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" *If it is true that 'the proper study of mankind is man,' then the Police Courts are a veritable University.*"—

—SIR GERVAIS RENTOUL, K.C.

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Payment into Court, and the Jury.

THE rules of the Code of Civil Procedure relating to payment into Court appear as RR. 213 to 225. In *Selby v. Cowley*, an action for damages in which the amounts of £3,500 and £857 were claimed as general and special damages respectively, the defendant paid £489 into Court. The action came on for trial before His Honour Mr. Justice Northcroft and a jury, at Wellington, and counsel for the plaintiff desired to inform the jury of the amount that had been paid in. His Honour ruled—and, if we may say so with respect, we think rightly—that the information must be withheld from the jury.

His Honour's ruling has drawn attention to the note in *Stout and Sim's Supreme Court Practice*, 7th Ed. 174, where the learned editor says :

> " In England O. xxii, r. 22, prohibits the communication to the jury of the fact that money has been paid into Court or of the amount paid in. There is no similar rule in New Zealand, and *it has been the general practice for many years to tell the jury what amount has been paid into Court.*"

With respect, we differ from the learned editor in respect of the words we have italicised. There has been no such practice, for instance, in the Wellington Judicial District within the memory of long-experienced counsel. The late Sir Robert Stout, C.J., adopted the opposite course. So has the present Chief Justice in at least two actions. Mr. Justice Sim's observation was due, perhaps, to the fact that there had been few cases in New Zealand tried before juries wherein there had been a payment into Court, and it is difficult to see how he could then say that any general practice, one way or the other, had been laid down.

Turning to the reported cases, we find that Herdman, J., held that the amount paid into Court may not be disclosed to the jury, while Sim, J., held to the contrary.

In *Flavell v. Christchurch Tramway Board*, [1920] N.Z.L.R. 127, experienced counsel were engaged—Mr. (afterwards Hon. Mr. Justice) Alpers and Mr. Buchanan, for the plaintiff, and the late Mr. J. J. Dougall and Mr. M. J. Gresson, for the defendant. The plaintiff claimed to recover the sums of £153 6s. and £1,000 as special and general damages respectively. The defendant had paid into Court the amount of £500, but had filed no statement of defence. The plaintiff refused to accept that sum, so the only matter for the jury's determination was the quantum of damages to be awarded. Before the trial, His Honour Mr. Justice Herdman was asked to decide whether plaintiff's counsel should be allowed to mention to the jury during the trial that the sum of £500 had been paid into Court. In ruling that no communication should be made to the jury, either of the fact that money had been paid into Court or of the amount paid in, the learned Judge said :

> " In England O. xxii, r. 22, prohibits the communication to the jury of the fact that money has been paid into Court or of the amount paid in. Upon this point our rules are silent; nevertheless I think that in such circumstances as the present the practice settled in England by a rule should be followed in New Zealand.
>
> " The question that the jury has to try in this case is not 'Is the amount paid in by the defendant Board sufficient?' Liability having been admitted by the defendant the simple duty of the jury is to assess the amount of the defendant's liability. The fact that a sum of money has been paid into Court will not be relevant to the matter which the jury will have to determine. To enable the jury to decide what sum they should award they will consider the injuries which the plaintiff has suffered, the extent of those injuries, the possibility of permanent disability, and the pain, suffering, and shock which he experienced. These matters directly affect the question of damages, but were I to allow the jury to know that a sum had been paid into Court by defendant I should be placing them in possession of information which has nothing whatever to do with the question which they will have to determine, and which might mislead them and improperly influence their minds. The jury must make up their minds about the amount of damages upon evidence which is relevant to the question of damages. Every other fact or circumstance should be rigidly kept from their knowledge."

The other reported case in which the matter came up for consideration was *Penny v. Skevington*, [1924] G.L.R. 43, where the plaintiff claimed as special and general damages the sum of £631 19s. 4d. and £1,500 respectively, and the defendant paid into Court the sum of £750 with denial of liability, and afterwards filed an amended statement of defence admitting liability and pleading that the amount paid in was sufficient to satisfy the plaintiff's claim. In an oral ruling as to whether leave was necessary to mention to the jury that £750 had been paid into Court, His Honour Mr. Justice Sim said :

> " In the absence of any rule on the subject, I think I cannot stop counsel from telling the jury the fact that money has been paid into Court or the amount paid in. In the case of *Flavell v. Christchurch Tramway Board*, Herdman, J., expressed an opinion that the English practice ought to be followed, but in England there is a rule expressly prohibiting such communications (O. xxii, r. 22), and even in England the rule itself has been adversely criticized.
>
> " It has been the practice for many years in New Zealand to tell the jury what amount has been paid into Court, and this course, I think, should be followed by counsel in the present case."

This judgment is no doubt the inspiration of the note in *Stout and Sim* to which we have referred. His Honour probably had in mind the reference by Lord Russell of Killowen, L.C.J., in *Klamborowski v. Cooke*, (1897) 14 T.L.R. 88, to the rule which disallows information as to the amount paid in being given to the jury. His Lordship was speaking not of the amount of payment, but merely of the fact that a sum of money had been paid into Court. He said :

> " In my opinion, the rule is a very foolish one, and works very inconveniently. I think it would be much better that the jury should know when money is paid into Court."

But this view was expressed at Nisi Prius during the course of a trial, and not in a considered judgment. But, in *Williams v. Goese*, [1897] 1 Q.B. 471, Lopes, L.J., took a different view of the rule, which he said was a salutary one and worked well. The rule in question has been repealed, and a new and more stringent one substituted (O. 22, r. 6 (1933)). Except in an action to which a defence of tender before action is pleaded or in which a plea under the Libel Acts, 1843 and 1845, has been filed,

> "No statement of the fact that money has been paid into Court . . . shall be inserted in the pleadings and no communication of that fact shall at the trial of any action be made to the Judge or jury until all questions of liability and amount of debt or damages have been decided, but the Judge shall, in exercising his discretion as to costs, take into account both the fact that money has been paid into Court and the amount of such payment."

The effect of this new rule is that neither the Judge nor the jury (if there be a jury) will have any knowledge of the fact that a payment into Court has been made or of the amount of it, or whether it was made with or without a denial of liability, until liability *and* the amount of the debt or damages are decided. The only place where there may previously be mention of any of these matters is in the notice of payment into Court to be served on the plaintiff (*1938 Yearly Practice*, 371). Thus, the rule to which Lord Russell of Killowen referred disparagingly has now been extended beyond the jury to the Judge.

Commenting on the amended rule, Scott, L.J., in *Millensted v. Grosvenor House (Park Lane), Ltd.*, [1937] 1 All E.R. 736, 737, 740, said :

> "As the words stand, they constitute a direction to counsel, parties, and witnesses, the observation of which the framers of the rule thought was generally in the interests of justice."

And Farwell, J., who was sitting in the Court of Appeal for this case, after saying, at p. 741, that the prohibition contained in the new rule originally applied only in an action tried by a Judge and jury, and had no application to a trial by a Judge alone, but that it now applies in both cases, added :

> "The purpose of the order is obvious. It was made to prevent the premature discloseure of a fact which was not relevant to the issues to be tried, but the disclosure of which might prejudice one or more of the parties to the proceedings."

Besides throwing doubt on the wisdom of the former English rule, Sim, J., in *Penny v. Skevington* (*supra*), said that in New Zealand there was an absence of any rule on the subject. He apparently overlooked R. 604 :

> "If any case arises for which no form of procedure has been provided by this Code, the Court before which such case arises shall dispose of such case as nearly as may be in accordance with the rules of this Code affecting any similar case, or, if there are no such rules, *in such manner as such Court deems best calculated to promote the ends of justice until a new rule or new rules are made.*"

If, therefore, it appears to the Court, before whom arises the question of informing the jury as to fact or the amount of the payment into Court, that the course best calculated to promote the ends of justice is that the jury should not be allowed so to be informed, the ends of justice can best be promoted from disallowing such information to go to the jury.

The question of injustice does not arise as to the amount claimed, and it is necessary for the proper conduct of the trial that the jury should know what damages are sought. It was to the amount claimed, not the amount paid in, that Sir Robert Stout, C.J., directed himself when in *Norton v. Bertling*, (1910) 29 N.Z.L.R. 1099, 1114, he said :

> "For forty-three years I have been in regular attendance in the Courts, and I can say that in almost every case which I have ever heard the amount of the damages claimed has been mentioned to the jury both by Judges and counsel. It was always usual for the junior counsel to read all the pleadings, and he never completed his task without reading the amount of damages claimed. Whatever the English practice is on this point we have nothing to do with it. We have a practice of our own, and it has been laid down again and again that in matters of practice our Courts follow our own practice rather than that of the English Courts. Moreover, a rule that the jury are not to know the damages claimed seems to me absurd. Supposing the jury, not knowing the amount claimed, gave more than was asked for, must the plaintiff because he has under-estimated his damage submit to a new trial ? For it has been held by the House of Lords, in *Watt v. Watt* ([1905] A.C. 115), that the Court cannot reduce the damages. Why should the jury not know what is claimed ? It seems to me that if that is the rule in England it is one of the absurd practices which is a survival from the time when there was not such an intelligent appreciation of principle in the practice of law as there is to-day. I do not understand what reason there can be in the rule, and I for one shall decline to follow it unless it is so laid down by the Privy Council or the Court of Appeal."

But the position regarding disclosure of the fact of payment of moneys into Court, or of their amount, is totally different. Among the possibilities of injustice to one party or the other that could result from informing the jury of the amount paid into Court by a defendant, two examples may be given.

Take a claim for £1,000 for damages for personal injuries where the defendant makes a payment into Court of, say, £200. If the jury come to the conclusion that this is the right amount, they may feel that if £200 or anything less is awarded, the plaintiff, having to bear practically all the costs of a Supreme Court action, would recover very little for his injury. In these circumstances, any jury would be tempted to give a verdict for more than the amount paid in. No jury, called upon to do justice, should be subjected to such temptation, as the costs thus becoming payable by the defendant would be wholly disproportionate to the excess of the amount of the verdict over the payment into Court. Again, it is conceivable that a jury with knowledge of the amount paid in might consider it to be the minimum which, in the defendant's opinion, could be awarded against him ; and an award that "split the difference" between that sum and the sum claimed might emerge.

In any case, it is unfair that the jury, in weighing the considerations of fact as to liability, should be burdened by the duty of shutting out from their minds the known fact that the defendant has paid money into Court in respect of the claim ; or that, in weighing the considerations as to quantum of damages, they should be under the difficult duty of disregarding the fact that the defendant has paid in a certain sum.

The object of the non-disclosure rule in England is, accordingly, the avoidance of the assessing tribunal, whether it be Judge or jury, being unconsciously influenced through knowledge of the payment ; or, as it was well phrased by Farwell, J., in *Millensted v. Grosvenor House (Park Lane), Ltd.* (*supra*), who said its purpose was obvious : "It was made to prevent the premature disclosure of a fact which was not relevant to the issues to be tried, but the disclosure of which might prejudice one or more of the parties to the proceedings."

It appears, therefore, that a payment into Court should, in relation to the jury's consideration of the evidence, be included, on the ground of irrelevancy, among what Swift, J., in another connection in *Brown v. New Empress Saloons, Ltd.*, [1936] W.N. 156, 157, called "absolutely immaterial matters, such as the state of politics or the weather, or the colour of the plaintiff's hair."

New Year Honours.

THE inclusion of the name of the Hon. Mr. Justice Ostler in the New Year honours, wherein the title of Knight Bachelor was conferred upon him, gave immense pleasure to every member of the profession in the Dominion. But even greater satisfaction was given by the welcome news that His Honour, who was absent during the whole of last year on sick-leave, is sufficiently restored to health to be able to resume his duties on the Supreme Court Bench and in the Court of Appeal after the vacation. It is the unanimous wish of every member of the profession, by all of whom His Honour is highly respected and with whom he is so deservedly popular, that he will long be spared, in fully restored health, to occupy the position of senior puisne Judge, an office dignified of its occupancy by so many other distinguished Judges in the course of our legal history.

The conferring of the Companionship of St. Michael and St. George on Mr. Arthur Donnelly, of the firm of Messrs. Raymond, Stringer, Hamilton, and Donnelly, of Christchurch, where he is Crown Prosecutor, was also welcomed by his professional brethren with great happiness and satisfaction. It is not our purpose here to enlarge on the many qualities of mind and heart which distinguish this well-known and greatly-beloved member of the profession. We wish him a continuance of his restoration to health, and many more years of the useful service he has rendered to the community at large in the multifold spheres of activity which have become distinguished by his connection with them.

Mr. Justice Quilliam.

WITH the return to office of the Hon. Mr. Justice Ostler the profession has to say farewell to the Hon. Mr. Justice Quilliam who held office as a temporary Justice of the Supreme Court during the pleasure of His Excellency the Governor-General during Mr. Justice Ostler's term of sick-leave.

The appointment of a temporary Judge is a matter of unusual delicacy and difficulty; but the selection of Mr. Justice Quilliam to meet an emergency was one of unusual merit, and his success is well-deserved since he put public duty before personal inclination when asked to assume judicial office. In his short period of office, he won the respect and sincere regard of every one whose duty lies in the Supreme Court in the Districts in which his work took him. We know that he takes with him into his retirement the real affection of all who appeared before him, and their sincere esteem. These were earned by His Honour's unfailing courtesy and broad humanity, and his common-sense approach to the matters that came before him.

He will not be forgotten.

Summary of Recent Judgments.

SUPREME COURT. Auckland. 1938. Nov. 25, 30; Dec. 13. *Callan, J.*

BATEMAN v. ACKROYD AND ANOTHER.

Practice—Trial—Running-down Action—Defendant Motor-car Drivers both Insured—Contest between them to fix Blame on Other—Disclosure of Insurance—Special Circumstances—Motion for New Trial—"Unfair or improper practice"—Counsel's Reference to Irrelevant Considerations—Attempt to inflame Jury's Feelings—Serious and Obvious Misconduct—Test as to whether Jury influenced to Erroneous Conclusion—Damages—Assessment—Accident hastening Necessity for Inevitable Operation—Whether Matter to be taken into Account by Jury—Code of Civil Procedure, R. 276 (*d*).

Before a new trial may be granted under R. 276 (*d*) of the Code of Civil Procedure, upon the ground of unfair or improper practice of the successful party, such misconduct must be serious and obvious, and it must also have led to an erroneous conclusion by the jury.

Norton v. Stringer, (1909) 29 N.Z.L.R. 249, 12 G.L.R. 10, and **King v. A. Hall, Ltd.,** [1921] N.Z.L.R. 94, G.L.R. 264, applied.

Peat v. Greymouth Evening Star Printing and Publishing Co., Ltd., [1917] N.Z.L.R. 40, [1916] G.L.R. 834, referred to.

Croll v. McRae, (1930) 47 N.S.W.W.N. 50, mentioned.

In a running-down action, the plaintiff was a passenger in a taxi-cab driven by one of the defendants which came into collision with a private car driven by the other defendant. The case was a contest between the two drivers each of whom sought to put upon the other the sole blame for the accident.

A sketch-plan of the scene of the accident, prepared by L., who was not called, was put in evidence by a witness for the plaintiff. In answer to a question asked him by plaintiff's counsel without objection, it emerged that L. was an insurance assessor acting in respect of the claim against the defendant private-car owner.

Counsel for the defendant private-car driver, in his address, mentioned to the jury that both defendants were insured, wishing them to understand that the other defendant, as the driver of a vehicle plying for hire, was compelled to insure against claims by his passengers.

In addressing the jury, plaintiff's counsel said that "the real defendants" were well able to pay "fair compensation" without inconvenience to themselves. He proceeded:

> "We all know who are the real defendants in this case; they can pay the amount of damages awarded without losing a wink of sleep. The newspapers which we purchase with alacrity at 2d. are not public benefactors—they are only there to make money out of us (God bless them). These other interests are only there for that purpose—they gamble and make money out of these risks; they come here prepared to pay. It is only when we have a little unseemly wrangle, such as here during the last three days, when things somehow do not seem to be going along smoothly with one another, that we get such a contest as this. This is the real position, gentlemen, with regard to the defendants—the real defendants in this case."

Later on, he said:

> "£1,750 is not too much for these two gentlemen—or these two companies—to pay."

The learned trial Judge, in his summing-up, took strong exception to these remarks, and asked the jury to disregard them.

The jury gave a verdict against the defendant private-car driver alone for the full amount of special and general damages claimed.

On a motion to set aside the verdict and for a new trial on, *inter alia*, the ground that the verdict was obtained by unfair and improper practice of the plaintiff's counsel to the prejudice of the unsuccessful defendant,

North, for the defendant, Ackroyd, in support; **Goldstine,** for the defendant, White; **Singer,** for the plaintiff, **Bateman,** to oppose.

Held, 1. That, in the particular circumstances of the case, it was not improper, once L.'s name and action in the preparation of the plan emerged, that the jury should be told the nature of his interest in the matter; and that, in view of the course which counsel for the defendant private-car driver had taken in mentioning that both drivers were insured, the mere mention of the topic of insurance was not improper.

2. That, when the topic of insurance had emerged in a manner that was legitimate because inevitable, it was not improper to warn the jury against a tendency to which juries may be prone—namely, a tendency to diminish damages because of a fear that the defendant was unable without hardship to pay more.

Grinham v. Davies, [1929] 2 K.B. 249, followed.

3. That the reference made by plaintiff's counsel to newspapers, in view of the facts mentioned in the judgment, was improper and constituted serious misconduct in that it was an attempt to inflame the feelings of the jury by improper reference to totally irrelevant considerations.

By reason of an old injury to the same knee as was injured in the accident in respect of which he claimed damages, the plaintiff would probably have become permanently disabled in any event about twelve years after the date of the accident, if the injury by accident had not occurred. Two competent and experienced medical men, called on behalf of the plaintiff and defendant, respectively, concurred in the view that he should submit to an operation which, for many months, possibly for a year, of total disablement would deprive him of the use of his knee, and would involve him in expense and suffering.

Held, That the jury could take into account that, as the result of the fresh injury, the expense of the operation had to be met twelve years earlier than otherwise; and it would not be unreasonable for them to add something to the damages because the expense, loss, pain, and inconvenience inseparable from the operation had become presently inescapable, whereas, before the accident, they were only a strong future probability.

The motion failed, as the Court could not infer that the jury had been influenced by the misconduct of the plaintiff's counsel, as, where the amount of damages appeared to be reasonable, the inference that impropriety has influenced the amount of the award becomes difficult.

Solicitors: **Singer and Robinson,** Auckland, for the plaintiff; **Armstead and Kendall,** Auckland, for the defendant, Ackroyd; **Goldstine, O'Donnell, and Wilson,** Auckland, for the defendant, White.

Case Annotation: *Grinham v. Davies,* E. and E. Digest, **Practice** Vol., p. 562, para. 2211.

COURT OF ARBITRATION.
Gisborne.
1938.
November 29;
December 13.
O'Regan, J.

WHITEHEAD v. WAIKOHU COUNTY.

Workers' Compensation—Non-fatal Accident—Commutation of Weekly Payments—Disposal under Order of the Court—Workers' Compensation Act, 1922, s. 5 (1).

A lump sum is never payable in a non-fatal case unless (*a*) the employer and worker have so agreed, or (*b*) unless the Court has given judgment that the balance of the weekly payments be commuted into a lump sum in manner prescribed by s. 5 (1) of the Workers' Compensation Act, 1922. The Court of Arbitration so commuting can prescribe the manner of the disposal of the lump sum for the benefit of the injured worker.

Hodge v. Alton Co-operative Dairy Co., Ltd., (1914) 17 G.L.R. 139, referred to.

Rough v. Prouse Lumber, Ltd., (1909) 12 G.L.R. 151, mentioned.

Where a worker, aged seventy-three years, was entitled to weekly payments for compensation, and, by the purchase of the home in which he and his wife were living on affectionate terms, he could be saved £24 annually, the Court commuted the payments of weekly compensation, the sum of £300 to be expended in the purchase of the house in the joint names of husband and wife, and the balance administered by the Public Trustee as agreed by the parties.

Counsel: **Burnard,** for the plaintiff; **J. Blair,** for the defendants.

Solicitors: **Burnard and Bull,** Gisborne, for the plaintiff; **Blair and Parker,** Gisborne, for the defendants.

SUPREME COURT.
Palmerston North.
1938.
September 9;
October 10.
Johnston, J.

SHELTON v. VILES.

Damages—Compensation for Pecuniary Loss for Personal Injury—Motion for New Trial—Trial before Judge and Jury—Whether Damages excessive—Principles guiding Court in reviewing Jury's Assessment of Damages—Code of Civil Procedure, R. 276c.

The question for the Court on a motion for a new trial is not whether the verdict appears to the Court to be right, but whether it is such as to show that the jury had failed to perform the judicial duty cast upon them.

The evidence before the jury must be the foundation of the award of damages, and, if inferences drawn by the jury from the evidence are unreasonable, the Court can set the award aside.

Where in an action for general damages for personal injury, apart from the imponderable elements the question of financial loss is involved, it is the duty of a jury to make the money situation after the injury as far as possible coincide with what it was before, so that the injured party's money prospects are disturbed to the least possible extent.

If it can be shown that the jury's award is not referable to loss that can reasonably be related to antecedent and present circumstances, as well as to opportunity for future advancement reasonably within the grasp or capacity of the person injured if the injury had not occurred, it can be properly interfered with.

Mechanical and General Inventions Co., Ltd., and Lehwess v. Austin and the Austin Motor Co., Ltd., [1935] A.C. 346, followed.

Hip Foong Hong v. H. Neotia and Co., [1918] A.C. 888, and **Greenlands Ltd. v. Wilmshurst,** [1913] 3 K.B. 507, applied.

Phillips v. London and South Western Railway Co., (1879) 5 Q.B.D. 78, referred to.

Counsel: **H. R. Cooper,** for the defendant, in support of motion for a new trial on the ground that the damages awarded were excessive; **J. Graham,** for the plaintiff, to oppose.

Solicitors: **Graham and Reed,** Feilding, for the plaintiff; **Cooper, Rapley, and Rutherford,** Palmerston North, for the defendant.

Case Annotation: *Greenlands Ltd. v. Wilmshurst,* E. and E. Digest, Vol. 17, p. 135, para. 413; *Phillips v. London and South Western Railway Co., ibid.,* p. 176, para. 784; *Mechanical and General Inventions Co., Ltd., and Lehwess v. Austin and the Austin Motor Co., Ltd., ibid.*

COURT OF APPEAL.
Wellington.
1938.
December 2, 9.
Blair, J.
Kennedy, J.
Callan, J.
Northcroft, J.

GUARDIAN, TRUST, AND EXECUTORS COMPANY OF NEW ZEALAND LIMITED v. HALL (No. 2).

Practice—Appeals to the Privy Council—Judgment ordering the Removal of a Caveat—Whether a "final judgment"—Affidavits relative to Notice of Motion for Leave to Appeal—Time for Filing—Privy Council Appeal Rules, 1910, R. 2 (*a*) (*b*)—Court of Appeal Rules, R. 25.

A judgment ordering the removal of a caveat is not a "final judgment" within R. 2 (*a*) of the Privy Council Appeal Rules, 1910.

It is not the practice of the Court of Appeal to exclude affidavits so long as they have been filed in ample time to be dealt with before the hearing, and, if further time be required, the position may be met by the granting of an adjournment.

Counsel: **Cooke,** K.C., and **Nolan,** for the appellants; **Lysnar,** for the respondent.

Solicitors: **Nolan and Skeet,** Gisborne, for the appellants; **Beaufoy and Maude,** Gisborne, for the respondent.

SUPREME COURT. Wanganui. 1938. November 18; December 8. *Quilliam, J.*

KEATS v. THOMPSON.

Landlord and Tenant—Sublease—Lease and Subtenancy entered into after Passing of Fair Rents Act, 1936—Holding-over by Subtenant—No Statutory Grounds for ejecting him—Inability of Lessee to give Vacant Possession to Lessor—Liability of Lessee—Fair Rents Act, 1936, s. 13.

A tenant, on the expiration or sooner determination of his tenancy, must deliver up to his landlord the whole of the demised premises; so that a lessee, who agrees to take a tenancy subject to a subtenancy, cannot claim at the end of the term of his lease that he has only a correlative obligation to restore possession subject to a subtenancy.

Harding v. Crethorn, (1793) 1 Esp. 57, 170 E.R. 278, followed.

Henderson v. Squire, (1868) L.R. 4 Q.B. 170, explained.

Even though a lessee is unable to yield up vacant possession at the end of the term of his lease owing to the restrictions imposed by the Fair Rents Act, 1936, which was in force when the tenancy and subtenancy were created, he is not relieved from his obligation to yield up vacant possession, as, in the absence of express stipulation to the contrary, the parties must be taken to have contracted with regard to the law when the lease was entered into.

Baily v. De Crespigny, (1869) L.R. 4 Q.B. 180, followed.

Reynolds v. Bannerman, [1922] 1 K.B. 719, distinguished.

Counsel: B. C. Haggitt, for the appellant; **Maclean,** for the respondent.

Solicitors: W. H. Maclean, Taihape, for the plaintiff; **W. R. Emerson,** Taihape, for the defendant.

Case Annotation: *Harding v. Crethorn,* E. and E. Digest, Vol. 31, p. 546, para. 6932; *Henderson v. Squire, ibid.,* p. 546, para. 6925; *Baily v. De Crespigny, ibid.,* p. 465, para. 6111; *Reynolds v. Bannerman, ibid.,* p. 575, para. 7229.

SUPREME COURT. Auckland. 1938. October 11, 13. *Fair, J.*

GRAY AND OTHERS v. COMMISSIONER OF STAMP DUTIES.

Public Revenue—Death Duties—Gift—Letter asking Addressee to transfer into her Name and accept as a "Gift" Writer's Capital in Addressee's Business—Whether a "Gift" or "Voluntary contract"—Gift Duty assessed and paid on such Letter—Whether Writer's Administrator precluded from denying such Transaction a Gift—Death Duties Act, 1921, ss. 5 (1) (c), 38, 39 (a) (d) (f), 40.

Prior to the year 1923 G. paid to S. sums totalling £2,250 to be used as capital in her business, no interest thereon to be payable by her. On January 2, 1923, G. signed the following letter to S.:—

"In reference to my talk with you concerning my capital in your business, this I want you to transfer into your name, and accept as a gift from me.

"I do not think any legalities are necessary to this, but if they are you can take whatever steps you think fit to make it so."

This letter was not intended by G. to be a gift nor was it so construed by S. Prior to its execution, G. and S. had arranged that G. might demand payment of the foregoing sum at any time during his life if he should require it. It was not anticipated that he would require payment and the letter was signed to give effect to such arrangement.

When, in 1927, the respondent obtained knowledge of the transaction, through an Income-tax Inspector noticing a transfer of the said sum of £2,250 in the books of S.'s business from G.'s account to hers, and called upon G. to file a gift statement to pay duty thereon and assessed duty upon the said letter, he added to the sum of £2,250 the sum of £534, the interest, which, as G.'s solicitors had advised the respondent, would be due for interest had such been paid. Gift duty was assessed accordingly and paid.

In 1929, when S.'s business collapsed and she was endeavouring to sell her building in which it was conducted, £6,200 was agreed upon as the amount of capital which G. and his brother had put into S.'s business and building; and S. signed a mortgage over the building to secure £6,200, of which the share of G. was £2,784 made up as aforesaid.

G. died in 1935, and, in assessing the final balance of his estate for the assessment of death duty the respondent included therein the sum of £2,784 as being property comprised in a gift within the meaning of Part IV of the Death Duties Act, 1921, inasmuch as *bona fide* possession and enjoyment of the said property had not been retained by S. to the entire exclusion of G., or of any benefit to him within the meaning of the provisions of s. 5 (1) (c) of the statute.

Upon a case stated by the respondent at the request of the appellants, the administrators of G.'s estate,

Haddow, for the appellants; **V. R. S. Meredith,** for the respondent.

Held, 1. That the letter of January 2, 1923, did not release the debt due by S. to G., but was merely the expression of an unfulfilled intention to do so.

Commissioner of Stamp Duties v. Todd, [1924] N.Z.L.R. 345, [1923] G.L.R. 505; **Strong v. Bird,** (1874) L.R. 18 Eq. 315; and **Edwards v. Walters,** [1896] 2 Ch. 157, applied.

2. That the transaction was not within the terms of ss. 38 and 39 of the Death Duties Act, 1921; and the letter did not constitute a "voluntary contract."

3. That the payment of gift duty did not preclude the appellants from denying that the transaction was a gift.

Commissioner of Stamps v. Erskine, [1916] N.Z.L.R. 937, G.L.R. 641, applied.

Consequently the said sum of £2,784 was therefore a debt owing by S. at the time of G.'s death, and it should be calculated on that basis at its real value and not at the value of property comprised in the gift, irrespective of S.'s ability to pay.

Solicitors: Haddow and Haddow, Auckland, for the appellant; **Crown Law Office,** Auckland, for the respondent.

Case Annotation: *Strong v. Bird,* E. and E. Digest, Vol. 25, p. 538, para. 268; *Edwards v. Walters, ibid.,* Vol. 6, p. 366, para. 2416.

COURT OF ARBITRATION. Auckland. 1938. October 19, 25. *O'Regan, J.*

DANIEL AND OTHERS v. COLLINS.

Workers' Compensation — Liability for Compensation — "Dependants"—Children neglected by Father, and supported chiefly by Grandfather—Diligence in enforcing Legal Right to Maintenance—Probability of securing same—Workers' Compensation Act, 1922, s. 4 (2).

A person may be dependent upon a worker at the time of the latter's death, and so entitled to compensation, although he was in fact receiving no maintenance, or inadequate maintenance, provided he had a legal right to maintenance, and had done his best to enforce it; but the extent of the dependency is a question of fact for the Court.

Young v. Niddrie and Benhar Coal Co., Ltd., [1913] S.C. (H.L.) 66, 6 B.W.C.C. 774, followed.

New Monckton Collieries, Ltd. v. Keeling, [1911] A.C. 648, 4 B.W.C.C. 332, considered.

Sherwood v. New Zealand Shipping Co., Ltd., (1911) 13 G.L.R. 642, referred to.

The Court always attaches importance to the activities of the plaintiff in seeking to enforce his legal right to maintenance, and the probability of that right being secured.

Public Trustee v. McMahon, (1913) 15 G.L.R. 655, and **Carleton v. Hague,** (1914) 16 G.L.R. 512, referred to.

Counsel: T. C. Webb, for the plaintiffs; **Trimmer,** for the defendant.

Solicitors: Webb and Ross, Whangarei, for the plaintiffs; **Connell, Trimmer, and Lamb,** Whangarei, for the defendant.

Case Annotation: *Young v. Niddrie and Benhar Coal Co., Ltd.,* E. and E. Digest, Vol. 34, p. 250, para. 2151; *New Monckton Collieries, Ltd. v. Keeling, ibid.,* p. 249, para. 2143.

SUPREME COURT. Wanganui. 1938. November 18; December 8. *Quilliam, J.*

KWONG CHONG FORE v. GEORGE.

Agricultural Workers—Wages—Youths and Females in Market Gardens—Whether Casual Employment prohibited on other than a Weekly Basis—Agricultural Workers Act, 1936, s. 20 (1)—Agricultural Workers Amendment Act, 1937, s. 2 (1)—Agricultural Workers Extension Order, 1938, No. 2, Serial No. 1938/22, cls. 4, 5.

The employment of persons to do weeding, planting, and general labourers' work in a market garden is controlled by Part III of the Agricultural Workers Act, 1936, as modified by the Agricultural Workers Extension Order, 1938, No. 2, but the statute, which is a penal one, does not prohibit the casual employment in a market garden of youths and females at an hourly rate of wages or for wages on other than a weekly basis.

Chapman v. Rendezvous Limited, [1922] G.L.R. 457, applied.

Counsel: Young, for the appellant; **Bain,** for the respondent.
Solicitors: McBeth, Withers, and Young, Wanganui, for the appellant; **Crown Law Office,** Wanganui, for the respondent.

SUPREME COURT. Auckland. 1938. December 6, 15. *Reed, J.*

SCOTT AND ANOTHER v. COMMISSIONER OF STAMP DUTIES.

Public Revenue—Stamp Duties—*Ejusdem Generis* Rule—"Other Consideration whatsoever other than rent"—Rule excluded—License to cut Timber for Royalty on All Millable Timber within Certain Area payable by Instalments whether Timber cut and removed or not—Whether "Consideration . . . other than rent"—Stamp Duties Act, 1923, ss. 118, 120, 126.

The phrase in s. 120 of the Stamp Duties Act, 1923, "or other consideration whatsoever other than rent," repels any implication of the doctrine of *ejusdem generis* and includes all matters that can be regarded in law as a consideration for the grant, excluding only rent.

L. Marks, Morrin, and Jones, Ltd. (in Liquidation) v. Marks, [1931] N.Z.L.R. 756, G.L.R. 279, referred to.

By a license to fell and remove timber from land, which was admitted to be a license within the definition contained in s. 118 of the Stamp Duties Act, 1923, the consideration was stated to be a royalty on all millable timber within a certain area payable by a large sum on execution and smaller instalments payable quarterly for eight years, the licensees having the right to fell and remove timber during a period of ten years. It was provided that no property in the timber should pass to the licensees until severed from the land; that the property in any timber severed but not removed during the continuance of the grant reverted to the grantor and the licensees had no rights in respect of any timber standing or fallen which was not removed within the ten years; and, further, that the said royalty should be payable notwithstanding that the licensees might not cut or remove any millable timber from the lands or that the same might be damaged or destroyed by any cause.

On an appeal from the assessment of stamp duty,

Leary and **Dyson,** for the appellants; **V. R. S. Meredith** and **N. I. Smith,** for the respondents.

Held, dismissing the appeal, That the instrument was a contract for the sale of the timber upon the land, and the consideration for the license was a "consideration other than rent."

Hutchison v. Ripeka te Peehi, [1919] N.Z.L.R. 373, G.L.R. 441, and **Macklow Bros. v. Frear,** (1913) 33 N.Z.L.R. 264, 16 G.L.R. 341, applied.

Egmont Box Co., Ltd. v. Registrar-General of Lands, [1920] N.Z.L.R. 741, G.L.R. 446; **Hira te Akau v. Pukeweka Sawmills, Ltd.,** [1924] N.Z.L.R. 615, G.L.R. 342; and **Howe v. Waimiha Sawmilling Co.,** [1920] N.Z.L.R. 681, [1921] G.L.R. 35, distinguished.

Endean v. Minister of Stamp Duties, [1922] N.Z.L.R. 168, [1921] G.L.R. 567, mentioned.

Stamp duty was, therefore, assessable on the instrument as if the license were an instrument of conveyance on sale of land for the amount of the present value of the consideration.

Solicitors: Morpeth, Gould, Wilson, and Dyson, Auckland, for the appellants; **Crown Law Office,** Auckland, for the respondent.

SUPREME COURT. Timaru. 1938. May 6; December 15. *Northcroft, J.*

In re **FILSHIE (DECEASED), RAYMOND v. BUTCHER AND OTHERS.**

Will—Construction—Bequest for Erection, Construction, and Maintenance of Kerbing and Headstones over Graves—Severance of Trust for Erection and Construction from that for Maintenance—Validity of former—Invalidity of latter—Rule against Perpetuities.

The will of a testatrix delivered the residue of her estate to trustees to expend it

"in erecting, constructing, and keeping in repair suitable kerbing and headstones over 'the graves' of herself and her deceased husband, father, mother, brother, and sister."

On originating summons for interpretation of this clause,

Raymond, for the plaintiff; **A. W. Brown,** for the defendant.

Held, That, to the extent to which the trust related to the maintenance of the kerbing and headstones, it was void as offending the rule against perpetuities, but that the trust for their erection and construction could be severed from that for their maintenance and was valid.

In re Dean, Cooper-Dean v. Stevens, (1889) 41 Ch.D. 552, and **In re Clarke, Bracey v. Royal National Lifeboat Institution,** (1923) 2 Ch. 407, applied.

Solicitors: Raymond, Raymond, and Tweedy, Timaru, for the plaintiff; **Raymond, Stringer, Hamilton, and Donnelly,** Christchurch, for the defendants.

Case Annotation: *In re Dean, Cooper-Dean v. Stevens,* E. and E. Digest, Vol. 43, p. 613, para. 561; *In re Clarke, Bracey v. Royal National Lifeboat Institution, ibid.,* Supp. Vol. 8, para. 47a.

COURT OF ARBITRATION. Napier. 1938. December 1, 12. *O'Regan, J.*

BERRYMAN (INSPECTOR OF FACTORIES) v. HAWKE'S BAY FARMERS' MEAT COMPANY, LIMITED.

Industrial Conciliation and Arbitration Acts—Jurisdiction—Appeal from Magistrate—Notice of Appeal not given within Seven Days—Appeal on Law—Not made by Way of Case Stated—Industrial Conciliation and Arbitration Act, 1925, ss. 134 (5)—Magistrates' Courts Act, 1928, ss. 164 (1) (*d*), 165.

The Court of Arbitration has no jurisdiction to hear an appeal from the decision of a Stipendiary Magistrate if notice of intention to appeal has not been served on the intended respondent within the prescribed period of seven days. The service of such notice must be either personally on the respondent or in such a manner that it must necessarily come under his notice within seven days after the determination by the Magistrate.

Paton v. Wilson, (1913) 33 N.Z.L.R. 246, 16 G.L.R. 339, followed.

If an appeal to the Court of Arbitration on a question of law is not made by way of case stated, in compliance with s. 165 of the Magistrates' Courts Act, 1928, the Court of Arbitration has no jurisdiction to hear the appeal.

Mayor, &c., of Christchurch v. Jenkin, [1920] G.L.R. 188, followed.

Counsel: Holderness, for the respondent; Appellant, in person.

Solicitors: Logan, Williams, and White, Hastings, for the respondent.

SUPREME COURT. Wellington. 1938. August 26; December 19. *Blair, J.*

In re **ROONEY (DECEASED), PUBLIC TRUSTEE v. ROONEY AND OTHERS.**

Will—Devisees and Legatees—Construction—Evidence—Latent Ambiguity—Gift to "my two grandchildren"—Fourteen Grandchildren at time of Execution of Will and at Testatrix's Death—Extrinsic Evidence as to which two Grandchildren were meant.

A testator by his will bequeathed to "my two grandchildren" £20 each. He had fourteen grandchildren, all of whom were alive both at the date of his will and at his death.

Carrad, for the plaintiff; **Hanna,** for G. J. Rooney; **von Haast,** for all the infant grandchildren.

Held, That the following evidence was admissible in order to identify the "two grandchildren": (*a*) That testator's two grandchildren, Moira and Joan, used often to stay with him, and that he was on more intimate terms with them than with any of his other grandchildren; (*b*) that in a former revoked will he gave legacies of £25 to each of his grandchildren Moira and Joan by their names; and (*c*) that when he brought his last will to the Public Trust Office for safe custody and gave tentative instructions for a new will, he said that in that last will he intended by the bequest of £20 each to benefit only Moira and Joan.

In re Mayo, Chester v. Keirl, [1901] 1 Ch. 404, referred to.

Solicitors: The Solicitor, Public Trust Office, Wellington, for the plaintiff; **Duncan and Hanna,** Wellington, for G. J. Rooney; **H. F. von Haast,** Wellington, for the grandchildren.

Case Annotation: *In re Mayo, Chester v. Keirl,* E. and E. Digest, Vol. 44, p. 621, para. 4506.

COURT OF ARBITRATION. Napier. 1938. December 6. *O'Regan, J.*

MASTERS v. MANSON.

Workers' Compensation—Liability for Compensation—Neighbouring Farmers assisting each other in Farm-work for Payment—Injury to One while repairing Roof of Dwellinghouse of the Other—Whether "Farm-work"—Whether Injured Party entitled to Compensation—Workers' Compensation Act, 1922, s. 2, First Schedule.

Plaintiff and defendant were neighbours, each owning a small farm property. Over a period of twenty years, they had helped each other with ordinary farm work at an agreed hourly rate of payment, which was paid by settlement at intervals. Plaintiff was asked to repair a leaking roof of defendant's dwelling, and he returned and reached the roof by means of a ladder, tightened a few nails which appeared to have "sprung," and was proceeding to another part of the roof when he slipped and fell to the ground, a height exceeding 12 ft., and suffered temporary total disablement, and permanent damage to each wrist.

Green, for the plaintiff; **Commin,** for the defendant.

Held, That plaintiff was engaged in farm work, and that he was injured by accident entitling him to compensation.

Carr v. Guardian Assurance Co., Ltd., and Cracknell and Crimp, [1928] N.Z.L.R. 108, G.L.R. 84, and **Calder v. Douglass,** [1929] N.Z.L.R. 49, G.L.R. 28, applied.

Trim v. Gillett, (1933) 26 B.W.C.C. 157; **Oldroyd v. Turner,** (1935) 28 B.W.C.C. 369; **Goulden v. Burke,** [1926] N.Z.L.R. 459; and **Fry v. The King,** [1936] N.Z.L.R. s. 60, G.L.R. 379, distinguished.

Underwood v. Perry and Son, Ltd., (1922) 15 B.W.C.C. 131, mentioned.

Solicitors: Kelly and McNeil, Hastings, for the plaintiff; **Cornford, Son, and Commin,** Hastings, for the defendant.

Case Annotation: *Trim v. Gillett,* E. and E. Digest, Supp. Vol. 34, para. 2189a; *Oldroyd v. Turner, ibid.,* para. 22206; *Underwood v. Perry and Son, ibid.,* Vol. 34, p. 20, para. 8.

SUPREME COURT. Auckland. 1938. December 2, 14. *Fair, J.*

PUBLIC MUTUAL INSURANCE COMPANY OF NEW ZEALAND (IN LIQUIDATION) v. HUNTER.

Company Law—Winding-up—Company with no Shares and no Fixed Capital—Membership by signed Application or by Application for Insurance Policy—Articles providing for Levies on Members—Policyholder's Name not entered in Register of Members—Whether such Policyholder a Member, and liable for Levy—Companies Act, 1933, ss. 24 (b), 38 (2), Second Schedule, Table C., Art. 3.

Section 38 (2) of the Companies Act, 1933, does not make entry in a register of members an essential condition of membership.

The plaintiff company was incorporated with no fixed shares and no fixed capital, its main object being to insure, *inter alia,* motor-vehicles owned by its members and to indemnify such members for claims for compensation, its other objects being insurance of different kinds. Its memorandum of association provided that

"The system by which the business of the company shall be carried on shall be by way of contributions from time to time levied upon members at such time and in such amounts as may be determined by the directors."

The articles of association provided that every person desirous of becoming a member should lodge a signed application to that effect or a signed application for a policy of insurance in a prescribed form, and that the granting of a policy of insurance to any person should be sufficient evidence of the admission of such person to the membership of the company; and provision was made for assured contributions by members, and, in addition, levies, both calculated on the amounts of a member's insurance according to a scale.

The defendant signed a proposal for a policy of insurance over a motor-car, agreeing to pay all premiums, fines, and contributions in accordance with the articles. He received a policy, for the renewal of which he later paid a renewal premium. His name did not appear on a register of members. The directors made a levy on all members pursuant to the articles.

On a claim against the defendant for the amount of his unpaid levy,

Richmond and Haynes, for the plaintiff; **Johnstone,** K.C., for the defendant.

Held, That, in the circumstances, the compilation of a register of members was not necessary to constitute the defendant a member of the company or to make him liable for payment of the levy.

Portal v. Emmens, (1876) 1 C.P.D. 201, aff. on app., *ibid.,* 664; **In re Albion Assurance Society, Winstone's case,** (1879) 12 Ch.D. 239; and **In re Oola Lead and Copper Mining Co., Ltd.,** (1868) 2 I.R. Eq. 573, applied.

Semble, That the defendant, having acted as a member by accepting and renewing the policy, must be taken to have had knowledge of the memorandum and articles of association, and, as regards the company and the policyholders who were members of the company under s. 38 (1) or by entry in the register, he was precluded from denying that he was a member.

In re Florence Land and Public Works Co., Nicol's case, (1885) 29 Ch.D. 421, considered.

Solicitors: Buddle, Richmond, and Buddle, Auckland, for the plaintiff; **Goldstine, O'Donnell, and Wilson,** Auckland, for the defendant.

Case Annotation: *Portal v. Emmens,* E. and E. Digest, Vol. 10, p. 1121, para. 7878; *In re Albion Assurance Society, Winstone's case, ibid.,* p. 1081, para. 7567; *Re Oola Lead and Copper Mining Co., Ltd., ibid.,* Vol. 9, p. 190, para. q; *In re Florence Land and Public Works Co., Nicol's case, ibid.,* p. 189, para. 1192.

Three Important New Zealand Real Property Decisions of 1938.

By E. C. Adams, LL.M.

In 1938, the New Zealand Courts gave three decisions of great importance to real-property lawyers, dealing with: (*a*) The estimated value of land by the mortgagee when he exercises power of sale through the Registrar of the Supreme Court; (*b*) the acquisition of title by a trespasser by operation of the Real Property Limitation Act, 1833; and (*c*) what constitutes a caveatable interest by a caveator (other than the District Land Registrar) under the Land Transfer Act.

The Mortgagee's Estimated Value of Land.

When a mortgagee of land makes application to the Registrar of the Supreme Court to conduct a sale of the mortgaged land, the New Zealand law requires him to state in his application the value at which he estimates the land to be sold. In *Wellington City Corporation v. Government Insurance Commissioner*, [1938] N.Z.L.R. 308, the City Council had a rating charge for £1,450, which ranked as a second charge, as the first mortgagee was the Crown, the Government Insurance Commissioner. Had the first mortgage not been to the Crown, the City Council's charge would have had priority over the first mortgage, and the case would never have gone before the Courts: *The King v. Mayor, &c., of Inglewood*, [1931] N.Z.L.R. 177, G.L.R. 63. The mortgagee estimated the value of the land at £12,000, which was £3,200 less than the Government valuation thereof. The City Council contended that the mortgagee had to state in his application a *reasonable* value; the first mortgagee submitted that this estimate of the value was left to his discretion. The Court of Appeal had previously held in *Public Trustee v. Wallace*, [1932] N.Z.L.R. 625, G.L.R. 254, that there was no power to fix a reserve price. The mortgagee's viewpoint was upheld both in the Supreme Court and the Court of Appeal. Blair, J., in delivering the judgment of the Court of Appeal, at p. 323, l. 5, said:

> "We think that the intention of the Legislature was to provide an ingenious device to render difficult, if not impossible, the mischief disclosed in *Hamilton's* case, which mischief was that a mortgagee was able to acquire the mortgaged property at a trifling figure quite unrelated to the actual value of the property to the mortgagee. Before the passing of this legislation, it was by no means uncommon for properties to be bought in by the mortgagee at nominal values; but this practice, since 1905, has ceased, and the most usual figure at which the mortgagee buys is the amount of the principal, interest, and costs."

Wellington City Corporation v. Government Insurance Commissioner, therefore, merely confirms judicially a New Zealand conveyancing practice of more than thirty years' standing.

Opinions will differ as to whether the ordinary law gives a mortgagor adequate protection in normal times; it certainly does not in times of great financial stress, for since 1914 the Legislature has often had to intervene—*e.g.*, the Mortgages Extension Act, 1914; the Mortgagors Relief Act, 1931; and the Mortgagors and Lessees Rehabilitation Act, 1936. But it is clear that the ordinary law (which was considered in *Wellington City Corporation v. Government Insurance Commissioner* (*supra*)) does give a mortgagor a certain amount of protection, and prevents a mortgagee from buying in the property at a value much lower than its value to him as a security.

A mortgagor may redeem the property on payment to the mortgagee of the amount of his valuation and certain costs; if, therefore, a mortgagee fixes too low an estimate, he runs a real risk of losing his security. On the other hand, if he fixes too high a value, he will, in the event of his buying the property in at the Registrar's sale, have to give the mortgagor credit for more than the security is worth. There is, however, only one reported case of a mortgagee stating an excessive sum: *Bank of Australasia v. Scott*, [1926] G.L.R. 274, 281. The bank's agent, not then anticipating having to buy in the property, estimated £6,750 as the value. Later, the bank claimed that it had intended to insert £5,750 in the application to the Registrar; and, having bought the property in at the Registrar's sale, claimed to set aside the Registrar's sale: it had not taken a transfer from the Registrar. But the Supreme Court ruled that it could not give the mortgagee any relief against the mortgagee's own error of judgment. The mortgagee bank having become the purchaser of the property, the mortgagor had an indefeasible right to be credited with the amount of the mortgagee's estimated value—*viz.*, £6,750. As pointed out by the Court, one effect of inserting too high a value is to stifle bidding by third persons, and that in itself is prejudicial to the mortgagor.

The Acquisition of Title by a Trespasser.

Although s. 60 of the Land Transfer Act, 1915, provides that no title shall be acquired over land after it has become subject to that Act, by possession, adversely to or in derogation of the title of the registered proprietor, and although s. 3 of the Land Transfer (Compulsory Registration of Titles) Act, 1924, provides for all privately owned land not hitherto subject to the Land Transfer Act to be brought under that Act within five years or as soon thereafter as may be convenient, the effect of the Real Property Limitation Act, 1833, will still often have to be considered in New Zealand, for the 1924 Act authorizes the issue of limited titles, and s. 16 (3) of that Act states that the issue of a limited certificate of title shall not stop the running of time under the Statutes of Limitation in favour of any person in adverse possession of such land at the time of the issue of such certificate, or in favour of any person claiming through or under him.

Owing to inadequate surveys, and to the possibility that possession does not coincide with title boundaries, most of the titles issued pursuant to the 1924 Act have been issued *limited* as to parcels, and so far comparatively few landowners have taken any steps to have the limitations as to parcels removed by the deposit of a survey plan in the Land Registry. Moreover, s. 72 of the Land Transfer Act, 1915, itself provides that every certificate of title is void as against the title of any person adversely in actual occupation of and rightfully entitled to such land at the time when the land was brought under the Act and continuing in such occupation at the time of any subsequent certificate of title.

Much case law has grown up around the Real Property Limitation Act, 1833. The late Professor Garrow once told the writer that one of the most difficult chapters to write in his book on Real Property was the one headed "Title to Land—Statutes of Limitation."

Whatatiri v. The King, [1938] N.Z.L.R. 676, follows the leading case of *Sampson v. New Plymouth Harbour Board*, (1908) 27 N.Z.L.R. 607, 10 G.L.R. 336, in so far as it decides that the mere fact that land is held in trust and is inalienable, is not sufficient to prevent the operation of the Real Property Limitation Act, 1833. *Whatatiri v. The King* further emphasizes that an oral acknowledgment of ownership by a trespasser to the documentary owner is not sufficient to stop time running under the statute: the acknowledgment, to be effective, must be in writing. But the plaintiff Native in *Whatatiri v. The King* failed to establish title by operation of the statute, because her possession had not been adverse to the trustees and because it had not been exclusive, for from time to time numerous other Natives had lived or squatted on the land. The plaintiff was in fact a *cestui que trust*, for the land had been originally granted to the Anglican Bishop upon trust, "as a site for a church and burial-ground, and as an endowment for schools for the benefit of the aboriginal inhabitants of the Colony of New Zealand." It was stated by learned counsel in argument in the Australian case of *Maguire v. Browne*, (1913) 17 C.L.R. 365, 367, that to constitute title by adverse possession there must be (*a*) *animus possidendi*; (*b*) physical possession; and (*c*) exclusive possession. On the facts as found by the Judge, requisites (*a*) and (*c*) above were certainly lacking in *Whatatiri v. The King* (*supra*). On principle, *Whatatiri v. The King* is consistent with *Maguire v. Browne* (*supra*).

A Caveatable Interest under the Land Transfer Act.

As only legal estates and interests are registered under the Land Transfer Act, the caveat system is necessary to protect equitable interests and trusts. But a person (other than the District Land Registrar) has no right to caveat unless he is "entitled to" or "beneficially interested" in *the land* itself: *Guardian Trust and Executors Co. of New Zealand, Ltd. v. Hall*, [1938] N.Z.L.R. 1020. Citing *In re Bielfield*, (1894) 12 N.Z.L.R. 596, *Hutchen's Land Transfer Act*, 2nd Ed., 143, states that a person beneficially interested in the proceeds of the sale of land may lodge a caveat to protect himself from a collusive or improper sale. The recent ruling of the Court of Appeal in *Guardian Trust and Executors Co. of New Zealand, Ltd. v. Hall* does not appear to support that statement entirely; for, in delivering the judgment of the Court of Appeal Callan, J., at p. 1026, said:

> "The interest conferred upon the caveator by the will of his father was a right to share in the residue, and the residue was to be arrived at by sale, realization, and a discharge of liabilities. This process is not yet complete. There have been cited against the caveator *Lord Sudeley v. Attorney-General* ([1897] A.C. 11); *Dr. Barnado's Homes National Incorporation Association v. Special Income-tax Commissioners* ([1921] 2 A.C. 1); and *Corbett v. Inland Revenue Commissioners* ([1937] 3 All E.R. 808, 809). These cases are clear and high authority for the proposition that the legatee of a share in residue has no interest in any of the property of the testator until the residue has been ascertained, and that his right is to have the estate properly administered and applied for his benefit when the administration is complete. The applicability of these cases to the interpretation of the words 'entitled to' and 'beneficially interested' where they occur in s. 146 of the Land Transfer Act is not weakened or affected by the circumstance that they are all revenue cases. They are examples of the application to revenue problems of a general proposition as to the nature of the legal rights of a person entitled to a share in residue. *In re Bielfield* (*deceased*) ((1894) 12 N.Z.L.R. 596), a decision of *Williams*, J., is distinguishable on the ground that the caveator in that case was entitled by the will of the testator not to a mere share of residue, but to the reversionary interest in specific leasehold premises."

The Court of Appeal ordered the caveat to be removed, because the caveator had no actual beneficial interest in the land itself. It is to be observed, however, that where there is a trust for sale and conversion and all the debts of the testator have been paid, and all the beneficiaries are *sui juris*, they can request the trustee not to sell but instead to transfer the land to them in *specie*; it is apprehended that in such a case a beneficiary would have the right to caveat.

The principle of *Lord Sudeley's* case, [1897] A.C. 11, is often followed by the Stamp Duties Department in issuing assessments under the Death Duties and Stamp Duties Acts. As we have seen, the attempt to confine that principle to revenue cases has failed.

Mechanically Recorded Evidence.

Its Value Demonstrated.

In keeping with the ideas of the Minister of Justice (the Hon. H. G. R. Mason) on law reform and facilitation of litigation, use was made by the Supreme Court recently for the first time of a special recording machine based on the Dictaphone principle. It was purely in the way of an experiment, evidence being taken in the usual way by the Judge's associate at the same time. In this case, a non-directional microphone was suspended approximately eqidistant from the Bench, the counsels' tables, and the jury seats; and another microphone stood near the Registrar. Wires lead from the microphones to a Dictaphone Telechord recording-machine devised to preserve continuity of speech.

The taking of evidence in shorthand has been used in recent years in England, and some Australian States, but even that system, although involving less delay than direct transcription on the typewriter, had its limitations; and the local experiment was designed to go one step further and enable cases to be conducted with maximum efficiency. The action in which this experiment was made was a claim or an action for £7,000 damages brought against the Wellington City Corporation and the Westport Coal Co., Ltd., by Marcia Donnellan, aged seventeen, whose left leg was amputated following a collision between a tram and a lorry in Wakefield Street, Wellington; and the award of £7,000 damages against the Corporation has set a new high level in damages for personal injuries in New Zealand. This latest case was also notable for the installation for the first time of this new method of recording evidence.

The value of the Dictaphone Telechord recording of the evidence in the above trial was referred to by the learned Chief Justice, Sir Michael Myers, on one of the days of this trial, when His Honour commented

on the value of the mechanical notes. An omission in the typewritten notes of evidence was repaired by reference to the Dictaphone Telechord record of the proceedings. His Honour drew counsel's attention to the omission, and quoted the correction: "I knew he had said it, but I took the precaution of sending for the mechanical notes," he said. "It shows the value of the mechanical notes."

If the system be generally adopted, it would obviate the necessity for the trial Judge taking elaborate long-hand notes, which involve a waste of time and perhaps prevent the Judge from having a full opportunity of observing the witness's demeanour, and also prevents cross-examination from being conducted at a speed sufficient to avoid a witness's having too much time to think about his answers. It would also be of particular help in the recording of the Judge's summing-up. Frequently in the past, on application for a new trial on the grounds of misdirection of the jury, discussion has arisen in the Court of Appeal as to the exact wording of the trial Judge's direction to the jury. The recording system would overcome that difficulty, and, if necessary, the cylinders could be played back to show what actually was said, or even to indicate the inflection and emphasis used.

The operation of the system is simple. The whole of the speech is recorded through microphones either directional or non-directional depending upon the particular Court-room in which the instrument is being used; but, whichever type of microphone be used, it would be suspended from a convenient place in the Court. As it is unobtrusive, it would have no repressive psychological influence on a witness. The recording-machine can be placed outside the Court-room at any convenient place, so that there is no interruption of proceedings through typists or others entering the Court to change records. The only visible mechanism appearing in the Court is the microphone and very little wiring.

A special microphone is provided for use by the Registrar, or Court officer taking the Court. When examination or cross-examination or address begins, he speaks into this microphone, to indicate the name of counsel and whatever the Court officer says is recorded on the cylinder for the benefit of the typists. Similarly, when the Judge speaks the change is indicated through the Court officer's microphone.

The completeness and incontrovertibility of the mechanical recording of the whole proceedings, in question and answer form, is an important feature. It obviates any possibility of misconstruction in transposition from first to third person, as often happens in taking notes of technical evidence direct on the typewriter which is the prevailing system here.

A further device was given a trial during the past few weeks in the Supreme Court in Wellington. This device was a microphone and amplifier together with loud-speakers used for the purpose of enabling Judge, jury, and counsel more readily to hear a witness's statements and replies to questions. The use of the microphone before the witness-box and the loud-speaker behind the jurymen was of great assistance. This device was installed on the second day of hearing, and, after that, no witness, however gentle in voice, was asked to raise his tone. No suggestion of mechanical amplification was given, but the voice was clearly heard by the jury at conversational pitch. The microphone and amplifier were also used by the Chief Justice in his direction to the jury.

New Zealand Law Society.

Council Meeting.

A meeting of the Council of the New Zealand Law Society was held at the Supreme Court Library, Wellington, at 11 a.m. on Friday, December 9, 1938.

The following Societies were represented: Auckland, represented by Messrs. A. H. Johnstone, K.C., J. B. Johnston, and H. M. Rogerson; Canterbury, Messrs. K. M. Gresson and J. D. Hutchison; Gisborne, A. T. Coleman; Hamilton, Mr. H. J. McMullin; Hawke's Bay, Mr. H. B. Lusk; Marlborough, Mr. W. T. Churchward; Nelson, Mr. C. R. Fell (proxy); Otago, Messrs. R. G. Sinclair and C. L. Calvert (proxy); Southland, Mr. A. M. Macdonald; Taranaki, Mr. R. Quilliam; 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. D. Brodie, H. W. Kitchingham, and L. K. Munro.

The President, Mr. H. F. O'Leary, K.C., occupied the chair until 12 noon, when he withdrew to appear in Court, the Vice-President, Mr. A. H. Johnstone, K.C., occupying the chair for the remainder of the meeting.

Clerical Workers' Application for Award.—Mr. J. F. B. Stevenson wrote stating that practitioners and employees in the Canterbury District and in the Taranaki, Wellington, and Nelson Industrial Districts had been given the same exemption as had been granted in connection with the Dominion Clerical Workers' Award.

Mr. Hutchison pointed out that the Canterbury employers had just completed a new agreement with their employees and that this agreement included a clause providing for a five-day week until such time as any two of the other three major centres of the Dominion should decide to revert to a five-and-a-half day week. He thought that similar provision should be included in any future agreements entered into by employers in other districts.

It was accordingly decided to bring the matter to the attention of those districts concerned.

Juries in Civil Cases and Special Juries.—Mr. A. H. Johnstone reported that the Auckland Committee had not yet received reports from all the District Law Societies, and thought it advisable to await these prior to making any recommendations on the matter.

Examinations for Barristers and Solicitors.—Mr. Gresson reported that no combined report from the Deans of the Law Faculties was as yet prepared, but that Mr. A. C. Stephens and he had drafted a report which would be presented later.

Mr. A. H. Johnstone pointed out that the New Zealand Law Society had its representatives on the Council of Legal Education, and that a report prepared under the auspices of the Society had been forwarded to that Council, which had sent it on to the University. The greatest of care had been taken to obtain all possible information, and inquiries had been made all over the Empire concerning law courses in the various Colonies and Dominions. It had been desired to lay down a course culturally better than the previous one, and one which would compare favourably with

those in countries in which we sought reciprocity. If any substantial cutting-down of subjects occurred, the objects for which the Council of Legal Education had been set up would be lost. He thought that nothing should be done until the new Professor of Law in Auckland had been given an opportunity of considering the syllabus and advising thereon. The law course in Sydney was more severe than the New Zealand one, and the Melbourne course was just as severe.

It was decided that the matter should be held over until the next meeting.

History of Administration of Justice in New Zealand for One Hundred Years.—Mr. Rogerson stated that Mr. N. H. Good was preparing a report on the lines required, and would send this immediately it was ready.

Shortly before the meeting concluded, this report arrived, and it was decided to circulate it immediately among the District Societies, and, if necessary, to ask them to treat it as an urgent matter.

Multiplicity of Returns due between April 1 and June 1.—The Secretary of the Wanganui District Law Society wrote as follows :—

"I notice from the minutes of the meeting of the Council of the New Zealand Law Society held on September 30 last that the above question was held over to enable my Society to forward a complete list setting out the various returns referred to. These returns are land-tax returns, employment-tax returns of income other than salary or wages, and income-tax returns.

"I may say that the question was first raised by a practitioner from a smaller town, who explained that in his town one official was detailed to deal with land-tax, income-tax, employment-tax, employment registration, and motor-car registration.

"The result was, of course, congestion, and any person wishing to transact business dealing with any of these matters had to take his place in a queue, and might be called on to wait for a long period before he can be attended to. In the larger centres the congestion is not so bad, but it is, nevertheless, very considerable.

"The difficulty about employment returns is common to all dairying districts."

Members were of opinion that this was not a matter in which the Law Society should interest itself, and it was accordingly decided that no action should be taken.

Solicitor acting for Vendor and Purchaser.—The Secretary of the Canterbury Law Society wrote as follows :—

"I am directed to send you with this letter some observations on the above matter, and to ask that your Society should take into consideration the propriety of making some alteration in the scale of charges.

"It is thought that if this were done, it would in many cases prevent quarrels and misunderstandings."

Enclosure :

"A case recently arose in this district in which a client protested against being charged by a solicitor who was acting for the complainant (who was vendor) and for another party (who was purchaser). The charges made to the complainant related only to procuring the consent of the mortgagee to the sale and matters necessary to be attended to to discharge the vendor's obligations, and which, if they had not been so attended to by the purchaser's solicitor, would have had to be done by another solicitor acting separately on behalf of the vendor.

"It is suggested that there is no impropriety if a solicitor acts for both vendor and purchaser and charges the vendor for matters exclusively referable to the vendor's obligations, even although the same solicitor acts for and charges to the purchaser the cost of completing the transfer. It was thought that consideration might be given to the question of adding some note to the scale recognizing the propriety of both parties being charged by their common solicitor in this way. The scale implies that where a solicitor acts for and charges the transferee no charge can properly be made by him to the transferor. It is suggested that where work has to be done exclusively on behalf of the transferor, this may properly be charged for notwithstanding the solicitor making his full charges against the transferee."

Mr. Hutchison outlined the position as set out in his Society's report, and recommended that the report should be adopted.

It was decided as follows :—

That the Council is of opinion that in a case such as that referred by the Canterbury District Law Society—where a solicitor acting primarily for a purchaser acts as well for the vendor, there is no impropriety in such solicitor making, in addition to the usual charges to the purchaser, a charge to the vendor, provided the charge made to the vendor is for work necessary to discharge obligations resting on the vendor (as, for example, procuring the consent of a mortgagee).

Requests for Library Assistance.—The Marlborough and the Nelson District Law Societies wrote asking if some assistance could be granted to them for the carrying on of their libraries.

The President pointed out that under the New Zealand Council of Law Reporting Act, 1938, that Council was given power to make grants out of its profits to the New Zealand or District Societies. He recommended therefore that applications by any District Societies should be forwarded to the New Zealand Law Society which would bring the applications before the Council of Law Reporting when it met in March next.

This suggestion was unanimously adopted.

Customary Hire-purchase Agreements.—The following letter was received from the Wanganui Society :—

"I enclose a copy of letter received from Mr. , Solicitor, Wanganui. The question is obviously one of importance to Electrical Dealers and Finance Companies, and I should be obliged if you could refer the matter to the proper authority with the object of having the matter put right."

Enclosure :

"Referring to my conversation with you on the 19th instant, I now wish to request your Society to apply to the New Zealand Law Society to recommend the amendment by Order in Council of the Seventh Schedule to the Chattels Transfer Act, 1924, by the addition of 'machines, chattels, or appliances of any kind requiring electrical current for their operation,' or some such similar amendment to cover hire-purchase or conditional-sale agreements comprising electric washing-machines, vacuum cleaners, refrigerators, &c.

"Power Boards and retail dealers have, during recent years, sold probably millions of pounds' worth of chattels of this nature on unregistered conditional-sale agreements, and, unless the proposed amendment is made, difficulties such as were encountered in *Randall and Kings'* case last year, relating to radios, may be encountered, and, in addition, finance corporations without being aware of the risk they run may lose the protection afforded them by s. 2 (3) of the Chattels Transfer Amendment Act, 1931."

Several members expressed the view that this was not a matter for action by the Law Society, but one which should be undertaken by individual practitioners on behalf of their clients.

It was accordingly decided that the subject was not one for the Law Society, but that those concerned should take the necessary steps.

(To be concluded.)

London Letter.

By Air Mail. Strand, London, W.C. 2,
December 19, 1938.

My dear EnZ-ers,—

This letter should reach you in the midst of the festive vacation period, just about New Year, if the air-mail service runs true to form. Consequently, to all of you, with the heartiest goodwill, I say: "The same to you."

In two days' time the Courts will be closing for the brief fortnight of Christmas vacation; and signs of departure for the South Coast, or anywhere else that will avoid the heavy snow that is ushering in Christmas week, are in evidence around the Temple. One shivers even more, when one remembers that you will be in your summer holiday attire as this reaches you, though it certainly does not so leave me at present. I hope you all have the best of weather, of good times, and a happy holiday generally to prepare you to meet with renewed vigour a prosperously busy 1939.

His Majesty Dines at His Inn.—His Majesty the King, a barrister and Bencher of the Inner Temple, dined last Tuesday with his fellow Benchers and barristers and with the students of that fortunate house; but it is not yet known which Inn, if any, will have the honour of admitting, electing, and receiving in like manner Her Majesty the Queen as barrister and Bencher.

Contempt of Court.—Last week the new Court of Appeal, which for the moment consisted of Lords Justices Luxmoore and Goddard, had an unusual experience. Early in the sitting they had refused an application by a litigant who had failed in the County Court and asked for a new trial. The disappointed applicant did not take action of reprisal at once. Like the expectant deer-stalker in his northern forest, he waited till the Lords Justices rose and so presented a better target. Then he opened fire upon them with tomatoes. Nothing could excuse such flagrant contempt of Court. If anything could be said in mitigation it is that the culprit chose a missile which, though it must offend against dignity and comfort, is not likely to inflict physical injury. It was otherwise when an old-time Judge, ducking as a brickbat crashed into the wall behind him, remarked, "Had I been an upright Judge I had been slain." There is also that excellent chestnut about Vice-Chancellor Malins who, when an offender missed him with an egg, said, "That must have been meant for my brother Bacon." But he sent the offender to prison, and in this case one thinks that the order for six weeks' imprisonment might well have been more severe. Perhaps the approach of Christmas may suggest a full apology and the possibility of mitigation. If it does the contemptuous marksman will be lucky.

What chiefly troubles me, now that the safety of Clauson and Goddard, L.JJ., is assured and the contempt of Frank Harrison in the course of purging, is as to why this man, having a good English name, threw those tomatoes. He was no William Tell with a tomato, any more than the defendant dart-thrower was in the case to which Slesser, L.J., made reference in another Court; and if he had been a cunning fellow he would have aimed elsewhere if he really did intend to hit one or more of the Judges. Deplorable though his conduct was, it was plain that he was moved by a sense of some deep but undisclosed injustice; and it would be interesting to know just how and why he got the impression that he had been "cheated out of his case" or "out of a fair trial" at or before his case was heard in the County Court.

The Croydon Water Case.—In *Read v. Croydon Corporation*, [1938] 4 All E.R. 631, which arose out of the typhoid epidemic at Croydon in the autumn of last year, Mr. Justice Stable, though he expressed his satisfaction at the full disclosure made by the officers of the corporation of all relevant matters, found that there had been negligence on the part of the corporation as regards the purifying of the water at the Addington well. The Judge excluded certain grounds of claim as untenable, and finally the question was whether, upon this finding, the corporation who owned the water undertaking were liable in damages to a child of an occupier in the borough who contracted typhoid fever through drinking the water. Mr. Justice Stable held that there was a common-law obligation on the corporation as regards the child, *and he awarded her £100 damages.* It was a test case, and since there were over three hundred cases of illness, of which forty-three were fatal, the total liability of the corporation, if the judgment stands, will be heavy. The necessity for the chlorination and filtering of water is now well known, and also the importance of excluding from the works any workman who has had typhoid fever until it is certain that he is not a "carrier." In the present case the negligence appears to have been a temporary lapse in the precautions usually taken, but it happened to occur at a time when their observance was specially required.

Injured Feelings.—The Court of Appeal gave their decision this week in a sad but interesting case on negligence and consequent damage: *Owens v. Liverpool Corporation.* A most unfortunate collision took place between one of the defendant's tramcars and a hearse, by which that vehicle was injured and the coffin displaced. The mourners coming behind must have suffered dreadfully and one does not feel that any pecuniary compensation could recompense them. They, however, sued for damages for injured feelings and were unsuccessful before the County Court Judge. Their appeal has now been allowed and their damages, which the learned Judge below had assessed in case he was wrong, confirmed. We shall soon have a full length judgment from the Court; but as the decision has been given it is not premature to take note of it. The adjacent question of damage for nervous shock has often been canvassed and *Hambrook v. Stokes*, [1925] 1 K.B. 141, is cited as the leading case, to which the new decision will no doubt be a valuable postscript. If a person is put in terror or shocked by what he actually sees, as apart from what is reported to him, he can sue. Two years later *Hambrook v. Stokes* was discussed in an interesting way in Scotland (*Currie v. Wardrop*, [1927] S.C. 538), where an acute difference of judicial opinion emerged. The case is well worth perusal.

A happy and prosperous New Year to you all!

Yours as ever,
Apteryx.

Practice Precedents.

Probate and Administration: Citation to Propound a Testamentary Instrument.

By E. G. Rhodes.

If there should be two wills of a deceased person in existence, persons interested under the earlier will, if they believe the later will to be invalid, may themselves propound the earlier will: and, if the executors or administrators under the later will neglect or decline to propound it, and no caveat has been lodged, the persons interested in the earlier will may cite the parties interested under the later will to propound it or to show cause why probate of the earlier will should not be granted.

The procedure is commenced by a notice to the parties interested under the later will that, failing an appearance on their behalf, a grant of probate of the earlier will will result. The persons cited then have an opportunity of attacking the earlier will: either by filing affidavits, when the matter is dealt with in Banco, or by the issue of a writ of summons for proof in solemn form, in which case the persons supporting the earlier will will be named as defendants.

In *In the Goods of Quick, Quick v. Quick*, [1899] P. 187, an action brought to set aside an alleged will, the legatees thereunder did not appear on being cited, and a grant of administration was made to the next-of-kin of deceased.

In *In the Goods of George Dennis*, [1899] P. 191, deceased left a document executed as a will, wherein he gave all his property to a person whom he appointed executrix. Upon proof of service of a citation on that person, calling upon her to bring in the will or to show cause why administration, as upon intestacy, should not be granted to applicant as next-of-kin and there being no appearance for or on behalf of the executrix, and although there was no evidence before the Court as to the invalidity of the will, a grant to the applicant, as upon an intestacy, was made: see, also, *Mortimer on Probate Law and Practice*, 2nd Ed. 511 *et seq.*

In the precedent following, it is assumed that there are two wills, one executed in 1907 and the other in 1938. The executor in the 1938 will renounces, and the same person as the executor in the first will applies on motion for a grant of the 1907 will alleging by affidavits mental incapacity or testamentary incapacity. A deed of revocation is filed and both wills are brought into the Registry. The usual affidavit in support of the motion for grant is also filed. The following forms are required:—

Motion for Grant of Probate.

IN THE SUPREME COURT OF NEW ZEALAND.
.....District.
.....Registry.

In the estate of A. B. etc. deceased.

Mr. of Counsel for C. D. &c. the applicant herein to move in Chambers before the Right Hon. Sir Chief Justice of at the Supreme Court House on day the day of 19 at the hour of 10 o'clock in the forenoon or as soon thereafter as Counsel can be heard for GRANT OF PROBATE of the will of the above-named deceased dated the day of 1907 to the said C. D. the executor therein named.

Dated at this day of 19 .

Certified pursuant to the Rules of Court to be correct.

Counsel for applicant.

Memorandum for His Honour.—The deceased A. B. executed a will dated the day of 1907, and appointed the said C. D. executor thereof. On the of , 1938, deceased executed another will whereof he appointed C. D. executor.

It appears from the affidavits of and filed herein that deceased was not of mental capacity or testamentary capacity when the second will was executed. C. D. has renounced the later will. The beneficiaries under this later will refuse to take any steps to propound the will. It is respectfully suggested that a citation be issued calling upon the beneficiaries under the will dated the day of , 1938, to propound same or show cause why probate of the will of deceased dated the day of , 1907, should not be granted; and, if no appearance to the citation is entered, it is respectfully suggested that this Honourable Court grant probate of the will dated the day of , 1907, to C. D. the executor therein named. His Honour is respectfully referred to *Mortimer on Probate Law and Practice*, 2nd Ed. 511 *et seq.*, and to *Morton v. Thorpe*, (1863) 3 Sw. & Tr. 179, 164 E.R. 1242; *In the Goods of Quick, Quick v. Quick*, [1899] P. 187; and *In the Goods of George Dennis*, [1899] P. 191.

Counsel moving.

Affidavit in Support of Motion for Probate.

(*Same heading.*)

I C. D. &c. make oath and say as follows:—

1. That I knew A. B. &c. now deceased when alive and that the said A. B. was resident or was domiciled at within this Juridical District and that the nearest Registry Office of this Court to the place where the said A. B. resided or was domiciled is at .

2. That the said A. B. died at on or about the day of 1938 as I am able to depose from having seen his dead body after death.

3. That the said deceased duly executed a will bearing date the day of 1907 which is now produced and shown to me and marked "A."

4. That the said deceased duly executed a further will bearing date the day of 1938 which is now produced and shown to me marked "B."

5. That I this deponent am the executor named in both the said wills.

6. That it appears from the affidavits of and to be filed herein that the said deceased was not of mental capacity or testamentary capacity when he executed the said will on the day of 1938.

7. That I am informed and verily believe that the beneficiaries under the said will dated the day of 1938 refuse to take any steps to propound the said will and desire that I should take no steps in that direction.

8. That I have renounced all my right and title to probate and execution of the said will of the day of 1938 as appears from the renunciation hereto annexed and marked "C."

9. That I am informed and verily believe that the said deceased executed no will or testamentary instrument subsequent to the day of 1938 hereinbefore referred to.

10. That the solicitor who drew the said will dated the day of 1938 is now dead and both witnesses to the said will have left the Dominion of New Zealand and cannot be found.

11. That I believe the will dated the day of 1907 to be the last valid will and testament of the said deceased.

12. That I will faithfully execute the said will dated the day of 1907 by paying the debts and legacies of the said deceased so far as the property will extend and the law binds.

13. That according to my knowledge and belief the estate and effects of the said deceased in respect of which probate is sought to be obtained are under the value of £ .

Sworn &c.

Renunciation.

"C."

(*Same heading.*)

WHEREAS the above-named A. B. duly made and executed a will dated the day of 1907 whereof he appointed to be the sole executor AND WHEREAS the said A. B. duly made and executed a further will dated the day of 1938 whereof he appointed the said to be the sole executor AND WHEREAS the said A. B. died on or about the day of 1938 AND WHEREAS it now appears that the said A. B. was not of testamentary

capacity at the date of the execution by him of the said will dated the day of 1938 AND WHEREAS the beneficiaries under the said will dated the day of 1938 have requested the executor not to make application for probate of the said will dated the day of 1938 NOW THEREFORE in pursuance of such request the executor of HEREBY RENOUNCES all his right and title to probate and execution of the said will of the said A. B. deceased dated the day of 1938.

Dated this day of 19 .

Signed by the said in the presence of .

This is the Renunciation marked "C" referred to in the annexed affidavit of sworn this day of 19 .

A Solicitor &c.

AFFIDAVIT OF .

(*Same heading.*)

I G. H. of medical practitioner make oath and say as follows:—

1. That I am a duly qualified and registered medical practitioner practising in the City of .

2. That I attended the said A. B. prior to his death for a period of over four years the first occasion being when he consulted me alleging he had pains in his stomach.

3. That some year or so later he called on me and said his complaint was worse and was caused by his wife trying to poison him.

4. That he produced to me several bits of glass and small stones that he said his wife had placed in his food.

5. That I soon formed the opinion that the said A. B. was suffering from general debility and delusions and I ordered him into a rest home but he refused to go.

6. That the said A. B. was visited by me at his home for various minor troubles relating to his health.

7. That the said A. B. was quick tempered and very sullen at times and he treated his wife unreasonably and was biassed against her.

8. That on one occasion the said A. B. consulted me complaining that his wife was mentally defective, but I did not take any action in the matter because I was absolutely satisfied on having observed and known his wife that the complaint was without foundation.

9. That I know of no reason that would cause the said A. B. any mental worry though he mentioned on several occasions he had bad luck in losing a sum of money in speculation.

10. That the said A. B. seemed reasonably fond of his children but was in my opinion too harsh in his treatment of them but not actually cruel to them.

11. That the said A. B. in conversing with me would talk calmly and suddenly fly into a passion his language regarding his wife being most intemperate and coarse.

12. That in the early part of the year 1938 I treated the wife of the said A. B. for injury to her arm which she alleged had been caused by her husband striking her with a broom. The injuries were consistent with such action on the part of the husband.

13. That from my observations the wife of the said A. B. conducted herself well and with great restraint and her home was neat and tidy.

14. That in my view the said A. B. during the year 1938 being the last year of his life by reason of his state of mind and his conduct towards his wife was not in a fit state to make a will or deal reasonably with his property in any manner in which consideration of his wife was involved.

Sworn &c.

AFFIDAVIT OF WIDOW.

(*Same heading.*)

I E. F. &c. of widow make oath and say as follows:—

1. That I am the widow of the above-named A. B. who died at the City of on or about the day of 1938.

2. That at the time of his death my husband the said A. B. was years of age. I am now years of age.

3. That my said husband was married once only and then to myself this dependent at on the day of 19 and there is issue of the marriage children to wit [*names*] aged years and years respectively.

4. That for years immediately prior to his death I resided with my said husband and children at .

5. That my said husband was always quick tempered and quarrelsome.

6. That throughout our married life my husband frequently struck me and I had to seek police protection on several occasions and medical attention.

7. That the only reason I continued to live with my late husband was to preserve a home for my children who were exceedingly considerate and kind to me.

8. That towards the last few years prior to his death my late husband became very morose and without any provocation would flare into violent tempers and generally displayed such an unreasonable aversion to me as to amount to an obsession on his part.

9. That because of his conduct it was impossible for me to visit entertainments or to cultivate any social life as I was not able to have any one visiting my home.

10. That in the last year of his life my late husband developed a suspicion that I was trying to poison or injure him by putting glass and other injurious materials in his food.

11. That my husband would go around our home picking up bits of glass and shell and small stones and after collecting them he would show them to various people telling them he had taken them out of his food.

12. That my late husband was restless and wandered round the house at night muttering to himself.

13. That my late husband was not actually cruel to my children but there was always a tense atmosphere and he was severe in his demeanour to them. He frequently checked them harshly and wrongly and they were afraid of him.

14. That my late husband consulted Dr. as to my treatment of him but Dr. visited me and advised me to take no action as he considered the said A. B. was suffering from delusions.

15. That my husband was in receipt of a war pension and though he lost a considerable sum of money some years ago was not in financial want. I think however he brooded over the loss of the money as he often referred to his bad luck in losing his money.

16. That at no time was there any cause on my part of complaints against me by the said A. B.

Sworn &c.

CITATION.

(*Same heading.*)

GEORGE THE SIXTH by the Grace of God of Great Britain Ireland and of the British Dominions beyond the Seas, King Defender of the Faith, Emperor of India.

To [*persons cited*].

WHEREAS it appears by the affidavit of and sworn the of 19 that A. B. late of died on or about the day of 19 AND WHEREAS the said duly executed a will bearing date the day of 1907 whereby he appointed of the Dominion of New Zealand to be the executor thereof AND WHEREAS the said duly made and executed a further will purporting to be his last will and testament on the day of 1938 whereby he appointed the said to be executor thereof AND WHEREAS if probate is granted of the will of the said deceased dated the day of 19 you would be entitled to an interest in the estate of the said deceased AND WHEREAS from the affidavits of : and filed in this matter it appears that the said A. B. was not of testamentary capacity when he executed the said will dated the day of 1938 AND WHEREAS the executor has renounced all his right and title to probate and execution of the said will of the day of 1938 AND WHEREAS the said executor has made application to this Honourable Court for probate of the said will dated day of 1907 of the said deceased to be granted to him AND WHEREAS copies of the before-mentioned wills and also a copy of the application for probate and the copies of the affidavits filed in support thereof are served on you herewith.

NOW THIS IS TO COMMAND YOU the said : and that within twenty-one days after service hereof on you inclusive of the date of such service you do cause an appearance to be entered for you in the Registry of this Honourable Court and take steps to propound the said will of the said deceased dated the day of 1938 or otherwise to show cause why probate of the said will of the said A. B. deceased dated the day of 1938 should not be granted to AND TAKE NOTICE that in default of your commencing within the said period of twenty-one days an action to propound the said will of the said deceased dated the day of 1938 or within that period to appear to show cause why probate of the said will of the said deceased dated the

day of 1907 should not be granted to the executor therein named or appearing do not show cause to the contrary our said Court will proceed to grant probate in common form of the said will of the said A. B. deceased dated the day of 1907 to the said the executor named therein.

Dated at this day of 19

Registrar.

Extracted by solicitor for whose address for service is at the office of .

PROBATE.

(*Same heading.*)

WHEREAS A. B. late of deceased died on or about the day of 1938 leaving two wills bearing date the day of 1907 and the day of 1938 respectively AND WHEREAS by order of this Court on the day of 19 IT WAS ORDERED that a citation do issue directed to the beneficiaries under the will of the said deceased bearing date the day of 1938 calling upon them and each of them to enter an appearance and propound the said will of the day of 1938 or to show cause why probate of the will of the said deceased dated the day of 1907 should not be granted to the and that in default of their so appearing and propounding the said will of the day of 1938 or otherwise showing cause why probate of the will of the said deceased bearing date the day of 1907 should not be granted to the executor named therein probate of the last-mentioned will would be granted to the executor named therein AND WHEREAS a citation was duly issued and served on each of the said beneficiaries under the said will of the day of 1938 AND WHEREAS the said beneficiaries have not so entered an appearance or propounded such will and have not shown cause why probate of the will bearing date the day of 1907 should not be granted to C. D. &c. the executor in the will dated the day of 19 NOW THEREFORE BE IT KNOWN TO ALL MEN that on this day of 1938 the will of the said A. B. deceased bearing date the day of 1907 a copy of which is hereunto annexed has been exhibited read and proved before the Right Honourable Sir Chief Justice of and administration of the estate effects and credits of the said deceased has been and is hereby granted to C. D. the executor in the said will and testament named being first sworn faithfully to execute the said will by paying the debts and legacies of the deceased as far as the property will extend and the law binds.

Given under the seal of the Supreme Court of at this day of one thousand nine hundred and .

Registrar.

NOTE.—No affidavit of service of citation is furnished herewith, though it is required to be filed.

Recent English Cases.

DIVORCE.

Desertion—Constructive Desertion—Desire of Offending Party to Continue Cohabitation.

In order that conduct may amount to constructive desertion it is necessary to show that the offending party did not wish to continue cohabitation.

BOYD *v.* BOYD, **[1938] 4 All E.R. 181. P.D.A.**

As to constructive desertion: see HALSBURY, Hailsham edn., vol. 10, pp. 654–656, par. 964; and for cases: see DIGEST, vol. 27, pp. 315, 316, Nos. 2930–2939.

HUSBAND AND WIFE.

Marriage—Presumption of Marriage—Parties Living as Husband and Wife—Subsequent Marriage Ceremony—Parties described as Bachelor and Spinster in Certificate of Ceremony.

The description of parties in banns and marriage certificate as single persons will rebut a presumption of marriage which may have arisen from their previous conduct.

Re BRADSHAW; BLANDY *v.* WILLIS, **[1938] 4 All E.R. 143. Ch.D.**

As to presumption of marriage: see HALSBURY, Hailsham edn., vol. 16, pp. 598, 599, par. 931; and for cases: see DIGEST, vol. 27, pp. 70, 71, Nos. 542–548.

MASTER AND SERVANT.

Liability for Tort of Servant—Fraud Involving Forgery—Ostensible Authority.

A master is liable for acts done by a servant within his ostensible authority, although the act may be a forgery.

UXBRIDGE PERMANENT BENEFIT BUILDING SOCIETY *v.* PICKARD, **[1938] 4 All E.R. 324. K.B.D.**

As to principal's liability for wrongful act not expressly authorized: see HALSBURY, Hailsham edn., vol. 1, pp. 285–287, par. 471; and for cases: see DIGEST, vol. 1, pp. 594–604, Nos. 2282–2340.

Verbal Contract of Employment for Indefinite Period at Fixed Yearly Salary—Sales Manager for Company to be Formed—Company never Formed—Dismissal after Three Months—Contract not to be Performed within a Year—General Hiring for a Year—Custom as to Notice in Case of Sales Manager—Statute of Frauds, 1677 (c. 3), s. 4.

A contract, being a general hiring of services for one year, entered into before the beginning of the year, comes within s. 4 of the Statute of Frauds.

VERNON *v.* FINDLAY, **[1938] 4 All E.R. 311. K.B.D.**

As to agreements not to be performed within a year: see HALSBURY, Hailsham edn., vol. 7, p. 110, par. 156; and for cases: see DIGEST, vol. 12, pp. 123–125, Nos. 806–828.

MONEY-LENDING.

Insufficient Memorandum of Loan—Unenforceable Contract—Right to Return of Security for Loan—Whether Plaintiff Put Upon Terms—Moneylenders Act, 1927 (c. 21), ss. 5 (6), 6.

Where under the Moneylenders Act, 1927, a contract is merely unenforceable and not illegal, the Court will order delivery up of securities without putting the plaintiff on terms.

COHEN *v.* J. LESTER, LTD., **[1938] 4 All E.R. 188. K.B.D.**

As to relief apart from Moneylenders Acts: see HALSBURY, Hailsham edn., vol. 23, p. 206, par. 310; and for cases: see DIGEST, vol. 35, p. 218, Nos. 450–452.

Memorandum of Loan Agreement—Loan Secured by Bill of Sale—Borrower Receiving Copy of Bill of Sale—Reference to Power of Seizure and Sale—Moneylenders Act, 1927 (c. 21), s. 6.

Where a loan is secured by a bill of sale, the terms of the bill of sale can be incorporated in the memorandum by reference if the borrower has been given a copy of the bill.

HOARE *v.* ADAM SMITH (LONDON), LTD., **[1938] 4 All E.R. 283. K.B.D.**

As to sufficiency of memorandum: see HALSBURY, Hailsham edn., vol. 23, pp. 190, 191, par. 280; and for cases: see DIGEST, Supp., Money and Moneylending, Nos. 353*a*–353*y*.

PUBLIC AUTHORITIES.

Statutory Powers—Permissive Powers—Erection of Bus-shelter—Interference with Access to Private Premises—Authority Acting Reasonably.

If a public authority, acting under statutory powers, has infringed private rights, it will not be liable if it has acted reasonably in doing something which the legislature must have contemplated would entail an infringement of such rights.

EDGINGTON, BISHOP AND WITHY *v.* SWINDON BOROUGH COUNCIL, **[1938] 4 All E.R. 57. K.B.D.**

As to permissive authority: see HALSBURY, Hailsham edn., vol. 26, pp. 259, 260, par. 573; and for cases: see DIGEST, vol. 38, pp. 21–31, Nos. 112–175.

SALE OF GOODS.

Implied Warranty—Fitness for Human Consumption—Husband and Wife Lunching in Hotel—When Wife Entitled to Sue in Contract.

Where a man and woman enter a hotel and order food, it is a question of fact to be decided on the evidence as to

whether there is a contract between each of them and the proprietor.

LOCKETT *v.* A. & M. CHARLES, LTD., [**1938**] **4 All E.R. 170. K.B.D.**

As to implied fitness for human consumption: see HALSBURY, Hailsham edn., vol. 29, pp. 63–66, par. 73,; and for cases: see DIGEST, vol. 39, p. 442, Nos. 710–715.

Oral Contract—Acceptance—Acceptance Within the Sale of Goods Act, 1893, s. 35—Sufficiency—Sale of Goods Act, 1893 (c. 71), ss. 4 (3), 35.

Once there has been acceptance within s. 35 of the Sale of Goods Act, 1893, the requirements of s. 4 are complied with.

Re A DEBTOR; DEBTOR *v.* PETITIONING CREDITORS AND OFFICIAL RECEIVER, [**1938**] **4 All E.R. 308. Ch.D.**

As to acceptance of goods: see HALSBURY, Hailsham edn., vol. 29, pp. 28–30, pars. 27–30; and for cases: see DIGEST, vol. 39, pp. 369–377, Nos. 84–161.

Sale of Lemonade Containing Poison—Liability of Retailer—Implied Conditions—Sale for Particular Purpose—Sale by Description—Merchantable Quality—Liability of Manufacturers—Foolproof Process with Adequate Supervision—Sale of Goods Act, 1893 (c. 71), s. 14 (1), (2).

The duty owed by a manufacturer of goods is not to ensure that they are perfect but to take reasonable care to see that no injury is done to the consumer.

DANIELS AND DANIELS *v.* R. WHITE AND SONS, LTD., AND TARBARD., [**1938**] **4 All E.R. 258. K.B.D.**

As to the application of the doctrine in *M'Alister (or Donoghue) v. Stevenson*: see HALSBURY, Hailsham edn., vol. 23, pp. 632–634, par. 887; and for cases: see DIGEST, Supp. Negligence, Nos. 364*a*–364*f*.

SETTLEMENTS.

Settled Land—Trustees Having Power of Sale with Consent of Annuitant—Trustees also Statutory Owners—Inconsistency of Two Powers of Sale—Statutory Power only Exercisable—Settled Land Act, 1925 (c. 18), s. 108 (1).

Where a general power of sale given by the Settled Land Act, 1925, to statutory owners is inconsistent with a limited power contained in a settlement, the statutory power is the only operative one.

Re JEFFERYS; FINCH *v.* MARTIN, [**1938**] **4 All E.R. 120. Ch.D.**

As to conflict between settlement and statutory provisions: see HALSBURY, Hailsham edn., vol. 29, pp. 749, 750, par. 1044; and for cases: see DIGEST, vol. 40, pp. 766–768, Nos. 2980–3003.

STREET TRAFFIC.

Speed-limit—Speedometer—Evidence by Two Police Officers of Speedometer Reading—Sufficiency of Evidence—Road Traffic Act, 1934 (c. 50), s. 2 (3).

Evidence of two police officers based solely on an untested speedometer and unaccompanied by any expression of opinion is not sufficient to satisfy s. 2 (3) of the Road Traffic Act, 1934.

MELHUISH *v.* MORRIS, [**1938**] **4 All E.R. 98. K.B.D.**

As to speed-limit: see HALSBURY, Supp., Street and Aerial Traffic, par. 682; and for cases: see DIGEST, Supp., Street and Aerial Traffic, Nos. 199*a*–207*a*.

WILLS.

Construction—Gift to Person and the Descendants of His Branch of the Family—Whether Construed as Entailed Interest—Indefinite Gift of Income—Law of Property Act, 1925 (c. 20), s. 130 (2).

In order to decide whether an entailed interest in personalty has been created, it is necessary to see whether the expressions used would have created an entailed interest in freehold land before 1926.

Re BROWNLIE; BROWNLIE *v.* MUAUX, [**1938**] **4 All E.R. 54. Ch.D.**

As to gifts creating an estate tail: see HALSBURY, 1st edn., vol. 28, Wills, pp. 787–791, pars. 1437–1440: and for cases: see DIGEST, vol. 44, pp. 1015–1026, Nos. 8728–8844.

Covenant Not to Revoke—Revocation by Remarriage—Restraint of Marriage—Public Policy—Validity.

A covenant not to revoke a will which is broken either by marriage or by remarriage is, to that extent, not enforceable as being in restraint of marriage and against public policy.

Re MARSLAND; LLOYDS BANK, LTD. *v.* MARSLAND., [**1938**] **4 All E.R. 279. Ch.D.**

As to covenants relating to wills: see HALSBURY, 1st edn., vol. 28, Wills, pp. 514, 515, par. 1025; and for cases: see DIGEST, vol. 44, pp. 178, 179, Nos. 73–86.

WORKERS' COMPENSATION.

Claim—Time—Widow of Workman Pursuing Other Remedy—Failure through Misjoinder of Parties—Further Proceedings Barred by Lapse of Time—Reasonable Cause—Workmen's Compensation Act, 1925 (c. 84), s. 14.

The fact that it seemed in the applicant's interest to take other proceedings is not reasonable cause for not making a claim under the Workmen's Compensation Act, 1925.

HARRIS *v.* JAMES HOWDEN & CO. (LAND), LTD., [**1938**] **4 All E.R. 167. K.B.D.**

As to claim for compensation: see HALSBURY, 1st edn., vol. 20, Master and Servant, pp. 180–182, pars. 385–390; and for cases: see DIGEST, vol. 34, pp. 367–375, Nos. 2971–3038. See also WILLIS'S WORKMEN'S COMPENSATION, 31st edn., pp. 389–413.

Rules and Regulations.

Industrial Efficiency Act, 1936. Industry Licensing (Fish-export) Amendment Notice, 1938. December 7, 1938. No. 1938/168.

Industrial Efficiency Act, 1936. Industry Licensing (Cement-manufacture) Amendment Notice, 1938. December 7, 1938. No. 1938/169.

Industrial Efficiency Act, 1936. Industry Licensing (Dry-cell Manufacture) Amendment Notice, 1938. December 7, 1938. No. 1938/170.

Health Act, 1920. Drainage and Plumbing Regulations Extension Order, 1938, No. 5. December 12, 1938. No. 1938/171.

Education Act, 1914. Teachers' Salaries Regulations, 1938. Amendment No. 1. December 13, 1938. No. 1938/172.

Industrial Efficiency Act, 1936. Industry Licensing (Cigarette-papers Manufacture) Notice, 1938. December 14, 1938. No. 1938/173.

Public Service Act, 1912, and Finance Act, 1936. Public Service Amending Regulations, 1938. December 5, 1938. No. 1938/174.

Physical Welfare and Recreation Act, 1937. Physical Welfare and Recreation (Fees and Allowances of Members of National Council) Regulations, 1938. December 13, 1938. No. 1938/175.

Reciprocal Enforcement of Judgments Act, 1934. Reciprocal Enforcement of Judgments (France) Rules, 1938. December 13, 1938. No. 1938/176.

Reciprocal Enforcement of Judgments Act, 1934. Reciprocal Enforcement of Judgments (Belgium) Rules, 1938. December 13, 1938. No. 1938/177.

Industrial Efficiency Act, 1936. Industrial Efficiency (Motor-spirits Licensing) Regulations (No. 2), 1938. December 13, 1938. No. 1938/178.

Post and Telegraph Act, 1928. Postal Amending Regulations, 1938 (No. 2). December 17, 1938. No. 1938/179.

Samoa Act, 1921. Samoa High Court Amendment Rules, 1938. December, 1938. No. 1938/180.

Board of Trade Act, 1919. Board of Trade (Wheat and Flour) Regulations, 1938. Amendment No. 1. December 20, 1938. No. 1938/181.

Fisheries Act, 1908. Salt-water Fisheries Amendment Regulations, 1938 (No. 3). December 20, 1938. No. 1938/182.

Industrial Efficiency Act, 1936, and the Board of Trade Act, 1919. Industrial Efficiency (Pharmacy) Regulations, 1938. December 20, 1938. No. 1938/183.

Agricultural Workers Act, 1936. Agricultural Workers Extension Order (No. 5), 1938. December 20, 1938. No. 1938/184.