of the rule. If, for instance, in an issue where the child himself is a party—a legitimacy proceeding *in rem* in the true sense—it is against public policy to admit the evidence of a parent to prove the bastardy of that child, why should an entirely different policy permit such evidence in the case where a vital issue is still the legitimacy of the child, even though it be raised for a different purpose, and perhaps with secondary emphasis? Nor ought we to shut our eyes to the glaring absurdity in which a different decision would involve the administration of this branch of the law. This evidence, we are told, is admissible in divorce; being therefore so received it bastardizes the child. But if and when the child, as in this case he certainly will do, becoming of age, applies for his writ in this House, and proceedings follow, the evidence will not be admissible and he will be pronounced legitimate. Equally, of course, if the child instituted proceedings to-morrow for a declaration of legitimacy we should be afforded the agreeable prospect of holding judicially in 1924 that the infant was illegitimate; and in 1925 that he was legitimate. Nothing but absolute necessity, founded upon decisions binding upon me, would drive me to a conclusion so ludicrous and incongruous. I find here no such necessity. On the contrary, by adhering to an ancient rule of the highest authority, in its natural and ordinary meaning; adding nothing to it; but giving full effect to the terms in which it has been expressed, I am able to avoid an inconsistency which would rightly bring the law into disrepute.

The Fraudulent Infant.

Another master of English prose was Lord Sumner, who could put the whole principle of a case into a vivid phrase. Here, for instance, is a passage from his judgment in the Court of Appeal in *R. Leslie, Ltd.* v. *Sheill*, [1914] 3 K.B. 607, 618:

> I think that the whole current of decisions down to 1913, apart from dicta which are inconclusive, went to show that, when an infant obtained an advantage by falsely stating himself to be of full age, equity required him to restore his ill-gotten gains, or to release the party deceived from obligations or acts in law induced by the fraud, but scrupulously stopped short of enforcing against him a contractual obligation, entered into while he was an infant, even by means of a fraud . . . Restitution stopped where repayment began; as *Kindersley*, V.-C., puts it in . . . an analogous case, "you take the property to pay the debt."

And here is another, at p. 619:

> In the present case there is clearly no accounting. There is no fiduciary relation: the money was paid over in order to be used as the defendant's own and he has so used it and, I suppose, spent it. There is no question of tracing it, no possibility of restoring the very thing got by the fraud, nothing but compulsion through a personal judgment to pay an equivalent sum out of his present or future resources, in a word nothing but a judgment in debt to repay the loan. I think this would be nothing but enforcing a void contract. So far as I can find, the Court of Chancery never would have enforced any liability under circumstances like the present, any more than a Court of law would have done so.

Invitation to Danger.

No anthology would be complete without many extracts from the judgments of Lord Macnaghten, who from January, 1887, to February, 1913, sat constantly in the House of Lords and Privy Council. Never were the grave and the gay better fused than in *Cooke* v. *Midland Great Western Railway of Ireland*, [1909] A.C. 229, 233 :

> I cannot help thinking that the issue has been somewhat obscured by the extravagant importance attached to the gap in the hedge, both in the arguments of counsel and in the judgments of some of the learned Judges who have had the case under consideration. That there was a gap there, that it was a good broad gap some 3 ft. wide, is, I think, proved beyond question. But of all the circumstances attending the case it seems to me that this gap taken by itself is the least important. I have some difficulty in believing that a gap in a roadside fence is a strange and unusual spectacle in any part of Ireland.

And at pp. 234, 235, Lord Macnaghten went on to say :

> I think the jury were entitled and bound to take into consideration all the circumstances of the case—the mode in which the turntable was constructed ; its close proximity to the wall by which the plaintiff's leg was crushed ; the way in which it was left, unfenced, unlocked, and unfastened ; the history of this bit of ground and its position, shut off as it was by an embankment from the view of the company's servants at the station, and lying half derelict. After the construction of the embankment it served no purpose in connection with the company's undertaking, except that at one time a corner of it was used as a receptacle for some timber belonging to the company, and afterwards as a site for this turntable. In other respects, and apart from these uses, it seems to have been devoted or abandoned to the sustenance of the railway inspector's goat and the diversion of the youth of Navan. It is proved that in spite of a notice board idly forbidding trespass it was a place of habitual resort for children, and that children were frequently playing with the timber, and afterwards with the turntable. At the date of the trial, twelve months after the accident, a beaten path leading from the gap bore witness to the numbers that flocked to the spot and to the special attraction that drew children to it.

In the same case, another Irishman, Lord Atkinson, at p. 238, said this in his judgment :

> To the blind the most obvious danger may be a trap. To the idiotic the most perilous act may appear safe and cautious.

Honesty in Disguise.

The light touch, the brilliant instead of the pedestrian way of putting a point, is shown in another judgment of Atkin, L.J., as he then was, in *In re Thellusson, Ex parte Abdy*, [1919] 2 K.B. 735, 764 :

> We were pressed in argument with the contention . . . that " great difficulties will arise in the administration of bankruptcy if the Court is to decide according to what it considers high-minded without regard to law or equity." I think that these difficulties are exaggerated. But while one may agree that opinions as to rules of honesty differ, the difficulty of recognizing honesty when she appears, affords no inadequate reason for discarding her altogether. The advantages of maintaining a high standard of commercial morality in my judgment far outweigh the suggested inconveniences of administration.

Ruritania and Sam Weller.

A Judge who combined great skill in the use of gentle irony with great knowledge and love of literature and legal history, was MacKinnon, L.J. Here is an ironical passage from *Kleinwort, Sons and Co.* v. *Ungarische Baumwolle Industrie Aktiengesellschaft*, [1939] 2 K.B. 678, 694, 695, [1939] 3 All E.R. 38, 43 :

> The attempted extension of the principle would obviously lead to preposterous results. Suppose the Kingdom or Legislature of Ruritania passed a law that no Ruritanian subject should pay a hotel bill which he had incurred in England. When the Ruritanian subject was sued in the County Court by the hotel proprietor the County Court Judge, if that principle were correct, would have to give judgment for the defendant. That seems to me obviously absurd and I do not think that I need discuss the matter any further.

And here is one of his literary excursions, to be found in *Safford* v. *Safford*, [1944] 1 All E.R. 704, 709, 710 :

> Similarly, if some Act a century ago referred to a person being " detained for five years in a debtor's prison," I apprehend that a man who was living in the Rules of the Fleet, and not inside the prison itself, would be " detained in a debtor's prison " . . . When [the husband] was allowed to visit his father under the conditions imposed by Dr. Davies he was much more " detained " in the East Riding Mental Hospital than a man was " detained " in the Fleet Prison while he lived in the Rules. And the dirty man in the brown coat (No. 20 on the Coffee Room Flight) whose story was told to Mr. Pickwick by Sam Weller in the Fleet was, I think, " detained " in that prison until he died, although after seventeen years strict incarceration (for a debt of £9 multiplied by five for costs) he was for a long period let out daily by the turnkeys to spend his time in public houses.

Seekers after Justice.

A more rugged irony is often to be found in the judgments of Viscount Dunedin, one of the greatest Scottish lawyers. Here is a typical passage, taken from his extempore judgment in *Nixon* v. *Attorney-General*, [1931] A.C. 184, 190 :

> My Lords, it is the right of every litigant who has lost his case before the Court of Appeal to bring an appeal to this House unless there is some statutory reason against it, and one cannot wonder that the gentlemen who have brought this appeal feel strongly upon the matter in which they think that they have been unjustly dealt with in regard to a pension. But although I say that, that does not make any difference as to the quality of the appeal when brought. I confess that I have listened for some hours without discovering that even the ingenuity of counsel could bring forward any argument that was much worth consideration, and I think they were driven, as they were in duty bound driven, to the ultimate virtue of persistency.

No collection of judgments should be without a quotation of Scrutton, L.J. Here is the opening paragraph of his extempore judgment in *Oakley* v. *Lyster*, [1931] 1 K.B. 148, 151, an opening typical of his robust style :

> Four or five hundred years ago if a person wanted justice from the King's Court he had to obtain a particular form of writ, and, if he chose the wrong one, his claim was not maintainable whatever the facts might be. Before the Common Law Procedure Act and the Judicature Act much the same thing happened. The plaintiff had to express his claim in a way that was legally accurate, and if he did not, a demurrer put an end to the action. Great injustice was thereby done. Now, the Courts find out the facts, and, having done so, endeavour to give the right legal judgment on those facts. So in this case I begin by ascertaining the facts in order to see whether the form in which the plaintiff is claiming is substantially right, or, if not substantially right, whether any injustice is done by giving him the real remedy which the facts justify.

Irony.

Finally, it may be amusing to quote some of the dicta of Maule, J., one of the most famous of the ironical Judges.

In *Re Woodall*, (1846) 3 C.B. 639, 640 ; 136 E.R. 256, he said :

> I think we ought not to step out of our way to meet the crotchets of conveyancers.

In *Ex parte Gilmore*, (1847) 3 C.B. 967 ; 136 E.R. 388, he said :

> If this motion were successful, we should be inundated with applications from parties whose husbands were travelling abroad for business, or in pursuit of scientific speculations of such a nature as to make the period of their return doubtful.

In *Melville* v. *Doidge*, (1848) 6 C.B. 450, 456; 136 E.R. 1324, 1326, again, he said:

> It certainly is pretty strong evidence of negligence, that a man has £447 in his pocket, and loses it.

In *Hancock* v. *York, Newcastle, and Berwick Ry. Co.*, (1850) 10 C.B. 348, 356; 138 E.R. 140, 143, he said:

> This declaration carefully steers clear of stating that the defendants did the mischief. It shows about as good a cause of action, as if it had stated that somebody beat the plaintiff with the defendant's stick.

In *Keates* v. *Earl of Cadogan*, (1851) 10 C.B. 591, 601; 138 E.R. 234, 238, he said:

> The declaration struck me, at first sight, as a perfectly bad one; and it does not improve upon acquaintance.

In *Hamilton* v. *Terry*, (1852) 11 C.B. 954, 976; 138 E.R. 752, 762, he said:

> I am not, however, so obstinately wedded to my opinion, as to think it necessary to multiply expressions of regret at my inability quite to coincide with the view taken by the majority of the Court. Upon the whole, the judgment will be for the defendant.

In *Whitaker* v. *Wisbey*, (1852) 12 C.B. 44, 58; 138 E.R. 817, 822, he said:

> The last point is perfectly new, and it is so startling that I do not apprehend it will ever become old.

In *Blackman* v. *Asplin*, (1852) 12 C.B. 453, 454; 138 E.R. 983, 984, he said:

> *Edgar* v. *Halliday* was a decision by two Judges only; and one of them has since repented of it.

D. C. L. P.

PRESENTATION OF LAND TRANSFER INSTRUMENTS FOR REGISTRATION.

The Functions of the District Land Registrar.

By E. C. Adams, LL.M.

The recent case of *Cromwell Borough* v. *Skinner*, [1950] N.Z.L.R. 765, is of more than passing interest to conveyancers in New Zealand.

Certain sections in the Borough of Cromwell, in Otago, had been granted many years ago to the municipality "in trust for municipal purposes." The municipality proposed to sell them to a purchaser, and the Land Transfer officials had indicated that, as in their opinion the land was not a "public reserve" within the meaning of the Public Reserves, Domains, and National Parks Act, 1928, there was nothing to prevent a sale of the sections. Now, the Act last cited is administered by the Lands Department, and, as it considered that the land did constitute a "public reserve" within the meaning of that Act, the Minister of Lands entered a caveat against the title. It may be added here in passing that, if the transfer had been presented for registration and duly registered, the purchaser would have obtained an indefeasible title, on the authority of *Boyd* v. *Mayor, &c., of Wellington*, [1924] N.Z.L.R. 1174. The effect of the lodging of the caveat was that the municipality had to take the next step, for, as the caveat was to protect a *trust*, it could be removed only by the caveator's withdrawing it or by order of the Supreme Court. Accordingly, it made application under s. 152 of the Land Transfer Act, 1915, for removal of the caveat. It was common ground that the land was alienable if it was not a "public reserve," and that it could not be sold if it was a "public reserve." That followed from s. 156 of the Municipal Corporations Act, 1933, which reads as follows:

> (1) Save as provided in subsection three hereof, the Council, pursuant to a special order in that behalf, may sell any land vested in the Corporation, or exchange any such land, and in respect of any such exchange may give or receive any money for equality of exchange.
>
> (2) Where any land so sold or exchanged was at the time of such sale or exchange vested in the Corporation in trust for any particular purpose or purposes, whether by or pursuant to any Act or any deed of trust or otherwise howsoever, all moneys received by the Council upon such sale or exchange shall be applied in or towards the purchase of other lands to be held for the same purposes as affected the lands disposed of, and all lands received in exchange shall be held for the purposes that affected the land given in exchange.
>
> (3) Nothing in this section shall be deemed—
>
> (*a*) To authorize the Council to deal with any public reserve within the meaning of the Public Reserves, Domains, and National Parks Act, 1928, otherwise than in accordance with the provisions of that Act:
>
> (*b*) To apply to the sale or exchange of any land by the Council pursuant to the power conferred by section one hundred and ninety-four hereof or to any express power of sale or exchange conferred by any other Act:
>
> (*c*) To authorize the sale or exchange of any land vested in the Corporation in trust for any particular purpose, if the sale of such land is prohibited by the instrument creating the trust.

Therefore, if the land was a "public reserve" the caveat was sustainable; if it was not a "public reserve" the caveat ought to be removed. Kennedy, J., held that the land was not a "public reserve," because "municipal purposes" were not sufficiently specific to constitute the land a "public reserve." Therefore, His Honour ordered the Minister's caveat to be withdrawn.

In a consideration of this case, it may be convenient —and, I trust, instructive—to discuss also the more general topic of the functions of the Registrar on presentation of instruments under the Land Transfer Act, 1915.

The general rule is summed up in the last part of para. 87 of *Kerr's Australian Lands Titles (Torrens) System*, 52, 53, 54, as follows:

> With regard to instruments effecting dealings presented for registration *prima facie* it is the duty of the Registrar to register any instrument presented in proper form and signed by a person competent in law, and according to the title as appearing on the Register to effect the dealing represented by the instrument. Furthermore, the Registrar must register instruments in the order of their production, there being no authority conferred on him to go into questions of priority. But it is equally the Registrar's duty to refuse to register any instrument when on the documents and facts before him there is *prima facie* evidence of fraud or improper dealing. Thus the duty of the Registrar is neither wholly quasi-judicial nor is it merely ministerial. It is clear that in the first instance the Registrar's function is quasi-judicial, that it involves the exercise of a discretion, but there arrives a point at which it becomes purely ministerial. Take the instance of a transfer in statutory form. Upon its lodg-

ment the Registrar is not a mere machine, a mere automaton, to receive and register the instrument. He has to consider its validity. But once the Registrar has satisfied himself that an instrument is in due form, that the dealing contemplated thereby is one which is on its face authorized by the statute, and that he has no notice of any reason why the instrument should not proceed to registration, then his duty becomes the merely ministerial one of effecting the necessary entries to bring about registration of the instrument.

It is the Registrar's duty to refuse to register any instrument which *ex facie* is invalid, or where there is *prima facie* evidence of fraud or improper dealing. Thus, if the instrument appears to be in contravention of statute law, he should not register it. The Registrar is supposed to know the statute law, and he cannot ignore the records in his own office.

In *Finlayson* v. *Auckland District Land Registrar*, (1904) 24 N.Z.L.R. 341, a block of Maori land was partitioned by the Maori Land Court to a Maori called Kete Hohaia. By memorandum of transfer, Kete Hohaia purported to transfer to the applicant portion of the block, and on the transfer was a certificate by a Commissioner of the Maori Land Court to the effect that he had witnessed the execution of the instrument, and that the alienation effected by it was in accordance with law. On the applicant's tendering her transfer for registration, the District Land Registrar refused to register the instrument. The Court held that the land was inalienable, as not coming within the amendments to s. 117 of the Maori Land Court Act, 1894, and that it was the duty of the Registrar to refuse to register the instrument. At p. 346, Edwards, J., said :

> The alienation which the transfer purports to effect was therefore in flat contravention of the law. Counsel for the applicant contends, however, that the certificate of the Commissioner of the Maori Land Court indorsed upon the transfer is conclusive evidence that the facts are not what they are admitted to be, or that the law is not what it is (it is not clear which), and that it was the duty of the Registrar to ignore the records of his own office, and to register the transfer ; and that, as he has refused to do this, this Court has no choice but to order him to do so, though with a perfect knowledge that it is compelling a breach of law. This contention is based upon s. 13 of the Maori Land Laws Amendment Act, 1895, and s. 2 of the Maori Land Laws Amendment Act, 1897.

At pp. 347, 348, His Honour continued as follows :

> Now, the applicant has not got a title. She is not relying upon these provisions as a protection to a title which she has, but as a means of enabling her to obtain a title which she has not. An instrument purporting to deal with land under the Land Transfer Act does not transfer any estate or effect an alienation until registration. Other objections apart, it is good as an agreement : *Otago Harbour Board* v. *Spedding* (N.Z.L.R. 4 S.C. 272) ; *Waitara* v. *McGovern* (18 N.Z.L.R. 372). Here, then, the applicant has at present an agreement and no more. If it were in form an agreement confirmed by the Maori Land Court, would this Court, with the facts before it, enforce it in a suit for specific performance ? I think, clearly not. The instrument is in a form which would make the title complete upon registration, *but it is upon its face contrary to the provisions of the statute law. It is the duty of the Registrar to refuse to register instruments which his own records show to be in contravention of the statute law* . . . Moreover, the records of the Land Transfer Office are in themselves conclusive evidence of the matters properly appearing therein. They are therefore conclusive to show that the land is inalienable. If the certificate of the Commissioner of the Maori Land Court is conclusive to the contrary, here is estoppel against estoppel, which sets the matter at large : *Duchess of Kingston's case* (Notes, 2 Sm. L. C., 10th Ed. 728) ; *Reg.* v. *Hutchings* (6 Q.B.D. 300, 303).

Jordan v. *Stanford*, (1898) 2 G.L.R. 105, appears to go even further. In this case, certain Maori Reserves were brought within the jurisdiction of the Maori Land Court by an Order in Council, which was declared to have been *ultra vires*, and a Land Transfer certificate of title had issued in pursuance of an order of the Maori Land Court that a certain Maori was entitled to an estate in fee simple. The District Land Registrar had refused to register against such certificate of title a transmission and a lease from the successor under such transmission. At p. 107, Conolly, J., said :

> It appears to me to be not only the right but the duty of a Registrar to refuse to record any document where there appears to be fraud or improper dealing. Among other matters I should assume that he is supposed to know that this Native Reserve was vested in the Public Trustee by statute. He exercises his discretion at his own risk.

This case was approved by the Court of Appeal in *Public Trustee* v. *Registrar-General of Land*, (1899) 17 N.Z.L.R. 577, where, at p. 593, Edwards, J., in delivering the judgment of the Court of Appeal, pointed out that the duty of the District Land Registrar to issue certificates of title in accordance with Governor's warrants was purely ministerial—at all events, *so far as he had no notice that they had been wrongfully issued.*

The District Land Registrar, then, should know the relevant statute law, must not ignore the records of his own office, and should stay his hand if he has notice of any improper dealing. Thus, he should not register an alienation (as defined in the Maori Land Act, 1931) by a Maori of Maori land if it has not been confirmed by the Maori Land Court. Until such an alienation is duly confirmed, it has no force or effect : *Wilson* v. *Herries*, (1913) 33 N.Z.L.R. 417. The District Land Registrar should not register any instrument which *ex facie* is contrary to law : *Wolters* v. *Riddiford*, (1905) 25 N.Z.L.R. 532, 534. It is true that in the much-discussed case of *Boyd* v. *Mayor, &c., of Wellington*, [1924] N.Z.L.R. 1174, a municipality, which had been registered as proprietor by virtue of a void Proclamation, obtained an indefeasible title which could not be disturbed. But the Proclamation *ex facie* was not irregular : the duty of the District Land Registrar to register it was ministerial : it appeared to be in order : it appeared to be a valid act of State.

Finally, it may be mentioned in support of this branch of my argument that in *Walker* v. *District Land Registrar*, [1918] N.Z.L.R. 913, Chapman, J., refused to order the District Land Registrar to register a transfer by a mortgagee in contravention of a war-time moratorium.

I have pointed out that the Registrar ought not to register any instrument which appears to be in contravention of statute law. He cannot, however, inquire as to whether an instrument executed by a company registered under the Companies Act, 1933, or, presumably, a corporation incorporated by Royal Charter, is *ultra vires* that company or corporation. If the instrument is executed under seal and appears to be in order, he cannot inquire further. He cannot, for instance, ask to see the memorandum of association, to satisfy himself that the company has power to execute the instrument proferred for registration. That is a domestic matter, into which the Registrar cannot inquire : *In re Kaihu Valley Railway Co. and Owen*, (1890) 8 N.Z.L.R. 522. It is obvious to me that the same principle applies to instruments executed by societies registered under the Incorporated Societies Act, 1908.

There are certain statutes, however, which require the filing of returns of trustees or members of the committee in the office of the District Land Registrar —*e.g.*, the Friendly Societies Act, 1909, and the

Industrial and Provident Societies Act, 1908. Dealings by these bodies must be executed by the trustees or members of the committee as disclosed in the return filed in the office of the Registrar.

Accordingly, there appears to be a distinction between what may be termed domestic *ultra vires* and statutory *ultra vires.*

A corporation created by statute may have what has been called a qualified estate in fee simple. Thus, in *In re Auckland Grammar School Board, In re Auckland City Corporation*, [1941] N.Z.L.R. 646, Fair, J., said, at p. 654:

> The estate of the Board in this land was less than an estate in fee-simple in several respects, inasmuch as it did not have power to sell the land nor to mortgage it except for certain limited purposes, and it could not lease it except on special terms. I think, therefore, that the limitations upon the right of the Board to deal with the land may be described as making the interest a qualified one, which resembles an estate in fee-simple but with restrictions foreign to the estate of the owner of an absolute estate.

The same learned Judge, referring to an endowment vested in the Auckland City Council, said in *Auckland City Corporation* v. *The King*, [1941] N.Z.L.R. 659, 667:

> The granting of the land as an endowment is the granting of an absolute estate, but it is qualified as to the powers of disposition inasmuch as there is no power of sale. The land itself is, therefore, not held for general purposes—that is, for any purpose to which the Council cares to devote it. It cannot sell the land and devote the capital to objects that might properly be provided out of appropriate capital expenditure.

In *The King* v. *Registrar of Titles, Ex parte The Commonwealth*, (1915) 20 C.L.R. 379, 396, Higgins, J., said:

> A corporation such as this [a local body] has not the ordinary rights of a fee simple proprietor (*Mulliner* v. *Midland Railway Co.* (11 Ch. D. 611, 619); *Great Western Railway Co.* v. *Talbot* ([1902] 2 Ch. 759); *Same* v. *Solihull Rural District Council* (86 L.T. 852)).

The learned Judge continued, at p. 402:

> The position of the Registrar then is, that the document presented for registration does not show on its face a valid disposition of the land. I take it that the Registrar's duty is confined to seeing that the instrument is in accord with the prescribed practice, and that it is signed by a registered proprietor competent to effect a transaction of the sort disclosed by the instrument. He is not concerned to inquire into the circumstances, or even to verify the facts stated. In this case, the Registrar sees what purports to be a lease for 500 years from a municipal corporation; and there is nothing on the face of the instrument to take it out of the general rule forbidding such leases on the part of the Corporation.

Speaking more generally, Sir Samuel Griffith, C.J., at p. 385, said:

> While the Registrar of Titles may be justified in refusing to register an instrument which is on its face a breach of trust, or is forbidden by positive law, it is not, in my opinion, competent for him to examine the propriety of the bargain or the sufficiency of the consideration for an instrument presented for registration unless he has independent reasons for suspecting *fraud*, in which case he would, I think, be justified in holding his hand.

This last extract leads us to another aspect of the Registrar's duty—namely, his power to prevent a breach of trust.

It is necessary here to distinguish between *public* trusts and *private* trusts.

Notice of a private trust cannot be entered on the Land Transfer Register except in connection with "no survivorship" titles, as to which, see articles in (1941) 17 NEW ZEALAND LAW JOURNAL, 137, and (1946) 22 NEW ZEALAND LAW JOURNAL, 91. But notice of a *public* trust may be entered on the Register: s. 130 of the Land Transfer Act, 1915. To these public trusts there apply the provisions of Appendix I to the Land Transfer Act, 1915. It is provided that notice of a *public* trust on the Register acts as a perpetual caveat, and this prevents any dealing in *manifest* contravention of such public trust. Even the mere reference in the certificate of title to the statute under which the land has been granted is sufficient to prevent the registration of any dealing in manifest contravention of the public trust: *Canterbury University College* v. *Wairewa County*, [1936] N.Z.L.R. 304. As a matter of practice, of course, it is preferable that there should be an express reference to the trusts on the certificate of title. The difficulty is that the statute does not define *public* reserve or *public* land, and it is my personal opinion that the word "public" should be given a wide rather than a narrow meaning. Section 13 of the Public Reserves, Domains, and National Parks Act, 1928, is more specific, and reads as follows:

> (1) No District Land Registrar shall without special authority of law register or otherwise give effect under the Land Transfer Act, 1915, to any dealing with any public reserve except in conformity with the trusts upon which such reserve is held for the time being.
>
> (2) The provisions of clauses one, two, three, and five of Appendix I to the Land Transfer Act, 1915, shall apply not only to land set apart or reserved by the Crown as public reserves but also to any other lands being public reserves as defined in this Act, and the notification provided for by the said clause two shall in the case of such other lands be made by the local authority or trustees in which or in whom any such other land is vested, and may be made by its inclusion in any memorandum of transfer of such other land to such local authority or trustees, or in any application to bring any such land under the provisions of the Land Transfer Act, 1915.

Therefore, it is clear that, if, in the recent case of *Cromwell Borough* v. *Skinner* (*supra*), the District Land Registrar had been of opinion that the land was a public reserve, it would have been his duty to refuse to register the transfer.

An example of a public reserve is the recent Court of Appeal case *Kaikoura County* v. *Boyd*, [1949] N.Z.L.R. 233, a reserve in trust for the improvement and protection of a named river.

As to private trusts: The District Land Registrar has a discretionary power to lodge a caveat to protect a private trust if he becomes aware of its existence. As to lands brought under the Land Transfer Act, 1915, by virtue of the "Compulsory Act," and issued in the name of trustees who have no power of sale: He is commanded by the Legislature to lodge a caveat to protect the trust. Where a caveat has been entered, either in exercise of his discretionary authority or in pursuance of the statutory command, no dealing can be registered in breach of the trust: in practice, either an order of the Supreme Court authorizing the dealing must be produced or all the beneficiaries, all being *sui generis*, must consent to the dealing.

What is the power of the Registrar, where no caveat has been lodged to protect a private trust? The leading Australian case of *Templeton* v. *Leviathan Proprietary, Ltd.*, (1921) 30 C.L.R. 34, appears to supply the answer. As pointed out in *Kerr's Australian Lands Titles* (*Torrens*) *System*, 56:

> The High Court rejected the contention that in instances where potential breach of trust may be involved the Registrar's power to reject an instrument is limited to cases where either

a document of trust has been filed or a caveat has been lodged. The High Court, on the contrary, laid down that, where it has come to the knowledge of the Registrar that a dealing lodged for registration is a breach of trust, or that for any other reason the person dealing with the land as registered proprietor is not competent at law or in equity to deal with it in the manner proposed, it is his duty to refuse to register.

In this case, the sale had actually been authorized by a Court order made in Chambers, but, as it had been made in the absence of some of the beneficiaries, it was not binding on them, and, consequently, the refusal of the Registrar to register the transfer evidencing the sale was justified. In short, the papers which the Registrar had before him showed that the transaction was in breach of trust.

But, where land owned by trustees subject to a private trust is dealt with by the registered proprietors, the Registrar cannot issue requisitions on mere suspicion that the dealing may be in breach of trust. There must be facts within his knowledge sufficient to rebut the presumption *Omnia praesumuntur rite esse acta*. The general principle was well stated by Richmond, J., in *George* v. *Australian Mutual Provident Society*, (1885) N.Z.L.R. 4 S.C. 165, 171, 172:

> The grand purpose of the Land Transfer Act, 1870, was to facilitate the sale of land. Every facility given for the alienation of trust property may be also a facility for the commission of fraud; the security of the trust is to some extent subordinated to facility of alienation. I take it to have been the purpose and intent of the Legislature by the Land Transfer Act to effect the latter object, necessarily, at the expense to some extent, of the former—to facilitate the alienation of land at the possible expense of equitable rights. It is clear that the purchaser is protected except in the case of fraud—that is, as I understand the Act, fraud to which he is a party.

Let us now consider for a moment a dealing by a person holding the land in a representative capacity—*e.g.*, a legal personal representative. Usually such a person has become registered by virtue of a transmission. It must not be forgotten that s. 124 (2) of the Land Transfer Act, 1915, provides that such a person, for the purpose of any dealing with the land, shall be deemed to be the absolute proprietor of the land. The effect of this appears to be that a person holding in a representative capacity and registered by virtue of a transmission is in pretty much the same position as that of a trustee holding under a private trust. On the presentation of a transmission, the Registrar may lodge a caveat to prevent any improper dealing: if a transfer or other dealing is presented for registration immediately after the transmission, the Registrar may intervene a caveat, and this will authorize the Registrar to satisfy himself that the transfer is not an improper one: *Re Griffen, Flynn and Griffen* v. *Invercargill District Land Registrar*, (1898) 1 G.L.R. 101. But, if the Registrar fails to lodge a caveat, then the maxim *Omnia praesumuntur rite esse acta* applies. This is clearly shown by the case *In re Fairbrother to Allen*, (1896) 15 N.Z.L.R. 196, a decision of Sir James Prendergast, C.J., to which the principle of *stare decisis* has long since applied. Transmission of the estate of a deceased registered proprietor of land under the Land Transfer Act, 1915, to his widow as executrix was registered in 1893; and in 1896 a transfer by the widow to a purchaser, not describing the transferor as executrix nor purporting to be made in pursuance of a sale for payment of debts of her late husband, was presented for registration. Section 16 of the Administration Act, 1879, provided that an executor, transmission to whom had been registered, should, for the purpose of dealings, be deemed to be the absolute proprietor. It was held that the District Land Registrar, *not having express notice of a breach of trust*, was bound to register, without requiring production of the probate or *other evidence that the executrix was acting within her legal powers*.

As *Hogg's Registration of Title to Land throughout the Empire*, 382, says:

> In general, the position of a personal representative who is registered owner is similar to that of a trustee.

And, at p. 381, the learned author lays down the rule thus:

> In jurisdictions where particulars of beneficial interests are not entered on the Register, the right of the personal representative to deal with the property can only be challenged by the Registry Office *under circumstances which raise some suspicion of wrong*, or where the personal representative is not transferring in that character, and an administrator has been held entitled to sell the land of which he is registered owner after a lapse of twenty-five years from the intestate's death.

Some suspicion of wrong would arise, for instance, if the proprietor registered in a representative capacity purported to make a gift of the land, or attempted to transfer the land to himself, when he was not at the same time also solely beneficially entitled to the land. If he is the sole devisee, and he has cleared deceased's estate by payment of debts, legacies, and death duties, he may transfer the land to himself. But, if he is not the sole devisee, then *prima facie* the transfer is not in order, and the Registrar may decline to register until the transferee has got in all outstanding beneficial interests; but, even in these circumstances, the Registrar cannot be too inquisitorial. For example, if all the beneficiaries, all being *sui juris*, consent to the transfer, or by deed of assignment have by way of gift or for a valuable consideration released or assigned their beneficial interests to the legal personal representative, the Registrar must register the transfer. He cannot, for instance, require proof that the beneficiaries have had independent legal advice: *Hosken* v. *Danaher*, [1911] V.L.R. 214.

We leave now dealings by trustees or by registered proprietors holding in a representative capacity, or by statutory corporations having limited powers of dealing, and revert to the normal case of a person being registered under the Land Transfer Act, 1915, in his own right. The Registrar as a rule is not concerned with the covenants in a lease. Thus, he cannot decline to register a transfer of a lease merely because such transfer may constitute a breach of covenant: the lessor has his remedy; he may re-enter for breach of covenant: *In re Duggan*, (1882) N.Z.L.R. 2 S.C. 144. Such covenants are contractual provisions with which the Registrar is not concerned. The position, however, may be different if the restriction is imposed by statute. Crown leases, for instance, require the consent of the Land Settlement Board, and the Registrar must see that the necessary precedent consent has been obtained before registering any dealing therewith.

Finally, there are other cases where the Legislature, in order to carry out its policy—for example, against the creation of slums or aggregation of land—has been obliged to command the Registrar not to register any dealing in contravention of the statutory provisions. Here, there is very little room for the application of the maxim *Omnia praesumuntur rite esse acta*. The Registrar must reasonably satisfy himself that the dealing is in order, and, if necessary, he must requisition for the necessary evidence. Examples of these statutory

provisions are ss. 125 and 128 of the Public Works Act, 1928, s. 332 of the Municipal Corporations Act, 1933, s. 9 of the Land Subdivision in Counties Act, 1946, and s. 249 of the Maori Land Act, 1931; and, as to the principle, see *Deans* v. *District Land Registrar*, [1928], N.Z.L.R. 311 (a transfer in breach of a local Act containing restrictive provisions as to subdivision of land).

MANNERISMS.

By GILCHRIST ALEXANDER.

Nothing endears a public man to the public more than a recognized mannerism. In the political world, the cartoonist's first aim is to pin down the leader of a party by a familiar and constantly repeated habit. Where would Winston Churchill be without his cigar—generally freshly lighted, be it noted—or Stanley Baldwin without his pipe, or, in the olden days, Joseph Chamberlain without his orchid?

In the legal world, Spy of *Vanity Fair* hit off in inimitable fashion the foibles and personal idiosyncrasies of many of the leading men of the day. Who that practised before him could forget the pleasing habit of that plodding but ever courteous and pleasant Judge, Gainsford Bruce, J.? At 3.30 p.m. every day, his clerk placed on the Bench beside him a steaming cup of tea. As he listened to the arguments of counsel, the learned Judge reflectively sipped his tea and ruminated on the validity or otherwise of the case presented. His judgments are embodied in the reports, and, strictly speaking, one should hasten to them for a correct appreciation and recollection of this estimable Judge. But Spy has shown him in characteristic attitude with the cup to his lips, and that is the memory of him which the surviving counsel of the day will cherish.

Few who practised before him will forget the peremptory rapping on the Bench with his pencil, a habit in which that formidable Lord Chief Justice, Lord Russell of Killowen, indulged when matters were not going expeditiously enough for his taste. A later generation became familiar with a similar habit on the part of Rigby Swift, J., who no doubt contracted it on the Northern Circuit, that home of forthright men; but Rigby Swift, J.'s, rapping was but a feeble echo of the Lord Chief Justice's mandatory summons.

One recollects the toying with an eyeglass as a familiar judicial habit. In days long ago, when it was the custom of the Lord Chancellor on occasion to preside over Appeal Court I at the Court beside the Carey Street entrance to the Courts, it was fascinating to watch Lord Halsbury at work. There he sat, a little man of immense dignity, the huge and ornate mace on the Bench in front of him and the Great Seal suspended behind him. There was no question who was master in that Court. Leading silks, accustomed to lord it in lesser Courts, assumed an unwonted humility before this dominating personality. Then, when the crucial document was produced and handed up to the Bench, the programme was always the same. The Lord Chancellor affixed a pair of tortoise-shell eyeglasses to his nose, carefully read through the relevant passages, twitched his nose to relax hold of the glasses, and caught them as they fell into his extended hand. He never had to read the document twice.

Romer, L.J., grandfather of the present Romer, J., made play with a monocle. One could tell when he was in full cry after some vital point. First of all, he diligently polished his eyeglass, the while he was elaborating his question to counsel. The question having been posed, he adjusted his monocle and through it gazed intently at the silk as if to measure the visible effect of his question as well as the purport of the answer. Should the answer be satisfactory, he relaxed his features and caught the descending monocle. If, however, he was not satisfied, the whole process had to be gone through again. The coloured handkerchief was produced, the polishing was renewed, and not until some finality was reached did the learned Lord Justice pass on to the next point.

Vaughan Williams, L.J., made no play with eyeglass or pencil, but it was his habit to roll about in his seat, posing some question of portentous length, while he gazed fixedly at his colleagues in succession, as if it were to them, and not to counsel, that his question was directed. For their part, his fellow Judges displayed no enthusiasm for this particular idiosyncrasy.

Hawke, J., was one of those Judges who appeared to be thoroughly at home on the Bench. If one ventured into his Court in the middle of the afternoon, as like as not one would see him leaning on his right elbow with a rolled-up handkerchief in his right hand pressed against his cheek. This attitude seemed to be conducive to reminiscence, for sooner or later, if counsel were of the necessary vintage, he would be led to recall events of the past in which he and counsel had a common interest. Then, with a reproachful look at counsel, he would suddenly announce: "Really, Mr. Blank, we must get on."

The rolled-up handkerchief was a not uncommon feature in the Law Courts. Carson, in his palmiest days at the Bar, made much play with it. I can still see him in the crisis of a case, standing up in the front row, his tall slim figure bent forward as he leant both hands on the desk in front of him, and in his right hand a handkerchief so tightly rolled as to form a small compact ball. So often did one see this, and so characteristic did the attitude become, that I have little doubt that subconsciously he had come to rely on it as an aid to his advocacy.

So also Sir John Lawson Walton, an Attorney-General whose brilliant advocacy is now almost forgotten, had a habit of which I daresay he was barely conscious. Many a time I have sat behind him in the Court of Appeal and witnessed his invariable practice when conducting a case in that Court. When he was arguing a point of law, he stood very erect, with his hands behind his back. In his hands, he held a small crumpled piece of paper, and during the whole course of the argument he continued to twiddle the paper about with the fingers of both hands. Like Carson with the rolled-up handkerchief, he seemed to find comfort and support from this humble accessory.

Spy has caught the favourite attidude of Rufus Isaacs when addressing the Court. There he stands, a

(*Concluded on p. 368.*)

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

The Reward of Kindness.—While argument centres round the problem of what legal aid should be given to poor people and who are the poor people to whom such legal aid should be given, some thought, even if only by way of diversion, might well be given to the curious case of Sir Charles Russell, afterwards Lord Russell of Killowen. At the time he was at the zenith of his career as a barrister, but in his capacity as M.P. for Hackney, he was an easy mark when his constituents required subscriptions to local charities. On one occasion, schoolboys formed a football club. The secretary approached him for a subscription and received half a guinea, whereupon the mother of the lad, having been deserted by her husband some time previously, wrote to Sir Charles saying that, as he had been kind enough to send half a guinea to a boys' club, she would be much obliged if he would obtain a divorce for her, and she enclosed a stamped envelope so that he could forward it to her in the course of the next few days. Somewhat bewildered at the request, Sir Charles sent for the woman, and, after hearing her, he promised to provide her with counsel and solicitor, which he duly did at his own expense. On being told a distorted version of this charitable action, the husband promptly filed a cross-petition and applied for the leave of the Court to join Sir Charles as a co-respondent. Fortunately, the Registrar, realizing that the litigating parties were of the humblest class and that the allegedly adulterous association was in the highest degree unlikely, caused inquiries to be made through the petitioner's solicitor. The application failed, but it is said to have had a dampening effect on Sir Charles's enthusiasm for the matrimonial causes of poor litigants.

Bicycles and Trailers.—In *Cannan* v. *Earl of Abingdon*, [1900] 2 Q.B. 66, Bigham and Phillimore, JJ., held that a bicycle was covered by the words "every coach, chariot, berlin, hearse, chaise, chair, calash, wagon, wain, dray, cart, car, or other carriage whatsoever." Our Court of Appeal recognized it as "a means of transport" within the meaning of s. 7 of the Workers' Compensation Amendment Act, 1943: *Hassett* v. *Bridgeman* (*No. 2*), [1948] N.Z.L.R. 1220. By s. 12 of the Licensing Act, 1872, every person who is drunk while in charge on any highway "of any carriage, horse, cattle or steam engine" may be apprehended, fined, or imprisoned. A Divisional Court of the King's Bench (Lord Goddard, L.C.J., and Hilbery and Byrne, JJ.) now consider that, inasmuch as this section has as its purpose the protection at which it aims, the word "carriage" therein is to be interpreted as including a bicycle: *Corkery* v. *Carpenter*, [1950] 2 All E.R. 745. On the day that this decision was delivered, this Court found that an empty poultry shed, which had no brakes and no braking system, was unequipped with pneumatic tyres, had no distinguishing mark exhibited on the back, and was drawn along the road by a tractor, was a trailer and not a "land implement." The definition of the latter under the Motor Vehicles (Construction and Use) Regulations, 1947 (Eng.), includes a living van and any trailer which for the time being carries only the necessary gear or equipment of the land locomotive or land tractor which draws it. That is all we have to say about a land implement, save, of course, that it does not include a bicycle.

Laconic Ardour.—During the hearing of a recent application before the Supreme Court, the circumstances in which the testator had married his housekeeper assumed importance, at least in the mind of one of the counsel. When it emerged that the testator had kept a diary, he insisted upon this being produced. It did throw, however, some light upon the romantic premarital proclivities of the deceased farmer. It read: "Wet day. Got married."

Quo Vadis.—Replacing Lord Simon at a few hours' notice, Russell Vick, K.C., President of the English Bar Association, attended the thirtieth annual meeting of the Canadian Bar Association at Montreal, and, at one of the social functions there, spoke of a litigant who brought an unsuccessful case in the King's Bench Division. He said to his counsel: "Where do we go from here?" The counsel said: "We have a good chance; we will go to the Court of Appeal." He went to the Court of Appeal, and lost. Then the client said: "Where do we go from here?" "We will go to the House of Lords—very expensive, very expensive." Well, he went to the House of Lords, and he lost. Then the client said: "Where do we go from here?" Counsel replied: "Now that is the end: it is finished!" In gloomy silence, they proceeded to walk down the Embankment, and the client said: "What do I do now?" "Are you married?" asked counsel. "Yes," was the answer. "Then go home and breed; *we want men like you.*"

Exam. Note.—The recent newspaper report that an employer had been held "precariously" liable for the acts of his employee recalls the answer made by a student from Malay to a question set by J. H. Carson, K.C., in an examination paper. The story is told by J. A. Strachan in his book *The Bench and Bar of England.* "For what acts," he asked, "of a co-partner is a partner liable?" He received from this candidate the startling answer: "A partner is liable for his co-partner's contracts (*e.g.*, fraud) and torts (*e.g.*, murder) if done in the ordinary course of the partnership business."

Speed Note.—

Magistrate: And what did the defendant say when you told her that she was going 55 m.p.h. in this built-up area?

Traffic Cop: She said: "What a cheek you've got to accuse *me*! You *must* have been doing much more yourself to overtake me at all."

From my Notebook.—"Lawyers, of course, are conservative people and they are also generally very busy, or try to be. All their time is taken up now in keeping pace with the mass of legislation and orders produced inevitably in their own countries under modern conditions of government, so that it is not physically possible for them to make themselves aware of what is going on in other countries. Another of the occupational diseases of their profession is complacency. They all know that their own system is best and that they have nothing whatever to learn from others": Lord Jowitt, L.C., in a speech to the Third International Congress of Comparative Law, Lincoln's Inn, July 31. 1950.

MANNERISMS.

(*Concluded from p. 366.*)

bland smile on his face, with both hands grasping the ribbons on the front of his silk gown. Almost all advocates have a mannerism of some sort, and this is one which seems to come most naturally.

C. F. Gill, a cross-examiner almost as deadly as Carson, had a curious habit. As he stood waiting for an answer to some searching question, he jingled loudly the coins in his trousers pocket. So loudly and constantly did he do this that it came to be accepted as the normal accompaniment of his cross-examination. Nor was the sound unobtrusive. It could be heard plainly at the back of the Court. When the witness was hesitant, the effect was startling. Somehow in the silence it seemed to suggest a sense of urgency, as if the patience of the cross-examiner were being tried and he was being driven to employ himself in some time-serving expedient.

Some leading silks of the last generation had a good deal of the actor in their composition. But Marshall Hall was theatrical in the extreme. Occasionally he carried this tendency to an absurd length. His calculated dropping of the pistol in a murder trial verged on a fiasco. He was always posing before a jury. Towards the end of his career, his physical disabilities caused him to provide himself with various gadgets in Court—air cushions, sprays for the throat, and so on. He was not slow to turn these accessories to advantage when it suited him. Nothing amused the fellow-members of his profession more than his tactics. Thus, it was his habit when his witness was being cross-examined, and was making damaging admissions, immediately to distract the attention of the jury. It might be that his air-cushion needed attention. More likely his throat began to trouble him. Then he had to throw back his head, open his mouth, and very elaborately and with great deliberation spray his throat with well-directed puffs from his spraying apparatus. This manoeuvre was generally attended with much success; no jury could resist such a spectacle. For the time being, the witness was forgotten. Here was much more entertainment.

One looked for little mannerisms in the leaders of that date. Upjohn, K.C., pushing his spectacles up on his forehead and peering into the document which he was reading, was a familiar figure. In the Revenue Court, one would see Danckwerts, K.C., holding open in his left hand a volume of the statutes and passing the forefinger of his right hand along the lines of the statute which he was reading.

There was something comforting in the very familiarity of these actions. They lent almost a family touch to the dry and rigid processes of the law. Everybody knows that what endears a member of the family to his or her brethren is not so much sterling qualities as some attractive foible, some gesture or action constantly repeated and constantly expected, by which that member will afterwards be brought to mind. So with personalities in the law. In the pages of the law reports they are on a common level, differentiated no doubt by degrees of intellectual merit, but set out in all the drabness of the printed word. In the memory of their fellows who saw them in the flesh, they have colour and distinction. Their features and voices may be vividly recalled, but, without doubt, what will rise to the mind, when their names are mentioned, will be some endearing foible or engaging mannerism.