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Incorporating "Butterworth's Fortnightly Notes."

*" For quotable good things, for pregnant aphorisms, for touchstones of ready application, the opinions of the English Judges are a mine of instruction and a treasury of joy."*

—JUDGE CARDOZO, Chief Judge of the Court of Appeals of New York.

Vol. X. Tuesday, December 4, 1934 No. 22

# Abolition of the Actio Personalis Rule.

ELSEWHERE in this issue will be found a resolution of the Standing Committee of the New Zealand Law Society approving, with modifications, the introduction of legislation on the lines of the Law Reform (Miscellaneous Provisions) Act, 1934, which became law in July last in England.

The necessity for such legislation has already been stressed in these pages: applying the words of the learned Chief Justice in *Findlater v. The Public Trustee and Queensland Insurance Co., Ltd.*, [1931] G.L.R. 403, 407, we urged the need for statutory action as " of urgent national importance: see p. 141, *ante*. We there reminded our readers of what was said editorially three years before in this JOURNAL on the same subject: Vol. 7, p. 125. It is, therefore, unnecessary to go into details relating to the importance and the necessity for the legislation now recommended by the New Zealand Law Society. We proceed to consider the manner in which the Mother of Parliaments has dealt with the subject.

The first section of the Law Reform (Miscellaneous Provisions) Act, 1934, deals with the effect of death on certain causes of action. In general, all causes of action subsisting against or vested in a deceased person shall survive against, or for the benefit of, his estate. Causes of action excluded from this general provision are those relating to defamation, seduction, or for inducing one spouse to leave or remain apart from the other, and claims under s. 189 of the Supreme Court of Judicature Act, 1925, for damages on the ground of adultery (*cf.* s. 29 of the Divorce and Matrimonial Causes Act, 1928). Where the cause of action survives for the benefit of deceased's estate, in no case are exemplary damages recoverable; in the case of a breach of promise to marry, damages are limited to such damage to the estate of the deceased person as flows from the breach of promise itself; and, if deceased's death has been caused by act or omission giving rise to the cause of action, the damages are to be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be recovered.

No action in tort is to survive against the estate of a deceased person unless either proceedings in that behalf were pending at his death, or the cause of action arose within the six months prior to his death and proceedings are taken not later than six months of the grant of probate or letters of administration to his personal representatives.

It will be noted that there is no time limit for actions for the benefit of the estate of the deceased, and the limitation mentioned applies only in regard to actions taken by persons claiming against the deceased's personal representatives. The New Zealand Law Society has drawn the attention of the Solicitor-General to this matter, and recommended that in any local legislation on these lines there should be a time limit to actions by the personal representatives as well as against them.

If the deceased dies before, or at the same time, as any damage has been suffered by reason of his wrongful act or omission, such cause of action is to be deemed, for the purposes of the Act, to have been subsisting against him before his death as would have subsisted if he had died after the damage was suffered. Thus, if A. suffered a damage after B.'s death as the result of an act or omission by B. while still alive, A. will have a cause of action against B.'s estate.

The rights conferred by the Act for the benefit of the estates of deceased persons are in addition to, and not in derogation of, any rights conferred on the dependants of the deceased by the Fatal Accidents Act, 1846 to 1908 (*cf.* the Deaths by Accident Compensation Act, 1908, which replaced the Act of 1880, which adapted Lord Campbell's Acts of 1846 and 1864: see *The Reprint of the Public Acts of New Zealand*, 1908-1931, Vol. 6, title *Negligence*, p. 427. The local statute applies to the Cook Islands and to the mandated territory of Western Samoa. So much of the Law Reform (Miscellaneous Provisions) Act, 1924, as relates to causes of action against the estates of deceased persons, applies in relation to causes of action under Lord Campbell's Acts, just as it applies to other causes of action not expressly excluded as above stated. For the purposes of Lord Campbell's Acts, any illegitimate person is brought within the definition of " children," in the same manner as has already been provided by s. 2 of the Deaths by Accidents Compensation Act, 1908; and, in addition, adopted children are brought within the scope of the statute (*cf.* s. 21 of the Infants Act, 1908).

In the case of the insolvency of an estate against which proceedings are maintainable by virtue of the Act, any liability in respect of the cause of action is deemed a debt provable in the administration of the estate, notwithstanding the fact that it may be in the nature of unliquidated damages arising otherwise than by a contract, promise, or breach of trust (*cf.* Administration Act, 1908, s. 63, and Bankruptcy Act, 1908, s. 110).

Funeral expenses may be recovered in actions under the Fatal Accidents Acts, if same have been incurred by the parties for whose benefit the action is brought.

There has been some criticism in England as to the limitation of time within which an action may be brought for the benefit of the estate of a deceased person; in regard to the possible consequences in relation to claims under Lord Campbell's Act; and in regard to the measure of the damages in claims which may be brought or continued by the representatives of a deceased person.

These are summarised and discussed in an article in the *Law Times Journal* of September 22 last. We do not propose to traverse these objections as some of them are affected by local statutory provisions, and there is sufficient talent in this country to consider the effect of the possibilities of the recent English Act under our own conditions and to provide accordingly in the legislation that is proposed for the abolition here of the *actio personalis* rule, which has little in its favour apart from the respect due to an ancient institution.

# Summary of Recent Judgments.

SUPREME COURT
Christchurch.
1934.
Oct. 5;
Nov. 12.
*Johnston, J.*

**EDMONDS v. EDMONDS.**

**Justices of the Peace—Practice—Notice of Appeal—Whether Personal Service required—Sufficient Service where Respondent cannot be found—Appeal on Law only—General Appeal—Telegram asking Magistrate to state Case under Part IX, subsequently withdrawn and Notice of General Appeal substituted—Whether General Appeal under Part X debarred—Justices of the Peace Act, 1927, ss. 313, 316 (1).**

Appeal under Part X of the Justices of the Peace Act, 1927, from a Magistrate's order of May 21, 1934, increasing from £2 to £2 10s. per week the amount payable by appellant to respondent under a maintenance order dated March 30, 1920; and under Part IX from an order of the same date made by the same Magistrate varying a prior charging order dated March 30, 1920, whereby certain assets of appellant acquired since the charging order of March 30, 1920, were charged with payment of the increased maintenance from that date payable. Both orders were made under the provisions of the Destitute Persons Act, 1910.

Section 316 (1) of the Justices of the Peace Act, 1927, thus prescribes the method and time for service of notice of appeal.

> "(1) The appellant under the provisions of the last preceding section shall, within seven days after the conviction or the making of the order, give to the complainant notice in writing of such appeal, and of the matter and grounds thereof, and of the Court to which it is to be made."

Under this section personal service is not necessary or required.

The appellant's solicitor and/or his clerk on the last day for service called first on the solicitors who had acted for respondent, who said that they had no authority to accept service, then twice at respondent's flat, who was not there, and then at the house of one of the solicitors on whom he left notice of appeal, and finally at the respondent's flat where he put a duplicate notice under the door.

**R. L. Saunders,** for the appellant; **W. J. Hunter,** for the respondent.

**Held,** That the service was sufficient and in time.

**Semble,** If the party to be served evades service or is absent for any length of time from the only place of address leaving no one to whom notice can be given, sufficient service or dispensation from service may well be supported by service on the solicitors who have acted and appeared on the order.

**Godman v. Crofton,** [1914] 3 K.B. 803, followed.
**Wills and Sons v. McSherry,** [1913] 1 K.B. 20, and **Denton v. Denton,** [1924] N.Z.L.R. 187, reconciled and explained.

Part IX of the Justices of the Peace Act, 1927, relates to appeals on point of law only, by way of case stated. Section 313 is as follows:—

> "Any person who appeals under the provisions contained in this Part of this Act against any determination of a Justice from which he is, under the provisions hereinafter contained in Part X of this Act, or otherwise, by law entitled to appeal to the Supreme Court shall be taken to have abandoned such last-mentioned right of appeal finally and conclusively and to all intents and purposes."

Part X relates to "General Appeal and Practice and Procedure thereon." Appellant's solicitor on the last day on which appellant could ask for a case to be stated under Part IX sent a telegram, of which no notice was given to the respondent, to the Magistrate applying to him to state and sign a case setting forth the facts and the grounds of his determination (as required by s. 303). Respondent's solicitor, about twenty-five minutes after the Magistrate had received the telegram, produced to the Magistrate a letter withdrawing the application by telegram and substituting an enclosed application.

**Held,** That no irrevocable step had been taken which committed appellant to an appeal on point of law only and debarred an appeal under Part X.

**Solicitors: R. L. Saunders,** Christchurch, for the appellant; **Hunter and Ronaldson,** Christchurch, for the respondent.

**Case Annotation:** *Godman* v. *Crofton*; *Wills and Sons v. McSherry*, E. & E. Digest, Vol. 33, p. 416.

NOTE:—For the Justices of the Peace Act, 1927, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908–1931, Vol. 2, title *Criminal Law*, p. 351.

SUPREME COURT
Wellington.
1934.
Sept. 12, 13, 14;
Nov. 12.
*Myers, C.J.*

**PALMERSTON NORTH CITY CORPORATION AND ANOTHER v. MANAWATU-OROUA ELECTRIC-POWER BOARD.**

**Electric-power Board—Reduction of Charge for Power used for Milking Purposes—Separate Rate (for Increase of Deficiency caused thereby) on City within Board's District—Colourable and Real Purposes of Scheme—Abuse of Powers of Board—Injunction—Certiorari—Electric-power Boards Act, 1925, ss. 55, 56—Code of Civil Procedure, RR. 465, 466, 467, 474, 599.**

A city, which had its own electric plant and its own reticulation system, had an agreement with the Electric-power Board, within whose district it was situated, for the supply of electricity at a price which enabled the City Council to supply electricity to the inhabitants of the city at lower prices than those charged by the Board to consumers within the other portions of the Board's district. The Board determined to reduce the charge for power used for milking purposes, and to provide for the increased deficiency by a separate rate over the city area under s. 56 (2) of the Electric-power Boards Act, 1925. The reason alleged for the reduction was colourable. The real purpose was to induce the city to sell its undertaking to the Board and join the Board's scheme so that the inhabitants of the city would have to pay the same price for their electricity as was paid by the Board's county customers.

**Callan, K.C.,** and **H. R. Cooper,** for the plaintiffs; **H. P. Richmond** and **Innes,** for the defendant.

**Held,** applying the principle laid down in **Westminster Corporation v. London and North Western Railway Co.,** [1905] A.C. 426, and **Palmerston North Borough v. Palmerston North-Kairanga River Board,** [1916] N.Z.L.R. 919, and on app. *ibid.* 1129, That the majority of the members of the Board had not acted reasonably or in good faith, and that in the making of the separate rate the powers of the Board were both misused and abused. An injunction was therefore granted at the suit of the city, restraining the Board from giving effect to and from enforcing or collecting such separate rate.

The plaintiffs claimed under the "Extraordinary Remedies" rules a writ of certiorari, which claim for relief was abandoned at the hearing, and an injunction. Rule 466 is as follows:—

> "Any person claiming the issue of a writ of mandamus or of a writ of injunction or of a writ of prohibition, or an order under R. 464, shall without issuing a writ of summons file in Court a statement of claim setting out the facts upon which he bases his claim to the relief sought to be obtained."

A statement of claim is within the rule so long as it does not claim anything more than one or more of the special forms of relief claimed therein and plaintiff is not confined to the claim of the issue of one particular writ.

The practice of claiming under the rule certiorari is incorrect, but does not make the statement of claim a nullity. Defendant's course is to apply to amend the statement of claim by striking out the prayer for a writ of certiorari.

**Semble,** Where the relief claimed includes certiorari the plaintiff may file his statement of claim in a proper case for a writ of prohibition and then move thereon (under R. 467) for the writ of prohibition prayed in the statement of claim or alternatively for certiorari (under RR. 465 and 474).

**Kerr v. Brown,** [1925] G.L.R. 379, followed.

**Solicitors: Cooper, Rapley, and Rutherfurd,** Palmerston North, for the plaintiff; **Innes and Oakley,** Palmerston North, for the defendant.

**Case Annotation:** *Westminster Corporation v. London and North Western Railway Co.*, E. & E. Digest, Vol. 38, p. 21, para. 119.

NOTE:—For the Electric-power Boards Act, 1925, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 3, title *Electric Lighting and Power*, p. 4.

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SUPREME COURT Christchurch. 1934. Oct. 30; Nov. 13. *Johnston, J.*

**JOHN v. PUBLIC TRUSTEE.**

**Will—General—Evidence—Devise of a Section being Lots 11 and 12 together with the Shed erected thereon—Ambiguity established by Facts outside Will—Admissibility of Extrinsic Evidence that Testatrix in Instructions identified the Land by the Shed erected thereon.**

Testatrix devised and bequeathed to the plaintiff "the . . . section containing . . . ½ acre being Lots 11 and 12 . . . together with the shed erected thereon" and the residue to her trustee upon trust to permit her daughter to have the free use, income, occupation, and enjoyment thereof during her lifetime, but only until the death of the husband of testatrix, and from and after the death of the survivor of the said daughter and testatrix to permit the said husband to have the free use, income, occupation, and enjoyment thereof during his lifetime, subject to payment of rates, taxes, insurance, and upkeep. Testatrix owned 1 acre of land, comprising four allotments of approximately a quarter each. Lots 11 and 12 fronted Winters Road, and on them was erected the dwellinghouse, a washhouse and tank-stand, and part of an old wood-shed called "the brewery." Lots 6 and 7 fronted an unformed blind road. Wholly on Lot 7 were erected a fowl-house, a small tool-shed, and a shed that was erected and used by the plaintiff. The "brewery" shed stood partly on Lot 11 and partly on Lot 6.

**Brassington,** for the plaintiff; **M. J. Gresson,** for the defendant.

**Held,** That, even if the will did not establish ambiguity—a knowledge of the land and buildings raising a doubt as to whether testatrix identified the devised land by buildings or sectional numbers—an ambiguity could be established by extrinsic evidence to the effect that in giving instructions for her will testatrix was only prepared to identify the land devised to the plaintiff by reference to the shed which the plaintiff had erected (admittedly the sections fronting the blind road) and that the testatrix had no knowledge of the allotment numbers, the person receiving the instructions having erroneously inserted the wrong allotment numbers in order to specify the land described by testatrix with reference to a particular shed and a blind road.

**Held,** further, That, in the light of that evidence, the words of dominant description were the words "together with the shed erected thereon," and that the devise to plaintiff was that of sections Nos. 6 and 7 fronting the blind road on which the shed erected by the plaintiff was at the time testatrix made her will and at the time of her death standing.

**Collins v. Day,** [1925] N.Z.L.R. 292, followed, and the principle thereof held not to be limited to cases of doubt as to the identity of the donee of bounty.

**Solicitors: Wilding and Acland,** Christchurch, for the plaintiff; **Wynn Williams, Brown, and Gresson,** Christchurch, for the defendant.

# Realisation of Small Estates.

## Payments without Grant of Administration.

By G. R. POWLES, LL.B.

By a number of statutory provisions certain debtors of deceased persons are empowered to make payment to those apparently entitled without requiring production of probate or letters of administration. The object of these provisions seems twofold: First, to secure to dependants of a deceased person small sums—constituting in some cases the deceased's whole estate—of which, in the absence of some enabling authority, they might be completely deprived; and, secondly, to enable the debtors in question to obtain a discharge from minor obligations which they are willing and anxious to meet. In view of the fact that in some cases (as will be seen later) the debtor is permitted to vary the ordinary rules of distribution, and of the possibility, amounting in many cases to certainty, that the rights of the deceased's creditors will be defeated by such payment, it is thought that regard for the needs of dependants is the principal reason for the existence of the sections in question. It is, however, interesting to note that in no case is the authority granted made to depend upon the value of the whole estate of the deceased being less than a defined amount—it is only the actual sum paid by the debtor which must be less than the prescribed sum. The principal statutory provisions of the nature mentioned relate to personal property as follows:—

*Property of a deceased seaman* (not exceeding £100) may, if it comes into the hands of the Marine Department, be paid by the Minister to the widow or child or to any person entitled to the personalty of the deceased either under the will, if any, or on intestacy or to a person entitled to take out representation. The Minister is discharged from all liability in respect of such payment, but every person to whom the payment is made shall apply the same in due course of administration (Shipping and Seamen Act, 1908, s. 96).

*Moneys due by any Government Department* (not exceeding £100) may, on the death of the creditor, be paid to any person whom the Minister of Finance may consider entitled thereto. Any such payment made shall be valid against all persons whatever, and all persons acting under this provision shall be absolutely discharged from all liability (Public Revenues Act, 1926, s. 142).

*Proceeds of life insurance policies* (not exceeding £200 exclusive of profits) may, on the death of the assured, be paid, together with the accrued profits, to the husband, wife, father, mother, child, brother, sister, nephew, or niece of the deceased, or to any person entitled under the will or on intestacy or to any person entitled to obtain probate or administration. Payment hereunder discharges the company, but persons receiving the money shall apply the same in due course of administration (Life Insurance Act, 1908, s. 76, and Amendment Act, 1920, s. 5).

*Deposits in Post Office Savings Bank* (not exceeding £200) may, on the death of the depositor, be paid wholly or in part to any of the following:—

(*a*) Any person who has paid the expenses of the funeral:

(*b*) Any creditor:

(*c*) Widow or widower:

(*d*) The persons entitled on intestacy:

(*e*) Any person entitled to take out probate or administration:

(*f*) Any person undertaking to maintain the children:

(*g*) The Public Trustee.

The Postmaster-General may, if he considers that injustice or hardship would result, depart from the observance of the rules of law regulating distribution on intestacy. All payments made under this section shall be valid as against all persons (Post and Telegraph Act, 1908, s. 88).

*Deposits in private savings-banks* (not exceeding £200) may, on the death of the depositor, be paid wholly or in part to any of the following:—

(*a*) The widow or widower:

(*b*) The person entitled under the will or on intestacy:

(*c*) Any person entitled to take out probate or administration.

Payment hereunder discharges the trustees of the savings-bank from further liability, but any persons receiving any moneys are required to apply the same in due course of administration (Savings-banks Amendment Act, 1927, s. 2).

*Benefits due from friendly societies* (not exceeding £150) may, on the death of a member of a registered society, be distributed among such persons as appear to be entitled by law to receive the same. Such payment shall be a complete discharge to the society, but any person to whom the moneys ought to have been paid shall have his lawful remedy against the person who has received the money (Friendly Societies Act, 1909, s. 58).

*Moneys due by building societies* (not exceeding £100) may, on the death *intestate* of any member or depositor entitled, be paid to the person entitled upon intestacy. Such payment is valid and effectual in respect of any demand from any other person as next-of-kin or representative, but such next-of-kin or representative shall have his lawful remedy against the person who has received the money (Building Societies Act, 1908, ss. 29 and 30).

*Moneys due by Public Trustee* (not exceeding £100) may, on the death of the creditor, be paid to any person considered by the Public Trustee to be entitled thereto. Any *bona fide* payment is valid against all persons whatsoever, but any person to whom the moneys ought to have been paid has his lawful remedy against the person to whom the moneys have been paid (Public Trust Office Amendment Act, 1921, s. 88).

*Moneys of an infant invested with the Public Trustee* (not exceeding £100) may, on the death of the infant, be paid to any person proved to the satisfaction of the Public Trustee to be entitled by law to receive the same. The Public Trustee acting *bona fide* is absolutely discharged from liability in respect of such payment, but any person to whom the moneys ought to have been paid has his lawful remedy against the person to whom the moneys have been paid (Public Trust Office Amendment Act, 1921, s. 91).

*Pension moneys unpaid at death of pensioner* may, in the discretion of the Minister, be paid to and for the benefit of the widow, or to any person having the control of the children of the pensioner for the benefit of such children; or towards the costs of the pensioner's funeral, or in respect of his maintenance in any charitable institution (Pensions Act, 1926, s. 74; Finance Act, 1929, s. 36 (8)).

*Moneys due from industrial or provident societies* (not exceeding £100) shall, where the member entitled dies *intestate*, be transferable or payable to or among the persons who appear to the committee, upon such evidence as they may deem satisfactory, to be entitled by law to receive the same. Such payment or transfer is valid and effectual against any demand upon the committee or society by any other person (Industrial and Provident Societies Act, 1908, s. 9 (*f*) and (*g*)).

*Duties of payer.*—Although the provisions of the Administration Act enabling the Commissioner of Stamp Duties to compel a person dealing with the estate of a deceased person without grant of administration to pay duty do not affect payments made under any of the above special provisions—Administration Act, 1908, s. 33 (3)—yet the estate represented by the payment is subject to the payment of death duty. Section 27 of the Death Duties Act, 1921, provides that the estate of a deceased person shall not be exempt from death duties by reason merely of the fact that no grant of administration has been, or need be, or can be, made. Then s. 61 imposes upon any person making any payment out of the estate of a deceased person without administration having been obtained the duty, under penalty of a fine not exceeding £5, of giving notice in the prescribed form to the Commissioner of Stamp Duties. By s. 35 the Commissioner may, if no administration is granted within six months after the death of the deceased, proceed to assess duties and recover them in the same manner, with all necessary modifications, as if administration had been granted.

Apart from these statutory duties, there is the general duty upon the payer to act *bona fide*; he is not bound to exercise the powers granted to him (*In re Johnson, dec'd.*, (1912) 32 N.Z.L.R. 166), and, as he is in many cases acting in a quasi-judicial capacity, he must assure himself that the power upon which he proposes to act actually applies to the case before him and must act only upon evidence which appears to him reliable. For instance, where a society had statutory power to pay moneys "to or among the persons who . . . appear to be entitled by law to receive the same" and had paid *one* of the deceased's next-of-kin while knowing that there were others, it was held that such a payment was *ultra vires* and that the Act "was not intended to give to this company a power to select among the representatives of the deceased person and to pay to one of them to the exclusion of the others" (*Symington v. Galashiels*, (1894) 21 R. (Ct. of Sess.) 371). On the other hand, it has been held that the word "appear" in the above section imports "reasonably," and that a society which has no knowledge of a will and pays to the person entitled on intestacy is protected (*Nelson v. Royal London Friendly Society*, (1896) Diprose and Gammon 544). Again, in the recent case of *O'Reilly v. Prudential Assurance Company*, [1934] 1 Ch. 519, where the matter in question was the somewhat similar

one of the " facility of payment " clause in a policy, whereby the company was authorised to pay to the husband or wife or relation by blood of the assured, and there the company had paid to the assured's niece and was subsequently sued by the administrator, Romer and Maugham, L.JJ., although holding that the company was protected by the clause, doubted whether this would be so if the company had known at the time of making the payment that an administrator of the assured's estate had been appointed.

*Duties of payee.*—It is not to be supposed that, merely because a certain person is entitled by statute to receive money, such person may lawfully hold that money against all the world. The general rule is that any person receiving and dealing with assets of a deceased person is liable to account therefor to those rightfully entitled, and this principle is recognised by most, but not all, of the special statutory provisions now being discussed. From the point of view of the payee these provisions fall into definite classes :—

(*a*) Moneys due by the Public Trustee, moneys of an infant invested with the Public Trustee, benefits due from friendly societies, and moneys due by building societies, where the remedy of the person rightfully entitled as against the payee is expressly preserved. In these cases no express duties are cast upon the payee, though it would seem that he should hold the money, in the first place, for the administrator if any. Failing an administrator, the payee should apply the moneys as they would be applied by a duly appointed administrator in the course of administration—that is to say, in payment of debts, and then to the beneficiaries under the will or the persons entitled upon intestacy. If the payee did not so act as administrator, he would, as *executor de son tort*, render himself personally liable (to the extent of the moneys received) to any creditor, beneficiary, or person entitled.

(*b*) Property of a deceased seaman, proceeds of life insurance policies, and deposits in private savings-banks, where the payee is directed to apply the moneys in due course of administration. In these cases the payee clearly has thrust upon him the duties of an administrator.

(*c*) Deposits in Post Office Savings-bank, where the particularity of the provisions as to payment and the discretion given to the Postmaster-General to depart in cases of hardship from the rules of distribution point to the conclusion that the payee takes absolutely. This seems to be the only case where it is safe for the payee to keep the moneys for his own use regardless of the claims of others. In this respect there is a curious and perhaps unwarranted difference between the Post Office Savings Bank and private savings-banks.

(*d*) Moneys due by any Government Department or by an industrial or provident society where there is no express reservation of rights and the payments are to be valid against all persons whatsoever. In spite of this it would seem that the discretion of the Minister of Finance or of the committee of the society, as the case may be, should be exercised according to law and the validation of payments would probably apply only to the payer and not the payee. In the absence of any express provision to the contrary it is submitted that the remedy of the person rightfully entitled to the money remains, although the matter cannot be free from doubt when these sections are contrasted with the others discussed above under classes (*a*) and (*b*).

# Company Law in New Zealand.

## The new " Morison ": An Advance Review.*

Since the year 1904, when the work entitled *The Law of Limited Liability Companies in New Zealand* by the late Mr. C. B. Morison, K.C., appeared, it has maintained an unrivalled position, and has been regarded by lawyers of more than one generation as an indispensable part of their libraries. For the past thirty years, " Morison " has been the pabulum on which those dealing with company law, both as students and as practitioners, have fed ; and which they have assimilated to their great advantage. With the coming into force of the Companies Act, 1933, a new edition of this notable text-book became necessary. Under the editorship of Mr. F. C. Spratt, assisted by Mr. D. G. B. Morison, son of the author of the first edition, *Morison's Company Law in New Zealand*, second edition, is about to be issued. An advance perusal of the finished work shows that it is worthy of its origin and of those who have developed and modernised it.

While in the main the second edition follows the design of its original author, it has some new features which will commend themselves to its users. The main part of the work has been dealt with as a comprehensive treatise on company law in its various aspects, with particular reference to New Zealand conditions and requirements. The formation, membership, and management of companies limited by shares are dealt with under their various heads in separate chapters. Then, the useful treatment of special types of companies —such as private companies, companies limited by guarantee, unlimited companies, mining companies, co-operative dairy companies, insurance companies, and British and foreign companies carrying on business in New Zealand—are separately treated in self-contained chapters in the second part of the work, and these give in succinct but comprehensive manner all that a seeker after any such specialized knowledge requires to find. Winding-up and dissolution form the subject of the third part of the work.

Very conveniently, the annotated statutes, comparative tables, rules, and forms, with a summary of fees and duties, provide the material for separate appendixes to which copious cross-references are given ; and so are not obtruded into the text. The plan of the original " Morison " is also varied by the introduction of numbered and headed paragraphs indicating the subheadings of the statements of the law ; and references to statutes and citations of cases are carried to the foot of the page on which they appear. The annotation of the work by cross references to the paragraph numbers of relevant matter elsewhere in the text-book offers to the reader a complete commentary on any part of the subject, and places the portion of the law under notice in its proper setting both in relation to the general law and to particular statutory provisions relating to it.

A glance through the Table of Cases brings to notice the extreme care devoted by the editors to their task : over 2,400 cases are cited, and there is evidence that their research has brought them down to the last numbers

**Morison's Company Law in New Zealand*, second edition, by F. C. Spratt, LL.B., author of *The Law of Bankruptcy*, etc., assisted by D. G. B. Morison, LL.B.; Butterworth & Co. (Aus.) Ltd., Wellington and Auckland. Pp. 1092, with Index and Table of Cases.

of the English and New Zealand law reports to come to hand. The original edition contained 904 cases, so that the number has been almost trebled; in fact, no New Zealand case has been omitted and all English decisions of importance have been included. The index is complete, and handy to use; though the system of cross-references already referred to almost renders the provision of so complete a reference-index a work of supererogation.

This rapid summary of the contents and features of "the new *Morison*" would be more inadequate than the writer would like if attention were not drawn to the inclusion of a hundred company precedents carefully drawn to meet conditions arising out of the new statute and rules, and well annotated. These should prove of great value to the practitioner faced with a new body of statute law.

When the new work was first announced, it was stated that it would contain itself within 900 pages. That the authors and publishers have fulfilled their desire to make the text-book as complete as lay within their power is proved by the fact that the handsome volume which bears their names runs to 1092 pages. The result of the editors' painstaking research cannot result otherwise than in value to the profession, to accountants, and to all who are concerned in the practical application and administration of Company Law in this Dominion. It will be in their hands within the coming week.

# The Judicial Committee.

In an article in the current *Fortnightly*, Mr. Norman Bentwich takes up the theme—not unfamiliar—of "Law as a Link of Empire;" but his article has the title, "An Imperial Link," and it is printed, in modern journalistic style, with a note of interrogation. The Imperial Link referred to is, of course, the Judicial Committee, and Mr. Bentwich has to admit that in practice its jurisdiction is becoming restricted, says the *Law Journal* (London) editorially. From Australia and South Africa appeals to the Privy Council have almost disappeared. They come from Canada in constitutional cases. But the Judicial Committee now exists mainly as a Court of Appeal from India, New Zealand, and the Crown Colonies, and though the Irish Constitution, in terms, reserves the right of appeal to the King in Council, notwithstanding that the decision of the Supreme Council is in all cases to be "final and conclusive," yet it is well known that the Free State objects to this mark of judicial subservience and will have none of it. Mr. Bentwich admits that in this Ireland must be humoured. "It is contrary to the spirit of the relations now existing between the Mother Country and the other members of the British Commonwealth to insist on maintaining a tie which one party regards as a chain." It seems that the constitutional question of the right to appeal from the Free State is to be argued, but it is hardly worth while. For questions between the different parts of the British Commonwealth, should they arise, there may yet be set up a Court such as was suggested by the Report from which came the Statute of Westminster; and the Judicial Committee has an important function to perform in deciding matters of constitutional law or of international law—such as the recent piracy question—referred to it. But it is hardly now a final Court of Appeal of general resort.

# Maintenance Orders in Magistrates' Court.

## The Effect of a Decree Absolute.

By J. W. KEALY.

Where a maintenance order has been obtained under the Destitute Persons Act for the maintenance of a wife, and the parties are subsequently divorced, questions arise as to whether or not the Destitute Persons Act order for maintenance continues in force, or as to whether or not it is, *ipso facto*, determined by the decree of divorce. The question has not as yet been authoritatively decided by the New Zealand Supreme Court, but there are some decisions which are more or less in point.

In *Busch v. Busch*, (1912) 32 N.Z.L.R. 49, Chapman, J., held that the obtaining of a decree for restitution did not affect the continuance of an existing maintenance order. He says at p. 51:

> "It seems to me that there are here two parallel systems, one administered in the Magistrate's jurisdiction and the other in that of the Supreme Court, and that neither overrides the other. It might prove very inconvenient if it were otherwise.
>
> "Mr. Adams argued that the decree of this Court created a status which necessarily contradicted the finding upon which the Magistrate bases his exercise of discretion. The decree certainly effects a change of status, but I do not think it has the effect suggested. The Magistrate made this order for maintenance on the ground that the appellant was not providing his wife with proper maintenance. The facts have not altered since; and the alteration of the status does not to my mind effect an alteration either of the facts or of the finding of the Magistrate. . . . I do not think that any change of status can alter this liability, unless one can be found as to which the Legislature has declared that it shall have that effect."

In 1925, in the case of *Ricketts v. Ricketts* (*unreported*), Stout, C.J., decided in a Habeas-Corpus application that there was no power to enforce an order made under the Destitute Persons Act in favour of a wife subsequently to a divorce on the ground (as stated in a newspaper report on December 14, 1925) that:

> "the maintenance order was vacated and her (the wife's) remedy would be to apply for a petition for permanent alimony."

Judging from the information available it would seem that the wife was not represented at the hearing and, it may be, that the law was not fully argued.

In *Liversey v. Liversey*, [1926] N.Z.L.R. 117, which was an application for leave to serve a respondent beyond New Zealand, Reed, J., drafted a form of notice to be served upon the respondent with the citation. Clause 4 of this notice reads as follows:

> "If the petitioner obtains a divorce it will have the effect of annulling any order at present existing for the maintenance of the respondent unless in the divorce proceedings an order for alimony or maintenance is made."

No grounds for the insertion of this statement appear in the decision, and no authorities were cited; nor does legal argument appear to have taken place as regards the form of the notice to respondent.

In the later case of *Bennett v. Bennett*, [1931] N.Z.L.R. 38, which was a similar application—*viz.*, for leave to serve outside the jurisdiction—and which was also decided by Mr. Justice Reed, the learned Judge says:

> "Since my judgment in *Liversey v. Liversey* I have reconsidered the form of notice to the respondent in cases of this class,

and have had the further advantage of discussing the matter with some of my brother Judges, with the result that I think the form appended hereto is more suitable."

In this new appended form, the old cl. 4, quoted above, is omitted. No reason for the omission is mentioned in the judgment, nor does any argument appear to have taken place.

In England, in *Bragg v. Bragg*, [1925] P. 20, it was held by Duke, P., and Horridge, J., that an English decree of divorce did not of itself have any effect upon an existing English Lower Court maintenance order, the question as to whether such order should continue in force still remaining one entirely for the discretion of the Magistrate. Sir Henry Duke, P., says at p. 23 :

"On the face of it, it seems anomalous that a woman who has obtained an order for maintenance as a wife, such maintenance to be provided by her husband, when she has put an end to the relation of husband and wife, may still say that the order for the maintenance of the wife by the husband subsists. It is not because it seems anamalous that that may not be the statutory provision, nor is it conclusive to show that it is contrary to common sense. . . . There are grounds of common sense for holding that an order which dealt with maintenance, and not, so far as that part of it goes, with any of the other obligations of married life, should continue to exist. That, however, does not conclude the matter at all. It is still necessary to see what are the limits of the justices' jurisdiction. . . . Sections 4 and 5 of the Act of 1895 described the persons who may resort to the jurisdiction and the relief they may get. The person in s. 4 is 'any married woman' under various circumstances—*that is, a woman who at the time* of her resort to the Court of summary jurisdiction is qualified by her condition. Then, s. 5 describes what kind of order may be made; and 5 (*c.*) provides 'that the husband shall pay to the applicant personally, or for her use, to any officer of the Court, and so on, such weekly sum not exceeding £2 as the Court shall, having regard to the means both of the husband and wife consider reasonable. . . .'

"Mr. Frampton says the description of the payee as a "wife" and of the payor as a "husband" operates as a limitation of the rights of the wife and of the obligation of the husband. Mr. Barnard, [for respondent] on the other hand, says: 'No. The Act is describing persons who may claim remedies, and the words are mere words of description of persons standing in a certain relationship at the time the Court of summary jurisdiction comes to deal with them.'"

Part of Horridge, J.'s, judgment reads :—

"The question in this appeal is whether or not there is any provision in the Summary Jurisdiction (Married Women) Act, 1895, which limits the operation of orders made under s. 5 to the period of the existing marriage. I can find no such words. In s. 5 (*c*), the provision that 'the husband shall pay to the applicant personally,' is merely defining the husband at the time of the application. The 'applicant; personally,' of course, is the wife, but there are no words to show that the order itself is to be limited to the period of the marriage."

The question arose in the Magistrates' Court in New Zealand in 1926 in the case of *Rivers v. Rivers*, 21 M.C.R. 33, and in that case Mr. J. W. Poynton, S.M., followed *Busch v. Busch* and *Bragg v. Bragg* and held that the Magistrates' Court order was not *ipso facto* affected by a subsequent decree of divorce.

The practice of the Auckland Magistrates' Court appears to be to regard *Rivers v. Rivers* as correctly decided, and, consequently, to treat lower Court orders as remaining in force notwithstanding any subsequent decree of divorce. This practice does not appear to have been always followed in other parts of New Zealand, however, and the writer has been informed that in at least one case (in a suburban Court) a contrary decision has been given. (In any case of course a Magistrate would probably exercise his discretion and refuse to enforce such an order in those cases where by decree of the Supreme Court the question of maintenance for the wife had been settled in the divorce proceedings.)

In view of the decision in *Bragg v. Bragg* it would appear as if a lower Court maintenance order continues in force notwithstanding a decree of divorce; but, until the matter is authoritatively decided, in view of the doubt created by the decisions in *Ricketts v. Ricketts* and *Liversey v. Liversey* the safe course, when acting for the wife, would appear to be to place the matter beyond all question by obtaining a Supreme Court order for maintenance.

Since the foregoing was written the question has been discussed in the case of *Burke v. Burke*, [1934] N.Z.L.R. 978. In the course of Mr. Justice Ostler's judgment many of the authorities are reviewed; but the matter is still left open. His Honour, at p. 981, says—

"In view of the conflict of opinion on the point, and in view of the difficulties which I have pointed out, I am not prepared to hold that this maintenance order, which was made for the benefit not only of the wife but also of her children, has been rendered void by the final decree in divorce of the parties. The point requires consideration by a higher authority; and, as I can determine the controversy between the parties without deciding the point, I prefer to leave it undecided."

The above notes deal with the ordinary case of an order under the Destitute Persons Act. Different considerations may apply in the case of an order made provisionally in England under the Maintenance Orders (Facilities for Enforcement) Act, and merely confirmed by the New Zealand Courts. The question then arises as to whether such an order is an English order governed by English law or a New Zealand order governed by New Zealand law. If the latter law applies, then the above notes will apply with equal force to such an order. If the former is the position, and English law governs the position, then the continuing validity of such a maintenance order would appear to be established, beyond question, by *Bragg v. Bragg* (*supra*).

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# Wanganui District Law Society.

## Annual Meeting.

The twenty-first annual meeting of the members of the Wanganui District Law Society was held in the Grand Jury Room, Courthouse, Wanganui, on Thursday, October 25, 1934.

The annual meeting was held in the morning to enable practitioners to take part in the annual golf match, President *v.* Vice-President, in the afternoon.

The Annual Report and Statement of Accounts were adopted.

Officers for the year were elected as follows :— President, Mr. R. A. Howie; Vice-President, Mr. F. J. Christensen (Marton); Treasurer, Mr. G. W. Currie; Council, Messrs. L. N. Ritchie (Raetihi), Barton, Brodie, Tustin, Haggitt, and Wilson; Auditor, Mr. C. H. Clinkard; Representative on New Zealand Society, Mr. R. A. Howie; Auditor, Mr. C. H. Clinkard.

Christmas Holidays were fixed as follows: Close at noon on December 22, 1934, reopen on the morning of Thursday, January 10, 1935.

At the annual dinner of the members of the Society, held in the evening, occasion was taken to make a presentation to Mr. G. W. Currie, to mark the end of twenty-one years' service to the society.

# New Zealand Law Society.

## Instruments executed out of New Zealand.

The New Zealand Law Society resolved at its last meeting to request the Government to consider an amendment to allow Land Transfer documents executed out of the Dominion to be executed before a Commissioner of the Supreme Court of New Zealand (see p. 269, *ante*). The following reply has been received from the Registrar-General of Land, and is published for general information :—

Office of Registrar-General of Land,
Wellington.
10th October, 1934.

The Secretary,
New Zealand Law Society,
Wellington.

Dear Sir,—

**Instruments Executed out of New Zealand.**

Your letter of the 5th instant referring to the above subject reached me yesterday.

Your correspondent has raised two questions, or rather two issues on the one matter—viz., the refusal of District Land Registrars to accept for registration Land Transfer documents executed in Australia

(*a*) Attested by a Commissioner of the Supreme Court of New Zealand; and

(*b*) Verified by a declaration signed before a Commissioner of the Supreme Court of New Zealand as to the execution thereof.

Section 168, Land Transfer Act, 1915, provides—

"Every instrument executed for the purpose of creating, transferring, or charging any estate or interest under this Act shall be signed by the registered proprietor and attested by at least one witness."

It further provides that if the instrument is executed in New Zealand such witness shall add to his signature his place of abode and calling, office, and description.

It further provides that an instrument so executed shall, when registered, have the force and effect of a deed executed by the parties signing the same.

Section 169 provides that an instrument so executed shall be deemed to be duly attested.

It further provides that the execution of such an instrument may be proved by statutory declaration if the parties executing the same are resident within New Zealand.

Section 176 provides that an instrument duly executed out of New Zealand shall be excepted for registration—

"If it has been executed in part of the British Dominion (except New Zealand) if such execution is verified in accordance with the Statutory Declarations Act 1835; or

If executed in a foreign country the instrument has been executed before a British Minister or Consul exercising his functions in that country, and the instrument is sealed with his Seal of office (if any); or

If a declaration of attesting witness made before any such Minister or Consul verifying the execution is endorsed or annexed to the instrument."

Section 15, Statutory Declarations Act, 1835 (Imperial), provides that a witness within His Majesty's Dominions may verify or prove any matter in a suit pending by a solemn declaration in writing made before a Justice of the Peace, Notary Public, or other officer authorised by law to administer an oath, and certified and transmitted under the signature and seal of any such Justice, Notary, or officer.

Section 16 of the same Act provides that a deed or instrument in writing may be verified in the same manner.

Section 4 of the Acts Interpretation Act, 1924, defines "statutory declaration" if made—

(*a*) In the United Kingdom or British Possession other than New Zealand as a "declaration made before a Justice of the Peace, Notary Public, or other person having authority therein to take or receive a declaration under any law for the time being in force."

(*b*) In a foreign country means "a like declaration made before a British Consul, a Vice-Consul, or before any person having authority to take or receive such a declaration under any Act of the Imperial Parliament or the General Assembly for the time being in force authorising the taking or receiving thereof."

The same section defines "oath" and "affidavit" as including an affirmation and statutory declaration.

Section 47 of the Judicature Act, 1908, provides for the appointment by any Judge of the Supreme Court of persons to act as Commissioners of the Court in any country or place beyond the jurisdiction of the Court for the purpose of administering and taking any oath, affidavit, or affirmation, etc.

Section 48 of the same Act provides that any oath so taken shall be as effective in New Zealand as if it had been taken in New Zealand before a proper authority.

The essential for a Land Transfer instrument is that it shall be signed by the registered proprietor and attested by at least one witness. It is further required that if such instrument is executed in New Zealand the witness must add his occupation and address (s. 168).

Each District Land Registrar has a discretion to call for proof by statutory declaration as to the execution of such an instrument (s. 169).

In order to facilitate registration, and so as not to cause annoyance, the District Land Registrars throughout New Zealand accept certain classes of witnesses without calling for proof of execution by statutory declaration.

A Justice of the Peace, Solicitor, Magistrate, or an officer of the Supreme Court is included amongst such accepted witnesses.

It has not been the custom in the past to accept instruments executed in Australia which have been attested by a Commissioner, and I have personally refused to accept them; but on more mature consideration I am of the opinion that the practice is not correct, and that as a Commissioner of the Supreme Court is an officer of the Court such instruments are in order and should be accepted for registration when witnessed by a Commissioner of the Supreme Court.

It is, of course, to be remembered that a Commissioner, when attesting an instrument, must add his occupation (Commissioner of the Supreme Court of New Zealand will suffice) and address.

Although the Statutory Declarations Act provides for a declaration to be certified under the seal of the Justice of the Peace, etc., the omission of such a seal, if the officer taking the declaration has no seal, should not be a reason for a District Land Registrar to refuse to accept the document.

I am of opinion that a document verified by a declaration made by a witness before a Commissioner of the Supreme Court of New Zealand, if otherwise in order, may be accepted for registration, and that there is no necessity for any amendment of the law.

I am forwarding a copy of this memorandum to each of the District Land Registrars so that the practice in each District shall be uniform in the future.

J. J. L. Burke,
Registrar-General of Land.

## Admission of Barristers and Solicitors: Reciprocity with Queensland.

By Queensland Order in Council, October 11, (*Queensland Gazette*: Oct. 13, 1934), the Rules of Court relating to the admission of barristers were amended to provide that a person admitted as a barrister in New Zealand who has practised as such for five years and has resided in Queensland for at least five months at the time of his application for admission, is entitled to admission as a Queensland barrister on proof that barristers and solicitors of the Supreme Court of Queensland are admitted to practice in New Zealand upon similar conditions. The admission fee in such a case is thirty guineas.

Accordingly, a New Zealand Order in Council was made on November 13, setting out similar conditions for the admission as barristers and solicitors respectively of barristers and solicitors of the Supreme Court of Queensland (1934 *New Zealand Gazette*, Nov. 15, p. 3568).

## Meetings of Standing Committee.

A meeting of the Standing Committee of the Council of the New Zealand Law Society was held on Friday, October 26, 1934, at 2.15 p.m., in the Supreme Court Buildings, Wellington.

Present: The President, Mr. C. H. Treadwell in the Chair; Mr. P. Levi, Treasurer; and Messrs. A. M. Cousins, P. B. Cooke, E. F. Hadfield, G. G. G. Watson, and S. A. Wiren. Apologies for absence were received from Messrs. H. F. O'Leary and C. A. L. Treadwell.

**Abolition of "Actio Personalis" rule: Powers of Courts to Award Interest on Debts and Damages.**—Pursuant to the Council's resolution of September 28, the Committee considered the Bill which had recently been before the English Parliament, and which it was proposed to introduce in similar form into the New Zealand legislature.

The President briefly outlined the position in regard to the proposed Bill, and informed the meeting that there was no information available concerning the progress of the Bill in England, where he understood it had not yet become law. The opinion was expressed that before the Committee could adequately consider the provisions of the Bill, it should be given the opportunity of viewing the English Act when finally passed.

It was resolved to write to the Solicitor-General and obtain further information concerning the measure, the Bill to be considered again when this is available.

**Noxious Weeds Amendment Bill.**—The Nelson District Law Society brought to the notice of the Society the provisions of the above Bill which proposed to include a mortgagee in the definition of "Occupier" and so make him liable to clear noxious weeds.

The Society was asked to object to the Bill on the grounds that it is inequitable to impose a new and onerous condition in the contract between mortgagor and mortgagee, and that such interference would be a further discouragement to the investment of money on farm properties.

The Committee considered the effect of the proposed legislation, and resolved that the President and Mr. G. G. G. Watson should take such action to oppose the measure as they think fit.

Note.—Messrs. Treadwell and Watson have since forwarded the following report:—

> A deputation consisting of the President (Mr. C. H. Treadwell) and Mr. G. G. G. Watson waited on the Pastoral and Agricultural Committee at the Parliamentary Buildings at 11 a.m. on Wednesday, October 31, 1934, and placed before the Committee the views of the Society on the Noxious Weeds Amendment Bill, under which it was proposed to extend the definition of the term "occupier" to include mortgagees, who would thus become liable to clear noxious weeds.
>
> The deputation pointed out the serious effect such legislation would have on mortgagees, one of the undesirable features being the tendency for investors to refrain from lending money on properties subject to the provisions of the Act.
>
> As a result of the representations of the deputation, and the similar representations of other bodies, the Bill was amended so as to delete that part of the proposed legislation to which the Society objected.

**Stamp Duty on Transfers of Mortgages: Ad Valorem Duty on Transfers to Mortgagee of Mortgaged Property.**—The Committee considered the representations of the Wellington District Law Society that these duties should be abolished. Mr. Watson explained that the payment of duties on transfers of mortgages, in view of the fact that stamp duty on mortgages had for some time been abolished, appeared to be an unnecessary payment, which often involved the mortgagor in considerable expenditure in refinancing transactions.

Where a mortgagee takes a transfer from his mortgagor in satisfaction of the mortgage, it was felt that the payment of ad valorem duty in these circumstances created a hardship on the mortgagee, who in a great many cases was already a heavy loser.

It was resolved that the President and Mr. G. G. G. Watson should interview the Minister of Finance with a view to steps being taken to abolish the duties referred to.

A further meeting of the Standing Committee of the Council of the New Zealand Law Society was held in the Supreme Court Buildings, Wellington, on Wednesday, November 21, 1934, at 11.30 a.m.

Present: The President, Mr. C. H. Treadwell in the Chair; the Treasurer, Mr. P. Levi; and Messrs. P. B. Cooke, S. A. Wiren, A. M. Cousins, H. F. O'Leary, G. G. G. Watson, E. F. Hadfield, and P. Levi. Apologies for absence were received from Mr. C. A. L. Treadwell and Mr. R. H. Webb.

**Abolition of Actio Personalis Rule.—Power of Courts to Award Interest on Debts and Damages.**—The attention of the members of the Committee had, since the previous meeting, been directed to the Law Reform (Miscellaneous Provisions) Act, 1934, by which the Bill recently forwarded by the Solicitor-General had been passed into law in England. Their attention had also been called to a critical article on this Act in 178 *Law Times Journal*, 182.

After some discussion, the following motion was unanimously carried:

> "That this Society approves of the introduction of legislation on the lines of the English Act, but desires to draw the attention of the Solicitor-General to the critical article on that Act in the *Law Times* of September 22, 1934, and in particular to the desirableness of introducing a limitation of time in connection with the bringing of actions by representatives of deceased persons."

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"**Any person.**"—In days of old, that is to say, three or four years ago, I mentioned that s. 21 of the New South Wales Matrimonial Causes Act which provides that "any person" may show cause to the Court against the application to make absolute a decree *nisi* had been held to include the mother of the respondent, a decision which indeed may add a new terror to mothers-in-law and especially in divorce law—but in *Munro v. Munro, cor.* Boyce, J., the point was taken that the Crown Solicitor was not within these words of description. The contention was that as the Act specially provided that the Crown Solicitor could intervene where there was reason to assume that the decree *nisi* had been obtained by collusion, his only right of intervention was on that ground; and that he had not the wider right given to mothers-in-law and others of intervening for the purpose of showing a miscarriage of justice upon other grounds. In this case the ground of intervention was that the petition not having been opposed at the hearing false evidence of the respondent's habits regarding alcoholic refreshment and the proper discharge of "the trivial round the daily task" of housekeeping had been given and accepted as the basis of the decree *nisi*. His Honour ruled that the interests of the public generally were involved in divorce proceedings and that as the Crown Solicitor represented the public his intervention should be allowed.—W.B.

# New Zealand Conveyancing.

By S. I. GOODALL, LL.M.

## Memorandum of Transfer and Grant of Right to Lay and Maintain Water-pipes and take Water from an Artesian Bore and Storage Tank on the Land of the Grantor (appurtenant to the Land of the Grantee).

*Under the Land Transfer Act, 1915.*

MEMORANDUM OF TRANSFER AND GRANT OF WATER RIGHTS.

WHEREAS A.B. of etc. (hereinafter called "the Transferor") is registered as proprietor of an estate in fee-simple subject however to such encumbrances liens and interests as are notified by memorandum underwritten or endorsed hereon in ALL THAT piece of land situated etc. containing etc. being etc. (hereinafter called "the servient tenement").

AND WHEREAS C.D. of etc. (hereinafter called "the Transferee") is registered as proprietor of an estate in fee-simple subject similarly as aforesaid in ALL THAT piece of land situate etc. containing etc. being etc. (hereinafter called "the dominant tenement").

AND WHEREAS the Transferor has for the consideration hereinafter appearing agreed to grant to the Transferee as and in the nature of an easement appurtenant to the dominant tenement the right to take water from the artesian bore and the storage tank connected therewith upon the servient tenement and for that purpose to lay and maintain a line of water-pipes from the said artesian bore and storage tank across the servient tenement to the boundary between the servient tenement and the dominant tenement.

NOW THEREFORE in pursuance of the said recited agreement and in consideration of the royalty hereinafter covenanted to be paid the Transferor DOTH HEREBY TRANSFER AND GRANT unto the Transferee full free and uninterrupted right liberty and privilege following TO THE INTENT that the same shall be an easement subject as hereinafter appears forever appurtenant to the dominant tenement that is to say:

1. To take and convey water in free and unimpeded flow (except during any periods of necessary cleaning and repairing) from the artesian bore and the storage tank connected therewith on the servient tenement at the point of intake shown on the plan annexed hereto the said storage tank being thereon in outline coloured green and the said point of intake being thereon marked "Intake" AND to convey such water therefrom to the dominant tenement by the pipe line hereinafter referred to.

2. To lay place and maintain at a uniform depth of inches or thereabouts from the surface in and under the soil of the servient tenement a line of water-pipes of an internal diameter of not more than inches from the said point of intake in a right line on the bearing of degrees minutes delineated in red on the said plan annexed and marked "Pipe line" to the point in the boundary line between the servient tenement and the dominant tenement thereon marked "Outlet."

3. To enter upon the servient tenement with or without engineers and workmen and with or without any necessary vehicles implements tools pipes and materials of any kind for the purposes of laying maintaining repairing and from time to time renewing the said pipe line and opening up the soil of the servient tenement as shall be necessary thereto.

AND the Transferee DOTH HEREBY COVENANT with the Transferor as follows that is to say:—

1. THE Transferee shall and will pay to the Transferor a royalty of £ by the year for and in respect of the rights hereby granted such royalty to be paid yearly in advance in one sum on the day of in each year during the currency of this grant.

2. THE Transferee and his engineers and workmen in the exercise of all or any of the rights hereby granted will cause as little damage as possible to be done to the surface and freehold of the servient tenement and will at the cost of the Transferee effect all work with reasonable despatch and restore the said surface as nearly as possible to its then former condition or state and as may be necessary will replace the soil thereof with the surface and turf thereof consolidated to its proper level and if necessary will re-sow the same in English grasses with proper quantities of seed and manure for the full width and extent to which the same shall have been disturbed or interfered with and further the Transferee will compensate the Transferor for all damage caused by any such work to any cultivation crop of any kind for the time being sown or growing or in the course of harvesting upon the said land.

3. THE Transferee will at his own cost forthwith instal a valve at the said point of intake connecting the said pipe line to the said storage tank and will keep and maintain the said valve and pipe line in good and serviceable repair and shall not nor will permit the same to fall into disrepair nor do damage of any kind nor become a nuisance by bursting leakage or any cause whatsoever.

PROVIDED always and it is hereby agreed and declared by and between the parties hereto as follows:—

1. THE Transferee may at any time on giving three calendar months' notice in writing in that behalf to the Transferor and on paying to the Transferor all royalty damages costs and other moneys if any payable by the Transferee hereunder execute stamp and register a surrender and extinguishment of this grant.

2. IF the Transferee shall make default in payment of the said royalty at the times and in the manner aforesaid and such default shall continue for the space of days or if the Transferee shall make default in performance or observance of any of the other covenants conditions or provisoes herein expressed or implied and on the part of the Transferee to be performed or observed the Transferor shall be at liberty thereupon or at any time thereafter to cease to supply the Transferee with water as aforesaid and to disconnect or cut off the said pipe line from the said artesian bore and storage tank and thereupon this grant and all rights whatsoever of the Transferee hereunder shall forthwith cease and determine but without releasing the Transferee from liability for payment of any royalty theretofore accrued due or damages for any antecedent breach or default hereof or hereunder.

3. IF and when this grant shall be determined from any cause whatsoever whether on the part of the Transferor or the Transferee the necessary surrender shall be prepared stamped and registered at the sole cost of the Transferee and the said pipe line and valve shall be left in good and substantial repair order and condition and shall be and remain the sole and exclusive property of the Transferor.

IN WITNESS etc.

MEMORANDA OF ENCUMBRANCE.

1. As to the servient tenement:
2. As to the dominant tenement:

SIGNED etc.

SIGNED etc.

(Consents of encumbrancers, if any.)

# Sales of Goods.

### By Professional Men.

The fact that the law is no respecter of persons is exemplified by its treatment of professors of the fine arts. In *Robinson v. Graves*, recently heard in the King's Bench Division, the plaintiff claimed £262 10s. for the painting of a portrait of the defendant's wife. The plaintiff's evidence was that the defendant, having been introduced as Prince Dmitrovitch Ivanoff, had commissioned him to paint a portrait of Miss Patricia Finnigan, who subsequently married the defendant. The terms were: half the agreed price of 250 guineas to be paid the next day (the parties having met at a cocktail party in July, 1932) and the balance on completion of the portrait. The defendant denied the giving of the order, and also that he was introduced under the above title—his real name being Frederick Beresford Graves, professionally known as Rex Graves, film producer. The defence in law was that, as the amount involved exceeded £10, the alleged contract was within the Sale of Goods Act, 1893, sec. 4 (1) (Sale of Goods Act, 1908, s. 6), which had not been complied with. The plaintiff's contention was that the giving of sittings was a recognition of a pre-existing contract, and there had also been an acceptance of the portrait. Mr. Justice Acton accepted the plaintiff's evidence, but this did not conclude the matter. In the absence of a written note or memorandum, and there being no evidence of acceptance of the goods, the contract was not enforceable by action, by reason of the above sub-section. Judgment was therefore given for the defendant, with costs.

The law reports reveal that it was an artist (and not a lawyer) who was originally responsible for classifying a painting as "goods." In *Isaacs v. Hardy*, (1884) Cab. and El. 287, a picture dealer claimed damages for breach of a contract to paint and deliver a picture of a given subject at an agreed price. The defendant duly painted the picture, the progress of which was approved by the plaintiff, who supplied the frame. For some reason not disclosed, the defendant (after putting the picture in the frame) refused to part with it, and pleaded that the contract was not in writing, as required by 29 Car. 2, c. 3—*i.e.*, the Statute of Frauds—s. 17, which then governed contracts for the sale of "goods, wares, and merchandise." The words of Mr. Justice Mathew are worth quoting, viz.:

> "Such a defence never appears to have been raised by an artist before, but I am of opinion that the non-compliance with the Statute of Frauds is an answer to the action."

Judgment was therefore given for the defendant (the artist), who kept his picture—at the cost of placing his profession for the first time in a category in which it has now remained for fifty years.

This result was partly achieved by citing *Lee v. Griffin*, (1861) 1 B. & S. 272, 121 E.R. 716, in which a surgeon-dentist claimed £21 for two sets of artificial teeth ordered by a lady, who died before trying the teeth. Her executor (the defendant) disputed liability, and relied upon the absence of any acceptance or written memorandum. The plaintiff contended, however, that he was entitled to be paid for his work and labour done, and materials provided, and Mr. Justice Crompton gave judgment in his favour. This was reversed by the Court of Queen's Bench, including the same Judge, who (on second thoughts) observed that the case bore a strong resemblance to that of a tailor supplying a coat, the measurements of the mouth and the fitting of the teeth being analogous to the measurement and fitting of the garment. Mr. Justice Hill and Mr. Justice Blackburn concurred, the latter Judge remarking that:

> "If the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and labour; but, if the result of the contract is that the party has done work and labour which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered. The case of an attorney employed to prepare a deed is an illustration of this latter proposition. It cannot be said that the paper and ink he uses in the preparation of the deed are goods sold and delivered."

The same case established the principle that, in order to decide whether a contract be for work and labour, or for the sale of a chattel, the value of the skill and labour, as compared with that of the material supplied, is not a criterion. The Court declined to follow some *obiter dicta* in *Clay v. Yates*, (1856) 1 H. & N. 73, 156 E.R. 1123, in which Baron Martin had remarked that, if an artist painted a portrait for 300 guineas, and supplied the canvas (worth 10s.), he might surely recover for work and labour. Chief Baron Pollock had also stated his impression that, in the case of a work of art, whether in gold, silver, marble, or plaster, where the application of skill or labour is of the highest description and the material is of no importance as compared with the labour, the price might be recovered as work, labour, and materials—even if a chattel was bargained for. Reasonable as these views may appear, they were subsequently held unsound in law, and there is now no possibility of their receiving judicial sanction.

The profession of accountancy is in the same position as the law, and balance-sheets and profit-and-loss accounts (like the attorney's deed referred to in the above-quoted extract from the judgment of Mr. Justice Blackburn) are not "goods."

The position of architects is anomalous, as their work is severable into parts—*e.g.*, the preparation of plans and the superintendence of the building. A claim for the cost of preparation of plans alone, however, is usually subject to the conditions governing the sale of goods, and the same applies to an action in *detinue* for the return of plans.

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**The Fish Pond.**—Emily Brandt and Elsie Smith equally aged twenty-one have recently attained unusual prominence as members of Sydney's Younger Set by their exploits in housebreaking. Their "lurk" was to ascertain whether the occupier of a house was at home and then break in. Miss Smith who was awarded twelve months' imprisonment at Quarter Sessions was flatteringly described by the police "as a first-class housebreaker and very cunning." The arresting constable said that "she did not smoke or drink or swear," and so it may be that I am in error in saying that she was a member of Sydney's Younger Set.

A nice point of etiquette was determined by the Justices sitting in the Police Court at Prahran, Victoria. A defendant who was without a coat was brought in by the police for trial. Mr. Brown, P.M., said he had no right to appear in that way; but the police said the gaol authorities had no coat that they could give him. Mr. Brown said he did not feel disposed to hear the case. The dreadful suspense that followed this announcement was fortunately fated to lead to a happy solution of the matter, for one of the Justices then sitting, a Mr. Wiseman, whose name should go down to history, bracketted in a dead heat with that of Sir Walter Raleigh, took off his overcoat; a constable helped the defendant to put it on, and the course of justice resumed its dignified progress in the Courts of Prahran, Victoria.—W.B.

# Practice Precedents.

## Charging Orders.

(*Continued from p.* 299.)

### Application to make Charging Order Nisi Absolute.

Rule 326 of the Code of Civil Procedure (*Stout and Sim's Supreme Court Practice*, 7th Ed., p. 241,) states :—

> Any party having obtained an order *nisi* may at any time after he has obtained judgment move to have such order made absolute. Such order may be in the form No. 27 in the first schedule to the Code.

An affidavit of service of the charging order *nisi* must be filed to meet cases of non-appearance on the motion for order to make the order *nisi* absolute. The notice of motion must be served on all persons affected thereby : see note to R. 326, *loc. cit.*

When made absolute, the order absolute takes effect from the date of the order *nisi*.

The order *nisi* creates no charge until it is served on the garnishee : see also R. 317 ; and *In re Stanhope Silkstone Collieries Co.*, (1879) 11 Ch. D. 160, 48 L.J. Ch. 409.

As to the liability of persons acting in contravention of the order, see R. 323 of the Code of Civil Procedure : Under R. 332 the Court may refuse to interfere when from the smallness of the amount involved the remedy would be vexatious or worthless.

The application is to the Court and should be made by way of notice of motion supported by affidavit.

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IN THE SUPREME COURT OF NEW ZEALAND.
.....District.
.....Registry.

Between A.B. etc. Plaintiff and
C.D. etc. Defendant.

AFFIDAVIT OF SERVICE OF CHARGING ORDER NISI.

I of Solicitor make oath and say as follows :—

1. That I am a solicitor employed by Messrs. solicitors for the plaintiff herein.

2. That I did on the day of 19 serve on E.F. of the City of accountant a sealed copy of a charging order *nisi* dated the day of 19 a copy of which is hereunto annexed and marked "A" by delivering the same to him personally at .

Sworn etc.

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NOTICE OF MOTION TO MAKE CHARGING ORDER NISI ABSOLUTE.

(*Same heading.*)

TAKE NOTICE that this Honourable Court will be moved by Mr. of counsel for the above-named plaintiff on day the day of 19 at 10.30 o'clock in the forenoon or so soon thereafter as counsel can be heard FOR AN ORDER that the charging order *nisi* herein made on the day of 19 be made absolute. AND for a further order that the costs of and incidental to this order be paid to the plaintiff UPON THE GROUNDS that the plaintiff has entered judgment against the said defendant for the sum of £ which judgment is unsatisfied and that the plaintiff is entitled to such order AND UPON THE FURTHER GROUNDS set out in the affidavit of filed herein.

Dated at this day of 19 .

Counsel moving.

To E.F. and to the defendant's solicitors.

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AFFIDAVIT OF SERVICE OF NOTICE OF MOTION.

(*Same heading.*)

I of solicitor make oath and say as follows :—

1. That I am a solicitor employed by Messrs. solicitors for the above-named plaintiff.

2. That I did on the day of 19 serve on E.F. and Messrs. solicitors for the above-named defendant copies of the notice of motion for charging order absolute herein a true copy of which is hereunto annexed and marked "B" at by delivering a copy personally to the said E.F. and the said Messrs. .

Sworn etc.

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AFFIDAVIT IN SUPPORT OF MOTION.

(*Same heading.*)

I of solicitor make oath and say as follows :—

1. That I am a solicitor in the employ of Messrs. of solicitors for the above-named plaintiff.

2. That judgment was entered by the above-named plaintiff against the above-named defendant on the day of for the sum of £ .

3. That the said judgment is wholly unsatisfied.

4. That on the day of 19 a charging order *nisi* was issued by this Honourable Court at charging the interest of the defendant under memorandum of mortgage No. to secure the payment of the principal sum of £ together with interest as therein provided.

5. That the said E.F. was on the day of 19 served with a copy of the said charging order *nisi* by as appears from the affidavit of service filed herein.

6. That the said defendant is mortgagee under the said memorandum of mortgage No. from G.H. of : .

7. That the moneys secured by the said memorandum of mortgage are now due and owing but have not been repaid.

Sworn etc.

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ORDER FOR CHARGING ORDER ABSOLUTE.

(*Same heading.*)

day the day of 19 .

Before the Honourable Mr. Justice .

UPON READING the charging order *nisi* herein the notice of motion to make the said charging order *nisi* absolute filed herein and the affidavits filed in support thereof and UPON HEARING Mr. of counsel for the above-named plaintiff IT IS ORDERED that the said charging order *nisi* be and the same is hereby made absolute AND IT IS FURTHER ORDERED that the defendant do pay to the plaintiff the sum of £ for costs of and incidental to this order.

By the Court.

Registrar.

(*To be concluded.*)

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# Rules and Regulations.

**Post and Telegraph Act, 1918.** Amendments to Regulations under the Act.—*Gazette* No. 83, November 15, 1934.

**Law Practitioners Act, 1931.** Reciprocal Admission in New Zealand of Barristers and Solicitors of Queensland.—*Gazette* No. 83, November 15, 1934.

**Companies Act, 1933.** Companies (Winding-up) Rules and Supreme Court (Companies) Rules.—*Gazette* No. 84, November 20, 1934.

**Transport Licensing Act, 1931.** Amendment No. 2.—*Gazette* No. 85, November 22, 1934.

**Native Purposes Act, 1931.** Taranaki Maori Trust Board Regulations amended.—*Gazette* No. 85, November 22, 1934.

**Cook Islands Act, 1915.** Constitution of Island Council of Niue, Cook Islands, altered.—*Gazette* No. 85, November 22, 1934.

**Finance Act (No. 2), 1934, Part I.** Application to Cook Islands Public Service.—*Gazette* No. 85, November 22, 1934.

**Sales Tax Act, 1932-33.** Exempting certain Goods from Sales Tax.—*Gazette* No. 85, November 22, 1934.

**Census and Statistics Act, 1926.** Regulations under the Act.—*Gazette* No. 85, November 22, 1934.

**Government Railways Act, 1926.** Alterations to the Scales of Charges upon the New Zealand Government Railways.—*Gazette* No. 85, November 22, 1934.