Butterworth's Fortnightly Notes

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LONG AND HANNA v. BARKER AND OTHERS.

Will—Testamentary capacity—Onus probandi—Liability of being displaced by slight evidence—Standard of testamentary capacity—How fixed—Best class of evidence—Mental incapacity arising from drink.

This was an appeal from Herdman J. and was allowed. The learned Judge made an order recalling and cancelling Probate of the will of Martha Ann Barker deceased on the ground that the testatrix at the time she made the will by reason of senile decay no longer possessed that sound mind and memory essential to testamentary capacity. It was from this order the appeal was made. The Court of Appeal reviewed at length the evidence given in the Court below and held that the testatrix was not suffering from the disabilities alleged when she made the will in question.

Luxford and Beckerleg for Appellants.
Meredith for Respondents.

ADAMS J. delivered the judgment of the Court and made the following interesting references to the law applicable to a proper consideration of the case.

"The law applicable to cases of this type is well settled and it is therefore not necessary to review the authorities. When a testamentary instrument is challenged on the ground of testamentary incapacity it must be shown to the satisfaction of the Court that at the time when the instrument was executed the testator had a sound disposing mind and memory; that he not only knew the proper objects of his bounty, but also the extent of his property. In **Jarman on Wills**, 6th Edn. p. 48, it is said that 'the general rule is that the **onus probandi** lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. Buf if a will is rational on the face of it, and appears to be duly executed, it is presumed, in the absence of evidence to the contrary, to be valid.' We take that to be a correct statement of the law, adding only this, that the presumption of testamentary capacity is, like all other presumptions of fact, liable to be displaced by slight evidence."

The learned Judge referred to previous wills made by the deceased and how she had treated her different children in these and the disputed will and then added:

"We have, therefore, a testamentary document rational on the face of it and duly executed, and which in the light of the surrounding circumstances appears to be a reasonable disposition of the property. The facts in relation to its preparation and execution already referred to are such as would be expected in the case of a testator of normal testamentary capacity. But the question of testamentary capacity having been put in issue the evidence on that point must be carefully considered. It has always to be remembered, however, that the standard of capacity is not fixed by any rule of perfection. Many persons whose intelligence is of a low order are nevertheless competent to make a valid will. The following passage from **Williams on Executors** 13th Edn. (1921) p.p. 26-27 may be cited as indicating this: 'So it is laid down by Erskine J., in delivering the opinion of the Judicial Committee of the Privy Council in **Harwood v. Baker**, 3 Moo. P.C. 282, 290, that in order to constitute a sound disposing mind the testator must not only be able to understand that he is by his will giving the whole of his property to the objects of his regard, but must also have capacity to comprehend the extent of his property and the nature of the claims of others whom, by his will, he is excluding from participation in that property. On the other hand it must be observed that mere weakness or infirmity of understanding is no objection to a man's disposing of his estate by will, for Courts cannot measure the size of people's understanding and capacities; nor examine into the wisdom or prudence of men in disposing of their estates.' . . . . 'If a man,' says Swinburne, Pt. 254 Pl 3, 'be of a mean understanding (neither of the wise sort nor of the foolish), but indifferent as it were, betwixt a wise man and a fool, yea though he rather incline to the foolish sort, so that for his dull capacity he might worthily be called **grossum caput**, a dull pate or a dunce, such a one is not prohibited from making his testament.'

"On this question of mental capacity it is plain that, other things being equal, the best evidence is that of trained observers who have had the advantage of personal observation and knowledge of the persons whose capacity is in issue, at or about the time of the execution of the will. For this reason amongst others great weight should be given to the evidence of Dr. Gordon, and the Matron of the Hospital, and Messrs. Andrew Hanna, S.J., Hanna and C. P. Nutsford. Experience shows also that the evidence of members of the family, however honest they may be, is more or less liable to be affected by interest or prejudice, particularly in cases such as the present, where a certain amount of feeling is found to exist."

The learned Judge then reviewed at great length and detail the whole of the evidence for and against the appellants' case.

With regard to certain allegations that drink was in some measure responsible for the deficient mental capacity of the testatrix the learned Judge made the following comment:

"The probabilities are that, acquiring the habit late in life, she would be more susceptible to the effects of the liquor, and be affected by comparatively small quantities. At times, becoming more frequent with a growing habit, she would be more or less under the influence of liquor. This is confirmed by the evidence of Amy Barker and the three respondents who were living in the home with her.

"The distinction between mental incapacity arising from drinking and ordinary incapacity from insanity was discussed by **Sir John Nicholl in Avery and Others v. Hill** 2 Add. Eccl. Cas. 206: In cases where mental perception is partially paralysed by indulgence in liquor, the person affected may exhibit all the signs of failure of memory and incoherency in speech of which the witnesses speak in this case and may also behave in a childish or foolish manner, such as is described. But this partial paralysis is temporary and passes off as the alcohol is dissipated."

Solicitors for appellants: **Fitchett Rees & Luxford**, Auckland.
Solicitors for respondents: **Meredith & Paterson**, Auckland.

SUPREME COURT.

Sim, J.
Adams, J.
Ostler, J.

Ap. 6, 28, 1925.

HOLLOWAY v. JUDGE OF THE COURT OF ARBITRATION AND OTHERS.

Arbitration Court—Sec. 92 Industrial Conciliation and Arbitration Act—Power to order shops to be closed on Saturdays at 1 p.m. as well as on statutory half-holidays.

Motion for order for certiorari to remove into the Supreme Court for the purpose of quashing it an order made by the Court of Arbitration amending the North Canterbury Grocers' Assistants and Drivers Award. Clause 1 of this Award contained a provision to the effect that in the area to which the award applied, Saturday should be deemed to be the statutory half-holiday. This provision was made in spite of the fact that in two of the boroughs within the area Wednesday had been declared to be the statutory half-holiday under the Shops and Offices Act 1921-1922. The Court of Appeal held that the Court of Arbitration had no jurisdiction to alter in this way the statutory half-holiday: **Fielden v. Holloway**, 1924 G.L.R. 524. Thereupon the Court of Arbitration made an order under Sec. 92 of the Industrial Conciliation and Arbitration Act 1908 amending the award by striking out Clause 1, and substituted another provision which did not contain the objectionable provision. By this new clause grocers' shops in those portions of the area in which Saturday is the half-holiday are to be closed from 1 p.m. on Saturdays and in those portions of the area in which Saturday is not the statutory half-holiday the shops are to be closed from 1 p.m. on Saturdays and also on the statutory half-holiday. There is however a proviso relieving the occupier from the obligation from closing on the statutory half-holiday if he elects to give the notice provided for in Sec. 14 of the Shops and Offices Act and observes Saturday in lieu of the Statutory half-holiday.

Cuthbert for the plaintiff: The Arbitration Court had no jurisdiction to make the order. Sec. 14 of the Shops and tion with the statutory half-holiday and the Arbitration Court has not the power under Sec. 69 to interfere with these rights in such a way.

Donnelly for the defendants.

SIM J. delivered the judgment of the Court in which he said: "It is clear from the memorandum subjoined to the order that the object of the Court in framing the order in this way was to force occupiers in those parts of the area where Wednesday or Thursday was the statutory closing day to elect under Section 14 of the Act to close on Saturday in lieu thereof. The Court has thus sought to do indirectly what the Court of Appeal held it could not do directly, namely to alter the statutory closing day. In our opinion the order made by the Arbitration Court was a valid exercise of the power conferred by Section 69 of the Shops and Offices Act. That section is quite general in its terms and gives the Court power to fix the closing hours of shops on any working day. The only limitation which, in effect, Section 14 imposes on this power is that the Arbitration Court is not entitled to substitute explicitly any other day for the statutory closing day, and is not entitled to authorise an occupier to keep his shop open on the afternoon of the statutory closing day. There is, however, nothing, we think, in Section 14 which prevents the Court from exercising the power conferred by Section 69 in such a way as to force occupiers to elect to observe Saturday in lieu of some other statutory closing day. In our opinion, therefore, the Arbitration Court has interpreted rightly the power conferred by Section 69 of the Shops and Offices Act.

"But even if the Court had been wrong in its interpretation of the statute, it is clear, we think, that Section 96 of the Industrial Conciliation and Arbitration Act 1908 would have been a bar to interference by this Court by certiorari or otherwise. I accept the interpretation put upon that section by Mr. Justice Salmond in his judgment in the case of **New Zealand Waterside Workers' Federation v. Fraser** (1924) G.L.R. 139, namely that so long as the Arbitration Court keeps within the limits of the jurisdiction entrusted to it by the Legislature, its proceedings and judicial acts within those limits are not subject to the examination question or control of any other Court, whether on the ground of error of law or fact, irregularity of procedure, defect of form or substance or any other ground whatever. Now in the present case the Arbitration Court had jurisdiction, under Section 69 of the Shops and Offices Act, to fix the hours of closing for the specified shops. The complaint made by the plaintiff is that in exercising that jurisdiction the Court did not give proper effect to the provisions of Section 14. If that had been so, it would have been only an error of law in connection with a question which the Court had to determine in the course of exercising its jurisdiction, namely the proper construction of Sections 14 and 69 of the Act. To hold that in such a case this Court could interfere by certiorari would be to repeal, in effect, Section 96 of the Industrial Conciliation and Arbitration Act.

"We think, therefore, that the motion for a writ of certiorari should be dismissed with costs £10 10s. to the defendants."

Solicitors for plaintiff: **Garrick Cowlishaw and Co.**, Christchurch.

Solicitors for defendants: **A. T. Donnelly**, Crown Solicitor, Christchurch.

Alpers, J. April 5, 22, 1925.
Wellington.

ARMSTRONG v. KELLEHER.

Licensing—To aid counsel assist and procure—To commit an offence—Unlawfully on licensed premises—Licensees's duty to expel—What necessary.

Appeal from decision of Stipendiary Magistrate at Wellington and was allowed. The facts found by the S.M. were as follows in respect of a charge against the respondent as licensee of the Albert Hotel of aiding counselling and procuring one Hill to commit an offence etc. viz., th coffence of being found unlawfully on licensed premises at a time when such promises were required by law to be closed.

At about midnight on November 28 a party of 5 were driven to respondent's hotel by Hill in his motor car. They knocked at a side door and asked to see the respondent who had in fact gone to bed. The night porter endeavoured to stop them; but they pushed past him and went to the respondent's bedroom. Four members of the party were personal friends of the respondent; the fifth was an acquaintance who desired a room so that he might stay the night. A room was alloted to him and he went off to bed; the other four stayed in the respondent's room talking with him for some two hours. There was some ale in the room and he treated each to a glass; several times respondent pressed the party to go home pointing out that their friend had got his room and was in bed. Eventually they promised to go home if he would treat them to another drink. The respondent refused to get out of bed to fetch liquor; but he gave the key of the storeroom to two women of the party and told them if they liked to fetch two bottles of beer he would treat them to it. The women obtained the bottles of ale from the storeroom and a portion of it had been consumed when the police were heard knocking at the door; the four visitors thereupon left the respondent's bedroom and quitted the hotel by another door. The police officers found respondent alone in his bedroom; four empty glasses, four empty ale bottles, one full bottle of ale with the cork drawn and one small bottle of whiskey partly full, were found in the room. Throughout the time the four visitors were there, the respondent did not leave his bed; the beer consumed was given to them as his guests and he did not drink anything himself.

The four visitors were each subsequently convicted and fined for being on licensed premises after closing hours in breach of Section 194 of "The Licensing Act, 1908."

The Magistrate dismissed the charge.

Macassey for appellant.
Perry for respondent.

ALPERS J. in allowing the appeal said: "I am of the opinion that the inference drawn by the Magistrate from the facts found by him is erroneous in law. Counsel for the respondent in support of the Magistrate's decision relied mainly upon **Regina v. Coney** 8 Q.B.D. 534, the well-known prize fight case, and in particular upon this passage in the **Judgment of Hawkins J.** (page 557). In my opin-

ion, to constitute an aider and abettor some active steps must be taken by word, or action, with the intent to instigate the principal or principals. Encouragement does not of necessity amount to aiding and abetting; it may be intentional or unintentional, a man may unwittingly encourage another in fact by his presence, by misinterpreted words or gesture, or by his silence, or non-interference or he may encourage intentionally by expressions, gestures, or actions intended to signify approval. In the latter case he aids and abets, in the former he does not.

"This is a statement of the law in broad and general language; but it is not exhaustive of the cases that may arise. Here the respondent was not merely a person present as a spectator, he was the person in control with a very clear duty to exercise control. In **Du Cros v. Lambourne** 1907 1 K.B. page 40 the owner of a motor car was held to have been rightly convicted of aiding and abetting the offence of driving at a speed dangerous to the public. The appellant in that case sat on the front seat of the car beside the driver; he uttered no words and made no gesture either of protest or encouragement. But Darling J. says (at page 46): 'The appellant was the owner of the car and in control of it, and he was therefore the person to say who should drive it. The case finds that he allowed (I emphasize that) Miss Codwin to do so; that he knew that the speed was dangerous and that he could and ought to have prevented it.'

"The Magistrate in this case is of opinion that the respondent showed 'looseness and lack of control,' but adds that his 'chief efforts, if inadequate, seem to have been directed towards getting the visitors to depart. Section 187 of 'The Licensing Act, 1908,' authorises the licensee to turn out of his house any persons whose presence there would subject him to a penalty and the police are bound to assist him in ejecting them. Yet these people were allowed to remain on the premises for some two hours. The act of giving the keys of the storeroom to the two women in order that they might fetch more beer was surely 'in the nature of a voluntary act' and aided and abetted them in attaining the only purpose for which they were there—to obtain drink. Counsel for respondent sought to support the Magistrate's decision on the further and alternative grounds (1) that Hill and the other three persons were bona fide guests—and so committed no offence, (2) that if they did commit an offence it was complete the moment they entered the door and forced their way past the night porter and so the respondent could not 'aid, assist, counsel, or procure' an offence which had been committed before he ever knew of their presence on the premises. As to the first submission the four persons had pleaded guilty to being unlawfully on the premises and had been convicted by the Magistrate who tried this case. They had clearly come to the hotel at that late hour for no other purpose than to obtain liquor and the respondent could not, even though they were his personal friends, convert them into 'guests' by giving them liquor, as is suggested, in order to bribe them to go **Leslie v. Clarke** 22 N.Z.L.R. 967. As to the second contention the offence to which these four persons pleaded guilty is not constituted until they are 'found' upon the premises (**Moran and another v. Jones** 27 T.L.R. 421.). And even if the offence were constituted when they entered upon the premises, it continued till they left.

"I am of the opinion, therefore, that the respondent should have been convicted and that the appeal should be allowed with £7 7s. costs."

Solicitors for appellant: **P. S. K. Macassey**, Wellington.
Solicitors for respondent: **Perry and Perry**, Wellington.

MacGregor, J. May 1, 8, 1925.
Wellington.

MARLBOROUGH ELECTRIC POWER BOARD v. AUSTRALIAN MUTUAL PROVIDENT SOCIETY AND THE ATTORNEY-GENERAL.

Local Bodies Loans Act—Sec. 9—Whether terms mandatory—Irregularity in notice of proposal—Cured by Order-in-Council—Whether Court has jurisdiction to question some.

An originating summons was issued by the plaintiff under the Declaratory Judgments Act 1908 to have determined inter alia whether an Order-in-Council was effective to cure an irregularity in proceedings taken to raise a loan for the plaintiff. It was admitted that there was an irregularity in the statutory notice of the proposal for the loan and the proposal itself as they did not state as was the fact that it was proposed to provide a sinking fund for the repayment of the loan.

Evans for the plaintiff.
Cooke for the defendant society.
Currie for the Attorney-General.

MacGREGOR J. after remarking that the provisions of Sec. 9 of the Local Bodies Act 1913 were mandatory as was already decided in **Gisborne Borough v. Auckland Provincial Patriotic Association** 1916 N.Z.L.R. at p. 221 by Cooper J. said with reference to the effectiveness of the Order-in-Council: "This Order-in-Council is ex facie good, and does in precise terms validate the proceedings taken for raising the loan in question. At first sight therefore it would certainly appear that in terms of Section III the validity of the proceedings or of the security for the loan cannot now be questioned on the ground of the irregularity or defect referred to in the first question. At the argument before me, however, exception was taken to the Order-in-Council by counsel for the Attorney-General, who was served with these proceedings as representing the inhabitants of the locality affected by the loan. He contended that the Order-in-Council was ultra vires and of no legal effect on two grounds: (1) That the defect or irregularity complained of was of too grave a nature to be dealt with under Section III, and (2) that the Governor-General should not in the circumstances have been satisfied that the ratepayers had not been misled. After consideration I am not at all convinced in the present case that either of these grounds has been substantiated. Even if I were so satisfied, however, I do not think that I would have power in these proceedings to disregard or set aside on either ground an Order-in-Council duly promulgated under Section III. It appears to me from the language of the section that by statute the Governor-General himself is made the sole judge in the matter. It is for him alone to determine whether or not the irregularity or defect discovered in the proceedings is one which comes within the wide purview of Section III. He it is who has to be satisfied that the ratepayers have not been misled by the irregularity or defect in question. Once he is so satisfied by his advisers, then he may in his discretion validate the proceedings by Order-in-Council, as he has done in the recent case, and thereupon the validity of the proceedings or of the security for the loan 'shall not be questioned' on the ground of such irregularity or defect This Court has I think no jurisdiction to sit in appeal from the Governor-General's decision in the matter, as I am invited to do in the present case. If the law were otherwise, the result would be that an Order-in-Council under Section III, instead of proving a protection to mortgagees, would be in effect a delusion and a snare to all persons lending money to local bodies. In my opinion the Court cannot in these proceedings go behind or question an Order-in-Council gazetted under Section III, which is good on its face."

Plaintiff Board to pay £8 8s. costs to each defendant.

Solicitors for the plaintiffs: **Burden Churchward and Reid**, Blenheim.
Solicitors for the A.M.P. Society: **Chapman Skerrett Tripp and Blair**, Wellington.
Solicitors for the Attorney-General: **The Crown Law Office**, Wellington.

Sim, J.
Reed, J.
Ostler, J. Mar. 26; April 21, 1925

SAUNDERS v. DISTRICT LAND REGISTRAR. CHURCH PROPERTY TRUSTEES v. REGISTRAR OF DEEDS.

Municipal Corporations Act, 1920—Sec. 335—Subdivision—Meaning of.

These two cases were taken together and involved the proper construction of Sec. 335 of the Municipal Corporations Act 1920. The facts to adopt the words of His Honour Mr. Justice Sim are:

> In the cases now before the Court there has not been anything, I think, which brings them within the section as thus interpreted. All that Mr. Saunders did was to sell part of his holding without any intention or idea of selling the balance. In the other case the Church Property Trustees, being the owner of a block of about 70 acres of land, offered the whole block for sale by public tender. No satisfactory offer was received for the block. The Christchurch Drainage Board then negotiated for and bought a small piece of the block for the purposes of the Board. After that Canterbury College offered to purchase a further portion of the block, which was selected and defined by the College acting by its Chairman. This offer was accepted. Subsequently the Trustees received

an offer from one Daniel Neil to purchase the balance of the block, and this offer was accepted. The position with regard to these sales is thus stated in his affidavit by Mr. C. F. Smith the Church Steward to the Trustees:

11. That none of the three sales was made on a plan of subdivision for sale previously prepared or approved by the Plaintiff, but in each case the purchaser selected for itself or himself the piece of land it or he desired to buy and on its own initiative approached the plaintiff with its or his offer to purchase the piece of land it or he had so selected.

12. That prior to such sales the plaintiff had not formulated or adopted any scheme or plan for the subdivision of the said block for the purposes of sale but was desirous of selling the whole in one block without subdivision and none of the sales was made pursuant to any scheme for disposing of the balance of the land save and except the final offer of Daniel Neil which was for the balance of the land left after the sales previously made to the Drainage Board and Canterbury College respectively.

Saunders in person.
Andrews for Church Property Trustees.
Fair for defendants.

The Court unanimously held that there was, in neither case, a subdivision within the meaning of Sec. 335.

SIM J. after discussing the effect of **In re Francis and Overend** 21 N.Z.L.R. 394: **In re Gaulter** 22 N.Z.L.R. 787: **In re Palmer** 23 N.Z.L.R. 1013: **Riddiford v. Mayor of Lower Hutt** 24 N.Z.L.R. 54: **In re Land Transfer Act** 25 N.Z.L.R. 383: made the following observations:

"The decisions in the cases already mentioned, in so far as they can be applied, ought to be treated, I think, as authorities in the construction of section 335 of the Municipal Corporations Act 1920. This was not disputed by Counsel for the District Land Registrar, who, however, sought to distinguish them by saying that the language used in section 335 was not the same as that contained in the sections of the Public Works Acts already referred to. Section 335 deals with the case of an owner who proposes to subdivide his land for purposes of sale lease or other disposal. It does not say 'subdivide into allotments,' and this, it was argued, made the decisions inapplicable, so that the section ought to be read as imposing the duty of submitting a plan and getting it approved in every case where an owner proposed to deal with any part of his land by sale lease or other disposition. It is difficult to understand how a subdivision could be made other than into allotments, and the subsequent part of the section makes it clear that this is what the Legislature meant, for there is to be 'a plan of subdivision showing the several allotments.' I think, therefore, that the subdivision contemplated by the section is a subdivision into allotments, and that this expression must be interpreted in accordance with the decisions already referred to. In order to constitute such a subdivision it is not necessary to have any laying out of a new road, and to that extent the decision in **Riddiford v. Mayor of Lower Hutt**, 24 N.Z.L.R. 54 is inapplicable But there must be something more than a proposed sale lease or other disposal of part of a holding, the owner intending to retain the balance for himself. That is the result of the decision in **In re Francis and Overend**, 21 N.Z.L.R. 394 and **In re Gaulter**, 22 N.Z.L.R. 787 when applied to section 335."

His Honour then referred to the particular facts of the two cases and concluded his Reasons thus:

"The sales were thus all separate and independent transactions. They were not part of any scheme of subdivision on the part of the Trustees, and in my opinion there has not been any subdivision within the meaning of the section. This view of the matter is supported by the opinion expressed by Mr. Justice Williams in the case of **In re Palmer**, 23 N.Z.L.R. p. 1020 to the effect that sales made in this way would not have come within section 21 of the Act of1900. It is supported also by the answers given by the Court of Appeal in **In re Land Transfer Act**, 25 N.Z.L.R. 385 to questions 5, 8 and 10.

"I think, therefore, that in Saunders' case an order should be made directing the Registrar to register the Transfer, and directing the costs of both parties to be paid out of the assurance fund. Mr. Saunders' costs should be fixed at 20 guineas and disbursements and the Registrar's at £15 15s.

"In the other case an order should be made declaring that the Defendant was not right in law in refusing to register the conveyances in question. As there is no fund out of which the costs of the originating summons can be ordered to be paid, the parties will have to pay and bear their own costs."

REED J. held that examples might be multiplied to show that unreasonable results would flow from construing the section in question in the way contended for by the defendants. "Such a construction," he said, "of the section, therefore, would mean that rights, which already existed before the Statute was passed, would be taken away and that the Legislature had enacted that which was unreasonable and opposed to natural justice. Are then the words of the Statute so plain and unequivocal that it is clearly manifested that such was the intention of the Legislature?

A comparison with a Statute with provisions in pari materia with the provisions of the Municipal Corporations Act is instructive in considering this question. The Public Works Act 1902 provides in Section 2 for the case of an 'owner of any land who sells any part thereof' and in Section 3 'where land . . . . is subdivided into allotments for the purposes of sale.' Here there is a clear distinction made between the two cases that of an owner who sells a part of his land only and of one who subdivides into allotments for sale. Section 2 includes all sales of land whether a piece only or a sale on a subdivision, whilst Section 3 deals only with sales on a subdivision. The different meanings to be attached to these two sections is clearly pointed out by Williams J. in **In re Land Transfer Act and Public Works Act** 25 N.Z.L.R. 385, 399 where in comparing the sections he says: 'The section (section 2) applies equally whether the land is subdivided into allotments or whether the owner sells only a single piece of it.' If in the present case the Legislature had intended to provide for the case of 'an owner of any land who sells any part thereof' the use of the words would have made that intention clear, it cannot therefore be said that the words that are used are so clear and unequivocal that, in spite of all absurdities that would follow, the construction contended for must be placed upon them.

Again, in the Public Works Act Amendment Act, 1900, Section 20, there is this provision: 'In every case where the owner of land hereafter subdivides the same into allotments for the purpose of disposing of the same by way either of sale or of lease etc.'

The meaning of the words 'subdivides the same into allotments for the purpose of disposing of same by way of sale' was considered in the cases of **The Mayor of Wellington in re Francis & Overend** 21 N.Z.L.R. 394, **Gualter v. District Land Registrar** 22 N.Z.L.R. 787 and **In re Transfer to Palmer** 23 N.Z.L.R. 1013.

Although the learned Judges that formed the Courts in these cases were not, in all matters, in accord, in no judgment is there anything inconsistent with the observation of Williams J. in the last mentioned case at p. 1020 as follows: 'It cannot be said that if a man has a piece of land which he advertises for sale as a whole and then sells a part of it, that in any business sense there has been a subdivision of the land into allotments for the purpose of disposing of the same by way of sale, and that the part sold is one of the allotments.

I am of opinion, therefore, that if a person, owning land within a borough, sells a part of it and retains the balance he does not thereby subdivide his land for the purposes of sale within the meaning of Section 335 of the Municipal Corporations Act 1920. In order to bring a sale of property within that section there must be something in the nature of a scheme or plan of subdivision, the public being invited to purchase by reference to such scheme or plan."

Solicitors for Saunders: **R. L. Saunders**, Christchurch.
Solicitors for Church Property Trustees: **H. D. Andrews**, Christchurch.
Solicitors for defendants: **Crown Solicitor**, Christchurch.

Sim, J. Mar. 13, April 8, 1925
Adams, J. Christchurch.

HOBBS v. SHIELDS.

Negligence—Contributory negligence pleaded—Effect on application by defendant for judgment or nonsuit.

The plaintiff riding a motor bicycle collided with the defendant driving a motor car at the intersection of two roads. He alleged negligence on the part of the defendant and sued for damages. The defendant denied negligence and pleaded contributory negligence. At the trial the jury found for the plaintiff and awarded damages. The defendant obtained leave and moved for judgment for defendant or nonsuit or failing either of these then for a new trial on the ground that the verdict was against the weight of evidence.

Twyneham for Plaintiff.
Thomas for Defendant.

SIM J. delivered the judgment of the Court. A new trial was ordered. As is usual in such cases the Court did not discuss the evidence. The learned Judge made the following comments with regard to the application for judgment for defendant or nonsuit: The ground on which the first two applications were based was that "in the evidence of the plaintiff and of his witnesses contributory negligence was disclosed on the part of the plaintiff." But, as pointed out by Mr. Beven in his work on Negligence (3rd ed.) p. 138, "contributory negligence implies a **prima facie** case established by the plaintiff. To displace a **prima facie** case by showing contributory negligence implies a preference of one of two differing views. This preference is the prerogative of a jury." It follows from this that the defendant was not entitled to have the case withdrawn from the jury at the close of the plaintiff's case, and is not entitled to have the question of the plaintiff's alleged negligence determined by this Court on the present motion. The defendant's application for a nonsuit or a judgment in his favour is, therefore, refused.

Solicitor for Plaintiff: **Roy Twyneham**, Christchurch.
Solicitor for Defendant: **Charles S. Thomas**, Christchurch.

Alpers, J. April 23, 1925.

CLARK v. DILLON AND ANOTHER.

Trustee—Breach of trust—Deed of covenant—Power of sale in will—Sec. 54 Property Law Act—Meaning of—Instigating requesting or consenting to breach of trust—Where legal and illegal part of covenant are severable.

Action for moneys due under Deed of Covenant which the defendants pleaded constituted a breach of trust and was therefore not binding on them. They were executors of the will of Alfred Dillon deceased the sale of whose property had given occasion for the execution of the Deed of Covenant in question.

Harker for plaintiff.
Strang for defendant.

ALPERS J. said in reference to the power of sale in the will which was practically identical with the wording of Sec. 54 of the Property Law Act 1908 that it authorised them to sell upon "any special conditions as to title or otherwise." Commenting on the effect of this the learned Judge said: "And this, it is suggested, would warrant almost any terms they pleased as to time and conditions of payment. Reliance is placed upon **Quill v. Hall** 10 G.L.R. 530 which decides that in such a case as this the sale and mortgage are to be regarded as one transaction and that a trustee is justified under such a trust for sale to sell for terms other than cash. Counsel for Plaintiff urges that the decision must be read subject to the limitations expressed in the judgment of Cooper J.: 'In my opinion, therefore, trustees for sale with power to invest on mortgage of real property have power when selling the trust property to allow a proper proportion of the purchase money to remain on mortgage. Their duty is to see that the amount so allowed to remain on mortgage does not exceed the amount which if the property had been an independent property they could as trustees properly advance out of the trust funds of the estate.' The result of that case is, however, fairly stated in two subsequent cases. **In re Ellis: Ellis v. Ellis** 17 G.L.R. 384 and **re Heargarty** 1916 G.L.R. 199 neither of which was cited by Counsel. In the former case Mr. Justice Chapman citing **Quill v. Hall** says (page 385): 'The expression 'sell or otherwise convert into money' was not however intended to compel the Trustees to sell for cash to the detriment of the estate. It left it open to the Trustees to make the best sale they could in accordance with the mode in which such sales are usually effected in this country.' No doubt the statutory margin of security for trust investments is intended to guard against the very oscillation of 'boom' and 'slump' which occurred here: but a sale on a 25 per cent. deposit where the vendor does not part with the title really involves no risk to the trust estate and the Court would probably in the circumstances have given its approval to the sale on the terms proposed. The Court's approval was however in fact not applied for: the parties preferred to compromise the difference between them and that fact is sufficient consideration to support the covenant. In so far as the Deed of Covenant is an agreement on the part of the Trustees to pay to one beneficiary cash in full for his share, in preference to and at the expense of the other eleven beneficiaries, it does, no doubt, constitute a breach of trust."

The learned Judge then reviewed the evidence and found that the plaintiff had not "instigated or requested" the breach of trust. He said that a cestui que trust does not instigate request or consent in writing to a breach of trust merely because he becomes party to a document which is subsequently acted upon by the other party to it in such a way as to constitute a breach of trust. In re Somerset, **Somerset v. Earl Poulett** 1894 1 Ch. 231 per Lindley L.J. at 265. He added: "No doubt the Deed of Covenant is a somewhat loosely drawn document and here and there a sentence lends colour to the construction the Defendants seek to place upon it. It is not however, to be looked at piecemeal but as a whole and its legality will be presumed against the Defendants' contention. Paragraph 4 was evidently intended by the plaintiff's solicitor to guard against the possibility that the document might be construed in the sense now contended for by the defendants. The Court never lends its aid to the commission of a breach of trust and therefore does not decree performance of a contract which involves one. But looking at the document in its entirety and giving due weight to the presumption of legality." . . . . "Where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be created by Statute or by the Common Law you may reject the bad part and retain the good. (Willes J. in **Pickering v. Ilfracombe Railway** 1868 37 L.J.C.P. 123).

A mortgage for example granted by a corporation may be ultra vires as a charge upon the property mortgaged and yet be valid as to the covenant for repayment. (**Payne v Breton** 1858 27 L.J. Ex. 495). So here, we may reject the agreement, if agreement there be, to pay the plaintiff out of the trust fund and leave binding upon the defendants that which they contend is only a secondary liability—the obligation to pay out of their personal shares."

Solicitors for the plaintiffs: **Lee Mackie Harker & McKay**, Waipawa.
Solicitor for defendants: **S. W. Strang**, Waipawa.

Stout, C.J.
Sim, J.
Reed, J.
Adams, J.
Ostler, J.

Mar. 20, Ap. 21, 1925.
Wellington.

ATTORNEY-GENERAL AND OTHERS V. MAYOR AND OTHERS OF CITY OF WELLINGTON.

Trust—For benefit of inhabitants—Vague and indefinite—Wellington City Reserves Act, 1871—Local body loan—"Particular purpose"—Whether proposed elevator or lift is within "improved access" under heading "Street Works."

The evidence of this case was taken before **Stout, C.J.**, and then reserved for consideration of the Full Court. The statement of facts is taken from the judgment of **Reed, J.**

The ratepayers of the City of Wellington have authorised the Wellington City Council to raise a loan of £129,150 in respect of a purpose designated on the voting papers as Proposal No. 2. It is headed "Street Works" and the details are subdivided as follows: Permanent Road paving, then follows a list of streets; New Road Brooklyn to Vogeltown; Stormwater Drainage and Foreshore Improvements Island Bay; Improved access to Roseneath; New Road to Khandallah; Widening Evans Bay Road from Oriental Bay to Kilbirnie; Widening Luxford Street; Widening Adelaide Road; Road to Karori via Raroa Road.

The City Council having received the approval of the ratepayers to Proposal No. 2—Street Works, it is entitled to raise the loan and proceed with the works including "Improved Access to Roseneath."

It is proposed to carry out this work by means of a contrivance that will lift passengers from the Oriental Bay Road to the heights of Roseneath on an inclined place at an angle of 34 degrees. It will enable passengers to travel from Oriental Parade to a certain Crescent. As to the name to be applied to this contrivance, there has been much controversy, witnesses for the plaintiff call it a tramway and witnesses for the City Council say it is a lift or elevator. I think it would not be improper to describe it by either term; in any case I think it comes within the class of vehicle described in Section 172 (4) (n) of the Municipal Corporations Act, 1920, as "elevators, moving platforms, and machinery for passenger traffic."

The projected scheme necessitates the use of a certain part of the Town Belt. This part is vested in the City Council by virtue of a Deed of Conveyance dated the 18th January, 1883, executed by Sir James Prendergast as the officer administering the Government for and on behalf of the Queen. It should have been conveyed in 1871 by the Superintendent of the Province of Wellington in accordance with the provisions of the Wellington City Reserves Act, 1871, but was omitted from the conveyance executed in pursuance of that Act. By virtue of the "Abolition of Provinces Act, 1875," this land became vested in Her Majesty. The Deed recites these facts and proceeds:

> "And whereas the Corporation are desirous that the said parcel of land . . . should be conveyed to them upon such trusts and for such purposes of public utility to the said City of Wellington and its inhabitants as are hereinafter declared concerning the same." The habendum is "To hold the said parcel of land and premises unto the Corporation subject to the provisions of 'The Wellington City Reserves Act, 1871' . . . upon trust for the use and benefit of the inhabitants for the time being of the said City of Wellington in such manner as the Corporation shall from time to time direct and declare, but nevertheless . . ."

Then follows power to use the land as a quarry.

Taylor and D. S. Smith for plaintiffs.

O'Shea and Hemery for defendants.

SIM J. agreed with the judgment of Reed J. on both questions. On the question of the construction of the conveyance from the Crown, Sim J observed: By Section 4 of the Wellington City Reserves Act, 1871, the conveyance has to be "upon such trusts and for such purposes of public utility to the City of Wellington and its inhabitants as shall in and by the deed or deeds of conveyance thereof be expressed and declared." The trust declared by the conveyance was this: "Upon trust for the use and benefit of the inhabitants for the time being of the said City of Wellington in such manner as the Corporation shall from time to time direct and declare." A trust for the use and benefit of the inhabitants of the City of Wellington was, it was argued, a good charitable trust, while a trust for purposes of public utility would not be a good charitable trust, for the reason that there might be some purposes of public utility which were not charitable. In connection with this question Counsel referred to the judgment of Lindley L.J. in **In re Macduff** (1896) 2 Ch. 451, 466, 467. The distinction thus sought to be established by Mr. O'Shea may be sound, but, in my opinion, it does not help his case. In order to comply with the requirements of the Statute, the conveyance must select one or more definite purposes of public utility to the City of Wellington, whether charitable or not, and declare these to be the purposes for which the land is to be held. But the conveyance has not done that, because the purposes of public utility for which the land is to be held are just as vague and indefinite as they were before the conveyance was made. I think, therefore, that the conveyance does not comply with the Act of 1871, with the result that it is void: **Queen v. Hughes**, L.R. 1 P.C. 81; **Solicitor-General v. Mayor of Wellington**, 21 N.Z.L.R. 1.

REED J. said inter alia: "The plaintiffs claim that any expenditure by the City Council on the proposed scheme would be ultra vires as not having been authorised by the ratepayers. It is contended that the heading to Proposal No. 2—"Street Works," and the nature of the other projected works grouped under that heading, limits the powers of the City Council in providing 'improved access to Roseneath' to actual works on streets, as for instance a road or street to Roseneath, and that the scheme is not a street work. If there had been a separate proposal 'Improved access to Roseneath' with a specified sum of money allocated to it there is no doubt that the Council could have carried out any scheme which would provide access. I think there is no necessity to describe with particularity the means that a local body proposes to adopt to carry out the 'particular purpose' required to be stated in compliance with the provisions of Section 9 (a) of the Local Bodies Loans Act, 1913. In **In re Wanganui Borough Council** (1922) N.Z.L.R. 500, 505, Mr. Justice Sim held that the Act did not require a Council to specify with particularity and precision the actual proposed extensions of a tramway system, that it would be sufficient to specify generally extension of tramway system. So in this case it was unnecessary for the Council to specify the means it proposed to adopt to improve the access to Roseneath. This being so, does the fact that, instead of making it a matter of a separate proposal, it is under the heading of 'street works' and is grouped with a number of undoubted street works, restrict the City Council to providing the improved access by means of a street? I think that the heading taken in conjunction with the grouping undoubtedly limits the powers of the Council to a work which, reasonably, can be said to come within the term street works.

"This narrows the question to whether the proposed scheme is a street work. I think it is. It is so treated in the Municipal Corporations Act, 1920. Division VI. of that Statute deals with the 'Particular Powers of the Council' and Part XXI. of that Division with 'Streets, Bridges, and Ferries' and Section 172 (4) provides: 'The Council shall have power in respect of every street, to do the following things.' The powers are then set out, commencing with the construction and repairing of streets, surveying and laying out new streets, diverting or altering the course of streets, and including the power of erecting shafts or structures on streets in connection with drainage, and so on, concluding with subsection (n) which gives the Council the power 'for the purpose of providing access from one street to another or from one part of a street to another part of the same street, to construct on any street, or on land adjacent to any street, elevators, moving platforms, and machinery for passenger traffic, and such subways, tunnels, shafts, and approaches as are required in connection therewith.' The Act therefore treats the provision of that means of access between streets as being a street work. I have already stated that I consider the contrivance adopted by the Council as falling within the description in the subsection. It will be necessary to the lawful construction of the work that it starts from a street and ends at a street and that it is erected either on a street or over land adjacent to a street. Provided those conditions are complied with, I think the carrying out of the scheme is in accordance with the mandate of the ratepayers."

To the contention on behalf of the defendant that the Crown had sufficiently expressed and declared the trust in declaring that it is to be for the use and benefit of the inhabitants of the City of Wellington, the learned Judge said: "Now it may be first noted that the Crown does not purport to delegate the duty; on the contrary the deed expressly purports to declare the purposes of public utility for which the land is to be held. The only question, therefore is: has it done so sufficiently? I do not think it has. In my opinion there is practically no difference between 'for such purposes of public utility to the City of Wellington and its inhabitants' and 'for the use and benefit of the inhabitants . . . of the said City of Wellington.' The deed appears to me to do nothing more than paraphrase the words public utility and altogether fails to declare the objects. Although purporting not to do so, the Crown in effect has delegated its authority to the City Council. The power therefore has not been properly exercised. This being so, the conveyance is void and the land reverts to the Crown to be held subject to the provisions of the Wellington City Reserves Act, 1871, **The Solicitor-General v. The Mayor and Citizens of the City of Wellington** 21 N.Z.L.R. The Corporation may be able to obtain from the Crown a conveyance of the land upon trusts which will enable it to carry out the proposed work on the land, but until that has been done the plaintiffs are entitled to an injunction against using the land for that purpose.

"There will be a declaration that Deed of Conveyance No. 99249 is void and that the land comprised in that conveyance is the property of the Crown subject to the provisions of the Wellington City Reserves Act, 1871, and, further, there will be an order for an injunction restraining the defendant Council, until the further order of the Court, from proceeding to construct the work in question upon any portion of the lands comprised in that conveyance. As arranged between the parties there will be no costs."

ADAMS AND OSTLER J.J. concurred with the decision come to by Mr. Justice Reed. STOUT C.J. dissented from the remainder of the Court and thought judgment should go for the defendant.

Solicitors for Attorney-General: **Crown Law Office**, Wellington.

Solicitors for other plaintiffs: **Morrison, Smith, and Morrison**, Wellington.

Solicitors for defendants: **City Solicitor**, Wellington.

Stout, C.J. Mar. 9, 20, 1925.
Wellington.

JACKSON v. GOODGER.

Will—"Personal effects"—Meaning of—Whether includes money in Bank and house—Payments by son to mother—For household use—Whether in trust or not.

Defendant is the executor of the will of Elizabeth Goodger. The deceased made the following bequest in her will:

> "And I give and bequeath my clothing and personal effects other than my said furniture unto my daughter Elizabeth Jackson."

The question was whether plaintiff was entitled to money in Bank and in deceased's house under the bequest.

H. F. Johnston for plaintiff.
Cornish for defendant.

STOUT C.J. referred to the following cases in construing the words "personal effects": **In re Wolfe** 1919 2 Ir. p. 491; **Michell v. Michell** 5 Madd 69; **Anderson v. Anderson** 1895 1 Q.B. 749, and **Moodie v. Commins** 22 N.Z.L.R. 510 and held that the money in question was included with the meaning of the words.

To the contention that the paying or giving of moneys from son to mother would be gifts to her as his agent to use for household purposes and that any moneys saved would revert to the son the learned Chief Justice said: "Cases of such a character as **Birkett v. Birkett**, 98 L.T. 540; **Barrack v. McCulloch**, 3 Kay & J. 110 **and Raymond & Raymond and Another**, 31 N.Z.L.R., 69, were referred to. These were cases in which the relationship between a husband and wife was dealt with. A wife is generally in household affairs the agent of her husband and he is liable for her acts, but there can be no inference of agency between a mother managing her own house in her own name in that she became an agent for her son. If the question of agency was raised it would have to be proved and not inferred."

Solicitors for plaintiff: **Johnston and O. & R. Beere**, Wellington.
Solicitors for defendant: **Webb Richmond & Cornish**, Wellington.

COURT OF ARBITRATION

Fraser, J. Mar. 16, 1925

McFADYEN v. GILLOOLY AND BROWN.

Workers Compensation—Death by accident—Dependency—Partial or total—Widow having received moneys from father during lifetime of deceased.

Plaintiff claimed on the basis of total dependency upon her late husband. Plaintiff was daughter of fairly wealthy man and she received benefits from him during his lifetime and from his estate after his death. Plaintiff admitted having received £500 during her father's lifetime and said she did not know what had become of it. She admitted receiving £3000 from her father's estate and said she had placed it all on fixed deposit and that neither principal nor interest had been touched since. Her husband had always handed over to her his wages and this money was used by her for household expenses and her own maintenance and for that reason she claimed as total dependant.

W. J. Joyce for plaintiff.
P. B. Cooke and Murdock for defendants.

FRAZER J. after stating the facts, said: The legal presumption that a wife is solely dependent upon the earnings of her husband is a rebuttable presumption. In **New Monckton Collieries v. Keeling** (1911 A.C., 648, 4, B.W.C.C., 332), it was held that in all cases dependency was a question of fact. The cases **The Public Trustee v. McMahon and Others** (15 G.L.R. 654), **Carleton v. Hague** (16 G.L.R. 512), and **Hickson v. Burnet** (1922 G.L.R. 329), are more or less beside the point. In the first case the dependency was purely nominal, and in the second case there was evidence that the plaintiff had not been maintained by the husband for a number of years, but there was 'a fair probability that her legal rights would have been actively and effectually asserted by her if she had discovered her husband's whereabouts." In the first case **(Public Trustee v. McMahon and Others)**, only £5 was awarded. here the legal right was practically worthless and the compensation accordingly was merely nominal. In the second case **(Carleton v. Hague)**, the Court had to take into consideration the probability of the plaintiff asserting her legal rights successfully, and it assessed the amount of compensation accordingly. In **Hickton v. Burnett**, where the husband had been paying up regularly under a maintenance order, the Court awarded the plaintiff £250 as the value of her legal rights. In the present case the real question for the Court to decide is whether the plaintiff was at the time of her husband's death in fact dependent on her husband's earnings, and, if so, to what extent. The plaintiff says that she used her husband's earnings for the maintenance of herself and for general household expenses, and did not use her own money for those purposes. Now, I think a Court dealing with such a case as this is bound to scrutinise the plaintiff's statement carefully. Here is a woman who has received from her father considerable sums of money over a number of years. If she had not used this money for herself, surely she could have come armed with a statement showing what had become of the money and the accumulated interest. The plaintiff was not at all clear in her evidence, and was most indefinite as to the £500 received before her father's death. When a woman claims on the basis of total dependency, and admits having received money from her father's estate, and cannot account for it, we must assume that she has spent some of it on her own maintenance. We are not satisfied that she has not spent at least some of the money on herself. To that extent she was not totally dependent on her husband. In **Young v. Macklow Bros.** (11 G.L.R. 621), Mr. Justice Sim held that there was not a total dependency. In that case it was clear that the parents of the deceased had sufficient money of their own to keep themselves in decent comfort, and actually did so maintain themselves. The money received from their son was deposited in the Savings Bank and treated as a nest egg. The Court held that the parents were not dependent on the deceased son because they were not maintaining themselves out of the money contributed by the son.

In the present case the facts are different. If a wife has funds of her own but does not use any for her own maintenance or for household expenses, but depends wholly on her husband's earnings, she is totally dependent. We are not satisfied, however, that the plaintiff has established total dependency, for the reasons already given. As I have already said, we are bound to assume that some of the money received from her father was spent on her own maintenance. We have had some difficulty in fixing the amount of compensation, because of our inability to ascertain how much of the plaintiff's money had been spent on her own maintenance. The husband earned £5 or £6 a week and paid this amount to his wife. Notwithstanding the discrepancies in evidence, and a certain amount of hesitancy on the part of the plaintiff in giving the Court the facts, so far as she was able to give them, we are satisfied that the degree of dependency, though not total, was very considerable, and we have decided to award the plaintiff, on the basis of partial dependency, the sum of £500, with funeral expenses amounting to £24 0s. 6d. In view of the unsatisfactory nature of the evidence, we fix the costs of the action at £8 8s., which is on a somewhat lower scale than usual.

Solicitor for Plaintiff: **W. J. Joyce**, Greymouth.
Solicitors for Defendants: **Park & Murdock**, Hokitika.

Frazer, J. Ap. 21, 24, 1925.
Auckland.

DOWSE v. R. M. AITKEN AND SON.

Workers Compensation—Mine—Meaning of—Mining operations—Meaning of.

In a claim by the plaintiff for compensation in respect of an accident received while dismantling an aerial rope-way at an old and disused mine the Court was called upon to consider the meaning of mine and mining operations.

O'Regan for plaintiff.
H.P. Richmond for defendant.

FRAZER J. after dealing with the facts of the case in giving judgment for the defendant said: "The word 'mine' is defined by the Mining Act 1908 as every parcel of land in, is one which comes within the wide purview of Section III.

and the word includes also all machinery used in such operations. 'Mining operations' are defined by the same Act as including, inter alia, the erection, maintenance and use of machinery in connection with mining. The plaintiff, in order to succeed must satisfy the Court that the dismantling of machinery on a former mining property, that has ceased to be used as a mine, is a mining operation carried on in a mine. It appears to us that the words 'are carried on', appearing in the definition of a mine, cannot reasonably be given the meaning 'have been carried on,' for that would have the effect of making every abandoned claim a mine for all time, and would lead to endless confusion and difficulty. Further, the words 'erection, maintenance and use of machinery' in connection with mining operations contemplate that mining is actually being carried on or is about to be commenced, and, in our opinion, we would improperly strain the meaning of the words if we were to treat them as being wide enough to include the dismantling or demolition of plant that had formerly been used for mining purposes on a property now no longer used as a mine.

"It is open to question, too, whether the word 'mine' should, for the purposes of The Workers Compensation Act, 1922, be given the meaning given to it by The Mining Act, 1908. The Mining Act deals with mining operations generally, and Section 63 of The Workers Compensation Act was enacted for the benefit of mining contractors—a class of men who undertake certain kinds of work in mines on a contract system. For the defence, it was contended that the word 'mine' in Section 63 of The Workers Compensation Act, should be given the meaning found in most dictionaries—'an excavation used for the purpose of digging out metals or minerals.' Some dictionaries, however, give as a secondary meaning, 'a place where such minerals may be obtained by excavation,' a somewhat wider definition. We think that it is probable that the meaning to be given to the word 'mine' in The Workers' Compensation Act should not be as narrow as that contended for by the defence, but should be wide enough to cover the places in which mining contractors are employed. In view, however, of the decision to which we have come on the very wide definition given in The Mining Act, it is unnecessary for us to decide this point, and attempt a precise definition of the word 'mine' in Section 63 of The Workers Compensation Act."

Solicitors for plaintiff: **P. J. O'Regan**, Wellington.
Solicitors for defendant: **Buddle Richmond and Buddle**, Auckland.

LAND AND INCOME TAXATION.

by
F. J. Rolleston, Esq., M.P.

The system of direct taxation on land and income dates from the year 1891. The law imposing a tax on land had actually been enacted some 13 years previous in the year 1878, but this law was never operative. It was repealed in the following year by the Act which imposed a flat tax on all property, both real and personal, known as the property tax. The Act of 1878 imposed a flat tax on one halfpenny in the pound on the unimproved value of land with a provision that all land of an unimproved value of £500 or under should be exempt. There was no provision for graduation, or for any exemption other than that already mentioned. The Land and Income Tax Act of 1891 abolished the property tax and effected a notable change in the system of taxation in that it introduced for the first time a direct tax on both land and income and also the principal of graduation in regard to both The main principles of the Act of 1891 subject to various amendments made from time to time still remain as part of our taxation system.

The principle of the land tax created by the Act of 1891 was that all land should be taxed on its unimproved value at the rate of 1d. in the £ up to £5000 after deducting all mortgages, and after £5000 the graduated tax was imposed without any deduction for mortgages. All mortgages were taxed at 1d. in the £, so that in all cases the amount lost by the deduction of the mortgage was made up; but as the mortgage, based on the capital value, in many cases exceeded in amount the unimproved value, it often happened that valuable properties would pay no land tax, while the tax on the mortgage would exceed the tax which would have been assessable on the land only. The amount of the mortgage tax was in 1902 reduced to ¾d. in the £, a reduction which seems to show that the real purpose of the tax was lost sight of. When the mortgage tax and the land tax were levied at the same amount, the revenue would not suffer by the device of a land owner placing a mortgage on his property in order to avoid or reduce his land tax. In 1916 the tax on mortgages was abolished and income tax on income from mortgages was substituted, and this principle is still in force. It has however one drawback in that its effect operates unequally as between different classes of lenders. A man with a capital of £5000 can lend his money on mortgages of 6 per cent. and receive for himself the full rate of interest without deduction for tax, whereas an institution or individual with a large capital would by lending at the same rate have to submit to a large deduction for income tax. The result has been that the large lending institutions can afford to lend money on mortgage only at a high rate of interest. The abolition of the tax on mortgages meant of course that, if revenue from land tax was to be maintained, the question of the amount deductible for mortgages would have to be reviewed. Consequently in the following year it was provided that the maximum deductible for a mortgage should be £1500, and then only if the unimproved value did not exceed £3000. This exemption was reducible on a sliding scale if the value exceeded £3000, and disappeared altogether when the value reached £6000. Later on when in consequence of the war requirements the land tax became oppressive—more on account of its weight than of its incidence—there was a demand for some relief; and in 1920 relief was granted in the easy but quite unscientific way of granting a further deduction in the case of mortgaged land. The effect of the amendment of 1920 was that the maximum amount deductible for mortgages was raised to £4000, where the unimproved value did not exceed £6000, reducible on a sliding scale and disappearing altogether when the unimproved value reached £8000. In 1924 a further exemption was granted and the maximum amount deductible for mortgages was raised to £10,000 where the unimproved value did not exceed £10,000 reducible on a sliding scale and disappearing altogether when the unimproved value reached £15,000. The effect of this amendment in 1924 is still to be seen but it is certain that it will mean a considerable loss in revenue. As nearly half the land assessable for land tax is owned in the town by business people it is obvious that the increased mortgage exemption will be taken advantage of to the fullest extent, with the result that many valuable sites will either escape land tax altogether or else pay very little. In fact it may be said in the words of one of our most eminent judges that the law in regard to taxation of land of an unimproved value not exceeding £10,000 is now "so framed that no person

with his wits about him need be taxed under it unless he likes."

Another effect of this mortgage exemption is that, as the tax is assessable on the value of the land less the amount of the mortgage as at 31st March, sales of land which are well mortgaged and are being acquired by other land owners will be fixed to take effect on 1st April and in this way the purchaser will be able to escape a whole year's tax on the land purchased. It is difficult to see why the principle of levying tax on land should be different from that of levying rates on land. There are no deductions of any kind allowed in the assessment of rates.

The principle of the income tax has not varied materially since 1891. Graduation on the zone system, under which an income of £999 would pay say 6d. in the £ while an income of £1000 would pay 1/- in the £ has been replaced by a graduation on every pound, a much fairer method of assessment. The £300 exemption still remains except that it disappears at £900 and now there is a further exemption of £50 for each child under the age of 18 years. A further small concession has been made in favour of earned income as against unearned income.

The most interesting feature of the income tax was the imposition of the income tax on profits from land. This was imposed as a war measure in 1916 in order to meet the demand for the taxation of alleged profits made by farmers. This tax was equitable in that it was a tax on all profits from land irrespective of the tenure of such land and it taxed rents as well as profits. The abolition of the tax in 1923 was only partial, and has left many anomalies. Thus the rents derived from freehold land are taxable, but the profits are not. Then in regard to leasehold lands, the law is that if such lands are held for pastoral purposes and the lease is a pasturage license for a term of 21 years, or a small grazing run for a term of 21 years with the right of renewal, then profits from such lands are taxable. Profits from lands held for pastoral purposes on any other tenure e.g. a freehold or a renewable lease or a lease in perpetuity are not taxable, nor are profits from land held on any tenure which may be used for agricultural purposes or some purpose other than pastoral.

An interesting point in the assessment of income tax was decided in 1912 in the case of Dalgety v. Commissioner of Taxes (31 N.Z.L.R. 260). In this case a run-holder had returned his stock on hand at the end of every year at the uniform price of 5/- per head. Subsequently on a clearing sale the sheep realised 8/11 per head. It was held that the surplus over 5/- per head was income and taxable accordingly. In later years when the value of stock had advanced considerably and sheep stations were being sold freely many large sums were collected by way of income tax under the authority of this case because it had been the practice among many runholders to fix low standard values in their income tax returns. It was not surprising therefore that the principle of the decision was challenged in the case of Anson v. Commissioner of Taxes (1922 N.Z.L.R. 330) but the Full Court in this last case upheld the decision in Dalgety's case. In a later case of Macfarlane v. Commissioner of Taxes (1923 N.Z.L.R. 801) a similar point came up for a decision in a slightly different form. In that case standard values and the valuation made for probate duty. The and on his death the Commissioner claimed to treat as income the difference between these standard valus and the valuation made for probate duty. The majority of the Court (Stout C.J., Stringer and Adams J.J.) held that Dalgety's case and Anson's case were distinguishable on the ground that in those cases an actual sale of the stock had been made, while in Macfarlane's case no sale had been made. The minority dissenting judgments of Hosking and Salmond J.J. put very forcibly the case for the other point of view viz. that it made no difference whether the tax-payer's business came to an end by death or by realisation, and it is difficult to escape from the reasoning of these dissenting judgments. The law however as established by this decision appears to be that the principle of Dalgety's case and Anson's case applied only where an actual sale of the assets is made. Speaking generally the Land and Income Acts have not given rise to much litigation. This is partly due to capable draftsmanship, but more perhaps to the exceedingly fair and reasonable way in which the Acts have been administered.

LONDON LETTER.

The Temple, London,
London, April 2, 1925.

Dear N.Z.,

I am sorry to say that the main thing I have to mention to you this fortnight, in legal matters, is unmentionable: quite unmentionable. I cannot say what litigation is like on your side of the water, but I should like to think that there is some happy country left where occasionally, at any rate, a case is in the list which even the youngest Judge may hear without a blush! However, as I thing I have mentioned these unmentionable matters before I may as well go in medias res at once, and tell you that the whole of the Law has been intrigued, or plagued, ever since I last wrote to you with the personal intimacies of the lives of such as the Dennistouns and their various friends. I use the word "friends" as a euphemism; in those circles of society in which such people move and into which I, for all my most energetic curiosity, have never been able to get so much as a glimpse, affairs apparently have arrived at such a pitch that what we should hardly dare to refer to above a whisper they regard as a mere acquaintanceship! Now this may all seem to be to you very loose talk in a letter written by a lawyer to his brother lawyers, presumably on subjects touching the law; but if you had been able to see (and smell) our High Courts of Justice over this latter period, you would not blame me. As it happens, it has been my personal lot to be myself involved meanwhile in protracted proceedings over the road, in litigation, of which I will tell you later bearing on the malicious presentation of a bankruptcy petition. But, wending my way about the familiar corridors, I have felt more like an unwilling "super" in a film scenario than like a sober and unromantic limb of the law. I will assume, and if I am wrong I trust you will forgive me, that you have followed the press reports of **Dennistoun v. Dennistoun** for yourselves; and I will sum up the whole discussions in the Temple by saying that some say one thing and some say another and the moderate view is that the whole trouble has been that the

jury took up the lady's side of the case from the start and Mr. Justice Macardie's efforts to hold the scales of justice evenly, at any rate till both sides might be heard, have erred a little in an excessive emphasizing of the man's point of view. There resulted an investigation of every incident in the lives of a couple of adventurers, which has been almost beyond reason and endurance; and when at last all the evidence was led and all the speeches made, the expedient was adopted, as it is too often adopted these days, of attempting to keep the jury right by putting a detailed catechism to them. The jury, intending to say one thing quite definitely, have only succeeded in saying a number of things quite indefinitely. Intending to give Mrs. Dennistoun a verdict, which would carry £5000 and costs, they have given such answers as have necessitated the postponement of judgment, the almost certain disappearance of the plaintiff's £5000 and a very doubtful chance, so far as she is concerned, of recovering any of her costs. Meanwhile the Judge has incidentally decided that a dum casta clause cannot be implied in a separation agreement; and if you observe closely the proceedings in the earlier days of the trial, you will also see an interesting decision as to the admissibility of evidence. For the rest, among counsel the name of Mr. Norman Birkett K.C. has come well to the fore, as all of us who ever had work to do at Birmingham knew it must inevitably do, sooner or later; among solicitors, Sir George Lewis has been well in the limelight, and there was more than a breeze between him and his brother professional in the course of the action.

From this we may turn, aptly, to the subject of Sir Evelyn Cecil's **Judicial Proceedings (Regulation of Reports) Bill,** a measure intended to exclude this sort of matter from the press or at least to confine it to very narrow (and uninteresting) limits. This project of legislation does not now make its first appearance; little more than a year ago the same attempt was made to effect the purification of the newspapers, in this respect. Among the press itself, there was the surprising but highly praiseworthy combination between the "Morning Post" (organ of all that is most conservative) and the "Daily Herald" (organ of all that is least conservative) to effect the reform from within. This failing, there followed a movement in both Houses of Parliament, with a view to legislation. As you know, this failed of its object, in the face of the many fatal obstacles which were brought to light very many years ago, when the whole subject was thrashed out in the prolonged and voluminous proceedings of a Royal Commission. It is safe to say that Sir Evelyn Cecil's present Bill would never have survived the first struggles for existence, but for the surfeit of unpleasant cases suddenly appearing together, to-day. The press actively condemns the whole project of its restriction, and you may be quite sure that little or nothing will come of it.

The Court of Criminal Appeal (the Lord Chief Justice, Rowlatt and Swift J.J.) were in a punitive mood, to say the least, last week. So far as the appellant prisoners were concerned, all was for the best in the best of all possible worlds; their convictions were quashed, and they sat on the dock, as free men, listening to the advocates for the prosecution receiving their punishment. In **Rex v. Morgan** the trouble was that a new indictment had been presented, after the preliminary enquiry, without leave and in reliance upon the case of **Rex v. Mosley** (1924) 2 K.B. 187, which decides that a fresh count may be added to an indictment without the leave of the Court or without any further binding over of the prosecutor to prosecute, provided, of course, that it turns upon facts already disclosed in the depositions. The Court of Criminal Appeal ruled that the presenting of a fresh indictment was a thing altogether different from the adding of a fresh count to an indictment, and that the rules applying to the latter by no means covered the former. My young friend, Bertram Long, who appeared for the Crown and was in further difficulties as to the giving in evidence of documents without the previous giving of notices to admit or produce, had a very rough passage. In **Rex v. Baldwin** the whole profession of the Bar came in for a sound drubbing, and, if I may venture as one of the accused to say so, it most richly deserves it. In the particular case, the advocate had cross-examined the accused into arguing to such degree about the effect of his evidence, that a foundation was laid for putting in evidence as to his antecedents, which being done the accused was convicted by a too well-informed jury. The Lord Chief Justice protested hotly against the ever-increasing habit of counsel, of driving a witness to argue with them by putting such questions as "Is not the effect of your evidence. . ." this, that, or the other? What the Court objected to was the position, ensuing, in which a witness, in altogether disadvantageous circumstances and with but an amateur's experience, finds himself arguing the case with counsel, a skilled and professional controversialist with all the amenities and advantages, of the stage, in his favour. The rebuke was, I have said, well deserved, but less by the Bar to which it was addressed than to the leading lights, such as were at the very moment committing all the offences, referred to, in the sensational cases proceeding elsewhere. The Bar which appears in the Court of Criminal Appeal consists for the most part of the younger men; and, whatever the Lord Chief Justice may say the younger men keep (or, if it is preferred, are forced to keep) a much stricter discipline upon themselves, in these matters. Approving His Lordship's determination to have the witness protected and to have his cross-examination kept within the proper bounds, I venture heartily to disapprove all their Lordships' timidty in letting the fashionable performers proceed exactly as they will in such matters.

My bankruptcy case (Wilson v. Jones: vide "Morning Post," 23rd March) has more than a personal interest, in as much as it is a sequel to a famous appeal of the past. Perhaps you recall the case of **Wilson v. The United Counties Bank** (H.L.) (1920) A.C. 102? The plaintiff, Wilson, at any rate, could never forget it; and he had reason, since it brought him in some £46,000 damages where he can hardly have expected to get any damages at all, if he had been cautiously advised! I hesitate to detail to you the lengthy story, the more so as it is all in the reports: **In re Wilson's Deed** 85 L.J. (K.B.) 329, and page 337 in the Court of Appeal: **In re Wilson** (ibid) 1408, and page 1413 in the Court of Appeal. If the rather unusual form of action, based upon a claim in damages for malicious presentation of a bankruptcy petition and malicious procuring of an adjudication in bankruptcy happens to interest you, I may refer you to the judgments of Horridge and Rowlatt J.J., at pages 1410-1413 of

the above report, for the earlier chapters of the story. You will there see that Wilson, going abroad in 1914 and leaving his affairs trembling on the verge of bankruptcy, entrusted the Bank with the management of the latter and, to avoid bankruptcy, gave his sister a power of attorney to effect a Deed of Assignment, for the benefit of his creditors. You will further see how, discovering a flaw in the execution of that Deed, he held up the proceedings of the Trustee, under it, whereupon his creditor (Jones) acting on behalf of all the creditors, procuring his bankruptcy. Horridge and Rowlatt J.J. and the Court of Appeal, the then Master of the Rolls and Sargant J. upheld the action of the creditor and maintained the bankruptcy, which followed the normal course, until there came this astonishing success of the action against the Bank. With the proceeds of that success, Wilson paid off all his creditors, 20/- in the pound and interest; and, having secured his annulment of bankruptcy, launched his action against the creditor, Jones, for malicious presentation, etc. Mackinnon J. trying the latter cause, was sympathetically inclined to a plea of res judicata, upon the grounds that the four Judges above-mentioned had decided the point already. He felt however able to dismiss the action on his own account, in the face of any reasons to a contrary effect which may appear in the dissenting judgment of Phillimore L.J. (See page 1416.) There are three elements essential to the cause of action: malice, absence of reasonable and probable cause, and conclusion of the proceedings (complained of) in the plaintiff's favour. Mackinnon J. found there was no malice, in fact. Even without that finding, and even apart from the question of res judicata, he very much doubted whether the proceedings must necessarily be held to have terminated in plaintiff's favour simply because the bankruptcy was eventually annulled? **Lavery v. Owen** 16 T.L.R. 375 quite definitely asserts that this must be so; but **Lavery v. Owen** is almost impossible to reconcile with the House of Lords' leading case: **Metropolitan Bank v. Pooley** 10 A.C. 210, and Mackinnon J. expressed a doubt whether it had the supposed general application, except in cases of exactly parallel circumstances.

And that, I am ashamed to say, is all my news. I cannot be expected to make news for you, as I think you will readily agree; had you been over here yourselves, you would also readily admit that I could not be expected to find news for you, so long as Mrs. Dennistoun, Mr. Dennistoun, Mrs. Robinson and Mr. Robinson (who, with their Newtons and their Hobbs, were unhappily still with us, till a day or two ago), Mrs Waterhouse and Lady Wilson-Barker and others were occupying all the Courts with startling facts and all the usual sources of gossip with even more startling fancies! Goodness knows it was hard enough to get through with one's own cases meanwhile. There was only this consolation. One might miss a witness, but at any rate there was no risk of losing him. There was no chance of his leaving the Law Courts, for the dull and matter-of-fact life outside! If he wasn't in our Court when wanted, we knew in what Court to find him.—Yours ever,

INNER TEMPLAR.

BENCH AND BAR.

Mr. E. H. L. Bernau, late of Napier, has commenced the practice of his profession in Wanganui in partnership with Mr. C. L. Curtis.

Mr. F. T. Carson, who is 34 years of age, and has for six years been attached to the local office of the Public Trust Office, succeeds Mr. Miller as First Assistant, District Public Trustee.

Mr. S. V. Beaufoy, recently of the firm of Messrs. O'Malley & Beaufoy, Wairoa, has joined Mr. J. Emslie in practice in Timaru.

Mr. Robert Stout, associate to the Rt. Honourable the Chief Justice, was admitted as a solicitor of the Supreme Court on the 4th May on the application of Honourable John MacGregor, by the Right Honourable the Chief Justice.

His Honor Mr. Justice Sim, at Dunedin, has recently made the following admissions to the profession:—

As Barristers:—Mr. J. N. Smith, of the firm of Messrs. Reid and Lemon; Mr. R. S. M. Sinclair, of the firm of Messrs. Moore, Moore and Nichol; and Mr. J. C. Parcell, of the firm of Messrs. Naylor and Parcell, of Tapanui.

As Solicitors:—Mr. R. A. King, of the firm of Mr. E. J. Smith; and Mr. J. E. Stevenson, of the firm of Messrs. Moore, Moore and Nichol.

Mr. G. G. G. Watson, of the firm of Chapman, Skerrett, Tripp and Blair, of Wellington, has been appointed a Commissioner of Oaths for the High Court of Australia and also for all the State Courts of the Commonwealth. He has also recently been sworn in as a Notary Public.

OBITUARY.

SIR THEOPHILUS COOPER.

The Hon. Sir Theophilus Cooper died on the 18th May, aetat 75 years, at the residence of his son, Dr. H. A. Cooper, Eltham. He had been in failing health for some time, but the final illness was short. He was born in Newington, Surrey, England, in 1851, being the eldest son of the late Mr. Theo. Cooper, afterwards of Auckland. He was educated at a private school in London. In company with his father, he came out to New Zealand by the ship Gertrude in 1863. After residing for about two years at Port Albert, Kaipara, where he held a position on the composing staff of the "Auckland Gazette," he removed to Auckland, obtaining employment on the staff of the "Southern Cross." Four years later he relinquished his position and entered the office of the late Mr. J. B. Russell as a law clerk. In a brief period he rose to the position of accountant, but gave up that situation soon after to study for the legal profession. Mr. Cooper, who was articled to Mr. Russell, was admitted a barrister and solicitor of the Supreme Court by the late Mr. Justice Gillies, on June 20, 1878. He was then taken into partnership by his employers, the style of the firm being Russell, Devore, and Cooper. The partnership continued until May, 1883, when Mr. Russell retired. For many years he was a member of the Council of Law Reporting in New Zealand, and a member of the Council of the New Zealand Law Society. During the fifteen years he was a member of the Auckland Education Board, Mr. Cooper did much useful work. For close on ten years he was deputy-inspector of lunatic asylums. Frequently, he was asked to accept nomination for an Auckland seat in the House of Representatives, and he was often mentioned as a prospective occupant of the Supreme Court Bench. He was appointed a Judge of the Supreme Court and President of the Arbitration Court in February, 1901. He continued as President of the Arbitration Court until September, 1903, when Mr. Justice Chapman relieved him. Thereafter, His Honour, in conjunction with the Chief Justice, conducted the business of the Supreme Court in the Wellington judicial district. He retired from the Bench in 1921, in which year he received the honour of knighthood. Since then he lived in retirement at Eltham.

LAW SOCIETIES.

At the Supreme Court, Wellington, on Friday, May 22nd, Bench and Bar united in tributes to the late Sir Theophilus Cooper, an ex-Judge of the Supreme Court, who died recently at the residence of his son, Dr. Cooper, at Eltham.

On the Bench were His Honour the Chief Justice (Sir Robert Stout), His Honour Mr. Justice MacGregor, and His Honour Mr. Justice Ostler. There was also a large attendance of members of the Bar.

"I am glad," said Sir Robert Stout, all present upstanding, "to see so many members of the Bar present on this occasion, even though it is a sad one. It is my intention to refer to the death of the late Mr. Justice Cooper. I had known Mr. Justice Cooper for a very great number of years. I knew him well before he was appointed a Judge of this Court in January or February, 1901, I think, at all events early in that year; and, knowing him well as a barrister, and a friend, and also as a Judge, I can say that there was no man who had a higher ideal of his office than the late Mr. Justice Cooper. He was a specially careful man. He spared no time to keep abreast of his work; and he spared no time to ascertain the realities of the questions he had to deal with. It is true that during the last years of his life he suffered from trouble and disease which prevented him doing what he was accustomed to do; but even to the last, as I know from his communications to me, he was intensely interested in his profession; and I am sure you will all join with the Judges on the Bench in expressing to his wife and children and other relatives, our sincere sympathy in their loss. Even though he has not latterly been as he was in the days of his vigour, still he has been a kindly man of high character and high purpose and high ideals in life. If you read his life, his biography, you will read the life of a man who shed lustre on his profession and did his best for what he believed to be the good of his country.

Mr. Gray, in the absence of the President of the New Zealand Law Society, and as Vice-President of the Society, said: "I wish to say, on behalf of the members of the Bar that they agree with all Your Honour has said of the late Sir Theophilus Cooper, who first took his seat as a member of the Supreme Court Bench in this Court some twenty-four years ago. Many of us had the pleasure of practising before him for a great many years; and we know how thoroughly, how well, and how conscientiously he performed the duties of his high office, and with what untiring courtesy he treated all members of the Bar who practised before him and all witnesses and others who had business in the Court. His Honour has left behind a reputation for care, thoroughness, and ability, which we trust will long be remembered and honoured."

APPRECIATION.

We have obtained the following personal reference to the late Mr. Justice Cooper from Sir John Findlay, K.C., which gives us so clearly the outstanding qualities of this great Judge. Sir John Findlay writes:

"It is now over thirty years since I first met at the Bar this late eminent Judge. He then had the most extensive practice in Auckland, but he also had briefs in many important cases in all the main centres of New Zealand. He often appeared in our Court of Appeal.

"His career at the Bar was a most distinguished one. Blade straight and steel true by nature his weapons of advocacy were never envenomed. In the many cases I had with him and against him he always maintained the highest traditions of his profession, preferring defeat to any departure from forensic honour which might have won him victory. But great as were his gifts as a barrister his temperament best suited the office of a Judge and his appointment to the Supreme Court Bench in 1901 was genuinely welcomed by the Bar of New Zealand as one of the best that could be made. He brought to the discharge of his judicial duties all the qaulities which adorn the justice seat. To patience courtesy and industry he added a deep and thorough knowledge of the law and his judgments will remain a permanent monument of his fitness for his high office. Failing health towards the close of his judicial career dimmed the brilliancy of his legal intellect and his earlier vigorous capacity for work. He had too high a conception of a Judge's duties to continue in that office when ebbing strength began to impair his efficiency and he retired in 1921. He will be long remembered by the legal profession as one whose record both at the Bar and on the Bench was conspicuous for honour, efficiency and courtesy."

CORRESPONDENCE.

The Editor, 9th May, 1925.
Butterworth's Fortnightly Notes,
Wellington.

Sir,—

I have read with interest the chatty letters of your London correspondent. I notice in that last published, an appreciative reference to the new edition of Sir Hugh Frasers Law of Libel and Slander and do not for a moment wish to qualify a word said about that excellent work. I think, however, that it is in the interests of the profession here to call attention to Dr. Gatley's recent work on the same subject because in that work the decisions of our own and other oversea Courts are fully adverted to and the substance of them is in many cases embodied in the text.

Like your London correspondent in his case I too was led on by the literary charm of Dr. Gatley's book to substantially read it through and can speak confidently of the thoroughness and lucidity with which the subject has been dealt with by him.

Yours faithfully,

J. H. HOSKING.