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"Nowadays, it is well recognized by everybody that the law is something which needs to be very carefully studied, not only for its practical working, but also for its improvement. The day is over when lawyers could pose as grand panjandrums, and lay down the law unchallenged. They must be criticized, and the proper people to criticize them are the lawyers themselves, whose constructive and earnest criticisms are likely to have the best results."

—LORD WRIGHT, M.R.

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Landlord's Consent to Alienation of a Lessee's Interest.

V. "REASONABLE" AND "UNREASONABLE" WITHHOLDING.

WE now pass to a consideration of the application of the principles to which we have drawn attention. The following decisions, while being illustrative, are by no means exhaustive of the relevant cases.*

A landlord may withhold his consent to an assignment because he objects to the use the proposed assignee intends to make of the premises proposed to be assigned, although that use is not forbidden by the terms of the tenancy or at law: *Premier Confectionery (London) Co., Ltd. v. London Commercial Sale Rooms Co., Ltd.*, [1933] Ch. 904; or, in relation to the lease of a farm, when he honestly believes that the proposed assignee is not fit to undertake the duties and obligations of a lessee on account of age and physical health, and bases his refusal on such belief: *In re Connor*, (1910) 30 N.Z.L.R. 437; or if the proposed assignee's references are not satisfactory: *Shanly v. Ward*, (1913) 29 T.L.R. 714; but he is to be given an opportunity for receiving replies to inquiries about the proposed assignee: *Cameron v. Nash*, (1900) 3 G.L.R. 107. In *White v. Akroyd*, [1919] N.Z.L.R. 813, Chapman, J., said that a landlord's consent was not unreasonably withheld when he had used his means of knowledge of the proposed assignee fairly, that he was not bound to hold an exhaustive inquiry, and that upon the material before him he had come honestly to the conclusion that the proposed assignee was not a desirable tenant.

A consent cannot be reasonably withheld because the lessor desires to regain possession of the premises before the termination of the term: *Bates v. Donaldson*, [1896] 2 Q.B. 241; or to enable him to become the purchaser of the reversion of the premises for his personal occupation: *In re Winfrey and Chatterton's Agreement*, [1921] 2 Ch. 7; while a "racial" objection to the proposed assignee is not in itself a reasonable ground for refusal to consent to an assignment to him: *Mills v. Cannon Brewery Co., Ltd.*, [1920] 2 Ch. 38 (a German); *Lempriere v. Burghes*, [1921] N.Z.L.R. 307, and *Wing v. Kensit*, (1921) 21 N.S.W. S.R. 464 (Chinese). Moreover, the fact that the landlord acts "under advice" does not negative unreasonableness on his part, and refusal of consent to assignment was held to be unreasonable when based upon the ground that the landlord had been advised that trade was, and was likely to be, depressed and the proposed assignee was a "foreign" company, though known to the landlord to be a solvent, responsible, and financially strong company incorporated in New South Wales and carrying on business successfully in the State where the demised premises were situated; in this case the refusal was considered especially unreasonable in view of the fact that the original lessee was a company; *Charles Atkins and Co., Ltd. v. Backhouse*, [1928] S.A.S.R. 179.

Where a tenant desires to sublet, it is unreasonable for the landlord to withhold his consent unless the subtenant enters into a direct covenant with him to pay the rent reserved by the headlease: *Balfour v. Kensington Gardens Mansions, Ltd.*, (1932) 49 T.L.R. 29; or, where the demised premises adjoined those occupied by the landlord as a cinematograph theatre, except on condition of the insertion in the sublease of a covenant not to use such demised premises for the purposes of a cinematograph theatre: *Premier Rinks, Ltd. v. Amalgamated Cinematograph Theatres, Ltd.*, (1912) 56 Sol. Jo. 536; but, where the landlord occupied part of a building and had let another part, with a common entrance, it was held not to be unreasonable for the landlord, before granting his consent to an underletting of such other part, to ask the purpose for which the portion to be underleased was to be used, and to require a similar covenant between the under-tenant and himself: *In re Spark's Lease, Berger v. Jenkinson*, [1905] 1 Ch. 456.

The mere fact that the lessee is committing a continuing breach of the covenant to repair expressed in the lease does not necessarily entitle the lessor to refuse his consent to an assignment, where the disrepair is not very serious: *Farr v. Ginnings*, (1928) 44 T.L.R. 249. In such a case the effect of the assignment would be that the lessor's position would be improved as he would retain his right to damages for breach of covenant against the lessee and would also have a right against the assignee to compel him to put the premises in repair under pain of forfeiture.

In the case of a sublease, the lessor is entitled to be told what is in substance the true nature of the transaction to which he is asked to assent. If the provisions of a sublease are reasonable and proper, then the lessor cannot refuse to give his consent because it was a sublease, but it by no means follows that the lessor is disentitled to withhold his consent because of the nature of the provisions it contains: *Fuller's Theatre and Vaudeville Co., Ltd. v. Rofe*, [1923] 435, 440; thus, where the sub-tenant proposed to use the premises in a manner which, in the landlord's opinion, would prejudicially affect the letting value of houses belonging to him in the vicinity, refusal of consent was reasonable: *Cartwright v. Russell*, (1912) 56 Sol. Jo. 467.

In *Governors of Bridewell Hospital v. Fawkner and Rogers*, (1892) 8 T.L.R. 637, consent was refused where the proposed assignee was the General of the Salvation Army, and such refusal of consent was held to be reasonable. This is an illustration of the withholding of consent on broad grounds which are important as between the lessor and other lessees, having regard to

* For conditions in which it has been held that consent is not required, notwithstanding a covenant not to assign, sublet, charge, or part with the possession of the demised premises, without consent, see *Garrow's Law of Real Property in New Zealand*, 3rd Ed., 544 *et seq.*

the relation of lessor and lessee *inter se*, or to the due and proper management of the property of which the lessee had cognizance. As Warrington, L.J., remarked in *Hould r Bros. and Co. v. Gibbs*, [1925] Ch. 575, 586, in referring to the *Bridewell* case,

> "what was there apprehended was damage to the lessor in respect of other properties of his; but the damage which was apprehended would have resulted, if it resulted at all, either from the personality of the proposed assignee, who was the General of the Salvation Army, or from the user to which he was likely to put the property."

In the *Bridewell* case, the user was personal rather to the landlord than to the tenant, but it had reference to the user by the proposed tenant of the property; and so that decision was not an exception to the principle enunciated in *Houlder Bros. and Co. v. Gibbs*. But in *Young v. Ashley Gardens Properties, Ltd.*, [1903] 2 Ch. 112 (where the landlord had given his consent subject to the condition that if the rateable value of the premises were increased by reason of the assignment, the lessee and the assignee would be liable for any such increase in outgoings), it was held that the landlord was not entitled to impose the condition or any proviso to the like effect, and that the lessee was entitled to assign his lease without any further consent. It is clear that this was a condition which the landlord attempted to impose, not in reference to the relation between himself and the lessee, or in relation to the property which was the subject of the lease, but one which was wholly personal to himself, as his attempt to obtain immunity from possible increase in the rates was wholly extraneous to the lessee or to the user of the property.

An interesting decision as to the effect of the importation of the proviso to be implied in leases by s. 19 (1) of the Law Reform Act, 1936, was that given in *Balfour v. Kensington Gardens Mansions, Ltd.*, (1932) 49 T.L.R. 29. The lease of a flat, dated September 10, 1930 (after the coming into force of the corresponding English provision), contained the following covenant by the tenant:

> "Not to assign, sublet, or part with the possession of the flat or any part thereof without the previous written consent of the lessors or their agent, such consent to any assignment or subletting to an individual not to be unreasonably withheld on proof being furnished of the respectability and financial responsibility of the proposed assignee or sub-tenant: Provided always that the lessors may as a condition of such consent to any assignment or sublease require the proposed assignee or sub-tenant to enter into direct covenants with the lessors to perform and observe all the covenants on the tenant's part herein contained, and non-compliance with such condition shall be deemed a reasonable ground for refusing such consent notwithstanding the respectability and financial responsibility of the proposed assignee or underlessee."

The impact of the implied statutory proviso on this covenant was felt when Macnaghten, J., held that the landlord's withholding of consent except on the terms that the proposed subtenant should enter into a direct covenant with them to pay the rent reserved by the lease was "unreasonable" as the proposed subtenant was a person of respectability and financial responsibility. The implied proviso, in the circumstances of the case, prevailed over the elaborate covenant expressed in the lease.

It must be remembered that where a lease contains a covenant against assigning, &c., without consent, the lessee must ask for such consent, even if he makes an assignment against which the lessor could make no reasonable objection; and omission to ask for the lessor's consent is not a mistake in respect of which equitable relief may be had against forfeiture for breach of covenant: *Barrow v. Isaacs and Son*, [1891] 1 Q.B. 417.

VI. The Lessee's Remedy on Refusal of Consent.

Another matter for consideration is the remedy of the tenant when, owing to the unreasonable withholding of consent of the landlord, he wished to complete the proposed assignment of his lease. In *Treloar v. Bigge*, (1874) L.R. 9 Ex. 151, Amphlett, B., observed that the covenant not to assign without license cuts down the lessee's common-law right; but, in the case of a covenant qualified by a provision against unreasonable refusal to consent, an unreasonable refusal returns the lessee to his common-law position. Adopting the reasoning of Amphlett, B., in *Sear House Property and Investment Society*, (1880) 16 Ch. D. 387, 392, Hall, V.C., said that he considered

> "the convenient construction is that the words be construed as not being in themselves a covenant to be enforced by damages, but as leaving the lessee to deal with the premises without restriction of the license of the lessor for permission to assign to a responsible and respectable tenant be unreasonably withheld."

Applying these judgments in *Joseph v. Belgrave*, (1881) N.Z.L.R. 1 S.C. 16, 20, where the relevant words of the proviso were "having regard to the solvency or respectability of the proposed assignee or sublessees," Johnston, J., said:

> "The true meaning of the covenant and proviso taken together seems to me to be this: that the lessor, desiring to protect himself against the chance of a bad or insolvent sub-tenant, insists upon a covenant by the lessee not to assign without consent, agreeing that the lessee shall be exonerated from that covenant if the lessor refuses to give his consent without a sufficient reason referring to the respectability or pecuniary responsibility of the assignee."

Consequently, if the landlord's refusal is unreasonable, the lessee's remedy is to disregard him, and assign without it: *Treloar v. Bigge* (*supra*), followed in *Richardson v. Hatrick and Merson*, (1908) 28 N.Z.L.R. 171.

One result of s. 19 of the Law Reform Act, 1936, is to nullify the decision of Sim, J., in *Blake v. Official Assignee of Rendall*, (1909) 11 G.L.R. 452, which was to the effect that where the stipulation that the lessor's consent was not to be unreasonably withheld was an independent covenant by the lessor, distinct from a covenant in the same lease by the lessee not to assign without consent, the lessee was not entitled to assign without consent if the consent were unreasonably refused, and that the lessee's only remedy was an action for damages or specific performance: and see, to similar effect, *Ideal Film Renting Co., Ltd. v. Nielsen*, [1921] 1 Ch. 575. Now, the implied proviso is to be read into all leases, "notwithstanding any express provision to the contrary."

Finally, it must be observed that there is no opportunity given for contracting out or negativing the express proviso to be implied in all leases by Part VII of the Law Reform Act, 1936. The words

> "notwithstanding any express provision to the contrary."

seem, therefore, to nullify any qualification in existing covenants, such as "such consent shall not be withheld if it be proved to the lessor's satisfaction that the proposed assignee or sub-tenant is a respectable, solvent, or responsible person or body." The effect of the section, is, therefore, to limit the landlord to withholding his consent on grounds that will satisfy the Court that it is, in the circumstances, "reasonable," which renders the withholding of consent more difficult for him than under the extended provisos hitherto inserted in leases.

Summary of Recent Judgments.

COURT OF APPEAL
Wellington.
1936.
Sept. 30; Oct. 16.
Reed, A.C.J.
Ostler, J.
Blair, J.
Kennedy, J.
Callan, J.

THE KING v. BOYD.

Criminal Law—Receiving—Evidence—Admissibility—Evidence of Possession of Other Goods to prove Guilty Knowledge—"Found in the possession of the accused"—Crimes Act, 1908, s. 284 (2) (*a*).

Section 284 of the Crimes Act, 1908, contemplates proof of the possession at a then past date of property dishonestly obtained.

The words "found in the possession of the accused" in subs. 2 (*a*) of that section, which is as follows,

(2) Where any one is being proceeded against for a crime under this section, the following matters may be given in evidence to prove guilty knowledge, that is to say,—

(*a*) The fact that other property obtained by means of any such crime or acts as aforesaid was found in the possession of the accused within twelve months of the time when he was first charged with the crime for which he is being tried: . . .

means that somebody has discovered the goods by means of some sense, such as feeling or seeing or even smelling them, so long as the person so finding is able to say what they were and that they were in the possession of the accused.

Counsel: Singer, for the prisoner; **C. H. Taylor,** for the Crown.

Solicitor: Crown Law Office, Wellington, for the Crown.

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

COURT OF APPEAL.
Wellington.
1936.
Oct. 9, 16.
Reed, A.C.J.
Ostler, J.
Blair, J.
Kennedy, J.
Callan, J.

INGRAM v. FITZGERALD.

Negligence—Master and Servant—Surgical Operation—Negligence of Nurse in Operating-theatre—Injury to Patient—Whether Operating Surgeon vicariously liable.

F., a surgeon, on being consulted by I., advised that she should undergo at the same time two distinct operations, the second of which involved an abdominal incision; he suggested that she should enter a named private hospital for such purpose; and she and her husband made the necessary arrangements with that hospital to do so. In due course she was suitably prepared for the operation before being taken into the operating theatre, where F., his assistant surgeon, and the anaesthetist were present, as well as the theatre sister, and one, and at times two, assistant theatre sisters, all members of the nursing staff of the hospital, and engaged and paid and provided by the hospital in the ordinary course. Each sister was qualified and had sufficient experience properly to undertake the work which fell to her duty to discharge in the theatre.

In the course of the first operation iodised phenol (iodine containing carbolic acid) was used for cauterizing purposes by F., and after such use it became the duty of one of the assistant sisters to remove the beaker containing it outside the theatre or to a safe place. Instead, she returned it to a tray which held a similar beaker containing tincture of iodine and to the spot where the stock iodine was kept. The first operation continued for about forty minutes after the iodised phenol was used.

After the first operation, F. and his assistant surgeon proceeded to scrub up and regown, this taking about fifteen minutes. While they were so engaged the two assistant sisters placed the patient in the position required for the second operation, and, upon an indication from the anaesthetist, the assistant sister who had previously handled the iodised phenol proceeded to paint the abdomen of the patient. Instead of painting the patient with (as she thought) plain tincture of iodine, the sister actually used the iodised phenol, with the result that the patient was badly burned. The sister's error was discovered by F. very soon after it had occurred and prompt measures were taken by him.

I. claimed damages against F. After evidence had been given, the case was removed into the Court of Appeal for argument. It was explicitly admitted that F. was not personally negligent, and it was taken as a fact that I., through the sister's negligence, was painted with iodised phenol instead of with tincture of iodine. The question for the Court of Appeal was whether F. was vicariously liable for the sister's negligence.

E. J. Anderson, for the plaintiff; **Calvert,** for the defendant.

Held, That, in the circumstances, the sister, in discharging the duty of painting, was neither the servant of the operating surgeon, nor was she in a position analogous to that of a servant doing work as his servant or agent; and that accordingly he was not vicariously liable for her negligence.

Perionowsky v. Freeman, (1866) 4 F. & F. 977, 176, E.R. 873, and **Van Wyk v. Lewis,** [1924] App. D. (S. Af.) 438, applied.

Hillyer v. Governors of St. Bartholomew's Hospital, [1909] 2 K.B. 820, and **Logan v. Waitaki Hospital Board,** [1935] N.Z.L.R. 385, distinguished.

Solicitors: Webb, Allan, Walker, and Anderson, Dunedin, for the plaintiff; **Brugh, Calvert, and Barrowclough,** Dunedin, for the defendant.

Case Annotation: *Perionowsky v. Freeman*, E. & E. Digest, Vol. 34, p. 548, para. 56; *Hillyer v. Governors of St. Bartholomew's Hospital, ibid.*, p. 550, para. 87.

SUPREME COURT.
Wellington.
1936.
Sept. 15, 16, 17, 23.
Smith, J.

IN RE A LEASE, WELLINGTON CITY CORPORATION TO WILSON.

Landlord and Tenant—Covenant for Renewal—Relief granted to Lessees—Fixation by Court of Ground Rental—Test for determining Nature and Amount of same as between Freeholder and Prudent Lessee.

After an order has been made under the Property Law Amendment Act, 1928, granting relief to the lessees against a refusal of the lessor to grant a new lease of a city lot, a further order provided that a new lease should be given "at the full improved ground rental (as defined in the lease) to be determined" by the Supreme Court.

The ground rental was defined in the lease as follows:—

"In ascertaining such new rental the valuers shall not take into consideration the value of any buildings or improvements then existing upon the said demised premises, but they shall value the full and improved ground rental of the said premises that ought to be payable during the said new term."

On application to the Court to fix such rental,

O'Shea, and **Marshall,** for the lessors; **Treadwell,** and **James,** for the lessees.

Held, 1. That in determining such rental the valuers must proceed on the basis that there are no buildings on the land, and ascertain what a prudent lessee would give for the ground rental of the land for the term, and on the conditions mentioned in the lease.

Drapery and General Importing Co. of New Zealand, Ltd. v. Mayor, &c., of Wellington, (1912) 31 N.Z.L.R. 598, followed.

2. That the proper course for ascertaining who is a prudent lessee is to judge the character of the prudent lessee in relation to the particular premises by inferring from the evidence what the parties expected that a lessee would do with the particular site.

3. That the nature of the ground rental between the freeholder and a building lessee can only be represented—omitting the influence of improvements in determining it—by a moderate

rate of interest on the capital invested by the lessor, which, where the lessor lets unimproved land to a building lessee, is only the capital value of the unimproved land.

4. That the lessor must take the ground rental which a reasonable but prudent lessee thinks it proper to give.

Solicitors: **The City Solicitor,** Wellington, for the lessor; **Treadwells,** Wellington, for the lessee.

SUPREME COURT. Wellington. 1936. Nov. 2. *Myers, C.J.*

HAYES v. UNION STEAM SHIP COMPANY OF NEW ZEALAND, LIMITED.

Master and Servant—Hiring of Crane for Particular Service—Injury caused while in Hirer's Service to Hirer's Employee—Hirer not liable to such Employee.

H., a waterside worker, employed by the defendant in the discharge of cargo from a ship owned by the defendant, was making up slings in the hold when the wire of the ship's gear, in which the ball of the crane was entangled, struck him. The defendant hired the crane from the Wellington Harbour Board for the purposes of the unloading operations. The crane was the property of the Wellington Harbour Board and was operated by a craneman of the Wellington Harbour Board's employ.

In an action for damages,

F. W. Ongley, for the plaintiff; **C. G. White,** and **James,** for the defendant.

Held, nonsuiting the plaintiff, That at the time of the accident the craneman was the servant of the Harbour Board and not of the defendant, which could not be liable for his negligence, if established, or for any defect in the crane if the accident had thereby been caused.

McCartan v. Belfast Harbour Commissioners, [1911] 2 I.R. 143, and **Ainslie (or Kerr) v. Leith Harbour and Docks Commissioners,** [1919] S.C. (Ct. of Sess.) 676, followed.

New Zealand Shipping Co., Ltd. v. Wellington Harbour Board, (1914) 33 N.Z.L.R. 1403, referred to.

Solicitors: **Ongley, O'Donovan, and Arndt,** Wellington, for the plaintiff; **C. G. White,** Wellington, for the defendant.

Case Annotation: For *Ainslie (or Kerr) v. Leith Harbour and Docks Commissioners*, see E. & E. Digest, Vol. 34, p. 155, para. 1216 vii; and for *McCartan v. Belfast Harbour Commissioners*, see Supplement No. 11, title *Master and Servant*, para. 1770 iv.

SUPREME COURT. Dunedin. 1936. Aug. 24; Sept. 10; Oct. 28. *Kennedy, J.*

W. L. GRAY AND SON v. SOUTH ISLAND MOTOR UNION MUTUAL INSURANCE ASSOCIATION.

Insurance—Motor-vehicles—"Passenger-service vehicle"—Conditions necessary for the Exclusion of Motor-vehicle from Definition—Contract of Carriage excluding or modifying Owner's liability to pay Damages—No Bar to Claim against Owner or Insurance Company by injured Passenger for Hire—Transport Licensing Act, 1931, s. 2; Motor-vehicles Insurance (Third-party Risks) Act, 1928, ss. 3, 6.

In order that a motor-vehicle may be excluded from the definition of "passenger-service vehicle" in s. 2 of the Transport Licensing Act, 1931, all three excluding conditions in that section must be contemporaneously satisfied.

The purpose of the Motor-vehicles (Third-party Risks) Act, 1928, is that the insurance against liability to pay damages on account of the death of any person or of bodily injury being sustained or caused through or by or in connection with the use of a motor-vehicle in New Zealand, subject to the exceptions and limitations specified in s. 6 thereof, is that the insurance should constitute a fund available for the payment of the person injured.

The passenger for reward in a motor-vehicle is not prevented from claiming against the owner or the insurance company by reason of the fact that the contract of carriage excluded or modified the liability of the owner or of any other person to pay damages in respect of accidents due to the negligence or wilful default of the owner, his servants, or agents.

To imply that if the motor-vehicle were illegally used, the person injured might claim if a stranger, but not if he or his employer were contractually associated with the owner of the vehicle, however innocent of knowledge of the illegality such injured person might be, would be to frustrate the full attainment of the purpose of the statute.

Counsel: **W. D. Taylor** and **D. A. Solomon,** for the plaintiff; **J. S. Sinclair** and **A. I. Wood,** for the defendant.

Solicitors: **Adams Bros.,** Dunedin, for the plaintiff; **Tonkinson and Wood,** Dunedin, for the defendant.

NOTE:—For the Transport Licensing Act, 1931, see THE PUBLIC ACTS OF NEW ZEALAND (REPRINT) 1908-1931, Vol. 8, title *Transport*, p. 832; and for the Motor-vehicles Insurance (Third-party Risks) Act, 1928, *ibid.*, p. 822.

SUPREME COURT Wellington. 1936. Aug. 18; Sept. 3, 30. *Johnston, J.*

COURT OF APPEAL Wellington. 1936. Oct. 9, 12, 16. *Reed, A.C.J.* *Ostler, J.* *Blair, J.* *Kennedy, J.* *Callan, J.*

BENNETT v. BENNETT.

Divorce and Matrimonial Causes—Separation as a Ground of Divorce—"Agreement for separation . . . in full force and effect"—Degree of Separation requisite to create Statutory Right to Divorce—Divorce and Matrimonial Causes Act, 1928, s. 10 (i).

The question as to what degree of separation must be maintained to create a statutory right to divorce must be settled, not by the intentions of the parties, but by the words of the statute interpreted in the light of the legislative policy which dictated its enactment.

To entitle a person to a decree on the ground provided by s. 10 (*i*) of the Divorce and Matrimonial Causes Act, 1928—*viz.*,

> "That the petitioner and respondent are parties to an agreement for separation, whether made by deed or other writing or verbally, and that such agreement is in full force and has been in full force for not less than three years,"

it must be shown that the spouses have separated by their mutual agreement at least three years before the date of the petition, and that throughout those three years they have completely and without interruption adhered to their agreement to separate.

Where it was shown that there were intermittent acts of sexual intercourse between the spouses subsequently to their entering into an agreement for separation, the petitioner was held to have failed to establish the statutory ground upon which her petition was based.

Mason v. Mason, [1921] N.Z.L.R. 955, applied.

Rowell v. Rowell, [1900] 1 Q.B. 9, and **O'Callaghan v. O'Callaghan,** (1904) 6 G.L.R. 534, distinguished.

So held by the Court of Appeal (*Reed*, A.C.J., *Blair*, *Kennedy*, and *Callan*, JJ., *Ostler*, J., dissenting) affirming the judgment of *Johnston*, J., dismissing the petition.

Counsel: **J. D. Willis,** for the appellant; **C. H. Taylor,** for the Solicitor-General, intervening.

Solicitors: **Nielsen and Willis,** Wellington, for the appellant; **Crown Law Office,** Wellington, for the Solicitor-General, intervening in the suit.

Case Annotation: *Rowell v. Rowell*, E. & E. Digest, Vol. 27, p. 246, para. 2172.

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

Charitable and Non-charitable Purposes.

The Trustee Amendment Act, 1935, considered.

By E. C. Adams, LL.M.

Last year the New Zealand Legislature enacted a most important amendment to the law of trusts. I refer to s. 2 of the Trustee Amendment Act, 1935, which reads as follows :—

> (1) No trust shall be held to be invalid by reason that some non-charitable and invalid as well as some charitable purpose or purposes is or are or could be deemed to be included in any of the purposes to or for which an application of the trust funds or any part thereof is by such trust directed or allowed.
>
> (2) Any such trust shall be construed and given effect to in the same manner in all respects as if no application of the trust funds or any part thereof to or for any such non-charitable and invalid purpose had been or should be deemed to have been so directed or allowed.
>
> (3) This section shall not apply to any trust declared before or to the will of any testator dying before the passing of this Act.

This provision is obviously intended to prevent trusts from failing where a testator or settlor intending a charitable trust includes objects, which, in the eyes of English law, are not charitable, although a layman perhaps would regard them as charitable. Undoubtedly, it is intended to deal with such cases as *In re Catherine Smith, Campbell v. New Zealand Insurance Co., Ltd.*, [1935] N.Z.L.R. 299 (affirmed on appeal by the Judicial Committee of the Privy Council*), and *In re Knowles, Brown v. Knowles*, [1916] N.Z.L.R. 83, [1917] A.C. 393.

Briefly, the effect of the above two cases is that a trust for charitable or benevolent purposes is bad—the word "benevolent" not being synonymous with "charitable." In future by reason of s. 2 above quoted such a trust will be good, for now

> "it shall be construed and given effect to in the same manner in all respects as if no application of the trust funds or any part thereof to or for" benevolent purposes "had been or should be deemed to have been so directed or allowed."

In both of those cases "charitable" purposes were mentioned by the testators. And I think that the intention of the Legislature is to validate intended trusts only where charitable purposes are mentioned by the testator or settlor; the specific charitable purpose is not necessary but there must be disclosed at least a general charitable intention.

But has the Legislature gone further than this, and validated intended trusts where charitable purposes have not been mentioned, but where a testator or settlor has use a term which is wider than charitable but which would include, *inter alia*, objects charitable in the eyes of the law? In other words, has the Legislature abrogated the rule in such well-known cases as *Morice v. Bishop of Durham*, (1805) 10 Ves. 522, 32 E.R. 947, which decided that a bequest for "such objects of benevolence and liberality as the trustee in his own discretion shall most approve," could not be supported as a charitable legacy?

Some benevolent and liberal objects are undoubtedly charitable—*e.g.*, trusts to relieve poverty. Following the section literally, could it not be said that "benevolent objects" could be deemed to include "non-charitable and invalid purposes," as well as "charitable purposes?"

The reason why I think that the Legislature has not abrogated the rule in *Morice v. Bishop of Durham* is that the ground upon which the trust failed in that case was that the words were *too indefinite*: see *In re Smith, Public Trustee v. Smith*, (1932) 48 T.L.R. 44, 47, per Lord Hanworth, M.R. It is a general rule of English law that a trust will not be enforced, unless the persons or objects to be benefited thereby are *certain*, the only exception being trusts which disclose a general charitable intention: see, for example, *Houston v. Burns*, [1918] A.C. 337.

I do not think that the New Zealand Legislature intended to alter this general rule. I think that s. 2 of the Trustee Amendment Act, 1935, must be intended to apply only to cases where there is a definite charitable trust expressed or where there are words which in their legal sense connote a general charitable intention. It may be that the New Zealand Legislature is dealing only with the other class of cases mentioned by the Master of Rolls in *In re Smith, Smith v. Public Trustee* (*supra*)—*i.e.*, where the trust instrument deals with *alternative* purposes.

> "From time to time you find cases in which you have, as in *In re Macduff, Macduff v. Macduff*, [1896] 2 Ch. 451, a bequest of money to some one or more purposes, charitable or philanthropic, and it is held that they must be treated as alternative purposes and that such a bequest is not good because the alternative was given to those who had to determine how the bequest should be made use of to denote it to philanthropic purposes; and there are many philanthropic purposes which cannot be held to be charitable . . . "

It seems that before s. 2 of the Trustee Amendment Act, 1935, can operate there must be more than one class of purposes enumerated in the trust instrument. If no alternative is given to the trustees, the section may not apply. I think that the Courts will still hold that such words as "benevolent" or "philanthropic" objects or purposes are too vague to be enforced.

However, I notice the following marginal note: "*cf.* 1928, No. 3754, s. 131, Victoria."

The statutory predecessor of the present Victorian provision was s. 79 of the Trusts Act, 1915, which has twice been judicially considered, but only apparently by a Court of first instance: *In re Griffiths, Griffiths v. Griffiths*, [1926] V.L.R. 212, and *Re Bond, Brennan v. Attorney-General*, [1929] V.L.R. 333. In both cases the statutory provision was successfully invoked, but I do not think that it can be inferred from them that the Legislature has gone so far as to abrogate the well-known rule in *Morice v. Bishop of Durham* (*supra*).

In re Griffiths, Griffiths v. Griffiths (*supra*) was a clear case of a discretion being given to the trustees between non-charitable objects (and therefore uncertain objects) and objects undoubtedly charitable. The testator directed his trustees to divide one-fourth of his estate "amongst other persons than my said near relatives and/or charitable institutions or organizations." The trust could not be enforced in favour of "all other persons than the near relatives," on the grounds of uncertainty, but the section operated to save the gifts to the charitable institutions or charitable organizations, the Court holding that the word "charitable" governed the word "organizations" as well as "institutions."

Now *Re Bond, Brennan v. Attorney-General* (*supra*), undoubtedly goes much further. The words of the will

*In the course of their judgment, their Lordships said that they "find themselves so fully in agreement with the views expressed by the learned Chief Justice and his colleagues in the majority in the Court of Appeal, and in particular by Johnston, J., in his brief but very lucid judgment, that it would be superfluous to repeat what has already been so well said."

were: "All my other properties to be disposed of and given to the blind and their children." After holding that a gift to the blind of a particular district, or to the blind *simpliciter*, was a good charitable gift, Cussen, J., applied s. 79 of the Trusts Act, 1915, and interpreted the will as if the words "and their children" were omitted. But in so doing he issued a warning: "I am not to be taken as saying that in every case where there is a gift for charitable purposes, and the word 'and' is used in connection with some other object, s. 79 would validate the gift." Therefore the applicability of the statutory provision to such cases where the trustee has no discretion to apply the whole fund to either charitable or non-charitable purposes exclusively, but is bound to apply it to both, will have to be considered. The rule in equity was that such a fund had to be apportioned equally between the charitable and non-charitable purposes; the gift as to one-half for charitable purposes was good, but as to the other half it was invalid: see the interesting judgment of Salmond, J., in *Nelson Diocesan Trust Board v. Attorney-General*, [1924] G.L.R. 259.

However, in both Australian cases after the deletion of the words which were void, because they were uncertain, there remained words creating a charitable trust. If in the case of *Morice v. Bishop of Durham* the uncertain words are deleted, you have no trust left.

Although s. 2 of the Trustee Amendment Act, 1935, has been designed to prevent the repetition of such costly litigation as must have been involved in such cases as *Knowles's* and *Campbell's*, and to prevent the wishes of donors from being frustrated by the unfortunate mingling of such words as "benevolent" and "philanthropic," with the more technical term "charitable," I venture to predict that that section will itself be the cause of litigation in the future.

Value of the Country Practitioner.—"Some five or six weeks ago I was drifting on a beautiful southern sea under a lovely sky round a beautiful and historic country. As I went I heard the distant sound of shells, and saw great columns of smoke arise from devastated buildings. I could not help contrasting the comparative peace and prosperity of this country with the miseries of Spain, and I could not help thinking of our own two professions, and the extent to which the stability and peace of this country depend upon them, and upon the equal administration of justice," said Sir Claud Schuster, K.C., recently. "I also thought how much of our peace and stability depend on the quiet, honest effort of the provincial solicitor in his own office with his own client, not in the light of open Court, but behind closed doors, where he is answerable for his client's interests only to himself and to his conscience. I reflected how little the people at large realize that the welfare of the two professions depends on the sense of the debt which each member of them owes, not to the Judge who sits above, not to the client who does not know enough to judge, but to himself and to the duties which he took upon himself when he was called or admitted. The Law Society and the provincial societies exist primarily to uphold a high standard of honour among the members of the profession, but they cannot do so unless, from the commonsense and the common sense of honour of Englishmen generally, that professional sense of honour is generated and maintained."

New Zealand Law Society.

Council Meeting.

(*Continued from p. 298.*)

Agency Costs: Request for Ruling.—The Otago Committee forwarded the following report:—

"We have considered the question of Agency charges referred to the New Zealand Law Society for a ruling by the Auckland Law Society and subsequently submitted to us by the New Zealand Law Society for our report.

"The facts as stated show that the Transfer and Mortgage were more closely related than usual by reason of the fact that the Vendor was also the mortgagee in the subsequent mortgage. We consider, however, that for purposes of the ruling required the transactions must be considered as separate transactions.

"It seems to us that the place for completion of both transactions was the Land Transfer Office, Auckland: See Ruling No. 116. It follows, therefore, that the Vendor should pay his own Agency costs incurred in Auckland (Supplemental Ruling No. 25), and that if the mortgagee company having its registered office in Taumarunui employs a solicitor in Auckland to stamp and register the mortgage the Agency charges so incurred may be added to the scale fee (Ruling No. 148), and are payable by the purchaser in the capacity of mortgagor.

"We have no definite information as to where the settlement actually took place; but, even if the Transfer were handed to the solicitor for the time being acting for the mortgagee for stamping and registration, no charge should be made against the mortgagor for the stamping and registration of the Transfer (Ruling No. 151).

"We are of opinion that the purchaser in the capacity of mortgagor should pay only the Agency charges properly incurred on the stamping and registration of the mortgage.

"Dunedin, Aug. 14, 1936." A. E. GASCOIGNE, P. S. ANDERSON, F. B. ADAMS, A. I. W. WOOD."

The report was adopted.

Audit Regulations: Revision.—The Secretary reported that each District Society had been asked for its comments on the present Regulations, and that he had prepared and circularized a memorandum incorporating these comments and dealing with each of the Regulations. The Audit Committee, together with a committee appointed by the Accountants Society, would be considering the proposed amendments in the near future.

It is intended to circulate a draft of the new Regulations before they are finally adopted.

Costs on Sale of Property for Overdue Rates.—The Secretary of the Municipal Association of New Zealand wrote, drawing attention to the variation in the practice of Supreme Court Registrars in dealing with solicitors' costs arising out of the sale of property for overdue rates. The New Plymouth Registrar, for example, had ruled that the Borough Council was not entitled to receive from the proceeds of the sale any costs other than the costs on judgment and a reasonable agency fee to the date of sale. Inquiries made from other Registrars indicated a wide divergence of practice, and it was therefore suggested that the Law Society might confer with the Justice Department with a view to obtaining uniform action among the Registrars.

After some discussion, it was decided to take no action in the matter.

Admission as Solicitor: Examination Requirements.—The Solicitor-General wrote, asking for the views of the Society concerning a letter received in connection with the Law Professional Examinations. The writer

f such letter stated that, by Regulations made in 1926, the syllabus was altered by including some cultural subjects, but students were allowed until 1930 to complete under the old Regulations, under which he himself needed only Latin to complete the examination. He sat for this subject in 1930, but failed, and finally passed in 1932, but could not be admitted as a solicitor until he passed the additional subjects. He therefore asked if the Government could alter the Regulations to allow him to be admitted without further examination.

It was decided that the Society could not support the request.

Advertising by Solicitors: Broadcasting.—The Otago Society wrote as follows:—

"Enclosed is a copy of a letter received from Mr. —— who is employed as a law clerk by a Dunedin firm. He has been admitted but no practising fee is paid for him.

"The matter was referred to my Council at a meeting held on the 20th instant. I was instructed to forward to Mr. —— a copy of the rules laid down by the Wellington District Law Society and published in their Annual Report, 1933, and recently adopted by the Council of this Society, and to inform him that in the opinion of the Council he is a "practitioner" for the purposes of the Rules.

"In accordance with Mr. ——'s request, my Council has referred the matter to the New Zealand Law Society for a ruling with a recommendation that the above Rules should be adopted by the New Zealand Society and promulgated and that the word "practitioner" should be amplified to include admitted but not practising barristers and solicitors."

Letter Enclosed:—

"Further to my conversation with you of recent date relative to the publication of my name over the radio in connection with a series of law lectures I propose giving, I would respectfully ask you to approach the Otago Law Society with a view to obtaining a ruling as to the scope of the motion passed by the Society disapproving, *inter alia*, the publication of a barrister's or solicitor's name over the air while giving legal lectures.

"I would respectfully refer you to 'The Annual Practice,' at p. 2676, where, under the heading 'Miscellaneous,' para. 2, the following words appear: 'a non-practising barrister may allow the publication of his name and, if he thinks fit, of his photograph,' also to p. 2665 where "Practising barrister" is defined as '. . . a member of the Bar who is entitled to practise and who holds himself out as ready to do so.'"

"'The question I particularly wish answered is this: "Is a qualified and admitted clerk who is working in a legal office, but not paying practising fees, covered by this motion?"

"'I would suggest that, if possible, a ruling on the matter be also obtained from the New Zealand Law Society.'

Extract from the Annual Report for 1933 of the Wellington District Law Society:

"*Advertising by Solicitors.*—Pursuant to the motion carried at the last Annual Meeting of the Society, the Council has given consideration to various matters which may be considered to constitute advertising by solicitors. It is obviously impossible to lay down strict rules to cover all possible breaches of the fundamental principle that practitioners should not either directly or indirectly seek to advertise themselves in their professional capacity. The Council, however, desires to express its disapproval of the following matters to which its attention has been expressly directed:—

1. Voluntarily supplying to the Press reports of or concerning cases in which the practitioner has been engaged.
2. Supplying to the Press before trial information as to writs having been issued, and in particular supplying the name of the practitioner concerned.
3. Voluntarily supplying to the Press reports or information concerning the settlement of cases which have not been called in open Court in the presence of Press representatives.
4. Voluntarily supplying to the Press reports of or extracts from legal or quasi-legal addresses or lectures delivered by practitioners.
5. Causing such last-mentioned addresses or lectures to be reprinted and circulated amongst any section of the public.
6. Causing articles published in legal periodicals to be reprinted and circulated among any section of the public.
7. Voluntarily supplying to the Press any information concerning practitioners' own professional movements or activities.
8. Broadcasting addresses on any legal or quasi-legal subject unless done anonymously.
8. When broadcasting addresses on any non-legal subject, introducing into such address any reference to the lecturer's profession.

The Council hopes that, attention having been drawn to these matters, there will be no further cause of complaint in the future."

After the President had expressed the view that the Wellington rules might well be adopted by the N.Z. Law Society and apply to all qualified persons, it was decided to place on the Order-paper for the next meeting the question of the adoption of these rules.

Commission on Collection of Interest.—The Southland Society wrote, suggesting the advisability of fixing a rate of commission on the collection of mortgage interest, and stating that a commission of 5 per cent. would be reasonable. They enclosed the following report for the information of the Council:—

"The sub-committee appointed to consider this matter finds that although the scales of the Public Trust and the Trustee Companies all provide for commission at the rate of 5 per cent. on rent and mortgage interest up to £500 per annum and further that at least some Land Agents in Invercargill have been charging 5 per cent. for the collection of mortgage interest the rate chargeable by solicitors is usually 2½ per cent. For most solicitors the collection of interest involves other work for which no charge is made—*e.g.*, keeping relative insurances renewed, inspections, preparation for tax purposes of lists of interests collected, inquiries to ascertain if rates and interest under prior mortgages are paid, &c.

"The Public Trust Office was formed for the public service and is not intended to be a profit-making business. No doubt some system of costing is applied in its various activities so that its scale as now in force can be taken as evidence of the rate of commission which must be charged to enable the collecting department of the business to carry its share of the office overhead apart from any question of profit.

"The sub-committee considers that in most cases 2½ per cent. is too low a scale to be adequately remunerative in itself, and that the Council would be justified in fixing the scale at 5 per cent. for rent and mortgage interest up to £500 and 2½ per cent. over that amount, and requesting members to observe this scale except in the following special circumstances: (1) Where the annual amount collected is so large and so easily collected that a lower rate would be adequately remunerative; (2) where the mortgagee's circumstances are such that a charge of 5 per cent. would involve hardship.

"The fact that a mortgagee has always been charged a rate lower than 5 per cent. in the past should not be deemed a special circumstance entitling him to any reduction. There is no reason why an undercharge should be continued indefinitely. It is considered that if the scale were thus increased members would not lose business, as mortgagees during the last few years have been made to realize that they get their interest paid more promptly when they have a solicitor collecting it than when they employ anyone else. Even if mortgagees decided to collect their own interest or appointed land agents or accountants to do so they would, in cases of trouble, have to go back to their solicitors to have the necessary legal action taken. In some cases an increase in the rate of commission might result in benefit to the mortgagee in that more time and effort could be given to the collection of his interest.

"Most interest nowadays is payable quarterly and not half-yearly as in the past, which means there is double the work of sending notices, letters, receipts, cheques, statements, and book-work, and in case of default as often happens double the number of overdue notices to send."

It was decided to inform the Southland Society that it was considered impracticable to adopt any uniform rate, and that the matter must be left to the individual practitioner.

(To be concluded.)

New Zealand Conveyancing.

By S. I. Goodall, LL.M.

1. Deed of Assignment by Way of Gift from Widow of a Testator of her Equitable Life Interest under her Husband's Will to the Children who are entitled in remainder.

2. Memorandum of Transfer by Way of Gift from Widow (Administratrix) of a Deceased of her own One-third Interest in Land to the Children together with the Two-thirds Interest to which they are entitled upon the Intestacy.

1. Deed of Assignment by Way of Gift from Widow of a Testator of her Equitable Life Interest under her Husband's Will to the Children who are entitled in Remainder.

This deed made the day of 19 between A.B. of Widow (hereinafter called "the donor") of the one part and C.B. [*spinster*] D.B. [*married woman*] and E.B. [*merchant*] all of (hereinafter together called "the donees") of the other part

Whereas F.B. of &c. (hereinafter called "the testator") by his last will bearing date the day of 19 after appointing W.X. and Y.Z. both of &c. (hereinafter called "the trustees") to be executors and trustees thereof and bequeathing certain pecuniary legacies gave devised and bequeathed all the rest residue and remainder of his estate both real and personal of whatsoever kind and wheresoever situate unto the trustees upon trust for sale conversion and investment as therein mentioned and to pay the income therefrom to the donor during her life and after her death upon the further trust for the donees in equal shares

And whereas the testator died at on or about the day of 19 without having revoked or altered his said will probate whereof was granted to the trustees by the Supreme Court of New Zealand at on the day of 19 under No. /19

And whereas the testator left him surviving his widow the donor and [*three*] children and no more namely the donees all of whom have attained the age of twenty-one years.

And whereas the said estate of the testator is now represented by the property and assets standing in the names of the trustees and more particularly set out in the Schedule hereto.

And whereas the life interest of the donor under the said will in the estate of the testator is estimated to be of the value of £ as shown by the Statement L under the Death Duties Act 1921 relating to the said estate filed by the trustees as executors of the said will in the office of the Assistant Commissioner of Stamp Duties at

And whereas the donor is desirous of making a gift to the donees of her said life interest under the said will in the estate of the testator.

And whereas all debts duties testamentary expenses and legacies in the said estate of the testator have been duly paid and discharged

Now this deed witnesseth as follows:—

1. In consideration of the natural love and affection of the donor for the donees the donor doth hereby convey assign and release unto the donees all that the said recited life or other interest of the donor under the said will in the estate of the testator to hold the same unto the donees as tenants in common absolutely.

2. The donees do hereby declare that the equitable life estate and interest hereinbefore conveyed shall merge and be extinguished in the equitable estate and interest in remainder of the donees under the said will in the estate of the testator to the intent that the donees shall henceforth be entitled in equity to the entirety of the said estate of the testator as tenants in common in equal shares.

In witness &c.

SCHEDULE.

Signed &c.
Signed &c.

2. Memorandum of Transfer by Way of Gift from Widow (Administratrix) of a Deceased of her own One-third Interest in Land to the Children together with the Two-thirds Interest to which they are entitled upon the Intestacy.

Under the Land Transfer Act 1915.

Whereas A.B. of Widow (hereinafter called "the transferor") is registered as proprietor of an estate in fee-simple subject however to such encumbrances liens and interests as are notified by memoranda underwritten or endorsed hereon in all that &c.

And whereas the transferor is so registered as aforesaid as the administratrix of the estate of C.B. of &c. (hereinafter called "the deceased") by virtue of transmission pursuant to letters of administration granted to the transferor by the Supreme Court of New Zealand at on the day of 19 under No. /19

And whereas the deceased died at intestate on or about the day of 19 and by virtue of the provisions of the Administration Act 1908 the transferor his widow and the following persons (being all the children of the deceased) namely D.B. [*spinster*] E.F. [*married woman*] and G.B. [*merchant*] all of (hereinafter collectively called "the transferees") are as the successors of the deceased in the course of distribution of the said estate of the deceased entitled to the said land in the shares or proportions of one-third to the transferor and two-thirds to the transferees.

And whereas all debts duties funeral and testamentary expenses in the estate of the deceased have been duly paid and discharged

And whereas the transferor is desirous of making a gift to the transferees of the transferor's one-third share in the said land and contemporaneously transferring to the transferees their own two-thirds share therein.

Now therefore in pursuance of the premises and in consideration of natural love and affection the transferor doth hereby transfer to the transferees as tenants in common in equal shares all her estate and interest in the said parcel of land above described.

In witness &c.
Signed &c.
Signed &c.

Australian Notes.

By WILFRED BLACKET, K.C.

Treasure Trove.—On November 4, 1935, W. H. Knight found in the bathroom of the People's Palace, Pitt Street, Sydney, conducted by the Salvation Army Auxiliary Co. of Australia, Ltd., a wallet containing £58. He took it to the manager, who for many months endeavoured to find its owner. Then Knight, claiming to be entitled as against all but the true owner, sued the company in Sydney District Court for the amount. The defendant insisted on its right as owner of the premises to hold the money on behalf of its owner. In argument on this point of law the cases cited were *South Staffordshire Water Co. v. Sharman*, [1896] 2 Q.B. 44; *R. v. Rowe*, (1859) Bell C.C. 93; *Scarborough v. Cosgrove*, [1905] 2 K.B. 805, and *Bridges v. Hawkesworth*, (1851) 21 L.J.Q.B. 75. Curlewis, J., nonsuited the plaintiff. I have given full particulars of the facts because the £58 was in New Zealand notes, but please don't all speak at once.

The Licensee's Right to Transfer.—In the paragraph under this heading on p. 255 *supra*, I referred to the legal conflict of opinion between the Licensing Court and His Honour Judge Curlewis and anticipated some interesting happenings in the future; but Berry, the licensee, having been legally evicted, the battle-ground was changed, for the owners then applied for a transfer of the license to their nominee under s. 37 (2), and this application (which was exactly within the terms of the subsection) was granted on application for prohibition by Berry, and also by Kessell and Scurlatt, the owners. The Full Court held that the Licensing Court was entitled to act under its statutory powers, leaving to other Courts the determination of any contractual or fiduciary rights that the parties might have.

Solicitors' Fidelity Guarantee.—Under the New South Wales Legal Practitioners Amendment Act, 1935, which is, in the main, a copy of the New Zealand Law Practitioners (Solicitors' Fidelity Guarantee Fund) Act, a question arose as to whether a claim could be made against the Fund by a client who had not prosecuted the defaulting solicitors to conviction. Mr. Justice Maxwell, to whom the matter had been referred, thought that such prosecution would be necessary in ordinary cases; but, as in the case in consideration the solicitor was dead, such prosecution had not been possible. The view taken by the Institute was that proof of prosecution could be waived if the solicitor were dead, or had absconded, or had been prosecuted to conviction for default in his dealings with other clients.

The point is of tremendous importance, for since the passing of the local Act, the number of defaulting solicitors in this State has been so great and their total defalcations so enormous that it seems certain that the Fund will be inadequate for the reimbursement of all victimized clients.

The Statutory Committee appointed by the Act referred to and thereby empowered to deal with, and adjudicate upon, complaints preferred against solicitors held its first sittings recently. In the case of Digby Hunt where the charge was that he had misappropriated trust moneys, the order was that he should be struck off the roll; and Ronald Duncan was suspended from practice for six months and ordered to pay certain costs on account of certain professional misconduct. In the case of Norman Caldwell, the facts were, it is to be hoped, very unusual. One, Potts, was suing the Hemp Corporation for wages and Caldwell agreed to act for him upon the terms that Potts would pay 20 per cent. of any sum recovered from the defendant and that Potts should give four £20 promissory notes to Caldwell which were to become immediately payable if Potts should fail to prosecute his claim or should settle it with the defendant. Caldwell was able to satisfy the committee that he did not know that this agreement was champertous until he was so advised by counsel appearing for him upon the inquiry. He was censured by the committee and ordered to pay the costs of all parties, and it was further ordered that the promissory notes should be burnt in the presence of the Secretary of the Institute.

Up the Flue.—Mrs. Ferrari of Katoomba, N.S.W., deserves all the sympathy that misfortunes such as hers may claim. She had received £2,500 from her brother under such circumstances that the Court of Equity after his death decreed that she must restore all securities and moneys included in it to his executrix, and should pay over at once the sum of £1,026 in cash. She had discounted a mortgage, one of these securities, and had carefully put the proceeds, £966 in notes, in a brown-paper bag under the mattress of a bed. Then she went away from home for a few days, and her husband, needing some fuel to boil some water in the copper, naturally went to the mattress and took from under it some papers and without noticing that these were £100 bank-notes used them in the fire. She was thus prevented from paying any part of the £1,026 and was made bankrupt by the executrix. The Registrar on her examination rather rudely told her that he did not believe her story about the fire under the copper nor the strange mistake about the notes, but that if she could think out a much better one he would hear it later. He also wants to know why she transferred her home and furniture to her husband when he was on his deathbed, and why he had not left her anything under his will. Mrs. Ferrari appears always to have been a woman of affairs, but it seems likely that she will find that being a bankrupt is the most interesting occupation in which she has so far been engaged.

Those Simple Remedies.—Archibald Siddell, a retired bank manager, died at Sydney at the age of 82, having by his will directed that his body before interment should "be tested for death by placing capsicum or cayenne on the eyeballs." Bees and bulldog ants do not seem to have occurred to him. It is stated that throughout his long life he was a vehement advocate of brandy and salt for the cure of the body, but it is not quite clear whether the salt was to be used before or after death.

Prevision.—At Brisbane, R. H. Andrews was fined £20 for having an unlicensed pistol in his possession, and it was stated that charges of false pretences were pending against him. From the fact that a card found in his pocket showed that he was a financial member of the "Ancient, Reckless, and National Association of Liars" and by virtue of such membership was entitled to tell lies throughout 1936, it would seem that he rather expected to be involved in some Court work during that year.

Poor Peter!—Peter Collier of Melbourne, metal turner, who earned £4 8s. a week and gave every penny of it to his wife, used to ride to his work on a bicycle; but he greatly disliked doing so on the nasty cold wet windy mornings, which are not so rare as to be unusual in that metropolis. Frequently he asked his wife for money for train fare, but she would not give him any; and so at last he sold his bike, and told her it must have been stolen. She insisted on his reporting the theft to the police, but upon inquiry they discovered that he had sold it, and charged him with having caused a public mischief by giving false information of a crime. He was fined £5—but everyone, even his own wife, was very sorry for him.

Oh Mary!—Mary Soper, married, of Ivanhoe (Vic.), had £1,660 in the bank and £2 10s. in her purse when she stole some women's clothing from Myer's Emporium in Melbourne. "The little more, but ah! how much it is"—and in so writing, I am quoting Browning from memory, but I am sure of my accuracy in describing the theft as "the little touch that means so much." It meant, *inter alia*, £10 in the fine awarded.

Christchurch Practitioners at Golf.

W. J. Hunter Cup.

The annual handicap stroke competition for the W. J. Hunter Cup took place at the Shirley Links, Christchurch, on Dominion Day. "Lawyers, stern and grim, who took their golf very seriously, lawyers, gay and inconsequent, out for their yearly jaunt round the course, were present in record numbers," said the *Press* (Christchurch) in recording the event. Mr. Justice Northcroft and the three city Magistrates were also present.

The visitors and their friends were welcomed by Mr. A. S. Taylor, president of the Canterbury Law Society, and Mrs. Taylor, and entertained by them at tea served in the clubhouse.

When the last card was handed in, Mr. Taylor thanked the Christchurch Golf Club for the use of the links, and Mrs. Taylor presented the Hunter Cup to the winner of the match, Mr. Ivan Wood.

A putting competition for the women guests was won by Miss Betty Smithson.

Some Authority.—"We have been referred to *Croft v. Lumley*, (1857) 6 H.L. Cas. 672, but, having regard to the ultimate decision, that case is no authority for anything except that very great and very learned lawyers may differ," said Greer, L.J., with Slesser, L.J., concurring and having nothing to add, in *Wilkins v. Carlton Shoe Co., Ltd.*, (1930) 94 J.P. 207, 209. The Judges responsible for the determination of this important and seemingly negative authority were Lord Campbell, C.J., in the Court of first instance; Cresswell, Williams, and Chowder, JJ., Pollock, C.B., and Alderson, B., and Martin, B., in the Exchequer Chamber (5 E. & B. 682); and Lords Chelmsford, L.C., Cranworth, and Wensleydale, with Coleridge, Wightman, Erle, and Williams, JJ., Martin, B., Crompton, B., Bramwell, B., Watson, B., and Channell, B., in the House of Lords, the original judgment being affirmed in both places.

Legal Literature.

Oh Law! By JULIUS HOGBEN. Pp. 126. Auckland: Unity Press, Ltd.

This series of broadcast talks given by the author during the past few years provides an interesting programme of excursions along the byways of English law from the time of Aethelbert, King of Kent. These talks are necessarily written for relaying to the popular ear, and the curiosities of the law are grouped under their appropriate subject-matter, such as "Husbands and Wives," "Lawyers," "Parsons," "Physicians, Quacks, and Surgeons." The author is to be complimented on his extensive research and on the sustained interest, spiced with humour, which pervades his pages, none of which is ever dull. The book is in pocket-size format, and is pleasantly produced.

Summary of the Law Relating to Land Surveying in New Zealand (Exclusive of Town-planning and of Local Acts). By E. M. KELLY. Pp. 169. Wellington: New Zealand Institute of Surveyors (Inc.).

This, as the title-page states, is a handbook for the use of Survey students. The author, who is a solicitor, has made no attempt to make a legal text-book of it, but it provides a useful index to the rules of law which a surveyor requires to observe in the course of his professional work. While the case-law cited is by no means exhaustive, New Zealand decisions have been used to illustrate the text. An index and a table of cases and of statutes would have rendered the work of use to practitioners, but unfortunately these are omitted.

Famous Murders. By GEORGE A. BIRMINGHAM. Pp. 848. London: Chatto and Windus.

The twenty-three famous murders which are recalled in the pages of the book are given a popular treatment in distinction from the more scientific analysis appearing in the familiar volumes of the *Notable Trials* series, published by Messrs. William Hodge and Co., Ltd., which the author acknowledges as his sources. Canon Hannay in his introduction applies himself to finding an answer to the question: Why do people like reading crime stories, and especially murder stories? After a full discussion of the answers given by readers in various walks of life, he thinks the best answer is the simple one, that we like crime stories, exactly as children like ghost stories—because of the thrills. It is interesting to note Canon Hannay's preference for Wilkie Collins's *The Moonstone*, as "The best detective novel of all," since we know that Mr. E. C. Bentley's *Trent's Last Case* is the chosen favourite of most writers of fiction. The charming style of the author of *Spanish Gold* and a shelf-full of other novels, is fully displayed in these pages, in which he ranges through the Courts from 1671 to 1911. He is always to be relied upon for a good story, and, given the facts of the murder-cases with which he deals here, it is unnecessary to add that he makes the most of the story-telling.

Practice Precedents.

Motion for Special Leave to Adduce Further Evidence on Appeal to Court of Appeal.

Rule 5 of the Court of Appeal Rules provides, *inter alia*, that the Court of Appeal on appeal from a judgment after trial "shall admit further evidence . . . on special grounds only."

Rule 15 of the same Rules provides the size of paper on which an appeal is to be made. It also provides that the number of the lines on each page of the case is to be 47 (in 12 pt. type), each line being $5\frac{3}{4}$ inches or 146 millimetres in length, and every fifth line shall be numbered in the margin.

Rule 13 (*a*) provides that all cases on appeal shall be printed; but *in these applications* it is common to type the motion and affidavits. Seven copies only are required to be furnished to the Court, and in the majority of cases typed documents are supplied—that is to say, an original typed copy and six legible carbon copies.

With regard to these applications the Court is not inclined to infringe the principle which prescribes extreme caution in admitting evidence on an appeal to the Court of Appeal. The reasons upon which that principle is based have often been stated: see *Union Steam Ship Co. v. Hobbs*, (1893) 12 N.Z.L.R. 103.

In *Corry v. Paterson* special leave to adduce further evidence on appeal was allowed, and the learned Judge who had sat in the Court below also sat in the Court of Appeal to consider the application for leave. In the Court of Appeal judgment it was said that the discovery since the trial in the Court below of a document which was evidence of joint ownership in the horse "Croupier," gave an entirely new complexion to this litigation. His Honour, the learned trial Judge said that, had this document been admitted to proof in the Court below, he would have been obliged to decide that, taken in conjunction with the other evidence, it established that the horse was owned jointly by appellant and respondents.

In the recent case of *Gower v. Cornford*, p. 291, *ante*, it was laid down that it is necessary that the Rule that fresh evidence may be admitted in the Court of Appeal on special grounds only should not be rendered nugatory by too wide an application of these words. It is only in very exceptional circumstances that the Court of Appeal will permit further evidence to be called on appeal where the appellants fail to show that such evidence could not have been obtained by the exercise of due diligence, as, in *Gower's* case, by sealing an order for discovery.

Hereunder is a form or precedent which includes a form of endorsement.

ENDORSEMENT.

No.

IN THE COURT OF APPEAL OF NEW ZEALAND.

BETWEEN

A.B. etc. APPELLANT

AND

C.D. etc. RESPONDENT.

Notice of Motion for Special Leave to Adduce Further Evidence on Appeal.

X
Solicitors for Appellant (City).
Y
Solicitors for Respondent (City).

Demy quarto paper and no other form must be used.

The Notice of Motion is folded lengthwise down the middle and is then endorsed on the upper portion as above.

The inside of the Motion—*i.e.*, within the fold (the covering page of the Motion itself)—is set out in the following manner:—

IN THE COURT OF APPEAL OF NEW ZEALAND.

No.

BETWEEN

A.B. etc. APPELLANT

AND

C.D. etc. RESPONDENT.

Notice of Motion for Special Leave to Adduce Further Evidence on Appeal.

X
Solicitors for Appellant (City).
Y
Solicitors for Respondent (City).

NOTICE OF MOTION FOR SPECIAL LEAVE TO ADDUCE FURTHER EVIDENCE ON APPEAL.

No.

IN THE COURT OF APPEAL OF NEW ZEALAND.

BETWEEN A.B. etc. Appellant
AND C.D. etc. and others Respondents.

TAKE NOTICE that Counsel for the above-named Appellant WILL MOVE this Honourable Court on day the day of 19 at 11 o'clock in the forenoon or so soon thereafter as Counsel can be heard FOR AN ORDER granting special leave to read and adduce in evidence the affidavits of and UPON THE HEARING of the appeal herein UPON THE FOLLOWING SPECIAL GROUNDS:

1. That the evidence was not within the knowledge of the Appellant at the time of the hearing of this action in the Supreme Court and that the Appellant did not become aware of the said evidence until on or about the day of 19 .
2. That the facts to be proved by the fresh evidence have a strong and distinct bearing on the case and could not have been given at the hearing of this action in the Supreme Court before the Honourable Mr. Justice on the day of 19 .
3. That it is just and equitable that such special leave as aforesaid should be granted by this Honourable Court.
4. That irreparable injury will be done to the Appellant if such special leave as aforesaid is refused by this Honourable Court.

Dated at this day of 1936.

Solicitor for the Appellant.

TO The Registrar of The Court of Appeal of New Zealand, Wellington

AND TO The above-named Respondents and their Solicitors Y.

NOTE.—(Every five lines is to be numbered—5, 10, and so on.)

AFFIDAVIT IN SUPPORT.

(*Same heading.*)

I, A.B., of the City of , Engineer, make oath and say as follows:—

1. That I am the Appellant in the above-mentioned appeal.
2. That on or about the day of 19 I was advised that one "O" who had bought 100 acres of land for £4 per acre at the sale on the day of 19 of the Estate by Q. as Mortgagee on day of 1935 had applied for a revaluation of the said land under the Valuation of Land Act and that such valuation had been made on the day of 1936.
3. That I was not possessed of this information at the hearing of this information on the day of 1936.

4. That hereto attached and marked "A" is a certified copy of the valuation referred to herein.
SWORN etc.

Exhibit "A"—Set out Certificate of Valuation.

AFFIDAVIT IN SUPPORT OF MOTION.

(*Same heading.*)

I, K. of , Solicitor, make oath and say as follows :—

1. That I am Solicitor for the above-named Appellant.

2. That on the day of 19 Mr. of Land Agent informed me that a block of land comprising 100 acres purchased by "O" at £4 per acre at the sale on the day of 19 by Q. as Mortgagee was valued under the Valuation of Land Act, 1908 and its amendments at approximately £3 15s. 0d. per acre and that such valuation was made on the day of 19 that is to say prior to the date of hearing of the action.

3. That I verily believe that the facts desired to be proved by reading and adducing in evidence the affidavit of filed herein have a strong and distinct bearing on the case.

4. That the facts contained in the said affidavit were not known and could not reasonably have been known or given in evidence at the hearing of the action in the Supreme Courts on the day of 19 .

5. That it is equitable and just that evidence of the facts should be read and adduced in evidence upon the hearing of the appeal herein.

6. That irreparable loss and injury will result to the Appellant if the special leave sought is not granted.
SWORN &c.

ORDER GRANTING LEAVE.

(*Same heading.*)

Before The Right Honourable Sir Chief Justice of New Zealand.
The Honourable Mr. Justice .
The Honourable Mr. Justice .
day the day of 19 .

UPON READING the Notice of Motion for leave to read and adduce in evidence the affidavits of and filed herein AND UPON READING the said affidavits filed herein AND UPON HEARING Mr. of Counsel for the Appellant and Mr. of Counsel for the Respondent THIS COURT DOTH ORDER that leave be and the same is hereby granted to the Appellant to read and adduce in evidence before the Court of Appeal the said affidavits AND IT IS ORDERED that (order as to costs).

By the Court.

Registrar.

Public Acts Passed, 1936.

1. **Reserve Bank of New Zealand Amendment Act, 1936.** April 8.
2. **Government Railways Amendment Act, 1936.** April 27.
3. **Employment Promotion Act, 1936.** May 15.
4. **Labour Department Amendment Act, 1936.** May 15.
5. **Industrial Conciliation and Arbitration Amendment Act, 1936.** May 15.
6. **Industrial Conciliation and Arbitration Amendment Act, 1936.** June 8.
7. **Factories Amendment Act, 1936.** June 8.
8. **League of Nations Sanctions Regulations Confirmation Act, 1936.** June 1.
9. **Transport Licensing Amendment Act, 1936.** June 8.
10. **Imprest Supply Act, 1936.** June 8.
11. **Shops and Offices Amendment Act, 1936.** June 8.
12. **State Advances Corporation Act, 1936.** June 8.
13. **Distress and Replevin Amendment Act, 1936.** June 11.
14. **Fair Rents Act, 1936.** June 11.
15. **Broadcasting Act, 1936.** June 11.
16. **Finance Act, 1936.** July 31.
17. **Regulations Act, 1936.** July 31.
18. **Motor-vehicles Amendment Act, 1936.** July 31.
19. **Prevention of Profiteering Act, 1936.** August 12.
20. **National Art Gallery and Dominion Museum Amendment Act, 1936.** August 12.
21. **Civil List Amendment Act, 1936.** August 19.
22. **Judicature Amendment Act, 1936.** August 21.
23. **Political Disabilities Removal Act, 1936.** August 21.
24. **Imprest Supply Act (No. 2), 1936.** August 21.
25. **Southland Electric-power Supply Act, 1936.** August 27.
26. **Pensions Amendment Act, 1936.** September 4.
27. **War Pensions Amendment Act, 1936.** September 4.
28. **Family Allowances Amendment Act, 1936.** September 4.
29. **Local Elections and Polls (Temporary) Amendment Act, 1936.** September 4.
30. **Agricultural Workers Act, 1936.** September 18.
31. **Law Reform Act, 1936.** September 18.
32. **Fisheries Amendment Act, 1936.** September 18.
33. **Mortgagors and Lessees Rehabilitation Act, 1936.** October 1.
34. **Land and Income Tax Amendment Act, 1936.** October 6.
35. **Land and Income Tax (Annual) Act, 1936.** October 6.
36. **Finance Act (No. 2), 1936.** October 13.
37. **Appropriation Act, 1936.** October 12.
38. **Railways Authorization Act, 1936.** October 16.
39. **Main Highways Amendment Act, 1936.** October 16.
40. **Industrial Efficiency Act, 1936.** October 29.
41. **Post and Telegraph Amendment Act, 1936.** October 29.
42. **Geneva Convention Act, 1936.** October 29.
43. **Protection of British Shipping Act, 1936.** October 29.
44. **Education Amendment Act, 1936.** October 29.
45. **Workers Compensation Act, 1936.** October 29.
46. **Naval Defence Amendment Act, 1936.** October 31.
47. **Agriculture (Emergency Powers) Amendment Act, 1936.** October 31.
48. **Wool Industry Promotion Act, 1936.** October 31.
49. **Reserves and Other Lands Disposal Act, 1936.** October 31.
50. **Hospitals and Charitable Institutions Amendment Act, 1936.** October 31.
51. **Coal-mines Amendment Act, 1936.** October 31.
52. **Thames Harbour Act, 1936.** October 31.
53. **Native Land Amendment Act, 1936.** October 31.
54. **Local Legislation Act, 1936.** October 31.
55. **Chatham Islands County Council Empowering Act, 1936.** October 31.
56. **Native Purposes Act, 1936.** October 31.
57. **Dentists Act, 1936.** October 31.
58. **Statutes Amendment Act, 1936.** October 31.
59. **Shipping and Seamen Amendment Act, 1936.** October 31.

New Books & Publications.

Underhill's Law of Partnership. Fifth Edition. Edited by Milner Holland, B.C.L., M.A. (Butterworth & Co. (Pub.) Ltd.). Price 12/6d.

Trust Accounts, Fifth Edition. By Pretor W. Chandler. (Butterworth & Co. (Pub.), Ltd.) Price 21/-

Tax Avoidance. By Leonard Stein and Herbert Marks. (Sweet & Maxwell, Ltd.). Price 10/6d.

The Tichborne Case. By Lord Maugham. (Hodder & Stoughton). Price 21/-.

The Tithe Act, 1936. By E. Lawrence Mitchell. (Land Agents' Society). Price 2/3d.

The Housing Act, 1936. By Leslie Maddock. (Eyre & Spottiswood). Price 15/-.

Summary of the Law Relating to Land Surveying in New Zealand (Exclusive of Town-planning and of local Acts): A Handbook for the use of Survey Students, by E. M. Kelly. (N.Z. Institute of Surveyors, Inc.). Price 21/-.

Oh Law! By Julius Hogben. (Unity Press, Ltd.). Price 2/6d.

The King's Justice, 1936 (Temple). Price 1/6.

Conveyancing, Land, and Probate Costs. Second Edition. By A. C. Calton. (Stevens & Sons.) Price 10/6.

Elementary Principles of the English Law of Contract. By R. Masuzima, LL.D. (Sweet & Maxwell.) Price 8/6.