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

"It has long been proved that the most effectual and only practical method of arriving at the rights of a dispute is by critical debate in the presence of an impartial third party, where every statement and argument on either side is submitted to the keenest scrutiny and attack. Where every step on the way to judgment has been tested and contested, the chance of error in the ultimate decision is reduced to a minimum."

—LORD MACMILLAN, in *Law and Other Things.*

Vol. XIV. Tuesday, January 18, 1938. No. 1.

Delay in Applying for a New Trial.

IN a recent unreported judgment,* dealing with a motion on behalf of a plaintiff in a running-down action to set aside the judgment and for a new trial, Mr. Justice Johnston had some pertinent things to say regarding the disadvantages and inconvenience of delay in the making of such applications.

Before referring in detail to His Honour's remarks, it is well to recount the facts, which are taken from the judgment.

The trial of the collision action took place before His Honour and a jury on February 11 of last year. The jury gave a verdict for the defendant, to which they added these words: "We consider plaintiff contributed towards the accident." On this verdict, judgment was entered for the defendant with the usual order as to costs and witnesses' expenses, and the time for motions in respect of the judgment was extended to fourteen days.

On February 24, plaintiff filed a motion for a new trial. The grounds upon which the application was made were as follows:—

"1. That the learned Judge who presided at the trial misdirected the jury on the following material points of law: (*a*) By directing the jury that if they found the plaintiff had been guilty of any of the alleged acts of negligence (as set out in para. 5 of the statement of defence), they should find a verdict for the defendant on the plaintiff's claim; and (*b*) by directing the jury that if they found (as admitted by the plaintiff) that the motor-cycle he was riding was not equipped with any lights, they should find a verdict for the defendant on the plaintiff's claim.

"2. That the learned Judge should have directed the jury that, although the plaintiff's motor-cycle was not equipped with any lights, yet, if in their opinion, on the evidence adduced at the trial, the real cause of the collision which injured the plaintiff was the fact that the defendant's car was being driven on the wrong side of the road, they could and should properly find a verdict for the plaintiff.

"3. That the learned Judge should have directed the jury that, although the plaintiff's motor-cycle was not equipped with any lights, yet, if in their opinion, on the evidence adduced at the trial, the real cause of the collision which injured the plaintiff was the negligent manner in which the defendant's car was driven (as set out in para. 3 of the statement of claim), they could and should properly find a verdict for the plaintiff."

We pause here to point out that no particular direction was asked of the learned trial Judge by counsel, and no objection was made by either counsel to His Honour's directions to the jury during his summing-up, or before or after the jury had retired to consider their verdict. After the jury had returned their verdict, no application was made to the learned Judge to make any note of his directions. Furthermore, no question of misdirection was raised before or after His Honour gave judgment in accordance with the verdict.

Prior to the filing of the motion for a new trial, no request was made to the learned trial Judge for a note of his summing-up. The motion was not accompanied by any note of the summing-up as taken by counsel, or as agreed upon by them; and counsel moving admitted that he had made no note of the summing-up or of that part of it which he claimed was a misdirection.

On July 6—nearly five months after the trial—plaintiff filed an affidavit by a newspaper reporter in the employ of a local newspaper, to which was attached a report of the action, of which the deponent said:

"Such report contains portions of His Honour's address to the jury and such portions are a true and correct transcription of the shorthand record taken by me of His Honour's said address."

Of this report, His Honour remarked that he would say no more than this:

"It amounts to but short extracts of a summing-up that occupied fifty-three minutes, which, torn from their context and robbed of the general directions given and the principles explained to the jury, are not a report that I can accept as being in any sense a sufficient résumé of my whole summing-up."

On the other hand, the memorandum filed in reply by defendant's counsel, His Honour said, correctly set out his general direction to the jury.

When the motion for a new trial came before him, the learned Judge, despite the unsatisfactory way in which (as he said) it had been presented, he agreed, with the concurrence of the parties, to hear it subject to the defendant's right to ask that the motion be dismissed on the ground of non-compliance with R. 277A of the Code of Civil Procedure, which is as follows:—

"Upon any motion for a new trial on the ground of misdirection, the terms of the direction given by the Judge at the trial must be proved either by a note taken by the Judge at or after the trial upon the request of the party who alleges himself to be aggrieved by the direction, or by a report of the summing-up taken by a reporter authorized under the provisions of the Shorthand Reporters Act, 1908, duly verified by the affidavit of such reporter."

On this first ground, counsel for the defendant pointed out that this rule made its first appearance in 1912, some years after *Connor v. McKay*, (1882) N.Z.L.R. 1 C.A. 169. This was an appeal from a judgment of Williams, J., to whom the application for a new trial was made. That learned Judge, in the Court below, referred to the duty cast upon the defendant's counsel of asking the Judge for a more explicit direction if he questioned its reasonableness; but, nevertheless, he made a rule *nisi* for a new trial on the ground that

* *Chrystall v. Everton:* Palmerston North, Oct. 11, 1937.

the verdict was against the weight of evidence and also on the ground of misdirection. On appeal, the motion for a rule *nisi* for a new trial was heard by the Court of Appeal (Prendergast, C.J., Gillies and Williams, JJ., and Gillies, J., dissenting), the rule *nisi* was granted. In his judgment, Williams, J., at p. 193, said:

> "On the ground of misdirection it now seems to me that the question was not put to the jury as it should have been, and if that be so I hardly think the duty lay on the defendant's counsel to point out to the learned Judge in what respect it was not sufficient."

And the learned Chief Justice, at p. 194, said:

> "I think with my brother Williams that counsel need not in this case have taken exception to the learned Judge's direction in order to enable him to move on the ground of misdirection."

This statement of the law, it was contended by counsel for the defendant on the motion before Mr. Justice Johnston, is now inapplicable; and that, under R. 277A, one of two alternatives must be adopted by the party moving,—namely, the terms of the direction given must be proved either by a note taken by the Judge at or after the trial upon the request of the aggrieved party, or by a report of the summing-up by a reporter authorized under the provisions of the Shorthand Reporters Act, 1908. He contended, further, that the request to the Judge to prove the direction actually given by his note must be made, if not at the trial, at any rate within the period within which the motion must be made.

During the argument, it was not contended by counsel moving that any such direction as was alleged in paras. (*a*) and (*b*) of the motion was given: if it has so been contended, His Honour said he would have had to deny that such direction was made. Counsel relied on the submission that the direction conflicted with the principle laid down in *Bourke v. Jessop*, [1933] N.Z.L.R. 1414. His Honour dealt exhaustively with the evidence, and also with his direction to the jury in the light of the principle so enunciated. Such opinion as he had expressed in his direction was in no part couched in language that could lead the jury to think that they were not judges of the question, whatever His Honour's own opinion might have been. As his direction, in his opinion, had not offended against the canon of *Bourke v. Jessop* (*supra*), he dismissed the motion.

Although His Honour was able to dispose of the motion on grounds other than those of procedure, his observations on the question of delay are timely and of great importance to counsel. On the question raised by defendant's counsel that the request to the trial Judge for a note of his direction should be made within the period for motions in respect of the judgment, His Honour said:

> "I think there are good grounds for holding that the request to the Judge for a note of his direction, together with a note of the specific direction said to have been given, should be made, if not immediately after the trial, at least within the time within which the motion can be filed."

Of even greater importance are His Honour's remarks regarding the effect of delay in applying to the trial Judge for a note of his direction. He said:

> "It appears to me that to allow the request to be made to the Judge, when no official note is taken, months after, as in this case, the motion has been filed, is, to say the least of it, inconvenient; especially so when, as here, counsel who appeared at the trial for the party moving made no note of his own on which he can rely.
>
> "The method adopted here of subsequently relying upon a newspaper report from which, if it were correct, counsel can suggest a misdirection which did not appear to him when he heard the summing-up, is embarrassing not only to the Judge and counsel moving, but also acts detrimentally to counsel on the other side."

Summary of Recent Judgments.

SUPREME COURT.
Palmerston North.
1937.
November 16;
December 7.
Myers, C.J.

In re **HOLBEN, HUBBARD, AND COMPANY, LIMITED (IN LIQUIDATION).**

Company Law—Shares and Shareholders—Undrawn Profits earned before Liquidation—Rights of Preference Shareholders to receive therefrom Arrears of Dividends—Whether an Amount overpaid before Liquidation and recovered by Liquidator a "Profit."

A company's articles of association conferred on the preference shareholders the right to receive out of the profits of the company a fixed cumulative preference dividend at the rate of 6½ per cent. per annum, and provided that:

> "In each year the net profits of the company available for distribution as dividends 'shall be assessed.' The first payment thereout shall be to the holders of preference shares until the cumulative dividends shall have been wholly paid."

The articles also provided that, until all dividends due on preference shares should have been paid, no sum should be carried to reserve. They were silent as to the return of capital or as to payment of arrears of the preference dividends on a winding up.

For some years before liquidation, no dividends had been paid on the preference shares. On application by the liquidator for an order determining the manner of distribution of moneys in his hands, after payment of the company's debts, including a sum overcharged to the company and recovered by the liquidator,

J. S. Hanna, for the liquidator; **Cleary,** for the preference shareholders; **A. M. Ongley,** for the ordinary shareholders.

Held, 1. That a sum representing undistributed profits shown in the company's accounts prior to liquidation belonged to the preference shareholders.

Bishop v. Smyrna and Cassaba Railway Co., [1895] 2 Ch. 265, and **Paterson v. R. Paterson and Sons, Ltd.,** (1916) 53 Sc.L.R. 404, on app. 54 Sc.L.R. 19, applied.

In re Smeetons, Ltd., [1928] N.Z.L.R. 190, G.L.R. 181, distinguished.

2. That a sum recovered by the liquidator for rent overpaid before liquidation was not a profit in any year assessed as being available for distribution, within the meaning of the articles, and was distributable among the shareholders in the company *pro rata*.

In re Spanish Prospecting Co., Ltd., [1911] 1 Ch. 92, referred to.

Solicitors: Jacobs and Grant, Palmerston North, for the liquidator; **O'Donnell and Cleary,** Wellington, for E. R. B. Holben and Mrs. Holben; **Gifford Moore, Ongley, and Tremaine,** Palmerston North, for C. Hubbard and A. L. Haynes.

Case Annotation: *Bishop v. Smyrna and Cassaba Railway Co.*, E. and E. Digest, Vol. 9, p. 172, para. 1094; *In re Spanish Prospecting Co., Ltd.*, Vol. 10, p. 1002, para. 6958.

SUPREME COURT. Wellington. 1937. Dec. 2, 10. *Myers, C.J.*

In re **O'DWYER (DECEASED), PUBLIC TRUSTEE v. HUON AND OTHERS.**

Will—Interest Passing—Bequest of Residue "for such of my children as survive me"—In the Event of "any child" of Testator predeceasing him "leaving a child or children who survive" him, such Child or Children to take (and if more than one equally between them) "the share or interest which his her or their parent would have taken under this will had such parent survived" the Testator—Whether Children of a Testator's Child who died before the Will was made took any Share in Residuary Estate.

Testator by his will directed his trustee to hold the residue of his estate for his wife for life, and subject thereto,

"for such of my children as survive me and if more than one in equal shares Provided however and I direct that should any child of mine predecease me leaving a child or children who survive me then and in every such case such last-mentioned child or children shall take and if more than one then equally between them the share or interest which his her or their parent would have taken under this my will had such parent survived me."

P., one of the children, died before the will was made, leaving four children who survived the testator.

In answer to the question asked in an originating summons whether P.'s children were entitled to share in the testator's residuary estate,

Byrne, for the plaintiff; **Cleary,** for the children of Mrs. Phillips; **Macarthur,** for all the other defendants.

Held, That the gift in the proviso was a substitutionary gift, and the words "should any child of mine predecease me" referred to death after the date of the will.

Hence, P.'s four children were not entitled to share in the testator's residuary estate.

In re Tarbutt, Public Trustee v. Tarbutt, [1922] N.Z.L.R. 316, G.L.R. 139, not followed.

In re Walker, Walker v. Walker, [1930] 1 Ch. 469, applied in **In re Syms, Guardian Trust and Executors Co. of New Zealand, Ltd. v. Sparling,** [1932] N.Z.L.R. 332, G.L.R. 22, and **In re Perrett, Perrett v. Public Trustee,** [1936] N.Z.L.R. 148, G.L.R. 38, followed.

Solicitors: The Solicitor, Public Trust Office, Wellington, for the plaintiff; **O'Donnell and Cleary,** Wellington, for the children of Mrs. Phillips; **Meredith, Hubble, and Meredith,** Auckland, for the other defendants.

SUPREME COURT. In Chambers. Wellington. 1937. Nov. 30; Dec. 6. *Reed, J.*

DUDFIELD v. THE KING.

Statute—Interpretation—Questions arising to be "determined by the Minister of Finance"—Jurisdiction—Whether Court may review Minister's Decision where Construction of the Statute involved—Finance Act, 1936, s. 10.

Notwithstanding that s. 10 of the Finance Act, 1936, provides that any question arising shall be determined by the Minister of Finance, his decision on the construction of the statute is not conclusive, and it is competent for the Court in an action to review it; but in matters of fact, not involving a wrong construction of the statute, his decision is final.

The King v. Board of Education, [1910] 2 K.B. 165, applied.

Counsel: J. Dunn, for the suppliant; **E. S. Smith,** for the respondent.

Solicitors: A. Dunn, Wellington, for the suppliant; **Crown Solicitor,** Wellington, for the respondent.

Case Annotation: *R. v. Board of Education,* E. and E. Digest, Vol. 19, p. 602, para. 290.

CT. ARB. Auckland. 1937. November 19, 30. *O'Regan, J.*

CATHIE AND SONS, LIMITED v. KINSMAN (INSPECTOR OF AWARDS).

Industrial Conciliation and Arbitration—Award—Wages—Holiday Payment in Factories—Prescribed Holiday occurring on Non-working Day (other than Sunday) in any Week—Industrial Conciliation and Arbitration Amendment Act, 1936, ss. 20, 21—Factories Act, 1921-22, s. 35—Factories Amendment Act, 1936, ss. 13, 14.

The provisions of the Factories Act, 1921–22, and its amendments, are mandatory and entitle workers to payment for any of the prescribed holidays, irrespective of the hours they have worked in any week prior to the holiday.

Counsel: J. F. B. Stevenson, for the appellant; Respondent in person.

Solicitors for the appellant, **Izard, Weston, Stevenson, and Castle,** Wellington.

CT. ARB. Auckland. 1937. December 6. *O'Regan, J.*

In re **MARTHA GOLD-MINING COMPANY (WAIHI) ENGINE-DRIVERS, ETC., INDUSTRIAL AGREEMENT.**

Industrial Conciliation and Arbitration—Working-hours—Award or Industrial Agreement providing for Working-week of less than Forty Hours—No Jurisdiction to amend—Industrial Conciliation and Arbitration Amendment Act, 1936, s. 21.

The Court of Arbitration has no jurisdiction to amend an award or industrial agreement in respect of the hours to be worked by any worker bound by such award or industrial agreement, wherein the maximum number of working-hours in the working-week is less than forty hours. The Court has complete jurisdiction to deal with the matter when making an award, but not otherwise.

SUPREME COURT. Napier. 1937. November 11. *Ostler, J.*

In re **McCAW, DECEASED, McCAW v. McCAW AND ANOTHER.**

Will—Devises and Bequests—Bequest for Division by Husband between Daughters "at his discretion"—Whether Trust created—"Moneys."

Testatrix, after giving a sum of money to her brother, bequeathed "all other moneys and my personal effects" to her husband "to be divided between my two daughters at his discretion."

The only property testatrix had, besides her personal effects, was a vested interest in her father's estate subject to a life interest to her mother.

On originating summons for interpretation of the will,

Greene, for the plaintiff; **Hallett,** for the defendants.

Held, 1. That, taking the circumstances under which the will was made into account, "other moneys" included such vested interest.

2. That no interest was given to the husband, but a trust was created in favour of the daughters.

Blakeney v. Blakeney, (1833) 6 Sim. 52, 58 E.R. 515, applied.

3. That the daughters took equal vested shares, and the discretion was as to the time when the division was to be made.

In re Cullen, Cullen v. Cullen, [1921] N.Z.L.R. 209, [1920] G.L.R. 536, distinguished.

Solicitors: Kelly and McNeil, Hastings, for the plaintiff; **Hallett, O'Dowd, and Morrison,** Napier, for the defendants.

Case Annotation: *Blakeney v. Blakeney,* E. and E. Digest, Vol. 37, p. 398, para. 105.

Law Librarian for over Twenty-two Years.

PRESENTATION TO MRS. RAINS ON HER RETIREMENT.

For over twenty-two years, Mrs. J. I. Rains has been a familiar figure to practically three generations of practitioners as she went about her duties as Librarian at the Wellington Law Library. For that long period, she has been of untiring assistance to those using the Library, owing to her remarkable knowledge of legal text-books and reports. In addition, she has had charge of the Judges' Library. So well known is she to lawyers all over New Zealand, that many of them, on learning that she has retired owing to indifferent-health, will feel that the Wellington Library will never again seem the same place to them, so assured were they of a warm welcome and ever-ready help when visiting Wellington for the Court of Appeal, or in connection with matters arising in their practices.

S. P. Andrew & Sons

Mrs. J. I. Rains.

WELLINGTON LAW LIBRARIAN, 1915–1937.

The sincerity of regard in which Mrs. Rains is held by the profession was shown at a gathering in the Library on December 15 last, when a very large attendance of Wellington practitioners met to bid her a reluctant farewell and to give her proof of their appreciation of her services. Mr. D. R. Richmond, President of the Wellington District Law Society presided. His Honour Mr. Justice Ostler was present as a representative of the Judiciary. Among the apologies received, each of which expressed appreciation of Mrs. Rains's work, and regret at her severing her long connection with the Library, were those of Chief Judge Jones, of the Native Land Court, Mr. C. H. Weston, K.C., Mr. E. T. D. Bell, Mr. E. P. Bunny, Mr. T. C. A. Hislop, and Mr. C. A. L. Treadwell, who were out of town.

WELLINGTON MEMBERS' AFFECTIONATE REGARD.

After reading extracts from a number of letters from lawyers in other parts of New Zealand expressing their great appreciation of the help given to them by Mrs. Rains when they were in Wellington, and asking to be associated with the presentation being made to her by members of the local Society, Mr. D. R. Richmond said that they had met to say farewell to Mrs. Rains, who, unfortunately for them all, was retiring at the end of the year, after twenty-two years' service.

"Mrs. Rains began work in this Library in October, 1915," Mr. Richmond continued, "and she was appointed, so she tells me, on somewhat the same lines as those upon which a lady has a new hat or frock sent home, namely, 'on approval.' Later, she was appointed to the staff of the New Zealand Society, and, some three years ago, she returned to the Wellington Society. She has given twenty-two years of her life to the service of the two Societies, and splendid service it has been. She has a wonderful knowledge of the Library, and has been of very great assistance to us and to practitioners from other towns when in Wellington. We very much appreciate her willingness and ability to help, and her unfailing courtesy."

Mr. Richmond said he knew that many practitioners would have grateful and pleasant memories of the help Mrs. Rains had given them during those nerve-shattering periods which precede a case, and which are referred to in the bill of costs "as preparation for trial." She had been an inspiration to many, both in the preparation and the conduct of their cases, and she had always had a ready and true sympathy for them when they had had to endure—as they all did at times—that never-pleasant experience, a decision against them. He felt that he could sum up the position by saying that she had become one of them; and that, if there were such a thing as Honorary Membership of the Law Society, Mrs. Rains would be fully entitled to such membership.

"It is my privilege this afternoon to give Mrs. Rains a present from the Judges resident in Wellington, the members of the Wellington Society, and a number of other practitioners in different parts of the country, and to ask her to accept it as a tangible sign of our very keen appreciation of all she has done for us and as

a mark of the affectionate regard which we have for her," Mr. Richmond continued.

" We understand that she is going to live in Auckland, and we hope that she will have many happy years of leisure, and that during such leisure she will let her thoughts turn sometimes to this Library and those who work here."

Mr. Richmond then presented a cheque to Mrs. Rains.

The Practitioners of the Dominion.

Mr. H. F. O'Leary, K.C., President of the New Zealand Law Society, was the next speaker. Addressing Mrs. Rains, he said he would like her to know and appreciate that this farewell was not only a farewell from those here, but from all the practitioners of New Zealand. In the course of the years, she had become known to most of the practitioners throughout the Dominion, who have every reason to remember the help and the kindness she had always extended to them when they had used this Library, or when they had had occasion to come to Wellington to attend the Courts. They would be disappointed if they were not associated with this farewell. On their behalf, Mr. O'Leary expressed the wish that in the course of her leisure her health would improve, and that she would have many, many years of pleasant retirement.

Mr. O'Leary, continuing, said he would like to say a few personal words. There were not many now left who knew Mrs. Rains when she first came to the Library, but he was one of these, and he particularly had cause to remember her kindness. " I have always looked upon you as a 'good-hearted old soul'," he added. " I can always remember your cheery words to us in this Library. After having a hard day in Court, you were always thoughtful and kind, either rushing out to buy aspirins, or else bringing one a cup of tea. You have always been ready to assure waiting counsel when waiting for a jury verdict that they were ten to two in his favour, or that the jury could not possibly convict in view of the Judge's summing up. When you go away, you will not be forgotten but will always be held in the highest regard and deepest affection by all of us who have known you."

Mr. Richmond then called on Mr. H. F. von Haast to say a few words.

" The Old Brigade."

Mr. von Haast, who was President of the Society in 1915 when Mrs. Rains was appointed, said that when, in 1915, Mr. Moschini left Mr. Harrison alone, the quesion of a lieutenant to him had to be fixed, and Mrs. Rains's name, amongst others, was considered. " Mr. Oswald Beere, Vice-President of the Society, was appointed to help me in meeting the applicants, along with the Secretary. Mrs. Rains was interviewed and eventually appointed to everyone's satisfaction, and, by the expressions that have been made to-day, apparently to the satisfaction of all here present. It was felt that a woman's presence might have a distracting effect in the Library, but it was soon proved that it was quite a wise move," the speaker continued.

" Mrs. Rains had as her head, Mr. Harrison, who was loved by all who knew him, and I am sure that Mrs. Rains can take back to Mr. Harrison the message that his memory is still kept green in the hearts of the legal profession, and we all join in wishing him a happy Christmas.

" It was soon found that Mrs. Rains had a greater knowledge of the books than many of us. She consoled us in our defeats, and she always had a sympathetic word for the man who was facing trials and sorrows; and I am sure that many a man has felt cheered and invigorated when he got one of Mrs. Rains's smiles.

" You will all join with me in wishing Mrs. Rains a long life and happiness, and I am sure that her family will appreciate her."

Mr. von Haast then presented a beautiful bouquet of delphiniums and pink carnations to Mrs. Rains, sent by an anonymous donor, with a card attached inscribed: " To Mrs. Rains: From one of the Old Brigade." In presenting it, Mr. von Haast remarked that he had apparently been asked to perform this pleasing function as he was one of the oldest of the " Old Brigade."

The Solicitor-General.

Mr. H. H. Cornish, K.C., the Solicitor-General, said that he would like to say a few words while Mrs. Rains was thinking of what she would like to say in response. He stated that on one occasion, when they were parting from an old colleague, Mr. Blair, just prior to his being made Mr. Justice Blair, it took Mr. Blair about ten minutes to think of what he would say, so he was trying then to give Mrs. Rains a few minutes before she would speak.

" I think I can express her feelings in an old French proverb which says, 'Going away is dying a little,'" he added: " I am sure it will be a great strain for Mrs. Rains to leave the work which is so dear to her. It is amazing the knowledge she has of the books in the Library. She can answer any questions regarding the books; in fact, I believe she could put her hand on any Year Book that was needed. As has so well been said by Mr. Richmond, Mr. O'Leary, and Mr. von Haast, she has been of the greatest help to all of us: *Amica certa in rebus incertis.*"

Mrs Rains's Reply.

Mrs. Rains, who was greatly affected by the sincerity and cordiality of the gathering, said, in reply, that it was impossible to say how grateful she was for the kindness shown to her. " It is a memory I will always treasure," she said, in thanking the speakers and all those who had participated in her farewell.

Cheers were then given for Mrs. Rains, followed by the singing of " She's a jolly good fellow."

Other Presentations.

At an informal gathering, at which past and present members of the Council of the Wellington District Law Society entertained Mrs. Rains, she was given a gold key of the Library, suitably inscribed. The presentation was made by the Hon. W. Perry, M.L.C., on behalf of those present.

The staff of the Supreme Court, at Wellington, and the Judges' Associates combined to give Mrs. Rains a silver tea and coffee service. This, they said in an accompanying letter, was " a token of the goodfellowship and affection " formed during the long time they had been associated with her. Mrs. Rains's courtesy and consideration, and the assistance she had always given the donors, were the subject of appreciative reference.

Blood Grouping.

Where the Law Lags.

By C. A. L. Treadwell.

It is suggested that the Committee now set up for the purpose of considering ways and means of reforming our laws should not overlook the importance of recommending to the Government the giving of power to Magistrates to order a blood-typing test in affiliation cases.

At present, such applications are made in vain, and Magistrates seem loth to express any opinion with regard to the need, in appropriate cases, of these tests being made.

If the furthering of the ends of justice is the principal task of the newly-founded Committee, and I assume it is, then this matter ought not to be overlooked.

Before considering the matter purely from the point of view of our profession, I ought, perhaps, first, to explain what is involved in blood-typing.

As far back as 1902 the medical profession had realized that there were four distinct types or groups of human blood, which were arbitrarily named AB, A, B, and O. These divisions were established by agglutination tests—that is, by mixing human blood with appropriate human serum from another agent. The result was either an agglutination of the red cells, or no such clotting. The reaction of the red cells to the admixture of serum enabled the medical profession to segregate the four classes of human blood. Subsequently, in 1928, there was a subdivision of these four types, but, for the purposes of this article, we need not concern ourselves with these subdivisions.

It is not a matter of opinion, but a firmly established and accepted scientific proposition that there are four main groups or types of human blood, and that by scientific testing if an alleged father of a child did not show a reaction compatible with the blood-groups of the mother and child, then he could not, in fact, be the progenitor of the infant.

It is appropriate here to mention that of the four groups, the type O is the most frequently found. About 48 per cent. of the Europeans are of this type. The type A is to be found in about 45 per cent., the type B in only about 6 per cent.; while type AB is found in about 1 per cent. only.

Starting then with the fact that a blood test or typing may entirely exculpate a defendant from the charge of being the father of an illegitimate child, it has to be conceded that in no instance will such a test necessarily establish that a defendant is the father of the infant in question. The best such a test can do in favour of the complainant is to establish that the defendant belongs to that group of persons of which the real father belongs.

It is the law in New Zealand, as it is in England, that these paternity claims must be proved by evidence in addition to and corroborative of the sworn statement of the mother. That is a safeguard which experience of this class of litigation has found to be very necessary. The woman involved is usually an unscrupulous sort of woman, and is quite likely to fall to the temptation to charge the man friend who is best able financially to bear the burden of supporting her child irrespective of the truth of the allegation. Moreover, experience has shown, I think, in New Zealand, that this form of litigation, based as it is on substantially emotional grounds, to be fruitful of perjury. That is not surprising when one remembers that it is a case of a mother fighting for her child's material advantage. It has, moreover, been remarked by Judges both in England and in New Zealand that this type of charge is easily brought and often with difficulty refuted.

One of the reasons advanced for the giving of Magistrates this proposed power in England was that Magistrates are prone to lean towards helping the woman in such cases, but that ground has little, if any, substance in New Zealand. It is not, in my opinion, a ground for advancing the proposition which I am at present advocating.

The dominating reason which satisfies me that in appropriate cases there ought to be provision for taking such tests is simply that it is in the interests of justice that this piece of evidence ought to be available; for it might prove, and prove beyond all manner of doubt, that the charge is false, even though, as I have already said, it can never prove that the charge is true.

There are cases where the mother has admitted a certain promiscuity, and in some such cases several men have admitted participating. Blood-testing in such a case might have the effect of eliminating all but one of the men from the group whence comes the real father. The order that was once made by a Magistrate, who professed a horror for the immorality proved, in which he ordered the financial responsibility for the child's maintenance to be shared, has little to commend it in the eye of the law.

It has been urged that if a test is made and the alleged father is found to come within the group whence the real father came that the Magistrates would be inclined to slacken the salutary rule of the need for corroboration. That plea has more substance in England than it would have in New Zealand. Many of these cases in England are decided by amateur judges, but in New Zealand the Magistrates are well versed in the rules of evidence, and, if the matter is properly represented to them, will not fall into the fallacy of regarding such a test as corroborative evidence. If a Magistrate did so, and there was no other corroboration worth the name, the order could be set aside on an appeal. If, on the other hand, there was evidence that the Magistrate was inclined to accept, and if accepted, would certainly provide corroboration, the taking of a blood-test might properly evaluate the corroborative evidence by exposing it as false. Surely in the interest of justice such a means of establishing the truth ought not to be denied.

At the present a blood-test could only be had by the consent of the mother, and no blood-test is going to prove her case for her, so it is not surprising that her counsel is always to be heard doubting the efficacy of the proposed test and drawing the Court's attention to the fact that so far no other unit of the Empire had adopted what he probably calls "a medical experiment." Moreover, the mother would also be heard to say that she was not going to let her child be operated upon because she knew who the father of the child was.

If there was any reason to believe that the testing was subject to error, or that the operation involved any danger, there would be much to say for letting the present procedure stand; but to-day we know, and it can be proved beyond dispute, that the test is precise and certain, and the taking of a few drops of blood from the child and from its mother would not involve either in the slightest danger, and at the most only the very slightest inconvenience.

One of the substantial arguments urged against the alteration of the law in this regard in England was on the score of expense; that the people usually involved in this form of litigation were usually poor and could not afford the large fees involved by a blood-grouping test. In the main cities of New Zealand these tests could be conducted for about two guineas each. At present the fee in England is from seven to ten times as much. It is quite certain that two guineas need not stand in the way of a defendant's obtaining this test if he demands it. The charge could be met as a disbursement payable before it were carried out. In New Zealand a "putative" father, strong in his own innocence, would find ways and means of meeting this expense, thereby, perhaps, establishing his innocence in spite of any corroboration to the contrary.

There is, of course, the practical difficulty of making a woman submit herself to the test. Force, of course, is out of the question, either in regard to the mother or the child. One might find substantial public objection to a child being subjected to the test if the mother objected.

The method, or, so it appears to me, of meeting this difficulty, would be for the Magistrate to order a test to be taken, and, if the mother refused, even if there appeared to be substantial corroboration to support the claim, to dismiss the application with costs. There is no reason why the mother should be allowed to prevent the Court's knowing that her allegation may be false.

At first, and indeed so long as the complainant desires the right, she ought to have present at the testing a medical man who can satisfy himself of the validity of the test. In some cases a medical certificate is accepted as evidence, and it has been suggested that this form of evidence ought to suffice for this class of case. With that I do not agree. The issues are important and the complainant ought to have the opportunity of cross-examining the scientist who made the tests. Later, when the method were well established and recognized, such medical certificates would, doubtless, be accepted by both parties without the need for the scientist's appearing. Until that time, however, the evidence should be given in the usual way even if it involves the additional expense of paying a witness's expenses. So far as that expense is concerned, and also so far as the cost of the blood-typing is concerned, it might be expedient for the Magistrate to authorize the payment of both by the State. That would be especially so when the test proved the falsity of the charge. As many of this kind of charge these days are preferred by the police on behalf of the Education (Child Welfare) Department, the Department would probably not object to meet the charge without the necessity of any change in the law. In the case of private litigation, however, a change in the statute is necessary.

In all the circumstances, it seems to me that while the old Latin tag, *fiat justitia ruat coelum*, retains any force in the administration of our laws we ought to welcome this alteration of the law because it will assure greater certainty in the result. In a number of foreign countries the Judges and Magistrates have the power to order blood-grouping tests, and from those countries the reports are entirely in favour of this power being available. After all, as I have previously indicated, it merely makes justice more secure.

Mortgagors and Lessees Rehabilitation.

Voluntary Settlements and Death Duties.

The following memorandum by the Commissioner of Stamp Duties, sent to the President of the Wellington District Law Society is published for general information.

My attention has been drawn to an article which appeared in the *New Zealand Herald* (Auckland) on November 18 last. The writer makes the statement that Auckland solicitors consider a serious anomaly exists between the practice of the Stamp Duties Department and the principles underlying the whole body of mortgage adjustment legislation. He also endeavours to explain where the anomaly exists.

There is in reality no conflict of policy or practice in the administration of the two sets of Acts. Many adjustments are made by the Commissioners, but every facility and encouragement is given to the parties to effect voluntary settlements and thus save time and expense. The Government is anxious that as many voluntary adjustments be made as is possible.

Mortgages in which adjustment may be involved will fall under three headings.

The first case will be that of mortgages which are finally adjusted prior to the date of death. These are accepted for duty purposes at the adjusted figures.

The second case is that of mortgages which have been adjusted after death but before the estate accounts have been certified. The Commissioner uses his discretion in placing a value upon these mortgages. More than likely he will accept the adjusted values but in any case the difference, if any, will be small.

The third case, and that of greatest difficulty, occurs where adjustment has not been made when the accounts are certified. In such cases the Commissioner endeavours to avoid anomalies in valuations by calling for copies of the applications for relief and supporting evidence, and he considers these in conjunction with the Government valuations.

The chief ground of complaint put forward by the writer of the article in question seems to be in connection with voluntary settlements made between relatives where the Commissioner forms the opinion that the mortgagees have given a greater concession to the mortgagors than they would be obliged to give under the relief legislation. If, in such transactions, the mortgagees bestow what under the Death Duties Act may be termed gifts, the Commissioner has no option but to make assessments of gift duty. He does not notify the parties that gift duty is payable unless he feels sure that gifts have, in fact, been made.

Where the mortgagees and mortgagors entering into voluntary adjustments are strangers or at arms' length, the question of gift rarely arises, and the circumstances would require to be exceptional before the Commissioner would attempt to say the transaction attracted gift duty. The personal covenant in the mortgage complicates the position in isolated cases, but they are usually cases of adjustments between relatives.

The author of the article has probably had an unusual case brought before his notice and from it has wrongly inferred that the Commissioner of Stamp Duties ignores the principles underlying the Mortgagors and Lessees Rehabilitation Act and relief legislation generally. This is not so. With adjustments between relatives, however, he must be interested in seeing that taxable gifts are not made under cover of the Rehabilitation Act, and in all cases that the value of the assets is ascertained as at the date of death and not at some other time when the position might be different.

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. 99. Appeal by the Commissioner of Crown Lands against the determination by a Commission of the capital value of the interest of the Crown in land held under occupation-with-right-of-purchase tenure.

The argument for the Crown was that the duty of an Adjustment Commission under paras. (*c*) and (*d*) of s. 38 of the Mortgagors and Lessees Rehabilitation Act, 1936, is limited to determination of (*a*) the basic value of the applicant's interest in the land and (*b*) the basic rent of the said land. The applicant had not exercised the right to purchase given to him under s. 195 of the Land Act, 1924, and amendments. Consequently, the occupation license with right of purchase did not constitute an agreement for sale and purchase within the meaning of the Mortgagors and Lessees Rehabilitation Act.

Held, 1. That it was not within the jurisdiction of the Commission to fix the value of the Crown's interest in the land so as to determine the value at which applicant can purchase if he determined to exercise his option so to do.

2. That s. 76 does not mean that particular applicants there referred to are entitled to ask from Commissions the exercise of a power not given to those Commissions in respect of applicants with like interests who exercise their right to apply under s. 29 ; and, further, that under the Act, apart from s. 76, the interest of a lessor who has only granted to his lessee an option to purchase cannot be effected save as to the actual rent payable.

"In order to fix the basic rent, which it is the Commission's duty to do, the Commission has of necessity to arrive at the value of the Crown's interest. So far it has to go, and in the case under consideration it has gone no further. If it has purported to go further, the declaration of this Court of the purpose of the value so found determines the interpretation to be placed on the finding.

"The application in question came before the Commission by virtue of the provisions of s. 76 of the Mortgagors and Lessees Rehabilitation Act, 1936, as at the time of the passing of the Act an application for revaluation had been lodged by the applicant under s. 216 of the Land Act, 1924, and had not been finally disposed of.

"It has been argued for applicant that such applications for revaluation, which under the section in question are to be deemed applications filed under s. 29 of the Mortgagors and Lessees Rehabilitation Act for an adjustment of the liability of the lessee or licensee and to be dealt with accordingly, must be treated by Commissions as applications for revaluation of the Crown's interest. No doubt such a revaluation was the purpose of the applicant in making his application under s. 216 of the Land Act, but, while s. 76 (1) says that such applications are to be deemed applications under s. 29 and s. 76 (2) says exercise under the Land Act of the power to revalue shall not be exercised till after February 1, 1937, it does not confer on Commissions or on the Court of Review powers in addition to those conferred upon it by the general provisions of the Act in regard to applications first made under s. 29. The Crown is bound by the Act, and lessees from the Crown can apply for a reduction of rent under s. 29. If applications directly under and derivatively under s. 29 are to be treated differently, we must find express direction to that effect. There is no express provision."

We repeat that if it were the purpose of the Legislature that lessees of the limited class referred to in s. 76 were to have the additional right to demand that the value at which the lessee should purchase could be fixed by the Commission or that the functions of the Revaluation Committee set up under the Land Act were to be exercised by Commissions, such intention could have been made clear. As this has not been done Commissions cannot assume this function. Beyond a declaration as to the scope of the Commission's jurisdiction we understand no variation of the order is asked for.

CASE No. 100. Appeal by the trustee in the estate of P. against an order of an Adjustment Commission concerning a certain mortgage of an interest in land under which H.F.W., principal debtor, and J.F.W., guarantor, were released and discharged from the whole of a sum of £6,417 19s. 9d. described by the Commission as an adjustable debt. The Commission found the principal debtor neither a home applicant nor a farmer applicant.

The practical effect of the order appealed against was the writing-off of unsecured advances made to the applicants' business for business purposes. The mortgage, which was the foundation upon which the debts could be declared adjustable, was in fact merely incidental to the debts incurred long before its execution and in no sense substitutionary, the value of the security being no more, at the most, than 25 per cent. of the debts already incurred.

In 1914 H. F. W., who is the father of J. F. W., sold his interest in his then business and proceeded overseas with the Expeditionary Forces. While in England apparently he was in touch with his cousin P. After the War, H. F. W. returned to New Zealand and commenced a fresh business as agent for gramophone records. P., who was at this time in Scotland, sent considerable sums of money to New Zealand, which were apparently, with his full knowledge and approval, used by H. F. W. for the purposes of his business. In or about 1923 H. F. W. and P. became tenants in common of a property in Auckland, but P. at no time acquired or had any interest in H. F. W.'s business. In 1927 H. F. W. owed P. some £8,767. H. F. W.'s son, J. F. W., and one M. were at this time in partnership with H. F. W.

In 1927 the advent of radio adversely affected the business, and in this year H. F. W. gave a mortgage to P. over his half-interest in the Auckland property owned by him and P. to secure the whole of the advances made to the business. J. F. W. joined in the mortgage as guarantor. The Government valuation of the property was £6,480 and the property was subject to a first mortgage of £3,461. H. F. W.'s half-share in the equity of £3,019, valued at £1,509, was the sole security given for advances approaching £9,000 made to the business.

While the firm paid interest on P.'s mortgage up to 1935, a serious set-back in 1933 made it certain the advances made by P. could not be recovered. In 1936 P., having previously died, his trustee and H. F. W. entered into an arrangement whereby H. F. W. conveyed his interest in the property, stated

to be of a value of £1,509 10s., to the trustee. The conveyance, which was executed on September 24, 1936, declared that the mortgage debt should not merge by operation of the conveyance. The trustee in addition wrote off the indebtedness of H. F. W. the sum of £1,760. The sum of £6,104, approximately, remained owing to the estate of P., and it was from the obligation to meet this indebtedness the Commission has released the applicants.

Held, That the arrangement by H. F. W. with the trustee was a *bona fide* settlement, under which the true relationship of mortgagor and mortgagee ceased. The policy of the Act is expressly stated to be to encourage voluntary settlements, and those made *bona fide* before the Act should not, in pursuance of the same policy, be interfered with without good reason. Consequently, the settlement in this case should not and cannot be revived for the purpose of treating the balance preserved as an adjustable debt.

In the course of its judgment, the Court said:

"While, if the mortgage over H. F. W.'s interest in the Albert Street property were in existence at the time of the passing of the *Mortgagors and Lessees Rehabilitation Act, 1936*, applicants could, as mortgagor and guarantor, properly make an application for adjustment, in substance the application would still not be an application by owners of property for an adjustment of the liabilities secured on that property but an application by business partners for relief against unsecured debts owing by the partnership on the ground that some small part thereof was secured by a mortgage.

"It becomes, unnecessary, therefore, to determine, in this case, the general questions of interpretation advanced on the question as to whether at the time of filing the application, subsequent to the conveyance of September 24, 1936, the applicant H. F. W. was or was not a mortgagor and J. F. W. a guarantor or not of a sum secured by way of mortgage. Certainly, by virtue of the conveyance, H. F. W. had ceased to be the owner of any part of the Albert Street property, and consequently ceased to be a mortgagor within the definition of one who is the owner of property subject to a mortgage.

"It is true the mortgagor remains liable as a covenantor, but there was, at the time of the passing of the Act, no property owned by applicant H. F. W. subject to a mortgage.

"For applicants, however, it is said that the application of the Act directed by s. 6 (3) to any mortgage executed before the passing of the Act, notwithstanding that 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, constitutes a notional continuation of ownership, despite actual or legal cessation thereof, which applies in this case. But in this case there was no exercise of the powers referred to. It is true that the mortgagee had received the rents, but there had been no sale, no rescission, or entry into possession in the correct sense. If there had, in substance, been exercise of the powers mentioned mere form of exercise of those powers, even if it took the form of a voluntary conveyance, might not be sufficient to prevent the purpose of the section.

"At the same time, on the authority of Mr. Justice Reed in *In re a Mortgage, H. to L.*, [1932] N.Z.L.R. 1231, mere continuance of liability under the personal covenant is not sufficient to sustain the relationship of mortgagor and mortgagee. A voluntary arrangement, even if the effect is to put an end to the status of mortgagor and mortgagee, is not an exercise of the powers covered by the subsection and cannot *per se* be so regarded unless the form is mere cover for the exercise of those powers. Each such case must be a question of fact so far as this aspect of the matter is concerned.

"Section 6 (3) opens the door to transactions at any rate partly closed. But it is a section that cannot be read apart from the definition of status contained in the Act, and various other sections. We do not intend in this judgment to define with precision either the limit or extent to which the door has been opened as this case can be disposed of on its own facts and merits.

"For the reasons given the decision of the Commission, treating the balance of the moneys owing in this case as an adjustable debt subject to discharge, must be set aside and the applications of both H. F. W. and J. F. W. for adjustment in respect thereof dismissed, but no order to this effect will be made until we hear from counsel as to whether it has in effect been agreed that the trustee shall not in any event recover more than £587 13s. 3d. If such is the case, we will make an order discharging the debts over that sum. We understood from counsel for the trustee he was really appealing for the real value of the personal covenant. Counsel are at liberty to move or address submissions in writing on this point only."

CASE No. 101. Appeal by a mortgagor lessee from the determination of a Commission, which as in other cases, had found the productive value of the land as a freehold. To ascertain the value of the Crown's unimproved interest the Commission found the actual value of the improvements to the land effected by the lessee and the difference between the value of the improvements so found and the productive value of the land as if a freehold has been determined as the value of the Crown's unimproved interest.

Having found these values, the Commissions had taken 5 per cent. on the unimproved value so found as the fair or basic rent payable to the Crown, and either put the rent so found on the expenditure side of the budget or capitalized it separately at 5 per cent. and deducted the amount so found from the productive value found without taking rent into account. Either process achieves the same result except where the basic rent so arrived at is greater than the rent payable under the lease.

Held, That the rental determined by a Commission in accordance with ss. 40 and 44 of the Act should, in all cases, for the purposes of uniformity, be shown as an item of expenditure in budgets framed for the purpose of ascertaining the value of applicant's interest in leasehold farm lands. This means that the rent to be paid is, in fact, capitalized at 5 per cent. and deducted from the productive value gives the value of the lessee's interest.

In the course of its judgment, the Court said:

"It was contended by the appellant in this case that, inasmuch as in many cases the Crown rent was assessed at 4 per cent. per annum on the Crown's estimate of the value of its interest at the time of entering into the lease, a Commission should, in fixing the basic rent payable to the Crown, fix the rental at 4 per cent. per annum on the unimproved value found by the Commission at the present time, and it was said that by fixing the basic rent at 5 per cent. per annum on the unimproved value so found certain anomalies are sure to arise.

"It has been overlooked, however, that the Commission is not concerned with how or at what rate the rent was assessed in the first instance, unless of course to check its ultimate finding, but is concerned in fixing what in its opinion is a fair rent, as directed by s. 40 (1), for the lessor's interest in the property. We consider that Commissions in taking 5 per cent. per annum on the unimproved value of farm lands as a fair rental for the owner of the unimproved interest are holding the balance between lessor and lessee evenly, when the productive value, which is the basis for determination of the unimproved value, is reached on a 5 per cent. basis.

"If the basic rent so calculated is greater than the total rent payable under the lease, then no reduction in the latter can be made—see s. 44 (1); and the rent reserved should be shown as an item of expenditure in the budget. The difference between the basic rent and the actual rent is then, in effect, capitalized at 5 per cent. to increase the value of the lessee's interest.

"Where the Crown has leased both the unimproved interest in the land and certain of the improvements, it appears more than 4 per cent. has been charged on the value of the improvements to allow for depreciation. In such case the rent is a composite of 4 per cent. and 5 per cent."

Australian Letter.

By JUSTICIAR.

Corroboration.—A decision of the Full Court of South Australia in *Hayter v. Howie*, [1937] S.A.S.R. 59, reversing the judgment reported [1936] S.A.S.R. 443, adds one more case to the multitude on this question. The facts were that the mother, who was a half-caste, and the putative father were employed on the farm, the latter for about a fortnight. His principal duty was to attend to and break in some horses and he used to go to the stables each night to mix up their feed. He was accompanied there on some occasions by the mother. According to her on one occasion, which seems to have been a Saturday night, she struck matches so as to give light in the stable, and on that occasion he attempted to have intercourse with her. In the course of a struggle, more playful than otherwise, he capsized some sheep-dip into which they both fell, and he admitted later this version of what happened on that night. The mother then gave evidence of intercourse which took place in a spare room on the following night after all the other persons in the house had retired. The respondent denied this.

The Full Court held that there was corroboration and the position is put most clearly in the judgment of Richards, J., who said :

> "The evidence establishes that on the Saturday night immediately preceding the Sunday night in question, the defendant attempted to have connection with the mother, and I think that the only reasonable inference to be drawn from the whole of the evidence is that she did not then show any decided disinclination to let him do so, and that it would have occurred then if the place and the circumstances had not been unfavourable. This appears to establish a guilty passion on his part, and I think indication to him that when a favourable opportunity might occur he would be allowed to make use of it. And that, in my opinion, is sufficient corroboration."

Order against Sheriff.—A jury recently returned a verdict for £250 damages against the Sheriff of New South Wales (Colonel G. F. Murphy) in the case in which Jack Carl Ward proceeded against him for false imprisonment.

It was stated during the hearing of the action that Ward, who was in partnership with his brother, was sued by the landlord of premises which they occupied at the time for arrears amounting to about £60 ; was placed in the debtors' prison at Long Bay, and was there for three or four days until a Supreme Court Judge decided that the order under which Ward was sent to Long Bay ought never to have been made. A memorandum was drawn up and signed by the solicitor for the creditor on whose behalf Ward was put in gaol stating that he could be released. Ward's brother was informed that, acting under the Sheriff's instructions, Ward would not be released. Ward, however, was subsequently released.

Ward was arrested on or about June 18, 1936, by virtue of a writ of *capias ad satisfaciendum* directing, *inter alia*, the Superintendent of the State Penitentiary at Long Bay to receive Ward and to keep him there until a certain sum in the writ was paid, or until he was discharged by due course of law. Upon the writ being discharged, and the fact being conveyed to him in the evening the Sheriff did not release the plaintiff until the following morning.

The Chief Justice (Sir Frederick Jordan), under s. 24 of the Prisons Act, refused to certify for costs for the plaintiff.

A Conveyancer's Lyrics.

In the Family Tradition.

"Like father like son" may be truly said of Joshua Williams and T. Cyprian Williams, both of them great names in the history of Lincoln's Inn. Just as Joshua Williams gave us his *Letters to John Bull*, so Cyprian Williams gave us his *Lyrics of Lincoln's Inn*, with notes for the benefit of the unlearned. These were published in 1896 in an attractive volume, with a picture on the cover reproduced from a drawing by Mrs. Cyprian Williams.

Many of the pieces collected were published, we are told in the preface, in the *St James's Gazette* between 1888 and 1892, and appeared anonymously. One of them was printed and appeared in the *Law Times*, and the rest of them appeared for the first time in the published volume. The *Lyrics* open with a "Dedication to the Student of Law." The first two lines might well have been addressed to the great company of readers of Cyprian Williams's now classic treatise, *Vendor and Purchaser* :

> I have often addressed thee in grave dissertation ;
> I have penned for thee many a solemn discourse ;

"The Bitter Cry of the Upright Trustee" affords a short survey of the principles of Equity in relation to trusteeship. A stanza will illustrate :

> What profit to have land and goods possessed for other's use ?
> A thankless task to hold the rind, while others suck the juice.

Excellent footnotes explain the technical points referred to. "The Married Women's Property Act" (1882), partly redrawn, becomes almost topical in view of our Law Reform Act, 1936, on the same subject. Its opening verses must now, of course, be read with due regard to the date at which it appeared, and the present law :

> There's a pleasurable fancy fostered by a recent Act
> That the law enables every married woman to contract.

Another stanza might be even more generally applicable :

> Hear the meaning of the statute, which its words at first concealed,
> Now by manifold decision at a vast expense revealed.

There is another lyric on the same subject entitled "On Husbands' Liability on their Wives' Contracts." The opening lines propound the problem :

> There's a theme of thrilling interest ; it touches tradesmen's tills,
> If a wife buys goods on credit, must her husband pay her bills ?

Both the lyrics are annotated. The subject seems one which interested Cyprian Williams greatly, for there is another lyric on the marriage contract, and another

one entitled "*Leake* v. *Driffield*" (6 T.L.R. 35, 24 Q.B.D. 98). Both these lyrics must be read in their entirety to enjoy to the full Cyprian Williams's wit and wisdom, and the same applies to the lyric "*Beatæ Possidentes Quas Lex Non Cogit Ad Solutionem*," which similarly deals with aspects of matrimonial law. On pure conveyancing there is the lyric entitled "After Writing of Contingent Remainders," "A Ballad of Lords Ailesbury and Iveagh and the Vendor and Purchaser Act, 1874" (relating to [1893] 2 Ch. 345), and "The Law of the Lame Limitation and the Lost Inheritance." Something of the spirit of these verses can be gathered from the opening lines of the "Ballad":

Lord Ailesbury sold his ancestral land;
But a tenant for life was he.
By previous deeds, ye must understand
It was subject to jointures three.

Shoulder-lines add to the information and the amusement. In wider spheres of law there are lyrics on "The Case of *The Memnon*" (4 T.L.R. 501), "Passing Reflections on Admiralty Law" (suggested by the case of *The Vindomora* (14 P.D. 172), of "Fraudulent Brokers and Outraged Bankers," "*Companhia de Mocambique* v. *British South Africa Company*" ([1892] 2 Q.B. 358; [1893] A.C. 602), and "*Mighell* v. *The Sultan of Johore*" (10 T.L.R. 37, 115).

These lyrics outside the sphere of the conveyancer testify to the amazing scope of the vital interest which Cyprian Williams must have possessed in every branch of the law. "The Exiled Barrister's Lament," the exile being due to temporary indisposition, and a *villanelle* on golf as a practising barrister's game complete the list of subjects treated.

Father and son, by their *Letters* and their *Lyrics*, have enriched the lighter literature of the law, and these writings coming from the pens of conveyancers afford convincing evidence that humanism is no stranger to conveyancing chambers.

Company Debentures.

Suggested Scale of Fees.

The following report was submitted to the last meeting of the New Zealand Law Society by a Committee appointed by the Wellington District Society. As it was decided to seek the views of the various Societies before further consideration by the parent body, it is now published for the information of practitioners, so that, if they desire to make any comments thereon, they may be able to communicate them to their respective District Societies.

The Committee desire to report that they have again met and considered the question of a scale of fees for debentures. The letters from the Palmerston North branch and from Mr. W. H. Cunningham, and a report prepared by Mr. Buxton, have all been taken into account.

Debentures fall into three main classes:—

1. The debenture to secure a fixed sum payable at a fixed time with a fixed rate of interest.
2. The bank debenture or debenture taken by trading-companies to secure accounts current.
3. Debenture stock with a trust deed.

The commonest form is No. 2, which, experience shows, runs into about twelve foolscap pages on account of the elaborate provisions as to making demands, computing interest, and the description of the moneys which the debenture is intended to secure. Though not quite so elaborate, the debentures taken by trading-companies usually have covenants as to trading with the debenture-holder which make them as long as a bank debenture.

The Committee think that £10 10s. is the minimum charge that should be made for such a debenture, even if it secures only £50. Such debentures invariably cover further advances.

This is twice as much as the local-body-loan scale for a loan of £1,000, but is the same as deed-of-mortgage scale for a £1,000 mortgage.

If the debenture is for a fixed sum at a fixed rate of interest, the covenants for repayment are much shorter; but, even so, there is quite as much work as in a deed of mortgage, and three copies at least must always be prepared—one for the debenture-holder, one for the company, and one for the Registrar. There would be very few cases in which a minimum charge of £10 10s. would be severe on the company.

A fairly common practice in Wellington is to charge deed-of-mortgage scale, less one-third, but though this was probably reasonable during the slump, such a charge seems too low now. It must be remembered also that in the case of current account debentures the *amount* given to the solicitor is often only the amount of the initial advance, and not the amount of the overdraft limit or the amount which may be actually secured by the debenture when it has been in force some time.

The Committee therefore recommend the adoption of the following scale:—

(a) Scale of Costs for Debentures.

	£ s. d.
1. Up to £1,000	10 10 0
2. Over £1,000 to £5,000—for each additional £100 or part (Increases £5 5s. per £1,000)	10 6
3. Over £5,000 to £50,000—for each additional £100 or part (Increases £2 12s. 6d. per £1,000)	5 3
4. Over £50,000 to £200,000—for each additional £100 or part (Increases £1 5s. per £1,000)	2 6
5. Maximum fee to be (Reached at £200,000).	337 2 6

Examples, Showing Land Transfer and Deeds Scales for Comparison.

Amount.	Deed.	Land Transfer.	Debenture.
£	£ s. d.	£ s. d.	£ s. d.
1,000 ..	10 8 6 ..	7 7 6 ..	10 10 0
2,000 ..	17 18 6 ..	13 2 6 ..	15 15 0
3,000 ..	25 8 6 ..	18 7 6 ..	21 0 0
5,000 ..	40 8 6 ..	28 17 6 ..	31 10 0
10,000 ..	66 13 6 ..	42 0 0 ..	44 12 6
20,000 ..	92 18 6 ..	68 5 0 ..	70 17 6
50,000 ..	171 13 6 ..	147 0 0 ..	149 12 6
100,000 ..	302 18 6 ..	278 5 0 ..	212 2 6
150,000 ..	434 3 6 ..	409 10 0 ..	274 12 6
200,000 ..	565 8 6 ..	540 15 0 ..	337 2 6 (Maximum).

NOTE:—Where banks or lending institutions have a settled printed form of security, the solicitor for the institution may make special arrangements as to charges for completing transactions involving such forms.

(b) Deeds of Hypothecation.

Where a deed of hypothecation is prepared, the scale for the corresponding debenture issue shall be increased by 25 per cent. with a maximum of fifty guineas.

(c) Trust Deeds.

Where a trust deed is prepared, the scale for the corresponding debenture shall be increased by 50 per cent.

NOTE:—(1) The scale is intended to include searches in the Registrar of Companies' Office, perusal of documents necessary to decide authority to issue debentures and affidavit, and due execution and registration.

(2) The suggested scale does *not* include specific charges collateral to the trust deed. These shall be charged for according to the appropriate scale applying to them—Land Transfer or Deeds scale.

(3) The scale does not include the preparation of any prospectus or other document preparatory to the debenture issue.

New Zealand Conveyancing.

By S. I. Goodall, LL.M.

1. Deed of Lien or Charge from a registered Company, being a Dealer in "Customary Chattels," to a Finance Corporation, intended to be registered and Charging the Property in Chattels the Subject of Hire-purchase Securities intended to be mortgaged to the Corporation by a Series of Assignments to be made from Time to Time.

2. Deed of Assignment of Hire-purchase Securities from the Company to the Corporation adapted to a General Form with Schedules of Securities, Advances and Interest, and Table of Periodical Repayments.

1. Deed of Lien or Charge from a registered Company, being a Dealer in "Customary Chattels," to a Finance Corporation, intended to be registered and Charging the Property in Chattels the Subject of Hire-purchase Securities intended to be mortgaged to the Corporation by a Series of Assignments to be made from Time to Time.

This deed made the day of 19 between A. B. Limited a Company duly incorporated under the Companies Act 1933 and having its registered office at and carrying on business there and elsewhere as (*inter alia*) a dealer in customary and other chattels (hereinafter together with its successors and assigns called "the Company") of the one part and C. D. Limited a Company duly incorporated under the Companies Act 1933 and having its registered office at and carrying on business there and elsewhere as (*inter alia*) a finance corporation (hereinafter together with its successors and assigns called "the Corporation") of the other part

Whereas the Company proposes to finance certain retail dispositions with the Corporation by assigning by way of mortgage to the Corporation as the principal securities from time to time certain customary hire-purchase agreements within the meaning of the Chattels Transfer Act 1924 and certain other hire-purchase agreements or agreements for conditional sale together with all moneys owing or to become owing thereunder and all bills of exchange and promissory notes if any collateral thereto

And whereas in anticipation of a series of such assignments by way of mortgage to be made from time to time the Corporation has called for a general lien or charge from the Company by way of collateral security upon the property in all and singular the chattels customary or otherwise to be comprised in and/or described by such customary and other agreements

Now this deed witnesseth as follows:—

1. In pursuance of the premises and in consideration of the advances and accommodation from time to time upon the execution hereof or at any time or times hereafter to be made and given by the Corporation to or at the request of the Company it the Company doth hereby charge by way of collateral security in favour of the Corporation all that the property in all and singular the chattels customary or otherwise comprised in and/or described by all and every the said customary and other agreements and each of them which are upon the execution hereof or shall hereafter be assigned by the Company to the Corporation.

2. In further pursuance of the premises and for the consideration aforesaid the Company doth hereby covenant with the Corporation to repay and pay to the Corporation all moneys advanced discount charges interest insurance charges costs and expenses and other moneys advanced or to be advanced or covenanted or to be covenanted to be paid upon and by any and every of such principal securities being the assignments by way of mortgage of all customary and other agreements as are upon the execution hereof or at any time hereafter shall be financed by the Corporation and/or assigned to it by the Company.

3. It is hereby declared to be the intent of these presents that the foregoing charge and covenant shall both of them be read into each and every present and future such assignment by way of mortgage of every such customary or other agreement the subject of and advance or financing by the Corporation to or for the accommodation of the Company in amplification of the provisions of any and every such assignment.

4. It is further expressly agreed and declared as follows:—

(1) These presents shall not bind or charge any other property or assets of the Company.

(2) The Corporation shall from time to time and at all times be entitled to possession of all and every such chattels hereby charged in respect of which default shall have been made under the respective customary or other agreement affecting the same.

(3) Upon the Company or the respective hirer paying in full to the Corporation all moneys to which the Corporation shall be entitled in respect of any such chattel then such last-mentioned chattel shall be thereby freed and discharged from the operation hereof.

In witness &c.

The common seal &c.

(*To be continued.*)

Pedestrians Again.—The pedestrian and the motorist are a constant theme of public interest and discussion; and, with the toll of the road standing high as it now does, no one can wonder at it. Recently we have had the remarkable phenomenon of a bigoted pedestrian being brought up and fined for exceeding his rights on a pedestrian-crossing: he declared that he had as good a right as anybody else to be on the highway and would not move for some minutes. Unfortunately for him he had not read *Harrison v. Rutland*, [1893] 1 Q.B. 142. His act was not only an infringement of the rules laid down by the Minister of Transport as to pedestrian-crossings, but it was also a flagrant trespass on a highway, for it is a trespass if the ordinary citizen makes use of the highway for loitering, or spying, and, in fact, any purpose not resultant from the common-law right to pass and repass. Obstinacy is not courage. On the other hand, I read in the daily Press that in suburban Surrey the pedestrians are too timorous or modest to press a button which would stop the motor-cars; and, instead, they can be seen to linger shivering on the side-walk, awaiting a safe crossing. And so this form of pedestrian-crossing has failed—at least at this place. Well did Terence observe: *Quot homines tot sententiæ!*

—Apteryx.

Correspondence.

The Off-side Rule.

[*It is to be understood that the views expressed by correspondents are not necessarily shared by the Editor.*]

The Editor,
NEW ZEALAND LAW JOURNAL,
Wellington, C.1.

DEAR SIR,—

After reading the article on the off-side rule at p. 304 of the LAW JOURNAL, I can only hope that the writer of the article is not a motorist during the holidays.

The article states that when one of two cars which are pursuing parallel courses in the *same* street makes a turn to its right at an intersection it has the right of way over the other car.

It is also stated that a car coming from another street and making a turn to the right at an intersection in the face of on-coming traffic has the right of way.

As to the first proposition, the writer has overlooked a direction to a jury given by Mr. Justice Smith at Auckland and reported in the *Auckland Star* of November 11, 1930.

The direction, a copy of which was supplied to me by Mr. Meredith, of Auckland, is as follows :—

> In my opinion and I have to take the responsibility for this direction, and all you have to do is to act upon it, this regulation applies when the two vehicles are in *different* roads. My view is that the *course* which is there referred to is the course which will enable each driver to determine whether there is a possibility of a collision. That can only mean conflicting courses. It does not mean the course which is in the mind of the driver when he is going to make the turn but the course which if continued will lead to the possibility of a collision. This regulation does not apply in the circumstances of this case because the defendant was making the turn from this road in the ordinary line of traffic. The defendant was going to cross from the left over to the right on his road, quite true, to get into another road, but he was going to turn in this road from right to left.
>
> *Ordinary Rule Applicable.*
>
> My direction is that the only rule applying to the circumstances is that each party must exercise the judgment and do the acts which a reasonable driver would exercise and do under the circumstances. Plaintiff had to establish his claim to the jury's satisfaction, said His Honour. Negligence was the failure to exercise the care of an ordinary driver. His Honour cited an opinion of the House of Lords that if the courses of two motor-cars crossed and there was no rule of the road such as there was at sea requiring one to give way and the other to keep to the course and both held on, both were equally blameworthy. The duty of the care was in proportion to the difficulty of the movement, or the degree of care incumbent on the driver was dependent on the difficulty of the movement he was about to execute.
>
> *More Difficult Movement.*
>
> A crossing from left to right was a more difficult movement, said His Honour, than the continuing of a course in the road. The driver who intended to turn to his right had to give attention to traffic behind him and traffic approaching him on its proper side. It was a difficult movement, and his duty of care was correspondingly great.

There were similar facts in the case of *Commerer v. Stratford Carrying Co.*, [1934] N.Z.L.R. 551, G.L.R. 485, and the Chief Justice decided against the person making such a turn.

A reference to Reg. 4, para. 5, shows that where traffic at an intersection is controlled by coloured lights a driver making a turn always yields the right of way to approaching vehicles. An illustration of this would be at the intersection of Taranaki Street and Courtenay Place. If this is the case with a corner controlled by coloured lights, why should it be different at a corner not so controlled ?

The second proposition appears to be covered by Mr. Justice Smith's definition of what a "course" is. Unless the motorist is going right across the road into a street on the far side he is not entitled to the right of way from traffic on his left. As a matter of practice and on the principle of treating the other driver as a "mug," I usually give way to such traffic because it is not always possible to tell whether the motorist is going to make a turn or proceed straight across.

A reference to such a position at a "T" crossing will more fully illustrate what I mean.

I write this letter merely because some of your readers may during the holidays make one of those two moves and have a disaster.

Yours, etc.,

Wanganui. J. M. HUSSEY.

On receipt of this letter, we referred it to the learned author of the article, whose reply is given below.—ED.

I have read the above letter with interest and readily agree from a practical point of view that the off-side rule should not apply in the cases mentioned by Mr. Hussey; indeed I made that clear in the article itself, but pointed out that para. 6 of Reg. 14 had overruled practical considerations.

When Mr. Justice Smith gave his direction to the jury and Myers, C.J., decided *Commerer v. Stratford Carrying Co.*, the rule required a driver "*when approaching*" an intersection to give way to a vehicle "approaching" from his right. But the rule as formulated in the 1936 Regulations says that "Every driver . . . when approaching *or crossing* any intersection . . . and to or *over* which any other vehicle is approaching or *crossing* so that if both continued on their course there would be a possibility of a collision, shall if such other vehicle . . . is approaching from his right, give way . . . ."

The reference to "crossing" together with the effect of para. 5, in my view, renders nugatory the dicta of Myers, C.J., and Smith, J.

I would point out, however, that the Transport Department takes a different view, as appears in its publication, *The Road Code*, at p. 28. The following direction is given to drivers :

> "When approaching or crossing an intersection . . . give way to any vehicle (not changing its course) on your right.
>
> "If you are *changing direction* yourself, give way to all other traffic."

Traffic Regulations should be framed as clearly as possible so that laymen can read and understand them. The article in question and Mr. Hussey's comments show that the rule as at present framed is capable of producing a legal wrangle.

The dicta of Myers, C.J., and Smith, J., provide a clear and practical method of applying the rule, which should be so framed that any driver turning to the right at an intersection will know that he has to give way to all other traffic. But so long as the words "both continued on their course" are retained in the rule, there will be not only conflicts of legal opinion, but confusion among drivers with inevitable unfortunate results.

"In the estimation of English-speaking people generally, a right of review is no less sacred than the right to be heard in the first instance."—CHIEF JUSTICE ROSENBERRY, in *Administrative Law and the Constitution.*

Obituary.

Mr. W. Nelson Matthews, Wellington.

There died at Wellington on January 1, Mr. William Nelson Matthews, a well-known and highly-respected member of the profession, who, but for the onset of ill-health some years ago, might have taken a very high place in the law.

Born at Blenheim in 1893, the late Mr. Matthews was a son of the late Mr. and Mrs. Charles Matthews of Marlborough. He was educated at the Rapaura School, and Marlborough High School, Blenheim, and, in 1912, he came to Wellington, where he took employment in Mr. Alexander Dunn's office and continued his studies at Victoria University College until they were interrupted by the War. After a period of training in New Zealand, Mr. Matthews saw service in France with the N.Z.F.A. (First Battery), having more than three years' service to his credit with the N.Z.E.F., which, unhappily, was to have its effect upon him in after years. Those who knew him at the War will always remember his unfailing cheerfulness and high spirits; and it was he who, for many years after the War, organized the annual reunion of the First Battery.

Returning to New Zealand after the Armistice, Mr. Matthews went back to Mr. Dunn's office and completed his LL.B. degree at Victoria College, and, early in 1920, was admitted as a barrister and solicitor.

In 1922, Mr. Matthews joined Mr. H. L. Spratt in practice at Hawera, where he remained for some three years. In 1925, he returned to Wellington and commenced practice upon his own account, and, by his strict integrity, his marked ability, and thoroughness, soon established a considerable practice both as a solicitor and in the Courts. He frequently appeared as junior counsel with the late Sir Alexander Gray, K.C., and it was while engaged with him in the Hunter Will case in 1930, that Mr. Matthews suffered a break-down in health, and had to abandon his practice and seek treatment.

For five years he held the position of Wellington reporter for the *New Zealand Law Reports*, and he also compiled the first two volumes of *Butterworth's Annotations of N.Z. Statutes*, a work of immense value to the profession.

By 1935, his health had so improved that Mr. Matthews was able to resume practice. Unfortunately, such improvement was not maintained and, for the past two years, his health has been causing increasing anxiety.

As a schoolboy Mr. Matthews was a very good runner, and was very interested in football, cricket, and other games, and was an excellent shot. After the War, he turned his attention more and more to rifle shooting, and became a very skilled marksman with the Karori Rifle Club.

Mr. Matthews's death at the age of forty-four years, while not unexpected, caused profound sorrow amongst his many friends (and they were legion in the profession), who mourn the passing of a gallant comrade, who met adversity with amazing courage and fortitude, and they extend sincere sympathy to Mrs. Matthews and her three young sons.

Practice Precedents.

Sale of Land in Lieu of Partition.

In an action for partition, where the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the land to which the action relates, request the Court to direct a sale of the land and a distribution of the proceeds (instead of a division of the land between or among the parties interested), the Court must, unless it sees good reason to the contrary, direct a sale accordingly.

The Court may, if it thinks fit, on the request of any party interested, and notwithstanding the dissent or disability of any other party, direct a sale in any case where it appears to the Court that, by reason of the nature of the land, or of the number of the parties interested or presumptively interested therein, or of the absence or disability of any of those parties, or of any other circumstance, a sale of the land would be for the benefit of the parties interested.

The Court may also, if it thinks fit, on the request of any party interested, direct that the land be sold unless the other parties interested, or some of them, undertake to purchase the share of the party requesting a sale; and, on such an undertaking being given, the Court may direct a valuation of the share of the party requesting a sale.

On directing any such sale or valuation to be made, the Court may give also all necessary or proper consequential directions.

Any person may maintain such an action against any one or more of the parties interested without serving the other or others, and it is not competent to any defendant in the action to object for want of parties; and at the hearing of the cause the Court may direct such inquiries as to the nature of the land and the persons interested therein, and other matters, as it thinks necessary or proper, with a view to an order for partition or sale being made on further consideration: see the Property Law Act, 1908, s. 105, which provides, however, that all persons, who, if that Act had not been passed, would have been necessary parties to the action must be served with notice of the decree or order on the hearing, and, after such notice, they are bound by the proceedings as if they had originally been parties to the action: and all such persons may have liberty to attend the proceedings, and any such person may, within a time limited by rules of the Court, apply to the Court to add to the decree or order.

On any sale under s. 105, the Court may allow any of the parties interested in the land to bid at the sale, on such terms as the Court deems reasonable as to non-payment of deposit, or as to setting-off or accounting for the purchase-money or any part thereof instead of paying the same, or as to any other matters.

It seems that the Court has no jurisdiction to direct a valuation of the shares of the parties desiring a sale of the whole property: see *Pitt v. Jones*, (1880) 5 App. Cas. 651; *Gray v. Dawson*, (1912) 31 N.Z.L.R. 1001.

It is provided by section 106 of the Property Law Act, 1908, that the proceeds of the sale may, if the Court thinks fit, be paid to trustees appointed by the Court, and applied as the Court from time to time directs in the discharge of any incumbrance affecting the land

directed to be sold; and, subject thereto, in the payment of the residue of the parties interested. Where the Court so directs the trustees (if any) may in their discretion apply the money in manner aforesaid; and where no such direction is given any party interested may petition the Court for an order that the money be so applied. Until the moneys can be applied as aforesaid, it must be invested from time to time in such securities as the Court may approve, and the interest and dividends thereof are to be paid to the parties interested.

In the following precedent the moneys were paid into Court, and, after the necessary costs and expenses were made, the balance was paid to those entitled. The conditions relating to the sale have not been set out hereunder, but will follow in the next Precedent to be published. It is assumed that no defence was filed, and so, the time having expired, the plaintiff moved on notice of motion which also was not defended, the decree and sale following. An affidavit of service is required.

STATEMENT OF CLAIM.

IN THE SUPREME COURT OF NEW ZEALAND.

.....District.

.....Registry.

No.

BETWEEN A. B. of &c. Plaintiff

AND

C. D. of &c. Defendant.

day the day of 19 .

The plaintiff by his Solicitor E. F. &c. says:—

1. The plaintiff and the defendant are registered as proprietors of an estate in fee-simple in

All that piece of land containing one rood more or less being part of Section No. , District and being Lot on deposited Plan No. together with &c. and being the whole of the land in Certificate of Title volume folio : Subject to &c.

2. The plaintiff and the defendant are of full age and are the only persons having a beneficial interest in the said land and are registered as proprietors of an estate in fee-simple therein as tenants in common in equal shares.

3. The plaintiff individually is interested in the said land to the extent of one moiety and requests this Court to direct a sale of the land and a distribution of the proceeds instead of a division of the said land as between the plaintiff and the defendant.

4. There is erected upon the said piece of land a dwellinghouse and by reason of that and other circumstances a division of the land between the plaintiff and the defendant is impracticable.

WHEREFORE THE PLAINTIFF CLAIMS:

(*a*) That this Honourable Court instead of a division of the said land will direct a sale of the said land and a distribution of the proceeds between the plaintiff and the defendant.

(*b*) That the costs of and incidental to these proceedings and of and incidental to such sale be paid out of the proceeds of such sale before any division between the plaintiff and the defendant is made.

(*c*) Such further or other relief as to which this Honourable Court may deem the plaintiff entitled.

NOTICE OF MOTION FOR DECREE FOR SALE ETC.

(*Same heading.*)

TAKE NOTICE that Counsel for the plaintiff WILL MOVE this Honourable Court at the Supreme Court on Wednesday the day of 19 at the hour of 10.30 o'clock in the forenoon or so soon thereafter as Counsel can be heard FOR AN ORDER AND DIRECTION that the fee-simple in

All that piece of land containing one rood more or less being part of Section No. , District and being Lot on deposited Plan No. together with &c. and being the whole of the land in Certificate of Title volume folio : Subject to &c.

be sold by public auction with the approval of this Court subject to a reserve price of £1,000 and under conditions of sale as per copy hereunto annexed AND that the moneys to arise from such sale be lodged in Court to the credit of this action and after paying thereout commission and the costs of and incidental to this action and of and incidental to such sale be paid out of Court to the plaintiff and the defendant in equal shares AND that the conduct of such sale be given to the plaintiff and that leave be granted to both the plaintiff and defendant to bid at such sale AND that the auctioneers be of the City of who be authorized to receive the deposit from the purchaser AND that the auctioneer's remuneration, in the event of no sale at auction or in the event of a sale to either the plaintiff or the defendant be an offering fee of £2 2s. and in the event of a sale at auction to other than the plaintiff or the defendant a commission of 5 per cent. on the first £300 of the purchase price and 2½ per cent. on the balance of the purchase price AND FOR A FURTHER ORDER AND DIRECTION that in the event of the said property not being sold at auction as aforesaid the auctioneer as agent for the owners without further application to the Court shall be at liberty to sell the said property by private contract for the price of £1,000 on the terms following—namely £50 cash as deposit and the balance cash over mortgage within one month the money to arise from such sale being lodged in Court to the credit of this action and after paying thereout commission and the costs of and incidental to this action and of and incidental to such sale to be fixed by the Registrar be paid out of Court by the Registrar to the plaintiff and the defendant in equal shares AND that in case of a sale by private contract the auctioneer's remuneration be the same commission as fixed in the case of a sale by auction AND FURTHER that this action be reserved for further consideration and that either party be at liberty to apply for further directions herein.

Dated at this day of 19 .

Solicitor for the plaintiff.

To the Registrar of the Supreme Court at and to the Defendant C. D. &c.

DECREE FOR SALE.

(*Same heading*).

day the day of 19 .

Before the Honourable Mr. Justice .

UPON READING the writ of summons and statement of claim in this action and the notice of motion for sale herein AND UPON HEARING Mr. of Counsel for the plaintiff AND the defendant not having filed a statement of defence within the time limited in the said writ of summons and there being no appearance of the defendant on the said notice of motion IT IS ORDERED AND DIRECTED that the fee-simple in

All that piece of land containing one rood more or less being part of Section No. , District and being Lot on deposited Plan No. together with &c. and being the whole of the land in Certificate of Title volume folio : Subject to &c.

be sold by public auction with the approval of this Court subject to a reserve price of £ and under conditions of sale as per copy annexed AND that the moneys to arise from such sale be lodged in Court to the credit of this action and after paying thereout of commission and the costs of and incidental to this action and of and incidental to this sale to be fixed by the Registrar be paid out of Court to the plaintiff and the defendant in equal shares AND that the conduct of such sale be and the same is hereby given to the plaintiff AND that leave be and leave is hereby granted to both plaintiff and the defendant to bid at such sale AND that the auctioneers be of the City of who is hereby authorized to received the deposit from the purchaser AND that the auctioneer's remuneration in the event of no sale at auction or in the event of a sale to either the plaintiff or the defendant be an offering fee of £2 2s. and in the event of a sale at auction to other than the plaintiff or the defendant a commission of 5 per cent. on the first £300 of the purchase price and 2½ per cent. on the balance of the purchase price AND IT IS FURTHER ORDERED AND DIRECTED that in the event of the said property not being sold at auction as aforesaid the auctioneers as agents for the owners without further application to the Court shall be at liberty to sell the said property by private contract for the price of £1,000 on the terms following—namely £50 as deposit and the balance cash over mortgage within one month the money to arise from such sale being lodged in Court to the credit of this action and after paying thereout of commission and the

costs of and incidental to this action and of and incidental to such sale be paid out of Court by the Registrar to the plaintiff and the defendant in equal shares AND that in case of a sale by private contract the auctioneer's remuneration be the same commission as fixed in the case of a sale by auction AND IT IS FURTHER ORDERED that this action be reserved for further consideration AND that either party be at liberty to apply for directions herein.

By the Court.

Registrar.

(Particulars and conditions of sale will be furnished in the Practice Precedent to follow in the next issue of this JOURNAL.)

Recent English Cases.

CRIMINAL LAW.

Bill of Indictment—Preferment—No Committal for Trial—Discretion of Judge—Administration of Justice (Miscellaneous Provisions) Act, 1933.

The Court of Criminal Appeal will not inquire into the exercise of the discretion of a judge in granting leave to prefer a bill of indictment under the Administration of Justice (Miscellaneous Provisions) Act, 1933.

R. *v.* ROTHFIELD, **[1937] 4 All E.R. 320.**

As to indictment where no committal: see HALSBURY, Hailsham, edn., vol. 9, p. 127, par. 165; DIGEST, vol. 14, pp. 208–211.

EQUITY.

Quia timet Action—Attempted Bribery of Employees—Right to Injunction.

An injunction to restrain further attempts to seduce employees from their allegiance will not be refused merely because previous attempts were unsuccessful.

SCOPHONY, LTD. *v.* TRAUB AND OTHERS, **[1937] 4 All E.R. 279.**

As to *quia timet* actions: see HALSBURY, Hailsham edn., vol. 13, pp. 62, 63, pars. 55–57; DIGEST, vol. 20, pp. 548, 551.

INCOME TAX.

Double Taxation—Relief—Shares in English Company Held by Indian Company—Relief to Preference Shareholder in Indian Company.

The principle of double taxation relief applying to ordinary shares applies also to preference shares.

BARNES (INSPECTOR OF TAXES) *v.* HELY HUTCHINSON, **[1937] 4 All E.R. 286. K.B.D.**

As to relief: see HALSBURY, Hailsham edn., vol. 17, p. 195, par. 399; DIGEST, vol. 28, p. 79.

Unclaimed Balances—Carried into Partners' Current Accounts—Trade Receipt.

If unclaimed balances are brought into the current account or accounts of a business, income tax will have to be paid on them, even though they have to be paid back.

MORLEY (INSPECTOR OF TAXES) *v.* TATTERSALL, **[1937] 4 All E.R. 339.**

As to trade receipts: see HALSBURY, Hailsham edn., vol. 17, pp. 95, 96, par. 190; DIGEST, vol. 28, pp. 17–21.

NEGLIGENCE.

Latent Defect—Breakage of Ring Causing Death of Workman—Liability of Manufacturer—Persons Entitled to Damages for Loss of Expectation of Life.

Although manufacturers may be negligent in the manufacture of an article, they are not responsible for an accident caused through a defect through defective manufacture, if there was, on the part of the persons using it, an opportunity for intermediate examination.

DRANSFIELD *v.* BRITISH INSULATED CABLES, LTD., **[1937] 4 All E.R. 382.**

As to liability of manufacturer: see HALSBURY, Hailsham edn., vol. 23, pp. 632–634, par. 887; DIGEST, vol. 39, pp. 440–443.

PRACTICE AND PROCEDURE.

Application for Security for Costs—Non-payment of Costs in Court Below—R.S.C. Ord. 58, r. 15.

The mere failure by an appellant to pay the costs of an action is not, in the absence of facts showing his inability to pay them, sufficient grounds for making an order for security.

HILLS *v.* LONDON PASSENGER TRANSPORT BOARD, **[1937] 4 All E.R. 230. C.A.**

As to secutiry for costs: see HALSBURY, Hailsham, end., vol. 26, p. 119, par. 237; DIGEST, pp. 802–812.

Production of Documents—Incriminating Matter—Matter Relevant to Issues Raised by Defence—Alleged Scandalous Matter Disentitling Author to Copyright.

The defendant's right to discovery of all documents relevant to his defence does not include a right to discovery of documents incriminating the plaintiff.

SITWELL *v.* SUN ENGRAVING CO., LTD., **[1937] 4 All E.R. 366.**

As to incriminating documents: see HALSBURY, Hailsham edn., vol. 10, pp. 394–396, pars. 476–478; DIGEST, vol. 18, pp. 161–164.

Act Passed and in Operation.

Mortgagors and Lessees Rehabilitation Amendment Act, 1936, No. 30. December 22, 1937.

Rules and Regulations.

Fisheries Act, 1908. Salt-water Fisheries Amendment Regulations, 1937, No. 4. December 8, 1937. No. 287/1937.

Post and Telegraph Act, 1928. Post and Telegraph (Staff) Regulations 1925, Amendment No. 12. December 8, 1937. No. 288/1937.

Pharmacy Act, 1908. Pharmacy Regulations, 1937. December 8, 1937. No. 289/1937.

Post and Telegraph Act, 1928. Post and Telegraph (Staff) Regulations 1925, Amendment No. 11. December 15, 1937. No. 290/1937.

Motor-vehicles Act, 1924. Heavy Motor-vehicles Regulations 1932, Amendment No. 7. December 21, 1937. No. 291/1937.

Industrial Efficiency Act, 1936. Industrial Licensing (Fertilizers) Amendment Notice 1937. December 22, 1937. No. 292/1937.

Regulations Revision Order, 1937. December 21, 1937. No. 293/1937.

Public Works Act, 1928. Water-power Regulations 1934, Amendment No. 1. December 15, 1937. No. 294/1937.

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