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TENANCY: COMPETING HARDSHIP OF LANDLORD AND TENANT.

SUBSECTION (2) of s. 24 of the Tenancy Act, 1948 (which is reproduced in the (consolidated) Tenancy Bill now before the Legislature as cl. 37 (1)) is as follows:

> (2) On the hearing by any Court of any application for an order to which the last preceding subsection relates, the Court shall take into consideration the hardship that would be caused to the tenant or any other person by the grant of the application and the hardship that would be caused to the landlord or any other person by the refusal of the application, and all other relevant matters; and may in its discretion refuse the application, notwithstanding that any one or more of the grounds mentioned in subsection one of this section may have been established.

In applying this subsection, there have been some differing opinions expressed in some judgments of the Supreme Court, and, slight though these differences were, they have been embarrassing to the inferior Courts before whom most tenancy cases begin and end. There was a generally-expressed desire for authoritative guidance by the Court of Appeal as to the principle on which the discretion of a Court to refuse an order conferred by s. 24 (2) should be exercised; and this involved the question of the onus of proof.

The opportunity came with the granting by Mr. Justice Shorland of leave to appeal from his judgment in *Jackson* v. *Huljich*, [1955] N.Z.L.R. 1057, 1058, which was an appeal from the decision of a Magistrate in which the application of s. 24 (2) was in issue. In granting such leave, on terms, His Honour, in an unreported judgment, said he had come to the conclusion that a question of law of both substance and public importance arose in that case, and that a decision of the Court of Appeal was desirable upon the question of the principle upon which the discretion of the Court to refuse an order under s. 24 (2) of the Tenancy Act, 1948, was to be exercised, when taking into consideration the hardship which would be caused to the tenant or any other person by the grant of the application, and the hardship which would be caused to the landlord or any other person by the refusal of the application.

His Honour went on to say:

> The reported decisions appear to me to indicate some slight, but nevertheless important, difference of opinion upon the point as to whether a tenant must prove hardship which merely exceeds the hardship of the landlord; or whether a tenant must prove hardship to a degree which overshadows the hardship of the landlord, in order to justify the discretion conferred by s. 24 (2) of the Act being exercised in the tenant's favour.
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> In view of the number of cases of this type which are now coming before the Court, an authoritative decision and ruling on this point would be desirable. The matter involved is, I think, a matter which goes far beyond this present case, and is of sufficient public importance to justify the leave sought being granted, subject to certain considerations which arise from the fact that the application for leave to appeal is somewhat late.

Thus, *Jackson* v. *Huljich*, [1955] N.Z.L.R. 1057, reached the Court of Appeal pursuant to special leave under s. 67 of the Judicature Act, 1908, from the judgment of *Shorland*, J., dismissing an appeal from a judgment of a Stipendiary Magistrate granting the respondents an order for possession of premises situate at St. Heliers Bay, Auckland, consisting of two lock-up shops together with upstairs living accommodation.

The main facts were not seriously in dispute. The respondents, father and son, were the owners of the property concerned which they purchased in 1950 for £4,000. The appellant had been the tenant, for eight years, of one of the shops and the upstairs portion of the premises. He occupied the shop where he carried on a butchery business, and the upstairs portion was occupied by an employee of the appellant. The object of the respondents in purchasing the property was to secure premises in which the respondent, the father, might carry on business in town in his later years. The position of the respondent, the son, was set out in the judgment of the learned Magistrate as follows:

> The plaintiff, K. Huljich, who is fifty-five years old, was, at the time of the hearing, farming a property of 182 acres (of which 70 acres is not in grass) at Mercer. He purchased this farm in 1940 for £2,800. He and his wife have suffered from rheumatism for the last six years, and have been advised by Dr. Monk to leave the farm, which is subject to flooding. His age is fifty-five and the age of his wife is fifty-three. He has two daughters, one of whom is living at home. He has had some experience as a butcher in Yugoslavia, and wishes to go into personal occupation of the shop as a butcher, and also to occupy the living quarters. In addition to the farm and the share in the shop property, he owns a half-share in a house in Long Drive, St. Heliers, occupied by his son. Production from the farm last year was £1,100.

It was not disputed that the respondents required the premises for their own use and occupation, that one year's notice of their intention to apply for the possession of the premises had been given and that the respondents had been the landlords of the appellant for two years before the giving of the notice.

Consequently, the property being "urban property," the respondents had established as a ground for the recovery of the possession of the property that con-

tained in s. 24 (1) (*h*) of the Tenancy Act, 1948. By virtue of the proviso added to s. 25 of that Act by s. 12 of the Tenancy Amendment Act, 1950, s. 25 (1) of the Tenancy Act, 1948, did not apply ; and the respondents were relieved from the burden of satisfying the Court, either that suitable alternative accommodation was or would be available for the tenant when the order took effect, or, alternatively, that the hardship caused to the landlords or any other person by the refusal of the Court to make an order for possession would exceed the hardship caused to the tenant or any other person by the making of such an order.

It was not disputed that the provisions of s. 24 (2) of the Tenancy Act, 1948, applied.

Both the learned Magistrate and the learned Judge in the Supreme Court declined, in the light of the particular circumstances of the case, to exercise the discretion conferred on the Court to refuse the application. Counsel for the appellant contended that the learned Judge had erred in his understanding and application of such principles.

In *Humphrey's Furniture Warehouse, Ltd.* v. *Charlie Ming Yee*, [1953] N.Z.L.R. 308, Hay, J., considered the effect of s. 24 (2) of the Tenancy Act, 1948. He said in the course of his judgment, at p. 309 :

> The effect, therefore, seems to be that, in the case of an application for possession based on s. 24 (1) (*h*), the provisions of subs. (2) of that section are to be read as though s. 25 (1) had not been enacted. There seems to be no warrant for the view that, in the exercise of the discretionary power in s. 24 (2), there is to be taken into account as a factor some presumed intention of the Legislature arising from the enactment of s. 12 of the Tenancy Amendment Act, 1950. Furthermore, I think that, before such discretionary power may be exercised in favour of a landlord, some hardship on his side must be established. If there were none, I would conceive it to be the duty of the Court to exercise its discretion in favour of the tenant, assuming always hardship to be shown on his side.

And, later, at p. 310, he said :

> Weighing up the whole situation in relation to hardship, I have come to the conclusion that the hardship that may arise on the side of the defendants [the tenants] is not so great as to overshadow that on the side of the plaintiff company [the landlord] so as virtually to dominate the position.

In *Jackson's* case, the Court of Appeal, in its judgment delivered by McGregor, J., observed, in the first place, that the discretion which is authorized is a discretion to refuse an application—that is to say, it is one which may be exercised in favour of the tenant. The subsection does not speak of a discretion which would be exercised in favour of the landlord.

In *Coltman* v. *Sutherland*, [1953] N.Z.L.R. 432, 433, Northcroft, J., viewed the position as follows :

> I reject, therefore, the objection of the defendants, and regard it as my duty to consider this application as in accordance with s. 24 (2) of the Tenancy Act, 1948, and not as in accordance with s. 25 (1) of that statute, which requires proof by the landlord of greater hardship than that of the tenant. I think, therefore, my duty is to have regard to the hardship of both parties and other persons affected but without any statutory injunction to require the landlord to prove greater hardship to him than that of the tenant.

Later, *McKenzies (Invercargill), Ltd.* v. *Lewis*, [1954] N.Z.L.R. 591, 593, Turner, J., after considering the facts of the particular case, expressed himself thus :

> This is a factor of substance which I am prepared to weigh seriously against the defendant's hardship. I find, however, it is insufficient to *tip the scale* in favour of the plaintiff company [the landlord].

But Turner, J., almost immediately reminded himself that each case must be decided on its own facts.

The Court of Appeal in *Jackson's* case said :

> It is suggested that *Hay*, J., when he spoke of a hardship on the tenant "not so great as to overshadow" the hardship of the plaintiff company so as virtually to dominate the position, was placing a much higher burden on the tenant to satisfy the Court that the latter, in its discretion should refuse the application, than did *Turner*, J., by inference, when he spoke of evidence "tipping the scale" in favour of the landlord.
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> It is further submitted that *Shorland*, J., in this case exercised his discretion on a wrong principle, when he adopted, in the passage we quote below, what has been described as the test suggested by *Hay*, J. *Shorland*, J., in the last paragraph of his judgment said :
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> "Weighing up the whole situation in relation to hardship, and applying the test which appears to have been applied by *Hay*, J., in *Humphrey's Furniture Warehouse, Ltd.* v. *Charlie Ming Yee* ([1953] N.Z.L.R. 308), I have come to the conclusion that the hardship which will be caused to the appellant if an order is made (for possession at a future date) is not so great as to overshadow the hardship which would be caused to the respondent if an order were refused altogether."

The Court of Appeal then drew attention to the fact that the appeal was from the refusal of the Judge in *Jackson's* case in the Supreme Court to exercise his discretion against the respondent; but the Court thought that it was clear, if such refusal was caused by the Judge's acting on a wrong principle of law, the Court of Appeal could review his refusal.

The principles on which the Court of Appeal should act were stated in *Davis* v. *Davis*, [1950] N.Z.L.R. 115, 124, in the judgment of Sir Humphrey O'Leary, C.J. :

> The matter being one of discretion, the question is not what order the Court of Appeal would have made if it had to decide the point. The questions are these : whether, in dismissing the petition and finding in favour of the respondent, the learned Judge in the Court below was guilty of a wrong exercise of his judicial discretion ; whether he acted on a wrong principle of law ; whether he took into account matters which were irrelevant ; whether he left out of account matters which were relevant, or whether his decision was calculated to work a manifest injustice, or was otherwise plainly wrong. In those cases only was the Court entitled to disturb his decision : see per *Asquith*, L.J., in *Christen* v. *Goodacre and Ministry of Health* ([1949] W.N. 234).

The Court of Appeal, therefore found it necessary to consider the principles on this particular point on which a Court should act in exercising the judicial discretion conferred on it by s. 24 (2) of the Tenancy Act, 1948, to refuse the application where the prerequisites contained in s. 24 (1) of the Act have been satisfied. It said :

> Subsection (2) of s. 24 is materially different from subs. (1) (*b*) of s. 25. The latter subsection refers to hardship, whereas the former directs that the Court shall take into consideration not only hardship but "all other relevant matters". The latter subsection expressly forbids the making of an order unless the Court is satisfied that the hardship caused to the landlord by the refusal of it would exceed the hardship caused to the tenant by the making of it. The former subsection, after requiring the Court to take certain matters into consideration, gives it power in its discretion to refuse the application. These material differences in the language of the two subsections afford a guide to their proper interpretation. From a practical point of view, it is clear that in all cases in which s. 24 (2) calls for consideration, the Court will have before it evidence from both sides of the anticipated hardship that might accrue to the parties themselves or any other person from a refusal or a granting of the application and also of "all other relevant matters". Evidence of other relevant matters may be of great importance in some cases, and it might considerably widen the circumstances in which the discretion could properly be exercised in favour of the tenant.
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> But, in our opinion, except in the preliminary stage, s. 24 (2) does not place any burden of proof on either party. For the subsection to operate, it is true that there is a preliminary

burden on the tenant to prove some hardship or other relevant matter before such can be considered by the Court. Likewise, if the tenant has satisfied this preliminary burden, the landlord is faced with a similar preliminary obligation to prove some hardship or other relevant matter.

Once this position is reached, in our view no burden rests on either party, and it is then for the Court to consider and weigh all relevant matters and determine whether it thinks, after such full consideration, the case is one for the exercise of the judicial discretion in favour of the tenant. If the landlord, there being no other relevant matters for consideration, proves greater hardship, one would normally anticipate a refusal to exercise the discretion against him.

While the discretion given to the Court to refuse an order for possession is a judicial discretion, it seemed to the Court of Appeal to be wrong to endeavour to formulate any rule of general application which might fetter the discretion of the Court. As it said :

While matters of hardship may broadly be capable of some degree of measurement, it seems to us that other relevant matters may be so variable in nature, degree, or consequence that, except in the light of the facts of an individual case, it would be impossible to state the effect that such matters might or should have on the exercise by the Court of the discretion conferred on it.

In this matter, at least, and with all respect, it seems to us that the expressions " overshadowing hardship " or " tipping the scales " are inapt to express the principle on which the Court should act. In our view, it may be difficult to place in the competing scales such diverse considerations of hardship and other relevant matters, and a nice balance on either side would not necessarily require the Court, as the case may be, to exercise or refuse to exercise its discretion.

Rather, in our opinion, it is the duty of the Court to consider all such matters and to exercise its discretion in favour of the tenant only when, after such full consideration, it considers it just and equitable so to do. This view seems to be in accord with that expressed by *Northcroft*, J., in *Coltman* v. *Sutherland*, [1953] N.Z.L.R. 432.

The Court went on to say that it had considered the Australian authorities referred to by counsel for the appellant, but, in view of the difference between the Australian regulations and the New Zealand statute, their Honours did not think the Australian cases were of material assistance in the construction of our Tenancy Act, 1948.

In concluding this part of its judgment, the Court of Appeal said :

In the present case, we do not think that *Shorland*, J., has erred in the application of the principles we have endeavoured to enunciate. It is significant that *Shorland*, J., did not add to " overshadow ", as *Hay*, J., did, the phrase " so as virtually to dominate the position ". If, by the expression which he did use, *Shorland*, J., meant to say that he could not exercise his discretion to refuse the application unless the circumstances were more than sufficient to tip the scales in the tenant's favour then, with respect, we would have thought that, in refusing this application, he would have been acting on a wrong principle of law. We are not justified in concluding that that is a true interpretation of the language he used ; but, assuming that such was His Honour's view, we are, on our own consideration of the facts, of the opinion that the actual decision under appeal was right.

In considering the facts of the case, their Honours considered that a factor of great weight was that, at the time of the expiry of the notice and the original hearing of the application, the respondents had owned the property for three years, and it must have been known to the appellant, from the time of their purchase, that his tenancy was precarious. From the time of giving the notice the appellant knew that his occupation was in jeopardy, and it behoved him, in his own interests, to make the utmost endeavour to obtain other premises. Although the appellant in his evidence said that he made inquiries for other premises and that the response was not very encouraging, and he did endeavour to buy the freehold from the respondent—an offer which the respondents were quite entitled to refuse to entertain—such efforts on the part of the appellant were not very strenuous, and his conduct was mainly actuated by the fact which he gave in evidence that he was " very reluctant to give up ". Their Honours agreed with the view of Shorland, J., when he said :

The evidence shows that the appellant has taken no real steps to secure other premises. This is a fact which is relevant (see *Kelley* v. *Goodwin*, [1947] 1 All E.R. 810) ; and this fact, in my view, materially weakens the appellant's claim to hardship.

The judgment continued :

In taking this view, we are not, we think, losing sight of the very real difficulty in obtaining other premises. Further, the appellant is not a man of straw. In addition to the asset of his business he owns his own home, an adjoining property from which he receives an income of £11 a week, the home at any rate unencumbered, and apart from other small assests to which we attach no significance, he was a bank credit of some £3,000. It is true, and very much in his favour, that, in the eight years the appellant has been in occupation of the premises, he has built up a successful business, no doubt, as he says, through hard work, good management, and working extremely long hours. He paid an initial goodwill of £500. His goodwill now has been assessed at up to £2,000 on the basis of a reasonably secure tenancy, although the expert who made this assessment does attribute seventy-five per cent. of this amount to site and twenty-five per cent. as a personal goodwill. Whatever the value of the goodwill unless, and perhaps even if, the appellant can re-establish himself in other premises he will be a substantial loser. But this factor is at least to some extent common to all proprietors of businesses who establish themselves in premises having no security of tenure. Moreover, the preservation of the appellant's goodwill is, in our view, entirely dependent on his avoiding an order for eviction, as no purchaser, in view of the provisions of s. 48D of the Tenancy Act, 1948 (included therein by virtue of s. 6 of the Tenancy Amendment Act, 1950), would be likely to offer more than a nominal sum for such goodwill. A sub-tenant, an employee of the appellant, occupies the living accommodation over the shop ; he is an " other person " within s. 24 (2), but we cannot assume, without any evidence, as we were invited on behalf of the appellant to do, that an order for possession in favour of respondents would cause hardship to him. In considering this aspect of the case we should say that we have entirely put aside negotiations which proved abortive between the parties for the purchase of the business by the respondents. In any event, however, we do think that from the time of notice to quit, the appellant (and perhaps understandably), hoped for the protection of the Tenancy Act, and, as a consequence, did not make the utmost endeavour to procure alternative premises.

On the other hand, their Honours pointed out, the respondent father was fifty-five years of age. He was engaged in farming a small property of 182 acres at Mercer, and resided there with his wife and one daughter. The farm was apparently not very productive and was subject to flooding. It was not disputed that, on medical advice, it was necessary for both this respondent and his wife to leave the farm. His financial position was very considerably weaker than that of the appellant. He had owned the property with which the Court was concerned for five years, and had been desirous of obtaining possession. Although it might be accepted that if he commenced a butchery business in these premises he might reap, to some extent, the fruits of what the appellant had sown, such was not an altogether unusual factor in cases of this nature. It seemed to their Honours, that, taking into account the time that had elapsed, the respondents were entitled to the order they sought. The appellant in all probability had, to some extent, offset his loss of goodwill from the profits of the business during the unavoidably protracted course of this litigation.

The appeal was dismissed, but the order of the learned Judge was varied by substituting October 31, 1955, as the date before which execution might not issue.

The general principle to be deduced from the judgment of the Court of Appeal is that in exercising the judicial discretion conferred by s. 24 (2) of the Tenancy Act, 1948, to refuse an order for possession, it is the duty of a Court to consider hardship and other relevant matters and to exercise its discretion in favour of the tenant only when, after such full consideration, it considers it just and equitable so to do. And, of course, the Court of Appeal's guidance on the question of onus is of great assistance.

SUMMARY OF RECENT LAW.

COMPANIES.

Private Company—Increase of Capital—Power to increase Capital exercisable by Entry in Minute-book—Companies Act, 1933, ss. 62, 300. The provision in s. 62 (2) of the Companies Act, 1933, that the power to increase capital must be exercised by a company in general meeting, is applied to private companies only when treated as subject to the qualification that anything that may be done by resolution at a meeting of the company may be done by entry in the minute-book under s. 300. Thus, a private company may increase its capital by entry in its minute-book in terms of s. 300 of the Companies Act, 1933, which is a special provision relating to private companies only, since s. 293 (1) constitutes a legislative direction that s. 62 (2) and s. 300 are to be fitted together by treating s. 300 as dominant. As Art. 42 of Table A of the Companies Act, 1908, does not contain provisions inconsistent with those of s. 300 (1), it does not affect the operation of that subsection. *So held*, by the Court of Appeal, affirming the judgment of *Hutchison, J.*, reported, [1953] N.Z.L.R. 1006. *Roach* v. *Roach's (1931), Ltd.* (C.A. Wellington. December 14, 1954. Gresson, Cooke, Turner, JJ.)

Winding-up—Costs—Taxation—Jurisdiction of Registrar—Procedure to challenge Jurisdiction—Companies (Winding-up) Rules, 1949 (S.I. 1949 No. 330), r. 4 (3). On January 13, 1949, a mutual insurance company purported to go into voluntary liquidation. On July 11, 1951, doubts having arisen whether or not the company had validly gone into liquidation, an order for its compulsory winding-up was made. On May 18, 1953, the liquidator, the Official Receiver, issued an originating summons joining as respondents representatives of the persons who might be regarded as being shareholders of the company at the date of the voluntary liquidation, and the Treasury Solicitor, to have decided who was entitled to the surplus assets. On February 11, 1954, an order was made on the summons and the costs of the liquidator and the respondents were ordered to be taxed as between solicitor and client and paid out of the assets of the company. The respondents lodged a bill of costs with the companies' winding-up department. In accordance with the practice which had prevailed for the past sixty years and upwards the taxation was conducted by the chief clerk to the registrar in that department. On December 16, 1954, on an attendance before the chief clerk, some of the respondents intimated that they proposed to challenge the jurisdiction of the chief clerk to conduct the taxation. The taxation proceeded *de bene esse*, and the registrar, having considered objections lodged by these respondents, made his certificate on March 15, 1955. These respondents issued a summons to have the registrar's certificate taken off the file as invalid. To this summons the liquidator was made respondent. *Held*, 1. The said respondents were entitled to follow the procedure which they had adopted to have the present question decided. (*Silkstone & Haigh Moor Coal Co.* v. *Edey*,[1901] 2 Ch. 652, followed.) 2. There was no legal basis for the practice of the companies' winding-up department under which the taxation of the costs had been conducted by the chief clerk, and, therefore, the chief clerk had no jurisdiction to conduct the taxation and the certificate must be taken off the file. *Re Wool Textile Employers' Mutual Insurance Co., Ltd.*, [1955] 2 All E.R. 827 [Ch.D.]

FACTORIES.

Dust—"All practicable measures" to be taken—Dust likely to be Injurious—"Substantial quantity of dust of any kind"—Provision of Exhaust Appliances "as near as possible to the point of origin of the dust"—Iron Moulders' Factory—Risk of Silicosis known only after Disease contracted by Workman—Damages—Measure of Damages—Personal Injury—Breach of Statutory Duty—Silicosis contracted by Workman—Shortened Expectation of Life—No Right to Damages for Loss of Prospect of making Provision for Dependants—Factories Act, 1937 (1 Edw. 8 and 1 Geo. 6 c. 67), s. 47 (1) (Factories Act, 1946 (N.Z.), s. 56 (2)). From 1930 to 1952, the plaintiff was employed as a moulder in the defendants' factory. The operation of moulding required the use of sand and involved a process known as knocking-out, in which the grains of sand had to be knocked out of the moulds. Several moulders were employed in the room where the plaintiff worked, and the moulds were separate loose objects which could be opened at any place on the floor. There was no synchronization among the moulders in regard to the knocking-out, and whenever this process took place a substantial quantity of dust was given out. Until about 1950, the dust was not thought to be dangerous. By about 1946, the plaintiff was seriously affected with silicosis and by 1948, was incurably ill. In about 1950, it was established that among the dust given off in the knocking-out process were small particles which were liable to produce silicosis after being inhaled over years; according to medical evidence it would take about fifteen years of exposure to the dust in the factory to render a man incurable. The defendants had taken no steps to protect moulders against inhalation of dust, and had not installed exhaust appliances. In 1954, the plaintiff commenced proceedings against the defendants for damages for breach of their statutory duty under s. 47 (1) of the Factories Act, 1937, in that they had failed to take all practicable, or any, measures to protect the plaintiff against the inhalation of dust and that they had failed to provide exhaust appliances although the nature of the process made it practicable so to do. At the trial of the action some evidence was given concerning masks or pads as protection against inhalation of dust and that, out of numerous varieties, only a mask known as "Mark IV", which had been used in certain industries during the last fifteen years, was effective in preventing the inhalation of small particles of dust, but that, having regard to the nature of the work in the defendants' factory, the workmen would not want to wear such a mask for more than fifteen minutes at a time. The trial Judge was of the opinion that the installation of extraction hoods and the supply of "Mark IV" masks were practicable measures. He found that the defendants were in breach of s. 47 (1) of the Act of 1937, and assessed the damages to which the plaintiff was entitled at £9,645 6s. 5d., which included a sum of £1,000 for loss of his prospect, during the period which had been cut off from his life, of making provision for his dependants. On appeal by the defendants, *Held*, 1. Since at the time when the plaintiff became seriously affected with silicosis the dust emitted in the process of knocking-out was not known to be injurious, that branch of s. 47 (1) of the Factories Act, 1937, which imposes an obligation to take measures to protect employees against dust which is likely to be injurious did not impose a statutory duty on the defendants to protect the plaintiff against this dust, although, as dust was emitted in substantial quantity during the knocking-out, the defendants were under a statutory duty by virtue of a separate branch of the subsection to take all practicable measures against inhalation of this dust; in the circumstances there should be a retrial on the question whether the defendants committed a breach of the latter statutory duty by failing to provide masks and, if they did, whether and to what extent the damage which the plaintiff suffered was attributable to the breach of this latter statutory duty, in view of the evidence that only one type out of several types of masks against dust existing in the relevant period gave protection against the minute particles which, as later became known, caused silicosis. 2. The defendants were not in breach of their obligation under s. 47 (1) of the Factories Act, 1937, to provide exhaust appliances as near as possible to the point of origin of the dust, where the nature of the process made it practicable, because (*a*) this obligation was directed to the case where the dust was emitted at some fixed point or points on a machine and, therefore, did not apply in the

present case where the dust did not originate at fixed points, and (*b*) on the facts the plaintiff had failed to show that the nature of the process made it practicable to provide exhaust appliances. (3) In any event the plaintiff was not entitled to damages in respect of the loss of the prospect of making provision for dependants. (Dictum of Viscount Simon, L.C., in *Benham* v. *Gambling*, [1941] 1 All E.R. 13, applied.) Order for a new trial. *Richards* v. *Highway Ironfounders (West Bromwich), Ltd.* [1955] 2 All E.R. 205. (C.A.)

LANDLORD AND TENANT.

Underlessees and Relief from Forfeiture, *219 Law Times*, 205, 215.

NUISANCE.

Trees—Branches of Tree overhanging Neighbour's Roof—Guttering blocked by Leaves from Tree—Magistrate making Order for Removal of Tree as Potential Nuisance to Users of Highway if Branches cut back on One Side—Duty of Landowner—Injunction limited to Abatement of Nuisance by Cutting Back Overhanging Branches to Boundary, unless Further Cause of Action arising from Continuance of Tree gave Right to Injunction to remove Tree. The duty of a landowner to his neighbours, or to members of the public on a highway bordering the landowner's property, in respect of his non-poisonous trees is a duty to exercise the care in the management of his trees which a reasonably prudent landowner will exercise. It is not a duty of insuring a neighbour or the users of the adjoining highway against damage from his trees. Until damage is caused, there is no nuisance—only the potentiality of a nuisance. He must eliminate nuisance which arises from encroachment upon the property of his neighbour of branches or roots from the tree (if actual and sensible damage to his neighbour is thereby caused); and this duty is discharged by cutting back the encroaching branches and roots to the boundary. (*Caminer* v. *Northern and London Investment Trust, Ltd.*, [1950] 2 All E.R. 486; [1951] A.C. 88, followed.) An injunction in respect of a nuisance arising from the encroachment of branches from a neighbour's tree must, *prima facie* at all events, be limited to the removal of the nuisance—*i.e.*, cutting back the branches to the boundary. An injunction which goes further and requires the removal of the tree requires for its basis some further cause of action giving a right to an injunction founded upon the continued existence on the owner's property of a particular tree which no longer encroaches upon the neighbour's property. In the present case, some evidence that the cutting of the branches of the tree back to the boundary might prove a danger to adjoining owners and to users of the highway, fell short of the requirement necessary to entitle the neighbour to an injunction requiring the tree-owner to remove the entire tree, as an injunction should be limited to abatement of the nuisance. (*Mandeno* v. *Brown*: *Mandeno* v. *Wilkie*, [1952] N.Z.L.R. 447; [1952] G.L.R. 342, on this point, distinguished.) *Darroch and Another* v. *Carroll.* (S.C. Auckland. April 5, 1955. Shorland, J.)

PRACTICE.

Compromise of Action—Settlement agreed before Hearing of Action—Terms of Settlement not made an Order of the Court—No Order for Proceedings to be stayed—Breach of agreed Terms—Jurisdiction of Court to enforce Settlement—Methods of disposing of Action where Terms of Settlement agreed before or during Hearing. The plaintiff brought an action to recover £500 money lent by him to the defendants jointly, and a further sum of £50, alleged to be due from the first defendant as consideration for making the loan to the three defendants jointly. When the action came on for hearing on January 11, 1955, counsel informed the Court that the action had been settled and what the terms of settlement were. By the agreed terms, which were set out on the backs of counsels' briefs and signed by counsel for both parties, the defendants were to pay to the plaintiff a sum of £450 by instalments, on the dates stated, and the taxed or agreed costs with the final instalment, and, if any instalment was in arrear, the whole debt and costs became due and payable at once. On the front of the briefs was written: "Before——, J. By consent, all proceedings stayed on terms indorsed on briefs. Liberty to either side to apply". The Court was not asked to make any order whatever, and no order was made staying all further proceedings. The defendants having failed to pay the last instalment and the costs, the plaintiff made an application in the original action asking for judgment for the amount of the final instalment and an order for the costs. *Held*, The application must be refused because, the Court having made no order in the action, the agreement compromising the action between the parties completely superseded the original cause of action and the Court had no further jurisdiction in respect of that cause of action. *Per Curiam*, the plaintiff's only remedy was to bring an action on the agreement of compromise. Observations on the different methods of disposing of an action where terms of settlement were agreed by the parties before or during the hearing. *Green* v. *Rozen and Others.* [1955] 2 All E.R. 797 (Q.B.D.)

VENDOR AND PURCHASER.

Statutory Tenant of Shop and Dwelling carrying on Grocery Business—Offer by Letter to Sell Business and Goodwill to Landlord—Landlord paying Deposit on Purchase in Terms of Letter—Such Payment treated as Acceptance of Offer—Contract repudiated by Purchaser—Contract not Conditional as Subject to Completion of Formal Document—As Vendor without Interest in Land Occupied, Contract not affected by Statute of Frauds—Enforceable Contract between Parties—Specific Performance refused—Declaration that Vendor no longer bound to perform Contract—Order for Forfeiture of Deposit, and Damages—Statute of Frauds, 1677 (29 Car. 2, c. 3), s. 4—Sale of Goods Act, 1908, s. 53. The plaintiff carried on business as a grocer in premises owned by the defendant, whose original lease of the property had long expired, and he had received notice to quit. The defendant endeavoured unsuccessfully to obtain an order for possession, and the plaintiff remained in possession as a statutory tenant. In September, 1954, there were negotiations for the purchase of the premises by the plaintiff, whose solicitors, in a letter to the defendant on September 14, said, *inter alia*, that the plaintiff was prepared to sell his grocery business to the defendant, or to anyone else with his concurrence, "at the price of £1,250 for goodwill plus stock, plant and equipment at valuation, deposit £250 cash to be paid to us on the signing of the contract, balance in cash on settlement, and possession one month later. Price to be net, *i.e.*, not subject to any deduction for commission or otherwise." The defendant sent no written reply, but, on September 29, he told the plaintiff's solicitors that he desired to accept the offer contained in the letter, and paid them a cheque for £250, receiving a receipt for "deposit on purchase grocery business as per letter 14:9:54." The plaintiff treated this payment as an acceptance of his offer and, after further discussions and correspondence between the parties, it was arranged that the date of possession be altered from October 29 to November 1, and that the plaintiff should get rid of a sub-tenant of portion of the premises so as to give vacant possession of the whole on settlement. The valuation referred to was made by the plaintiff's valuer alone, and the amount was £1,264 8s. 10d. On October 29, the defendant, by his solicitors, verbally repudiated the contract. On November 2, his solicitors wrote to the plaintiff's solicitors to the effect that the defendant had not been a principal party in the transaction, but that he had undertaken to sell the property. In an action for specific performance of the alleged contract for the sale of the business, and, alternatively for damages, *Held*, 1. That the contract was not conditional on the negotiation and completion of a formal document, for, while the offer contemplated that a contract would be signed, it was to be a contract embodying the terms contained in the offer only; and, when the plaintiff accepted a deposit without requiring a contract to be signed, there was no condition outstanding which rendered such acceptance nugatory. (*Von Hatzfeldt-Wildenburg* v. *Alexander*, [1912] 1 Ch. 284, and *Coope* v. *Ridout*, [1920] 2 Ch. 416; aff. on app. [1921] 1 Ch. 291, distinguished.) (*Brogden* v. *Metropolitan Railway*, (1877) 2 App. Cas. 666, referred to.) 2. That, as a statutory tenant has no interest in the land he occupies but only a personal right to retain possession of it with no estate or property as tenant, the contract was not affected by s. 4 of the Statute of Frauds; and that s. 53 of the Sale of Goods Act, 1908, could be invoked by the buyer only. (*Cameron* v. *The King*, [1948] N.Z.L.R. 813; [1948] G.L.R. 332, and *Jones* v. *Flint*, (1839) 10 Ad. and E. 758; 113 E.R. 285, followed.) 3. That, accordingly, there was an enforceable contract between the parties; but that as the contract was for the sale of chattels together with an undertaking to surrender a personal licence to occupy certain premises, an order for specific performance would be refused. (*Cohen* v. *Roche*, [1927] 1 K.B. 169, referred to.) 4. That the plaintiff was entitled to a declaration that the plaintiff was no longer bound to perform the contract and that the deposit paid by the defendant had been forfeited, and to damages. 5. That the plaintiff had remained in possession, not as a vendor who had a right to payment of the purchase money and completion of the contract but as one who had a claim for damages under an agreement which the purchaser had repudiated; that the defendant, who was himself the landlord, should allow the plaintiff free occupation for one calendar month; and that, apart from that period, the defendant was entitled to rent at the agreed rent. (*Dakin* v. *Cope* (1827) 2 Russ. 170; 38 E.R. 299, distinguished.) *Signal* v. *Kay-Stratton.* (S.C. Auckland. April 22, July 11, 1955. Stanton, J.)

DEEDS: EXECUTION IN ESCROW.

Proof of Intention Where Deed Executed by Several Parties.

By Malcolm Buist, LL.M.

II. The Issues of Law in In re Vanstone.

Perhaps the most satisfactory point from which to look in perspective at the law applicable to the foregoing facts is the remark of Parke, B., in *Bowker* v. *Burdekin*, (1843) 11 M. & W. 128, 148; 152 E.R. 744, 752, (referred to by Lord Wright in *Lady Naas* v. *Westminster Bank, Ltd.*, [1940] A.C. 366, 402; [1940] 1 All E.R. 485, 507):

> We are sitting in a Court of law [on Exchequer appeal], and I think we cannot deny to an instrument executed as a deed the effect of transferring the property of the party who executes it, according to the terms of it.

In the course of the judgments in *Vanstone's* case, two exceptions to, or modifications of, the absolute rule just stated were noted, the first being an intervention by equity, and the second being itself a common-law rule.

The rule enunciated by Parke, B., is illustrated by the *Naas* case (*supra*). Here, under a deed of covenant dated February 1, 1923, S. covenanted to pay N. ten shillings per week clear of income tax for life, or until S. executed a certain settlement in satisfaction and substitution. Having subsequently lodged £15,000 with the respondent bank, S., on or about August 12, 1925, signed, sealed, and unconditionally delivered as his act and deed the subsequent settlement, which declared the appropriate trusts and then ran:

> 16. In consideration of the settlement by these presents made by the settlor and the covenants on his part herein contained the first beneficiary [N.] hereby releases the settlor his executors and administrators and his estate from all the covenants on his part contained in the hereinbefore recited indenture of the 1st day of February, 1923, and from all claims and demands thereunder.
>
> 17. In consideration of the premises it is hereby agreed and declared by and between the settlor [S.] and the first beneficiary that as from the execution of these presents the hereinbefore recited indenture of the 1st day of February, 1923, and all the provisions therein contained shall cease to have effect.

Then the facts began to take on a transitory resemblance to those in *In re Vanstone*, for the first beneficiary declined to execute this deed of settlement for her part. The obstacle was that she wanted the preliminary deed of 1923 destroyed first. Ultimately she agreed that it be deposited with the respondent Bank in a box with two locks with different keys, she and the settlor to keep a key each. By this time, she had forgotten the whereabouts of the document to be so deposited. However, it was found as a fact that she had settled her difficulty with S. by the end of 1925, and ever since then was prepared to execute the deed of settlement.

The Bank, notwithstanding these negotiations, was informed on behalf of S., the settlor, that he proposed to make other arrangements and desired the stock to be sold. After selling the stock, the Bank suggested that the consent of N., as beneficiary, should be obtained. This began a long and protracted correspondence, paralleled by a similar exchange between the solicitors for settlor and beneficiary, and the whole culminated in the action.

The legal effect of the transaction was set out by Lord Russell of Killowen, at p. 389; 499:

> The trusts declared under clauses 1, 2 and 3 are immediate trusts; they are not made subject to any condition as to the happening of any event or otherwise. They sprang into existence the moment that the settlor unconditionally delivered the deed. The Lords Justices appear to have dealt with the matter as if it lay in contract and was governed by the rules as to offer and acceptance, with time being in some way of the essence of the contract; whereas the case is really one of a divesting and vesting of property. Indeed, in your Lordships' House, counsel for the Bank stated that they could not and did not attempt to support the reasoning of the Lords Justices. That the view of Morton, J., and the Master of the Rolls is correct, admits in my opinion of no doubt. Once the settlor signed, sealed and unconditionally delivered the deed, the trusts in favour of the appellants were constituted; the appellants became the persons beneficially interested in the stock, and it did not lie in the power of the settlor to undo what he had done. He had no power to revoke the trusts unless such a power was contained in the deed.

Equitable Exception: Different Burden.

One of the grounds rested on by the respondent Bank in the *Naas* case was a dictum by Sir George Jessell, M.R., in *Luke* v. *South Kensington Hotel Co.*, (1879) 11 Ch. D. 121, 125:

> It is well settled that if two persons execute a deed on the faith that a third will do so, and that is known to the other parties to the deed, the deed does not bind in equity if the third refuses to execute.

To this Lord Russell of Killowen replied, that he knew of no equitable principle as wide as that (*ibid.*, 391; 500). The authorities cited in *Norton on Deeds*, 2nd Ed., p. 21, in relation to this alleged principle, did not justify as broad a proposition. He continued:

> I do not think that the proposition can be carried further than this, that the equity arises where a deed is sought to be enforced against an executing party, and owing to the non-execution by another person named as a party to the deed the obligation which is sought to be enforced is a different obligation from the obligation which would have been enforceable if the non-executing party had in fact executed the deed.

He instanced the case where only one of two co-sureties, named in a deed, in fact executes the deed, and it is sought to enforce the deed against the one who did execute. He knew of no such equity against a non-executing party who sought to enforce benefits conferred on him by the deed. There was no foundation on which the equity could rest in such a case, for by his action he was affirming and adopting the deed and every provision of it, and was bound by it as effectually as if he had executed it.

In *In re Vanstone* this ground of relief was expressly disclaimed on behalf of the appellant members of the family. The doctrine was, however, referred to by Sir Harold Barrowclough, C.J., when he said:

> To say that the deed was executed on the understanding that others would sign, is not very different from saying that it was executed on the faith, or in the expectation, that others would do so. If a document is executed on the faith, or in the expectation, of others signing, there is room for argument that the deed would not bind in equity if such others fail to sign: see the statement of Sir George Jessell, M.R., in *Luke* v. *South Kensington Hotel Co.*, (1879) 11 Ch.D. 121, 125, as that statement has been qualified by the judgment of the House of Lords in *Lady Naas* v. *Westminister Bank*

LEGAL ANNOUNCEMENTS.

Concluded from page i.

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Ltd., [1940] A.C. 366; [1940] 1 All E.R. 485. But, in the last-mentioned case, Lord Maugham asserted that: "the equity comes into play only when, in its absence, the legal effect of the unconditional execution of the deed will lead to substantial injustice" (*ibid.*, 376; 490). In the present case, no such injustice could arise from giving full legal effect, as against those who did sign, to their unconditional execution of the instrument, and, moreover, the respondents have expressly disclaimed—no doubt because of the absence of any such substantial injustice—any reliance on that equitable doctrine.

Thus, as Viscount Maugham pointed out in the *Naas* case, at p. 376; 490, there are two propositions in respect of this equity, namely,

(*a*) that the intention of the person who is setting it up is not a matter of mere conjecture, and

(*b*) that the equity comes into play only when, in its absence, the legal effect of the unconditional execution of the deed will lead to substantial injustice.

Legal Exception: Escrow.

The other principal type of exception from the broad rule set out by Parke, B., that a deed, *prima facie*, operates according to the tenor thereof, is the "escrow", which, for practical purposes, may be described as a temporary delaying or interim postponement of that part of the ceremony of transfer of rights known as the "delivery" of a deed. For, besides being an expression of intention and a conveyance of rights, a deed is itself a chattel and, therefore, capable of ownership transferable by delivery.

As is said in *3 Holdsworth's History of English Law*, 3rd. Ed., 223:

> In England, as elsewhere, it is probable that there was a combination of ideas new and old. The delivery of the writing was allowed to stand in the place of the delivery of those rings or rods or knives by means of which seisin had formerly been delivered, or its delivery had been evidenced, and English law long retained traces of this phase. To this day a deed takes effect from its delivery, and, as we shall see, a fine was to the end "levied". This may have recalled the time when the document lying on the ground between the parties was lifted up by one of them.

In the *Naas* case, Lord Wright began by pointing out that the decisions in the Court of Appeal had proceeded on the assumption that the instrument was not an escrow, and a concession to this effect had rightly been made by the appellant. Whether or not an instrument was delivered as an escrow was a question of fact. The old law, as stated in *Sheppard's Touchstone*, p. 58, that an instrument could not be held to be an escrow unless it was delivered with express words so declaring, and was delivered to some person other than the person executing it, had now been abandoned. The character of the act of delivery depended on intention, which must be ascertained by considering the nature and circumstances of the case. These remarks, though *obiter*, conveniently sum up the law, and explain the intensive dissection of the facts entered into by both the Supreme Court and the Court of Appeal in *In re Vanstone*.

The following are the statements usually turned to by way of authority regarding the law of escrow:

> The maker (of a deed) may so deliver it as to suspend or qualify its binding effect. He may declare that it shall have no effect until a certain time has arrived, or till some condition has been performed, but when the time has arrived or the condition has been performed, the delivery becomes absolute, and the maker of the deed is absolutely bound by it, whether he has parted with the possession or not. Until the specified time has arrived, or the condition has been performed, the instrument is not a deed. It is a mere escrow.—Lord Cranworth in *Xenos* v. *Wickham*, (1867) L.R. 2 H.L. 296, 323.
>
> You are to look at all the facts attending the execution—to all that took place at the time, and to the result of the transaction; and therefore, though it is in form an absolute delivery, if it can reasonably be inferred that it was delivered not to take effect as a deed till a certain condition was performed, it will nevertheless operate as an escrow.—Parke, B., in *Bowker* v. *Burdekin*, (1843) 11 M. & W. 128, 147; 152 E.R. 744, 751.

In *In re Vanstone*, there was no doubt regarding the fact of delivery by all the parties executing the deed, in that each of them parted with possession of it after such execution, and none of them at any stage suggested retaining possession, though, of course, as the learned Chief Justice pointed out, none of the deponents swore in fact that he or she ever had in mind the idea of a conditional delivery, and it was too much to expect that these lay people would have been aware of the niceties of the law on the subject of a conditional delivery. A point that did not arise, however, but that might, at an earlier stage, have precipitated an inquiry into the legal effect of the signatures already affixed, is that of revocability.

The Revocation Test of an Escrow.

The juristic elements of the delivery of a deed in escrow are apparent under the rule that delivery in escrow must be to a third party, for this, it will be realized, led to or proposed a second delivery—that by the third party to the donee of the deed. The question arose whether title passed by the first or the second delivery. In *Sheppard's Touchstone*, p. 59, we find, "To some purposes it hath relation to the time of the first delivery, and to some purposes not".

For purposes of analysis, it may be convenient to divide the possible situations into two broad classes, comprising those where there is some element of mutuality, and those where there is not. In the former case, the condition of escrow is defeasible upon performance by the other party. As the learned Chief Justice pointed out in *In re Vanstone*:

> If a man signs and delivers a conveyance on sale it can readily be inferred that he signs and delivers it conditionally upon his being paid the purchase price. In such a case, as it was put by the Master of the Rolls, Sir John Romilly, in *Phillips* v. *Edwards*, (1864) 33 Beav. 440, 446, 447; 55 E.R. 438, 441, the deed implies mutuality, that is, some important act is to be done by or on the part of the person to whom it is to be delivered. In such cases, the instrument can readily be presumed to have been executed as an escrow. But here, nothing was to be done by, or on the part of, the widow.

A recent example of the first or *mutuality* type shows that the topic is not a mere example of recondite *minutiae* academically severed from reality. For, in *Thompson* v. *McCullough*, [1947] K.B. 447; [1947] 1 All E.R. 265, the Court of Appeal in England had to consider the validity of a notice to quit given after purchase but before payment of the balance of purchase-money. The vendor had, on April 10, executed a conveyance to the plaintiff, the defendant then being the tenant of the relevant premises, incorporating the usual acknowledgment of receipt of the purchase-money and testifying that the deed was signed, sealed, and delivered. At this date, however, (*a*) only £34 of the total purchase price of £110 had been paid, and (*b*) the one solicitor, acting for both parties, had possession of the conveyance. On April 12, the plaintiff gave the defendant notice to quit on April 20. The balance of purchase-money was not paid until June 21.

In proceedings commenced on May 19 for an order for possession, the defendant sought, successfully, to show

that the plaintiff was not yet entitled to the status of landlord. The County Court Judge held, *inter alia*: (*a*) that the conveyance was, when executed, delivered only as an escrow, and that it remained an escrow, and nothing but an escrow, until the plaintiff paid the balance of the purchase-money, and (*b*) that, on April 12, the plaintiff had not got in the legal estate to enable him to give a valid notice to quit.

On appeal, plaintiff contended, *inter alia*, that even if the delivery were in escrow, on the payment of the balance of purchase-money on June 21 the delivery of the conveyance dated back to April 10, and thus the notice to quit, given on April 12, was validated. Morton, L.J. (as he then was), who delivered the principal judgment, described this as "a very startling proposition". The following passage from the judgment of Farwell, L.J., in *Foundling Hospital* (*Governors and Guardians*) v. *Crane*, [1911] 2 K.B. 367, 377, had been advanced on behalf of plaintiff:

> The rules relating to escrows are thus stated by Preston in his book on Abstracts, 2nd Ed., Vol. 3, p. 65: ". . . (3.) On the second delivery of the writing [that is, the effective delivery] it will have relation, for the purposes of title, and not for the purpose of giving a right to intermediate rents, &c., from the delivery: (4.) So as the conditions be performed, and the deed delivered a second time, the deed will be good, notwithstanding the death of both or either of the parties before the second delivery"; and Sheppard's Touchstone, 8th Ed., pp. 58-60, is to the same effect."

His Lordship noted that the doctrine of relation back in this quotation did not give a right to intermediate rents, etc., and could see no good reason why it should have the effect of validating a notice to quit given at a time when the fee simple was not vested in the plaintiff. He had already pointed out that, on April 12, it was still uncertain whether the plaintiff would ever pay the balance of the purchase-money, *i. e.*, become landlord at law. Accordingly, he held, the notice to quit was ineffective. Bucknill, L.J., who was of the same opinion, quoted (at pp. 456, 269) from the finding of the County Court Judge a sentence that brings out the practical nature of the subject:

> The tenant had a right to know when he received notice to quit that the person giving it had a right or title to give it, so that this was an exception to the rule that the title related back.

In other words, relation back is a question of facts, circumstances, and intention.

But the suggestion in *Thompson* v. *McCullough* (*supra*), that the purchaser might not have completed the dealing, raises the question of revocability in relation to a deed delivered in escrow. This question was faced in *Hudson* v. *Temple*, (1860) 29 Beav. 536; 54 E.R. 735. Here, a disappointed purchaser commenced an action of detinue to recover certain title deeds, including assignments thereof executed by the vendor, and also an action of ejectment to recover the premises, in the following circumstances. Conditions of sale had reserved liberty to the vendor to annul any contract of sale if certain stipulations were not complied with. At a meeting for completion, some such matters being, in fact, outstanding, the purchaser's agent was late. The vendor had another engagement, and could not wait, so he executed the engrossments of the relevant assignments, saying to his solicitor, "You will hold these deeds and not give them up without payment of the purchase-money". As he was leaving the office, the vendor met the purchaser's agent, so they returned together. Difficulties then arose concerning the paying over of the purchase-money, so the vendor threatened to exercise his power of annulment if payment were not made. He did exercise such power that night by notice in writing, being still unpaid, and resold the premises.

The plaintiff commenced her actions of detinue and ejectment, and, in reply, the vendor sought a Chancery decree declaring the contract properly annulled, directing that the deeds be cancelled, etc. Sir John Romilly, M.R., said, in granting the vendor the relief he sought:

> It is assumed on both sides that there is no defence to the actions at law [*i.e.*, detinue and ejectment]; but if this deed was delivered as an *escrow*, it could have no operation until it was delivered over, otherwise it would follow that, in any case of a purchase of an estate, where the vendor executes the conveyance and gives it to his solicitor, on the assumption that he will not part with it except in exchange for the purchase-money, the purchaser, without paying the purchase-money, could sustain an ejectment merely on the ground that the deed has been executed. However, here it has been assumed, on both sides, that both the ejectment and the action of detinue could be supported. In that state of things I am of opinion that the plaintiff [the vendor, for this judgment is upon his motion for a restraining decree in equity] is entitled to succeed. He has done nothing to waive his right: . . . I am of opinion, therefore, that the whole of the legal proceedings [*i.e.*, ejectment and detinue] in this matter have been ill-advised, and that this Court must interfere and stop them" (*ibid.*, 545, 739).

The decree granted was accordingly for a perpetual injunction against proceedings at law, vacating the judgment obtained at law, and directing that the deed be cancelled.

Both *Thompson* v. *McCullough* (*supra*) and *Hudson* v. *Temple* (*supra*) recognized the factor of mutuality behind the operation of the first delivery in escrow. This factor appears to cover a considerable portion of the territory of revocability in relation to escrow.

"No Mutuality" Cases.

By contrast, in *Lady Naas* v. *Westminster Bank, Ltd.*, [1940] A.C. 366; [1940] 1 All E.R. 485, the settlor was not in a position to call upon any such right of defeasance. His transaction moved in the domain of trust, not in that of contract; it was constituted in the rea'm of gift, not of commerce. As Lord Wright, at p. 406; 510, said, "The substance of the matter is the transfer of the beneficial interest". This transfer was not subject to any *express* power or right of defeasance, for it had not been made conditional and no power of revocation was reserved. The House could not discover any *implied* power or right of defeasance, nor was there an equity upon which to found any relief to the settlor. Indeed, their Lordships found instead, that there was, in fact, no interval of escrow preserved in which any such *locus poenitentiae* might exist.

Such, it seems, was also the situation seen by the Court of Appeal in *In re Vanstone*. To any suggestion of revocability, it replied, in effect, that each individual signatory intended fully and finally to part at once with his or her share, without any thought of an interval of suspense, during which, failing complete mutuality, the assignment of a share might be revoked. As in the *Lady Naas* case, the beneficial interest was transferred by the individual assignor with absolute intent. In the Supreme Court, it is submitted, McGregor, J., had found such an interval by reading the transaction as a joint disposal of the principal portion of the family inheritance, inchoate until all members concerned had united to make up the whole of that portion. On this approach, any defection would cause a defeasance. But the Court of Appeal, it is submitted, viewed the inheritance in a notionally divided or distributed condition, and regarded the deed

as a series of independent, not interdependent, assignments. F. B. Adams, J., said expressly:

> In regard to the deed itself, its terms are, in my opinion, consistent with the view that it might operate as a separate assignment by each signatory, and I find nothing in the circumstances surrounding its execution that sufficiently evidences an intention to the contrary on the part of the persons concerned. *This being so, the deed was not delivered* as an escrow . . .

Conclusion.

Following up an analytical investigation in Dr. Harry A. Bigelow's article, "Conditional Deliveries of Deeds of Land," (1913) *26 Harvard Law Review*, 565, it may be possible to suggest that, in respect of each share represented by a signatory to the deed in *In re Vanstone*, the relevant execution of the deed had a *prima facie* effect akin to that described by Parke, B., in the quotation with which this part of this article began, of vesting in the widow an appropriate beneficial interest which *equity* would be at pains to protect, with the consequence that there was thrown upon each signatory the onus of satisfying *equity* that a precedent right or power of defeasance was reserved, expressly or by clear implication. Such a view or formulation may have the effect of throwing upon a party seeking to escape from his signature a heavier burden of proof than that required or accepted in the Supreme Court. To this extent, the decision of the Court of Appeal, though primarily one of fact alone, may have also a significance in law, as to the standard of proof required to establish an escrow. The suggestion would, however, presuppose that the widow possessed some enforceable *equity*, or that some consideration (natural affection, or waiving Family Protection claims) was present. In any event, the point was not raised.

CORRESPONDENCE.

Section 4, Death Duties Amendment Act, 1953.

The Editor,
New Zealand Law Journal,
Wellington.

Sir,

This section, dealing with quick successions, is a very good one in principle, as evidently the State has recognized the unfair burden of death duty falling on one estate more often than once in one lifetime. The rebate should naturally be less the further a part that the two deaths occur, but we feel that some consideration should be given to granting these concessions over a longer period. *We feel that to collect duty twice from virtually one* fund in six years, would still be regarded as an unexpected "windfall" from the point of view of the Public Revenues. In view of the preliminary part of this section, there must, however, be some reasonable time-limit. We refer here to the fact that the exemption is only available on that part of a succession which the Commissioner is satisfied still forms part of the second dutiable estate. If this position were clarified, as we will suggest, then the time limit of five years could safely be extended.

The difficulty, in practice, is that it is quite impossible in many cases to decide how much of a legacy the second deceased still possesses. If it is put immediately into shares or property, the Commissioner, in practice, accepts this as identification. If the legacy goes into a bank account, inquiries must exhaustively be *made into every deposit and withdrawal; and a somewhat* complicated mathematical calculation is made to see how much of the legacy is either invested or still in the bank account. If simply "spent" by deceased, no rebate is allowed. From our experience, the Department is absolutely fair with any doubt resolved in favour of the taxpayer, but only with great difficulty can the taxpayer either predetermine the death duty payable, or check the refund when paid.

To this extent, we feel that the practical application of this section offends against any views of simplification. Having seen some calculations made in a comparatively small estate, this refund question is decidedly *not* simple. In addition to this, it is not, in our opinion, strictly logical. For instance, if a legacy of £1,000 is immediately invested in shares, which can be identified through the brokers' records and are still identified as being intact on the second death, the full refund is granted. This same deceased may well have "stepped up" his drawings from his other funds in a bank account and thus virtually spent the legacy, but his estate will still receive the refund. The second legatee, instead of purchasing identifiable assets, merely adds the legacy to, say, a small Post Office Savings Bank account, and then also spends his legacy before death. The second legatee's estate would probably receive no refund, or a smaller one at the best.

We feel, therefore, that the principle of the refunds should be based *on an assumption that the second deceased is paying duty* on all assets which have already been taxed. This is suggested as a reasonable assumption, every bit as sound as the theoretical mathematics which now attempt to show exactly how much of the already taxed assets still remain. The refund should, therefore, be based on the actual amount received, with an appropriate adjustment if the final balance of the second estate is less than the legacy. At least, the net amount of the legacy, etc., can usually be ascertained exactly, even if the subsequent dealings with it become obscure. It is not suggested the amount of the refunds should necessarily remain as high as 50 per cent. reducible to 10 per cent. Above all, the writers would like to be *able to advise an executor that the duty assessed was strictly in* accordance with the law, and this is something one cannot do with confidence under the present arrangement for computing refunds.

Yours, etc.,
Saunders and Heney.

Christchurch,
September 27, 1955.

A Ruthless Master.—Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat. Where discretion is absolute, man has always suffered. At times it has been his property that has been invaded; at times, his privacy; at times, his liberty of movement; at times, his freedom of thought; at times, his life. Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions: Mr. Justice Douglas, dissenting, in *United States* v. *Wunderlich*, (1951) 342 U.S. 98, 101.

The Judge's Creative Role.—The Judge in deciding cases is not merely laying down a system of minimum restraints designed to keep the bad man in check, but is in fact helping to create a body of common morality which will *define the good man.* When he sees his office in this light, the Judge will realize, I think, how significantly creative his work is, and how sinister is the temptation to evade his responsibilities to the future by adopting a passive and positivistic attitude toward "the existing law": Lon L. Fuller, *The Law in Quest of Itself*, 137-138.

PEACE WITH JUSTICE.

An Address to the American Bar Association.*

By PRESIDENT DWIGHT D. EISENHOWER.

Naturally I am honoured that once again I am invited to speak before this great representation of the American Bar Association ; particularly in this summer of 1955.

This is the first of a series of meetings celebrating the John Marshall bicentennial. John Marshall was a soldier in the war for independence, a congressman, a diplomat of outstanding ability, a secretary of state.

But his reputation for greatness most firmly rests on his service as Chief Justice of the United States. It was in that office that he established himself, in character, in wisdom, and in his clear insight into the requirements of free government, as a shining example for all later members of his profession.

In his day, the truth about the nature of the union and the purposes that joined widely separated states into one republic—about the Constitution and the application of its principles to the problems of the times —was obscured by the fog of sectionalism, selfish interests, and narrow loyalties. Through a generation, he expounded these matters and formulated decisions of such clarity and vigour that we now recognize him as a foremost leader in developing and maintaining the liberties of the people of the United States.

He made of the Constitution a vital, dynamic, deathless charter for free and orderly living in the United States.

Thus his influence has been felt far beyond the confines of the legal fraternity. One result of his work was to create among Americans a deep feeling of trust and respect for the judiciary. Rarely indeed has that respect been damaged or that trust betrayed by a member of the judicial branch of our three-sided government.

Americans realize that the independence and integrity and capacity of the judiciary are vital to our nation's continued existence. For myself, this realization is understandably with me most sharply when it becomes my duty to make a nomination to the federal Bench.

To the officers and members of the American Bar Association, I express my grateful achnowledgment of the assistance they have rendered, as a public service, in aiding me and my trusted advisers in the review of professional qualifications of individuals under consideration for federal judicial positions. You have helped secure Judges who, I believe, will serve in the tradition of John Marshall.

No other kind will be appointed.

As we turn our minds to the global rather than the primarily national circumstances of our time, I feel that John Marshall's life and his works have even a more profound significance than is to be found in our veneration for the American courts and for his memorable services during the formative years of the republic.

The central fact of today's life is the existence in the world of two great philosophies of man and of government. They are in contest for the friendship, loyalty, and support of the world's peoples.

On the one side, our nation is ranged with those who seek attainment of human goals through a government of laws administered by men. Those laws are rooted in moral law reflecting a religious faith that man is created in the image of God and that the energy of the free individual is the most dynamic force in human affairs.

On the other side are those who believe—and many of them with evident sincerity—that human goals can be most surely reached by a government of men who rule by decrees. Their decrees are rooted in an ideology which ignores the faith that man is a spiritual being ; which establishes the all-powerful state as the principal source of advancement and progress.

The case of the several leading nations on both sides is on trial before the bar of world opinion. Each of them claims that it seeks, above all else, an enduring peace in the world. In that claim, all identify themselves with a deep-seated hunger of mankind. But the final judgment on them—and it may be many years in coming—will depend as much on the march of human progress within their own borders, and on their proved capacity to help others advance, as on the tranquillity of their relations with foreign countries.

Mankind wants peace because the fruits of peace are manifold and rich, particularly in this atomic age ; because war would be the extinction of man's deepest hopes ; because atomic war could be race suicide.

The world is astir today with newly-awakened peoples. By the hundreds of millions, they march toward opportunity to work and grow and prosper, to demonstrate their self-reliance, to satisfy their aspirations of mind and spirit. Their advance must not and cannot be stopped.

These hundreds of millions help make up the jury which must decide the case between the competing powers of the world.

The system, or group of systems, which most effectively musters its strength in support of peace and demonstrates its ability to advance the well-being, and the happiness of the individual, will win their verdict and their loyal friendship.

You of the American Bar Association will play a critical part in the presentation of freedom's case.

The many thousands of men and women you represent are, by their professional careers, committed to the search for truth that justice may prevail and human rights may be secured. Thereby, they promote the free world's cause before the bar of world opinion. But let us be clear that, in the global scene, our responsibility as Americans is to present our case as tellingly to the world as John Marshall presented the case for the Constitution to the American public more than a hundred years ago. In this, your aptitude as lawyers has special application.

* This is the text of the address by President Dwight D. Eisenhower at the 7th annual convention of the American Bar Association in Philadelphia, Wednesday, August 24, 1955.

In his written works and innumerable decisions, John Marshall proved the adequacy and adaptability of the Constitution to the nation's needs. He was patient, tireless, understanding, logical, persistent. He was—no matter how trite the expression—a crusader; his cause, the interpretation of the Constitution to achieve ordered liberty and justice under law.

Now America needs to exercise, in the crusade for peace, the qualities of John Marshall. Peace and security for all can be established—for the fearful, for the oppressed, for the weak, for the strong. But this can be done only if we stand uncompromisingly for principle, for great issues, with the fervor of Marshall—with the zeal of the crusader.

We must not think of peace as a static condition in world affairs. That is not true peace, nor in fact can any kind of a peace be preserved that way. Change is the law of life, and, unless there is peaceful change, there is bound to be violent change.

Our nation has had domestic tranquillity largely through its capacity to change peacefully. The lone exception was when change, to meet new human concepts, was unduly resisted.

Our founders would scarcely recognize the nation of today as that which they designed. It has been greatly changed. But the change has been peaceful and selective; and always conforming to the principles of our founding documents. That has made it possible to conserve the good inherited from the past while adjusting to meet constantly rising goals. In that way we have kept in the front ranks of those who respect human dignity, who produce increasingly and who share fairly the fruits of their labours.

This is the kind of peace that we seek. Our programme must be as dynamic, as forward looking, as applicable to the international problems of our times as the Constitution, under John Marshall's interpretations, was made flexible and effective in the promotion of freedom, justice and national strength in America.

That is the spirit in which the American delegation went to Geneva. We asserted then—and we shall always hold—that there can be no true peace which involves acceptance of a status quo in which we find injustice to many nations, repressions of human beings on a gigantic scale, and with constructive effort paralyzed in many areas by fear.

The spirit of Geneva, if it is to provide a healthy atmosphere for the pursuit of peace, if it is to be genuine and not spurious, must inspire all to a correction of injustices, an observance of human rights and an end to subversion organized on a world-wide scale. Whether or not such a spirit as this will thrive through the combined intelligence and understanding of men, or will shrivel in the greed and ruthlessness of some, is for the future to tell. But one thing is certain. This spirit and the goals we seek could never have been achieved by violence or when men and nations confronted each other with hearts filled with fear and hatred.

At Geneva we strove to help establish this spirit.

Geneva spells for America, not stagnation, then, but opportunity—opportunity for our own people and for people everywhere to realize their just aspirations.

Eagerness to avoid war—if we think no deeper than this single desire—can produce outright or implicit agreement that injustices and wrongs of the present shall be perpetuated in the future. We must not participate in any such false agreement. Thereby, we would outrage our own conscience. In the eyes of those who suffer injustice, we would become partners with their oppressors. In the judgment of history, we would have sold out the freedom of men for the pottage of a false peace. Moreover, we would assure future conflict!

The division of Germany cannot be supported by any argument based on boundaries or language or racial origin.

The domination of captive countries cannot longer be justified by any claim that this is needed for purposes of security.

An international political machine, operating within the borders of sovereign nations for their political and ideological subversion, cannot be explained away as a cultural movement.

Very probably, the reason for these and other violations of the rights of men and of nations is a compound of suspicions and fear. That explains. It cannot excuse. In justice to others and to ourselves, we can never accept those wrongs as a part of the peace that we desire and seek.

We must be firm but friendly. We must be tolerant but not complacent. We must be quick to understand another's viewpoint, honestly assumed. But we must never agree to injustice for the weak, for the unfortunate, for the under-privileged, well knowing that if we accept destruction of the principle of justice for all, we cannot longer claim justice for ourselves as a matter of right.

The peace we want—the product of understanding and agreement and law among nations—is an enduring international environment, based on justice and security. It will reflect enlightened self-interest. It will foster the concentration of human energy—individual and organized—for the advancement of human standards in all the areas of mankind's material, intellectual and spiritual life.

Can we achieve that sort of peace? I think we can. At times it may seem hopeless, far beyond human capacity to reach. But has any great accomplishment in history begun with assurances of its success? Our own republic is a case in point. Through a long generation there was almost a unanimous world conviction that the United States of America was an artificial contrivance that could not long endure.

And the republic survived its most perilous years—the experimental years—because of dedicated efforts by individuals, not because it had a built-in guarantee of success or a path free from obstacles.

Our case for peace, based on justice, is as sound as was John Marshall's for the Constitution and the Union. And it will be as successful—if we present it before the bar of world opinion with the same courage and dedicated conviction that he brought to his mission.

In our communities we can, each according to his capacity, promote comprehension of what this republic must be—in strength, in understanding, in dedication to principle—if it is to fulfil its role of leadership for peace.

In the search for justice, we can make our system an ever more glorious example of an orderly government devoted to the preservation of human freedom and man's individual opportunities and responsibilities.

No matter how vigorously we propose and uphold our individual views in domestic problems, we can present abroad a united front in all that concerns the freedom and security of the republic, its dedication to a just and prosperous peace.

Above all, conscious of the towering achievements manifest in the republic's history under the Constitution, assured that no human problem is beyond solution given the will, the perseverance and the strength—each of us can help arouse in America a renewed and flaming dedication to justice and liberty, prosperity and peace among men.

So acting, we shall prove ourselves—lawyers and laymen alike—worthy heirs to the example and spirit of John Marshall. Like him in his great mission, we shall succeed.

LAND TRANSFER: LEASE.

Extension of Term: Variation of Covenants.

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

Referring to my article, *ante*, p. 92, at p. 94, a valued correspondent writes to me as follows:

> I was very interested in your article in the issue of the New Zealand Law Journal, dated April 5, 1955, especially with regard to the question of extensions and variations of leases.
>
> Your article seems to me to imply that the consent of the mortgagee of the estate of leasehold is not required to any variation or extension of the lease. My firm acts for a local leasing body, which frequently extends leases and increases the rental, or at times registers a variation of lease solely increasing the rental. Although the mortgagee in those cases invariably holds the lessee's copy of the lease, and his consent to the variation may be implied by his production of the lease for the purpose of registration, I have adopted the practice, to ensure that there could subsequently be no misunderstanding, of obtaining the mortgagee's written consent on the Memorandum of Variation of Lease.
>
> I should appreciate your views as to whether or not consent is required under the Land Transfer Act, and you may care to mention the matter at some time in the Law Journal. The definition of "land" in the Land Transfer Act, 1952, includes any estate or interest; and, on a cursory reading of s. 116 (6), I assumed that the consent of the mortgagee of the estate of leasehold was necessary.
>
> In the instances I have in mind, the increases of rental have been substantial (sometimes as much as 300 per cent.), and it could, therefore, be a matter of some importance to ensure that the mortgagee is clearly giving his consent to the transaction.

Now there has been a slight misunderstanding, probably due to the fact that, in my article, I was striving for brevity and conciseness. I was referring to the mortgagee of the estate of the lessor: my correspondent, to whom I am much indebted for raising these points so vital to the conveyancer, is referring to the mortgagee of the estate of the lessee.

The power to extend the term of a registered Land Transfer lease by a short prescribed memorandum was first conferred by s. 4 of the Land Transfer Amendment Act, 1939. Before that, on the renewal of a Land Transfer lease, it was always necessary to draw another Memorandum of Lease and repeat the covenants set out in the original lease or vary them to suit the intentions of the parties. A registered Memorandum of Extension of a Land Transfer lease is in fact a new legal lease: by adopting the short form prescribed by Form L in the Second Schedule to the Land Transfer Act, 1952, the same result is achieved as by the registration of a new Memorandum of Lease for the new term of years; but, usually, it is achieved with considerably less labour. Now, in my article to which my correspondent refers, I wrote:

> But, if the fee is mortgaged, the memorandum of extension will not be binding on the mortgagee *unless he has consented thereto in writing on the memorandum.*
>
> This condition should be particularly noticed by the conveyancer; it differs from s. 119.

By thus drawing attention to the difference between ss. 116 and 119 of the Land Transfer Act, 1952, I intended to convey that the *condition* that the consent under s. 116 had to be in writing on the *memorandum itself*, differed from the requisites of the consent of a mortgagee to the original lease under s. 119 of the Act. At p. 93 of my article, I dealt very shortly with s. 119, as follows:

> Section 119 of the Land Transfer Act, 1952, provides that no lease of mortgaged land or encumbered land shall be binding upon the mortgagee except so far as the mortgagee has consented thereto. Although the consent of the mortgagee may be effectual, if obtained after the registration of the lease, and may be even implied, the careful conveyancer will endeavour to get the mortgagee's consent endorsed on the lease before it is registered. If this is not done, there is a real risk, that, if the mortgagee exercises his power of sale, the registration of the lease will be extinguished.

In truth, s. 116 (6) of the Land Transfer Act, 1952, despite its added requisite that the mortgagee's consent to be effective must be endorsed on the memorandum itself, is the necessary and logical corollary of s. 119. They both deal with precisely the same subject-matter—the consent by a mortgagee to what is in effect a lease of an estate in land already mortgaged. Neither of these particular provisions appears to apply to a mortgage of the lease itself. This interpretation, I think, is borne out by s. 117, which deals with the bringing down of encumbrances on registration of *new* leases in renewal of, or in substitution for, leases already registered.

Section 117 (1) provides that, where upon the registration of a lease the Registrar is satisfied that it is in renewal of or in substitution for a lease previously registered, and that the lessee is the person registered as proprietor of the prior lease at the time of the registration of the new lease or at the time of the expiry or surrender of the prior lease, whichever is the earlier, he shall, *if the lessee so requests* and if the new lease is registered not later than one year after the expiry or surrender of the prior lease, state in the memorial of the new lease that it is in renewal of the prior lease or in substitution of the prior lease, as the case may be. In every such case, the new lease shall be deemed to be subject to all encumbrances, liens, and interests which

the prior lease is subject to at the time of the registration of the new lease or at the time of the expiry or surrender of the prior lease, whichever is the earlier. It will be noted that it is the lessee, and not the mortgagee, who makes the request to bring forward the mortgage on the new lease, and on such request being made, the new lease is deemed to be subject to all encumbrances, etc. There is no mention of the mortgagee's consent being necessary, although it is only right to point out that, in the case of a substituted lease, the old lease could not be surrendered without the consent of the mortgagee: s. 120 (2) of the Land Transfer Act, 1952. But the terms, conditions and covenants of the renewed or substituted lease may not be the same as those in the old lease: yet, apparently, they are binding on the mortgagee.

It appears to the writer of this article that s. 119 of the Land Transfer Act, 1952, which, as pointed out, provides that no lease of mortgaged or encumbered land shall be binding upon the mortgagee except so far as the mortgagee has consented thereto, is little more than declaratory of the common law. The position under the general law was that where a mortgagor granted a lease without the consent of the mortgagee, the only right the lessee had as against the mortgagee who did not consent, was to redeem the mortgage, if the mortgagee took steps to evict him: see, for example, *Iron Trades Employers Insurance Association, Ltd.* v. *Union Land and House Investors, Ltd.*, [1937] Ch. 313; [1937] 1 All E.R. 481, where the English law (apart from statute) is explained at length by Farwell, J. In (1942) 18 NEW ZEALAND LAW JOURNAL 45, I said:

> A prudent lessee would, however, not rely on such a right, which lack of money at the crucial moment might render impossible to exercise, but instead would endeavour to get the mortgagee's consent. Of course, as the legal estate remains in the mortgagor under the Land Transfer Act, a mortgagor under that Act can grant a legal lease without the mortgagee's consent; but such lease is liable to be determined by the mortgagee at a later date exercising his rights and powers under his mortgage.

When giving his consent to a lease by his mortgagor, the mortgagee can impose conditions, *e.g.*, that he (the mortgagor) assign the rents to him, the mortgagee: a suitable precedent for this purpose was supplied: *ibid.*, p. 46. The precedent given at the end of this article is another example of conditions being imposed by the mortgagee on his consenting to a lease.

The power to vary, etc., the covenants in a lease already registered *notwithstanding* that the term of the lease is not extended, was first enacted by s. 36 of the Statutes Amendment Act, 1947, eight years after the power was first given to extend the term of a lease by a short statutory form: this novel provision was enacted at the request of the New Zealand Law Society. There is no provision in the Act itself stating that the variation will not be binding on a mortgagee of the lease unless he consents thereto. But, bearing in mind that s. 119 of the Land Transfer Act, 1952 is declaratory of the common law, such a provision appears to be implied as a matter of common sense, although it apparently is no concern of the District Land Registrar, if the consent is not obtained, unless the mortgagee subsequently exercises his power of sale. If the mortgagee has not consented to the variation of the lease, he, in exercise of his power of sale, could, it is submitted, ignore the variation, and confer a good legal unvaried lease on his purchaser: or, if he sold through the Registrar of the Supreme Court and bought in at the sale, the Registrar could confer on him the legal ownership of the lease as it existed before the variation.

In the case of an extension of a lease even where the covenants of the original lease are varied, etc., it would appear that the terms, covenants, and conditions of the new lease are binding on the mortgagee whether he consents to the extension or not; perhaps the reason for that is that, by virtue of s. 116 (2) of the Land Transfer Act, 1952, he obtains a *legal* mortgage of the renewed or substituted lease, whereas under the general law he would have at the most an equitable mortgage. Nevertheless, if the covenants, etc., in the old lease are to a substantial degree varied, negatived, or added to by the memorandum of extension, then it would certainly be prudent for the lessee to obtain the consent of the mortgagee to the extension of the lease.

My correspondent concludes as follows:

> In the instances I have in mind, the increases of rental have been substantial (sometimes as much as 300 per cent.), and it could, therefore, be a matter of some importance to ensure that the mortgagee is clearly giving his consent to the transaction.

I agree with this statement. Whatever the position under the Land Transfer Act is as to registration of extensions and variations of leases (which have been enacted to achieve a sort of conveyancing shorthand), it is good conveyancing practice to get the consent of the mortgagee of the lease to every extension of a lease which alters the covenants, etc., of that lease, and to every memorandum of the variation of a lease under s. 116 (4) of the Land Transfer Act, 1952. Therefore it will be seen that, although I differ from my correspondent's construction of some of the relevant Land Transfer provisions, I am with him 100 per cent. as to the correct conveyancing practice to be adopted.

CONVEYANCING PRECEDENT.

CONDITIONAL CONSENT OF MORTGAGEE EMBODIED IN DEED OF LEASE.

AND FOR THE CONSIDERATION AFORESAID the mortgagee DOTH HEREBY CONSENT to the letting of the premises by the mortgagor to the tenant at a rental of AND THIS DEED FURTHER WITNESSETH as follows:

1. This consent shall be limited to the letting hereinbefore mentioned and shall not extend to any further letting by the mortgagor nor shall it imply any waiver of the above-mentioned covenant in the said Memorandum of Mortgage.

2. All rentals received by the mortgagee shall be applied first in payment of the costs of collecting the rent at 5 per cent. of the gross amount thereof, together with all Court and other costs incurred by the mortgagee, secondly in payment of rates and insurance premiums and such other outgoings in respect of the security as the mortgagee thinks fit, thirdly in the maintenance and repair of the premises to such an extent as the mortgagee deems necessary, fourthly in payment of overdue and current instalments in respect of the mortgage or if the mortgagee thinks fit any other mortgage affecting the land.

3. The mortgagor HEREBY COVENANTS with the mortgagee that the mortgagor will not terminate the tenancy, vary the rental or create any new tenancy without the consent of the mortgagee first had and obtained.

LEGAL LITERATURE.

PRACTICE AND PROCEDURE.

Sim's Practice of the Supreme Court and Court of Appeal of New Zealand. Ninth Edition. By Sir WILFRID JOSEPH SIM, K.B.E., M.C., Q.C., LL.B., with Assistant Editors NORMAN ANDREW MORRISON, LL.B. and JOHN CHARLES WHITE, LL.M. Pp. li + 783. Wellington: Butterworth & Co. (Australia) Ltd.

This work was first published in 1892, and there is no present prospect that it will ever die. It has been a tremendous help to the profession over the sixty-five years of its existence. One reason for its popularity is that the Code of Civil Procedure in the Supreme Court and the Rules of the Court of Appeal, though forming Schedules to the Judicature Act 1908, were not included in the *Reprint of the Public Acts of New Zealand 1908-31*, and therefore are not kept up to date by the annotation of the Reprint. It was indeed an official tribute to this work that the *Reprint*, in Vol. 2, p. 90, recommended the reader to refer thereto.

The first edition of the book was written by the late Chief Justice, Sir Robert Stout, P.C., K.C.M.G., and the late Sir William Alexander Sim, Kt., a former Judge of the Supreme Court of New Zealand. Hitherto the book has been popularly known as "Stout and Sim". The learned editor points out in his preface to the 9th Edition, however, that the first edition was very substantially the work of Sir William Sim. Moreover, he was solely responsible for the second to the sixth editions, and his son, Sir Wilfrid Sim, has been solely responsible for the seventh edition, the eighth edition (with the unhappy exception of the index), and now this ninth edition (but with the above-mentioned assistant editors). There is, therefore, sound reason to support Sir Wilfrid's decision to change the name of the book to *Sim's Practice and Procedure*, though the old name of "Stout and Sim" may die hard, and a few may regret the change.

On the ground of expense, practitioners have been known to complain of the frequency with which editions of some law books appear. There could not be any complaint on that ground, however, at nine editions of a standard work in sixty-five years. It is indeed fifteen years since the eighth edition was published, and a new edition has been overdue, both because the work has been out of print and by reason of the number of alterations in Acts and Rules and the number of new decisions. Sir Wilfrid delayed the 9th Edition on purpose, because he knew of impending considerable changes in the Rules, and thought that it would be unfair to practitioners to publish the new edition until such changes could be incorporated therein.

It is pleasing to note that, despite the amount of new matter incorporated, the 9th Edition has fewer pages than the eighth, though the new pages are larger than the old.

It is impossible to mention all such new matter in this brief review. Some idea of its extent in the statutory field can be gauged from the fact that the Table of Contents includes references to nineteen statutes dated later than 1940. The inclusion of the Crown Proceedings Act, 1950, and a separate print of the Crown Proceedings Rules 1952 (S.R. 1952/122), should be appreciated. The preface mentions that twenty-one sets of rules have affected various parts of the rules since the eighth edition. The most extensive of these sets are the Crown Proceedings Rules 1952, the Supreme Court Amendment Rules (No. 2) 1954 (S.R. 1954/155), and the Court of Appeal Rules 1955 (S.R. 1955/30). The above-cited Amendment Rules (No. 2) 1954 replaces or amends over 250 rules and forms, dealing especially with originating and interlocutory applications, and makes important changes in Chamber practice. *Inter alia*, it substitutes a new Part VI of the Code for the former rules 394 to 426. The above-cited S.R. No. 1955/30 is a complete new set of rules of the Court of Appeal. It consolidates, re-arranges, and otherwise amends the old rules, and introduces changes in procedure, especially as to time for appealing, setting down for hearing, security for costs, and poor persons' appeals.

Those who have been fortunate enough to possess the eighth edition of this work, but have delayed annotating it with the recent large sets of rules, will profit by the timing of the 9th Edition.

It must be difficult to decide what special Acts and Rules to incorporate in a book such as this, bearing in mind the desirability of keeping its bulk within bounds. For example, the Sheriffs' Fees Notice 1952 (S.R. 1952/124) has not been reproduced, though there is a reference thereto on p. 18. I think that most practitioners should be satisfied with the learned editor's selection.

I imagine that all who use this book will particularly welcome the news (given in the preface) that it contains a completely new index, and that Sir Wilfrid has given personal attention thereto.

A small test check revealed only one oversight, and that can well be excused, since it occurs on p. 164 in a note to the new R. 187, and that new rule was one of those made while the book was going through the press. Where an affidavit is sworn before a Justice, the form for the jurat given in such note was appropriate under the old R. 187, but does not accord in part with the new R. 187 (2).

D. R. WOOD.

VALUATION DEPARTMENT.

Whangarei Branch.

A branch office of the Valuation Department is being opened at Whangarei on September 12. The address is Thompson's Building, Walton Street, Whangarei, and the postal address is P.O. Box 220, Whangarei.

This office will serve the seven northernmost Counties, together with all Boroughs and Town Districts within them.

IN YOUR ARMCHAIR—AND MINE.

By Scriblex.

A Question of Procedure.—The Motor Spirits Distribution Regulations, 1955, permit any person representation before the Licensing Authority by counsel, solicitor or agent (Reg. 3 (1)); and then provide that the Authority "may require any person to transcribe or summarize in writing, either during or after the proceedings, any oral statement made by that person during the proceedings." (Reg. 3 (2)). The purpose of this somewhat curious requirement is far from clear. If it is intended to be a limitation on the oral submissions of counsel, then it seems to take away what is given under the earlier subsection. On the other hand, if it is intended to impose upon counsel the obligation of giving a précis of what he has said, it would seem to place upon him the obligation to do what should be part of the duty of the Authority (or its secretary) if it is to follow intelligently what is submitted. There is, of course, a third explanation—that the provision is designed to trammel the irrelevancies of the "agent", often a bush-lawyer with a sad story to tell and unlimited time to devote to its gradual unfolding.

The Hungry Tax-gatherer.—The "*de minimis*" rule appears to present no terrors to the Inland Revenue Department in England. Its latest triumph relates to the case of a salaried local government officer, required as part of his duties to attend evening committee meetings, and given in respect thereto a dinner allowance of 6s., which he claimed on the year's aggregate to be entitled to deduct from his taxable income. On appeal by the Department from the General Commissioners who allowed his claim, the Court decided against him on the ground that the expenditure was not "wholly, exclusively, or necessarily incurred in the performance of the duties." It was held that the expenses were only allowable if they were incurred "in the doing of the work of the office," and the exigencies of the job did not require him to eat at the same time: *Durbidge* v. *Sanderson*, [1955] 3 All E.R. 154. A more rational approach to the problem would be made by the average law-clerk. He would see that the performance of the duties did not interfere with his consumption of the meal.

The Wicked Grandmother.—The efforts of the Police to distinguish the judgment of Mr. Justice Gresson in the "picks case" remind Scriblex of what a modern Chaucer might describe as "the Grand-daughter's Tale." This is *Simpkins* v. *Pays*, [1955] 3 All E.R. 10. The *dramatis personae* consist of a female lodger, an old lady, and her grand-daughter—a family group with a hobby of entering for newspaper competitions, each filling up one forecast on a coupon common to all, and sending in the completed entries in the name of the old lady. In the absence of the grand-daughter, but with the knowledge that her consent could be taken for granted, it was arranged between the other two that if any prize-money was received it would be shared equally. One of the grand-daughter's forecasts won a prize of £750, which was duly paid to the old lady who found herself unable to recede from the die-hard doctrine of "what's mine is my own" school of thought. The lodger sued, and the defendant argued that the arrangement was not intended to create a legal relationship and did not amount to an enforceable contract. The Court found that the lodger was entitled to recover £250, and added a rider that the grand-daughter who was not a party to the action seemed to be entitled to £250 as well.

The Value of Evidence.—A few months ago, some of the members of our profession were fortunate enough to have the opportunity of meeting Robert G. Storey, Dean of the Faculty of Law of Dallas University, Texas, and one of the foremost jurists of the United States. In a short talk, he emphasized that in this changing world there were two dominant legal systems—the Anglo-American and the Soviet; and that one of the basic issues in this world-wide struggle is whether or not a legal system will survive based upon the independent judiciary or upon the will of man imposed by a dictator. In amplifying the same concept at the Ninth Legal Convention of the Law Council of Australia held in Brisbane last July, he gave an illustration from an incident immediately prior to the Nuremberg Trial. The late Foreign Minister, Andrei Vishinsky, who was, in addition, Chief Prosecutor in the Soviet Union, had come to Nuremberg, and, after spending about three weeks on preparatory work, he took his leave. Mr. Justice Jackson gave him a dinner on the eve of his departure, and this was the Friday night before the trial started on November 20 following. In the presence of the Right Hon. Sir Norman Birkett, Lord Justice Lawrence, Lord Reid, Sir David Maxwell Fyfe, Sir Hartley Shawcross, the top prosecutors and their top assistants, Mr. Justice Jackson said, "There will only be one speech to-night and that will be by Mr. Vishinsky". When the meal was over, Vishinsky made a very interesting and humorous speech, and then he lifted his glass and asked everybody to rise and give a toast. This was the toast, three days before the trial actually started, "Here is to the conviction and execution of all the defendants who go on trial next Monday morning". Standing by Mr. Storey's side was Judge John J. Parker, one of the U. S. Judges, and a distinguished jurist. Judge Parker said, "I shall never drink a toast to the conviction of any man regardless of his guilt before I hear the evidence".

From My Notebook:

"Where a husband neglected his two wives (for they are polygamous) in favour of other women, he was severely upbraided (in judicial proceedings) and ordered to spend six nights a week with his wives. In the quaint language of the Lozi, 'a woman does not marry a blanket'. Or in the case of theft, the thief is brought to the King who will give him a village or cattle and make him his tribute collector. People will then see if he will thieve again or become a good citizen."—Professor Max Gluckman in *The Judicial Process among the Barotse of Northern Rhodesia.* (Manchester University Press, 1955.)

"Freedom of speech is not unrestrained. It is freedom under the law. We recognize and accept some limitation on freedom of speech and expression. Under our own law there are three divisions on the limitation on freedom of speech. There is the limitation imposed by the law of defamation, the limitation imposed by the law of sedition, and the limitation imposed by the law on indecent publications and similar legislation. It is with this last division of the limitation of freedom of speech that we are now concerned."—**The Hon. J. R. Marshall as reported in *Hansard* (August 17, 1955).**

OBITUARY.

Mr. L. W. Willis (Napier).

Mr. Lawrence William Willis, one of Hawke's Bay's leading practitioners and Crown Solicitor for ten years, died in Napier on August 16, after a grave illness.

Except for a brief period in Gisborne, Mr. Willis's professional life was spent in Napier where he was a member of the firm of Messrs. Lusk, Willis, Sproule and Woodhouse. In Hastings, the firm is Hallett, O'Dowd, Lusk, Willis, and Sproule.

Mr. Willis was born in Taranaki in 1902; and after two years' secondary education he went to work on his father's farm. He was then thirteen years of age. After two years on the farm, he began the examinations for qualification as a solicitor which he passed at the age of seventeen years.

Too young to be admittted, he decided to take examinations for the LL.B. degree, and completed them at the unusually early age of twenty. He was admitted as a barrister and solicitor the following year, on reaching the age of twenty-one years.

He was a past-president of the Hawke's Bay Law Society, and, at the time of his death, was on the council of the Society. He was Crown Solicitor for ten years, until March last year when he resigned for health reasons.

Mr. Willis was president of the Napier Club and a committee member for many years. He was also a member of the Hawke's Bay Club and the Napier Golf Club. In his younger days, he was an active member of the Napier High School Old Boy's Football Club and was a keen tennis player.

Mr. Willis was regarded affectionately by a wide circle of friends, one of his outstanding qualities being his generous and sympathetic understanding.

He married Miss Jessie Johnson, Taradale, and besides his wife he left two sons, William, who is a member of the firm in Napier, and Ian, who is studying at the Teachers' Training College in Auckland.

Mr. Willis's father died some years ago but his mother, Mrs. S. H. Willis, and his two sisters, Eileen and Joyce, live in Hastings. He is also survived by four brothers, Trevor and Clive, Hastings, Edgar, Hatuma, and Ronald, Porangahau.

Tributes to Mr. Willis's Memory.

On August 22, 1955, in the Courthouse at Napier, practitioners from all parts of Hawke's Bay paid tribute to the late Mr. L. W. Willis. Mr. W. A. Harlow, S. M., presided.

Mr. H. W. Dowling, President of the Hawke's Bay Society, addressing the Court, said that he had a sad and distressing task to perform on behalf of his fellow-members of the bar and of the Hawke's Bay Law Society. He continued:

"With us to-day is a vacant chair, occupied, we would all like to think, by the spirit of Lawrence William Willis, so that he could hear and take comfort and pride from what I have to say.

"In the passing of a close friend (and a close friend he was of us all) one experiences many emotions: sorrow that a familiar face, form and voice will be with us no longer; regret that we ourselves perhaps did not accept more fully the responsibilities of friendship; gratitude that we were permitted to enjoy that friendship while our friend was with us; and a sense of personal loss when we think our own lives will not be quite as full again. And we all have a deep instinctive hope that the Architect of our being has so prepared his plan that we may all, in due time and place, once again become united after death as we were before it.

"The mortal remains of Lawrie Willis were put aside last week—but your Worship well knows we all feel that the man we knew has not perished. He will live on in our thoughts to influence our daily conduct, and as an example, to his contemporaries and to those who follow, of all that is to be admired in one who lives with and by the law.

"In mental ability he was brilliant, yet he never became overbearing or dogmatic. As Crown Prosecutor, he was just, fair, and understanding, with a very high appreciation not only of the duties and responsibilities of his office, but also of its limitations on his powers. He was a sympathetic confidant and a patient adviser. How many of us recall his genuine championship of the cause of the ordinary man and his sympathy with his problems.

"The greatest compliment we can pay him is to say: 'Never did he break his word and he never broke faith. Never in all the years we appeared against each other, in either the criminal or civil Court, did he ever depart so much as one step from the path of strict honour which he set out to follow.'

"While we personally are the poorer for his going before us, our Society and the law have been enriched by his presence; and he has left behind him an example both of wisdom and conduct in the practice of the law which we should all be proud to follow.

"And so, with your Worship's leave, the members of the Hawke's Bay bar have sought this opportunity, on the floor of the very Court in which he practised for so long, of expressing to his widow and family and his associates our deep sympathy with them in their bereavement; and of renewing with each other and ourselves our own faith in the ideals which Lawrie Willis emphasized and made his own.

"And may I, in conclusion, quote a few lines from a mutual friend, which so truly express the thoughts we all have at this sad moment:

Here was a man, who no vainglory knew,
No bitterness, no spite. But kindness gave
In thought, in word, in deed.
And, by that hallowed quality, bequeathed
A memory, in truth acceptable as precept, for his fellow-men.

Mr. W. A. Harlow, S.M., then said:

"This Court mourns with you in the passing of the late Lawrence William Willis, and joins in the expression of sympathy for his widow and family in their great loss.

"Speaking for myself, I found Mr. Willis to be skilful and careful as a lawyer, resolute (but at all times eminently fair) as an advocate, and very likeable as a man. I esteemed it a privilege to call him a friend.

"This Court was his forensic home; here were conducted the great majority of his professional struggles. He enjoyed his triumphs with modesty, and met defeat with dignity."

The Court then adjourned as a mark of respect.

Rule Against Perpetuities.—"For a long period of time the maxim had prevailed that in point of law a real estate could be tied up by a strict settlement for the duration of the lives in being and for twenty-one years longer. The origin of the error, for it clearly was an error, was this, that in point of fact a fine never could be levied to bar the issue in tail, or a common recovery suffered to bar the remainders over, until the son of the last tenant for life was of age. Now, when the matter came to be questioned in the case of *Cadell* v. *Palmer*, (1833) 1 Cl. & Fin. 372; 6 E.R. 956, before me here, in 1833, when I had the assistance of the learned Judges, we were all agreed that the doctrine of adding twenty-one years, as a term in gross, to the duration of the existing lives was a mere mistake, and the more clearly a mistake because we so plainly saw how it had arisen; yet we all agreed that, after the Courts had so long acted upon it, and the conveyancers had so long proceeded upon the assumption, reverting to the true principle would be most pernicious, and would shake the titles to many estates all over the country. I make bold to think that a shock given to all the titles in England would not have been more fatal to the peace and happiness of society than the shock [of annulled marriages] which disturbs numberless families, afflicts the character of parents, and deals out to their progeny the portion and the name of bastard, besides shaking an almost equal number of titles to real estates." Lord Brougham in *R.* v. *Millis*, (1844) 10 Cl. & F. 534, 739; 8 E.R. 844, 920.