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THE DEFAMATION ACT, 1954.

VII.—THE DEFENCE OF "QUALIFIED PRIVILEGE".

IN our last issue, we commenced a review of s. 17 of the Defamation Act, 1954. We shall now give some further consideration to the new section.

THE SECTION CONSIDERED.

It has long been accepted that there are cases in which the individual's right to the protection of his reputation must yield to the public interest, which requires that the fullest information upon certain matters shall be widely available. This salutary principle of the common law has, in theory, never been destroyed. In practice, however, the area of its application is by no means certain, and, at any rate in this century, the Courts have been unwilling to apply it in any instances not falling clearly within the decided cases. The Law of Libel Amendment Act, 1888 (Eng.), assisted the process whereby a principle was exchanged for a catalogue. This was to some extent adopted in s. 2 of the Law of Libel Amendment Act, 1910 (N.Z.). The Defamation Act, 1952 (U.K.), extended the catalogue so as to bring within it the category of privileged reports. The proceedings of many bodies which were of little interest to the public, or did not even exist, in Victorian times, may now be reported without fear of actions for libel; but, in this regard, our statute law was reasonably up-to-date. Thus, though it may be regretted that a principle has been abandoned in favour of a catalogue, or, more specifically, a series of categories of privilege, the new Act does at any rate ensure that the list of categories has been modernized and rendered more realistic in New Zealand conditions.

Privilege enjoyed by newspapers before the present Act has been built up piecemeal, a long and not altogether sure step in this process being the Law of Libel Amendment Act, 1910, which is now repealed, but otherwise the present Act confirms the special status of all such actions as have hitherto been privileged: (s. 17 (4)).

Section 17 confers qualified privilege on a variety of actions, many of them new to that benefit. Subsection (1) provides that, subject to the provisions of the section, the publication in a "newspaper" or as part of any programme or service provided by means of a "broadcasting station," as those terms are respectively defined in s. 2 (1), of the reports or other matters mentioned in the Schedule shall be privileged unless the publication is proved to be made with malice.

Section 17 extends the statutory defence of qualified privilege conferred on certain reports by ss. 2 and 3 of the Law of Libel Amendment Act, 1910, as extended by the Law of Libel Amendment Act, 1933, and s. 26 of the Statutes Amendment Act, 1948. The section and the First Schedule replace the existing New Zealand provisions, and largely follow s. 7 of the Defamation Act, 1952 (U.K.) and the Schedule to that Act; but like the New Zealand s. 2, and unlike the United Kingdom provisions, the section is not limited to newspaper reports, and it applies to criminal as well as civil proceedings.

Subsection (1) provides that the publication of any matter mentioned in the First Schedule is to be privileged in a civil or criminal proceeding, unless the publication is proved to have been made with malice.

Subsection (2) provides that, in a civil action in respect of any matter mentioned in Part II of the Schedule, s. 17 is not to be a defence to a newspaper or a broadcasting station if it is proved that the defendant has been requested by the plaintiff to publish in the same manner as the defamatory matter a reasonable letter or statement by way of explanation or contradiction and has refused or neglected to do so, or has done so, in a manner not adequate or not reasonable in the circumstances.

Subsection (3) which is new to New Zealand, provides that s. 17 is not to protect the publication of any matter the publication of which is prohibited by law or by order of any Court in New Zealand or in the territory in which the subject-matter arose, and is not to protect the publication of any matter mentioned in Part II of the First Schedule which is not of public concern or the publication of which is not for the public benefit.

Subsection (4) preserves all other existing privileges.

The reports detailed in Part II of the Schedule are protected, so long as three conditions are present: (*a*) they must not be prohibited by law or by the order of any Court, in New Zealand (subs. (3) (*a*); the report must be of public interest and for the public benefit (subs. (3) (*b*)); and (*c*), if published in a newspaper or

over the air from a broadcasting station, the newspaper or broadcasting station must be prepared to publish an explanatory or contradicting statement, if the person claiming to have been defamed asks for that to be done (subs. (2)).

In the cases specified in Part II of the Schedule, the victim of a defamatory report or statement may demand that any newspaper or broadcasting station which has published it, print or give a reasonable letter or statement to explain or contradict it. If in response to such a request the newspaper or broadcasting station fails to publish such reasonable letter or statement, or does so in a manner not adequate or not reasonable having regard to all the circumstances, a defence under the section will not be available (subs. (2)). It will be a question for the jury to decide what is a " reasonable letter or statement " and an " adequate " mode of publication under the section. No doubt any correction should be given a prominence similar to the matter it corrects and the letter or statement, in order to be reasonable, should be confined to the refutation of the libel or any necessary explanation required to prevent mis-interpretation or false innuendo. It should clearly not contain extraneous self-advertisement or complaint or gratuitous criticism of the journal in which it is to appear.

The First Schedule sets out the matters to which s. 17 applies, as follows :

PART I.

Statements Privileged Without Explanation or Contradiction.

1. Fair and accurate reports of the proceedings of the House of Representatives.

[*This clause follows s. 2 (1) (a) of the Law of Libel Amendment Act, 1910, now repealed.*]

2. Fair and accurate reports of the proceedings of Courts of justice in New Zealand.

[*This follows part of s. 2 (1) (b) of the Law of Libel Amendment Act, 1910, now repealed.*]

PART II.

Statements Privileged Subject, in the case of a Newspaper or a Broadcasting Station, to Explanation or Contradiction.

3. Fair and accurate reports of the proceedings of the legislature of any territory outside New Zealand.

[*This is new to New Zealand. Clause 1 of the United Kingdom Schedule is limited to the Legislatures of Her Majesty's dominions outside Great Britain, and is in Part I of the Schedule to the Defamation Act, 1952 (U.K.).*]

4. Fair and accurate reports of Courts of justice outside New Zealand (including international Courts by virtue of the definition in Part III of the Schedule).

[*This follows the part of s. 2 (1) (b) of the Law of Libel Amendment Act, 1910, that is not in cl. 2 ; but the extension to international Courts is new. Clauses 3 and 4 of the United Kingdom Schedule relate to international Courts (wherever held) and to other Courts in Her Majesty's dominions outside the United Kingdom, and those clauses are in Part I of the United Kingdom Schedule.*

5. Fair and accurate reports of inquiries held under the authority of the Government or legislature of New Zealand or any other country, or copies or extracts from or abstracts of official reports of such inquiries.

[*This follows s. 2 (1) (c) of the Law of Libel Amendment Act, 1910, except that the existing provision is limited to New Zealand inquiries. Clause 5 of the United Kingdom Schedule is limited to inquiries in Her Majesty's dominions outside the United Kingdom, and is in Part I of the Schedule.*]

6. Fair and accurate reports of the proceedings of international organizations of which the Government of New Zealand or any other part of the Commonwealth is a member, or of international conferences to which any such Government sends a representative.

[*This is new to New Zealand. Clause 2 of the United Kingdom Schedule is limited to organizations of which the United Kingdom is a member and to conferences to which it sends a representative, and is in Part I of the Schedule.*]

7. Fair and accurate copies of or extracts from public registers, kept under any Act, or of other documents open to inspection by the public.

[*This is new to New Zealand and follows cl. 6 of the United Kingdom Schedule, which is in Part I. The clause is limited to New Zealand registers and documents.*]

8. Notices or advertisements published by any Court of justice in New Zealand or elsewhere or by any officer thereof.

[*This is new to New Zealand and follows cl. 7 of the United Kingdom Schedule, except that that clause is limited to Courts in the United Kingdom, and is in Part I.*]

9. Fair and accurate reports of public meetings or sittings in New Zealand of local authorities or of persons or bodies appointed or constituted under or acting under any Act (not being a Court of justice or a person holding an inquiry to which clause 5 relates).

[*This corresponds to s. 2 (1) (d) of the Law of Libel Amendment Act, 1910, but follows parts of cl. 10 of the United Kingdom Schedule.*]

10. Fair and accurate reports of the proceedings, or of the result of the proceedings, in inquiries held under the rules of any sporting, industrial, religious, or cultural association, relating to persons who are members of the association or are subject to its control by virtue of any contract.

[*This clause is new to New Zealand, except that paras. (f) and (g) of s. 2 (1) of the Law of Libel Amendment Act, 1910, as added by the Law of Libel Amendment Act, 1933, and s. 26 of the Statutes Amendment Act, 1948, make similar provision for inquiries by horse-racing and boxing organizations.*]

11. Fair and accurate reports of public meetings held in New Zealand for a lawful purpose relating to matters of public concern.

[*This is new to New Zealand, and follows cl. 9 of the United Kingdom Schedule.*]

12. Fair and accurate reports of general meetings of incorporated companies or associations constituted or operating in New Zealand (except private companies).

[*This is new to New Zealand, and follows cl. 11 of the United Kingdom Schedule.*]

13. Copies of or fair and accurate reports or summaries of statements, notices, or other matters, issued for public information by or on behalf of the Government or any local authority.

[*This follows cl. 12 of the United Kingdom Schedule, and corresponds to s. 2 (1) (e) of the Law of Libel Amendment Act, 1910, which relates to reports of the acts and proceedings of the Government or any State department or officer, so far as publication is authorized or requested by any Minister of the Crown.*]

Interpretation.—The Schedule carries its own in-

terpretation clauses, as Part III of the Schedule provides that, in the Schedule, unless the context otherwise requires,—

"*Court of justice*" *includes the International Court of Justice and any other judicial or arbitral tribunal deciding matters in dispute between States:*

"*Government*", *in relation to any territory outside New Zealand which is subject to a central and a local Government, means either of those Governments:*

"*Legislature*", *in relation to any territory outside New Zealand which is subject to a central and a local legislature, means either of those legislatures:*

"*Local authority*" *means a local authority within the meaning of the Local Government Loans Board Act 1926, whether by virtue of section two of that Act, or of any Order in Council thereunder or by virtue of any other Act.*

It should be noted that, where s. 17 applies to publications in a "newspaper," that term is redefined so as to bring in publications published periodically at intervals of not more than three months, thus bringing monthly and quarterly journals within the scope of the section: s. 2 (1).

New Zealand Statutory Provisions Repealed.

In New Zealand, the Law of Libel Amendment Act, 1910, related entirely to actions against newspapers, and, so far as the law relating to privilege has been affected by statute, it is to be found in ss. 2 and 3, which deal with the qualified privilege of reports of Parliamentary, judicial, and other proceedings, which will be mentioned in more detail later. The term "newspaper," where used in that statute, was defined in s. 12 to mean:—

> Any newspaper, review, magazine, or other print published periodically at intervals not exceeding three months.

This definition, which covered from daily publications to quarterly publications, differed from the definition of "newspaper" in s. 2 of the Printers and Newspapers Registration Act, 1908, which includes:

> every paper or pamphlet (other than those hereinafter excepted) containing any public news, intelligence, or occurrence, or any remarks or observations thereon or on any political matter, and published for sale periodically, or in parts or number at intervals not exceeding twenty-six days between the publication of any two such papers or pamphlets or parts or number, at a price of sixpence or any less amount; but does not include any document published in the course of his duty by the Government Printer or any document containing only matter wholly of a commercial nature.

"Newspaper," for the purposes of the Defamation Act, 1954, is defined in s. 2 (1) as meaning—

> any paper containing public news or observations thereon, or consisting wholly or mainly of advertisements and is published *in New Zealand or elsewhere*, periodically at intervals not exceeding three months.

The definition of "newspaper" in s. 7 (5) of the Defamation Act, 1952 (U.K.), is defined to allow an interval between issues of thirty-five days, thus bringing monthly journals within the scope of the statute in distinction from the current New Zealand comparable statute, which extends to quarterly publications.

Under s. 2 of the Law of Libel Amendment Act, 1910, qualified privilege attached to a fair and accurate report of (*a*) Parliamentary proceedings or the proceedings of any Parliamentary Committee; (*b*) the proceedings of any Court of Justice, whether in open Court or not, and the result of the same; (*c*) the proceedings in any inquiry held under the authority of statute or Order in Council; (*d*) the proceedings of any local authority, or any body constituted by statute for the discharge of public functions, in so far as the report relates to matters of public concern, and the publication thereof is for the public benefit; and (*e*) of the acts and proceedings of the Executive Government, or of any Department or officer thereof, so far as the publication of such reports is authorized or requested by any Minister of the Crown.

It will be seen that the First Schedule to the Defamation Act, 1954, summarized above, is more extensive and in greater detail. There was nothing in our Law of Libel Amendment Act, 1910, comparable with s. 17 (3) of the Defamation Act, 1954. A provision comparable with s. 17 (4) was s. 2 (2) of the Law of Libel Amendment Act, 1910, which provided that nothing in that section which related to qualified privilege, was to be so construed as to take away or restrict any privilege existing at common law.

Section 3 of the Law of Libel Amendment Act, 1910, which may be compared with s. 17 (2) of the new Defamation Act, 1954, is as follows:

> 3. In the case of a publication in any newspaper of a report of any such proceedings as are mentioned in paragraph (*d*) of the last preceding section, the protection intended to be afforded by that section shall not be available in any civil or criminal proceedings if it is proved that the defendant has been requested by the person defamed to publish in that newspaper a reasonable letter or statement by way of contradiction or explanation of the defamatory matter, and has without reasonable justification refused or neglected to publish the same within a reasonable time.

In re-enacting that section, as s. 17 (2) of the new Act, its provisions have been extended to broadcast statements, and has incorporated some of the phrasing of s. 7 (2) of the Defamation Act, 1952 (U.K.).

Procedural.

Sections 9 to 13 of the Defamation Act, 1954, are largely procedural. They reproduce, mostly with merely verbal amendment, ss. 4 to 8 of the Law of Libel Amendment Act, 1910.

Agreements for Indemnity.

Section 14, which follows s. 11 of the United Kingdom statute, relates to agreements for indemnity entered into between authors and publishers, or publishers and printers and insurers, whereby one party agrees to indemnify the other against any loss caused by the publication of defamatory matter.

Section 14 was originally enacted in order to remove any doubts as to the validity of certain contracts of insurance and indemnity. It provides that an agreement for indemnifying any person against civil liability for defamation is lawful, unless, at the time of the publication, the person indemnified knows that the matter is defamatory, and does not reasonably believe that there is a good defence to any action brought upon it.

It would seem that s. 14 is merely declaratory of the common law.

In some future issue, we hope to give some consideration to those sections of the new Act, which, so far, have not been dealt with in these pages.

SUMMARY OF RECENT LAW.

PRACTICE.

Appeals—Appeals to Supreme Court—Late Service of Notice of Appeal—Mistake of Appellant's Solicitor—Discretion of Court to allow Further Time—Magistrates' Courts Act, 1947, s. 73 (1). On the delivery of a judgment on October 5, 1954, the appellant's solicitor applied to the Magistrate to fix security for appeal; and this was done. On the following day, notice of motion on appeal was lodged in the Supreme Court, and a duplicate was delivered to the Registrar of the Magistrate's Court. On October 11, the amount fixed as security for appeal was paid into the Magistrate's Court. By an oversight in the office of the appellant's solicitor, no copy of the notice of appeal was served on the respondent's solicitor, until October 29. It was not suggested that respondent had suffered in any way from the late service of the notice, except that, perhaps, the appeal might in consequence, not be heard during the then current session of the Supreme Court, which commenced on October 12. *Held*, 1. That, under s. 73 (1) of the Magistrates' Courts Act, 1947, it was within the unfettered discretion of the Court to allow further time to serve the notice of the appeal, as the application had been made within the period of one month from the date of the delivery of final judgment; and that each case must be considered solely on its merits, and the Court will grant leave if justice requires it. (*Burt* v. *Robinson* (*No. 2*), [1937] N.Z.L.R. 893; [1937] G.L.R. 514), *Wight* v. *Anderson*, [1936] N.Z.L.R. 315; [1936] G.L.R. 273, applied.) 2. That, on the facts of this case, there was nothing in the nature of the mistake of the appellant's solicitor in not serving the notice of appeal in time, to exclude it from being a proper ground for exercising the Court's discretion in the appellant's favour. (*Gatti* v. *Shoosmith*, [1939] Ch. 841; [1939] 3 All E.R. 916, followed.) *Darroch and Another* v. *Carroll*. (S.C. Auckland. November 19, 1954. Stanton, J.)

Settlement—Revocation—Power to revoke with Consent of a Judge of the Chancery Division—Validity—Person cannot impose Duty on Court to give Consent. In a voluntary settlement dated October 17, 1917, it was provided: "The settlor may at any time during her life with the consent of a Judge of the Chancery Division of the High Court of Justice from time to time by any deed or deeds revoke or vary either wholly or partially the trusts and powers of and concerning the whole or any part of the trust fund and of the income therefrom respectively . . ." By a deed dated December 14, 1953, the settlor purported to revoke all the trusts of the settlement, and she now applied for the consent of a Judge of the Chancery Division. *Held:* a private person could not impose on a Judge the jurisdiction or duty to adjudicate on such a matter, and the provision was improper and inconsistent with the practice of the Courts; accordingly the application would be dismissed. (Dictum of *Simonds*, J., in *Re H.'s Settlement* [1939] W.N. 3, applied.) *Re Hooker's Settlement. Heron* v. *Public Trustee and Others.* [1954] 3 All E.R. 321 (Ch. D.).

RATES AND RATING.

Rating on Annual Value—Land held under Licence from Crown—Licence for Two and a Half Years—Buildings erected thereon to be removed at Termination of Licence—Such Buildings, Irrespective of Permanency, "rateable property"—"Annual value" of Buildings to be ascertained by Assessing Rent at Date of Valuation which Licensee would be willing to pay if Buildings in other Hands—Rating Act, 1925, s. 2. A company was granted a licence to occupy Crown Land for a period commencing on January 21, 1952, and expiring on June 30, 1954, to be used by it for purposes incidental to the construction of a bridge nearby. The company erected buildings for the use and occupation of its employees during the construction period; at the conclusion of which they would be removed. Some of the buildings were not physically attached to the land. The company, in terms of the licence, could not erect any permanent buildings on the land, and any buildings erected could be removed at the termination of the licence, no compensation being payable if they were left. The company had to pay all rates and outgoings in respect of the land during the term of the licence. The Lower Hutt City Corporation, the rating authority, levies rates according to the "annual value," and the rateable value of the land comprised in the licence was assessed on the basis that the buildings erected or placed upon such land should be taken into consideration in assessing the amount of rates payable. On objection by the company to such assessment, *Held*, 1. That the word "buildings" in the phrase "with the buildings and improvements thereon" in the definition of "rateable property" in s. 2 of the Rating Act, 1925, means all the buildings located on the land at the date of the valuation, irrespective of their permanancy or otherwise. 2. That "annual value" of the buildings should be determined by assessing the rent which, if the buildings were on other land, the company would be willing to pay for them. (*London County Council* v. *Erith and West Ham*, [1893] A.C. 562, followed.) *In re Wilkins and Davies Construction Co., Ltd.'s, Objection.* (Lower Hutt. October 19, 1954. Carson, S.M.).

WORKERS' COMPENSATION.

Accident arising Out of and In the Course of Employment—Dermatitis—Malt-house Hand—Worker developing new Sensitivity to Moulds and to Dust—Worker given Light Work by Employer—Inability to work in Malt-house and Loss of Opportunity to Earn overtime—Compensation based on Loss of Earnings by Reference to Average Weekly Earnings—Workers Entitled to have Estimate made of Compensation on Quasi-schedule Basis before Electing to take Such Compensation instead of Compensation based on Loss of Earnings—Workers' Compensation Act, 1922, ss. 3, 6—Workers' Compensation Amendment Act, 1947, s. 41 (3). In 1944, the plaintiff was treated with penicillin injections for burns, but no rash appeared. Subsequently when working as a farm labourer he had used penicillin ointment for treating mastitis in cows. He had no dermatitis at this time. In June, plaintiff commenced working for defendant as a malt-house hand, and for some nine to ten months continued at that work with no apparent trouble. In March or April, 1952, he had four injections of penicillin at the Christchurch hospital over a period of two days. There was no immediate development of a rash, but on the first day on which he returned to work after these injections a rash appeared. He reported back to the Christchurch Hospital. He was given some lotion, and the rash disappeared within the next few days. Subsequently, the rash reappeared and became worse, affecting various parts of his body. He sought medical advice; and, in February, 1933, he was advised to leave the work in which he was engaged as he had no chance of recovering while engaged in that work. The work of malt-house hand in which plaintiff was engaged involved various jobs which included the turning or ploughing of the barley on the kiln floor twice during each shift; and, twice a week it also involved removing the barley from the kiln floor and placing fresh barley on the floor. The temperature of the kiln was fairly high, and the barley on the floor may on occasions have a temperature of 200°. The air temperature above the barley was not as high as that; but the fact that it can be very high was shown by a provision in the award that, when men are working in the kiln the air temperature 4 ft. above the grain must not be higher than 160°. There were certain moulds on the floor of the kiln and in the barley; and these moulds, blue mould and penicillium mould, might cause dermatitis. The high temperature in which plaintiff had to work would cause sweating, and this sweating irritates the dermatitis and makes the condition worse. The plaintiff received compensation from March 3, 1953 to July 3, 1953, at which date he was certified fit for light work. He commenced light work on July 13, 1953, and all the medical witnesses were of opinion that he should not engage in any heavy work liable to bring on perspiration. On a claim by the plaintiff for compensation for the full amount from July 3 to 13, 1953, when he commenced light work; and his further claim for compensation based on loss of earnings, calculated according to the differences between the wages he was receiving in the malt-house and the wages he was able to earn at light work. *Held*, 1. That, on the evidence, the plaintiff, as a result of working in the malt-house for the defendant company, had developed a sensitivity to moulds and to dust which he did not have before he commenced that work; and that he was entitled to compensation in respect of the dermatitis which he developed while employed by the defendant company. (*Dodd* v. *Doring Industries*, [1951] G.L.R. 491, and *Smith and Liddle* v. *Pukemiro Collieries Ltd.*, (1952) G.L.R. 261, and *Costigan* v. *General Motors Ltd.* (unreported), distinguished.) 2. That, the fact that, owing to his condition's being such that he was unable to continue working in the malt-house, the plaintiff, by leaving his employment and thereby losing an opportunity of earning overtime payments, did not affect his right to claim compensation based on loss of earnings by reference to his average weekly earnings in the employment of the defendant company. 3. That, the plaintiff, if he so desired, was entitled to have an estimate made of compensation on a quasi-schedule basis before he elected to take compensation thereunder instead of compensation based on loss of earnings. *McGeorge* v. *New Zealand Breweries, Ltd.* (Comp. Ct. Christchurch. October 27, 1954. Dalglish, J.)

THE PLACE OF LAW IN INTERNATIONAL RELATIONS.

By Eelco N. Van Kleffens, *Minister of State and Ambassador of the Netherlands.**

I should like to speak to you about the place of Law in international relations, and, more especially, of the need there is for putting into the conduct of international relations a much greater emphasis on Law than has been done these last few years. And when I say "Law," I mean, by the nature of the thing, international law.

I believe that this would be to the advantage of all nations. Partaking of the majesty and authority characteristic of all Law, international law is the only objective and impartial yardstick in international relations; a solid basis for any international policy worthy of that name; a sure touchstone for the settlement of international disputes; and an effective reducing-agent of mere statecraft, cleverness, and opportunism. It sets up "a standard to which the good and the just can repair." International optimism, confidence and tranquillity are in direct proportion to its strength and advancement.

All this is of especial importance to nations who are in a defensive position. "In diplomatic debate," said the former President of the International Court of Justice, Professor Basdevant, "a State feels particularly strong when it is in a position to invoke a rule of positive international law."[1]

I should like very much to explore with you why this is so true. For I believe that there is every reason for such an exploration. It seems to me that, without the slightest doubt, there has been a striking and highly undesirable neglect of international law in the conduct of international relations ever since the outbreak of the Second World War. Let me give three illustrations, which unfortunately may easily be multiplied.

1. In spite of the fact that during the war against Germany, the Allied Powers had a very strong legal position, in addition to a very strong political and military position, there was nothing in the Atlantic Charter in the nature of a reference to international law.

2. Even more surprisingly, the draft of the United Nations Charter prepared in 1944 at Dumbarton Oaks by representatives of China, the Union of Soviet Socialist Republics, the United Kingdom, and the United States of America, contained no reference at all to international law, or even to justice. There was no indication to guide the future organization in finding an answer to the question on what basis its decisions were to be taken. Several nations were shocked by so grave an omission, and by the prospect that everything seemed to be left to politics. At the Conference of San Francisco I therefore proposed to say clearly in the Charter that the new organization was to function in conformity with the elementary principles of morality and justice and on the basis of respect due to international law. Other countries presented similar suggestions, with the result that the Charter now refers expressly to international law.

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* An address at Princeton University on November 29, 1954, under the auspices of The Woodrow Wilson School of Public and International Affairs.

Dr. Eelco Nicolaas van Kleffens was born 1894, in Friesland, Holland; he received his degree of Doctor at Law at Leiden University in 1919 on thesis: "The Relations between the Netherlands and Japan from 1605." He was secretary of the Board of Directors of the Royal Dutch Petroleum Company in London, 1921-1923; Deputy-Chief, Legal section Ministry of Foreign Affairs, The Hague, 1923-1934, and of Diplomatic section, 1929-1939; Minister to Switzerland, 1939; Minister of Foreign Affairs, 1939-1946; leader of delegation to San Francisco Conference, 1945; Minister without portfolio and Netherlands representative, United Nations, 1946-1947; Ambassador to U.S.A., 1947-1950; Minister of State, 1950; Minister to Portugal, 1950; President of United Nations, 1954.

[1] Regles Generales du Droit de law Paix: Recueil des Cours de l'Academie de Droit International de La Haye, vol. 58, p. 480.

Christmas Message to the Profession

From the **ATTORNEY-GENERAL.**

I GLADLY accept the invitation of the Editor of the Law Journal to make my first message to the profession, as the new Attorney-General, one of Christmas greetings and good wishes for the New Year.

In these laborious days, the Christmas vacation is well earned. In more spacious days which I can only just remember, lawyers enjoyed a more leisurely life. The legal offices closed on Saints' Days and other days of commemoration. The Christmas and Easter vacations were much longer than the holidays of other people; and, at least in the provincial town where I went to school, the lawyers had a half holiday in the middle of the week as well as on Saturday.

But the lawyers are no longer like the lilies of the field. The days of our years are now bustling, busy days, and the Christmas vacation is well earned. My wish is that it may be well enjoyed by you all as a festival of goodwill, as a time for family reunions, and as a period of rest and relaxation to fit you for another strenuous year.

I hope that the New Year will be a happy and prosperous one for the profession. As Attorney-General, I look forward to a year in which I hope to be of some service to the profession and the fraternity of the law.

J. R. Marshall.

Attorney-General's Office,
Wellington.

3. My third example has to do with a very successful institution which has been functioning in my own country for more than a quarter of a century: The Hague Academy of International Law, an international, non-political, non-profit organization which organizes a first-class summer school of recognized standing and proved drawing-power for the teaching of international law. This institution used to receive from the Carnegie Endowment for International Peace an annual subvention which before the war was paid with exemplary regularity, but had to be discontinued after the war. The Academy has tried in all countries to raise new funds, but hitherto with little success.

It is clear that at this time international law has been relegated into the background; the general public does not seem to know very well what it is, and is not interested. Can it be that the nations have come to the conclusion that, inasmuch as international law has not prevented the outbreak of the Second World War, it is a useless instrument which therefore may be discarded?

No conclusion could be more rash or wrong. It is of course quite true that international law did not prevent the war. But neither did diplomacy, nor anything else. The point is not whether international law can prevent a war, but whether it can make a contribution to preventing a war, and whether a well-founded appeal to international law can perceptibly strengthen the case of whoever appeals to it. And *that* it can.

There is much vague and confused thinking on this subject, and it seems to me that the time is overdue for these things to be clearly stated. Here is a strong shield, giving those who possess it better morale, a consideration undoubtedly of special importance to the armed forces. A shield is a weapon of defence, not offence. No weapon can be more legitimate.

Fortunately, there are a few signs that a better understanding in this respect is at hand. Let me mention only the remarkable address given by the Secretary of State of the United States, Mr. John Foster Dulles, to the American Bar Association at its Boston meeting of August 26, 1953, in which Mr. Dulles said that one of the inadequacies of the United Nations Charter "came out of disregard for the fact that world order, in the long run, depends, not on men, but upon law, law which embodies eternal principles of justice and morality." And the Secretary of State quoted on that occasion from the late Senator Taft's book, "A Foreign Policy for Americans," in which he said, speaking of the United Nations Charter: "The fundamental difficulty is that it is not based primarily on an underlying law and an administration of justice under that law."

Now why is it that an appeal to international law has that power of strengthening our position?

The answer is to be found in that quality, inherent in and typical for all law, which requires rights to be respected and the law upheld. If, as private persons, we have a right not to be attacked, damaged or insulted, then that means that this right is to be respected by all, that those who infringe it are wrong, and that those in charge of upholding the law will if necessary make sure that it *is* upheld. A well-founded appeal to law will be understood and admitted by all decent people. Similarly, if a State is wronged or about to be wronged, an appeal to international law will be understood and admitted by all decent people, and evil-doers without hesitation branded as such, with even less hesitation than in the case of an appeal to purely moral considerations (which after all have a strongly individualistic tinge), and with very much less hesitation than in the case of an appeal to force.

Where does that peculiar quality of international law, and indeed of all law, come from? That is the basic question we must try to answer.

There are several countries where the constitution or some other enactment proclaims the binding force of international law. There are others where the judiciary has declared international law to be binding.[2] You all know that in the United States a mixed system prevails: the constitution states [3] that treaties are part of the supreme law of the land, whilst the Supreme Court has ruled that not only treaties, but international law in its entirety, rules based on custom included, are part of American law.[4] All this, however, gives no final explanation of the binding force of law; it merely shifts the issue, for the question immediately arises: what, ultimately, gives the constitution, or an act of Congress or of Parliament, or a judicial precedent its binding force? Besides, in the law of many countries there is no such provision as here referred to, and yet nobody has ever contended that international law is not binding there.

The answer to our question, therefore, must be sought outside of national constitutions, laws or judicial precedents.

It would, of course, be quite wrong to say that law is binding, because, if you infringe it, the police come to fetch you. That simply would amount to confusing the foundation of the obligatory force of law with the fact that often (not always, and not necessarily) law has a sanction to restrain transgressors.

Also, there is no answer to be found in saying that all law, and international law with which we are concerned here in particular, is binding because the People want it to be binding. For immediately there arises the question: *why* do people want it to be binding? What is there in law, and in international law, that makes people want it to be binding? You see, we are all the time confronted with the same question. It is obvious that we must look for an answer elsewhere.

Much, in the course of the centuries, has been written on the subject.

Let is first listen to Cicero, who, having observed that it is against nature to seek one's own advantage at the expense of others, clinched this by saying: "If everyone did that, human society would of necessity destroy itself."[5] Grotius, who quoted him, added: "All that is unjust is against the nature of a society of reasonable beings."[6] Before him, Celsus, quoted in the Digest (I, 1), had called law "the art of what is good and fair."

These pronouncements are worthy of note, particularly because they show very clearly that Cicero, Celsus, and Grotius (and they were far from being the only ones) consider that the foundation of the respect due to law belongs to the domain of sociology and morality,

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[2] England is an example: Blackstone, Commentaries, IV, 5.

[3] Art. 6.

[4] The Paquete Habana and The Lola, 20 Sup. Crt. 290.

[5] De Officiis, III, 5.

[6] De Iure Belli ac Pacis, Bk. I, ch. I, para. III, 2. See also ibid., Prolegomena, 16.

not to the realm of law. Disregard of law disregards what is good and fair, and destroys society ; to destroy society is against the interest and nature of mankind, and therefore inadmissible for practical as well as for moral reasons.

The ultimate basis of the respect due to law, accordingly, is extra-legal—*i.e.*, outside the realm of law. As a command of a social and moral nature, the obligatory force of law is enjoined directly on the individual through his own sense of what is right or wrong, and not, as in the case of a command founded on law, through the medium of a fundamental legal rule he must obey whether or not he thinks that rule to be just. There simply is no such legal rule. I believe this explanation to be correct ; it applies to the binding force of all law, not excluding international law.

From the 18th century on, however, attempts have been made to leave this safe ground indicated amongst others by Cicero, Celsus and Grotius, and to give the respect due to international law a *legal* basis. Christian Wolff, a remarkable German lawyer who lived from 1679-1754, was the first to advance a theory which for a long period of time found a numerous following, especially in France. It was based on the idea of there being certain fundamental rights of states, as permanent as the state itself, absolute and inalienable, of which the state cannot be deprived without ceasing to be a state. The catalogue of these rights varies from author to author, but it may be said with the late professor Antoine Pillet[7] that there are five of them which have found general recognition : the rights to preservation, to independence, to equality, to respect, and to international commerce.

The assimilation of states to individuals is obvious ; states as well as individuals are considered equal and autonomous. Although autonomous, the state, like the individual, respects the equal rights of his peers. In particular, agreements must be kept because, if they are not, one or more fundamental rights of the other partner or partners is infringed.

In the course of the present century, this theory has been under effective attack.

It was pointed out, amongst other things, that it is inconsistent with reality. If independence is an inalienable right of a state, how is it then that there are several states (take Morocco, or Andorra, or the Sheikdoms in the Persian Gulf) that are *not* wholly independent, without thereby ceasing to be states ? Moreover, all states are becoming more and more inter-dependent instead of independent.

Also, for those who like a logical argument it may be pointed out that this theory of fundamental rights of states rests on a form of reasoning which is a vicious circle : these rights are an essential part of a state, but they are only conceivable in a society of states. So either the state, considered individually, has these rights, but then they are anterior to the society (which is inconceivable), or they are not anterior to the society of states, but then it is difficult to see how the state suddenly finds itself vested with these rights on entering that society.

This theory therefore has to be rejected.

Quite another attempt to show that respect due to international law has an ultimate basis of a legal nature was the theory that all international law rests on consent, given either expressly (as in the case of treaties), or tacitly (as with custom).[8] In this way, there always is a contractual obligation, and *pacta sunt servanda*. Of this maxim, as eminent an authority as the late Professor Anzilotti has made the keystone of his theory of international law.[9] I am none the less of the opinion that it cannot be left floating in the air ; we must ask ourselves *why pacta sunt servanda*, for whilst nobody doubts that consent can create a legal obligation, this does not mean that the ultimate basis of the *validity* of that obligation is consent. So this consent theory really means little or nothing. Why, moreover, should a mere fiction of tacit consent be given so large a place ? And can consent, express or tacit, perhaps be withdrawn with the same liberty with which it is supposed to have been given ?

Other attempts of the same nature have been made, but time does not allow me to go into them. So far as I can see, they are all intrinscially defective. I firmly believe that Cicero, Celsus, Grotius and all who thought and think like them are right : sooner or later one is driven to the conclusion, however one tries to look at it, that the ultimate basis of the respect due to international law (and to *all* law, for that matter) lies outside the realm of law—it is of a moral and sociological order. We respect law and its enforcement because we feel in our heart and conscience it is right and useful that the law be observed, and not because there is any fundamental rule of law commanding us that we *must* accept it as right, whether we agree to accept it or not.

This natural urge has nothing to do with the content or substance of law. In the same matter, that substance may differ from country to country, just as in one and the same country it may be different at different times. The appreciation of the *substance* of a given legal rule is the task of our sense of justice ; as soon and as long as that sense of justice is satisfied, we have the natural desire to see law respected precisely *because it is law*. The alternative is anarchy, and from that we instinctively shrink.

I realize of course very well that, speaking like this, I am leaving the boundaries of strict law (though perhaps not necessarily those of jurisprudence). I know I am, and I am quite impenitent, for it is not my purpose to confine myself to legal rules—we want to *understand*. Where basic things are concerned, it is rarely possible to stay outside the realm of metaphysics ; in fact, as Emile Meyerson has rightly pointed out, " any science presupposes a minimum of metaphysics."[10] If we do not, we shall never get to rock-bottom, and to get to rock-bottom is the purpose for which I am speaking to you. Remember also that all the social sciences are somehow related, and that the various headings under which they are known to us are convenient labels rather than compartments separated from others by watertight bulkheads. And therefore, if we cannot understand law without making an excursion into, *e.g.*, sociology or ethics, by all means let us make that excursion.

In any case, I think we have now a full understanding of the importance of a well-founded appeal to international law in disputes we have with foreign states : every right-minded person carries within him a natural

[7] Recherches sur les Droits Fondamentaux des Etats, p. 3.

[8] The theory that the binding character of custom rests on tacit consent is very old, cf. Hermogenianus in the Digest, I, 3, 35.

[9] Corso di Diritto Internazionale, I, passim.

[10] De l'Explication dans les Sciences (1922), p. 6.

respect for law. Let us not fall victim to the delusion that international law is so abstruse a science that the general public cannot understand an argument which is based on it. If it is a mistake to overrate what people know, it is an even greater mistake to underrate what they understand. They are perfectly able to sift the genuine from the spurious, and that applies to all countries—it is above all a matter of clear presentation of the issues.

Decent men want law; they know that law is the average of what is right, nationally or internationally. They sense in it the element of legitimate defence against chaos or attack. That is why an appeal to law has such tremendous force; the immediate reaction of the people is: if country X has a really good case at law, its case is respectable, it deserves to be upheld. We now know why that is so, and you see why in the beginning I spoke of the majesty and authority characteristic of Law.

Therefore, let us give international law a much greater place in our defensive preoccupations than we have been doing since the end of the war. We have neglected it too long. A powerful weapon of defence has been left unused. Let us then make full use of it.

HANDS ACROSS THE HERRINGPOND.

Scotsmen at the Dutch Law Schools.

By W. F. DE WAAL, D. JUR. (LEIDEN).

From the start, I want to make it clear that from the legal point of view this article is nothing more than a fishing expedition. The following will make this statement clear.

Lord Dunedin, in a speech delivered in Glasgow on May 21, 1935, for the David Murray Foundation in the University of Glasgow, entitled: "The Divergencies and Convergencies of English and Scottish Law," said:

> It (the influence of Roman law) was peculiarly helped by another circumstance. The Roman law had been actually adopted in Holland, as there had arisen there a celebrated teaching school at Leiden, which was founded in 1574. There in the seventeenth century it was a common practice for Scotch lawyers to go to perfect their legal education. They came back and all through the reported cases in the seventeenth and eighteenth centuries you find numerous references to Roman law.

This statement aroused my curiosity. I thought that the learned Law Lord, whose clear and logical opinions I hardly need to emphasize, inferred that this education at Leiden University, my old Alma Mater, had had a deep influence on the students and on the forming of Scottish legal thinking.

Consequently, I wrote to Leiden, and, by courtesy of Professor R. P. Cleveringa and of the secretary of the historical committee of Leiden University, Mrs. O. Idenburg-Siegenbeek van Heukelom, I got a list of the names of students of Scottish origin at Leiden. This list begins in the year 1588 and ends in 1777. The political situation in Holland and on the Continent became increasingly difficult and turbulent and probably brought this connection to an end. As the list covers several hundreds of names, it is not possible to publish it in this Journal, but it is open for inspection at the office of the Secretary of the New Zealand Law Society in Wellington.

The list contains several names, which to-day are still well known in the profession and in business circles. To take a few at random: Cunningham, Hay, Fletcher, Svright (Sievright) and of course, the Campbells were coming.

Of about two of them only something more is known in Holland:

1. Ramsaeus (Ramsay) Jacobus, entry in Album Studiosorum Lugduni Batavae: April 6, 1588. This is the first entry of a Scot. He became, 1588, Extraordinarius Professor Logica; 1592, teacher at the State College (a political body); March 12, 1953, Under or Vice-Regent at the same College; died in the same year in Leiden.

2. Murdisonius (Mordisonius, Mordison) Johannes, born 1568 in Scotland; at the age of thirty-one, he entered the Law faculty (as all of the list). In 1599, he was lecturer in physica; November 9, 1603, Professor Logica; died 1605 in Leiden.

Apart from the mistakes in the spelling of the names, in perusing the list one will find the names of tutors and valets included. This was done, as the secretary of the historical committee explains, for two reasons, the first (and probably most important) being that in this way they were—as were the students—free from excise on liquor, and, the second, that they were under the jurisdiction of the Academic Senate, which was probably inclined to be more lenient with their peccadilloes then the ordinary Courts.

I thought that I could find out something more about an entry of the year 1728, the two brothers, John and Edward Murray: "Ducis de Ahol filii." They were the sons of the first Duke of Atholl. *Burke's Peerage* does not mention their Christian names, but they are clearly sons of the first Duke, of his second marriage, and they predeceased their father. The son John of the first marriage died at Malplaquet. Whether they came there on the advice of their half-brother George, who was in Holland some years before and died much later in Medemblik in Holland, is impossible to say. (For George Murray, see *Encyclopaedia Britannica*).

Another entry, which can be investigated better in Holland, is that of Thomas Hope 1699. Whether he was the founder of the famous, still existing, private bankers' house of that name in Amsterdam, it is at the moment impossible to say. At present, no bearer of the name of the founder is a member of the firm, it having passed to the descendants of Dutch regent families, who were related by marriage to the Hopes. Through the close relationship of the bankers' house with the trading firm of van Eeghen and Co., which, in its turn, is very closely related to the original (and still mainly) Scottish firm of Maclaine, Watson, and Co., of London and the Far East, old ties still exist.

A source of information for Scottish students' life at Dutch Universities is *Boswell in Holland*. Boswell

chose the University of Utrecht, into which he entered in 1763.

The reason why Boswell choose Utrecht instead of Leiden, where his father (as the list shows) and his grandfather had been studying, was the advice of Sir David Dalrymple. In the sketch of Boswell's life to August, 1763. In *Boswell in Holland* it is said:

> Though the main objective was the law, it was hoped that he might also improve himself generally in culture and manners; and for this purpose Utrecht was thought to offer advantages over Leiden. Contemporary social life in a University town on the level Boswell sought was indeed more developed in Utrecht than in Leiden.

A careful study of the life of Alexander Boswell will perhaps give a clearer and more detailed understanding of the influence of Dutch law teaching on Scottish law. Some of the letters of Alexander to his son give an indication of this.

It is quite possible that the house where Alexander had rooms in Leiden as a student "op de hoek van de Vliet in the street called Rapenburg" (p. 52) is still in existence.

Alexander Boswell, a Scottish Judge under the title Lord Auchinleck, must figure in the contemporary law reports, and his name might be a starting point for further investigations on the subject.

It seems that Boswell's interests (apart from in himself, of course) were more in the life of the young man about town than in that of a student. Nevertheless he did not do so badly at the University, according to the survey that is to be found in the Grand Tour diary. One thing strikes the reader of his Holland-Journal, that he apparently found the life at a Dutch University quite different from that of an English or Scottish one. I believe that a student's life in Holland and on the Continent always was—and still is—much more free than in England.

Another still-existing tie between Scotland and Holland is that of the Clan Mackay. The Mackays are in Holland barons (of Opheemert, as the name of the castle is) and Lord Reay in Scotland and England. The present holder of the title was born in Holland, educated in Utrecht, and became naturalized as a British subject on his succession to the title.

There is one name of a student at Leiden University not mentioned in the list, being that of an Englishman, who made a great career. That is Sir James Harris, afterwards Baron Malsbury, later an earl and a viscount. He was Minister and later Ambassador of the King of England at The Hague in a difficult time, about 1780 to 1790.

In a very scholarly, but also very entertaining book, "Ambassadors and Secret Agents," Professor Alfred Cobban, of London University, has described his career in Holland.

I cannot resist the temptation to quote Sir James's opinion of the legal profession in Holland at the time, although Professor Cobban very courteously says that it may be quite wrong. It reads (p. 21):

> The Patriots (the bourgeois democrats) were led by a triumvirate of lawyers, members of a profession, observed Harris, very uncharitably, which in this country does not tend to enlarge the ideas, not to inspire sentiments of liberality and integrity. It teaches on the contrary, cunning, chicanery and narrowness of mind. Another, and obviously no less partial judgment, describes them as muddlers, lovers of good eating and drinking, but ignorant of the finer arts of statesmanship and diplomacy.

I said in the beginning that I was on a fishing expedition. If anybody in perusing the list of names, would discover a forefather, about whose career he knows more, I would gratefully collect this information and send it on to Holland. Professor Cleveringa wrote me that my inquiry had stirred the interest of the secretary of the historical committee. It might perhaps be a help in a further study of the influence, mentioned by Lord Dunedin, of these students on Scottish legal thinking.

One conclusion, however, can be safely made. It is this: notwithstanding our contemporary boast of advancement of international relations, the work in those bygone days had *one* big advantage. What made the study of Scottish or other nationalities at each other Universities easier and possible, without an extensive knowledge of the language of the country? It was the common use of Latin in lectures and books, that performed that feat. That Latin may not have been the Latin of Cicero and Tacitus; but it was a common tool, and it is, I submit, at least doubtful whether the loss of that common tool is not a definite step backwards in international exchange of knowledge. That it is still possible to express difficult contemporary economic and social problems in that language, is clearly shown by the Papal encyclicals, for instance, *Rerum Novarum* and *Quadragesimo Anno*. Nobody will accuse these Papal encyclicals of lack of clarity or lucidity. The only instance of the use of a national language in an encyclical is, as far as I am aware, in that against the Hitler regime, *Mit Brennender Sorge*. I think, therefore, that the loss of the use of Latin in the Universities all over the world is a decidedly grave one.

Two Schools of Thought.

In fact, there are distinct signs that there are amongst legal theorists, consciously or unconsciously, growing up two schools of thought—one of which may be described as the "liberal" school and the other the "conservative" school which is on the whole less prepared to accept what it regards as novel theories. To a large extent the "liberal" school puts the bigger emphasis on "justice" and the "conservative" school on "certainty." It might be added, for the sake of completing the picture of the different schools or trends of thought, that there are not lacking those who are ingenious enough to embrace new principles without admitting that there is anything new in them, thus having the best of both worlds. It is submitted that those who adopt this view point are straining precedent beyond its limits to fit in with pre-conceived ideas: there is surely something unsound about a process of legal inquiry which decides first what is right in a particular case and then what authority can be pressed into service to support the predetermined decision. (Certainty or Justice (1953) *216 Law Times*, 480).

SUBDIVISIONS OF LAND IN A CITY, BOROUGH OR TOWN DISTRICT.

Statutory Restrictions and Approvals.

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

The decision of His Honour Mr. Justice Hay in *Concrete Buildings of New Zealand Limited (In Liquidation)* v. *Swaysland*, [1953] N.Z.L.R. 997, is beginning to create great interest in the legal profession. The facts are correctly set out in the headnote :

" On or about April 27, 1953, the respondent agreed to buy and the company to sell to him, for £300 a section of land described as Lot 22 on a plan of subdivision prepared by the company, and part of the land in a certificate of title. The respondent purchased the section through a firm of land agents to whom, at the time of entering into the contract, he paid the full purchase price. He was not informed that the plan of subdivision of the land of which the section formed part had not been approved by the Upper Hutt Borough Council, within whose boundaries the land was situated. At the time of entering into the contract, the respondent was informed by the land agents that the company was in a sound financial position, and was able to complete the contract by transferring the section to him.

" On May 14, 1953, the company's debenture-holder appointed a receiver, who, in exercise of the power of sale created by the debenture, offered for sale by auction the whole of the land included in the sub-divisional plan of twenty-six sections, situate in the Borough of Upper Hutt. The Borough Council had not approved the plan. At the time of the hearing, the company was in the process of a creditor's voluntary winding-up pursuant to a resolution passed on July 9, 1953.

" On July 3, 1953, the respondent lodged a caveat against the certificate of title, which included the land sold to him, claiming an estate or interest in that part of the land by virtue of his agreement for sale and purchase. The caveat forbade the registration of any memorandum of transfer or other instrument affecting that land until the caveat should be withdrawn by the caveator, or by order of the Supreme Court or some Judge thereof or until the same should have lapsed under the provisions in that behalf contained in s. 145 of the Land Transfer Act, 1952."

On a summons by the company for removal of the caveat, Hay, J., held that the sale of the section to the respondent constituted a subdivision of the company's land for the purpose of s. 332 of the Municipal Corporations Act, 1933, under which it is provided that a plan of a subdivision of land in a borough must be approved by the Borough Council before such a subdivision is made and that no plan of any land in a borough which it is proposed to subdivide may be deposited under the Land Transfer Act, unless, *inter alia*, the plan has been duly approved by the Borough Council. His Honour also held that the contract for sale and purchase of the section was made in breach of the provisions of s. 332 of the Municipal Corporations Act, 1933, and was *per se* illegal ; and no rights under it could accrue to either party, following *Re Mahoud and Ispahani*, [1921] 2 K.B. 716, and *Bostel Bros. Ltd.* v. *Hurlock*, [1949] 1 K.B. 74 ; [1948] 2 All E.R. 312. It was further held that the caveat could not stand by reason of the fact that it was lodged to protect a contract prohibited by statute, and therefore, illegal ; and the Court, in the circumstances, had no power to impose terms. An order for the removal of the caveat from the register was accordingly made.

The respondent was a young man with no prior experience of matters relating to the purchase of land, or of the procedure relating to the depositing of plans in the Land Transfer Office.

One may well remark that the consequences of a breach of s. 332 by a subdividing owner may well have most unjust results on an innocent purchaser. A breach of the statute causes no rights to accrue to either party of the intended contract. In *Swaysland's* case, the young man who had paid in full the purchase money for his section was able to sue successfully the land agent who had effected the sale of the section ; but, as the learned editor of this JOURNAL pointed out in (1954) 30 N.Z.L.J., 49, 51, owing to a recent amendment to the Land Agents Act such a remedy would not now be available to an innocent purchaser. If the young man in *Swaysland's* case had also built a house on the land, what would have been his position ? He could never have got a title to the house ; probably it would have accrued to the creditors of the contravening party, the company vendor, which in the meantime had gone into liquidation.

It is submitted that the law should be amended so as to give an innocent purchaser an equitable charge on the land for the amount of money he has expended. It may be that he already has some right by virtue of the rule in *Sinclair* v. *Brougham*, [1914] A.C. 398 ; but there would be no harm in writing it into our statute law. Perhaps the better way would be to permit the registration of a notice of lien : *cf.*, Wages Protection and Contractor's Liens Act, 1939.

The writer has recently read an opinion by an eminent counsel who points out that s. 332 of the Municipal Corporations Act, 1933, catches *all* leases no matter how short the term. Section 128 of the Public Works Act, 1928, however, which requires narrow roads and streets to be widened on a subdivision of land does not apply to leases unless they are for a term (including any right of renewal) for at least fourteen years. As the law stands at present, it appears that s. 332 of the Municipal Corporations Act, 1933, applies to a periodic lease, *e.g.*, a weekly or monthly tenancy. It is not the practice to register short-term leases under the Land Transfer Act, 1952 : a periodic lease cannot be registered under that Act. In Wellington, at any rate, there are many leases for a short term of years drawn up in the form of agreements or deeds and which not being in a memorandum of lease form could not be registered under that Act. Often they are not described according to the official description of the land. For example, they may purport to be a lease of shop and land at No. Street, Wellington. In many cases, the lessee or tenant relying on the protection of the Tenancy Act has expended large sums on the land and the buildings. If his lease is void he is a mere trespasser and therefore, it appears, can have no rights under the Tenancy Act, 1948 : *Allan* v. *Reid*, [1951] N.Z.L.R. 338 ; G.L.R. 182 ; *Mansion House Kawau, Ltd.* v. *Stapleton*, [1948] N.Z.L.R. 1015 ; G.L.R. 454.

An amendment to the existing law is clamant, exempting leases less than for a certain term (including any right of renewal), say, for five years. To be adequately ameliorative, the amendment should be made retrospective.

Learned counsel in the course of his opinion goes on to suggest that s. 332 applies not only to a lease of part of the lessor's holding or land but also to a lease of a room or rooms in existing buildings. This is a startling proposition and runs counter to the long-established practice of the Land Registries. The question is: Does the legislation include subdivision by lateral planes as well as by perpendicular planes? The writer has also read an opinion given by another learned counsel as long ago as 1929, when s. 335 of the Municipal Corporations Act, 1920 (the statutory predecessor of s. 332 of the Municipal Corporations Act, 1933) was in force. Counsel conceded that to treat s. 335 as applying to leases of rooms, for howsoever short a period, would fetter business exceedingly, and also that the general view of practitioners, as well as the practice of the Registries, was that s. 335 did not apply. Counsel also conceded that in seeking to restrict uncontrolled subdivision the statute primarily contemplated such subdivision of *land* in New Zealand as was usual in New Zealand. It was also obvious that the reference in said s. 335 to "streets" and "reserves" was inapplicable to the subdivision of a single building.

It is confidently submitted that this is the true construction and the reasoning in *In re a Transfer to Palmer*, (1903) 23 N.Z.L.R. 1013, appears applicable.

The writer set out the history of s. 332 of the Municipal Corporations Act, 1933, in (1946) 22 NEW ZEALAND LAW JOURNAL, 4-6, to which perhaps reference may usefully be made. Although said s. 332 is not exactly in *pari materia* with ss. 125 and 128 of the Public Works Act, 1928, the principles of construction applied by the Court to those sections and their predecessors would, it is confidently submitted, be applied to s. 332: *Wellington City Corporation* v. *Public Trustee*, [1922] N.Z.L.R. 293; [1921] G.L.R. 512.

First, they are all restrictive of a landowner's common law rights over his land, and therefore are to be *strictly* construed. If there is any doubt about it the landowner must get the benefit of the doubt: *Plimmer* v. *District Land Registrar*, (1908) 27 N.Z.L.R. 1134, 1147; 11 G.L.R. 223, 231; *Palmer's* case, *supra*. The section being one in derogation of rights, is to be interpreted in accordance with the rule laid down in *In re Cuno, Mansfield* v. *Mansfield*, (1889) 43 Ch. D. 12, 17.

In construing the meaning of subdivision of land for the purposes of the Public Works Act, 1928, the Courts have taken the popular meaning of that phrase. What the man in the street would regard as a subdivision of *land*. The man in the street would not regard the leasing of a room in an existing building as a *lease* of *land*. For example, the Courts have held that a transfer of one part of a person's land was not a subdivision of land: *In re a Transfer to Palmer*, (1903) 23 N.Z.L.R. 1013. (That particular decision was abrogated by s. 129 of the Public Works Act, 1928). As Williams, J., pointed out in that case the principles of the interpretation of a taxation statute apply to statutes restricting an owner's rights to subdivide his land. The Court cannot presume that the Legislature intended anything more than it has said *taking the words in their ordinary sense*.

In *this* country at all events no one would think of referring to the separation of the ownership of the mines and minerals under the surface from the ownership of the surface of the land as a subdivision of that land. Still less would anyone think of referring as a subdivision to the leasing or to that matter to the sale of a flat or a suite of rooms in a building. To use the word "subdivide" with reference to the separation of a building from other parts of a building or land would be a misuse of the word as it is generally understood.

There may also be cited *Mowbray* v. *Mayor, etc. of Takapuna*, [1929] N.Z.L.R. 99; [1929] G.L.R. 8, and *Lillicrap* v. *Mayor, etc., of Invercargill*, [1932] N.Z.L.R. 734; [1932] G.L.R. 204. The requirements of the statute for the constructing of streets and the making of reserves are not matters that can have any reference to the leasing of suites in a building; as an eminent authority once observed: "To require the alteration of the plan of an existing building would be to require the alteration of the building itself, and I cannot find that the section gives the Council any power to require the alteration of a building before the owner of it is entitled to exercise the right of leasing a part of it."

If a building has been built and the owner proposes to lease a part of it, he is not a person who "proposes to subdivide the *land*," within the popular meaning of that phrase.

If s. 332 applies in the case of a lease of part of a building, that is to say, if a lease of a part of a building is a subdivision, must not a similar lease for fourteen years and upwards be regarded as a subdivision or sale of a part under ss. 125 and 128 of the Public Works Act, 1928? If so, it would follow that an owner could not lease for a term of fourteen years a back part of a building because that part has no frontage to a public street. It would also follow that he could not lease a room or any part of the building if the building fronted a street less than a chain wide without being required to widen the street to half a chain from the middle. The result seems to be absurd.

A closer examination of s. 332 of the Municipal Corporations Act, 1933, may now be made, to ascertain whether the above construction is correct.

It deals with *proposed* subdivisions of land: not with any actual physical subdivision: *Lillicrap's* case, *supra*.

The statute first of all states what shall be deemed to be a subdivision of land for the purposes of the Act. This definition, it is true, is somewhat artificial, but it is probably exhaustive, and it is set out in subs. (i).

Subsection 2 enacts that when any person holding any *land* in a borough (which of course would include a city or independent town district, a town district forming part of a county coming within the Land Subdivision in Counties Act, 1946) *proposes to subdivide* the *same* (*i.e.*, proposes to sell or lease or otherwise dispose of any specified part less than the whole, or proposes to advertise or to offer for disposition any specified part less than the whole or proposes to apply to the District Land Registrar for the issue of a certificate of title for any part thereof) a plan of subdivision showing *the several allotments* and their dimensions, and the streets and reserves (if any) proposed to be made, shall be prepared by a registered surveyor and approved by the Council *before such subdivision is made*.

What the subdivisional plan has to show is the several *allotments* and their dimensions. There is nothing about buildings. Buildings are usually governed by a local body's by-laws. Here, the reasoning in such cases as *Mowbray's*, *Palmer's*, and *Lillicrap's*, *supra*, comes in. If the Legislature had intended leases of part of a building to be included it would

have said so. The word "allotment" is not apt to include part of a building: it means part of an existing holding of *land*: that I think is the meaning which has always been ascribed to it in New Zealand.

Subsection 7 provides that every person who subdivides any *land* otherwise than in accordance with a plan of subdivision approved by the council, or in case of an appeal in accordance with a plan of subdivision approved by the Board under that section *and before such plan has been duly deposited* under the Land Transfer Act or the Deeds Registration Act commits an offence and is liable on summary conviction to a fine of £100. A plan of subdivision of land to be deposited under the Land Transfer Act does not require to show *proposed* buildings: to show them would be improper as title to land is based on a cadastral survey. Existing buildings must be shown on Land Transfer plans but not proposed ones. Here again the reasoning of the majority of the Court in *Palmer's* case comes in.

Subsection 8 provides that in no case shall

(*a*) The plan of any *land* in a borough which it is proposed to subdivide be deposited under the Land Transfer Act, 1915 (now 1952) or in the Deeds Register Office: or

(*b*) The *transfer* of any *allotment* or subdivision of any such land be registered under the Land Transfer Act, 1915 (now 1952), or the Deeds Registration Act, 1908: or

(*c*) Any certificate of title be issued in respect of any such allotment or subdivision—

unless the plan has been duly approved under that section, etc.

It is somewhat curious that the word "lease" has been omitted from para (*b*). But I do not think that anything turns on this. Sub-section 8 is a machinery section and must be interpreted in the light of subss. (1) and (2). It is confidently submitted that it does not authorize a District Land Registrar to decline to register a lease of a room in or part or parts of a building.

It may be mentioned that in the new consolidated Municipal Corporations Act, 1954, which comes into force on April 1, 1955, s. 332 of the present Act becomes ss. 350-353; but these new sections do not appear to alter the law as discussed in this article, except that a lease for less than three years without the necessary consent of the Council is not a criminal offence; in this respect, such a lease is to be put on the same footing as the mere application to the District Land Registrar for the issue of a separate certificate of title.

The Strength of Freedom.

Exposure, then, of Communist aims and treacheries is one thing. Giving them the kind of exaggerated publicity they desire is something else. We must not be deceived by their pretence of peaceful patriotism and co-operation. But we must also not inflate their power and influence to the point where fear of them saps the roots of that trust and confidence in our laws and in our liberties and in ourselves which is essential to the functioning of democratic society.

Once such confidence is replaced by manufactured and exaggerated suspicion, repressive legislation and unnecessary administrative interference can easily follow. This, in its turn, provokes internal divisions and bitter controversies which weaken our strength and our solidarity. It is a vicious process and exactly what the Communist leaders wish. The stronger we become to resist external aggression, the more anxious the Communists are to weaken and divide us internally, especially by fostering suspicions, setting class against class, group against group, person against person. We assist in that work if we permit or encourage witch-hunting, guilt by association, accusation by implication; if we sit idly by and allow all the progressive elements in our society to be lumped with Communists as 'reds.' We have not approached this position in Canada, and I hope we never will. But it is something that we should be on guard against as a secondary result of the Communist infection.

By all means, let us protect ourselves against those who would practise or conspire to practise treason and sedition. Let us pursue them, unmask them and, if they have broken the law, punish them. But we should not confuse political heresy with political treason, or dissent with disloyalty. Nor should Canadians be frightened into conformity by making it dangerous to hold, to express or to advocate unpopular doctrines. No society can be free and healthy where this occurs, no matter to what heights its national income may soar. (Mr. Lester B. Pearson, Secretary of State for External Affairs, Dominion of Canada, at a meeting sponsored by B'nai B'rith at Guelph, Ontario.)

This I Believe.

Throughout this experience of mankind, where there is order and system there is a mind and a purpose. Trees in the forest fall at random; where logs are gathered in piles the woodcutter has been at work. Grass and wild flowers grow at random; where they appear in neatly-trimmed beds and rows the gardener has been at work. Over an area four billion light-years across—as far as to-day's giant telescopes can penetrate—floats nightly to us the evidence that we live in a universe of law and order.

If the mind that planned the universe ordained that it should be a universe of law and order, then it meant that justice, too, should prevail, for the absence of the one is inconsistent with the presence of the other. And if justice, then righteousness and goodness, which are but synonyms of justice.

That goodness, righteousness, and justice do not at all times and in all instances prevail is due only to the fact that lesser minds and hearts have willed it so. They would indeed prevail if all human minds and hearts were in tune with the infinite mind and heart of the Creator. A hopeless ideal, you say. In the foreseeable future, yes. But the day when it will be so is hastened by every individual act of mercy, kindness or love, by every individual heart that says "yes" to God, and by all the institutions of human justice, which, haltingly and stumblingly but with measurable progress, are putting that divine ingredient into men's relationships with each other.

That the Great Comet of 1864, when next it visits our corner of the cosmos, will, if it finds us at all, find us victor over many of the present self-inflicted ills of mankind is to-day only a matter of faith. But it is such a faith, along with a contribution towards its fulfilment, that makes the administration of justice a part of God's work on earth. And this, I am proud to say, I believe. (Glenn R. Winters, Editorial (1952), 36 J. Am. Jud. Soc'y, 67.)

NEW ZEALAND LAW SOCIETY.

Meeting of Council.

A meeting of the Council of the New Zealand Law Society was held on Friday, November 12.

The following Societies were represented: Auckland, Messrs. F. J. Cox, T. E. Henry, S. D. E. Weir, H. R. A. Vialoux (proxy); Canterbury, Messrs. A. I. Cottrell and A. L. Haslam; Gisborne, Mr. M. R. Maude (proxy); Hamilton, Mr. R. McCaw; Hawke's Bay, Mr. J. H. Holderness; Marlborough, Mr. A. G. Wicks; Nelson, Mr. I. E. Fitchett; Otago, Messrs. J. R. M. Lemon and J. C. Robertson; Southland, Mr. E. H. J. Preston (proxy); Taranaki, Mr. R. O. R. Clarke; Westland, Mr. A. M. Jamieson; and Wellington, Messrs. A. B. Buxton, R. Hardie Boys, E. T. E. Hogg, and E. F. Rothwell.

The President (Mr. T. P. Cleary) occupied the chair.

Apologies were received from Messrs. A. A. Barton, R. E. Gambrill, J. R. Mills, and G. H. Wallace.

Mr. Justice Shorland: The following resolution was carried:

"The Council and members of the New Zealand Law Society respectfully tender to the Honourable Mr. Justice Shorland their congratulations on his appointment to the Supreme Court Bench and trust that he will have a long and happy period of judicial service.

The Council desires to express to him its deep gratitude for the invaluable service that he, as a Vice-President of the Society, a member of the New Zealand Council of Law Reporting, the Rules Committee, and the Council of Legal Education, has given to the profession."

Hon. T. Clifton Webb, Attorney-General: The following resolution was carried:

"The Council and members of the New Zealand Law Society tender to the Hon. Mr. T. Clifton Webb the congratulations of the profession on his selection for the high office of High Commissioner for New Zealand in the United Kingdom.

The Council and members desire to record their appreciation of his interest in and the service given by him to the legal profession in New Zealand during the period in which he has held office as Attorney-General."

New Appointments:

(*a*) *Vice-President*: The resignation of Mr. W. P. Shorland as a Vice-President of the New Zealand Law Society was received.

On the motion of Mr. Hardie Boys, seconded by Mr. Cottrell, Mr. A. B. Buxton was elected a Vice-President of the New Zealand Law Society.

(*b*) *New Zealand Council of Law Reporting*: On the motion of Mr. Hardie Boys, seconded by Mr. Cottrell, Mr. A. T. Young was appointed a member of the New Zealand Council of Law Reporting for the unexpired term of office held by Mr. Shorland. (March, 1958).

(*c*) *Rules Committee*: A letter was received from the Secretary, Rules Committee, asking for nominations for membership of the Rules Committee, the present appointments expiring on December, 31, 1954. Messrs. A. M. Cousins, W. E. Leicester, and F. C. Spratt were nominated for the appointments.

(*d*) *Council of Legal Education*: The resignation of Mr. W. P. Shorland was received. Mr. A. M. Cousins was nominated as a member of the Council of Legal Education for the unexpired term of office.

Medical Examination of a Person Intoxicated in Charge of a Car: The following letter was received from the Minister in Charge of Police:

25th August, 1954.

I have to acknowledge receipt of your letter of 12th August, and in reply to inform you that recent instructions to the police regarding medical examination are as follows:

When the police are calling a doctor the arrested person should be so informed and advised that, in addition, he is entitled to have his own doctor called to examine him, and that he will be responsible for the fee of a doctor whom he calls. If he desires his own doctor, such doctor should be communicated with as soon as possible and informed that his attendance is required by the arrested person, who is solely responsible for the fee.

With regard to the right of an accused person to communicate with a solicitor, I reiterate that it is not considered necessary or desirable that an onus should be placed on the police to inform an accused person that he is entitled to communicate with his solicitor.

It was resolved that no further action be taken.

Judges' Salaries: As an increase in the salaries of Judges had been provided for in recent legislation, it was resolved that no further action was necessary.

Law Practitioners Act—Consolidation: The President reported that although the representatives of the Society had been assured that the Bill would be brought down before the Session ended, it was later found that owing to pressure of legislation the Bill had not been included in the Order Paper for the Session. The Law Draftsman had assured the President that he hoped to prepare the Bill and have copies printed before the end of the year. It was resolved that the report be received.

Juvenile Offences: Fingerprints: Confessions: The following letter was received from the Commissioner of Police:

6th September, 1954.

I have to acknowledge receipt of your letter of 16th August, 1954, enclosing copy of a letter from the Southland District Law Society.

In reply, I have to inform you that the police are properly instructed as to their duties in respect of Section 40 of the Police Force Act, 1947, the provisions of which are enforced when a person is in lawful custody. I should be pleased if any case where fingerprints have been improperly taken were brought to my notice.

Where it is practicable a young person is interviewed in the presence of a parent or relation, as is well exemplified in the case *Police* v. *Weir*, referred to. However, no inflexible rule can be laid down as to where and when an interview must take place and circumstances must govern every case.

Where it does happen that a juvenile is interviewed apart from its parents the result of the interview is communicated to the parents without delay. The police are instructed that the natural emotions and anxieties of the parent should be treated with all possible consideration, and all information, the disclosure of which would not be obviously against the interests of justice, or the child or its parents, should be given to the parents. The objective being the reformation of the child, the police are instructed to give to the parents any advice or assistance which in the best interests of the child they feel they can give with discretion and due regard to the proper discharge of their duty.

From the foregoing it will be seen that the police are fully aware of their duties, but I should be pleased if you would bring to my notice any case where a member of the Force has acted inimically to the interests of justice.

Legal Education: The following is a report of the Conference with the University:

At the invitation of the University of New Zealand Messrs. T. P. Cleary, A. M. Cousins, H. J. Butler, and A. C. Perry attended a full-day conference held on Friday, October 15, at the offices of the University.

The representatives of the University were Dr. G. A. Currie, Vice-Chancellor, Professor I. D. Campbell, Dean of the Law Faculty, Victoria University College, Mr. E. T. Mills, Dean of Canterbury Law Faculty, Dr. J. Williams, Principal of Victoria University College. The Registrar of the University and the Secretary of the Law Society were also present.

The following are particulars of the business considered:—

1. *Membership of the Council of Legal Education*: The membership of the Council at present consists of two Judges, two Deans and two Law Society nominees.

A recommendation had been made by the Council of Legal Education that there be two Judges, four Deans and four Legal Practitioners. The Academic Board asked that this recommendation be amended suggesting that there be two Judges, four Deans and *two* Legal Practitioners. Senate also suggested that the Vice-Chancellor be made a member of this Council.

The Conference resolved that Senate be recommended to approve the Constitution of the Council of Legal Education as recommended by that Council—*i.e.*, two Judges, four Deans,

four nominees of the Law Society with the addition of the Vice-Chancellor.

2. *The Conference* also resolved that the New Zealand University Act of 1930 be amended so as to provide that the Council of Legal Education shall make its recommendations to the Senate.

3. *External Examinations*: The Council of Legal Education asked for the views of the Conference on the question of the conduct of examinations.

There was an exchange of views, but the unanimous opinion was that the matter could be more carefully considered at a later stage by the Council of Legal Education.

4. *Full-time Students*: The Council of Legal Education asked for an expression of opinion upon the amount of full-time study for the law course which the members of the Conference thought desirable.

The Conference expressed the opinion that while no law student should be required to attend the University as a full-time student, there is considerable advantage to a student who undertakes one or two years' attendance full-time.

5. *Prescription in Procedure*: The Council of Legal Education suggested that the Law Society might prepare and submit a draft prescription which would be in line with the Society's proposals.

It was resolved that the Conference recommend that Section XI of the LL.B. Statute (1954 University of New Zealand Calendar, p. 144) be amended by adding the following subsection:—

> (3) A candidate shall be credited with a pass in the Law of Procedure either (i) if the Registrar of the University of New Zealand shall have received a certificate from a teacher in a Constituent College that the candidate has undergone a course of study of the Law of Procedure of not less than forty lectures, and has shown an adequate knowledge of the subject as prescribed or (ii) if the candidate shall have passed the examination in the law of Procedure.

It was further resolved that the prescription in the subjects of Evidence and Procedure should be reviewed by Professor Campbell and Mr. N. A. Morrison, who should submit a report to the Council of Legal Education, the Law Society and the Law Faculties.

The President added that the meeting had been a very cordial one, the main purpose of the conference being to strengthen the Council of Legal Education and, as set out in the report, the recommendation to increase the number of representatives of the University and of the Law Society was approved. It was thought that the addition of the Vice-Chancellor would assist in presenting the views of the Council of Legal Education to the Senate.

It was resolved that the report be received.

Workers' Compensation Act: The following letter from the Minister of Labour was received:

24th August, 1954.

> In reply to your letter of 13th August, 1954, I am advised by my departmental officers that a start has already been made on the consolidation of the Workers' Compensation Act and its amendments and it is expected that the measure will be introduced into Parliament at the next Session.

Evidence Act, 1908, s. 5 (4): The following letter was received from the Minister of Justice:—

18th August, 1954.

> At its last meeting the Law Revision Committee considered suggestion for the amendment of s. 5 (4) of the Evidence Act, 1908, to permit a wife to give evidence against her husband in sexual cases irrespective of the age of the victim.
>
> The Committee decided that the papers relating to the matter should be referred to the New Zealand Law Society for the expression of its views. I accordingly attach copies of this correspondence. I shall appreciate the comments of the Law Society on the subject for the Committee's next meeting early in 1955.

Dr. Haslam and Mr. E. C. Champion, to whom the matter was referred for consideration, reported as follows:—

1. Section 5 of the Evidence Act, 1908, was enacted in the present form by Section 2 of the Evidence Amendment Act, 1952. *Inter alia*, the section codifies in convenient form the competency and compellability of accused persons and their spouses in criminal proceedings. The section also records the exceptions to the general principles pertaining to these topics.

2. The listed exceptions fall broadly under the heading of certain offences which tend to imperil the marital state or family life. Therefore public policy presumably justifies a derogation from the basic principle that the spouse of an accused shall not be a competent witness for the prosecution.

3. The exceptions are as follows:—

Under sub-section (3):

(*a*) Offences against or affecting the personal liberty of the spouse called as a witness:
(*b*) Bigamy.
(*c*) Offences in respect of property of witness for which proceedings are taken under the Married Woman's Property Act, 1952.

And under sub-section (4):

Offences of incest, indecent assault, rape, attempted rape, and sundry offences against children where the victim is:
(*a*) *Under the age of* 16 *years*, and
(*b*) Is a daughter or granddaughter or under the care and protection of accused or his wife.

4. The Society is asked whether in its view the above age limit of 16 years should be removed, so that a wife could give evidence against her husband in the sexual cases listed above irrespective of the age of the victim.

5. It may be noted that although in Victoria there is a similar age limit (Section 13—Crimes Act, 1949); the corresponding provision of the Criminal Evidence Act, 1898 (U.K.)—*i.e.*, Section 4, contains no restriction as to age.

6. While in certain cases there may be danger of conspiracy between wife and daughter to prefer a false charge against an unwanted husband—(*e.g.*, the facts alleged in *R.* v. *Phillips*, (1936) 156 L.T. 80, the limitation as to age appears illogical in principle. When an alleged offence on a daughter endangers a marriage, her age does not seem a major consideration.

7. As the English Statute has apparently proved satisfactory without any limitation in this respect for a period of more than 50 years, it is suggested that the above age limit could safely be abrogated.

It was resolved that the report be adopted and forwarded to the Minister.

New Zealand Law Reports: The New Zealand Council of Law Reporting advised that it had granted permission to Butterworth & Co. to increase the annual subscription rate of the New Zealand Law Reports to £6 2s. 6d. as from January 1, 1954.

The matter was noted.

Commonwealth and Empire Law Conference.—The Secretary reported that (1) a preliminary programme had now been received which sets out *inter alia* the subjects selected for discussion—

Law Societies are invited to arrange for submission by their members, papers on any one or more of the subjects. A paper will be deemed to express the personal views of the writer unless it is submitted as the views of the organisation.

(2) A copy of the programme has been sent to each District Society.

Societies were urged to ascertain if any of their members intend visiting the United Kingdom next year, and to advise the New Zealand Law Society as soon as possible, so that the information could be forwarded to the Secretary of the Conference.

The Secretary further reported that the Commissioner of Taxes in New South Wales had agreed that the expenses of the members of the legal profession attending the above conference would be allowable deduction for income tax purposes except to the extent that they were not of a domestic or personal nature.

The Commissioner of Taxes in Wellington had been asked whether he would consider making a similar grant to members of the New Zealand profession attending the conference. The Commissioner replied that he regretted that the deduction could not be permitted.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

"**The Great Detective is above the Law.** Perhaps one should say outside the law, rather. Great detectives do not exactly express the opinion that the law is an ass, but all of them claim the right at times to correct its blindness. Holmes is particularly fond of exercising his own judgment . . . The society beauty who murders the blackmailer Charles Augustus Milverton is allowed to go free, and Captain Croker, who kills villainous Lord Brackenstall, is pronounced 'Not Guilty,' by Watson, acting as a typical British jury."—Julian Symons, "The Great Detective," in *The Saturday Book*, 1954, No. 14.

Lawyers and Detective Fiction.—A correspondent from Suva has kindly referred Scriblex to a quotation from the *Saturday Review of Literature*, in which it is stated that lawyers read more Westerns and "whodunits" than they do popular works about the law and legal profession. If this is so, Scriblex can only refer, with some trepidation, to an article "Who Cares Who Killed Roger Ackroyd?" written by that eminent critic, Edmund Wilson. He declares *The Nine Tailors* of Dorothy L. Sayers as "one of the dullest books I have ever encountered in any field," while, in Ngaio Marsh's *Overture to Death* (recommended to him by several correspondents) he finds "the dialogue and doings of a lot of faked-up English county people who are even more tedious than those of *The Nine Tailors*. His final conclusion is that the reading of detective stories is simply a kind of vice that, for silliness and minor harmfulness, ranks somewhere between smoking and crossword puzzles. With so many fine books to be read, so much to be studied and known, he says, there is no need to bore ourselves with this rubbish—opinions that brought forth a storm of violent and acid comment from "whodunit" addicts.

Nosegay Note.—A current movie version of Gay's *Beggar's Opera* (in which Sir Laurence Olivier sings somewhat uncertainly in the role of the hero) reminds Scriblex of a curious custom of the past, whereby the Church of St. Sepulchre's used to present a nosegay to every criminal on his way to execution at Tyburn. It remains obscure whether the practice had its origin in some kindly feeling for the unfortunates who were so soon to bid farewell to the beauties of this earth, or whether it may have been prompted by a feeling akin to that which caused the victims to be crowned with garlands of flowers. "Now I am a wretch indeed," says Polly in the *Opera*, alarmed on account of Captain Macheath; "methinks I see him already in the cart, sweeter and more lovely than the nosegay in his hand." It may be assumed that the practice of sending nosegays to the wives of visitors to Dominion Legal Conferences has a different origin altogether.

A Lost Opportunity.—If the submission of the appellant in *Simpson* v. *Attorney-General* had prevailed, then all statutes passed since 1946 would be invalid. The Court of Appeal rejected this tempting contention. In more radical circles it is considered that the Court has thereby lost the opportunity of disproving the allegation of ultra-conservatism so often brought against the law.

Brutality for Babes.—For that section of the Indecent Publications Amendment Act, 1954, that imposes penalties upon the purveyors of pulp magazines of horror and violence, strong support is to be found in Dr. F. Wertham's *Seduction of the Innocent* (Rheinehart, 1954) in which he says:

> The atmosphere of crime books is unparalleled in the history of children's literature of any time or any nation. It is a distillation of viciousness. The world of the comic book is the world of the strong, the ruthless, the bluffer, the shrewd deceiver, the torturer and the thief. All the emphasis is on exploits where somebody takes advantage of somebody else, violently, sexually, or threateningly. It is no more the world of braves and squaws, but one of punks and molls. Force and violence in any conceivable form are romanticized. Constructive and creative forces in children are channelled by comic books into destructive avenues. Trust, loyalty, confidence, solidarity, sympathy, charity, compassion are ridiculed. Hostility and hate set the pace of almost every story. A natural scientist who had looked over comic books expressed this to me tersely, "In comic books life is worth nothing; there is no dignity of a human being."

Sadism, says Kingsley Martin in *The New Statesman and Nation* is the most vicious aspect of obscenity. Those who want the civilisation of the West to be destroyed could not have imagined a subtler or a swifter method of undermining it than to pervert a whole generation of children; to teach them that love is ugly and that brutality is manly.

Minor Contempt.—According to the daily Press, there has been another of those unhappy scenes in Court when Magisterial dignity has been affronted by casual onlooker, hat on head, who strolls into the place of hearing as if justice was temporarily dormant. A powerful corrective was once administered by Judge Mayne sitting in Dublin during one of its eras of tumult when he saw a man in Court with his head covered: Rapping loudly on the Bench, he exclaimed: "I see you standing there—like a wild beast with his hat on."

Special Pleading.—In *United Australia, Ltd.* v. *Barclays Bank, Ltd.*, [1940] 4 All E.R. 20, the late Viscount Simon, L.C., at p. 32, showed MacKinnon, L.J., that he, too, could quote from Dickens:

"Lord Campbell, in his Life of Lord Ellenborough (ch. 46) permits himself the reflection that 'in the exquisite logic of special pleading rightly understood, there is much to gratify an acute and vigorous understanding.' Lord Campbell himself was one of three future Lord Chancellors who were pupils of Mr. William Tidd, and might be expected loyally to subscribe to the ecstatic comment, 'Oh, what a writer Mr. Tidd is, Master Copperfield!' However, while admiring the subtlety of the old special pleaders, our Courts are primarily concerned to see that rules of law and procedure should serve to secure justice between the parties." The ecstatic comment came from Uriah Heep.

In My Notebook.—"I am always grateful for the fact that I was born in Victorian times. In those days it was easier to do one's duty than it is now, for to do one's duty was the conventional goal which all were taught to aim at and it applied in marriage as in other spheres of life. This was before the age when Rights became emphasized and Duties apt to be forgotten."—Claud Mullins, London Magistrate, in *Marriage Failures and the Children* (Epworth Press, 1954). . . .

THEIR LORDSHIPS CONSIDER.

By Colonus.

Fraud on Power of Appointment.—"The term fraud in connection with frauds on a power does not necessarily connote any conduct on the part of the appointor amounting to fraud in the common law meaning of the term, or any conduct which could be properly termed dishonest or immoral. It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power. Perhaps the most common instance of this is where the exercise is due to some bargain between the appointor and appointee, whereby the appointor, or some other person not an object of the power, is to derive a benefit. But such a bargain is not essential. It is enough that the appointor's purpose and intention is to secure a benefit for himself, or some other person not an object of the power. In such a case the appointment is invalid, unless the Court can clearly distinguish between the quantum of the benefit *bona fide* intended to be conferred on the appointee and the quantum of the benefit intended to be derived by the appointor or to be conferred on a stranger. Apart from cases of appointments made in pursuance of a bargain under which the appointor or a person not an object of the power is to derive a benefit, there is no authority for holding an appointment bad because it is made on a condition to be performed not by the appointee but by a third party. The real vice of an appointment on condition that the appointee shall benefit the appointor or a third party is that the power is used not with the single purpose of benefiting its proper objects but in order to induce the appointee to confer a benefit on a stranger, and obviously this vice is absent where the condition is not to be performed by the appointee. Nor is there any case in which a bargain to allow the funds to go in default of appointment, or a condition the non-performance of which will leave the funds to go in default of appointment, has been successfully impeached. The limitations in default of appointment may be looked upon as embodying the primary intention of the donor of the power. To defeat this intention the power must be *bona fide* exercised for the purpose for which it was given. A bargain or condition which leads to the fund going in default of appointment can never therefore defeat the donor's primary intention." Lord Parker of Waddington, delivering the judgment of the Privy Council in *Vatcher* v. *Paull*, [1915] A.C. 372, 378, 379.

Public Policy; *Restraint of Trade.*—"The terms of this document are certainly peculiar," said Lord Macmillan, who was setting out the facts in *Vancouver Malt and Sake Brewing Co., Ltd.* v. *Vancouver Breweries, Ltd.*, [1934] A.C. 181, 189. "It purports to be an agreement for the sale and purchase of the goodwill of the appellants' brewer's licence except in so far as it relates to the manufacture, sale and distribution of sake. As it is expressed in the narrative, the desire of the respondents was to purchase the goodwill of the appellants' brewer's licence so far as relating to the manufacture and sale of beer, ale, porter, and lager beer. What exactly is meant by the goodwill of a licence or part of a licence, it is difficult to conceive. The subject-matter of the sale was not the goodwill of the appellants' business. The only business in which they were engaged was the brewing of sake, and the goodwill of their licence so far as relating to sake was expressly excluded from the sale. They had no goodwill to sell so far as regards the brewing of beer. Nor was the appellants' licence itself, even in part, the subject-matter of the sale. Presumably it could not be, for a licence is personal and is not transferable by sale. There was in fact no sale of anything."

Proceeding with the judgment, his Lordship said that they had had the benefit of a full discussion of the law relating to contracts in restraint of trade, and many decisions and dicta had been quoted. "It is no doubt true," he continued, "that the scope of a doctrine which is founded on public policy necessarily alters, as economic conditions alter. Public policy is not a constant. More especially is this so where the doctrine represents a compromise between two principles of public policy; in this instance, between, on the one hand, the principle that persons of full age who enter into a contract should be held to their bond, and, on the other hand the principle that every person should have unfettered liberty to exercise his powers and capacities for his own and the community's benefit. But that the law against contracts in restraint of trade, whatever be its precise scope at any given time, is a doctrine of full force and vitality at the present day cannot be gainsaid. The law does not condemn every covenant which is in restraint of trade, for it recognizes that in certain cases it may be legitimate, and even beneficial, that a person should limit his future commercial activities, as, for example, where he would be unable to obtain a good price on the sale of his business unless he came under an obligation not to compete with the purchaser. But when a covenant in restraint of trade is called in question the burden of justifying it is laid on the party seeking to uphold it. The tests of justification have been authoritatively defined by Birkenhead, L.C., in these words: 'A contract which is in restraint of trade cannot be enforced unless (*a*) it is reasonable as between the parties; (*b*) it is consistent with the interests of the public. . . .' Every contract therefore which is impeached as being in restraint of trade must submit itself to the two standards indicated. Both still survive.": *McEllistrim* v. *Ballymacelligott Co-operative Agricultural and Dairy Society, Ltd.*, [1919] A.C. 548, 562, [1934] A.C. 181, 190.

The Riddle of the Sphinx.—"When the Summary Jurisdiction Act provided, as the sufficient record of all summary convictions, a common form, which did not include any statement of the evidence for the conviction, it did not stint the jurisdiction of the Queen's Bench, or alter the actual law of *certiorari*. What it did was to disarm its exercise. The effect was not to make that which had been error, error no longer, but to remove nearly all opportunity for its detection. The face of the record 'spoke' no longer: it was the inscrutable face of a sphinx." Lord Sumner in *R. v. Nat Bell Liquors, Ltd.*, [1922] 2 A.C. 128, 159.