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"The shadow of the land goes to the Queen, but the substance remains with us. We will go to the Governor, and get payment for our lands as before. . . . What man of sense would believe that the Governor would take our goods, and only give us half of its value? If you have anything else to say, say it; but, if not, finish, and all of you say 'Yes.'"

—NOPERA PANAKARAEO, at Kaitaia, April 28, 1840, when asked to sign the Treaty of Waitangi.

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The Effect of the Treaty of Waitangi on Subsequent Legislation.

I.

By reason of the munificent gift of Waitangi Estate to the people of New Zealand by His Excellency the Governor-General (Lord Bledisloe) and the Lady Bledisloe, attention is being focussed on the historic events which took place on the shores of the Bay of Islands on February 5-6, 1840. Elsewhere, a valued contributor has summarized the attitude of the Courts towards the Treaty, which, they have held, did not have the effect of statute law. The historic document has been termed "the Magna Charta of Maori rights," and it is well at this time that we should recall the manner in which preservation of the rights of the Natives agreed to be conserved to them under the Treaty has been implemented by the successive Governments of this country.

To appreciate the purpose of the Treaty of Waitangi, it must be remembered that in 1831, owing to the lawlessness prevalent around the Bay of Islands by reason of the influx of reprobates of many nations, thirteen Maori chiefs of the North petitioned the King of England for protection, "lest strangers should come and take away our land." Then and later, public opinion in Great Britain was opposed to the annexation of more colonies; and only the force of circumstances eventually changed the attitude of the Colonial Office. King William IV replied promising his protection, but implying the independence of New Zealand by granting the chiefs a flag (now reproduced in the house-flag of the Shaw, Savill, and Albion Shipping Company), and expressing the hope that his subjects would live in harmonious relations with the New Zealanders. Busby was appointed British Resident in 1833, and the new national flag was hoisted in his presence at a gathering of chiefs, on March 20, 1834. New Zealand was thus recognised as a foreign country by Great Britain.

Conditions did not improve. In 1835, a meeting of Busby and other European residents with the Chiefs of the tribes north of the Firth of Thames—thirty-five in number—followed the increase in the numbers of French whalers in New Zealand waters, and the coming of Baron de Thierry, a British subject by birth but of emigré French descent, with his pretensions to the sovereignty of New Zealand based on the doubtful acquisition of a large tract of Native land. This gathering, which was held at Waitangi, formally declared and affirmed New Zealand's position as an independent sovereign State under the title of "The Confederation of the United Tribes of New Zealand." The date was October 28, 1835.

Better government was now desired by the respectable white settlers, and a further petition was sent to the King. An inter-tribal war having broken out at the Bay of Islands in May, 1837, Captain Hobson, then in command of H.M.S. *Rattlesnake*, was sent to protect endangered British lives, and to report on the prevailing conditions. He reported in the following August on the acquisition of large tracts of land from the Natives by European "land-sharks," in most cases for ludicrous consideration, and he predicted disastrous consequences to the Native race if this were allowed to continue. On consideration of his report, a Select Committee of the House of Lords recommended annexation by negotiation. Captain Hobson was appointed British Consul and, alternatively, Lieutenant-Governor in June, 1839, and, in his Instructions, he was authorized to treat with the aborigines of New Zealand, so that

> "the chiefs should be induced, if possible, to contract with you, as representing Her Majesty, that henceforward no lands shall be ceded, gratuitously or otherwise, except to the Crown of Great Britain."

As will be seen from its text which is reproduced in *The Public Acts of New Zealand*, 1908-1931, Vol. 6, title *Natives and Native Land*, pp. 101, 102, the Treaty of Waitangi was drawn in pursuance of such Instructions, and so became the charter of Maori rights and the foundation of all the Native-land legislation which has followed.

It also appears from the Treaty, which was made between the chiefs of The Confederation of the United Tribes of New Zealand and Her Majesty the Queen, that, after those chiefs and the separate and independent chiefs who had not joined that Confederation had ceded all their rights and powers of sovereignty to the Crown and had received all the rights and privileges of British subjects, these two important features stand out:

(*a*) The Crown confirmed and guaranteed to the Chiefs and Tribes of New Zealand "the full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries, and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession"; and

(*b*) The Native Chiefs yielded to the Crown the exclusive right of pre-emption over such lands as the proprietors thereof might be disposed to alienate at such prices as might be agreed upon between the respective proprietors and the persons appointed by the Crown to treat with them in that behalf.

The Treaty was signed by most of the Native Chiefs, as well as by those of the Bay of Islands, prior to May 21, 1840, when Captain Hobson proclaimed the sovereignty of the Queen over the North Island by virtue of the

pact first read and executed at Waitangi, and over the South Island and Stewart Island by right of discovery.

The terms of the Treaty of Waitangi were never specifically enacted as part of the municipal law of New Zealand, but, nevertheless, the effect of the Treaty appears through a long series of Ordinances and Statutes, and colours the legislation of this country in no uncertain manner.

II.

The growing-pains of the new British colony were mostly felt in regard to land-purchase, and especially in relation to Native land. From June, 1839, for the brief period during which New Zealand was a dependency of New South Wales, open and unrestricted purchase from the Natives had prevailed. Then came the period during which the Ordinances of the Colony regulated such purchases. The Royal Charter of November, 1840, for erecting the Colony of New Zealand contained this passage :

> " Provided always that nothing in these our Letters Patent contained shall affect or be construed to affect the rights of any aboriginal Native of the said Colony of New Zealand to the actual occupation or enjoyment in their own persons, or in the persons of their descendants, of any lands in the said Colony now actually occupied or enjoyed by such Natives."

This passage was repeated in Article 37 of the Royal Instructions to the Governor, in para. 62 of which the Governor was enjoined in regard to the Native inhabitants " to protect them in their persons and in the free enjoyment of their possessions " as well as to promote religion and education among them. These Instructions and those of 1841, in the words of the Secretary for State,

> " distinctly established the general principle that the territorial rights of the Natives as owners of the soil must be respected."

A Chief Protector of Aborigines became an officer of the new Executive Council. For the following twelve years New Zealand was governed as a Crown colony.

Proclamations issued by the Crown contemporaneously in Sydney and in New Zealand, in January, 1840, invalidating all titles to Native land which had not been derived from the Crown, raised a storm of indignation among the " purchasers " prior to the Treaty. They pointed to the above-quoted passages which appeared to be limited to preservation of the rights of the Natives in lands in their actual occupation. (The Treaty said " possess so long as it is their wish and desire to retain the same in their possession.") The attack was twofold : against the Crown's right of pre-emption, which, in *Reg. v. Symonds*, H. S. Chapman, J., held was more than a mere " first offer "—it was an exclusive right of extinguishing the Native title ; and against the acknowledgment of any customary right of Native ownership, as distinct from mere occupation.

As late as March, 1840, the Colonial Office declared that in the pre-Treaty period the independence of New Zealand had been recognized consistently " by solemn Acts of Parliament and the King of England." The land-claimants, notably those residents of New South Wales who had acquired large areas of Native land, sometimes from a chief, sometimes from a *hapu* or a private individual, were at once clamant in their indignation at the invalidation of their purchases. But a New South Wales Act, passed in August, 1840, rendered absolutely null and void all titles to land not acquired from the Crown by virtue of its rights of pre-emption under the Treaty of Waitangi, and Commissioners were appointed to confirm or reject land claims in New Zealand.

On June 9, 1841, before the Commissioners had reported, the Legislative Council of New Zealand passed the Land Claims Ordinance No. 1 (Sess. 1, No. 2) which repealed the New South Wales Act and determined its Commissioners' powers, and authorized the Governor of New Zealand to appoint Commissioners with similar duties.

Clause 2 recited that it was " expedient to remove certain doubts which have arisen in respect of titles to land in New Zealand," and declared :

> " That all unappropriated lands within the said Colony, subject however to the rightful and necessary occupation and use thereof by the aboriginal inhabitants of the said Colony, are and remain Crown or domain lands of Her Majesty, her heirs and successors, and that the sale and absolute right of pre-emption from the said aboriginal inhabitants, vests in and can only be exercised by Her said Majesty, her heirs and successors, and that all titles to land in the said Colony of New Zealand which are held or claimed by virtue of purchases or pretended purchases, gifts or pretended gifts, conveyances or pretended conveyances, leases or pretended leases, agreements, or other titles, either mediately or immediately from the Chiefs, or other individuals or individual of the aboriginal tribes inhabiting the said Colony, and which are not, or may not hereafter, be allowed by Her Majesty, her heirs and successors, are, and the same shall be, absolutely null and void."

This Ordinance was not to affect the title to any land already purchased from the Crown. (The Land Claimants Estate Ordinance, 1844 (Sess. 3, No. 20), later provided that legal estate in land granted by the Crown was to be deemed to have been in the grantee from the date of his purchase.) The Ordinance provided for the appointment of Commissioners to report on land claims and for the regulation of the issue of Crown grants, and enjoined that they were to be guided by the real justice and good conscience of each case.

III.

A very real difficulty had appeared. The whole of the area of New Zealand was held, by right mostly of conquest by force of arms, by some Native tribe or another. As Judges Fenton, Rogan, and Mair said in the *Oakura* case :

> " Before the establishment of the British Government in 1840, the great rule which governed Maori rights to land was force—*i.e.*, that a tribe or association of persons held possession of a certain tract of country until expelled from it by superior force, and that, on such expulsion, if the invaders settled upon the evacuated territory, it remained theirs until they in their turn had to yield to others."

Bishop Selwyn records that there was originally a distinct owner for every habitable spot in the North Island ; claims had become complicated by inheritance and marriage affecting the title of right without any formal documents, and no valid alienation could take place without the consent of the tribe, whether the ownership was joint or several. Sir William Martin, our first Chief Justice, referred to this phenomenon in the following terms :

> " So far as yet appears, the whole surface of the Islands, or as much of it as is of any value to man, has been appropriated by the Natives, and with the exception of the part which they have sold, is held by them as property. Nowhere was any piece of land discovered or heard of " [by the Commissioners] " which was not owned by some person or

set of persons. . . . There might be several conflicting claimants of the same land; but, however the Natives might be divided amongst themselves as to the validity of any one of the several claims, still no man doubted that there was in every case a right of property subsisting in some one of the claimants. In this Northern Island at least it may now be regarded as absolutely certain that, with the exception of lands already purchased from the Natives, there is not an acre of land available for purposes of colonization but has an owner amongst the Natives according to their own customs."

The first Land Claims Ordinance was superseded by that of February 25, 1842 (Sess. 2, No. 14), which declared all lands within the Colony validly sold by the Natives were vested in the Crown as part of the Crown demesne, and any person reported by the Commissioners to be found as being entitled to a grant from the Crown of any such land was to receive four times as many acres as he should have expended pounds sterling in disallowed purchases from the Natives, thus validating an arrangement made in November, 1840, by Lord John Russell with the New Zealand Company and making it of general application. This Ordinance was in force from February 25, 1842, to September 6, 1843, but was disallowed by the Home Government on the ground that it was subversive of the principle of limitation of grants to a maximum of 2,560 acres, and of valuation (of land to be granted) according to a rate varying inversely as the time since which it had been purchased.

It is recorded that 1,037 claims were made for the Commissioners' consideration to alleged purchases which exceeded the total area of New Zealand by 654,000 acres. By October, 1842, 104 claims had been investigated, and 48,328 acres had been awarded by the Crown to claimants at a general average of 6s. 3d. per acre.

The New Zealand Company was not silent, and their claim to twenty million acres was hotly promoted. As their Mr. Joseph Somes said in a letter of January 24, 1843, to Lord Stanley, Minister for the Colonies:

> "We have always had very serious doubts whether the Treaty of Waitangi, made with naked savages by a Consul invested with no plenipotentiary powers, without ratification by the Crown, could be treated by lawyers as anything but a praiseworthy device for amusing and pacifying savages for the moment."

The reply from the Under-Secretary, Mr. Hope, expressed Lord Stanley's and the British Government's views:

> "Lord Stanley entertains a different view of the respect due to the obligations contracted by the Crown of England, and his final answer to the demands of the New Zealand Company must be, that, so long as he has the honour of serving the Crown, he will not admit that any person, or any Government acting in the name of Her Majesty, can contract a legal, moral, or honorary obligation to despoil others of their lawful and equitable rights."

The whole tenor of subsequent Native legislation has broadly followed the principle so stated: the Treaty of Waitangi must be observed by protection of the rights secured to the Natives thereunder. By fifty-one votes, at the end of the historic three-days' and nights' debate in the House of Commons in 1845, this principle was affirmed.

The "Wairau Massacre" of April, 1843, followed the New Zealand Company's disregard of the Land Claims Ordinances, and of the Maoris' rights to land and the Crown's rights of pre-emption, Te Rauparaha having first asked Captain Wakefield to refer the claim to the Marlborough lands to the Com-

(*Concluded on page 25.*)

Summary of Recent Judgments.

SUPREME COURT
Auckland.
1933.
Dec. 8, 13
Herdman, J.

CARTER v. DOBSON.

Animals Protection—"Absolutely protected" Animal—Found in Possession of Accused—Complete Absence of Intent to Commit Offence—Not a Defence to Information—Animals Protection and Game Act, 1921-22, s. 40.

Appeal from conviction and fine of £5 1s. by a Stipendiary Magistrate.

Coleman, for the appellant; **West,** for the respondent.

Held: That, where black teal, which are "absolutely protected animals" under s. 40 of the Animals Protection and Game Act, 1921-22, were found in the possession of appellant who had a complete absence of intent to commit an offence, such absence of intent is no defence to an information under that section, the law making it his business to see that birds which are in fact in his possession are not birds that are absolutely protected.

Reg. v. Woodrow, (1846) 15 M. and W. 404, 153 E.R. 907, followed.

Case Annotation: *Reg. v. Woodrow,* 14 E. & E. Digest, p. 34, para. 50.

NOTE:—For the Animals Protection and Game Act, 1921-22, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 1, title *Animals,* p. 183.

SUPREME COURT
Hamilton.
In Banco.
1933.
Aug. 29;
Dec. 18.
Smith, J.

RE TAYLOR (A BANKRUPT), EX PARTE DALGETY & CO., LTD.

Bankruptcy—Proof of debt—Appeal from Official Assignee's Decision admitting Proof—Other Creditor—Whether "Person aggrieved"—Bankruptcy of Husband—Mortgage from Husband to Wife, submortgaged to Bank to secure Husband's Overdraft, guaranteed by Wife, out of which Moneys advanced by Husband to Wife—Wife's Inaction in refraining from calling up Principal and not pressing for Interest—Whether Money "entrusted to Husband for Purpose of Business—Marshalling—Bankruptcy Act, 1908, s. 66, Married Women's Property Act, 1908, s. 8.

Any creditor who has proved his own debt in bankruptcy may under s. 66 of the Bankruptcy Act, 1908, appeal against the decision of the Official Assignee in admitting the proof of another creditor or in refusing to reverse that decision.

Re Sidebotham, Ex parte Sidebotham, (1880) 14 Ch. D. 458, and **Re J. Burn, Ex parte Dawson,** [1932] 1 Ch. 247, distinguished.

Re Stenson, Ex parte Merriman, (1883) 25 Ch. D. 144, referred to.

Motion on behalf of Dalgety and Co., Ltd., one of the creditors in the estate of J. W. Taylor, a bankrupt, for an order reversing the decision of the Official Assignee in refusing to reject certain proofs of debt.

J.W.T. purchased from B., his father-in-law, certain property for £25,000, executing a mortgage to B. to secure that amount. B. bequeathed to J.T., wife of J.W.T., the said mortgage subject to the payment by her of £5,000 to his trustees to form part of his residuary estate. J.T. having no money of her own, the Bank of New Zealand granted J.W.T. an overdraft, from which he drew a cheque for £5,000, a draft for this amount was sent to the executors of B.'s will, and the transfer of the mortgage

from them to J.T. was effected. The wife guaranteed the whole overdraft with a limit of £7,000 and submortgaged to the bank the said mortgage of £25,000 and guaranteed her husband's account. Later, she signed a further guarantee of her husband's account, limited to £650, and in respect of this guarantee a further advance of £650 was made by the bank to the husband, who carried on his farming business from November, 1927, until December, 1932, when he filed his petition in bankruptcy. At that date there was owing to his wife £25,000 principal on the mortgage with arrears of interest amounting to £9,831 4s. 7d. She valued her security at £15,000 and proved for the balance £19,431 4s. 7d. The Bank of New Zealand proved for the amount of the bankrupt's overdraft. J.W.T. had made statements to his creditors that his wife went without her interest to allow him to pay his other creditors and that she would not claim interest as long as Dalgety's gave him time to pay.

Gillies and **Barrowclough,** for Dalgety and Co., Ltd., in support of motion to review; **Stace,** for Mrs. Janet Taylor; **Hoggard,** for the Bank of New Zealand; **Seymour,** for Ira George Taylor; **Swarbrick,** for the Official Assignee.

Held, That the wife's inaction in refraining from calling up the principal sum between March, 1930, when she became transferee of the mortgage, and December, 1932, when her husband became bankrupt, did not amount to an "entrusting" of her property to her husband for the purpose of his farming business, the capital representing the purchase price of the farm on which he carried on that business, but she was entitled to stand in her father's shoes as a person who did not lend or entrust money of her own to her husband, nor did the evidence show that there was an "entrusting" of the interest to her husband for the purposes of his business, but merely that she authorized him to state what her intentions were.

Held further, That, on the facts set out in the judgment, the doctrine of marshalling did not apply so as to compel the Bank of New Zealand to marshal its securities and exhaust its remedies against the wife before participating in the distribution of the husband's estate.

In re Cronmire, Ex parte Cronmire, [1901], 1 K. B. 480, applied, and the view expressed in **Davis v. MacKerras,** (1930) 43 C.L.R. 488, 491, as to the meaning of "entrusted" adopted.

Solicitors: Gillies and Tanner, Hamilton, for Dalgety and Co.; **Rogers, Stace, and Hammond,** Hamilton, for Mrs. Taylor; **W. Tudhope,** Hamilton, for the Bank of New Zealand; **Seymour and Harkness,** Hamilton, for Ira George Taylor; **Swarbrick and Swarbrick,** Hamilton, for the Official Assignee.

Case Annotations: *Re Sidebotham, Ex parte Sidebotham,* 4 E. & E. Digest, p. 225, para. 2114; *Re Burn (J.), Ex parte Dawson,* E. & E. Digest Supplement No. 8, title *Bankruptcy,* para. 6318 a; *Re Stenson, Ex parte Merriman,* E. & E. Digest, Vol. 4, p. 337, para. 3162; *Re Cronmire Ex parte Cronmire, ibid* p. 482, para. 4341.

NOTE:—For the Bankruptcy Act, 1908, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 1, title *Bankruptcy,* p. 465, for the Married Women's Property Act, 1908, see *ibid,* Vol. 3, title *Husband and Wife,* p. 821.

COURT OF ARBITRATION
Dunedin.
1933.
October 20.
Frazer, J.

IN RE OTAGO MOTOR ENGINEERING TRADE APPRENTICESHIP ORDER.

Master and Servant—Apprentices—Apprenticeship Order—Effect of Cancellation of Award whereby Employers were for the time being bound—Apprentices Act, 1923, s. 5—Amendment Act, 1925, s. 2.

Application by the District Registrar of Apprentices at Dunedin for interpretation of the Otago Motor Engineering Trade Apprentices Order, February 24, 1924, recorded in 28 *Book of Awards,* 67, under cl. 8, whereof it was directed *inter alia*—

"If ordered to do so by the Court or a committee, any apprentice residing within a twelve-mile radius of the Chief Post-office, Dunedin, shall attend the classes at the King Edward Technical College."

Held, That, when an award or industrial agreement is cancelled, and the employers who were parties thereto are no longer "for the time being bound by an award or agreement," the Apprentices Act, 1923, ceases to apply to those employers; and, because the ground of the application of the Act to other employers has ceased to exist, the Act does not apply to those other employers. The Court is bound by s. 5 (1) (*a*) to limit the making of apprenticeship orders to specified localities, and the existence of special awards affecting employers in other localities to meet special circumstances can have no bearing on the continued existence of general apprenticeship orders in the industry in any other locality.

NOTE:—For the Apprentices Act, 1923, and the Apprentices Amendment Act, 1925, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, Vol. 5, title *Master and Servant,* p. 555.

SUPREME COURT
Wellington.
1933.
Nov. 10, 11, 12, 18; Dec. 17.
Blair, J.

GOVERNORS OF WELLINGTON COLLEGE AND WELLINGTON GIRLS' HIGH SCHOOL v. JOHN DUTHIE AND COMPANY, LIMITED, AND ANOTHER.

Damages—Measure of Damages—Contract for Erection of Buildings—Delay in supply of Window-sashes under Prime Cost Item by Companies under Agreement with Owner—Claim by Contractor against Owner for Damages for Delay substantially reduced on Arbitration by Owner's Defence—Action by Owner against Companies—Right of Court to look to Arbitration Award for Assistance in finding what it was reasonable Defendants should pay Plaintiff—Costs of Arbitration reasonably defended recoverable as natural consequence of Defendants' Breach of Contract.

Claim for damages arising out of a building contract.

The plaintiff Board contracted with K. for the erection by him of additions to school buildings. The specification called for steel windows, the supply of which was provided for by way of a prime-cost item. The architect on behalf of plaintiff, the owner of the building, arranged with defendants for the supply by them of the steel window-sashes required. Defendants were guilty of a breach of contract in their delay in the deliveries of the sashes. In consequence, serious delay was caused to the work by want of sashes with consequential loss to the contractor. In an arbitration on the contractor's claim against the plaintiff to which the defendants were not parties, the contractor was awarded damages and costs amounting to £904 18s. Plaintiff incurred legal costs in connection with this arbitration, said to amount to £150, and sued defendants for these amounts.

Hislop and **Powles,** for the plaintiffs; **O'Leary** and **Buxton** for the defendants,

After a finding on the facts that the defendants had not failed to mitigate damages and that the contractor's loss arose in the ordinary course from defendants' breach,

Held, 1. That, where damages are assessed by another tribunal in proceedings to which defendant is not a party, a jury may look at the damages so assessed in order to find what it is reasonable that defendant should pay.

The figure fixed by the liquidator was accordingly adopted.

2. That as the contractor's claim had been reduced by plaintiff's defence to one-fifth of the amount claimed, this was a successful result, constituting evidence that the costs of the defence in the arbitration had been properly incurred.

Judgment was therefore given for the amount awarded by the arbitration and for solicitor-and-client costs in the arbitration proceedings to be taxed "on the footing that another person is going to pay them."

Grebert-Borgnis v. Nugent, (1885) 15 Q.B.D. 85, **Hammond and Co. v. Bussey,** (1887) 20 Q.B.D. 79, and **Agius v. Great Western Colliery Co.,** [1899] 1 Q.B.D. 413, applied.

Motion dismissed.

Solicitors: Brandon, Ward, and Hislop, Wellington, for the plaintiffs; **Bell, Gully, Mackenzie, and O'Leary,** Wellington, for the defendants.

Case Annotation: *Grebert-Borgnis v. Nugent,* 17 E. & E. Digest 105, para. 193; *Hammond and Co. v. Bussey, ibid,* p. 110, para. 214; *Agius v. Great Western Colliery Co.,* p. 110, para. 215.

SUPREME COURT
Wellington.
1933.
Oct. 19;
Dec. 19.
Blair, J.

AVERY v. UNIVERSITY OF NEW ZEALAND.

Education—Taranaki Scholarships—"Resided" within the Taranaki Provincial District—Scholar attending School and boarding in District in Term-time, but spending Holidays with Parents outside District—New Zealand University Amendment Act, 1914, s. 17.

Originating summons to determine whether plaintiff possessed the necessary residential qualification to entitle her to a Taranaki Scholarship as provided by s. 17 of the New Zealand University Amendment Act, 1914.

Section 17 of the New Zealand University Amendment Act, 1914, establishes "Taranaki Scholarships," "for the purpose of bringing higher education within the reach of deserving scholars within the Taranaki Provincial District"; and provides that "The scholarships shall be open to all candidates who have resided and attended a school within the district for not less than two years (such residence and attendance to have continued to within six months of the date of the award) . . ."

Stanton, for the plaintiff; **P. B. Cooke,** for the defendant.

Held, 1. That a candidate who is in all other respects qualified to hold a scholarship, whose parents reside outside the Taranaki Provincial District, who has attended school within that district and boarded at the school hostel for the required period, but who has spent her school holidays with her parents at their home, has "resided" within that district within the meaning of that word in s. 17.

2. That the break of residence constituted by the school holidays does not destroy the continuity of residence required by the statute.

The learned Judge observed that "pauper" cases are not helpful in construing the term "resided" in the statute.

Stoke-on-Trent Borough v. Cheshire County Council, [1916] 3 K.B. 699, and **Berkshire County Council v. Reading Borough Council,** [1921] 2 K.B. 787, referred to.

Solicitors: Stanton and Johnstone, Auckland, for the plaintiff; **Chapman, Tripp, Cooke, and Watson,** Wellington, for the defendant.

Case Annotation: *Stoke-on-Trent Borough v. Cheshire County Council,* 19 E. & E. Digest, p. 577, para. 135; *Berkshire County Council v. Reading Borough Council, ibid,* Vol. 33, p. 273, para. 1902.

NOTE:—For the New Zealand University Amendment Act, 1914, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, Vol. 2, title *Education,* p. 1128.

COURT OF ARBN.
Dunedin.
1933.
Nov. 27.
Frazer, J.

OWEN v. BURRELL AND OTHERS.

Workers' Compensation—"Arising out of and in the course of the employment"—Whether Worker had reached Ambit of Employment—Workers' Compensation Act, 1922, s. 3.

Claim for compensation in respect of accidental injury.

Plaintiff, housekeeper at an hotel, whose duty it was to prepare breakfast for guests, stayed with friends one night and rising about 6 a.m. next morning went to the hotel. Being unable to obtain admission at the front door of the hotel—the only means of access—she went around a street corner to the side of the hotel to awaken a porter by knocking on an iron fence bounding the hotel premises. While hurrying back to the front door after attracting the porter's attention, she slipped and broke her leg as she turned to take a short cut through a neighbouring petrol station.

Warrington, for the plaintiff; **Paterson,** for the defendant.

Held, That the worker had not reached the ambit or sphere of her employment and was not in the course of her employment when she met with the accident.

Gibson v. Wilson, (1901) 3. F. (Ct. of Sess.) 661; **St. Helens Colliery Co., Ltd. v. Hewitson,** [1924] A.C. 59, 16 W.B.C.C. 230, applied.

Morrison v. Owners of "Aboukir," (1928) 21 B.W.C.C. 163, distinguished.

Judgment for defendant.

Solicitors: Irwin and Irwin, Dunedin, for the plaintiff; **Lang and Paterson,** Dunedin, for the defendant.

Case Annotation: *Gibson v. Wilson,* 34 E. & E. Digest, p. 278, para. n. c. to para. 2341; *St. Helens Colliery Co., Ltd. v. Hewitson, ibid,* p. 280, para. 2364; *Morrison v. "Aboukir" (Owners),* E. & E. Digest Supplement No. 8, title *Master and Servant,* para. 2552 b.

NOTE:—For the Workers' Compensation Act, 1922, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 5, title *Master and Servant,* p. 555.

SUPREME COURT
Wellington.
In Chambers
1933.
Oct. 20, 25
Ostler, J.
FULL COURT
Wellington.
1933.
Dec. 7, 11.
Myers, C.J.
Reed, J.
Blair, J.

MOORE v. COMMERCIAL BANK OF AUSTRALIA, LIMITED, AND OTHERS.

Practice—Trial—"Conveniently tried"—Special Jury or Judge alone—Alleged False Representation by Bank as to Credit—Claim for Damages and Declaration that Guarantee void—Special Jury granted on Plaintiff's Application—Subsequent filing of amended Statement of Claim, raising new Cause of Action and new Issues on old Cause of Action—Review of Order—Action ordered to be tried before Judge alone—Code of Civil Procedure, R. 257.

If a plaintiff can show that his action can be more conveniently tried before a jury—*i.e.,* with justice to all parties taking all the circumstances into consideration—it is the duty of the Court so to order.

The plaintiff was held to have discharged the onus of showing that his action could be more conveniently tried before a jury when he had shown that the determination of the questions of fact in issue were simple, and that no elaborate directions would be required. The question of the soundness of the company whose financial position was in question being one on which a special jury could reasonably be expected to be experts, and, the right determination of the facts in issue requiring business experience, he was entitled to a special jury.

Brett v. Cox, (1899) 18 N.Z.L.R. 694, distinguished.

So held, by *Ostler, J.,* who made an order granting a special jury accordingly.

On motion to review and rescind that order, since the making of which the plaintiff had filed an amended statement of claim which raised a completely new cause of action, as well as new issues on the old cause of action,

Hardy, for the plaintiff; **P. B. Cooke** and **James,** for the defendants,

Held, by the Full Court (*Myers,* C.J., *Reed* and *Blair,* JJ.), That, applying the test proposed by *Scrutton,* L.J., in *Ford v. Blurton,* (1922) 38 T.L.R. 801, 804, to the facts generally, there were no special circumstances to show that trial before a jury would be more convenient, and the action should accordingly be tried before a Judge alone.

Solicitors: Stewart Hardy, Wellington, for the plaintiff; **Chapman, Tripp, Cooke, and Watson,** Wellington, for Yaldwyn and the Commercial Bank; **Dolan, Rogers, Stephenson, and Anyon,** Wellington, for Hammond; **Young, White, and Courtney,** Wellington, for Pierard.

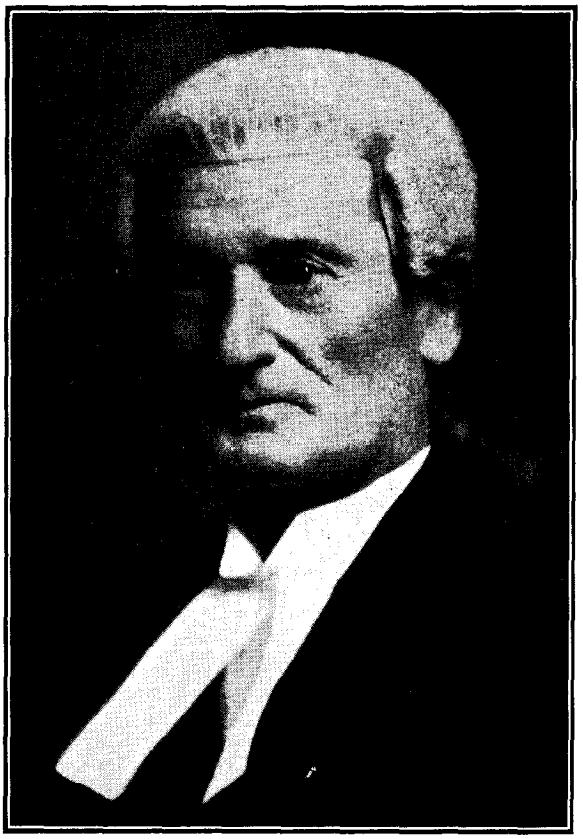
NOTE:—For R. 257 of the Code of Civil Procedure, see Stout and Sim's *Supreme Court Practice,* 7th Ed., p. 196.

Our New Judge: His Honour Mr. Justice Johnston.

The winter of our discontent, arising from the delay in the appointment of a successor to Mr. Justice Adams who retired on August 3 last, has been dissipated by the elevation to the Supreme Court Bench of Mr. Harold Featherston Johnston, K.C., of Wellington. The new appointment continues the recent successive appointments of Wellington counsel in the persons of the late Sir Charles Skerrett, Mr. Justice Blair, Mr. Justice Smith, the present Chief Justice, and Mr. Justice Kennedy.

Mr. Justice Johnston leaves the profession enjoying the full confidence of those who know him best.

The new Judge brings the number of New Zealanders on the Bench again to seven out of its nine members, as he was born in Wellington in 1872. He comes of families who have taken a prominent part in the building of our nation. His father, the Hon. Sir Charles Johnston, was a life member of the Legislative Council, and its Speaker for some years prior to his death. His maternal grandfather was Dr. Isaac Earl Featherston, one of the most brilliant men who have adorned our public life: he was Superintendent of the Province of Wellington, and, later, New Zealand's first official representative in London. After completing his early education at Wanganui Collegiate School, His Honour entered Trinity College, Oxford. In 1897 he graduated B.A., was called to the Bar as a member of Lincoln's Inn, and, later in that year, was admitted a Barrister and Solicitor of the Supreme Court of New Zealand. The whole of his active life in the profession has been passed in Wellington, where he took silk in 1930. He has been a member of the Council of the New Zealand Law Society for some years past, as the representative of the Marlborough District Law Society, and a member of the Rules Committee since its foundation. In 1928, he was President of the Wellington District Law Society, and has held other offices in that body.



S. P. Andrew, Photo.

His Honour Mr. Justice Johnston.

In 1900, the newly-appointed Judge married the eldest daughter of the Right Hon. Sir Francis Bell, K.C., and has one daughter and three sons, the eldest of whom is in the British Army and is stationed in England.

Mr. Justice Johnston has a store of varied experience which must prove very helpful to him on the Bench. He has not only practised law with such distinction as to become King's Counsel, but he has also a first-hand knowledge of our principal national industry, having been engaged for a number of years in farming. He has also been a soldier, serving during the war in France and Flanders with the London Scottish Regiment. In this connection it is interesting to note that though he had a brother a General and could no doubt have himself easily obtained a commission, Mr. Justice Johnston joined up as a private soldier.

He is a fluent public speaker, and, in his command and choice of language and cultured style, has few equals in the Dominion.

He has always been keenly interested in sport. At Wanganui he was a fine "five-eighths," but had the misfortune to injure his knee so badly that he was unable to continue the game at Oxford. Later, he became an enthusiastic polo player, and he is now a keen golfer.

The profession, which associates one name in particular with the Law of Contract will be interested to know that at Oxford Mr. Justice Johnston had as one of his tutors Sir William Anson. He attended lectures by Holland and Dicey. He was also a pupil of a coming young don called F. E. Smith, and gave evidence on his behalf on a famous occasion when the future Lord Chancellor of England was wrongfully charged with riotous conduct in a town and gown contest. Sir John Simon, Mr. Hilaire Belloc, and Mr. C. B. Fry were among his contemporaries at the University.

His Honour has for many years been interested in politics; and at last election contested the Hutt seat. His views were, however, insufficiently radical for the electorate.

To his new duties, His Honour Mr. Justice Johnston will bring a fund of qualities. He has a broad outlook on affairs and an extensive knowledge of his fellow-man. Strength of character, independence of mind, and wide human sympathy, are among his outstanding characteristics; and his experience and knowledge of the world will commend him to those who appear in his Court, where, it can confidently be predicted, his considerateness and courtesy will endear him to members of the Bar.

The new Judge took the oath of judicial office before His Honour the Chief Justice, in his Chambers, on February 1, Mr. Justice Ostler and Mr. Justice Blair being also present. He will be the resident Judge at Christchurch, his first duties being to preside over the present Supreme Court Sessions in that city.

Suggested Improvements in Legal Education.

An Editorial.

There is much to be said for Professor Algie's view that law-students nowadays come to our University Colleges too young and too immature; the reason for this goes deep into our system of general education from the primer class upwards. He supports the proposal to raise the age of entrance into the University from sixteen to seventeen years. In view of the fact that our law course tends to be rather more vocational than cultural, he considers that we should insist that as sound a general education as possible shall be provided for law students before they commence their specialized studies. He gives instances of some Universities overseas wherein a degree in Arts is an essential preliminary for study for the LL.B. degree.

Finally, Professor Algie deals exhaustively with the curriculum for the law degree, and comes to the conclusion that the syllabus is too heavy, and has too much ground to cover in too detailed a manner. Consequently, he advocates that text-books should be prescribed and that far more attention should be paid to broad general principles rather than to ill-digested details. This would result in the striking-out of a number of the statutes which now form part of the prescribed syllabus. The Professor has no doubt heard of the remark of Lord Halsbury when he was aged ninety-seven: "God forbid that I should know all the law!" No man can be master of the lore accumulated during seven hundred years in one subject: why then try and make the law student a jack of all trades? This argument is reinforced by the reflection that the law student attends lectures for only a few half-hours in each week of the University year. This all goes to show that a lawyer is a student all his days; and the aspirant to the profession should primarily be trained in methods of study, and given a foundation and a background.

To come to the practical suggestions for a reconstructed curriculum: Professor Algie would have the first year devoted to more or less cultural subjects, such as Latin, English or Philosophy, Legal History, and Constitutional History. Jurisprudence, if included, should be postponed until late in the course. (This is a subject on which, of late, many teachers of law have animadverted.) Preferably, in the Professor's view, it should be relegated to the years of advanced study for the Honours and LL.M. standard. Similarly, in his opinion, Roman Law and International Law should not be included in the LL.B. course at all.

Those who know Professor Algie's keen and progressive mind would be surprised if he stopped at the foregoing suggested improvements of our system of legal training. He is nothing if not thorough. So he goes on to sketch out a completely revolutionary change in the whole LL.B. course, designed to give students the opportunity of spending a longer time upon certain major subjects in order to obtain a real and lasting grasp of their leading principles, and leaving enough time to cultivate ability to apply them. This would necessitate a five years' course. In the first year the subjects undertaken would be Latin, English or Philosophy, and Legal History treated broadly so as to include a certain amount of biography. In the second and subsequent years, there would be an attempt to present the divisions of Law in a scientific and logical sequence, and in a form calculated to lead the student to see that the various branches of law are really interrelated and that there are a number of ideas and principles common to them all. For the second year, the work would concern itself with Legal History and Biography, treated in greater detail; Colonial History and Colonial Government; and Constitutional Law: the Nature, History, and Functions of Government and our system of Courts; the Elements of Law, treated in broad outline. Then, in the third year, the course would cover Constitutional Law and Government, treated in greater detail; the Law of Property; the Law of Contract; Personal and Family Law: capacity, marriage, divorce, etc.—each of these main divisions being treated broadly. In the fourth year, treated in greater detail, there would be the Law of Property; the Law of Contract, applying previously-mastered principles to such branches of contract as agency, partnership, negotiable instruments, etc.; Personal and Family Law; as well as Adjective Law, which would be treated in broad outline. The fifth year would be essentially revisionary, aimed at strengthening the student's grasp of the basic principles of substantive and adjective law mastered in the earlier years, and now studied from a new angle—that of the Case Book. The way, too, would be prepared for forensic work, and there could be a lead-in to Honours and advanced work for those wishing to proceed to higher studies. For examinations, a selection from amongst the teachers of law in the several Colleges in this proposed new system would conduct the annual examinations during the course.

Such, in general outline, is the trend of Professor Algie's criticisms and suggestions. Some of them are provocative, others may be considered idealistic; but no one will deny their sincerity, or minimise their value. For the first time for many years, practitioners and others interested in the professional studies and preparation for a legal career are given something constructive, "to bite on." As previously stated, we are all indebted to Professor Algie for blazing the track to heights that lead onwards and upwards. If we have been somewhat aimless in our views of legal education in recent years, this is due to the fact that while University work in the Dominion in all other branches has moved with the course of improved conditions of research and the added knowledge thereby acquired, the system of training for the profession of the Law remained in a static condition for some time. We invite contributions to the JOURNAL on the matters on which he has touched in his report, and we shall in due course ask him to reply to such further suggestions on the subject of legal education as may evolve in the course of the discussion.

"**O.K.**"—It is on record that the late President Wilson, when noting documents, declined, in his precise way, to follow the example of his predecessors and put the initials "O.K." to them. He set the Native Indian word out in full—*viz.*, "Okeh." More recently, and in a judgment of no less an authority than Scrutton, L.J., reference is made to "O.K." on a contract: "Each document was considered, altered by agreement, with each alteration initialled, and then the whole document was initialled as agreed by each side, or as Mr. Talbot [the plaintiff] said O.K.'d, the Court being informed by evidence that O.K. means 'Orl Korrect.'": *British Russian Gazette, &c. v. Associated Newspapers, Ltd.*; *Talbot v. Same* [1933] 149 L.T. 545, 550.

The Treaty of Waitangi.

Its Consideration by the Courts.

Although land titles have from the first been a main subject of litigation, it was not for some years after the Superior Courts had been established that any question involving the Treaty of Waitangi became relevant (as far as can be gathered from Reports presently available). In what has been called the "classic judgment" of H. S. Chapman, J. (the elder), in *Reg. v. Symonds* (Eng. Parl. Papers, 1847, p. 67), that learned Judge said:

> "Whatever may be the opinion of jurists as to the strength or weakness of the native title, whatever may have been the first vague notions of the natives of this country, whatever may be their present clearer and still growing conception of their own dominion over land, it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished (at least in times of peace), otherwise than by the free consent of the native occupiers. But for their protection, and for the sake of humanity, the Government is bound to maintain, and the Courts to assert, the Queen's exclusive right to extinguish it. It follows, from what has been said, that in solemnly guaranteeing the native title, and in securing what is called the Queen's pre-emptive right, the Treaty of Waitangi, confirmed by the charter of the colony, does not aver, either in doctrine or in practice, anything new and unsettled."

In *Reg. v. Fitzherbert*, (1872) 2 C.A. 143, the Treaty is pleaded in the defendant's rejoinder, but is not mentioned in the judgment (in these Reports there is no note of the arguments). In *Wi Parata v. The Bishop of Wellington*, (1877) 3 J.R. (N.S.) S.C. 72, the Court, *per* Prendergast, C.J. (for himself and Richmond, J.), referred to "the pact known as the Treaty of Waitangi, entered into by Captain Hobson on the part of Her Majesty with certain Natives at the Bay of Islands, and adhered to by some other Natives of the Northern Island"—a somewhat guarded and depreciatory description—and said:

> "So far as that instrument purported to cede the sovereignty—a matter with which we are not here directly concerned—it must be regarded as a simple nullity. No body politic existed capable of making cession of sovereignty."

And indeed in constitutional practice New Zealand has always been treated as belonging to the class, not of "ceded," but of "settled" territories. The judgment goes on:

> "So far as the proprietary rights of the natives are concerned, the so-called treaty merely affirms the rights and obligations which, *jure gentium*, vested in and developed upon the Crown under the circumstances of the case."

Although several of the utterances in this judgment received correction at the hands of the Privy Council in *Nireaha Tamaki v. Baker*, [1901] A.C. 561, their Honours' observations on the Treaty of Waitangi escaped criticism from their Lordships, who apparently took the view (afterwards developed in the New Zealand Courts) that the Native land legislation passed at various times covered the whole ground. Criticism had, however, already been applied by Gillies, J., in *Mangakahia v. N. Z. Timber Co., Ltd.*, (1881-2) N.Z.L.R. 2 S.C. 345, in these words:

> "Theoretically, the fee of all lands in the colony is in the Crown, subject nevertheless to the 'full, exclusive, and undisturbed possession of their lands' granted to the Natives by the Treaty of Waitangi which is no such 'simple nullity' as it is termed in *Wi Parata v. The Bishop of Wellington*."

It may be added that the plaintiff's case was not, however, helped by the Treaty, nor by the Native Rights Act, 1865, described by the learned Judge as "merely a declaratory Act. It declares the pre-existing rights of the Natives as British subjects under the Treaty of Waitangi and the powers of the Queen's Courts in respect of the persons and property of the Natives."

Emboldened by these observations, counsel in *Tamihana Korokai v. Solicitor-General*, (1912) 32 N.Z.L.R. 321, argued that

> "the New Zealand tribes were treated in the Treaty as sovereign States, and this Court has no jurisdiction to inquire whether this recognition was justified. The rights of Natives rest upon the Treaty and not upon their bare rights *jure gentium*."

Sir Robert Stout, C.J., said that *Wi Parata v. The Bishop of Wellington* had

> "emphasized the decision in *Reg. v. Symonds* that the Supreme Court could take no cognisance of treaty rights not embodied in a statute. . . . In the case of *Nireaha Tamaki v. Baker* the Judicial Committee of the Privy Council recognised, however, that the Natives had rights under our statute law to their customary lands."

Edwards, J., revived the epithet "so-called," and observed that

> "whatever rights were conserved to the Maoris by the Treaty of Waitangi were fully recognized by the Native Lands Act, 1862, which recited the treaty, and was enacted with the declared object of giving effect to it."

Perhaps the most illuminating of the judgments is that of F. R. Chapman, J. (the younger), which contains the following passages:

> "It has been argued that the Treaty of Waitangi was an international treaty entered into with chiefs having the sovereignty. The contrary opinion was pronounced by the Supreme Court in *Wi Parata v. The Bishop of Wellington*. The terms employed and the mode of execution of the treaty leave it at least an open question whether it was so regarded at the time. It professes to be made with certain federated chiefs and certain chiefs who are not federated, but it does not state over what territories they exercised authority, though the text of the treaty seems to suggest that it was contemplated that it should be made with several chiefs who might possibly be regarded and were provisionally and hypothetically treated as sovereigns of their respective territories. Later it became a matter of general knowledge, derived, I presume, from maps prepared pursuant to section 21 of the Native Land Act, 1873, that there are eighteen or twenty tribes in New Zealand. If that be so, the numerous signatories of the Treaty of Waitangi can hardly be described as sovereign chiefs. . . . The whole current of authorities shows, however, that the question of the origin of the sovereignty is immaterial in connection with the rights of private persons professing to claim under the provisions of the treaty of cession: (*Cook v. Sprigg* [1899] A.C. 572). Such treaty only becomes enforceable as part of the municipal law if and when it is made so by legislative authority. That has not been done. The sense in which the treaty has received legislative recognition I will refer to later. . . ."

> "From the earliest period of our history the rights of the Natives have been conserved by numerous legislative enactments. Section 10 of 9 & 10 Vict. c. 103, called 'An Act to make Further Provision for the Government of the New Zealand Islands' (Imperial, 1846), recognizes the laws, customs, and usages of the Natives, which necessarily includes their customs respecting the holding of land. Section 1 of 10 & 11 Vic. c. 112, called 'An Act to promote Colonization in New Zealand, and to authorize a Loan to the New Zealand Company' (Imperial, 1847), recognizes the claims of the aboriginal inhabitants to the land. To the same effect is the whole body of colonial legislation. . . . The various statutory recognitions of the Treaty of Waitangi mean no more, but they certainly mean no less, than these recognitions of Native rights.

> "The due recognition of this right or title by some means was imposed on the colony as a solemn duty: *Nireaha*

Tamaki v. Baker ([1901] A.C. 561, 579). That duty the Legislature of New Zealand has endeavoured to perform by means of a long series of enactments culminating in the Native Land Act, 1909."

Another attempt to invoke the Treaty was made in *Waipapakura v. Hempton*, (1914) 33 N.Z.L.R. 1065, this time in support of an action by a Maori lady for wrongful conversion of fishing-nets seized by an officer under the Fisheries Act, 1908, as being used in breach of Regulations under that Act. After being argued before one Judge at New Plymouth, it was reargued before a Full Court. Stout, C.J., once more laid down that

> "until there is some legislative proviso" [? provision] "as to the carrying out of the Treaty, the Court is helpless to give effect to its provisions. . . . Even if the Treaty of Waitangi is to be assumed to have the effect of a statute it would be very difficult to spell out of its second clause the creation or recognition of territorial or extra-territorial fishing rights in tidal waters. . . .
>
> "In the tidal waters—and the fishing in this case was in this area—all can fish unless a specially defined right has been given to some of the King's subjects which excludes others. It may be, to put the case the strongest possible way for the Maoris, that the Treaty of Waitangi meant to give such an exclusive right to the Maoris, but if it meant to do so no legislation has been passed conferring the right, and in the absence of such both *Wi Parata v. The Bishop of Wellington* and *Nireaha Tamaki v. Baker* are authorities for saying that until given by statute no such right can be enforced."

Since the above decisions, it is believed that the Treaty of Waitangi has not been displayed any more for judicial consideration—except, perhaps, in the lower Courts, by some adventurous advocate, and for the gratification of his Maori clients. Such a case is reported in the late Mr. Justice Alpers' *Cheerful Yesterdays*, at p. 162.

The Retirement of Lord Merrivale.—It must be many a long year since Bench and Bar assembled and met together in such force and quality as they did at Lincoln's Inn last week to do honour to Lord Merrivale on his retirement from the Presidency, says "Outlaw," in the *Law Journal* (London). We all knew that the Henry Duke behind the Merrivale was popular and of high repute as a man and as a Judge; but few quite realised until that night how greatly and universally he was esteemed.

Lord Chancellor and ex-Chancellors, Law Lords, Judges, and Silks all save those who were prevented by physical impossibility or compulsion or the act of God seemed to be there: the eminent juniors; and as many of the others with means and permission to buy a ticket as could crowd in. A notable affair; its last peer was long ago; and we shall be fortunate if we live to see its like again. It was a tribute not mainly to Lord Merrivale as a Judge or as the last President but one of the Probate, Divorce, and Admiralty Division; but notably to his manhood, his inviolable honesty, his serene and unfailing kindliness and courtesy to everyone, including the most nervous and most junior member of the Bar.

Even in Ireland, when he was Chief Secretary, these qualities appeared and are not forgotten; and Sir Plunket Barton, in his recently published book on Tim Healy, tells of the high regard in which Lord Merrivale was held by that redoubtable rebel and Governor-General.

Contract: Mutual Mistake.

Some Important Recent Decisions.

By E. W. White, M.A., LL.M.

The decision of the House of Lords in *Bell v. Lever Bros., Ltd.*, reported in [1932] A.C. 161, is of first-rate interest and importance upon the difficult question of the effect of mutual mistake in the formation of contract.

The central facts were that Lever Bros., Ltd. (the main respondent), had made agreements with the appellants by which the appellants were appointed respectively Chairman and Vice-Chairman of a subsidiary company, the Niger Co., Ltd., in which Lever Bros., Ltd., held approximately 99 per cent. of the shares.

During their tenure of office the appellants had made secret profits (some £1,360) in respect of four cocoa transactions without the knowledge of either of the respondent companies.

Subsequently, owing to the amalgamation of the Niger Co. with a third company, the appellants' services were no longer necessary, whereupon Lever Bros. in pursuance of a generous compensation agreement paid to the appellants a total sum of £50,000 by way of compensation and in purchase of the appellants' rights under their respective service agreements which had been terminated before the due dates. Bell's salary was £8,000 a year for five years plus insurance benefits.

Lever Bros. later discovered the secret transactions, and claimed that in consequence they would have been entitled to terminate the respective service agreements without payment of compensation. They therefore brought an action to have the compensation agreements rescinded and the compensation returned on the ground (*inter alia*) of a mistake of fact. The Niger Co. was later added as a plaintiff. Originally the action was based on charges of fraud.

The action was tried before Mr. Justice Wright with a City of London special jury.

At this stage it is of interest and indeed of importance to set out three at least of the findings of the Jury:

(1) That the plaintiffs were, at the date of the payment of compensation, entitled to terminate the defendants' services without compensation.

(2) That they would have dismissed the defendants without compensation had they known the true facts.

(3) That the defendants, honestly, but mistakenly, believed that their contracts of service could not be terminated without their consent.

Wright, J., held upon the findings that since both parties were labouring under the mistaken impression that the agreements could not be terminated without payment of compensation, Lever Bros., now respondents, were entitled to have the compensation agreement rescinded, and to recover the money paid: 46 *The Times* L.R. 489. This judgment was affirmed by the unanimous decision of the Court of Appeal, [1931] 1 K.B. 557. The Court of Appeal went further, however, and were unanimously of the view that the judgment could also be supported on the ground of breach of duty on the part of the appellants to make full disclosure of their breach of agreements. The judgment

of the Court of Appeal was reversed by the House of Lords (Lord Blanesburgh, Lord Atkin, and Lord Thankerton; Lord Warrington of Clyffe and Viscount Hailsham dissenting).

The House of Lords were called upon to decide:—

(1) Whether the agreements were void by reason of a mutual mistake; and also

(2) Whether they could be set aside on the ground of non-disclosure?

As to the first question of "mutual mistake," Lord Atkin took the view that the mistake concerned only the quality of the thing contracted for and,

> "in such a case, a mistake will not affect assent unless it is the mistake of both parties and is as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be."

Granted that, if all the circumstances had been known, the contract would not have been entered into, that fact does not of itself constitute such a mistake as will prevent its formation. If A. buys a picture from B., both erroneously believing it to be the work of an Old Master, the contract is binding notwithstanding that the picture is a modern copy. The noble Lord continued:

> "It would be wrong to decide that an agreement to terminate a definite specified contract is void, if it turns out that the agreement had already been broken and could have been terminated otherwise. The contract released is the identical contract in both cases, and the party paying for release gets exactly that which he bargained for. It seems immaterial that he could have got the same result in another way or that if he had known the true facts he would not have entered into the bargain."

Lord Atkin stated it to be of paramount importance that contracts should be observed.

Lord Thankerton in his judgment considered that the mistake was not as to the existence of the agreements which were terminated—for such agreements did certainly exist—but rather as to the possibility of terminating them by other means.

In perusing both these judgments we are reminded of the profound distinctions embodied in and illustrated by Sir William Anson's celebrated "Dresden China" formula.

On the other hand, Lord Warrington of Clyffe, in his dissenting judgment (in which Viscount Hailsham concurred), was of the view that, having regard to the matter on which the parties were negotiating, the erroneous assumption or foundation upon which they had acted was essential to the contract, and was "as fundamental to the bargain as any error one could imagine." They both therefore confirmed the view of the Court of Appeal and of the trial Judge.

The decision rested in a sense with Lord Blanesburgh who simply expressed himself as being in entire agreement with Lords Atkin and Thankerton on both the questions before the House, thus establishing a majority and reversing the judgment of the Court of Appeal which, in all, was supported by six Judges.

Upon the first question, then, the conflict of judicial opinion concerned the application of established principles to the facts, rather than the principles themselves.

While Lord Blanesburgh's speech does not make any contribution to the discussion upon the two main issues, it is a masterly analysis of the contracts—clearing away a very real confusion of ideas. In the result the noble Lord was prepared to allow the appeal upon the single ground that no amendment should be granted whereby "mutual mistake" might be substituted for "fraud" as the basis of the action.

This judgment also makes important distinctions with regard to profits made by a director from a contract according as his company is interested in such contract or not.

We deal now with the second issue—viz., whether the agreement should be set aside on the ground of nondisclosure. This issue raises the question as to the duty upon servants and agents to disclose their own misconduct to their employers.

As has been said the Court of Appeal was unanimous in the view that the appellants were in a position *uberrimae fidei*, and were under a duty to disclose, before and at the time of the negotiations for the termination of their contracts of service, any breaches of contract. They had failed to do so, thus rendering the "compensation contract" voidable, and the compensation paid recoverable.

Lord Justice Scrutton refrains from laying down any general rule, but puts it thus: If a servant has stolen from his employer and his employer finding out the theft accuses an innocent fellow servant, is not the real thief bound to inform his employer of his own delinquency? In other words while there is a duty not to steal, is there not also a duty to confess?

The Court of Appeal was of the view that such a duty existed.

The House of Lords did not accept this view. To quote Lord Atkin:

> "Unless this contract can be brought within the limited category of contracts *uberrimae fidei* it appears to me that this ground must fail. I see nothing to differentiate this agreement from the ordinary contract of service; and I am aware of no authority which places contracts of service within the limited category I have mentioned. I am satisfied that to imply such a duty would be a departure from the well established usage of mankind, and would be to establish obligations entirely outside the normal contemplation of the parties concerned."

Lord Atkin puts a concrete case: If a man agrees to raise his butler's wages, must the butler disclose that two years ago he received a secret commission from the wine merchant?

Since the above article was written the report of a recent Auckland case (*Smith v. Herring and Another*, [1933] N.Z.L.R. 825) has come to hand.

This was an action for specific performance of a contract for sale of certain land. The contract obliged the purchasers to form a road, though neither party contemplated that the local authority would require the construction of a storm-water sewer costing £300 as part of such road formation.

One of the grounds of defence was "mutual mistake."

Mr. Justice Reed examines the judgment of Lord Atkin to which reference has been made and proceeds:

> "As applied to the facts of the present case the hypothetical case put by his Lordship relieves me of the necessity of a detailed examination of the law he says: 'A. buys a roadside garage business from B. abutting on a public thoroughfare: unknown to A., but known to B., it has already been decided to construct a by-pass road which will divert substantially the whole of the traffic from passing A.'s garage. Again A. has no remedy.' That is a stronger

case than the present, for it is not suggested that the plaintiff knew that a storm-water drain would be required. . . ." Applying these principles to the facts of the present case the defendants can get exactly what they contracted for, a conveyance of the lots or sections with permission from the City Council to connect houses built on those lots with an existing sewer. That the Council has thought fit to impose conditions that had not been foreseen does not destroy the identity of the subject-matter."

The learned Judge therefore held that "there was no such mutual mistake as would negative or nullify consent and so afford a defence."

A decree for specific performance was granted.

Case Law.

Its Interest and Charm.

By HERBERT TAYLOR.

In addition to the benefits referred to by the late Mr. Justice McCardie, in the speech reproduced recently in the JOURNAL, there are other reasons why Case Law may not be without interest or charm. The learned Judge himself was capable of a wide range of quotation, as a reference to *Callot v. Nash*, (1923) 39 T.L.R. 291, will show. After declaring that the dress of woman has been ever the mystery, and sometimes the calamity of the ages, he enumerates some of the gorgeous apparel referred to in the case, and then proceeds to found himself upon a quotation from Ovid's *Remedium Amoris* for the proposition that "*pars minima est ipsa puellae sui.*" Not content with this manifestation of the wisdom of the ancients, His Honour invokes Victor Hugo to prove "*les modes ont fait plus de mal que les révolutions.*"

A judicial pronouncement of a different order comes in the following terms from Lord Bramwell upon the doctrine of equity of redemption :

> "Whether it would not have been better to have held people to their bargains and taught them by experience not to make unwise ones, rather than relieve them when they had done so, may be doubtful. We should have been spared the double condition of things, legal rights and equitable rights, and a system of documents which do not mean what they say. But the piety or love of fees of those who administered equity has thought otherwise, and probably to undo this would be more costly and troublesome than to continue it."

The literary charm of Lord Bowen's style may be seen in the following statement, dealing with the question of dominant motive under a Bankruptcy Act :

> "It is an exceedingly difficult thing (it is possible, no doubt, for juries may have to do it) to arrive at an opinion as to what is the dominant or operative motive of a man in doing a particular act, but if we are to consider whether, amongst all the shadows which pass across a man's mind, some view, as well as the dominant view, influenced him to do the act, we shall be embarking on a dark and unknown voyage across an exceedingly misty sea."

Lord McNaghten deals with an erring company promoter in the well-known case of *Gluckstein v. Barnes* :

> "Mr. Gluckstein complains he may have difficulty in recovering from his co-Directors their share of the spoil. I cannot think this is a case in which any indulgence ought to be shown to Mr. Gluckstein. He may or may not be able to recover a contribution from those who joined him in defrauding the company. He can bring an action if he likes. If he hesitates to take that course, or takes it and fails, then his only remedy lies in an appeal to that sense of honour which is popularly supposed to exist among robbers of a humbler type."

In a recent case, Lord Sumner administers judicial balm to the hurts of another promoter :

> "On the facts of the present case, however, Mr. Lewis has actually got the profits of his promotion, sadly diminished it is true. He did not cheat anybody ; he was cheated himself. He is not exposed to any claims. Fortunately for himself, his opponents have been otherwise dealt with. No contracts of his, tainted or otherwise, have to be adopted or put in suit by the liquidator. Mr. Lewis simply wants to keep what he still has left, and cannot quite see how to manage it. He has been acquitted of any fraud, and no one now charges him with any. By common consent he was Mr. Hooley's victim, not his accomplice, and if the result of this is to deprive him of a possible opportunity of keeping his money, at the cost of his reputation, he must console himself by reflecting that the price of a good name is far above rubies, and that he is not the first person who has had to cry : 'All is lost save honour.'"

No doubt others of the JOURNAL'S readers will be glad to supply further purple patches from the Law Reports.

Bench and Bar.

Mr. D. W. Russell who was formerly with Messrs. Slater, Sargent, and Connal, has commenced practice in Christchurch on his own account.

Mr. A. A. G. Reed, LL.B., has been admitted to partnership in the firm of Messrs. Wynn Williams, Brown, and Gresson, Christchurch.

Mr. W. W. King, of Auckland, who was formerly Associate to Mr. Justice Hosking, has taken up his duties as Associate to Mr. Justice Johnston.

Mr. P. H. W. Nevill, who has for the last two years been managing clerk to Mr. G. T. Baylee, of Dunedin, has now commenced practice on his own account in that city.

The partnership of Messrs. Hamel and Rutherford, of Patea, has been dissolved by mutual consent and Mr. Rutherford has returned to Dunedin, his home town, to practise there. Family interests consequent upon the death of Mr. Rutherford's father have induced Mr. Rutherford to go to Dunedin.

On December 1, practitioners of South Taranaki assembled at the Carlton Tea Rooms, in order to farewell the departing guest.

Mr. Hamel, as President of the local Law Society, presided. Associated with him was Mr. G. J. Bayley, Vice-president. Mr. Hamel said that it was with very real regret that he was saying farewell to his partner, but he wished him well in his new sphere of action. Mr. Bayley, on behalf of the general body of practitioners also expressed regret at the departure of one who had always earned the respect and esteem of his brethren in the profession. Mr. J. Hessell, of Kaponga ; Mr. A. Chrystal, of Eltham ; Mr. T. E. Roberts, of Patea ; and Messrs. James Foy and John Houston, of Hawera, also spoke in similar terms.

Australian Notes.

By Wilfred Blacket, K.C.

Equity Calling.—Mr. Justice Street (N.S.W.) showed that he was well abreast of the times, and possibly even about two jumps ahead of them when he recently ordered that an injunction against the Commonwealth Savings Bank to restrain payments from a certain account should be broadcasted by wireless to all its branches. The managers of other banks were considerably alarmed for the newspapers had stated that the order was that the injunction should be "served" on these branches by wireless, and bank officers had visions of ceaseless listening in to the loud speaker in future to get the latest news of the orders of the Court. Such a duty could not of course be discharged, and obviously no person who had not heard of the injunction could suffer for failure to act in accordance with its terms, but the justification of His Honour's order is in the fact that any branch of the Savings Bank may pay £10 to a depositor in any other branch and may pay out any further sum upon assurance of the customer's identity. In this case the person enjoined was thought to have gone to Melbourne with intent to invest some money on a horse in some race there, and if there had not been warning notified by wireless the funds the subject of litigation might have been withdrawn at a remote branch. Wonderful thing wireless—perhaps not the world's greatest invention for as Ikey once remarked "The man vot invented interest—he vos no slouch."

Duress.—A curious relic of barbarism was on exhibition in the case of *R. v. O'Brien* at Melbourne General Sessions. The prisoner, a married woman, was charged with having falsely declared that she owned property worth £500, whereas in truth and in fact she had no such luck. The declaration was contained in a bail bond given to secure her husband's release, but, as he was present when she made the declaration, Judge Foster was compelled to hold that she was entitled to acquittal on the ground of duress. It is quite possible that Mrs. O'Brien may think that the law is a foolish thing if it has an idea that women do what their husbands tell them to do in these days, and really it does seem to be time that this old fiction was obliterated. Possibly its original purpose was to induce women to consider favourably proposals of marriage made to them, but the modern girl does not need any such inducement. Moreover, there is always a danger that this shield for crime may be deliberately used to defeat the due course of justice.

Brief Mention.—Melbourne Supreme Court, *cor.* Macfarlan, J., has decided that a bequest to the Pope is valid and that the money should be paid over to his representatives in Victoria. It was also held that His Holiness was a sovereign, and that if he appeared it would be only by grace, and of courtesy, and indeed the word "grace" would seem very appropriate to the Pope.

Quaint things the old bills of lading were. They began "In the name of God the Father, God the Son, and God the Holy Ghost. God save the Ship!" and went on to state that the reason for this pious invocation was that one puncheon of rum was in the good ship *Mary Jane.*

This mode of drafting was adopted by a Chinese who in his will quoted Confucius for a start. "The proverb says," he wrote, "Do not detain a person of sixty years for the night: do not keep one of seventy years to dinner. I am sixty-five years old. I am always afraid that morning will not vouchsafe evening!" Other "Garden stuff" follows, and one trouble for the Probate Court which has to construe it is that no one in Australia white or Chinese can do more than boldly guess the meaning of the strange words of some weird dialect used by the writer. It is quite certain, however, that many very difficult points of law are involved, and it seems a great pity that the estate is only worth £620, for very much more than that amount could have been usefully spent in litigation.

M. F. Morton, of Sydney, articled clerk, provided a humorous interlude to the proceedings of the Supreme Court, Sydney, by his application that his four months' absence in South Africa playing football should count as service under the articles. His "master" made an optimistic affidavit as to the educational value of playing centre forward with the "Wallabies" and the Court accepting the joke in the spirit in which it was offered by joyous majority, the Chief Justice, not "feeling strongly enough on the matter to dissent," granted the application.

Jordan, C.J., N.S.W.—There are no smudges of political bargaining on the robes of F. R. Jordan, K.C., now Chief Justice of New South Wales, for he always kept out of politics, seeking his diversion from the asperities of his practice of the law in the study of languages and in fencing. Every good lawyer is of necessity continually increasing his knowledge of law, and Jordan, C.J., will, in this respect, need to follow this rule for his practice was confined, I think, entirely to Equity, so that he has now to go on to perfection in his grasp of Common Law and Criminal Law. All his professional brethren wish him well for although he had not achieved high renown he never made an enemy and has many friends.

What's the use ?—In that land of Weird Happenings—to wit, New South Wales—F. J. L. Measures was convicted of obtaining £2,800 from Miss Western by fraud and false pretences. He had come from America thirty-five years ago, and during all that time he had been quite busily engaged in various fraudulent and covinous transactions. Among other activities he had purchased Mount Wilga Estate for £6,000: had then mortgaged it for £20,000, and after subdividing it had given second and third mortgages for £600, £800, and other sums over allotments worth £50 at the utmost. He had defrauded registered moneylenders of £20,000, which may or may not have been a very blameworthy action, and had been twice bankrupt, once for £129,000—his estate paying one penny in the pound—and later for £29,000. Many of his victims were women, and it was stated that £200,000 would be needed to make good his defaults. It was, therefore, fortunate for Measures that Judge Thomson was ready to season Justice with Mercy. His Honour said he could not "see that any good purpose would be served by sending Measures to gaol," and therefore ordered that the prisoner should be bound over in one surety of £500 or two of £250 and on his own recognizance of £500 to be of good behaviour and to appear for sentence if called upon within four years, his own recognizance including a provision that he pay £2,800 to Miss Western within twelve months. Naturally this view of the matter is not applauded by the police. "What's the use of

sending this man to gaol," asks the Judge: "What's the use of securing the conviction of such a criminal if a Judge won't send him to gaol," is the question that agitates the police. Yet it may be that some good may emerge from this order for as Measures is now free to carry on his business in his usual way, he may be able to raise enough money on third mortgages of some more of those allotments to repay the £2,800 due to Miss Western.

A Friend in Need.—Miss Betty Mascot Davidson, of Sydney, owned a car, and while out in it there was a collision with a car driven by W. R. Conduct who later on sued her for damages caused, as it was alleged, by her negligence. During the hearing before Judge Nield it was found that Miss Davidson was an infant and, therefore, incapable of suing or being sued, and so it seemed that there would be a sudden end of the case, but this was not to be, for William Melville, clerk to the firm of solicitors acting for her, gallantly offered to be her "next friend" for the purposes of the suit, and of course the plaintiff gladly consented to the necessary amendments in the proceedings, and the action ended in a verdict of £100 and costs against the infant so appearing by her next friend. Of course, there may have been some good reason for finally disposing of the case at that hearing, but on this mere statement of facts it would seem to be a case of "save me from my next friend."

Miss Corry and Some Curses.—Woman may be a ministering angel when pain and anguish wring someone else's brow, but when it is her own brow that is being operated upon the case is quite different. The relevancy of this observation is to be found in the facts in *Hely v. The Parramatta Golf Club, cor.* Long Innes, J., in the Equity Court, Sydney. Mrs. Hely was formerly handicap manager to the Club but some trouble arose concerning a score-card handed to her by Miss Corry. The unpleasantness was brought to the notice of the Club Committee, and they by resolution suspended Mrs. Hely and she then took her troubles to the Court. She swore that all she said about Miss Corry was "God pays His debts and if it is not in her golf it will be paid in her home," a mysterious utterance which seems to be based on the assumption that the Almighty takes very particular notice of scoring cards in the "ancient and royal game" when played by ladies at Parramatta, but another deponent averred that Mrs. Hely said that the members of the committee were "a pack of cheats," and also said "I curse you Miss Corry, and I hope the curse goes into your golf, into your home, and on to yourself," and, if true, this was very improper, for lady members of golf clubs should direct their curses to the golf-ball only, for it is there for that purpose. In any case it would be unsportsmanlike to endeavour to fasten slices, and pulls, and bunkers, and things like those on to an opponent's golf. Who knows, if these things were allowed a voluble lady of good vocabulary might curse herself into a championship by exercise of her malevolence and profanity. The secretary of the Club was annoyed because he feared Miss Corry might resign and he added perhaps tearfully "and she is just the idol of the men," a fact which may probably account for these strange happenings. In accordance with the practice in Equity as viewed by barristers practising on the Common Law side, the matter was ordered to stand over till Friday week, but I shall not cable the result.

The Effect of the Treaty of Waitangi on Subsequent Legislation.

(*Concluded from page 15.*)

missioner appointed under the Ordinances to enquire into the Company's claims.

Shortland's proclamation of July 12, designed to prevent any claimant from exercising acts of ownership over lands the title to which had not been investigated, led to the eventual cessation of the New Zealand Company's operations. In October, 1843, Fitzroy's temporary waiver by proclamation of the Crown's right of pre-emption in favour of the New Zealand Company led to his recall by the Colonial Office.

In the Instructions of the new Governor, Captain (afterwards Sir George) Grey, he was ordered to revoke Fitzroy's proclamation, as was done in June, 1846, and in 1847 in *Reg. v. Symonds*, H. S. Chapman, J., in a judgment in which Sir William Martin, C.J., concurred, held that Fitzroy had no authority to waive the Crown's right of pre-emption in opposition to his Instructions in that behalf. The new Governor was also enjoined to fulfil "honourably and scrupulously the conditions of the Treaty of Waitangi," thus initiating Grey's well-known Native policy.

On his arrival in November, 1845, Grey told a gathering of Chiefs at Kororareka, which was then in ruins following Heke's War:

> "I assure the whole of the chiefs that it is the intention of the Government, most punctually and scrupulously, to fulfil the terms and provisions of the Treaty which was signed at Waitangi on the arrival of Governor Hobson. I have heard that some persons, evil-disposed both towards the Queen of England and the chiefs of this country, have told you that by your signing that paper you lost your lands. By that Treaty the protection of the Queen and your possessions are made sure to you. Your lands shall certainly not be taken from you without your consent."

The Native Land Purchase Ordinance, 1846 (Sess. 7, No. 19), followed, in order further to protect the rights of both parties to the Treaty. After reciting that the Crown's right of pre-emption over all lands in the Colony had been obtained by the Treaty, it referred to divers persons who had entered into contracts for the purchase, use, or occupation of lands with Natives without the Crown's sanction. The recital proceeds:

> "By such secret and irregular purchases not only is the law sought to be evaded, but the general tranquillity of the Colony is liable to be seriously endangered."

"For the purpose of providing a speedy and effectual remedy for the evils aforesaid," it was enacted that if any person purchased or agreed to purchase any estate or interest in land from the Native race, or any rights of timber-cutting, mining, or pasturage, or of use or occupation of any such land without a license from the Crown, such person would be liable upon conviction to a fine of from five to a hundred pounds, and similarly if the offence were persisted in for the space of a month. Up to half of any such fine could be awarded to persons showing activity in procuring the conviction.

IV.

In the New Zealand Government Act, 1846 (9 and 10 Vict. c. 103), all the provisions of the 1842 Act were repealed in regard to Crown lands, and it rested with the General Assembly to make laws generally in regard to land, with reservation to the Crown to make provision by Letters Patent for the maintenance of

"the Laws, Customs, and Usages of the aboriginal native inhabitants of New Zealand, so far as they are not repugnant to the general principles of humanity, for the government of themselves in all their relations and dealings with one another . . . any repugnancy of any such native Laws, Customs or Usages to the Law of England, or to any Law, Statute, or Usage in force in the said Islands of New Zealand, or in any part thereof, in anywise notwithstanding."

(Although this Imperial Act has been long repealed, our present municipal law recognizes Native custom, in matters such as succession, adoption, and marriage, When succession to Native title is in question, once the Native Land Court has established any such custom as a fact, the Superior Courts recognise such custom as binding on them.)

Chapter XIII of the accompanying Royal Instructions has been often referred to. It provided for the registration of statements of the extent and locality of all lands to which any Natives, either as tribes or individuals, claimed either a proprietary or possessory title, and that all lands not so claimed or registered should be the demense lands of the Crown. A Land Court was to be set up, and it was laid down that no claim should be admitted unless it should be established to the satisfaction of such Court that either by some act of the Executive Government, or by the adjudication of some Court of competent jurisdiction, the right of the aboriginal inhabitants had been acknowledged, or else that the claimants or their progenitors, or those from whom they derived title, had actually had the occupation of the lands so claimed, and had been accustomed to use and enjoy the same, either as places of abode, or for tillage, or for the growth of crops, or for the depasturing of cattle, or otherwise for the convenience and sustentation of life by means of labour expended thereon.

The injustice of this Instruction and its deviation from the settled European policy and from all Native common law in relation to land, raised fierce indignation in the Colony.

Richmond, J. (himself a former Native Minister) had something to say about this in *Wi Parata v. The Bishop of Wellington*:

"These Regulations have a long history attached to them. They used to be called the Notorious Regulations of 1846*—Earl Grey's Regulations—and were considered to be exceedingly unjust to the native race. The natives were no longer to be allowed to assert title over vast forests they had never entered, and places where no human foot had ever trod. All that was to be taken into the hands of the Crown. The natives were to be allowed to keep only those places which were in their actual occupation. Those Regulations were never acted on, and they caused a very strong protest. The then Chief Justice of the Colony, Sir William Martin, sent home a strong pamphlet on the subject to Earl Grey. Sir George Grey never acted on them."

Chapter XIII of the Instructions, 1846, was subsequently suspended within the Province of New Munster (the South Island) in all its provisions as to the settlement of the lands constituting the demense lands of the Crown, by the New Zealand Colonization Act, 1847 (10 and 11 Vict. c. 112), except such as related to the claims of the Natives and restrictions in the alienation of their lands; and by the Royal Instructions of March 13, 1848, January 27, 1849, and February 7, 1850, the 14th, 22nd, 24th, and 30th clauses were wholly repealed.

* It is assumed that "1840" in the *Jurist Reports* is an error for 1846. Earl Grey did not become Secretary of State till 1846. Chap. XIII was pleaded in *Reg. v. Fitzherbert*, (1872) 2 C.A., 139 at p. 157.

In practice, it was assumed that all land was vested in the Crown, and until the Crown issued a freehold title the customary Native lands, which were held by Natives or their descendants, according to the customs and usages of the Maori people, could not be recognized. On the other hand, once the Natives established their right to land by such usage, the Crown was bound to issue a freehold title: the Privy Council recognized this right of the Natives under New Zealand statutes: *Nireaha Tamaki v. Baker* [1901] A.C. 561.

Although the Instructions of 1846 mentioned the establishment of Native Land Courts to investigate the Natives' customary-title claims, it was not until 1862 that these Courts were established. The Court of Appeal has laid it down that it is a question for the Native Land Court in the first instance to determine on proper evidence whether any particular area is Native customary land or not; and, when land is claimed both by the Crown and by Natives, by an order which is binding on the Crown: *Tamihana Korokai v. The Solicitor-General* (1912) 32 N.Z.L.R. 321.

Later the status of the Maori under the Treaty was questioned, but all doubts were set at rest by s. 2 of the Native Rights Act, 1865:

"Every person of the Maori race within the Colony of New Zealand, whether born before or since New Zealand became a dependency of Great Britain, shall be taken and deemed to be a natural born subject of Her Majesty to all intents and purposes whatsoever."

And the protection "in all cases of the persons and property whether real or personal of the Maori people and touching the titles to land held under Maori custom and usage" was placed under the protection of the Supreme Court and all other Courts of Law in New Zealand, in the same manner as such Courts had jurisdiction in all cases touching the persons and properties of European subjects.

Thus, after many years, the legislation of the Colony became completely impressed with the spirit and intent of the Treaty of Waitangi.

V.

The period of Constitutional Government began with the passing of the New Zealand Constitution Act, 1852 (15 & 16 Vict. c. 72).

The Native Land Act, 1865, which recited the Treaty of Waitangi, became the foundation upon which all subsequent Native-land legislation has been built.

The principle that is contained in the pact of Waitangi, namely, the cession of all land to the Crown, with the guarantee of the Native customary title to all entitled thereto so long as retention of the same in possession is desired by the persons respectively establishing such title, and the acknowledgement of the Crown's right of pre-emption in such lands is transmuted into a long series of Native-land statutes from 1852 onwards. This legislation, both in regard to Native customary land and to the alienation of Native land to which the Crown had issued titles, is comprehensively summarized in the introduction to the Native Land Act, 1909, written by the late Sir John Salmond. This has been reproduced for its legal and historical value in *The Public Acts of New Zealand (Reprint)*, 1908-1931, Vol. 6, p. 87 *et seq.* Therein, in clear outline, it may be observed how the principles of the Treaty of Waitangi were applied, and the rights of the Crown and of the Natives thereunder were respected and protected,

throughout the period of the main development and expansion of European settlement.

The Native Land Act, 1931, consolidated the provisions of thirty-four statutes dealing with Natives and their land. The effect of the Treaty of Waitangi appears in regard to customary land in Part IV; to the ascertainment of equitable owners of lands granted by the Crown prior to October 23, 1894, or dealt with by the Native Land Court prior to that date, and held by the nominal owners as trustee, and, if so, who are the beneficiaries; the partition of Native freehold land, in Part VI; exchange and consolidation of Native lands, in ss. 156-168; the restrictions on the alienation of Native land by sale or lease generally appears in Parts XII and XIII; the disposal of Native land available for European settlement and the disposal thereof by sale or lease in Part XIV; the incorporation of owners of areas of freehold land held by more than three persons as tenants-in-common in Part XVII and the powers of assembled Native owners in Part XVIII, and the acquisition of Native land by the Crown is generally dealt with in Part XIX. The unlawful cutting or removal of timber, flax, &c., from Native freehold land is an offence under s. 533 of the same Act. The rights of the Natives in regard to land having thermal or mineral water are dealt with in the Thermal Springs Districts Act, 1910, which also makes provision for compensation for such lands when purchased by the Crown. The payment of goldfields revenue from Native land to Natives is dealt with in ss. 30 to 38 and 447 (5) of the Mining Act, 1926, and s. 544 of the Native Land Act, 1931, and special provisions as to forests on Native lands are contained in Part VI of the Forests Act, 1921-22. The reservation of land by the Crown for the use of Natives, the protection of "landless" Natives, and the reservation of Native burial-grounds and meeting-house sites are generally provided for by the Native Land Act, 1931, and the Native Trustee Act, 1930. In these ways, the Legislature has from time to time implemented the Treaty of Waitangi in regard to the confirmation and guarantee to the Maoris of "the full, exclusive, and undisturbed possession of their properties so long as it is their wish and desire to retain the same in their possession"; to the protection of the Maoris from exploitation and their own improvidence; and to the conservation of the Crown's right of pre-emption at a fair price.

Difficulties arose from time to time due to the rapid development of European settlement, to the uneven distribution among Native tribes of land suitable for their proper maintenance, and to the Natives' want of foresight in retaining their lands or the proceeds thereof for future requirements. The re-settlement of the poor Maori is in course of being effected, and the development of modern methods of dairying and agriculture among the Natives is proceeding apace.

The whole trend of legislation in regard to the Maori has generally followed the spirit of the Treaty of Waitangi. As between the two races, it stands. As an old chief said to a predecessor of our present Governor-General: "The Treaty has been rained upon by the rain. It has been exposed to the blast of the storm. But the words remain. They cannot be rubbed out!" And the words spoken by Hobson to the first signatories of the Treaty on that February afternoon, ninety-four years ago to-day, have become in fact and law a commonplace of our national life: "We are now one people."

Practice Precedents.

Administration Act, 1908: Consent of Supreme Court to Sale.

Section 7 of the above Act provides that, in addition to the powers conferred by ss. 5 and 6, an Administrator shall have an absolute power of sale of any real estate without any limitation whatever (except as herein provided), *subject* to any estate or interest lawfully created therein prior to any such sale; and the proceeds of any such sale shall be assets in the hands of such Administrator for the purposes of this Act; and it is provided that *the power of sale* thereby conferred is not to be exercised *without the consent of the Court*; but that such consent is not necessary where the sale is made by the Administrator in exercise of any duty or power imposed or conferred upon or vested in him by s. 5 of the Administration Act, 1908.

Section 7 extends to any Administrator, to whom administration has been granted, as to any estate unadministered.

What the Court has to determine is whether the price at which it is proposed to sell the land is at the time of the application a fair price for the land: *Re McFarland (deceased)*, [1916] G.L.R. 699, and see *Garrow's Law of Property*, 2nd Ed., Vol. 1, p. 194, and *Garrow's Law of Wills and Administration*, pp. 563-4.

The application is usually made by petition, but it may be made by Originating Summons: *In re Sim (deceased)*, [1917] N.Z.L.R. 169.

Section 9 of the Act provides that the Court may order generally as to estates of deceased persons.

These forms are by way of Petition.

IN THE SUPREME COURT OF NEW ZEALAND.

.....District.

.....Registry.

IN THE MATTER of the Administration Act, 1908,

AND

IN THE MATTER of the Estate of A.B. of Farmer deceased (hereinafter referred to as "the said deceased").

To the Honourable the Supreme Court of New Zealand.
THE HUMBLE PETITION of C.D. of , Accountant, SHEWETH AS FOLLOWS:—

1. That the said deceased died on or about the day of 19 leaving a Will dated the day of 19 wherein he appointed E.F. of Carpenter to be his sole Executor and that on the day of 19 Letters of Administration with the Will annexed were granted to your petitioner as the duly appointed Guardian of the said E.F. who is a minor by this Honourable Court at and your petitioner was thereby appointed and is now the Administrator with the Will annexed of the estate of the said deceased.

2. That by his said Will the said deceased devised and bequeathed all his property to the said E.F. absolutely and that the said E.F. is a minor of the age of twenty years.

3. That the estate effects and credits of the said deceased consisted of the following assets the gross value of which is £ and the net value of which is £ .

4. That the debts expenses and charges have been duly paid and except a mortgage for £ on the real property of the said deceased which property is hereinafter described in paragraph 5 hereof there is no outstanding charge on the estate.

5. That the chief asset in the estate of the said deceased is certain real property being all that property (*here set out description of property*).

6. That the capital value of the said property according to the Government valuation thereof (which valuation is attached hereto and marked "A") is £ and the said property is subject to a mortgage in favour of G.H. of Clerk.

7. That the said property has been valued by one "I.L." a Valuer residing and carrying on the business of a Land Valuer in the City of and the said I.L. values the said property at the sum of £ ; such valuation is hereto annexed marked "B."

8. That the said property has a three-roomed cottage thereon which cottage is very old and greatly in need of repairs and it is not in the best interests of the estate to expend any moneys in repairs to the said cottage.

9. That an advantageous sale is in the best interest of the said estate.

10. That your petitioner has received an offer from one of Clerk to purchase the said property described in paragraph 5 hereof at or for the price of £ .

11. That your petitioner considers that a sale of the said property at the price offered is in the best interests of the estate and with the consent of E.F. on the day of 19 entered into an agreement in writing with the said for the sale to him of the said property at the price of £ upon the terms and conditions set forth in the said agreement a true copy of which is hereunto annexed marked "C" provided the said sale should be approved by this Honourable Court.

12. That your petitioner therefore proposes subject to the consent of this Honourable Court being obtained to sell the said property upon the terms and conditions set forth in the said agreement.

WHEREFORE your petitioner humbly prays that this Honourable Court may make an order as follows:—

(a) Authorizing your petitioner to sell the said property described in paragraph 5 hereof to the said at and for the sum of £ upon the terms and conditions set forth in the said agreement for sale dated the day of 19 .

(b) That the costs of and incidental to this application be fixed by this Honourable Court and paid out of the estate of the said deceased.

(c) For such further or other order as to this Honourable Court may seem meet.

AND your petitioner will thus ever humbly pray.

Dated at this day of 19 .

Signed by etc.

AFFIDAVIT VERIFYING PETITION.

I, C.D., of the City of Accountant make oath and say that so much of the foregoing petition as relates to my own acts and deeds is true and so much thereof as relates to the acts and deeds of any other person I believe to be true.

Sworn, etc.

MOTION IN SUPPORT OF PETITION.

(*Same heading.*)

Mr. of Counsel for C.D. of Accountant the Administrator of the Estate of the said deceased TO MOVE before the Right Honourable Chief Justice of New Zealand at his Chambers Supreme Courthouse on day the day of 19 at the hour of 10 o'clock in the forenoon or so soon thereafter as Counsel can be heard FOR AN ORDER in terms of the prayer of the petition filed herein:—

(a) Authorizing the said C.D. to sell the real property being (*description of property as in petition*) to of Clerk at and for the sum of £ and upon the terms and conditions set forth in the agreement for sale dated the day of 19 .

(b) That the costs of and incidental to this application be fixed by this Honourable Court and paid out of the estate of the said deceased.

(c) For such further or other order as to this Honourable Court may seem meet.

Dated at this day of 19 .

Counsel for petitioner.

Certified pursuant to rules of Court to be correct.

Counsel for petitioner.

Reference: His Honour is respectfully referred to sections 7 and 9 of the Administration Act, 1908.

ORDER GIVING LEAVE TO SELL.

(*Same heading.*)

day the day of 19 .

Before the Honourable Mr. Justice .

UPON READING the Motion and Petition filed herein and the affidavit verifying the said petition AND UPON HEARING Mr. of Counsel for C.D. of Accountant the petitioner herein IT IS ORDERED that the petitioner herein be and he is authorized to sell (*set out description of property as in petition*) to of Clerk at and for the sum of £ (*words and figures*) and upon the terms and conditions set forth in an agreement for sale dated the day of 19 and made between the petitioner and the said (a true copy of which agreement is annexed hereto) AND IT IS FURTHER ORDERED that the costs of and incidental to this order amounting to £ be paid out of the estate of the said deceased.

By the Court.

Registrar.

Rules and Regulations.

Post and Telegraph Department Act, 1918. Amendments to Staff Regulations.—*Gazette* No. 1, January 11, 1934.

Post and Telegraph Act, 1928; Post and Telegraph Amendment Act, 1933: Additional Post Office Savings Bank Regulations.—*Gazette* No. 1, January 11, 1934.

Convention between the United Kingdom and Austria respecting legal proceedings in Civil and Commercial matters: Extension to New Zealand.—*Gazette* No. 1, January 11, 1934.

Land and Income Tax (Annual) Act, 1933: Notification by Commissioner of Taxes *re* payment of Income Tax.—*Gazette* No. 1, January 11, 1934.

Fisheries Act, 1908. Amendments to General Regulations under Part II of the Act.—*Gazette* No. 2, January 18, 1934.

Convention between the United Kingdom and Denmark respecting Legal Proceedings in Civil and Commercial Matters. Extension to New Zealand.—*Gazette* No. 2, January 18, 1934.

New Books and Publications.

The Agricultural Landowners' Handbook on Taxes, Rates and Death Duties (England and Wales). Fourth Edition. By R. Strachan Gardiner, F.S.I. (Central Landowners' Assn.). Price 7/-.

Children and Young Persons Act, 1933. By Alfred E. Ikin, B.Sc. LL.D. (Pitman & Son Ltd.). Price 15/-.

Law of Education. By H. J. Simmonds, C.B., C.B.E. and A. W. Nicholls, M.A., B.Litt. (Pitman & Sons Ltd.). Price 22/6d.

County Court Notebook. By Erskine Pollock, LL.B. (Solicitors' Law Stationers Society). Price 3/6d.

The Ratepayer and His Assessment (Outside London). By E. I. Watson, LL.D. (Solicitors' Law Stationers Society.) Price 12/6d.

Digest of Co-operative Law at Home and Abroad. By Margaret Digby. (P. S. King & Son). Price 8/6d.

The British Year Book of International Law, 1933. (Oxford University Press). Price 22/6d.

Hayes and Jarman's Forms and Wills. 16th Edn., 1933. (Sweet & Maxwell, Ltd.). Price 55/-.

Safford's Rent and Mortgage Interest Restrictions Act, 1920-1933. (Sweet & Maxwell, Ltd.). Price 10/6d.

A Guide to the Rent and Mortgage Interest Restrictions Acts, 1920-33. By E. C. Wilkinson, LL.D. (Sclicitors Law Stationers Society). Price 13/6d.

The Pharmacy and Poisons Act explained. By H. Glynn-Jones and Hugh N. Linstead. (Eyre & Spottiswoode.) Price 12/6d.