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

" I am reluctant to repeat the warning, so often reiterated in this House, against the danger of superseding the words of the Legislature by language used by Judges in particular cases, and with reference to the facts of the particular cases, in order to explain how they arrived at the particular decisions."

LORD WRIGHT in *Harris v. Associated Portland Cement Manufacturers, Ltd.*, [1938] 4 All E.R. 831, 842.

Vol. XV. Tuesday, April 18, 1939. No. 7.

"Added Peril": A Clarification.

AN extreme degree of carelessness in carrying out work within the scope of the employment does not amount to an " added peril," and it is no answer to a claim for compensation under the Workers' Compensation Act, 1922. This important proposition emerges from the decision of the House of Lords in *Harris v. Associated Portland Cement Manufacturers, Ltd.*, [1938] 4 All E.R. 831, decided in December last.

An " added peril " was described by Lord Haldane in *Lancashire and Yorkshire Railway Co. v. Highley*, [1917] A.C. 352, as meaning " a peril voluntarily superinduced on what arose out of the employment, to which the workman was neither required nor had authority to expose himself." And, in *Stephen v. Cooper*, [1929] A.C. 570, hitherto regarded as the leading authority, Lord Hailsham, L.C., at pp. 573, 574, said :

> " It is well established by a series of decisions in your Lordships' House, that, apart altogether from the question of serious misconduct, if the accident arises from some peril to which the workman has exposed himself by his own conduct, and which he was not obliged to encounter by any term of his contract of service, the accident cannot be said to arise out of his employment."

In *Harris's* case, this statement was explained by Lord Atkin, at p. 835, when he restated it, as follows :—

> " It is plain that Lord Hailsham, L.C., was addressing himself to the facts of the case before him, and was merely purporting to restate the well-known test that a workman, to recover compensation, must be doing something he was employed to do. With great respect, however, I think that in this connection the word ' obliged ' is capable of being misunderstood. The peril which a workman encounters in the course of doing his work by doing it negligently is not a peril which he is obliged to encounter. In fact, by his contract of service, he is obliged not to encounter it, for it is an implied term that he should work with reasonable care.
>
> " There are many things which the workman is not obliged to do, for he is given a complete discretion as to what to do and where (within limits) to do it—as, for instance, in the case of gamekeepers, and often gardeners. Even so, however, I think that the word may be misunderstood and the test must be, whether the perils are those which he in fact encounters while doing the work which he is employed or authorized to do."

His Lordship criticized the expression " added risk," which was valuable enough in its right context. In a sense, he said, every man who does his appointed work negligently adds to the risks of his employment done carefully the risk of that employment done carelessly. The " added risk," His Lordship thought, might be more correctly called a different risk—that is, the risk of doing something which was not within his employment at all.

Lord Thankerton agreed as to the misleading use of the word " obliged " by Lord Hailsham, L.C. He could not agree with the Courts below that the question is one of " fact and degree " of recklessness : there must be a separable act—that is, the risk in doing something which is not within the worker's employment at all. His Lordship said the Courts below were open to the criticisms appearing in Lord Buckmaster's speech in *Thomas v. Ocean Coal Co., Ltd.*, [1933] A.C. 100, 108, 109, in the course of which, in referring to the principle of " added peril," used by Lord Hailsham, L.C., he says :

> " I agree with the Master of the Rolls [Lord Hanworth] in thinking that such a phrase is not a touchstone whereby to determine whether or not a man was acting within his employment, and it would, I think, be unfortunate if this phrase got crystallized into a form of test, and an accident should be looked at according to the meaning of those words instead of relying, as reliance must be placed, upon the words of the Act of Parliament."

Lord Macmillan, like Lords Atkin, Thankerton, and Wright, based his opinion on the cardinal condition of a valid claim for workers' compensation—*viz.*, that the accident causing personal injury to the worker arose " out of and in the course of his employment." In fine, the case arose on s. 1 (1) of the Workmen's Compensation Act, 1925 (Gt. Brit.), alone : this is substantially the same as s. 3 (1) of the New Zealand statute, the material words " personal injury by accident arising out of and in the course of his employment " being identical. Lord Macmillan, at p. 839, stated the principle in the following terms :—

> " It is well settled that a workman, during his working-hours, and when he ought to be doing what he is employed to do, may choose to do something which has nothing to do with his employment, and, while so engaged, may sustain injury by accident. In such a case, the accident plainly does not arise out of and in the course of the employment. The workman has, for the time being, by his conduct put himself outside his employment. He is not working at his job. He is doing something else. It is in this light that *Stephen v. Cooper* should be read and understood. The workman there, at the time of the accident was engaged, not in doing his work, but in a ' foolhardy act of bravado.' However, if an accident befalls a workman while he is doing something that he is employed to do, he cannot be said to have quitted his employment merely by reason of the manner in which he has acted in doing what he was employed to do."

A valuable review of the leading cases is found in Lord Wright's speech, which should be read in its entirety. In referring to the passage already quoted from Lord Hailsham's speech in *Stephen v. Cooper*, Lord Wright, at p. 842, said :

> " These words were apt and appropriate to the facts of the case as found by the arbitrator, but cannot properly be applied apart from their context, or used as a general statement of law of the same binding force as if written into the statute. I am reluctant to repeat the warning, so often reiterated in this House, against the danger of superseding

the words of the Legislature by language used by Judges in particular cases, and with reference to the facts of the particular cases, in order to explain how they arrived at the particular decisions. Nevertheless, I must at least give a reference to the words of Lord Dunedin in *Plumb v. Cobden Flour Mills Co., Ltd.* ([1914] A.C. 62), later quoted by Lord Buckmaster in *Thomas v. Ocean Coal Co., Ltd.* ([1933] A.C. 100, 109). In particular, Lord Dunedin there pointed out that most of the erroneous arguments put before the Courts in this branch of the law will be found to depend on disregarding the salutary rule that a test convenient in a particular case must not be allowed to dislodge the original words of the Act. I venture to add that the tendency to disregard the words of the Act and substitute extracts from judgments is largely responsible for the accretion of thousands of cases round a legislative measure which was intended to be administered rather than litigated upon."

In *Stephen's* case, Lord Wright added, the man was not obliged by his contract of service to assume the role of an acrobat, and, in doing so, he exposed himself to a peril arising from his own conduct. Hence the aptness in that case of the language of Lord Hailsham, L.C. Lord Warrington of Clyffe stated the position, at p. 582, thus:

"In my opinion it was quite open to the arbitrator on the evidence to find that what the appellant did was not merely an improper way of doing what he was employed to do—namely, replacing the chain—but was the doing of a thing—namely, the walking along the pole—which, whatever the object with which it was done, was a thing he was not employed to do and was not in the contemplation of either party to the contract."

The distinction so drawn was, in Lord Wright's opinion, vital in principle to the decision whether a case does or does not come within s. 3 (1) of our Act. Lord Warrington of Clyffe did not use the word "obliged," nor was that word used in the section of the Act. The term may be helpful in some cases when the Court is inquiring whether the thing done is different in kind from anything the man is employed to do, but it is not appropriate when the question has to do with acts which involve serious or wilful misconduct, or even negligence, but are otherwise such as the man has to do. It can only be appropriate when considering what is the intrinsic character of the acts, so as to determine if they fall outside the employment. If a man does what he is employed to do, he may perhaps be said to do what he is "obliged" by his employment to do, and, if that is true in any such case, it does not become less true merely because he does it in a manner which is negligent or improper, even to the extent of serious and wilful misconduct. No one would say that a man's employment obliged him to be guilty of serious and wilful misconduct, though the action as a whole was one which fell within his employment, and, as such, fell within s. 3 (1).

Lord Wright continued:

"'Obligation' on any view refers to the character of the act, and not to the manner of doing it. However, I should hesitate to treat the word as affording in any case real or general guidance. Lord Shaw, in *Stephen's* case, seems to indicate his opinion that, in certain events, a zealous or well-meaning workman may exceed his strict duty without losing the protection of the Act. That may well be true. Emergencies also may raise questions. The word 'obliged' finds no place in the Act, and the Courts have no right to insert it.

"The distinction to which I have been adverting is clearly drawn by this House in *Barnes v. Nunnery Colliery Co., Ltd.* ([1912] A.C. 44). Lord Atkinson says, at p. 49: 'In these cases under the Workmen's Compensation Act a distinction must, I think, always be drawn between the doing of a thing recklessly or negligently which the workman is employed to do, and the doing of a thing altogether outside and unconnected with his employment.' In the same case, Earl Loreburn, L.C., said, at p. 47: 'But if the thing he does imprudently or disobediently is different in kind from anything he was required or expected to do and also is put outside the range of his service by a genuine prohibition, then I should say that the accidental injury did not arise out of his employment'."

In referring to the leading decisions, Lord Wright said that the problem may be compendiously stated in the words of Lord Macnaghten in *Reed v. Great Western Railway Co.*, [1909] A.C. 31, as being whether the man, at the time when the accident happened, was about his own business, and not about the business of his employers. Again, in cases where there was an act of disobedience to regulations or orders, the question has been said to be whether the disobedience took the action outside the scope of the employment or was only a piece of misconduct in the employment. *Plumb v. Cobden Flour Mills Co., Ltd.*, [1914] A.C. 62, and *Lancashire and Yorkshire Railway Co. v. Highley*, [1917] A.C. 352, were cases in which the former view was taken, and it was held that the accident did not arise out of the employment. In these and other cases, the phrase "added peril" has been used, but, as Viscount Haldane pointed out, what that phrase means is a peril voluntarily superinduced on what arose out of the employment, to which the workman was neither required, nor had authority, to submit himself: *Highley's* case, [1917] A.C. 352, 361. Lord Dunedin in the same case, at p. 365, said:

"The question is always whether the case falls within the words of the Act, and that added peril is a test only, though a very convenient test in certain circumstances."

In *Thomas v. Ocean Coal Co., Ltd.*, [1933] A.C. 100, 109, Lord Buckmaster expressed himself to the same effect. That an "added peril" may not take a case out of the Act is, in Lord Wright's view, clear from the words of s. 1 (1) (*b*) (which is similar to s. 15 of the New Zealand statute), which enables compensation to be given if the injury results in death or serious and permanent disablement where the injury is attributable to serious and wilful misconduct. To say that the injury is attributable to serious and wilful misconduct means that it would not have occurred but for serious and wilful misconduct, so that the misconduct must have involved "an added peril." It seemed to his Lordship that this phrase, which does not embody a principle, is very apt to mislead and distract the mind from the true question.

Their Lordships, with Lord Russell of Killowen dissenting, reversed the order of the Court of Appeal (Sir Wilfred Greene, M.R., and Romer and MacKinnon, L.JJ., affirming the judgment of the County Court Judge), and held, in the words of Lord Macmillan, that the question was not one of degree, but of kind, not of the degree of carelessness or rashness which the worker exhibits in doing the work, but whether he is doing his work at all.

The general effect of *Harris's* case is to clarify the judgments dealing with "added peril," and to provide an objective test based on the actual words of the statute.

So long ago as 1920, the Court of Arbitration, in *Readford v. New Zealand Shipping Co., Ltd.*, [1921] N.Z.L.R. 40, held, in the words of Stringer, J., that the mere fact of the worker having added a risk to his employment does not of itself operate as a bar to compensation under the Act, but is merely a test as to whether or not the accident occurred outside the sphere of his employment. The deceased had quite unnecessarily increased the risks of his employment

by choosing a dangerous method of going to his work instead of the perfectly safe method that was available to him. That, however, was not sufficient to deprive his dependants of the benefits of the Act. Though the judgment is couched in somewhat hesitating terms, the effect is that the accident arose "out of" as well as "in the course" of the deceased worker's employment, and it differed in degree, and not in kind, from the risks incidental to that employment.

In a judgment delivered on February 24 of the present year, *Leonard v. Union Steam Ship Co. of New Zealand, Ltd.* (to be reported), the Court of Arbitration, per O'Regan, J., remarked that it certainly appeared that some confusion had been caused by the careless use of the phrase "added peril." Nevertheless, the Court could not agree with the plaintiff's counsel that, since the decision of the House of Lords in *Harris's* case, added peril was no longer tenable as a defence. It was quite clear, in the Court's opinion, that there was a distinction between a peril which takes the case outside the ambit of the employment, and a careless or negligent act within the employment. While that statement of the Court might be more felicitously phrased, no exception can be taken to the concluding passage from the judgment. After referring to *Plumb v. Cobden Flour Mills Co., Ltd.*, [1914] A.C. 62, 7 B.W.C.C. 1, and *Hetherington v. Dublin and Blessington Steam Tramway Co.*, [1927] I.R.75, 20 B.W.C.C. 852, the Court says:

> "In each of the cases quoted the injured man suffered from a risk introduced by himself and altogether outside the contract of service, and hence it was held that the accident did not arise out of the employment and that the employer was not liable to pay compensation. Such cases must be distinguished, however, from acts of carelessness within the contract of employment. It has been well said that, strictly speaking, every act of negligence by the worker is an added peril. Hence it is obvious that, but for the distinction between added perils in the proper sense and acts of carelessness within the contract of service, the Workers' Compensation Act in a large class of cases would be reduced to a dead letter. The outstanding characteristic of the Act is that it allows compensation without reference to any question of negligence. The employer is made liable for the results of accidents whether, in fact, he has been negligent or not. The Act leaves the door of the common law open to an injured man, and so he may discard his new remedy, and proceed for damages as before, but the Act is made available to him even in cases where there is no suggestion of negligence on the part of the employer, nor is a worker himself to be denied compensation by reason of any negligence on his own part, unless it amounts to serious and wilful misconduct, and even that will not preclude a claim where the accident causes death or permanent injury."

As to the last-mentioned aspect of the worker's negligence, it is well to remember Lord Macmillan's comment in *Harris's* case, at p. 838:

> "If the injury to the workman is proved to have been attributable to his serious and wilful misconduct, compensation is not to be disallowed by reason of this fact if the injury results in death or serious and permanent disablement. This is tantamount to saying that, although the accident is attributable to the workman's serious and wilful misconduct, it may nevertheless be held to arise out of and in the course of his employment. In such a case, although the employer cannot, in answer to the claim, plead that the accident was due to the serious and wilful misconduct of the workman, he may still plead that, for other reasons, it did not arise out of and in the course of the employment. Further, but again only if the accident results in death or serious and permanent disablement, the employer is precluded from pleading that the accident did not arise out of and in the course of the employment because at the time of the accident the workman was (*a*) acting in contravention either of a statutory or other regulation applicable to his employment or of orders given by or on behalf of his employer, or (*b*) acting without instructions from his employer, provided in both cases that such act was done by the workman for the purposes of, and in connection with, his employer's trade or business. Subject to these qualifications and restrictions, the plea that the accident did not arise out of and in the course of the employment remains available to the employer."

The judgments of the majority of their Lordships in *Harris's* case show that once their Lordships' test of the words of the statute is applied, and it is found that the work the worker was seeking to do was within the scope of his employment, and he was seeking to do it as part of his employment, the question of negligence, great or small, is irrelevant; and no amount of negligence in doing an employment job can change the worker's action into a non-employment job.

Summary of Recent Judgments.

SUPREME COURT. Palmerston North. 1939. March 23, 31. *Reed, J.*

In re **PALMER (DECEASED), WHITE v. FELTHAM CHILDREN'S HOME TRUST, INCORPORATED, AND OTHERS.**

Charitable Trust—Will—Legacies and Bequests—Gift to named Home—No Institution so named but Similar Institution in existence—Misnomer—Validity of Gift to latter Institution—Evidence—Existing Institution properly named in earlier Draft of Testator's Will—Inadmissibility—Subsequent closing of existing Institution—*Cy-près* Doctrine—Approved Scheme of Distribution—Religious, Charitable, and Educational Trusts Act, 1908, s. 15.

Testator bequeathed £1,000 "to the Old Men's Home at Hunterville," and made several other bequests to beneficiaries more or less identified with the religious body known as "the Brethren," of which he was an enthusiastic member. At no relevant date was there an institution known as "the Old Men's Home" at Hunterville, but there was an institution available to old men and known as "Bethel Home, Hunterville," conducted by one Robert King, described on the admission-form as a "home for aged saints in assembly fellowship," and carried on partly by the inmates' voluntary contributions, and partly by donations from friends and benefactors of the Brethren.

Evidence was tendered that the testator was interested in the home, and that in an earlier draft of his will that £1,000 was left to the assembly treasurers to be applied by them "for the maintenance of the Home at Hunterville for aged Christians named Bethel Home and conducted by Robert King."

For some time subsequent to the testator's death the Bethel Home was carried on. Before the legacy was paid over it was closed down. The Court was asked to approve a scheme for the distribution of the moneys representing the legacy by payment to Feltham Children's Home Trust, Incorporated, an institution supported and maintained by the Brethren, with provision for the relief of "aged, infirm, poor, or distressed people in New Zealand," and caring for poor, distressed, or sick children.

Upon originating summons under the Religious, Charitable, and Educational Trusts Act, 1908,

Hadfield, for the plaintiff; **G. C. Kent,** for the first defendant; **Prendeville,** for the second defendant; **Byrne,** for Public Trustee, ordered by the Court to represent the third defendant and other charities mentioned in the will.

Held, 1. That the evidence of the intention disclosed by the earlier draft of the will was inadmissible, as the case was not a correct description of any suggested object, and there was no suggested competitive object.

In re Bateman, Wallace v. Mawdsley, (1911) 27 T.L.R. 313, followed.

2. That the term used in the will was a misnomer for the object of the testator's intention, an existing charity—*viz.*, the Bethel Home, Hunterville—as evidence apart from the earlier draft will indicated.

3. That the gift was charitable, as the words "Old Men's Home" indicated an intention to assist the needy.

Verge v. Somerville, [1924] A.C. 496, 506, followed.
In re Slevin, Slevin v. Hepburn, [1891] 2 Ch. 236, applied.

4. That the legacy be administered *cy-près* in accordance with s. 15 of the Religious, Charitable, and Educational Trusts Act, 1908, and, in terms of an approved scheme, be paid to the Feltham Children's Home Trust, Incorporated.

Public Trustee v. Attorney-General, [1923] N.Z.L.R. 433, referred to.

Solicitors: Haggitt, Elliott, and Fawcett, Feilding, for the plaintiff; **Kent and Webb,** Wellington, for the first defendant; **Crown Law Office,** Wellington, for the second defendant; **Solicitor, Public Trust Office,** Wellington, for the third defendant.

Case Annotation: *In re Bateman, Wallace v. Mawdsley,* E. and E. Digest, Vol. 44, p. 641, para. 4775; *In re Slevin, Slevin v. Hepburn, ibid.,* Vol. 8, p. 346, para. 1404; *Verge v. Somerville, ibid.,* Supp. Vol. 8, para. 1404.

SUPREME COURT. Napier. 1939. February 23; March 20. *Ostler, J.*

In re **ELLISON (DECEASED), RAINBOW AND ANOTHER v. ELLISON AND OTHERS.**

Will—Devises and Bequests—Deficiency—Clause providing for Priority of Specified Gifts over others in Event of Deficiency of Assets—Estate ample before Napier Earthquake—Legacies paid prior thereto—Reduction of Value of Estate by Earthquake—Insufficient to pay Annuities in full—Whether payable out of Capital—Gifts given priority ranking *inter se*—Specific and demonstrative Legacies taking priority over Annuities—Adjustment of Annuities *inter se*—Method of Adjustment and Valuation—Whether Interest should be added to Arrears of Annuities—Whether Legacies or Benefits received prior or subsequent to Earthquake should be refunded.

By his will the testator bequeathed all the household effects in his dwellinghouse to his wife; and to his son, daughter, and nephew a specific number of shares each in the E. Company in which he held shares.

He devised and bequeathed the remainder of his property for conversion, and after payment of debts and funeral and testamentary expenses upon trust to pay his wife a lump sum of £500, and an annuity of £750 for the remainder of her life. She was also given the option of retaining the testator's dwellinghouse as the home or of having it sold and another home purchased with the proceeds, or the option of being paid the interest earned by the purchase price. The wife was also given a life interest in a property known as "Te Awanga." Upon the death of the wife certain pecuniary legacies were given. Then followed a direction to pay his nieces an annuity of £50 during their joint lives, to be divided equally between them. On the death of either the whole of the annuity was to be paid to the survivor for life and a direction to pay an annuity of £50 to a daughter-in-law for her life. The residue was bequeathed to the testator's surviving children as tenants in common and equal shares.

By the last clause in the will the testator declared that in the event of any deficiency of assets the following gifts should for all purposes have priority over any other gifts contained in the will—*viz.*, the gifts of shares in favour of his son and daughter, the legacy and annuity in favour of his wife and the gift to her of household effects, and the annuity in favour of the nieces.

The trustees paid debts and death duties and the £500 legacy to the widow, handed over shares to the three legatees thereof in satisfaction of their legacies, allowed the widow the use of the house until sold, from which date he was credited with interest at 5 per cent. upon the purchase price. They also paid her such income as Te Awanga produced.

Down to the date of the Napier earthquake, February 3, 1931, the estate produced ample income to pay the annuities provided for in the will. As the result of losses in that earthquake the assets and income of the estate were substantially reduced and the trustees became unable to pay the annuities in full.

On an originating summons for the interpretation of the will,

Biss, for the trustees; **Scannell,** for H. E. Ellison; **Martin,** for R. and O. Ellison and also for P. C. Ellison; **Grant,** for the Hawke's Bay Children's Home; **Tattersall,** for E. M. V. Ellison.

Held, 1. That the annuities were payable out of the capital of the estate in so far as they could not be paid out of income.

Re Coller's Deed Trust, Coller v. Coller, [1937] 3 All E.R. 292, applied.

2. That the gifts referred to in the last clause of the will took priority over all other gifts in the will.

3. That the specific legacy of the household effects in the house and the demonstrative legacies of shares took priority over the annuities and only the two annuities mentioned in the said clause would abate rateably *inter se.*

4. That the method of valuation of such annuities for the purposes of abatement should be as settled by *Re Cox, Public Trustee v. Eve,* [1938] 1 All E.R. 661, which was applied.

5. That as the executors were authorized by the will to transfer the shares and pay the widow's legacy, none of such legatees could be called upon to refund any part of his or her legacy, nor could the executors in making the adjustment of the abatement of the legacies debit the widow with any part of her legacy.

6. That there could be no refund or adjustment of the benefits received by the widow in respect of her rights in connection with the dwellinghouse or with the income of Te Awanga, received to the date of the earthquake, but, in the adjustment, the widow should be debited with all benefits in these respects received by her since the date of the earthquake.

7. That there could be no refund of moneys paid to the daughter-in-law on her annuity to the date of the earthquake, but there should be a refund of moneys paid to her since that date.

8. That the joint annuity of the nieces should be valued on the expectation of life of the younger of the two.

9. That in making the adjustment between annuitants interest should not be added to the amounts short paid to the annuitants.

Re **Wyles, Foster v. Wyles,** [1938] 1 All E.R. 347, applied.

Solicitors: Gawith, Biss, and Wilson, Masterton, for the plaintiffs.

Case Annotation: *In re Coller's Deed Trust, Coller v. Coller,* E. and E. Digest, Supp. Vol. 39, para. 457a.

SUPREME COURT. Nelson. 1939. March 10, 22. *Reed, J.*

HARGREAVES v. HARGREAVES.

Husband and Wife—Deed of Separation—Covenant by Husband for Weekly Payments for the "Support and maintenance" of Wife and Child—Whether Allowance to Wife liable to reduction on account of Earnings of Child.

By a deed of separation giving the wife the custody of the one child the husband covenanted that he would pay to the wife "for the support and maintenance of" herself and the said child the sum of £2 10s. per week. Provision was made for reduction on the reduction of the husband's pension, provided that the said weekly payments should not be reduced below £2 4s.

On appeal from the decision of a Stipendiary Magistrate giving judgment for the wife in a claim for arrears of payments under the deed,

Rout, for the appellant; **Kerr,** for the respondent.

Held, That the allowance to the wife was not affected by the measure of the cost of maintenance of the child, or liable to reduction on account of the earnings of the child.

De Crespigny v. De Crespigny, (1853) 9 Exch. 192, 156 E.R. 82; **Rowell v. Rowell,** (1903) 89 L.T. 288; and **Hole v. Hole,** [1936] N.Z.L.R. 1010, G.L.R. 697, referred to.

Solicitors: Rout and Milner, Nelson, for the appellant; **J. R. Kerr,** Nelson for the respondent.

Case Annotation: *De Crespigny v. De Crespigny,* E. and E. Digest, Vol. 27, p. 234, para. 2057; *Rowell v. Rowell, ibid.,* para. 2059.

The "Just and Equitable" Ground for Winding-up.

A Consideration of some Decisions.

By L. J. H. Hensley.

Like Lord Clyde in *Baird v. Lees*, [1924] S.C. 83, 92, "I have no intention of attempting a definition of the circumstances which amount to a 'just and equitable' cause." It is now many years since this ground for a compulsory winding-up of a limited company escaped from the confines of the *ejusdem generis* rule which sought to limit its operation. On the other hand, the "just and equitable" cause cannot altogether be said to be at large, although some recent cases, which it is proposed shortly to examine, reveal a tendency on the part of the applicants, though not of the Court, to extend the principle beyond judicially established limits.

A well recognized extension of the just and equitable cause is to be found in the case of private companies consisting of so few members as to be practically partnerships.

In re Yenidje Tobacco Co., Ltd., [1916] 2 Ch. 426, was decided on the question of "deadlock," but, nevertheless, gave birth to what may be termed "the partnership analogy," since judicially approved by Courts of the highest authority in England and by the Court of Appeal in New Zealand. The words of Warrington, L.J., in *Yenidje's* case are often quoted, and will bear repetition:

> "In substance, therefore, it seems to me these two people are really partners. It is true they are carrying on the business by means of the machinery of a limited company, but in substance they are partners, the litigation in substance is an action for dissolution of the partnership, and I think we should be unduly bound by matters of form if we treated either the relations between them as other than that of partners or the litigation as other than an action brought by one for the dissolution of the partnership against the other; but one result which of course follows from the fact that there is this entity called a company is that, in order to obtain what is equivalent to a dissolution of the partnership, the machinery for winding up has to be resorted to."

The principle thus laid down in *Yenidje's* case was approved by the Judicial Committee in *Loch v. John Blackwood, Ltd.*, [1924] A.C. 783, 791, and the opinions expressed by Warrington, L.J., commended as "careful and accurate."

These authorities were also considered and applied by our Court of Appeal in *Tench v. Tench Bros., Ltd.*, [1930] N.Z.L.R. 403. The Chief Justice (Myers, C.J.) however, uttered the following warning:—

> "Remembering that a private company in New Zealand may have as many as twenty-five shareholders, I wish to guard myself against saying that the principle laid down in the two cases cited [*Yenidje's* case and *Loch's* case] applies to every New Zealand private company. It is sufficient to say that, in my opinion, it applies to the present case, which is the case of four brothers who originally carried on business in partnership in equal shares and then converted their business into a private company."

For the sake of completeness *Davis v. Collett*, [1935] Ch. 693, must also be mentioned. There, one director and shareholder in a small private company, by means of certain irregularities, acquired complete control of the company and excluded the other director and shareholder from the management of it. Crossman, J., applying the principles laid down in *Yenidje's* case granted a winding-up order, although the opening words of his judgment, "in deciding whether it is just and equitable that the company should be wound up, I am left really to consider in the widest possible terms what justice and equity require," are perhaps a little too wide, unless they are related to the established principles considered and applied by him in his judgment.

Now it should not be thought that the Courts, in thus invoking the partnership analogy, are losing sight of the corporate entity of a limited company.

The analogy is still only an analogy. It does not mean that a small private limited company *is* a partnership, and it does not justify a loose identification of a private company with a partnership in every feature.

Mr. Justice Edwards certainly went so far as to say in *Ex parte Simson Brothers, Ltd.*, (1913) 16 G.L.R. 159, which was not a winding-up case, that "a private company is really in the nature of a partnership with limited liability and subject to certain statutory regulations," but as against that statement is the more recent pronouncement of Mr. Justice Ostler in *Russell v. Croucher*, [1937] G.L.R. 36: "With regard to the contention on behalf of the plaintiff that the Courts in the case of a private company will look through the company and treat it as a partnership, I can find no authority for that proposition except in applications for the winding-up of such a company."

It also must not be lost sight of that the partnership analogy in winding-up is based on and supported by s. 38 of the Partnership Act, 1908, which empowers the Court to declare a dissolution of partnership in certain cases, including the case "where circumstances have arisen which in the opinion of the Court render it just and equitable that the partnership be dissolved."

There are, however, those who would press the analogy further, and who, like Professor R. S. T. Chorley, would commend "a more realistic attitude towards corporate entity," and who like the same professor would sympathize with the view expressed by the Canadian Judges in *E. B. M. Co., Ltd. v. Dominion Bank*, [1937] 3 A.E.R. 555, who said: "That the company was a sham simulacrum or cloak and that its business must be regarded as the business of these three directors." (See *1937 Annual Survey of English Law*, p. 215.)

Such a view was rejected by the Judicial Committee, who found it necessary to reaffirm the principles laid down so long ago in *Salomon v. Salomon and Co., Ltd.*, [1897] A.C. 22.

The two recent decisions, which it now proposed to examine, reveal, to some extent, an endeavour to press the "just and equitable" rule beyond its previously well-defined limits and the firm rejection by the Courts of such an attempt.

In *In re Cuthbert Cooper and Sons, Ltd.*, [1937] 2 A.E.R. 466, half the shares in a private company were held by two elder sons, who, at the time proceedings were brought, were the sole directors, and the remaining half belonged to the estate of their deceased father, who had appointed three younger sons his executors and bequeathed the shares to them. In a petition presented by the three younger sons for the winding-up of the company, it was alleged that the elder sons, who continued the sole directors of the company, had consistently refused to register the three younger sons as shareholders or to assign any reason

for such refusal; that the younger sons had been improperly dismissed from their employment with the company; and that the directors had refused to supply the younger sons with copies of the balance-sheet for the then current year. Thus, there were all the elements of a family squabble, and indeed it might appear from a reading of the case that the younger sons were being harshly and unsympathetically treated. Yet no deadlock was disclosed, nor any injury to the company or its property, nor any assertion by the "elder brethren" of anything beyond their strict legal rights under the articles of association of that company. Simonds, J., after pointing out that the petitioners had, if they chose to exercise them, other remedies in respect of their allegations of failure to be put on the register and of wrongful dismissal, held that

> "whether it be a matter of articles of association or articles of partnership the rights of the parties are determined by those articles and the question whether it is right for me to apply the principles of partnership to the question of dissolution depends upon what are the contractual rights of the parties as determined by the articles of association in this case."

The learned Judge then came to the conclusion that the three executors were in the awkward position in which they found themselves by reason of the bargain, as contained in the original articles of association, entered into by their testator. In the absence, therefore, of proved allegations of ill-faith and illegal oppression, he rejected the invitation of the petitioner's counsel to go behind the strictly lawful position and exercise the equitable jurisdiction of the Court, and held that the petition was misconceived.

"I should be travelling outside the limits within which cases have been decided before [said Simonds, J], if I held that it was just and equitable to wind up this company."

The case is certainly close to the border-line, but as no infringement of the petitioners' contractual rights under the articles had been established, and as, apparently, other appropriate remedies were still open to them, it is difficult to quarrel with the decision.

An even more recent decision on the extent of the "just and equitable" rule was delivered in December of last year by Mr. Justice Bennett in *Re Anglo Continental Produce Co., Ltd.*, [1939] 1 A.E.R. 99. There the petition took the somewhat unusual form of a petition presented by the company for its own compulsory winding-up. The petition was presented by a majority of the shareholders in number and value, though not such a majority as would enable a special resolution to be passed.

As the headnote stated:

> "The substantial reasons given for its being just and equitable to wind up were (1) that the majority of shareholders desired to have repaid to them the money which they had tied up in the company, as it was not earning any interest or dividend, and (2) that there was a state of deadlock and friction which made it impossible for the business to be carried on. The company was not being carried on at a loss."

The Court held that it should not exercise its jurisdiction as prayed, unless

> "Some wrong had been done to the company and the company is deprived of its remedies in respect of it by improper use of voting-power of the shareholders, or that the substratum of the company has gone, or that it is impossible owing to the way in which the voting-power is held and to the feelings of the directors towards one another for the business of the company to be carried on."

The petitioner had failed to establish that any of these conditions existed and the petition was accordingly dismissed.

Dealing, first, with the second of the company's grounds for an order, it should be observed that there was no evidence that any state of friction existed. A governing director with very large powers under the articles was in control, and it was suggested that a Mr. Hansen, who apparently had the power of appointing a second governing director with co-ordinate jurisdiction, might exercise that power and then friction might develop between the two joint governing directors. This, of course, was pure speculation, a sort of *quia timet* application that could not be accepted seriously by the Court; no doubt it was alleged in order to bring the petition at least *ex facie* within the well-known principles laid down in *Yenidje's* case and *Davis v. Collett*.

The other ground is at least attractive to disgruntled shareholders who would regard a private company as a partnership at will.

"The mere fact that a majority want to get their money back does not make it just and equitable that the company should be wound up in order that they may get it back. There must be something more than that," was the answer of Bennett, J., in refusing these petitioners the drastic remedy of a winding-up.

Public Law in Europe.—Annexation after a successful war is a fact which Public International Law will recognize, but it is founded upon nothing else than—

> "The good old rule, the simple plan,
> That he may take who has the power,
> And he shall keep who can."

Accordingly, though conquest implies the acquisition of the territory of a State and the vesting of the whole rights of property and sovereignty in the conqueror, yet for the result to be complete the conquering State must have the power to hold its newly acquired possession. But the invasion and capture of Bohemia and Moravia by Germany present a variation on this procedure, since it is not the result of war, nor was there any case for war. It was annexation in time of peace by the mere show of overwhelming force. For this, no doubt, history has precedents, but it is difficult to find for it any basis for recognition in International Law. Doubtless, if the annexation stands—as presumably it will—it will acquire a legal basis, and other countries will recognize it. How far the final destruction of the State of Czechoslovakia is a breach of promises made by Germany at Munich is being sufficiently discussed elsewhere. In the mixture of nationalities this new State—the product of the Treaty of Versailles—it may have contained in itself the seeds of dissolution. But under President Masaryk, who died eighteen months ago, and President Benes, who succeeded him, it was a great experiment in a free State, and the catastrophe of the present "rape" lies in the loss by an ancient people of their liberty.—APTERYX.

The Office of Coroner.

By J. H. Luxford, S.M.

II.

The Scope of an Inquest should be limited.

In the first part of this article I put forward the proposal that the office of Coroner be abolished, and that such inquests as may be necessary be held by the Magistrates' Court on the application of the police, or, should the police decline to apply, on the application of any interested person. That involved dispensing with the requirement that an inquest be held *super visum corporis*. I referred to coronial proceedings under the existing law as dangerous because they may and in fact do interfere with the proper administration of criminal, civil, and natural justice, and I intimated that I would discuss the advisability of making certain alterations of the law to remedy the evil.

The first further amendment must be the definition of the extent and scope of an inquiry into the manner of the death of a person. The Wright Committee (at p. 14, para. 60) dealt with this question, and said:

> "There is . . . a tendency on the part of Coroners to go beyond the mere investigation of the facts of an unnatural death and to deal with questions of civil or criminal liability for the consideration of which the Coroner's Court is ill-equipped. There is also a tendency to make animadversions on the character and conduct of individuals. These may leave an indelible stain on the character of such individuals, though their conduct is not an issue in the case and they have sometimes no real opportunity at all of defending themselves."

The Committee at a later stage (at p. 33, para. 115) referred to questions of civil liability being raised in coronial proceedings. This is prevalent in New Zealand and has no bearing on the question of the manner of the deceased's death. I agree with the statement deposed to by one witness before the Committee that inquests are becoming happy hunting-grounds for gentlemen who use them to pick up material on the chance of getting damages out of one party or another. This practice was rightly described as an abuse of the Coroner's Court.

In my opinion, the scope of an inquest should be limited to ascertaining the actual cause of death. If that were so, the *factum* of the accident or other happening and the medical evidence only would be relevant; but not the circumstances surrounding the accident or happening, such as the deceased's negligence or the negligent or criminal act of any other person.

Shipping and air casualties are the subject of statutory inquiries, whether or not there is a loss of life. Factories, mines, and other places where workmen are exposed to danger are the subject of stringent regulations and of frequent inspections by qualified persons, who are required by law to inquire into the cause of any casualty occurring there.

A Coroner's Court is not the tribunal to inquire into technical matters. In the absence of an express statutory provision for setting up a Court of Inquiry comprising qualified persons to inquire into a casualty or disaster, the provisions of the Commissions of Inquiry Act, 1908, can always be invoked in proper cases.

The Wright Committee dealt with the practice of Coroners adding riders to their verdicts and making animadversions upon the conduct of persons. The same practice obtains in New Zealand, but will be impossible if the scope of an inquest is limited in the manner I have suggested.

Is the practice justified? Does it serve any useful purpose? Or may it not create an evil which outweighs any good that it serves?

Coroners' riders and animadversions are eagerly looked for and are given full publicity in the Press. But the answer to my questions is found in the Wright Report (at p. 35, para. 121):

> "Another instance of a tendency at inquests to pass beyond what we regard as the legitimate scope of the inquiry is exhibited by the habit of Coroners . . . of bringing in verdicts or riders of censure or exoneration. . . . We recommend that the inclusion of such matter in the verdict or in riders to the verdict should be prohibited. The only defence of these riders that we have heard is that riders of blame may act as a deterrent to individuals against whom they are directed. This, however, seems to involve an infringement of the principle of natural justice that persons should not be condemned in proceedings to which they are not parties and in which their conduct is not in issue. Nor is there any reasonable certainty that a right decision will have been arrived at . . . in a matter in respect of which no specific charge has been brought against any one, where the individual censured may not have had proper warning or an opportunity of answering the charge or being heard or represented and where in fact the question of his conduct is no more than a side issue. Verdicts of exoneration stand or fall with verdicts of blame."

After referring to an inquest on a girl of nineteen, who was said to have had sexual relations with a much older married man, who at one stage was thought to have been responsible for the death, but was shown by the medical evidence not to have been, and who was censured by the Coroner for his conduct, the Report states:

> "Animadversions of this character are matters of grave importance, because in the eyes of English law a man's right to have his reputation unassailed is to be preserved on the same principle that leads to the safeguarding of his right of personal liberty."

Too much stress cannot be laid on this interference with natural justice. How can a coronial inquest properly go into all the circumstances surrounding an alleged breach of the moral code? Yet Coroners seldom let the opportunity pass to declaim in the strongest terms any person who may have transgressed, indeed, do not hesitate to put questions relating to transgressions, whether they have any bearing on the manner of death or not.

There may be cases where the surrounding circumstances can conveniently and fairly be inquired into at an inquest. The power to do so, however, should be exercised only on an order of the Attorney-General, who would decide what parties to the proceedings should be cited and the charges they would have to meet; also whether two or more experts should sit with the Magistrate.

It is not necessary for me to elaborate this phase further.

The danger of the existing system interfering with the proper administration of civil and natural justice is not so serious as its possible interference with criminal justice. Perhaps I should not refer to natural justice as a special branch, because it is inseparably wrapped up in civil and criminal justice. This danger was the subject of serious controversy in England for many years prior to the passing of the Coroners Amendment Act, 1926 (Gt. Brit.). The effect of s. 20 of that Act is to require a Coroner to adjourn an inquest until after the conclusion of the criminal trial whenever some

person has been charged with murder, manslaughter, or infanticide of the deceased. He may resume the inquest after the criminal trial, presumably if the accused is acquitted and is shown not to have caused the death of the deceased, or decide not to resume the inquest, presumably if the accused is convicted or is shown to have caused the death of the deceased.

Some Coroners in New Zealand defer giving a formal finding pending the conclusion of a criminal trial, but there is no legal requirement that they should do so. The general practice in murder cases has been for the Coroner to sit with the presiding Magistrate or Justices during the preliminary hearing of the indictable charge against the accused, and to conduct the inquest simultaneously, but to defer his formal finding until after the trial.

The inquest on the death of Eyre was conducted simultaneously with the preliminary hearing of the murder charge against Thorn, and provides a classic example of the danger to which I have referred. The Crown Prosecutor actually called Thorn as a witness in the coronial proceedings, and Thorn was forced to claim privilege.

The provisions of the 1926 Amendment Act prevent the occurrence of a similar happening in England, but afford no remedy to the evil consequences which may follow an inquest touching the death of a murdered person where somebody is merely suspected of the crime. Let me again quote from the Wright Report (at p. 22, para. 87):

> "The cases of suspected murder which have been the subject of inquests have generally resulted in a verdict . . . that the murder was committed by some person or persons unknown. In the occasional cases where this has not happened and the murderer has been named, the position has usually been that there was not sufficient evidence to justify an arrest. We are inclined to think that in some of these cases the decision not to charge the suspect was wrong; and the consequence has been a very painful investigation, or, as it has been rightly called, an 'experimental trial' before the Coroner."

The inquests relating to the deaths of the victim of the Arch Hill murder and of Elsie Walker are examples of "experimental trials" in New Zealand. Probably no judicial proceeding in this country has been the subject of such condemnation in legal circles as the inquest relating to the death of Elsie Walker.

The Wright Committee dealt at some length with the safeguards present in a criminal trial which protect an accused from a possible miscarriage of justice, and stated:

> "We would compare these proceedings (in a criminal trial) with those which might take place in a Coroner's Court where murder is suspected and there is a suspicion against a particular individual who has not, however, been arrested . . . The suspect is subpoenaed to attend. He may not know by whom or on what grounds what is in truth a charge being made. Though the fiction is maintained that it is not a trial but an investigation, the evidence may be built up to make a case against him, sometimes when he is not even present throughout the inquest. The rules of evidence may not be and sometimes are not fully observed in such cases. He is eventually called as a witness and questions are put to him. However the matter is disguised, the real object of these questions is to elicit his guilt; yet there may be nothing which would amount to a *prima facie* case against him. He may be and in practice always is cautioned that he need not answer any questions, but if he does not answer, his refusal can only be because the answer may incriminate him, and an objection to answer based on this ground is scarcely calculated to place him in a favourable light. . . . The theory is that it is not a trial but an investigation and therefore a natural element in the investigation is to elicit every possible scrap of information from the suspected person. The result has been in several of these cases a severe cross-examination of a suspected person. These are the features which have caused so much dismay to the public mind. . . . Thus the principle underlying the criminal law of this country, which is referred to with pride, that the interests of an accused person should be safeguarded, is completely ignored."

The Committee was emphatic that although an inquest might throw some light on an alleged crime involving the death of a person, such cases are very rare and the possibility of eliciting valuable information too remote to counter-balance the objections to the present system.

The Report is a valuable document which should be studied by all persons interested in law reform. It devotes a chapter to the question, "Should the office of Coroner be retained?" and answers it in the affirmative, but subject to material limitations being imposed. I appreciate the grounds on which the Committee came to its conclusion because there is no Court in England similar to the Magistrates' Court which could be given sole jurisdiction to hold inquests.

Much more could be advanced in support of my proposals, but enough has been said to justify the suggested reforms of the present system.

New Zealand Law Society.

Annual Meeting.

(*Concluded from p. 78.*)

Agreements to Lease Affecting Houses and Residential Flats.—The Auckland Society was of opinion that the present provision should not be changed, but that if the majority of the Council favoured an alteration then there should be a general overhaul in the provisions under the scale concerning leases. The Otago Society thought the same, and was of opinion that the fee suggested in the Wellington report was not adequate. A reduction in the scale would make little or no difference to the preparation of leases by land agents. It was pointed out that the Wellington Society had gone very extensively into the matter, which was a real difficulty in Wellington, and that they had come to the conclusion that there must be either a reduced scale or that the provisions of the present scale could not be observed. The Wanganui Society agreed with Auckland; while, though the Southland Society sympathized with Wellington, it was felt that the suggested scale was too low. He was of opinion that the whole Landlord and Tenant Scale should be revised.

It was decided that no action should be taken.

An amendment that the scale for leases with reference to residential dwellings and flats should be referred to a Sub-committee was lost.

Reports and Statutes in the Law Libraries.—Mr. Wood drew attention to the fact that it would be of great value if each Library prepared a list of the Reports and statutes it possessed and forwarded this to each of the other Libraries. It would then be possible to ascertain with the minimum of inconvenience what reports were available in various parts of New Zealand.

It was accordingly decided that each District Society should be asked to compile a list of the Reports and statutes it possessed and send a copy of this list to each of the other societies.

Barrister and Solicitor Acting for a Local Body of which he is a Member.—The following letter was received from the Wellington Society :—

"At the last meeting of my Council, the following letter from a practitioner in the District was considered :—

"'I understand there was a ruling of the English Law Society some years ago that it was not proper for a barrister to act for a local body of which he was a member.

"'I should like to know what view the society would take in the case of a member or chairman of a Borough Council in New Zealand acting as solicitor to that Council, such solicitor having a general practice in the same borough.'

"As it was considered that the matter was of some general importance, it was decided to bring it to the attention of your society with a view to a definite ruling being adopted. Would you kindly therefore place the question on the order-paper for the next meeting.

"The attention of your Council is directed to the rulings of the English Bar set out on p. 2751 of the *Annual Practice*, 1939, as follows :—

"'**Member of County Council.**—A barrister should not appear either for or against a County Council or other local authority of which he is a member.

"'**Member of Local Council.**—A barrister should not accept briefs from the Town Clerk when the barrister is a member of the local Council.'

"My Council is aware of the provisions of s. 3 of the Local Authorities (Members' Contracts) Act, 1934, but desires the matter to be discussed apart from any bearing which that section may have on the particular instance quoted."

On the motion of the President, it was decided that Messrs. Hutchison and Godfrey should be a Committee to consider the matter and report to the next meeting.

Land Transfer Act: Caveats.—The Auckland Society wrote as follows :—

"It has been urged upon my society by a practitioner that steps should be taken to have the Land Transfer Act amended to overcome the difficulties which he considers arise under such circumstances as the following :—

"A. holds a first mortgage over a property against which a caveat is subsequently lodged by B. to protect another interest—*e.g.*, an agreement to execute a second mortgage. A. exercises his power of sale and executes a transfer to the purchaser C. This transfer cannot be registered until the caveat is removed and the practitioner in question has expressed the opinion that the only available procedure is under s. 154 of the Act—*viz.*, to lodge the documents in the Land Transfer Office and get the District Land Registrar to give the requisite notice to the caveator.

"This procedure is open to this grave objection, that as a purchaser almost certainly will decline to pay the purchase-money until the caveat is removed the vendor has to part with the documents without first receiving payment.

"On careful consideration of the relevant sections of the Act the Council of my society came to the conclusion that in a case such as cited the procedure for removal of a caveat provided by s. 152 is open to the mortgagee, and that if this view is correct no amendment of the Act is called for. The practitioner referred to is satisfied that if my Council's view is correct no amendment is necessary. In the opinion of my Council the mortgagee is within the meaning of s. 151 'a registered proprietor against whose title to deal with land under the Act the caveat has been lodged,' and such a registered proprietor can proceed under s. 152. (*Vide* definition of registered proprietors, s. 34 (3).) If this interpretation is correct, it follows that a mortgagee should receive the notice required to be given to a registered proprietor under s. 151. A representative of my Council has discussed the position with the District Land Registrar here, and, while his views coincide with those of my Council, he states that it has not been the practice to give such notice to a mortgagee—s. 151 apparently having been interpreted as not requiring this to be done.

"My Council feels that the matter is one of sufficient importance to bring before your society with the request that the Registrar-General be interviewed, and if he accepts my Council's interpretation that he be asked to give instructions to all District Land Registrars to include mortgagees amongst those to receive notice under s. 151."

This letter was also referred to Messrs. Weston, K.C., Hadfield, and Webb for a report.

Vouching Trust Account Payments.—The Wanganui Society wrote as follows :—

"I enclose herewith copy of a letter received from a firm of solicitors dealing with the question of vouching trust account payments, and I should be obliged if you would place the letter before the recently constituted Committee of the Law Society and Accountants Society for its consideration and ruling.

"The question is obviously one of great importance to solicitors, and was discussed at some length by my Council. The members were unanimous that in many cases it is a matter of impossibility to obtain separate signed vouchers to support payments from the trust account, many instances being given. My Council cannot appreciate that there is any particular magic in a voucher and feels satisfied that under proper safeguards the endorsement of a cheque drawn to order is just as valid a receipt as a separate voucher: it was in fact pointed out that in the case of payments by many Government Departments cheques require endorsement only, and there is printed on the cheques a statement that the endorsement operates as a receipt for payment, and that no further receipt is required."

Mr. Brodie stated that his society felt that it was impossible in many cases to get people to send back receipts, and, in any event, many accountants were of opinion that endorsed cheques were satisfactory vouchers.

The President drew attention to the minute of June 26, 1936, when the Taranaki Society had previously raised the matter, and when it had been decided that the question was one for the individual solicitor and his auditor to decide.

Mr. Quilliam was of opinion that that decision was most unsatisfactory as auditors varied considerably in their demands. He thought that there should be some uniformity of practice, and that there should be all vouchers or none. He recommended that the matter should be referred to the Joint Audit Committee for their considered opinion.

After several other members had expressed their opinion, the general feeling was that the regulations should not be made any more onerous than necessary, and it was decided that no action should be taken.

Mortgagors and Lessees Rehabilitation Act, 1936, s. 82.—The following letter was received from the Wanganui Society :—

"I enclose herewith copy of a letter from a solicitor of this city, suggesting an amendment to s. 82 of the Mortgagors and Lessees Rehabilitation Act, 1936. I should be obliged if you would bring this letter to the notice of the proper authority.

"I understand that amendments to the above Act are in contemplation. If the Council thinks fit I shall be glad if it will forward to the proper authority the following suggestion.

"That s. 82 be amended to make it lawful for an applicant to whom the section relates to sell upon such terms as shall be approved of in writing by all parties affected by the application, such approval to be filed in the Court before completion of the sale.

"The position is that where any reduction has been made it is necessary to apply by motion supported by affidavit for leave to sell.

"This involves, where all parties consent, a considerable amount of trouble and delay, and, I suggest, unnecessary work for the Court of Review. Where such consents are obtained leave is granted as a matter of course.

"I realize that no encouragement should be given to applicants to sell without leave or consent, and for this reason I suggest that the consent be filed.

"In the case of many applications, only one property is involved and only mortgagees are affected.

"In such cases, especially, dealings will be facilitated if they can be completed at once upon the filing of a formal consent.

"I have a case at present in which much inconvenience is being caused, and I anticipate others."

The view was expressed that as a rule, no trouble was caused when consents were lodged.

The motion that representations should be made to the appropriate Minister on the lines of the Wanganui letter was put to the meeting and was lost.

Removal of Fencing Covenants. — The Auckland Society wrote as follows :—

"I am instructed to request you to bring before the notice of your Council the position that pertains at present with respect to fencing covenants.

"There seems to be no authority for the removal of these from titles if they have become obsolete and of no effect. In consequence, there have been cases where as many as five covenants have had to be brought down on titles, and instances are not unknown where covenants were actually of no effect at the time of the registration of the transfer in which they were contained.

"My Council suggests that consideration be given to the question of providing legislative authority for District Land Registrars to remove fencing covenants from certificates of title on being satisfied that such covenants are no longer of any effect."

On the motion of the President it was decided to refer the letter to Messrs. Weston, K.C., Hadfield, and Webb for consideration and report.

Removal of Quarrying and Similar Rights.—The following letter was received from the Nelson Society :—

"You will remember that at the meeting on Friday it was decided to refer two matters in connection with the Land Transfer Act to a Sub-committee and the Chairman said that I might add a third matter to be considered at the same time.

"The point I want to bring up is in relation to s. 99 of the Land Transfer Act. That section provides that the Registrar shall upon proof of re-entry by a lessor, note such re-entry upon the Register and that thereupon the estate of the lessee shall determine. The Registrar here, and I understand the Registrar-General agrees with him, holds that this only applies to leases strictly so called, and that where a registered proprietor has granted to a grantee for a term of years the right to take timber or stone on payment of a royalty or created any other *profit a prendre* there is no machinery for getting this off the Register notwithstanding that the grantor may legally have terminated all the rights in accordance with the provisions of the instrument. I also understand that the Land Transfer Department agree that s. 99 ought to be made to apply to such an instrument and intends to do so when a general revision of the Act takes place, but in the meantime, in this district at least, considerable inconvenience is being caused through grants of the kind mentioned remaining on the title although they have in fact long since been determined.

"I shall be obliged if you will bring this matter before the Committee together with the other two matters mentioned at the last meeting."

The matter was referred to Messrs. Weston, K.C., Hadfield, and Webb for a report.

Students' Supplement, 1939.

Last year the Students' Supplement to the JOURNAL was an innovation and an experiment. It proved a great success, and was the subject of favourable comment not only in the Dominion, but overseas as well. Consequently, it has been decided to make this contribution to legal literature on the part of the junior members of the profession an annual event. Attention is drawn to an inset announcement of the appearance of this year's Students' Supplement, which will be published on August 22. The Organizing Committee hopes that, with the assistance of their Local Committees, they will have the support and encouragement of both principals and law clerks in their endeavour to emulate the achievement of last year's organizers. As they say in their announcement, the success of the Supplement depends on all law Clerks.

Mr. W. W. Samson.

Presentation on Retirement.

Mr. A. T. Young, President of the Wellington District Law Society, recently presided over a large gathering of its members to bid farewell to Mr. W. W. Samson, Registrar of the Supreme Court at Wellington, on the eve of his retirement.

He read letters from a number of practitioners, expressing regret at their unavoidable absence and sending their good wishes to Mr. Samson. Among the apologies received were messages from Messrs. H. F. O'Leary, K.C., C. H. Weston, K.C., J. J. McGrath, C. A. L. Treadwell, R. H. Webb, F. C. Spratt, A. J. Luke, W. H. Cunningham, E. P. Bunny, W. E. Leicester, C. R. Barrett, and Gillespie.

Mr. Young said that Mr. Samson would retire from office officially June 30 next, but he went on leave on the morrow of the day of the gathering, which was the last opportunity of seeing him in office.

MR. SAMSON'S CAREER.

"Some of you have known Mr. Samson only since 1925, but I assure you that his association with the profession and the Public Service goes back much further," said the President. "In 1898, he joined the Justice Department as a cadet in Christchurch ; and, since then, I am assured that he has played many parts.

In 1901, on the occasion of the inauguration of the Commonwealth, New Zealand sent to Australia a contingent, for which they selected "six-footers" : not only the stature requirements, but also all the military qualifications were fulfilled in Gunner Samson of E Battery. In 1902, Mr. Samson came to Wellington ; he was back in Christchurch in 1907 ; and in 1911 he was Acting-Registrar in Wellington. I am told that in addition to his work as Registrar, he undertook, among other duties, the coaching of a number of gentlemen, some of whom are present with us to-day. Judging from the positions they occupy in the profession to-day, there can be no doubt that his coaching was efficient.

"From 1918, Mr. Samson was occupying posts in the South Island ; and it was not until 1925 that he came back here as Registrar of the Court of Appeal and Sheriff. Those of us who knew him before 1925 welcomed him back as an old friend, while those who did not know him before welcomed him for the reputation he brought with him. Since then he has done much to cement the friendship with old and new friends. Mr. Samson has now had the splendid record of forty-one years' continuous service in the Justice Department."

AT THE FOOT OF OLYMPUS.

In his capacity as Registrar of the Court of Appeal, Mr. Young proceeded, Mr. Samson had occupied a seat at the foot of Olympus, and, on occasions, when a fresh breeze had blown down from the heights towards the far counsel, "Sammy" had been envied for his seat of comparative shelter at the foot of the mountain. All were grateful to Mr. Samson for his courtesy and for the help he had always given to the members of the profession ; and, in that respect, Mr. Young said, he spoke not only of their personal contact with him,

but also of his ability as head of the Registry of the Supreme Court. Of recent years, he had seemed a retiring man, but he could best be judged by his Department. All agreed that the Registrar's Department of this Court spoke for itself. It was a credit to him, and second to none in New Zealand.

"We hope that Mr. Samson will enjoy his leisure and retirement, and we all wish him and Mrs. Samson health and happiness for many years," said the President, in conclusion. "As an expression of our esteem and goodwill, we ask him to accept this canteen of cutlery. We have selected for him an article of daily use in the hope that it will bring back frequent memories of his association with the profession here. On behalf of the members of the Wellington District Law Society we wish him good luck and good health."

THE MISSING EXHIBITS.

In reply, Mr. Samson said he wished that he was sitting in that sheltered seat to which reference had been made instead of facing so many learned gentlemen; nevertheless he appreciated their presence very much. He referred to the time when he was first in Wellington as Deputy-Registrar in 1902. In 1911-12 he was acting as Registrar and Sheriff while Mr. D. G. A. Cooper was in England. He recalled one happening of those times, when there was a trade-mark case before the Court of Appeal and it was the duty of the office staff to see that there were sufficient bottles of Bass's ale and Guinness's stout on the bench before each of the five Judges. But one particular morning, some of these necessary exhibits were missing. Notwithstanding reliance on the solicitors in the case to supply the missing exhibits, there was a difficulty in procuring the particular labels, and in desperation the Court office had to fall back on the President's father, the late Mr. Thomas Young, who quickly got busy and fortunately was able to get the necessary bottles in good time for the Court sitting at 10.30 that morning.

Mr. Samson then drew attention to the fact that he was only the fifth Registrar in the Wellington Court. At first there was Mr. Strang; then Mr. Allan; Mr. Cooper followed; and then Mr. Hawkins and Mr. Samson himself. From a Registrar's and Sheriff's point of view that was a great record to put up.

"When I joined the staff here in 1902 the Magistrates' Court Office was where the Judges' Library now is and the small Court was the Court-house, Mr. A. D. Thomson being the Clerk of the Court at that time.

"I have always been proud of my association with the profession here; and, although perhaps I have appeared to be reserved, this has been due no doubt to change of habits. I agree with Mr. Young that the work of the Wellington office is now of a very high standard; and I would like to pay a tribute to the loyalty of the staff. I cannot really let this opportunity pass without paying a deserved tribute to them.

"I very much appreciate the thoughts that have been expressed in letters personally from members of the profession, and the good wishes of others who have called on me. I also appreciate very much the kind thoughts and sentiments expressed by you for the welfare and health of Mrs. Samson. I can assure you that your handsome present will be used daily, and that we shall always think of the good-will and sentiments which accompanied it."

The function concluded with applause and musical honours.

Practice Precedents.

Motion to Review and Rescind Order for Interrogatories.

In the precedent following it is assumed that an order for interrogatories on summons in a libel action has been made. The interrogatories directed to be answered are set out hereunder. It is desired to review the order: Code of Civil Procedure, R. 421. It will be seen two interrogatories were sought to be administered. The authority relied upon was *Jones v. Richards*, (1885) 15 Q.B.D. 439. In England, the objection can only be taken in the affidavit filed in answer to the interrogatory. In New Zealand, the objection may be taken on affidavit on the application for leave to deliver the interrogatory. For the difference between the English practice and the New Zealand practice, see *O'Neill v. New Zealand National Creditmen's Association (Wellington), Ltd.*, [1933] N.Z.L.R. 144.

An application for leave to deliver interrogatories may be resisted on several grounds. One of those grounds is that the interrogatory might tend to incriminate the party sought to be interrogated: *Redfern v. Redfern*, [1891] P. 139.

Generally as to the law relating to objections to answer the interrogatories, seen *Gatley on Libel and Slander*, 3rd Ed. 557 *et seq.*

The procedure for review and to rescind is by way of notice of motion. An affidavit in support is usually filed, though the affidavit filed in opposition to the summons may be relied upon.

ORDER FOR INTERROGATORIES.

SUPREME COURT OF NEW ZEALAND.

.....District. No.

.....Registry.

BETWEEN A. B. plaintiff

AND

C. D. &c. defendant.

INTERROGATORIES on behalf of the above-named plaintiff A. B. for the examination of the above-named defendant C. D.

1. Did you on or about the day of 19 or on some other date and what date write and send or cause to be sent to the plaintiff a letter of which a copy is annexed hereto marked "A" and of which the original will if you require it be shown to you before swearing your affidavit in answer to these interrogatories on your giving reasonable notice in that behalf?

2. Is the signature X. to the original of the letter referred to in interrogatory number 1 in your handwriting?

The defendant is required to answer both the above interrogatories.

MOTION TO RESCIND AND REVIEW ORDER FOR INTERROGATORIES.

(*Same heading.*)

TAKE NOTICE that Counsel for the defendant C. D. will move this Honourable Court on day the day of 19 at 10.30 o'clock in the forenoon or so soon thereafter as Counsel can be heard on review of the whole of the order dated the day of 19 made in Chambers in this action by the Honourable Mr. Justice whereby leave was given to the plaintiff to deliver to the defendant certain interrogatories and the defendant was ordered to answer the said interrogatories by affidavit on oath to be filed within ten days of the service of such order and whereby the costs of and incidental to such order were fixed at £ and were reserved FOR AN ORDER rescinding the said order upon the grounds that the said order is erroneous in law and upon the further grounds stated in the affidavit of the defendant filed herein

AND FOR AN ORDER that the costs of and incidental to this motion and of the said order be paid by the plaintiff.

Dated at this day of 19 .
Solicitor for the defendant.

To the Registrar and to the plaintiff and his solicitor

AFFIDAVIT IN SUPPORT OF MOTION.

(*Same heading.*)

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

1. That I am the defendant in this action.

2. That I have read the interrogatories proposed to be administered on behalf of the above-named plaintiff filed herein (or annexed to the affidavit of).

3. That I am advised by my solicitor and verily believe that the plaintiff desires my answers to the said proposed interrogatories with a view to endeavouring to establish with the aid of such answers and by means of evidence as to handwriting that the letter referred to in paragraph 2 of the statement of claim filed herein was written by me.

4. That I object to answer the said interrogatories on the grounds that to the best of my belief my answers to them would tend to incriminate me.

Sworn &c.

ORDER RESCINDING ORDER FOR INTERROGATORIES.

(*Same heading.*)

day the day of 19 .

Before The Honourable Mr. Justice

UPON READING the motion to review and rescind the order for interrogatories dated the day of 19 and the affidavit in support thereof filed herein and upon reading the interrogatories and upon hearing Mr. of Counsel for the defendant and Mr. of Counsel for the plaintiff it is ordered that the said order to answer the said interrogatories be and the same is hereby rescinded and it is ordered that the plaintiff do pay to the defendant the sum of £ for costs of and incidental to the motion and summons.

By the Court.

Registrar.

Recent English Cases.

Noter-up Service

FOR

Halsbury's "Laws of England"

AND

The English and Empire Digest.

CRIMINAL LAW.

Conviction for Libel—Recognisance to Come up for Sentence if Called Upon—Undertaking not to Repeat Libel—Breach of Undertaking—Whether Right to Trial by Jury—Crown Office Rules, 1906, rr. 115, 167.

Where a person has entered into a recognisance to come up for judgment if called up, final judgment may be passed on him without trial by jury.

R. *v.* DAVID, **[1939] 1 All E.R. 782. C.C.A.**

As to recognisances : see HALSBURY, Hailsham edn., vol. 9, pp. 231, 232, par. 236 ; and for cases : see DIGEST, vol. 14, pp. 492–494, Nos. 5412–5448.

ESTOPPEL.

Res Judicata—Actions Founded on Same Negligent Acts—Second Action by Agent of Plaintiff in Former Action—Son Driving Father's Motor-car.

Though parties in two actions may be principal and agent, they are not one person so as to allow the doctrine of res judicata *to be pleaded.*

TOWNSEND *v.* BISHOP, **[1939] 1 All E.R. 805. K.B.D.**

As to *res judicata* : see HALSBURY, Hailsham edn., vol. 13, pp. 412–414, pars. 467–469 ; and for cases : see DIGEST, vol. 21, pp. 205–211, Nos. 472–506.

LIBEL AND SLANDER.

Slander—Words Actionable *per se*—Words Imputing a Criminal Offence—"You Have a Conviction"—Words not Putting Defamed Person in Jeopardy of Prosecution—Payment in of Precise Sum Awarded as Damages—Costs.

Words imputing a crime of which a person has been convicted are actionable without proof of special damage.

GRAY *v.* JONES, **[1939] 1 All E.R. 798. K.B.D.**

As to words imputing a criminal offence : see HALSBURY, Hailsham edn., vol. 20, pp. 417, 418, pars. 503, 504 ; and for cases : see DIGEST, vol. 32, pp. 47–51, Nos. 528–634.

MISTAKE.

Mistake—Rectification—Agreement Containing Arbitration Clause—Parties Proceeding to Arbitration and Award Made—Claim for Rectification of Agreement in Action to Enforce Award—Estoppel.

In an action to enforce the award of an arbitrator, rectification may be sought of the contract containing the arbitration clause.

CRANE *v.* HEGEMAN-HARRIS CO., INC., **[1939] 1 All E.R. 662. Ch.D.**

As to time for rectification : see HALSBURY, Hailsham edn., vol. 23, p. 160, par. 232 ; and for cases : see DIGEST, vol. 35, pp. 142–144, Nos. 408–419.

POWERS.

Special Power of Appointment—Fraudulent Exercise of Power in Favour of Two Appointees—Severance—Subsequent Appointment to Same Appointees—Freedom from Taint of Second Appointment—Onus of Proof.

Where there has been a fraudulent appointment, and a second appointment in favour of the same appointee, the onus is on the appointor to show that the second appointment is free from taint.

Re CHADWICK'S TRUSTS ; SHAW *v.* WOODWARD, **[1939] 1 All E.R. 850. Ch.D.**

As to fraudulent appointments : see HALSBURY, Hailsham edn., vol. 25, pp. 581–586, Pars. 1033–1037 ; and for cases : see DIGEST, vol. 37, pp. 504–517, Nos. 972–1084.

WILLS.

Condition—Condition Inducing Future Separation of Spouses—Public Policy—Construction of Condition.

A clause in a will which is prima facie *void as conducing to a divorce may be unobjectionable if the testator's intention was to prevent money falling into the hands of a spendthrift husband.*

Re THOMPSON ; LLOYDS BANK, LTD. *v.* GEORGE, **[1939] 1 All E.R. 681. Ch.D.**

As to conditions inducing future separation of spouses : see HALSBURY, 1st edn., vol. 28, Wills, pp. 585, 586, par. 1159 ; and for cases : see DIGEST, vol. 44, pp. 453, 454, Nos. 2754–2762.

Rules and Regulations.

Animals Protection and Game Act, 1921-22. Green Turtle (*Chelonia mydas*) and Luth or Leathery Turtle (*Dermocyelys Coriacea*) absolutely protected. March 24, 1939. No. 1939/32.

Air Force Act, 1937. Royal New Zealand Air Force Regulations, 1938. Amendment No. 2. March 29, 1939. No. 1939/33.

Motor-vehicles Insurance (Third-party Risks) Act, 1928. Motor-vehicles Insurance (Third-party Risks) Regulations, 1939. March 29, 1939. No. 1939/34.

Dairy Industry Act, 1908. Dairy Registration and Inspection Amending Regulations, 1939. March 29, 1939. No. 1939/35.

Post and Telegraph Act, 1928. Radio Amendment Regulations, 1939. March 29, 1939. No. 1939/36.

Industrial Efficiency Act, 1936. Industry Licensing (Nail-manufacture) Notice, 1939. April 4, 1939. No. 1939/37.