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LIMITATION OF ACTION: ACCRUAL OF "CAUSE OF ACTION" IN TORT IN RESPECT OF BODILY INJURIES.

IN a recent judgment, *Henderson* v. *Stewart*, delivered by Mr. Justice Hay, leave was sought under the proviso s. 4 (7) of the Limitation Act, 1950, to bring an action arising out of an accident wherein bodily injury was caused to the intended plaintiff, and which had occurred some six years previously. When, through the alleged negligence of its driver, a taxi in which the intended plaintiff was travelling left the road and rolled down a bank, she received what appeared to be a slight blow on the head; but she was not disabled and she did not appear to have suffered any ill-effects from the accident. The accident happened on December 31, 1946. Seven months later, she received a cerebral haemorrhage, and was in hospital for nine weeks. After her discharge she received treatment for a period of nine months as she was unable to walk, but at the end of that period she had regained her ability to walk and considered that she would have no further trouble. She remained in good health for a period of approximately eighteen months; but, at the beginning of 1950, she started getting pains in the head and back. From the beginning of 1950 until March, 1953, she was attended by various doctors and underwent a series of medical examinations and tests. During this period she wore appliances and received treatment and expected that she would be cured of her disabilities; but, at the time of swearing her affidavit (May, 1953), she had been advised medically that she would have to undergo a bone graft of the spine and might be permanently disabled. Her affidavit stated that she was medically advised that her present disabilities arose from injury to the head, and that, from the history of the state of her health, such injury must have been sustained by her in the accident of December 31, 1946. Until March, 1953, she had always hoped that her disabilities were of a temporary nature; and she was not certain that they sprang from the accident of December 31, 1946.

In the course of his judgment, Mr. Justice Hay said:

> It is material, therefore, to consider what was the date on which the cause of action accrued. If it was the date of the accident itself, the application is too late as six years had already expired before it was made. It is contended, however, by the intended plaintiff that here the cause of action is not only the accident itself but also the damage caused to the plaintiff; and that, as such damage did not become apparent till a much later stage, the plaintiff is still within the maximum period of six years in respect of which the Court may exercise its discretion.
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> The case most nearly in point in connection with the matter is a recent decision of Mr. Justice Streatfeild in *Archer* v. *Catton and Co., Ltd.*, [1954] 1 All E.R. 896, which laid down the principle that in an action of negligence the cause of action accrues at the time of the negligence, because it is then that the damage is caused even though its consequences may not be apparent until later. The learned Judge approved that principle as stated by the learned author of *Charlesworth on the Law of Negligence*, 2nd Ed., 597, in reliance on the case of *Howell* v. *Young*, (1826) 5 B. & C. 259; 108 E.R. 97.
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> It is, on the other hand, argued on behalf of the intended plaintiff that where damage is the cause of action, or part of the cause of action, the statute runs from the date of the damage and not of the act which causes the damage. Authority for this principle is to be found in *Backhouse* v. *Bonomi*, (1861) 9 H.L. Cas. 503, and the other cases cited in *20 Halsbury's Laws of England*, 2nd Ed. 617: see also *Salmond on Torts*, 11th Ed. 193, 194, and *Dillon* v. *Macdonald*, (1902) 21 N.Z.L.R. 375, 392).
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> I find it unnecessary to decide which of the two principles to which I have referred is the correct one to be applied to the circumstances of the present case, although I should be disposed to follow the first, namely, that the cause of action accrued at the time of the alleged negligence.

As this question must necessarily arise from time to time, the ascertainment of the point of time when the "cause of action" within the meaning of s. 4 (7) of the Limitation Act, 1950, has accrued in negligence caess, where action is brought in respect of bodily injury, is of obvious importance.

I. The Limitation Act, 1950.

The expression "date on which the cause of action accrued" is not defined, though it is used in several places in the Limitation Act, 1950. The expression similarly appears in the corresponding English statute, from which a definition is omitted, probably because the Law Revision Committee (Eng.) stated in para. 6 of its Report:

> Any attempt to produce a comprehensive statutory definition . . . would probably create more difficulties than it would solve.

But the Committee expressed the opinion that the test for determining when a cause of action accrues is whether a complete cause of action, to which, under the old procedure, the defendant could not have demurred, has arisen. They recognized, however, that this is not wholly satisfactory, since it makes the operation of the new statute depend to some extent on technicalities of pleading with which the present generation of lawyers is not familiar.

The term "action" is defined in s. 2 (1) of the Limitation Act, 1950, to mean "any proceeding in a Court of law other than a criminal proceeding"; so

that an action, under the statute, is exclusively a civil one. Under s. 30, for the purposes of the Act, any claim by way of set-off or counterclaim is deemed to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded.

References in the statute to " a right of action to recover land " include references to a right to enter into possession of the land, or, in the case of rentcharges, to distrain for arrears of rent. References to the bringing of such an action include references to the making of such an entry or distress : s. 2 (5).

Any references in Part II to a " right of action " are amplified by s. 2 (7) to include references to a cause of action and a right to receive money secured by a mortgage or charge on any property to recover proceeds of the sale of land, and to a right to receive a share or interest in the personal estate of a deceased person.

A " right of action " is not the power of bringing an action. As Lord Esher, M.R., said in *Attorney-General* v. *Lord Sudeley*, [1896] 1 Q.B. 354, 359 :

> Anybody can bring an action, though he has no right at all. The meaning of the phrase is, that the person has a right or claim before the action which is determined by the action to be a valid right or claim.

The term " cause of action " means that which makes action possible, as Lord Dunedin said in *Board of Trade* v. *Cayzer, Irvine, and Co., Ltd.*, [1927] A.C. 610, 617 ; or, as Lord Esher, M.R., put it in a definition which has been frequently applied, a cause of action is " every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court " : *Read* v. *Brown*, (1888) 22 Q.B.D. 128, 131.

It follows, therefore, that " cause of action " means the fact or combination of facts giving rise to a right of action. And the date on which the cause of action accrues is the date on which a right of action arises.

The Limitation Act, 1950, must first be referred to for specific applications of artificial dates for the accrual, for the purposes of the statute, of specific causes or rights of action.

If, however, there is no express provision made in the statute for the construction of the term " cause of action " in regard to the matters it specifies, then ascertainment of " the date on which the cause of action accrues " is to be sought in the common law.

Section 4, so far as is relevant here, is as follows :

> 4. (1). Except as otherwise provided in this Act, the following actions shall not be brought after the expiration of *six years* from the date on which the cause of action accrued, that is to say,—
>
> (*a*) Actions founded on simple contract or on tort : . . .

Thus, the cause of action for breach of a simple contract accrues on the breach itself, for that is the gist of the action ; and, if the breach occurs over six years before the commencing of the action upon it, the fact that the subsequent damage happened within six years next before the suit will not prevent the application of s. 4 (1) (*a*) : *Gibbs* v. *Guild*, (1881) 8 Q.B.D. 296, 302 ; except where there is something in the nature of a concealed fraud, in which case time runs from the discovery of the fraud ; or where the action is for relief from the consequences of a mistake : Limitation Act, 1950, s. 28 : *Beaman* v. *A.R.T.S. Ltd.*, [1949] 1 K.B. 550 ; [1949] 1 All E.R. 465.

But s. 4 (7) provides as follows :

> 7. An action in respect of the bodily injury to any person shall not be brought *after the expiration of two years from the date on which the cause of action accrued* :
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> Provided that application may be made to the Court, after notice to the intended defendant, for leave to bring such an action at any time within six years after the date on which the cause of action accrued ; and the Court may, if it thinks it is just to do so, grant leave accordingly, subject to such conditions (if any) as it thinks it is just to impose, where it considers that the delay in bringing the action was occasioned by mistake or by any other reasonable cause or that the intended defendant was not materially prejudiced in his defence or otherwise by the delay.

Neither s. 4 (7) nor its proviso appears in the corresponding statute of the United Kingdom, the Limitation Act, 1939. Much of our Limitation Act, 1950, is derived from that statute, for instance, s. 4 (1) (*a*) (relating to the six years' limitation on actions founded on simple contract and tort) is reproduced from s. 2 (1) (*a*) of the United Kingdom statute. But that statute does not modify in any way that six years' limitation in respect of an action in respect of bodily injury, as our s. 4 (7) does. It goes without saying that this important divergence from the United Kingdom statute has a bearing on English case-law on what is our s. 4 (1) (*a*), in actions claiming damages where bodily injuries have been caused by negligent acts.

The question when " the cause of action " accrues in tort, is not so simple as in the case of a breach of contract.

In *Brundsen* v. *Humphrey*, (1884) 14 Q.B.D. 141, which is of undoubted authority, the facts were that the plaintiff was a cabman driving his vehicle when the defendant ran into his cab, and negligence on the part of the defendant's servant was proved. It was held that the plaintiff had a cause of action, in regard to his personal injuries, which was distinct from his cause of action in respect of damage to his cab, as damage to goods and injury to the person, although occasioned by one and the same wrongful act, are infringements of different rights and give rise to distinct causes of action. In the course of the judgment in the Court of Appeal there are several dicta on the nature of the cause of action where damages are claimed in respect of bodily injuries.

In discussing the rule, *Interest reipublicae ut sit finis litium*, Brett, M.R., at p. 145, after saying it is a rule which sometimes produces a harsh result, and that, in fact, it is never wanted except when injury undeveloped at the time of action brought, is afterwards developed, continued :

> However, the maxim exists and it must receive a proper application. But, in order to apply it, one must often suppose what is not the case. It is to be assumed that the subsequent damage was in the contemplation of the person injured.

Bowen, L.J., as he then was, after discussing the old distinctions of forms of action, which, he said, still have a historical value as throwing light on the principles and definitions of the common law, said that, in the case before their Lordships, the plaintiff's remedies in respect of his bodily injuries would have been in an action on the case for negligence, based on the negligent management by the servant of his master's horses, a negligence for which in the eye of the law the master or employer is responsible. He continued at pp. 149, 150 :

Now what is the gist of such an action on the case for negligence ? If the whole of the plaintiff's case were to be stated and the entire story told, it seems to me that it would have comprised two separate or distinct grievances, . . . Actions for the negligent management of any animal, or any personal or moveable chattel, such as a ship or machine, or instrument, all are based upon the same principle—viz., that a person who, contrary to his duty, conducts himself negligently in the management of that which contains in itself an element of danger to others, is liable for all injury caused by his want of care or skill. Such an action is based upon the union of the negligence and the injuries caused thereby, which in such an instance will as a rule involve and have been accompanied by specific damages. Without remounting to Roman law, or discussing the refinements of scholastic jurisprudence and the various uses that have been made, either by Judges or juridicial writers, of the terms "injuria" and "damnum," it is sufficient to say that the gist of an action for negligence seems to me to be the harm to person or property negligently perpetrated. In a certain class of cases the mere violation of a legal right imports a damage. "Actual perceptible damage," says Parke, B., in *Embrey* v. *Owen*, (1851) 6 Ex. 353, at 368 "is not indispensable, as the foundation of an action ; it is sufficient to show the violation of a right, in which case the law will presume damage." But this principle is not as a rule applicable to actions for negligence : which are not brought to establish a bare right, but to recover compensation for substantial injury. "Generally speaking," says Littledale, J., in *Williams* v. *Morland*, (1824) 2 B. & C. 916, "there must be temporal loss or damage accruing from the wrongful act of another in order to entitle a party to maintain an action on the case" : see *Fay* v. *Prentice*, (1845) 1 C.B. 835, per Maule, J.

Later on, in considering whether one or two causes of action arose from the one act of facts, His Lordship made clear the ingredients of the cause of action where negligence has led to the infliction of bodily injury. At pp. 150, 151, he said :

The mere negligent driving in itself, if accompanied by no injury to the plaintiff, was not actionable at all, for it was not a wrongful act at all till a wrong arose out of the d amage which it caused. One wrong was done as soon as the plaintiff's enjoyment of his property was substantially interfered with. A further wrong arose as soon as the driving also caused injury to the plaintiff's person. Both causes of action, in *one* sense, may be said to be founded upon one act of the defendant's servant, but they are not on that account identical causes of action. The wrong consists in the damage done without lawful excuse, not the act of driving, which (if no damage had ensued) would have been legally unimportant.

The causes of action in *Brunsden* v. *Humphreys* (*supra*) arose out of one act of the defendant's servant : but several contemporaneous acts in these days of fast-moving traffic may constitute the one cause of action in an action based on negligence causing bodily injury. This is made clear by Gresson, J., in *Bass* v. *The King*, [1948] N.Z.L.R. 777, 781 :

The cause of action in the petition was that the respondent was liable vicariously because either or both of its servants was negligent in the handling of a motor-vehicle in charge of each respectively. In *Dillon* v. *Macdonald*, (1902) 21 N.Z.L.R. 375, the Court of Appeal discussed the meaning of the phrase "cause of action" and referred with approval to the definition, enunciated in *Jackson* v. *Spittall*, (1870) L.R. 5 C.P. 542, and subsequently approved by a conference of Judges, that "a cause of action" is "the act on the part of the defendant which gives the plaintiff his cause of complaint" 552. In cases arising out of the handling of motor-vehicles, it is seldom one act which constitutes the negligence. It is more often a series of acts or a combination of acts or omissions which together constitute conduct. In this case, the act on the part of the respondent which gives the plaintiff the cause of complaint is the negligent driving of one or other or both of respondent's drivers. The essence of suppliant's claim is damages for injury through the negligent driving of respondent's servants ; it proceeds on the liability of the respondent for its servants' default. The breach of duty alleged by the Petition of Right was negligent driving on the part of respondent's servants.

II. "Cause of Action" in Tort.

The classic application of the use of the term "cause of action" in actions arising in tort is found in the speech of Lord Bramwell in *Darley Main Collieries Co.* v. *Mitchell*, (1886) 11 App. Cas. 127, 144 :

Before entering upon an exposition of the meaning of "cause of action" in tort, Lord Bramwell said that laying down general propositions is attended with the same danger as giving definitions. Some necessary qualification or exception is generally omitted. Moreover, such propositions are often and justly called "obiter." With these dangers before his eyes, His Lordship said that he would, nevertheless, venture on some abstract propositions. He went on to say :

It is a rule that when a thing directly wrongful in itself is done to a man, in itself a cause of action, he must, if he sues in respect of it, do so once and for all. As, if he is beaten or wounded, if he sues he must sue for all his damage, past, present, and future, certain and contingent. He cannot maintain an action for a broken arm, and subsequently for a broken rib, though he did not know of it when he commenced his first action. But if he sustained two injuries from a blow, one to his person, another to his property, as, for instance, damage to a watch, there is no doubt that he could maintain two actions in respect of the one blow.

In illustrating that proposition, His Lordship then continued :

If he became bankrupt, the right in respect of the watch would vest in his trustee. That for damage to his person would remain in him. I have put the case of a trespass. The same would be true of an action for consequential damages. A man slandered or libelled by words actionable in themselves must sue, if at all, for all his damage in one action. Probably, if he sustained special damage, as that he lost a contract through being charged with theft, he might maintain one action for the actionable slander, another for the personal loss,—certainly if the case in Siderfin* is right. But it is not necessary to decide this.

Lord Bramwell proceeded :

I now come to the case of where the wrong is not actionable in itself, is only an injuria, but causes a damnum. In such a case it would seem that as the action was only maintainable in respect of the damage, or not maintainable till the damage, an action should lie every time a damage accrued from the wrongful act.*

For example : A. says to B. that C. is a swindler, B. refuses to enter into contract with C., C. has a cause of action against A. ; D., who was present and heard it, also refuses to make such a contract ; surely another action would lie. And so one would think if B. subsequently refuses another contract. Of course, one can see that frauds might be practised. So they may in any state of law. But I cannot see why the second action would not be maintainable if the second loss was traced to the speaking. And perhaps one might apply the same test. Would not the first right of action pass to the trustees of C. if he became bankrupt If the second loss was after the bankrupt's discharge, it would not.

Then, Lord Bramwell came to his third proposition :

There is still another class of cases to be considered, viz., those where the act causing damage is not in itself wrongful. No easier case can be taken than the above ground case of an excavation, whereby an adjoining owner's soil is let down. It cannot be said that the act of excavation is unlawful. A contract

* His Lordship was, no doubt, referring to *Saunders* v. *Edwards*, (1662) 1 Sid. 95 ; 82 E.R. 991.

to do it could be enforced. No injunction against it could be obtained unless injury was imminent and certain. What would be the rights of the person damaged in such a case ? I think the former reasoning would apply. If there was an excavation 100 yards long, and fifty feet of the neighbouring soil fell in, the right of action would be in respect of those fifty feet, and not only in respect of what had fallen in, but what would in future fall in along the fifty feet. But if afterwards the other fifty feet fell in there would be a fresh cause of action. Surely this must be so. If ten feet at one end fell in and afterwards ten feet at the other it would be impossible to say that there would not be two causes of action. If the excavation was on two sides of a square, the same consequences. The Attorney-General denied this, and was driven to do so. But suppose A. owned the adjoining property on one side, and B. that which was at right angles to it, there must then be two causes of action.

Our Court of Appeal, in a judgment delivered by Cooper, J., in *Dillon* v. *Macdonald*, (1902) 21 N.Z.L.R. 375, 392, 393, summarized the position, when discussing the meaning of the phrase " cause of action " :

> In an action for damages for breach of contract, the cause of action is the breach of contract . . . There is, however, one class of cases in which the fact of damage is a necessary and essential ingredient in the " cause of action "—namely, actions for torts causing damage to person or property not actionable without special damage, or until damage is sustained. *Brunsden* v. *Humphrey* (14 Q.B.D. 141) is a good illustration of the first branch of this class, and the well-known cases of *Backhouse* v. *Bonomi* (9 H.L.C. 503) and *Darley Main Colliery Co.* v. *Mitchell* (11 App. Cas. 127) are instances of the second branch. In this class of cases the damage is the gist of the action, and it is properly stated as part of the " cause of action."

Having, so far, considered the meaning of the expression " cause of action " as used in the Limitation Act, 1950, we propose in our next issue to discuss the question as to when time begins to run—in other words, when the cause of action " accrues "—in negligence cases where bodily injury results.

SUMMARY OF RECENT LAW.

ACTS PASSED, 1954.

1. Judicature Amendment.
2. Patea By-election.
3. Imprest Supply.
4. Imprest Supply No. 2.
5. Imprest Supply No. 3.
6. Electoral Amendment.
7. Nelson College Amendment.
8. Waitaki High School Amendment.
9. Canterbury Agricultural College Amendment.
10. Medical Practitioners Amendment.
11. Occupational Therapy Amendment.
12. Primary Products Amendment.
13. Dairy Industry Amendment.
14. Historic Places.
15. Public Service Amendment.
16. Military Training Amendment.
17. Invercargill Licensing Trust Amendment.
18. Child Welfare Amendment.
19. Government Life Insurance Amendment.
20. New Zealand Army Amendment.
21. Royal New Zealand Air Force Amendment.
22. Veterinary Services Amendment.
23. Land and Income Tax Amendment.
24. Land and Income Tax (Annual).
25. Imprest Supply (No. 4).

CRIMINAL LAW.

Appeal against Sentence—Appellant charged with causing Death while under Influence of Drink while in Charge of Motor-vehicle—Disagreement of Jury and Stay of Proceedings by Crown—Applicant also charged on Count of Negligent Driving causing Death, and convicted thereon—Sentence of Twelve Months Imprisonment—Measure of Punishment increased by Regard to Evidence of Intoxicated Condition on Charge on which Appellant was not found Guilty—Such Increase not permissible—Sentence quashed and Sentence of Six Months Imprisonment imposed in Lieu thereof. It is not the function of the Court which has to pass sentence for a particular offence of which a man has been found guilty to add to that sentence some further term of imprisonment for the commission of a supposed offence of which the jury has not found him guilty. The appellant was tried on an indictment containing two counts: (*a*) that being in charge of a motor-vehicle while under the influence of drink or a drug to such an extent so as to be incapable of having proper control of that vehicle, he did by an act or omission in relation thereto cause death; and (*b*) that he did negligently drive a motor-vehicle and thereby cause death. The jury disagreed on the first count; and found the appellant guilty on the second count. The Crown filed a stay of proceedings in the first count. The appellant was sentenced to twelve months imprisonment on the count on which he had been convicted. He appealed against sentence. *Held*, That it may not be improper in a case of negligent driving for the sentencing Judge to have regard to evidence of the prisoner's condition; but on the facts of this case, where there was a disagreement on the part of the jury whether his condition had reached the standard of intoxication laid down in the statute, and the Crown had chosen not to proceed on the intoxication charge, the evidence on that charge should not affect the length of the sentence. The sentence was quashed, and, in lieu thereof, a sentence of six months' imprisonment with hard labour was imposed; and the order for cancellation of the appellant's driving licence and the order that no further licence was to issue for two years was to stand. *Dunn* v. *The Queen.* (C.A. Wellington. July 14, 1954. Gresson, North, Turner, JJ.)

Appeal—Leave to Appeal—Notice of Application for Leave to Appeal filed Three Months Late—Power of Extension—Substantial Grounds necessary before Time extended—Criminal Appeal Act, 1945, s. 7 (2).—Appeal from Conviction—Breaking and Entering—Evidence amounting to Suspicion only—Evidence not establishing Guilt—Conviction quashed. Substantial grounds must be given before the Court of Appeal will exercise its power under s. 7 (2) of the Criminal Appeal Act, 1945, to extend the time within which notice of appeal or notice of an application for leave to appeal must be given. Where the case against the accused, who was convicted of breaking and entering, depended wholly on circumstantial evidence, and there was no evidence to connect the accused with a pair of socks and a torch found on the road where he was apprehended, the Court of Appeal reached the opinion that it would be unsafe to convict on that evidence, and the conviction was quashed, as no useful purpose would be served by ordering a new trial as all available evidence was before the Court at the trial. *Farrell* v. *The Queen.* (C.A. Wellington. July 14, 1954. Finlay, Gresson, Cooke, North, Turner, JJ.)

DAMAGES.

Breach of Contract—Damages particularized in Pleadings under Separate Heads—Plaintiff bound thereby subject only to Court's Power of Amendment—General Verdict given—Misdirection to put Damages to Jury as if Claim for Single Undistributed Sum—Damages to be assessed solely in Respect of Items as Particularized—Jury, if allowed to do otherwise, to be directed to assess Damages with Strict Reference to Such Heads—New Trial on All Questions on Action. Where damages are claimed under separate heads, the jury must either assess them under such heads, or, if allowed to do otherwise, must be carefully directed to assess them with strict reference to those heads; and a direction which means, or may reasonably be understood to mean, that the jury is

LEGAL ANNOUNCEMENTS.

Continued from cover i.

AUCKLAND FIRM requires Barrister and Solicitor with knowledge of conveyancing and estate work. Salary £1,000—£1,500 a year—early partnership available suitable applicant. Reply with testimonials:

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free to proceed otherwise is a misdirection. (*Barner* v. *Pigden*, [1937] 1 K.B. 664; [1937] 1 All E.R. 115; and *Anglo-Cyprian Trade Agencies, Ltd.* v. *Paphos Wine Industries, Ltd.*, [1951] 1 All E.R. 873, referred to.) (*Ryan* v. *Ross*, (1916) 22 C.L.R. 1 and *Coroneo* v. *Kurri Kurri and South Maitland Amusement Co., Ltd.*, (1934) 51 C.L.R. 328, applied.) Appeal from the judgment of *Hay*, J., allowed, and a new trial, to extend to all questions in the action, ordered. *Akatarawa Sawmilling Co., Ltd.* v. *Mulholland*. (S.C. & C.A. Wellington. April 28, 1954. Barrowclough, C.J.; Stanton, Hutchison, F. B. Adams, JJ.)

DEATHS BY ACCIDENTS COMPENSATION.

Apportionment of Damages—Widow remarried Twenty-two Weeks after Deceased's Death to Husband in Better Financial Position and with Better Prospects than Deceased—Elder Son living with Mother and Stepfather—Younger Son with Foster Parents, likely to become Adopting Parents in Better Financial Position than Deceased Father—Effect of Pending Adoption—Consideration of Circumstances arising after Deceased's Death and Probable Future Needs of Dependants—Deaths by Accidents Compensation Act, 1952, ss. 13, 16, 17, 18. Deaths by Accidents Compensation—Adoption—Likelihood of Early Adoption of Dependant Child—Relationship and Dependency to be Regarded at Date of Deceased's Death—Effect of Infants Act, 1908, deeming Adopted Child to be no longer Child of Natural Parents—Adoption Subsequent to Deceased's Death a Circumstance to be taken into Account in considering Probable Future Needs of Dependent—Infants Act, 1908, s. 21—Infants Amendment Act, 1950, s. 2—Deaths by Accidents Compensation Act, 1952, ss. 5, 13, 18. By virtue of s. 21 of the Infants Act, 1908, (re-enacted by s. 2 of the Infants Amendment Act, 1950), if the adoption of a child takes place before the death of his natural father, the adopted child would no longer be a child or dependant of his natural father under the Deaths by Accidents Compensation Act, 1952. Adoption subsequent to the death of the child's natural father does not deprive the child of all rights as a dependant under the Deaths by Accidents Compensation Act, 1952, as both the matters of relationship and dependency must be regarded as at the date of the death of the deceased. A subsequent adoption is a circumstance arising after the death of the deceased person; but s. 18 of the Deaths by Accidents Compensation Act, 1952, while it empowers the Court to take such circumstances into account, is not mandatory in depriving the person who has subsequently ceased to be a relative of the deceased of all provision; and the adoption is only one of the circumstances that should be taken into account in considering the probable future needs of such dependant. On a motion for apportionment of damages amounting to £2,000 under s. 13 of the Deaths by Accidents Compensation Act, 1952, the circumstances of the deceased's dependants at the time of the hearing were as follows. The deceased, who died on June 9, 1952, as the result of an accident left him surviving a widow (from whom he had separated on October 31, 1951) and one son born on July 23, 1951; and a second child born on August 2, 1952, after the deceased's death. The widow remarried on November 11, 1952, her second husband being in better financial circumstances and with better prospects than the deceased. The elder child was under the care of the Child Welfare Department when the deceased died, but with its consent he was living with his mother and stepfather. The younger child had, since he was three months old, been in the care of foster parents, who desired to adopt him, and who were in reasonable circumstances and fully capable of maintaining him. Thus, the position of the deceased's dependants at the time of the hearing of the motion, was that the widow's new husband was in a better financial position and with a larger income than the deceased, the elder son had a stepfather with greater financial ability to maintain him than his deceased father had; and the younger son had foster parents, likely to become adopting parents, who were in a better financial position than his deceased father. *Held*, 1. That the widow's pecuniary loss existed only during the period from the death of her husband to the date of her remarriage (twenty-two weeks) and she should receive £100. (*Willis* v. *The Commonwealth*, (1946) 73 C.L.R. 105, followed.) 2. That the position of the younger child should be dealt with on the basis that he was still legally a dependant of the deceased, that he had been cared for since shortly after birth by foster parents, and that, although there was no legal obligation on the foster parents to provide for his maintenance, there was a likelihood, subject to the ordinary vicissitudes of life, of such relationship and provision continuing, and that there was a likelihood also, although no certainty, of his being adopted by his present foster parents. 3. That subject to the payment to the costs and disbursements of the parties, the sum of £100 to the widow, and the past maintenance of the two sons respectively, the balance was to be held upon the statutory trusts contained in s. 14 (2) (3) of the Deaths by Accidents Compensation Act, 1952, for the elder son as to two-thirds and for the younger son as to one-third, the order to be subject to the provisions of ss. 16 and 17 of that statute. *Perpetual Trustees Estate and Agency Co. of New Zealand, Ltd.* v. *Crossan*. (S.C. Invercargill. (In Chambers). August 31, 1954. McGregor, J.)

DEED.

Construction—Deed providing Gift-over in the event of the Death of Named Person "Unmarried"—Such Person a Widow at Time of Her Death—Not in State of Marriage at Relevant Time—"Unmarried." A settlor, by each of two deeds of gift, made in 1912, declared certain trusts for the benefit of his daughter, J., under which the trust funds would devolve on her surviving brother and sister and the issue of her deceased mother and sister, "in the event of the death of [J.] unmarried." At the date of the deeds, J. had not been married. She married in 1918. There was no issue of the marriage. Her husband died in 1946, and she died in 1949, without having remarried. If the word "unmarried" were construed as meaning "never having been married," there would be a resulting trust in favour of the settlor, so that the property comprised in the trusts would form part of his estate with the usual exigencies as to revenue in favour of the Crown.

On originating summons asking whether J., having no issue and having been predeceased by her husband, died "unmarried" within the meaning of the deeds. *Held*, That the intention of the settlor as expressed in the deeds of gift was that the word "unmarried" therein in the context therein meant "is not in a state of marriage at the relevant time." (*Boyce* v. *Wasborough*, [1922] 1 A.C. 425, followed.) (*Knubley* v. *Collins (No. 2)*, [1926] G.L.R. 487, and *Milliken* v. *Public Trustee*, [1926] N.Z.L.R. 835; [1927] G.L.R. 6, applied.) Cameron *v. Gray*. (S.C. Dunedin. June 28, 1954. McGregor, J.)

DESTITUTE PERSONS.

Wife's Maintenance—Maintenance to be reasonably sufficient for Wife's Necessities—Wife not entitled under Statute to one-third of Husband's Income—Destitute Persons Act, 1910, ss. 2, 17. The Destitute Persons Act, 1910, deals with maintenance in the light of the wife's necessities, "adequate maintenance" being defined in s. 2 as being "maintenance reasonably sufficient for the necessities of the person to be maintained." Consequently the "unwritten rule"—that a wife usually receives one-third of the husband's income—does not strictly apply to complaints for maintenance under the statute. *X.* v. *X.* (Auckland. August 4, 1954. Grant, S.M.)

DIVORCE AND MATRIMONIAL CAUSES.

Nullity—Allegation that Respondent's Wife alive at Time of His Purported Marriage to Petitioner—Presumption of Validity of Respondent's Marriage to Such Wife in Absence of Evidence to Contrary—Matter to be determined in Light of Presumption, on Whole of Material before Court—Final Decree pronouncing Petitioner's Marriage Null and Void. In civil cases, including those in the divorce jurisdiction, a presumption of validity of a marriage arises from proof of celebration followed by cohabitation; and, in the absence of sufficient evidence to the contrary, where other evidence is tendered, the matter falls to be determined upon the whole of the material, *i.e.*, in the light of the presumption and of such other evidence. (*In re Peete*, [1952] 2 All E.R. 599, followed.) (*Tweney* v. *Tweney*, [1946] P. 180; [1946] 1 All E.R. 564, referred to.) The petitioner, in an undefended petition for nullity of marriage, alleged that, at the time of her marriage to the respondent on April 14, 1933, he was already married to a wife then living. It was proved that on March 1, 1922, the respondent had married one S., who died on December 19, 1938. Her death certificate showed that S. was married to J. S. in 1914; but it made no reference to her marriage to the respondent. In the certificate of her purported marriage to the respondent, she was described as a widow. Apart from any presumption that might apply, there was no direct proof that S. was free to marry in 1933; and, as a question of fact, the validity of S.'s marriage to the respondent was not established. On the other hand, there was no direct evidence of its invalidity. *Held*, 1. That the presumption of validity was applicable in the present case to the proof of the marriage of the respondent to S. 2. That the marriage certificate of S., to the respondent was sufficient evidence of celebration, and the petitioner was entitled to rely on the presumption arising from due celebration and subsequent cohabitation. 3. That, bearing the presumption in mind, it was legitimate to infer that J. S. the husband of S., was already dead at the date of her marriage to the respondent in 1922, and that hshe ad correctly described herself as a widow on that occasion;

and, if S.'s death certificate (which was some evidence of the particulars stated therein) was evidence of her marriage to J. S., the marriage certificate on her marriage to the respondent, describing her as a widow might perhaps be equally good evidence of J. S.'s death; and the petitioner had sufficiently proved his case. (*In re Stollery, Weir* v. *Treasury Solicitor*, [1926] Ch. 284, referred to.) A final decree was made pronouncing and declaring the petitioner's marriage to have been and to be null and void by reason of the fact that the respondent at the date thereof was already lawfully married to S., she being still alive. *C.* (*Otherwise H.*) v. *H.* (S.C. Auckland. May 24, 1954. F. B. Adams, J.)

GAMING.

Offences—Tipping—Publishing Information as to Probable Result of Horse-race—Guide to Doubles Betting a "Newspaper"—Gaming Act, 1908, s. 30 (1) (b). The defendant company printed and the defendant published an eight-page publication purporting to give a guide to doubles investments for race-meetings held in New Zealand on certain Saturdays. It was offered for sale at the price of 1s. It was not then registered as a newspaper under the Printers and Newspapers Registration Act, 1908. Each defendant was charged with a breach of s. 30 (1) (*b*) of the Gaming Act, 1908 (as substituted by s. 15 of the Gaming Amendment Act, 1949). *Held*, 1. That the publication was a "newspaper" for the purposes of the Post and Telegraph Act, 1925, but it was not included within that term in the Printers and Newspapers Registration Act, 1908; and it must be deemed to be a newspaper in that it contained articles of news relating to racehorses, a current topic of public interest, and advocated opinions therein, and it was published weekly. 2. That the publication must, therefore, be deemed to be a "newspaper" within the meaning of the proviso to s. 30 (1) of the Gaming Act, 1908, and be exempted accordingly; and no offence had been committed. *Police* v. *Printing Service Ltd. and Another.* (Auckland. July 16, 1954. Wily, S.M.)

JUSTICES OF THE PEACE.

Committal for Sentence—Accused pleading "Guilty" orally and committed for Sentence without signing Written Plea—Plea signed after Magistrate had left Bench—Strict Compliance with Statutory Requirements mandatory—Accused committed for Sentence without Jurisdiction—Existing Defect in Jurisdiction not cured by Subsequent Compliance with Statute—Justices of the Peace Act, 1927, s. 181 (3). The accused, after the intimation prescribed by s. 181 (1) of the Justices of the Peace Act, 1927, orally pleaded "guilty" to the offence charged; but his written plea of "guilty" though completed in the proper form, was not signed by the accused until after the Magistrate had committed him for sentence to the Supreme Court, and had left the Bench. On motion to set aside the committal for sentence: *Held*, 1. That the requirements of s. 181 of the Justices of the Peace Act, 1927, are mandatory and must be strictly observed; and, accordingly, at the time of the committal for sentence the requirements of the section in regard to the plea of "guilty" had not been complied with; and the jurisdiction of the Magistrate to commit at such time did not exist. (*R.* v. *Kohi Moka Wirori*, (1911) 14 G.L.R. 129; *R.* v. *Watson*, (1912) 15 G.L.R. 60; and *R.* v. *Birmingham*, (1912) 15 G.L.R. 168, followed.) 2. That the subsequent compliance with s. 181 (3) after the Magistrate had left the Bench did not cure the existing defect in the Magistrate's jurisdiction. *The Queen* v. *Halkett.* (S.C. Dunedin. (In Chambers). August 14, 1954. McGregor, J.)

MORTGAGE.

Discharge of Mortgage where Remedies Statute-barred—Court's Unfettered Discretion to make or refuse Order discharging Mortgage—Conduct or Inaction of Parties and All Circumstances to be taken into Consideration—Applicant to make out Case for Exercise of Discretion in His Favour—Land Transfer Act, 1952, s. 112. The dicretion of the Coyrt to make an order under s. 112 of the Land Transfer Act, 1952, discharging a mortgage where the remedies thereunder are statute-barred, is unfettered; but, in order to succeed, an applicant must make out a case for the exercise of the discretion in his favour. (*In re Dalton, State Advances Corporation of New Zealand* v. *Wolferstan*, [1953] N.Z.L.R. 167, and *Thomson* v. *Commissioner of Stamp Duties*, [1952] N.Z.L.R. 39; [1952] G.L.R. 96, referred to.) (*In re A Mortgage, Pearce to Sansom*, [1951] N.Z.L.R. 331; [1951] G.L.R. 183, not followed.) *In re A Mortgage, Presland* v. *Death.* (S.C. New Plymouth. August 28, 1953. Cooke, J.)

MUNICIPAL CORPORATIONS.

Laying Drains through Private Lands—Distinction between Public Drain and Private Drain—Hearing of Objections—Duty of Council—Municipal Corporations Act, 1933, s. 223 (1) (b)—*Ninth Schedule, cl.* (d). The Municipal Corporations Act, 1933, does not define what is a public drain and what is a private drain. A public drain is a drain which is in the general interest of the city or borough, as opposed to one for the particular benefit of an individual or of one household. The distinction is between a drain laid in connection with a particular property or even a drain laid to be used in common by two or more properties for the benefit of the particular household or households for whom it is installed, and, on the other hand, a drain laid to meet the needs of a group or collection of homes and to enable that settlement to be connected up to the general drainage system of the city. That it is laid on the private property of some individual does not necessarily preclude its being a public drain if it had for its object or purpose the needs of a section of the public. (*Wellington and Manawatu Railway Co., Ltd.* v. *Mayor, &c., of Wellington*,(1895) 14 N.Z.L.R. 472, referred to.) The hearing by a municipal council of objections to the laying of a drain by a private owner and the council's inquiry are judicial in character, and the objector must be given full opportunity of stating his objections and giving his reasons therefor, and, as well, opportunity of hearing what is urged in support of the proposals and freedom to comment on, criticize, and combat the reasons with which the proposal is supported. *Connelly et Ux.* v. *Palmerston North City Corporation.* (S.C. Palmerston North. August 18, 1954. Gresson, J.)

PRACTICE.

Writ—Service out of Jurisdiction—Breach of Contract committed within Jurisdiction—Defendant domiciled in India—If Defendant a British Subject, Service with Leave; if not, Service of Notice of Writ with Leave—Code of Civil Procedure, RR. 50, 51A.—Practice—Trial—Place of Trial—Action for Breach of Contract—Plaintiff and Witnesses within Jurisdiction—Defendant in India—New Zealand Forum Conveniens—*Code of Civil Procedure, R. 48* (C). The plaintiff, B., claimed from the defendant, P., an amount for moneys lent. Both were natives of India. P. owned some property in New Zealand but he had returned to India, where, as was held by *Fair*, J., he was domiciled and remained a British subject; and leave to serve the writ outside New Zealand was granted. The writ was served in India on P. on March 1, 1953. No defence was filed and judgment by default was entered. A charging order absolute was sealed charging P.'s land in New Zealand with the amount of the judgment. Later, on P.'s motion, the judgment was set aside on the ground that it had been served on a Sunday, and, on B.'s application, the writ was renewed for six months. On a motion by P. for a stay of proceedings on the ground that he was resident and domiciled in the State of India, and that he was not a British subject but a national of the State of India, and that the Court had no jurisdiction over him. *Held*, 1. That, in view of the provisions of R. 51A of the Code of Civil Procedure, if the defendant is a British subject, leave to serve him abroad with a writ may be given; and, if he is not a British subject, leave to serve him with a notice of the writ may be given. (*Fowler* v. *Barstow*, (1881) 20 Ch. D. 240, applied.) *Cockney* v. *Anderson*, (1862) 1 DeG.J. & S. 365; 46 E.R. 146; *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, [1894] A.C. 690; and *Wallace* v. *Bastings*, (1899) 18 N.Z.L.R. 639, distinguished.) 2. That the action should not be stayed as the balance of convenience and of justice required that the order of *Fair*, J., for service of the writ on the defendant in India, should stand. (*Logan* v. *Bank of Scotland* (*No. 2*, [1906] 1 K.B. 141; and *Oppenheimer* v. *Rosenthal and Co.*, [1937] 1 All E.R. 23, applied.) *Semble*, That where a plaintiff, as here, summons a defendant resident abroad to attend before a New Zealand Court, and where the defendant accepts that summons literally and attends personally to defend (perhaps accompanied by witnesses), then, in the event of his defence succeeding, it may well be that the plaintiff will be ordered to pay the costs which the defendant has not unreasonably incurred by attending; and substantial costs have been awarded in some cases. (*Picasso* v. *Trustees of Mayport Harbour*, (1884) W.N. 85; *Markham* v. *Abbott*, (1889) 10 L.R. N.S.W. 1; 5 N.S.W. W.N. 95, and *King* v. *Ivanhoe Gold Corporation*, (1909) 11 W.A.L.R. 106, referred to.) A motion, under R. 314 of the Code of Civil Procedure by the plaintiff for leave to issue a charging order (notwithstanding that the matter had yet not proceeded to judgment) charging the defendant's land in New Zealand, was dismissed in the absence of any evidence that the defendnt was making away with his property. *Bava Bhaga* v. *Parbhu* (*Otherwise Parbhoo*). (S.C. Wellington. June 15, 1954. Turner, J.)

REVISION OF THE UNITED NATIONS CHARTER.

By His Excellency Mr. L. K. Munro, New Zealand*
Ambassador to the United States.

The subject of Charter revision is particularly enticing for those of us concerned with the day to day operations of the United Nations. No doubt all constitutional instruments are imperfect, but those which reflect international realities in our present day world are undoubtedly the least perfect of all. No one is more aware of this than the delegations whose task it is, despite these imperfections, to seek positive results in the field of international peace and security, economic and social co-operation, and other areas of United Nations activity. How much more easily this or that desirable objective might be accomplished if the Charter had "teeth" in it; if the voting procedure in the Security Council were different; if the jurisdiction of the United Nations were clearly defined; and so on. How absurd it is, moreover, that a country with many millions of inhabitants has the same voting power in the General Assembly as one with, say, half a million. All this is undoubtedly true. But before we decide that the obvious remedy is a full-scale revision of the Charter, we must first face some hard facts, unpleasant though they may be.

First, the United Nations is not a world government. It is true that the Charter places some limitations on sovereignty, but only in certain specified circumstances. Basically, the United Nations is an association of sovereign states.

Secondly, there is no prospect of establishing a world government within the foreseeable future. Indeed, if the San Francisco Conference were being held today, I seriously doubt whether the measure of agreement which was achieved nine years ago could now be reached.

Thirdly, any amendment of the Charter requires the unanimous agreement of the five permanent members of the Security Council. I need hardly dilate on this formidable obstacle to any radical change.

Fourthly, there is no substitute for the United Nations. Regional security organizations of like-minded states are not a substitute for the United Nations, but—in present day conditions—an indispensable adjunct to it. An organization of a similar type, but without regional limitations, might be able to act more promptly and effectively than the United Nations, but it would not be a substitute for it; it would be something different. The United Nations is a meeting place for different ideologies; if co-existence is possible, it is the only place where it can be organized. This must be borne in mind if proposals are made to scrap the existing organization and start afresh on different lines and, if necessary, with different membership.

When the members of the United Nations are faced with the decision whether or not to hold a Review Conference, as they will be next year, these are among the considerations which they must weigh. They raise issues of the utmost gravity, and it is for this reason that most governments, including my own, have not yet taken a position on this question. Many of these governments, however—and mine was one of those which took the lead in this respect—have felt it desirable to enter into preliminary study of the question. Accordingly, the New Zealand delegation was a co-sponsor of a resolution adopted by the last General Assembly, which initiated certain preparatory work.

For the purposes of this discussion, I should now like to leave aside, for the moment, the considerations which I enumerated a moment ago and to consider what might be aimed at if a decision *were* taken to hold a Review Conference. These are personal views, and must not be taken as implying even a personal opinion on my part that a Conference should be held. That is a matter on which, I think, it would be better to suspend judgment.

In what respects, however, *could* the Charter be improved? What leaps to the mind first, perhaps, is the voting procedure in the Security Council. My country was a leading opponent of the veto at the time the Charter was drawn up, but we must realise that had it not been accepted there would probably have been no agreement at all. Equally, today, it would be unrealistic to expect its abolition.

You will recall that in 1950, the Fifth Session of the General Assembly adopted the 'Uniting for Peace' resolution which, among other things, introduced a procedure designed to provide against the event—never contemplated at San Francisco—that the Security Council, because of the lack of unanimity of its permanent members, might be unable to exercise its primary responsibility for the maintenance of international peace and security. Under this resolution, the General Assembly is enabled to make recommendations to members for collective measures to maintain or restore international peace and security. This procedure was not, of course, an amendment of the Charter, although its constitutionality has been debated at great length. It merely re-emphasized the Assembly's existing powers, under Articles 10, 11 and 12 of the Charter, and of course the Assembly's recommendations could not have the force of a decision of the Security Council taken under Chapter VII of the Charter.

But the Assembly's action in adopting a procedure of this kind underlined—if any underlining were necessary—the importance attached by Members to the upholding, in one way or another, of the Organization's general responsibility for the maintenance of international peace and security, despite the persistent refusal of a Permanent Member of the Security Council to do so. The Assembly's action recognized and accepted the limitations imposed by the veto and established a remedial and accessory procedure.

Although the Soviet Union has, with rare exceptions, been the only power to exercise the veto—and certainly it has grossly abused it—I doubt whether any of the Great Powers would be prepared to renounce it entirely, particularly in cases involving military enforcement action. What one might be permitted to hope for—and it is a tenuous hope—would be some restriction on the use of the veto in certain specified categories of questions—for example, the peaceful settlement of

* An Address to the International and Comparative Law Section of the American Bar Association, Chicago, August 17, 1954.

disputes, the appointment of the Secretary-General, and the admission of new members.

The problem of the admission of new members is one which exercises me greatly and one which brings the United Nations into disrepute perhaps more than any other. No solution—and many, both constitutional and political in character, have been advanced—is yet in sight to a deadlock which up to the present prevented the admission of more than a score of candidates. Some of them have been knocking at the door since 1946, and most of them are well qualified. For this, of course, the Soviet Union—which has refused to agree to the admission of well qualified non-Communist candidates unless Communist candidates, often ill-qualified, are simultaneously admitted—must bear the brunt of the responsibility. There may be something to be said, however, for the argument that erring states can be better dealt with inside rather than outside the organization. At any rate, there is a fairly widespread sentiment in favour of universality of membership. Although I am by no means convinced that the conditions of admission need to be amended since the terms of Article 4 paragraph 2 are, in my view, clear and not susceptible of equivocal interpretations, the question might nevertheless be usefully examined.

The article of the Charter which is now most often the subject of dispute is the domestic jurisdiction clause, Article 2, paragraph 7, which provides that nothing in the Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state. The argument about what these words mean—particularly the words " intervene " and " essentially "— has been going on since 1946, and I do not propose to expound it here. It is enough to say that up to the present this provision has not prevented the Assembly from taking up or making recommendations on any question which has come before it. A number of countries, including New Zealand and the United States, have expressed concern at the tendency of the General Assembly to place on its agenda subjects whose international character is doubtful. One remedy which has been suggested is amendment of Article 2, paragraph 7. Let me read you an extract from a speech made by Dr. Charles Malik of the Lebanon when the Moroccan question was being discussed in the Assembly last year. Dr. Malik said :

> There is no doubt that the domestic jurisdiction clause of Article 2, paragraph 7, is overriding over every other provision in the Charter. There is no doubt that it governs Articles 10 and 11. Thus there is no doubt that it is not enough to show that a topic falls within the scope of the Charter to prove that the General Assembly is competent to consider it. It must further be shown that this topic does not belong to the class of topics falling under the essential domestic jurisdiction of a state . . .
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> So long as what belongs to the essential domestic jurisdiction of a state is agreed upon, there is no conflict between Article 2, paragraph 7, and Articles 10 and 11. A conflict however at once arises and can only be settled by a simple vote, bringing in the operation of Article 18, as soon as there is no agreement whether a topic within the scope of the Charter belongs or does not belong to the essential domestic jurisdiction of a state. In that case the member state which does not believe that the topic belongs to the essential domestic jurisdiction of a state can properly, *i.e.* constitutionally, urge its consideration under Article 10 or Article 11.
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> There are two extreme cases whose validity is quite clear. On the one hand, it is not enough for one state . . . to claim that a matter belongs to the essential domestic jurisdiction of a state, to prevent the consideration of that matter by the General Assembly. If such a claim by one state, or even by a minority of states, prevented the consideration of an item, then we would have a veto in the General Assembly. But the very essence of the General Assembly, as the town meeting of the world, is absence of the veto. It will be recalled that even in the Security Council there is no veto when it comes to the adoption of the agenda. Thus the claim of one state or of a minority of states cannot block the consideration of an item, if that item falls within the scope of the Charter and if there is no agreement . . . as to whether the item belongs to the essential domestic jurisdiction of a state.
>
> On the other hand, if the case is clearly and manifestly one of essential domestic jurisdiction, then I believe its consideration does constitute intervention in the sense of Article 2, paragraph 7, and is therefore ruled out on constitutional grounds. In that case there should be a rule somewhere that not even a majority—not even 59 members—can put it on the agenda. For to put it on the agenda will obviously contravene Article 2, paragraph 7, and this means an illicit revision of the Charter which can only take place according to a specified procedure and not in accordance with the voting of Article 18. Thus, if one extreme validly prevents one state or a minority of states from blocking consideration, the other extreme validly prevents even an overwhelming majority from forcing consideration.
>
> The defect of the Charter with respect of the organic interaction between Article 2, paragraph 7, and Articles 10, 11 and 18 is now fully revealed; *we do not have any authoritative listing, or any formal definition, of what belongs to essential domestic jurisdiction.* To provide such a listing or definition should be one of the important tasks of the projected revision of the Charter.

In the extract which I have quoted, Dr. Malik has focussed attention on the core of the domestic jurisdiction problem which has, in recent years, provoked many of the most bitter debates in the brief history of the United Nations and led to a sad lack of unity among its members. We are all, I am sure, familiar with the major issues in which the principle of domestic jurisdiction has been invoked and with the arguments which have been adduced in support of and in opposition to recourse to Article 2 paragraph 7.

I do not always agree with Dr. Malik, but his views are often thought-provoking. I do not know whether a listing of the kind he suggests would be practicable—it is always difficult to draw up an exhaustive list of anything. Moreover, it is probably correct to observe in this connection that few members would welcome a delineation of that kind. Proposals in the past to refer questions of the Assembly's competence to the International Court of Justice for advisory opinions have not been popular either with those powers who seek to invoke the protection which, by its terms, the Article should offer, or with those nations who feel strongly that discussion and recommendations upon controversial issues should not be prevented or inhibited by the effects of Article 2 paragraph 7.

The complications of this provision are multiplied by the existence of other Charter provisions which many Members, as well as a body of legal authority, regard as being in conflict with the principle of domestic jurisdiction. Of these, the provisions relating to the promotion of human rights—Articles 55 and 56—are most frequently cited, since so many of the issues which revolve around the interpretation of Article 2 paragraph 7 involved questions of human rights and fundamental freedoms. Issues of this nature have presented the greatest difficulties and have severely strained the Organization since in no case, as I pointed out earlier, has the existence of Article 2 paragraph 7 prevented Assembly consideration. Furthermore, in most cases, the condemnatory or hortatory resolutions which have been adopted have had no good effect.

Whether the domestic jurisdiction problem can be solved or at least ameliorated by Charter amendment I find it difficult to know. As with many of the issues which will be brought forward if a review of the Charter is undertaken, the problem is as much political in origin as it is constitutional. And while more precision might be achieved in the unlikely event that it were agreed to amend or to define more closely the words "essentially" and "intervention", the basic problem, it seems to me, would still remain.

Nevertheless, the solution proposed by Dr. Malik—whether or not, as I said, it is a practicable one—deserves examination.

The questions I have mentioned do not, of course, even begin to exhaust the possibilities. It is widely considered, for instance, that on some questions, Charter provisions are inadequate not because of any fundamental defects but because of the way in which member nations seek to use them or simply because the world we live in today is not the world of 1945 when the Charter was drafted. One of these is, of course, that of armaments. As the United States Secretary of State, Mr. Dulles, pointed our earlier this year, had the delegates at San Francisco known they were entering the age of atomic warfare, they would have seen to it that the Charter dealt more positively with the problems thus raised.

I have referred to the ways in which some member states seek to use certain provisions of the Charter. One of the great purposes of the United Nations, expressed in Article 1, para. 3, is "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples . . .". Article 76 (*b*) refers to the progressive development in the particular circumstances of each trust territory "towards self-government or independence." The record of my government in Western Samoa has shown its anxious desire to comply with the letter and the spirit of these provisions. But as I look round me in a troubled world, where the weak still fall before some of the strong, I have some apprehension lest enthusiasts will press for independence as well as self-government for certain territories and thus lead to a fragmentation of sovereignty which will be an irresistible lure to the predatory. I repeat, it is not the Charter which will lead to these dangers but an unwise use of its provisions.

But we should not allow ourselves to be carried away in a vain pursuit of the ideal. Admittedly the United Nations has not measured up to the hopes of its founders. It may be that this is, in part, due to fundamental defects in the Charter. But these defects, when examined, are more often than not found merely to reflect the realities of international life. In national government, the education of public opinion is almost always a pre-requisite for constitutional change. For a better international organization, we must educate both peoples and governments.

INTERLOCKING SUBVERSION IN UNITED STATES GOVERNMENT DEPARTMENTS.

A Postscript to the Case of Alger Hiss.

By J. E. Farrell, LL.B.

The International Security Subcommittee of the United States Senate Committee on the Judiciary[1] has brought down a report on interlocking subversion in the United States Government. The Subcommittee set out

> to determine the existence of and to expose the design by which Communist agents were able to infiltrate the executive and legislative branches of government.

The Subcommittee arrived at a number of conclusions including the following :—

> The Soviet international organization has carried on a successful and important penetration of the United States Government and this penetration has not been fully exposed.
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> In general, the Communists who infiltrated our Government worked behind the scenes—guiding research and preparing memoranda on which basic American policies were set, writing speeches for Cabinet officers, influencing congressional investigations, drafting laws, manipulating administrative reorganizations—always serving the interest of their Soviet superiors.
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> Thousands of diplomatic, political, military, scientific, and economic secrets of the United States have been stolen by Soviet agents in our Government and other persons closely connected with the Communists.
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> Despite the fact that the Federal Bureau of Investigation and other security agencies had reported extensive information about this Communist penetration, little was done by the executive branch to interrupt the Soviet operatives in their ascent in Government until congressional committees brought forth to public light the facts of the conspiracy.

The Subcommittee made recommendations which included the following :—

> That a thorough study be made by the Committee on the Judiciary, in co-operation with the Department of Justice, of existing legislation, with a view toward extending the statute of limitation on false swearing and false affirmations by Government employees concerning Communist membership and subversion.
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> That the Internal Security Subcommittee continue to support Senate bill 16, giving Congress the power to grant immunity to certain witnesses, and, in the event of its enactment into law, review the evidence taken by the subcommittee during this session of Congress with the object of recalling certain witnesses who have refused to testify.

The report reviews the activities of the secret Communist underground in the United States from the formation of the first Communist cell in the United States Government by the late Harold M. Ware, a son of the late Ella Reeve Bloor. Sworn testimony established to the satisfaction of the Subcommittee that various Government employees, many of them lawyers—including Alger Hiss—were members of Ware's parent cell. One, Lee Pressman, admitted Communist membership; Hiss denied membership; and the others invoked privilege. A man named Nathaniel Weyl was also a member of this cell and he confirmed Alger

[1] Presided over by Senator William E. Jenner and including both Republican and Democrat Senators.

Hiss's membership. Weyl voluntered his evidence to the Federal Bureau of Investigation after the outbreak of war in Korea and he gave this and other evidence on oath before the Subcommittee.[2]

The lawyer members of this original cell made sure progress in the Administration. One was attorney for the Agricultural Adjustment Commission and Assistant General Counsel, National Labour Relations Board; Lee Pressman was General Counsel, Works Progress Administration and Resettlement Administration, and General Counsel, C.I.O.; and yet another was special counsel, Securities and Exchange Commission, chief counsel La Follette Civil Liberties Committee, and special Assistant to the Attorney General. Alger Hiss was even more successful.

The Subcommittee in its report details evidence of interlocking subversion; of the work of Communists in the Administration; of the difficulties of checking infiltration; of the protection afforded by the fifth amendment to the Constitution; and of the status and functions of the Federal Bureau of Investigation.

An examination of the records of various Communists and suspected Communists revealed that each supported the other in securing positions and advancement in the civil service. One Communist recommended another, eulogised his services, and rated him "E" for excellent.

"They travelled to every continent as emissaries and representatives of the American people. They attended virtually every international conference where statesmen met to shape the future."

Evidence given by former Communist and Vassar girl, Elizabeth Bentley, is reproduced in the report and is some evidence of the magnitude of the problem facing the administration:

Miss Bentley was asked regarding a Morgenthau plan for Germany:

Miss BENTLEY. No; the only Morgenthau plan I knew anything about was the German one.

Senator EASTLAND. Did you know who drew that plan?

Miss BENTLEY. Due to Mr. White's influence, to push the devastation of Germany because that was what the Russians wanted.

Senator FERGUSON. That was what the Communists wanted?

Miss BENTLEY. Definitely Moscow wanted them completely razed because then they would be of no help to the allies.

Mr. MORRIS. You say that Harry Dexter White[3] worked on that?

Miss BENTLEY. And on our instructions he pushed hard.

Miss Bentley was asked about the sources of military information and she replied:

Well, the military information came largely from George Silverman and Ludwig Ullmann; and, as I said, it was information of the most varied things you could think of. We had complete data as to almost all of the aircraft production in the country, as to types, how many were being produced, where they were located, and so on. We had all sorts of inside information on policies of the Air Corps. As I said, we knew D-day long before D-day happened, and we were right.

[2] Weyl's disclosure was not made until after Hiss had been convicted.

[3] Harry Dexter White, chief architect of the International Monetary Fund as well as its first United States executive director and Treasury representative on many government and international bodies (now deceased) and identified by Miss Bentley and Whittaker Chambers as a participant in Communist activity. Among the papers secreted by Chambers were compromising notes in White's handwriting.

Liaison between Communists in various branches of the Government was excellent. Irving Kaplan rose rapidly from a $5,000 a year post to a senior post with the United States Group Control Council in occupied Germany. In the course of his progress he used the names of other Communists as character references. One of these was Lauchlin Currie, who was President Roosevelt's adviser on Far Eastern Affairs and visited Generalissmo Chiang Kai-Shek as the President's personal emissary. There are many instances of the activities and influence of the Communists in almost every phase of American life, labour relations, agriculture, national recovery, finance, defence (including atom science research), the Treasury, and foreign affairs. The United States Army had no method of screening Communists in its ranks, and a Communist could be commissioned unless he "held the view that the Government of the United States could or should be overthrown by violence."

John Lautner, former member of the Disciplinary Review Commission of the Communist party gave this evidence:

Mr. LAUTNER. I was a graduate of Military Intelligence and I was assigned to Psychological Warfare in propaganda work.

Senator FERGUSON. And you were a Communist?

Mr. LAUTNER. I was a member of the Communist Party at the time of my induction.

Senator FERGUSON. Now, who was your superior officer in the Military Intelligence, Psychological Warfare?

Mr. LAUTNER. In Psychological Warfare, my superior officer was Peter Rhodes, who was in charge of the Mediterranean theater of operations monitoring system at that time.

Senator FERGUSON. Was he a Communist?

Mr. LAUTNER. * * * Later on I found out he was.

Few Communists were as tractable as Lautner, and the Fifth Amendment was invariably their shield. The following extract from the evidence of Frederick Palmer Weber is a colourful illustration of the use of such a plea:—

Mr. WEBER. You see, I am a Virginian, born and raised in Virginia, and my people fought for the Confederacy and I grew up under Thomas Jefferson's shadow and I would rather die than take away any man's right to hold any political opinion whatsoever that he so chooses on the basis of his own reading and understanding. I wouldn't do it. I wouldn't consent to it and I would not penalize any man for his particular opinions.

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Mr. MORRIS. I would like to revert back a little bit. You made the statement in the course of your testimony here today that you would at no time object to anyone's making a speech or expressing his views under any circumstances. Do you recall that you were active in a protest strike against the appearance of Mme. Tatiana Tchernavin while at the University of Virginia?

Mr. WEBER. I will plead my privilege.

Mr. MORRIS. Did you not protest the appearance of that woman because she was considered anti-Soviet at that time?

Mr. WEBER. I will plead my privilege.

The Federal Bureau of Investigation was very much alive to the activities of Communists in the Government Service and had reported on the information secured by it. Little action resulted from its reports. An understanding of the function and status of the F.B.I. is obtained from the testimony of J. Edgar Hoover given after the publication of the Report on Interlocking Subversion to the Internal Security Subcommittee:

Mr. HOOVER. The Federal Bureau of Investigation is a service agency. It does not make policy, it does not evaluate. It secures facts upon which determination can be made by officials of the United States Government. . . .

We do not inject ourselves into legislative matters. We do not express opinions or draw conclusions in our investigative reports. We have well-defined channels of official distribution through which we direct the results of our investigations.

Since we are not an agency for decision as to action, we are legally, morally and in good conscience obligated to relay all information and facts we secure to the responsible officials and agencies of Government.

It is my duty to report to the Attorney-General those matters in which he has a responsibility. It is likewise my duty, at the specific direction of the President, to report matters coming to our attention which are of pertinent interest to the President.

Senator BUTLER. I would like to ask one question. What opportunity did the FBI have, after Mr. White's[4] transfer to the Monetary Fund, to observe his activities?

Mr. HOOVER. I may say, Senator Butler, that the FBI, as I indicated in my formal statement, had initiated an investigation and surveillance of Mr. White in November, 1945. He was appointed in the early part of 1946. We continued our surveillance and investigation of Mr. White through 1946 and at times in 1947 and 1948, but I must point out that while he was a member of the United States Monetary Commission the premises of that Commission are extra-territorial, and the FBI does not have any right to follow any employee or any person on to the property of that Commission. We are under the same restrictions in regard to the United Nations.

Senator BUTLER. Therefore, his appointment hampered your investigation rather than helped it?

Mr. HOOVER. We were certainly hampered as far as surveillances were concerned.

Senator JENNER. Also hampered in regard to Mr. Frank Coe,[5] because as I understand, you reported that he was a security risk and in spite of that, he was appointed in June, I believe you stated, to the Monetary Fund.

Mr. HOOVER. That is correct, Mr. Chairman. I might say that the same problem is faced today by the FBI in conducting investigations of espionage activities of members who are attached to the delegations of the United Nations.

Senator JENNER. Sir, we run into the same problem in our committee.

The findings and recommendations of the Subcommittee raise the question whether the Constitution and the existing laws of the United States of America render that nation vulnerable to attacks by Fifth Columnists apart altogether from the dangers inherent in the existence within its frontiers of many extra-territorial premises capable of harbouring enemies of the Republic. Alger Hiss and others could not be indicted for espionage because of the Statute of Limitations; Communists summoned before House committees plead privilege with monotonous regularity; and Communists enjoy some immunity on American soil whilst employed at United Nations notwithstanding their pledge "to lie, to steal, to rob or to go out into the streets and fight."

The F.B.I. has stood powerless while Communists acted as staff officers to the executive personnel of the nation. That many of the gravest decisions of the United States during the last decade have been influenced by Communists in the Government service is now openly acknowledged and freely conceded. Burdened with its own particular domestic problems as never before perhaps "the preservation of the sacred fire of liberty"[6] at home and abroad is the major undertaking which confronts the American nation.

Any suggestion of an amendment to the Constitution to deal with the present evils is interpreted by a large section of the community as an inroad upon the individual freedom of the United States citizen and there are not wanting critics both in America and England who heap derisive and sterile comment on any such suggestion.

It is a far cry from the introduction in England of Regulation XIV under the Defence of the Realm Act in 1914, under which the Home Secretary was given a discretion, for reasons of national security, to intern without trial; and English critics should not readily assail United States legislators when measures are introduced in the interest of national security in that country.

Lawyers generally will follow with interest, sympathy, and understanding the efforts of the American people to arm themselves against the enemies within their ranks. It can be taken as axiomatic that the constitutional issues will be safeguarded by the legal profession and will be tested by the ordinary machinery of legal process.

Regulation XIV of the Defence of the Realm Act was tested in the House of Lords[7] and Viscount Simon, who was author of the regulation has referred to it as "a hateful necessity." Whilst the House of Lords was not unanimous[8] in its decision it was never questioned that Parliament could pass such an enactment and the Regulation was only challenged as being *ultra vires*.

[4] Harry Dexter White.

[5] Virginius Frank Coe started with the United States Government in 1934 and held important administrative posts. He was technical secretary to the Bretton Woods Monetary Conference in 1944 and later became Secretary of the International Monetary Fund and $20,000 a year. Coe refused to answer all questions whether he had been engaged in subversive activities or whether he was a Communist. He was dismissed by the I.M.F. a few days after he had given his testimony.

[6] From George Washington's inaugural address.

[7] *Rex* v. *Halliday*, [1917] A.C. 260.

[8] The dissenting judgment of Lord Shaw of Dumferline is of particular interest.

The Rule of Law

But what seems to me more ominous is the tendency to scepticism as to whether a struggle for improvement in the law is worth while, the doubt that reliance can be placed upon any law for the control of force or the determination of conflicts. Indeed, there is a cult which thinks meanly of our calling and tutors youth that 'realistically' there is no law except the will of those in authority, that judgments of the Courts express nothing deeper than the personal preference of the Judge, and his opinions merely manipulate words and symbols to rationalize or dissemble his predilections. Our people, appalled by the magnitude and stubbornness of the manifestations of lawlessness, tend to sink into a suicidal fatalism that accepts violence, crime, injustice and misgovernment as part of the natural and changeless order of things.

The most revealing symptom of a declining faith in reason and legitimacy as power in the world is evidenced by the zeal with which people everywhere are turning their minds to accumulating instruments of physical power. The titanic struggle for military superiority now being waged between nations is on the assumption that material, not moral, force will determine their destinies. No nation is more forceminded today than our own. The people are burdened and unhappy under it, but they do not know how to withdraw because the stakes seem to be so high that the dreadful game must be played on to fortune or to ruin. And within each nation the internal struggle for power between classes, creeds, races and ideologies tends to take on the uncompromising character. (Mr. Justice Rober H. Jackson, in an address at the laying of the cornerstone of the new American Bar Centre of the American Bar Association, Chicago, November 2, 1953.)

GRANT OF EASEMENT: LANDING STRIP FOR USE BY AIRCRAFT.

Agreement to use Lands as Air-Landing Strip.

By E. C. ADAMS, I.S.O., LL.M.

EXPLANATORY NOTE.

An easement of this nature will not be found in the precedent books, for it is only in recent years that the need for it has arisen.

Although incidents and burdens of a novel kind binding successive owners of land cannot be annexed to the ownership of land at the mere caprice of owners, the category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind: *Dyce* v. *Hay*, (1852) 1 Macq. 305, 313.

It is a fallacy to suppose that every easement must be brought within some particular class which has been recognized, such as watercourses, or light or air. These, together with rights of way and support, are the most common and familiar, but they are by no means exhaustive of the easements which have been held to be of a "known and usual" description: *Stroud's Law of Easements*, 9, citing *Simpson* v. *Godmanchester*, [1896] 1 Ch. 214, 218, per Lord Herschell.

One will find most instructive the following passage from the judgment of Sir Samuel Griffith, C.J., in *The Commonwealth* v. *Registrar of Titles for Victoria*,(1918) 24 C.L.R. 348, 353, 354. Lord St. Leonards said in *Dyce* v. *Hay*, (1852) 1 Macq. 303, 312:

> The category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind.
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> A recent instance of a novel easement is to be found in the case of *Attorney-General of Southern Nigeria* v. *John Holt and Co. (Liverpool) Ltd.*, [1915] A.C. 617.
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> In the course of argument I referred to several possible easements novel in kind. For instance, an easement or servitude for the passage of aeroplanes through the superjacent air of the servient tenement to a landing place, for the passage of an electric current through suspended wires passing through that air, for the free passage of the flash from a heliograph station. Why not also of the sun's rays? All these would be servitudes of a right of passage over the servient tenement, not indeed on the surface of the soil, but through that which *usque ad coelum*, is in the eye of the law a part of the land. In the olden days air was not thought of as a subject of property any more than as a substance capable of being liquified or solidified. In the light of modern knowledge, however, there is no difference in principle between a right to the free passage of moving air to my windmill and the free passage of running water to my watermill.

In the case cited by Sir Samuel Griffith, C.J., *Attorney-General of Southern Nigeria* v. *John Holt and Co. (Liverpool) Ltd.*, *supra*, the right to place stores and casks upon land reclaimed from the sea, was recognized as an easement; and it has been recently held in England that the right to use a coal-shed for the purpose of storing such coal as may be required for the domestic purposes of a flat, is a legal easement: *Wright* v. *Macadam*, [1949] 2 All E.R. 571.

From these cases it may reasonably be deduced that an easement of the nature set out in the following easement is a legal easement and therefore capable of being registered under the Land Transfer Act.

As the farmer who owns the servient tenement would probably require notice to be given to him by the grantees to use the air-strip, care must be taken to guard against the rule against remoteness of vesting. This could be done simply by limiting the term of the easement to twenty-one years.

In the following easement advantage has been taken of the decision of the Court of Appeal in England, *In re Villar*, [1929] 1 Ch. 243, where the vesting was postponed "until the expiration of twenty years from the day of the death of the last survivor of the lineal descendants of her late Majesty, Queen Victoria, who shall be living at the time of" the testator's death, and the limitation was held good. What one has to take notice of and avoid is the principle laid down in such cases as *Smith* v. *Colebourne*, [1914] 2 Ch. 533, explained and distinguished by the New Zealand Court of Appeal in *Wellington City Corporation* v. *Public Trustee*, [1921] N.Z.L.R. 1086. If, as in the following Precedent No. 1, there is a condition precedent to happen before the easement can be exercised, it is well to beware then of the rule against perpetuities, as the rule against remoteness of vesting is commonly called: as to this point, see article and precedent in (1950) 26 NEW ZEALAND LAW JOURNAL, 123.

It will be observed that in the following Precedent No. 1, there are five separate and independent grants. Therefore there will be five lots of stamp duty to pay (probably 5s. 6d. each) and five registration fees. The first four grants are appurtenant to dominant tenements, but the fifth is an easement in gross. It is quite conceivable that in some grants enabling aircraft to use landing strips the company owning or operating the aircraft would like to come in as a grantee: the easement in favour of such a company would also be in gross.

It cannot yet be said that there is any established practice as to the class of covenants to be included in an easement of this nature. Perhaps in some cases provisions should be inserted as to fencing and permissible height of trees and buildings in the vicinity of the air-strip. As to aerodromes for commercial purposes reference may usefully be made to s. 4 of the Public Works Amendment Act, 1935. In a few cases Proclamations under the authority of these provisions have been issued and registered against the relevant titles.

I am indebted to Mr. A. C. O'Connor, of Taihape, for the very comprehensive Precedent No. 2 hereunder. It would not be registrable under the Land Transfer Act; but it would support a caveat: *Wellington City Corporation* v. *Public Trustee*, *supra*.

PRECEDENT No. 1.

GRANT OF EASEMENT: AIR-LANDING STRIP FOR USE BY AIRCRAFT.

MEMORANDUM OF TRANSFER.

WHEREAS A. B. of Levin Farmer (hereinafter termed "the Grantor") is registered as proprietor of an estate in fee simple in the land described in the First Schedule hereto (hereinafter termed "the servient tenement") AND WHEREAS C. D. of Levin Sheep Farmer (hereinafter termed "the grantee of the first part") is registered as proprietor of an estate in fee simple

in the land described in the Second Schedule hereto (hereinafter termed "the first dominant tenement") AND WHEREAS E. F. of Levin Sheep Farmer (hereinafter termed "the grantee of the second part") is registered as proprietor of an estate of leasehold in the land described in the Third Schedule hereto (hereinafter termed "the second dominant tenement") AND WHEREAS G. H. of Levin Sheep Farmer (hereinafter termed "the grantee of the third part") is registered as proprietor of an estate of leasehold in the land described in the Fourth Schedule hereto (hereinafter termed "the third dominant tenement") AND WHEREAS I. J. of Levin Sheep Farmer (hereinafter termed "the Grantee of the fourth part") is registered as proprietor of an estate of leasehold in the land described in the Fifth Schedule hereto (hereinafter termed "the fourth dominant tenement") AND WHEREAS the grantor the grantee of the first part, the grantee of the second part, the grantee of the third part, the grantee of the fourth part and K. L. of Levin Sheep Farmer (hereinafter termed to grantee of the fifth part) did agree by parol to construct on the servient tenement at their joint expense an air landing strip for use by aircraft carrying out aerial topdressing AND to construct a road from the public road known as road over and across the servient tenement to the said air landing strip for the purpose of giving access to the said air landing strip AND WHEREAS it was also agreed by the parties hereto that the said air landing strip when constructed should be sown and laid down in good English grasses to the satisfaction of the grantor at the cost of all the parties hereto in equal shares AND WHEREAS the grantor did agree upon completion of grassing of the said landing strip and upon completion of the said road to his satisfaction to grant to the respective grantees the rights over and in respect of the servient tenement more particularly hereinafter set forth and for such purpose to enter into and execute these presents AND WHEREAS the said air landing strip has been completed and grassed and the said road constructed to the satisfaction of the grantor (as he doth hereby acknowledge) AND WHEREAS the site and dimensions of the said air landing strip and the line of the said road are more particularly shown on the diagram annexed hereto, the said air landing strip being therein outlined in red and the said road being coloured in yellow AND WHEREAS the cost of constructing and grassing the said air landing strip and the cost of constructing the said road has been borne by the parties hereto in equal shares (as each of the parties hereto doth hereby acknowledge) NOW THIS MEMORANDUM OF TRANSFER WITNESSETH as follows:—

1. IN pursuance of the premises and in consideration of the Covenants on the part of the respective grantees hereinafter contained THE GRANTOR DOTH HEREBY TRANSFER AND GRANT unto the grantee of the first part and also (as a separate grant) unto the grantee of the second part and also (as a separate grant) unto the grantee of the third part and also (as a separate grant) unto the grantee of the fourth part and also (as a separate grant) unto the grantee of the fifth part, the full and free right, liberty privilege and authority FIRST to use the said air landing strip (in common with the Grantor) at such times as shall from time to time be mutually agreed upon by the parties hereto for the purpose of allowing aircraft engaged or hired by parties hereto to take off from, land on, taxi on along or over, alight on and generally operate from the said air landing strip whilst carrying out aerial topdressing over the servient tenement the first dominant tenement, the second dominant tenement, the third dominant tenement, the fourth dominant tenement and any land hereafter owned or leased by the grantee of the fifth part respectively and SECONDLY to go past repass with or without vehicles, horses or other animals, carts, carriages, and motor vehicles of all descriptions through over and along the said road for the purpose of carrying manure and equipment to the said air landing strip PROVIDED ALWAYS that the Grantee of the first part, the grantee of the second part, the grantee of the third part, the grantee of the fourth part and the grantee of the fifth part shall have no rights of user over or in respect of the said air landing strip nor any right of way over or in respect of the said road except at such times as aerial topdressing operations are being carried out as aforesaid and at such times as it may be necessary to effect and carry out repairs and maintenance to the air landing strip and the said road AND IT IS HEREBY AGREED AND DECLARED by and between the grantor and the grantee of the first part that the respective easements hereinbefore created over the servient tenement shall, so far as the grantee of the first part is concerned, be and remain forever appurtenant to the first dominant tenement AND IT IS HEREBY AGREED AND DECLARED by and between the grantor and the grantee of the second part, the grantee of the third part and the grantee of the fourth part respectively that the respective easements hereinbefore created over the servient tenement shall, so far as the grantee of the second part the grantee of the third part and the grantee of the fourth part are concerned be and remain appurtenant to the said estates of leasehold in the second dominant tenement, the third dominant tenement and the fourth dominant tenement respectively AND IT IS HEREBY AGREED AND DECLARED by and between the grantor and the grantee of the fifth part that the respective easements hereinbefore created over the servient tenement shall, so far as the grantee of the fifth part is concerned, be in the nature of easements in gross BUT the grantee of the fifth part shall not assign or dispose thereof without the consent in writing of the grantor first had and obtained AND IT IS HEREBY AGREED AND DECLARED that the rights hereby conferred on the grantees may be exercised at any time during the life of the last survivor of the issue now living of His Late Majesty King George the Fifth and within twenty-one years after the death of such last survivor but for no longer period.

IN WITNESS WHEREOF, ETC.

PRECEDENT NO. 2.

DEED GRANTING RIGHTS TO USE AIR LANDING STRIP FOR AERIAL TOP DRESSING.

THIS DEED made this day of 1954 BETWEEN A. B. of Wanganui, Farmer and C. D. of Wanganui, Farmer (hereinafter called "the Owners") of the one part AND the various persons whose names and signatures are set forth in the Fourth Schedule hereto all of whom are Farmers at Wanganui and surrounding districts (hereinafter called "the members") of the other part WHEREAS the said A. B. is the registered proprietor of the estate or interest in land described in the First Schedule hereto AND WHEREAS the said C. B. is the registered proprietor of the estate or interest in land described in the Second Schedule hereto AND WHEREAS there has been constructed on the land described in the First Schedule hereto an air strip or landing ground for aircraft suitable for the purpose of spreading artificial fertilisers from the air AND WHEREAS there has been constructed on the land described in the Second Schedule hereto an access road from the public road to the air strip on the land described in the First Schedule hereto AND WHEREAS the cost of constructing such air strip and access road has been borne by certain of the members only AND WHEREAS it is intended at some future time but within a period of 21 years from the date of this deed to construct a shed or store for the storage of artificial fertilisers on the land described in the First Schedule hereto AND WHEREAS the signatories hereto have all agreed to contribute towards the cost of construction of such air strip and access road and the storage shed when erected NOW THIS DEED WITNESSETH as follows:—

1. THE said A. B. shall provide, free of rental, the land described in the First Schedule hereto for use by all the parties hereto as a landing strip for aeroplanes which may be used for the purpose of spreading artificial fertilisers from the air upon the lands vested in, leased by, or otherwise held and farmed by all the parties hereto at the date hereof and shall allow all the parties hereto (including the said C. D.) their agents, carriers, contractors and employees with or without vehicles, horses or other equipment to have the use of such air strip for such purpose in accordance with the terms and conditions settled by all the signatories hereto.

2. THE said C. D. shall provide, free of rental, for use by all the parties hereto the access road situate upon the land described in the Second Schedule hereto, to be used by all the parties only for access to the said air strip for the purpose of spreading artificial fertilisers from aircraft in the air over the lands now vested in, leased by, or otherwise held or farmed by the parties hereto and shall permit all parties hereto their agents, contractors and employees with or without vehicles, horses or other equipment to have the use of such access road.

3. ALL the parties hereto hereby acknowledge and agree that each of them shall be bound as between themselves by all the provisions of this deed.

4. THE control of the said air strip and the access road thereto shall be vested in the Committee (hereinafter called "the Committee") which shall consist of all the parties hereto which shall settle the terms and conditions upon which such air strip and access road shall be used. The Committee shall elect a Committee of five of the parties hereto (hereinafter called "the Management Committee"). The Management Committee shall generally manage the affairs of the Committee and shall handle all finances of the Committee. The Management Committee shall be elected annually by all the parties hereto.

5. EACH of the parties hereto shall pay forthwith to the Management Committee or to its duly appointed representative the sum of per acre in respect of the areas of land owned or leased by them and described under the name of each of them in the Third Schedule hereto and shall from time to time pay to the Management Committee or to its duly appointed repre-

sentative such further sums or sum as the parties hereto shall from time to time decide.

6. THE Management Committee may in its discretion permit any of the parties hereto to use the said air strip and access road for the purpose of spreading artificial fertilisers from the air on any lands not described in the Third Schedule hereto but owned or leased by any of the parties upon such terms and conditions and at such times as the Management Committee shall decide.

7. THE Management Committee may at any time within the period of 21 years from the date of this deed grant the benefit of this deed to other farmers of the Wanganui and neighbouring Districts not being signatories to this agreement who shall sign an agreement to be bound by all the provisions of this agreement PROVIDED HOWEVER that any farmer so signing such an agreement shall specify the area of his land and the legal description thereof over which he wishes to sow artificial fertilisers and shall forthwith pay to the Management Committee or to its duly appointed representative the sum of —— per acre on the said area specified and shall become liable for all future levies made by the Management Committee in respect of the maintenance, repair or capital improvement of the said air strip and access road AND PROVIDED FURTHER that any farmer so signing such an agreement shall not be liable for the payment of interim levies made prior to his so signing other than the said initial levy of per acre and any further levies that may have been made for capital improvements only to the said air strip and access road.

8. IF any original signatory hereto shall at any time within the period of 21 years from the date of this deed be desirous of adding further lands to the lands described in the Third Schedule under his name he may, in the discretion of the Management Committee, be permitted to do so, and in respect of such additional lands so added, the provisions of Clause 7 hereof shall apply.

9. THE MANAGEMENT COMMITTEE shall out of such funds and out of such further funds as may be contributed as hereinafter provided:

(*a*) Repay to the respective parties hereto who have already borne the cost of construction of such air strip and access road such sum or sums as have already been contributed by such parties.

(*b*) Upon a decision being made in that behalf by all the parties hereto to erect upon the land described in the First Schedule as close as conveniently possible to the said air strip, a shed or sheds suitable for the storage of artificial fertilisers whether in bags or in bulk, such shed or sheds to be well constructed of good materials. Such shed or sheds shall at all times remain the property of all the parties hereto.

(*c*) Maintain and metal in a suitable manner the access road from the public road to the said air strip and shed or sheds.

(*d*) Repair and maintain in a satisfactory manner the shed or sheds, air strip and access road.

(*e*) Repair and replace any fences, gates, culverts, bridges, or other improvements upon the Owners' land damaged or destroyed by any of the parties hereto or their agents or carriers in making use of such access, strip or shed provided however that if any such damage or destruction is in the opinion of the Management Committee, brought about by avoidable negligence on the part of any of the parties hereto or their agents or carriers such party shall, upon being called upon by the Management Committee so to do, at his own cost repair and replace such damage or destruction.

10. ALL the parties hereto shall have the right at all times to use the said access, air strip and shed or sheds for the purpose of aerial topdressing of the lands specified in the Third Schedule hereto or applicable to this agreement by virtue of clauses 6 and 7 hereof, and if any dispute shall arise as to the use of such access, air strip or shed or sheds the decision of the Management Committee thereon shall be final and binding upon all the parties hereto.

11. IN making use of such access, air strip and shed or sheds each of the parties hereto shall use all reasonable care and shall be responsible to see that his agents, employees, contractors and carriers use all reasonable care to avoid damage to such access, air strip or shed or sheds or to the farm lands of the Owners or any improvements erected thereon.

12. THE Management Committee shall have the right at any time to debar any of the parties hereto from using the said access, air strip and shed or sheds for such time as they shall in their own discretion deem equitable if in their opinion such party is not carrying out in a reasonable manner his obligations under this agreement.

13. IF any liability whatever in damages or otherwise shall devolve upon the Owners by reason of the use of such access, air strip, shed or sheds, all the parties shall share such liability with the Owners and such liability shall be deemed to be one of the expenses of the construction and maintenance of such access, air strip and shed or sheds and shall be borne by all the parties hereto in the same proportions as they bear the cost of construction and maintenance of such access, air strip and shed or sheds.

14. WHEN the said access and air strip are not required for the purposes of aerial topdressing each Owner shall be entitled to use the same for grazing purposes as part of his farm lands in the usual manner.

15. THE Management Committee is hereby empowered at any time and at all times to formulate and lay down such rules or by-laws as are not inconsistent with the terms hereof regulating the use of such access, air strip and shed or sheds and such regulations or by-laws shall, upon being communicated to the parties hereto be binding upon them in the same manner as if they had been incorporated in this agreement.

[N.B.—*In framing these by-laws care must be taken not to infringe the rule against remoteness of vesting.*]

16. ANY of the members may at any time by notice in writing to the Management Committee or its duly appointed representative give up and abandon his rights under this agreement but in such case he shall not be entitled to a refund of any moneys paid by him to the Management Committee or its duly appointed representative in terms of this agreement, and shall not be released from liability for his proportional share of any moneys then or at any time thereafter payable by the Management Committee in any way arising out of the construction and/or use of the said air strip, access, shed or sheds up to the date of his giving up and abandoning his rights under this agreement.

17. ALL the parties hereto shall pay to the Management Committee for the use of the said air strip such sum per ton of artificial fertiliser sown from aircraft using the said air strip as the Management Committee shall from time to time fix. All such sums so received shall be used by the Management Committee for the purposes set out in Clause 9 hereof.

18. THE Management Committee may at any time within the period of 21 years from the date of this deed permit the use of the said air strip and access road and shed or sheds (when erected)by other farmers who are not parties hereto and shall fix the charge to be paid for such at such sum as at its discretion it thinks, being an amount per ton not less than the amount paid or payable by the parties hereto. All such sums so received shall be used by the Management Committee for the purposes set out in Clause 9 hereof.

19. THE said A. B. and C. D. respectively HEREBY AGREE for themselves, their executors, administrators and assigns to grant in favour of the other parties hereto, and each to the other of them, a perpetual easement over the lands described in the First Schedule and Second Schedule hereto to be appurtenant to the land described in the Third Schedule hereto in terms of this agreement and whenever called upon so to do to execute in favour of all the parties hereto such a grant of easement to the intent that the lands described under the names of the members in the Third Schedule hereto shall have the permanent right to use the said air strip and access road, but the costs of and incidental to the execution of such grant of easement and all costs of necessary surveys shall be borne by the party requiring such grant to be formally executed, or in the event of all parties hereto requiring such formal grant to be given them all such costs shall be borne by the funds administered by the Management Committee.

IN WITNESS whereof these presents have been executed the day and year first above-written.

SIGNED by the said A.B. and C. D. In the presence of }

THE FIRST SCHEDULE HEREINBEFORE REFERRED TO.

[*Set out official description of first servient tenement.*]

THE SECOND SCHEDULE HEREINBEFORE REFERRED TO.

[*Set out official description of second servient terement.*]

THE THIRD SCHEDULE HEREINBEFORE REFERRED TO.

[*Set out names of the dominant owners and the official description of their lands.*]

THE FOURTH SCHEDULE HEREINBEFORE REFERRED TO

Full Name Signature.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

The Black Cap.—In his evidence to the Royal Commission on capital punishment, Lord Justice Goddard explained that the black cap was now worn in England on two occasions only—when passing sentence of death, and when the Judges received the Lord Mayor at the Law Courts. He said that the reason it is worn when receiving the Lord Mayor is that he is the one subject who has the right to come into Court covered, so the Judges also cover; and the reason why it is worn when passing sentence of death is simply that the covering of the head in ancient times was regarded as a sign of mourning. The Lord-Justice-General informed the Royal Commission that in Scotland the assumption of the black cap symbolizes the fact that the Judge is not expressing a private judgment but is merely the instrument of State and some Judges who had conscious objections to the death sentence desired to "safeguard themselves by assuming the full cloak of judicial officialdom in pronouncing the sentence." It seems that the usual portrait of Lord Chancellor Coke shows him wearing at the one time the coif, the black skull cap and the sentence cap. It is thought that the sentence cap had its origin as late as the 18th century. The one worn by Coke has ear-flaps which are not present in the modern version. Submissions were made to the Royal Commission on capital punishment for the discontinuation of the wearing of the black cap by the Judges when pronouncing the sentence of death, upon the ground that nowadays it was a piece of macabre theatricality. However, no recommendation to this effect was made by the Commission.

Election Promises.—In his excellent collection "Here and There" in the *Solicitors' Journal*, "Richard Roe" mentions that one of the best things that F. E. Smith ever said in the House of Commons was in "puncturing" a ministerial reply to a challenge on some election promise, that the Government regarded it as an obligation of honour to bring in a certain measure "if time permits." The observation of "F.E." was that the reply suggested the existence of three classes of men "honourable men, dishonourable men, and honourable men if time permits." "Circumstances may alter cases," observes "Richard Roe," "but short of stark impossibility, they do not alter promises. It is in his ability to give his word and keep it that the human creature differs most distinctly from all other creatures."

Marriage Note.—In *Redfern* v. *Redfern*, [1954] N.Z.L.R. 872, Finlay, J., describes as a most novel suggestion the submission of counsel that the petitioner should be refused a divorce that, because of his unfortunate matrimonial history, would prevent him from entering into any further marriage. It would be going a long way, said the Judge, and breaking quite new ground, for the Court to restrain anyone, even a bad matrimonial risk, because it thought him unfitted for marriage. This view is merely an extension of the concept of Dr. Johnson that marriage has many pains, but celibacy has no pleasures. Even the Greek philosopher, Socrates, lent his support to the gamble. "By all means marry," he wrote, "if you get a good wife, you'll become happy; if you get a bad one, you'll become a philosopher." At all events, on matters of matrimony, there is room for difference of opinion. This is markedly illustrated in *Bravery* v. *Bravery*, [1954] 3 All E.R. 59, in which that iconoclastic Judge, Denning, L.J., indicates that he would apply the criminal law to what he deems a grave matrimonial offence. "Those cases under the criminal law have a bearing on the problem now before the Court, because the divorce law, like the criminal law, has to have regard to the public interest, and consent should not be an absolute bar in all cases. If a husband undergoes an operation for sterilisation without just cause or excuse, he strikes at the very root of the marriage relationship. The divorce courts should not countenance such an operation any more than the criminal courts. It is severe cruelty. Even assuming that the wife, when young and inexperienced, consented to it, she ought not to be bound by it when in later years she suffers in health on account of it, especially when she was not warned that it might effect her health." These views do not find favour with the other members of the Court of Appeal (Evershed, M.R., and Hodson, L.J.). "We also feel bound to dissociate ourselves from the more general observations of Denning, L.J., at the end of his judgment, in which he has expressed his view (as we understand it) that the performance on a man of an operation for sterilisation, in the absence of some 'just cause or excuse' (as was not, in his view, shown to exist in the present case) is an unlawful assault, an act criminal *per se*, to which consent provides no answer or defence. The Court must, no doubt, take notice of any relevant illegality which appears in the course of any proceeding before it; but in the present case both the general question, whether an operation for sterilisation is *prima facie* illegal, and the more particular question whether the operation here performed was a criminal assault, are alike irrelevant to the issue to be determined." Practitioners of an earlier generation will recall the anger with which Scrutton, L.J., criticized the views of McCardie, J., who, as a bachelor, regarded himself as a sociological expert upon sexual habits and morals of his day.

From my Notebooks.—"He (the late Sir William Holdsworth) was so delicate at birth that, when the family stood round waiting for him to die, the doctor begged his mother 'not to grieve too much, because, had he lived, he would have been an idiot.'"—Sir A. L. Goodhart, Q.C., giving the Selden Society Annual Lecture.

The late Mr. Frank Evershed, a solicitor, who died in June last, at Burton-on-Trent, aged 87, was the father of Sir Raymond Evershed, Master of the Rolls. He gained his Rugby Cap for England playing in 1889 against the first New Zealand touring side of Maoris and appeared for England on nine subsequent occasions.

"I shall go on protesting against this system under which the State subsidises litigants and then does not pay the costs of the other side when the assisted litigant loses. Nobody listens, and nobody I suppose, ever will."—Stable, J., in the Queen's Bench Division.

"The provisional assessment . . . is, I confess, so small and inadequate that I can only think that after the time that elapsed between the hearing and the judgment, he [Croom-Johnston, J.] must have forgotten the really grievous injuries that the plaintiff sustained and may have mislaid the medical reports."—Lord Goddard, C.J., in *Wormald* v. *Cole*, (1954) 2 W.L.R. 613.

THE LAW SOCIETY'S RETIRING PRESIDENT AND VICE-PRESIDENT.

Council's Tributes to their Services.

At the conclusion of the July meeting of the Council of the New Zealand Law Society, its members met informally to express their appreciation of Mr. W. H. Cunningham, who had that day resigned from the Presidency, and of Mr. J. B. Johnston, of Auckland, who had retired from the office of Vice-President, after being a member of the Council for over twenty years and Vice-President for three years.

The Retiring Officers' Services.

In proposing the toast of their healths, Dr. A. L. Haslam, Canterbury District Law Society, said that the members of the Council wished to make a brief expression of appreciation to their friends, Mr. W. H. Cunningham and Mr. J. B. Johnston, who had that day ended their connection with the Council. They would like them to know something of the members' affection and gratitude towards them both. He continued:

"In Mr. Cunningham's case, it is perhaps fortunate that the principles of relevancy, codified or otherwise, prevent his being submitted to the refinement of torture of listening to a summary of his distinguished career in wider fields than the Law. It is perhaps sufficient to say that the profession has benefited by the experience which Mr. Cunningham has gained by outstanding service in two World Wars, in the field of education, in sport, and in public life generally. We visiting delegates perhaps fail to realize that the Dominion meetings are but a fractional part of the President's duties. We have, nevertheless, all appreciated the warm welcome extended to us by Mr. Cunningham, whether we have come from the frozen wastes in the shadow of the Antarctic icecap or from the more congenial, gentle climate of Auckland.

"Under Mr. Cunningham's tactful guidance the most formidable of agenda have been speedily and efficiently disposed of in a pleasant atmosphere. We have admired his refusal to be discouraged by the conspicuous absence of Westland, or at the failure of our rulers at times to appreciate the urgency and importance of the representations made on our behalf by Mr. Cunningham on matters of legislation affecting the profession and its work. One of the highlights of four crowded years must have been Mr. Cunningham's visit to Australia to attend the Commonwealth Law Conference with the New Zealand delegation. We recall how Lord Jowitt went out of his way to congratulate the profession in New Zealand on being so ably led. More recently, Mr. Cunningham represented the Society in the various functions connected with the visit of Her Majesty the Queen.

"Throughout the Dominion, all practitioners have had an opportunity of meeting Mr. Cunningham at two Dominion Law Conferences, in Dunedin, in 1951 and more recently in Napier. With charm and dignity he presided over the most unpredictable of all democratic assemblies, a self-appointed parliament of lawyers.

"Our friend, Mr. J. B. Johnston, to-day terminates a period of service which is almost unique in the history of the Society. For a comparable achievement one recalls perhaps Mr. H. B Lusk, of Hawke's Bay, Sir Alexander Johnstone, Q.C., of Auckland, or Mr. G. G. G. Watson of Wellington. For upwards of twenty years, Mr. Johnston has been a member of this Council and during the past three years our Vice-President. All delegates have had the benefit of Mr. Johnston's wide experience and deep insight into professional problems. Like Mr. Cunningham he has been prepared to give liberally of his leisure time in making a notable contribution to the life of the Law. An example of that modesty which, if I may say so, has endeared Mr. Johnston to us all, was the reply he gave to his fellow-practitioners in Auckland when last year they tendered him a function in his honour after some thirty years of service on their Council. He said that he should instead be thanking them for the privilege of serving the profession which he loved so well.

"Regret that these two busy, distinguished leaders of the profession are officially leaving us to-day, is tempered by the thought that on that most important of domestic tribunals, the Disciplinary Committee, the services of both gentlemen will still be available. Mr. Johnston has been for some sixteen years a member, and for some years the chairman of that committee. Mr. Cunningham has also served over a considerable period. The profession is fortunate that it will still have the benefit of the mature wisdom and ripe experience of them both."

The health of Mr. Cunningham and Mr. Johnston was then honoured as an expression of profound good wishes and deep-felt gratitude.

Mr. W. H. Cunningham.

In replying to the toast of his health, Mr. Cunningham referred to his four years as President as an experience which he was deeply grateful to have had and, while the office entailed much hard work, it had produced many rewards, notably the right to represent the Law Society at the Australian Centenary Conference in 1951. During his four years in office, Mr. Cunningham said, he had had at all times the loyal support of the delegates from District Law Societies who formed the Council, as well as the loyal help and assistance of the two Vice-Presidents. Mr. J. B. Johnston, who was the oldest member of the Council in point of service, had been a tower of strength to him throughout his term. He also acknowledged the assistance given him at all times by the Society's secretary. He wished the new President and Vice-Presidents happiness and success in their respective offices.

Mr. J. B. Johnston.

Mr. Johnston, in acknowledging the Council's expressions of gratitude and regard, said:

"I would like in the first place to join with Dr. Haslam in the tribute paid by him to our retiring President, Mr. Cunningham. I wholeheartedly endorse all that he said. I have had the privilege in my time on the Council of sitting under five Presidents, and it has been a great pleasure to me during the past few years to have occupied the office of a Vice-President under Mr. Cunningham. I would also like to offer my congratulations to those gentlemen who have to-day been appointed to high office in the Society; first, to Mr. Cleary, who now fills the highest office in the gift of the Society. I sincerely hope that the burden of this office added to the tremendous burden which he is carrying in his practice will not put an undue strain upon his health. To Dr. Haslam and Mr. Shorland I would say that I hope they will enjoy office as much as I have, and, if so, they certainly will have no regrets.

"I cannot depart without saying something about our Secretary. I have been a delegate throughout the whole term of her office—and before—and I am in a position to assess her worth. It is no overstatement to say that she has lived for her work. Throughout her term she has collected a vast amount of information about the Society—historical and otherwise—which is invaluable to the Council. I trust that Mrs. Gledhill will long remain in health and strength to continue her good work.

And now I must thank you, Dr. Haslam, for the very kind words which you have said about me and my services to the Council. I can say truthfully that the obligation is not all on one side. I feel that I have got more from the Council than I have given to it. One of the greatest privileges has been to get to know so many—literally hundreds—of my brother-practitioners from all parts of the Dominion. I have thus had an excellent opportunity of understanding my fellows and of watching the workings of the legal mind. And I am able to assure those in doubt that there really is no racial difference between the practitioners of the North Island and those of the South. (Laughter). It is true that for a short season I will continue to come down here to the meetings of the Disciplinary Committee. It would not be kind of me to express the hope that I may meet you there, but I do look forward to seeing you all again on other occasions.

"As I said in my letter of resignation I will carry away with me happy memories of my experiences, and if, at the same time, I can take with me something of the respect and regard of those with whom I have sat round this table over the years, then I will be more then repaid for any service that I may have given to the Council or to the profession at large."