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"An Act of Parliament can do no wrong, though it may do several things which look pretty odd."

—HOLT, L.C.J., in *City of London* v. *Wood*, (1701) 12 Mod. Rep. 669, 687; 88 E.R. 1592, 1602.

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A Defect in the Legitimation Act, 1908.

IN the recent judgment, *In re Davey (deceased)*, *Public Trustee v. Wheeler*, [1937] N.Z.L.R. 58, there is demonstrated a striking difference between the English statute retrospectively legitimizing children born out of wedlock on the subsequent marriage of their parents and the New Zealand statute-law on the subject. As the result, distinct hardship has to be borne by a person who at the time of hearing was legitimate in England but illegitimate in New Zealand, with the result that the Court had to declare that he is not entitled to share in a bequest by his grandmother to her grandchildren.

The facts, so far as material to this discussion, were that the testatrix, who was domiciled in New Zealand, died at Auckland in October, 1928, leaving a will made earlier in the same month, of which probate was granted. By cl. 2 of the will, the sum of £1,000 was given and bequeathed by the testatrix to such of her grandchildren as should be living at her death, and, if more than one, in equal shares. She left five grandchildren, four of whom were legitimate, and consequently within the legal definition of "grandchildren": see (1936) 12 N.Z.L.J. 317. The fifth, L., with whom we are concerned, was born in England on January 30, 1910, his parents then being unmarried; but they were married in England on February 18, 1911. The parents came to New Zealand, returning from time to time to England, and from 1919 until August, 1925, they resided with their two children in New Zealand. The mother then visited England and did not return to New Zealand until November, 1926. During her absence, the father left New Zealand for Melbourne, in January, 1926, with another woman. On December 7, 1927, the mother obtained a decree of divorce in New Zealand on the ground of her husband's adultery, and the custody of the two children was given to her.

On January 1, 1927, the Legitimacy Act, 1926 (Eng.) (*2 Halsbury's Complete Statutes of England*, 25), came into force. Section 1 provided as follows:

> (1) Subject to the provisions of this section, where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of this Act, the marriage shall, if the father of the illegitimate person was or is at the date of the marriage domiciled in England or Wales, render that person, if living, legitimate from the commencement of this Act, or from the date of the marriage, whichever last happens.
>
> (2) Nothing in this Act shall operate to legitimate a person whose father or mother was married to a third person when the illegitimate person was born.

It is provided by the Schedule to the Act that persons so legitimated may be re-registered, so as retrospectively to record as legitimate the birth of a person already registered; but by cl. 4,

> The failure of the parents or either of them to furnish information as required by this schedule in respect of any legitimated person shall not affect the legitimation of that person.

Section 8 (1) provides that where the parents of an illegitimate person marry, and the father was or is, at the time of the marriage, domiciled in a country other than England or Wales, by the law of which the illegitimate person became legitimated by virtue of the marriage, that person, if living, is to be recognized in England and Wales as having been so legitimated from the date of the marriage.

None of the parties to the present proceedings disputed the fact that L. became legitimate in England and Wales on January 1, 1927, by virtue of the provisions of s. 1 (1) (*supra*) and of s. 12 (3), which limited the operation of the statute to England and Wales, unless as otherwise expressly provided therein.

At the date of the death of the testatrix, L. had not been legitimated under the provisions of the Legitimation Act, 1908 (N.Z.), s. 2 of which provides:

> Any child born before the marriage of his or her parents (whether before or after the coming into operation of this Act), whose parents have intermarried or hereafter intermarry, shall be deemed on the registration of such child as hereinafter provided to have been legitimated by such marriage from birth, and shall be entitled to all the rights of a child born in wedlock, including the right to such real and personal property as might have been claimed by such child if born in wedlock, and also to any real and personal property on the succession of any other person which might have been claimed through the parent by a child born in wedlock.

The important words of this section are, "on the registration of such child," the legitimation by the subsequent marriage of the parents being conditioned to the fact of registration in the manner provided in s. 6 of the Act for production to the Registrar or Deputy Registrar under the Births and Deaths Registration Act, 1908, of evidence of that marriage.

L.'s parents had not registered him in New Zealand as legitimate by reason of their marriage after his birth, and, consequently, while he was legitimate in England and Wales by force of the Legitimation Act, 1926 (Eng.), at the time of his grandmother's death, he could not participate in her bounty as he was not, in New Zealand, a "grandchild." As Mr. Justice Smith said, L. was not legitimated in England by the subsequent marriage of his parents, who were domiciled in England at the time of his birth and of their marriage. He held that, on the evidence submitted to him, the parents of L. became domiciled in New Zealand after their return to this country in 1919. The Court must have been satisfied in 1927, when the divorce proceedings were taken, that the husband was so domiciled at that time—the wife alleged the husband's domicile in New Zealand, and the proceedings were served upon him; and His Honour was not prepared, in the light of the decree of divorce which was made in the following year, to draw an inference that the husband had abandoned his New Zealand domicil when he left New Zealand in 1926.

He proceeded:

> "The effect of the English Legitimacy Act of 1926 was to make him legitimate in England and Wales by the force of the statute and not by the voluntary act of the father in marrying the mother. Legitimation of this kind is not

dependent upon the doctrine of legitimation by subsequent marriage . . . It is more like legitimation *per rescriptum principis*: see *Justinian's Novels*, 74 and 79; and *cf. Gera v. Ciantar*, (1887) 12 App. Cas. 557. It is, indeed, legitimation by force of an Act of Parliament conferred and imposed upon a class by reference to a marriage and to the domicil of the father at the time of the marriage. This legitimation does not date from the marriage, but from January 1, 1927, the date of the commencement of the Act. If a foreign Court is to give effect to this legitimation, it should recognize the status of legitimacy only as from January 1, 1927.

On January 1, 1927, L.'s father was domiciled in New Zealand; and the New Zealand Court, on applying the principles enunciated in *Diceys' Conflict of Laws*, 5th Ed. 569, could not regard L. as legitimate in New Zealand. The learned Judge said:

"Whether in respect of this kind of legitimation the domicil of L.'s father must have been English at the time of L.'s birth or not, my view is that it must have been English when the English Act was passed. If this is not established, then at least there is lacking one of the essential grounds (if it is not the only essential ground) for enabling a foreign Court to determine L.'s status as legitimate in the foreign country as from January 1, 1927."

L., accordingly, failed for two reasons. It is indisputable that, since January 1, 1927, he has been legitimate in England and Wales by virtue of s. 1 (1) of the Legitimation Act, 1926 (Eng.). But he failed because, outside England and Wales where that statute is operative, his status of legitimacy depends, not on the operation of that statute, but on the domicil of his father on the date of its coming into operation. If his father's domicil on January 1, 1927, had been England, then L., by the comity of nations, would be recognized as legitimate in New Zealand and elsewhere. But, for the reasons given, he could not be so recognized in New Zealand. He failed for the further and distinct reason that, if his parents at any time before the death of the grandmother had taken advantage of the provisions of s. 2 of the Legitimation Act, 1908 (N.Z.), to register him as legitimate by reason of their marriage subsequent to his birth, no question would have arisen as to his legitimacy in New Zealand, or, in consequence, as to his right to share in the provision made by his grandmother for her grandchildren.

The point, therefore, that we wish to make is that the whole cause of L.'s being deprived of his share in the bequest of £1,000 left by his grandmother to her grandchildren, was the necessity for registration in New Zealand of the subsequent marriage of his parents, before—by virtue of s. 2 of the Legitimation Act, 1908, *cit sup.*—he could be legitimated in New Zealand, whereas he was legitimated in England and Wales, *ipso facto*, on the coming into force of the Legitimation Act, 1926 (Eng.).

In passing, it may be remarked that, while in New Zealand, re-registration is the foundation of the legitimation of any child born out of wedlock on the subsequent marriage of his or her parents, the New Zealand statute does not bar legitimation if, as appears in s. 1 (2) of the corresponding English statute, either of them was married to a third person at the time of the child's birth. That can remain. But the other conflict between the English statute and the New Zealand statutory provisions should be resolved as soon as possible by rendering re-registration optional in this country, as it is in England; so that the retrospective legitimation of a child born out of wedlock on the subsequent marriage of its parents becomes at once operative whether or not registration be effected. The status of the child is then established on the secure ground of a statute, and is not dependent on the doubtful possibility of its parents' knowledge of the law (as at present) with the corresponding uncertainty of their active interest or dilatoriness in the matter of the ir children's legal rights. Moreover, if the statute were amended in the direction we have indicated, difficult questions which now have to be resolved by the application to the particular facts of the principles of private international law where there is a conflict of statutory provisions, as in the case we have here discussed, could not arise in respect of the child's status of legitimacy in New Zealand.

Apart from considerations of convenience, the amendment to the Legitimation Act, 1926, which we suggest, has historical justification. Although, with the exception noted above, the Legitimation Act, 1926 (Eng.), is of more general effect than is our own present corresponding legislation, until the passing of the statute of 1926, England was one of the few countries of the civilized world in which children were not legitimated by the subsequent marriage of their parents.

The root of *legitimatio per subsequens matrimonium* is found in the Roman law, beginning with the Emperor Constantine in 355 A.D. Canon law, which in many instances is a bridge between Roman law and modern law, enlarged the rule of Roman law. It was more indulgent than the Roman law by extending the rule to children born out of wedlock, if the parents could have intermarried at the time of the birth. The general principle was expressed by Pope Alexander III, when he wrote to the Bishop of Exeter in 1172: "Tanta est vis matrimonii, ut, qui antea sunt geniti, post contractum matrimonium legitimi habeantur." He was defining the general law to enable the Courts of England to follow those of the Continent in applying it. But *legitimatio per subsequens matrimonium* was one of the rules of the civil and Canon law that was never received by the common law of England.* At the famous Parliament of Merton, in 1256, the bishops proposed legitimation by the fact of the parents' subsequent marriage; but the barons would have none of that humane expedient as with one voice they declared, "Nolumus leges Angliae mutari!"

Although, "by the middle of the twelfth century . . . the marriage law, of England was the Canon law" (*Pollock and Maitland*, ii, 367-8), the objection to the adoption of the rule of legitimation remained. It was founded largely on considerations of the succession of real property: as Coke put it, "An heir must be *ex iustis nuptiis natus, nam haeres legitimus est quem nuptiae demonstrant.*" Blackstone impliedly admits that property considerations prevailed, though, with specious reasoning, he attempts to justify, on the basis of a regard for public morals, the non-recognition in England of legitimation on the parents' subsequent marriage.

In Scotland, the law was different: as Boswell says in his *Life of Johnson*, "I talked of legitimation by subsequent marriage, which obtained in the Roman law, and still obtains in the law of Scotland." In fact, the rule established by the canonists was recognized in the law of most Christian States, although the jurisdiction in respect of marriage remained substantially in the hands of the Church. Later, when the secular authorities began to legislate in regard to marriage,

*The Justinian law recognized legitimation *per rescriptum principis* (Nov. 89 x); and the Canon law followed this in cases where the general rule was inapplicable by providing legitimation by Papal decretal. In English law, this was done by statute, e.g., John of Gaunt's children, temp. Richard II.

the rule of legitimation by subsequent marriage continued, and still continues, to prevail in almost all the countries of Central and Western Europe. It was included in the Code Napoléon. With more or less variation, it was adopted under the British flag in the Isle of Man, the Channel Islands, Lower Canada, Cape Colony, Malta, St. Lucia, Demerara, Ceylon, and Mauritius.

In New Zealand and Australia, the advisability of relieving illegitimate children from the unmerited hardships inflicted on them, from their legal disabilities, and from the social stigma which they suffer, was recognized long before the British Parliament gave them statutory relief on their parents' marriage. New Zealand led the way in 1894 (the 1908 Act being a re-enactment), followed by South Australia (1898), Queensland (1899), New South Wales (1902), and Victoria (1905). But the mere fact of the parents' marriage does not necessarily legitimate the children then born, as registration of some kind is required under the various statutes of these States.

We think that the effect of the recent judgment in *In re Davey*, reinforced as it is by reasons of justice, charity, and convenience, gives emphasis to the need for our own Legislature to amend the Legitimation Act, 1908, so as to bring it into harmony with the liberal view of *ipso facto* retrospective legitimation on the parents' marriage taken by the English statute, following the Roman law, the Canon law, and the Code Napoléon. The family is the essential foundation of civilized society, and of the State itself; and nothing should be left undone which may add to its strength and homogeneity.

Summary of Recent Judgments.

SUPREME COURT. Christchurch. 1936. Dec. 15, 17. *Northcroft, J.*

IN RE CAINS (DECEASED), CAINS AND ANOTHER v. CAINS AND OTHERS.

Will—Devises and Bequests—Bequest of "Money I have in the Savings Bank or elsewhere"—Whether construed in Primary Sense—Evidence—Whether Extrinsic Evidence admissible to explain Meaning of "Money."

Testatrix at the date of her will had a farm property at Styx, money on deposit in the Post Office Savings Bank, an interest in remainder in land in the North Island in the estate of her father, and furniture and other chattels.

The will contained a general direction to pay debts, then gave to testatrix's husband a life interest "in my freehold property" or in the proceeds should it be sold. Then, after the payments of debts and expenses, she directed her trustee "to see how much money I have in the Government Savings Bank or elsewhere and after giving £200 of the same to my said husband the balance is to be invested in the manner or manners before mentioned and the income therefrom given to my said husband during his life for his sole and separate use, everything else that I possess at the time of my death I give to my said husband for his sole use and enjoyment. Upon the death of my said husband my remaining trustee is to divide my remaining estate both principal and interest equally between my children by both marriages then living and for this purpose may sell any property and call in or sell mortgages or other securities."

At the time of the death of testatrix her assets consisted of her said remainder in land, a second mortgage of little value, and furniture and personal effects.

On originating summons for interpretation of the will,

Geddes, for the plaintiffs; **Lockwood,** for W. G. Cains; **E. A. Lee,** for the other defendants.

Held, 1. That "money" must be construed in its primary sense, that the interest of testatrix in her father's estate was not included in the bequest of money, and that such interest was disposed of by the gifts of residue to her husband absolutely.

2. That extrinsic evidence of reference of the testatrix to her interest in her father's estate as her "money" was inadmissible.

Solicitors: A. S. Geddes, Christchurch, for the plaintiffs; **C. G. Lockwood,** Christchurch, for W. G. Cains; **Jones and Lee,** Christchurch, for the other defendants.

SUPREME COURT. Wellington. 1936. Dec. 11, 17. *Myers, C.J.*

IN RE SIR DOUGLAS McLEAN (DECD.)

Executors and Administrators—Commission—Whether Difference in Procedure where Petitioner Trustee or Administrator—Passing of Accounts—Accounts those under Executors' Commission Rules and not under Rule 531P.—Right to challenge Items—Duty of Registrar in reporting—Questions to which Jurisdiction limited—Administration Act, 1908, s. 20—Code of Civil Procedure, R. 531P.—Executors' Commission Rules, *1935 New Zealand Gazette, 3991.*

There is no difference in procedure so far as a petition for commission under s. 20 of the Administration Act, 1903, is concerned, whether the accounts be those of an "administrator" or a trustee.

The proceedings under the Executors' Commission Rules, 1935, are irrespective of Rule 531P of the Code of Civil Procedure. The accounts that are before the Court on the hearing of the petition for commission are not the accounts that may have been filed under Rule 531P, but the accounts that are filed under the Executors' Commission Rules.

The right exists in any beneficiary in the case of such a petition to attack or question anything in the accounts, including the propriety of any item which may affect the question or quantum of commission. The Registrar, therefore, should inquire into and report upon the propriety of any dispute or challenged item.

The jurisdiction under s. 20 of the Administration Act, 1908, and the Rules made thereunder, is limited merely to the questions of allowance and quantum of commission and the passing of accounts; and the purpose of such a petition does not determine the ordinary liability of the petitioning administrators or trustees in any other proceedings.

In the Will of Clements, (1894) 20 V.L.R. 321, and **Strauss v. Wykes,** [1916] V.L.R. 200, distinguished.

In the Will of Lucas-Tooth, (1931) 49 N.S.W. W.N. 18, and **In the Will of Lucas-Tooth,** (1932) 50 N.S.W. W.N. 86, mentioned.

Counsel: Cooke, K.C., and **Carrad,** for the Public Trustee; **Hadfield** and **Tripe,** for the executors and trustees of the will; **James** and **R. C. Christie,** for the trustees of the marriage settlement.

Solicitors: J. H. Carrad, Acting-Solicitor to the Public Trust Office, Wellington, for the Public Trustee; **Carlile, McLean, Scannell, and Wood,** *Napier, for the executors and trustees of* the will; **Chapman, Tripp, Watson, James, and Co.,** Wellington, for the trustees of the marriage settlement.

SUPREME COURT. (In Chambers). Auckland. 1936. Dec. 18, 22. *Fair, J.*

GRANDISON v. GRANDISON AND MIDDLEMISS.

Divorce and Matrimonial Causes—Practice—Interrogatories—Tendency to show Respondent and Co-respondent guilty of Acts of Adultery alleged in Petition—Disallowance—Divorce and Matrimonial Causes Act, 1928, s. 47.

Interrogatories sought to be delivered by the petitioner in a suit for divorce directed towards proving the occasion when, and the circumstances in which, as the petitioner alleged, the co-respondent admitted the acts of adultery relied on (although not directly referring to such admissions), and tending to establish the petitioner's credibility, should be disallowed under s. 47 of the Divorce and Matrimonial Causes Act, 1928.

Counsel: Rudd, for the petitioner, in support; **S. R. Mason,** for the co-respondent, to oppose.

Solicitors: Haddow and Haddow, Auckland, for the petitioner; **Mason and Mason,** Auckland, for the co-respondent.

COURT OF ARBITRATION.
Wellington.
1936.
Dec. 3, 9.
Page, J.

KINSMAN v. PURITY BREAD COMPANY, LIMITED
KINSMAN v. DENHARD BAKERIES, LIMITED.

Industrial Conciliation and Arbitration—Award—Award in Force at Date of coming into Operation of Part II of the Finance Act, 1936—Whether "in substitution or replacement" of earlier Award—Finance Act, 1936, s. 15, (3), (4).

By general order of May 29, 1931, the Court of Arbitration reduced the rates of remuneration provided for in awards. At that time there was in force an award of July 17, 1929, relating to the baking industry and covering most of the Dominion. On December 22, 1931, a new award covering the same area was made in substitution or replacement of the prior one; and it continued in force until December 11, 1932, after which date no award or industrial agreement was in force in the said area. On March 19, 1934, an industrial agreement operating through the Wellington Industrial District only was entered into, and on August 6, 1935, a new award, the Wellington (Twenty-five-mile radius) Bakers, Pastrycooks and their Labourers Award was made, and this was still in existence when claims were severally made against the defendants for alleged breaches of award. The question for decision was whether having regard to the foregoing history, the latest award could be held to be an award "in substitution or replacement" within the meaning of those words in s. 15 (3) of the Finance Act, 1931.

Inspector of Awards, in person; **J. F. B. Stevenson,** for the defendants.

Held, giving judgment for each defendant, That the Wellington (Twenty-five-mile radius) Award was neither "in substitution" nor "replacement of the Dominion award that was in force in June, 1931, and consequently did not come within the awards referred to in subs. 3 of s. 15 of the Finance Act, 1936.

2. That, as no application had been made to the Court in terms of s. 15 (4) of the Finance Act, 1936, no review of the award or alteration of the rates had been made.

Solicitors: Izard, Weston, Stevenson, and Castle, Wellington, for the defendants.

SUPREME COURT.
Auckland.
1936.
Dec. 2, 15.
Fair, J.

IRVIN AND ANOTHER v. BROOKES.

Gift—Donatio Inter Vivos—Whether complete or incomplete—Onus of Proof—Death of Intending Donor before acceptance by Intended Donee.

The facts that a daughter in whose name her mother standing *in loco parentis* to her was not informed of the deposit by her mother of a sum of money in her name, and that the mother died before the daughter assented to or accepted such intended gift, do not prevent the gift, if intended, being complete subject to the donee's right to disclaim, the acceptance of a gift by the donee being presumed until his dissent is signified, even though the donee is not advised of the gift.

C. G. Lennard, for the plaintiffs; **Finlay** and **H. J. Butler,** for the defendant.

Held, That, on the evidence, the presumption of a gift to the daughter had not been rebutted.

Legge v. Legge, (1904) 23 N.Z.L.R. 350; **Standing v. Bowring,** (1885) 31 Ch.D. 28; **London and County Banking Co., Ltd. v. London and River Plate Bank, Ltd.,** (1888) 21 Q.B.D. 535, and **Kuge v. Palm,** (1922) 68 D.L.R. 482, applied.

Solicitors: Lennard and Lennard, Auckland, for the plaintiffs; **Johnston, Coates, and Fee,** Auckland, for the defendant.

Case Annotation: *Standing v. Bowring,* E. & E. Digest, Vol. 25, p. 519, para. 133; *London and County Banking Co., Ltd. v. London and River Plate Bank, ibid.,* p. 520, para. 134; *Kuge v. Palm, ibid.,* p. 518, para. 130b.

Mercantile Agents.

A Comparison of English and New Zealand Statutes.

By J. A. JOHNSTON, LL.B.

It may safely be said that cases under s. 2 of the Factors Act, 1889 (*1 Halsbury's Statutes of England,* 37), and decided previously to the passing of our Chattels Transfer Amendment Act, 1931, are applicable to the corresponding s. 3 of our Mercantile Law Act, 1908. It is submitted that the most recent English case, *Staffs Motor Guarantee, Ltd. v. British Wagon Co., Ltd.,* [1934] 2 K.B. 305, would have been decided differently in New Zealand. The matter can perhaps be best approached by a general review of s. 3 (1) of the Mercantile Law Act, 1908, which reads as follows:—

> "Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods made by him when acting in the ordinary course of business of a mercantile agent shall, subject to the provisions of this Part of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same."

At first sight, the intention and effect of the subsection would appear to be clear; but an examination of the authorities reveals many difficulties in interpretation.

In *Folkes v. King,* [1923] 1 K.B. 282, Scrutton, L.J., says:

> "The history of the Factors Acts is restriction of their language by the Courts in favour of the true owner, followed by reversal of the Court's decisions by the Legislature."

The same tendency on the part of the Courts appears still to exist, as is shown by the recent case of *Staffs Motor Guarantee, Ltd. v. British Wagon Co., Ltd.* (*supra*), to which reference will be made.

In examining the subsection, it is first necessary to determine what is a mercantile agent. Section 2 defines a mercantile agent as follows:—

> "'Mercantile agent' means an agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods."

The learned author of *Pereira on Hire and Hire Purchase,* at p. 121, says,

> "the kind of mercantile agent intended to be covered by the words in the Act is one who sells goods on commission; a person may be a mercantile agent although he only acts for one principal."

The question has arisen, but apparently has not been determined, as to whether a person holding the sole rights for a particular district for the sale of goods of a particular manufacture, and the practice being for such person to first purchase from the manufacturer the goods he sells, can be regarded as a mercantile agent. The point is discussed in *Traders' Finance Corporation, Ltd. v. General Motors Acceptance Corporation, Ltd.,* [1932] N.Z.L.R. 1, where Ostler, J., at p. 5, says:

> "It is contended that General Motors have no agents in the proper sense but that they only appoint 'distributors' which are claimed to be something quite different. It is true that according to the printed form of appointment put in in evidence the appointee is called a 'distributor' and he agrees to buy the company's cars he sells, at the company's

price less a discount and to sell them at the retail price fixed by the company. He also agrees not to hold himself out or to purport to act as agent or locally empowered representative of the company for any purpose whatsoever. But he is given the sole right of selling the company's cars in the district assigned to him."

It was not necessary in that particular case to decide whether a "distributor" is a "mercantile agent," but it is at any rate arguable that in certain circumstances he is.

It is not necessary that the mercantile agent should purport to sell as an agent. If he is in fact a mercantile agent, then even though he describes himself as the owner and purports to sell as owner the subsection still applies. In this connection, Ostler, J., in *Traders Finance Corporation, Ltd. v. General Motors Acceptance Corporation, Ltd.* (*supra*), quoting at p. 11 from a judgment of Buckley, L.J., says:

"The question whether the person with whom the pledgor was dealing believed him to be an agent or believed him to be the owner of the goods is a question which is not material for the purposes of the Factors Act. The object of that Act as regards sale and as regards purchase was that a person who with the consent of the owner is in possession of goods as a mercantile agent shall have the same rights of dealing with them as if he were himself the owner. That was the purpose of the Act; the question whether or not the pledgee believed that the person dealing with him had the character of a mercantile agent is not relevant. He deals with the pledgor because the pledgor has possession of the goods."

It is difficult to reconcile the New Zealand case of *Cunningham v. Richardson*, [1924] G.L.R. 70, with this statement of the law, although no doubt the actual decision is correct as the agent was not in possession with the consent of the owner.

The effect of the decision in *Staffs Motor Guarantee, Ltd. v. British Wagon Co., Ltd.* (*supra*), seems to be that where the mercantile agent holds under a hire-purchase agreement from the owner then he holds as bailee and not as a mercantile agent, and the subsection does not apply.

The requirement that the mercantile agent shall hold "as a mercantile agent" does not appear in the words of the Factors Act, 1889, nor in the words of our Mercantile Law Act, 1908. However, earlier statutes, such as 4 George IV, c. 83 (1823), and 6 George IV, c. 94 (1825), use the expression "intrusted for the purpose of sale" and "intrusted for the purpose of consignment or sale." (Our earliest Act of 1880 uses the word "intrusted" but does not add "for the purpose of consignment or sale.")

Under these English enactments it was decided that the mercantile agent must hold "as a mercantile agent," and, although the wording of the Act has been altered, the earlier decisions are still applied, no doubt very properly. For instance, to use the example given in some text-books, supposing a person were to let a furnished house to an auctioneer the auctioneer would not have possession "as a mercantile agent" so as to give a good title if he sold the furniture; likewise, in the case of the owner of a motor-car garaging his car in a mercantile agent's garage.

However, the case of *Staffs Motor Guarantee, Ltd. v. British Wagon Co., Ltd.* (*supra*), goes very much further than the example just given; and, in view of the provisions of our Chattels Transfer Amendment Act, 1931, s. 2 (6), the decision presumably would not apply in New Zealand. Section 57 (5) of our Chattels Transfer Act, 1924, provides as follows:—

"The purchaser or bailee of chattels the subject of a customary hire-purchase agreement shall not have any right to sell, deal with, or dispose of such chattels otherwise than as may be specially provided in the agreement; and no sale, dealing, or other disposition purported to be made by such purchaser or bailee shall be effectual to confer title upon any person as against the vendor or bailor named in the customary hire-purchase agreement, or against the assigns of such vendor or bailor."

In his judgment in *Traders' Finance Corporation, Ltd. v. General Motors Acceptance Corporation, Ltd.*, Ostler, J., at p. 10, says:

"If the purchaser under the hire-purchase agreement had been Bishara Bros., then a most important question of law would have had to be decided as to how far s. 57 (5) of the Chattels Transfer Act, 1924, has impliedly repealed s. 3 of the Mercantile Law Act, 1908, and s. 27 (2) of the Sale of Goods Act . . ."

No doubt, as a result of the query raised in that case, the Legislature enacted the first paragraph of subs. (6) of s. 2 of the Chattels Transfer Amendment Act, 1931, which subsection reads as follows:—

"Subsection five of section fifty-seven of the principal Act shall be read subject to the provisions of section three of the Mercantile Law Act, 1908. For the purposes of the last-mentioned section, a person entitled to the benefit of a customary hire-purchase agreement as assignee or mortgagee shall be deemed to be the true owner of any customary chattels the subject of such hire-purchase agreement."

It would therefore appear that in New Zealand, although a mercantile agent holds under a customary hire-purchase agreement, he may still hold "as a mercantile agent"; and *Staffs Motor Guarantee, Ltd. v. British Wagon Co., Ltd.*, would not apply in this country, at any rate as regards customary chattels.

I have endeavoured to seek some general principle from the cases, and have somewhat diffidently come to the conclusion that, so far as New Zealand is concerned, if there is an intention that the mercantile agent shall have any power to sell, however restricted that power may be, he holds "as a mercantile agent" and the subsection applies whether he actually holds as bailee or under agreement for sale and purchase or under any other similar disposition.

The next words of the section which require to be elucidated are "with the consent of the owner." It has been held that even where the consent has been obtained by fraud the subsection none the less applies. A difficulty has arisen in England as to whether, where the consent is obtained in circumstances which amount to larceny by a trick, the possession is with the consent of the owner. In *Folkes v. King* (*supra*), which was a decision of the Court of Appeal, it was decided that where goods had been obtained by what amounted to larceny by a trick by the mercantile agent (there being no mistake as to the identity of the agent) the purchaser from him nevertheless acquired a good title. The decision has perhaps not always been regarded with approval by the Courts: see *London Jewellers, Ltd. v. Attenborough*, [1934] L.J.K.B. 428, 433, and *Heap v. Motorists Advisory Agency, Ltd.*, [1923] 1 K.B. 577.

The true principle would appear to be that where the owner intends to part with possession to the particular individual (there being no doubt as to the identity of such individual) the subsection applies however that consent be obtained; but the position might be otherwise if the owner parts with the possession to, say, Mr. Blankarn, being induced by a trick to think that it is Mr. Blankiron to whom he is giving possession. Scrutton, L.J., in *Folkes v. King*, at p. 306, says;

> "I do not quite understand the view that there must be 'consent in law,' and if there is no contract there is no consent. There may be consent to a state of facts without any contract at all."

Subsection 4 of s. 3 of the Act provides that the consent of the owner shall be presumed in the absence of evidence to the contrary.

The next words to be discussed are "in possession of goods or of the documents of title to goods." The words are clear although there must arise individual cases where it is difficult to decide whether the facts do or do not amount to possession within the meaning of the Act. Scrutton, L.J., in *Folkes v. King*, at p. 306, says:

> "The purport of the Act seems to be that an ostensible mercantile agent, ostensibly in possession of goods, can give a good title in the ordinary course of business to a bona fide purchaser, provided that he proves that the owner intended the agent to have possession of the goods."

It would appear that ostensible possession is sufficient for the purposes of the Act.

Subsection 2 of section 2 of the Act provides that a person shall be deemed to be in possession of goods or of the documents of title to goods where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf.

Then as to "when acting in the ordinary course of business as a mercantile agent." In *Oppenheimer v. Attenborough and Son*, [1908] 1 K.B. 221, it was held that the authority given by s. 2 of the Factors Act, 1889, to a mercantile agent who is in possession of goods with the consent of the owner to pledge the goods when acting in the ordinary course of business as a mercantile agent is a general authority given to every mercantile agent and is not restricted by the existence in any particular trade of a custom that a mercantile agent employed in that trade to sell goods has no authority to pledge them. The following is an extract from the judgment of Lord Alverstone, C.J., at p. 227:

> "In my opinion the words 'acting in the ordinary course of business of a mercantile agent' mean that the person must act in the transaction as a mercantile agent would act if he were carrying out a transaction which he was authorized by his master to carry out."

The words "business of a mercantile agent" are not to be read as if they were "business of such mercantile agent." There have been cases where the charging of a very high rate of interest has not taken the transaction out of the protection of the Act.

Lastly, as to the proviso:

> "Provided that the person taking under the disposition acts in good faith and has not at the time of the disposition notice that the person making the disposition has not authority to make the same."

It was held in *Heap v. Motorists Advisory Agency, Ltd.*, [1923] 1 K.B. 577, that the onus is on the person taking under the disposition of proving that he acted in good faith and without notice of the agent's want of authority. Subsection (2) of s. 2 of the Sale of Goods Act, 1908, provides that a thing is deemed to be done in good faith within the meaning of that Act when it is in fact done honestly whether it is done negligently or not. Presumably the words would have the same meaning under the Mercantile Act. In *Oppenheimer v. Frazer and Wyatt*, [1907] 2 K.B. 50, it was held that where joint purchasers act as partners in a particular speculation if one of the joint purchasers does not act in good faith the other purchasers although they personally act in good faith are not within the protection given by the Act. The notice which will deprive a pledgee or a purchaser of the protection of the Act does not mean formal notice. Knowledge of the facts and perhaps a wilful disregard of the means of knowledge when a suspicion exists, would be sufficient.

Prices of Farm Products.

Order by the Court of Review.

Section 39 (4) of the Mortgagors and Lessees Rehabilitation Act, 1936, provides that a computation of the gross income derivable from lands by the average efficient farmer is to be determined on the basis of such prices for farm products as may be fixed by Order in Council, or, in default of any such Order in Council or in so far as the Order in Council does not extend, by the Court of Review. The Court of Review was asked to fix such prices, and by an Order of that Court made on January 19, 1937, the prices of farm products which are to form the basis of the gross income that can be derived from farm lands are those which are set out in the Schedules to the Order.

The Court of Review has further ordered Adjustment Commissions, in determining the basic value of the interest of any applicant in any farm lands, to proceed to ascertain the productive value of those lands by reference to the prices as above ascertained. An explanatory report, which must have entailed a vast amount of detailed work, was prepared for the Court by the Under-Secretary for Justice. This is attached to the Order, and it is to be used by Adjustment Commissions with a view to applying the said prices in any particular case in any particular district.

As the Minister of Justice has pointed out, the Order will furnish all interested parties with full particulars for forming the basis of computation required by the statute. He has also expressed the hope that, in accordance with the spirit of the legislation, all interested parties will avail themselves of the material provided in the Order and its Schedules with a view to arriving at voluntary settlements.

For general convenience of all interested parties, the Registrars of the Court of Review have been supplied with copies of the Order, which covers forty-eight pages of detailed information. These can be obtained from the Court offices at a cost of two shillings.

Postscript.—The following interesting news item appeared in the *Kew Observer* (England) in the course of the report of a case:

> "His Lordship then adjourned the Court, on Counsel intimating that there were still a few pints to be dealt with."

Some Memorable Clients.

By Wilfred Blacket, K.C.

Here's Luck.—One I will call "Thompson" because that was not his real name. He would now be over one hundred if spared for some all-wise purpose to this day, but it is well to regard "safety first" in the publication of libellous matter. The little trouble that drew me to him in professional interest was that he had killed his wife with an extra outsize butcher's knife produced in Court, and murder was charged against him. The uncontested facts were that he had been on a spree, and that shortly thereafter he had been at work cleaning tripe when his wife sauntered in with a request for money. A quarrel, overheard by people near, ensued, and presently upon hearing her screams, some of these rushed in and found her on the floor with an awful wound in her abdomen. At the hospital she made a statement, entirely in accordance with the section, stating, *inter alia*, that he had said some very ungentlemanly things to her and then had rushed towards her and had struck her with his knife. At this stage of the Crown case it seemed a million to one on Regina, but you can never tell your luck in a Law Court or on a pony racecourse. The doctor was the last witness; and he, having obtained his diploma a month before, quite readily admitted on cross-examination that he knew all there was to be known about surgical science and all the latest learning and discoveries about knife-wounds; and that, having very closely examined the wound in question, and, "having then in mind the fact that the knife had entered the abdomen and stopped at the backbone," he was able to say—with all the certainty of youth and inexperience—"that she had pressed on to the knife and that it had not been driven into her." The prisoner rose to the occasion manfully. In his statement from the dock, made without any stoking or suggestion, he explained that after a discussion with his wife (in which he regretted that he had used some expressions which were far from kind and courteous) he resumed his work of washing tripe, having the knife held to his side by his arm and pointing backwards; and that the deceased, angrily rushing forward to strike him, had run on to its point with lamentable consequences. The Judge highly commended the science and acumen of the young doctor and impressed his evidence on the jury, who acquitted as soon as they had had one smoke. It is the business of doctors to save human lives. Some doctors make out a list of all the lives they have saved. If this doctor has such a record, Thompson's name ought to head the list.

As Thompson knew, I had been assigned by the Court for the defence, being the youngest barrister then present, and received no fee. Three months later, he stealthily came into my Chambers. "When you got me off I said I'd do something for you," he said. "Well I can do it now: back Fair Alice for the Lilliebridge Handicap." In a loud and indignant tone of voice I said, "Pooh, pooh, I can't take anything from you," and so on. He persisted in urging me. I persisted in refusal and presently said: "You know these home-and-dried certainties don't always come off. I suppose there are some other horses in the race?" "That's what makes it a certainty," he said; "there are nine horses in the race and we've stiffened the other eight." But even that precaution was not sufficient. Someone must have stiffened Fair Alice or livened up a dead 'un, for she was beaten by three lengths—a safe margin even at Lilliebridge; safe even at Woop Woop, N.S.W., where the judge once had to decide whether the local horse or the one from the township's hated rival had won. The local crowd yelled out in minatory tones the information that Black Diamond was the winner and shook the sapling judge's box violently to emphasize the fact. Firm in courage, the judge "rode in the whirlwind and directed the storm." "Black Diamond did not win," he said; "Nuggett won. I don't mind half a length, or a length, *but three lengths is too much.*"

More Gratitude.—It had been a long calendar of assorted murders and felonies, and, at the final adjournment of the Court, several of the detectives came to me in the Crown Prosecutor's room and said they wanted me to have a little souvenir of the cases in which we had been concerned. I said "nothing doing," or words to that effect, in my most emphatic manner; but they asserted that it was of no intrinsic value: "it wouldn't pawn for a bob," but was merely a little thing that a professional gentleman might like to hang on his watch-chain. It was wrapped in many folds of brown paper and was in fact a piece of green bone taken from the skull of Deeming—so famous a man needs only one name and I forget the other—a criminal then recently hanged for murdering several wives. His practice was to kill them and bury them in cement under the hearthstone of the home. It was a great scheme while it lasted, and as a means of securing domestic peace had its merits; the only trouble was that he tried it twice too often. The piece of bone offered me showed a skull fully an inch thick so that it was lucky that hanging was the means of his execution. They could never have killed him with a stick.

O! By the Way.—It just occurs to me that although I may claim to have reasonably keen perception of the incongruous and ludicrous, and ready appreciation of wit, I never during forty-five years of practice was guilty of making a joke in Court during the progress of a case. I use the term "guilty" advisedly, for I would as readily joke at a revivalist service or at a mother's funeral as in Court. Advocates have to realize, as I have written before, that a case is merely a brief to a barrister; but it may be the event of a lifetime to the client, and besides that the client is entitled to continual assurance that his advocate's whole mind and thought are monopolized by his consideration of the work he was retained—no, "trusted" is the better word—to perform. To such a client, a joke by his advocate would seem as much out of place as a double-bunger at a Mother's Meeting. I know that this will sound like a recent edition of *Advice to the Young*; but may be some of the grown-ups may be glad of a reminder.

The Dreaded Cleaver.—One client I held for many years in fearful remembrance. He had been carrying on business as a butcher, but his trade had ended for a time because of an unfortunate accident. This was that, while she was sitting at table giving her infant a nourishing meal, and having a saveloy herself, my client came up behind her with a cleaver—curious what a lot of uses butchers' implements of trade may be made to serve—and split her skull. (The classic phrase would be "cleft her to the chine," but I am not quite sure whether a woman has one). The evidence of

insanity was breast-high, and I could have added to it by showing that he insisted on our pleading that the affair had been an accident; and I could soothe him only by telling him I was going to set up self-defence. When the acquittal on the ground of insanity was recorded, the poor fellow howled in anguish and said that meant "that he would be kept there all his life." Then, turning on me, he said he would "kill me the first day he got out." Now I have previously mentioned that it takes a lot of influence to keep a man in gaol in New South Wales, but a homicidal lunatic is usually released as soon as a relative and the local clergyman and a few other voters put the hard word on the local Member and assure him that no improper use of lethal weapons need be feared in future. I should be reluctant to accept such an assurance respecting this critic of my forensic art; but, as I have never met him, I have not yet learned what sensations are among those present when one is "cleft to the chine."

"Ted" Lee, Crown Prosecutor (N.S.W.), lived under a similar shadow. He prosecuted a hairdresser who was sent up for six months, and, as soon as the convict was released, Ted gave up his custom of going for a daily shave and never allowed a barber's razor to touch his cheek again.

New Zealand Law Society.

Council Meeting.

A meeting of the Council of the New Zealand Law Society was held at the Supreme Court Library, Wellington, at 2.30 p.m. on December 11, 1936.

The following Societies were represented: Auckland, Messrs. J. B. Johnston, L. K. Munro, and H. M. Rogerson (Proxy); Canterbury, Messrs. A. S. Taylor and A. F. Wright; Hamilton, Mr. J. F. Strang; Hawke's Bay, Mr. H. B. Lusk; Nelson, Mr. W. V. Rout; Otago, Mr. A. N. Haggitt; Taranaki, Mr. J. C. Nicholson; Wanganui, Mr. A. D. Brodie; Westland, Mr. J. J. Molony (Proxy); and Wellington, Messrs. H. F. O'Leary, K.C., D. Perry, and G. G. G. Watson.

Mr. P. Levi, Treasurer, was also present.

Apologies for absence were received from Messrs. A. H. Johnstone, K.C. (Auckland), R. F. Gambrill (Gisborne), and F. G. O'Beirne (Southland).

The President, Mr. H. F. O'Leary, K.C., occupied the chair, and extended a welcome to Messrs. Brodie and Molony.

Audit Regulations.—Revision.—The Chairman reported for the Audit Committee that the revision of the Regulations had been completed, and that the new Regulations were at present being printed. It was intended to forward enough proofs to each District Society to enable them to peruse and comment on the proposed Rules with as little delay as possible.

Practising Fees in Arrears: Action to be taken.—Messrs. D. Perry and G. G. G. Watson reported that the following letter, which they had received from the Secretary, in their opinion correctly set out the position, and they therefore recommended that it should be adopted as their report on the subject.

"The position at the moment is set out in ss. 41, 42, and 43 of the Law Practitioners Act, 1931.

Section 41 provides as follows:—

'(1) No barrister shall act as such unless he has obtained from the Court a certificate which is then in force to the effect that he is on the roll of the Court as a barrister thereof.

'(2) Any barrister who offends against this provision shall be deemed guilty of a contempt of Court, and shall be liable to a fine not exceeding fifty pounds.'

Section 42 is identical, except that 'barrister' is replaced by 'solicitor.'

Section 43 provides that the Registrar shall on payment of the prescribed fees issue a certificate which shall remain in force to the 31st January next.

By s. 38 (2) of the Law Practitioners Amendment Act, 1935, provision is made for a refund of part of the annual fee where a practitioner who has paid for a certificate has not practised for three months during the year, and the Council of the District Law Society is empowered to accept such part of the annual fee as it thinks fit when a practitioner is commencing during the last three months of any year.

It is clear therefore,—

1. That any person who acts as a barrister or solicitor after the 31st January in any year without a certificate is guilty of a contempt of Court and liable to a fine not exceeding £50.

2. The District Law Society has no power to postpone the date of payment.

In the Wellington District, and probably in most of the others, 75 per cent. of the practitioners pay their fees on or before the due date, and almost all of the others could do so if they so desired. It seems unfair to those who do pay before the 31st January that a minority should be able to take several months' grace before payment, and it would seem desirable for the New Zealand Law Society to adopt a definite ruling to the effect that all fees must be paid when due and that the District Law Society should enforce this rule strictly.

Two further questions then arise:—

(*a*) *How is payment to be enforced?*

It must be agreed that the only method available at present, viz., motion for contempt of Court, is a cumbersome one, and rather like taking a sledge hammer to drive a tack. Moreover, it is an illogical action, as a solicitor may never have been near even the Magistrate's Court and yet be guilty of contempt if he has practised.

It has been suggested that the District Law Societies should be given the right to issue a summons for recovery of the amount when overdue, but, as Mr. Cousins pointed out, this might lead to the conclusion that late payment was contemplated by the Act, which would be undesirable.

It seems to me that the position could be best met by amending sections 41 and 42 to make it an offence punishable by a fine up to say £50 for any person to practise without a certificate after the 31st January in each year and that such offence should be dealt with in the Magistrate's Court on a charge made by the District Law Society concerned, the only proof necessary being a certificate from the Registrar of the Supreme Court that the fee had not been paid and a similar certificate from the President of the Society to the effect that the practitioner was still holding himself out as practising.

(*b*) *What is to be done with Practitioners unable to pay?*

Admittedly this is a difficult matter. On the one hand, it is clearly unjust to all those who pay to allow another to carry on without payment; moreover, as after all the fee required is not excessive in amount, the conclusion must be reached that the man who cannot pay it is probably a potential danger to the profession and would be much better out of it.

On the other hand, there is the natural desire to temper justice with mercy, and to allow an unfortunate practitioner who may be just managing to earn enough each week to pay for food and lodging to carry on, without forcing him to give up his practice and go on to relief work.

I think, however, it is time a definite stand was taken, and that the New Zealand Society should rule that in every case where a District Law Society has such a case as that of —— on its hands, it must either pay the practising fee for him or take steps to enforce payment, which would be the same as compelling him to give up practice."

It was decided to circulate the report for consideration and comment.

Appeals under the Justices of the Peace Act.—The President reported that, accompanied by Mr. D. Perry and the Secretary, he had interviewed the Minister of Justice in connection with this matter and had stressed the importance of having uniformity in the system of appeals from all inferior Courts to the Supreme Court.

The Hon. Mr. Mason had since written stating that during the recess he would give attention to the matter with a view to effecting an improvement in the law along the lines suggested.

Motor-vehicles Insurance (Third-party Risks) Act, 1928.—The Minister of Transport wrote as follows;—

"Further to your letter of the 15th October concerning the compulsory insurance premiums payable in respect of motor-cars owned by legal practitioners, I have arranged for consideration to be given to your Society's representations and find that the experience of insurance companies has been so unfortunate in recent months so far as the private car class is concerned that it is not possible to consider extending the concessions which already apply to certain groups of cars in that class.

If the concession were extended to cars owned by legal practitioners, then other professions would have equally good grounds for receiving the concession, and finally the position would be arrived at whereby it would require a raising of the premiums in the whole of the private car group."

It was resolved to circularize practitioners, drawing attention to the position, and pointing out the danger incurred in using their cars for the carriage of employees or clients.

Five-day Week.—The Commissioner of Stamp Duties wrote as follows;——

Stamp Duties and Land and Deeds Offices.

"The times that the above offices are required to be open to the general public are fixed by regulations made under the Stamp Duties Act, 1923, and the Land Transfer Act, 1915, and under these regulations it is necessary that the offices should be open on Saturday mornings.

To give effect to the five-day week proposal, which has been applied to Government Departments not required by statute to remain open on Saturday mornings, an amendment to the regulations would be necessary so far as these offices are concerned.

Before taking any steps in this direction, I would be pleased to have the views of your Society on the proposal to apply the five-day week to the Stamp Duties and Land and Deeds Offices throughout New Zealand together with any suggestions you may care to put forward."

The District Societies had been asked for their opinion prior to the meeting, and letters were received from a number of the Societies, the majority being opposed to the suggestion. The Council decided to inform the Commissioner that, as the matter is one of public policy, the Society does not feel that it can express an opinion.

It was also decided to draw the attention of the Commissioner to the need, if Saturday morning closing were adopted, for amendment of s. 89 of the Companies Act, 1933, and s. 30 of the Stamp Duties Act, 1923, to allow for stamping and registration on the succeeding Monday when the Saturday would otherwise be the last day.

Encumbrances on Leases: Automatic carrying forward when New Lease granted.—The following letter was received from the Secretary of the Otago Society;

"My Council has recently considered and approved a suggestion that on the expiration of a lease and the grant of a new lease, all encumbrances on the old lease should automatically be carried forward to the renewed lease. The adoption of this course would avoid what is at times a burdensome expense on clients—the preparing, stamping, and registering of fresh mortgages or encumbrances on the grant of a new lease.

I enclose herewith for your Society's consideration a draft of proposed clauses for insertion in an amendment to the Land Transfer Act, which have been carefully considered by my Council and approved.

My Council is also of the opinion that some provision should be inserted in the Land Transfer Act for the variation of leases, chiefly as to rental and term, on the lines of the provision for variation of mortgages set forth in section 104 of the Land Transfer Act, 1915. The variation would then be read into and form part of the original lease in the same manner as in the case of variations of mortgages.

My Council will be pleased if these suggestions be considered by the New Zealand Law Society, and, if deemed worthy of support, that the proper authority be communicated with in an endeavour to obtain an amendment to the law accordingly."

The view was expressed that it would be very dangerous to support the proposed amendments without mature consideration. It was accordingly decided to ask Messrs. C. H. Weston, K.C., R. H. Webb, and E. F. Hadfield to consider the question and report to the next meeting.

(To be concluded.)

Legal Literature.

Recollections of An Amateur Soldier, by C. A. L. Treadwell, O.B.E., a Captain in the New Zealand Forces in the Great War. With a Foreword by Colonel C. H. Weston, K.C., D.S.O., V.D., Judge-Advocate-General, New Zealand Military Forces: pp. xiv + 252 Demy 8vo. New Plymouth; Thomas Avery & Sons, Ltd.

A Review by Hon. Mr. Justice Northcroft, D.S.O.

Mr. C. A. L. Treadwell has joined the number of barrister-soldiers in the various branches of the forces sent overseas by the Dominion during the Great War who have made contributions to our war-literature by placing on record his own recollections of four years on active service. The quality of this, his latest work, is indicated in the following review note which has been written by the Hon. Mr. Justice Northcroft, D.S.O., formerly Lieutenant-Colonel and commander of a battery of artillery in the New Zealand Division.

Mr. Justice Northcroft says:

"I have just finished Mr. Treadwell's excellent war book. I could not wish it better or different. It recalls the atmosphere perfectly, and it made me live again my own war-time experiences. The author's approach to the subject could not have been better; he has avoided the temptation to be historical, which, being impersonal, is mostly dull. On the other hand he has been frankly personal—to those who were not there, he makes the incidents and emotions of the period vivid and real: to those who were, he lets us live it over again. The book is never dull; it is fresh and frank, and the author has a lively capacity for entertaining. The book should become well known for the benefit of those who otherwise might miss it.

"Mr. Treadwell has done a proper task in telling New Zealanders what the men were like whom we buried overseas—how they lived and fought and died. The Infantry are made to live again—to work and trudge and grouse and fight, and, if need be, to die; always truly cheerful despite their grousings; always manly, and always dutiful."

Practice Precedents.

Application for Leave to Lease Settled Land.

By virtue of s. 4 of the Settled Land Act, 1908, the Supreme Court, if it deems it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in Part I of the Act, may authorize leases of any settled estate or of any rights or privileges over or affecting the same.

"Settlement" and "settled estate" are defined in s. 3 of the Act.

Before granting its consent, the Court must be satisfied that the conditions specified in s. 4 (1) (*a*), (*b*), (*c*), and (*d*) are observed; and, in addition to such conditions, the lease must contain such covenants, stipulations, and conditions as the Court may deem expedient with reference to the special circumstances of the devise.

Leave may be granted to lease part of a settled estate: see *In re Ford (deceased)*, [1921] N.Z.L.R. 875.

On an application to the Court to approve a particular lease, or to vest any powers of leasing settled land in trustees, the applicant must produce such evidence as may be found by the Court to be sufficient to enable it to ascertain the nature, value, and circumstances of the estate, and the terms and conditions on which leases thereof ought to be authorized.

Every application to the Court must be made with the concurrence or consent of the parties specified in s. 19 of the Act; a general concurrence is not enough, as where a trustee of a settled estate was also a beneficiary and joined in a petition, he was required to concur in his capacity as a beneficiary: *Re Graham*, (1903) 6 G.L.R. 261. But, if the Court thinks fit, a petition may be granted without consent or concurrence of a person whose consent or concurrence has been refused or cannot be obtained, unless there is a person entitled to an estate of inheritance whose consent or concurrence has been refused or cannot be obtained; but subject to and so as not to affect the rights, estate, or interest of any person whose consent or concurrence has been refused or cannot be obtained, or whose rights, estate, or interest ought in the Court's opinion to be excepted.

As to the notices to be given of the application to the Court, and the persons on whom such notices are to be served, see s. 21; and as to the insertion of newspaper notices, as the Court may direct, see s. 23. As to the authority to the Court to insert in building leases provisions for valuation and renewal, and the nature and form of such provisions, see s. 28 and the Second Schedule to the Act; and as to the order that may be made for the costs of the parties of and incidental to any application for leave to lease, see s. 32.

The lease of the settled land, which is the subject of the following forms, is not to be considered in regard to a lease for mining purposes, with which s. 3 of the Settled Land Amendment Act, 1922, specifically deals.

The short form of affidavit verifying the petition as set out in R. 415 of the Code of Civil Procedure, may be used, as the application is non-contentious.

A form of consent, pursuant to s. 19, should be filed after execution by all the persons having any beneficial estate or interest under or by virtue of the settlement, and by all trustees having any estate or interest on behalf of any unborn child.

PETITION FOR LEAVE TO LEASE LAND.

IN THE SUPREME COURT OF NEW ZEALAND

.....District.

.....Registry.

IN THE MATTER of the Settled Land Act 1908

AND

IN THE MATTER of the Settlement under the Will of A.B. &c. deceased.

TO the Supreme Court of New Zealand.

THE HUMBLE PETITION of sheweth:—

1. That your petitioner is the sole trustee acting under the will of the above-named (deceased) which will bears date the day of and was duly proved in the Supreme Court of New Zealand at on the day of . A copy of such will is hereunto annexed and marked "A."

2. That part of the trust property remaining to be administered by your petitioner in accordance with the trusts declared by the said will of the testator consists of a piece of land [*Description*] upon which are standing buildings of wood roofed with iron.

3. That the buildings standing on the said piece of land are let to for years from the day of at £ per annum with the condition that the tenancy shall cease in the event of the said buildings being condemned or permission to occupy the same being refused or withdrawn.

4. That the said [*Lessee*] used the said building for [*Purpose*].

5. That your petitioner is advised and believes that the said buildings which are very old are by reason of their age in an advanced stage of decay and that it may become necessary at any time to demolish the same and further that it is impracticable to renovate or restore them to good condition as the fabric is not sound.

6. That your petitioner has from time to time been warned by the Official Inspector that it may in the near future become his duty to take action to require the said buildings to be demolished.

7. That it would be for the benefit of all persons interested in the premises that your petitioner should be authorized to grant a lease or leases of the said land upon conditions that will lead to the erection thereon of a modern building or buildings of a permanent nature suited to the locality in which the said land is situate.

8. That your petitioner is advised that he is not empowered to grant a lease that will effect what is desired without the order of this Honourable Court under ss. 4, 28, and 29 of the said Act.

9. That the form of lease which your petitioner proposes should be granted is similar to the form of lease adopted by the Harbour Board and such leases are considered most beneficial to the lessor as they preserve to the lessor the full value of the land while at the same time they secure to a tenant the value of his improvements so that the tenant is able to give to the lessor the best ground rent and the special covenants and conditions which your petitioner proposes should be embodied in such lease are as follows:—

WHEREFORE your petitioner prays:—

1. That an order may be made empowering your petitioner as such trustee as aforesaid to negotiate and grant a lease for twenty-one years in possession upon terms and conditions and with provisions for renewal as set out in para. 9 of the petition and subject to such other conditions as to this Honourable Court may seem meet.

2. That the costs of your petitioner and of all other persons if any served with notice of this petition may be paid out of the income arising from the said estate.

3. That such further or other order may be made in the premises as to this Honourable Court shall seem fit.

AND YOUR PETITIONER WILL EVER PRAY &c.

Petitioner.

(Usual short affidavit verifying petition in support).

MOTION IN SUPPORT OF PETITION.

(*Same heading.*)

Mr. of Counsel for the applicant C.D. as trustee of a settlement under the will of the above-mentioned deceased to move in Chambers before the Right Honourable Sir Chief Justice of New Zealand at the Supreme Court House on day the day of 19 at the hour of o'clock in the forenoon or so soon thereafter as Counsel can be heard for an order in terms of the prayer of the petition filed herein that an order be made empowering your petitioner [*Continue as in prayer of petition*].

Dated at this day of 19 .

Certified correct pursuant to the Rules of Court.

Counsel for applicant.

REFERENCE.—His Honour is respectfully referred to ss. 4, 28, and 29 of the Settled Land Act, 1908.

MEMORANDUM.—[*Set out history and facts briefly, specifying the parties on whom notices should be served and whose consent should be filed.*]

Counsel for applicant.

ORDER FOR LEAVE TO LEASE.

(*Same heading.*)

day the day of 19 .

Before the Honourable Mr. Justice .

UPON READING the petition of and the Affidavit verifying the same and the motion filed in support of the said petition and the consent of and filed herein AND UPON READING the will of deceased AND UPON HEARING Mr. of Counsel for the petitioner IT IS ORDERED that the said [*Petitioner*] as trustee of the will of the said deceased BE AND HE IS HEREBY EMPOWERED to negotiate and grant a lease of all that piece or parcel of land situate [*Description*] upon which are now standing buildings of wood roofed with iron such lease to be for a period of twenty-one years in possession and to contain the following special terms covenants and conditions that is to say :—

AND IT IS FURTHER ORDERED that the costs of the petitioner be paid out of the income arising from the said estate.

By the Court.

Registrar.

NOTE.—The lease when drafted should be produced to the Registrar for approval.

Recent English Cases.

Noter-up Service.

FOR

Halsbury's "Laws of England."

AND

The English and Empire Digest.

BANKRUPTCY.

Bankruptcy—Notice—Substituted Service—*Re* A JUDGMENT DEBTOR (No. 1539 OF 1936) (C.A.).

Substituted service of a bankruptcy notice can only be resorted to where there is a practical impossibility of actual service, and the method of substituted service will in all reasonable probability be effective to bring the notice to the knowledge of the person to be served.

As to substituted service : see HALSBURY, 1st edn., 23, par. 207 ; DIGEST Practice, pp. 329-336 ; YEARLY SUPREME COURT PRACTICE, 1937, pp. 73-79. **[1936] 3 All E.R. 767.**

DIVORCE.

Divorce—Costs—Taxation—Witnesses—Irrelevant Inquiry—PELSTER *v.* PELSTER AND SAMUEL (P.D.).

Costs of witnesses who were intended to prove that the co-respondent in a divorce suit was the same person who had been co-respondent in an entirely disconnected suit some years before will not be allowed where the co-respondent has not voluntarily given evidence in disproof of the alleged earlier adultery.

As to taxation of costs in divorce cases : see HALSBURY, Hailsham edn., 10, pars. 1295-1299 ; DIGEST 27, pp. 538-540. **[1936] 3 All E.R. 783.**

INCOME-TAX.

Income-tax—Profits from Trade—Builder—Sale of House—Mortgage to Building Society by Purchaser—Guarantee of Repayment by Builder—HARRISON (INSPECTOR OF TAXES) *v.* JOHN CRONK & SONS, LTD. (H.L.).

Where a builder guarantees repayment to a building society of moneys advanced on mortgage to the purchasers of the builder's houses, and he deposits with the building society part of the sums guaranteed, such deposits ought to be brought in as trading receipts for income-tax purposes not at their face value, but on a proper actuarial valuation as at the time of the completion of the sale.

As to trading profits : see HALSBURY, Hailsham edn., 17, pars. 221-225 ; DIGEST, 28, pp. 17-21. **[1936] 3 All E.R. 747.**

LIBEL.

Libel—Newspaper Report—Criminal Proceedings—Fair and Accurate Report—MITCHELL AND ANOTHER *v.* HIRST, KIDD, & RENNIE, LTD., AND ANOTHER. (K.B.D.).

Where a charge of theft has been withdrawn and a conviction obtained of having taken a car away without the owner's consent contrary to the Road Traffic Act, 1930, sec. 28, a newspaper report of the "theft" of a motor-car is not a fair and accurate report.

As to newspaper reports of legal proceedings : see HALSBURY, Hailsham edn., 20, par. 580 ; DIGEST 32, pp. 137-139. **[1936] 3 All E.R. 872.**

MISTAKE.

Mistake—Payment Subject to Deduction of Tax—Receipt in Full Settlement—Inland Revenue Decision that no Tax Payable—BULLINGDON R.D.C. *v.* OXFORD CORPORATION (K.B.D.).

Where accounts arising out of the alteration of local government areas have been settled upon the understanding between the parties that part of the payment is in the nature of interest, and in respect of that part income-tax is deducted, and a receipt is given under seal and is stated to be in full satisfaction of all claims, the transaction cannot be reopened if subsequently the revenue authorities take the view that the payment treated as interest was in fact a capital sum and that no tax should have been deducted.

As to reopening accounts upon the ground of mistake : see HALSBURY, 1st edn., 21, par. 70 ; DIGEST 35, pp. 162, 163. **[1936] 3 All E.R. 895.**

PARTNERSHIP.

Partnership—Dissolution—Partnership to Continue Notwithstanding Retirement of One Partner—ABBOTT *v.* ABBOTT (Ch.D.).

A partnership under an agreement which specifies no fixed time for the duration of the partnership but which provides that it is to continue notwithstanding the retirement or death of one partner, is not a partnership at will, but will continue, unless dissolved by the court or some other event, so long as two of the partners are still living and have not retired.

As to dissolution of partnership otherwise than by the Court : see HALSBURY, 1st edn., 22, pars. 165-173 ; DIGEST 36, pp. 497-503. **[1936] 3 All E.R. 823.**

SALE OF GOODS.

Sale of Goods—Contract—Printed Words—Compensation for Under-shipment—Typewritten Words—"Sold Subject to Shipment"—HOLLIS BROS. & CO., LTD. *v.* WHITE SEA TIMBER TRUST, LTD. (K.B.D.).

A clause in a charter-party that the goods are "sold subject to shipment ; any goods not shipped to be cancelled" gives to the sellers an option whether or not they will ship any of the goods, with no liability in respect of any short delivery.

As to delivery of wrong quantity : see HALSBURY, 1st edn., 25, par. 365 ; DIGEST 39, pp. 559-561. **[1936] 3 All E.R. 875.**

EVIDENCE.

Evidence—Admissibility—Trust of Income as Directed—Written Statement by Trustee as to Directions.

A statement made by a trustee as to a testator's directions for the application of a trust fund is not admissible in evidence after the trustee's death.

Re GARDNER'S WILL TRUSTS; BOUCHER *v.* HORN. **[1936] 3 All E.R. 938, Ch.D.**

As to declaration against interest: see HALSBURY, Hailsham edn., 13, pars. 656, 657; DIGEST 22, pp. 102-109.

LANDLORD AND TENANT.

Landlord and Tenant—Lease—Covenant to Give Notice of Assignment or Underlease.

A covenant by a lessee to give notice to the lessor of every assignment or underlease and to produce such assignments and underleases for registration, applies to all assignments and underleases affecting any sub-lease whether derived mediately or immediately out of the head lease.

PORTMAN *v.* J. LYONS & CO., LTD. **[1936] 3 All E.R. 819 Ch.D.**

As to registration of assignments with superior landlord: see HALSBURY, Hailsham edn., 20, par. 86; DIGEST 31, p. 103.

PRACTICE.

Practice—Costs—Action for Nuisance—Claim for Injunction and Damages—Motion for Interlocutory Injunction—Claim for Damages Satisfied—Claim for Injunction Abandoned.

Where in an action for damages and an injunction the plaintiff moves for an interlocutory injunction, and the defendant subsequently pays into Court a sum in respect of damages which the plaintiff accepts, and the plaintiff then abandons his claim to an injunction, the plaintiff will be liable for the costs of the motion.

WILTSHIRE BACON CO., LTD., *v.* ASSOCIATED CINEMA PROPRIETORS, LTD. **[1936] 3 All E.R. 1044, Ch.D.**

As to costs on payment in: see HALSBURY, 1st edn., 23, par. 263; DIGEST Practice, pp. 493, 494.

STREET TRAFFIC.

Street Traffic—Traffic Signs—"Halt at Major Road Ahead"

The indication given by a traffic sign which bears the words "Halt at Major Road Ahead" is that the motorist shall bring his car momentarily to a standstill.

TOLHURST *v.* WEBSTER. **[1936] 3 All E.R. 1020, K.B.D.**

As to neglect of traffic directions: see HALSBURY, 1st edn., 27, par. 583; DIGEST Supp., Street Traffic No. 50.

SEWERS AND DRAINS.

Sewers and Drains—Land Drainage—Sea-wall.

There cannot exist at law a right on the part of an owner of land on the seaward side of a sea-wall to let sea-water on to the land on the landward side of the wall or to make any breach in the sea-wall which will expose the land on the landward side to the risk of such an event.

SYMES AND JAYWICK ASSOCIATED PROPERTIES, LTD., *v.* ESSEX RIVERS CATCHMENT BOARD. **[1936] 3 All E.R. 908, C.A.**

As to sea-walls and defences: see HALSBURY, 1st edn., 28, pars. 717-720; DIGEST 44, pp. 79-83.

WORKMEN'S COMPENSATION.

Workmen's Compensation—Miner's Nystagmus—Disablement—Recovery from Disease not Complete—Return to Former Work at Higher Wages.

The fact that a workman is able to return to work and earn full wages, for a period of time after being certified as disabled by an industrial disease, does not debar him thereafter from recovering compensation on it being found that he is still suffering from the disease referred to in the original certificate.

RICHARDS *v.* GOSKAR **[1936] 3 All E.R. 839, H.L.**

As to date of disablement: see HALSBURY, Supp. to 1st edn., 20, par. 349; DIGEST Supp., Master and Servant, Nos. 3821*a*-3846*c*.

Rules and Regulations.

Health Act, 1920. Regulations as to Drainage and Plumbing applied to the Kaitaia Town District; as from February 1, 1937. No 110/1937.

National Expenditure Adjustment Act, 1932. Interest Restriction (Deposits with Trading Companies) Regulations, 1937. January 21, 1937. No. 111/1937.

National Expenditure Adjustment Act, 1932. Interest Restriction (Deposits with Investment and Building Societies) Regulations, 1937. January 21, 1937. No. 112/1937.

Stamp Duties Act, 1923. Stamp Duties Office Regulations, 1937. January 21, 1937. No. 113/1937.

Scientific and Industrial Research Act, 1926. Scientific and Industrial Research (Allowances) Regulations, 1936. January 21, 1937. No. 114/1937.

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New Books and Publications.

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Lawyer's Remembrancer, 1937. By Arthur Powell, K.C. Revised by J. W. Whitlock, M.A., LL.B. (Butterworth & Co. (Pub.) Ltd.) Special Edition, price 14/-; de Luxe Edition, price 21/-.

Bell's Sale of Food and Drugs. 9th Edition. By R. A Robinson. (Butterworth & Co. (Pub.) Ltd.). Price 21/-.

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Law of Libel and Slander. By W. Valentine Ball, O.B.E., M.A., and P. Browne, M.A. Second Edition, 1936. (Stevens & Sons). Price 14/-.

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The Forms of Action at Common Law (Reprint). By F. W. Maitland, 1936. (Cambridge University Press). Price 5/6.

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Gibson's Practice of the Courts. By A. Weldon and R. L. Morse (Law Notes). Price 28/-.

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