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"*Justice is found, experimentally, to be most effectually promoted by the opposite efforts of practised and ingenious men presenting to the selection of an impartial Judge the best arguments for the establishment or explanation of truth.*"

—SYDNEY SMITH, in an Assize sermon, York, 1824.

Vol. XIII. Tuesday, November 2, 1937. No. 20

Crime Statistics in 1936.

ALTHOUGH the prison statistics do not tell the whole story of the prevalence or extent of crime in this country, it is pleasing to observe from the report of the Controller-General of Prisons, for the year 1936, that the total number of receptions (3,813) has continued steadily to decline over the past five years, the aggregate number received in 1936 being 346 less than during the previous year. The number of distinct prisoners received, which eliminates consideration of inter-institutional transfers and receptions of short-sentenced persons more than once in the same year, was 1,790. This is 368 less than the number of distinct persons committed to prison in 1935, and, compared with 3,401 for 1932, represents approximately a 50 per cent. drop in five years. It is of interest to observe that the numbers still continue to diminish, the present number in custody being considerably less than the number at December 31 last.

In his report, the Controller-General of Prisons points out that, in New Zealand, fortunately there are no criminal gangs such as exist in countries with large metropolitan areas, and who prey on the community with an utter disregard for life and property. Nevertheless, he observes, a small increase in the number of persons sent to prison for offences against the person is disquieting; but, as he points out, this increase is due to the greater number of persons charged with, and committed to prison for, negligently driving motor-vehicles causing death. On the other hand, the aggregate number of imprisonments for offences in relation to property showed a drop from 887 for 1935 to 599 for 1936, though the detailed records show an increase in the number committed to prison for burglary.

When we turn to the annual report of the Census and Statistics Department, we find that the number of convictions in 1936, in comparison with 1935, show an increase.

Under the heading "Miscellaneous Offences" in the Prisons Report, it is to be observed that the number of offences for drunkenness, and drunkenness in charge of a motor-vehicle, has shown a fairly marked increase, which, unhappily, tends to retard the downward trend in the prison population. "It would be preferable in cases of persistent drunkenness for commitments to be made to the inebriates' institutions under the Reformatory Institutions Act rather than to prison," the Controller-General says.

While there has been a considerable increase in the number of traffic offences in the last three years, the ratio of total offences to the number of vehicles on the road and to usage of motor spirit shows an improvement, says the report. Convictions for drunkenness in charge of a motor-vehicle, on the other hand, show an increase, both absolutely and relatively to road usage. The vigorous campaign against road accidents, now being prosecuted, has no doubt swelled the number of convictions in 1936.

The report gives figures from 1927 onwards, and shows that drunken drivers have increased from 294 in that year to 477 in 1936, an increase of 150 on 1935. The total number of traffic offences was 16,693, a figure exceeded in the range of years taken by 1929 (16,767) and 1930 (18,145). The number of 1935 was 15,303.

The number of criminal cases in Magistrates' Courts during 1936 (50,928) was much higher than in 1935, the increase being 3,369, or 7·1 per cent., and the summary convictions (41,890) show an increase of 9·3 per cent. over those for 1935, states the report. Summary convictions for the year 1936 represent a rate of 26·60 per 1,000 of mean population, as compared with 24·54 in 1935 and 24·30 in 1934, which was the lowest rate recorded in the last ten years. The greater proportion of the cases dealt with are in respect of what we may term minor offences.

The general statistics refer to all cases dealt with in Magistrates' Courts, including those in which a person is charged with two or more offences committed simultaneously. If only the principal offence is counted in each instance, the number of cases in 1936 is reduced from 50,928 to 40,053, the latter representing an increase of 7·5 per cent. on 1935.

The total number of cases in which sentences were passed upon persons brought before the Supreme Court during 1936 shows an increase of 30, or 2·6 per cent. on 1935. The number of distinct persons sentenced in the Supreme Court during 1936 was 460, or 2·5 per cent. fewer than in 1935. On the basis of distinct persons sentenced during the year, offences against the person showed an increase of 24·4 per cent., offences against property recorded the same figure as in 1935, while forgery, &c., showed a considerable decrease.

Theft, wilful damage, and breaking and entering and attempts were the principal charges. Convictions for theft and wilful damage showed increases of 9·3 per cent. and 19·7 per cent. respectively as compared with 1935. Convictions for breaking and entering decreased by 12·1 per cent.

Juveniles summarily convicted in 1936 (2,373) show an increase of 12·6 per cent. on the number for 1935, while two juveniles were committed to the Supreme Court for trial or sentence.

The apparently large number of juvenile offenders annually recorded in New Zealand is greatly accentuated by the fact that many children are brought up under the provisions of the Child Welfare Act, 1925, enabling Magistrates to commit indigent, &c., children to the care or supervision of the Child Welfare Branch of the Education Department. There were 297 such committals last year, as against 351 in 1935 and 271 in 1934.

There are fourteen prisons and State reformatories and three Borstal institutions in New Zealand, as well as twenty-three minor prisons and police gaols. In addition to these, there are the police stations which may be deemed to be prisons for any period (which may not exceed seven days) during which prisoners are detained there undergoing sentence. The daily average number of prisoners in confinement in these various institutions during 1936 was 1,050, a figure 162, or 13·4 per cent., below that for 1935.

Altogether there were 3,813 receptions into the various prisons, &c., during the year, a decrease of 8·3 per cent. from the previous year. The number of distinct prisoners received during the year, under sentence for criminal offences, was 1,790, this figure representing a decrease of 17·1 per cent. as compared with 1935. The distinct prisoners represent a rate of 11·36 per 10,000 of mean population in 1936, as compared with 13·81 in 1935.

Among suggestions made by the Controller-General of Prisons in his report is that, in cases of persistent drunkenness, rather than commit them to prison the offenders should be committed to the inebriates' institutions under the Reformatory Institutions Act, 1909. But he is not hopeful of the results of the "short and sharp term of imprisonment" that seems to be a favourite sentence in some of our Courts. On this topic, he says:

"It will be observed that over 62 per cent. of the prisoners admitted to prison during the year under review received less than three months, and 75 per cent. less than six months. The futility of these short sentences of imprisonment from a reformative or training point of view has been stressed repeatedly, and this view is supported by practically all authorities overseas.

"The purpose of imprisonment, apart from the punitive and deterrent aspect, which seems to be the main idea underlying the short sentence, is the inculcation of habits of industry and orderliness and a sense of social responsibility. Time is an essential factor in habit-formation and also in the matter of imparting any vocational training calculated to assist the offender in earning his livelihood on release. The first sentence is said to be the 'turning-point' in an offender's career, and it is vital that unless the offence is one that calls for serious punishment recourse should be had to some alternative to imprisonment, rather than that the initial dread be minimized through the serving of a short sentence less irksome than anticipated. There is no doubt that the probability of relapse increases with the number of previous sentences.

"It is significant that of the total number of persons received under sentence last year 33 per cent. had not been previously convicted, and of the balance 22 per cent. previously had been dealt with other than by imprisonment, but of the total received only 15 per cent. had previously served a substantial term in prison or Borstal. It is thus clear that comparatively few persons return to prison after serving a year or more, and that the greatest amount of recidivism is amongst those committed for short sentences."

In last year's Prisons Report, special reference was made to the desirability of introducing legislation along the lines of the Criminal Justice Administration Act, 1914 (Eng.), *11 Halsbury's Complete Statutes of England*, 371, which provides for the allowance of time for the payment of fines by instalments, as an alternative to imprisonment. The preamble to the Act shows that its object was to diminish the number of cases committed to prison and to amend the law with respect to the treatment and punishment of young offenders. The phenomenal drop in the commitments to prison in England since the statute was passed shows that it has achieved its primary object. In his Report, the Controller-General of Prisons hopes that similar legislation will shortly be introduced in New Zealand.

Summary of Recent Judgments.

COURT OF APPEAL.
Wellington.
1937.
October 1.
Myers, C.J.
Smith, J.
Fair, J.

BIRT v. ROBINSON (No. 3).

Motor-vehicles—Road Collisions—Obligation on Driver to keep Vehicle "as far as practicable to his left of the centre-line"—Interpretation—Practice—Nonsuit—Question of Fact not left to the Jury—New Trial—Motor-vehicles Regulations, 1933 *(1933 New Zealand Gazette, 351)*, **Reg. 11 (2).**

Regulation 11 (2) of the Motor-vehicles Regulations, 1933, is as follows:—

"Every driver of a motor-vehicle shall keep the vehicle as far as practicable to his left of the centre-line."

A collision occurred on a straight road, with 18 ft. of bitumen in the centre, in heavy rain and bad visibility, between plaintiff's motor-cycle and defendant's motor-car. Plaintiff, who was driving close to the centre on his correct side, saw defendant's car when it was 60 ft. or 70 ft. off, travelling on its wrong side of the road. Both continued their course until, when the defendant was about 8 ft. away from the point of impact, he swerved further towards his incorrect side of the centre-line, and when the impact took place, the middle of his car was about 2 ft. on his incorrect side of the centre-line, the plaintiff being at that distance from it on his correct side. Evidence to this effect was given by the plaintiff and was accepted in its entirety.

Held, nonsuiting the plaintiff, 1. That if the plaintiff had complied with the regulation the collision would not have occurred; and, as his breach of a regulation framed for the purpose of preventing the type of accident which happened was a contributing cause of the accident, it amounted to an act of disqualifying contributory negligence; and the fact that the defendant was guilty of a breach of the same regulation and was in fault did not affect the position, as the negligence of the plaintiff was a proximate cause of the collision.

2. That as the accident would not have happened without the plaintiff's negligence, and he had the last opportunity of avoiding the accident by the simple act of turning to the left, and there was no evidence to warrant a finding that the defendant had the last opportunity, it was the duty of the Court to withdraw the case from the jury.

On appeal from this decision,

Cooke, K.C., and **Ongley,** for the appellant; **Leicester,** for the respondent.

Held, per *totam Curiam*, allowing the appeal, (*per Myers*, C.J., and *Fair*, J., whether or not the learned trial Judge were right or wrong in his interpretation on the said reg. 11 (2), and per *Smith*, J., assuming that the learned trial Judge's interpretation was right), That the learned trial Judge was wrong in withdrawing the case from the jury, as, in the circumstances, the jury had to determine whether each party was, in fact, negligent, and, if both were negligent, then, with a proper direction to say who was really responsible for the collision.

Held, further (*Smith*, J., not deciding the question), That the true meaning of the said reg. 11 (2) is that every driver of a motor-vehicle shall, as far as is practicable, keep the vehicle to his left of the centre-line; and, consequently, on that ground, the judgment of nonsuit could not stand.

Per *Smith*, J., That, even if the trial Judge thought there was no room for the doctrine of last opportunity, the case had still

to go to the jury to have the responsibility for the collision determined upon the principle applicable to such a case.

Swadling v. Cooper, [1931] A.C. 1, and **Robertson v. Ling Sing,** [1936] N.Z.L.R. 653, followed.

Solicitors: **Gifford Moore, Ongley, and Tremaine,** Palmerston North, for the appellant; **Leicester, Jowett, and Rainey,** Wellington, for the respondent.

SUPREME COURT.
Auckland.
1937.
September 28.
Callan, J.

BEKKER v. WRACK (No. 2).

Practice—Costs—Claim for Substantial Damages—Verdict for Plaintiff for Nominal Damages—Whether Plaintiff entitled to Costs—Code of Civil Procedure, R. 557.

Although in an action claiming substantial damages for slander, the jury, not desiring the plaintiff to make money out of being slandered, awarded the plaintiff damages amounting to one farthing on each cause of action, it is not in conflict with such verdict for the Court to allow her costs for an action properly brought to vindicate her character in respect of serious and unjustified slanders.

Lancaster v. Kyle, (1914) 17 G.L.R. 120, distinguished.

Beath and Co., Ltd. v. Goldsborough, [1918] G.L.R. 186; **Moore v. Gill,** (1888) 4 T.L.R. 738; **Wood v. Cox,** (1889) 5 T.L.R. 272; **O'Connor v. Star Newspaper Co., Ltd.,** (1893) 68 L.T. 146; **Martin v. Benson,** [1927] 1 K.B. 771, referred to.

Counsel: **Robinson,** for the plaintiff; **Thurlow Field,** for the defendant.

Solicitors: **Singer and Robinson,** Auckland, for the plaintiff; **E. Thurlow Field,** Auckland, for the defendant.

Case Annotation: *Moore v. Gill,* E. and E. Digest, Vol. 32, p. 178, para. 2195; *Wood v. Cox, ibid.,* Vol. 17, p. 130, para. 377; *O'Connor v. Star Newspaper Co., Ltd., ibid.,* Vol. 32, p. 179, para. 2207; *Martin v. Benson, ibid.,* Supplement to Vol. 32, 2198a.

COURT OF ARBITRATION.
Auckland.
1937.
October 4, 8.
O'Regan, J.

JUDE v. MELLSOP AND OTHERS.

Workers' Compensation—Liability for Compensation—Employer's Trade or Business—Whether Worker employed in and for the Purposes thereof—Whether Worker on Ladder within Scheduled Occupations—Workers' Compensation Act, 1922, s. 3.

A worker is not in an employment in and for his employer's trade or business merely for the reason that he was injured while doing work advantageous to his employer, such as repairing or improving the premises wherein the business is carried on; and he cannot recover compensation unless his case falls within the category of occupations mentioned in the First Schedule to the Workers' Compensation Act, 1922.

Manton v. Cantwell, (1920) A.C. 781, 13 B.W.C.C. 551, followed.

Counsel: **Schramm,** for the plaintiff; **Sexton,** for the defendants.

Solicitors: **Schramm and Elwarth,** Auckland, for the plaintiff; **Sexton and Manning,** Auckland, for the defendants.

Case Annotation: *Manton v. Cantwell,* E. and E. Digest, Vol. 34, p. 257, para. 2199.

SUPREME COURT.
Auckland.
1937.
October 8.
Reed, J.

In re **HAMILTON (DECEASED).**

Probate and Administration—Sealing of Letters of Administration before Execution of Bond—Lapse of Grant—Administration Act, 1908, s. 21.

Letters of administration cannot lawfully be sealed before the execution of the prescribed administration bond. The affixing of the seal is, in effect, a certificate that there has been due compliance with the conditions attached to the letters of administration.

Where letters of administration were sealed by the office of the Supreme Court but no bond had been executed within one calendar month from the grant of the application for administration, on a later application to dispense with sureties.

A. K. Turner, in support.

Held, That the grant had lapsed, and that a motion to dispense with sureties could not be entertained except upon an application for a regrant of letters of administration.

Solicitors: **Turner and Kensington,** Auckland, for the applicant.

SUPREME COURT.
Invercargill.
1937.
August 17, 20;
Sept. 29.
Kennedy, J.

WALSH v. FAIRWEATHER.

Husband and Wife—Tortfeasors—Negligence—Whether Liability of Husband in Tort to Wife altered by Law Reform Act, 1936—Practice—Third-party Notice by Defendant (sued by Wife for Damages) for Contribution by Husband alleged to be another Tortfeasor—Discretion of Court to refuse—Law Reform Act, 1936, s. 3 (4), s. 17 (1) (*c*)—Code of Civil Procedure, R. 95.

The plaintiff, a wife, who was a passenger in a car driven by her husband and who suffered injuries in a collision with a car driven by the defendant, sued the latter for damages for such injuries alleged to have been caused by his negligence.

Macdonald, in support; **Prain,** to oppose.

Held, 1. That s. 3 (4) of the Law Reform Act, 1936, has not altered the law that a wife living with her husband may not sue him in tort for damages for personal injury resulting from negligence.

2. That, therefore, the defendant could not recover contribution from the defendant as another tortfeasor in respect of the damages for the injuries to the wife under s. 17 (1) (*c*) of the said Act.

3. That, there being no possible claim for contribution, the Court, in the exercise of its discretion under R. 95 of the Supreme Court Code of Civil Procedure, should refuse an application for the issue of a third-party notice claiming such contribution.

Glasgow Corporation v. Robertson or Cameron, [1936] 2 All E.R. 173, and **Gottliffe v. Edelston,** [1930] 2 K.B. 378, applied.

Solicitors: **J. C. Prain,** Invercargill, for the plaintiff; **A. M. Macdonald and Son,** Invercargill, as agents for **Webb, Allan, Walker, and Anderson,** Dunedin, for the defendant.

SUPREME COURT.
Wanganui.
1937.
August 13;
October 7.
Smith, J.

VALPY v. INSPECTOR OF FACTORIES.

Shops and Offices Acts—"Restaurant"—Bush Cook-house—Whether a "Private hotel or boardinghouse" and therefore "Restaurant"—Shops and Offices Act, 1921–22, s. 2 (1)—Amendment Act, 1936, s. 12.

The words "a private hotel or a boardinghouse" in the definition of "restaurant" in s. 2 (1) of the Shops and Offices Act, 1921–22, as amended by s. 12 of the Amendment Act, 1936, which, so far as material, provides that "restaurant" includes

"(*b*) Any building or place in which is carried on exclusively the business of a private hotel or a boardinghouse . . ."

a place where both board and lodging is provided.

A "bush cook-house" was conducted by a person who supplied meals but not lodging to the employees of a company. Though he sold occasional meals to persons other than such employees, he did not, as part of his ordinary "cook-house business" supply meals to the public, nor hold himself out as a seller of meals or replenishment to the public.

On appeal from a conviction by a Magistrate, for failure to keep a wages and time-book,

Stevenson, for the appellant; **Bain,** for the respondent.

Held, That such "bush cook-house" was not a building or place in which was carried on exclusively the business of a private hotel or a boardinghouse and was therefore not a "restaurant" within the meaning of the Shops and Offices Act, 1921–22, and its amendments.

Gohns v. Scherff, (1912) 14 G.L.R. 712, and **Mostyn v. McVicars,** (1912) 31 N.Z.L.R. 1012, referred to.

Solicitors: **Izard, Weston, Stevenson, and Castle,** Wellington, for the appellant; **Bain and Fleming,** Wanganui, for the respondent.

COURT OF APPEAL.
Wellington.
1937.
September 17, 24.
Myers, C.J.
Ostler, J.
Johnston, J.
Fair, J.

BIRT v. ROBINSON (No. 2).

Practice—Appeal to Court of Appeal—Special Leave—Notice of Appeal out of Time—Pauper Appeal—Considerations moving Court to grant Leave in Special Circumstances—Nonsuit in Court below—Leave given on Terms as to Costs of First Trial—Court of Appeal Rules, R. 19—Code of Civil Procedure, R. 272.

Appellant, a pauper, having been nonsuited and his notice of appeal having been out of time was unable to comply with R. 272 of the Code of Civil Procedure.

On application for special leave to appeal under R. 19 of the Court of Appeal Rules,

Cooke, K.C., and **Arndt,** for the appellant; **Leicester,** for the respondent.

Held, by the Court of Appeal, That there were special circumstances that justified leave to appeal being given under R. 19, but not unconditionally.

Dillicar v. West, [1921] N.Z.L.R. 617, and **Mansfield v. Blenheim Borough Council,** [1923] N.Z.L.R. 842, referred to.

Special leave was therefore granted, subject to the condition that, if appellant succeeded in the appeal, the defendant in a retrial, whatever the result of that retrial might be, should be allowed the costs to which he would have been entitled had the case proceeded to a further trial under R. 272 of the Code of Civil Procedure.

Solicitors: **Gifford Moore, Ongley, and Tremaine,** Palmerston North, for the appellant; **Leicester, Jowett, and Rainey,** Wellington, for the respondent.

SUPREME COURT.
Auckland.
1937.
Sept. 17, 23.
Callan, J.

In re **WILLIAMS, DECEASED, ANDERSON AND ANOTHER v. WILLIAMS AND OTHERS.**

Executors and Administrators—Will—Interest passing—Contingent partial Intestacy—Appropriate Point of Time for Distribution—Whether Widow's Right to £500 and Interest applicable to such an Intestacy—Method of Distribution—Administration Act, 1908, ss. 47, 48, 49.

Where after a testator's death it becomes clear that there is a contingent partial intestacy, the person to take under the rules of law for the distribution of the estate of a man dying intestate under Part III of the Administration Act, 1908, must be settled by considering, as the appropriate point of time, the date of the testator's death.

The whole of s. 47 (2) of the statute (entitling the widow of the intestate, when the net value of estate exceeds £500, to £500 thereof absolutely and to a charge on the estate for that sum with interest thereon from the date of the death of the intestate at 4 per cent. per annum until payment) is applicable to such a partial contingent intestacy.

A testator gave his widow a life interest in his whole estate, and, upon her death, after giving certain legacies, directed the division of the residue among his brothers and sisters in equal shares, share and share alike.

The testator left no children or other more remote issue. Both his parents predeceased him. He had three brothers and three sisters. Two brothers and one sister predeceased him leaving issue. One brother and two sisters survived him, but each of them had since died. The last survivor died in 1937. The brother who survived him and one of the sisters who survived him left issue. All the issue of the three brothers and of the two sisters who left issue were of full age.

Towle, for the trustees; **H. J. Butler,** for the widow; **Holmden,** for the children of testator's surviving brother and sister; **Prendergast,** for other defendants.

Held, 1. That the personal representatives of the widow after her death would be entitled to £500 with interest thereon at 4 per cent. per annum from the testator's death until payment, such interest to be charged upon the corpus of the ultimate residue remaining after the payment of the legacies, plus two-thirds of ultimate residue that would remain when such £500 and interest had been deducted from that portion of the residuary capital which would remain after the legacies had been deducted.

2. That the balance should be divided into six equal shares, of which the personal representatives of the one brother and two sisters, who survived the testator but had since died, should each get one-sixth while another one-sixth went to each of the three groups of children whose parents were respectively the two brothers and one sister who predeceased the testator leaving issue.

Bullock v. Downes, (1860) 9 H.L. Cas. 1, 11 E.R. 627; **Hutchinson v. National Refuges for Homeless and Destitute Children,** [1920] A.C. 795; and **Public Trustee v. Sheath,** [1918] N.Z.L.R. 129, discussed and applied; dictum of *Chapman,* J., therein dissented from.

Public Trustee v. McKee, [1931] 2 Ch. 145, and **In re Saunders, Public Trustee v. Saunders,** [1921] 1 Ch. 674, referred to.

Solicitors: **Miller and Blundell,** Kawakawa, for the plaintiffs; **Towle and Cooper,** Auckland, for the widow and certain other defendants; **Clendon and Vollemaere,** Thames, for certain other defendants.

Case Annotation: *Bullock v. Downes,* E. and E. Digest, Vol. 44, p. 876, para. 7328; *Hutchinson v. National Refuges for Homeless and Destitute Children, ibid.,* p. 882, para. 7386; *Public Trustee v. Sheath, ibid.,* p. 720, 5692 (ii).

COURT OF ARBITRATION.
Auckland.
1937.
September 10.
O'Regan, J.

HALL v. ABELS LIMITED.

Workers' Compensation—Liability for Compensation—No loss of Earning Capacity—Effect—Workers' Compensation Act, 1922, s. 3.

The Workers' Compensation Act, 1922, applies only where, as the result of injury or accident, there has been loss of earning capacity, injuries within the Second Schedule to the statute excepted.

Counsel: **J. J. Sullivan,** for the plaintiff; **Hore,** for the defendants.

Solicitors: **Sullivan and Winter,** Auckland, for the plaintiff; **Buddle, Richmond, and Buddle,** Auckland, for the defendants.

SUPREME COURT.
Gisborne.
1937.
August 13;
September 13.
Reed, J.

In re **HURIMOANA 1B2 BLOCK.**

Rating—Native Land—Charge granted by Native Land Court Receiver—" May "—Whether Native Land Court has Discretion subsequently to refuse to appoint Receiver—Whether Jurisdiction to transfer Liability to other Land or remit—Rating Act, 1925, ss. 102, 108, 109—Native Land Act, 1931, s. 42.

Section 108 of the Rating Act, 1925, provides for the lodging of claims for rates due on Native land and for treating them as charging-orders. Subsection 6 enables the Court to transfer the liability for rates to other land or to remit the whole or part of rates. Subsection 7 says "A charge when granted *may* be enforced by the appointment of a Receiver," &c. Section 109 provides that if a charge granted under the Act remains unsatisfied for more than one year the Court may . . . order that the land affected . . . be vested in the Native Trustee for the purposes of sale for the payment of such charge.

When the Native Land Court has granted a charging-order for rates under s. 108 of the Rating Act, 1925, it has no discretion subsequently to refuse to appoint a Receiver under subs. 7 thereof unless it is prepared under s. 109 to appoint the Native Trustee for the purpose of sale of the land affected by the charge. Nor upon the hearing of an application to appoint a Receiver or the Native Trustee is the jurisdiction under s. 108 (6) to transfer the liability for rates to other land or to remit the whole or part of rates exercisable by the Court.

Julius v. Bishop of Oxford, (1880) 5 App. Cas. 214, applied.

Counsel: **J. Blair,** for the Cook County Council; **A. A. Whitehead** and **Coleman,** for the Native owners.

Solicitors: **Blair and Parker,** Gisborne, for the Cook County Council; **Coleman and Coleman,** Gisborne, for the Native owners.

Case Annotation: *Julius v. Bishop of Oxford,* E. & E. Digest, Vol. 19, p. 339, para. 1504.

The Off-side Rule.

1.—What Constitutes a Breach of the Rule.

The most important provision of the Traffic Regulations is contained in para. (6) of Reg. 14*; popularly known as the off-side rule, though many people contend that an on-side rule would be better. There are arguments in favour of that, but the off-side rule has been adopted, and, if it is strictly observed, a collision at an intersection cannot happen. At least that would be the position if the rule amounts to an absolute prohibition against driving on to or across an intersection if another vehicle is approaching from the right so that if both continued on their course there would be a possibility of a collision.

Does the rule amount to an absolute prohibition? Not according to the judgment in the recently reported case of *Police v. McLaughlin*, (1937) 32 M.C.R. 51. The effect of this judgment is far reaching, and, if correct, may destroy the value of the rule. The defendant was charged with a breach of the rule and set up by way of defence, that he was unaware of the approach of a car from the right because his view of the intersecting road in that direction was obstructed by a tree at the corner. The Magistrate said that when the vehicle on the right came into view it was so close to the intersection that the defendant had only an infinitesimal time in which to give way, and that the law did not require a driver to exercise such an extreme standard of care that he should be able to pull up within the length of his vehicle. The information was dismissed on the ground that "a motorist driving his car with a reasonable standard of care ought not necessarily to have been aware that at this particular intersection there was a vehicle approaching on his right."

The implication is that the off-side rule applies only at "open" intersections; or, put another way, a motorist is not required to give way to traffic on his right unless he has had sufficient opportunity to see the other vehicle before he reaches the intersection. So if the corner is "built up" or has a tree growing on it and a motorist cannot see along the road to the right before he reaches the intersection, he is entitled to assume there is no traffic approaching from that direction.

The Magistrate cited and applied the dictum of the Court of Appeal in *Algie v. D. H. Brown and Son, Ltd.*, [1932] N.Z.L.R. 779, in which it was held that a breach of the rule raised a presumption of negligence, but not a conclusive presumption. Reed, J., in delivering the judgment of himself and of Ostler and Smith, JJ., said:

> "The rule presupposes that the traffic from the right should be seen or ought to have been seen and that a breach of the regulation was either a voluntary or a negligent act."

The Magistrate took this dictum to mean that a motorist exercising reasonable vigilance may, for some reason, be excused for being unaware that a vehicle was approaching on his right. The Judges, however, were not referring to an excuse that would be an answer to a prosecution for a breach of the rule, but to an excuse that would be an answer to a civil action for damages founded on negligent driving. The dictum purports to construe the regulation, and says, in effect, that if a motorist fails to give way he is guilty of an offence unless the entry of his vehicle on to the inter section is caused by some act over which he has no control, and that his inability to control the act was not brought about by his own negligence.

That is a fair and common-sense construction of the rule. If a motorist stops or slows down on approaching an intersection for the purpose of giving way, but another vehicle following in his wake runs into and pushes his vehicle on to the intersection, his breach of the rule is neither a voluntary nor a negligent act; if he attempts to give way but is unable to do so because the brakes of his vehicle are not in order or his speed is too great, the breach is not a voluntary act, but it is a negligent act.

In *Police v. McLaughlin*, *supra*, the Magistrate found as a fact that if the defendant "had reduced his speed to such an extent as to be able to stop, say within a car's length, and concentrated his attention entirely on that part of the road to his right, he could probably have given way."

That is exactly what a motorist is required by the rule to do. He is prohibited from passing or attempting to pass in front of another vehicle on an intersection if the other vehicle is approaching or crossing the intersection on his right and there is a possibility of a collision if both vehicles continue on their course. The onus is on him to see that no vehicle is approaching before he attempts to cross the intersection, and the greater the obstruction of his view to the right the greater must be his vigilance. But the question of vigilance can be relevant only to penalty.

2.—One-way Street Intersections.

It is doubtful whether the off-side rule applies at the intersection of a "through traffic" street with a "one-way" street if vehicles are forbidden to travel along the "one-way" street in the direction of the "through traffic" street. A reasonable construction of the rule is that it applies to vehicles "*lawfully*" approaching an intersection on a driver's right, and consequently has no application at an intersection of the kind just mentioned. If that is correct, the rule had no application to the questions in issue in *Algie's* case. There the plaintiff was riding a motor-cycle alongside and to the left of a tram-car as both vehicles proceeded across an intersection. The tram-car had the right of the road. The defendant's motor-car approached the intersection on the right of the tram-car and attempted to pass in front of it. The motorman promptly applied his brakes, and the tram pulled up suddenly. That caused the plaintiff to go slightly ahead of the tram-car. The defendant's car passed in front of the tram, collided with the motor-cycle, and injured the plaintiff. The trial Judge entered judgment for the defendant, notwithstanding the jury's verdict in favour of the plaintiff, on the ground that the plaintiff had been guilty of a breach of the off-side

* (6) Every driver of a motor-vehicle when approaching or crossing any intersection the traffic at which is not for the time being controlled by a police officer, traffic inspector, traffic-control lights, or the presence of a compulsory-stop sign, and to or over which any other vehicle (inclusive of trams) is approaching or crossing, so that if both continued on their course there would be a possibility of collision, shall, if such vehicle (being other than a tram) is approaching from his right, or if such vehicle (being a tram) is approaching from any direction, give way to such other vehicle, and allow the same to pass before him, and, if necessary for that purpose, stop his vehicle. No driver of a motor-vehicle shall increase the speed of his vehicle when approaching any intersection under the circumstances set out in this clause.

rule. This judgment was reversed by the Court of Appeal on grounds that will be discussed in a subsequent part of this article; but all the Judges assumed that in the circumstances of the case the rule applied.

As between the plaintiff and the defendant, the rule would have applied except for the intervention of the tram-car, but that vehicle had the right of road. Consequently, while the tram-car was approaching and crossing over the intersection, no vehicle could lawfully be driven in front of it, if by so doing there was any possibility of a collision. Unfortunately the Court of Appeal did not consider whether the obligation of a driver to give way is not limited to a vehicle *lawfully* approaching on his right. Such a construction of the rule seems irresistible.

(*To be continued.*)

New Zealand Law Society.

Council Meeting.

(*Continued from p. 282.*)

Issue of Probates under Death Duties Act, 1921, s. 36.—The President reported that the Wellington members had interviewed the Commissioner of Stamp Duties and had brought before him the points raised by Otago and Southland, but the Commissioner had indicated that he had no intention of altering the present regulation concerning the retaining of bonds by his Department. It was pointed out that in Wellington it had never been the custom to ask for the return of a bond from the Department, and it was rare for a solicitor to give the bond personally.

Members stated that in small estates it was quite usual in country towns for solicitors to give the bond themselves; that the Commissioner was insisting on a claim to which he was really not entitled: if an asset turned up after the estate was completed, the solicitor might be mulcted in a penalty; that the bond was given only to expedite probate at the solicitor's request, and that the solicitor obviously undertook a liability which must continue.

It was decided to hold the matter over until the December meeting to enable the Otago Society to look further into the question.

Adjustment of Mortgages: Valuation for Death Duties' Purposes.—The following letter was forwarded by the Canterbury Society:—

Re Mortgagors and Lessees Rehabilitation Act.

We are acting for the Executors of a deceased testator who left a fairly substantial estate, a large part of the estate being represented by mortgage investments. In connection with certain of these mortgage investments applications have been made by the Mortgagors for an adjustment of their liabilities under the provisions of the above Act, and at the date of death these applications had not been dealt with by the local Adjustment Commission and this position still remains. When filing the stamp accounts for death duty purposes, we showed the mortgages and accrued interest at the amount actually owing as at date of death, but we drew the attention of the Assistant Commissioner of Stamp Duties in Christchurch to the fact that application under the Act had been made by certain of the Mortgagors and we submitted that, if when the applications had been dealt with by the Adjustment Commission any remission of accrued interest or reduction of principal was ordered by the Commission, the Executors would be entitled to have the value of the estate reduced accordingly. To this submission the Assistant Commissioner in Christchurch replied as follows:—

'If the Trustees do not accept the values of the balance of the mortgages returned, it will be necessary for them to be valued. To enable this to be done the following are required in each case:—

'(*a*) A Government Valuation Certificate in respect of the land included in each mortgage.

'(*b*) A copy of the Statement of Assets and Liabilities which was filed in support of the application for adjustment under the Mortgagors and Lessees Rehabilitation Act, 1936.

'(*c*) A statutory declaration by each mortgagor as to whether or not any material alteration has taken place in the assets and liabilities of the Mortgagor between the date of death of the deceased and the date when the application for adjustment was prepared.'

To this we replied on behalf of the Executors that so far as our clients were concerned, they were of opinion that the mortgages were worth the amount of principal and interest owing thereunder at date of death and that they would oppose any remission of interest or reduction of principal by the Adjustment Commission, but that if after valuations had been made by competent and independent Valuers, the Adjustment Commission ordered any such remission or reduction, the Executors would be bound thereby subject of course to their right of appeal to the Court of Review. If the Commission ordered any remission of interest or reduction of principal and this was not disturbed by the Court of Review, then the Executors would be bound by the Commission's order and the estate would lose the amount so remitted and it would be unfair that death duty should be paid thereon. We contended, therefore, that the proper method of finding the true value of the mortgages for death duty purposes was the method provided by the Act. To this the Assistant Commissioner in Christchurch has replied as follows:—

'Referring to your letter of the 13th inst., and particularly to your comments regarding the mortgages in the 9th schedule, I have to inform you that the Commissioner has advised that in all cases where a mortgage is subject to the Mortgagors and Lessees Rehabilitation Act, 1936, the valuation of the mortgage for death duty purposes is to be based on the assets and liabilities as set out in the statement filed in support of the application under the Act. To enable me to make this valuation, I have to request you to furnish the documents mentioned in my previous requisition.'

It seems to us that the method of ascertaining the value of the mortgages as required by the Commissioner of Stamp Duties is most unsatisfactory for the following reasons:

1. So far as the Government valuation is concerned in the case of the mortgages in the estate in question, the existing Government Valuations were made several years ago and our experience has shown that these existing Government Valuations are of little, if any, value in ascertaining the present value of mortgaged property.
2. The statement of Assets and Liabilities which had to be filed with the Application for Relief, has been found to be of very little real assistance when the applications have come before the Adjustment Commission. Firstly, in preparing his Statement the Mortgagor Applicant had to estimate the value of the mortgaged property and as he was seeking a reduction of his mortgage he was inclined to estimate the value on a low basis. Furthermore, the rush of Christmas vacation, and we think the general experience in legal offices was that a very large number of applications had to be prepared and filed in the limited time available before the 31st January. Consequently the applications had to be prepared in haste and on information supplied by the applicant which could not be checked, and our experience at any rate has been that many applications filed have not disclosed the true position of the Mortgagor. We do not suggest that this was done intentionally.

3. The Statutory Declaration by the Mortgagor asked for by the Commissioner as to whether any material alteration has taken place in his assets and liabilities between the date the application was filed and the date of the death of the Mortgagee, seems to us of little value.
4. If the Commission dealt with the application before the date of death of the Mortgagee, and the Commission had ordered a reduction of principal and remission of arrears of interest, we submit the Executors in filing their stamp accounts would be justified in showing the mortgage at the amount which was owing after the amount remitted had been deducted. Why therefore should there be any difference in a case where the Mortgagee dies before the Mortgagor's liability has been adjusted and where the Mortgagee dies after such adjustment has been made ?

It seems to us that the matter is one of some importance to the legal profession in the administration of deceased estates, as many cases similar to ours must occur before all the applications under the Act are disposed of, and for this reason we have placed the position before you so that the matter can, if the District Law Society thinks desirable, be discussed by the Canterbury Law Society.

The President reported that the Wellington members had interviewed the Commissioner of Stamp Duties on this matter also, and had pointed out the absurdity of his Department levying duty on an asset which the estate never received. The Commissioner, however, would not budge, pointing out that if executors think the mortgage is not worth its face value, they should furnish proof to the Department of this fact. He also pointed out that the executors of a mortgagor never, by any chance, drew the attention of the Department to the fact that a scaling down of the mortgage by a Commission is pending.

It was decided to ask the Attorney-General to consider the question of amending the law to deal with cases such as those specified in the Canterbury letter.

Undertakings by Solicitors.—The Auckland Committee presented the following report :—

We have received the views of the following Societies : Taranaki, Hawke's Bay, Otago, Southland, Gisborne, Wellington, and Auckland. Of these Societies Hawke's Bay, Taranaki, Otago, Southland, and Wellington agree with the ruling of the English Law Society. The Gisborne Law Society, having considered the ruling in general meeting, came to the conclusion that the words " on behalf of my client " are in reality ambiguous, and that if a solicitor does not intend to accept personal liability he should expressly state that intention.

Our view (which is in accord with the conclusion reached by the Council of the Law Society of the District of Auckland and whose reasons we are adopting) is that it is undesirable to adopt the practice which appears to have been followed in England.

We agree that " it is obviously desirable that it should be made clear in the undertaking itself whether or not the solicitor is intending to accept personal liability." On the other hand, we think it is perfectly clear that a solicitor who signs an undertaking " on behalf of his client " is not contracting personally. In the Article on Agency in *1 Halsbury's Laws of England*, 2nd Ed., 297, it is said that the words " on behalf of " when qualifying a signature are conclusive to negative responsibility of the signatory as principal. The cases cited in support of the note are cases where in the body of the contract there is no qualification but the signature is a signature as agent or on behalf of another. In the class of undertaking we are considering, the inference of agency is rather stronger and we do not imagine that any solicitor receiving an undertaking given " on behalf of a vendor " would think anyone but the vendor was liable thereunder.

As this is the law we do not consider it advisable to introduce a variation of the law that cannot be enforced. If the New Zealand Law Society adopts such a rule as appears to have been adopted by the English Law Society, we might well see a situation such as the following arising :—

Solicitor A desires from Solicitor B the latter's personal undertaking that a certain deed shall be stamped and registered. B gives him an undertaking " on behalf of his client." A reads the undertaking and bearing in mind the Law Society's ruling, he assumes that it is a personal undertaking (which in law it is not). B fails to implement the undertaking. A cannot sue B and it would be cold comfort to him to know that all that had happened was that B had been solemnly informed by the Council of the Law Society that the Council disapproved of B's action. We do not see what more the Council could do. B's decision to stand on his legal rights could not be held to be professional misconduct, and could not be penalized.

Any solicitor wanting the personal obligation of another solicitor should know what words will create that obligation. It seems undesirable to introduce a special and different rule of law to govern a particular class of undertaking, especially when such a rule is without sanctions, and in our view the attempted introduction of it would lend to confusion.

We consider that the attention of practitioners should be drawn to the necessity of indicating with precision in an undertaking whether it was intended to impose a personal liability on the solicitor giving it or whether it is given by a solicitor as agent only for his client. There should be no difficulty in finding language to make the position perfectly clear. At the same time, the Council might indicate its disapproval of the use in an undertaking of ambiguous words which might enable a solicitor to evade responsibility.

Dated at Auckland this 9th day of September, 1937.

L. K. Munro
G. P. Finlay
J. B. Johnston
A. H. Johnstone.

It was decided that the report should be approved, and that the Committee should be asked to prepare a memorandum for circulation, this to carry into effect the last paragraph of their report. The members of the Committee were heartily thanked for their work in the matter. A member suggested that it would be useful to include in the memorandum stereotyped forms of undertakings, one where personal liability was taken, and one where the liability was that of the client. The members of the Committee agreed to include such forms in their memorandum.

Law Revision Committee.—Mr. Gresson, as one of the Society's representatives on the Law Revision Committee, gave a brief outline of the matters considered at the first meeting of the Committee, and stated that he was of the opinion that excellent results would follow from its formation.

Compensation for Motor Accidents.—Attention was drawn to the statements in the Press that the Government intended to introduce legislation putting compensation for motor accidents on a basis similar to that for accidents under the Workers' Compensation Act. The Hamilton Society thought that such legislation should be opposed.

The President thought that this was purely a matter of policy on which the Society should not take sides, and that in any event, as there was no draft of the proposals before the meeting, it was premature to make any comments.

It was decided to ask the Attorney-General to let the Society have a draft of the proposed Bill as soon as it was available, so that it might be considered in good time by the District Societies.

Rules re Executors' Commission.—Attention was drawn to the rules concerning Executors' Commission, which he considered were far too cumbersome. The Secretary pointed out that the new rules had been gazetted in 1935 as the result of representations by the Council to the Rules Committee. It was decided that the matter should be considered at the next meeting, if so desired.

(*To be continued*).

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 No. 88. Appeal from an order of a Commission that an amount of £123 7s. 1d. said to be due to W.R. by Mrs. R. under an unregistered instrument by way of security dated July 13, 1927, be deemed an adjustable debt and be discharged as from June 28, 1937. The amount due under the bill of sale was guaranteed by the husband of Mrs. R. After the passing of the Mortgagors and Lessees Rehabilitation Act, 1936, W.R., the holder of the bill of sale, gave notice to R. as guarantor, and this notice caused applications for adjustment to be filed by Mrs. R. and her husband.

The bill of sale covered Mrs. R.'s furniture, and some time in 1930, when default was made by Mrs. R. under the bill of sale, W.R. took possession of the furniture and sold it. The furniture realized less than the amount due under the bill of sale, and the amount of £123 7s. 1d. was left owing by Mrs. R. For this sum the husband remained liable on his guarantee.

Counsel for the mortgagee asked that the Commission's order declaring the sum in question an adjustable debt and discharged be set aside on the ground that the sale of the property exhausted the bill of sale as a mortgage and that there was no mortgagor who could make application for adjustment since the ownership of the property had passed from the mortgagor when possession was taken and sale of the furniture made. The mortgagee said that his claim to the sum in question rested, and had rested since the sale of the property, not on a mortgage but on the covenant to pay contained in an instrument no longer effective as a mortgage.

Held, 1. That the husband was a "guarantor" and, as such, is entitled to be an "applicant" for adjustment, within the definition of those words in the Act, and, unless the Commission determines otherwise, was entitled to have his liability for the adjustable debt arising after realization of the security discharged pursuant to ss. 48 (2) and 49.

2. That the wife, as "mortgagor" within the meaning of the Act, was similarly entitled to have her liability discharged.

The Commission was, therefore, entitled to declare the sum said to be due an adjustable debt and discharge it and the appeal will be dismissed.

On the first question, the Court said:

Section 6 (1) of the Act enumerates the mortgages to which the Act is to apply. It applies to mortgages executed before the passing of the Act, to those executed after the Act if they were in fact operative or designed to take effect before the passing of the Act, to mortgages to which the Act has at any time applied despite variations thereto, and to mortgages in replacement of mortgages to which the Act has at any time applied. If s. 6 (1) stood alone, mortgages under which the powers of sale had been exercised would not, it can be conceded, come within the provisions of the Act.

Section 6 (3), however, provides that the Act "shall apply with respect to any mortgage as aforesaid, notwithstanding that, whether before or after the passing of the Act, any power of sale, rescission, or entry into possession conferred by the mortgage may have been exercised." In view of this subsection the exercise of the power of sale in this case would not, *per se*, prevent the bill of sale being subject to the Act.

It has been urged that the section applies only to cases where a partial exercise of the power of sale has been exercised, so that there remains in the mortgagee by virtue of the mortgage still a power of sale or entry into possession on some part of the property comprised in the mortgage and the mortgage so kept alive. We are of opinion that this construction dependent on an interpretation of the word "any" that excludes cases where a mortgagee has exhausted his power of sale and restricting the meaning of "any power of sale" to "a partial power of sale," is not justified. It has, indeed, been put forward as the only possible limitation imposed by the section itself on a scope suggested as unreasonably unrestricted.

The Act must be read as a whole, and other sections have been referred to as relevant to the interpretation or this subsection which it is said, if applied literally and without limitation, opens an infinity of closed transactions for review. Section 4 (2) relates to mortgaged land held for agricultural purposes or for a dwelling, and provides that where such lands have ceased to be occupied by a mortgagor for his own use because he has abandoned or temporarily left the premises unoccupied or because the mortgagee has exercised or commenced to exercise or indicated his intention to exercise his powers, nevertheless the mortgagor shall be deemed to have continued the use until the passing of the Act unless the mortgagor has ceased to be the mortgagor of the premises.

Section 6 (3), on the other hand, applies to mortgages over both land and personal property, and it is contended that, if it has the effect contended for by the mortgagor, s. 4 (2) limits the field of review in cases the Act is more particularly designed to give relief in, namely, farm and home mortgages. Consequently, it is said such an interpretation should be avoided.

It is true that if s. 4 (2) was identical with s. 6 (3) such an argument would have great force but while there may be some overlapping, s. 4 (2) is expressly designed to enable a farmer applicant or a home applicant to take advantage of the moral and social reasons on which the Act is founded to claim retention of his home or his farm. Such considerations do not apply in the case of other mortgages. Nevertheless, in the case of other mortgages, a mortgagor is entitled to retain possession of his property if his liabilities can be so adjusted as to enable him to have a reasonable prospect of meeting them subject, of course, to other relevant considerations. Those cases, including the case of a mortgagor whose property has been sold yet is embarrassed by the retention of a claim by the mortgagee for a balance not satisfied by the sale of the property, have to be met. In particular, the claims of guarantors which under the wide definition given to it by the statute includes a large class who are still liable despite the sale of the property can only obtain relief by virtue of s. 6 (3).

Quite apart from the question whether the instrument by way of security given by the wife as grantor, and executed by the husband as guarantor, is a "mortgage" within the meaning of the Mortgagors and Lessees Rehabilitation Act, 1936—a question which the Court has decided in the affirmative—it seems clear that the positions of both husband and wife under their respective applications for an adjustment of their liabilities in respect of debts evidenced by the said instrument are safeguarded by the provisions of s. 48 (2) of the Act. That subsection provides as follows: "Where any property of any applicant has, whether before or after the passing of the Act been lawfully sold . . . under a power conferred by or in respect of any adjustable security . . . and the net proceeds of the sale are not sufficient to pay the total amount secured on the property by any adjustable security, the amount remaining unpaid, *except to the extent (if any) to which it may be otherwise secured* or may not be owing by the applicant shall be deemed to be an adjustable debt and the provisions of the next succeeding section shall apply accordingly with respect to that amount."

* *Continued from p. 283.*

On the second question, (2 *supra*), the Court said:

The contention of counsel for the grantee—to the effect that a document, originally a mortgage, loses that status upon realization of the security, and thereupon becomes a mere covenant to pay, is correct and that, therefore, the quondam mortgagor is no longer a mortgagor and therefore not an "applicant" for the purposes of the Act—and, in view of s. 6 (3), untenable, and very weighty reasons would be required to induce the Court to give an interpretation to the words of s. 6 (3) contrary to what appears to be their plain and material meaning. The whole intention of the Act is to preserve the status and rights of mortgagors even in cases where the mortgagee has obtained a higher right, in the form of a judgment; see subs. (7) of s. 4.

Further, it is obvious from the very words of subs. (2) of s. 48 that it was not intended that there must be some tangibly secured residuum of debt unrealized in order to enable an applicant to avail himself of the provisions of that subsection, otherwise the words "except to the extent (if any) to which it might be otherwise secured" would not only be meaningless but would be a flat contradiction of the meaning which, under the grantee's submissions, must otherwise be attributed to the whole subsection.

CASE No. 89. Appeal by the rating authority from an Adjustment Commission which found the applicant to be a "home applicant" and that he was entitled to retain his property. The Commission fixed the value of the property at £850. It was subject to the following charges: To the State Advances Corporation, £925 9s. 3d.; to the Auckland City Council for rates in arrear, £86 16s. 2d.; and to the second mortgagee, £310 13s. 8d. The Commission ordered that the applicant should execute a new mortgage for £850, the value of the property, in favour of the first mortgagee. It released him from all liability in respect of the residue owing to the first mortgagee and from all liability under the second mortgage. It was also ordered that the reduction effected by the operation of s. 42 of the Act on the adjustable securities of the applicant should take effect as from April 1, 1937.

It was submitted on behalf of the rating authority that the effect of the Commission's order was to reduce the whole of the charges upon the property to £850, and that the first mortgagee was to obtain a fresh security for that amount to the prejudice of the rating authority. Argument proceed solely in respect of the special rates above mentioned, which amounted to £30 1s. Counsel referred to the definition of "adjustable security" in s. 4 (1) of the Act. In anticipation of argument on behalf of the mortgagee, counsel for the rating authority submitted that, though rates were undoubtedly a statutory charge, the omission of the adjective "statutory" with respect to any charge on property belonging to a non-farmer applicant did not mean that statutory charges were excluded from the definition of the words "adjustable security" in s. 4 (1). He submitted that the words "any charge" included both statutory and non-statutory charges and that the only real distinction drawn, in the subsection, between farmer applicants and non-farmer applicants was that in the case of a farmer rates were liable to reduction by operation of s. 42 of the Act in respect of any property owned by such farmer, whether mortgaged or not, but in the case of a non-farmer applicant were reducible only in respect of property subject to a mortgage in regard to which an application for adjustment was made. He also referred to s. 42 (5) in support of his submission that rates, being a prior charge to a mortgage-debt, must be so dealt with by the Commission.

On behalf of the mortgagee it was contended that s. 4 (1) made a clear distinction as to the nature of the charges comprised in the definition of "adjustable security" in the cases of farmer applicants and of non-farmer applicants, and that the omission of the word "statutory" in the latter case and its inclusion in the former was a clear indication that the Legislature intended that such distinction should be made.

Held, 1. That statutory charges are included in the definition of "adjustable security" in the case of non-farmer applicants notwithstanding the omission in their case of the word "statutory" as an adjective qualifying the words "any charge."

2. That, following the Court of Appeal judgment in *The King v. Mayor, &c., of Inglewood*, [1931] N.Z.L.R. 177, as only special rates made prior to the execution of a mortgage to the Crown rank in priority to the Crown's mortgage, the appeal of the rating authority was allowed to the extent that the amount to be secured by the new first mortgage to the State Advances Corporation, pursuant to the Commission's order, should be the sum of £850, less the amount of such special rates.

In the course of its judgment, the Court said:

It is true that, if the Legislature, in legislating *in pari materia* has changed the language of the enactment, *prima facie* the inference is that the Legislature intended to change the meaning of the enactment but it does not of necessity follow. The statute must be interpreted according to its reason and context. The general purposes of the Act, so far as home applicants are concerned, are set out in s. 2 (2), which, *inter alia*, provides that such adjustments of liabilities shall be made as will ensure that the liabilities secured on any property do not exceed the value of that property.

It is clear, quite apart from the definition of "adjustable security" in s. 4 (1), that rates are a liability secured upon the property in respect of which they are made and levied and if they were deemed to be excluded in s. 4 (1) effect could not be given to the general purposes and objective of the statute. Further, in the case under review the words "any charge" as applied to non-farmer applicants are more general than the words used in the case of farmer applicants and the settled rule of construction is that general words are to be construed generally. There is actually no real distinction bewteen the words "any statutory or other charge" and the words "any charge." The latter is the wider term, and includes every sort or kind of charge. Charges may be described, according to one classification, into statutory and non-statutory charges. A charge must be either the one or the other. If the words used in the Act in relation to farmer applicants had been "any statutory or non-statutory charge" there would have been no doubt whatever but that the subsequent words "any charge" would generally have been accepted as including both classes of charge.

CASE No. 90. Appeal by co-mortgagors as other applicants, against an order of the Commission that the mortgagors pay an adjustable debt of £526 within a period free of interest in the meantime. It was admitted that one mortgagor was not in good financial circumstances, but the other was wealthy. The property is situated in a city, and the building is subdivided into shops and offices and let at an annual loss, even after adjustment. It was submitted by the mortgagees that the building has a substantial speculative value.

Ordered, confirming the order of the Commission, that interest at 4½ per cent. per annum be paid on the adjustable debt until repayment.

Australian Letter.

By Justiciar.

£20,000 Claim.—Allegations that the mind of the late Mrs. Elizabeth Kirby had been warped by blind unreasoning jealousy against her son's wife, whom she had determined would never get any of her property, were made by counsel in the case in which the son William Henry Kirby claimed £20,000 from the £177,600 estate of his mother. "The facts relate to a romance of business, on the one hand, and to a tragedy of life, on the other," said the son's counsel.

William Henry Kirby in the action alleged a non-fulfilment of a contract between himself and his mother of September, 1925, by which he said his mother promised that if he refrained from taking steps to recover £20,000 she would leave this amount of money in the will. The defendant pleaded a denial of the contract, and also denied the allegations. There was another plea under the Statute of Frauds. Mrs. Kirby and her son had worked in harmony to extend a well-known undertaking business which was founded in the last century. When Mr. Kirby, who was now sixty-two years of age, reached the age of twenty-one years he was given a half-share in the business, which was a family business. Later on, a considerable amount of property was transferred to him.

In 1918 the plaintiff, then forty-five years of age, met a Miss Sproule, whom he married in 1922. This woman, who became a fine wife and an excellent mother, was liked by the elder Mrs. Kirby at the outset, but later on the elder Mrs. Kirby became intensely jealous of the other woman, and there could be no doubt that her mind became warped by this blind unreasoning jealousy. From the time of the engagement the elder Mrs. Kirby apparently was determined that she would take back all the property she had given to her son so that the son's wife would never get it. In 1922, through her then solicitors, the elder Mrs. Kirby suggested the re-transfer to her by her son of various properties on the footing that she would give the son in return an annuity of £1,000 for his lifetime. This arrangement was not acceptable to him because it did not safeguard the interests of his wife or possible children, but in May, 1923, he transferred the properties to her on the understanding that she would shortly give him £20,000 in return or would leave it to him in her will. Later on representations were made by friends and relatives about the need for protecting Mr. Kirby's wife and children. He saw his mother and she said: "Well, I will not give you any of it." He then consulted solicitors and told his mother that he would have to sue for the money. Finally, she told him that if he promised not to take steps to recover the £20,000 in her lifetime, she would leave it to him in her will.

Mrs. Kirby, senior, died in 1934, and did not leave her son one cent. Practically the whole of the fortune went to the dependants of soldiers. It was stated in the will that the testatrix during her lifetime had made what she considered to be proper provision for her son. There was a provision in the will directing the trustees to pay his expenses if he stayed at the sports club or any other club to which women were not admitted.

The jury brought in a verdict for £20,000.

Practice Precedents.

Application for Cancellation of Registration of Lien.

Section 76 of the Wages Protection and Contractors' Liens Act, 1908, sets out the time within which a claim for lien for work done must be registered.

A lien may be discharged by a receipt signed by the claimant or his agent verified by affidavit and filed: s. 78. But it sometimes happens, that, because of inadvertence or some other cause, although the claim for lien has been settled, the registration of the lien is not discharged. Any person alleging that he is prejudicially affected by a claim of lien or charge, or by registration under Part III of the Act, may at any time apply to the Court to have such claim or registration cancelled or the effect thereof modified, and such order may be made as may be just: s. 88.

"Court" is defined in s. 48 of the Act as the Court in which any proceedings may be taken under Part III of the Act (the Part dealing with contractors and workers' liens), and includes the Judge of any such Court, and a Magistrate in any matter in which such Magistrate has jurisdiction under that Part. Claims of lien, and other matters arising under Part III of the Act, may be heard, determined, and enforced in the Magistrate's Court, if the amount in question does not exceed the jurisdiction of that Court; but the Supreme Court has jurisdiction in all matters, irrespective of the amount involved, arising under Part III: s. 63.

Jurisdiction is given by s. 88 to the Court—that is, either the Supreme Court or the Magistrates' Court in which proceedings under the Act are taken; consequently, until the position is reviewed by another Court, an application in the Supreme Court for cancellation of a lien should not be made by summons in Chambers, but should be made in open Court by notice of motion, as was held by Edwards, J., in *Manning v. Craddock*, (1909) 12 G.L.R. 394, 396. When, however, proceedings have been taken in the Magistrates' Court for the establishment of a lien, the Supreme Court has no jurisdiction to hear and determine an application to vacate such lien, as the jurisdiction of the Magistrates' Court has been invoked and that Court is dealing with or has dealt with the matter: *Owen v. Maunsell*, [1928] N.Z.L.R. 381, 383.

It may be considered necessary in the circumstances of any particular case to precede this application by an application to the Court in the original lien proceedings to dismiss the proceedings for want of prosecution or other cause.

The forms hereunder provide for an application to the Supreme Court, the claim for lien having been struck out for want of prosecution.

Motion to cancel registration of Lien.

IN THE SUPREME COURT OF NEW ZEALAND.

........District.

........Registry.

In the matter of the Wages and Contractors' Liens Act 1908

and

In the matter of a lien claimed in proceedings between &c. and &c.

TAKE NOTICE that Counsel for A. B. and Co. Ltd. &c. WILL MOVE this Honourable Court at the Supreme Court House at on day the day of

19 at 10.30 o'clock in the forenoon or so soon thereafter as Counsel can be heard for an order that the claim for lien made by one C. D. of &c. (now deceased) and dated the day of 19 and the registration of the said lien in the Land Transfer Office at under number be cancelled UPON THE GROUNDS :—

1. That the said A. B. and Co. Ltd. &c. is the registered proprietor of the parcel of land comprised in the certificate of title.

2. That the said A. B. and Co. Ltd. is prejudicially affected by the registration of the claim of lien.

3. That the claim of lien has been struck out by this Honourable Court.

4. That the said A. B. and Co. Ltd. has been unable to obtain a discharge of the said lien by the above-named plaintiff, and UPON THE FURTHER GROUNDS appearing in the affidavit of G. H. &c. filed in support hereof.

Dated at this day of 19 .

Solicitor for applicant.

To C. C. of &c. (as administrator of C. D. &c. deceased), and to the Registrar.

This notice of motion is filed by solicitor for applicant whose address for service is the office of the said at .

AFFIDAVIT IN SUPPORT OF MOTION.

(*Same heading.*)

I G. H. of the City of accountant make oath and say as follows :—

1. That I am an accountant employed by one A. B. and Co. Ltd. a company duly incorporated and carrying on business &c.

2. That I have been in the employ of the said company since April 1920.

3. That prior to and during the year 1914 and down to the commencement of my employment by the said A. B. and Co. Ltd. I was employed as bookkeeper by the said E. F. Co. Ltd. a company incorporated &c.

4. That the said E. F. Co. Ltd. went into liquidation in the year 1921 and I was duly appointed liquidator of the said E. F. Co. Ltd. on the day of 19 .

5. That during the year 1914 the said E. F. Co. Ltd. was having erected by one C. D. of the City of builder (now deceased) a warehouse on the parcel of land known as &c.

6. That a claim under Part III of the above-mentioned Act to recover from the said E. F. Co. Ltd. the sum of £400 for work done in connection with the said warehouse and also a lien over all that parcel of land containing &c. was filed in the Registry of this Honourable Court at by the said C. D. now deceased.

7. That the said lien was registered under number against the certificate of title in the Land Transfer Office at on the day of 19 .

8. That on the day of 19 an order striking out the said proceedings for lien was made by this Honourable Court at . Copy of such order is attached hereto marked "A."

9. That I have in my custody and possession certain books and papers which formerly belonged to the said E. F. Co. Ltd. and amongst such books I found a ledger with an entry therein showing the payment of the said sum of £400 to the plaintiff. A copy of the said entry is as follows :—

10. That the said C. D. died at on or about the day of 19 .

11. That letters of administration of the estate effects and credits of the said C. D. were granted by this Court at to one C. C. on the day of 19 .

12. That I have inspected the records in the Registry of this Honourable Court relating to such grant and I find that accounts have been duly filed but there is no record in the same regarding the said £400.

13. That as liquidator of the said E. F. Co. Ltd. I completed the winding-up of the same and upon discharging the liabilities of the said company paid all shareholders a dividend of in the pound per share.

14. That the administrator of the estate of the said C. D. the said C. C. advised me that he had no knowledge whatsoever of the said claim or lien or the registration thereof and has declared to give me a discharge of the same lien.

15. That as the registered proprietor of the said land the said A. B. and Co. Ltd. desires to deal with the same and is prejudicially affected by the registration of the claim for lien as aforesaid.

Sworn &c.

[NOTE.—An affidavit of service of these proceedings on the administrator is to be filed if the administrator is not represented at the hearing.]

ORDER FOR CANCELLATION OF LIEN.

(*Same heading.*)

day the day of 19 .

Before the Honourable Mr. Justice .

UPON READING the notice of motion filed herein and the affidavit of G. H. and [*affidavit of service*] filed in support thereof AND UPON HEARING Mr. of Counsel for the said A. B. and Co. Ltd. and there being no appearance for or on behalf of the administrator of the said C. D. deceased THIS COURT DOTH ORDER that the claim of lien and the registration thereof in the Land Transfer Office at under number against the Certificate of Title Register Book Volume folio be cancelled and the same is hereby cancelled.

By the Court.

Registrar.

Bills Before Parliament.

Air Department.—Clause 3 : Establishment and functions of Air Department. Cl. 4 : Officers of the Air Department. Cl. 5 : Saving of superannuation and other rights of teachers appointed to Department as education officers. Cl. 6 : Validation of payments in respect of Air Force and Air Department. Cl. 7 : Annual report.

Air Force.—Clause 3 : Power to raise and maintain an Air Force. Cl. 4 : Organization of Air Force. Cl. 5 : Constitution of Regular Air Force. Cl. 6 : Constitution of Air Force Reserve. Cl. 7 : Constitution of Territorial Air Force. Cl. 8 : Certain members of Defence Forces deemed to be transferred to Air Force. Cl. 9 : Every officer and airman to take oath of allegiance. Cl. 10 : Minors may enlist in Air Force. Cl. 11 : Appointment of Air Secretary. Cl. 12 : Constitution of Air Board. Cl. 13 : Air Board to administer Air Force. Cl. 14 : Functions of Board in relation to civil aviation. Cl. 15 : Provision for gratuities to members of Regular Air Force on retirement. Cl. 16 : Provision for payment of pensions in event of death or disablement of members of Air Force. Cl. 17 : Application of provisions relating to Royal Air Force. Cl. 18 : Discipline of members of Air Force when attached to any other branch of His Majesty's Forces. Cl. 19 : Regulations to be made.

Army Board Bill.—The sole purpose of this Bill is to provide for the establishment of an Army Board, having (in relation to the Land Forces of the Dominion) functions corresponding to the functions of the Naval Board (in relation to the Naval Forces) and of the Air Board (in relation to the Air Forces).

Many of the existing provisions of the Defence Act are obsolete, but a general revision of the law cannot be undertaken until the Army Board has had an opportunity to review the present system and make recommendations for the reorganization of the Defence Forces, having regard to present-day requirements. Clause 3 : Army Secretary to be appointed. Cl. 4 : Establishment of Army Board. Cl. 5 : Procedure of Board. Cl. 6 : Functions of Army Board. Cl. 7 : Consequential amendments of existing legislation.

Broadcasting Amendment.—Clause 2 : Establishment of National Commercial Broadcasting Service. Cl. 3 : Section 10 of principal Act amended. Cl. 4 : Operations on subsidiary accounts established in connection with Broadcasting Account.

Physical Welfare and Recreation.—Clause 3 : Constitution of the National Council of Physical Welfare and Recreation. Cl. 4 : Payment of allowances and travelling-expenses to members. Cl. 5 : Meetings of Council. Cl. 6 : Procedure of Council. Cl. 7 : Committees of the Council. Cl. 8 : General function of the Council. Cl. 9 : Particular functions of the Council. Cl. 10 : Districts and District Committees. Cl. 11 : Grants to local authorities and voluntary organizations. Cl. 12 : General

powers of local authorities. Cl. 13 : Borrowing-powers of local authorities for purposes of this Act. Cl. 14 : Commissions of Inquiry in assistance of Council. Cl. 15 : Appointment of officers. Cl. 16 : Expenses of administration of Act. Cl. 17 : Annual report of Council and statement of grants. Cl. 18 : Regulations.

Sale of Wool.—Clause 1 : To be read together with and deemed part of the Sale of Goods Act, 1908. Cl. 2 : Commencement of this Act on a date to be specified in that behalf by the Governor-General by Proclamation. Cl. 3 : Disallowing provisions for draft allowances in relation to contracts of sale of wool.

LOCAL BILLS.

Auckland Harbour Board Loan and Empowering.
Christchurch Domains Amendment.
Hamilton Borough Council Empowering Amendment.
Napier Harbour Board Loan Empowering.
Taupiri Drainage and River District Amendment.
Thames Valley Drainage Board Empowering.
Wanganui Harbour District and Empowering Amendment.
Wellington City Empowering and Amendment.

Recent English Cases.

Noter-up Service.

FOR

Halsbury's "Laws of England."

AND

The English and Empire Digest.

NEGLIGENCE.

Dangerous Articles—Sale for Purposes of Resale—Opportunity for Intermediate Examination—Chemicals Supplied for Experiments in School.

In order to render a manufacturer liable to the ultimate purchaser, it is necessary that the article must reach the purchaser in the form in which it leaves the manufacturer, without opportunity for intermediate examination.

KUBACH AND ANOTHER *v.* HOLLANDS AND ANOTHER (FREDERICK ALLEN AND SON (POPLAR), LTD., THIRD PARTY), **[1937] 3 All E.R. 907. K.B.D.**

As to exclusion of implied warranties: see HALSBURY, 1st. edn., 25, par, 293 ; DIGEST 39, pp. 464-466.

Invitee—Defective Ladder Removed from Building Operations—Ladder Put Back by Unknown Person.

Where a dangerous chattel has been removed by an invitor or his employees from the sphere in which it is ordinarily used, it is necessary for an invitee to show that the invitor or his responsible employees knew, or ought to have known, that the dangerous chattel had been brought back to a place where it might be used by the invitee if he is to recover damage suffered from it.

WOODMAN *v.* RICHARDSON AND CONCRETE, LTD., **[1937] 3 All E.R. 866. C.A.**

As to nature of invitor's duty : see HALSBURY, Hailsham edn., 23, par. 853 ; DIGEST 36, pp. 41-45.

PERPETUITIES.

Power of Appointment—Appointment upon Trust to Pay Income During their Joint Lives to Two Grandchildren in Equal Shares as Tenants in Common—After Death of Either Grandchild to Pay Whole Income to Survivor—Neither Grandchild Alive at Date of Deed Conferring Power of Appointment.

Where there is a limitation to two for life, with the remainder to the survivor for life, the remainder is contingent and not vested.

Re LEGH'S RESETTLEMENT TRUSTS ; PUBLIC TRUSTEE *v.* LEGH, **[1937] 3 All E.R. 823. C.A.**

As to contingent remainders : see HALSBURY, 1st edn., 24, pars. 415, 416 ; DIGEST 37, pp. 96, 97.

SALE OF LAND.

Title—Investigation—Assent—Assent not in Accordance with Title Disclosed—Conclusiveness.

The words in the Administration of Estates Act, 1925, s. 36 (7), "sufficient evidence," do not mean "conclusive evidence," but only that the assent is sufficient evidence until, upon a proper investigation of title, facts come to the purchaser's knowledge which indicate the contrary.

Re DUCE AND BOOTS CASH CHEMISTS (SOUTHERN), LTD.'S CONTRACT, **[1937] 3 All E.R. 788. C.D.**

As to conclusiveness of assent : see HALSBURY, Hailsham edn., 14, par. 681.

Warranty—Action of Breach—Information Given by Vendor—Reliance on Information by Purchaser—Evidence of Intention.

Apart from some special arrangement or some special evidence of intention, a vendor of real estate does not guarantee or warrant the correctness of information given.

TERRENE, LTD. *v.* NELSON, **[1937] 3 All E.R. 739. C.D.**

As to representations by vendor : see Halsbury, 1st edn., 25, pars. 508, 509 ; DIGEST 40, pp. 46-50.

Restrictive Covenants—Benefit of Land Unsold—Covenant to Run with Land until Happening of Specific Event.

The benefit of a restrictive covenant may be made to run with the land of the covenantee until the happening of some specific event, e.g., *the sale of the land.*

ZETLAND (MARQUESS) AND ZETLAND ESTATES CO. *v.* DRIVER AND ANOTHER, **[1937] 3 All E.R. 795. C.D.**

As to restrictive covenants : see HALSBURY, 1st, edn., 25, pars. 827-832 ; DIGEST 40, pp. 310-314.

SHIPPING.

Salvage—Collision—Apportionment of Blame—Salvage Services by Ship in Same Ownership as Ship in Collision.

The fact that a salving ship belongs to the same owners as does the colliding ship does not disentitle her from claiming the appropriate salvage remuneration.

The Kafiristan, **[1937] 3 All E.R. 747. H.L.**

As to disqualification from claiming salvage : see HALSBURY 1st edn., 26. par. 885 ; DIGEST 41, pp. 843, 844.

Rules and Regulations.

Trade Agreement (New Zealand and Germany) Ratification Act, 1937. Commencement of Trade Agreement between New Zealand and Germany. October 11, 1937. No. 251/1937.

Primary Products Marketing Act, 1936, and Agriculture (Emergency Powers) Act, 1934. Butter Marketing Regulations, 1937. October 11, 1937. No. 252/1937.

Health Act, 1920. Drainage and Plumbing Regulations Extension Order, 1937, No. 8. October 7, 1937. No. 253/1937.

Customs Amendment Act, 1921. Customs Tariff Amendment Order, No. 2. October 13, 1937. No. 254/1937.

Post and Telegraph Act, 1928. Post Office Savings-bank Amending Regulations, 1937, No. 2. October 13, 1937. No. 255/1937.

Health Act, 1920. Hairdressers (Health) Regulations Extension, 1937, No. 5. October 13, 1937. No. 256/1937.

Fisheries Act, 1908. Salt-water Fisheries Amendment Regulations, 1937, No. 3. October 13, 1937. No. 257/1937.

Fisheries Act, 1908. Trout-fishing (Nelson) Regulations, 1937. October 13, 1937. No. 258/1937.

Fisheries Act, 1908. Trout-fishing (East Coast) Regulations, 1937. October 13, 1937. No. 259/1937.

Fisheries Act, 1908. Trout-fishing (North Canterbury) Regulations, 1937, No. 2. October 13, 1937. No. 260.

Customs Act, 1913. Customs Import Prohibition Order, 1937, No. 9. October 20, 1937. No. 261/1937.

Customs Act, 1913. Customs Export Prohibition Order, 1937, No. 5. October 20, 1937. No. 262/1937.

Customs Act, 1913. Customs Import Prohibition Order, 1937, No. 10. October 20, 1937. No. 263/1937.

Tobacco-growing Industry Act, 1935. Tobacco Board Fund Regulations, 1937. October 13, 1937. No. 264/1937.

Cinematograph Films Act, 1928. Cinematograph Films (Censorship of Posters) Regulations, 1930, Amendment No. 2. October 20, 1937. No. 265/1937.