New Zealand
Law Journal
Incorporating "Butterworth's Fortnightly Notes."

"The virtue of the common law was its adaptability to growth and improvement. In generations present and future, the lawyer likewise will be measured by the same test."

—PRESIDENT ROOSEVELT, to the Annual Meeting of the American Law Institute, Washington, May, 1937.

Vol. XIII. Tuesday, July 20, 1937. No. 13

Place of Residence, Abode, or Business.

FOLLOWING our recent article on "The Time of Service or Delivery by Post" of documents or notices (*ante*, p. 165), we have been asked by a reader to define what is meant by "place of residence," "last known place of residence," "usual place of business," and the like phrases used in statutes. In the article referred to, we did not embark on any such definitions, as "residence" and "business" are elastic words, as James, L.J., said in *Ex parte Bruell, In re Bowie*, (1880) 16 Ch.D. 484, 487; and they must receive a construction in accordance with the intention of the Legislature and objects and intent of the statute in which they are found. They are ambiguous words, and may even have different meanings according to the position in which they are found: *Ibid.*, 487, per Cotton, L.J.

The words in question are susceptible of a wide or a narrow interpretation; and it must follow that, while their meaning varies with the context in which they appear, no general definition can be given; and the various cases and dicta, which follow, are given for illustrative purposes only. As illustrations, these are by no means exhaustive, as a wealth of cases on construction of the words shows.

"Residence," therefore, has a variety of meanings according to the statute or document in which it is used, as Erle, C.J., said in *Naef v. Mutter*, (1862) 31 L.J.C.P. 357, 359. Thus, the words "residing in any licensing district" in s. 43 of the Licensing Act, 1908, are to be read as permanently residing in any licensing district: *Moore v. Harding*, (1911) 30 N.Z.L.R. 1229. But s. 35 (2) of the Legislature Act, 1908, which provides—

> "For all the purposes of this Act a person shall be deemed to have resided within the district wherein he has his usual place of abode, notwithstanding his occasional absence from the district,"

is an enabling and relieving clause, and not intended to operate as a disabling clause. In this view, a workman who pitches his tent in the vicinity of a work—say, a railway tunnel at which he is employed—may properly be said to reside there even in the case where he does not bring his family to the spot: *Taumarunui Election Petition*, (1915) 34 N.Z.L.R. 562, 569.

Residence must not be confused with domicile, for a man may have two or more residences in two or more countries, but he can have but one domicile. What constitutes a man's residence depends on personal facts: voluntary choice and habitual and repeated action are mainly material, such as making a home, keeping an establishment, pursuing a settled object in or at a particular place: Viscount Sumner in *Egyptian Delta Land and Investment Co., Ltd. v. Todd*, [1929] A.C. 1, 12 (where "residence" of a company is exhaustively considered).

In general terms, "residence" imports some idea of fixity, though not necessarily of permanence. Thus, if a man is engaged for a fixed period at a place, so that he cannot leave without breaking his contract, he must be regarded as residing there: *Ford v. Hart*, (1873) L.R. 9 C.P. 273; *Duffy v. Chambers*, (1890) 26 L.R. Ir. 100. Short of this, he cannot leave the place without forfeiting his employment, and that fact alone compels him to reside there: *Beal v. Town Clerk of Exeter*, (1887) 20 Q.B.D. 300. But, as Coleridge, C.J., said in the last-mentioned case, the residence of a wife and children can be imputed to the absentee in the appropriate cases; and residence may also be conferred in the case of a barrister on circuit or a sailor at sea, when there is no doubt of both the power and the intention to return as soon as the circuit or the voyage is over.

In some cases there is no difficulty in determining where a man has his settled or usual abode, and, if that is ascertained, he is not the less resident there because from time to time he leaves it for the purposes of business or pleasure: *In re Young*, (1875) 1 Tax. Cas. 57; *Rogers v. Inland Revenue Commissioners*, (1879) 1 Tax. Cas. 225. But a man may reside in more than one place: *Inland Revenue v. Cadwalader*, (1904) 7 F. (Ct. of Sess.) 146; *Loewenstein v. de Salis*, (1926) 10 Tax. Cas. 424. In other cases, the question of residence is one of fact and degree, and must be determined on all the circumstances of the case: *Reid v. Inland Revenue Commissioners*, [1926] S.C. 589. Thus, "ordinarily resided" in a taxing statute connoted residence in a place with some degree of continuity and apart from accidental or temporary absences: *Levene v. Inland Revenue Commissioners*, [1928] A.C. 217, 225, per Viscount Cave, L.C. In the same case at p. 232, Lord Warrington of Clyffe would not attempt to define the word "resident," which, he said, had no technical or special meaning, and, in particular, it was impossible to restrict its connotation to its duration. If "ordinarily resident" had any definite meaning, he should say it meant according to the way in which a man's life is usually ordered.

Section 13 of the Otago Licensing Ordinance, 1865, provided that applications for publicans' licenses were to be heard in licensing districts on specified days by a Bench of Magistrates consisting, *inter alia*, of Justices who act and "usually reside" in such district. In construing these words in *In re T. A. Jones*, (1870) Mac. 780, Mr. Justice H. S. Chapman said:

> "A temporary residence where a man usually resides for the purpose of business, recreation, or parliamentary duty

does not constitute usual residence. The place where a man usually resides is the place where he and his family make their ordinary home . . . I am not prepared to say that a man may not have two places of residence—a country house, and a town house, for instance. In such case he will 'usually reside' in one during part of the year, and in the other during another part of the year."

Where in a taxing statute the words were "residing or being," Pollock, C.B., said that the word "being" was introduced advisedly, that the ambiguous character of the word "residing" might never be relied upon to prevent the recovery and collection of the tax: *Attorney-General v. McLean*, (1863) 1 H. & C. 750, 760, 158 E.R. 1085, 1090. In the same case, Martin, B. (at p. 762; 1091) said that the word "being" was conclusive; but if it were necessary to give judgment on the word "reside" alone, without the word "or be," there could be strong ground for contending that one who spends the day at his shop attending to his business, and may there be seen and conversed with on matters of business, and does not choose to be communicated with elsewhere, is "residing" there, much more than in the place where he sleeps at night but does not wish anyone to call on him, and where, if anyone does call, he cannot see him during the day.

The words "place of residence" is where a person has his domicile or home: as Hawkins, J., said in *Holborn Guardians v. Chertsey Guardians*, (1884) 14 Q.B.D. 289, 295,

"A man who goes from his home on a journey or a visit intending to return to it when his journey or his visit is over, though dwelling away from it for a time, cannot be said to be resident at the place where he is a mere visitor. On the other hand, if a person having a fixed home, whether as the head of it or as being a member of a family, and whether emancipated or not, quits it with the intention not to return or to return only upon the happening of some particular uncertain event, he cannot be said during his absence to reside in the home he has quitted."

Thus, where a man, whose home was in Queenstown, went to Dunedin for any purpose, leaving his wife and family at Queenstown and intending to return there, he resided at Queenstown. If, in such circumstances, he met with an accident and were taken to the Dunedin Hospital, or if he fell into want and were admitted to the Benevolent Institution, then, at the time of his admission to either, he would still have been residing in Queenstown: *Otago Benevolent Institution Contributors v. Southland Hospital and Charitable Aid Board*, (1894) 12 N.Z.L.R. 575, 578, per Williams, J., in construing s. 74 of the Hospitals and Charitable Institutions Act, 1885.

"Dwelling" is the ordinary dwelling-place of a party, and not a place like a gaol where a person is temporarily detained in custody: *Dunston v. Paterson*, (1858) 28 L.J.M.C. 97, 100; *Powell v. Guest*, (1864) 34 L.J.C.P. 69, 70. But where a person's residence in London for three or four days of each week was entirely subservient to the purposes of his business, and that alone, and not as a place of residence, his family and home having been elsewhere, he was considered as having dwelt at the latter place alone: *Kerr v. Haynes*, (1860) 29 L.J.Q.B. 70, 72.

The "last" place of abode means "the then present place of abode if the party have any, the last which he had if he has ceased to have any": per Coleridge, J., in *Reg. v. Evans and Yale*, (1850) 19 L.J.M.C. 151, 152.

In regard to sufficiency of delivery of a notice or document at a person's residence, no general rule can be laid down, as every case of this kind must depend on its own special circumstances: per Lord Denman, C.J., in *Gridley v. Austin*; *Daubney v. Phipps*, (1849) 16 Q.B. 504, 511, 117 E.R. 972, 975; and see *MacGregor v. Kelly*, (1849) 3 Exch. 794, 154 E.R. 1066 (delivery to a servant at the defendant's residence); *Re Bush*, (1884) 8 Beav. 66, 50 E.R. 26 (delivery to an appointed agent); *Crowder v. Shee*, (1808) 1 Camp. 437, 170 E.R. 1033 (delivery to one of several jointly liable); and *Re Killock*, (1887) 56 L.T. 887.

Where the statute provided that it was sufficient to deliver a bill at the defendant's "last known apparent place of abode," at the time the bill was delivered, Lord Ellenborough said that the last apparent place of abode is to be taken as the last place of abode, though it was open to the defendant to show if he could, that at the time of delivery, he had a last known place of abode. It was not sufficient for him to show that he had another known place of abode subsequent to the delivery of the bill: *Wadeson v. Smith*, (1815) 1 Stark. 324, 171 E.R. 486.

The words "usual place of business" have no technical meaning. Each case must depend on its own circumstances. Similar terms, which occur in various Acts of Parliament, have not received any precise legal definition, but have been left by the Courts to be interpreted according to the circumstances of the particular case: *Blackwell v. England*, (1857) 27 L.J. Q.B. 124; *Knott v. Miller*, (1894) 12 N.Z.L.R. 397. The words "usual place of business" in s. 9 of the Auctioneers Act, 1891, for example, mean "the business domicile" (*Middlemiss v. Simson*, (1885) N.Z.L.R. 4 S.C. 186), or "the usual place of business as an auctioneer" (*Mayor, &c., of Roslyn (No. 2)*, (1895) 13 N.Z.L.R. 650), and these places were indicated by the special facts of the case.

While we are dealing with the word "residence," we may as well consider that word in relation to the witness who attests a deed or a bill of sale.

In *Blackwell v. England*, (1857) 8 E. & B. 541, 545, 120 E.R. 202, 204, where the statute required a description of the "residence and occupation" of every attesting witness, and the attesting witness described himself as "of King's Bench Walk, clerk to Messrs. Brundrett and Randall of the same place, solicitors," and the clerk was to be found at that address during business hours, but slept and took his meals elsewhere, Coleridge, J., said that the word "residence" had two definite technical meanings, and the word varies in its construction according to the object for which residence is required. He added:

"In one set of Acts, the object is to ascertain the settlement of a pauper; there he resides where his head lies at night. In another class of Acts the object is to ascertain the jurisdiction of the Court: with reference to that object domicile may be important. But, unless the cases on such Acts decide that the word 'residence' always imports the domicile, they do not bear on the present case. And, as I think that they do not establish the word has such a technical sense, I construe it as used in this Act with reference to its object, and I think the description here sufficient."

So, too, where s. 20 of the Chattels Transfer Act, 1924, provides that the execution of an instrument shall be attested by at least one witness, who shall add to his signature his "residence" and occupation, different considerations apply to show that the word "residence" has no definite technical meaning, and "Wm. Rattray, Civil Servant, Wellington," or "J.

Brown, Law Clerk, Wellington," are sufficient attestations in the case of an instrument under the Act: *Johnston v. Simeon*, (1882) N.Z.L.R. 1 S.C. 305; *Te Aro Loan Co. v. Cameron*, (1895) 14 N.Z.L.R. 411. In the latter case, Williams, J., said:

> "It is well known that nearly all deeds executed in the Colony are not attested with greater particularity than this. It is usual and common for a witness to be content with signing his name and giving his occupation and the town in which he resides. If I were to hold such attestation insufficient in the case of an instrument under this Act, I should have to hold it insufficient in the case of a deed also—which would be to render invalid the greater number of deeds in the Colony.
>
> "Nor do I think the question is one of fact. There was no evidence that John Brown was not the real name of the witness, nor that he was a law clerk, nor that he was not resident in Wellington. In the absence of any evidence that any of these particulars was untrue, it was the duty of the Magistrate, as a matter of law, to hold the attestation sufficient."

The words, "resides" and "residence" of the plaintiff in R. 9 of the Code of Civil Procedure are used in their ordinary meaning, and, consequently, where a firm carried on business in Invercargill and had agents in Dunedin, their place of residence was Invercargill: *Hindley and Co. v. Tothill, Watson, and Co.*, (1893) 12 N.Z.L.R. 348; as Williams, J., saw no reason to give the words in the rule a more extensive meaning than the ordinary one. There is a distinction in the case of a corporation, which is a creation of statute: as Mr. Justice Reed said in *National Bank of New Zealand, Ltd. v. Dalgety and Co., Ltd.*, [1922] N.Z.L.R. 636, 638,

> "It does not sleep, and can only be said to live in the sense that it exists: it has been described as 'a juristic person—that is, one only by fiction of law.' It exists and resides where its business is controlled—its head office. . . . I think, both in principle and in authority, that a company with a head office and branches in New Zealand 'resides' in the sense in which that word is used in the rules, where its head office is and nowhere else in New Zealand."

But a foreign company, established by foreign law, opening an office and carrying on business within the jurisdiction of the Court, ought to be considered as resident within that jurisdiction for all necessary purposes. Such companies may therefore be said to have a residence at a branch office although they also reside in a country where they are incorporated or established: *Haggin v. Comptoir d'Escompte de Paris*, (1889) 23 Q.B.D. 519, referred to in *Weddel v. Harding*, (1912) 15 G.L.R. 171; but as Mr. Justice Reed said in *National Bank of New Zealand, Ltd. v. Dalgety and Co., Ltd.*, *supra*, at p. 638, these cases are no authority for the proposition that a company with its head office in New Zealand and branches in various centres throughout the Dominion has a separate residence at each of those branches and the language of R. 9 does not warrant any such construction.

We conclude, therefore, that the words "residence" and "place of abode" are flexible and must be construed according to the object and intent of the particular legislation where they may be found. Primarily, they mean the dwelling and home where a man is supposed usually to live and sleep. They may also include a man's business abode, the place where he is to be found daily, especially where personal presence seems to be an ingredient. To make the business house a residence, it must be not merely a place where business is transacted, but where the business-man's duty and occupation would lead anyone to expect that in ordinary circumstances he would be found.

Summary of Recent Judgments.

COURT OF APPEAL.
Wellington.
1937.
July 1, 8.
Myers, C.J.
Ostler, J.
Kennedy, J.
Callan, J.
Northcroft, J.

PHIMESTER v. PHIMESTER.

Divorce and Matrimonial Causes—Restitution of Conjugal Rights—Decree—Notice to Respondent Wife as to Location of Home to which she is to return—Practice to be adopted—Divorce and Matrimonial Causes Act, 1928, ss. 8, 18.

The husband-petitioner obtaining a decree for restitution of conjugal rights should state, either as a footnote to the decree, or in a separate notice served upon the respondent, the home to which she is to return and the effect or possible result of non-compliance with the decree; and, in any subsequent suit founded upon non-compliance with the decree, the Court should require proof that the respondent had been given the required notice.

Counsel: **Leicester** and **Aekins,** for the petitioner; **Cornish,** K.C., Solicitor-General, as *amicus curiae*.

Solicitor: **K. C. Aekins,** Auckland, for the petitioner.

SUPREME COURT.
Palmerston North.
1937.
June 1, 2, 29.
Reed, J.

STEIN v. ANDERSON.

Building Contract—Preparation by Builder of Plans and Specifications—Whether under same Liability as Architect.

Where a builder prepares plans and specifications for work that he constructs, there is no rule of law that he thereby assumes the responsibility of an architect and is under the same liability. It is a question of fact whether in the circumstances of each particular case a necessary inference arises that the builder represented that he was competent to fulfil the full duties of an architect.

Counsel: **A. M. Ongley,** for the plaintiff; **Oram,** with him **Gibbard,** for the defendant.

Solicitors: **Gifford Moore, Ongley, and Tremaine,** Palmerston North, for the plaintiff; **Gibbard and Yortt,** Dannevirke, for the defendant.

COURT OF ARBITRATION.
Christchurch.
1937.
June 23; July 1.
O'Regan, J.

BAILEY v. H. McCREE AND SON.

Industrial Conciliation and Arbitration Acts—Estoppel—Dismissal in Magistrates' Court of Charge of Breach of Apprenticeship Order not appealed from—Claim for Penalty in Court of Arbitration for alleged same Breach but at later Period—Whether Court of Arbitration has power to deal therewith—Industrial Conciliation and Arbitration Act, 1925, ss. 130, 134, 136.

Where there has been no appeal from a Magistrate's dismissal of a claim for a penalty for breach of an apprenticeship order, the matter in issue is *res judicata* and operates as an estoppel, and the Court of Arbitration has no jurisdiction to deal with a claim for a penalty for the same breach but alleged to have been committed at a later period.

Creaven v. Miller, (1899) 18 N.Z.L.R. 65, and **Kinnis v. Graves,** (1898) 78 L.T. 502, applied.

Solicitor: **R. A. Young,** Christchurch, for the defendant.

Case Annotation: *Kinnis v. Graves*, E. & E. Digest, Vol. 21, p. 229, para. 610.

SUPREME COURT. Napier. 1937. May 21; June 29. *Myers, C.J.*

MANAGH v. MANAGH AND GOODGER.

Divorce and Matrimonial Causes—Alimony and Maintenance—Order for Permanent Maintenance with no dum casta **Clause—Application by Husband for relief—Whether Husband disentitled in any event to Relief on Ground of Wife's unchastity—Evidence—Whether Evidence of Acts of Adultery prior to Order where subsequent Misconduct with same Man relevant—Divorce and Matrimonial Causes Act, 1928, s. 41.**

Section 41 of the Divorce and Matrimonial Causes Act, 1928, which is both a consolidating and an amending Act, is as follows:—

"The Court may from time to time vary or modify any order for the periodical payment of money made under the provisions of this Act relating to matrimonial causes and matters either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the order as to the whole or any part of the money ordered to be paid, and subsequently revive it wholly or in part, as the Court thinks just."

A husband whose wife has obtained a divorce and an order for permanent maintenance, which did not contain a *dum casta* clause, is not, in the absence of such a clause, disentitled from obtaining relief under s. 41 on the ground of the unchastity of the *quondam* wife, the matter being one for the discretion of the Court to be exercised on the principles laid down in *Wickins v. Wickins, (No. 2)*, [1918] P. 282.

The difference between an identical section in an English consolidating Act only and a New Zealand consolidating amending Act discussed.

Where the grounds for relief alleged is that the wife both prior to and since the order had been guilty of misconduct with a man named as co-respondent in the husband's suit, in which the charges of adultery were abandoned, and the decree granted on the wife's cross-petition, the evidence of acts of adultery prior to the date of the husband's petition must not necessarily be disregarded, unless the subsequent acts of misconduct are not proved.

Wickins v. Wickins (No. 2), [1918] P. 282, and **Restall v. Restall,** [1930] P. 189, applied.

Abbott v. Abbott, [1931] P. 26; **Hall v. Hall,** (1914) 111 L.T. 103; **Dufty v. Dufty,** [1931] P. 116; and **M. v. M.,** [1916] N.Z.L.R. 797, referred to.

Collins v. Collins, (1910) 103 L.T. 80, distinguished.

Counsel: A. M. Ongley, for the petitioner; **Lawry,** for the respondent.

Solicitors: Gifford Moore, Ongley, and Tremaine, Palmerston North, for the petitioner; **A. E. Lawry,** Napier, for the respondent.

Case Annotation: *Wickins v. Wickins (No. 2)*, E. & E. Digest, Vol. 27, p. 514, para. 5528; *Restall v. Restall, ibid.*, Supp. No. 11, 27 title *Husband and Wife*, No. 5376a; *Abbott v. Abbott, ibid.*, Nos. 4171a, 5405a; *Dufty v. Dufty, ibid.*, No. 5405b; *Hall v. Hall, ibid.*, No. 5330a; *Collins v. Collins, ibid.*, Vol. 27, p. 506, para. 5417.

SUPREME COURT. Auckland. 1937. July 1, 7. *Reed, J.*

DAGNELL v. HUDDART PARKER, LIMITED.

Workers' Compensation—Defence of Common Employment—Injury suffered prior to Passing of Law Reform Act, 1936—Part VI of Statute not retrospective—Workers' Compensation Act, 1922, s. 67—Law Reform Act, 1936, Part VI.

Part VI of the Law Reform Act, 1936, which deals with the liability of employers to their servants for injury caused by the negligence of fellow-servants, is not retrospective.

Barber v. Pigden, [1937] 1 All E.R. 115, discussed.

In re Athlumney, Ex parte Wilson, [1898] 2 Q.B. 547, applied.

Counsel: Sullivan, for the plaintiff; **J. B. Elliott,** for the defendant.

Solicitors: Sullivan and Winter, Auckland, for the plaintiff; **Russell, McVeagh, Mackay, and Barrowclough,** Auckland, for the defendant.

The Heir-at-law.

A Consideration of Macleay v. Treadwell.

By E. C. ADAMS, LL.M.

In recent years there has been reported no more interesting case to real-property lawyers in New Zealand and Australia than *In re Macleay, Macleay v. Treadwell*, [1937] N.Z.L.R. 230, where the Privy Council upset a majority decision of the N.Z. Court of Appeal. At first sight it may appear to be of interest only to the legal theorist, but the writer thinks that it may have far-reaching practical consequences.

Most New Zealand law students since the days of the Administration Act, 1879, have, I suppose, been taught to avoid in legal documents affecting land the use of such words as "heir," "my right heir," "my lawful heir," and the plural forms thereof. The recent case shows the wisdom of such advice. It has settled the *prima facie* legal meaning of "heir-at-law" in a will or settlement executed after the coming into operation of the Administration Act, 1879, as being the old common-law heir; but it appears to have left in extreme doubt the meaning of the words in the immediately-preceding sentence, some of which have already been judicially interpreted by the New Zealand and Australian Courts. The doubt is inferred by the writer because the Privy Council stated that the case of *Morrice v. Morrice*, (1893) 14 N.S.W.L.R. Eq. 211 (which was the leading case relied on by the next-of-kin), was "hard to understand"; and because the Privy Council in its judgment appears to have been studious to avoid all mention of *In re McDonald's Settlement, O'Callaghan v. O'Callaghan*, [1928] V.L.R. 241, where the words "right heir" were interpreted as meaning next-of-kin, and where those words were given by the Judges a distinctly opposite meaning to what they said probably ought to be given to "heir-at-law," the very words which the Privy Council had to interpret.

There also appears to remain unsettled the true meaning of the words "the heirs" in s. 7 of the Property Law Act, 1908 (which is the section which revokes the rule in *Shelley's* case), with reference to a will or settlement executed after the coming into operation of the Administration Act, 1879. A gift to A. for life followed by a limitation to his heirs, in a will or settlement executed *before* the coming into operation of the Real Estates Descent Act, 1874, gives A. an estate for life, and, on his death, A.'s common-law heir gets the estate in fee-simple. A.'s heir cannot be ascertained until he dies, for *nemo est hæres viventis*; but, whether A. dies before or after the Administration Act, 1879, it is the common-law heir and not the statutory next-of-kin who takes: *In re Williams, Campbell v. Hill*, [1926] N.Z.L.R. 762. It was suggested in argument in the Court of Appeal in *Macleay's* case ([1935] 463, 470), that the same interpretation must prevail with regard to a will or settlement executed after the Administration Act, 1879, although *Nicholson v. Nicholson*, [1923] G.L.R. 59, decided otherwise. And, moreover, it was argued that the word "heirs" and all similar words when used as words of purchase and not merely as words of limitation still retain their common-law meaning. It may be said with confidence that the only two phrases which in New Zealand bear

the imprint of legal certainty are "heir-at-law," which *prima facie* means the old common-law heir, and "the heirs of the body" of any person, which will create an estate tail: *Matheson v. Atkinson*, (1906) 26 N.Z.L.R. 145. A gift to A. and his heirs will give A. an estate in fee-simple; the words "and his heirs" are not meaningless but they are surplusage: *Martin's Property Law Act, 1905*, 12. They are merely words of limitation.

The real importance of the Privy Council's judgment in *Macleay's* case appears to be in the following passage, at p. 239, l. 25:

> "To sum up, this examination of the legislation in question appears clearly to show that in New Zealand it has not put an end to the common-law heir-at-law; it merely results that he shall not ultimately take beneficially as heir. So far from denying his continued existence it leaves vested in him, for an interval of indefinite duration, it may even be permanently, the New Zealand real estate of every owner who dies possessed of such property. During that term of vesting, too, the rights of ownership with reference to the property are not in suspense, so that the status of the heir-at-law is brought literally within the words of *Blackstone's* well known definition of an heir as being one 'upon whom the law casts the estate immediately on the death of the ancestor'" (Comm. Vol. I, p. 201).

This is really what *Martin* pointed out, *op. cit*, 12:

> "Upon probate or administration, the land vests in the legal personal representative upon trust for the next-of-kin. It would seem, however, that in the interval between death and probate or administration the legal estate would vest in the heir."

The Privy Council, at p. 238, points out that as long ago as 1875, it was decided in *Larkin v. Drysdale*, (1875) 1 V.L.R. (L.) 164, 166, that the status of the old heir-at-law between the death of the deceased and grant of administration to his estate had not been destroyed, and accordingly that an action of ejectment brought during that interval by the heir-at-law was sustained. Could the heir-at-law or devisee during such interval bring an action for ejectment in respect of a piece of land subject to the Land Transfer Act, 1915? (See *Little v. Dardier*, (1891) 12 N.S.W.L.R. Eq. 319.)

Under the Land Transfer Act, 1915, the estate of the registered proprietor is paramount; generally speaking, he has an indefeasible title against all the world: *Fels v. Knowles*, (1906) 26 N.Z.L.R. 604, 620. But what happens to his statutory estate when he dies, and administration of his estate is not taken out? A dead person has no rights in the eyes of English law; a dead person can own nothing. If administration is taken out, his administrator or executor does not get the statutory estate until transmission is registered in his favour: *Howie v. Barry*, (1909) 28 N.Z.L.R. 681. The difficulty is surmounted by some writers who suggest that on a registered proprietor's death there is a *sub modo* vesting (see, for example, *Hogg's Registration of Titles Throughout the British Empire*, 373). If this be so, then this Privy Council case shows that the *sub-modo* vesting is in favour of the common-law heir, or devisee, as the case may be, until administration is granted, and probably until transmission following thereon is granted, and probably until transmission following thereon is registered.

The passage already cited from the judgment of the Privy Council refers only to an intestacy. But it follows that where a deceased leaves a will, his realty will vest in the devisee, until grant of administration is made: *Saunders v. Cabot*, (1885) N.Z.L.R. 4 C.A. 19.

The judgment in *Macleay v. Treadwell* may have an important bearing on the interpretation of s. 60 of the Land Transfer Act, 1915, which reads as follows:—

> "After land has become subject to this Act no title thereto, or to any right, privilege, or easement in, upon, or over the same, shall be acquired by possession or user adversely to or in derogation of the title of the registered proprietor."

Now this section does not actually say that the Limitation Acts shall not apply to land subject to the Land Transfer Act; its protection is limited to the title of the "registered proprietor," which term, however, includes the registered owner of any estate or interest in the land. It may be argued that, if there be no "registered proprietor," there is no protection; and it may be further argued that, if the registered proprietor be dead and no transmission has been registered, there is in reality no "registered proprietor."

It appears to be the view of some writers that, if a registered proprietor dies and no grant of administration is taken out and a trespasser remains in possession for twenty years, the trespasser will obtain a good title by the operation, presumably, of the Real Property Limitation Act, 1833 (see, for example, *Kerr's Australian Lands Titles (Torrens) System*, p. 254, *note* 277). I do not think that that is the general view of the legal profession, and I for one do not think it is correct; and I think that the principle of this Privy Council decision is rather against such a view. It would appear that, when a registered proprietor dies and no administration is taken out, s. 60 operates so as to protect his heir-at-law or devisee, as the case may be.

At common law, be it remembered, the heir could not disclaim, as Garrow says, "it was his, and to get rid of it he had to convey it to someone else." Has that law been altered in New Zealand? Section 67 of the Land Transfer Act, 1915, reads:—

> "If any certificate, whether on the first bringing of land under this Act or otherwise, is issued in the name of a person who has previously died, such certificate shall not be void, but the land comprised therein shall devolve in like manner as if such certificate had been issued immediately prior to such death."

No doubt this section is intended to meet the common-law rule that a grant to a dead person is a nullity. But surely the Legislature intended that such certificate when issued should enjoy all the benefits of indefeasibility of title conferred by the Land Transfer Act; if such a certificate should enjoy all such benefits, so must one originally issued in the name of a living person who has since died. Section 222 reads:

> "In any form under this Act the description of any person as proprietor, transferor, transferee, mortgagor, mortgagee, lessor or lessee, or as trustee, or as seised of, having, or taking any estate or interest in any land, shall be deemed to include the heirs, executors, administrators, and assigns of such person."

(The word "heirs" in this section is noteworthy.) A certificate of title is a form "under this Act." I, therefore, conclude that, immediately on the death of a registered proprietor of realty, his heir-at-law or devisee is entitled to all the protections enjoyed by the registered proprietor. Of course, the land cannot be dealt with until transmission is registered; but, as the Privy Council points out, "the rights of ownership are not in suspense."

The vesting in the heir may even be *permanent*. *Immediately* on the death of the ancestor, intestate, the realty becomes vested in the heir-at-law. It may be contended that, if a grant of administration has not

been taken out, the heir-at-law or devisee may even register transmission in his favour, for under the Land Transfer Act "transmission" means the acquirement of title to any estate or interest *by operation of law.* Against this contention, however, is *In re Andreas Petersen,* (1890) 9 N.Z.L.R. 538, which was the case of a devisee under a will of a person dying *after* the coming into operation of the Administration Act, 1879, seeking to register transmission without having the will proved. Prendergast, C.J., in upholding the refusal of the District Land Registrar to register, said at p. 541 :

> "At all events it is quite clear that the provisions of the Administration Act make it certainly the duty of the Registrar not to register without probate, and, at any rate, it is a proper thing for him to require probate before registering."

It is particularly to be observed that in *Petersen's* case counsel for the Registrar-General of Land admitted that the case of *Larkin v. Drysdale, supra,* was against him; and that is the case which the Privy Council chiefly relied on in *Macleay v. Treadwell* to establish the point that land on an intestacy still in the first instance vests in the heir-at-law. Counsel for the Registrar-General, the late Mr. Martin Chapman, thought that such cases as *Larkin v. Drysdale* appeared to ignore the Administration Acts rather than to be decisions upon them. It is possible, therefore, that *In re Andreas Petersen* was wrongly decided; and, whether this is so or not, it may not apply to an intestacy where the land vests in the first instance in the heir-at-law. But *In re Andreas Petersen* will apparently have to be followed by District Land Registrars until it is definitely overruled.

It is conceived that the heir-at-law or the devisee may desire to get on the Register in order to save the expense of taking out administration in the Supreme Court; that appeared to be the reason for the applicant's attempted short cut in *In re Andreas Petersen, supra.* A Land Transfer title often remains in the name of a deceased registered proprietor for years, because the beneficiaries cannot afford or do not desire the expense of taking out administration; the beneficiaries are usually in possession; the rates are paid; but nothing is done to put the title in order until a proposed mortgage or sale renders a marketable title imperative. Once the heir-at-law or devisee got on the Register, he could deal with the land, as if it were his own, unless the Registrar interposed a caveat, for s. 124 (2) of the Land Transfer Act, 1915, reads: "The person so registered as proprietor shall hold the estate or interest transmitted subject to all equities affecting the same, but for the purpose of any dealing therewith shall be deemed to be the absolute proprietor thereof."

Judicial Composure.—One of the Aldermen of the City of London, Sir George Collins, declined the other day to take his Court duty and asked a brother City Magistrate to substitute for him, because he had just been defrauded on a large scale and did not feel in the mood to sit in judgment. He said he feared he would impose the maximum penalty on everyone if he went on to the Bench. This reminds one of another Magistrate, who, after being deceived by a defendant as to his previous character, had him brought back into the Court with a view to increasing the sentence. When the man reappeared, the Magistrate pulled himself together, and said: "Wait a minute, as I am very angry." Then, checking himself further, he said: "I'd better not do anything at all. Let the sentence stand as imposed!"

The Law of Negligence.

Some Recent English Decisions.*

Dealing first with invitees, licensees, and trespassers in the case of *Indermaur* v. *Dames,* (1866) L.R. 1 C.P. 274, Mr. Justice Willes had defined an invitee as a person who went not as a mere volunteer or licensee, or a guest or servant, or a person whose employment was such that danger might be considered as bargained for, but one who went to premises upon business which concerned the occupier and upon his invitation, express or implied. A licensee was a person who, without being under a paid contract of service, associated himself with the servants of another in the performance of that servant's work: *Potter* v. *Faulkner,* (1861) 1 B. & S. 800, 121 E.R. 911, or who put himself under the control of an employer to act in the capacity of a servant: *Johnson* v. *Lindsay and Co.,* [1891] A.C. 371. A trespasser was a person who did an act without a shadow of right to it, and the owner of the premises, subject to the trespass, owed no duty beyond refraining to do any act which unnecessarily involved danger to the trespasser. In *Hillen and Pettigrew* v. *I.C.I. (Alkali), Ltd.,* [1936] A.C. 65, the plaintiffs claimed to be invitees but were held to be trespassers. Lord Atkin had said during this case :

> "In my opinion this duty to an invitee only extends so long as and so far as the invitee is making what can reasonably be contemplated as an ordinary and reasonable use of the premises by the invitee for the purposes for which he has been invited. He is not invited to use any part of the premises for purposes which he knows are wrongfully dangerous and constitute an improper use."

Other recent cases were *Weigall* v. *Westminster Hospital,* [1936] 1 All E.R. 232, *Morgan* v. *Incorporated Central Council of the Girls' Friendly Society,* [1936] 1 All E.R. 404, *Schlarb* v. *London and North Eastern Railway Co.,* [1936] 1 All E.R. 71, *Simmons* v. *The Mayor, &c., of the Borough of Huntingdon,* [1936] 1 All E.R. 596, and *Schiffman* v. *The Grand Priory in the British Realm of the Venerable Order of St. John of Jerusalem,* [1936] 1 All E.R. 557.

The law relating to the sale of "jerry-built" houses to unsuspecting purchasers may be considered in relation to the case of *Otto and Otto* v. *Bolton and Norris,* [1936] 1 All E.R. 960. Miss Otto had bought a newly-built house from the defendants for occupation by herself and her mother. It was unfinished, and the defendants agreed to complete the house and decorations to her reasonable approval after completion of the purchase. Within six months of occupation falls of the ceiling had taken place in the bedroom, and the mother had been injured in subsequent falls which took place within eighteen months of occupation. Miss Otto had then brought an action against the vendors for breach of warranty, both expressed and implied, and her mother had claimed damages on an alleged duty to take care in the construction of the house to prevent its being dangerous, breach of which duty being the negligence complained of. The defence had been a denial of the warranty, or, alternatively, that the warranty, if any, was confined to mere decorations, and did not extend to structure: that Miss Otto employed her own surveyor; and that the

* Being the substance of a recent lecture by Mr. Hector Hughes, K.C., to the Solicitors' Managing Clerks' Association, London.

house was completed and passed for habitation by the surveyor of the local urban Council before occupation. This defence had failed, but the defence to the negligence claim, that it was not sustainable in law, had succeeded. Mr. Justice Atkinson had found as facts that Miss Otto relied on Norris's assurance that the house was well built, and but for that assurance would not have bought, and that the work complained of was bad, and that the defendants were negligent. On these findings of fact he had had three questions of law to decide: first, whether the assurance given amounted to a warranty; secondly, the effect in law of such a warranty collateral to and forming part of the contract for sale—these affected Miss Otto; and, thirdly, whether Mrs. Otto was entitled to recover damages for negligence. *De Lassalle* v. *Guildford*, [1901] 2 K.B. 215, had decided that an affirmation at the time of sale was a warranty provided it appeared on evidence to have been so intended. The assurance given to Miss Otto had therefore been a warranty. In view of *Miller* v. *Cannon Hill Estates, Ltd.*, [1931] 2 K.B. 113, and *Lawrence* v. *Cassel*, [1930] 2 K.B. 83, Mr. Justice Atkinson had held that the warranty which was given to Miss Otto and was broken was enforceable in law. In deciding against Mrs. Otto's claim in tort he had reviewed four important authorities: *Collis* v. *Selden*, (1868) L.R. 3 C.P. 495, *Cavalier* v. *Pope*, [1906] A.C. 428, *Malone* v. *Laskey*, [1907] 2 K.B. 141, and *Bottomley* v. *Bannister*, [1932] 1 K.B. 458. In the last case Lord Justice Scrutton had said in his judgment:

> "It is at present well-established English law that in the absence of express contract a landlord of an unfinished house is not liable to his tenant, or a vendor of real estate to his purchaser, for defects in the house or land rendering it dangerous or unfit for occupation, even if he has constructed the defects himself, or is aware of their existence."

Lord Justice Greer had pointed out in the same case that there could never be a claim for negligence unless there was a duty, for negligence meant breach of duty.

Dealing with damages for personal injury, Mr. Hughes said that one rule as to the measure of damages in such cases had been stated sixty-four years ago by Lord Esher, then Mr. Justice Brett, when he said in *Rowley* v. *London and North Western Railway Co.*, (1873) L.R. 8 Exch. 221, 230, that if juries gave damages fully equivalent to the pecuniary loss sustained, defendants would be ruined, and the defendants most liable to such actions would no longer be able to carry on their business upon the same terms, for no compensation would give a man back his limb or his life, or give the dependants back their bread-winner. In a civil Court the death of a human being could not be complained of as an injury, and this prevented the recovery of any damages in respect of the death, even where the cause of action was complete without proof of the death. In *Flint* v. *Lovell*, [1935] 1 K.B. 354, the trial Judge had included as one of the elements of damage that the plaintiff's normal expectation of life had been materially shortened. The Court of Appeal had refused to accede to the argument of the defendant-appellant that if the death of a human being could not, apart from statute, give a right of action, the shortening of life could not give such a right of action or constitute an independent head of damage, and held that in assessing damages the Judge was entitled to take into consideration as one of the elements of damage the fact that the plaintiff's normal expectation of life had been materially shortened. In *Slater* v. *Spreag*, [1936] 1 K.B. 83, the plaintiff had been the administratrix of a man who was struck by a motor-car driven negligently by the defendant. She had claimed under the Law Reform (Miscellaneous Provisions) Act, 1934, and the Fatal Accidents Act, damages for personal injuries, including pain and suffering and apprehension of shortening of life, and also funeral expenses. Mr. Justice Mackinnon awarded damages under the Fatal Accidents Act, but held that, as the deceased remained unconscious from the accident until death, he was incapable of suffering either physical or mental pain, or of realizing that his expectation of life was shortened, and therefore the administratrix was deprived of damages under the Law Reform Act.

[NOTE.—Since the above article was in type, the House of Lords has reversed the decision of the Court of Appeal in *Rose v. Ford*, [1936] 1 K.B. 90, but the Report of the final decision, with its repercussions on *Flint v. Lovell* (*supra*), is not yet to hand.—ED.]

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, on June 25.

The following District Societies were represented: Auckland, by Messrs. W. H. Cocker (proxy), J. B. Johnston, and L. K. Munro; Canterbury, Messrs. K. M. Gresson and A. S. Taylor; Gisborne, Mr. A. T. Coleman; Hamilton, Mr. C. L. MacDiarmid; Hawke's Bay, Mr. H. B. Lusk; Nelson, Mr. J. Glasgow; Otago, Mr. E. J. Smith; Taranaki, Mr. R. Quilliam (proxy); Wanganui, Mr. A. D. Brodie; Westland, Mr. J. W. Hannan (proxy); and Wellington, Messrs. H. F. O'Leary, K.C., D. Perry (proxy), and G. G. G. Watson.

Mr. P. Levi, Treasurer, was also present. Apologies were received from Mr. A. H. Johnstone, K.C., and Mr. E. H. J. Preston.

The President, Mr. H. F. O'Leary, K.C., occupied the chair, and he extended a welcome to Messrs. Cocker, Coleman, Quilliam, and Hannan, who were attending the Council meeting for the first time this year.

Council of Law Reporting.—The President reported that a draft Bill incorporating the points agreed on by both Councils had been prepared by a Committee of the Council of Law Reporting and was circulating among the members of that body.

Audit Regulations: Revision.—The following report was received:—

> "The Audit Committee desire to report that since the last Council meeting they met on several occasions and discussed in detail the suggestions and comments made by the District Societies.
>
> "The Draft Rules as circulated were then re-drafted to include such suggestions as were thought to be of importance, and the revised Draft was submitted to the New Zealand Society of Accountants for their consideration.
>
> "A joint meeting with the Committee appointed by the Accountants' Society was held in Wellington on Thursday, May 20, and the regulations discussed in detail. As a result of this meeting, at which no alterations of any material points were suggested, a memorandum setting out the details

in which the Joint Committee thought alterations were desirable was prepared and forwarded to the Accountants' Society. When their reply has been received, the Audit Committee will be in a position to have the regulations finally settled and printed."

One of the members of the Council asked if the proposed regulations covered the case of a solicitor who handled no trust moneys and did not appoint an auditor. He thought it should be imperative that an auditor be appointed in every case. The Secretary explained that the attention of the Audit Committee had already been drawn by the Otago Society to the matter. The revised regulations provided that where a solicitor had handled no funds, he must make a statutory declaration to that effect within a month after the end of the year.

Advertising by Solicitors: Broadcasting.—The following report was received from Messrs. Munro and J. B. Johnston :—

"Auckland,
June 18, 1937.

"We have given careful consideration to the rules suggested by the Wellington District Law Society concerning advertising by solicitors. In our opinion it is preferable that Rule A set out below should be substituted for the rules prepared by the Wellington Society so far as the latter relate to broadcasting, and that Rule B should be added to the Wellington proposals.

"(*a*) **Broadcasting:**

"A barrister or a solicitor employed or engaged in the practice of law may, on the invitation of any Broadcasting body, broadcast lectures on law, but must not allow the publication of his name or photograph.

"A barrister or a solicitor not employed or engaged in the practice of law may allow the publication of his name, and, if he thinks fit, of his photograph.

"There is no objection to the announcement of the name of a barrister or a solicitor (without mention or indication of his being a member of the legal profession) before short talks on matters of current interest of a non-legal nature.

"(*b*) **Answers to Legal Questions:**

"It is contrary to professional etiquette for a barrister or a solicitor to answer legal questions by broadcasting or in newspapers or periodicals where his name is directly or indirectly disclosed or liable to be disclosed."

"J. B. JOHNSTON.
"L. K. MUNRO."

Mr. Munro explained that Section "A" of the report embodied the rules of the English Bar Council and pointed out that it was desirable for the Society to follow as closely as possible the procedure in England. On the motion of the President, seconded by Mr. Munro, it was decided to approve the Wellington rules as amended by the foregoing report and circulate the completed rules to practitioners. The President and Mr. Watson were empowered to settle the final form of the rules before circulation.

Practising Fees in Arrears: Membership of District Law Societies: Rehabilitation Act.—The following report was received :—

"The President desires to report that, accompanied by the Secretary, he interviewed the Attorney-General (the Hon. H. G. R. Mason) on Thursday, 29th April, 1937, on the following matters arising from the Annual Meeting of the Council :—

"(*a*) *Practising Fees in Arrears.*—Mr. O'Leary explained the effect of the report adopted by the Council, and asked that the Law Practitioners Act should be amended in the direction indicated during the coming session.

"Mr. Mason thought there should be little difficulty in the matter, and asked that, prior to the commencement of the session, the Society should let him have a memorandum setting out the various points on which amendments were being sought.

"(*b*) *Membership of District Law Societies.*—This question was discussed at some length, the Attorney-General's attention being drawn to the letter from Auckland set out in the minutes.

"Mr. Mason promised to give the matter further consideration before making any decision.

"(*c*) *Rehabilitation Act.*—(i) *List of Applicants.*—Mr. O'Leary outlined the discussion which had taken place at the last Council meeting, and asked that a complete list should be made available at each Supreme Court Registry.

"Mr. Mason explained the enormous amount of work which would be involved in preparing and keeping such a list up to date, and said that the matter had already been given very close consideration. Owing to the projected increase in the number of Commissions, and to the very great number of cases withdrawn and settled, it seemed clear that by the end of the year most of the City applications would have been settled. In view of the ever changing nature of the list, therefore, he could not adopt the suggestion put forward.

NOTE.—The following letter has since been received :—

"May 6, 1937.

"Dear Sir,

"Referring to the representations made to the Hon. the Minister that a list of names of all applicants for adjustment of liabilities under the Mortgagors and Lessees Rehabilitation Act should be made available, I have to inform you that a complete list of names supplied by each Registrar of the Court of Review has now been compiled, and a copy has been forwarded to the Registrars of the Supreme Court at Auckland, Wellington, Christchurch, and Dunedin, at which places the list may be inspected by interested persons free of charge.

"(ii) *Uniformity in Principles Adopted by Commissions.*—Mr. O'Leary explained to the Attorney-General the various points raised by members at the Council meeting, and urged that a meeting of Chairmen of the Commissions should be held.

"Mr. Mason thought that a mass meeting of all the Chairmen would be too cumbersome, but that it would probably be of advantage to call them together in different districts. He promised to give the matter consideration, and also to consider the question of allowing some representative practitioners to be present at these meetings to put forward the views of the Law Societies."

The President was empowered to take such action as he thought fit in connection with any matters which might arise concerning the above report.

Interviews between Convicts and Solicitors.—The Auckland Law Society forwarded the following letter :—

"June 22 1937.

"My Council has recently been considering the question of interviews between convicts and solicitors. As you will see from the correspondence enclosed, the Minister of Justice has stated that convicts may have interviews with solicitors concerning appeals against conviction or sentence outside the hearing but within the view of a prison official. In respect of all other matters convicts may have interviews with solicitors provided the Public Trustee concurs. My Council is of the opinion that cases might well arise in which a convict should be able to consult with a solicitor without the necessity of having first to obtain the consent of the Public Trustee. For instance the convict might be involved in a matrimonial suit, or he might be dissatisfied with the manner in which the Public Trustee was handling his estate. My Council, being of the opinion that it was desirable that the position as stated in *Halsbury* (old edition), Volume 23, page 265, should apply, have been in communication with the Minister with a view to having such procedure adopted if possible in New Zealand. In this my Council has not been successful. The members accordingly resolved at their last meeting that the matter should be placed before the Council of the New Zealand Law Society for consideration and for such action (if any) as might be thought fit.

"The file is accordingly forwarded herewith. Please return this to me after the matter has been completed."

Mr. Munro said that the Attorney-General had previously been interviewed concerning the English

Rule and had at first seemed sympathetic, but now pointed out that the rule was no longer in force in England.

As the matter was of practical importance it was decided that the Wellington members should interview the Attorney-General and see if anything can be done.

Qualified Consents to Leases.—Mr. Perry reported that Mr. Levi and he had been in further touch with the Registrar-General of Lands, and read a letter received from the latter on May 28. He also read a reply which had been sent to the Registrar-General. He felt that the legislation proposed by the Registrar-General would be of great inconvenience and that the Society should oppose it. It was decided to empower the President together with Messrs. Levi and Perry to take such action as they thought fit.

Delegates' Expenses.—A Society wrote pointing out that the expenses of delegates were paid for only two meetings out of four each year and that their Society had not shared in the grant from the Council of Law Reporting. Though unable to afford to pay travelling expenses for the other two meetings they were of the opinion that the Society in question should be represented on every occasion.

It was decided that the present arrangement should continue for this year and that the question should be reconsidered at the first meeting next year.

(To be continued).

Obituary.

Mr. Cecil Duff, Hastings.

It was a great shock to his professional brethren to learn of the death of Mr. Cecil Duff, of the Hastings firm of Messrs. Duff and Averill on June 18, twenty-four hours after he was sent to a private hospital for an immediate operation.

The late Mr. Duff, who was in his fifty-sixth year, was born at Waitahuna, Otago, and spent his early life at Edievale. He was educated in Dunedin, where he studied for his profession and was admitted. He practised at Stratford, and at Napier, but for the last twenty years he was a resident of Hastings, where his useful and active life brought him into touch with every section of the community.

Since 1916, Mr. Duff was continuously a member of the Council of the Hawke's Bay District Law Society, and he held the office of President in 1926 and 1927. At all times an indefatigable worker in the interests of his professional colleagues, he was much valued and greatly esteemed as a member of the Council.

Mr. Duff saw service in the South African War, and took a keen interest in the South African War Veterans' Association up to the time of his death. In public life he served on the Hastings Borough Council from 1921 to 1923, and he was a member of the Napier Hospital Board from 1929 until his death.

For many years Mr. Duff was president of the board of management of the Y.M.C.A. at Hastings, and he was a keen supporter of the local musical and amateur dramatic organizations. He took an active part in educational matters, as a member of School Committees and of the Hastings High School Parents' League. For a term he was chief of the Hastings Orphans' Club, and a leading member of the Rotary Club. He was a member of the Heretaunga Masonic Lodge, of which he was recently elected Master, but his death occurred before his installation which was to have taken place during the present month.

One of the principal office-bearers of St. Andrew's Presbyterian Church during practically all his years of residence in Hastings, he was tireless in devotion to his duties in that Church's affairs.

Mr. Duff is survived by his widow and two daughters, for whom much sympathy is felt in their sudden loss. His death was mourned by all Hastings, its people having learned to esteem him as a citizen whose sound judgment and ready understanding were a civic asset. His kindly disposition endeared him to a wide circle of friends; and many others, who participated of his unostentatious bounty, mourn the loss of a generous benefactor.

At the opening of the day's sitting of the Royal Commission investigating hospital affairs at Napier on June 18, Mr. M. R. Grant, as counsel for the Hospital Board, said that it was his sad duty to refer to the passing of Mr. Duff, who for a number of years had been a valued member of the Board. His passing was very sudden. Four days earlier Mr. Duff had been paying his respects to the Commission and his death had come as a great shock to all. Mr. Grant tendered to Mr. Duff's widow and family the deep sympathy that was being felt by them all.

Mr. H. B. Lusk, as president of the Hawke's Bay Law Society, associated himself with Mr. Grant's remarks and said that Mr. Duff had been held in something more than respect by members of the profession; they had had an affection for him. Mr. Duff's death was not only a shock but a great grief.

Mr. E. D. Mosley, S.M., Chairman of the Commission, said that the news of Mr. Duff's passing was more than a shock to him and he extended his deep sympathy to his wife and family. For thirty years he had known Mr. Duff to be a man of the utmost integrity, and one whose word could always be relied upon. To the legal profession the Commission extended its sympathy.

Reference to the death of Mr. Cecil Duff was made in the Hastings Magistrate's Court, where, on the morning after his death, there was a large gathering of representatives of Hastings and Napier legal firms.

"We are here to-day," said Mr. David Scannell, "to pay that tribute to which Mr. Duff was so justly entitled. It is the last offering we can make. We have found Mr. Duff at all times a strenuous fighter for his client, and always capable, painstaking, just, and honourable."

The Magistrate, Mr. J. Miller, said he fully associated himself with Mr. Scannell's remarks. On such an occasion words could not adequately express one's feelings. He had known Mr. Duff as a young man in Dunedin and had regarded him as a capable lawyer and a conscientious man. Not only had he been of great assistance to the Bench, but he had also been a public man with the interests of the people at heart. Mr. Duff had spent a great deal of time in public affairs and had been held in the highest esteem by Bench, Bar, and public.

On the afternoon of Mr. Duff's funeral, which was one of the largest ever seen in Hastings, the business premises closed as a tribute of respect to an esteemed citizen.

Court of Review.

Summary of Decisions.*

By arrangement, the JOURNAL is able to publish reports of cases decided by the Court of Review. As decisions in this Court are ultimately determined by the varying facts of each case, it is not possible to give more than a note of the actual order and an outline of the factual position presented. Consequently, though cases are published as a guide and assistance to members of the profession, they must not be taken to be precedents.

CASE 61. Motion for extension of time in which to file an application for adjustment of liabilities by beneficiaries in an estate which had been administered under Part IV of the Administration Act, 1908, the real question being the right of the beneficiaries to make an application even if they were in time.

In 1926 the testator had appointed trustees to manage his affairs during his lifetime. He died in 1935, leaving seven children, who were sole beneficiaries under his will, of which probate was granted to the trustee company, and, on its application, an order was made by the Supreme Court for its administration under Part IV of the Administration Act. It was alleged by the mortgagees that administration was completed in April, 1936—*i.e.*, five months before the passing of the Mortgagors and Lessees Rehabilitation Act, 1936.

The present application related to certain of the properties owned by the deceased, all of which were subject to various mortgages. The beneficiaries urged that the failure of the administrator or the trustees to apply for adjustment would cause them, as the only really interested persons (as they alleged) in obtaining the benefits of the Act, serious loss.

Held, 1. That an applicant for the benefits of the Act must come within the generic term "applicant," as defined by the Act—that is to say, he must be a "mortgagor," "lessee," or "guarantor": s. 2. *Prima facie* as the beneficiaries in this estate were not "mortgagors," "lessees," or "guarantors" who could apply for an adjustment of the liabilities which the testator incurred to the "mortgagees" made party to the proposed application; and they were not so entitled as the representatives of a deceased mortgagor: s. 60 (2). In this case, there were personal representatives of the deceased mortgagor, and the Act makes no provision for beneficiaries succeeding to the right of the personal representatives, if those personal representatives failed to make application; and the Court of Review had no power to grant a right of this nature without special statutory provision.

NOTE.—Whether or no beneficiaries in such case have a right of action against the personal representatives, in the event of their refusal to make application with resultant loss to the beneficiaries, is not a matter for the Court of Review.

2. That the general equitable purposes of the Act do not cover a case where it might reasonably be anticipated that loss would be occasioned to beneficiaries through neglect of personal representatives to make application, and that the Court cannot effect such equitable purpose by exercise of the wide power given to it by s. 71, which, while it gives wide powers to the Court to make orders, including the citation of parties who may be indirectly affected, can only be exercised in cases where an application, instituted by the parties entitled by the provisions of the statute to make application, is properly before the Court.

3. That, whatever order the Court might be empowered or disposed to make in respect of certain applications made by the personal representatives, it had no right to use those proceedings to authorize the institution of fresh proceedings which amounted, not only in form but in substance, to an application under the Act for an adjustment of liabilities for which the applicants were in no respect liable and in respect of which they were not entitled by the statute to make application.

4. That, whether or not, as alleged by the mortgagees, the administration was completed before the passing of the Mortgagors and Lessees Rehabilitation Act, 1936, it appeared that certain of the properties which were subject to mortgages, even if abandoned to the mortgagees or in the possession of the mortgagees, had not been actually transferred to those mortgagees and in respect of those properties applications had been filed; and, whether these applications had been filed on behalf of the mortgagees or as personal representatives of the deceased mortgagor, must be determined when those applications come before the Court and not on this motion for leave for further time to file an application by third parties; and in these proceedings the Court should not anticipate interlocutory applications that may be made to it in respect of such applications for adjustment, or declarations that may be made in respect of the properties the subject of those applications, by a Court having jurisdiction in the administration of the estate.

As the Court in the present proceedings had to determine only the right of the beneficiaries to make an application under the Mortgagors and Lessees Rehabilitation Act, 1936, the Court, dismissing such application, was of opinion that they had no present right to make such application, and that the Court should not attempt to give them such right by exercising the jurisdiction of the Court under s. 71.

CASE 62. Motion by first mortgagee for leave to exercise powers granted under a mortgage. The second mortgagee, who was the applicant for adjustment, alleged an agreement by the mortgagor to sell to him, but he could produce no document or writing as evidence of such an agreement. The second mortgagee, deeming himself the owner of the land and without the consent of the first mortgagee, purported, after the passing of the Mortgagors and Lessees Rehabilitation Act, 1936, to lease the property to a third party for five years with a right of purchase.

Held, granting the leave sought, That the applicant was not a mortgagor within the meaning of the Act.

CASE 63. Motions by a lessor and a mortgagee for an order extending the time for filing notices of appeal under s. 27 (1).

Held, making an order on one motion, that it was necessary to make an order only on one motion as one notice of appeal is all that is necessary to open up the whole matter for all parties.

NOTE.—The practice of the Court is that once a notice of appeal is filed by any party it cannot be withdrawn without the leave of the Court or upon consent of all parties who appeared before the Commission.

* Continued from p. 170.

Australian Letter.

By JUSTICIAR.

A curious feature of legal activity in this jurisdiction in recent times has been the frequency of applications to the Court against newspapers for contempt. The profession in New Zealand is no doubt familiar with *R. v. Fletcher, Ex parte Kisch*, (1935) 52 C.L.R. 248, in which the principles applicable to cases of criticism of the Court are expounded. Possibly you are also aware of the decision in *R. v. Dunbabin, Ex parte Williams*, (1935) 53 C.L.R. 434, in which the above-mentioned decision of Evatt, J., was approved. The article complained of in the last case, scandalous though it is, makes entertaining reading, and is preserved in the *Law Reports*, which, of course, are approved by the Justices.

Newspapers and Contempt.—The Supreme Court of New South Wales has also been kept busy with similar applications. In *Ex parte Auld, Re Consolidated Press, Ltd.*, (1936) 53 W.N. 206, the Court considered how far the publication in a newspaper of the photograph of an accused person constitutes a contempt. In that case the Full Court expressed its complete agreement with the judgment of Blair, J., in *Attorney-General v. Tonks*, [1934] N.Z.L.R. 141. In *Ex parte McCay, Re Consolidated Press, Ltd.* and *Ex parte Baume, Re Consolidated Press, Ltd.*, (1936) 53 W.N. 212, quite a different set of facts were presented. The defendant newspaper published a paragraph containing the following sentence: "Mr. Tom Clarke, Lecturer in Journalism at London University, has been sent for to report upon the editorial deficiencies of the *Sun* organization." On the next day each of the applicants who were employed in editorial capacities by the newspapers referred to in the paragraph commenced actions for defamation against the respondent company. On the same day Sir Hugh Denison, a director of the companies which controlled these newspapers, sent the respondent company a telegram: "Statement about Tom Clarke published in *Telegraph* absolutely false. I hope you will order immediate retraction." The following day there appeared in the *Telegraph* a further paragraph under the heading "S.O.S." This, by the way, was written by an allegedly humorous writer whose half-column appears each morning. On this morning his article contained the following:

> "Then there's Sir Hugh Denison; a pal who used to kick around the wharves with me. What a cobber he's turned out to be. Wired me from Bourke of all places. S.O.S. object you divulging my secrets stop how dare you stop think of my public stop lay off stop Denie stop."]

Though the paragraph was merely facetious and no one reading it would imagine that a telegram had been sent in those terms, nevertheless a telegram had been sent denying the whole suggestion, whereas the parody represented that a person in authority had admitted the truth of part of the matter complained of. The respondent was fined £100.

The Full Court was recently faced with a further contempt matter, which was of interest on two grounds: for the exposition of the law as to contempt applicable to the facts, and for the fact that the respondent to the application proved that the applicant did not exist, and therefore was unable to recover costs against it. The applicant was Bread Manufacturers, Ltd. It had been incorporated as a company limited by guarantee. In the forefront of its objects it showed that its purpose was to regulate the production and distribution of bread and to fix the wholesale and retail price of bread. Of the 350 master-bakers in the Sydney metropolitan area, 319 were members of the company. It was held that its objects were such that it was a trade-union within the meaning of the Trade-union Act, 1881, and, therefore, its registration as a company was void. On the question of contempt the facts were: In September, 1936, a bread-carter had issued a writ against the company and certain other defendants for libel. On March 21 and April 18, the respondent newspaper had published certain articles denouncing the master-bakers for an alleged combination to keep up prices and for allegedly bringing pressure to bear upon non-members of the combine to prevent under-selling. In the course of holding that there was no contempt the Full Court said:

> "The administration of justice, important though it undoubtedly is, is not the only matter in which the public is vitally interested: and if in the course of the ventilation of a question of public concern matter is published which may prejudice a party in the conduct of a law suit, it does not follow that a contempt has been committed. The case may be one in which as between competing matters of public interest the possibility of prejudice to a litigant may be required to yield to other and superior considerations. The discussion of public affairs and the denunciation of public abuses, actual or supposed, cannot be required to be suspended merely because the discussion or the denunciation may, as an incidental but not intended by-product, cause some likelihood of prejudice to a person who happens at the time to be a litigant."

The Chief Justice said when these principles were applied to the facts of the present case, he was of opinion that it was impossible for the Court to be satisfied beyond a reasonable doubt that a case of contempt had been made out. The Court had no concern with the question whether the charges made in the articles in question were justifiable or unjustifiable. It was at least clear that they were made in relation to a matter which may fairly be regarded as one of public interest.

There has just been reported a further contempt matter which concerns reports of judicial proceedings. The applicant, one Terrill, had been charged under the Farm Produce Agents Act, 1926, that he had fraudulently rendered false accounts. During the hearing there was published an article in the *Daily Telegraph* with the display heading:

> "10d. for 19 bags of beans.
> "Growers' charge against agent."

The chief objection to the article, apart from its general display, was the fact that it was not stated that the tenpence which had been received by the grower for nineteen bags of beans was a net amount after deducting certain proper charges which were not challenged by the prosecution. The applicant conceded that the newspaper had no intention of causing prejudice to him. The evidence which had been given against Terrill was to the effect that having been employed to sell beans on behalf of clients, he sold them through another agent and then pretended to his clients that he had sold them to that agent for a much lower price than that at which he had in fact sold them. The prosecution alleged not that he had deducted too much, but that he had admitted the receipt of too little.

In dealing with the principles applying to cases of criminal contempt, the Chief Justice pointed out that in order that a report of a judicial proceeding might be

exempt from proceedings for contempt, notwithstanding that there might be some likelihood of its injuring a party to the proceedings, it was necessary that it should be fair and accurate. It need not be complete. A fair abridgment or summary had the same protection as a verbatim report. In considering whether a summary was fair, it must be kept in mind that it was not necessary that the report should be made by a trained lawyer. It might be made by a layman; and if it was, then, so long as no bias was shown by the reporter, and the summary was in fact one which any person of ordinary intelligence using reasonable care might reasonably regard as giving a fair summary of the proceedings, no exception could be taken to it by reason only of the fact that if the reporter had possessed the technical knowledge of a lawyer he might have made amplifications or modifications. If, however, in any material respects the report was not fair, if it was partial, if it misrepresented the proceedings by *suggestio falsi*—by representing something to have occurred which did not occur—or by *suppressio veri*—by withholding material facts which would put a different complexion upon facts truly reported—no protection could be accorded to the publication on the score of public interest, and the question of contempt must be determined upon ordinary principles.

"Privileged Occasion." — In the Supreme Court recently, Maxwell, J., said that if, in answer to an attack, a person made relevant statements published in a newspaper, even if they were defamatory, such statements were privileged, provided no malice was proved. His Honour nonsuited Frederick Loveday in a libel suit against Sun Newspapers, Ltd., and the Town Clerk of Canterbury (Mr. Edgar Jay) (*Sydney Morning Herald*, June 17, 1937). Loveday was formerly employed as a relief worker by the Canterbury Council. He sued Sun Newspapers, Ltd., for libel, said to be contained in an article published in the *Sun*, and claimed £1,000 damages. The plaintiff was a member of the Canterbury District Unemployed Council, and addressed other relief workers during the lunch-hour regarding unsatisfactory working-conditions. He was dismissed without reason, he said, being given by the Town Clerk, and debarred from other relief work and food relief. The *Sun* published a letter from the Unemployed Council claiming that Loveday had been victimized, and also a statement by the Town Clerk of Canterbury Council that Loveday had been dismissed for "general unsatisfactory conduct, which included abuse of gangers and the spreading of restlessness among his fellow employees." This, it was alleged, was a gratuitous insult and abuse of the plaintiff. Maxwell, J., said that if an attack had been made against the Town Clerk, he was justified in using the same medium for replying to that attack. The law justified a man in repelling a libellous attack by a denial. He was satisfied that the Town Clerk's statement could be regarded fairly as a denial, coupled with an explanation.

Shocking the Bench.—Sir Richard Bethell's metaphors and illustrations, even when veiled in a dead language, were not always appreciated by the learned tribunals to which they were presented. On one occasion, he was earnestly putting his submissions to the Court. "Having exposed the *a priori* arguments of my learned friend," he said, "I will now proceed to denude the *a posteriori*——." "Oh, Sir Richard, Sir Richard! Shame on you!" interrupted a scandalized Lord Justice of Appeal.

New Zealand Conveyancing.

By S. I. Goodall, LL.M.

Agreement between a Sawmilling Company and Cartage Contractors for Carriage of Output of Mill to Company's Yard, Railway-station, or Wharf: a "Cartage Agreement."

(*Concluded from p.* 174.)

13. (1) The company shall be entitled to deduct each month from the moneys payable to the contractors the sum of [*threepence*] per [*one hundred*] superficial feet sawn-timber measurement and such deductions shall continue until the sum of [*two hundred and fifty*] pounds has been deducted by the company.

(2) The amounts so deducted in terms of this clause shall be held by the company as security for the due and faithful performance by the contractors of their several obligations under this agreement.

(3) In the event of the security in the hands of the company becoming reduced below the sum of [*£250*] then and in such case and in every such case the said deductions shall recommence and shall continue until the sum of [*£250*] has once more been collected by the company as security for the due and faithful performance and observance by the contractors of their obligations hereunder.

14. (1) The company shall also be entitled in each and every month during the continuance of this agreement to retain for the period of thirty-one days in terms of the Wages Protection and Contractors' Liens Act 1908 and its amendments one-fourth of the price payable each month to the contractors.

(2) So long as no notice of lien charge or other proceedings is received by the company in pursuance of that Act then and in each and every such case the sum so retained shall be paid to the contractors within seven days following the said period of thirty-one days.

15. (1) The contractors shall insure themselves and their employees and servants against accident inclusive of claims by statute or at common law and shall produce to the company the receipts for premiums payable in respect of such insurances at least three days prior to the time when they shall respectively become due failing which the company shall be at liberty to pay such premiums and to deduct the amount so paid from the moneys payable to the contractors hereunder.

(2) Such insurances shall be effected in an insurance office in New Zealand approved or nominated by the company.

(3) The contractors shall also effect and keep on foot all such fire and other insurances which shall be necessary to protect the company against loss of or damage to any of the said timber during carriage and delivery and such fire and other insurances shall be taken out in the same insurance office as aforesaid.

16. The contractors shall at their own cost and expense keep the private roadway between the company's said mill and the public road in good order condition and repair to the satisfaction of the company so that the contractors can perform and fulfil their obligations under this agreement in all weather at all seasons and under all circumstances.

17. (1) In the event of the company's bush being destroyed by fire or in the event for any reason of there being no further output from the company's mill then and in such case this agreement shall cease and determine:

PROVIDED HOWEVER that the contractors shall complete the carriage and delivery of all sawn timber available at the company's said mill.

(2) In the event of the company's bush being only partially destroyed by fire then the company may at its option by notice in writing to the contractors determine this agreement:

PROVIDED HOWEVER that in the event of the company not so determining this agreement then and in such case the same shall be suspended for such time and period as the parties hereto shall agree upon or failing agreement as shall be fixed by arbitration.

18. In the event of the company's said mill being destroyed or materially damaged by fire or any other cause then and in such case the company may at its option determine this agreement:

PROVIDED HOWEVER that in the event of the company deciding not to determine this agreement then and in such case the same shall be suspended until the mill is re-erected equipped and once more working and there is timber available on the company's mill-skids for carriage.

19. (1) In the event of any strike or lockout or combination of the workmen of the company or of the company's sawmillers and/or of the company's bush contractors occurring and such a strike lockout or combination of workmen as aforesaid is in the opinion of the company hindering the operations of the company then and in such case and in every such case reasonable time shall be allowed to the contractors for the delivery of sawn timber under this contract and this agreement may at the option of the company be temporarily suspended.

(2) In the event of any strike occurring on the part of the workmen of the contractors then and in such case reasonable time shall be allowed to the contractors for delivery under this agreement.

20. The contractors shall have the right to sublet this contract PROVIDED HOWEVER that the following conditions in respect thereof are first complied with namely:—

(*a*) The intended subcontractors shall be first of all approved of in writing by the company before the contractors shall agree to sublet.

(*b*) The subcontractors shall observe every condition of this agreement and shall enter into a deed of covenant direct with the company so to do.

(*c*) The contractors shall continue liable under this agreement and shall indemnify the company in respect of every breach on the part of the subcontractors and all settlement of accounts shall continue to be made only through the contractors and the company shall not become liable in any way direct to the subcontractors.

21. In the event of the contractors failing or being unable to deliver the output of the company's mill then and in such case the company shall be at liberty and is hereby empowered (after giving seven days' notice thereof in writing to the contractors) to enter into any agreement or arrangement with any other person or persons to assist the contractors in the expeditious performance of the contractors' obligations under this contract on such terms as the company shall think fit and any extra costs or expenses occasioned thereby shall be deducted by the company from any moneys due and to accrue due to the contractors and the company is hereby authorized at its option to deduct if necessary any such extra costs and expenses from the amount of security held by the company.

22. (1) If the contractors shall make default in delivery of any sawn timber in terms of this agreement or shall fail to comply with any of the conditions hereof they shall pay to the company the amount of loss and/or damage which shall be sustained by the company as a result of such default or defaults and the company shall be at liberty to deduct the amount of such loss and/or damage from the amount of security held by it in terms of this agreement.

(2) If the contractors shall continue to make default as aforesaid then the company may at its option by notice in writing to the contractors determine this contract and thereupon the amount of security shall be forfeited to the company by way of damages and the company shall also be entitled to recover from the contractors all further loss or other damages which shall be sustained by the company as a result of the default on the part of the contractors.

23. (1) In the case of any difference or dispute arising as to any clause made or herein contained or implied or as to the construction of these presents or arising in any way in respect of this agreement such difference or dispute shall be decided by an arbitrator if the parties can agree upon the appointment of one person and if otherwise then by the arbitration of two indifferent persons one to be appointed by each party hereto or an umpire to be chosen by the arbitrators before entering on the consideration of such difference or dispute and if in any dispute arising herein either party neglect to appoint an arbitrator or shall appoint an arbitrator who shall refuse to act then the arbitrator appointed by the other party shall make a final decision and every such arbitration shall be subject to the provisions in that behalf contained in the Arbitration Act 1908 or any then subsisting statutory modification thereof.

24. The liabilities of the contractors hereunder shall as between them and the company be both joint and several and in the event of the death of any one or more of the contractors shall enure and be imposed upon the survivor or survivors of them.

25. This agreement shall bind and enure to the benefit of the company its successors and assigns.

In witness whereof &c.
The Common Seal &c.
Signed &c.

"The law changes because men and things change. The gulf that is fixed between the legal order of the Middle Ages and that of the modern period, vast though it may seem to us, owes its existence to the accumulation of minute changes, the significance of which probably not one of their contemporaries surmised. And every change in the relation of power necessarily effects a change in the social norms that obtain. All legal development, therefore, is based upon the development of society; and the development of society consists in this, that men and their relations change in the course of time. The great never-ending task of juristic science is to resolve the conflict between the changing demands of life and the words of the established law."—PROFESSOR EUGEN ERLICH, in *Fundamental Principles of the Sociology of Law.*

Practice Precedents.

Appointment of Public Trustee as Executor and Appointment of Executor as Advisory Trustee.

The Public Trust Office Act, 1908, provides that, with the consent of the Supreme Court or a Judge thereof, executors, whether appointed before or after the coming into operation of the Act, may, unless expressly prohibited, before or after taking out probate, appoint the Public Trustee sole executor: s. 13 (1) (*a*).

Trustees, whether appointed before or after the coming into operation of the Act, and whether appointed under a deed, deed-poll, or will, may, unless expressly prohibited, and notwithstanding the terms of the trust as to the number of trustees, appoint the Public Trustee (if he consents thereto) sole trustee in their place without obtaining the consent of the Supreme Court or a Judge thereof: s. 13 (2).

Executors or administrators whose duties continue in the nature of a trusteeship after their administration is closed will for the purposes of s. 13 (2) be deemed to be trustees: s. 13 (3).

Where there are more trustees, executors, or administrators than one, any one trustee or executor (whether before or after proving a will), or any one administrator, may apply to the Supreme Court or a Judge thereof to have the Public Trustee appointed sole trustee, executor, or administrator: s. 13 (4).

All applications to the Supreme Court or a Judge thereof under s. 13 of the Act may be by petition, or in such other manner as may be prescribed by rules made under s. 31 of the Act; and the Court or a Judge may, and is given jurisdiction to, make such order as it thinks fit.

As to the provision where the executor appoints the Public Trustee as executor and as to legacies of infants, see s. 17 of the Public Trust Office Amendment Act, 1913, wherein, by such appointment, the Public Trustee becomes trustee, and whereby any executor may pay the legacy or share due to any infant into the Public Trust Office and by writing (in a form to be prescribed) direct the Public Trustee to account to such infant, &c. In the making of an order the Court has a discretion which must be exercised judicially: *In re Duke*, [1916] N.Z.L.R. 1133.

In *In re Anderson* (*deceased*), [1931] N.Z.L.R. 507, it was held that the Court must be satisfied that the change of executor will not result in greater cost of administration than if the work were carried out by a nominated executor, and that the fullest disclosure has been made by the Public Trustee to such executor of his or her rights, and of the liability of the estate of deceased to pay commission.

The provisions as to the appointment of an advisory trustee are to be found in s. 4 of the Public Trust Office Amendment Act, 1913. This section provides, *inter alia*, that the Public Trustee may act with an advisory trustee to the extent as therein provided.

By subs. (3) of s. 4, where the Public Trustee acts with advisory trustees the trust property must be vested in the Public Trustee, and he will have the sole management and administration of the estate and its trusts as fully and effectually as if he were the sole trustee. The Public Trustee may consult the advisory trustee and the advisory trustee may advise the Public Trustee on any matter relating to the trusts or the estate. The Public Trustee may follow the advice given by the advisory trustee, and will not be liable for anything done or omitted by him by reason of such advice or directions.

If in doubt as to the advice or directions given, the Public Trustee may in a summary manner refer the matter to a Judge in Chambers. The Judge's decision thereon will be final. It will not be obligatory for the Public Trustee so to move.

Section 4 (3) (*e*) of the Public Trust Office Amendment Act, 1913, provides that where there are more advisory trustees than one the advice and direction referred to means the unanimous advice of all the advisory trustees who are *sui juris* and for the time being resident in New Zealand; and s. 4 (3) (*f*) provides that where the advisory trustees are not unanimous, and tender to the Public Trustee conflicting advice or directions, the Public Trustee may apply to the Court for advice and directions.

Subject to the provisions of the trust instrument (if any), the remuneration of advisory trustees will, in the case of each estate, be such as is fixed by the Public Trustee with the concurrence of the advisory trustees, or if they do not agree, then by a Judge of the Supreme Court: *1923 New Zealand Gazette*, 2257.

The following forms provide for the appointment of the Public Trustee as executor in place of the executor appointed, and for the appointment of the latter as advisory trustee.

The consent of the Public Trustee is assumed to be available, so that the application becomes, in effect, *ex parte*.

(NOTE.—The petition must be supported by a motion-paper: see R. 414A of the Code of Civil Procedure.)

MOTION IN SUPPORT OF PETITION FOR APPOINTMENT OF PUBLIC TRUSTEE AS EXECUTOR, ETC.

IN THE SUPREME COURT OF NEW ZEALAND.

.....District.

.....Registry.

IN THE MATTER of the Public Trust Office Act 1908 and its amendments

AND

IN THE ESTATE of A. B. &c.

Mr. of Counsel for C. D. the applicant and the duly appointed executor of the estate of the above-named A. B. 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 10 o'clock in the forenoon or so soon thereafter as Counsel can be heard FOR AN ORDER that the said C. D. be authorized to appoint the Public Trustee of the Dominion of New Zealand sole executor and trustee of the will of the said deceased in place and in the stead of the said C. D. pursuant to the above-mentioned Act and that the said C. D. be appointed advisory trustee under the will of the said deceased AND FOR AN ORDER as to the costs of and incidental to this petition AND FOR SUCH FURTHER ORDER as to this Court may seem meet.

Dated at this day of 19 .

Solicitor for applicant.

Certified pursuant to the rules of Court to be correct.

Counsel moving.

REFERENCE.—Section 13 of the Public Trust Office Act, 1908; s. 4 of the Public Trust Office Amendment Act, 1913.

NOTE.—It is always an advantage to set out a brief memorandum of the facts even though they be contained in the petition. It helps the Judge.

PETITION FOR APPOINTMENT OF EXECUTOR AND ADVISORY TRUSTEE.

(Same heading.)

To The Right Honourable The Chief Justice of New Zealand.

THE HUMBLE PETITION OF C. D. of farmer showeth :—

1. That your petitioner is a brother of the said deceased.

2. That on the day of the said deceased duly executed his last will and testament a copy of which is hereunto annexed and marked with the letter "A."

3. That the said deceased died at in the Provincial District of on or about the day of and that probate of the said will was on the day of granted to your petitioner as sole executor under the said will by this Honourable Court.

4. That the value of the estate of the said deceased was sworn under the value of £ and that the persons beneficially interested therein are your petitioner and the following—namely, and .

5. That the executorship duties of the estate of the said deceased have not been completed and your petitioner proposes to leave immediately on a trip to England and does not desire to continue the administration of this estate and proposes to appoint the Public Trustee as executor and trustee of the said will of the said deceased in his place and stead subject to the consent of this Honourable Court thereto and to the appointment of your petitioner as advisory trustee.

6. That the Public Trustee is willing subject to the consent of this Honourable Court to accept the administration of the estate of the said deceased.

WHEREFORE YOUR PETITIONER HUMBLY PRAYS that this Honourable Court may make an order as follows :—

(*a*) Authorizing your petitioner to appoint the Public Trustee of the Dominion of New Zealand sole executor and trustee of the will of the said deceased in the place and stead of your petitioner pursuant to s. 13 of the Public Trust Office Act 1908 :

(*b*) Appointing your petitioner to be advisory trustee under the will of the said deceased pursuant to s. 4 of the Public Trust Office Amendment Act 1913 :

(*c*) That the costs of and incidental to this application amounting to £ be paid together with the disbursements hereof out of the estate of the said deceased.

AND YOUR PETITIONER WILL EVER HUMBLY PRAY.

[*Signature of petitioner.*]

[*Small affidavit verifying.*]

[*Consent of Public Trustee.*]

ORDER ETC.

(Same heading.)

day the day of 19 .

Before the Honourable Mr. Justice .

UPON READING the petition of and the affidavit in support thereof and the consent of the Public Trustee and the motion filed herein AND UPON HEARING Mr. of Counsel for the petitioner IT IS ORDERED AS FOLLOWS :—

(*a*) That the said C. D. be authorized to appoint the Public Trustee of the Dominion of New Zealand sole executor and trustee of the will of the said deceased in place and stead of the said C. D. pursuant to s. 13 of the Public Trust Office Act 1908.

(*b*) That the said C. D. be and he is hereby appointed advisory trustee under the will of the said deceased.

(*c*) That the costs of and incidental to this application amounting to the sum of £ be paid out of the estate of the said A. B. deceased.

By the Court.

Registrar.

In indenture or deed
Though a thousand you read,
Neither comma nor colon you'll ken :
A stop intervening
Might determine the meaning
And what would the lawyer do then ?

Recent English Cases.

Noter-up Service.

FOR

Halsbury's "Laws of England."

AND

The English and Empire Digest.

BAILMENT.

Motor-car—Car Park—Car Left by Owner—Ticket—Exception from Liability—Delivery to Third Party Without Production of Ticket.

The relationship between a motorist and the owner of a car park in which the motorist leaves his car for a nominal charge is that of licensor and licensee, and not of bailor and bailee.

ASHBY *v.* TOLHURST, [1937] **2 All E.R. 837. C.A.**

As to nature of contract of bailment : see HALSBURY, Hailsham edn., 1, par. 1231 ; DIGEST 3, pp. 53-57.

BANKERS.

Payment of Pension — Receipt and Certificate — Forged Receipt—Liability of Bank.

Where the payment of a pension is made through a bank, the bank receiving from the pensioner a receipt and a certificate of his being still alive, there is no warranty by the bank, when it collects the amount of the pension from the persons liable to pay it, that the pensioner is still alive.

GOWERS AND OTHERS *v.* LLOYDS AND NATIONAL PROVINCIAL FOREIGN BANK, LTD., **[1937] 3 All E.R. 55. K.B.D.**

As to money paid to bank by mistake : see HALSBURY, Hailsham edn., 1, pars. 1361-1363 ; DIGEST 3, p. 179.

BANKRUPTCY.

Deed of Arrangement—Assignment of Lease to Debtor—Covenant of Indemnity—Contingent Liability to Indemnify Assignor—"Creditor."

A creditor is not entitled to prove under a deed of arrangement not incorporating bankruptcy rules of administration in respect of a contingent liability.

Re CASSE ; ROBINSON *v.* GRIGG, **[1937] 2 All E.R. 710. Ch.D.**

As to interpretation of deeds of arrangement : see HALSBURY, Hailsham edn., 2, par. 610 ; DIGEST, 5, pp. 1082-1087.

CONFLICT OF LAWS.

Company—Registered in England with Property in Scotland—Floating Charge on Whole Undertaking Ranking as First Charge—Validity of Charge in Respect of Property in Scotland.

A floating charge given by an English company over all its property, including property in Scotland, is a valid security, notwithstanding that a floating charge is unknown to the law of Scotland.

Re ANCHOR LINE (HENDERSON BROS.), LTD., **[1937] 2 All E.R. 823. Ch.D.**

As to equitable jurisdiction over foreign property : see HALSBURY, Hailsham edn., 6, pars. 270-277 ; DIGEST 11, pp. 347-354.

CRIMINAL LAW.

Autrefois Convict—Magistrates—Conviction and Fine in Absence of Accused—Conviction not Recorded in Court Register—Further Conviction and Fine in Respect of Same Charge.

The fact that a conviction has not been recorded in the register kept in pursuance of the Summary Jurisdiction Act, 1879, sec. 22, does not prevent the conviction from being made the subject of a plea of autrefois convict.

R. *v.* MANCHESTER JUSTICES, *Ex p.* LEVER, **[1937] 3 All E.R. 4. K.B.D.**

As to plea of *autrefois convict* : see HALSBURY, Hailsham edn., 9, par. 212 ; DIGEST 14, pp. 336-349.

DISCOVERY.

Action by Insurance Company to Avoid a Policy—Non-disclosure of Convictions of Motor Offences—Application for Discovery of Documents in similar cases.

In an action by an insurance company to avoid a policy on the ground of non-disclosure of convictions of motor offences, discovery will not be allowed of documents tending to show that insurances have been accepted in other cases where disclosure of similar convictions has been made.

MERCHANTS' AND MANUFACTURERS' INSURANCE CO., LTD. *v.* DAVIES, **[1937] 2 All E.R. 767. C.A.**

As to nature of discovery: see HALSBURY, Hailsham edn., 10, par. 454; DIGEST 18, pp. 101-105.

GIFT.

Donatio mortis causa—Delivery—Power of Attorney.

The giving of a power of attorney over specific property cannot of itself constitute a good donatio mortis causa.

Re CRAVEN'S ESTATE, LLOYDS BANK, LTD. *v.* COCKBURN, **[1937] 3 All E.R. 33. Ch.D.**

As to *donatio mortis causa*: see HALSBURY, Hailsham edn., 15, par. 1283; DIGEST 25, pp. 552-554.

HUSBAND AND WIFE.

Separation Deed—Payment of Weekly Sum to Wife "During Her Life"—Death of Husband—Liability of Husband's Estate.

In the absence of any express intention in a separation deed that the husband's covenant to pay a weekly sum to his wife during her life is not to bind his real and personal estate, the weekly payments will continue to be payable after the husband's death.

KIRK *v.* EUSTACE, **[1937] 2 All E.R. 715. H.L.**

As to duration of annuities under separation deeds: see HALSBURY, Hailsham edn., 16, par. 1178; DIGEST 27, pp. 231-233.

INFANT.

Necessaries—Trading Agreement—Hire-purchase Agreement—Agreement to Purchase Motor-lorry.

A hire-purchase contract cannot in general be for the benefit of an infant.

MERCANTILE UNION GUARANTEE CORPORATION, LTD. *v.* BALL, **[1937] 3 All E.R. 1. C.A.**

As to necessaries: see HALSBURY, Hailsham edn., 17, pars. 1312, 1313; DIGEST 28, pp. 165-171.

INCOME-TAX.

Assessment—Allowance—Non-resident Housekeeper.

An allowance in respect of the services of a housekeeper cannot be claimed unless the housekeeper is resident in the literal meaning of the word.

BROWN *v.* ADAMSON (INSPECTOR OF TAXES), **[1937] 2 All E.R. 792. K.B.D.**

As to allowance for housekeeper: see HALSBURY, Hailsham edn., 17, par. 602; DIGEST, Supp. Income Tax Nos. 540*g*, 540*h*.

LIBEL AND SLANDER.

Libel—Privileged Occasion—Allegation of Improper Conduct by Public Official—Communication to Member of Parliament.

A member of Parliament to whom a written communication is addressed by one of his constituents asking for his assistance in bringing to the notice of the appropriate minister a complaint of improper conduct in relation to his office on the part of some public official acting in that constituency, has sufficient interest in the subject-matter of the complaint to render the occasion of such publication a privileged occasion.

R. *v.* RULE, **[1937] 2 All E.R. 772. C.C.A.**

As to privileged occasions: see HALSBURY, Hailsham edn., 20, pars. 573-575; DIGEST 32, pp. 118-135.

WORKMEN'S COMPENSATION.

Compensation—Two Accidents—Total Incapacity from First Accident—Second Accident Supervening—Right of Compensation for Second Accident.

A workman who is receiving compensation in respect of total incapacity due to an accident is not entitled to receive in addition compensation in respect of a second supervening accident.

WHEATLEY *v.* LAMBTON, HETTON, AND JOICEY COLLIERIES, LTD., **[1937] 2 All E.R. 756. C.A.**

As to maximum limit of compensation: see WILLIS'S WORKMEN'S COMPENSATION, 30th edn., pp. 248, 249; DIGEST 34, pp. 413, 414.

Rules and Regulations.

Timber Export Act, 1908. Timber Export Duty Order, 1937. June 23, 1937. No. 188/1937.

Motor-spirits (Regulation of Prices) Act, 1933. Motor-spirits Prices (Taranaki-Wellington) Regulations, 1937. June 24, 1937. No. 189/1937.

Fisheries Act, 1908. Fresh-water Fisheries Regulations, 1936. Amendment No. 1. June 22, 1937. 190/1937.

Health Act, 1920. Camping-ground Regulations Extension Order, 1937, No. 2. June 21, 1937. No. 191/1937.

Factories Act, 1921-22. Factories Consolidated Regulations, 1937. June 30, 1937. No. 192/1937.

Motor-spirits (Regulation of Prices) Act, 1933. Motor-spirit Prices (Wellington) Regulations, 1937. Amendment No. 1. July 7, 1937. No. 193/1937.

Stock Act, 1908. Stock Diseases Regulations, 1937. July 7, 1937. No. 194/1937.

Stock Act, 1908. Stock Diseases Order. July 7, 1937. No. 195/1937.

New Books and Publications.

Real Property. Fourth Edition. By G. C. Cheshire, D.C.L., M.A. (Butterworth & Co. (Pub.) Ltd.) 42/-.

Local Government, 1935. Edited by Philip F. Skottowe, LL.B. (Butterworth & Co. (Pub.), Ltd.) Price 65/-.

Salmond's Law of Torts, 9th Edition. By W. T. S. Stallybrass. (Sweet & Maxwell.) Price £2/2/-.

Palmer's Shareholders, Directors, and Voluntary Liquidators Legal Compendium, 34th Edition. By A. F. Topham and A. M. R. Topham. (Stevens & Sons.) Price 5/6.

You May Cross-Examine. By Lewis Herman and Mayer Goldberg. (MacMillan & Co., Ltd.) Price 13/-.

Trusts on the Continent of Europe. By F. Weiser, 1936. (Sweet & Maxwell.) Price 10/6.

Trustees Handbook. Extracted from "Snell's Principles of Equity," "Williams Real Property." Third Edition, 1936. (Sweet & Maxwell.) Price 5/-.

Aids to Justinian. By James Burnett, 1936. (Stevens & Sons.) Price 3/6.

Handbook on Joint Stock Companies, Gore-Browne. By Hayden & Stanley Borrie. 39th Edition, 1936. (Jordan & Sons.) Price 27/-.

Income Tax Law and Practice, 9th Edition. By C. A. Newport and R. Staples. (Sweet & Maxwell.) Price 15/-.

Roman Law and Common Law. By W. W. Buckland, LL.D., D.C.L., F.B.A., and A. D. McNair, LL.D., 1936. (Cambridge University Press.) Price 21/-.

Private Companies. (Their Utility and the Exemptions they enjoy.) 17th Edition. By Herbert W. Jordan, 1936. (Jordan & Sons, Ltd.) Price 2/9.

Rent Rebates. By Geoffrey Wilson (Victor Gollanz and The New Fabian Research Bureau.) Price 1/6.

Handbook of the Practice of the County Courts, Second Edition. By J. C. Spickett. (Jordon & Sons, Ltd.) 14/-.

Law of Housing, Second Edition. By W. Ivor Jennings. (C. Knight.) 47/-.

Local Government and Local Finance in England and Wales. By Wright and Hobhouse. Eighth Edition. By Oakes & Wheatley. (Sweet & Maxwell.) 17/6d.