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*"Justice is itself the great standing policy of civil society."*

—*Burke.*

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# Accountancy for Law Students.

For some time past, there has been a growing feeling among members of the profession in all parts of the Dominion that some better qualification in accountancy, at least to a useful degree of realisation and application of principles, should be a pre-requisite for admission as a Solicitor. Recent events have intensified that desire; and opinions are being freely expressed that the purely legal training to which is added a slight course in the keeping of trust accounts, now required of aspirants to the law, should properly be supplemented in the direction indicated.

In 1927, there was added to the subjects of the degree and law professional examinations, a course in what is termed "Trust Accounts and Book-keeping." The paper on this subject, however, is merely a test of rule-of-thumb knowledge. If, on the other hand, the syllabus went further and provided for the law student's tuition in the most simple of profit-and-loss and balance-sheet accountancy, he would be enabled at the outset to grasp the principles of accountancy before undertaking the application of those principles to the necessities of a legal practice.

As it is, the young Solicitor has been accustomed to look upon his strictly professional work as his first care and his all-absorbing duty. The accountancy subject is, as we have said, a mere smattering of knowledge. Men who first tried to keep accounts while attending to the legal aspects of their work, will have very distinct recollections that the accountancy part of the office routine was a burdensome duty, made the more distasteful through unfamiliarity. It was the seemingly necessary evil of their professional lives, largely because they were not so well versed in accountancy principles as they were in legal ones. And mental habits, once formed, are difficult of readjustment.

If the present course were extended to a well-grounded instruction in practical accountancy, from the first principles upwards, a better understanding and liking for the subject would have far-reaching effects for good. The young Solicitor now, with his rule-of-thumb knowledge of a limited extent of book-keeping, is like the driver of a motor-vehicle when a fuse blows out. The amateur in the car can put a new fuse in; but it takes a practical mechanic to discover the cause of the short-circuit. The young practitioner, with his pass in "Trust Accounts and Book-keeping," is in the same position as the amateur driver, with this exception: he is legally responsible for the running of the whole machine.

A further advantage of extending the subject as we have suggested, would be the equipment of members of the profession with a solid ground-work for higher study in those branches of accountancy that touch their own and their clients' affairs. At least one of the affiliated colleges of our University has already offered to provide this useful course; there is no reason why its example should not be followed by the others. Then, the qualified Solicitor would have the opportunity of supplementing his accountancy knowledge by taking courses in (say) executors' and estate accounts, and in criticism of commercial balance-sheets and profit-and-loss accounts.

Many practitioners have to rely on what we may term amateur accountants in their offices. The early years of practice do not justify the appointment of more experienced ones. This position is not a fair one to the Solicitor himself, or to those with whom he deals. In many incidents of life, we profit by our mistakes. But a mistake in a Solicitor's trust account may be fatal; for, if trouble ensues, it is the Solicitor himself who has to bear the expensive responsibility for carelessness or dishonesty on the part of those under him; and he is not so instructed in accountancy as to be able to scent concealed danger. It is a strange, but true, commentary on the present system that one of the looked-for rewards of the profession is the freedom to dissociate oneself from the accountancy side, owing to success bringing with it the means of employing a qualified and experienced accountant. All these difficulties would be minimised, if not overcome, by the young Solicitor's having a useful knowledge of general accountancy principles and practice. This, he does not get in the present examination-subject.

It may be objected that the successful man earns repose from his worrying books of account as a result of his careful personal attention to them in earlier years. But the ruling of the Court of Appeal in a case reported on the next page is significant. The New Zealand Law Society is seen to be alive to the necessity for an authoritative ruling on a question that any thinking man should have been able to answer without Their Honours' assistance. This is by no means a criticism of the Law Society; quite the reverse. It had in mind the duty of impressing not junior practitioners solely, with the seemingly elementary book-keeping duty of holding trust and personal funds in different compartments.

We do not intend to stress the advantage of being well-versed in the intricacies of company and other commercial balance-sheets, or in the keeping of estate and executors' accounts. Their preparation is largely within the accountant's sphere; but it is surely part of a Solicitor's professional equipment to be able to explain, and, where need be, to question such documents of importance,—often of supreme importance,—to their clients. If the specially-designed student-course of accountancy to which we have alluded were made more comprehensive, the knowledge of principles therein obtained would be followed in many cases by keen desire for further knowledge in the post-admission course we have mentioned. We respectfully suggest to the Council of Legal Education that from every point of view its overhauling of the present accountancy syllabus for law-students is desirable; not merely from the important personal aspect, but also as a means of a Solicitor's advancement and profit at a time when commercial matters are increasingly engaging the attention of the Courts and of the profession generally.

# Court of Appeal.

Myers, C.J.
Reed, J.
Ostler, J.
Smith, J.

September 29; October 2, 1931.
Wellington.

## IN RE F., A SOLICITOR.

**Solicitor—"General Trust Account"—"Separate Trust Account"—Interpretation—Must Contain Only Trust Moneys Excepting Undrawn Costs Properly Deductible—Law Practitioners Act, 1908, S. 47.**

F., a solicitor, banked in the one account, termed "Trust Account," clients' trust funds as well as his own private moneys. Owing to his overdrawing amount of his firm's moneys in such account, a shortage in the trust fund resulted. Repayment was made and no loss to clients followed. The Court, finding it impossible to resist the conclusion that, when he received moneys from his accountant, he knew they were not his firm's property, ordered him to be struck off the rolls. The N.Z. Law Society asked for the Court's ruling as to the banking of a solicitor's own moneys in a "Trust Account."

**Held:** Solicitor's trust account must be separate and distinct from his general account. Practice of banking practitioner's own moneys in account in which trust funds included, is bad, and a breach of S. 47 of the Act. **In re Bruges,** 26 N.Z.L.R. 541, approved.

**Meek and Free** for The N.Z. Law Society.

**Leary** for practitioner.

MYERS, C.J., in delivering the judgment of the Court, said it could not be doubted that the keeping of but one bank account, even though it might be designated "Trust Account," into which a practitioner's own moneys were paid as well as his trust moneys, and upon which he drew for his own working and other expenses, was bad in practice. Not only that, but the Court were clearly of opinion that it was also a breach of Section 47 of The Law Practitioners Act, 1908. In their Honour's opinion "trust account" means an account into which only trust moneys are paid, a "general trust account" (as mentioned in subsection (1) of section 47) being an account into which are paid a practitioner's trust moneys generally, and a "separate trust account" being an account into which are paid the moneys belonging to a special client or moneys held on some particular trust. An account which mixed a practitioner's own moneys with trust funds and upon which the practitioner operated on his own account was not in their Honours' opinion a "trust account" as contemplated by Section 47. Of course, this did not mean that the moneys paid into the trust account might not include some to which the practitioner was entitled for costs owing to him by the client, and disbursements paid by him out of his general account on behalf of the client. Indeed, in practice that was customary and necessary, and the solicitor was, of course, entitled from time to time to draw cheques upon his trust account for moneys that were properly payable to him in this way; but, subject thereto, all moneys in the Trust Account must be held exclusively for the respective persons on whose behalf they had been received and paid out only to such persons or as they directed.

The view taken by the Court as to a solicitor's duty in regard to his keeping a trust account separate and distinct from his general account was, their Honours thought, in accord with that taken by the Court in **In re Bruges,** 26 N.Z.L.R. 541. In that case, it was true that the solicitor kept only a general account into which his trust moneys as well as his own moneys were paid, while in the present case the one account that was kept was designated "trust account." But they thought that the only inference to be drawn from what the learned Judges said in that case was that, in their view, it was the solicitor's duty to keep a trust account entirely distinct from his general account.

Solicitor for Auckland District Law Society: **W. H. Cocker,** Auckland.

Solicitor for practitioner: **L. P. Leary,** Auckland.

# Full Court.

Myers, C.J.
MacGregor, J.
Blair, J.
Smith, J.
Kennedy, J.

July 10, September 14, 1931.
Wellington.

## IN RE RIX.

**Crimes—Child Welfare—Jurisdiction—Children's Court—Justices of Peace Exercising General Jurisdiction—Not Appointed to Exercise Special Jurisdiction Under Child Welfare Act—"Child," Giving Age in Good Faith as 18, Pleading Guilty to Criminal Offence and Committed for Sentence—Sentenced by Supreme Court—Accused in Fact under 17—On Discovery of True Age, Court Moved to Quash Plea, Committal and Sentence—Justices Acting in Good Faith but Without Jurisdiction—Children's Court Alone Competent Tribunal—Plea, Committal and Sentence Quashed—Child Welfare Act, 1925, Ss. 26, 27, 29, 34, 40—Amendment Act, 1927, S. 19 (2)—Justices of the Peace Act, 1927, Ss. 126-131, 181.**

Motion to quash plea of guilty, committal and sentence of a lad named Walter Edward Rix, who on May 30, 1931, appeared before two Justices of the Peace at Whakatane charged with breaking and entering an office by night with intent to commit a crime therein. He pleaded "guilty" to the charge, and was committed by the Justices for sentence to the Supreme Court at Auckland. On June 8, 1931, Rix came before Smith, J., at Auckland, for sentence accordingly, and was ordered by the learned Judge to be detained in a Borstal Institution for a period of two years. On his arrest at Whakatane Rix had given his age to the police as 18, and his counsel also informed the Supreme Court before sentence that Rix was of the age of 18 years. Both those statements were apparently made in good faith, and in the belief that the lad actually was over 18 years of age. It had been clearly established, however, that in point of fact the age of Rix when sentenced was only fifteen years and three months. Rix, accordingly, being "a boy under the age of seventeen years," had been and was a "child" within the meaning of the Child Welfare Act, 1925 and its amendments, and therefore should, it was then contended, have been dealt with only by a "Children's Court" established under that Act.

**Held:** The Justices of the Peace and the Supreme Court had acted without jurisdiction, because, in the circumstances disclosed, the Children's Court alone had jurisdiction over the accused. Order made quashing plea of guilty, committal, and sentence. Accused's release also ordered, though proceedings could subsequently be commenced *de novo* under Child Welfare Act, 1925, and its amendments.

**Noble** in support.

**L. A. Taylor** to oppose.

MACGREGOR, J., in delivering the Court's judgment, said the foregoing facts giving rise to the present application were certainly unique. It was sought to quash the plea, the committal and the sentence of Rix, inasmuch as the whole of these proceedings were alleged to be null and void for want of jurisdiction. The broad ground for this somewhat startling suggestion was that the jurisdiction given to Children's Courts established under the Child Welfare Act, 1925, was an exclusive jurisdiction. If that jurisdiction were really exclusive, it would, their Honours thought, be found in the result that the proceedings hitherto taken against Rix were so taken without jurisdiction.

By S. 26 of the Child Welfare Act, 1925, it was provided that the Governor-General might from time to time, by warrant under his hand, establish for the purposes of the Act such number of Children's Courts as he deemed necessary and should also define the District or area within which any such Children's Court should have jurisdiction. After quoting S. 27 of the Act, their Honours stated it was common ground that the two Justices of the Peace who committed Rix for sentence were not Justices of the Peace appointed to exercise jurisdiction in a Children's Court under the provisions of the Child Welfare Act, 1925. In committing Rix for sentence, the two Justices

were apparently acting in their general jurisdiction under Part IV of the Justices of the Peace Act, 1927, relating to "Indictable Offences," and, in particular, under S. 181 of that Act. By that section "Any accused person" who pleaded "guilty" to an indictable offence not punishable by death might be committed to the Supreme Court for sentence, as was done in Rix's case. By S. 126 (2) of the Justices of the Peace Act, 1927, however, it was provided that "juvenile offender" meant any person "under or apparently under the age of 16 years," and special provisions were made and safeguards provided by Ss. 127, 128, 129 and 130 for the procedure to be adopted when a juvenile offender was brought before the Court charged with any offence. In the present case, it was apparent that Rix had not been treated as a "juvenile offender" under the Justices of the Peace Act. Nor was he, as had already been seen, dealt with as a "child" under the Child Welfare Act, 1925. The Justices of the Peace Act was passed in 1908, and was with its amendments consolidated and reenacted in 1927. The Child Welfare Act was meantime passed in 1925. By S. 126 (1) of the Justices of the Peace Act, 1927, it was provided that the part of that Act relating to juvenile offenders should be "read subject to the provisions of the Child Welfare Act, 1925. In the present case, it was admitted on all hands that Rix was a person under the age of 16 years, and therefore both a "Juvenile offender" and a "child." It was clear, accordingly, that on the actual facts of the case, as then ascertained, no Justices of the Peace had jurisdiction to deal with Rix except as a "child" under the provisions of the Child Welfare Act, 1925. (On that point their Honours drew special attention to the express declaratory terms of the Child Welfare Amendment Act, 1927, S. 19 (2) (a) and (b).) The Justices who had accepted Rix's plea of "guilty" and committed him to the Supreme Court for sentence were not in any way to blame for what had happened. They were quite entitled in the circumstances to rely on his voluntary statement that he was 18 years of age. S. 40 of the Child Welfare Act 1925 did not help in the present case, as the Justices were admittedly not sitting under that Act at all. It was not at any time suggested to them that Rix was either a "juvenile offender" or a "child." On his own admission of age, he had throughout been dealt with as an adult offender, notwithstanding the provisions contained in S. 34 of the Child Welfare Act, 1925. In other words, the Justices must, their Honour thought, be held to have found as a fact that Rix was over the age of 18 years, and therefore subject to their general jurisdiction under Ss. 131 and 181 of the Justices of the Peace Act, 1927. But the Justices were sitting at Whakatane as a Statutory Court of limited jurisdiction as defined in the Justices of the Peace Act. Their whole jurisdiction depended on the express provisions of that Statute, which obviously had not been complied with in the present case. No consent could give jurisdiction to a Court if a condition which went to the jurisdiction had not been performed or fulfilled. The law on that subject was thus tersely and clearly stated in 9 **Halsbury's "Laws of England,"** p. 14: "No appearance or answer, however, can give a jurisdiction to a limited Court, nor can such a Court give itself jurisdiction by finding facts. Where a limited Court takes upon itself to exercise a jurisdiction it does not possess, its decision amounts to nothing: jurisdiction must be acquired before the judgment is given." It followed in the Court's opinion that the Justices in committing Rix for sentence acted without jurisdiction.

The same result must, their Honours thought, be reached from a closer consideration of the provisions of the Child Welfare Act, 1925, itself. In discussing S. 29 of that Act, their Honours drew attention to Subs. (1) in particular, which spoke for itself, even apart from the declaratory provisions contained in S. 19 of the Amending Act of 1927. It certainly appeared to them to give an exclusive jurisdiction relating to offences committed by children to the Children's Court established under the Act "*save as hereinafter in this section provided.*" The exception or qualification created by the concluding words of S. 29 (1) referred, they thought, to the special jurisdiction given in certain cases to a Stipendiary Magistrate alone by S. 29 (3). At the argument in the Full Court it was contended for the Crown that exception or qualification was to be found rather in S. 29 (4). Tneir Honours did not agree with that contention. S. 29 (4) appeared to them to deal merely with procedure and not with jurisdiction, as Ss. 29 (1) and 29 (3) undoubtedly did. It was further argued on behalf of the Crown that S. 29 (4) in effect governed the present case, inasmuch as the Justices themselves had failed to comply with the provisions of S. 29 (1) of the Act by not sitting in a Children's Court, as they should have done. It was contended, therefore, that by virtue of S. 29 (4) the proceedings at Whakatane were not invalidated. It appeared to their Honours, however, that S. 29 (4), while no doubt effective in cases of judicial slips or defects of a procedural nature, could not be invoked to create a jurisdiction which did not already exist under the Statute. In other words, they did not think that that subsection could be construed so as to take away from a "child" the right or privilege already conferred upon him by S. 29 (1) to be tried for any offence in a Children's Court, constituted as it was with special safeguards and exceptional immunities appropriate only to juvenile offenders.

For these reasons, the Court arrived in the end at the conclusion that the proceedings hitherto taken against Rix were so taken without jurisdiction, and must be set aside accordingly. An order must, therefore, be made quashing the plea of "guilty," the committal for sentence, and the sentence of Edward Walter Rix who is now entitled to be released. No doubt proceedings might be taken *de novo* against Rix in the manner prescribed by the Child Welfare Act, 1925, and its amendments.

Solicitor for the accused: **W. Noble,** Auckland.
Solicitor for the Crown: **Crown Law Office,** Wellington.

# Supreme Court

Adams, J. May 25, 26; July 24, 1931. Christchurch.

IN RE STONE (DECEASED): STONE AND OTHERS v. STONE AND OTHERS.

**Will—Testamentary Capacity—Undue Influence—Probate and Administration—Action to Recall Probate in Common Form of Will and Codicils—Allegation that Codicils Signed While in State of Unsound Mind, Memory and Understanding and Under Wife's Undue Influence—Testator Fully Able to Appreciate Claims of Relatives and Extent of His Property—Sound Testamentary Capacity—Onus of Proving Undue Influence of Testator's Wife Not Discharged by Plaintiff—Probate Not Recalled.**

Action to recall probate in common form of the will and two codicils of S. Stone deceased and to pronounce for the will. The testator was a farmer. He had 7 sons and 2 daughters by his first wife, all of whom survived him. His first wife having died, the testator married the defendant M. A. Stone, on May 19, 1902, and lived with her up to the time of his death on August 13, 1930, being then 88 years of age. At the time of this marriage he was the owner of a farm at Ohoka, for which he had paid £6,900, and certain stock worth about £1,000. The farm was subject to a mortage for £5,000, and the testator's then estate, after deducting the mortgage debt, was worth about £3,000. He made a will on April 2, 1921, by which he appointed the defendants the executors and trustees of his estate, and devised and bequeathed to his wife his dwellinghouse, and 10½ acres of land at Ohoka with the furniture and other chattels in and about the dwelling, and the live and dead stock and other chattels which should be on the land at his death. The residue was vested in his trustees upon trust to sell and convert into money, to invest certain moneys amounting to £5,800 and to pay the income of that sum to his wife until her death or re-marriage, and to divide the residue between his children in equal shares. By a codicil dated March 27, 1930, the testator bequeathed to his wife a legacy of £4,000, and, by a second codicil dated June 28, 1930, he revoked the gift of income in the will and bequeathed the capital sum of £5,800 to his wife absolutely. The testator died on August 13, 1930. His estate was valued for the purpose of Death Duties at £17,000. No question was raised as to the will, but the plaintiffs said that at the times when the codicils were signed the testator was not of sound mind, memory and understanding, and that the execution of the codicils was obtained by the undue influence of his wife.

**Held:** Testamentary capacity depends on sufficiency of intelligence to understand and appreciate the testamentary act. On the evidence, testator had a sound disposing mind, memory, understanding at time of execution of codicils. Onus of proof of undue influence lay on plaintiffs, and was not discharged. No evidence of undue influence, the testator being a free agent and the codicils representing his own free will. **Banks v. Goodfellow** (1870) L.R. 5, Q.B., 549; **Harwood v. Baker,** 3 Moore, P.C., 291; **Wingrove v. Wingrove** (1889) 11 P.D., 81, followed.

**Lascelles** for plaintiff
**K. M. Gresson** for defendant.

ADAMS, J., said that the burden of proving that at the respective dates of the codicils the testator was a competent testator rested on the defendants. The law on that part of the case was stated in **Banks v. Goodfellow,** (1870) L.R. 5 Q.B. 549—the leading case on the subject. In that case the question was whether the testator was of sound mind when he made his will, but the question of incapacity arising from want of intelligence occasioned by supervening physical infirmity or the decay of advancing age was also considered. His Honour referred particularly to the passages on pages 566 to 569 of the report. Cockburn, C.J., delivering the judgment of the Court (Cockburn, C.J., Blackburn, Mellor, and Hannen, JJ.) said (p. 566): "In these cases it is admitted on all hands that though the mental power may be reduced below the ordinary standard, yet if there be sufficient intelligence to understand and appreciate the testamentary act in its different bearings, the power to make a will remains. It is enough if, to use the words of Sir Edward Williams in his work on Executors, 'the mental faculties retain sufficient strength fully to comprehend the testamentary act about to be done.' . . . This part of the law has been extremely well treated in more than one case in the American Courts." The Court then cited with approval passages from three decisions of American Courts: **Harrison v. Rowan,** 3 Washington at p. 585; **Den v. Vancleve,** 2 Southward at p. 660, and **Stevens v. Vancleve,** 4 Washington at p. 267. Those were too long for quotation in full but should be read. In the quotation from **Harrison's case** it was said (p. 567): "It is sufficient if he has such a mind and memory as will enable him to understand the elements of which it is composed, and the disposition of his property in its simple forms . . . . it is the soundness of the mind, and not the particular state of the bodily health, that is to be attended to; the latter may be in a state of extreme imbecility, and yet he may possess sufficient understanding to direct how his property shall be disposed of; his capacity may be perfect to dispose of his property by will, and yet very inadequate to the management of other business. . . ." In the quotation from **Den v. Vancleve** it was said (pp. 567-8): " . . . the mind may have been in some degree debilitated; the memory may have become in some degree enfeebled; and yet there may be enough left clearly to discern and discreetly to judge, of all those things and all those circumstances, which enter into the nature of a rational, fair, and just testament. But if they have so far failed as that these cannot be discerned and judged of, then he cannot be said to be of sound and disposing mind and memory." In **Stevens v. Vancleve** it was said (p. 568): "He," the testator, "must have memory; . . . . but his memory may be very imperfect; it may be greatly impaired by age or disease; he may not be able at all times to recollect names, the persons, or the families of those with whom he had been intimately acquainted; may at times ask idle questions, and repeat those which had before been asked and answered, and yet his understanding may be sufficiently sound for many of the ordinary transactions of life. . . . . The question is not so much what was the degree of memory possessed by the testator? as this: Had he a disposing memory? Was he capable of recollecting the property he was about to bequeath; the manner of distributing it; and the objects of his bounty? To sum up the whole in the most simple and intelligible form, were his mind and memory sufficiently sound to enable him to know and to understand the business in which he was engaged at the time he executed his will?" Cockburn, C.J., then considered the observations of the Judicial Committee in **Harwood v. Baker,** 3 Moore P.C. p. 291, and said of that case (p. 569): "From this language it is to be inferred that the standard of capacity in cases of impaired mental power is, to use the words of the judgment, the capacity on the part of the testator to comprehend the extent of the property to be disposed of, and the nature of the claims of those he is excluding."

His Honour next turned to the evidence as to testamentary capacity. He said that if the evidence of Mr. Van Asch, Dr. Ramsay and other witnesses who agreed with them were accepted, there was no reason to doubt the testamentary capacity of the testator. Mr. Van Asch was a solicitor of long experience and good standing and repute. He acted as the testator's professional adviser for upwards of 20 years, having frequent interviews with him in relation to his affairs. His integrity was beyond question, yet it was evident that, so far as his knowledge extended, he had no doubt of the testator's capacity. On the occasion when the first codicil was executed he received his instructions from the testator in the absence of Mrs. Stone, and his evidence showed that the testator had his children in his mind. If the testator's mental condition had been as described by some of the witnesses it must have been obvious to Mr. Van Asch, extending as it was alleged for a period of years. Dr. Ramsay also was a witness of standing, probity, and experience, and must have observed the mental weakness if it was as described. That applied also to Constable Holmes whom His Honour regarded as an intelligent and trustworthy witness, and to Albert Stone, who had better opportunities of observing the testator than his brothers or sister. His Honour observed also that the evidence of Dr. Beale suffered by comparison from the fact that his doubtful opinion was formed upon the evidence given at the trial without having seen the testator and on the assumption that that evidence would be accepted without criticism. If the view which His Honour had taken of the evidence had been in his mind it was at least possible that his opinion would have been expressed with more hesitation. That difficulty was inherent in every case where an opinion was sought on statements of fact which might require modification. Bearing in mind that in cases such as the present it was the duty of the Court to scrutinise the evidence carefully and to satisfy itself beyond reasonable doubt before pronouncing for the testamentary documents, and after careful and repeated consideration of the evidence, His Honour arrived at a clear conclusion that at the respective dates of the codicils the testator had a sound disposing mind, memory and understanding.

On the question as to whether the codicils were, or either of them was, obtained by the undue influence of the testator's wife, the onus of proof lay on the plaintiffs as the parties alleging it. In **Craig v. Lamoureux,** (1920) A.C. 349, the Judicial Committee said (p. 357): "There is no reason why a husband or a parent, on whose part it is natural that he should do so, may not put his claims before a wife or child and ask for their recognition, provided the person making the will knows what is being done. The persuasion must, of course, stop short of coercion, and the testamentary disposition must be made with comprehension of what is being done. As was said in the House of Lords when **Boyse v. Rossborough,** (1856) 6 H.L.C. 2, 49, was decided, in order to set aside the will of a person of sound mind, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence. It must be shown that they are inconsistent with a contrary hypothesis. Undue influence, in order to render a will void, must be an influence which can justly be described by a person looking at the matter judicially to have caused the execution of a paper pretending to express a testator's mind, but which really does not express his mind, but something else which he did not really mean. And the relationship of marriage is one where it is, generally speaking, impossible to ascertain how matters have stood in that regard. It is also important in this connection to bear in mind what was laid down by Sir James Hannen in **Wingrove v. Wingrove,** (1889) 11 P.D. 81, and quoted with approval by Lord Macnaghten in delivering the judgment of this board in **Baudains v. Richardson,** (1906) A.C. 169, that it is not sufficient to establish that a person has the power unduly to overbear the will of the testator. It must be shown that in the particular case the power was exercised, and that it was by means of the exercise of that power that the will was obtained." Those propositions were authoritative and final.

In the present case there was no such direct evidence, and it was proved that in the case of each codicil the instructions given by the testator to his solicitor were clear and definite. The first codicil was prepared on the testator's express instructions and in the absence of his wife, and without any evidence of interference or suggestion by her. And that applied also to the second codicil, but perhaps not so convincingly. His Honour did not in fact doubt the evidence of the testator's wife on that question. It might, of course, be open to conjecture that there had been previous conversations between him and his wife in which there might have been pressure or entreaty, but there was no suggestion in the evidence of any such conversation. Counsel for the plaintiffs submitted that there was sufficient evidence to support an inference of undue influence as was in the case of **Callaghan v. Myers** (1880) 1 N.S.W.L.R. 351. The Court in that case said that it was not necessary to prove undue influence by direct testimony any more than any other fact in question—the surrounding circumstances must be looked at. If His Honour might say so, that was both good law and common sense. But to justify an inference, facts must be found which made the inference reasonable and proper. In **Callaghan v. Myers** (*sup.*) the circumstances differed *toto coelo* from the facts in the present case, and His Honour was unable to draw any such inference. The circumstances relied on were: the difference in the age of the parties; the want of frankness in relation to moneys Mrs. Stone had received and her hesitating admissions as to the extent of her knowledge of the testator's intentions when the codicils were made; her "exiling" the children; that the young children of 12 years and 7 years were not allowed to have their meals with the testator and his wife; that soon after the marriage she left the home and would not return until the testator agreed to give her an allowance of £2 per week; that applications by the sons to their father for money were carefully scrutinised, but readily obtained for Mrs. Stone's relatives; the alleged "smack in the face"; the

alleged unfairness of the distribution by the testator of his estate. It was contended that those circumstances showed that Mrs. Stone—to use a colloquialism—married the testator for his money, and from the date of her marriage, set herself to devise and carry into effect a course of conduct calculated to estrange the testator from his family, and bring him completely under her influence. Some of the matters were trivial, and against the inference His Honour was invited to draw, there was the outstanding fact that, by the testator's voluntary statement to Mr. Van Asch, she was shown to have been a good wife to the testator during the whole 28 years of their wedded life, and that the sons when they came for monetary assistance were not denied. There was no reason to doubt that his married life was happy, save for the incident of her leaving him and demanding a reasonable allowance. His Honour thought also that by her capable assistance Mrs. Stone had a considerable share in producing the large increase of the testator's estate to which His Honour had referred. His Honour had already said that he did not credit the evidence as to the alleged assault, and added in regard to comments on the evidence of Mrs. Stone, that in his judgment her evidence on the main questions arising was substantially true. The evidence as to the so-called exiling of the children was open to comment. In the case of Mrs. Preece, the reason given for asking her to leave might well have been sufficient in the circumstances, and there was the fact that the son Albert said he could visit his father as often and stay as long as he liked. There did not appear to be any good reason why the other children could not have corresponded with the testator if they had desired to do so. When Ernest called on his father in October, 1928, his father opened the question of money and told him he had not got it, but to come back when his brother's instalment was paid. He returned and received £50, Mrs. Stone concurring. The truth appeared to be that the sons and daughter after leaving the home made few visits to the testator, and did not appear to have kept in touch with him by correspondence. Meantime for 28 years the testator was, with the efficient aid of his wife, building up a fortune. On the whole of the evidence His Honour was satisfied that, whatever might have passed between the testator and his wife with reference to the codicils, the testator was a free agent and the codicils represented his own free will.

His Honour accordingly pronounced for the will and for both codicils.

Judgment for the defendants accordingly.

Solicitors for plaintiffs: **Weston, Ward and Laseelles,** Christchurch.

Solicitors for defendants: **Helmore, Van Asch and Walton,** Christchurch.

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Smith, J. August 21, 31; September 7, 1931. Auckland.

## Re THE HARTLEY AND RILEY CONSOLIDATED GOLD DREDGING CO. LTD.

**Company—Voluntary Winding-up—Examination of Banker—Summons by Voluntary Liquidator for an Order Summoning a Banker for Examination Under Section 210 of The Companies Act, 1908—Right to Examine a Banker There Under Not Taken Away by Banking Act, 1908—Information at Such Examination not Evidence in a Legal Proceeding, but Secret Information for Benefit of the Court and Liquidator—Banking Act, 1908, Ss. 2, 19, 20, 21.—Companies Act, 1908, S. 210.**

Summons to the Manager of the Bank of New South Wales to show cause why an order should not be made granting liberty to the liquidator to inspect and take copies of any entries in the books of the Bank of New South Wales relating to all the bank accounts of A. H. Kitto and Kitto Limited with the said bank, and all vouchers relating thereto. The summons also asked for an order summoning the manager to appear as a witness to prove the said bank accounts and all matters and transactions therein recorded and to produce the said bank accounts and all vouchers relating thereto, and for an order appointing the time, place and examiner for such examination. It appeared that the books of Kitto and Kitto Limited had been taken from New Zealand and that the only records available to the liquidator of the transactions of the company were contained in the bank accounts.

**Held:** Order for bank officer's examination justified on the Court's being satisfied that it would be just and beneficial for the purposes of the winding up. Court has right to examine banker under S. 210 of the Companies Act, 1908. Examination after *Subpoena duces tucum* distinguished. S. 20 of the Banking Act, 1908, does not relieve bank officer from being summoned by the Court itself, and does not extend protection to him from being summoned before the Court under S. 210 (*supra*). Such proceedings intended to be secret proceedings, by the Court for the Court's information. Bank officer may supply proof of contents of bank books pursuant to S. 19 of the Banking Act; Court may act without legal evidence; but examination must not be vexatious. **Heiron's Case,** 15 Ch. D. 139, followed.

**Leary** for the liquidator.
**Towle** for the Bank.

SMITH, J., said that the Summons was intituled "In the Matter of The Companies Act, 1908" but its form was cast to comply with Ss. 21 and 20 of The Banking Act, 1908, save with regard to the appointing of a time, place and examiner for the examination of the manager. The procedure was irregular, but in substance the application had been treated before His Honour as an application to the Court by the liquidator under S. 210 of The Companies Act (as applied by S. 226 to a voluntary liquidation—see **Heiron's case,** 15 Ch.D. 139—to summon before the Court the manager of the bank for the purpose of examining him with regard to the trade dealings estate or effects of the company.

It was not desirable, His Honour stated, that he should discuss at the present time the state of affairs which the liquidator was investigating. It sufficed to say that it appeared that an examination of the accounts of Kitto and of Kitto Limited was necessary to enable the liquidator to discharge his duties, that the books of Kitto and of Kitto Limited had been taken from New Zealand, and that the only record available to the liquidator was contained in the bank accounts. The liquidator had satisfied His Honour that it would be just and beneficial for the purposes of the winding-up that he should have an order for the examination of a bank officer with regard to those accounts and that was sufficient to justify an order. **Heiron's Case** (*sup.*).

Mr. Towle contended, however, that the effect of the provisions contained in Ss. 19-21 (incl.) of The Banking Act, 1908, was to take away the jurisdiction of the Court to make an order summoning a banker for examination under S. 210 of The Companies Act, 1908, His Honour was unable to accept that contention. It had been said in several cases that the Court had the right to examine a banker under S. 115 of the English Companies Act, 1862 (our S. 210). His Honour referred to **In re Smith Knight and Co.,** L.R. 4 Ch. 421; **Druitt's Case,** 14 Eq. 6, sub nom. **Forbes' Case,** 41 L.J. 467; and **Bloxam's Case,** 36 L.J. Ch. 687. The argument against the examination of a banker based upon the confidential relationship existing between banker and customer was overruled in **Druitt's case.** Counsel submitted, however, that those cases were decided before the enactment of The Bankers Books Evidence Acts of 1876 and 1879, (to which the provisions of Ss. 19-21 of the New Zealand Act correspond) and that no case had since been decided on the right to summon and examine a banker under any of the sections corresponding to S. 210 of the New Zealand Act. That appeared to be so but the line of authority which His Honour had cited was recognised in leading text-books to-day. His Honour referred to **Palmer's Company Law,** 13th Edn. Part II 661; **Buckley's Companies Acts,** 11th Edn. 459; **Halsbury's Laws of England,** Vol. V, par. 807 note (w); **Hart's Law of Banking,** 3rd Edn. 234-236; **Grant's Law of Banking,** 7th Edn. p. 5 note (f). In none of those text-books was there any suggestion that a banker was relieved by the Bankers Books Evidence Acts of the liability to be summoned under any of the Sections corresponding with S. 210. His Honour thought that the view taken by the text-writers was correct.

His Honour next referred to the language of S. 20 of the Banking Act, 1908. That section was in two parts. The first part provided that the officer was not compellable to produce any book of the bank the contents of which could be proved as provided by S. 19. The second part relieved the officer from attending as a witness to prove the matters transactions and accounts recorded in the books unless by order of a Judge made for a special cause. The first operative part of S. 210 of The Companies Act, 1908, enacted that the Court might summon before it any person whom the Court deemed capable of giving information concerning the trade dealings estate or effects of the company. The question then arose whether S. 20 of the Banking Act was intended to relieve a bank officer from being summoned by the Court itself as distinct from being summoned by a party upon subpoena. His Honour thought it was not. The main object was to avoid the practice adopted by parties to a litigation of using a subpoena *duces tecum.* **Arnott v. Hayes,**

36 Ch.D. 731, 738 and 739; **Emmott v. The Star Newspaper Coy.,** 62 L.J. Q.B.D. 77. There was a distinction between a person who was summoned to give information by the Court under S. 210 and an ordinary witness who was summoned by a party on subpoena. **In re English Joint Stock Bank,** 3 Eq. 203, at p. 207. **In re Gold Coy.,** 12 Ch.D. 77, at p. 82. **In re Westmoreland Green and Blue State Coy.,** (1892) W.N. 2. A person summoned under S. 210 could not be summoned unless the Court concluded that he ought to be summoned. His Honour's opinion was that S. 20 of The Banking Act, 1903, did not extend to protect a bank officer from being summoned before the Court under S. 210 because it was the duty of the Court itself to determine under that Section whether he should be summoned. His Honour expressed no general opinion on that point but limited his view to the right of the Court under S. 210.

As defined in S. 2 of The Banking Act, 1908, "legal proceeding" meant any civil or criminal proceeding or inquiry in which evidence was or might be given, and included an arbitration. The examination under S. 210 might be a legal proceeding within that definition. But His Honour thought it was not a legal proceeding in which a person was called as a witness to "prove" anything. The person summoned by the Court did not give evidence to prove any matter of fact. He gave information to the Court in a secret proceeding; and the Court acted without legal evidence. **In re Gold Coy.,** 12 Ch.D. 77, 84. Hearsay was permitted. **In re the Ottoman Coy. Ltd.,** 15 W.R. 1069. His Honour, after referring to **Buckley on the Companies Acts,** 11th Edn. 462; **In re Norwich Equitable Fire Insce. Coy.,** 27 Ch.D. 515; **In re Grey's Brewery Coy.,** 25 Ch.D. 400, and **North Australian Territory Coy. v. Goldsborough Mort. Coy.** (1893) 2 Ch. 381, said that an examination under S. 210 was a secret examination by the Court for the information of the Court and the liquidator and the person who was questioned was not giving evidence as a witness in a legal proceeding to prove any matters whatever. His Honour thought that on that ground also, the second part of S. 20 which contemplated a bank officer being called as a witness to prove certain matters did not extend to protect a bank officer from being summoned by the Court to give information to the Court pursuant to the provisions of S. 210 of The Companies Act. Upon the view which His Honour adopted, the proceedings under S. 210 could remain the secret proceedings which they were intended to be. S. 20 of The Banking Act did not apply to protect a bank officer from examination under S. 210 where the Court considered that he should be examined and there was no need for the liquidator to attempt to obtain an order from a Judge under that section requiring the attendance of a bank officer for special cause.

The second operative part of S. 210 enacted that the Court might require the person summoned to produce any books, etc., relating to the company in his custody or power. If it were conceded that an examination under S. 210 was a legal proceeding within the first part of S. 20 of The Banking Act as defined in S. 2 of that Act though not a legal proceeding within the second part of S. 20 in which a person was called as a witness to prove some matter (and, His Honour thought it was not necessary to decide the point) then the bank officer when questioned could supply proof of the contents of the bank books pursuant to S. 19 of The Banking Act. That was the view taken in **Hart's Law of Banking,** 3rd Edn., 236 note (c). But the point did not appear to His Honour to be of importance. Since even hearsay was permitted in an examination under S. 210, the bank officer when summoned and required to produce accounts could supply copies of entries and verify them and the Court, if satisfied, as no doubt it would be, could accept them.

Mr. Towle relied on the cases of the **South Staffordshire Tramways Coy. v. Ebbsmith** (1895) 2 Q.B. 669 and **Pollock v. Garle** (1898) 1 Ch. 1. Those cases had no application to the matters in issue. Their effect was that in actions between parties the Court would apply the rules as to discovery between parties to an action in determining whether an order should be made for the inspection of a banker's books. Where a voluntary liquidator himself brought an action without having previously obtained an examination under S. 210, unless he made a strong case, for such an examination would be oppressive; but before bringing action he was entitled, in a proper case, to full discovery under S. 210. **Heiron's Case,** 15 Ch.D. 139. His application should be granted where it was just and beneficial for the purposes of the winding-up and so long as his inquisitorial powers were not being used for the purpose of vexation and oppression.

In the present case, the voluntary liquidator was seeking information before action brought for proper purposes and an order should be made for the examination of a bank officer under S. 210 with regard to the accounts of Kitto and of Kitto Limited. The examination must not, however, be vexatious. The accounts commenced probably about the time of the incorporation of the company. His Honour required information on that point. His Honour also required to know what was meant by the word "vouchers" which the banker was asked to produce. When those matters had been cleared up, the Court would be in a position to determine the form of the order to be made under S. 210, but an application in proper form should be filed upon which the order might be made.

Summons adjourned for further consideration.

His Honour subsequently made the Order for inspection, subject to the provision that the liquidator should pay the costs of the Bank as between solicitor and client.

Solicitors for the liquidator: **Bamford, Brown and Leary,** Auckland.

Solicitors for the Bank of N.S.W.: **Towle and Cooper,** Auckland.

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Myers, C.J.
MacGregor, J.
Smith, J.
Kennedy, J.

July 10; September 5, 1931.
Wellington.

## WELLS v. MAYOR, &c. OF NEWMARKET.

**Town Planning—Public Works—Injurious Affection—Compensation—Claim and Amended Claim Made—Abandonment of Claim by substitution of Amended Claim—No Provision for Treating Second Claim as Amendment of First—Appeal to Town Planning Board after Refusal of Building License—Whether claim in time — Effect of S. 5. of Town Planning Amendment Act, 1929—Principles upon which Compensation Based—Claim Unaffected by Sale of Subject Land after Right to Compensation accrued—The Public Works Act, 1928 Ss. 45, 53, 74—The Town Planning Act, 1926, S. 29, 34—Amendment Act, 1929, S. 5.**

Case stated for decision by the Supreme Court under the Public Works Act, 1928, S. 78, in relation to claims under the Town-planning Acts for compensation for land taken or for injurious affection, required by section 29 of the Town-planning Act, 1926, to be made and determined within the time and in the manner provided by the Public Works Act, 1908, (now the Public Works Act, 1928,) in respect of lands taken under that Act or in respect of damage done from the exercise of any powers conferred by that Act. The claimant's original claim was made and served on the respondent on November 25, 1930. Except for such service on the respondent no further action was taken in respect of this claim. On December 12, 1930, the claimant served on the respondent a claim for compensation dated the previous day, the material difference between the first and second claim lying in the inclusion in the latter of the sum of £100 for rates under the head of "Loss of rents and profits" which had not been included in the former. The receipt given by the respondent described the later claim as "Amended claim for compensation." On March 2, 1931, the claimant filed a copy of the claim for compensation dated 11th December, 1930, as an award pursuant to the provisions of S. 53 (a) of the Public Works Act, 1928. The claim was endorsed: "Copy of claim for compensation and receipt of respondent (*sic*)." On March 23, 1931, the respondent obtained an order of this Court pursuant to S. 53 (b) of the Public Works Act, 1928, setting aside the filing of the claim for compensation so filed in the Supreme Court on March 2, 1931, and allowing the respondent further time within which to give notice that it did not admit the same. Proceedings then followed under the Public Works Act, 1928, for the setting up of a Compensation Court and in due course the Court sat to hear the claim. The copy of the claim for compensation filed in this Court together with the notice requiring the claim to be heard by a Compensation Court was endorsed, "Copy of amended claim for Compensation." The recital in the notice was, "Whereas a certain claim for compensation for the amount of £929 12s. 0d. . . . a copy of which claim is attached hereto was made by me on the 11th day of December, 1930"; and the document proceeded: "This is to give you notice that I hereby require the said claim to be heard by a Compensation Court as by the said Act provided." The only claim before the Court was that dated December 11, 1930. In the previous claim of November 25, the claimant had claimed the sum of £829 2s. 0d. In consequence presumably of the possibility of the contention on behalf of the respondent, subsequently in fact made, that the

claim of December 11, 1930, was out of time, the claimant put in evidence at the hearing a copy of the claim of the 25th November, 1930, which if still available would on the respondent's own contention have been in time. The other relevant facts appear in the judgment.

**Held:** On original claim being abandoned, second claim (whether "amended claim" or not) only claim before Court; Court can permit amendment of latter, if thought fit, under S. 7. (2) "Operation of S. 34" in S. 29 (1) of Town Planning Act, 1926, equivalent to "the execution of the works" in S. 45 of the Public Works Act, 1928. (3) Subsequent sale of claimant's interest in land does not affect claim, as loss assessable on date whereon his right to compensation had accrued. *Quaere*: Whether "work" or "execution of the works" in S. 45 of the Public Works Act, 1926, applicable to claim for injurious affection.

**Stanton** for claimant.

**Beckerleg and Willis** for respondent Borough.

MYERS, C.J., delivering the judgment of the Court, said that the first question to be determined was as to whether the claimant could rely upon the earlier claim. In **Kairanga County v. Bannister,** 33 N.Z.L.R. 1184, the claimants, who had filed a claim for compensation under the Public Works Act of which a Court properly constituted had become seized, sought to abandon their claim by filing a new claim upon the assumption that the proceedings to recover compensation might be commenced *de novo*. It was held that there was no power to commence *de novo* proceedings to recover compensation, and that the new claim was, therefore, invalid and had no legal effect, the result being that the original claim still subsisted. The present case was the converse of the **Kairanga** case, because first one claim was made, but, before the time arrived for any step to be taken under the statute in respect of that claim, and, before, therefore, any Compensation Court became seized of the claim the claimant made a second claim in respect of which he took the statutory proceedings, and of which in due course the Compensation Court set up under the provisions of the statute had become seized. There could not be two similar separate claims under the statute in respect of precisely the same subject matter, and the Court was constituted and became seized of the second claim. The Court did not see how the claimant could then turn round and ask that the Court should consider and hear the first claim which was never the subject of any of the requisite statutory proceedings and which in all the circumstances of the case must, the Court thought, be regarded as having been abandoned. The second claim, in their Honours' opinion, superseded the first, and it was the second claim that the Court could hear and determine. Mr. Stanton had contended that the second claim must be regarded as merely an amendment of the first. But the answer to that contention was that the statute contained no provision for the making of such an amended claim. The only provision for amendment was contained in S. 74 of the Public Works Act, 1928, which enacted, firstly, that on the hearing of any claim for compensation under the Act it should not be lawful for the claimant to adduce evidence in relation to any matter not disclosed in the claim, but that he may with the leave of the Court amend his claim in any particular but might not thereby formulate a new cause of action or make a new claim, and, secondly, that such leave should be granted only on such terms and conditions as to notice to parties, payment of costs, or otherwise as the Court though fit. If after having made a claim, the claimant chose to make a further compendious claim, as he did in the present case, and added a new item and then proceeded upon the basis that the second claim was the claim which the Court had to hear, their Honours thought that he was bound by his second claim. The mere fact that he might choose to endorse it "Amended claim" or that the respondent might give a receipt in which the document was referred to as an amended claim for compensation could not in their Honours' view alter the position. The first claim having been abandoned, it followed that the only claim that the Court could hear was the second and actual claim which was the only claim filed in the Court, and which the Compensation Court was constituted to hear. If in the result it turned out that the second claim were out of time, so much the worse for the claimant. If the second claim were not out of time, and the claimant asked for an amendment of that claim by reducing any particular item or items, as in fact he had done, there was no reason why the Compensation Court should not if it thought fit allow the amendment under S. 74 of the Act.

The question then arose as to whether the claim dated December 11, 1930, and served on the following day was in time. In the month of November, 1929, the claimant applied in due form to the respondent for a permit to erect on the land in question in place of the buildings then erected thereon a modern two-storey building in brick and concrete to be used for the purposes of a shop and offices. On December 5, 1929, the respondent in exercise of the powers in that behalf contained in S. 5 of the Town-planning Amendment Act, 1929, by resolution refused to grant the permit on the ground that the new building if erected would be in contravention of the Town-planning scheme completed by the respondent and then in the hands of the Town-planning Board. On or about January 22, 1930, the claimant pursuant to the provisions of S. 34 of the Town-planning Act, 1926, as amended by S. 5 of the Amendment Act, 1929, appealed to the Town-planning Board from the decision of the respondent refusing to grant the permit. On February 21, 1930, the appeal was heard by the Town-planning Board, and by resolution of the same date the Board upheld the determination of the Council of the respondent Borough, and dismissed the appeal. On October 31, 1930, following upon a poll of the ratepayers of the respondent Borough, whereby a proposal to raise a loan to enable the respondent to purchase the claimant's land was defeated, the respondent intimated to the claimant that it was prepared to grant the permit, and such permit was granted on November 21, 1930. The respondent contended that by the combined effect of the Town-planning Acts and the Public Works Act the time within which the claimant had to make his claim was the period of one year from December 5, 1929. If that contention were correct, then clearly the claim dated December 11, 1930, and served the following day would be out of time.

In order to determine this question, it was necessary to consider certain provisions of the two Acts. Subsection (1) of S. 34 of the Town-planning Act, 1926, was repealed by S. 5 of the Town-planning Amendment Act, 1929. S. 29 (1) of the Town-planning Act, 1926, in so far as it was material to the present case, enacted that every person having any estate or interest in any land taken for the purposes of a Town-planning scheme or in any land, buildings, or other improvements injuriously affected by the operation of any such scheme, or injuriously affected by the operation of S. 34 thereof, shall, subject to the provisions of the section, be entitled to full compensation for all loss thereby sustained by him. It further enacted, as had already been stated, that claims for compensation under that section should be made and determined within the time and in the manner provided by the Public Works Act, 1908, in respect of lands taken under that Act, or in respect of damage done from the exercise of any powers conferred by that Act. The provisions of S. 45 of the existing Public Works Act, 1928, so far as they affected the question now under consideration were the same as were contained in the Act of 1908. If the provisions of S. 45 had to be applied strictly to a claim for injurious affection of the kind before the Court, the question might well be one of some difficulty because no question of "work" was involved, and there might be some difficulty in applying the words "execution of the works" to such a case. But the Court was relieved of that difficulty because of the words in S. 29 (1) of the Town-planning Act, 1926, "or injuriously affected by the operation of section thirty-four hereof." It could not be said, their Honours thought, that in the circumstances of the present case S. 34 ceased to operate until October 31, 1930, when the respondent intimated that it was prepared to grant a permit to the claimant. The only way to reconcile the provisions of the two Acts was, in their Honours' opinion, to read "the operation of section thirty-four" as being the equivalent of "the execution of the works." So read, the time when the section ceased to operate was the equivalent of the "completion of the construction of the work or portion thereof which causes the damage." Either that, or else there was a *casus omissus*, and in a case like the present the time for making the claim would be at large. The Court did not think that the latter alternative was the true position. In the view taken by their Honours, the time for making the claim did not commence to run until October 31, 1930. The claim of December 11, 1930, was, therefore, in time and was properly before the Compensation Court for hearing and determination.

The next question arose upon the peculiar wording of the main item of the claim. Part of the old wooden building upon the land was leased to a tenant whose tenancy expired at the end of September, 1929. Another portion was leased at a weekly rental and that portion became vacant in January, 1930. The main portion of the property was leased for a term expiring on March 29, 1930, and by the lease the claimant had covenanted that on the expiry of the term he would forthwith erect upon the land dem sed and adjoining land owned by him a modern building of the ground floor of which the lessees had covenanted to accept a lease for a term of ten years. But for the refusal of the permit the claimant could have commenced his new building early in 1930, though presumably not before the end of March, and it is said that the time required for the erec-

tion of the building would have been 6½ months. In point of fact the claimant very shortly after the permit was actually granted, namely on November 20, 1930, commenced the erection of a new building which it was estimated would be completed on June 8, 1931.

In his claim of December 11, 1930, the claimant under the heading "Loss of rents and profits" claimed (*inter alia*) £1,163 5s., as the "Rent of ground floor of new building from 1st December 1929 to 31st October 1930—47 weeks at £24 15s. 0d. per week," and £376 as the rent of first floor of new building for 47 weeks. He also gave credit for interest saved or earned on the cost of the new building calculated for the like period of 47 weeks. The respondent contended that the claimant was bound by the period from December 1, 1929, to October 31, 1930, and that there was no loss during that period. In their Honours' view, the matter was one of construction and intention. It was to be observed firstly that the claimant claimed loss in respect of the "new" building, and he assessed his loss on the basis of 47 weeks' rental of the new building from which he proceeded to deduct the rents actually received from the lessees of the existing building for the same period of 47 weeks. In point of fact, as of course the respondent well knew, there was no "new" building on the property on October 31, 1930. On the contrary, the erection of the new building could not be commenced before that date because it was not until then that the claimant was informed of the respondent's willingness to grant a permit. Their Honours thought, therefore, that the claim must be interpreted as a claim based on the rental of the new building for a period equivalent to that commencing on December 1, 1929, and ending on October 31, 1930. The claim was no doubt unfortunately expressed, but the most that could be said, the Court thought, was that there was a blunder on the part of the draftsman, which blunder, however, could not possibly have misled the respondent. Notwithstanding the blunder there could be no doubt as to what the claim actually meant. At the same time their Honours had difficulty in seeing how the claim could be made for loss of rents and profits for so long a period as 47 weeks. They could not see how the period of loss could be regarded as having commenced as early as 1st December 1, 1929, if the fact be that by reason of the provisions of his lease or leases the claimant could not commence the erection of the new building until after March 29, 1930. That, of course, was a question of fact for the Compensation Court—it might be that the claimant proved that notwithstanding the terms of the lease he had arranged with the lessees for the erection of the new building to commence at or soon after December 1, 1929. If that were not so, then it seemed to their Honours that the period of loss of rents from the new building could not be longer than the equivalent of the period from March 29, 1930, to October 31, 1930. It appeared from the case sated by the President of the Compensation Court that, after October 3, 1930, the claimant transferred all his interest in the land to members of his family. That did not, the Court thought, affect the position. The loss had to be assessed as at the October 31, as at which date the claimant's right to compensation had accrued.

The questions before the Court were answered accordingly.

Solicitors for claimant: **Stanton, Johnston and Spence,** Auckland.

Solicitor for respondent: **B. Beckerleg,** Auckland.

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Blair, J. August 12; September 18, 1931. Wanganui.

## ALLPRESS v. ALLPRESS.

**Divorce—Permanent Maintenance—Petition for Permanent Alimony Filed After Decree Absolute by Wife Guilty of Desertion—Alimony Granted—Divorce and Matrimonial Causes Act, 1928, S. 33—Divorce Rules, 87, 89.**

Petition by wife for permanent maintenance after decree absolute made. It appeared that the husband, on February 12, 1930, petitioned for divorce on the ground of desertion and a decree *nisi* was made on May 21, 1930, the wife not defending. The decree *nisi* was made absolute on September 16, 1930. On October 2, 1930, the wife filed the present petition for permanent maintenance, but owing to delay in filing the motion for an order in terms of the petition and irregularities in the said motion and the affidavits filed in support, the matter did not come on for hearing until August 12, 1931. The facts relevant to the question of maintenance appear in the report of the judgment.

**Held:** Filing by deserting wife of petition for alimony after decree absolute, no bar to order for permanent maintenance.

**L. A. Taylor** for petitioner.

**J. M. Hussey** for respondent.

BLAIR, J., said that the wife was 50 years of age and was married in April, 1903. There were three children, the two oldler being adults and the youngest—a girl—being about fourteen years of age and in the father's custody. The wife left the husband in the year 1927, and had never received any support from him, although he had offered her a home if she would return. She claimed,—although His Honour thought it was irrelevant to the present proceedings, and she was precluded from raising it,—that the reason why she could not accept the offer of a home was due to the husband's conduct. After the separation the wife supported herself by nursing, although she was not a certificated nurse. After the divorce she said she was unsuccessful in obtaining work and went to Sydney to live with her brother. She claimed that she was unable to work and was dependent for support on her brother, who had his own family to support. His Honour then detailed the successive illnesses of the wife, who had been discharged from hospital and advised not to work for several months, and had then (July, 1931) taken a place where she performed domestic duties for her keep. She added also that her brother has been compelled by the depression to close his home and search for work. There was an affidavit by Dr. Hair, medical practitioner of Sydney, made in November, 1930, in which he stated that he had been attending Mrs. Allpress since September 9, 1930. He confirmed that she suffered from excessive blood pressure and that she suffered from a condition of spasmodic headaches and he described her condition of health as serious. The husband's answer was that his wife was physically strong, enjoyed good health, and was well qualified to earn her living as a nurse. He did not indicate when he had last seen her, and admitted that she went to Sydney as she said, and that she had since only made two visits to New Zealand. His Honour did not know, therefore, how the husband was qualified to depose to his wife's physical condition. After giving a summary of the husband's financial position, His Honour remarked that it showed a surplus of assets over liabilities of £32 0s. 7d. and His Honour did not suppose the husband had overestimated the value of his assets. He was apparently able to provide £1 per week by way of payment to his married daughter for the maintenance of his youngest daughter. His Honour saw no reason to doubt the evidence of the physical condition of the wife as deposed to by Dr. Hair, and the evidence satisfied him that the necessities of the wife were as great, if not greater than the necessities of the daughter for whom the husband was paying £1 per week. That girl, living as she was with her sister, would, His Honour thought, be able to help enough in the house to the extent at least of earning her keep.

His Honour, after remarking that there were several cases in New Zealand where an order for permanent maintenance had been made in favour of a wife guilty of adultery, referred to **Williams v. Williams** (1928) G.L.R. 464, wherein Smith, J., following a dictum by Chapman, J., in **Geange v. Geange,** (1917) G.L.R. 512, made an order in favour of a wife guilty of desertion. In the present case the petition for alimony had not been filed until after the decree absolute had been made. The delay in the present case might be due to the fact that the wife had to live in Sydney. But the fact that her petition was filed after the decree absolute was not a bar. This was so held by Chapman, J., in **Martin v. Martin** (1923) G.L.R. 441, following **Scott v. Scott,** 37 T.L.R. 158, where he said that an application made some five months after decree absolute was in the circumstances of that case not too late. The petition in the present case was filed on October 2, but it was actually signed in Sydney on September 23. The decree absolute was sealed on September 16, and she would not know when that was to be done. Her necessities were great at the present time, and, as His Honour before said, they were as great if not greater than the youngest daughter's. He thought that the wife was entitled to some maintenance, but the husband's means were such that he could not at the present time afford to have his responsibilities added to. For that reason, His Honour thought that the fairest way to dispose of the present application would be to make an order in the wife's favour of ten shillings per week, and the husband could, His Honour thought, do that by reducing the daughter's allowance, which could be reduced.

The order for ten shillings per week dating from September 14, 1931, and subject to the terms and conditions detailed by Smith, J., in his judgment in **Williams v. Williams** (*sup.*) was accordingly made.

Solicitors for petitioner: **Armstrong and Barton,** Wanganui, agents for **L. A. Taylor,** Hawera.

Solicitor for respondent: **J. M. Hussey,** Wanganui.

# The English Courts at Work.

### Through New Zealand Eyes.

By T. H. Wood, LL.M. (N.Z.), LL.M. (Lond.)

A Maorilander whose knowledge of the various Courts in England has been acquired from a perusal of the weighty wisdom distilled into the pages of the Law Reports, is inclined to think that the dignity wherewith law is dispensed by the several tribunals operating in London rises progressively until it reaches its apex in the House of Lords. On viewing them at close quarters, he soon has his perspective adjusted. For, it then appears, the higher the Court, the less is the visible display; seemingly, the inner graces of the highest judicial officers need no adorning other than the established dignity and repute of their possessors.

The historical Old Bailey, London's Central Criminal Court, contains only four small court rooms, over which preside the Recorder of London, the Common Sergeant, and two judges respectively. Their procedure is similar to that adopted in our Supreme Court. The vastness of the Royal Courts of Justice amazes the visitor. In the same building, he finds the King's Bench, the Chancery and Probate, the Divorce and Admiralty, Divisions. Here, too, are the Courts of Appeal, civil and criminal. Most impressive to see, are the Judges of the King's Bench in their scarlet and ermine robes which gorgeously relieve the hue of the sombre-toned barristers before them. The Lord Chief Justice's Court and the Court of Appeal are very interesting, if only for the men, presiding and at the Bar, whose names are household words. At least three of the Lords Justices are on the bench together. Eminent King's Counsel add to the interest, as they appear with less-renowned juniors occuping the seats behind them. On one occasion during the present year, the writer saw no less than eight famous "silks" appearing in the one case, each with one or more juniors. It was not surprising that the Court appeared crowded with such an array in evidence.

The House of Lords does not sit in a court-room, but, while hearing appeals, occupies their Lordships' House itself. The ordinary members of England's supreme judicial tribunal sit facing one another on the green-upholstered benches of their august chamber, all very much at their ease. At first, it appears there is in progress an ordinary session of a very "thin" House. The learned Law Lords wear simple morning dress. One gathers the idea of a designed disregard of formality, here. The air of dignity is not lacking, however. It is imported into the proceedings by the counsel who occupy a rostrum behind the bar of the House, the K.C.'s, donning their full-bottomed wigs for the occasion in deference to the eminent assembly before them, the lesser counsel being also becomingly attired. When the Lord Chancellor is present (in morning dress, of course), it would seem that he occupies the rather uncomfortable-looking woolsack at the far end of the chamber from that containing the appearing counsel. His inability to lounge at ease on the padded seats whereon his distinguished brethren perform their judicial functions, and his distance from the Bar which no doubt adds to the enchantment but precludes easy hearing, are evidently the penalties of greatness that are solaced by an adequate salary and a retiring allowance that no man could despise.

Still more informal is the Privy Council. It does not even enjoy the mellowed surroundings of the "Lords," its room being far away from those serene precincts opening as it does on a corridor in one of the numerous Government buildings in Whitehall. The members of our highest appeal tribunal sit at a semi-circular table in ordinary dress, and, so far as altitude is concerned, on the same level as the counsel there to convince them. The writer of the Journal's London Letter has familiarised us all with their procedure. But the visitor can see at first-hand the learned members of the Judicial Committee lost in the profundity of their thoughts, suddenly to awaken with a subtle question for the confusion of counsel who is in their very near vicinity. The general atmosphere gives one the impression that the reviewing of the decisions of our own Court of Appeal is conducted with the greatest of ease,—an impression liable to a rude shattering on a subsequent plumbing of the depths of their Lordships' wisdom immortalised in the Reports. Though strict rules of procedure and address are adhered to, there is here little of the stiffness which is inseparable from the proceedings in Courts of lesser renown.

I was fortunate in seeing two ceremonies which have become traditional. One was the procession on foot of the Judges and senior counsel, led by the Lord Chancellor in all the glory of his robes of office, from the House of Lords to the Abbey to attend the service marking the opening of the Michelmas term. Afterwards, they drive in state to the Royal Courts to lunch before entering on the arduous duties ahead of them. The other ceremony was the initiation of newly-appointed King's Counsel. As they visited each court-room in turn, the presiding Judge called them within the inner Bar. On both these occasions, the K.C.'s wore their full-bottomed wigs, knee-breeches, silk stockings, and buckled shoes. Apart from the occasions mentioned, or at ceremonial gatherings, they are wigged and robed like their less prominent brethren, their silk gowns alone excepted.

It is somewhat difficult to compare our leading counsel with those in England. Each of the latter is a specialist in some branch of the law, and confines his attention within its limits. In New Zealand, we have not the opportunities of early and distinctive barristerial training such as obtains in England; nor do we particularise in any one department until mature years and the certitude of adequate financial return is assured, and generally not even then. Nevertheless, after seeing at work men whose names resound throughout the Empire, one can venture the opinion that our leading Court men compare very favourably: they could show to advantage when appearing in opposition to England's leading barristers. The recollection of the winning on end of five Privy Council appeals by our present Chief Justice while he was still adorning the New Zealand Bar, shows that the Mother Country's best have to look to their laurels when the best of ours are on the other side.

# Mortgages in Australia.

## Cancellation of Personal Covenants Proposed.

By WILFRED BLACKET, K.C.

The principal local industry of Australian Parliaments during some months past has been the passing of Moratorium Acts. The New South Wales Assembly, as might be expected, has passed quite the worst of them. This provides, taking the principal Act and Amending Acts together, that no mortgagor shall be sued on his personal covenant to repay, only the covenants which affect the maintenance of the premises being enforceable, and these only upon leave of the Court being obtained. The tremendous importance of this provision is, I am afraid, obvious to New Zealanders, as it is to Australians, for here there are many property owners who upon enactment of this measure will simply walk out of the mortgaged premises, leaving the mortgagee to take up the burden of the rates and other charges.

The cancellation of the personal covenant is another step on the road to the Soviet, and is in accordance with the announced policy of Communists in their statement,

"We must destroy all legal papers pertaining to private ownership . . . . and burn all certificates of indebtedness. We must take care that everything is wiped off the earth that is a reminder of the right of private ownership to property."

The nature of the Act was not discovered by His Majesty's Opposition in the Assembly, for they are unsuspicious persons who walk into all the traps that they, upon the most diligent search, can find. Whether the Council will accept the Bill or not is still a question, but it may do so, for it passed the wickedest and worst of Soviet measures—the Wheat Requisition Act,—without a murmur, and even with expedition and applause. It may be thought that as there are more mortgagees than mortgagors in the Council that the Bill will be rejected; but this is not certain, for it is always the noisiest (in the House and outside) who directs the course of legislation, and the mortgagor is always the man who squeals. The mortgagee was always the "strong silent man" that people who go to Pictures hear about, and it seems now that they may have to make silence a habit. This Bill when first brought before the Assembly was being considered by caucus, and the debate on the first reading proceeded without any copy of the measure being available. This strange condition of affairs has recently occurred in several measures before the New South Wales Assembly. I mentioned this matter when reporting proceedings upon the dreadful Law Reform Bill—now dead and buried with a verdict of *felo-de-se* recorded.

One wonders how much longer such practices as these will be tolerated. The English are a law-abiding people, but any further endurance of our present tyranny would seem to be a negation of the ancient boast that "Britons never shall be slaves."

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"The duties of a Lord Chancellor in appointing justices of the peace, are the most arduous and difficult of the many tasks entrusted to him."

—Lord Sankey.

# The Crown and Statute Law.

## Taking Advantage, though not Bound.

By C. C. CHALMERS.

(*Concluded*).

In the first portion of this article, I dealt with s. 6 (k) of the Acts Interpretation Act 1924 which, in effect, states that the Crown is not bound by any statute unless the statute provides to the contrary.

I now come to the second branch of the article, and the main purpose of it; that is, to discuss, but on account of the exigencies of space only briefly, the proposition of law that the Crown, though not bound by a statute, may take advantage of it. See, for instance, 6 *Halsbury*, p. 409, par, 622, and 27 *Halsbury*, pp. 164-5, par. 316. But *cf*, *Craies Statute Law*, 3rd ed., p. 366, which treats the maxim as though it were limited to the King taking the benefit of an Act "in his natural capacity as an Englishman, and not in his public and royal capacity." Craies cites, in support, 1 *Bl. Comm.* 262 (and 7 *Co. Rep.*, 32); but none of the authorities relied on by Halsbury. *Maxwell on Statutes*, 7th, 1929, does not appear to deal with the question at all: see p. 117 *et seq.*

The above proposition that the Crown, and not merely the King personally, can take the benefit of an Act, by which it is not bound, is, in any case, it is submitted, based on very doubtful authority. This appears from an examination of the cases, &c., cited by *Halsbury*, *supra*, and from *Cayzer Irvine and Co. v. Board of Trade* (1927) 1 K.B. 269, C.A., 95 L.J. K.B. 1054. In the Court below, before Rowlatt, J., the Crown had succeeded in the submission that the government could take advantage of the Statute of Limitations, although that was not an Act which bound the Crown. This latter point was decided in *Lambert v. Taylor*, 4 B. & C. 138. In *Cayzer's* case, *supra*, however, before Rowlatt, J., this point was not as fully argued, for the plaintiff, as it was by Sir John Simon in the Court of Appeal. Moreover, the authorities relied on by the Crown, before Rowlatt, J., and the judgment of Rowlatt, J. must be considered in the light of the remarks by Scrutton, L.J., in the Court of Appeal. Unfortunately, in that Court, the plaintiff succeeded, in the appeal, on another ground; and the Crown did not there argue the proposition of law above referred to. The judgment of the Court of Appeal is, therefore, only *obiter* on this point. The case went to the House of Lords (1927) A.C. 610; 96 L.J. K.B. 872. There, (p. 613 of Law Reports), Sir J. Simon was about to argue the proposition; but at the suggestion of Cave, L.C., the argument was postponed; and argument on the question became unnecessary, because the House of Lords upheld the Court of Appeal on the ground on which it had decided the case. The following portion however, of the judgment of Scrutton, L.J., is interesting and instructive: (1927) 1 K.B. 269 at 294; 95 L.J. K.B. 1054, 1061:

> "The only remaining question, which is one of great historical interest and importance, is whether the Crown can successfully say: 'We are not bound by the statute, but we are at liberty to take advantage of it.' At first sight such a statement appears somewhat strange. There is undoubtedly a long series of statements in text books repeating

each other for some centuries; but there is something to be said for the view argued by Sir J. Simon that they start with a passage in an unsuccessful argument of a law officer which was not relevant to the case before the Court, but which has been taken out by a text-writer and repeated for centuries until it was believed that it must have some foundation. Again, I have not heard the Solicitor-General on this point and, therefore, I am not going to say more than this, that it will need careful consideration when that question arises in a case in which it has to be decided, whether there is any foundation for this confidently repeated statement of text-writers except the passage in the Magdalen College Case, 11 C. Rep. 66b and possibly a passage in 7 Co. Rep. 32a, which is not the report of a case decided in the H. of L., but the case of a private conference between the law officers and the Chief Justices of the Stuart Kings in a case in which the parties, the subjects affected by the decision which was given against them, were not present and were not heard. Which of the two is the most satisfactory foundation for the statement in the text-books will need to be carefully looked at when the question becomes material to be decided."

The proposition has also been repeated by Judges in New Zealand: See *In re Buckingham* (1922) N.Z.L.R. 771, at 774 (Chapman, J.); *Harcourt v. The Attorney-General* (1923) N.Z.L.R. 686 at 692 (Reed, J.); and *McDougall v. The Attorney-General* (1925) N.Z.L.R. 104 at 112 (Sim, J.). An examination of the authorities cited by *Halsbury* (there is not space here to do this) forces one to the conclusion that "the authority for the rule is very doubtful and scanty," to employ the comment in the note on *Cayzer's case* in 43 L.Q.R., p. 157. See also note in 79 *Solicitors' Journal*, 993. If the proposition is unsound, it will certainly have far-reaching and beneficial effects. It will remove existing anomalies and injustices. The Crown, not knowing when it may require to invoke the provisions of any Act, will have to procure the enactment of a clause repealing s. 6 (k) of the Acts Interpretation Act, 1924, and declaraing that the Crown is to be deemed bound by and entitled to the benefit of every Act. The absurdity of the present position is shown by *McDougall v. The Attorney-General* (1925) N.Z.L.R. 104. There, the Crown would not submit to proceedings under the Declaratory Judgments Act, as being an Act not binding upon the Crown; although it had on several prior occasions (see *ibid*, Sim, J. at p. 112) been a party to proceedings under the Act.

Then, in *In re Buckingham* (1922) N.Z.L.R. 771, the Crown had registered its bill of sale under The Chattels Transfer Act, 1908, but successfully evaded the application of s. 20 of the Act to the bill of sale itself, as being an Act not binding on the Crown. Even, for the moment, assuming that the Crown may take advantage of an Act, it cannot, it is submitted, take advantage of certain of its provisions and reject others, for that would be, not to take the benefit of an Act, but, in effect, to make a special Act. The right, if exercised, must bring the whole Act into play. There appears to be no direct authority on this point, but *The Queen v. Cruise*, 2 Ir. Ch. App. 65, lends some support to that view. *The King v. Canterbury Farmers, &c.* (1924) N.Z.L.R. 511, was a similar case ro Buckingham's case, *supra*, but with, no doubt, results unexpected by the Crown. Adams, J., held that registration of the bill of sale there did not affect with notice a rival registered bill of sale holder, whose title being legal took priority of the Crown's merely equitable title. That decision may have led to the passing of the Chattels Transfer Act, 1925, s. 4 of which now makes the Act binding also on the Crown.

One can imagine greater absurdities, as is illustrated by the following example: The Crown, through its law officer at Dunedin, in an action before the Court there, elects to take advantage of the Sale of Goods Act, an Act which does not bind the Crown by virtue of s. 6 (k) of the Acts Interpretation Act, 1924. On the same day, in a similar case in Auckland, the Crown law officer objects to the application to the Crown of the same Act. Here we have the absurd spectacle of an Act being simultaneously in force and not in force, so far as the Crown is concerned. In other words, it amounts, in effect, to law officers having the right to legislate, and to repeal legislation, from day to day, as to the Crown may seem meet!

# Illness of the Chief Justice.

As this issue goes to press, we learn with very sincere regret that His Honour the Chief Justice, Sir Michael Myers, has been obliged by sudden illness to undergo a minor operation in a private hospital in Wellington.

Latest advices are to the effect that His Honour is progressing satisfactorily.

We are sure that every member of the profession in the Dominion, and many others overseas, join with us in the respectful and heartfelt wish that it will not be long before "the Chief" is back again in the Court to which his very presence adds lustre, fully restored to his usual good health.

# Acts Assented To.

**Public Acts.**

No. 17. Defence Amendment Act, 1931 (Oct. 3).
No. 18. National Provident Fund Amendment Act, 1931 (Oct. 3).
No. 19. Imprest Supply Act, 1931 (No. 4) (Oct. 3).
No. 20. Land and Income Tax Amendment Act, 1931 (Oct. 16).
No. 21. Land and Income Tax (Annual) Act, 1931 (Oct. 16).

**Private Acts.**

No. 1. Wanganui Church Acre Amendment Act (August 31).
No. 2. Dominion Life Assurance Office of New Zealand, Ltd. Act, 1931 (Oct. 16).

**Local.**

No. 1. Petone Borough Council Empowering Act (August 31).
No. 2. Auckland and Suburban Drainage Amendment Act, 1931 (Oct. 3).
No. 3. Rotorua Borough Reclamation Empowering Act, 1931 (Oct. 3).
No. 4. South Wairarapa River Board Empowering Act, 1931 (Oct. 16).
No. 5. Cameron and Soldiers' Memorial Park (Masterton) Trustee Empowering Act, 1931 (Oct. 16).

"I recently showed a distinguished foreign commissioner over the Central Criminal Court. The visitor was much impressed by the swiftness of the procedure. This, he said, was far superior to that in his own country, although it had 'the very best of judges that money could buy.'"

—Mr. Sheriff Collins, at the Lord Mayor of London's Banquet to His Majesty's Judges.

# Recent English Cases.

## Workers' Compensation.

The House of Lords has again had to decide a case on the law of Workers' Compensation for industrial disease; and has arrived at a conclusion contrary to that which had been formed by the Judge of a Northern Court and by the Court of Appeal (*Kitchen v. Koch and Co.*, 72 L.J. (N.S.) 60. Sec. 43 of the English Act of 1925 is no triumph of draftsmanship; but the effect of it, stated quite generally, is that a workman may claim compensation for disablement by a disease of this kind as if it were an accident, if the disablement is due to employment in which he was engaged within twelve months of its commencement. In cases where the official certifying surgeon cannot name the date of commencement the law directs that it shall be fixed at the date on which the certificate is given. Then there is the general provision of sec. 14—that claims must be made within six months of the date when the cause for them occurs; but this rule is relaxed where it is found that failure to make the claim in time was due to "mistake, absence from the United Kingdom or other reasonable cause." In the case before the House of Lords the appellant must have contracted his illness before June, 1928, when his employers closed their works. They did not receive the appellant's claim and certificate till July, 1929. It stated no date for the inception of the disease; and the employers, rightly taking the date of the certificate as the date of disablement, said that the claim was out of time.

The appellant's advisers then discovered that the certificate which they had sent in on his behalf was so defective as to be void. The disease which it named was not a scheduled disease, and compliance had not been made with the formalities needed to make its date (July, 1929) the date of disablement. After correspondence, and further mistake, the certifying surgeon ultimately dated back the occurrence of the disease to May 22, 1929, which was just within the twelve months allowed for claims. The employers then alleged that the claim was out of time as not having been made within six months of its occurrence. This contention was upheld by the County Court and the Court of Appeal. The House of Lords, however, felt that the workman could say that the delay was occasioned by mistake or other reasonable cause. They declined, however, to endorse certain observations (made *obiter*) of Cozens Hardy, M.R., in *Moore v. Naval Colliery Co.*, (1912, 1 K.B. 28), which, if accepted, might abolish a time limit for claims of this kind. In the result there was some "bungling" by an official whose genius is not of the kind which fills up forms correctly, and these mistakes caused delays and doubts; but they have not in the end deprived a workman of what seems a sound case for compensation.

## Will: Execution.

"Let's choose executors and make our wills." So said a very eminent authority, but in his time, and later in Blackstone's time, the law, which was the perfection of common sense, followed the rule that you might sign the will where you liked provided the signature was meant to authenticate the document. Then Parliament, thinking this to be dangerous laxity, intervened and said the signature must be "at the foot or end" of the will (Wills Act, 1837, sec. 9).

This might have been supposed to be a sufficient direction, but, in his *Real Property*, the 13th edition—the last he himself edited—at p. 207, Joshua Williams said: "Some very careless testators, and very clever judges have, however, contrived to throw upon this clause of the Act a discredit which it does not deserve," and so the Wills Act, 1852, prescribed with an extraordinary wealth of detail, just where the signature might be put, adding the general caution that no signature should be "operative to give effect to any disposition or direction which is underneath, or which follows it."

That, however, has not succeeded in choking off the carelessness of testators and the ingenuity of judges, and it has been held, for instance, that if the signature is at the end of the first sheet of a will consisting of several, it may be possible to re-arrange them so as to put the signed sheet last: *Re Wotton*, L.R. 3 P. & D. 159; 43 L.J., P. & M. 14; *Re Gilbert*, 78 L.T. 762; and the use of an asterisk has proved effectual for a like purpose: *Re Birt*, L.R. 2 P. & D. 214; 40 L.J. P. & M. 26.

In *Re Stalman* (1931, W.N. 143), at the Liverpool Assizes recently, Finlay, J., with a laudable desire to uphold the will, held that a signature at the extreme top was effective. This was by an extension of the principle of the first two cases just cited, though one hesitates to suggest that the learned Judge considered that, to meet the statute, the body of the will might be "deemed to be" shifted so as to come above the signature. It was, however, too much for the Court of Appeal, who held that the result disregarded the plain words of the statute. But why does the learned Editor of the *Law Reports* "star" the decision? It is just such elementary truths that the practitioner rejoices to read in the full Reports.

## Driver of Motor-car: Servant or Agent?

A case of interest to owners of motor-cars, *Barnard v. Sully*, 72 L.J. (N.S.) 122, was decided recently on appeal from a County Court. On January 3, 1930, the plaintiff's van was run into by the defendant's motor-car in the Brixton Road. The plaintiff claimed damages for injuries to himself and the damage caused to his van. The defendant pleaded that the car was not being driven by himself and that the driver was not her servant or agent and, alternatively, if he were the servant or agent that he was not acting within the scope of a servant's or agent's authority. The County Court Judge withdrew the case from the jury on the ground that at the time of the collision the motor-car was not being driven by the defendant or by her servant or agent, and gave judgment for the defendant. The plaintiff appealed.

Scrutton, Greer and Slesser, L.JJ. (sitting as additional Judges of the King's Bench Division) allowed the appeal. The fact was admitted that the defendant's motor-car ran into the plaintiff's van, damaged it and injured the plaintiff. There were occasions on which a motor-car might neither be driven by the owner nor by his servant nor by his agent, but these occasions were rare. The presumption was the car was being driven by the owner or by his servant or by his agent, but this was a rebuttable presumption, and the onus of proof was on the owner. The mere fact of ownership was material

on which the case ought to have been put before the jury.

### Cheques and Agency.

As is well known, the codifying of the law of bills of exchange and cheques in the Bills of Exchange Act, 1882, did little to stem the tide of decisions on the subject. It may, to a certain extent, have wiped out the old decisions, but a line of new ones was promptly started: *Vagliano's Case* (1891, A.C. 107; 58 L.J., Q.B. 357), for instance, which was the result of the provision of sec. 7 (3) that where the payee was a "fictitious or non-existing person," the bill might be treated as payable to bearer. But apart from cases arising on the words of the statute, there are cases depending on the general law of which the codifying statute forms a part. This is illustrated by *Slingsby and Others v. The District Bank*, in which Mr. Justice Wright delivered a considered judgment on August 16th last (72 L.J. 122). The plaintiffs, who were executors, had an account with the defendant bank. On their instructions, their solicitor C., a member of the firm of C. & P., drew a cheque for 5,000*l.*, payable to John Prust & Co., stockbrokers, for the purchase of stock. C. obtained the signatures of the plaintiffs, but then, instead of sending the cheque to John Prust & Co., he utilised the space after their name by inserting "per C. & P." He indorsed it "C. & P." only, and paid it into the Westminster Bank to the credit of a company to which he was indebted. He disappeared, and the 5,000*l.* was lost. Had the plaintiffs a remedy against the Westminster Bank or the District Bank? They sued the Westminster Bank first and failed. Then they sued the District Bank and succeeded on the ground that the indorsement on the cheque was insufficient, and did not justify the payment of the cheque by that bank.

A cheque to "A., per X." is a novelty, but the intention appears to be that X. shall receive the money as agent for A., says the *Law Journal* in comment on the foregoing case. What then is the correct indorsement? Can he indorse "X." only, or must he indorse "A., per X." If the former, the indorsement was in order. If the latter, then the indorsement was defective, and the bank was liable. The legal text-books on Banking and Bills of Exchange appear to furnish no guidance, but Wright, J., referred to banking publications, which stated that the correct indorsement was "A. per X.," though the banking witnesses called for the bank said that in practice an indorsement "X." simply was accepted. The learned Judge held, however, that banking theory was better than banking practice, and so the indorsement was insufficient. This he put on the ground that the customer's mandate was to pay "A. per X.," and the bank could not discharge itself except under an exactly corresponding indorsement. Nor could the bank escape liability by the plea that the plaintiffs had facilitated the fraud by leaving a space after the name of the payee, "John Prust & Co.," which could be filled up "per C. & P." Leaving spaces in the money lines of a cheque, so that the amount can be readily increased by the addition of words and figures, has since *Young v. Grote* (4 Bing. 253; 5 L.J. 103, C.P. 165) was revived by *London Joint Stock Bank v. Macmillan* (1918, A.C. 777; 88 L.J., K.B. 55) disabled the customer from setting up the forgery. But Wright, J., declined to extend this to the leaving of a space after the name of the payee. The leaving of a space on that line is usual, and no one would anticipate the insertion of an agent's name.

# Reprint of the N.Z. Statutes.

### The Managing Editor Arrives.

Since the last issue of the JOURNAL appeared, Mr. H. Alleyn Palmer, the Managing Editor of the *Public Acts of New Zealand* (*Reprint*), which is now in course of publication, arrived in New Zealand from London by the R.M.S. *Tamaroa*.

Mr. Palmer studied at University College, Oxford, where he was in residence when War broke out in 1914. In September of that year he joined the Middlesex Regiment and served with it in Egypt and later in France: later still he joined the Indian Army and served as Captain and Adjutant of the 91st Punjabis Depot in Rangoon, Burma. On his return from the East, having obtained his Master of Arts degree at Oxford, he read law as a pupil of Mr. St. John Micklethwaite, K.C. He was called to the Bar by the Inner Temple in November, 1921, and commenced practice in Chambers with the Hon. Geoffrey Lawrence, K.C. It is interesting to note that another member of the same Chambers at that time was "Inner Templar," the present writer of the JOURNAL'S "London Letter."

Mr. Palmer first became associated with Messrs. Butterworth and Co. in connection with the compilation of the *English and Empire Digest*; after the conclusion of that work, he acted as Associate Editor of Halsbury's *Statutes of England*, a huge undertaking that covers a period of seven hundred years.

Mr. Palmer was appointed Managing Editor of the proposed *Reprint* when Mr. Christie, the Parliamentary Law Draftsman, visited England last year at the request of the Publishers. Thus, at the outset of his task, Mr. Palmer at once had the advantage of the Parliamentary Law Draftsman's wide experience of New Zealand law and conditions. At the same time, Sir Thomas Sidey, then Attorney-General, was in London for the Imperial Conference. Advantage was taken of his presence there to discuss with him the plan of the *Reprint* and the classification of the Statutes to be included therein. His kindly advice and valuable suggestions have greatly facilitated the work, and enabled its being readily advanced towards an early conclusion.

Mr. Palmer has now come to the Dominion where he will have the general guidance of the New Zealand Editorial Board, which has been appointed by the Government, and the more particular assistance of the Law Draftsman, who, in addition to his position as a member of the Board, will act as the Government's representative to ensure that the work is carried out in accordance with their requirements. The printing is in the hands of the Government Printer, the excellence of whose work is universally recognised.

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"There is no human being whose smile or frown, there is no Government, Tory or Liberal, whose favour can start the pulse of an English Judge upon the Bench, or move by one hair's breadth the even equipose of the scales of justice."

—Lord Justice Bowen.

# Discharge of Contract.

### By Subsequent Impossibility of Performance.

"When a party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity because he might have provided against it by his contract." Such was the law expressed in the old seventeenth century case of *Paradine v. Jane*, Aleyn 26, and the Court of Appeal in *Walton Harvey, Ltd. v. Walker and Homfrays, Ltd.*, 1931, 1 Ch. 274, 100 L.J., Ch. 93, asserted that this was still the law unless an additional condition in the contract could be implied.

While the general rule may be thus stated, the trend of cases in recent years has been to wear away the rule so that strict adherence to the bond is less common than a discharge of the contract by reason of circumstances arising which make the fulfilment of the contract impossible. This development is due to the doctrine of an implied condition, the principle of which is clearly expressed by Lord Loreburn in *F. A. Tamplin Steamship Co., Ltd. v. Anglo-Mexican Petroleum Products Co., Ltd.*, 1916, 2 A.C. 397; 85 L.J.K.B. 1389. "When a lawful contract has been made and there is no default, a Court of law has no power to discharge either party from the performance of it unless either the rights of someone else or some Act of Parliament give the necessary jurisdiction. But a Court can and ought to examine the contract and the circumstances in which it was made, not, of course, to vary, but only to explain it in order to see whether or not from the nature of it the parties must have made this bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it is not expressed in the contract. . . . An examination of the decisions confirms me in the view that when our Courts have held innocent contracting parties absolved from further performance of their promises, it has been upon the ground that there was an implied term in the contract which entitled them to be absolved. . . . It is, in my opinion, the true principle."

Modern examples abound of applications of this principle. In *Taylor v. Caldwell*, 1863, 3 B. & S. 826; 32 L.J.Q.B. 164, a contract for the letting of a music-hall was discharged because the hall had been burned down; it was an implied term that the subject-matter of the contract should continue to exist. Similarly in contracts where the continued existence of a set of circumstances may be considered as an implied condition, any ending of that state of things may discharge the contract, as in *Krell v. Henry*, 1903, 2 K.B. 743. The doctrine received its greatest extension in commercial causes arising out of circumstances caused by the war, when, under the name of "commercial frustration," the principle was held to apply to cases where supervening circumstances render performance impossible in the time and manner contemplated by the parties. In *Metropolitan Water Board v. Dick, Kerr and Co., Ltd.*, 1918, A.C. 119; 87 L.J.K.B. 370, delay in constructing a reservoir due to the war and consequent concentration by the defendants upon work ordered by the Ministry of Munitions was held sufficient to discharge the defendants.

The application relied upon by the defendants in the recent Court of Appeal case was that in *Baily v. De Crespigny*, L.R. 4 Q.B. 180, in which it was held that the intervention of some higher authority, rendering performance impossible, discharged the contract. The defendant had covenanted with the plaintiff that neither he nor his assigns would erect any but ornamental buildings on certain land adjoining the plaintiff's land. Later a railway company acting under an Act passed twenty-two years after this contract, acquired the land by compulsory purchase and built a station. The plaintiff sued the defendant on the covenant, but the Courts held that the action of the railway company, acting under statutory powers, had rendered the performance impossible: the Legislature had created a new kind of assign such as was not in the contemplation of the parties when the contract was entered into.

In *Walton Harvey, Ltd. v. Walker and Homfrays, Ltd.* (*supra*) the facts did not justify the Court in holding that there was an implied condition within the limits laid down by the cases. By a Private Act of Parliament in 1920, the Corporation of Manchester obtained powers enabling them to take parts of certain streets for improvements, one of these being the site of the St. Peter's Hotel. The Act provided that the Corporation should not compulsorily acquire these premises before October 31, 1925. On December 31, 1924, the defendants, the owners of the St. Peter's Hotel agreed to let the plaintiffs, who are advertising agents, the exclusive right of fixing and exhibiting electric advertisements on the hotel, and the agreement was to remain in force for seven years. The plaintiffs, in accordance with this agreement, entered on the premises and fixed the electric signs. On December 18, 1925, the Corporation, acting under powers given by the 1920 Act, served a notice to treat in respect of the premises, and subsequently, in April, 1928, an agreement was reached between the Corporation and the defendants by which the defendants sold their leasehold to the Corporation. The Corporation gave notice to the plaintiffs that the licence for the advertisement hoarding would be withdrawn.

The plaintiffs brought an action for damages for breach of contract, but the defendants contended that their failure to carry out the agreement was wholly due to the compulsion exercised by the Corporation with statutory authority. Bennett, J., held, and the Court of Appeal agreed with him, that the premises were acquired compulsorily, but that nevertheless, the defendants were not discharged. They knew in December, 1924, that there was a risk, after October 31, 1925, that the St. Peter's Hotel would be acquired by the Corporation. They could not say that this acquisition was not in the reasonable contemplation of either party at the date of the contract, and no implied conditions as to the existence of the premises should be read into the contract. In the state of knowledge possessed by the defendants, they should have foreseen and provided against the exercise by the Corporation of its statutory powers.

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"It is an unwritten law in the profession that counsel are always prepared gratuitously to advise upon all cases where an appeal is suggested by a pauper, and this is particularly the case where counsel are eminent."

—His Honour Mr. Justice Blair.

# Supreme Court.

Smith, J. July 6; September 29, 1931. Auckland.

IN RE JENNINGS (DECEASED), JENNINGS AND OTHERS v. NICHOLSON AND OTHERS.

**Will—Construction—Precatory Trust—Vesting—Gift by Testator of Real and Personal Estate to Wife for Life with Provision That After Her Death "the Property shall Revert to Son who shall Regard it as a Temporary Home for Sisters Whenever They Wished to Come There"—Power of Sale to Son "If it should appear to Him to be Beneficial to Dispose of the Property Provided One-third of Value Distributed Between his Four Sisters" (Named).**

Originating Summons for the interpretation of the will of William Jennings, deceased, who died at Ramarama (formerly known as Maketu) on May 15, 1897, leaving a will dated February 13, 1897, and a codicil dated April 30, 1897. The will provided *inter alia* as follows: "I give and bequeath to my wife Alice Jennings all my real and personal property for her use and benefit during her lifetime but not to be sold and after the decease of the said Alice Jennings the property shall revert to my son Henry Jennings who shall regard it as a temporary home for all his sisters whenever they wish to come there. But if at any time after my son Henry Jennings has come into possession of the property it should appear to him to be beneficial to dispose of the property he shall have power to dispose of it for his and his sisters' benefit providing that he distributes one third of the value of the property between his four sisters Annie Helen Bella and Lizzie." The codicil provided: "It is my wish and command that my grand-daughter Alice Jennings finds a home with her grandmother Alice Jennings and that after her death my son Henry Jennings shall give her a home until such times as she finds one for herself I hereby appoint William Henry Nicholson School Master Maketu Auckland as my executor to see that all the provisions of my will executed February 13th, 1897 and codicil thereto dated April 30th 1897 be carried out in their entirety."

The Will and Codicil were both drawn and written by the executor named in the codicil. Probate was granted to him on July 6, 1897.

At the time of his death, William Jennings was 64 years of age. He left him surviving (a) his widow, Alice Jennings, (b) four daughters, the plaintiffs herein, and described in the will as Annie, Helen, Bella, and Lizzie, each of them being then of full age and Annie and Bella being then married, (c) two sons, William George, and James, then in Australia, not referred to in the will, and (d) another son, Henry Jennings, referred to in the will, and, at the time of his father's death, 18 years of age. William Henry Nicholson, (the executor of the will of William Jennings) died October 1, 1904, and probate of his will was granted to his widow, the defendant, Mary Ann Nicholson.

Testator's son, Henry Jennings, married on December 29, 1909. Three children were born of the marriage, viz., Rayfield, Glenworth and Joan. They were still minors, and were represented in these proceedings by the Public Trustee. Their father, Henry Jennings, died at Ramarama on September 26, 1920, leaving a will and codicil, by which his widow, Emily Jennings, and one John Hill Lewis were appointed the ecutrix and Executor respectively of his will. Probate was not granted to them until June 12, 1925, following apparently upon the death of Alice Jennings, (the widow of the testator Williams Jennings) on March 27, 1925. On April 27, 1927, Emily Jennings (the widow of the aforesaid Henry Jennings) married one Michael Mahon of Ramarama. She was, as Emily Mahon, a defendant in the present proceeding together with her co-executor, John Hill Lewis. They represented the estate of Henry Jennings. The assets comprising the estate of the deceased William Jennings were for Death Duty purposes assessed as follows: Plate and ornaments valued at £13 11s. 6d.; horses and farming stock valued at £19 and real property valued at £197. The real property comprised some 24 acres. It was unencumbered at the date of William Jennings' death and it remained unencumbered at the present time. The Government valuation of this land on 31st March, 1928, showed a capital value of £1,175. The questions raised in the originating summons in respect of the will of the testator, William Jennings, were (1) Whether Henry Jennings was granted the whole of the remainder as an absolute gift or whether a trust was created in favour of the four sisters described as "Annie, Helen, Bella and Lizzie," and (2) If a trust was created, whether the said sisters could at any time request a sale of the property?

HELD: Trust as to temporary home too vague for enforcement. Restriction of power of disposition inoperative as a trust, because it imposed no obligation to sell. Gift to son being unconditional, he took absolute vested interest on testator's death.

**Jacobsen** for plaintiff.

**Rose** for defendant, Emily Mahon.

**Johnstone** for Public Trustee.

SMITH, J., said that the first question was as to the nature and extent of the interest given to Henry. The words "the property shall revert" were the words of gift, and, in their ordinary meaning, they carried the whole of the real and personal property, and not merely the right to the possession of it for a limited time. The words "who shall regard it as a temporary home for all his sisters whenever they wish to come there" purported to qualify the words of gift. Taken, however, with the words of gift, they showed clearly that Henry was to take the property beneficially. The question then was whether Henry took the property beneficially subject to a trust which could be enforced against him. His Honour thought it clear that this trust as to a temporary home was too vague to be enforced by the Court. **In re Hamilton** (1906) N.Z.L.R. 218. They had, then, words of gift including real property which amounted to a devise of the real property, and such a form of gift must be construed to pass the fee simple, unless a contrary intention appeared by the will: S. 28 of the Wills Act, 1837. The words of gift comprised the personal property as well, and, in His Honour's opinion, those words were sufficient to pass all the property to Henry, subject to the life interest unless a contrary intention otherwise appeared. He was of opinion that no contrary intention so appeared. In the next clause of the will, the testator contemplated, for the operation of that clause, that it must have appeared to Henry himself to be beneficial to dispose of the property, and then he purported to give a power of disposition in that event; and, upon such a disposition, he purported to give to the daughters an interest in the "value" but not in the property itself. But if Henry did not think it beneficial to sell, His Honour was of opinion that the testator contemplated that he had given the property itself in its unconverted state at the expiration of the life interest to his son Henry absolutely, subject to a trust as to a temporary home which was too vague to be enforced. The restriction as to the power of disposition, was, in His Honour's opinion, inoperative as a trust, because it imposed no obligation upon Henry to sell; and it must be regarded as repugnant and void to what amounted to an absolute gift of the property in specie to Henry. **In re Elliott** (1896) 2 Ch., 353.

The next question was whether Henry took a vested interest at the testator's death. Henry died in 1920, before the expiration of the life interest in 1925. But the gift to Henry was not made contingent upon his surviving the widow or upon attaining full age, and, in His Honour's opinion, he took a vested interest at the death of the testator. His representatives could now claim the property absolutely. **Packham v. Gregory,** 4 Hare 396; and see **Re Jobson,** 44 Ch. D. 154. As there was nothing in the codicil to affect the view of the will which had had adopted, His Honour's answer to the first question in the Originating Summons was "Yes." That answer, he added, disposed of the other questions.

Solicitors for plaintiff: **Bennett and Jacobsen,** Auckland.

Solicitor for the defendant Emily Mahon: **H. G. Rose,** Auckland.

Solicitors for the Public Trustee: **Stanton, Johnstone and Spence,** Auckland.

# Court of Arbitration.

Frazer, J. August 13, 1931.
Auckland.

PAGET v. THE KING.

**Workers Compensation—Independent Legal Advice—Release from Liability for Further Compensation Moneys—Solicitor Chosen and Instructed by Employer to Advise Worker as to his Legal Rights Not Independent Solicitor Although Acting *bona fide* and Giving Sound Advice—Act for Benefit of Injured—Strict Adherence Essential—Release Set Aside—Workers' Compensation Act, 1922, S. 18.**

The Suppliant was injured by accident on August 1, 1930, while engaged in road-making for the Public Works Department, at Ruakokore, near Opotiki. Liability for the payment of compensation was admitted by the Public Works Department, and on December 19, 1930, the suppliant, on receipt of certain moneys, executed the following acquittance: "I Richard William Paget of Omaio do hereby acknowledge to have received this 19th day of December, 1930 from His Majesty the King the sum of £17 4s. 1d. sterling in full satisfaction and discharge of all actions claims and demands which I may now have or but for this discharge might have against His Majesty the King or his contractors agents or servants in respect of injuries whether now or hereafter to become manifest arising either directly or indirectly from an accident which happened to me during the course of my employment on or about the 1st day of August, 1930 while employed on the Opotiki-East Coast Road—Te Kaha to Orete Point Section AND in consideration of the abovementioned payment I hereby undertake not to commence or institute any action suit or proceeding against His Majesty the King or his contractors agents or servants in respect of the said injuries or in respect of any claim which I now have or might have for any matter or thing whatsoever arising out of or relating to the said accident and this discharge may be pleaded in bar to any action suit or proceeding commenced by me against His Majesty the King his contractors agents or servants AND I DO FURTHER ACKNOWLEDGE that before signing this agreement I had competent and independent advice as to all legal and medical questions arising in connection with my claim for compensation AND I ACKNOWLEDGE that the nature and extent of my injuries have been fully explained to me by Eric Candy Medical Practitioner AND that the legal questions in connection with my claim have been thoroughly explained to me by Gilbert Murray my solicitor AND I FURTHER ADMIT that this document has been read over to me and I fully understand the meaning and effect thereof." The document was properly executed and attested. Appended to it were the following certificates: (a) "I, Gilbert Murray of Opotiki, solicitor DO HEREBY CERTIFY that I have carefully considered all legal questions arising in connection with the claim of the above-named Richard William Paget for compensation AND I have fully explained his legal rights to him. (Signed) Gilbert Murray, 19th December, 1930." (b) "I, Eric Candy of Opotiki, Medical Practitioner DO HEREBY CERTIFY that I have carefully examined the above-named Richard William Paget AND I have fully explained to him the nature and extent of his inquiries. (Signed) E. Candy, 19th December, 1930." It was not disputed that, before executing this document, the suppliant had obtained competent and independent medical advice from Dr. Eric Candy. The suppliant, however, asked the Court to set aside the document on the grounds that he had not received independent legal advice within the meaning of Section 18 of the Workers Compensation Act, 1922. The practice of the Public Works Department, when negotiating for the settlement of compensation claims arising in the Opotiki district was to take injured workmen to one or other of the two firms of solicitors practising at Opotiki. The work was divided by the Department between these firms. On this occasion it was Mr. G. Murray's turn to act as legal adviser to the injured worker, and the engineer of the Public Works Department arranged with him to advise the suppliant as to his legal rights under the Act. Mr. Murray, in giving evidence, stated that he understood that he was retained by the Public Works Department to give the suppliant independent legal advice as required by section 18 of the Act. He said that his fee was paid in every case by the Public Works Department, and that he regarded the Department as his client, and responsible to him for his fee. The engineer of the Department had remained in the room when the suppliant was being advised. It was contended by counsel for the Crown that, although the solicitor's fee was paid by the Public Works Department, it was clearly understood by the parties that the solicitor was in no way acting for the Crown, but was free to give the suppliant independent legal advice.

**Held:** Solicitor, to be independent, must be claimant's own solicitor, acting independently of employer. Claimant must be given free choice of solicitor to advise him. Requirements of Act must be adhered to strictly to the letter. *Bona fides* of all concerned in present case undoubted. Agreement set aside as invalid.

**Sullivan** for suppliant.
**Hubble** for the Crown.

FRAZER, J., after outlining the facts, delivered an oral judgment in which he said that the question the Court had to decide related to the validity of an agreement which purported to give a full release from liability for further payments of compensation in respect of the accident to the suppliant. Section 18 of the Workers Compensation Act, 1922, provided that no such agreement was to be binding on a claimant unless, before it was made, he had had competent and independent legal and medical advice. In so far as the medical advice was concerned, there was no question. It was admitted that Dr. Candy advised the suppliant fully and independently. The difficulty arose as to the legal advice. The Court wanted to make it perfectly clear that they were quite satisfied that both Mr. Atkinson, the Public Works Department's engineer, and Mr. Murray, the solicitor concerned, were perfectly honest in the matter. The best proof of their *bona fides* and of the soundness of Mr. Murray's advice was that the plaintiff at first refused to sign the agreement; because he had been made clearly to understand that, if he signed it, he would sign away all his legal rights. The Act, however, was strict in its wording. The legal advice had not only to be competent, which it was, but also independent. Mr. Murray said he had advised Paget independently. The Court believed that he had advised him as fully and fairly as if he had been his independent legal adviser; but that did not satisfy the requirements of the Act. A solicitor, to be independent, must have been a client's own solicitor. He must have looked to the suppliant as his client. In the present case, what had happened? The Department knew that there were only two firms of solicitors in Opotiki, and it also knew that the average working man had little legal business to transact, and little occasion to consult a solicitor. It was quite natural in a case like this for Mr. Atkinson to have said to the suppliant: "If you have no solicitor of your own, what about going to Mr. Murray?"—it happening to be his turn to act as legal adviser. The fact of the matter, however, was that Mr. Atkinson did not act as Paget's agent in making an appointment with Mr. Murray. He telephoned to Mr. Murray, asking him to act really as the solicitor for the Department in advising Paget. That destroyed the independence of Mr. Murray in the matter, though he actually gave the same advice as an independent solicitor would give. Nothing much turns on the Department paying the fee of the solicitor; but His Honour imagined that the proper way to arrange the matter would have been for the engineer to say to the claimant: "You choose your solicitor, and consult him, and we" (the Department) "will pay his fee for you up to £1 1s. 0d." Then there could have been no question of the solicitor's complete independence. The Workers' Compensation Act had been framed for the benefit of injured working men; and Section 18 was intended to protect them against the possibility of an unfair advantage being taken of their lack of experience in legal matters. The Court must, therefore, construe the section carefully and strictly. It was not enough to say that they were perfectly satisfied with the *bona fides* of all concerned; they must be satisfied that the Act had been adhered to strictly to the letter. It was conceivable that a solicitor might think that he had possible favours to hope for from an important Department such as the Public Works Department, and might be influenced by that circumstance in advising an injured worker. Of course, the Court knew that that had not been so in the present case; but the position was open to abuse, and might lead to men being unfairly or improperly advised. The Court could not say, therefore, that what had taken place constituted Mr. Murray an independent legal adviser retained by the suppliant himself. The agreement as an agreement could not be treated as valid and binding, because the necessary requirements of the Act had not been fully complied with, and the Court was bound to set it aside.

Solicitor for the petitioner: **J. J. Sullivan**, Auckland.
Solicitor for the Crown: **V. R. S. Meredith, Crown Solicitor**, Auckland.

Frazer, J. August 18, 1931.
Auckland.

VODANOVICH v. WOODS.

**Workers' Compensation—New Trial—Motion by Unsuccessful Plaintiff for New Trial on Grounds of False Testimony—"Improper Means"—Principles on which Court may set aside Judgment—Rules as to New Trials under Code of Civil Procedure inapplicable to Proceedings under Workers' Compensation Act—Quaere: Whether Court has power to Review its Judgment for Defendant—Workers' Compensation Act, 1922, Ss. 29, 30.**

Motion by unsuccessful plaintiff for New Trial, upon the grounds (i) that the defendant when giving evidence at the trial was guilty of such misconduct as to affect the result of the said trial inasmuch as he gave false testimony on oath at the said trial; and (ii), that two witnesses called on behalf of the said defendant, were guilty of false testimony in deposing that they were at the quarry when the accident occurred and would have known had any such accident then occurred. The plaintiff's counsel referred His Honour to **Garnaut v. Bennett,** 12 G.L.R. 470, to Regulation 217 of the Regulations under the *Workers Compensation Act, 1908, and to Rule 276 (g)* of The Code of Civil Procedure.

**Held:** "Improper means" in S. 30 of Workers' Compensation Act, 1928, *ejusdem generis* with "fraud." New trial should be granted only in special circumstances: **Chapman v. Macdougall** (1916) G.L.R. 162, applied. *Quaere*: Whether S. 30 should be read independently of S. 29.

**Noble** in support.
**Hore** to oppose.

FRAZER, J., delivering, orally, the Court's judgment, said that the jurisdiction of the Court to set aside an order,—in the present case, to set aside a judgment,—depended upon whether the original order or judgment had been obtained by fraud or by other improper means: S. 30, Workers Compensation Act, 1922. The words "improper means" must be construed *ejusdem generis* with "fraud": that is to say, the Court must have been misled in some way, by believing a witness who had given his evidence recklessly or carelessly, or by some misconduct of the successful party. In so far as fraud would include deliberate perjury, there was nothing in the affidavits filed, or in their recollection of the evidence, or in the notes that the members of the Court took, to show that any of the witnesses were guilty of perjury. By perjury, His Honour meant that a witness made a deliberately false statement with the intention of misleading the Court. After reviewing the evidence given at the trial, His Honour said that, taking the evidence as a whole, it was impossible for the Court to say that the judgment had been obtained on the strength of what had been said about the crusher being at work on March 15. The other evidence weighed more strongly with it than did the evidence respecting the crusher. In any event, the Court could hardly be expected to say that it was satisfied that the witnesses referred to in the Motion before the Court swore falsely or carelessly that the crusher was working on that morning.

The Court had read the report of the case of **Chapman v. Macdougall,** 1916, G.L.R., 162, from which it was very clear that a new trial should be granted only in special circumstances. One of the grounds with which Cooper, J., had dealt at length is that of "surprise," and that was a matter which was material under the Supreme Court Rules. A new trial was granted if material evidence had been found, or if something had arisen since the trial or at the trial, which the other side could not have forseen at the time. The Court, in the case cited, considered the ground of surprise relevant. Under the Workers' Compensation Act, the Court was not entitled to consider surprise. The Act permitted the setting aside of an order or judgment only on the ground of fraud or other improper means. His Honour added that it was probably due to an oversight that the Workers Compensation Act did not make fuller provision for ordering a new trial in a case in which the Court was of the opinion that a new trial should be granted. There was no appeal under the Act, for the reason that the Arbitration Court was a working man's Court, and it was undesirable that payment of compensation moneys should be held up by prolonging litigation. There was no doubt that, if appeals were allowed, it would, because of that, be more to the working man's disadvantage than to his advantage. For the same reason the Court did not think that new trials should be granted indiscriminately; but in cases of genuine surprise it thought that power to order a new trial should be provided for. Under Ss. 29 and 30 the Court had the power to review, set aside, or vary a judgment or order. It had been argued, however, by Mr. Hore that S. 30 applied only in cases to which S. 29 related, and that, accordingly, the Court had power only to increase or reduce the amount payable under an order already made, but had no power to award compensation when the original judgment or order has been in favour of a defendant. His Honour thought that S. 30 should be read independently of S. 29, though it might be that the section was not as clear and precise in its wording as it might be. The Court was of the opinion that a new trial should not be granted, apart altogether from the question as to whether the Court had power in such a case to order a new trial, because the grounds relied on by the plaintiff were insufficient.

Solicitor for plaintiff: **W. Noble,** Auckland.
Solicitors for defendant: **Buddle, Richmond and Buddle,** Auckland.

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Frazer, J. September 8, 1931.
Wellington.

McHERRON v. HANSFORD AND MILLS CONSTRUCTION CO. LTD.

**Workers' Compensation—Progressive Disease—Aneurism of Cerebral Artery—Quantum—Whether to be based on Expectation of Short Working Life or on Full Period of Liability—Full Compensation for Period of Liability where Incurable Progressive Disease Results after Accidental Injury—Progressive Effects of Disease Independently of Effects of Accidental Injury Distinguished—Workers' Compensation Act, 1922, Ss. 4, 5.**

Claims for compensation in respect of an injury by accident suffered by the plaintiff on October 17, 1930, during employment as a foreman labourer in the erection of St. Patrick's College buildings at Silverstream. On that date, he was continuously occupied from 10 a.m. until noon, with four or five breaks of a few minutes' duration, in concreting the roof of a cellar. The work necessitated his kneeling on a parapet nine inches above the roof level, and spreading and smoothing the liquid concrete with a trowel. He resumed work on the roof at 12.40 p.m., and was then on the last stage of the job, filling in the holes left by the removal of the wooden plugs or "screeds" that had been used to indicate the height to which the concrete had to be spread. The mixed concrete was being passed up to him, by means of a rope working over a pulley, by a labourer named Jarvis. Up to this time, there was nothing to indicate that the plaintiff was not in perfect health. He was working normally, and there was nothing in his appearance to cause any comment. About 12.45 p.m. he stood up and spoke incoherently to Jarvis, who noticed that he looked strange and ill. He sat down for about twenty minutes, but, as he did not then appear to be any better, Jarvis reported the occurrence to the general foreman, who sent for a doctor. The plaintiff was removed at once to the Wellington Public Hospital, and his case was diagnosed as being one of cerebral haemorrhage. A lumbar puncture revealed the presence of blood in the spinal fluid. Some days after his admission to hospital, the plaintiff developed a right-sided hemiplegia. Later, his physical condition gradually improved, and was, at the time of hearing, practically normal, except for a slight loss of power in the right arm and leg and a minor degree of inco-ordination of the muscles. His mental condition, however, was seriously impaired. His speech was incoherent, and he could not remember the names and purposes of common objects. His condition was one of aphasia, due to the destruction of part of the brain substance as a result of the haemorrhage. It was common ground among the medical witnesses that it was very unlikely that the plaintiff would ever be fit for work again.

**Held:** (1) When worker, who was suffering from progressive disease, which might at any time bring about his collapse, sustains an accidental injury from which he can never recover, the incapacity due to the disease is inseparable from the incapacity due to the disease is inseparable from the incapacity due to the injury. Compensation payable for full period of liability. (2) Owing to claimant's precarious condition of health and of the uncertainty as to future developments of his

disability, the Court ordered full compensation to date and weekly payments of full compensation until further order during the remainder of the period of disability. **McInnes v. Dunsmuir and Jackson Ltd.**, 1 B.W.C.C., 226, followed. **Barnabas v. Bersham Colliery Co.**, 4 B.W.C.C., 119, distinguished.

**O'Regan** for plaintiff.

**White** for defendant company.

FRAZER, J., after setting out the above facts, said that the medical witnesses had been divided in opinion as to the cause of the cerebral haemorrhage. Those called for the plaintiff had considered that it was caused by the rupture of a cerebral aneurism, which was brought about by the plaintiff having to work in a stooping position. A medical witness called for the defendant company was of the opinion that the haemorrhage might with equal likelihood have been caused by the rupture of a sclerosed cerebral artery, and that it could not be suggested that the work that the plaintiff was doing had had any appreciable effect in inducing the rupture; that it was as likely to occur in a period of rest as during a period of work; and, further, that an abnormal increase in inter-cranial blood pressure was more likely to occur in the course of a heavy effort than in the act of doing light work in a stooping position. In view of the conflict of medical testimony, the Court decided to appoint Dr. J. R. Boyd, of Wellington, as a medical referee. His report on the pathological aspects of the case may be summarised as follows:

"The retinal vessels were normal, which indicates that there cannot have been extensive cerebral arterio-sclerosis; and cerebral haemorrhage does not occur unless there is extensive sclerosis of the cerebral arteries. There is no evidence of general arterio-sclerosis, and it is unlikely that there could be extensive sclerosis of the cerebral arteries unless general arterio-sclerosis were present. There is no evidence of syphilitic infection. Cerebral arterio-sclerosis may, therefore, be ruled out. On the other hand, the symptoms observed are typical of weeping aneurism of a cerebral artery. The progressive development of symptoms, leading to hemiplegia, are indicative of a slow leakage of blood such as would occur in a case of a small rupture of a congenital aneurism. In fact, the whole train of symptoms is inconsistent with any other theory. A rupture of a cerebral aneurism is not generally induced by a severe and sustained effort, but by a slight effort. It usually occurs at the commencement of the effort. In the present case, it occurred almost immediately after the plaintiff had commenced work after the luncheon interval; and the comparatively slight effort of stooping to smooth out the liquid concrete was sufficient to cause a rupture. It is reasonable to infer that the rupture was in fact precipitated by the position in which the plaintiff was working and by the work he was doing."

His Honour said that a further question remained as to the quantum of compensation. It was conceded that the walls of a congenital cerebral aneurism become progressively weaker and that, when they were as weak as they must have been in the case of the plaintiff, a rupture may be expected at any time, on the happening of any slight strain or effort. The accidental injury that the plaintiff had suffered did not in all probability cut short his working life by any great space of time. The question for the Court's decision was: Should, then, his compensation be based on his expectation of a few weeks or months of working life, or should it be based on the full period of liability? In deciding this question, it was desirable to make a clear distinction between two classes of cases. In cases of one class, a man suffering from a progressive disease, which would in a year or two certainly end his working life, met with an accident which incapacitated him. At the end of the year or two, he would still be incapacitated, but his incapacity from that time would be attributable to the natural progress of the disease. In other words, he would have arrived at a stage at which he would have arrived independently of the accidental injury, from the effects of which he had recovered. In such a case, a claimant was entitled to compensation only for the period during which his incapacity was due to the combined effects of the accidental injury and the disease. In cases of the other class, a man suffering from a progressive disease, which might at any time bring about his collapse, suffered an accidental injury from which he could never recover. The present case is one of that type. The broken aneurism could never be soundly repaired; and there was a definite destruction of part of the brain substance, which had given rise to a permanent condition of mental confusion sufficiently profound to render it impossible for the plaintiff to earn his living. In a case of this class, it was clearly impossible "to separate the incapacity due to the disease from the incapacity due to the injury to the worker": **Hutton v. Stonex Bros.**, (1930) G.L.R., 27. It was impossible to escape the conclusion that the words, "Where the worker's total or partial incapacity for work results from the injury" in Section 5 of The Workers Compensation Act, 1922, must be construed in a similar manner to the corresponding words "Where the death of the worker results from the injury" in Section 4. The latter words have been given a definite meaning in **Clover, Clayton v. Hughes**, 3 B.W.C.C., 275, **McFarlane v. Hutton Bros.**, 20 B.W.C.C., 222, and **Hore v. General Steam Navigation Co.**, 22 B.W.C.C., 100. If the work that a man was doing helped "in a material degree, in the sense that it brought on the mishap which it may be would not have happened if he had not the diseased condition," the requirements of the Act were satisfied, and compensation was payable for the full period of liability. A similar view appears to have been adopted by the Court of Appeal in **McInnes v. Dunsmuir and Jackson Ltd.**, 1 B.W.C.C., 226, which was a claim for compensation for incapacity due to cerebral haemorrhage caused by exertion in the course of the work of a claimant whose arteries were degenerated. His Honour said that the cases cited (*supra*) must, of course, be carefully distinguished from a case such as **Barnabas v. Bersham Colliery Co.**, 4 B.W.C.C. 119, in which the weight of evidence was that it was as probable that the deceased worker had died from natural causes as from the result of any strain or effort. In the present case, the opinion of the medical referee was that the rupture of the aneurism was due to the strain induced by the plaintiff's stooping and cramped position and by the work he was doing at the time the seizure occurred.

The Court, in view of the plaintiff's precarious condition of health and of the uncertainty as to future developments of the disability from which he is suffering, did not think it proper to order the commutation of future payments for a lump sum.

Judgment for the plaintiff for full compensation to date, and for further weekly payments of full compensation until further order, during the remainder of the period of liability.

Solicitors for plaintiff: **O'Regan and Son**, Wellington.

Solicitors for defendant company: **Young, White and Courtney**, Wellington.

# Rules and Regulations.

**Customs Act, 1913.** Notification by Comptroller of Customs respecting rates of exchange for Customs purposes.—Gazette No. 73, October 8, 1931.

**Fire Brigades Act, 1926.** By-laws made by Port Chalmers Fire Board.—Gazette No. 73, October 8, 1931.

**Fisheries Act, 1908.** The Rotorua Trout-fishing Regulations Amendment No. 2.—Gazette No. 73, October 8, 1931.

**Fisheries Act, 1908.** The Taupo Trout-fishing Regulations Amendment No. 2. Gazette No. 73, October 8, 1931.

**Fisheries Act, 1908.** Revoking regulations with regard to nets, and making others in lieu thereof.—Gazette No. 72, October 1, 1931.

**Government Life Insurance Act, 1908.** Regulations relating to annual premiums.—Gazette No. 73, October 8, 1931.

**Government Railways Act, 1926.** Alterations to scale of passenger fares.—Gazette No. 68, September 18, 1931.

**Government Railways Act, 1926.** Amended Regulations *re* travelling allowances and relieving allowances.—Gazette No. 70, September 24, 1931.

**Hawke's Bay Earthquake Act, 1931.** Regulations regarding the replacement of lost Debentures.—Gazette No. 72, October 1, 1931.

**Health Act, 1920; Maori Councils Act, 1920; Native Land Amendment and Native Land Claims Adjustment Act, 1916.** By-laws relating to the Maori Council of the Araiteuru Maori District.—Gazette No. 72, October 1, 1931.

**Public Works Act, 1928.** Amendments to the Electrical Wiring Regulations, 1927.—Gazette No. 72, October 1, 1931.

**Stock Act, 1908.** Amended regulations for the prevention of the introduction into New Zealand of diseases affecting Stock. —Gazette No. 61, August 20, 1931.

**Unemployment Amendment Act, 1931.** Regulations as to Unemployment-relief Tax levied on Income other than salaries and wages.—Gazette No. 71, September 26, 1931.

**Unemployment Amendment Act, 1931.** Exemption from general Unemployment levy of persons resident in Chatham Islands. —Gazette No. 73, October 8, 1931.

# New Zealand Law Society.

## Proceedings of Council.

A meeting of the Council of the New Zealand Law Society was held in Wellington on Friday, October 2, 1931, at 2.15 p.m.

The President (Mr. A. Gray, K.C.) occupied the chair.

The District Law Societies were represented as follows: Auckland (Messrs. R. P. Towle and A. H. Johnstone); Gisborne (Mr. C. H. Treadwell); Hamilton (Mr. N. O. Johnson); Hawke's Bay (Mr. H. B. Lusk); Marlborough (Mr. H. F. Johnston, K.C.); Nelson (Mr. W. H. Cunningham, *Proxy*); Otago (Mr. J. M. Paterson); Southland (Mr. P. Levi, *Proxy*); Wanganui (Mr. N. G. Armstrong); Westland (Mr. A. M. Cousins); and Wellington (Messrs. A. Gray, K.C., C. H. Treadwell, and H. E. Anderson).

Amongst the subjects dealt with, the following are mentioned:

**Reciprocity with Queensland for Admission of Barristers and Solicitors**: A letter was received from the Attorney-General (Sir Thomas Sidey) forwarding copies of letters addressed to the Attorney-General of Queensland by the Barristers' and Solicitors' Boards respectively of that State.

The correspondence indicated that the Barristers' Board in Queensland are quite agreeable to extend reciprocity to New Zealand, and had submitted through their Attorney-General to their Honours the Queensland Judges a recommendation that the Queensland Rules should be amended to provide that a barrister or solicitor of New Zealand who has practised as such for a period of five years, and who shall have resided in Queensland for at least five months preceding the date at which he intends to apply for admission as a barrister or solicitor, may be admitted as a barrister or solicitor of the Queensland Supreme Court; provided that New Zealand admits Queensland barristers and solicitors upon similar conditions. The correspondence also indicated that if the recommendation made by the Barristers' Board of Queensland is carried out, and New Zealand amends its rules in a similar manner, the Queensland Solicitors' Board could see no need to alter the present rule in Queensland regarding the admission of solicitors, which provides that solicitors of New Zealand may be admitted in Queensland provided that New Zealand grants admission to Queensland barristers and solicitors. (Rule 16 [4]).

Finality in the matter now awaits the approval of the recommendation submitted to their Honours the Judges in Queensland by the Barristers' Board of that State.

**Retirement of Attorney-General (Sir Thomas Sidey)**: A letter from the President to the late Attorney-General Sir Thomas Sidey, upon his relinquishing the office of Attorney-General, and Sir Thomas Sidey's letter in reply were read. The President's action in writing to Sir Thomas Sidey thanking him on behalf of the profession for the great service he had rendered to the profession during his term of office as Attorney-General, and referring specially to various statutes carried through Parliament by him, was approved, and in further appreciation of the services rendered by Sir Thomas Sidey it was unanimously resolved as follows:

> "That the Council of this Society places on record its concurrence in every respect with the expressions contained in the letter written by Mr. Gray as President to Sir Thomas Sidey on his retiring from the office of Attorney-General, and also records its appreciation of his interest in, and his signal services to, the legal profession during his term of office."

**Rules Committee**: A letter was received from the Acting-Secretary to the Rules Committee, constituted by the Judicature Amendment Act, 1930, inviting, for the consideration of the Committee, suggestions from the various District Law Societies for alterations or additions to the Supreme Court Rules or the Rules under the Divorce and Matrimonial Causes Act, which would be welcomed and carefully considered.

The Council resolved that the NEW ZEALAND LAW JOURNAL be requested to draw the attention of practitioners to the matter, with a view to suggestions in the direction indicated being made It was also resolved that suggested amendments should, until further notice, be addressed to the Under-Secretary, Department of Justice, Wellington (the Acting Secretary of the Rules Committee).

**Divorce and Matrimonial Causes Act, 1929**: A copy of a draft Bill to amend this Act, introduced into Parliament by a private member, was submitted to the Council by the Statutes Revision Committee of the House of Representatives for its comments. Copies of the Bill had also been circulated to the District Law Societies for the same purpose.

The provisions of the Bill were considered, and it was resolved to inform the Statutes Revision Committee that in view of the fact that the Council is composed of representatives of the District Law Societies whose Councils have already supplied to that Committee expressions of their respective views which bind their delegates, it was felt that the Council as a whole was not in a position to give an independent expression of opinion as to the need for an amendment of the existing law, and that, therefore, no further action need be taken by this Society.

# Bills Before Parliament.

**Trading-Coupons Bill.** (HON. MR. HAMILTON), as reported from Industries and Commerce Committee (H.R.): EXPLANATORY MEMORANDUM This Bill deals only with the issue and redemption of trading-coupons in connection with the sale and purchase of goods, and, in particular, does not deal with the practice adopted by some traders of making so-called "gifts" of other articles to purchasers of their goods. With respect to trading-coupons, the Bill provides as follows: (1) It prohibits their issue after the passing of the Act by any persons other than the manufacturers, packers, importers, distributors, and sellers of goods. (2) It provides that after the 30th April, 1932, trading-coupons shall be redeemable only for money. Up to that date (unless their issue was in contravention of the Trading-stamps Prohibition and Discount-stamps Issue Act, 1908) trading-coupons may be redeemed in accordance with the terms of their issue. (3) It restricts their redemption after that date to the issuer of the coupons and to the seller of the goods. It is proposed to repeal the Trading-stamps Prohibition and Discount-stamps Issue Act, 1908. So far as trading-stamps and trading-stamp companies are concerned, the restrictions imposed by the Bill cover the restrictions imposed by the Act now proposed to be repealed; the provisions of that Act authorising the issue of discount-stamps have not been availed of to any considerable extent, and it is considered that no good purpose is served by their retention on the statute-book.

**Air Navigation Bill.** (HON. MR. COBBE). Explanatory Memorandum: This Bill is an adaptation, without material alteration, of the Air Navigation Act, 1920 (Imperial). The essential purpose of the Bill is to enable the Governor-General in Council to make regulations for carrying out the Convention relating to Aerial Navigation, that was signed at Paris on the 13th day of October, 1919, and to which the New Zealand Government is a party. When the Bill is passed, it is intended to issue regulations on the lines of the Imperial Air Navigation Orders that have been made for the same purpose.—Cl. 3. Power to give effect to Convention.—Cl. 4. Power to apply Convention to internal flying.—Cl. 5. Special provisions which may be made by regulations.—Cl. 6. Special powers in case of emergency.—Cl. 7. Trespass, nuisance, and responsibility for damage.—Cl. 8. Penalty for dangerous flying.—Cl. 9. Wreck and salvage.—Cl. 10. Power to provide for investigation of accidents.—Cl. 11. General provisions as to Orders in Council, &c.—Cl. 12. Special provisions as to Crown: not to apply to aircraft belonging to or exclusively used in His Majesty's service, but subject to provisions of any Orders-in-Council from time to time made in relation thereto.—Cl. 13. Repeal of Aviation Act, 1918. Savings.

**Directors Protection.** (RIGHT HON. SIR FRANCIS BELL). Cl. 2. "Corporation" means a corporate body incorporated under provisions of any New Zealand statute the affairs whereof are managed by directors, other than a private company incorporated under the provisions of the Companies Act, 1908: "Director" means a person who is a director of a corporation, or who, being party to a contract with a corporation whereby he purports to become liable for any debts or obligations of that corporation, or whereby any property of his purports to become charged with any such debts or obligations, has been within a period of twelve months antecedent to the making of such contract a director of that corporation.—Cl. 3. Contract made by director whereby such director, alone or jointly with any other, purports to become personally liable for whole or part of any debt or obligation of corporation, otherwise than as shareholder thereof to the extent of the uncalled liability upon shares, or whereby any property of director becomes charged with any such debt declared contrary to public policy, null and void.—Cl. 4. Where under pressure from a creditor of a corporation a director subscribes for or accepts additional shares whereon there is uncalled liability such creditor shall have additional shares held by that director, and any security or charge in favour of or for the benefit of such creditor, granted before or at the time of or after such pressure, subscription, and acceptance, and whether granted by director or by corporation, to extent of the liability of such director, be null and void.—Cl. 5. Nothing in Act applies to private company or to a director of private company.

## Bills Passed.

Since the last issue of the JOURNAL went to press, the following Bills were introduced and have been passed:

**Land and Income Tax (Annual).** (HON. MR. DOWNIE STEWART). LAND TAX: Cl. 2. For the year commencing on April 1, 1931, land-tax to be assessed, levied, and paid, pursuant to Part V of the Land and Income Tax Act, 1923, at the rate of one penny for every pound of the unimproved value of land, after making the deductions and exemptions authorised by law. INCOME-TAX: Cl. 3. For the same year, income-tax shall be assessed, levied, and paid, pursuant to Part VI of the Land and Income Tax Act, 1923, at the rates specified in the Schedule to this Act.

**Land and Income Tax Amendment.** (HON. MR. DOWNIE STEWART). Cl. 2. S. 52 of principal Act (relating to the liability of lessees for land-tax repealed; S. 53 of principal Act repealed by Subs. 2.—Cl. 3. S. 74 (2) of principal Act (as set forth in S. 2 of Amendment Act, 1927) repealed, and the following subsection substituted: "(1) From yearly assessable income of every person, other than a company or an absentee, there shall, for the purpose of assessing income-tax on that income, be deducted by way of special exemption the sum of £260, diminished at the rate of one pound for every three pounds of the excess of that income over £260 and not over £560, and further diminished at the rate of one pound for every 30/- of excess of that income over £560, so as to leave no deduction when yearly assessable income amounts to or exceeds £500."—Cl. 4. S. 4 of the Amendment Act, 1930, amended, as from the first day of April, 1932, by omitting from paragraph (*a*) of subsection 1 "seven thousand five hundred pounds" and substituting the words "three thousand pounds."—Cl. 5. (1) S. 83 of the principal Act (prescribing a special exemption in respect of income derived from use of land) repealed. (2) Consequent repeals: (*a*) S. 6 Amendment Act, 1926: (*b*) S. 8 Amendment Act, 1930.—Cl. 6. (1) Where in any income-year taxpayer has derived assessable income and has also derived any non-assessable income from a source referred to in next succeeding subsection, then, notwithstanding anything to the contrary in the principal Act or in the annual taxing Act, the amount of special exemption (if any) to which he may be entitled under S. 74 of the principal Act and the rate of income-tax payable on his taxable income to be computed as if the non-assessable income derived by him as aforesaid were assessable income. (2) Non-assessable income referred to includes: (*a*) Income derived from securities issued by the Government of New Zealand subject to condition that income derived therefrom shall be exempt from income-tax: (*b*) Income derived from debentures issued by companies on terms providing for payment of income-tax by such companies, as provided by S. 171 of principal Act: (*c*) Dividends or other profits derived from shares or other rights of membership in companies.—Cl. 7. Amending provisions as to assessment of gold-mining and scheelite-mining companies. S. 97 of principal Act amended by inserting after "shareholders of the company" in subs. 1: "if the aggregate amount of the dividends paid since the commencement of business by the company does not exceed twice the amount of the capital paid-up in cash, and in every other case shall be deemed to be the total sum paid as dividends during that year."—Cl. 8. Provision for extension of time for payment of land-tax or income-tax where extension rendered necessary by Hawke's Bay earthquake.