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"Lawyers are no luxury; only a barrister can appreciate the monstrous absurdity of the proposition that every man is presumed to know the law. The man in the street needs advice as to his ordinary rights, now more than ever before."

—HON. F. P. HOWARD at the annual dinner of the Hardwicke Society.

Vol. XI. Tuesday, October 22, 1935. No. 19

Dramatic Societies and Copyright.

AT the present time when there is much activity throughout the Dominion among dramatic societies the question occasionally arises as to the occasions whereon royalties are payable to the authors of copyright dramatic works produced by such societies. No general rule can be given for determination of the question, in view of the provisions of the Copyright Act, 1913, and of the need to consider the circumstances in which any particular performance is given.

By s. 3 (1) of the Copyright Act, 1913, it is enacted that, subject to the provisions of the Act, copyright shall subsist for the term provided in the statute in every literary, dramatic, musical, and artistic work; and, by subs. (2), for the purposes of the Act, "copyright" is defined to mean the sole right to produce or reproduce the work or a substantial part thereof, or to perform the work or any substantial part thereof in public. By s. 5 (1),

> "Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright."

The definition of "performance" in s. 2 of the Act, includes

> "An acoustic representation of a work and any visual representation of any dramatic action in a work."

This is wide enough to include the reading of a play without action, scene, or costume. By s. 5 (1) (*f*) "the reading or recitation in public by one person of any reasonable extract from any published work," shall not constitute an infringement of copyright; so it is clear that the reading of a whole play by a number of persons, without the consent of the owner of the copyright, would be an infringement.

The considerations to which we now propose to address ourselves in order to ascertain what constitutes an infringement of copyright in a dramatic work must be read as applying equally to the reading of a play as well as to its performance in dramatic form.

In order to ascertain whether there has in fact been an infringement of an author's sole right to produce or reproduce his work, consideration must first be given to the question whether there has been a representation of the work *in public*. This is largely, if not wholly, a question of fact to be determined by the facts of each case: *Planche v. Braham*, (1837) 4 Bing. N.C. 17, 19, 132 E.R. 695; *Wall v. Taylor*, (1883) 11 Q.B.D. 102, 107; and *Harms (Incorporated), Ltd., and Chappell and Co., Ltd. v. Martan's Club, Ltd.*, [1927] 1 Ch. 526, 532, where the tests formerly applied under the old copyright law were held to be applicable under the Copyright Act, 1911 (United Kingdom), of which our Act is an adaptation giving substantially the same rights.

Under the old copyright law, before a claim for infringement would lie, a performance had to be represented at a place of dramatic entertainment; but it was held that this condition was satisfied if the performance were given at any place in public, though the room were ordinarily used for different purposes: *Russell v. Smith*, (1848) 12 Q.B. 217, 116 E.R. 849. The present Copyright Act makes no mention of the place of performance, but, as has already been stated, gives to the author of a dramatic work the sole right of performance "in public." With this modification, the decisions under the old copyright law are applicable.

The amateur dramatic club came before the Courts in 1883, under the old law, when three representations of a play, *Our Boys*, were given at Guy's Hospital, for the entertainment of nurses, attendants, and others connected with the hospital, admission being free. A general invitation was given to persons connected with the hospital, and for the last performance tickets were given to members of the amateur club to distribute among their friends. On each occasion there were about one hundred and seventy persons present. In the Divisional Court, *Duck v. Bates*, (1883) 12 Q. B.D. 79, Lord Coleridge, C.J., said:

> "The case is important from the fact that at the present day a large number of theatrical performances are given by amateurs, not for gain for themselves but in aid of some charitable or public object in which they are interested. It might no doubt be a serious injury to the owner of the copyright in a dramatic piece if it were frequently represented in London and the provinces by amateurs who receive money for their performances, though not for their own benefit, and so far attract the public to prevent them from visiting the regular and recognized places of public entertainment."

Judgment went for the defendant, and was affirmed on appeal by Brett, M.R., as he then was, and Bowen, L.J., Fry, L.J., dissenting: (1884) 13 Q.B.D. 843. The Master of the Rolls early in his judgment said that the statute was intended to give an author the right to what he had written:

> "What was intended to be protected was the value of the author's invention, that is the key to the construction of the Act: he does not want sentimental protection: he has power himself to represent his drama, and to confer upon others the right to represent it. That power gives value to his production."

His Lordship went on to show that to constitute a breach of the statute it is not necessary that there should be profit, as even if a company of players were to act a play, although they derived no profit, the author would be injured. His Lordship then said that, to support an action for infringement, the performance must be other than domestic or private, as he considered, on the facts, the Guy's Hospital performance of *Our Boys* to have been.

In stating the principles upon which a performance could be held to be an infringement of copyright, at p. 847, he said:

> "Did the Legislature intend to prohibit a representation without the author's consent by children in a nursery before their parents or by grown-up persons in a drawing-room? It is clear that something more than that must have been intended; and why should not a representation of that kind

be called a dramatic entertainment? Because it is obviously domestic and private. Suppose that the servants of the household are invited to witness the performance; nevertheless it is a domestic entertainment. As I have already intimated the author wants protection for the pecuniary value of his drama; and a representation in a private room is of no pecuniary value. In order to entitle the author to penalties there must be a representation which will injure the author's right to money; such, for instance, as a representation which, although it is not for profit, would attract persons who are willing to pay money, and would induce them not to go to see a performance licensed by the author."

His Lordship proceeded:

"The representation must be other than domestic or private . . . Suppose that a drama is represented in a country town, and that all persons of a certain class throughout the county are free to come: Suppose that a member for a parliamentary borough (I do not mean shortly before or during an election) organises dramatic entertainments, to which the inhabitants are admitted without payment: suppose that an amateur company chose to act some drama for a charitable object with admission upon payment of money or by tickets issued generally: in each of these instances an infringement of the statute has been committed. . . . As to the principle upon which damages are to be assessed, the proper ground at first sight seems to be the amount of profit made by the representation; but upon this principle the damages would be limited to the amount which those infringing the author's right may earn: they may act for nothing, and therefore the protection to the author would be insufficient: therefore the Legislature has included within the provisions of the Act a company which is not acting for profit. A private representation will not injure an author; but a public representation—that is, a representation to which any portion of the public are freely admitted, either with or without payment—is prohibited by the statute, unless the proprietor of the copyright consents thereto."

Bowen, L.J., at p. 850, said that, in order to incur the penalties of the statute, the true view is that

"the place of dramatic entertainment must be some spot for the occasion appropriated to the dramatic entertainment of the public; and then the question of fact will arise, whether the place has not been so appropriated on any particular occasion: profit is a very important element: the question of numbers also is very important: these are matters to be taken into consideration."

The Master of the Rolls and Bowen, L.J., concluded their judgments by issuing a warning that those who might go beyond the facts of the case under consideration might incur the penalties of the statute.

In a more recent case, about to be considered, Sargant, L.J., said that *Duck v. Bates* was very much upon the borderline, the defendant just managed to escape, and a very little might have turned the scale.

In a case under the present Copyright Act, *Harms (Incorporated), Ltd., and Chappell and Co., Ltd. v. Martan's Club, Ltd.*, [1916] 1 Ch. 870, the plaintiffs were the owners of the copyright in a musical play. The defendants were the proprietors of a social and dancing club which had a membership of eighteen hundred ladies and gentlemen of high social standing. A musical number forming part of the play was performed by the club's orchestra, without the plaintiffs' consent, on a certain evening before an audience of one hundred and thirty members and fifty guests. Under the club's rules, no limit was fixed as to the number of guests that might be introduced by members. The defendants admitted the performance, but denied it was given "in public." Mr. Justice Eve, after considering other facts, in relation to whether the performance was public or private, including that the club members were people who would have been willing to pay money to hear it at a performance licensed by the copyright owners as a commercial transaction, said:

"But, beyond all this, I think that the fact that, subject to the necessary limitations of space, this performance could have been attended by eighteen hundred members of the club, each bringing one or more guests, members of the general public, introduces an element so alien to any idea of privacy or domesticity as to stamp the performance with a publicity sufficient to make it an infringement of the plaintiff's copyright."

On appeal, on the ground that Eve, J., had incorrectly interpreted the words "in public," his judgment was affirmed: [1927] 1 Ch. 526. The Master of the Rolls, after quoting the words of Brett, M.R., in *Duck v. Bates* (*supra*) relating to the key to the construction of the old Act, said that the present Act secures like protection to the author, and gives him what is a valuable right:

"To ascertain whether or not there has been an infringement of that right, it must be ascertained whether, upon the facts as a whole, there has been a performance in public, to see whether there has been any injury to the author.

"Did what took place interfere with his proprietary rights? As to that, profit is a very important element. Next, you must consider whether there has been admission of the public, with or without payment, and when you are considering what you mean by any portion of the public you will find in *Duck v. Bates* (13 Q.B.D. 843, 847) that according to Brett, M.R., it means the public who would go either with or without payment—the class of persons who would be likely to go to a performance if there was a performance at a public theatre for profit. Then one also has to consider whether or not the performance is a domestic one to exclude the notion of 'public'—domestic in the sense of private and domestic, a matter of family and household concern only. Then again you must consider where the performance took place, bearing in mind that the place need not be one which is kept habitually for the exhibition of dramatic entertainments."

Sargant, L.J., with whom Lawrence, L.J., agreed, said in the course of his judgment in associating himself with the views expressed by the Master of the Rolls:

"I wish in addition to lay very great stress upon this clear feature of the present case, as it appears to me—namely that there has been an invitation to the members of the public capable of becoming members of the club upon the terms of getting in return for their subscription the performance of music, so that you do really get an invitation to the public, and an invitation to the public to listen at a price or at a payment, though the payment is an annual one. Beyond that, there is of course this, that the members of the public who have become members of the club by passing through the not very severe test imposed, have also the privilege of bringing in other members of the public upon whom no test is imposed, who happen to be their friends and are invited on any particular evening."

In the most recent case of the kind, *Jennings v. Stephens*, (1935) 51 T.L.R. 553, the members of the Overstone and Sywell Dramatic Society seem to have been particularly well advised. When they agreed to give a performance of *The Rest Cure* to the Duston Women's Institute, they stipulated in advance as a condition of their performance that no one other than members of the institute and the performers should be present, as ordinarily members were allowed to bring guests to the monthly meetings. The Institute at Duston had 109 members out of a total female population of 1,084. It was affiliated to the National Federation of Women's Institutes, under the rules of which it was formed. The handbook of the Federation said that a Women's Institute was a voluntary association of country women, formed to improve conditions of rural life and provide opportunities for mutual help and intercourse. It was the general rule to sanction the formation of institutes in rural communities of not more than four thousand inhabitants. The Women's Institute Constitution and Rules provided for monthly meetings of a social and educational nature. In this action against the dramatic society the author sought a declaration that the performance before sixty-eight

members of the Institute infringed her copyright, contending that the Duston Women's Institute was not a private club, but a branch of a public institution; and that, as such, it could not give a dramatic performance which not was a performance in public.

Mr. Justice Crossman, in his judgment, said that in considering,—as it had been contended for the plaintiff, the author of, and owner of the copyright in, the play—whether the performance was "in public," he had to bear in mind the cases of *Duck v. Bates* (*supra*) and *Harms (Incorporated), Ltd., and Chappell and Co., Ltd. v. Martan's Club, Ltd.* (*supra*), and, having regard to those authorities, determine whether there had been any admission of the public to the performance in question, how many people were present, where the performance was given, whether it was for profit, and whether it would attract members who would be willing to pay money, inducing them not to go to see a performance licensed by the author. The Duston Women's Institute was a separate institution and a small local society. Treating the *dictum* of Bowen, L.J., in *Duck v. Bates*, (*supra*) at p. 850 as being applicable to this question under the Act, his Lordship could not accept the contention that no performance at a Women's Institution could fail to be public. The performance was a quasi-domestic and not a public affair, and the action must be dismissed.

The learned Judge regarded as a consideration of importance the fact that only members of the Institute were admitted to the meeting in question, and that guests were specially excluded. His Lordship rejected the suggestion that the case was a test case. He said he was satisfied it could not be so, as each case must depend on its own circumstances.

Broadcasting the production or the reading of a play, without the consent of the author, is also an infringement of copyright, as a broadcast performance being intended for "listeners-in" is a performance "in public" notwithstanding the reading or acting taking place in a private room among members: *Chappell and Co., Ltd. v. The Associated Radio Co. of Australasia, Ltd.*, [1925] V.L.R. 350; and, even if the players and the broadcasting authority were licensed by the owners of the copyright, a "performance" through a loudspeaker, otherwise than for domestic and private use, may be an infringement of the copyright by those operating the loudspeaker: *Performing Right Society, Ltd. v. Hammond's Bradford Brewery Co., Ltd.*, [1934] Ch. 121.

Amateur societies, which give readings of plays or perform them on a stage or otherwise, have reason to take particular care that the copyright of the authors is not infringed. As we have said, and as the cited cases show, no general rule as to when royalties may not be payable can be enunciated. The tests as to whether a performance is or is not "in public" must be carefully applied in each case, with rejection of the commonly-held assumption that payment for admission is necessary before royalties may be claimed. As Brett, M.R., pointed out, the key to the construction of the Copyright Act is the express grant given to the author of the sole right to produce and reproduce his work or any substantial part of it in public. Under the ordinary principles applicable, that grant is to be construed in favour of the grantee; and, accordingly, the author of a dramatic work is entitled to a right which is not to be lightly defeated or affected by the acts of others in derogation of that grant.

Summary of Recent Judgments.

SUPREME COURT
Auckland.
1935.
Sept. 11, 25.
Callan, J.

IN RE BAIRD (DECEASED), HALL v. MACKY AND OTHERS.

Will—Effect of Discharge in Bankruptcy upon Debt due by Legatee to Testatrix under whose Will he was a Beneficiary—Right of Trustees to retain Moneys to which Legatee entitled under specific Gift against Debt to Estate due by Legatee—Bankruptcy Act, 1908, s. 132.

C., under an appointment exercised by will by his great-aunt H.B. in respect of shops at K. which she directed to be sold and the net proceeds divided, but which were not sold but were let, took beneficially as to one fraction of these proceeds a direct and immediate benefit, as to another an interest in remainder subject to his mother's life interest, and under H.B.'s will was beneficially interested in the ultimate residue of H.B.'s estate.

During her life H.B. had lent C. money, and at her death on December 2, 1929, he owed her £1,800. After that date C.'s mother, H.B.H., paid £1,000 on account of C.'s indebtedness to the trustees of H.B.'s estate. H.B.H. also advanced to C. and, to secure herself for part of his indebtedness to her, she took from him an assignment by way of mortgage of his interest in the K. property and of his interests under the will of H.B. and the will that gave the latter her power of appointment. Due notice of this assignment was given to the trustees in the estate of H.B.

On October 30, 1932, C. was adjudicated a bankrupt. H.B.H. proved for the unsecured debts owing to her. The trustees in the estate of H.B. did not prove in the bankruptcy. On November 4, 1932, the Official Assignee abandoned to H.B.H. as mortgagee the interests mortgaged to her. On February 24, 1933, C. obtained his discharge in bankruptcy. The trustees of H.B.'s estate, who had notice of the said abandonment and application by C. for his discharge, had from time to time credited the share of income which would otherwise have been paid to him or his assignee against his indebtedness to H.B.'s estate.

On originating summons, to ascertain what money, if any, H.B.H. was entitled to receive from H.B.'s trustees on account of C.'s interests assigned to her,

Inder, for the plaintiff; **Richmond,** for the defendants,

Held, 1. That by the discharge in bankruptcy C. was released from the debt that he had owed to H.B.

2. That, there being no right to retain money to pay off a debt that no longer exists, as from February 24, 1933, any moneys retained by H.B.'s trustees to meet the supposed continuing liability of C. had been wrongly kept back.

3. That there is no universal rule that the executor of a creditor is not allowed to withhold from a beneficiary a specific gift under the will to meet a debt due to the testator, and, applying the test adopted by *Chitty*, J., in *In re Taylor, Taylor v. Wade*, [1894] 1 Ch. 671, where there is on either side a liquidated demand, the executors have money in hand payable to the legatee and the legatee owes a debt to the testator's estate, the executors have the right of retaining such money as against the debt due from the legatee.

4. That, therefore, up to the date of C.'s discharge in bankruptcy the moneys withheld were lawfully withheld.

Bank of New Zealand v. Baker, [1926] N.Z.L.R. 462, **In re Pink, Pink v. Pink,** [1912] 1 Ch. 498, **In re Watson, Turner v. Watson,** [1896] 1 Ch. 925, and **In re Taylor, Taylor v. Wade,** [1894] 1 Ch. 671, applied.

Solicitors: McGregor, Lowrie, Inder, and Metcalfe, Auckland, for plaintiff; **Buddle, Richmond, and Buddle,** Auckland, for the defendants.

NOTE:—For the Bankruptcy Act, 1908, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-31, Vol. 1, title *Bankruptcy*, p. 466.

Case Annotation: *In re Taylor, Taylor v. Wade*, E. & E. Digest, Vol. 23, para. 5086, p. 439; *In re Pink, Pink v. Pink, ibid.*, para. 5063, p. 436; *In re Watson, Turner v. Watson, ibid.*, para. 5081, p. 438.

SUPREME COURT. In Chambers. Wanganui. 1935. Aug. 10; Sept. 14. *Myers, C.J.*

W. E. v. R. W. S.

Mortgagors and Tenants Relief—Jurisdiction—Application for Leave to file and proceed with a Bankruptcy Petition against a Farmer Guarantor—"All the functions of the Supreme Court . . . under the principal Act" transferred to Court of Review in respect of "Land used exclusively or principally for agricultural purposes"—Extent to which Jurisdiction of the Supreme Court or a Stipendiary Magistrate taken away—Mortgagors and Tenants Relief Act, 1933, s. 16—Rural Mortgagors Final Adjustment Act, 1934-35, ss. 5, 35—Order in Council, *1935 New Zealand Gazette*, 1738.

The terms of the Order in Council, *1935 New Zealand Gazette*, 1738, do not conflict with s. 3 (2) of the Rural Mortgagors Final Adjustment Act, 1934-35, and the Order in Council is valid. Its effect is to transfer to the Court of Review not "all the functions of the Supreme Court . . . under the principal Act," but only all the functions of that Court in relation to applications for relief made to that Court in respect of any mortgage or lease over land which is declared or deemed by that Court to be "land used exclusively or principally for agricultural purposes" as defined by the Rural Mortgagors Final Adjustment Act, 1934-35. Except to that extent, the jurisdiction under the principal Act is not interfered with.

In re A Mortgage, C. to State Advances Superintendent, *Ante* p. 200, approved.

Counsel: G. W. Currie, for the mortgagee, in support of application for leave to file and proceed with a bankruptcy petition; **Kincaid,** for the guarantor, to oppose.

Solicitors: Speight and Course. Hamilton, for the mortgagee; **Maclean and Kincaid,** Taihape, for the guarantor.

NOTE:—For the Mortgagors and Tenants Relief Act, 1933, see Kavanagh and Ball's *New Rent and Interest Reductions and Mortgage Legislation*, 2nd Ed., p. 1; for the Rural Mortgagors Final Adjustment Act, 1934-35, see Ball's *Rural Mortgagors Adjustment Legislation*, p. 10.

SUPREME COURT New Plymouth. 1935. Aug. 16; Sept. 24. *Myers, C.J.*

OFFICIAL ASSIGNEE OF MOTION v. NEW ZEALAND SERO-VACCINES LIMITED (IN LIQUIDATION).

Company—Preliminary Agreement by Trustee for intended Company—Effect of Confirmation of Minutes of Meeting that was a Nullity—Whether Acts of Company evidence of fresh Agreement on Terms of preliminary Agreement—Ratification—New Contract.

Before the incorporation of the defendant company there was a meeting of four persons who subsequently signed the memorandum and articles of association, who called themselves the "provisional directors" of the company and who approved and adopted, subject to alterations, one of which was to be submitted to the company's statutory meeting for approval, a preliminary agreement between M. (whose Official Assignee was the plaintiff) and a trustee on behalf of the company. At a meeting of directors after the incorporation of the company the minutes of the previous meeting were read and confirmed. There was no new formal agreement between the company and M., and the only agreement executed by the company adopting the preliminary agreement was the affixing of the company's seal to the preliminary agreement (without any words of agreement on the part of the company) pursuant to a resolution at an irregular meeting of directors which was a nullity. This resolution purported to be in pursuance of the resolution of the meeting before the company's incorporation. No statutory meeting was ever held, but the company went into liquidation. Upon the facts set out in the judgment the learned Chief Justice came to the conclusion that all the acts of the company were done under the erroneous belief that the preliminary agreement was binding upon the company.

In an action by the Official Assignee of M. for the balance of purchase-money under a binding agreement with the company,

Quilliam, for the plaintiff; **Middleton,** for the defendant,

Held, 1. That the confirmation of the minutes of a meeting before incorporation that was a nullity could not amount to a ratification of something done by self-styled provisional directors as agents for a company that was not then in existence.

In re Portuguese Consolidated Copper Mines, Ltd., Ex parte Badman, Ex parte Bosanquet, (1890) 45 Ch.D. 16, distinguished.

2. That the preliminary agreement, having been entered into before the company was in existence, was incapable of confirmation, and that the acts of the company, having been done under the erroneous belief that that preliminary agreement was binding on the company, were not evidence of a fresh agreement having been entered into between M. and the company on the same terms as the preliminary agreement, and that there was therefore no agreement between M. and the company.

In re Northumberland Avenue Hotel Co., (1886) 33 Ch.D. 16, followed.

Solicitors: Govett, Quilliam, and Hutchen, New Plymouth, for the plaintiff; **Middleton and Middleton,** New Plymouth, for the defendant.

Case Annotation: *In re Portuguese Consolidated Copper Mines, Ltd., Ex parte Badman, Ex parte Bosanquet*, E. & E. Digest, Vol. 9, para. 1664, p. 269; *In re Northumberland Avenue Hotel Co., ibid.*, para. 4198, p. 635.

SUPREME COURT Christchurch. 1935. July 11, 27. *Northcroft, J.*

WACKER v. BULLOCK AND ANOTHER.

Will—Provision by Mother for Daughter if she "shall obtain a divorce from her present husband"—Whether limited to Proceedings in which Daughter the Petitioner—Whether Provision *contra bonos mores.*

By her will testatrix directed her trustees to invest one-fourth share of her estate and to pay the net annual income to the plaintiff, her daughter, E., during her life without power of anticipation and after her death to hold such fourth share for the three other children of testatrix, and testatrix declared that if E. "shall survive her present husband or shall obtain a divorce from her present husband" the trustees should hold such fourth share for E. absolutely.

E. was committed to a mental hospital in 1921 and had continued to be a mentally defective person ever since. Her marriage with "the present husband" was dissolved in 1932 on the husband's petition.

Cuthbert, for the plaintiff; **Malley,** for the defendant trustees; **Macnab,** for the added defendants.

Held, 1. That, on a general review of the dispositions of the testatrix concerning E., the words "shall obtain a divorce" were not limited to proceedings in which the plaintiff should be the petitioner.

2. That provision made by a mother for her daughter upon the contingency of the latter either divorcing her husband or being divorced by him was not against public policy as being *contra bonos mores*, not being in itself likely to induce the mischief aimed at in **Lambert v. Dillon,** [1933] N.Z.L.R. 1059, and the cases therein cited.

Semble, There is a clear distinction between the encouragement of separation between the spouses, which is the voluntary act of one or both, and provision for the contingency of divorce, which in the final resort is the decree of the Court made only proof of its legal justification.

Lambert v. Dillon, [1933] N.Z.L.R. 1059, and **In re Moore, Trafford v. Maconochie,** (1888) 39 Ch.D. 116, distinguished.

Tennant v. Braie, (1608) Toth. 78, 21 E.R. 1280, and **Mason v. Mason,** [1921] N.Z.L.R. 955, mentioned.

Solicitors: R. A. Cuthbert, Christchurch, for the plaintiff; **A. J. Malley,** Christchurch, for the defendant trustees; **A. A. Macnab,** Blenheim, for the other defendants.

Case Annotation: *In re Moore, Trafford v. Maconochie*, E. & E. Digest, Vol. 44, para. 2646, p. 438; *Tennant v. Braie, ibid.*, para. 2754, p. 453.

SUPREME COURT
In Chambers.
Auckland.
1935.
Sept. 6, 11.
Fair, J.

Wellington.
Oct. 7.
Myers, C.J.
Reed, J.
Johnston, J.

IN RE HEWER.

Criminal Law—Bail—Accused charged with Crime involving Imprisonment with Hard Labour for Life—Bailable at Discretion—Considerations moving Court to refuse Bail—Tests to be applied—Applicability of Tests to modern Conditions—Crimes Act, 1908, s. 368.

When an accused person, who is bailable at discretion in terms of s. 368 of the Crimes Act, 1908, applies for bail, the Court should apply the rule and the three tests laid down by *Coleridge*, J., in *In re Robinson*, (1854) 23 L.J.Q.B. 286, and adopted by *Stout*, C.J., in *R. v. Valli*, (1903) 23 N.Z.L.R. 27, when the Crown opposes bail, in the absence of exceptional circumstances.

The fact that conditions such as wireless, passport restriction, transport development, and the like, have changed since the said rule and tests were laid down and adopted in 1854 and 1903 respectively, does not render the said decisions inapplicable at the present time; and the fact that the accused is a married man with four children, and the Crown's admission that the Crown had no special reason to suppose that the accused would be likely to abscond, are not such exceptional circumstances as to afford sufficient ground for modifying the rule.

Ex parte Hatry, (1929) 168 L.T.Jo. 303, **The State v. Purcell,** [1926] I.R. 207, **H.M. Advocate v. Quinn and Macdonald,** [1921] S.C. (J.) 61, and **Procurator-Fiscal v. McGlinchy,** [1921] S.C. (J.) 75, referred to.

So held by *Fair*, J. (and *Smith*, J., concurred in the conclusion arrived at) dismissing a summons to the committing Magistrate and the prosecutor to show cause why the accused should not be released on bail pending trial.

On an application made *de novo* at Wellington, *Myers*, C.J., *Reed* and *Johnston*, JJ., without deciding whether there was jurisdiction to hear it, dismissed the application on the merits.

Counsel: Singer, for the accused, in support, at Auckland; **G. S. R. Meredith,** for the Crown, to oppose; at Wellington, **Solicitor-General, Cornish, K.C.,** to oppose.

Solicitors: R. A. Singer, Auckland, for the accused; **Crown Solicitor,** Auckland, for the Crown.

Case Annotation: *Ex parte Hatry*, E. & E. Digest, Supp. No. 10, Vol. 14, para. 1345a; *The State v. Purcell, ibid.*, para. 1344*i*; *H.M. Advocate v. Quinn and Macdonald, ibid.* Vol. 14, p. 159, para. 1343*c*.

NOTE:—For the Crimes Act, 1908, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 2, title *Criminal Law*, p 182.

SUPREME COURT
Auckland.
1935.
Sept. 9.
Fair, J.

RE K.K. FOOTWEAR, LTD. (IN LIQUIDATION), EX PARTE KITCHENER.

Company Law—Winding-up—General Manager also a Director—Whether a "servant" of Company, whose Salary entitled to Priority—Companies Act, 1933, s. 258 (1).

Kitchener was employed by a company as director, receiving a fee of fifteen guineas a year, and as general manager at a salary varying from £350 to £600 a year. He was subject to the control of the board of directors, and, after a committee of supervision was appointed by the creditors, carried out his duties subject to the control of the supervisor, without whose consent he could not appoint or dismiss an employee.

Sexton, in support of motion to admit proof as preferential; **J. N. Wilson,** to oppose.

Held, That as general manager Kitchener was a "servant" within the meaning of s. 258 (1) of the Companies Act, 1933, and that his salary for four months prior to the winding-up of the company was entitled to the priority given by that section.

In re Beeton and Co., Ltd., [1913] 2 Ch. 279, and **In re Eastern Ontario Milk Products Co.,** [1923] 1 D.L.R. 591, applied.

Solicitors: Sexton and Manning, Auckland, for the applicant; **Goldstine, O'Donnell, and Wilson,** Auckland, for the liquidator.

Case Annotation:—*Re Beeton and Co., Ltd.*, E. & E. Digest, Vol. 10, p. 945-946, para. 6475; *Re Eastern Ontario Milk Products Co., ibid.*, p. 944, para. 6469a.

FULL COURT
Wellington.
1935.
July 3.
Reed, J.
Blair, J.

GIBBS v. GALBRAITH AND ANOTHER (No. 2).

Magistrates' Court—Practice—Appearance—Removal of Action to Supreme Court—Application for further Particulars refused—Plaintiff in Witness-box, but before he was sworn Application for Adjournment granted—Application for Removal of Action into Supreme Court—Whether waived by Commencement of Hearing—Magistrates' Courts Act, 1928, s. 162.

On motion to review and rescind the order made by *Blair*, J., allowing motion for removal of action from the Magistrates' Court into the Supreme Court, reported *Ante*, p. 112, where the facts appear,

Rollings, in support; **O'Leary,** K.C., and **Wylie,** to oppose,

Held, That, as certain matters preliminary to the trial only were disposed of by the Magistrate, and as the trial had not commenced, the plaintiff had not established any waiver on the part of the defendant to obtain a removal of the action to the Supreme Court pursuant to s. 162 of the Magistrates' Courts Act, 1928, and the order made removing such action was accordingly a proper one.

Solicitors: W. P. Rollings, Wellington, for the plaintiff; **Wylie and Wylie,** Wellington, for the defendants.

NOTE:—For the Magistrates' Courts Act, 1928, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 2, title *Courts*, p. 98.

SUPREME COURT
Blenheim.
1935.
July 24;
Aug. 23.
Reed, J.

BROOKER
v.
MAHAKIPAWA GOLDFIELDS, LIMITED.

Mining—Prospecting License—Refusal of Warden—Grounds for Warden's Exercise of Discretionary Power of Refusal of Grant of Prospecting License Examined upon Appeal—Mining Act, 1926, ss. 4, 58, 169 (2), 366 (2).

A Warden refused a license to prospect upon grounds which may be summarized as follows: (*a*) The applicant has no practical experience of mining nor technical knowledge; (*b*) His idea of mining the land by process of dredging is impracticable; (*c*) The applicant has not the necessary capital to mine the land; (*d*) Prospecting by boring is (i) useless and (ii) potentially harmful to the workings of the objector Company.

On an appeal on law and fact from this decision,

Virtue, and **C. T. Smith,** for the appellant; **Scantlebury,** for the respondent,

Held, That the first three reasons were irrelevant to the consideration of an application for a prospecting license, that the fourth was no reason for refusing an application to be allowed to prospect in such a manner as the applicant might consider fit, and that the fact that prospecting by boring was potentially harmful was no ground for refusal of the license where no existing right was interfered with.

Urquhart v. Gray (No. 2), (1912) 32 N.Z.L.R. 12, and **Morris v. Consolidated Goldfields of New Zealand, Limited (No. 1),** [1932] N.Z.L.R. 1266, referred to.

Nicolson v. Scandinavian Water-race Company, Ltd., (1910) 29 N.Z.L.R. 452, and **In re Paterson,** (1898) 16 N.Z.L.R. 295, distinguished.

Solicitors: C. T. Smith, Blenheim, for the appellant; **A. E. L. Scantlebury,** Blenheim, for the respondent.

NOTE:—For the Mining Act, 1926, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 5, title *Mines, Minerals, and Quarries*, p. 943.

SUPREME COURT
Auckland.
1935.
Aug. 12;
Sept. 7.
Fair, J.

HARTSHORNE v. HARTSHORNE.

Divorce and Matrimonial Causes—Practice—Costs—Wife's Costs of Defence in Husband's Suit on Ground of Adultery ordered to be paid by Husband—Husband's fresh Petition on Ground of Separation—Different Cause of Action—Whether Proceedings should be stayed until Costs of previous Proceedings paid—Divorce and Matrimonial Causes Act, 1928, s. 51.

The Court will not stay proceedings until the payment by the petitioner of his wife's costs awarded against him in a previous divorce suit in another suit founded upon a different cause of action from that in the previous suit.

Hence, where the first suit alleged adultery and the ground relied upon in the second suit was a mutual agreement for separation, a stay of proceedings until the petitioner paid the costs of the former suit, for which he had been ordered to give security, was refused.

The general principle laid down in **Yeatman v. Yeatman and Rummell,** (1869) 39 L.J.P. & M. 37, and **Abdy v. Abdy,** (1896) 12 T.L.R. 524, applied.

Sanders v. Sanders, [1911] P. 101, mentioned.

Counsel: W. J. King, for the respondent, in support; **Butler,** for the petitioner, to oppose.

Solicitors: King and McCaw, Hamilton, for the respondent; **Milne and Meek,** Auckland, for the petitioner.

Case Annotation: *Yeatman v. Yeatman and Rummell*, E. & E. Digest, Vol. 27, p. 442-3, para. 4552; *Abdy v. Abdy, ibid.*, p. 443, para. 4557; *Sanders v. Sanders, ibid.*, p. 443, para. 4554.

NOTE:—For the Divorce and Matrimonial Causes Act, 1928, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 3, title *Husband and Wife*, p. 865.

SUPREME COURT
Dunedin.
1935.
June 11;
July 23;
Aug. 16.
Kennedy, J.

LAKE v. HARVEY.

Licensing—Offences—Permitting Liquor to be consumed at a Time when Licensed Premises were required to be closed—"Restaurant"—Whether Definition applies to Restaurant Premises when closed to the general Public—Sale of Liquor Restriction Act, 1917, ss. 2 (2), 11.

Appellant, the occupier of certain premises which comprised a restaurant within the meaning of s. 2 (2) of the Sale of Liquor Restriction Act, 1917, hired a room in such premises (after the premises had been closed to the general public) to a body of persons, a cricket association, and supplied them with refreshments. Liquor, provided by the association, was delivered to the premises before 7 p.m. to await the arrival of the guests; but it was not consumed until after 8 p.m., at hours when licensed premises are required to be closed. At least one person not a member of the association was present and was supplied with liquor and food for the sum of 2s. Appellant was convicted.

On appeal from such conviction,

C. J. L. White, for the appellant; **F. B. Adams,** for the respondent,

Held, dismissing the appeal, That the room used by the association was a "restaurant" after the premises had been closed to the general public.

Brett v. Till, [1921] N.Z.L.R. 788, approved and followed.

Semble, The provisions of s. 11 of the Act are ancillary to the provisions restricting the sale of liquor in hotels, and are designed to place restaurants more or less in the same position as hotels.

Mahoney v. Bibron, [1925] V.L.R. 248, referred to.

Solicitors: C. J. L. White, Dunedin, for the appellant; **The Crown Solicitor,** Dunedin, for the respondent.

NOTE:—For the Sale of Liquor Restriction Act, 1917, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 4, title *Intoxicating Liquors*, p. 371.

SUPREME COURT
Hamilton.
1935.
Sept. 5, 10.
Callan, J.

LOWER MANGAPIKO DRAINAGE BOARD v. PUBLIC TRUSTEE.

Land Drainage—Rating—Classification List—Whether more than one at same time relating to same Land permissible—Effect of Reclassification—Whether Special Differential Rate to secure Loan prevents Reclassification prejudicing Security—Land Drainage Act, 1908, ss. 3, 34 (2).

A Land Drainage Board may not have more than one classification list at a time relating to the same land.

Western Taieri Land Drainage Board v. Gow, [1916] G.L.R. 279, applied.

When a reclassification has been made under s. 33 of the Land Drainage Act, 1908, it takes the place of the previous classification for all purposes, and such previous classification no longer has any legal existence.

The fact that a Land Drainage Board has raised a loan on the security of "annually recurring special differential rates on all land . . ." as classified according to the provisions of the Land Drainage Act, 1908—*viz.*, specifying the classification and existing rates—does not prevent the Board from *bona fide* altering the classification, even if such alteration prejudices the holder of the security, as it is not competent for a public body by contract to renounce a power entrusted to it in the public interest, or to bind itself not to exercise such power or otherwise to entrammel its discretion in regard to the exercise of such a power.

Napier Borough v. Hawke's Bay Education Board, [1924] N.Z.L.R. 596, distinguished.

Mansfield v. Blenheim Borough Council, [1923] N.Z.L.R. 842, and **Ayr Harbour Trustees v. Oswald,** (1883) 8 App. Cas. 623, followed.

Counsel: H. A. Swarbrick, for the plaintiff; **Strang,** for the defendant.

Solicitors: Swarbrick and Swarbrick, Te Awamutu, for the plaintiff; **Strang and Taylor,** Hamilton, for the defendant.

Case Annotation: *Ayr Harbour Trustees v. Oswald*, E. & E. Digest, Vol. 11, p. 103, para. 4.

NOTE:—For the Land Drainage Act, 1908, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 4, title *Land Improvement and Protection*, p. 466.

SUPREME COURT
Hamilton.
1935.
Sept. 3, 19.
Callan, J.

IN RE HAWKE (DECEASED), HAWKE v. PUBLIC TRUSTEE AND OTHERS.

Family Protection—Court encouraged to make further Provision for Widow and Children by Terms of Codicil contemplated by Testator, the Execution of which was prevented by the state of his Health—Style of living to which the Widow, dependent Daughters, and young Children of wealthy Testator entitled—Family Protection Act, 1908, s. 33.

The Court has no right to interfere under the Family Protection Act except in so far as it is satisfied that the testamentary dispositions of a testator fall short of making for the wife or for the children such provision as a wise and just testator would regard it his moral duty to make.

Where, owing to a change in economic conditions, the provision made for wife and children became inadequate, and the testator gave instructions for a further testamentary document making further provision for them, the execution of which was prevented by the state of his health, the Court, although it could not make for him the codicil that he contemplated, would be encouraged by the testator's views to increase the provision.

Where a testator is able to leave the financial provision necessary for all his dependants to continue the style of living in which he had encouraged them and to which his generosity had accustomed them, it is his duty, so far as his widow, his dependent daughters, and young children are concerned, under the statute to leave that provision unless he considers on good grounds that a humbler style is desirable.

So held, by *Callan,* J., who also granted to a son of twenty-eight, in addition to his share of income from the estate, £1,000 of capital towards the purchase of a farm, in view of the proposed codicil giving two-fifths of the estate to the widow absolutely as a fund from which she could meet any needs of herself and any child.

Counsel: McMullin, for the plaintiff and for the widow and two daughters of the testator; **Strang,** for the six infant children of the testator; **de la Mare,** for the Public Trustee, as executor and trustee and also as representing the unborn children of the children of the testator; **Conlan,** for the Archbishop of Wellington and the Catholic Bishops for the time being of the several Catholic dioceses in New Zealand.

Solicitors: McMullin and Brown, Hamilton, for the plaintiff; **Strang and Taylor,** Hamilton, for the six infant children (defendants); **Solicitor for the Public Trust Office,** Hamilton, for the defendant The Public Trustee for the Dominion of New Zealand; **Conlan and Wright,** Auckland, for the defendants The Roman Catholic Hierarchy.

NOTE:—For the Family Protection Act, 1908, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-1931, Vol. 3, title *Family Protection*, p. 292.

SUPREME COURT
Auckland.
1935.
Sept. 9, 24.
Fair, J.

MOUNT ALBERT BOROUGH v. REGISTRAR OF THE SUPREME COURT.

Rating—Arrears of Rates—Sale by Registrar for specified Arrears for which Judgment obtained—Whether Surplus on Sale applicable to payment of Judgments for other Rates due—Rating Act, 1925, s. 79.

Where, on a sale of a property by the Registrar of the Supreme Court for arrears of rates for which a judgment has been obtained under s. 79 of the Rating Act, 1925, there is a surplus after payment of the judgment with interest and costs and expenses, such surplus may not be applied in payment of judgments for rates due and costs recovered against the same owner other than that pursuant to which the property was sold.

Counsel: Rogerson, for the plaintiff; **Meek,** for two mortgagees; **Cocker,** for the Public Trustee, representing two owners whose addresses were unknown.

Solicitors: Nicholson, Gribbin, Rogerson, and Nicholson, Auckland, for the plaintiff; **Milne and Meek,** Auckland, for the mortgagees; **Hesketh, Richmond, Adams, and Cocker,** Auckland, for the Public Trustee.

NOTE:—For the Rating Act, 1925, see THE REPRINT OF THE PUBLIC ACTS OF NEW ZEALAND, 1908-31, Vol. 5, title *Rating and Valuation of Land*, p. 977.

SUPREME COURT
Dunedin.
1935.
June 4, 5, 6, 7;
Sept. 12.
Kennedy, J.

HAYMAN AND OTHERS v. COMMISSIONER OF STAMP DUTIES.

Death Duties—Partnership Businesses conducted in New Zealand and in London under different Styles—Field of Operations and Seat of Business in New Zealand—Partners resident in London and residual overriding Managerial Control there—Whether One Business or Two Businesses—Whether deceased Partner's Share therein Property in New Zealand liable for New Zealand Death Duties.

L.H., resident in London and domiciled in England, owned an interest as partner with H.L.H. in businesses conducted in New Zealand and in London under different styles (due to historical reasons) which the learned Judge on the evidence held constituted one business only, the supply of goods, the system of remittance, the control over payments, and the management and the treatment of profit as one from the same business pointing to one business only. The London office, which had a staff of twelve only, exercised complete general control over the managers of the New Zealand branches, the staff of which totalled about one hundred and seventy.

L.H. died on September 16, 1923.

F. B. Adams and **H. S. Adams,** for the appellants; **G. G. G. Watson** and **Cleary,** for respondent.

Held, on an appeal from an assessment by the Commissioner of Stamp Duties, That, while the weight to be given to the London connection and other factors must not be disregarded, in view of the following facts:—

> "The profit comes from the sale of goods wholly in New Zealand to numerous customers there, from warehouses established in three of the principal cities. To those places purchases which are not made wholly in London but are also made on the Continent, in Japan, and America, and, to an extent, in New Zealand itself, converge. There, the great bulk, in fact almost the whole, of its movable property is situate and a great part of its immovable property; there also the great proportion of its employees work and there most of its organization exists. It is with reference to the New Zealand market that the buying must be done, and, if there is a customers' goodwill, it exists in New Zealand. Information must be collected and decisions must be come to in New Zealand, although requiring ultimate approval in London, and if approved there, decisions must be executed in New Zealand. The very great proportion of its assets is in New Zealand and its New Zealand staff bears an overwhelming proportion to that in London. There was necessarily a delegation of much control to the various managers in New Zealand"—

the real field of operations and the seat of the business was in New Zealand, the partnership business was a New Zealand business, and the deceased's share therein was property in New Zealand, and, therefore, death duties in New Zealand were payable thereon.

Laidlay v. The Lord Advocate, (1890) 15 A.C. 468, **Beaver v. Master in Equity of the Supreme Court of Victoria,** (1895) 64 L.J.P.C. 126, and **Commissioner of Stamp Duties v. Salting,** [1907] A.C. 449; 76 L.J.P.C. 87, applied.

Commissioner of Taxation of Western Australia v. D. and W. Murray, Ltd., (1929) 42 C.L.R. 332, referred to.

Solicitors: Adams Bros., Dunedin, for the appellants; **Crown Law Office,** Wellington, for the respondent.

Case Annotation: *Laidlay v. The Lord Advocate,* E. & E. Digest, Vol. 21, para. 907, p. 120; *Beaver v. Master in Equity of the Supreme Court of Victoria, ibid., n.*k, p. 120; *Commissioner of Stamp Duties v. Salting, ibid., n.*l, p. 120.

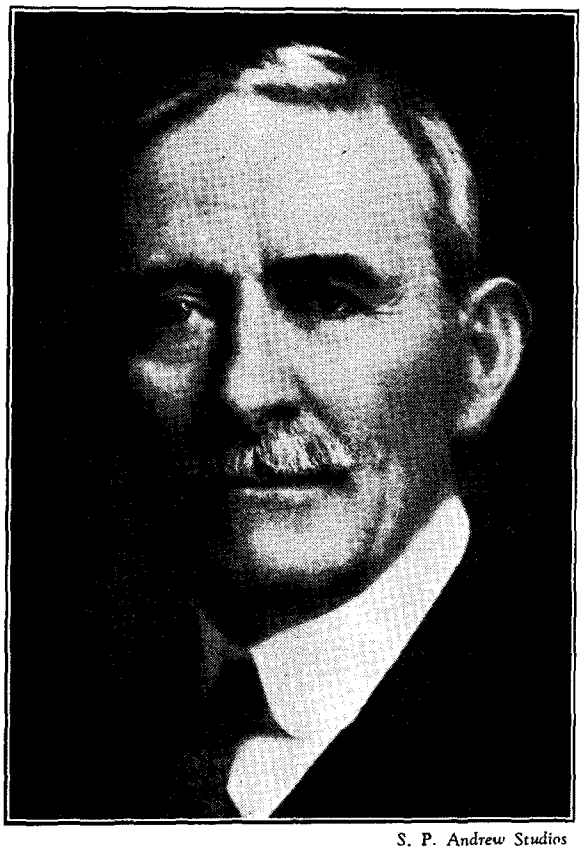
The Late Professor J. M. E. Garrow

Professor Emeritus, Victoria University College, Author of Law of Wills and Administration in New Zealand, Crimes Act, 1908, Law of Property, Law of Trusts and Trustees, etc.

By G. G. G. Watson, M.A., LL.B.

The legal profession in New Zealand has sustained a great loss in the death of Professor J. M. E. Garrow, who died at Nelson on October 7 at the age of seventy. All members of the profession are familiar with his well-known text-books, and a great proportion of the younger members of the profession owe much to the professional education they received at his hands.

Born in Scotland, Professor Garrow came to New Zealand as a child with his parents, who settled in Dunedin. After leaving school, he first took up public-school teaching, which, however, he later relinquished in favour of law. Having graduated at Otago University as Bachelor of Arts and Bachelor of Laws, he commenced practice in Dunedin. For some years, however, he devoted himself largely to the laborious task of tutoring large numbers of candidates for admission to the profession, in which work he achieved a most notable success. In 1911 he was appointed Professor of English and New Zealand Law at Victoria College, which post he occupied until his retirement, on account of ill-health, in 1929, when he went to spend the evening of his life at Nelson.



S. P. Andrew Studios

The late Professor J. M. E. Garrow.

At Victoria College Professor Garrow did a great work. Prior to his taking up the professorship, the number of students taking a course in professional law subjects was very small. Immediately after Professor Garrow's arrival the numbers increased enormously, and classes which had been attended by five or six students soon reached one hundred or more in number. Only a burning zeal for his work enabled the Professor to meet the situation of huge numbers of students attending classes in so many different subjects. Not content with merely lecturing to his students, he prepared voluminous notes for circulation among them, prepared practical problems for written solution by the students, and, with the aid of scanty assistance, corrected and annotated the students' written work. At no time was he content to lecture merely on selected phases of his subjects, but always endeavoured comprehensively to explain the whole subject in detail. The volume of work which he did was amazing to those who were privileged to see the full extent thereof. Undoubtedly his subsequent ill-health was largely contributed to by his complete sacrifice of himself to what he conceived to be his duty to his students. That duty did not, in his view, end in the class-room: he endeavoured to know personally each one of his students, and, for that purpose, not only encouraged them to seek his advice and guidance in his room at the College, but made a point of entertaining as many as he possibly could in his own home. During the Great War he kept up a personal correspondence with all his past and present students whose addresses he could locate. It was no mean task to write regularly to some hundreds of soldier students.

The publication by him of a number of legal text-books was due solely, in the first instance, to his desire to provide his students with suitable material for their studies. In subjects such as Property Law and Criminal Law there were no suitable New Zealand text-books available until Professor Garrow undertook the task of providing them. The writing of these books, in addition to his professorial duties, constituted an enormous burden, which, however, Professor Garrow cheerfully undertook, primarily in the interests of his students and of the profession that they were to enter. His work as a text-book writer was akin to his work as a Professor in that he paid the most meticulous attention to every detail. Every possible reported decision bearing on the subject-matter of his text was not only read, but read several times in every available report thereof, and the result of such decision was embodied in his book only after the most careful consideration.

So much for the man's work. As to his nature the outstanding characteristic was a complete subordination of everything else to duty. The highest reward he sought was the consciousness of work done to the utmost of his ability. He set himself, and expected of others, the highest ethical standards. He shunned publicity, and such little leisure as he had he devoted to simple hobbies and recreations. In music he found pleasure; in the enjoyment of Nature he found relaxation.

Professor Garrow's name should be remembered by New Zealand lawyers with gratitude for his labours on behalf of legal education and the interests of the profession generally; memory of him will certainly be cherished with affection by those who were privileged to know him intimately.

Professor Garrow in Retirement.

By E. C. ADAMS, LL.M., District Land Registrar, Nelson.

I trust that I may be permitted to add my modest meed in praise of Professor Garrow.

I have known him personally only during the last five years, in the autumn of his life; other pens must therefore record his previous life. But for many years as a District Land Registrar and Examiner of Titles, I have received invaluable assistance by constant reference to his book on Property. As one of my colleagues once put it: "*Garrow on Property* is a veritable quarry of information on everything appertaining to the law of real property in New Zealand." I once told the Professor that as District Land Registrar I had found particularly useful his chapter on "Title to Land by operation of the Statute of Limitations." "Yes," he laconically replied, "*that* chapter *did* take a bit of writing." Before the advent of *Garrow*, we struggled along the best we could with *Martin's Conveyancing* and our old friend, *Williams on Real Property*.

Since publication about two years ago of his treatise on Wills, the Professor had done but little legal writing; his eyes had troubled him, but he was always ready to discuss interesting law points, or the latest judgment of importance. He had left in younger hands the preparation of a new edition of *Garrow on Real Property*, but he had retained some control as consulting editor. Alas! Death is inexorable, and the new edition will pass through the Press without the author's guiding hand. A short time ago he spent many hours in the Arctic atmosphere of the Nelson Supreme Court library, studying the various judgments in *Clements v. Ellis* (1934) 51 C.L.R. 217, the latest leading case on the indefeasibility of title under the Torrens system. With the actual decision in that case he disagreed, and thought that the law had been correctly and best enunciated by Evatt, J. It was when discussing this case with me that he expressed the opinion that the present law of real property in New Zealand was full of inconsistencies, and badly needed rearranging by the Legislature, and he regretted that nowadays it seemed nobody's business to prevent the unscientific growth of law.

In private life the Professor was kindness personified. Just before undergoing his last, fatal operation, he sent me a message, apologising for not answering a note of a recent conveyancing case which I had sent him, and assuring me that he would attend to the matter as soon as he came out of hospital. And when he lay ill last week at the hospital he insisted on spring blooms from his own garden being sent as a comfort to the other patients. And who that has known the Professor will ever forget his smile and the merry twinkle of his eyes? To employ a Chaucerian metaphor, his eyes twinkled, "as do the stars in the frosty night." He enjoyed a friendly game of bridge. As Charles Lamb would have put it, he loved "a clear fire, a clean hearth, and the rigour of the game." And when he scored a Grand Slam (which was only too frequent when I was his opponent), his eyes twinkled again. And now his kindly smile will soon be but a memory, but there will remain his books on many branches of New Zealand law, monuments to his prodigious industry and encyclopaedic knowledge of the law. No man has rendered a greater service to the student or practitioner of New Zealand law than Professor Garrow.

And our hearts must go out to Mrs. Garrow, who has lost the most loving of husbands, the closest of companions, and the truest of friends.

Bush and Mining Contractors.

Cost of Insurance Cover.

Contracts for the performance of work involving the employment of labour normally provide that the contractor shall insure against his liability under the Workers' Compensation Act, 1922, the object being to protect the owner against his liability as "principal" under s. 13 of the Act mentioned. Under this section the owner has a right of indemnity as against the contractor and insurance by the latter will accordingly operate to protect the owner.

In the case of bush and mining contracts, which are affected by s. 63 of the Act, it has been usual to require that the insurance extend to cover the contractor also. By the provisions of s. 63 (1) bush and mining contractors are deemed for the purposes of the Act to be working under a contract of service, and accordingly "workers." The object and effect of the subsection is thus explained by Blair, J., in *Williamson v. Ramahiku, Ltd.*, [1934] N.Z.L.R. 729, 732,

> "It is well known that a great number of workers are employed in mines and in the clearing of land on the contract system, and, although they are workmen well within the class intended to be benefited by the Workers' Compensation Act, it is not practicable to employ them on a time basis. Contractors are without the benefit of the Act, and the Legislature intended to give the benefit of the Act to a large class of workers who, owing to the exigencies of their occupations, could be employed only upon a contract system but actually were workers in the real understanding of the word."

At the present time efforts are being made by interested parties to include also contractors under contracts for fencing, draining, and the like.

The status of bush and mining contractors as "workers" is further secured by s. 63 (2), which in somewhat curious terms provides that no deduction shall be made from the wages or other remuneration of any such contractor or his wages-men on account of any insurance on indemnity issued by an insurance company or otherwise to any person indemnifying him against liability in respect of accidents to any such contractor or his wages-men, and any such deduction shall constitute an offence against Part II of the Wages Protection and Contractors' Liens Act, 1908.

Section 63 (2) was recently considered by the Court in *Wallace v. Ellis and Burnand, Ltd.* (unreported; Hamilton, September 4, 1935) on appeal from the decision of a Magistrate. In this case Wallace entered into a contract for the felling of certain bush, cl. 6 of the contract providing as follows:—

> The contractor shall insure himself and his employees against accidents during the whole term of the contract and must produce to the company or its representative the policy providing such cover if so required for inspection.

Apparently the company paid the insurance premiums on the cover taken out by the contractor, Wallace, pursuant to this clause, and deducted the amounts so paid from the sums payable to Wallace. On proceedings commenced more than six months after such deduction, Callan, J., in an oral judgment, held that the company was not entitled to plead that it made the payments as agent for the contractor; that s. 63 (2) in effect incorporated and made applicable the provisions of s. 35 (4) of the Wages Protection and Contractors' Liens Act, 1908, for the benefit of the contractor; but that, as the action was commenced more than six months after the making of the deductions, these could not now be recovered by the contractor.

Few, if any, will feel inclined to quarrel with His Honour's judgment on the facts as detailed. It would seem, however, that the clause as inserted in the contract is unobjectionable, being merely designed to secure to the owner those rights to which he is entitled, and that the company's mistake was in itself handling any of the moneys relating to the policy. It is submitted that had the company insisted upon the completion of the policy and the payment of the premium before permitting the contractor to commence operations, or had it in other ways secured itself against non-performance of the condition in cl. 6 of the contract, it would not have offended against either the letter or the spirit of the Act. As owner it was entitled to be indemnified against liability for injuries to the contractor's workers: s. 13 (2), as these were in no sense the workers or employees of the owner save in his capacity as "principal"; and it seems reasonable that a contractor should bear the cost of the insurance policy whatever the nature of the work contracted for. The contractor himself is placed in the position of a "worker," and quite apart from the policy and provisions of the Act, it seems proper that the owner should bear the cost of any insurance which will indemnify him against his liability as the notional employer of that contractor. An insurance policy effected by a contractor pursuant to a clause similar to cl. 6 in the *Wallace* case does not assist the owner when the contractor is injured; he still remaining liable to pay compensation for an injury to the contractor notwithstanding the receipt by the latter of moneys under the policy: see s. 14, which provides that compensation payable by an employer does not abate by reason of insurance moneys received by a worker under a policy effected by the worker himself.

Certain insurers issue policies known as "working contractors' policies," which purport to cover not only the contractor and his employees, but also the owner both in respect of his liability as principal, and under s. 63 in respect of the contractor: it is clear that a clause requiring the contractor to effect such a policy would offend against the provisions of s. 63 (2).

In the circumstances it would appear (*i*) that owners may still, by appropriate measures, throw upon bush or mining contractors the cost of keeping the contractors' employees insured, and the owner indirectly indemnified against his liability; and (*ii*) that, while it is not possible for a bush or a mining contractor to contract himself out of his rights under s. 63, if he is unfortunate enough to have a deduction for insurance premiums made from moneys due him under his contract, he must act quickly or his right to recover the moneys back will be lost.

Defining their Terms.—Sometimes in the Police Court words are defined with the special meanings they possess in certain localities and in back-street controversies. A retired Stipendiary Magistrate has recalled the following description of "a spot of liveliness down our street," which is an example of the finer shades of the meaning of words.

"It was like this," said the defendant. "She says to me 'You're no lady,' and I smiles contemptsus-like. Then she says, 'You're an outrageous female,' she says, and I larfs scornful. Then she says, 'You're a woman,' she says; and I lets her have the soapsuds in her face. 'Owd you like to be called a woman, sir?"

Australian Notes

By Wilfred Blacket, K.C.

Powers of Sewerage Boards.—*Madell v. Metropolitan Water and Sewerage Board*, heard in Sydney Supreme Court, supplied a disastrous climax to the plaintiff's misfortunes. He is the owner of land at Enmore which is traversed by a sewer having a manhole on his property. The sewer was constructed many years ago by the Public Works Department, and later became vested in the Board. During its earlier years the sewer was sufficient for its purpose, but during some years past there has been an overflow at times of heavy rain, and quantities of offensive matter have been discharged. From this cause two of the plaintiff's cottages were rendered uninhabitable, had been condemned by the Council, and the land on which they stood declared unfit for building purposes. Other cottages owned by the plaintiff had been seriously depreciated by the same cause. At the hearing the only cause of action was negligence, and, as the plaintiff could not show any fault in the original construction of the sewer, nor was there any evidence of negligence by the Board in permitting storm water to enter it so as to cause the overflow, and as negligence was the only cause of action pressed, the plaintiff was nonsuited. Plaintiff's counsel refused an invitation to argue that there was a case of *res ipsa loquitur* as to negligence, and did not rely upon the nuisance count, but may it not be that upon these facts both nuisance and trespass could be supported? A sewer and manhole may under the Act be constructed on any man's land, but if the latter is allowed to pour water and offensive matter on to the servient land there must surely be a remedy at common law. One need not invoke *Rylands v. Fletcher* to find a cause of action on such facts; no man can run sewage over the land of another without being answerable at law, and the Board is not, as far as I can see, authorised by its Act to commit such a wrong with impunity.

A Patron of Art.—Albert P. Meurer when a lad worked in his brother's barber's shop at Lismore, New South Wales. For seven years or more he laboured there and allowed his wages to accumulate until, as he averred, £800 was due to him. Then he realised his life's ambition by purchasing pictures; not two guinea water-colours, but landscapes by Lister Lister at one hundred and twenty-five guineas, and other high-priced canvases by the most eminent of our artists. Then as his brother, Henry F. Meurer, said that these belonged to him, Albert P. had to sue for them in the Supreme Court, and the jury found in his favour to the extent of £525. Constantly it is complained that Australians will not patronise Art, but it is now clear than an exception must be made in favour of Lismore barbers.

Recovery of Rates.—Municipalities in New South Wales have various statutory methods of recovering overdue rates, but the trouble is that no one of these ways seems to be any good. Warringah Shire had an unpleasant adventure in this behalf recently. One H. W. H. Huntington owned land valued and rated at £505 and mortgaged for £200. The Shire obtained judgment against him for £66, but the writ of *fi fa* was returned *nulla bona*. Then a petition for sequestration of his estate was lodged, and the matter came on for hearing before Mr. Justice Long Innes, and various objections on technical grounds were raised but not

decided, as His Honour rejected the petition on the ground that the Shire was a secured creditor and had not, as required by s. 55 (2) of the Federal Bankruptcy Act, either (*a*) offered to give up its security for the benefit of the creditors, or (*b*) valued the security and proceeded only for the unsecured balance of his debt. In support of the contention that the Shire was a secured creditor, His Honour quoted the decision of Mr. Justice Lukin, A.B.C. 174, in *Re Lamprell, Ex parte City of Hobart*, and further said that if it had been necessary to determine the matter he would probably have exercised his discretion in favour of the debtor, and would have dismissed the petition or granted a postponement to enable the debtor to realise on his property. The fact that Huntington was a retired civil servant living on a pension of £4 19s. 2d. a week, which would very probably be forfeited upon bankruptcy, and that the Shire was his only creditor, seemed to His Honour to constitute "sufficient cause" under s. 563 to justify a refusal to make an order.

Mortgagee's Power of Sale.—In *Coroneo v. Australian Provincial Assurance Association, Ltd.*, decided in the Supreme Court, Sydney, the plaintiff's cause of action, as alleged, was that the defendant company had sold land mortgaged by him to it in "purported exercise of the power of sale by the said mortgage and by law conferred" and had "so recklessly wilfully and negligently conducted himself (*sic*) in and about the said sale that the said land and buildings were sold at a gross undervalue, whereby the plaintiff" lost the amount of the difference between the price realised and the true value. Pronouncing the judgment of the Court on a demurrer to the declaration, Jordan, C.J., described the action as "an attempt to litigate questions as between mortgagor and mortgagee which could only be the subject of proceedings in equity, in a suit in which the mortgagor offered to redeem or to account for what was owing." His Honour further said that the Court "did not disclose a cause of action maintainable at common law," and "was apparently based upon a misconception of the nature of a power of sale in a mortgage. . . . The power of sale, where it occurred in a legal mortgage, was not a common-law power. It was an equitable power which was inserted to enable the mortgagee to convey a title which was not only good at common law, but good in equity to defeat the equitable right of the mortgagor. . . . The operation of the equitable power of sale was simply this, that if it was exercised in a way that a Court of equity regarded as unexceptionable, that Court would not treat the title of the purchaser as being uncumbered by any equity of redemption in the mortgagor." And so it was that judgment on the demurrer passed for the defendant with usual consequences lamentable to the loser.

Free from Ladies.—Mrs. Newby of Sydney, and her husband, having secured ring-side seats at Leichhardt Stadium on the night of a wrestling match between one Lurich and another Penchaff, had every reason to anticipate a pleasant evening, for there never is a dull moment when either of these men is in the ring. The bout was of the willing order, and Penchaff threw his opponent out of the ring and he unfortunately fell on Mrs. Newby. As Lurich is seventeen stone in his wrestling costume, the lady was hurt to some extent, and she later brought an action against Leichardt Stadium, Ltd., alleging breach of contract to provide for her safety, and negligence in omitting to take proper precautions to prevent wrestlers from being thrown at her. No points of law arose on the hearing, and the jury, having viewed the locus, found for the lady, with £100 damages. It would have been risky for either party to this action to have called such evidence, but the fact is that it is quite usual at these contests for one or other of the contestants to be thrown out of the ring. Generally with practised wrestlers the opponent is hurled on to the reporters' table, which indeed seems to have been put there for that purpose. Carried on as it is at present, it is usually a brutal exhibition, but I confess to some fondness for it, because it is the only kind of sport that has not yet been taken up by ladies as competitors. But even before these notes reach the post a Brisbane message relates that at the Dawson-Bolt match a lady climbed into the ring and tried to separate the wrestlers. She was pulled away from them by strong men, pushed out of the ring through the ropes, pushed out of the Stadium, and then into the street—wrestling all the way.

Mrs. Jenkins et al.—South Australia contributes an interesting addition to the long line of cases wherein negligence in dealing with a "not negotiable" cheque is charged against a bank, but never has there been a case where so many strange circumstances have occurred. Mr. R. H. Wallman, member of a firm of solicitors in Adelaide, in administering an estate had to pay £350 to a beneficiary, Mrs. Eliza Ann Maria Jenkin, of Arthur Road, Prospect, whose surname he thought to be "Jenkins." He posted a cheque for that amount addressed to "Mrs. E. M. Jenkins, Prospect." The cheque was drawn in favour of a payee of that name. The letter was received by Mrs. E. M. Jenkins of North Road, Prospect, and she sent a receipt in that name, stating her address and telephone number to Wallman. The receipt was filed without any question raised as to the identity of the recipient. Mrs. Jenkins held the cheque for some time, and then took it to the local branch of the Savings Bank and offered it as a deposit upon opening an account. The Manager examined the cheque, but refused to accept it without evidence of her identity as payee. An officer of the local council, known to the manager, filled in and signed the form, vouching her identity as "Mrs. E. M. Jenkins." An account was then opened, but for some months was not operated upon. Then during May, June, and July, 1933, Mrs. Jenkins drew out £275 in various sums. In August, Mr. Wallman notified the Bank that its customer had no right to the cheque, and shortly afterwards started an action to recover the amount. In the Court of first instance he obtained a verdict for the amount and interest, and this was upheld by the Supreme Court of South Australia on the ground that the manager "should not have acted on the statements made to him without obtaining corroboration from some reliable source." The High Court on appeal set aside the verdict, and held that the evidence proved that the Bank had acted without negligence and in good faith, and in its judgment pointed out that this was the only case of its kind where the name of the person producing the cheque truly corresponded with the name of the payee. There are many passages in the Court's judgment, as delivered by Sir George Rich, that I should like to quote, but should not be justified in doing so, for such a curious series of coincidences and strange combination of mistakes can never happen again. Mr. Justice Starke, in a separate judgment, held that it was the respondent's own want of care that caused his loss, and there seems to be much support in the evidence for this finding.

Company Meetings.

The Quorum for "One-Man" Companies.

The advantages of limited liability offered to almost any and every speculative venture by the Companies Act has led to a large and growing number of "one-man companies." The term "one-man company" is, of course, not a strictly accurate one, for at least two persons must join together for the formation and preservation of a limited company. The term is, however, well understood as one which describes a company in which one person holds almost the whole of the issued capital; indeed, the beneficial interest in the whole of the share capital may be in the hands of one person. In these circumstances it is often desired by the controlling shareholder to acquire power to act in all matters relating to the company alone, unfettered by the temporary inconvenience which may arise as a result of the nominal or nominee shareholder's failure to attend any necessary meeting. The question then arises, is it *intra vires* the Companies Act to provide that the quorum at any general or ordinary meeting shall be one person?

The *Oxford Dictionary* defines a "meeting" as a coming together; an assembly; a congregation; a collection of people. This definition is in accordance with the common-law rule that one person cannot constitute a quorum or a meeting; and this rule applies although that person may hold proxies.

In *Sharp v. Dawes*, (1876) 2 Q.B.D. 26, an attempt was made to enforce a call upon shares which was said to have been made at a meeting which was attended by only one member. The sole member present took the chair and the minutes gravely recorded a resolution making the call and a resolution "that a vote of thanks be given to the chairman"! Mellish, L.J., said:

> "In this case, no doubt, a meeting was duly summoned, but only one shareholder attended. It is clear that, according to the ordinary use of the English language, a meeting could no more be constituted by one person than a meeting could have been constituted if no shareholder at all had attended. No business could be done at such a meeting, and the call is invalid."

Lord Coleridge, C.J., in the course of his judgment, guarded himself by indicating that in a different case it may be possible to show that the word "meeting" has a meaning different from the ordinary English meaning. This case was followed in *Re Sanitary Carbon Co.*, [1877] W.N. 223.

The common-law rule established by these cases afforded some difficulty in *East v. Bennett Bros., Ltd.*, [1911] 1 Ch. 163. In this case the company was empowered by the memorandum of association to increase the nominal capital, with the proviso that no new shares should be issued so as to rank equally with the preference shares, unless such an issue was sanctioned by an extraordinary resolution of the holders of the preference shares present at separate "meeting" of such holders. The articles of association contained a similar provision. The company desired to increase its capital by the issue of further preference shares. Resolutions were passed purporting to authorise such an issue, and later the question arose whether the issue was valid, as all the original preference shares were at the time of the resolutions held by one member. The question arose whether a separate "meeting" of such holders could have been held. Warrington, J., as he then was, held that as there was nothing in the constitution of the company to prevent the whole of the original preference shares being held by one shareholder, the word "meeting" in the memorandum and articles must be taken to have been used not in its strict sense, but as applicable to the case of a single shareholder.

It is submitted that quite apart from authority, it is now within the powers of a company to abolish in any case the common-law rule that one person cannot constitute a meeting of the company: see *Morison's Company Law in New Zealand*, 2nd Ed., p. 126, §258. Section 123 (1) (*d*) of the Companies Act, 1933, is as follows:

> "123. (1) The following provisions shall have effect *in so far as the articles of the company do not make other provision in that behalf*:—
>
> "(*d*) Three members personally present shall be a quorum."

Subject to the provisions of Part VIII of the Act, which relates to Private Companies, s. 293 (in that part) applies by subs. 1 all the provisions of the Act, so far as applicable to private companies. The section proceeds:

> "(2) In the application thereof to private companies,—
>
> (*a*) Paragraph (*d*) of subsection one of section one hundred and twenty-three of this Act (as to the quorum for meetings) shall be construed as if the reference therein to three members were a reference to two members."

It follows that this provision has effect "in so far as the articles of the company do not make other provisions in that behalf." It would seem at first sight that the section authorises a company so to frame its articles that one person may be a quorum at any meeting. In support of this construction reliance would doubtless be placed on the observations of Lord Coleridge, C.J., in *Sharp v. Dawes* (*supra*) that it may be shown that the word "meeting" has a meaning different from the ordinary English meaning.

But where the Act itself speaks of a meeting the presumption is that it means a meeting of at least two persons. If that be so the articles of any company cannot fix as a quorum a lesser number than the minimum required to constitute a meeting, so as to apply to any meeting required by the Act to be held.

Christchurch Practitioners' Annual Golf Match.—On Dominion Day, the annual golf match for the W. J. Hunter Cup was played on the Shirley Links. Representatives from Timaru and North Canterbury joined their Christchurch brethren who were present in large numbers. This year's winner was Mr. N. S. Bowie, who returned a card reading 79-10-69; and he was followed by Messrs. E. E. England (82-12-70), H. K. Kippenberger (84-12-72), and K. J. McMenamin (80-7-73). After the match the players, their wives, and friends were entertained at tea by Mr. A. F. Wright, president of the Canterbury District Law Society, and Mrs. Wright, the latter presenting the cup to the winner. The first name inscribed on the cup was that of Mr. E. J. Corcoran, of Kaiapoi, who was the winner in 1925, when the cup was presented for competition. Eight years later he tied with Mr. G. S. Branthwaite, for first place. Mr. A. T. Donnelly has won the cup twice, first in 1926, and again in 1932, when he himself was president of the society. Other winners were Messrs. D. E. Wanklyn (1927), T. A. Wilson (1928), G. W. C. Smithson (1929), C. A. Stringer (1930), R. L. Ronaldson (1931), and D. W. Russell (1934).

New Zealand Conveyancing.

By S. I. Goodall, LL.M.

Restrictive Covenants.

4. As to Leasehold Land.

(*Continued from p. 261*)

2. The Lessor's Estate.—The starting-point in this regard is that at common law neither the burden of the lessor's covenants nor the benefit of the lessee's covenants ran with the reversion, save that a grantee of the reversion might sue upon such obligations as were implied at law or were incidental to the relationship of landlord and tenant—*e.g.*, a covenant to pay rent: *Wedd v. Porter*, [1916] 2 K.B. 91.

(*a*) *The burden of the covenant.*—The immunity of the grantee of the reversion from liability to the lessee and his assigns continued at common law until 1540, when the statute 32 Henry VIII, c. 34, enacted that a lessee and his assigns should have the same remedy against the assignees of a lessor as the original lessee would have had against the lessor. This statute was defective; amongst other things it applied only to leases under seal, and, further, although the reversioner could sever and assign part of the reversion, there could not be a severance of a condition. Accordingly, the Property Law Act, 1908, s. 89 (1), provides, "The obligation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, in so far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, in so far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled."

This last statutory provision corresponds to s. 11 of the Conveyancing Act, 1881 (Imp.), since repealed and represented by the Law of Property Act, 1925 (Imp.), s. 142 (1). It has been held that the English provision applies only to covenants which touch and concern the land demised: *Davis v. Town Properties Investment Corporation*, [1903] 1 Ch. 797.

Adverting to Land Transfer land, a person taking a registered transfer of lease subject to an existing sublease has been held bound by a covenant in the sublease entitling the sublessee to remove buildings from the land: *Ostler v. Mayor of Levin*, (1912) 15 G.L.R. 254.

(*b*) *The benefit of the covenant.*—The occasion of the enactment of the statute of Henry VIII was the impossibility of enforcement of express covenants against lessees of the monastic lands by the persons to whom King Henry had regranted the reversions on the dissolution of the monasteries. The statute 32 Henry VIII, c. 34, also provided, therefore, that the assignee of a reversion should have the same right of enforcement of and suit upon covenants as the original lessor. This principle is restated with provision for severance of the reversion by the Property Law Act, 1908, s. 88 (1), corresponding to s. 10 of the Conveyancing Act, 1881 (Imp.), since repealed and represented by s. 141 of the Law of Property Act, 1925 (Imp.). Our own statutory provision reads, "Rent reserved by a lease, and the benefit of every covenant or provision therein having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein, shall be annexed and incident to and shall go with the reversionary estate in the land or in any part thereof immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and may be recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased."

This last-mentioned section likewise applies only to covenants which touch and concern the land demised. It also enables not merely a legal reversioner to sue, but any person for the time entitled, subject to the term, to the income of the land. Thus a mortgagor, not in default, of land under the Deeds system may have the benefit of the provision—*Turner v. Walsh*, [1909] 2 K.B. 484; or even an equitable assignee or a beneficiary under a trust—*Orr v. Smith*, [1919] N.Z.L.R. 818. Notice of the assignment of the reversion must be given to the lessee before suit by the new reversioner for rent: 4 & 5 Anne, c. 16; but not before enforcement of other rights: *Scaltock v. Harston*, (1875) 1 C.P.D. 106.

3. The Necessity for Privity.—For the purposes of enforcement of a covenant having reference to the land demised there must be privity of contract or privity of estate, or both, between the parties. "There are three relations at common law, which exist between the lessor and lessee and their respective assignees: first, privity of contract, which is created by the contract itself and subsists forever between the lessor and lessee; secondly, privity of estate, which subsists between the lessee, or his assignee in possession of the estate, and the assignee of the reversioner; and thirdly, privity of contract and estate which both exist when the term and reversion remain in the original covenantors. The statute 32 Henry VIII seems to have created a fourth relation, a privity of contract, in respect of estate, as between assignees. The statute annexes, or rather creates, a privity of contract between those who have privity of estate, and when one fails the other fails with it": *Bickford v. Parson*, (1848) 5 C.B. 920, 136 E.R. 1141, *per* Wilde, C.J.

The assignee of a lease is therefore liable to the reversioner upon such covenants as run with the land, his liability in point of time being co-extensive with his ownership of the lease: see *Churchwardens of St. Saviour's v. Smith*, (1762) 1 W. Bl. 351, 96 E.R. 195. The rule is not altered in the case of a transferee of a lease of Land Transfer land: *Wilson and King v. Brightling*, (1885) N.Z.L.R. 4 C.A. 4.

(*To be concluded*).

Of General Interest.—"This case illustrates several things, for example, the impropriety of selling and the folly of buying land of which the only road frontage is a merely "paper" road, the desirability of employing a solicitor to search and advise as to title *before* purchasing land, and the folly of building upon land before having obtained title thereto," *per* Callan, J., in *Ryder v. Arkle* (Auckland: October 8, 1935).

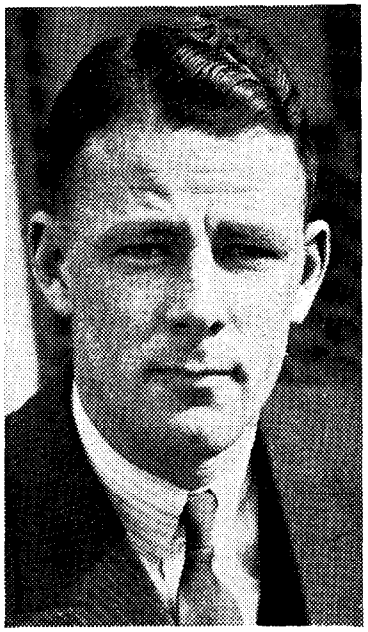
Doctorate of Laws.

Conferred on Dr. R. G. McElroy.

The degree of LL.D. has been conferred on Dr. Roy Granville McElroy, Ph.D., of Auckland, by the executive committee of the Senate of the University of New Zealand.

Dr. McElroy, who is a partner in the firm of Messrs. Lovegrove, George, and McElroy, received his secondary education at Thames High School and Auckland Grammar School and graduated at Auckland University College in 1928 with the LL.B. degree. The following year he gained the LL.M. degree with honours and was awarded the senior scholarship in contract and torts. For the following two years he was Associate to the Hon. Mr. Justice Smith.

In 1932 Dr. McElroy obtained the New Zealand University post-graduate travelling scholarship in law and proceeded to Cambridge University, where after two years' research he received the degree of Ph.D. in Law. Save in exceptional cases the University regulations prescribe a period of three years' research as a requisite for the degree.



Dr. R. G. McElroy, LL.D. (N.Z.) D. Ph. (Cantab.).

The award was made in respect of a thesis on "Impossibility of Performance of Contract," a branch of the law of contract which developed very rapidly during the Great War. In recent years the term "frustration" has come to be widely used to designate this branch of the law. This term has gained great currency following its use by the late Sir John Salmond in his notable text-book, *The Law of Contract.*

Dr. McElroy takes the view that the term "frustration" is one which is widely misunderstood at the present time, and he has ventured to differ from Sir John Salmond's conception of what this expression denotes. The thesis was very favourably commented upon by noted English authorities, one of whom described it as "an important contribution of real value to existing knowledge of a very difficult aspect of the law of contract," while another has written that Dr. McElroy has "formulated a coherent principle as the basis of a series of cases which had been treated by text-book writers as a mere haphazard collection, and in the process of formulation he has critically restated several propositions of law which, though frequently called into question, had not been properly elucidated." Dr. Winfield of Cambridge, and noted co-author with Sir John Salmond of *The Law of Contract* said, "His thesis for the Ph. D. was not only successful, but shewed a considerable margin beyond the standard of that degree."

A gracefully-worded appreciation of the value of Dr. McElroy's work is to be found in a footnote at p. 108 of the Jubilee number of *51 Law Quarterly Review*, issued in July last, in which Dr. Gutteridge, K.C., author of a notable article in that number reviewing the development of the law of contract during the past fifty years, acknowledges the use of materials contained in Dr. McElroy's thesis. Dr. Gutteridge, who is perhaps the foremost authority on commercial law in England today, elsewhere has written that Dr. McElroy's thesis "showed a power of analysis which is very rare and a degree of erudition which was surprising in a man of his age."

The present award by the New Zealand University is in recognition of the signal merit of this work, and of an amplification of it dealing with certain cognate topics and with the New Zealand law upon the subject.

Since the altered University regulations the degree has been awarded on only three occasions, the other two recipients being Dr. Craig, formerly Comptroller of Customs, and Dr. Cunningham, of Masterton.

"Libel!"

A Legal Play to be Produced in Auckland.

"No man may disparage or destroy the reputation of another"—so runs the opening sentence of that well-known work, *Odgers on Libel and Slander*; and nothing can so tend to destroy or disparage the reputation of a titled M.P. as a published allegation that he is an impostor, being in fact an ex-comrade-in-arms of the man he pretends to be. Without giving away the plot, this is the allegation on which Mr. Edward Wooll, of the Inner Temple, and Recorder of Carlisle, has based his play, *Libel*, which was such a success when performed in London last year.

It is a matter of interest to the profession to know that *Libel* will shortly be performed by the Auckland Catholic Repertory Society; and the fact that Miss Yselinde McVeagh, daughter of Mr. Robert McVeagh, is the talented producer, is a guarantee of the correctness of detail to be expected. The play depicts a trial in a Court of the King's Bench Division, on a summer afternoon, the next afternoon, and the morning of the day after, during which the facts of a strange and exciting story are slowly and with difficulty arrived at, the solution of the puzzle created by a series of coincidences being carefully preserved for the last moments of the hearing.

It will be refreshing for a lawyer to attend a play depicting a trial in which none of the rules of procedure is violated, and in which everything is well and correctly done by an author who has not only a keen sense of the dramatic, but also a sound knowledge of the law and practice of libel. The pleadings, which are formally opened by junior counsel, contain no skilfully-drafted innuendo; if they show that the defence contains the familiar "rolled-up plea," first made famous in *Penrhyn v. "Licensed Victuallers' Mirror,"* (1890) 7 T.L.R. 1, and debated ever since (for recent examples, see *Aga Khan v. Times Publishing Co.*, [1924] 1 K.B. 675, and *Sutherland v. Stopes*, [1925] A.C. 47, which rendered *Norton v. Bertling*, (1910) 29 N.Z.L.R. 1099, no longer law: *Williams v. Christchurch Press Co., Ltd.*, (unreported); *Gooch v. N.Z. Financial Times (No. 2)*, [1933] N.Z.L.R. 257), nothing turns on that. But the many incidents of the trial, which will interest as well as entertain members of the profession, include the inevitable introduction of and objection to hearsay, followed by the usual succinct explanation of the law of evidence to the witness, who, after accepting and appearing to appreciate the position, immediately resumes his hearsay narrative; the embarrassment of a junior at the absence of his leader; the enthusiasm of a foreign witness, who insists on assuming the role of an expert, though called on only to speak to facts; the usual exchange of courtesies between counsel, and some examples both of judicial wisdom and of judicial wit.

The author says, "This play is founded on a combination of facts, though the characters are entirely fictitious." This strikes one as worthy of a barrister familiar with the "rolled-up plea"—dissociating characters from facts reminds one of distinguishing allegations of fact from comments—and at the same time neatly qualifies the phrase common since the decision in *Jones v. Hulton and Co.*, [1910] A.C. 20.

Libel will be produced in the Concert Chamber of the Auckland Town Hall on November 1, 2, and 4.

Practice Precedents.

Originating Summons for Possession after Sale by Registrar.

Rule 550 of the Code of Civil Procedure (*Stout and Sim's Supreme Court Practice*, 7th Ed., 352) provides:

"Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to exercise any powers, whether statutory or otherwise, under any mortgage, or to redeem any mortgage, whether legal or equitable, may take out as of course an originating summons, returnable before the Court, for such relief of the nature or kind following as may by the summons be specified and as the circumstances of the case may require, that is to say:—

Sale, delivery of possession by the mortgagor, redemption, reconveyance, delivery of possession by the mortgagee, the exercise of any powers, whether statutory or otherwise, vested in the mortgagee under and by virtue of any such mortgagee.

The Court has jurisdiction under this rule to order *possession* to be given to a *mortgagee* who has sold the mortgaged land under the power of sale contained in the mortgage: *Monro v. McWilliams*, (1906) 26 N.Z.L.R. 574; but not where the mortgagee has purchased the property himself through the Registrar *and becomes* the *registered proprietor*: *Wellington Catholic Education Trust Board v. Cronin*, [1924] N.Z.L.R. 816.

It is important to note that the relationship of mortgagee and mortgagor must still exist before this remedy is available. Attention is directed to RR. 552 to 554 (inclusive) of the Code. Even though the only person to be served is the defendant, it is necessary to file a motion for directions.

The authority to issue, support, or attend the summons need not be filed before the hearing: see R. 545. A *declaration* of authority to act is not sufficient.

ORIGINATING SUMMONS.

IN THE SUPREME COURT OF NEW ZEALAND.

.....District.

.....Registry.

IN THE MATTER of the Judicature Act 1908 and the rules thereunder.

BETWEEN A.B. etc. plaintiff

AND

C.D. etc. defendant.

LET the above-named defendant C.D. attend before the Supreme Court of New Zealand at on day the day of 19 at 10.30 o'clock in the forenoon or so soon thereafter as counsel can be heard UPON THE APPLICATION of the above-named plaintiff A.B. FOR AN ORDER that the above-named defendant DO DELIVER UP to the plaintiff vacant possession of the dwellinghouse known as No. etc. erected upon all that piece of land situate in the City of containing one acre be the same a little more or less being part of Section etc. and being the whole of the land described in Certificate of Title Volume folio subject to etc. AND FOR SUCH FURTHER OR OTHER ORDER as in the circumstances may be just UPON THE GROUNDS:—

1. That the plaintiff by memorandum of mortgage numbered and registered in the Land Transfer Office at became the mortgagee of the said land.

2. That at the request of the plaintiff the Registrar of the Supreme Court of New Zealand at on the day of 19 caused the said land and dwellinghouse to be sold by public auction by virtue of and in exercise of the power of sale contained in the said memorandum of mortgage number .

3. That at the said sale the plaintiff became the purchaser of the said land and dwellinghouse at or for the price of £ being the estimated value thereof.

4. That the said defendant has refused and still refuses to deliver up vacant possession of the property aforesaid upon demand by the plaintiff.

AND UPON THE FURTHER GROUNDS appearing in the affidavit of filed herein.

Dated at this day of 19 .

Registrar.

This originating summons is issued by solicitor for the plaintiff whose address for service is at the office of the said at number etc.

This summons is directed to be served upon the defendant C.D.

Registrar.

NOTE:—Unless by consent, seven days' notice must be given defendant (R. 547) after service before hearing.

AFFIDAVIT OF IN SUPPORT OF SUMMONS.

(*Same heading.*)

I E.F. of the City of solicitor make oath and say as follows:—

1. That I am a solicitor in the employ of X.Y. solicitor for the plaintiff A.B. and am familiar with the proceedings herein.

2. That by memorandum of mortgage number dated the day of 19 and registered in the Land Transfer Office at the above-named C.D. of etc. mortgaged to the said A.B. all that piece of land situate in the City of containing one acre be the same a little more or less being part of Section etc. and being the whole of the land described in Certificate of Title Volume folio SUBJECT to etc. to secure to the said A.B. the repayment of the sum of £ [*words and figures*] together with interest on the said sum of £ at the rate of pounds per centum per annum as therein provided.

3. That the power of sale contained in the said memorandum of mortgage number became exercisable by the said A.B. by virtue of the default of the said C.D. in performance of the covenants of the said memorandum of mortgage number .

4. That on the day of the Registrar of the Supreme Court of New Zealand at at the request of the plaintiff A.B. caused the property aforesaid to be sold by public auction at in pursuance and by virtue of the power of sale aforesaid.

5. That at the said sale the said A.B. was the highest bidder and was declared the purchaser of the said property but that no transfer has yet been executed by the Registrar in favour of the mortgagee or any subsequent purchaser.

6. That acting on instructions I delivered to the said C.D. personally a notice requiring vacant possession of the said property immediately. Copy of notice is attached hereto marked "A."

7. That the said C.D. said he could not vacate the property as he was unable to find another suitable dwelling.

8. That the defendant has refused to deliver up vacant possession as demanded and still refuses to do so.

Sworn etc.

AFFIDAVIT OF SERVICE SUMMONS.

(*Same heading.*)

I E.F. of solicitor make oath and say as follows:—

1. That I am a solicitor employed by solicitor for plaintiff.

2. That the originating summons sealed herein a true copy of which is hereunto annexed and marked "B" was served by me on the said C.D. at by delivering a copy thereof under the seal of the Court to the said C.D. personally on the day of 19 .

3. That at the same time and place aforesaid I delivered to the said C.D. personally a copy of the affidavit filed in support of the said summons (a copy of which affidavit is hereto annexed and marked "C").

Sworn etc.

AUTHORITY TO ACT FOR PLAINTIFF.

(*Same heading.*)

I A.B. of etc. the above-mentioned plaintiff HEREBY AUTHORIZE you to appear and act as my solicitor in the proceedings by way of originating summons for possession brought by me against the said C.D.

Dated at this day of 19 .

C.D.

To X.Y., Solicitor, [*address*].

MOTION FOR DIRECTIONS.

(*Same heading.*)

Mr. of counsel for A.B. the above-mentioned plaintiff to move in chambers before the Right Honourable Sir Chief Justice of New Zealand at the Supreme Court-house at on day the day of 19 at 10 o'clock in the forenoon or so soon thereafter as counsel can be heard FOR AN ORDER giving directions as to service of the originating summons sealed herein.

Dated at this day of 19 .

Solicitor for plaintiff.

Certified pursuant to rules of Court to be correct.

Counsel moving.

MEMORANDUM :—His Honour is respectfully referred to R. 550 of the Code of Civil Procedure : *Stout and Sim's Supreme Court Practice*, 7th Ed., 352.

It is respectfully suggested that service of the summons on the defendant C.D. is sufficient.

By reason of a sale through the Registrar of the Supreme Court of New Zealand at on the day of 19 the plaintiff became entitled to possession of the property.

The Mortgagors and Tenants Relief Act, 1933, and its amendments do not affect this application.

The defendant refuses to give possession of the property to the plaintiff as demanded.

No transfer of the property to the purchaser has been executed.

Counsel for plaintiff.

ORDER FOR DELIVERY OF POSSESSION BY C.D.

(*Same heading.*)

day the day of 19 .

Before the Honourable Mr. Justice .

UPON READING the originating summons sealed herein and the affidavit of E.F. filed in support thereof and the affidavit of service filed herein AND UPON HEARING Mr. of counsel for the plaintiff and there being no appearance for or on behalf of the defendant C.B. THIS COURT DOTH ORDER—

1. That the above-named C.D. yield and deliver up vacant possession of all that piece of land containing [*set out full description of land*] together with the dwellinghouse thereon to the above-named plaintiff A.B. within seven days from service on him of this order.

2. That the costs of this summons and the proceedings herein be fixed at the sum of £ together with disbursement and be paid by the said C.D.

By the Court.

Registrar.

Rules and Regulations.

Native Purposes Act, 1931. Additional Regulations regarding the Arawa District Trust Board.—*Gazette* No. 68, September 26, 1935.

Fisheries Act, 1908. Fisheries Regulations amended, Alteration of Periods at which Toheroas may be taken.—*Gazette* No. 68, September 26, 1935.

Mortgagors and Tenants Relief Act, 1933.—Mortgagors Final Adjustment Act, 1934-35. Transferring certain Functions of the Supreme Court and of a Stipendiary Magistrate to the Court of Review of Mortgagors' Liabilities—*Gazette* No. 68, September 26, 1935.

Unemployment Amendment Act, 1932. Reduction in Rate of the Emergency Unemployment Charge.—*Gazette* No. 68, September 26, 1935.

Cook Islands Act, 1915. Regulation abolishing Export Duty on Copra exported from the Cook Islands, other than Niue.—*Gazette* No. 68, September 26, 1935.

Rotorua Borough Act, 1922. By-laws under the Act.—*Gazette* No. 68, September 26, 1935.

Noxious Weeds Act, 1908. Barberry (*Berberis vulgaris*) declared a Noxious Weed in the Waimarino County.—*Gazette* No. 68, September 26, 1935.

British Nationality and Status of Aliens (in New Zealand) Act, 1928. Amending Regulation under the Act.—*Gazette* No. 69, October 3, 1935.

Arbitration Clauses (Protocol) and Arbitration (Foreign Awards) Act, 1933. Rules of Court under s. 7 of the Act.—*Gazette* No. 69, October 3, 1935.

Samoa Act, 1921. Samoa Treasury Regulations Amendment Order (No. 2), 1935.—*Gazette* No. 69, October 3, 1935.

Fisheries Act, 1908. Taupo Trout-fishing Regulations, Amendment No. 6.—*Gazette* No. 69, October 3, 1935.

Health Act, 1920. Regulations as to Drainage and Plumbing applied to Kaikohe District and to Part of Waikato County.—*Gazette* No. 69, October 3, 1935.

Noxious Weeds Act, 1928. Convolvulus ("Convolvulus arvensis" and "Convolvulus sepium") declared to be a Noxious Weed within the Borough of Taihape.—*Gazette* No. 69, October 3, 1935.

Bills Before Parliament.

Coal-Mines Amendment Bill.—This Bill amends the Coal-mines Act, 1925, and authorizes the Government to purchase sell and store slack from coal-mines. Authority is also given for plant and transport facilities to be acquired for the purpose of converting the slack into effective fuel.

Colonial Light Dues Bill.—This Bill authorizes the collection in New Zealand on behalf of the United Kingdom Government of certain Colonial Light Dues payable to that Government.

The Immigration Restriction Amendment Bill.—The purpose of this Bill is to extend the duration of the Immigration Restriction Amendment Act, 1931, for one year to December 31, 1936.

That Act was intended to be a temporary emergency measure and confers on the Governor-General authority to make regulations restricting immigration while such restriction was considered in the public interest.

Police Offences Amendment Bill.—This Bill proposes to amend the Police Offences Act, 1927. Clause 2 repeals and re-enacts Section 32 of the principal Act (relating to the conversion of motor-cars and other vehicles). The clause provides that offences under the section may be triable either on indictment or summarily. Different punishments are provided where—

(*a*) The person charged is convicted on indictment.

(*b*) Where an accused elects to be tried summarily for an indictable offence and is convicted.

(*c*) Where an accused is convicted summarily of an offence which is not indictable.

A person charged with theft may be convicted of conversion under the section.

The Court may order compensation to be paid by a person convicted of conversion to the owner of the vehicle converted.

Clause 3 modifies s. 44 of the principal Act in relation to the payment of medical and hospital expenses by persons arrested in a state of drunkenness. Clause 4 creates an offence where a false allegation that a crime or other offence has been committed is made to a Police officer.

The Small Farms (Relief of Unemployment) Amendment Bill.—This Bill proposes to amend the Small Farms (Relief of Unemployment) Act, 1932-33. Clause 4 provides that existing titles shall be cancelled when land is acquired for small farms under the principal Act. Clause 6 gives an option to purchase to the lessee under s. 8 of the principal Act. Clause 10 extends the power given by s. 21 of the principal Act to make regulations.

Finance Bill.—Part I relates to salaries of public servants and effects an increase of seven and one-half per cent. in those salaries increased by the Finance Act (No. 2), 1934. The increase operates from August 1, 1935. Part II relates to pensions and effects an increase of all pensions paid by the State (with certain minor exceptions).

Government Railways Wellington to Johnsonville Bill.—Provision is made for transport in the Khandallah-Johnsonville district to be carried on solely by the Railways Department, either by electric trains or motor-vehicles. Obligations are imposed on the Railways Board to maintain an adequate service. Clause 19 authorizes payment of a subsidy from the Consolidated Fund into several State superannuation funds. Cl. 20 authorizes a grant to local authorities out of Main Highways Revenue Fund to be applied in relief of ratepayers in respect of lands used for farming purposes.

Law Practitioners Amendment Bill (reported from the Statutes Revision Committee).—Cl. 33 (relating to rights of solicitors to commence practice) is altered and now comes into force on May 1, 1939. It is also extended to provide that service in the legal branch of a Government Department shall constitute legal experience. Cl. 36, relating to restrictions on admissions of solicitors as barristers by virtue of practice, is now struck out. Cl. 38 is extended to remove restrictions on certain persons prohibited from charging for legal work done.