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"The law is a living organism, constantly growing, expanding, adapting itself, like a tree, which maintains its identity all the time, though in its full growth it looks very different from what it was when a sapling."

—LORD WRIGHT, in an address to the University of London Law Society, on "The Study of Law."

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The Principle of Public Policy.

IV.

IN *Beresford v. Royal Insurance Co., Ltd.*, [1938] 2 All E.R., 602, the House of Lords was asked to prefer one of two conflicting applications of the doctrine of public policy. The appellants relied on the sanctity of contract. The respondents repudiated the contract because of its nature, as being the encouragement of the commission of a crime. Stated shortly, the principle of public policy which prevailed was that the Courts will not allow a criminal to benefit from his crime.

In this case, their Lordships found themselves on firmer ground than they were in *Fender v. St. John-Mildmay*, to which we have already referred. The facts are well known, and may be stated briefly.

The assured, Major Rowlandson, had five similarly-worded policies of life insurance with the respondent company, and, from June, 1924, he had kept them alive, his premiums being about £450 for each quarter. In June, 1934, he was insolvent. In addition to loans from various friends, he had borrowed from the respondents, on the security of the policies, a total sum of £6,791. The policies had no surrender value above the amount advanced, and the insured was unable to pay the premiums due. The respondents extended the time for payment, and the final extension was to expire at 3 p.m. on August 3. He was unable to find the premium. At about 2.57 p.m. on that date, he shot himself. Letters and interviews earlier on that date made it clear that he shot himself for the purpose of the policy-moneys being made available to reimburse his various creditors.

A claim by the administratrix of the insured against the company for payment under the policies was heard by Swift, J., with a special jury. The jury found as facts that at the time he shot himself the assured was not labouring under such a defect of reason from disease of mind as not to know the nature and quality of the act he was doing, or if he did know it as not to know that what he was doing was wrong; and they also found that when he shot himself he possessed that degree of physical, intellectual, and moral control over his action which a normal man would possess. In other words, applying the *Mc Naghten* rules, Major Rowlandson, judged by every standard that either party or the Court could suggest, was sane at the time that he committed suicide.

Both parties invoked the doctrine of public policy.

The appellant claimed that, before the Court, there was a contract legally made, which had been carried out by the assured for many years, and, under it, the respondents had undertaken not to dispute liability except upon the conditions set out in the insurance policy, none of which had been fulfilled; and that it would be contrary to public policy if the respondents were allowed to repudiate their contract. The respondents said, in effect, that the assured died by his own hand when he was quite sane, and he thus committed a felonious act; and, therefore, that no one claiming through him could be entitled to benefit under the contract; that it would be contrary to public policy that they should be obliged to pay, and that the Court should not compel payment of a benefit accruing through the commission of a crime.

In the Court of first instance, Swift, J., held, in effect, that, whatever considerations of public policy might be urged against the company paying on a life policy where the assured had committed a crime in taking his own life, yet, where there was no idea of that kind when the policy was effected, and where felonious suicide was not expressly excepted, but impliedly covered, the dominant public policy to be observed was that of sanctity of contract; and he gave judgment for the plaintiff: [1936] 2 All E.R. 1052.

The Court of Appeal (Lord Wright, M.R., Romer, and Scott, L.JJ.), in a judgment delivered by Lord Wright, allowed the appeal from this judgment: [1937] 2 All E.R. 243. After holding that the administratrix had no better or other title to the policy-moneys than the assured himself would have had, the Court said that the promise to pay the personal representatives in the event of the insured's death was a promise to the assured only, and could be enforced, if at all, by the personal representative as such; and the same was true of assigns. If the insured had taken his life while insane, the fact would not have constituted a defence to the claim, as the act of an insane person is not in law his act. But, in English law, suicide while sane is a crime, and as the appellant stood in the shoes of the insured who had committed, as it were, murder on himself, her claim was equivalent technically to a claim brought by a murderer on the life of the murdered person, and it was clear that neither a murderer, his personal representative, or his assigns could recover: *Cleaver v. Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147 (the Maybrick case); *In the Estate of Crippen*, [1911] P. 108: *Re Sigsworth, Bedford v. Bedford*, [1935] Ch. 89. The general principle which must be applied by the Court, was, Lord Wright said, that it will not allow a criminal or his representative, to reap, by the judgment of the Court, the fruits of his crime; and, it followed, that no person is allowed to insure himself against the commission of a crime as Greer, J., said in *Haseldine v. Hosken*, [1933] 1 K.B. 822, 837—a principle which applied without qualification to a suicide such as that in question.

Lord Wright concluded, at p. 255, by saying of the principle of public policy which their Lordships applied:

> "The overriding duty, or inherent power, of the Court to refuse its aid to enforce a promise to pay, in such circumstances excludes its general duty to enforce performance of contracts."

In other words, public policy is paramount to all conditions, and is inherent in the jurisdiction of the Court; moreover, this particular application of the principle of public policy which prevented a criminal, even

posthumously, obtaining the profit of his crime, is paramount to the accepted postulate of the sanctity of contract.

The appeal to the House of Lords was unsuccessful—[1938] 2 All E.R. 602—and is of particular importance in relation to policies of insurance.

Lord Atkin, with whose opinion Lord Thankerton and Lord Russell of Killowen concurred, said that, in a discussion of the important subject of the effect of suicide on policies of life insurance it is necessary to distinguish between two different questions that are apt to be confused: (i) What was the contract made by the parties? (ii) How is that contract affected by public policy?

Before considering these matters in detail, it is convenient here to give condition 4 of the policy under consideration by their Lordships:

> "If the life . . . shall die by his own hand, whether sane or insane, within one year from the commencement of the insurance, the policy shall be void as against any person claiming the amount hereby assured or any part thereof, except that it shall remain in force to the extent to which a *bona fide* interest for pecuniary consideration, or as a security for money, possessed or acquired by a third party before the date of such death, shall be established to the satisfaction of the directors."

No part of this condition applied to the actual facts of this case: though the action was brought on behalf of the deceased's creditors, there was no assignment of any right under the policy to any creditor, and the policy was not held as security; moreover, several years had gone by between the commencement of the policy and the assured's suicide.

Lord Atkin went on to say:

> "On the first question, if there is no express reference to suicide in the policy, two results follow. In the first place, intentional suicide by a man of sound mind, which I will call sane suicide, ignoring the important question of the test of sanity, will prevent the representatives of the assured from recovering. On ordinary principles of insurance law, an assured cannot by his own deliberate act cause the event upon which the insurance money is payable. The insurers have not agreed to pay on that happening. The fire assured cannot recover if he intentionally burns down his house, nor the marine assured if he scuttles his ship, nor the life assured if he deliberately ends his own life. This is not the result of public policy, but of the correct construction of the contract. In the second place this doctrine obviously does not apply to insane suicide, if one premises that the insanity in question prevents the act from being in law the act of the assured.
>
> "On the other hand, the contract may, and often does, expressly deal with the event of suicide, and that whether sane or insane. It may provide that death arising at any time from suicide of either class is not covered by the policy. It may make the same stipulation in respect of suicide of either or both classes happening within a limited time from the inception of the policy. The rights given to the parties by the contract must be ascertained according to the ordinary rules of construction, and it is only after such ascertainment that the question of public policy arises. In the present case, the contract contained in the policy provided that the company would pay the sum assured to the person or persons to whom the same is payable upon proof of the happening of the event on which the sum assured was to become payable. It further provided that the policy was subject to the conditions and privileges indorsed, so far as applicable. It contained the further stipulation that, unless it was otherwise provided in the schedule, the policy, subject to the indorsed conditions, was indisputable. The schedule specified the assured as Charles Rowlandson, the life assured as the assured, the event on the happening of which the sum was to become payable as the death of the life assured, and the person or persons to whom the sum was payable as the executors, administrators or assigns of the assured."

His Lordship then set out the condition to which we have referred, and proceeded:

> "My Lords, I entertain no doubt that, on the true construction of this contract, the insurance company have agreed with the assured to pay to his executors or assigns on his death the sum assured, if he dies by his own hand, whether sane or insane, after the expiration of one year from the commencement of the assurance. The express protection limited to one year, and the clause as to the policy being indisputable subject to that limited exception, seem to make this conclusion inevitable. The respondents' counsel appeared shocked that it should be considered that a reputable company could have intended to make such a contract, but the meaning is clear, and one may assume from what one knows of tariff conditions that it is a usual clause. There is no doubt, therefore, that, on the proper construction of this contract, the insurance company promised Major Rowlandson that, if he, in full possession of his senses, intentionally killed himself, they would pay his executors or assigns the sum assured."

And as to the position of third parties who are affected by the application of the principle of public policy to contracts of life insurance, His Lordship said, at p. 607:

> "Anxiety is naturally aroused by the thought that this principle may be invoked so as to destroy the security given to lenders and others by policies of life insurance, which are in daily use for that purpose. The question does not directly arise, and I do not think that anything said in this case can be authoritative. I consider myself free, however, to say that I cannot see that there is any objection to an assignee for value before the suicide enforcing a policy which contains an express promise to pay upon sane suicide—at any rate, so far as the payment is to extend to the actual interest of the assignee. It is plain that a lender may himself insure the life of the borrower against sane suicide, and the assignee of the policy is in a similar position, so far as public policy is concerned. I have little doubt that after this decision the life companies will frame a clause which is unobjectionable, and they will have the support of the decision of the Court of Queen's Bench in *Moore v. Woolsey* ((1854), 4 E. & B. 243), where a clause protecting *bona fide* interests was upheld."

It was suggested at the Bar of their Lordships' House that, so far as the doctrine was applied to contracts, it would have the effect of making the whole contract illegal. Their Lordships considered the causes of death were severable: the policy before them was a contract to pay on an event which might happen from many causes, one only of which involved a crime by the assured. The criminal cause, Lord Atkin said, was severable; and the contract, apart from the criminal cause, was perfectly valid.

The contract between the parties having thus been ascertained, Lord Atkin proceeded to deal with the second question, which he answered by saying that the contract was not enforceable. His Lordship expressed the principle as being:

> "that a man is not to be allowed to have recourse to a Court of justice to claim a benefit of his crime, whether under a contract or a gift . . . the absolute rule is that the Courts will not recognize a benefit accruing to the criminal from his crime."

This is a wider statement than that of Lord Sumner, when, as Hamilton, J., in *In the Estate of Hall, Hall v. Knight and Baxter*, [1914] P. 1, 7, he said, "The principle can only be expressed in that wide form. It is that a man shall not stay his benefactor and thereby take his bounty," a pithy statement which, as Lord Atkin remarked, was not as wide as the principle permits.

The question, also, arose whether the insured's personal representative was seeking to recover a benefit which took shape only after the insured's death; but, as Lord Atkin pointed out, here the money became due, if at all, under an agreement made by the deceased, while living, in order to benefit his estate after his death. Consequently, he had the power of complete testamentary disposition over it. His Lordship thought that the principle of public policy could not be so narrow as to exclude the increase of the criminal's

estate amongst the benefits of which he is deprived by his crime. And, under the same ban, came his executor or administrator claiming as his representative.

Lord Macmillan, while not differing in the result from his noble and learned friends, or with the considerations leading to the conclusion reached in the Court of Appeal, expressed the difficulties which had confronted him: the dangers attending the application of considerations of public policy to contracts deliberately undertaken by persons of full age; the question whether the enforcement of the respondent's policy-obligation would enable a criminal to take advantage of his crime, or whether the obligation sought to be enforced was one which held out an inducement to commit a crime—namely, suicide. After discussing these difficulties, His Lordship said that he did not find them, cogent as they were, sufficiently convincing to deter him from agreement with their Lordships' conclusion. In particular, he felt the force of the view that to increase the estate which a criminal left behind him was to benefit him, albeit in a sense a post-mortem benefit,—namely, the benefit of having, by his last and criminal act, provided for his relatives or creditors. No criminal, he concluded, can be allowed to benefit in any way from his crime. He felt bound, both on principle, and, so far as the Courts of Great Britain were concerned, by authority, to hold that the Courts ought not to enforce a contract to pay a sum of money to a person's representatives in the event of his committing suicide. On the position of third parties who had *bona fide* acquired rights for value under such policies, His Lordship reserved his opinion.

The reasoning of their Lordships in this case may acquire importance in New Zealand in relation to comprehensive motor-car policies. In *Linekar v. Hartford Fire Insurance Co., Ltd.*, [1936] N.Z.L.R. 776, the general exceptions clause provided, *inter alia*, that no liability should attach to the insurer under the policy in respect of any loss, damage, or liability occurring, or any personal accident to the insured occurring, if any motor-vehicle in connection with which indemnity is granted under the policy is being driven with the consent of the insured by any person who to the insured's knowledge is unlicensed or disqualified at the time from holding a license. At the time of an accident, during the currency of the policy, the insured was driving the car but at that time he was not the holder of a driver's license. The judgment turned on the construction of the exception referred to.

In *Jury v. North Island Motor Union Mutual Insurance Co.*, [1930] N.Z.L.R. 562, the company's liability was excepted when the motor-vehicle with which the policy was concerned was being driven by or was in charge of any person under the influence of intoxicating liquor. When an accident occurred, the insured himself was under the influence of liquor while driving the motor-vehicle in connection with which indemnity was granted under the policy; and the company was held to be exempted from liability.

In a recently delivered judgment in *In re an Arbitration, O'Brien and the South British Insurance Co., Ltd.*, the Court of Appeal considered the construction of an exception clause in a comprehensive motor-car policy that was similar to that in *Linekar's* case, but which their Honours distinguished from *O'Brien's* case. In the latter case, the insured's husband was not a licensed driver when an accident occurred in which he was killed, and the hirer-insured was injured, the car being owned by a company, and the policy being issued in the names of owner and hirer. The main question in issue was whether the consent and knowledge of the "insured" included the consent and knowledge of the owner as well as that of the hirer. By a special term in this particular policy, the "insured," for the purposes of the indemnity for personal accident, referred to the hirer and to her only.

Having in mind, possibly, the observations of their Lordships in *Beresford's* case, and the fact that it is an offence in New Zealand for a driver to be intoxicated or unlicensed, His Honour the Chief Justice concluded his judgment in *O'Brien's* case as follows:

> "In the view I take of the case, I find it unnecessary to express any opinion as to whether or not *Linekar's* case was rightly decided on the various points with which it dealt. There is one observation, however, that I would make. On the one point dealt with in *Jury's* case, it does appear to me at first sight that that case and *Linekar's* are indistinguishable; and it occurs to me that there may be an aspect of the matter which was not discussed in either case which may require consideration in the event of the point again arising for determination. I refer to the question of public policy."

If the matter raised in the observation of the learned Chief Justice should come up for decision, there will of necessity arise for consideration the judgments in *Tinline v. White Cross Insurance Co.*,[1921] 2 K.B. 327, and *James v. British General Insurance Co.*, [1927] 2 K.B. 311, which were questioned in the Court of Appeal in *Haseldine v. Hosken*, [1933] 1 K.B. 822; and *Home Insurance Company of New York v. Lindal and Beattie*, [1934] 1 D.L.R. 497 (a decision of the Supreme Court of Canada). Something may turn on our special legislation, the Motor-vehicles Insurance (Third-party Risks) Act, 1928, and a distinction may be sought between the statutory indemnity and the terms of a private contract for comprehensive insurance, such as were considered in *Linekar's* and *O'Brien's* cases. If so, then attention will need to be given to observations of the learned Chief Justice (with which Johnston, J., concurred) in *Stewart v. Bridgens*, [1936] N.Z.L.R. 948, 966, repeated in *A.P.A. Union Assurance Society v. Ritchie and Barton Ginger and Co., Ltd.*, [1937] N.Z.L.R. 414, 423, and to the divergent opinions expressed by Reed, J., and Fair, J., in the first-named case, and by Ostler, J., in *Hurlstone v. Steadman*, [1937] N.Z.L.R. 708, 723. Again, there will arise for consideration the effect of statutory offences relating to the use of motor-cars (in the widest possible sense of the word "use") which are the subject of criminal law, and also to crimes of inadvertence involving *mens rea* in the legal sense.

In the meantime, as Scrutton, L.J., said in *Haseldine's* case, the present position of the law of motor insurance, in view of the statutory requirements of compulsory insurance, is in such a complicated state that until an opinion has to be pronounced, the matter must be left open. It will be for the Court to say, on its own volition if necessary, when the question comes up for decision, whether or not it would be justified in applying to policies of insurance containing clauses similar to those in *Jury's* case, in *Linekar's* case, and in *O'Brien's* case, the principles of public policy applied in the English and Canadian cases to which we have referred. This much, however, is certain: No contract of the parties can defeat the general principles of public policy, if its terms are in conflict with them: *Anctil v. Manufacturers' Life Insurance Co.*, [1899] A.C. 604.

Summary of Recent Judgments.

COURT OF APPEAL.
Wellington.
1938.
June 16, 30.
Blair, J.
Kennedy, J.
Johnston, J.
Fair, J.

ASHTON v. WHITTAKER.

Motor-vehicles—Off-side Rule—Breach—Proof of *Mens Rea*—Traffic Regulations, 1936 (Serial No. 86/1936), R. 14 (6).

Regulation 14 (6) of the Traffic Regulations, 1936,—the off-side rule—is a penal clause, and, before a breach of it can be established, *mens rea* must be shown—that is, that the driver of the motor-vehicle knew or ought to have known that there was a possibility of a collision if he proceeded on his way at the speed at which he travelled across the intersection.

Order of *Myers*, C.J., dismissing a motion by the first-named respondent for a new trial, [1938] N.Z.L.R. 563, affirmed.

Counsel: **Hampson,** for the appellant; **King,** for the respondent.

Solicitors: **Hampson and Chadwick,** Rotorua, for the appellant; **King and McCaw,** Hamilton, for the respondent.

COURT OF APPEAL.
Wellington.
1938.
April 8, 11, 12, 13, 26, 27, 28, 29.
Myers, C.J.
Blair, J.
Kennedy, J.
Callan, J.
Northcroft, J.

HUNTER AND ANOTHER v. HUNTER.

Trusts and Trustees—Removal of Trustees—Grounds for Removal—"Misconduct"—Jurisdiction—Principles on which Exercisable—Practice—Appeals to the Court of Appeal—Trial before Judge alone—Questions of Fact and Opinions—Principles Guiding Appellate Tribunal—Costs—Trustee unsuccessfully defending Action for his Removal—Incidence of Costs.

The jurisdiction of the Court to remove a trustee is ancillary to its principal duty of the Court to see that the trusts are properly executed; and, if the Court is satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustees may be removed. In exercising this jurisdiction the main guide must be, not whether the trustee has committed breaches of trust, but the welfare of the beneficiaries.

It is a sufficient ground for exercising this jurisdiction if the evidence shows (*a*) that there is a conflict between interest and duty; (*b*) that the trustee has failed to recognize this conflict and to take steps to ensure that his interest should not prevail as against his duty, and has disregarded the interests of the infant *cestui que* trust; and (*c*) that a state of hostility, which is calculated to work against the true interests of the estate exists between the trustee and the immediate possessor of the trust estate.

Letterstedt v. Broers, (1884) 9 App. Cas. 371, followed.

A trustee who defends proceedings which are brought to secure his removal and in which his defence fails may not only be deprived of his costs, but may be ordered to pay the plaintiff's costs.

Letterstedt v. Broers, (1884) 9 App. Cas. 371; **Passingham v. Sherborn,** (1846) 9 Beav. 424, 50 E.R. 407; **Palairet v. Carew,** (1863) 32 Beav. 564, 55 E.R. 222; and **Attorney-General v. Murdoch,** (1856) 2 K. & J. 571, 69 E.R. 910, followed.

Where misconduct, not involving dishonesty on his part, has been found against a trustee, in his office as trustee, costs should not be awarded him out of the trust estate.

Principles which should guide the Court of Appeal in hearing an appeal from the decision of a Judge sitting without a jury, discussed, **Powell v. Streatham Manor Nursing Home,** [1935] A.C. 243, followed.

Judgment of *Smith*, J., [1937] N.Z.L.R. 794, affirmed.

Judgment of *Smith*, J., as to costs, [1937] N.Z.L.R. 934, affirmed (*Myers*, C.J., and *Kennedy*, *Callan*, and *Northcroft*, JJ., *Blair*, J., dissenting).

Counsel: **Weston,** K.C., and **Hoggard** for the appellants; **Willis** and **Cresswell,** for the respondent.

Solicitors: **A. Dunn,** Wellington, for the appellants; **Nielsen and Willis,** Wellington, for the respondent.

Case Annotation: *Letterstedt v. Broers*, E. and E. Digest, Vol. 43, p. 755, para. 1981; *Passingham v. Sherborn*, *ibid.*, para. 1985; *Palairet v. Carew*, *ibid.*, p. 754, para. 1954; *Attorney-General v. Murdoch*, *ibid.*, p. 755, para. 1966; *Powell v. Streatham Manor Nursing Home*, Supp. to Practice Vol., p. 24, para. 3357*a*.

SUPREME COURT.
Christchurch.
1938.
June 30;
July 14.
Northcroft, J.

S.I.M.U. MUTUAL INSURANCE ASSOCIATION v. MINSON'S LIMITED, AND OTHERS.

Insurance—Motor-vehicles (Third-party Risks)—Statement by Driver of Car as to Cause of Accident—"Admission of liability"—"Owner"—Whether includes Driver at Time of Accident with Owner's Authority—Motor-vehicles Insurance (Third-party Risks) Act, 1928, ss. 11 (3), 12, 15 (3) (*d*), 16 (*b*), 17.

In order to determine what constitutes an "admission of liability" within the meaning of those words in s. 11 (3) of the Motor-vehicles Insurance (Third-party Risks) Act, 1928, each statement must be considered in the light of its own circumstances to determine whether it goes beyond a mere expression of wrongdoing and attains the status of an acknowledgment of liability to pay damages—*viz.*, is an admission of such a nature as to acknowledge an obligation to make a payment in respect of which the maker of the statement is entitled to have an indemnity from the insurance company.

Tustin v. Arnold and Sons, (1915) 84 L.J. K.B. 2214, distinguished.

The word "owner" as used in s. 11 (3) and (4) of the statute includes a driver of the car who is not the actual owner, but who is entitled to an indemnity under s. 3 of the Act.

Semble, In certain other sections of the statute the word "owner" is to be read literally as indicating the actual owner so as to exclude an insured driver.

Counsel: **Sim,** for the plaintiff; **M. J. Gresson** and **Alpers,** for the defendants.

Solicitors: **Duncan, Cotterill, and Co.,** Christchurch, for the plaintiff company; **Wynn-Williams, Brown, and Gresson,** Christchurch, for the defendants.

Case Annotation: *Tustin v. Arnold and Sons*, E. and E. Digest, Vol. 29, p. 406, para. 3201.

SUPREME COURT.
Hamilton.
1938.
May 18:
June 21.
Myers, C.J.

M. v. M.

Evidence—Nullity Suit—Non-consummation—Petitioner Pregnant at Time of Hearing—Medical Evidence of Possibility of Conception when Parties living together—Inadmissibility of Petitioner's Evidence that Pregnancy Result of Intercourse with Another Man.

At the time of the hearing of an undefended suit for a decree of nullity of marriage the petitioner was pregnant; and the effect of the medical evidence was that conception might have taken place when the petitioner and the respondent were living together.

Respondent neglected to submit himself for medical inspection; and petitioner tendered evidence of non-consummation of the marriage and that her pregnancy was the result of intercourse with a man other than respondent.

MacDiarmid, for the petitioner.

Held, dismissing the petition, That, while the Court could draw an inference adverse to the respondent from his refusal or neglect to submit himself to medical inspection, non-consummation of the marriage had not been proved as the wife's evidence as to paternity of the unborn child was inadmissible.

G. v. G., [1934] N.Z.L.R. 246, G.L.R. 246, followed.

Farnham v. Farnham (otherwise Daniels), [1937] P. 49, and **Burgess (otherwise Leadbitter) v. Burgess,** [1937] P. 60, referred to.

Solicitors: **MacDiarmid, Mears, and Gray,** Hamilton, for the petitioner.

Weekly Tenancies and Notices to Quit.

What Constitutes a Weekly Tenancy?

By F. W. JOHNSTON.

Was *In re Calcinai* (*a Bankrupt*), *Ex parte Calcinai*, [1937] N.Z.L.R. 701, correctly decided?

Weekly tenancies are so common in New Zealand that this question is of extreme importance to practitioners and to the general public.

The statement of facts set out in the report of *Calcinai's* cases says, *inter alia*,

> "He [that is, the Official Assignee] was unable to find a purchaser for the property at what he considered a reasonable price immediately, so he made a temporary arrangement with the bankrupt, by which the bankrupt was permitted to continue in occupation upon payment of a weekly rent. The arrangement was made orally, and no fixed term was agreed on."

In common, no doubt, with many of the older practitioners I read the decision with regret, as incidentally it meant the passing of another of the monumental decisions of the late Mr. Justice Williams—*viz.*, *Elder* v. *Gray*, (1892) 10 N.Z.L.R. 107.

In reading His Honour Mr. Justice Ostler's decision, it becomes apparent that *Elder* v. *Gray* was not cited before him; otherwise, if he had intended not to follow it or to distinguish it, he must have made some reference to it in his judgment.

With every respect, the extract itself from the statement of facts which I have cited above is itself contradictory in that if a weekly rent were specified, that, in itself, created a weekly tenancy, and therefore we have an express tenancy, not an implied one, with the definite term of the tenancy fixed by implication—*viz.*, a weekly tenancy. Therefore, it is a contradiction in itself to say that no fixed term was agreed upon; there was a fixed term agreed upon—namely, a weekly tenancy—but this, although not express, was by implication.

It may, of course, be that the statement of facts set out at the commencement of the report of *In re Calcinai* may have been agreed upon by counsel; and, if counsel agreed to the statement of fact that no fixed term was agreed upon, the case may have proceeded on that assumption: although with every respect I suggest that, if the statement of facts were agreed upon, it should have been that no fixed term was *specifically* agreed upon.

The decision in *Elder v. Gray* (*supra*) was a considered judgment as the dates set out opposite the headnote indicate that the hearing took place on March 7 and the judgment was given on April 10.

It is true that His Honour Mr. Justice Williams in that decision does not make any reference to s. 6 of the Property Law Consolidation Act 1883 Amendment Act, 1885, which was the statute in force at the time and is very similar to s. 16 of the Property Law Act, 1908, but it is inconceivable that the counsel engaged (Sir Robert Stout for the plaintiff and Mr. Frazer for the defendant), or His Honour the Judge himself, who in addition to his other attributes was a recognized authority on conveyancing, were unaware of the statute.

His Honour in his judgment, at pp. 108-09, says:

> "The defendant's wife, under the authority of the defendant, agreed to rent a house of the plaintiff at 15s. *per week*. . . . A weekly tenancy was thus created between the defendant and the plaintiff. In order to determine a weekly tenancy some notice to quit is required, although apparently it need not be a week's notice: *Jones v. Mills* ((1861) 10 C.B.N.S. 788; 142 E.R. 664)."

In *Jones v. Mills* (*supra*), an appeal in an action for ejectment from the judgment of Channell, B., the Court being Erle, C.J., Williams, Willis, and Byles, JJ., the statement of facts includes the following:—

> "There was no precise evidence as to the terms of the defendant's tenancy; but it appeared that he had for a considerable period paid John Meares the rent of 1s. 3d. weekly . . . The defendant had no notice to quit."

Erle, C.J., in his judgment, at pp. 796-97, said, *inter alia*:

> "The ejectment is brought against one who has been for several years in possession of the premises as a tenant from week to week . . . I also think that the tenant, having held for several years, was not liable to be turned out at the end of any week, without notice. I cannot find any authority for saying that his tenancy was determined at the end of each week. The rule which applies to tenancies from year to year has never, it seems, been extended to the case of a weekly or monthly tenant; but, though it has been laid down that a weekly or a monthly holding does not require a week's or a month's notice to determine it, unless there be some special agreement or some custom, I do not find that any person has ever held that the interest of a tenant so holding may be put an end to without any notice at all. It would be most unreasonable if a landlord was held to be entitled to turn his weekly tenant out at 12 o'clock at night on the last night of the week. Some notice must be necessary; and, none having been given here, the action has been prematurely brought, and the rule to enter a nonsuit must be made reasonable. I should feel inclined to hold upon the authority of *Thunder d. Weaver v. Belcher*, 3 East 449, 102 E.R. 669, that the tenant ought not to be ejected until after such demand of possession as would give him a reasonable time to get out: but I cannot, without further consideration, prevail upon myself to lay down any precise rule."

Williams, J., in his judgment, at pp. 797-98, said, *inter alia*:

> "The contention on the part of the defendant is, that he occupied the cottage in question under a tenancy from week to week, which by the understanding of the parties at the time of the demise, was only to be determined by either giving proper proof of his wish that such tenancy should cease. That proper proof—*viz.*, a notice to quit—has not been given, nor has it been dispensed with by anything that has occurred. It appeared that the defendant had held the premises for many weeks at a weekly rent. It cannot be said that there was a new contract each week; it must have been a tenancy from week to week so long as the parties should respectively please. If it had been a tenancy from year to year, it would have undoubtedly subsisted until it was terminated by a proper notice. The question is whether there is in this respect any difference in principle between a tenancy from week to week and a tenancy from year to year . . . Assuming that some notice was necessary, the question is whether the notice has been dispensed with. . . . How long the notice should be it is unnecessary upon this occasion to determine, inasmuch as none was given. But the inclination of my opinion is, that where the holding is from week to week, a week's notice should be given, and a month's notice where the holding is from month to month."

Byles, J., at p. 800, said:

> "There is *some* authority for saying that a week's notice is *not* necessary; but there is no authority defining what notice *is* necessary. I would rather, therefore, decide the present case on the ground that no notice at all was given, whereas the law requires a reasonable notice, without taking upon myself to say what notice would be reasonable."

I have always apprehended the law to be that if there is an agreement for a tenancy but no *express* agreement as to the term of the tenancy, but the rent

is fixed at so much per week, that constituted a weekly tenancy.

Adams v. Cairns, (1901) 85 L.T. 10, in a Court of Appeal comprising Smith, M.R., Williams and Stirling, L.JJ., definitely supports the finding by Williams, J., in *Elder v. Gray* that where the rent is payable weekly, and there is nothing else in the contract to indicate to the contrary, then the tenancy is a weekly tenancy.

The facts in *Adams v. Cairns* were that the defendant was the owner of a shop which he had leased to one Twine for a term expiring on June 24, 1901. In 1900 the shop was let by Twine to the plaintiff on the terms of a written agreement which was as follows:

> "I shall be pleased to accept you as tenant for barber's shop at the rental of 7s. a week, the rent not to be raised during my present tenancy."

The plaintiff went into possession, and later Twine, the lessee, surrendered to the defendant, the owner, his interest in the lease. The defendant gave the plaintiff notice to quit, subsequently entered and took possession, and the plaintiff brought an action for damages.

The action was tried before Ridley, J., with a jury, and the learned Judge held that the plaintiff was only a tenant from week to week and the jury found a verdict for the defendant. The plaintiff appealed.

Smith, M.R., in his judgment at p. 11, said, *inter alia*:

> "If the agreement had stopped at the words 'at the rental of 7s. a week,' I would agree with Ridley, J., that there was only a tenancy from week to week; but the agreement did not stop there, but went on to provide 'the rent not to be raised during my present tenancy.' In other words, the plaintiff's rent was not to be raised at any time up to June 24, 1901. What, then, is the effect of that last part of the agreement? If there was only a tenancy from week to week, what would be the use of that last clause?"

Williams, L.J., at p. 11, said:

> "I agree. On looking at this agreement, it is plain that the reservation of a rent of 7s. a week does not necessarily create a weekly tenancy. *If there were nothing more than the reservation of a weekly rent, the inference would be drawn that there was a weekly tenancy.* There is, however, something more—that is, the provision 'the rent not to be raised during my present tenancy'."

Section 6 of the Property Law Consolidation Act 1883 Amendment Act, 1885, says:

> "Any tenancy not exceeding one year may be created by agreement in writing or by parol and if there be a tenancy and no such agreement as to its duration it shall be deemed and held to be a tenancy determinable by one month's notice in writing."

Section 16 of the Property Law Act, 1908, is as follows:

> "No tenancy from year to year shall be created or implied by payment of rent; and if there is a tenancy and no agreement as to its duration, then such tenancy shall be deemed to be a tenancy determinable at the will of either of the parties by one month's notice in writing."

With every respect to many of my brother practitioners who may think otherwise, my contention is that this section often is wrongly construed, and is read by a great many as if the word "express" were interpolated between the words "no" and "agreement." In a nutshell, my contention is that, if there is an agreement for a tenancy at a weekly rental with nothing more, then there is an agreement as to the duration of the tenancy: an implied agreement. The ban on tenancies contained in the section under the statute is as against tenancies from year to year being created or implied by payment of rent.

It is true that His Honour Mr. Justice Callan in *Bremner v. Mereana Te Paa*, [1935] N.Z.L.R. s. 166, referring to s. 16 of the Property Law Act, 1908, at p. 167, said:

> "The statutory precursor of this section in force in 1899 was interpreted by Mr. Justice Edwards in *Todd v. McGrail*, (1899) 18 N.Z.L.R. 568, 572. The tenancy which His Honour there had to consider was one which, according to the implications of the common law, would have been a tenancy at will. His Honour held that the object of the New Zealand statute was to abolish all tenancies by implication of the law save that created by the statute itself, and to substitute one definite uniform rule for the determination of the nature of all *indefinite* tenancies. That definite uniform rule is that *all such* tenancies are in New Zealand tenancies determinable by one month's notice in writing."

It is respectfully suggested that this declaration of the law in *Bremner v. Mereana Te Paa* is distinguishable—

(*a*) In that in *Bremner's* case there had been previous lease, and the tenant had held over with the landlord's consent; and

(*b*) That when there is a tenancy at a weekly rent there is a definite term—*viz.*, a weekly tenancy implied—and therefore the tenancy is not an indefinite one.

It is also submitted that *Hawley v. Phillips*, (1894) 12 N.Z.L.R. 538, is distinguishable, as the agreement for the lease there was for one year; and, therefore, although the rent was payable weekly, the case was merely the ordinary one of a tenant holding over after the expiry of his term—in which case the statutory month's notice must be given.

Todd v. McGrail, (1899) 18 N.Z.L.R. 568, is also distinguishable, as it was held there that the tenancy was one in which there was no agreement as to its duration. Moreover, the general statement of the law in *Todd v. McGrail* (*supra*) as to indefinite tenancies, if it was intended to cover weekly tenancies, was *obiter*.

Of course, in cases in which the Fair Rents Act, 1936, and its amendments apply, at least fourteen days' notice must be given before commencing proceedings.

"**Proved.**"—Your criminal readers (using the word with strict academic application, of course) will be interested in a recent decision: *R. v. Wilsea* (*Times*, April 27). What is the meaning of "proved" in the phrase, "If a previous conviction of crime is *proved* against" a person convicted on indictment? (Our section is s. 7 of the Prevention of Crimes Act, 1871, and it provides for special punishment of the prisoner and for his restraint in certain ways). In this case the defendant had been convicted in March, 1935, and at that time a previous conviction for some other offence was properly proved, presumably in the ordinary way by a police officer. When this same person was brought up in 1938, the police proved the 1935 conviction properly, but only proved the earlier conviction by the word of the officer who remembered it, but was not present at it. The Recorder thought that the prisoner's point, that the prosecution had not properly proved the earliest conviction, was sound. It is true that the accused had confessed to it before the Magistrates, but that is not enough. It looks as if there would be an appeal, so I must say no more. Some of your readers may think that the statute means only that the earliest conviction must be well proved at the second. However, all points in favour of the liberty of the subject must, of course, be treated with respect.—APTERYX.

Southland and the Law.*

Some Early History Recalled.

By F. G. HALL-JONES, B.A., LL.B.

There was no practising Bar, not even a legal document, in the days of the navigators or the sealers, or of the first Southland settlements at Pegasus and at Codfish Island where the law of the strong right arm proved sufficient to settle any impending litigation. The first conveyance of land in the South Island is dated November 9, 1832, when Taboca (Whaka-Taupuka) for a consideration of sixty muskets conveyed to Peter Williams, manager of the Preservation Whaling-station, the whole of the West Coast from Dusky Sound to Preservation Inlet. Taboca ("Old Wig" to the whalers) died in the measles epidemic of 1835, and his successor John Tuhawaiki ("Bloody Jack" to the aforesaid) duly confirmed the grant. In each case, the chief signed by drawing his *moko*, or tattoo-mark, on the document.

From 1835-1840 conveyancing proceeded on a grand scale. A Scottish lawyer from Sydney made several voyages to these waters with a pile of imposing documents. His charge for each conveyance was £5 5s. to be paid in whalebone which he realized in turn at a handsome profit in Australia. In addition, hundreds of sailors turned up in Sydney with scraps of scrawled paper signed with tattoo-marks and purporting to be title deeds. By 1840 the whole of the South Island and Stewart Island had been bought up. Johnny Jones had a million acres, Catlin and Co. had seven million, and the Wentworth Syndicate wound up the transactions neatly with twenty million acres comprising everything not previously sold.

There is no need, however, for the present-day solicitor to blush at the modesty of his quarter-acre transfer, for all these earlier transactions whether on parchment or paper-scraps were declared invalid when on January 17, 1840, New Zealand came under the jurisdiction of the Governor of New South Wales. Provision was made for confirmation of any *bona fide* transaction, with a maximum area of 2,560 acres; and Williams became entitled to his four square miles of magnificent scenery in due course.

Preservation Inlet, either the first or second whaling-station in the South Island, was the scene of a tragic occurrence as the result of which Edwin Palmer stood his trial for manslaughter in Sydney in 1838. A strong case was built up against him in the lower Court, but several witnesses mysteriously disappeared before the trial and Palmer was acquitted. By direction of the Judge, Palmer and his influential friend Jones were both prosecuted for interfering with witnesses; but this case was never brought to a hearing.

By the 'fifties the whalers of Riverton had turned their thoughts to the land and settled as far inland as Burwood; the "blue bonnets" had come over the border from Otago and braw Hielan' men were depasturing their flocks over the fertile plains and grassy ridges. With them came the law, with its penalties and disputes. The first myrmidon of the law in Southland (still known as Murihiku) was a constable posted to the Bluff. When J. T. Thomson arrived there, in late 1856, he found Tommy Chasland breasting up to the constable, inviting him to a display of his qualities.

In 1861 Southland became a province, and the late T. S. Royds has recorded the scene in Court when two smugglers were heavily fined by the Resident Magistrate. One of them bent down in the box, and, on rising, heaved a heavy boot straight at His Majesty's worshipful representative.

Time permits me to refer to only one other incident, or series of incidents, but surely unique in our Empire's history.

Southland had by the end of 1864 pursued a progressive career of land, road, and railway development, when, with the financial stringency in England and with the Central Government's preoccupation with the Maori wars, local financial resources dried up. More than one firm obtained judgment against the Superintendent of the Province in the Supreme Court; and McKenzie and Co., who had erected piers at Bluff and the Mokomoko, pursued judgment to the point of execution. The Superintendent neatly assigned all the property of the Provincial Government to the General Government, but this was considered by the latter to be ineffective.

On December 20, 1864 Sheriff Price, acting on behalf of McKenzie and Co. under the authority of a Supreme Court writ, took possession of the railway plant, Government offices, furniture, papers, and documents—all that could be seized—to satisfy a judgment of £15,667 17s. 11½d. A messenger who was in charge and resided on the premises was forcibly expelled, the doors were locked, and the officials were prevented from resuming their ordinary duties. The Land Office and record-maps were included, and the whole machinery of Government was brought to a standstill. On the afternoon of the third day, the Superintendent (Dr. Menzies) gave a deed of indemnity to the Sheriff. In consequence of this, proceedings were stayed, the bailiffs were withdrawn, and the Government officers resumed their duties.

The second round opened in April, 1865. In the meantime it had been made clear that a writ could not be executed against the books, accounts, letters, documents, maps, and other records of a Provincial Government; but, on April 12, Sheriff Price seized the rolling stock of the Bluff-Invercargill railway and on the following day took possession of all the Government offices, but without interfering with public business. Negotiations with the plaintiff brought about a six weeks' delay, the sheriff leaving one bailiff in charge at Invercargill, one at Bluff, and one at the Mokomoko.

The third and final round came off six weeks later. On May 23, the Superintendent obtained a rule *nisi* in the Court at Dunedin calling on McKenzie and Co. to show cause why the writ of execution should not be set aside and ordering a stay of proceedings; but Sheriff Price determined this time to go right ahead. Macdonald and Russell, solicitors for the Provincial Council, served on him a notice of the order. The Registrar of the Supreme Court in Dunedin telegraphed him advice of the Court decision; but, in the absence of a "sealed" Court order (which arrived seven days late), the Sheriff carried out his arrangements. At 8 o'clock on the evening of May 26, he informed Superintendent Taylor that he was going to sell on the morrow at Bluff. Mr. Taylor was not lacking in courage. He wired and wrote the Resident Magistrate, Mr. J. Newton Watt, that he was not to resist the sale, but to resist *vi et armis* any attempt to remove

* Being the reply to the toast, "The Pioneer Bar," at the Southland Law Society's Bar Dinner (see p. 213).

a straw's worth of property. "Get all the reliable folk you can to resist: I will be answerable for all consequences."

The Superintendent's confidence in the Magistrate was not misplaced. Mr. Watt engaged every man he could get, placed one in every railway carriage, prevented the bailiff from entering the locomotive-shed, and had plenty in reserve backed by mounted and foot constables. "Are we to have a fight for it?" asked Sheriff Price. "I suppose so," quietly replied the Magistrate. The Sheriff's posters were countered with warning posters and the selling officer was served with a notice that he would sell at his own peril. Despite a bellman and a great number of children creating a great noise, the Sheriff knocked down the railway plant to the plaintiff at £292.

Two days later the same thing happened at Mokomoko. A large body of citizens and police had taken possession of all Government property and barricaded the jetty. The railway plant was sold for £146 to the plaintiff, and the Sheriff declined to sell any more. The purported sale under such circumstances of £20,000 worth of Government plant for £438 was too gross to escape official condemnation. The Sherift immediately received a "please explain" from the Law Officer in Wellington, with the footnote, "The Attorney-General is disposed to take a very grave view of your conduct in this case . . . " We can leave him to take his medicine.

Subsequent Court proceedings proved that the whole process of seizure had been illegal throughout, as a judgment against a Provincial Superintendent conferred no right of execution.

Needless to say finance was eventually made available for payment of McKenzie and Co.'s judgment, and the railway went ahead. It was formally opened by a train from Invercargill on October 20, 1866, but not without anti-climax. Dalgety, Rattray, and Co., who had constructed the first or Bluff section of the line, had never been paid. On passing Greenhills the official party found a barrier which that firm had erected across the line by way of signifying their lien. After some parley the barrier was removed; in due course the lien was satisfied; and, though the Mokomoko line and pier were abandoned, the Bluff train ran happily ever after.

The Woolsack Re-wooled.—The Woolsack has been again filled with wool. The Lord Great Chamberlain, Lord Ancaster, gave his sanction for it to be stuffed with a blend of British Dominion, and English, Scottish, and Welsh wool in place of horsehair. The International Wool Secretariat, through the Office of Works, was responsible for the substitution.

Whether it is a mere confused recollection of something mistaught at school, or a piece of sound information, we had always thought the Woolsack was material evidence of the supreme importance to England of her wool trade, in days when kings did not disdain partnership in it, and the Wafter of the Wool Fleet was, in his way, as important as the Lord Chancellor. Later, the Woolsack was the silent witness of the enactment of the enclosure laws which led to Sir Thomas More saying, in bold and bitter metaphor, that he saw sheep devouring men.

Or was the Woolsack merely a warning to the Lords, spiritual and temporal, not to go wool-gathering?

—Apteryx.

Statutory Negligence.

An Objective Standard.

Although the case of *McCrone v. Riding*, [1938] 1 All E.R. 157, [1938] W.N. 50, 54 T.L.R. 328, is marked in the *Weekly Notes* with the asterisk that indicates that it is not proposed to include it in the *Law Reports*, it appears to be a definite contribution to the law of negligence in cases where the duty to take care is imposed by a statute; and as the unanimous decision of three Judges of the King's Bench Division in England it carries considerable weight.

The Road Traffic Act, 1930, of Great Britain, makes a person guilty of an offence if he "drives a motor-vehicle on a road without due care and attention, or without reasonable consideration for other persons using the road." (It does not appear, but is not material, whether the words "for other persons using the road" are to be read with "care and attention," or only with "reasonable consideration.")

The Justices found that the acts of the respondent Riding, who was a learner, did not constitute such want of care and attention as amounted to an offence, but "had the respondent been an ordinary driver we would have convicted him." On appeal, the case was sent back to them to convict. The judgment of the higher Court quotes the section and says: "That standard is an objective standard, impersonal and universal, fixed in relation to the safety of other users of the highway"; and again, "due care and attention is something not related to the proficiency of the driver, but governed by the essential needs of the public on the highway."

When a Judge or jury pronounces on an issue of negligence, three separate mental processes are involved, and no amount of telescoping, whether in addresses, summings-up, or judgments, can destroy—though it may conceal—their logical distinctness.

One necessary step is to fix the standard of care that should have been attained in the circumstances. Another is to declare what degree of care the party actually displayed. The third is to compare the two and pronounce whether he fell short of the standard he should have reached.

The last step is a tolerably easy mental process, once the other two are taken. The second, however difficult, is a matter of the facts and of inferences to be drawn from the facts. The first is pure theorizing, and is the step where, in pronouncing an opinion, most of the difficulty lies. The notional standard that has to be set up is generally subjective, but the decision in *McCrone v. Riding* (*supra*) lays down unequivocally that there are cases where it is objective.

Where the standard is subjective, it is relevant to consider, besides other circumstances, the individual condition of the person on whom is cast the duty of taking care. It would not be reasonable to say that a blind pedestrian ought to have seen an approaching motor-vehicle. A fisherman cutting out a fish-hook from another fisherman's finger is not expected to take the same precautions against sepsis as a medical practitioner in the boat would be expected to take. (That the latter is not expected to take the same precautions as if he were conducting the operation

in his surgery or an operating-theatre is also true, but irrelevant, because it depends on the physical circumstances instead of the personal circumstances.) So an adult may be found guilty of negligence where a child would be exonerated.

In dealing however with statutory negligence for the future, it would appear that the first thing to be done is to descry what sort of standard the Legislature has intended to set up, subjective or objective. If it be found that the Legislature has adhered to the more general rule, then the actual individual in the case is taken, and the notional standard is discovered by breathing into him the breath of "the reasonable man," but without destroying his individual personality and characteristics. He may be the reasonable man blind of an eye or suffering from lumbago, or the reasonable man facing a tiger for the first time in his life; or, by contrary, the reasonable man in prime fettle for a rep. match, or the reasonable man who has spent his life as a lion-tamer. What is required of him depends on what manner of man he is. If, on the other hand, the wording of the Act shows that an objective standard is intended, then the theoretical individual to be used in fixing the standard is not the actual individual at all, but a concept who—since reason does not enter into the issue—may perhaps be described as "the average man." It cuts both ways; if a learner is culpable because he does not do what an average driver would do in the circumstances, a professional driver cannot be culpable for failing to use the superlative care and attention of the professional. He may be able to do the double-declutch, or instantaneously make engine-compression aid braking power, in a way beyond the ability of the average driver; but apparently there is no negligence in his failing to perform these feats, however much they would have helped to avert disaster.

A further question may arise if the law in point is delegated legislation. In that case it may be asked, Can the supreme Legislature be deemed to have authorized the making of regulations which shall impose, contrary to what no doubt is the rule of common law, an objective standard of care?

It remains to add that the wording of the Motor-vehicles Act, 1924, is not sufficiently close to that of the British statute to justify the offering of an opinion as to whether the New Zealand Legislature intended to set up a subjective or objective standard.

"**Feet Per Second.**"—In the last issue of the *Journal of Criminal Law* (London), a lengthy extract from the wireless talk by Mr. Justice Blair from the B.B.C. is commended to the readers' attention. After reproducing His Honour's words, as reported in *The Listener* of October 27, 1937, the Editor comments as follows:

"Excellent advice, and as citizens, we wish that every driver of a motor-car would bear Mr. Justice Blair's words of wisdom in mind. Unhappily, human nature is such that when travelling from one place to another we are all inspired with the same desire—to get to our destination as *soon* as possible. So we all travel as *fast* as possible—the controls comprised by the word "possible" being (1) regard for our safety, (2) road sense, (3) consideration for others, (4) the law. 'Feet per second' and 'kinetic energy' do not occur to most of us—until after the accident."

Legal Surnames.

And their Pronunciation.

I hope that others sometimes share the embarrassment that I feel when, arguendo, one comes across the name of some Judge or law reporter, and has doubts as to how it should be pronounced: otherwise these random notes will have but little appeal. But in the hope that they may be if not permanently useful at least momentarily entertaining, I set them down.

English surnames have been the subject of countless jests, most of them so old as not to be worth repeating, and, in many cases, the spelling is little guide to the pronunciation, just as is the case with place names throughout Britain. The difficulty certainly arises from the fact that until quite recent years no one seemed to care very much how a name was spelt, the owner of it least of all. It is recorded that a high dignitary of the English Church in the eighteenth century, who no doubt would have scorned to be wrong in the spelling of a classical name, spelt his own name in sixteen different ways. Shakespeare himself is another very well-known instance of the same thing. It is believed that nevertheless the pronunciation was comparatively regular, and in many cases has long survived the original spelling.

The commonest mispronunciation of a great legal name is, I fancy, "Coke." There can be little doubt that Sir Edward pronounced his name "Cook," just as do our legal friends in Wellington and Dunedin. So we should talk about "Cook upon Littleton." "Carew" was nearly always "Cary," as in the case of the poet, though custom has certainly altered his to the literal spelling. The old reporter Alleyn is "Al-leen," with the accent on the last syllable, and Ascham is "Askam."

The present Lord Chancellor, I believe, pronounces his name "Mawm," as does his equally famous brother Mr. W. Somerset Maugham, the novelist and playwright. The Lord Chief Justice is Lord Hewart of Bury, but he calls it "Berry." His famous predecessor in office, Lord Brougham and Vaux, whom Creevy and his friends irreverently and usually nastily referred to as "Bruffam," was really "Broo-am and Vawx." Lords Cheylesmore, Cockburn, Cowper, and Clerk were of course respectively "Chilsmore," "Coburn," "Cooper," and "Clark." The great Somers was "Summers," Stowell "Sto-el," and Ellesmere "Elz-mere."

The well-known (and if the stories are to be believed, often reversed) Kekewich was "Kek-wich": Lisle was "Leel," and Jervis "Jarvis." Sir Hardinge Giffard before he became Lord Halsbury was "Harding Jiffard": Lord Justice Melhuish was "Mellish," and Lord Justice Cozens-Hardy pronounced the first bit "Cuzzens." Prideaux, the author of the *Precedents*, is, of course, "Prido."

One is always a little surprised to hear the eminent authority on wills called Theobald, as spelt. Is it not certainly "Tibbald"? Pope makes the name of his predecessor, the great Shakespearian critic, ryhme with "ribald," and is it not exactly the same name as Romeo's friend Tybalt? I believe that the author (it is surely no secret) of the delightful *Forensic Fables* calls himself "Tibbald" Mathew.

The Scots lawyers' names are rather more difficult, though strangely enough better known. Bethune (Beeton), Dalziel (De-el), Ruthven (Riven), and Fiennes (Fynes), in the latter case exactly like Cassilis (Castles), Wemyss (Weems), Knollys (Noles), and Sandys (Sands), which are quite simple if one remembers that they are survivors of the old Northern plural in "-is" which was pronounced just plain "s."

I find that Pennyfather and Pennefather should be pronounced "Pen-nef-ather," with the accent on the second syllable. Our Mr. Justice F. W. Pennefather retired in 1899: I must confess that I have never heard his name pronounced in this way. Perhaps some of our senior practitioners who remember him can settle the matter. The eminent reporter De Gex, so often quoted, remains a puzzle. I can find no indication as to the correct pronunciation of his name: one usually heard "De Jay."

In conclusion, we are indebted to that delightful humourist Mr. P. G. Wodehouse for some of his best things in references to our profession. Who can forget the eminent firm of "Peabody, Peabody, Peabody, Hoots, Toots, and Peabody," and many other witty jousts at lawyers? I belive he pronounces his name "Woodhouse."

—J. M. P.

London Letter.

BY AIR MAIL. Strand, London, W.C.2.
July 11, 1938.

My dear EnZ-ers,—

Last week the Lord Chancellor was the first of a large assemblage of Judges for whom the Lord Mayor gave a dinner party. We note with the greatest pleasure that a large number of Judges from all over the Empire were amongst the Lord Mayor's guests, included in their number being your own Mr. Justice Smith. It is of the greatest importance that these hard-worked men, especially the Colonial Judges, many of whom are none too well paid and bravely endure the tropics, should meet the Lord Chancellor and Lord Chief Justice at the same hospitable table and make friends with them. The usual friendly speeches were made and everybody praised the law and those who sit to administer it. One of the most pleasing passages in the new Lord Chancellor's admirable speech was his reference to those Judges who, throughout the Empire, "administer honest and incorruptible justice." Lord Maugham knows more of the Continent and the continental point of view than any other of our Judges, and France, its language and its laws are to him familiar; and he was able to say that foreigners, speaking voluntarily and unanimously, expressed admiration for the Judges of England.

On the whole we think that Judges and lawyers alike may be satisfied with our present legal and judicial system. No system of judicial service can be perfect, and with the wonderful and kaleidoscopic complexities of modern society, politics, local government, business, and finance, the machine would indeed be perfect if it could adapt itself to every new demand and escape criticism. At present there is a businesslike request from the City for more, or more essentially, commercial Judges. When men like Lord Justice MacKinnon and Lord Porter are promoted, they leave a gap which it is difficult to fill and which should be filled with special care. More than this it would be presumptuous to say.

What Judges Cannot Do.—As the journey is long and term is still in being, the Free State, Northern Ireland, and Scotland were not, apart from Law Lords, represented at the Lord Mayor's banquet, but the Rt. Hon. the Lord Provost of Edinburgh, Sir Louis S. Gumley, with the Lady Provost, were observed at the high table in the immediate vicinity of the President of the P.D. and A. Division. Otherwise the Home, Dominion and Colonial Judges were strongly represented, and over a score of overseas Judges, most of them with their wives, had come, as the L.C. observed, "from all over the world." The longest journey, I believe, was that made by the Hon. Mr. Justice Smith and Mrs. Smith.

As the years go by the speeches at this dinner grow shorter and shorter, and for brevity I think those of Tuesday night constitute a record. Perhaps the briefest and the best was that of the L.C.J., who in his response to the Lord Mayor's toast of H.M. Judges was able to accept some praise on their behalf and for their services in applying the "force of law as contrasted with the law of force"; nor did he fail to admit their limitations, confessing that they could not "on all occasions and in every respect perform miracles." They had not yet discovered, for example, how to be in two places at once or how to hear cases before they are set down.

It was Lord Atkin who proposed the toast of the legal profession, and he did it well, quoting from three authorities in support of his case and indicating by a well-known remark of Rousseau on the Life of Man how nasty, brutish (as well as short) life would be without the lawyers. In a company composed mainly of lawyers and their wives, it is perhaps not surprising that his high and just estimate of the legal profession was accepted without audible indication of dissent by the attentive audience.

Joint Tortfeasors.—A pretty problem in legal technique has been solved as a result of the misadventures of one of the most beautiful of our film stars. The statute concerned, of which the title Law Reform (Married Woman and Tortfeasors) Act, 1935, is not unsuggestive of Hollywood influence, provides machinery by which a tortfeasor may recover a contribution from his or her joint tortfeasor. It was held in *Croston v. Vaughan*, [1937] 4 All E.R. 249, that the trial Judge might properly be asked to apportion the loss. This was where drivers of different vehicles were concerned. Recently Tucker, J., at Liverpool Assizes, found himself faced with a different situation. There (*Ryan v. Fildes*, unreported) it appeared that a schoolmistress, acting in excess of authority but within the scope of her employment, struck and injured a schoolboy. In an action for damages, judgment was given against the lady and against her co-defendants the school managers, who were liable as master for servant. On an application by the managers asking for an order, it was contended that a principal or a master found "vicariously liable" was not a "joint tortfeasor," and that this was a case not of contribution but of indemnity (which is not within the statute). But the learned Judge found a precedent in the Merle Oberon case (*Thompson v. Bundy and Ors., Times*, May 5), where judgment was entered against Miss Oberon and her chauffeur. This enabled his Lordship to make an order in favour of the school managers against the schoolmistress.

Yours as ever,

APTERYX.

New Zealand Conveyancing.

By S. I. GOODALL, LL.M.

Escheat, Reverter, and Bona Vacantia.

(*Continued from p. 215.*)

Secondly, under the Companies Act, 1933, there is similar provision that the company shall be deemed to be dissolved three months from registration of the returns of the final meeting where the liquidation is voluntary, whether a members' (s. 232 (4)) or a creditors' (s. 241 (5)) winding-up; but the provisions as to dissolution differ from those of the 1908 Act. Generally as to dissolution, which by implication includes that form of dissolution automatically following on voluntary liquidation, the English section above referred to has been here adopted, giving the Court power within two years on an application by the liquidator or any other person appearing to be interested to declare the dissolution to have been void: Companies Act, 1933, s. 281. The period of two years would appear to be incapable of extension. In the two Scottish cases of *Kerr* (*Lord Macdonald's* Curator Bonis) [1924] S.C. (Ct. of Sess.) 163, and *Forth Shipbreaking Co. Ltd.*, [1924] S.C. (Ct. of Sess.) 489, petitions were after the expiration of the period of two years presented to the Court in virtue of its *nobile officium*, on the ground of *casus improvisus*. Each petition was refused.

The procedure of application to the Registrar for dissolution on gazetted notice is now gone, but that of striking the name of a defunct company off the register has, with modification, been retained: s. 282. The period of limitation for the "aggrieved person" to apply and obtain an order for restoration under this section has been fixed at twenty years.

Notice of application to declare the dissolution of a company void or restore its name to the register should be given to the Crown or its representatives, in order that its rights to *bona vacantia* may be considered, whether the dissolution were automatic: *Re Henderson's Nigel Co., Ltd.*, (1911) 105 L.T. 370; or whether it took the form of removal of the name of a defunct company from the register: *In re Home and Colonial Insurance Co., Ltd.*, (1928) 44 T.L.R. 718.

If the dissolution of a company is declared void or the name of a defunct company restored to the register, the parties are generally restored to an "as you were" position. In the former case the Court may make an order on terms: s. 281 (1); and in the latter case may give directions for placing the company and all other persons in the same position as if the name had not been struck off: s. 282 (7); and see *Morris v. Harris*, [1927] A.C. 252.

Application to declare void a dissolution of a company should apparently be made in open Court on notice of motion. Forms of orders based on the English cases of *In re Spottiswoode, Dixon and Hunting Ltd.* (*supra*), and *Morris v. Harris* (*supra*), are to be found in *Palmer's Company Precedents*, 15th. Ed. Part II, 722.

Application for restoration of a company's name to the register, however, must be made by petition: the Supreme Court (Companies) Rules, 1934, Rule 7 (1) (*g*). A form of petition is given in *Palmer, op. cit.*, Part 1, 1156, and forms of orders *ibid.*, 1158, and Part II, 725.

9.—SUMMARY.

For an item of property to be left unadministered on the extinction of a company, and for a creditor to be left unpaid and unaware of the winding-up are not so rare that most practitioners can recall a few instances, some under the Companies Act, 1933, and others under the former Act of 1908. A person may well be aggrieved, and find himself by reason of lapse of time or other cause without remedy, or yet may be faced with a difficult question of law, but at all events this much is clear, the provisions of the Act of 1933 are not retrospective, and the problems of the previous dissolution of a company must be settled without reference to the later legislation.

To sum up:—

I. In the case of dissolution of a company under the Companies Act, 1908:—

1. All property vested in the company immediately before dissolution

(1) with the exception of that held by it on trust for another

(2) vests in the Crown to the exclusion, it is submitted, of the doctrine of reverter

(*a*) as to realty probably by escheat

(*b*) as to personalty, inclusive of leaseholds, as *bona vacantia*.

2. In respect of property held on trust a new trustee may be appointed; or the beneficiary being *sui juris*, a vesting-order may be made in his favour direct.

3. In respect of (2) (*a*) and (*b*) the distinction may conceivably become material in some circumstances—*e.g.*, questions arising out of encumbrances and charges.

4. In the case of automatic dissolution following on registration of the report of the final general meeting, or of dissolution following on application to the Registrar, apparently no application lies (except perhaps in the case of fraud) to avoid the dissolution or restore the name of the company to the register.

5. In the case of striking off the name of a defunct company application for reinstatement lies on the part of any person aggrieved without limitation of time apart from laches.

II. In the case of dissolution of a company under the Companies Act, 1933:—

1. All property vested in the company immediately before dissolution similarly

(1) with the exception of that held by it on trust for another

(2) vests in the Crown to the exclusion, it is submitted, of the doctrine of reverter

(*a*) as to realty probably by escheat

(*b*) as to personalty, inclusive of leaseholds, as *bona vacantia*.

2. In respect of property held on trust a new trustee may still be appointed; or the beneficiary being *sui juris* a vesting-order may be made in his favour direct.

3. In respect of (2) (*a*) and (*b*) the distinction may conceivably likewise become material in some circumstances—*e.g.*, questions arising out of encumbrances and charges.

4. In the case of automatic dissolution following on registration of the report of the final general meeting or otherwise application to declare the dissolution to have been void and an order thereon may be made within two years from the date of dissolution.

5. Application to the Registrar to dissolve without liquidation is abolished.

6. In the case of striking off the name of a defunct company application for restoration and an order thereon may be made within twenty years.

New Zealand Law Society.

Council Meeting.

A meeting of the Council of the New Zealand Law Society was held at Wellington, on Friday, June 24.

The following Societies were represented: Auckland, represented by Messrs. J. B. Johnston, L. K. Munro and H. M. Rogerson; Canterbury, Mr. K. M. Gresson; Gisborne, Mr. J. G. Nolan; Hamilton, Mr. H. J. McMullin; Hawke's Bay, Mr. H. B. Lusk; Marlborough, Mr. W. T. Churchward; Nelson, Mr. J. Glasgow; Otago, Mr. R. G. Sinclair; Taranaki, Mr. R. Quilliam; Wanganui, Mr. G. W. Currie (proxy); Westland, Mr. A. A. Wilson (proxy); and Wellington, Messrs. H. F. O'Leary, K.C., G. G. G. Watson, and P. B. Cooke, K.C. Mr. P. Levi, Treasurer, was also present. Apologies for absence were received from Messrs. A. H. Johnstone, K.C., and M. M. Macdonald. The President, Mr. H. F. O'Leary, K.C., occupied the chair.

Disciplinary Committee.—The President reported that since the last Council meeting three meetings of the Disciplinary Committee had been held.

Delegates' Expenses.—The following report was received from the President and Messrs. Castle and Watson:

The Committee desire to recommend as follows:

That in view of the financial position of the New Zealand Law Society this year, the expenses of delegates from seven District Law Societies—*viz.*, Gisborne, Marlborough, Nelson, Southland, Taranaki, Wanganui and Westland, be paid for the four meetings held and to be held during 1938, the estimated cost being £150; and that this arrangement be reviewed at the Annual Meeting each year.

It was decided that the report should be adopted.

Agency Costs on Stamping and Registration of Releases.—The following report was received from the Auckland Committee:—

At the last meeting of your Council it was decided that the Auckland members should consider the rulings in this connection, and if the position needs clarifying, they should draft a ruling incorporating the desired amendment and submit this to the next meeting. Accordingly such Sub-committee recommends the adoption by your Council of the following:—

The Council is of opinion that where on settlement of the purchase of a property, the title to which has to be delivered unencumbered to the purchaser, the vendor's solicitor hands to the purchaser's solicitor releases of existing encumbrances on the title, the latter should stamp and register such releases without charge, disbursements including agency charges (if any) to be paid by the vendor.

A similar practice should be followed where the case is one of mortgagor and mortgagee, and releases of encumbrances are in like circumstances handed to the mortgagee's solicitor.

It was resolved that the report should be adopted and the Committe thanked for their services.

Dominion Clerical Workers' Application for Award.—Mr. J. F. B. Stevenson wrote explaining what had occurred in the negotiations prior to the hearing of this application and reporting that legal employers and unions of legal employees had been exempted from the scope of the Clerical Workers' Award.

Guarantees: Suggested Reform.—The Secretary reported that this matter had been discussed at the Legal Conference, but that the following motion had been lost:—

That Mr. Adam's proposition be forwarded to the New Zealand Law Society for its consideration and appropriate action.

It was decided that no further action was necessary.

Resolutions forwarded from the Legal Conference.—The following resolutions were forwarded from the Legal Conference for consideration by the Council:

(*a*) **Juries:** That the questions of changes in connection with juries in civil cases and the provision as to special juries be considered by the Council of the New Zealand Law Society for appropriate action.

The President drew the attention of the Council to the following letter received from the Attorney-General:—

16th June, 1938.

The Law Revision Committee is investigating the question of the abolition of the Grand Jury, and the position in connection with the right of the Crown to stand aside jurors in criminal trials.

These matters were discussed at the last meeting of the Committee, when it was mentioned that the Dominion Legal Conference had referred certain matters relating to the jury system to the New Zealand Law Society. Members thought that it would be helpful to the Law Revision Committee if the Society would at the same time consider the matters above-mentioned, and also the provisions in the Juries Act relating to the preparation of the Special Jury Book.

I am writing, therefore, to suggest that these matters engage the attention of your Society, and to express the hope that the Society will in due course communicate to me the result of its deliberations.

It was decided to appoint the Auckland members of the Council as a committee to bring down a report after ascertaining the views of the various District Law Societies.

(*b*) **Examinations for Barristers and Solicitors:** That it be a suggestion from this Conference to the Council of the New Zealand Law Society that it take into consideration the new regulations, published in the New Zealand University Calendar for 1938 at p. 166, for the examination of candidates for admission as barristers and solicitors of the Supreme Court of New Zealand.

After some discussion, it was resolved that Mr. Campbell's paper should be brought to the notice of the Deans of the four Law Faculties, that they should be asked to act as a committee, with Mr. Gresson as Convenor, to prepare a joint report, and furnish this in due course.

It was also decided that the expenses of the committee in attending any necessary meeting should be paid.

(*c*) **History of Administration of Justice in New Zealand for the past 100 years.**

The following letter from the Under-Secretary of Internal Affairs was forwarded by the Solicitor-General:—

On the eve of the approaching Legal Conference at Christchurch I am taking the opportunity of broaching a subject which has long been in my mind—namely, the celebration of the Centennial by members of the New Zealand legal profession.

As a member of the National Historical Committee you are aware that at the Government's request the Committee has drawn up proposals for a series of historical surveys to be issued during the Centennial year. This series will necessarily be limited in its scope, and it has occurred to me

that it might be supplemented by a volume commemorating the administration of justice over the first hundred years—a subject which could not be given adequate treatment in a short historical survey.

The publication of such a volume by the New Zealand Law Society would, I suggest, form a most appropriate memorial to the Centennial, and I should accordingly be glad if you would introduce the proposal at the coming conference. I need scarcely remark that as Solicitor-General and also in your capacity as a member of the National Historical Committee you are in a particularly favourable position to raise the matter.

I may cite here as a parallel example that the Newspaper Proprietors' Association has agreed to publish a history of the New Zealand Press over the first hundred years. This publication will be accorded official status as a Centennial publication, and simliar recognition would be extended to a volume undertaken by the New Zealand Law Society.

A Committee, consisting of the President and Messrs. Gresson, Munro, and Sinclair, was appointed to meet the Under-Secretary during the afternoon to discuss the matter of finance and other details with him and report to the next meeting.

Next Legal Conference: Finance.—The following letter from the Secretary was received:—

Although the next Legal Conference will not be held until 1940, there are one or two matters which might well be considered at an early date.

From our observations at the recent Conference at Christchurch, which of course was very admirably run, it would appear that the time is fast approaching when the Conference will be so large that it will be unfair to ask any District Society to undertake the financial responsibility involved. I understand that the Canterbury practitioners paid three guineas each and that the Canterbury District Law Society found £200 as a contribution towards the expenses of their Conference.

It does not seem reasonable to ask the members of the four main Societies to find out of their own pockets the sum necessary for the financing of the Conference as well as to undertake the somewhat onerous duties of organization and entertainment. As the Conference concerns practitioners throughout the entire Dominion, it is really the responsibility of the New Zealand Law Society, although, of course, the actual control of the function must necessarily be in the hands of the District Law Society in whose town the Conference is being held.

I would suggest that, instead of the present system of finance, a commencement should be made immediately with a collection from each employer-practitioner in New Zealand of some small amount annually—say 10s.—to constitute a fund from which to pay the expenses of the next Conference. As we have approximately 1,400 employers in New Zealand, this contribution would furnish a fund of £1,400 every two years, which should be more than ample for the purpose, and which would mean that no special financial call would need to be made on the members of the District Society handling the Conference. Moreover, the raising of such a sum would mean that the smaller District Societies could come into the picture, and that the Conference could be held at New Plymouth, Nelson, Hamilton, or Napier, whereas, at the present moment, the limited number of practitioners makes it simply impossible for them to contemplate holding a Conference.

It may be considered, of course, that the amount produced by a levy of 10s. a year is more than is required, but it would be a simple matter to fix a smaller amount if so desired. If a contribution of 5s. were decided upon and this sum were collected in 1938, 1939, and 1940, this would mean that a sum of £1,050 would be furnished as a result of the three payments; or, if the collection were made only in 1939 and 1940, the amount would be £700.

It would appear from general indications that the Conference to be held in Wellington in 1940 will be a very large one, and it is quite possible that there will be an attendance of 500 upwards, as doubtless many practitioners will take the opportunity of visiting the exhibition at Wellington during Easter, and attending the Conference at the same time. Though no question has been raised by the Wellington Society concerning the expenses, which the members of that Society are perfectly willing to undertake, nevertheless it seems scarcely fair that they should be asked to find the whole of the money. (I may mention that I have not discussed the contents of this letter with any members of the Wellington Society, and they are not aware of the suggestions I am making).

It is rather unfortunate that some plan concerning a Dominion-wide contribution was not considered prior to the recent Christchurch Conference, as at that stage each of the four major Societies had controlled the Conference once, and it would have been a very opportune time to alter the system.

It was decided that the Council approved the principle of a Dominion-wide contribution to finance future conferences.

It was suggested that the best method would be for the New Zealand Society to fix an amount for contribution by each District Society, and to let each Society make its own arrangements about the collection and payment of this sum.

It was then resolved that each District Law Society should be informed of the above resolution, and that they should be asked if they concurred in the proposed contribution, and if they had any suggestions to make as to the amount or the method of contribution.

Reciprocity between New Zealand and English Barristers.—The following letter was received from the Joint Committee of the Inns of Court:—

I beg to acknowledge your letter of the 24th of February and to enclose a copy of the Consolidated Regulations where you will see by 43 (2) that the wishes of the New Zealand Law Society have been carefully considered.

I must now apologize for the long delay in answering your previous letter. As secretary of the Joint Committee I only receive communications from the Inns of Court, but your letter was addressed to me direct and was put by me before the Committee without reference to an Inn of Court. When after many meetings and much correspondence with high legal authorities, the matter was finally decided I thought I had completed my duty when informing all the Four Inns of the decision of the Committee—for I had forgotten that you had written to me direct. I beg you to accept my deepest apologies for this unpardonable oversight.

NOTE.—Section 43 (2) provides as follows:—

"So long as the law and practice of the Dominion of New Zealand provide for the admission of members of the Bar of England to the Bar of the Dominion of New Zealand upon conditions corresponding to those hereinafter mentioned any member of the Bar of the Dominion of New Zealand of three years' standing who has for the immediately preceding period of six months not been upon the Roll of Solicitors or practised as a Solicitor in that Dominion may (*a*) upon producing proof of such facts to the satisfaction of the Masters of the Bench of the Inn to which he seeks admission and (*b*) upon presenting a certificate of his Call to such Bar duly authenticated and a certificate from a Judge of the Supreme Court of the Dominion and from the Attorney-General or Senior Law Officer thereof that the applicant is a fit and proper person to be called to the English Bar be admitted as a student without having passed any of the examinations referred to in Regulation 1, and without producing any certificates such as are specified in Regulation 2, and without making the declaration prescribed by Regulation 4, and be called to the English Bar without submitting to the examination for Call to the Bar and without keeping any terms."

New Zealand Statutes, 1937: Delay.—The Hawke's Bay Society wrote as follows:—

My Council is of opinion that the Government Printer has this year been unduly dilatory in the dispatch of the bound volumes of the statutes. This complaint is nothing new, though in recent years there has been some improvement upon the conditions that previously obtained. It is submitted, with respect, that the New Zealand Law Society might with propriety urge that the delay has been of great inconvenience to the profession, and ask for greater expedition in the future.

It was decided to draw the attention of the Attorney-General to the complaint, and also point out to him that the only volume of the *1937 New Zealand Gazette* yet bound was the volume for the period ending 30th April, 1937.

(*To be concluded*).

Practice Precedents.

In Divorce: Petition for Alimony Pendente Lite.

Alimony is of two kinds: permanent alimony, and alimony pendente lite. Application for alimony pending suit, the subject of this precedent, is by way of petition supported by motion. It is sometimes not certain whether more than a verifying affidavit is required; but, following the general practice, an affidavit is supplied, the verifying affidavit being usually submitted in matters that are *ex parte* or not likely to be contentious.

If the wife is the petitioner, she may, under R. 78 of the Divorce Rules, file her petition for alimony pendente lite at any time after the citation has been served on the husband or after an order dispensing with such service has been made, provided the factum of marriage between the parties is established by affidavit previously filed.

If the wife is the respondent, then, under R. 79, she may file a petition for alimony pendente lite after having entered an appearance, and the husband must, within eight days of the filing and delivery of a petition for alimony pendente lite file his answer thereto upon oath (R. 90); and before filing the answer, he must file an appearance. If the wife is not satisfied with the husband's answer, she may apply to the Court or a Judge for a further and fuller answer to be supplied (R. 82). When the husband alleges that the wife has property of her own, she may within eight days after the delivery of the answer file a reply on oath to that allegation; but the husband cannot reply to such answer without the leave of the Court or a Judge (R. 83). Service of the petition, answer, and reply, on the opposite party or on his or her solicitor on the day the same is filed is required by R. 84. It may be difficult in actual practice to give effect to this rule; if there is any doubt that the document cannot be served and filed on the same day, the correct course would be to apply to the Court or a Judge for an extension of time. The difficulty, however, seldom arises. In any case a solicitor would hesitate to take such a point, as the Court or Judge would almost surely grant an extension of time on the application of the aggrieved party.

After the husband has filed his answer to the petition for alimony, or if no answer has been filed within the prescribed time, the wife may examine witnesses and apply by notice of motion for an allotment of alimony pending suit. Four days' notice is required: R. 85.

Rule 86 states that no affidavit can be read or made use of as evidence in support of or in opposition to the averments contained in a petition or in a reply except as may be required by the Court or a Judge. A wife may apply at any time after alimony has been alloted to her for an increase in alimony, by reason of the increased faculties of the husband; or the husband may petition for diminution by reason of reduced faculties: R. 88.

The Court in which proceedings were commenced has the power to amend, vary, or introduce new terms into an order for alimony pending suit: *Gadsby v. Gadsby*, [1932] N.Z.L.R. 1139, where an application for leave to issue a writ of attachment against the husband for non-payment of instalments under an order for alimony pendente lite, over ten years old and no steps having been taken for a final decree was met by an order suspending the future operation of the previous order as from a named date. In that case, the Court said that if the parties could not agree as to the subsequent maintenance of the respondent, she had her remedy under the provisions of the Destitute Persons Act, 1910.

PETITION.

IN THE SUPREME COURT OF NEW ZEALAND.

.....District.
.....Registry. No.

In Divorce.

BETWEEN A. B. &c. Petitioner

AND

C. B. &c. Respondent.

day the day of 19 .

The petition of A. B. the lawful wife of C. B. of : clerk showeth as follows:—

1. The said C. B. is employed by as a clerk and is in receipt of a salary of £258 per annum.

2. The said C. B. owns a motor-car which he uses for his own pleasure.

3. The said C. B. is the registered proprietor of a five-roomed dwellinghouse with all modern conveniences which house is situate at Street in the City of and is erected on all that piece or parcel of land [&c.].

4. The said dwellinghouse is valued at the sum of £ .

5. The said C. B. has the custody of the child of the marriage, a boy aged twelve years.

6. The said C. B. has paid to the petitioner the sum of £ only from the day of 19 to the day of 19 for maintenance of the petitioner.

7. That by a deed of separation dated the day of 19 the said C. B. agreed to pay to the said petitioner the sum of £ per week for maintenance and there is now owing under the said agreement the sum of £ .

8. That the petitioner A. B. has until the day of 19 been employed as a waitress at a wage of £ per week, but such employment has been terminated and the petitioner A. B. is wholly without means.

THE PETITIONER THEREFORE PRAYS that a decree may be made for the payment to her of alimony *pendente lite*.

Witness:

Signature:

AFFIDAVIT IN SUPPORT OF PETITION.

(*Same heading.*)

I A. B. the petitioner herein make oath and say as follows:—

1. That I am the petitioner in this suit.

2. That the respondent C. B. and I are separated by deed of agreement dated the day of 19 under which agreement my husband the said C. B. agreed to pay me the sum of £ per week as maintenance.

3. That the said C. B. has paid to me the sum of £ only from the day of 19 up till the day of 19 and there is now due and owing from the day of 19 the sum of £ for maintenance.

4. That my husband is the owner of a motor-car which he uses for private purposes and is also the registered proprietor of a five-roomed dwelling house [&c.]

5. That my husband took proceedings for divorce on the day of 19 on the grounds of adultery but such proceedings were dismissed on the day of 19 .

6. That I am now unable to work being under the care of Dr. for injuries to my back caused through an accident when I slipped in the street.

7. That it may be necessary for me to receive medical attention for some time and ultimately to undergo an operation.

8. That I have no means and am without financial support except any small sums of money I may receive from my father who is a working man in poor financial circumstances.

9. That I consented to my husband having the custody of the child of the marriage because he is a boy and receives better assistance from his father than I am able to give.

10. That my husband is a clerk employed by of the City of and is in receipt of a salary of £258 per annum in addition to which he receives various sums unknown to me as a pianist in the Orchestra.

11. That it is unnecessary for my husband to own a motor-car.

12. That I am of opinion that after my husband has paid his living expenses and other expenses he has left a sum sufficient to pay me the sum of £ per week as maintenance.

Sworn &c.

[NOTE.—An affidavit should be furnished by the doctor as to the injuries.]

MOTION IN SUPPORT OF PETITION FOR ALIMONY PENDENTE LITE.

(*Same heading.*)

TAKE NOTICE that Mr. of Counsel for the Petitioner herein WILL MOVE this Honourable Court in Chambers before the Right Honourable Sir Chief Justice of New Zealand at the Supreme Court House at on day the day of 19 at the hour of ten o'clock in the forenoon or so soon thereafter as Counsel can be heard FOR AN ORDER in terms of the prayer of the petition for alimony pendente lite filed herein UPON THE GROUNDS that the petitioner is without means and the wife of the respondent AND FOR A FURTHER ORDER that the costs of and incidental to this application be paid by the respondent to the petitioner.

Dated at this day of 19 .

Solicitor for Petitioner.

To the Registrar
and to
C. B. &c. and his Solicitors.

ANSWER TO PETITION FOR ALIMONY PENDENTE LITE.

(*Same heading.*)

The respondent C. B. in answer to the petition for alimony pendente lite herein says:—

1. He admits that he is employed as a clerk by at a salary of £258 per annum.

2. That the motor-car mentioned in para. 2 of the petition herein is held by respondent under a hire-purchase agreement from Company Limited under which agreement there is owing the sum of £ .

3. That the five-roomed dwellinghouse is subject to a first mortgage to the Company Limited and to a second mortgage [&c.] securing the sums of £ and £ respectively.

4. That default has been made in payments due under the second mortgage and the mortgagee is in possession of the said dwellinghouse.

5. That for the year ended 31st 19 my financial accounts show a debit balance of £ .

6. That additional expenses incurred since the said day of 19 are as follows:—

(*a.*) Legal expenses in divorce proceedings, £ .

(*b.*) Moneys paid under hire-purchase agreement, £ .

7. That the petitioner the said A. B. is well able to earn and has always earned good wages as a waitress and is able to keep house for her father.

8. That the respondent is unable to pay the said A. B. more than the sum of 5s. per week by way of maintenance or otherwise.

Signature:

Witness:

[*Small verifying affidavit.*]

AFFIDAVIT IN SUPPORT OF ANSWER.

(*Same heading.*)

I C. B. the respondent in this suit make oath and say as follows:—

1. That the petitioner and I separated by deed of separation dated the day of 19 under which deed I agreed to pay to the petitioner the sum of £ per week as maintenance and I was to retain the custody of the child of the marriage a boy now aged twelve years.

2. That I duly paid the said sum of £ per week up to and including the day of 19 when I ceased payment and took proceedings for divorce against the petitioner on the grounds of adultery.

3. That the said proceedings were dismissed by this Honourable Court on the day of 19 .

4. That the petitioner is a young woman aged thirty-one years and is well able to undertake employment as a housekeeper or a waitress if she so wishes.

5. That the statement of account attached hereto marked "A" has been prepared by a certified accountant and shows a debit balance of £ for the year ended the 31st day of March, 19 .

6. That additional expenses incurred since the said 31st day of March 19 are as follows:—

(*a.*) Legal expenses incurred in divorce proceedings, £ .

(*b.*) Moneys paid under hire-purchase agreement, £ .

7. That the motor-car is necessary to me as I suffer a permanent disability to my leg as the result of an accident received when a child.

8. That the second mortgagee is in possession of the dwellinghouse herein referred to but I pay the said mortgagee the sum of £ per week as rental for same.

9. That it is necessary for my mother to live with me to attend to my wants and those of my child. I do not pay my mother any wages.

10. That the greatest amount I can possibly pay to my wife as maintanenace is the sum of 5s. per week.

Sworn &c.

ORDER FOR ALIMONY PENDENTE LITE.

(*Same heading.*)

day the day of 19 .

Before the Honourable Mr. Justice .

UPON READING the petition for alimony pendente lite filed herein and the notice of motion and the affidavits filed herein on behalf of the parties and the answer of the respondent filed herein AND UPON HEARING Mr. of Counsel for the petitioner and Mr. of Counsel for the respondent IT IS ORDERED that the respondent do pay to the petitioner as alimony pendente lite the sum of one pound ten shillings (£1 10s.) per week as from the day of 19 AND IT IS FURTHER ORDERED that the respondent do pay to the petitioner the sum of £ for costs hereof.

By the Court.

Registrar.

Recent English Cases.

Noter-up Service

FOR

Halsbury's "Laws of England"

AND

The English and Empire Digest.

BANKRUPTCY.

Petitioning Creditor's Debt—Judgment Debt—Part of Debt Unenforceable in Bankruptcy—Debt of Married Woman incurred Before August 2, 1935—Bankruptcy Notice for Whole Debt—Validity of Notice—Law Reform (Married Women and Tortfeasors) Act, 1935 (c. 30), s. 4 (1) (c).

A bankruptcy notice which is bad as a whole cannot be made the basis of a petition by cutting away part of the judgment on which it is based.

Re A DEBTOR, THE DEBTOR *v.* THE PETITIONING CREDITOR AND THE OFFICIAL RECEIVER, **[1938] 2 All E.R. 824. C.A.**

As to amount for which bankruptcy notice may be issued: see HALSBURY, Hailsham edn., vol. 2, pp. 39, 40, par. 50; and for cases: see DIGEST, vol. 4, pp. 93, 94, Nos. 840–851.

BASTARDY.

Presumption of Legitimacy—Born in Lawful Wedlock—Maintenance Order with No Provision for Non-cohabitation—Necessity for evidence of Non-access.

Where parties to affiliation proceedings are under an order for maintenance only, which does not provide for non-cohabitation, there is a presumption of access which must be rebutted by evidence.

BOWEN *v.* NORMAN, **[1938] 2 All E.R. 776. K.B.D.**

As to the rule in *Russell v. Russell*: see HALSBURY, Hailsham edn., vol. 2, pp. 562, 563, par. 772; and for cases: see DIGEST, vol. 3, pp. 364–368, Nos. 54–97.

CONTRACT.

Performance—Performance in Manner that Must Bring Other Party into Contempt—Frustration—Damages—Breach of Contract—Whether General Damages Can be Awarded.

In an action for breach of contract, damages are not limited to loss which can be precisely proved.

AERIAL ADVERTISING CO. *v.* BATCHELORS PEAS, LTD. (MANCHESTER), **[1938] 2 All E.R. 788. K.B.D.**

As to damages in contract: see HALSBURY, Hailsham edn., vol. 10, p. 121, par. 151; and for cases: see DIGEST, vol. 17, pp. 130–135, Nos. 380–412.

As to frustration of contract: see HALSBURY, Hailsham edn., vol. 7, pp. 215–217, par. 296; and for cases: see DIGEST, vol. 12, pp. 386–404, Nos. 3172–3252.

CRIMINAL LAW.

Indictable Offence—Plea of Guilty Before Justices—Witnesses Bound Over Conditionally—Plea of Not Guilty at Trial—Depositions Read as Only Evidence for Prosecution—No Reference in Summing Up to Plea of Not Guilty—Criminal Justice Act, 1925 (c. 86), s. 13.

Where a prisoner has pleaded guilty before justices, and not guilty at Quarter Sessions, the case should not proceed on the depositions alone if injustice might thereby be done.

R. *v.* COLLINS, **[1938] 3 All E.R. 130. C.C.A.**

As to when depositions may be read: see HALSBURY, Hailsham edn., vol. 9, pp. 165, 166, par. 234; and for cases: see DIGEST, vol. 14, pp. 270, 271, Nos. 2770–2780.

FOOD.

Meat in Possession of Respondents—Whether on Premises for Purposes of Sale and Intended for Food of Man—Statutory Onus of Proof on Respondents—Whether Onus Discharged—Public Health Act, 1875 (c. 55), ss. 116, 117—Public Health Acts Amendment Act, 1890 (c. 59), s. 28.

Under s. 116 of the Public Health Act, 1875, the burden of proof that impure food is not exposed for sale for human consumption must be strictly discharged by the party charged.

CANT *v.* ALEXANDER HARLEY AND SONS, LTD., **[1938] 2 All E.R. 768. K.B.D.**

As to sale of meat: see HALSBURY, Hailsham edn., vol. 15, pp. 181–183, pars. 305–309; and for cases: see DIGEST, vol. 25, pp. 108–115, Nos. 322–384.

HIGHWAYS.

Excavation by Sanitary Authority—Non-Feasance—Excavation for Drainage Purposes—Accident Due to Subsequent Subsidence Three Years After Work Completed.

A sanitary authority, acting as such, is liable for non-feasance in regard to highways, even though it may happen also to be the highway authority.

NEWSOME *v.* DARTON URBAN DISTRICT COUNCIL, **[1938] 3 All E.R. 93. C.A.**

As to non-feasance: see HALSBURY, Hailsham edn., vol. 16, pp. 332–337, par. 455; and for cases: see DIGEST, vol. 26, pp. 398–409, Nos. 1239–1298.

HUSBAND AND WIFE.

Separation—Reconciliation Agreement—Provision for Future Separation of Spouses—Validity—Proceeding "Founded on" Adultery with Named Woman.

Provision for a wife in the event of future separation contained in a reconciliation agreement is not against public policy.

LURIE *v.* LURIE, **[1938] 3 All E.R. 156. Ch.D.**

As to reconciliation agreements: see HALSBURY, Hailsham edn., vol. 16, pp. 715, 716, par. 1163; and for cases: see DIGEST, vol. 27, pp. 223, 224, Nos. 1942–1945.

MINES AND MINERALS.

Coal Mine—Dangerous Machinery—Absolute Duty to Fence—Machinery Only Dangerous While Moving—Duty of Workman to See that Fence was in Position—Standard of Care to be Applied to Workmen—Impracticability of Preventing Statutory Breach—Coal Mines Act, 1911 (c. 50), ss. 55, 102 (8).

Where an employer is relieved by s. 102 (8) of the Coal Mines Act, 1911, from the statutory duty to fence, the contributory negligence of the workman will be a bar to a claim.

CASWELL *v.* POWELL DUFFRYN ASSOCIATED COLLERIES, LTD., **[1938] 3 All E.R. 21. C.A.**

As to dangerous machinery in mines: see HALSBURY, Hailsham edn., vol. 22, pp. 821–824, par. 1689; and for cases: see DIGEST, vol. 34, pp. 746, 747, Nos. 1211–1213.

MORTGAGE.

Mortgage by Company—Principal Repayable by Instalments over a period of 40 Years—Postponement of Redemption—Clog on Equity—Rule against Perpetuities—Whether Mortgage Valid as a Debenture—Companies Act, 1929 (c. 23), s. 74,

Postponement of redemption of a mortgage for 40 years is unreasonable, and a clog on the equity of redemption; but a mortgage does not come within the rule against perpetuities.

KNIGHTSBRIDGE ESTATES TRUST, LTD. *v.* BYRNE AND OTHERS, **[1938] 2 All E.R. 444, Ch.D.**

As to clog on the equity: see HALSBURY, Hailsham edn., vol. 23, pp. 366–369, pars. 460–464; and for cases: see DIGEST, vol. 35, pp. 352–354, Nos. 946–962.

As to mortgages and the rule against perpetuities: see HALSBURY, Hailsham edn., vol. 25, pp. 160, 161, pars. 278–278.

NEGLIGENCE.

Fatal Accident—Recovery of Damages under Fatal Accidents Act—Further Action under Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41)—Whether Further Award Made and the Amount Thereof.

Where damages have been given under the Fatal Accidents Acts, and an action is brought under the Law Reform Act, the jury must deduct from the damages they would have given the sum already awarded.

MAY *v.* SIR ROBERT MCALPINE & SONS (LONDON), LTD., **[1938] 3 All E.R. 85. K.B.D.**

As to damages for personal injuries: see HALSBURY, Hailsham edn., vol. 23, pp. 724, 725, par. 1016; and for cases: see DIGEST, vol. 36, pp. 125, 126, Nos. 831–838.

Pavement—Opening to Coal-Cellar Left Unguarded During Delivery of Coal to Premises—Pedestrian Stepping into Hole—Liability of Coal Merchant and Occupier of Premises—Law Reform (Married Women and Tortfeasors) Act, 1935 (c. 30), s. 6 (2).

The occupier of premises who orders a coalman to deliver coal through a coal-hole in the pavement is liable as well as the coalman for accidents arising from negligence in such delivery.

DANIEL *v.* RICKETT COCKERELL AND CO., LTD., AND RAYMOND, **[1938] 2 All E.R. 631. K.B.D.**

As to contribution between tortfeasors: see HALSBURY, Hailsham edn., vol. 23, pp. 687, 688, par. 970; and for case: see DIGEST Supp., Tort, No. 108a.

Bills Before Parliament.

Surveyors.—Establishment of a Survey Board; Incorporation of the New Zealand Institute of Surveyors; Registration of Surveyors; "Practice of Surveying" defined: Surveyors to have Annual Practising Certificates; Appeals from Board; Financial Provisions; and Miscellaneous.

LOCAL BILLS.

Cornwall Park Rating Exemption.
Lower Clutha River Improvement.
Palmerston North City Council Empowering.
Paritutu Centennial Park.
Tauranga Borough Council Empowering.
Wellington City Empowering and Amendment.

PRIVATE BILLS.

Joint Council of the Order of St. John and the New Zealand Red Cross Society Incorporation.

Rules and Regulations.

Primary Products Marketing Act, 1936; Agriculture (Emergency Powers) Act, 1934. Dairy-produce (Special Milk Products) Regulations, 1938. July 13, 1938. No. 1938/82.

Primary Products Marketing Act, 1936. Dairy-produce Export Prices Order (No. 2), 1937, Amendment No. 1. July 13, 1938. No. 1938/83.

Electoral Act, 1927. Electoral Regulations, 1928, Amendment No. 1. July 13, 1938. No. 1938/84.

Land and Income Tax Amendment Act, 1935. Income-tax: Exemption of Traders resident in or Nationals of Czechoslovakia. July 13, 1938. No. 1938/85.

Samoa Act, 1921. Samoa General Laws Amendment Order, 1938. July 5, 1938. No. 1938/86.

Samoa Act, 1921. Samoa Native Regulations, 1938. July 5, 1938. No. 1938/87.

Post and Telegraph Act, 1928. Postal Amending Regulations, 1938. July 20, 1938. No. 1938/88.

Industrial Efficiency Act, 1936. Industry Licensing (Gas-meter Manufacture) Revocation Notice, 1938. July 20, 1938. No. 1938/89.

Industrial Efficiency Act, 1936. Industry Licensing (Boat-fishing) Amendment Notice 1938. July 20, 1938. No. 1938/90.