110. Under certain circumstances, where a reasonable alternative offer, free from the prohibited conditions, was at the time made to the purchaser, lessee, or licensee, the prohibition contained in section 43, subsection (1), did not apply. A further important restriction was imposed on the patentee by subsection (5) of section 43, which provided—

(5) The insertion by the patentee in a contract of any condition which by virtue of this section is null and void shall be available as a defence to an action for infringement of the patent to which the contract relates brought while that contract is in force.

111. Prior to 1949 the provisions to prevent the restrictive use of patent rights were substantially the same as those at present in force in New Zealand : see sections 27 and 38 of the British Act of 1907 (as amended). In addition to making substantial amendments to section 27 of the 1907 Act and some amendments to section 43, possibly of not so great importance, the British Act of 1949 strengthened the provisions in question by enabling advantage, under certain circumstances, to be taken of findings in a report of the Monopolies and Restrictive Practices Commission as laid before Parliament under section 9 of the Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948 : see, for instance, section 40, subsection (3), and section 43, subsection (6), of the Patents Act, 1949.

112. It will be necessary for us a little later to consider the changes in the law made by section 37 and succeeding sections of the British Act of 1949, but firstly we will consider the implications arising from the passing of the Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948. While a considerable portion of this Act deals with abuses of monopoly and restrictive practices which do not fall within the ambit of our inquiry, the fact that certain findings under such Act are matters to be taken into consideration under the Patents Act, 1949, makes it clear that its implications, so far as patents, designs, and, possibly, trade-marks, are concerned, are such that it cannot be ignored.

113. There is no Act in New Zealand which is in essence the equivalent of the Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948. The Board of Trade Act, 1919, may possibly be wide enough to bring within its scope such inquiries as are envisaged under the aforesaid British Act. We do not think it necessary, however, to express any opinion on this point, and shall consider whether it is desirable that the provisions of the British Act should, in so far as they directly or indirectly affect monopolies and restrictive practices within the scope of our inquiry, be adopted in New Zealand.

114. In paragraph 25 of its second interim report the Swan Committee made certain observations relating to monopolies in general, and their relationship to patents, so that, with the background of the Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948, in mind, we have no hestitation in quoting their full remarks :—

It is easy to overestimate the part played by patents in creating and maintaining cartels, whether national or international. Several of the most important monopolies in this country exist with little or no help from patents, and it seems likely that, even where patents do form an important element in cartel arrangements, these arrangements could be reconstituted upon some other basis, even if patents were totally abolished. Where firms find it convenient and profitable to work together in regulating output and fixing prices, or where one or a few powerful firms desire to dominate smaller rivals, they will make use of whatever means come to hand to cement their agreements. Patents are often an available means, but they are not the only one. No conceivable reform of the patent system, nor even its total abolition, would, by itself, solve the problem of monopoly in modern industry. Nevertheless, it is sufficiently clear that patents do often play a part in the formation and maintenance of cartels, and that this use of patents is foreign, and may be inimical, to the purposes for which the patent system was instituted. It is not within our sphere to pronounce upon the merits and defects of cartels as such, but we are of opinion that it is wrong in principle that a patent should be used to establish a monopoly wider in scope and longer in duration than that conferred by a patent in itself, and it is obviously desirable that the patent law should keep in step with any measures which may be adopted in the future to limit or control monopoly in the public interest.