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"The common law is quite competent to pronounce anything to be illegal which is manifestly against the public good."

LORD CHIEF BARON POLLOCK—In *Jeffreys v. Boosey*, (1854) 4 H.L. Cas. 815, 936; 10 E.R. 681, 729.

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Some Recent Decisions Under the Fair Rents Act, 1936.

THE Fair Rents Act, 1936, contemplates the existence of the relationship of landlord and tenant before a party can bring himself within its provisions. In a recent case, *Sievwright v. Marsh (No. 2)*, (1939) 1 M.C.D. 115, Mr. A. M. Goulding, S.M., said, for this reason, when there is a true tenancy at will, if the tenant who has no right to assign purports to assign or to sublet, and then abandons his tenancy or has it determined by notice or demand for possession, the alleged assignee or subtenant, as the case may be, has no protection under the statute. There is no express tenancy between such an assignee or subtenant; there is no implied tenancy by payment of rent; and mere occupation does not create any tenancy, and, as it is not then a tenancy which is determined by a notice to the tenant at will to quit, the landlord is entitled to possession. In other words, a tenant whose contractual tenancy has been brought to an end by effluxion of the term or by a month's notice under s. 16 of the Property Law Act, 1908, has merely a personal right, which confers no right of assignment: it is a right which does not devolve on the bankruptcy of the tenant, and which is not transmissible by will.

The word "landlord" in s. 13 (1) (*e*) of the statute does not necessarily mean the legal owner, or the person or body entitled, in law, to the immediate reversion of the tenement, but includes the person or body beneficially entitled to the rents and profits thereof. In *McVilly v. Froggatt*, (1936) 32 M.C.R. 75, it was said that if the action for possession is brought by a trustee, or by a person entitled to sue as agent, the Court, for the purposes of s. 13 (1) (*d*), treats as landlord the persons actually having the right to occupy the tenement after the defendant's ejectment. The same principle was applied to s. 13 (1) (*e*) in *Presbyterian Church Property Trustees v. Clark*, (1939) 1 M.C.D. 122, where possession was sought by the plaintiff, a statutory body appointed by the Church to administer its property. The Church is the beneficial owner of all property vested in the plaintiff, although part of the property and the income arising therefrom may be subject to special trusts. The tenement for which possession was sought was a freehold property bought by the congregation of a Presbyterian Church for the provision of a manse for their minister. It was vested in the plaintiff as registered proprietor and was the property of the whole Church, but it might be used and enjoyed only by the minister of the particular congregation for the time being. That being so, the Presbyterian Church was the "landlord" within the meaning of s. 13 (1) (*e*); and an order for possession of the dwelling-house was accordingly made against the defendant, a monthly tenant, who occupied the property as a residence at the time of its purchase by the plaintiff for occupation as a manse.

An interesting judgment by Mr. A. M. Goulding, S.M., in *Cotton v. Greaves, Cotton v. Walsh*, (1939) 1 M.C.D. 168 dealt with the manner of bringing "flats or apartments" within the statute, or of excluding them therefrom. To the definition of "dwellinghouse" in s. 2 of the Fair Rents Act, 1936, which is as follows:—

> "2. In this Act, unless the context otherwise requires, 'dwellinghouse' means any house or any part of a house let as a separate dwelling where the tenancy does not include any land other than the site of the dwellinghouse and a garden or other premises in connection therewith; and includes any furniture that may be let therewith; but does not include—
>
> "(*a*) Any premises let at a rent that includes payments in respect of board or attendance; or
>
> "(*b*) Any premises used by the tenant exclusively or principally for business purposes: . . .

another exception was provided by s. 3 (1) of the Fair Rents Amendment Act, 1937, by excluding from the operation of the statute

> "(*c*) Any premises forming part of a building originally designed and constructed for the purpose of being let as more than two separate flats or apartments."

The building in which the tenements in question were situated was originally erected some years ago in its present form and design to comprise, under one roof, the two tenements in respect of each of which an application was before the Court for the determination of its fair rent, and one other tenement. Each tenement had always been separately let, and the original application for a building-permit was for the erection of a building comprising three flats. The evidence showed that the tenements were separate and self-contained, with separate entrances and yards, and two of the tenements had separate washhouses under a common roof.

The learned Magistrate said it was apparent from the first part of the definition of "dwellinghouse" in s. 2 that the statute was intended to apply to what is commonly understood as a "house": a separate building for human habitation. He interpreted the word "house" as used in s. 2 in its popular sense as meaning a single building to be occupied in its entirety by one family: *cf.* the observations of the Earl of Halsbury, L.C., in *Grant v. Langston*, [1900] A.C. 383, 391. His Worship proceeded:

> "The Legislature, however, recognized that in many cases buildings of the type I refer to in the course of time cease to be occupied in their entirety by a single family. In some cases portion of the house is devoted to business purposes and becomes separate and distinct from the part which continues to be occupied as a dwelling-place; or an

upper story may not be required and is let independently to another family for dwelling purposes. In those cases the building remains structurally what it was in its origin, though part is let as a separate dwelling. It may well be that in the case of quite large houses with many rooms several different parts may be let as separate dwellings. That does not necessarily alter the original design and construction of the original dwelling. To adopt the words of Lindley, M.R., in *Kimber v. Admans*, [1900] 1 Ch. 412, 415, 416: 'The house is the whole amalgamation . . . It applies, not to the interior portion of the building, but to the whole building.'

"Now, I think it quite possible that a house of the type I have referred to may be subdivided or altered or converted into two or more flats, as that term is commonly understood, and those flats may be let separately. Whether such flats be self-contained or not, they do, in my view, remain subject to the Fair Rents Act, 1936, since they comprise 'part of a house' and are let 'as a separate dwelling' within the first part of s. 2."

The learned Magistrate then gave the important decision that in order to determine whether a tenement comes within the exception provided in para. (*c*) of the definition of "dwellinghouse," a proper interpretation depends on the result of an inquiry as to the "original design and construction of the building." To embark on an inquiry as to what is "a flat or an apartment" does not go to the root of the matter, because, as His Worship observed,

"Whether premises be called a 'flat' or an 'apartment' they are both dwelling-places, though neither is a 'house' or a 'dwellinghouse' as that term is used in the earlier part of the section. A 'flat' or 'apartment' may be either humble or pretentious. It may be more humble than the humblest house or more lavish and extensive than a very large house. But it is never a house; it is always a part of a building comprising a larger amalgamation. The term 'flat' may even be synonymous with the term 'house.' As Sir George Jessel said in *Yorkshire Fire and Life Insurance Co. v. Clayton*, (1881) 8 Q.B.D. 421, 424: 'In modern times a practice has grown up of putting separate houses one above the other; they are built in separate flats or stories but for all legal and ordinary purposes they are separate houses.'"

The learned Magistrate did not think the premises in question were semi-detached houses, as had been suggested. In such a case each semi-detached house would be a 'house,' such as he had referred to in the earlier part of his judgment, and not a flat or apartment.

Referring to *Brown v. Potter*, (1932) 32 M.C.R. 89, His Worship said that if the "conjoined houses" referred to therein were semi-detached houses of the type he had mentioned, then he agreed with that judgment. If, on the other hand, they were part of one composite building and the "original design and construction" of the whole building was for the purpose of letting four separate tenements, then, with the greatest respect for the experienced Magistrate who decided that case, he could not agree that they were subject to the Fair Rents Act, 1936.

The learned Magistrate accordingly decided that the flats in question were not subject to the Fair Rents Act, 1936, as they were excluded therefrom by the exception, in para. (*c*) of s. 2, to the definition of "dwellinghouse" in the earlier part of that section.

In *Carswell v. Larkin*, (1939) 1 M.C.D. 149, Mr. J. H. Luxford, S.M., held that the definition of "dwellinghouse" in s. 2 (*cit. sup.*) limits the operation of the Fair Rents legislation to the typical building section, which contains a certain amount of land around the house for lawns and gardens, and sites for the garage, washhouse, and similar buildings. It follows that once land additional to the curtilage of the actual dwellinghouse is included in the tenement, the whole tenement is outside the provisions of the statute. Therefore, an order for possession was refused in respect of a tenement comprising a house, an outbuilding, and $5\frac{1}{4}$ acres of land, which was subdivided by fences, and, in addition to the house section, consisted of two paddocks of four acres and one acre respectively.

Some interesting procedural questions arising out of the legislation have been the subject of recent decisions. In *Meikle v. Layton*, (1939) 1 M.C.D. 144, s. 12 (1) was under consideration. It is as follows:

"12. (1) No proceedings for the recovery by the landlord of possession of any dwellinghouse to which this Act applies, or for the ejectment of the tenant therefrom, on any ground other than the grounds specified in paragraph (*b*) or in paragraph (*c*) of subsection one of the next succeeding section, shall be commenced in any Court unless notice in writing of his intention to commence the proceedings has been given by the landlord to the tenant at least fourteen days before the commencement of the proceedings:

"Provided that where the tenancy has been duly determined by notice in writing given not less than fourteen days before such determination the foregoing provisions of this section shall not apply."

This section means, in the learned Magistrate's opinion, that a notice is required in every case except where (*a*) the order for possession is sought on one of the grounds set out in s. 13 (1) (*b*); or (*b*) the tenancy has been terminated by a notice in writing given not less than fourteen days before such determination. The giving of the notice is a condition precedent to the right of the landlord to sue for possession.

It was held, therefore, that this notice is effective only in respect of the particular action to which it refers; and, once that action is disposed of, the notice is exhausted. For instance, where, under the section, a notice has been given of intention to commence proceedings to recover possession of premises subject to the statute, and such proceedings have been commenced and, later, struck out for non-appearance of either party, that notice becomes exhausted; and the plaintiff must again give a fresh notice of intention to sue for possession before commencing a new action to recover possession of the tenement.

Section 14 of the statute is as follows:—

"14. In any proceedings in any Court for the recovery by the landlord of possession of any dwellinghouse to which this Act applies, or for the ejectment of the tenant therefrom, the Court may from time to time, subject to such condition (if any) as it thinks fit, adjourn the proceedings, or stay or suspend execution of any order or judgment that may have been made or given in the proceedings (whether before or after the commencement of this Act), or postpone the date of possession specified in any such order or judgment, for such period as it thinks fit, or may, subject to such conditions (if any) as it thinks fit, discharge or rescind any such order or judgment."

In *Baker v. Williams*, (1938) 1 M.C.D. 80, the landlord's solicitor submitted that this section did not apply if the warrant of possession had been executed. The learned Magistrate considered that this submission was well-founded, as the provisions of s. 14 were enacted to enable the Court to stay execution of a warrant of possession from time to time, but not to set aside the execution of a warrant, because the Court is *functus officio* once the warrant has been duly executed.

The Court, His Worship observed, has adopted the practice of requiring the tenant to file a written application for a stay or suspension of execution subsequently

to the making of a formal order for possession, and of holding back the issue of the warrant until the application has been disposed of. But this application does not automatically stay execution until the application has been heard and determined. The person to whom a warrant is addressed must execute it forthwith, unless he receives notice that the Court has stayed execution, as it should do, in a proper case, until the application has been heard. But, the learned Magistrate added, the safe course is to file, *ex parte*, a formal motion by the tenant or on his behalf, supported by an affidavit setting out the grounds, at the time of filing the written application, for a stay of execution.

Summary of Recent Judgments.

JUDICIAL COMMITTEE.
1939.
March 27, 28;
April 27.
Lord Atkin.
Lord Russell of Killowen.
Lord Macmillan.
Lord Wright.
Lord Romer.

WRIGHT AND OTHERS v. NEW ZEALAND FARMERS' CO-OPERATIVE ASSOCIATION OF CANTERBURY, LIMITED.

Mortgage—Mortgagor and Mortgagee—Mortgage authorizing Mortgagee to sell on Terms—Whether bound to Credit Mortgagor with Whole of Purchase-money before Payment—Whether Right of Redemption revives on Rescission of Abortive Agreement to Sell pending Resale—Land Transfer Act, 1915, Fourth Schedule, cl. 7—Property Law Act, 1908, s. 70 (1).

Statute of Limitations — Continuing Guarantee of Balance on Current Account—Liberty to Creditor to take Collateral Security—Such Security taken making Balance of Account payable "upon demand"—Advances made on Current Account and Notice demanding Payment made during Six Years prior to Action brought—Date from which Limitation ran—Statutes of Limitations, 1623 (21 Jac. I, c. 16)—Statute of Limitations, 1833 (3 and 4 Wm. IV, c. 42).

A mortgagee, who has contracted to sell in exercise of his power of sale, and who (the land not having become vested in the purchaser) rescinds the contract, is not accountable for purchase-money which he has never received.

Irving v. Commercial Banking Co. of Sydney, (1898) 19 N.S.W.L.R. (Eq.) 54, approved and applied.

In the mortgage in question the mortgagee's obligation as to the application of the sale-moneys was only expressed to exist in relation to "the moneys arising from such sale," and the power of sale included a power in the mortgagee to rescind and resell "without being answerable for any loss or diminution of price."

C. A. Settle, for the appellants; **W. Barton,** K.C., and **A. M. Wallace,** for the respondents.

Held, That, in any event, such provisions negatived the existence of the right claimed by the mortgagor that he was entitled to be credited with the whole of the price for which the property was contracted to be sold under the rescinded contract.

The following provision was contained in a guarantee of payment by the principal debtors of all goods supplied or thereafter supplied by the respondents to them and all advances already made and thereafter made together with interest and charges:—

"This guarantee shall be a continuing guarantee and shall apply to the balance that is now or may at any time hereafter be owing to you by the [principal debtors] on their current account with you for goods supplied and advances made by you as aforesaid and interest and other charges as aforesaid."

Held, 1. That the effect of such provision was that the repayment of every debit balance was guaranteed, as it was constituted from time to time, during the continuance of the guarantee by the excess of the total debits over the total credits.

2. That the number of years that had expired since any individual debit was incurred was immaterial; and the question of limitation could only arise in regard to the time which had elapsed since the balance guaranteed and sued for had been constituted.

Parr's Banking Co., Ltd. v. Yates, [1898] 2 Q.B. 460, (1898) 67 L.J. Q.B. 851, distinguished.

Judgments of the Court of Appeal, [1935] N.Z.L.R. 614, G.L.R. 497, and [1936] N.Z.L.R. 157, G.L.R. 25, affirming the judgment of *Johnston*, J., [1934] N.Z.L.R. 1037, [1935] G.L.R. 29, affirmed.

Solicitors: John Bailey, Le Mesurier, and Watts-Jones, for **R. L. Saunders,** Christchurch, for the appellants; **Gard, Lyell, and Co.,** for **C. S. Thomas,** Christchurch, for the respondents.

Case Annotation: *Irving v. Commercial Banking Co. of Sydney*, E. and E. Digest, Vol. 35, p. 516, note *q.*; *Parr's Banking Co., Ltd. v. Yates, ibid.*, Vol. 32, p. 333, para. 185.

COURT OF APPEAL.
Wellington.
1939.
March 21, 22, 23;
April 27.
Myers, C.J.
Ostler, J.
Smith, J.
Fair, J.

BROTT v. ALLAN.

Negligence—Contributory Negligence—Last Opportunity—Issues—Pedestrian and Motorist—Two Issues as to whether Defendant and Plaintiff respectively guilty of "Negligence materially or directly contributing to the accident"—Third Issue as to whether Defendant had later Opportunity than Plaintiff of avoiding Accident—All answered "Yes" by Jury—Effect of Issues and Answers—Whether Evidence justified Third Issue.

The plaintiff, a pedestrian, started to cross a street in front of a stationary motor-vehicle, walked a short distance, and was knocked down by a motor-car driven by the defendant and seriously injured. In an action by the plaintiff against the defendant for damages, the issues, apart from the question of damages, submitted to the jury and the answers thereto, were as follows:—

"1. Was the defendant guilty of negligence materially and directly contributing to the accident? *Answer*: Yes.

"2. Was the plaintiff guilty of negligence materially and directly contributing to the accident? *Answer*: Yes.

"3. If the answer to both the above questions is 'Yes,' could the defendant, notwithstanding the plaintiff's negligence, by the exercise of reasonable care thereafter have avoided the accident? *Answer*: Yes."

On a motion on behalf of the defendant for a nonsuit or alternatively for judgment for the defendant or for a new trial, removed into the Court of Appeal for argument,

North and **Trimmer,** for the defendant, in support of motion; **Leary,** for the plaintiff, to oppose.

Held, per totam Curiam, That the real question for consideration was whether the evidence was such as to justify the jury in finding that the defendant had, or should have had, a later opportunity than the plaintiff of avoiding the accident.

Held, also (*Myers*, C.J., *Ostler* and *Fair*, JJ., *Smith*, J., dissenting), That, as the evidence did not justify such a finding, the answer to the third issue must be disregarded, and judgment given for the defendant.

Per *Ostler*, J., That the decision in *McLean v. Bell*, (1932) 147 L.T. 262, laid down no new principle, but must be regarded merely as an application of the law of contributory negligence to the facts of that case.

Per *Smith*, J. (dissenting), 1. That the evidence was sufficient to justify the finding that the defendant had, or should have had, a later opportunity than the plaintiff of avoiding the accident.

2. That the principle of *British Columbia Electric Railway Co., Ltd. v. Loach*, [1916] 1 A.C. 719, might be applied, and the fact that the defendant drove with an obscured windscreen might be considered as disabling negligence which justifies such a finding.

The effect of the unusual wording of the first and second issues discussed by *Myers*, C.J.

Payne v. Burney, [1938] G.L.R. 491, applied.

McLean v. Bell, (1932) 147 L.T. 262; **Allan v. Redding,** (1934) 50 C.L.R. 476; and **Williams v. Commissioner of Road Transport and Railways (N.S.W.),** (1933) 50 C.L.R. 258, distinguished.

Admiralty Commissioners v. S.S. "Volute" (Owners), [1922] 1 A.C. 129; **Swadling v. Cooper,** [1931] A.C. 1, 10; **Shearer v. Mayor, &c., of Dunedin,** (1904) 24 N.Z.L.R. 192; **Auckland Laundry Co., Ltd. v. Glendinning,** [1931] G.L.R. 461; and **Benson v. Kwong Chong,** (1932) N.Z.P.C.C. 456, referred to.

Solicitors: **L. A. Johnson,** Whangarei, for the plaintiff; **Connell, Trimmer, and Lamb,** Whangarei, for the defendant.

Case Annotation: *British Columbia Electric Railway Co., Ltd. v. Loach*, E. and E. Digest, Vol. 36, p. 117, para. 781; *McLean v. Bell, ibid.*, Supp. Vol. 36, para. 770b; *Swadling v. Cooper, ibid.*, para. 731a; *Benson v. Kwong Chong, ibid.*, p. 22, note s.p.

COURT OF APPEAL.
Wellington.
1939.
April 18, 19, 20;
June 7.
Ostler, J.
Smith, J.
Johnston, J.

In re **F. HALL AND SONS, LIMITED.**

Company Law—Winding-up—Private Company—"Just and Equitable"—Discretion of the Court—Companies Act, 1933, ss. 169 (*f*)—Administration Act, 1908, Part IV, s. 64 (*c*).

A private company consisted of two members. One, who held the bulk of the shares, died after probate of his estate had been granted to two executors, one of whom was appointed the administrator of deceased's estate under Part IV of the Administration Act, 1908, relating to insolvent estates.

After the estate had been cleared of debts without recourse to the shares in the company held by the estate, the administrator claimed the right to all the shares of the deceased in the company. The surviving member, as managing director, declined to buy the shares himself or to consent to their sale; and he requested the administrator to transfer the shares in pursuance of the will of deceased, in accordance with the articles of the company.

The administrator, claiming that a deadlock had been reached owing to the obstruction of the surviving member, petitioned the Court for the winding-up of the company upon the ground of this deadlock and upon another ground which was abandoned.

The winding-up of the company was ordered by *Blair*, J., upon the ground that it was just and equitable to do so, and from this order the company appealed.

W. D. Lysnar, for the appellant; **Burnard,** for the respondent.

Held, by the Court of Appeal, (1) That, on the facts, the deadlock had been brought about by the administrator's insistence on the right to sell the shares, when no such right existed, for, by s. 64 (*c*) of the Administration Act, 1908, if there were a surplus, the function of the administrator was not to realize further assets, but to apply to the Court for directions as to the application of such surplus; or, alternatively, the administrator had not discharged the onus, which on the whole case had shifted to it of showing that its claim to sell the shares was well founded.

2. That the Court should not, in the exercise of its discretion, order the company to be wound up on the ground that it was "just and equitable" to do so.

In re Loveridge, Silk v. Public Trustee, [1937] N.Z.L.R. 534, G.L.R. 309, applied.

Loch v. John Blackwood, Ltd., [1924] A.C. 783, mentioned.

The winding-up order made by *Blair*, J., was accordingly discharged, and the petition dismissed.

Solicitors: **Beaufoy and Maude,** Gisborne, for the appellant; **Burnard and Bull,** Gisborne, for the respondent.

Case Annotation: *Loch v. John Blackwood, Ltd.*, E. and E. Digest, Supp. Vol. 10, para. 5357a.

COURT OF ARBITRATION.
Wellington.
1939.
March 27, 28;
May 24.
O'Regan, J.

CHICK v. SHAW, SAVILL, AND ALBION COMPANY, LIMITED.

Workers' Compensation—Liability for Compensation—Kidney Tumour in early stage—Condition accelerated by Accident—Permanent Injury not preventing Worker from returning to Pre-accident Occupation—Compensation payable—Employer on receipt of Medical Advice discontinuing Payments—No Medical Certificate that Worker was fit for Work—No Liability for Non-submission to Medical Committee—Workers' Compensation Act, 1922, s. 2—Workers' Compensation Amendment Act, 1936, s. 9.

A worker was injured by accident in the course of his employment, being struck in the abdomen by a shank of a quarter of beef which he was assisting to load. He resumed work, but later, on finding blood in his urine, he was advised he had suffered a kidney injury. Three months later, after treatment, it was necessary to remove the left kidney, on which an early tumour was found. The employer ceased paying compensation after receiving medical advice that the incapacity was the result of disease and not accident. Though there was a permanent injury, in that the worker had suffered the loss of a kidney, the injury did not preclude him from returning to his pre-accident occupation.

Hardie Boys, for the plaintiff; **E. D. Blundell,** for the defendant.

Held, 1. That, in view of the medical evidence, the worker was entitled to compensation: though the tumour on the kidney was in a particularly early stage at the time of the accident, the bleeding, which would have commenced sooner or later, was accelerated by the blow.

2. That, where no medical practitioner had certified that the worker was fit for work and hence it was not competent for the employer to require the worker to submit himself for examination by a medical committee, and the employer had acted honestly in discontinuing payments of weekly compensation, no breach of s. 9 of the Workers' Compensation Amendment Act, 1936, was committed.

Solicitors: **Hardie Boys and Haldane,** Wellington, for the plaintiff; **Bell, Gully, Mackenzie, and Evans,** Wellington, for the defendant.

SUPREME COURT.
Palmerston North.
1939.
May 12, 18.
Ostler, J.

JOHN COBBE AND COMPANY, LIMITED v. VILES (N.I.M.U. INSURANCE COMPANY, THIRD PARTY).

Insurance—Motor-vehicles—Third-party Risks—Workers' Compensation paid by Employer to Employee injured by Negligence of Owner of Motor-vehicle—Successful Claim against Owner for such Amount—Liability of Insurance Company to Indemnify Owner of Motor-vehicle—Motor-vehicles Insurance (Third-party Risks) Act, 1928, s. 6—Workers' Compensation Act, 1922, s. 50.

An employer had recovered from the defendant the amount of workers' compensation paid to a worker who had been injured through the negligent driving of the defendant's motor-vehicle. The defendant, in third-party procedure, claimed for the amount so recovered from him against an insurance company under the indemnity created by s. 6 of the Motor-vehicles Insurance

(Third-party Risks) Act, 1928, which company had been joined as a third party.

J. Graham, for the plaintiff; **A. M. Ongley,** for the defendant; **H. R. Cooper,** for the third party.

Held, giving judgment for the defendant against the third party, That the unsuccessful defendant's claim against the indemnifier came within the words of s. 6 of the Motor-vehicles Insurance (Third-party Risks) Act, 1928, as the liability to the plaintiff for the moneys paid under the Workers' Compensation Act, 1922, was a liability to pay damages, and, therefore, under the statutory contract, the defendant was indemnified by the insurance company against the liability.

Wilson, Sons, and Co., Ltd. v. Barry Railway Co., (1916) 86 L.J. K.B. 432, applied.

Birmingham and District Land Co. v. London and North Western Railway Co., (1886) 34 Ch.D. 261, distinguished.

Solicitors: Graham and Reed, Feilding, for the plaintiff; **Gifford, Moore, Ongley, and Tremaine,** Palmerston North, for the defendant; **Cooper, Rapley, and Rutherford,** Palmerston North, for the third party.

Case Annotation: *Birmingham and District Land Co., Ltd. v. London and North Western Railway Co.*, E. and E. Digest, Vol. 3, p. 347, para. 375; *Wilson, Sons, and Co. v. Barry Railway Co., ibid.*, Vol. 36, p. 37, para. 211.

SUPREME COURT. New Plymouth. 1939. May 16. *Ostler, J.*

McRAE v. STEPHENS AND QUIRK.

Justices of the Peace—Information—Dismissal on Ground of Triviality—No Finding of Exceptional Circumstances—Later Finding of Fact in stating Case on Appeal—Jurisdiction—Justices of the Peace Act, 1927, s. 92 (1).

A Magistrate should not dismiss as trifling an information charging a breach of the Licensing Act, 1908, unless he finds as a fact exceptional circumstances, and he should state explicitly the ground for such dismissal; and he has no jurisdiction to find that fact, or any fact, in order to support his decision, when he is asked later to state a case on appeal.

Duddy v. Joyce, [1919] N.Z.L.R. 201, applied.
Burke v. Clausen, [1928] N.Z.L.R. 227, G.L.R. 225, distinguished.

Counsel: Bain, for the appellant; **Hussey,** for the respondent.
Solicitors: Bain and Fleming, Wanganui, for the appellant; **J. M. Hussey,** Wanganui, for the respondent.

SUPREME COURT. Gisborne. 1939. June 1. *Smith, J.*

DAVIS v. HUTCHINSON.

Breach of Promise of Marriage—Contract—Illegality—Promise to Marry based on Future Illicit Cohabitation—Second Promise when Woman pregnant as result of such Cohabitation—Whether new Contract tainted by Illegality.

The plaintiff in an action for breach of promise of marriage testified that the defendant promised to marry her if she would have sexual relations and if a child were conceived in the course of that relationship. Subsequently, when the defendant learned that she was pregnant as the result of that relationship, the parties promised to marry each other. In cross-examination she said, in answer to leading questions:

"The consideration for the first promise was the intercourse. There was nothing like that for the second talk in November. Any conversation that did take place in November was an expression of his willingness to fulfil the first promise."

On a motion, at the close of the plaintiff's case, to enter judgment for the defendant,

West and **A. P. Blair,** for the defendant, in support of the motion; **Burnard and Iles,** for the plaintiff, to oppose.

Held, 1. That the first promise was based upon an immoral consideration, and that an agreement founded upon it was void.

Fender v. Mildmay, [1938] A.C. 1, [1937] 3 All E.R. 402, distinguished.

2. That there was evidence (as set out in the judgment) from which a new contract might be inferred in the second promise.

3. That such inferred promise offered marriage to the plaintiff without being tainted with illegality.

Northcote v. Doughty, (1879) 4 C.P.D. 385, and **Ditcham v. Worral,** (1880) 5 C.P.D. 410, applied.

Skipp v. Kelly, (1926) 42 T.L.R. 258, mentioned.

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

Case Annotation: *Northcote v. Doughty*, E. and E. Digest, Vol. 27, p. 25, para. 19; *Ditcham v. Worral, ibid.*, para. 20; *Skipp v. Kelly, ibid.*, Supp. Vol. 12, para. 2190a.

SUPREME COURT. Wellington. 1939. March 7–10, 20–23; April 3. *Blair, J.*

HUTCHINSON v. HOWELL AND ANOTHER.

Patent—Infringement—Specification—Device for use in Milking-machine—Description—Non-definition of Extent of Buoyancy of "Float"—Whether Patent thereby invalidated by Proof of Manufacture and Sale without Proof of Installation of Milking-machine—Whether Infringement established.

The plaintiff's description of his patented invention in connection with milking-machines was that it "relates to a device that has been designed for use by incorporation in the down dripper milk vacuum tube . . . for the purpose of automatically controlling the vacuum action to cause a reduction in its intensity on the cow's teats while maintaining the full force in the tube. . . . The invention consists in a device formed by a long cylinder adapted to be arranged lengthwise in the milk tube and the passage through which is controlled by a gravity valve and a float positioned inside the cylinder and adapted to rise and fall therein in response to the flow of the milk and to govern the valve in its opening and closing movements."

In an action for infringement,

G. G. G. Watson and **Vautier,** for the plaintiff; **H. R. Cooper** and **Park,** for the defendants.

Held, 1. That the defendants' device, which was called a "plunger," was a clear imitation of the plaintiff's device.

2. That in its context it was no misdescription in the plaintiff's patent to call what he termed a "float" that name.

3. That it was no objection to the patent that the extent of the buoyancy of the float was not defined.

4. That the defence that, as plaintiff's patent was a combination, there was no infringement of the patent by the defendants, who were charged with manufacturing and selling only of their device, and there was no proof of the installation and use of the device in any milking plant, was unsound: the device was useless except when installed in a milking-machine, and the defendants, by their actions, invited and induced dairy farmers to instal their device in milking plants, and were therefore parties to the infringement of patent committed by any dairy farmer who used them.

British Thompson-Houston Co., Ltd. v. Corona Lamp Works, Ltd., (1921) 39 R.P.C. 49, and **No-Fume Ltd. v. Frank Pitchford and Co., Ltd.,** (1935) 52 R.P.C. 231, applied.
Norton and Gregory, Ltd. v. Jacobs, (1937) 54 R.P.C. 271, distinguished.

Solicitors: Chapman, Tripp, Watson, James, and Co., Wellington, for the plaintiff; **Cooper, Rapley, and Rutherford,** Palmerston North, for the defendants.

Case Annotation: *No-Fume Limited v. Frank Pitchford and Co., Ltd.*, E. and E. Digest, Supp. Vol. 36, para. 518a; *Norton and Gregory, Ltd. v. Jacobs, ibid.*, para. 680d; *British Thompson-Houston Co., Ltd. v. Corona Lamp Works, Ltd., ibid.*, Vol. 36, p. 839, para. 3261.

"No Survivorship."

The Land Transfer Act, 1915, ss. 131 to 134.

Sections 131 to 134 of the Land Transfer Act, 1915, constitute a device to confer on the beneficial owners of land held in trust under the Land Transfer Act—no trust being allowed to appear on the face of the title—somewhat the same protection as exists where the trust appears on the title and contains a provision making it incompetent for the trustees to act (except in making a fresh appointment of trustees) when their number has fallen below the number of original trustees. The effect of the sections, shortly put, is that a transferor of land to joint proprietors, or the joint registered proprietors of any land, may require the words "no survivorship" to be entered on the title, and thereupon any less number of joint registered proprietors cannot "transfer or otherwise deal with the land" without obtaining the sanction of the Supreme Court or a Judge thereof. In *Hogg on the Registration of Title to Land* it is stated that in twenty-one out of twenty-two jurisdictions whose statutes are examined a "no survivorship" entry is provided for.

Incidentally, the device confers a further useful protection: any disposition of the trust property having the effect of discharging it from the terms of the trust likewise requires the approval of the Court.

In the various cases of transfer and transmission that may arise, the statute works out as under:—

Class No. 1.—In the normal case of a change of trustees during the continuance of the trust, A., B., and C., the registered proprietors (or one or two of them), desire to retire in favour of D., E., and F. (or one or two of them). The usual deed of appointment is executed by the persons in whom the power to appoint is vested, together with a transfer from all the existing registered proprietors to all the proposed new proprietors. As the numbers are maintained, there is no statutory obstacle to registration of the transfer in the ordinary course.

Class No. 2.—If by reason of death of a trustee the full "quorum" is not available to sign the transfer, when a deed of appointment has been executed by the persons competent to make it, and a transfer by the surviving trustees, it then becomes necessary to apply to the Supreme Court under s. 133 for its sanction to the registration of the transfer. If the Court is satisfied by proper evidence of the regularity of the proceeding, the sanction will no doubt be forthcoming, and all that is then necessary to complete the transaction is (1) to furnish evidence for registration of transmission to the survivors, (2) to produce the sanctioning order, and (3) to register the transfer from the survivors to the new trustees. The restriction "no survivorship" no doubt continues on the title.

Class No. 3.—Sometimes an event has occurred, such as the disappearance of a trustee, in which it becomes competent to make a new appointment, but a registrable transfer cannot be tendered, it being impossible either for all the registered proprietors to join in the transfer, or for the proprietors on the title to be narrowed down to those who sign. Such cases, of course, are not limited to those where the "no survivorship" entry appears on the title. Here it is necessary to apply to the Court, not for a Court appointment, but for a vesting-order or its equivalent under an appropriate section of the Trustee Act, 1908. If, as is most convenient, the relief obtained is a vesting-order in favour of the newly appointed trustees, and their number is sufficient, no order under s. 133 is required. The vesting-order can be the basis of an application for transmission, and, as appears from the cases to be cited below, a transmission is not a "transfer or other dealing with the land" by registered proprietors, and on proof of the making of the vesting-order a transmission can be registered.

Class No. 4.—Where a case arises in which it is necessary to ask the Court to go further and make a new appointment, for lack of any person having that power, presumably a vesting-order will be sought and made at the same time under an appropriate section of the Trustee Act, 1908, in favour of the new trustees; or the less convenient course may be taken of obtaining under s. 23 of that Act an order appointing some person to convey the property. If a vesting-order be obtained, the registration of a transmission the application for which is based on the vesting-order is, as explained in dealing with Class No. 3, a dealing not affected by s. 133, and no express application to the Court under the Land Transfer Act is required. Application to the Court is of course necessary, but the Trustee Act is the only statute involved.

If instead of a vesting-order the relief obtained under the Trustee Act has taken the form of an order appointing a transferor, this, however, should perhaps be supplemented by an order under s. 133 sanctioning the registration of the transfer from the person so appointed to the new trustees. Although the transfer is not one by a registered proprietor, and may therefore possibly be outside the prohibition of the statute, it falls on the hither side of the distinction drawn in the cases between a transfer and a transmission.

Class No. 5.—Suppose lastly that it is proper that the land be assured so as to be discharged from the trust. This may happen either (1) upon an exercise by the trustees of a power of sale; or (2) when the trust has come to an end and the land is to be vested in a beneficiary who has become absolutely entitled. In either of these cases, to prevent the title from continuing to be clouded with the "no survivorship" restriction, it is necessary to approach the Court; but this time, not for the purpose of sanctioning the registration of a dealing by fewer proprietors than the prescribed "quorum," but for the purpose of once and for all removing the restriction. It can hardly be questioned that s. 134 (2) is wide enough to enable this to be done; or that before doing it the Court must be satisfied of the regularity of the transfer in question. The vendors will be in much the same position towards the Court as they would be towards a purchaser if they held under a title upon which the trust appeared and if the trust did not contain the usual clause exonerating purchasers from the duty of inquiry.

The device of the Act appears to be a convenient one, and in most jurisdictions, to judge from the paucity of decided cases, it seems to work smoothly enough. In New Zealand, however, it has produced a small crop of reported decisions. The first of these is *In re Tararua Club*, (1908) 27 N.Z.L.R. 928, 11 G.L.R. 114. This was a case of Class No. 2 listed above. A special feature was that the beneficiaries

were the members for the time being of an unincorporated club. The members were considered to be sufficiently before the Court for advertising to be dispensed with. The power of appointing new trustees apparently lay with the club in general meeting, and their resolution making an appointment was proved. Mr. Justice Cooper made an order sanctioning registration of a transfer by the surviving trustees to the new (including continuing) trustees.

The case is interesting because His Honour thought fit to impose three conditions :—

(1) He required the assent of the executors of the deceased trustee to be filed. No reason for this appears in the judgment. What, it may be wondered, would have happened had the executors declined to assent, or merely ignored the request ? Could they have been made justiciable in any way, even to the extent of being mulcted in costs ? Upon an ordinary title of joint proprietorship, they would obviously have had no interest, as their testator's interest died with him. To suggest that the position can be different under the " no survivorship " entry ignores the fairly obvious purpose of the legislation, to give back to beneficiaries with one hand what with the other hand was taken from them when trusts were kept off the register. Whatever prompted the condition, it may have helped to confusion of ideas in a later case.

(2) His Honour expressly directed that the " no survivorship " restriction should remain on the title. It is submitted that this was superfluous. It would be dangerous doctrine to say that the restriction can ever be removed without an express direction to that effect ; such a doctrine would materially reduce the protection given by the statute. Possibly His Honour had in mind the sort of direction that is sometimes necessary when authority is given to register a dealing held up by a caveat, and it has to be made clear whether the effect of the caveat is to be regarded as spent or continuing. But the analogy between a " no survivorship " restriction and a caveat is not a close one.

(3) His Honour was pleased to direct that the president of the club should lodge a caveat. With all respect for the memory of His Honour, who was perhaps anxious to act *ex abundanti cautela* in exercising an unexplored jurisdiction, the justification for this stipulation is not clear. An additional safeguard was, without any reason vouchsafed, imposed for the future besides the one that the creators of the trust had thought sufficient. The direction that the president of the club " for the time being " might withdraw the caveat to permit registration of an instrument suggests an attempt to make new law in two directions—one, about the respective duties and functions of the permanent trustees of an unincorporated society and its transient executive chief ; the other, about the devolution of a caveator's powers to consent to a dealing or withdraw a caveat.

The position in *In re Main*, [1931] N.Z.L.R. 671, G.L.R. 51, at the time of the legal proceedings was that the parcel of land the title to which bore the entry " no survivorship " had at one time been used for access to two other parcels. It was known as " The Avenue." The facts in the report suggest that the joint ownership of " The Avenue " arose not out of any declared trust, but rather in some way to protect the joint rights of the owners to use the parcel for their separate access purposes. Of the two other parcels, " No. 2 Portion " had subsequently passed through a number of hands, and apparently no benefit over " The Avenue " devolved upon whoever may have owned it in 1930 ; at any rate, he was not a party to the application. The owner of " No. 1 Portion " at that date according to the title was A.M., one of the two registered proprietors " without survivorship " of " The Avenue." A.M. had however died, and W.M. obtained probate of his will, and the application was by W.M. for sanction to his being registered by transmission as a registered proprietor of " The Avenue " in place of A.M. Mr. Justice Smith dismissed the application on the ground that a transmission was not a dealing affected by s. 133. Although " transmission " is included in the Act in the definition of " dealing," if a person gets on the title by transmission the case is not one which the section prohibits, of registered proprietors transferring or otherwise dealing with the land. So far, it may be said with respect, His Honour's judgment is unexceptionable. The position is clear if some of the various kinds of devolution by transmission are enumerated—probate and letters of administration (these are the commonest), the adjudication of a bankrupt, a vesting-order under the Trustee Act, a partition order or other vesting-order under the Native Land Act, an Act of Parliament, survivorship amongst joint registered proprietors, the vesting upon a marriage solemnized prior to 1885 in the registered proprietor's husband of an interest in land belonging to a *feme sole*, or the coming into force prior to September 1, 1880, of a will of lands, without probate—the last two instances must be virtually obsolete by now. Transmission to the survivors of joint registered proprietors, it may be noticed, is in practice in the North Island effected, perhaps a little informally, by a mere memorial of the death of the deceased proprietor, from which the Courts, the parties, and the public are expected to infer that such death has been proved to the satisfaction of the District Land Registrar, and that the estate in the land is accordingly vested by transmission in the survivors. It would be interesting to know whether this form of transmission is employed in Canterbury, where many of the official forms are believed to have been settled by the late Mr. Justice Williams when District Land Registrar there.

The exact words of the judgment in *Main's* case are these : " *Where* "—the word is not in italics in the reports—" an applicant is entitled, as executor, to succeed to the interest of a deceased joint proprietor in land held under a title upon which the words " no survivorship ' have been entered, he can have a transmission of that interest registered without infringing the provisions of s. 133 of the Land Transfer Act." But " where " can there be such a case ? The difficulty in reading this passage is that it seems to infer that a case of joint tenancy may exist in connection with which, one the death of one proprietor, the property devolves, and a transmission may go, not as normally to the survivors or survivor, but to the survivors or survivor jointly with the personal representatives of the deceased proprietor ; with the further inference that this peculiar devolution occurs where the joint proprietors were registered " without survivorship."

Acting apparently on the inferences set out above, A.M. sought registration by transmission, and in *Main v. District Land Registrar*, [1939] N.Z.L.R. 226,

sub. nom. Main v. Baird, [1939] G.L.R. 143, applied for a writ of mandamus to the District Land Registrar to register such a transmission and to remove the words "no survivorship." The application was unsuccessful in both respects. The inferences, or inferential obiter, of Mr. Justice Smith were not accepted by Mr. Justice Fair. In the judgment the surviving registered proprietor is expressly spoken of as the surviving "trustee." It is respectfully submitted that this phraseology was justified. It is true that joint tenancy can at law exist in respect both of legal and of beneficial ownership. In practice husband and wife occasionally prefer so to hold a piece of property, thus producing the same devolution as if they made reciprocal wills. A sporting testator might enjoy introducing such a tenure into his dispositions. But where there is joint tenancy coupled with no survivorship, the principal incident of beneficial joint tenancy—*i.e.*, the right of accrual by survival—is cancelled out by the restriction, and the presumption seems to be irrebuttable that a trust of some sort must somewhere be found; otherwise the problem of beneficial devolution simply cannot be worked out. The deadlock that has been reached for the time being in *Main's* case apparently requires for its solution an ascertainment of the trusts upon which the land is held, followed by a decision as to what step can be sanctioned as being incidental to a proper exercise of the trust powers—perhaps the registration of a transfer to new trustees executed by the surviving proprietor alone, as in Class No. 2 of the cases listed above; perhaps the removal of the restriction from the title as in Class No. 5, if the trust is at an end; perhaps, in either event, ancillary relief under the Trustee Act.

It has at times been suggested that the "no survivorship" provisions of the Land Transfer Act are inconvenient and should be repealed. Their world-wide use is in itself an argument to the contrary. If, indeed, the statute be defective, it is suggested that it should be extended rather than dispensed with. For instance, it would be more elastic, if, by the use and explanation of some such phrase as "no survivorship below three," it enabled four or more trustees to be appointed in the first place, and a quorum to be established not necessarily the same as the number in the original appointment. At present this can be done only by the roundabout course, first, of a transfer to the quorum, then an application for the "no survivorship" entry, and then a transfer from the quorum trustees to the full panel. In Victoria the restriction is entered by the Registrar on every title where the land was granted in joint tenancy for a public purpose. If in New Zealand public grants were made with any frequency to individuals rather than local bodies and other public authorities, a similar course might be a wise one. Clause (5) of Appendix I of the Act gives however virtually the same protection. Would it not be desirable also, wherever title is acquired upon transmission by executors claiming under a will in which the "quorum" stipulation appears, for the Legislature to direct that the "no survivorship" restriction be entered on the title for the more effectual carrying-out of the testator's declared intention?

"The true function of a lawyer is to unite parties riven asunder. Much of my practice was in bringing about private compromises."

—MOHANDAS KARAMCHAND GANDI, Barrister-at-Law.

English Law Reaches Wellington.

By N. A. FODEN, M.A., LL.D.

I.

The Port Nicholson Constitution.

The story of the celebrated Charter of Government granted by the "Sovereign" Chiefs of Port Nicholson to the New Zealand Company's pioneer settlers is one of the high-lights of our legal history. Regarded from the point of view of Constitutional Law, it undoubtedly occupies a unique position because the delegation of the authority to govern within the "dominions" of the Chiefs was bound up with the events leading to the acquisition of British sovereignty in this country. To decide the merits of the questions of law involved is a problem of no little complexity.

The scene must first be laid in London. When all preparations had been completed for the despatch of the first body of settlers to New Zealand, the Company was faced with the refusal of the Government to sanction the undertaking. The directors, accordingly, after deliberation decided upon a course of action which can only be regarded either as a mark of moral courage, or as a measure of the Company's political influence. On the eve of the departure of the first ships, the directors visited Gravesend to inspect the vessels and "for the purpose also of transacting other important and interesting business connected with the foundation of the new colony." The *Morning Chronicle* (London) reported the second object thus:

> "As the sanction of the Government has been withheld from the undertaking—as the infant colony has been left without the aid or protection of the Colonial Office—as no steps have been taken to secure the administration of English laws upon a soil which Englishmen are to inhabit—as all the hope which up to the eleventh hour the Company had entertained of even a slight recognition from the Colonial Secretary had been disappointed—under these circumstances the second object of the directors was to obtain, if not from each of the emigrants, at least from the great body of them, a voluntary agreement to a charter or code of laws, laying down regulations for the maintenance of order, and establishing a machinery for the administration of law and the enforcement of justice."

The document was to the effect: That all the persons parties to the agreement should submit to be mustered and drilled in such fashion and at such times as should be necessary to the security of all; that if any person committed an offence against the law of England he should be liable to be punished in the same manner as if the offence had been committed in England; that a Committee to conduct the Government of the Colony be appointed, with power to make rules and to appoint officers; that an umpire be appointed to preside in all criminal proceedings and assisted by seven assessors to decide on the guilt or innocence of the party accused—and so on.

Mr. Young, one of the directors, explained to the intending settlers that the Code was to remain in force only until such time as British Law was established under the authority of the British Government. There was no hesitation in subscribing to the compact.

When the Colonial Office heard of this it asked to be supplied with a copy of the agreement, and, upon being asked for what purpose it was required, informed

the Company that the object was to warn those who proposed to act under it of the risk that would be incurred in so doing, if the Law Officers were of the opinion that such a risk attached. The Company retaliated, so to speak, by charging the Government with being uncandid, unfair, and impolitic, and stated that the directors had been "entrapped" through the withholding of information into the adoption of measures they would have seen to be unnecessary had the intentions of the Colonial Office been disclosed to them.

> "The directors were led to the belief," they wrote, "that 800 individuals to whose voluntary expatriation they had been in some degree instrumental, and for whose welfare they were in some degree responsible, were about to be abandoned in the remotest part of the world, by the country which had given them birth, and the Government from which, as they owed it allegiance, they had indisputable right to claim protection."

However, in the meantime the emigrants were well on the way to their new home, but peace was made with the Colonial Office by informing it that the opinion of eminent counsel had been taken on the validity of the agreement, that such opinion was adverse thereto, and that instructions had immediately been sent to the Company's agent in New Zealand not to put the agreement into operation.

Unfortunately the absence of facilities for rapid transmission of instructions caused the countermanding directions to arrive at Port Nicholson too late to prevent steps being taken to institute the plan of voluntary government, for Colonel Wakefield, shortly after the arrival of the settlers, called a meeting of the Committee which had been constituted under the agreement.

On March 22, 1840, Wakefield reported:

> "In the absence of a representative of the Queen in this Port, the Committee of colonists are taking steps for the maintenance of the peace and for the payment of public works, under the sanction of the Native chiefs who are about to execute a formal document authorizing the white people settled in their territory to govern themselves. This means will ensure the legality of any acts done under the deed of agreement, until the sovereignty of these parts be acquired by the Government."

Let it be remembered at this juncture that the chiefs of Port Nicholson did not sign the pathetic Treaty of Waitangi, that "pointless extravaganza," as the Company's paper once described it, until April 29, 1840, and that Hobson did not proclaim the sovereignty which the chiefs had so misunderstandingly "ceded" to the Queen, until May 21 of the same year.

The ratification of the Chiefs having been successfully negotiated, the Committee, on April 4, met for the first time under the delegated powers. The *New Zealand Gazette*, Port Nicholson's first newspaper, published within a few weeks of the landing of the colonists, described the process of delegation as "Ratification and Extension of the Colonists' Contract by the Sovereign Chiefs of Port Nicholson." One wonders, pausing for a moment on the word "sovereign," just how many "sovereign" chiefs lived in the whole of New Zealand at that time and what marks distinguished a sovereign chief from a non-sovereign chief. At all events, the particular local chiefs who affixed their marks or *mokos* to the above - described agreement stated therein their satisfaction with and confirmation of the same and declared it to have the force of law within their territories and that it was binding upon all parties residing therein, but subject to six modifications, namely:—

(1.) The Council named in the agreement of the colonists was to continue in office for one year from January 1, 1840, when a fresh Council for a further year was to be elected and thereafter yearly elections were to be held.

(2.) The President was to hold office for five years, after which term an electoral body was to elect a President.

(3.) The Council could legislate and, through its President, could perform all acts, not being repugnant to the law of England, which the sovereign chiefs could have done. The chiefs agreed to ratify and confirm acts done by the Council in the lawful exercise of the powers conferred.

(4.) The chiefs renounced the levying of taxes and duties, and agreed not to do anything affecting the interests of the colonists or the rights granted by the agreement, or the ratification thereof, without the advice and consent of the Council.

(5.) The Maoris of the district were to have equal rights with the settlers except that for five years they were not to vote at the election of the Council, nor serve as assessors, unless the case involved the interests of the Natives, in which case three of the assessors were to be Maoris.

(6.) For five years no law affecting the rights of the Native population was to be made without the special consent of the chiefs.

Thus it will be seen that the position was developing in a manner most interesting to constitutional lawyers, but as this is designed to be an historical article and not an academic one, the nice questions of legal theory can be laid aside.

In the result, however, no consequences of any great moment followed upon the arrangements made for the preservation of law and order among the settlers, although actually the Magistrate appointed by the Committee acted in a judicial capacity on a number of occasions before Lieut.-Governor Hobson had put matters in train to suppress the "treason" at Port Nicholson by sending Shortland to the southern settlement to assert the Queen's authority. This latter event took place early in June, so that the whole of the self-governing activities of the colonists extended over roughly four months.

One act on the part of Major Baker the Magistrate did, however, have certain repercussions detrimental to the financial interests of the Company. The interesting but little-known case of *Pearson v. Baker* was the result—but this is another story.

High Court Judge Who Played Hockey.—One may reflect without emotion on a High Court Judge playing a sound game of golf; but there is a certain shock in the thought of so exalted and advanced a personage playing rugby or soccer or hockey. But the late Sir William Tudball, Judge of the High Court of Allahabad, who died the other day, it is recorded, played hockey after his appointment to the High Court Bench. "The Chief Justice of the day," according to the *Times*, "rather frowned upon his continuing to play hockey, a sport in which he gained some repute."

The Court of Review.

Its Residual Jurisdiction.

By W. W. KING, Associate-Registrar of the Court.

At first sight it would appear unnecessary at this stage to write an article on the Court of Review as it has now completed the work for which it was primarily created—that is, the capital reduction of farm, home, and other mortgages to their respective statutory basic values to the end that owners might remain in possession of their property—but there are still difficulties confronting practitioners.

Some 34,000 applications have been dealt with under the machinery of the Mortgagors and Lessees Rehabilitation Act, 1936, and there may still be some outstanding applications and appeals which have not been heard, in which case practitioners should see that they are set down for hearing immediately, as it is quite possible that all outstanding applications and appeals at a certain future date will be deemed by order to have been abandoned and consequently struck out. One indirect effect of this course would be to render s. 55, which it seems must soon be dealt with in some way, of no further effect; and therefore the restriction upon suing and enforcing judgments against applicants would be lifted.

There have been inquiries as to whether the Court, for various unforeseen circumstances, can reopen applications upon which orders have already been made under the Act; but under the legislation, as it stands at present, it would appear that the Court, which is one of limited jurisdiction, has no power to do so except in certain rare instances which will be referred to later. Section 27 (1) allows the Court to extend the time for appeal; but, of course, that discretion is not unlimited and can only be judicially exercised, and does not permit the reopening of cases for the purpose of making a fresh adjustment.

A conflict of interests is bound to give rise to the necessity for interpretation of orders of the Court. Most of the orders of the Court are, in form, documents varying existing documents of security or title, and have to be read in conjunction therewith. That being so, it would seem that the Court of Review, having, as has been said before, a limited jurisdiction circumscribed by the Act creating it, has no power to make declaratory judgments interpreting documents as varied by the Court order. In these circumstances, it would appear that the Supreme Court is the only Court having jurisdiction in this respect on appropriate proceedings brought. If, however, it was sought to enforce an order of the Court of Review in the Magistrates' Court, then it would appear that that Court would have jurisdiction in so far as it was necessary for the enforcement of that part of the order within its jurisdiction. The Court of Review is a Court of Record and, as such, has an inherent jurisdiction to rectify orders obtained by fraud, or by mistake, or otherwise, an order has been drawn up which does not express the intention of the Court; but this power would, of course, be exercised only upon established principles.

There are a limited number of orders in which the Court or the Adjustment Commissions have reserved leave to apply. The Court, of course, still has definite statutory functions relating to transactions taking place before January 1, 1941, but it will be necessary to clear the ground sooner or later, where leave has been reserved, in order definitely to finalize the respective rights of the parties. This might be done by legislation or order, making it mandatory that parties should apply before the date referred to, and, if they do not, then such leave be automatically cancelled.

Section 66 is another section that cannot be indefinitely left in its present form. It appears to be of permanent application to all mortgages to which the Act applies, or has applied, and may still be taken advantage of by persons liable under such mortgages, to cause mortgagees, if the Court of Review so orders, to apply insurance-moneys in or towards rebuilding, repairing, or replacing the destroyed or damaged property.

If an applicant, or successor in title, contemplates mortgaging, leasing, or selling his property, s. 82 presents some difficulties as to the Court which should interpret the section, or the various parts of it. It appears that it would be the Supreme Court's function to decide whether a subsequent purchaser, mortgagee, or lessee obtained a good title, and this would embrace determination of the meaning of "sale or other disposal of"; but it is undoubtedly within the province of the Court of Review, on application made to it, to determine the principles which should guide the Court of Review in granting or refusing leave to dispose, the terms and manner of disposal, and the distribution of the proceeds: see *In re Pike (a debtor), Ex parte Richards*, [1937] N.Z.L.R. 481, for a discussion by the Full Court of the jurisdiction of the Supreme Court, and the limitation of the Court of Review's jurisdiction.

It may be that s. 82 applies to the interest of any applicant who has had the benefit of a reduction under ss. 42 and 44, but not a mere writing-off of interest, penalties on rates, or costs under s. 38 (3). The restriction upon disposal imposed by s. 82, it is submitted, follows the land and survives through subsequent purchasers until January 1, 1941. Otherwise a fictitious disposal in the first instance would release the applicant's interest before the specified date, to the disadvantage of parties who have suffered reduction under ss. 42 and 44.

The words "to sell or otherwise dispose of" in s. 82 would appear to cover "sale, lease, or mortgage"; see discussion of the word "disposal" in *United Insurance Co., Ltd. v. The King*, [1938] N.Z.L.R. 885.

Motions under s. 82 should relate to a specific sale, as the Court will not consent to an unrestricted right of sale, and should be supported by an affidavit exhibiting a copy of the agreement, or at least setting forth the name of the proposed purchaser, the consideration, and the terms of payment. The motion and affidavit should be served on all mortgagees, lessors, and creditors who have had their adjustable debts discharged. Such service must be evidenced

either (*a*) by an affidavit that all such persons consent, or do not object, to the disposal; or (*b*) by a letter from each person to the same effect or by a letter from the objector setting forth the grounds of objection. In the latter event, the applicant must be prepared to show "exceptional circumstances" as required by subs. (2). The "exceptional circumstances" so far relied upon by applicants have been their inability, for various reasons—such as ill-health, old age, or physical incapacity—to work upon or retain their property, and leave has been sought to dispose of the property to some other member of the applicant's family, who was prepared to assume liability for all of the applicant's obligations in relation to the property.

In most contested cases, however, the disposal itself has been consented to; but the proceeds of sale, or of the goodwill of a lease, have had rival claimants. In such cases, the Court has preferred creditors, who have suffered reduction of their debts secured over the property disposed of, to other creditors or the applicant.

Centennial Legal Conference.

Wellington, Easter, 1940.

The Council of the Wellington District Law Society has issued an invitation to all members of District Law Societies to the Centennial Legal Conference, to be held in Wellington on March 27, 28, and 29, 1940, being the Wednesday, Thursday, and Friday after Easter next.

As the Conference will form part of the Dominion Centennial celebrations, it is intended that papers presented should have an historical bias and should be reprinted to form a permanent record. Remits, of course, may be on any subject of interest.

In order to facilitate the preparation of the time-table in detail, District Societies and members of the profession wishing to submit remits for consideration, or make any suggestions as to papers to be read, should communicate as soon as possible with the Secretaries of their local Societies who are asked to forward to the Conference Secretary at an early date all such remits and suggestions. It is suggested that as far as possible all remits and suggestions for papers be in the hands of the Conference Secretary by September 30, 1939, when the necessary selection will be made by the Conference Committee.

Owing to the Exhibition, it is certain that there will be considerable pressure on all available accommodation. It will be of considerable assistance if members who are expecting to attend the Conference will themselves make immediate application for accommodation at the hotels of their choice. At a later date a survey of hotel accommodation will be made, and a circular will be sent out with a view to assisting those members who have not been successful in securing accommodation.

The Conference Committee of the Wellington District Law Society have been making preliminary arrangements for some time, and there is every indication that a record attendance of practitioners will attend the Centennial Conference.

London Letter.

By Air Mail. Strand, London, W.C. 2,
May 28, 1939.

My dear EnZ-ers,—

Admirably phrased and admirably delivered, the speech of the Queen on laying the foundation-stone of the new Supreme Court at Ottawa will remain not the least memorable incident in a memorable visit. Partly in English and partly in French, to suit the twin races of the Dominion, the Queen recalled the two systems of law under which these races live, and found in the union of their administration at Ottawa a happy augury for the future: the common law of England which prevails outside Quebec; the civil law which is the foundation of the jurisprudence alike of Scotland and Quebec. "To see your two great races, with their different legislations, beliefs, and traditions, uniting more and more closely, after the manner of England and Scotland, by the ties of affection, respect, and a common ideal, is my fondest wish."

The Lawyers of Three Nations.—Whatever be the source of the laws, the ultimate object in the three great countries of the United States, Great Britain, and Canada, which—though not alone—are in the van of human progress, is to safeguard and secure liberty. It is just over a quarter of a century—in 1913—since the Bars of the United States and Canada first met in Montreal and heard an address from the English Lord Chancellor. At the request of Mr. Frank B. Kellogg, then President of the American Bar Association, Lord Haldane obtained the permission of the King to break with precedent and leave the country. "I have given my Lord Chancellor"—so ran the message of King George V to the members of the American Bar Association—"permission to cross the seas so that he may address the meeting at Montreal." The address was on the Higher Nationality, and, speaking to lawyers, Lord Haldane said: "I believe that if, in the famous words of President Lincoln, we 'highly resolve' to work for the general recognition by society of the binding character of international duties as they arise within the Anglo-Saxon group, we shall not resolve in vain." Kellogg, with the Pact of Paris which, with Briand, he later made, and to which the whole civilized world for the time adhered, Haldane, with his ideal, borrowed from Grotius and Goethe, that by common consent nations would come to respect rights, human and divine; events have shown them to be before the age. The King in his broadcast speech from Winnipeg on Wednesday night hoped that the achievements of the New World would at this time give guidance to the Old. That guidance is clear to all who remember the unarmed line between the United States and Canada, and the direction in which it points is not doubtful; certainly not a repetition on a yet more brutal scale of the tragedy which shattered the ideals of the Montreal address.

Lord Merrivale.—Lord Merrivale, known at the Bar as Henry Duke, who died last Saturday at the age of eighty-three, was the last survivor of the great advocates who dominated the common law Bar and won popular fame at the beginning of the present

century; the others were Rufus Isaacs, Edward Carson, F. E. Smith, and Marshall Hall. Sir Edward Clarke was earlier. The careers of the first three are well known. Marshall Hall did not go beyond advocacy. While at the Bar Henry Duke was the equal of any of them. Perhaps in his restrained and effective handling of cases he surpassed them. And he made his position entirely by his own merits. Without the advantages of public school or university education, he passed from apprenticeship in West Country journalism to the Press Gallery of the House of Commons, and then in 1885 he was called by Gray's Inn, and renewed his West Country associations on the Western Circuit. But all this was only the prelude to the position he won in London. Marshall Hall and Rufus Isaacs took silk in 1898. Henry Duke followed them in the following year. "F. E." was ten years later in 1908. Carson was already an Irish Q.C. when he came to the English Bar in 1892, and the silk in this country, which was at first refused to him, he obtained in 1894. After nearly twenty years in the first rank at the Bar, Duke became Secretary for Ireland when the Dublin Rebellion had broken Birrell's career there. But though Duke continued a policy of leniency, he succeeded little better than others.

No man who, before Ireland was a nation, allowed himself to be appointed to the Chief Secretaryship for that country could reasonably expect to survive the experience with unimpaired prestige. He might indeed survive, but hardly as a politician. Lord Merrivale, when he was Mr. Duke, K.C., M.P., went to Ireland after the Easter Rebellion of 1916 not fully knowing whither and to what kind of people and problems he went. "Who are these Sin Feeners?" he asked an Irish friend of the English Bar a few days before he went to Dublin as Chief Secretary. No further rebellion occurred in his time, but he was not regarded as wholly successful. He resigned in 1918; and returning to England and the law happily succeeded Swinfen-Eady, L.J., in the Court of Appeal. After eighteen months, he became President of the Probate, Divorce, and Admiralty Division, and was raised to the Peerage as Lord Merrivale in 1925, living in Gray's Inn, until his retirement in 1933. Calm, seeming slow, patient, just, courteous, and Devonian, he looked and was in fact grandly judicial, despite a certain hardness of hearing which hampered him in his later years. In the Divorce Court he had to deal with the new conditions due to the Matrimonial Causes Act, 1923, and he proved himself a capable, courteous, and dignified Judge. His judgment in *Apted v. Apted* in 1930 had an important effect in fixing the present manner in which the judicial discretion in divorce is exercised. I can just remember the days when Carson and he were often the "fashionable" leaders on opposing sides in the K.B. Quick in perception and slow of speech were both; well-matched, too; and the forensic battles of the Devonian and the Irishman were the students' joy. "Above all things," said Sir Francis Bacon of Judges, "integrity is their portion and proper virtue." The words may fittingly be applied to Lord Merrivale.

Hair as Evidence.—Before a motorist can be convicted for not stopping after an accident it must, I should say, be shown that he either knew or surely ought to have known that the accident had taken place. The words in s. 22 are pretty stiff, and some people might say that the duty is absolute, and that it is an offence not to stop after an accident whatever be the state of the driver's mind. Pending an authoritative decision on this point, we adhere to the old rule that evidence of *mens rea* is necessary to make out an offence—unless it manifestly appears that Parliament has made an exception. My attention is drawn to the matter by a report from a Midland Justices' Court last week (*Times*, May 22), showing that a motorist was heavily fined for this offence, though he swore he knew nothing of the mishap. Apparently the Police thought they should prove something as well as the mere occurrence. They produced two hairs found on the motorist's car, and a trichologist (Dr. Murray admits the word) who swore that they were from the head of a cyclist who was injured. The experts are apparently satisfied that no two people can have the same hair. Assuming that they are right, I feel some doubt as to the value of the evidence to show *mens rea*.

Foreign Law in England.—The case of *Kleinwort, &c. v. Hungarian Creditbank, &c.*, came quickly to the Court of Appeal. Mr. Justice Branson gave his judgment so lately as May 8 (reported [1939] 2 All E.R. 782), and now we have the decision of the Court of Appeal (*Times*, May 24) which affirms an admirable judgment. The point in issue is whether Hungarian business men who had promised English bankers to pay a sum in sterling in London could decline to pay it on the ground that Hungarian legislation made it unlawful for them to do so. Mr. Justice Branson thought that legislation of a foreign country could not interfere with contracts which were to be performed by payment here. England was the *locus solutionis*, and the law of England must therefore be applied. This is quite in accord with what is laid down by Dicey, and it is also consistent with the two decisions which were cited, *inter alia*, by the appellants: *Ralli Bros. v. Compania Naviera Sota y Aznar*, [1920] 2 K.B. 287, and *De Beeche v. South American Stores, Ltd.*, [1935] A.C. 148. In both of those cases the payment was to be made abroad—in Spain or Chile. So, the laws of those countries applied to the contract.

Statelessness.—I noticed this week that the Stipendiary Magistrate at Birmingham had a "stateless Serbo-Croat" before him upon a charge of landing here without an alien's permit. To the ordinary man the phrase seems a contradiction in terms. If he was a Serbo-Croat he was not stateless, and if he was stateless he was no Serbo-Croat. For some time during the War our Courts doubted whether a person who had once been a citizen of a State could cast off his nationality without obtaining some other. Lord Justice Phillimore (as he then was) said that he could not: *Ex parte Weber*, [1916] 1 K.B. 280*n*, 283. When this case came to the House of Lords the point was left open: [1916] A.C. 421. After the War, in cooler days, Russell, J. (as he then was), decided that the status of statelessness (if we may so express it) was recognized by Prussian law, and is not unknown to or unrecognized by our law. The intruder with whom the noble and learned Magistrate had to deal at Birmingham was twenty-eight years old, so he must have been born when Serbia was Servia and Croatia still part of Hungary. There is no racial unity in those parts. Whatever he was, the intruder was an alien; but yet a man of attainments. The Magistrate thought we might keep him.

Law Reform is Not Charitable.—Not long ago the Oxford Group lost a legacy because it had no legal entity which the law could recognize or to which the legacy could be paid; and now the Law Reform Association has been deprived of the annuity it would otherwise have received from an intending but baffled testator. There was too much brevity or simplicity in a "gift of £200 a year to the Law Reform Association, 55 Chancery Lane."

According to Bennett, J., the effect of such language was that the annuity was to be paid so long as the Association continued to exist, and ceased to be payable if and when the Association was dissolved; and the Association might live for ever, far beyond that far-off day when our laws will be perfect and unsusceptible to further improvement. In those circumstances the Judge thought he was bound to conclude "that the gift tended to a perpetuity" and thus he was bound by the decisions in *Thomson v. Shakespeare*, (1859) John. 612, *Carne v. Long*, (1860) 2 DeG. F. and J., 75, and *In re Swain, Phillips v. Poole*, (1908) 99 L.T. 604, to hold that it was void. As the language of deceased testators is not susceptible to change or improvement, the Law Reform Association might now direct their attention to a reform of the law which thus deprived them of this intended benefit; providing that Law Reform, for this purpose, should henceforth be treated as a charity.

Condescension, Even in an Affidavit.—The heretical belief or doctrine that a general allegation of fraud is good enough for an affidavit in support of an application for leave to defend received, last week, a deadly blow from Simmonds, J. A paragraph in such an affidavit contained a statement to the effect that by false and fraudulent representations that the property was a sufficient security for the advance and was well built and of good materials, a building society falsely and fraudulently misled the defendant into accepting a conveyance of the property. Said Simmonds, J.: "A charge of that general kind is one which ought not to be made in any affidavit which is relied on for leave to defend an action. I hope this will be the last time that I or any other Judge of this Division will see a paragraph of that kind in such an affidavit. I am glad to have had the opportunity of saying in open Court what I have already said in Chambers. Over and over again," he added, "it has been said that in cases where a defendant seeks leave to defend an action he must condescend to give particulars of his defence." Other facts were alleged in that affidavit, and Simmonds, J., having declared his mind as aforesaid, granted unconditional leave to defend.

Blood Tests, Liberty, and Perjury.—In the midst of conscription, gas-masks, and A.R.P. an involuntary pinprick in the cause of justice might seem to be a negligible interference with the liberty of the subject; but there was reason and some originality in the submissions of Mr. Dunne, the Metropolitan Magistrate, in his evidence before the Select Committee of the House of Lords which has been considering the Bill on blood tests and bastardy. His view was that a compulsory blood test, ordered solely on the motion of the Crown, involved an interference with the person and liberty of the subject; but a request by the defendant who himself submitted to the test stood on a different footing, and in such case the "requirements of justice might properly be said to override such an objection." But an order on the Crown's own motion was "an order made without request to free citizens engaged in civil litigation directing them to submit their bodies to some medical interference." He favoured the hearing of every case, in the first instance, without the blood test. If the man were then excluded, well and good; if not, recourse might be had to the test. He thought the test would reduce the number of frivolous cases and cases in which there was perjury; and "in nearly every defended case," said he, "perjury is committed." Bearer of a proud literary name, Mr. Matthew Arnold, the Watford solicitor, made another original suggestion, saying that "the ideal method would be for a compulsory blood test to be taken of every child, like vaccination. The blood group of the child could be registered and would always be available for pathological purposes and blood transfusions when required for police or affiliation purposes."

A Famous Saying.—I have seen in an old file of the *Westminster Gazette* correspondence relating to the question as to whether Lord Justice Mathew, who had recently died, was the inventor or first author of the phrase admittedly used by him: "Truth will out, even in an affidavit."

What Sir James Mathew "certainly said," according to one correspondent, was: "Truth will leak out, even in an affidavit." "The occasion," said the writer, "upon which he committed this brilliancy was an action brought to recover some land. At the end of the plaintiff's case it was submitted that there was nothing to show that the defendant was in occupation of the premises, and upon the evidence given at the trial the objection seemed to be fatal. But it occurred to the plaintiff's advisers that in an affidavit, made in an interlocutory application when it was important that the defendant should maintain the *status quo*, he had sworn that he was in possession. The affidavit was put in, and Mr. Justice Mathew (as he then was) gave judgment for the plaintiff in the single sentence aforesaid." It had been alleged that Charles Reade had already coined the phrase. "If so," said the correspondent, "the learned Judge might well say, '*Pereant qui ante nos nostra dixerunt!*'"

The *Westminster* itself, writing from recollection, was "quite sure it was Charles Reade who first jested as to the affidavit." Later it gave the reference. "We have now before us as we write a copy of *The Cloister and the Hearth*, and in Chapter XXVII (page 171 of our edition) we have the following:

> "Alas! It was an unlucky day. His sincere desire and honest endeavour to perjure himself were baffled by a circumstance he had never foreseen, nor, indeed, thought possible. He had spoken the truth.
> And IN AN AFFIDAVIT!"

The *Westminster* thought the Judge was quoting what at the time he believed to be familiar to many.

Another newspaper was of opinion that the legal *bon mot* was generally misunderstood. "He was not," said this paper, "disparaging the veracity of affidavits, though cynics have naturally seized on this interpretation, but contrasting unfavourably the value of written documents for getting at the whole truth with that of cross-examination."

Yours, as ever,

APTERYX.

Law Council of Australia.

Annual Convention, 1939.

The Law Council of Australia is holding its Annual Convention at Brisbane this year, commencing on Thursday, July 13, and continuing until Saturday, July 15.

A comprehensive programme has been arranged, and addresses will be given to the Convention by Mr. Justice Evatt of the High Court of Australia; Mr. Justice Macrossan, S.P.J., of the Supreme Court of Queensland; Mr. H. Mayo, K.C., of the South Australian Bar; Mr. David Maughan, K.C., of New South Wales Bar; and Professor Shatwell, of Tasmania. It is hoped that Professor K. H. Bailey of the Melbourne University will also give an address.

There will be a dinner on the evening of Thursday, July 13, and it is hoped that there will be a large and representative gathering of members of the profession of the Commonwealth. Other functions and entertainments are being arranged.

The Council hopes that some of the practitioners from New Zealand may find it convenient to attend the Convention—particularly as the Convention this year is being held at Brisbane, which attracts large numbers of tourists during the winter months on account of the winter climate in that State.

Any New Zealand practitioners who attend will receive a warm welcome from their professional brethren in the Commonwealth.

Obituary.

Mr. H. H. Loughnan, Christchurch.

One of the oldest and most prominent of the citizens of Christchurch, Mr. Henry Hamilton Loughnan, died on June 6 at his home, River Road, Avonside. Mr. Loughnan was well known in the city as partner in one of the oldest legal firms in Canterbury, filled a prominent position in local body administration, and was a keen musician and sportsman.

Mr. Loughnan was the son of Judge Loughnan, H.E.I.C.S., and was born in 1849 in Patna, Bengal, India. He was educated at Stoneyhurst, a famous Catholic College in England, being a contemporary there of Sir George Clifford, and many boys afterwards distinguished in public life.

Mr. Loughnan came out to Melbourne in 1868, and after a short stay in that city crossed the Tasman Sea. He spent some time in the Otago gold-diggings, after which he was engaged for a few years on a sheep-run. He then studied law as a Judge's associate to the Hon. H. B. Gresson, and also to the late Mr. Justice Johnston.

He was admitted as a barrister of the Supreme Court in 1876, and commenced to practise his profession in Christchurch in that year. In 1878, he joined Mr. William Izard, under the style of Izard and Loughnan. This firm, one of the best known and oldest in Christchurch, celebrated its diamond jubilee several years ago.

Among other prominent local body work undertaken by Mr. Loughnan he was elected to represent the South-East Ward on the Christchurch City Council in 1896, and was a member of the Council for more than thirteen years.

In musical circles, Mr. Loughnan played an important part for many years. He was a member of the Christchurch Orchestral Society for a long period and was also a member of the Musical Union. Mr. Loughnan claimed the privilege of having brought the first piano to Christchurch, when he arrived in the city.

In his younger days, as an enthusiastic cricketer, he took part in several inter-colonial matches, and at the time of his death was still a member of the Lancaster Park Cricket Club.

Mr. Loughnan is survived by six sons. They are the Rev. Father Basil Loughnan, of Melbourne; the Rev. Father Lewis Loughnan, S.J., of Melbourne, at one time Rector of Riverview College, Sydney; Mr. R. J. Loughnan, Christchurch; Mr. Bede Loughnan, solicitor, of the same city; Mr. Joseph Loughnan, of Lower Hutt, and Mr. A. B. Loughnan, solicitor, of Palmerston North.

Four daughters survive him. They are Mother Dorothy Loughnan, of the Convent of the Sacred Heart, Sydney; Mrs. W. O. Campbell, of Fendalton; Mrs. Lawrence McRae, of North Canterbury; and Mrs. John Ellis, of Auckland.

Mr. Loughnan was a brother of the late Mr. R. A. Loughnan, formerly one of the best-known journalists in the Dominion.

Mr. Loughnan's funeral was attended by a large number of practitioners.

Mr. A. P. Barklie, Geraldine.

Mr. Alfred Percy Barklie died on May 28, at the age of seventy-three years. Born on May 28, 1866, in Dublin, Mr. Barklie was the son of the Rev. John Knox Barklie, vicar of Moira, County Down, Ireland, who was later at Geraldine. He was educated at Tonbridge School, England, and received his legal education in London.

More than forty years ago, Mr. Barklie went to Geraldine, where he became a partner in the legal form of Messrs. Smithson and Raymond, more recently known as Raymond, Raymond, and Barklie. Since then he had practised in Geraldine, and was also borough solicitor.

In his younger days, Mr. Barklie took a great interest in hunting, and often followed the hounds, and was a lover of good horses. For many years past he had been a vestryman of St. Mary's Anglican Church, Geraldine. He retired from that position only this year, because of ill-health. He was one of the three included this year in the honours list of those who have given long and faithful service to the church. He leaves his widow and one daughter, and four sisters: Mesdames George Raymond, E. G. Hayes, Miss Ethel Barklie, and Sister Eveleen.

"The intellectual atmosphere of the law keeps in being a spirit of fair play and a habit of precise thinking, which is a valuable aseptic in public affairs."

—E. S. P. HAYNES in *The English Genius.*

Practice Precedents.

Application to Appoint Guardian of an Infant Becoming Possessed of a Legacy in United States of America.

Section 5 of the Infants Act, 1908, provides that every guardian under the Act has all such powers over the estate and the person, or over the estate, as the case may be, of an infant as any guardian, appointed by will or otherwise, now has in England under the Abolition of Old Tenures Act, 1660 (12 Car. 2, c. 24), *15 Halsbury's Complete Statutes of England*, 58, or otherwise.

The Court in its general jurisdiction may appoint a guardian of the property or estates of an infant: see *Daniell's Chancery Practice*, 8th Ed. 974.

The father, until he had been appointed guardian under the Infants Guardianship and Contracts Act, 1887, had no power to receive the legacies or any part thereof on behalf of the infant legatees, but that if, in proper proceedings, he were found to be a proper person, the Court would appoint him guardian under that Act: *Bayley v. Public Trustee*, (1907) 27 N.Z.L.R. 659. (The Infants Guardianship and Contracts Act, 1887, is now embodied in the Infants Act, 1908.)

A guardian can give a valid receipt for a legacy left to such infant: *Sime v. Hume*, (1901) 20 N.Z.L.R. 191.

It would appear from *In re M. G. Stuart-Forbes* (an Infant), (1907) 27 N.Z.L.R. 458, that the application is made by way of petition. In accordance with R. 414A of the Code of Civil Procedure a motion-paper is required in support of the petition. There should be an affidavit by some person of standing that applicant is a fit and proper person. There is apparently no express provision that a petition must be dated, but, as a matter of practice, it is dated at the top.

In cases where the moneys of infants are in issue, the Court is reluctant to dispense with security. When the amount of moneys is small the Court may dispense with security and accept in lieu thereof a written undertaking by the guardian to account: see *Daniell's Chancery Forms*, 7th Ed., 586(*n*), 587; and see also *2 Seton's Judgments and Orders*, 7th Ed. 951, 947. In *In re Stuart-Forbes* (*supra*), the Court dispensed with the surety.

As to the Court's general jurisdiction relative to costs, see R. 555 of the Code of Civil Procedure.

A certificate similar to an exemplification of probate may be adopted (*mutatis mutandis*) when it is required to be further certified by the American Consul.

In most States in America it is necessary to furnish to the Courts there a certificate that the Supreme Court of New Zealand is duly authorized and empowered by the laws of the Dominion of New Zealand to make the order. It appears there is no particular form of certificate, but it can be said that the form submitted here has been accepted: see *Rhodes's Practice Precedents*, 54.

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

IN THE MATTER of the Infant's Act 1908
AND
IN THE MATTER of A. B. an infant.

Mr. of Counsel for B. B. &c. to move before the Right Hon. Sir Chief Justice of New Zealand at his Chambers Supreme Court at the hour of 10 o'clock in the forenoon or so soon thereafter as Counsel can be heard for an order in terms of the prayer of the petition herein.

1. That the said B. B. be appointed the guardian of the estate of his infant child A. B. during his minority or until the further order of this Court.

2. That the said B. B. be authorized—

(*a*) To receive the moneys to which his said infant child is entitled under the will of C. B. of the City of in the State of in the United States of America deceased.

(*b*) To give a valid discharge to the executor of the will of the said C. B. for the said moneys due under the said will.

(*c*) To invest or apply the said moneys for the benefit of or on behalf of the said infant.

3. And for an order that security to account for the said moneys and securities therefor be dispensed with and for an order that the costs of and incidental to these proceedings be taxed by the Registrar of this Court at and paid out of the moneys payable under the said will of C. B. deceased UPON THE GROUNDS that the said A. B. cannot receive the moneys until a guardian is appointed on his behalf AND UPON THE FURTHER GROUNDS appearing in the affidavit of B. B. filed herein.

Dated at this day of 19 .

Solicitor for applicant.

Certified pursuant to the rules of Court to be correct.

Counsel moving.

REFERENCE.—Section 5 of the Infants Act, 1908; *Bayley v. Public Trustee*, (1907) 27 N.Z.L.R. 659; and *Sime v. Hume*, (1901) 20 N.Z.L.R. 191.

MEMORANDUM FOR HIS HONOUR.

This is an application for the appointment of guardian on behalf of an infant to receive moneys due under a will and to give an effectual receipt to the executor for the moneys.

The applicant is the father of the beneficiary an infant child who has been bequeathed the sum of £ under the will of his late uncle [*Name*] who was resident in the City of in the State of in the United States of America.

By virtue of the reference referred to it is submitted there is ample authority for making the order.

Counsel moving.

PETITION.
(*Same heading.*)
day the day of 19 .

To the Right Honourable Chief Justice of New Zealand.

THE HUMBLE PETITION of B. B. of &c. in the District of New Zealand, farmer, showeth—

1. That your petitioner is a farmer resident at and domiciled in New Zealand and is the lawful father of A. B. an infant child born at on the day of 19 .

2. That one C. B. of the City of in the State of in the United States of America died on or about the day of 19 leaving a will dated the day of 19 probate whereof was granted by the Court to the executor named in the said will on the day of 19 .

3. That the said C. B. was a brother of your petitioner and by his said last will the said C. B. deceased gave and bequeathed to the said the sum of dollars which in New Zealand currency (computed at 4·95 dollars to the pound) amounts to the sum of £ .

4. That by the laws of the State of and by the requirements of the [*Court*] distribution of your petitioner's child's share in the estate of the said C. B. must be made to the guardian duly appointed pursuant to the laws of the Dominion of New Zealand.

5. That the said A. B. resides with me and my wife and is a pupil at the Secondary School.

6. That I am in receipt of an income of £ and have always maintained and intend to maintain the said A. B. until such time as he is able to adequately support himself.

7. That your petitioner is desirous of being appointed guardian of the estate of his infant child the said A. B. in order that he may receive the moneys to which he is entitled under the will of the said C. B. and give an effectual receipt therefor and invest or apply the same on behalf of the said infant A. B.

YOUR PETITIONER THEREFORE HUMBLY PRAYS that he be appointed the guardian of the estate of his infant child A. B. to receive the moneys to which he is entitled under the will of the said C. B. deceased to give a valid receipt to

the executor for the same and to invest or apply the same on behalf of the said infant child and that the costs of and incidental to these proceedings be paid out of the said moneys.
AND YOUR PETITIONER WILL EVER PRAY ETC.
Signed by the said B. B. in the presence of .

[*Small verifying affidavit.*]

AFFIDAVIT OF FITNESS.

I X. Y. of in the Dominion of New Zealand accountant make oath and say as follows :—
1. That I am an accountant practising in the City of and am a member of the firm of accountants.
2. That I have known the said B. B. for the past fifteen years.
3. That in my opinion the said B. B. is in every way a fit and proper person to be appointed the guardian of the estate of his infant child A. B.
Sworn &c.

UNDERTAKING.
(*Same heading.*)

To the Registrar Supreme Court .
I of in the Dominion of New Zealand the guardian appointed by order of this Honourable Court at dated the day of 19 hereby undertake to account for all moneys and property received by me as such guardian or for which I may be held liable and to pay the balances from time to time found due from me and to deliver any property received by me as such guardian at such times and in such manner in all respects as this Honourable Court shall direct.
Dated at this day of 19 .
Signed by the said in the presence of .
Name :
Address :
Occupation :

CERTIFICATE.
(*Same heading.*)

WHEREAS on the day of 19 an order for the appointment of a guardian of the estates of infants was duly made by the Honourable Mr. Justice a Judge of the Supreme Court of New Zealand.
NOW THIS IS TO CERTIFY that this Honourable Court is duly authorized and empowered by the laws of the Dominion of New Zealand to make the said order.
Dated at this day of 19 .
Registrar.

ORDER FOR APPOINTMENT OF GUARDIAN.
(*Same heading.*)

day the day of 19 .
Before the Honourable Mr. Justice .
UPON READING the petition of for appointment of guardian of estates of infants filed herein the affidavit of filed in support thereof and the motion in support of the said petition IT IS ORDERED :
1. That the said be appointed the guardian of the estate of his infant child during his minority or until the further order of this Court.
2. That the said be authorized—
(*a*) To receive the moneys to which his said infant child is entitled under the will of late of in the State of in the United States of America deceased.
(*b*) To give a valid discharge to the executor of the said will for the same.
(*c*) To invest or apply the same on the said infant child's behalf.
3. That security by the said and sureties be dispensed with but a proper undertaking to be approved by this Court by the said to account for all moneys and property received by him be filed.
4. That the costs of and incidental to these proceedings be taxed by the Registrar as between solicitor and client be paid out of the said moneys.
By the Court.
Registrar.

Correspondence.

The Editor,
NEW ZEALAND LAW JOURNAL.
DEAR SIR,—

With the changing times in which we live, it sometimes appears that our law must of necessity lag behind. One of the changes that seems indicated by modern conditions is to the "Wills Act." According to this Act an infant may make a will under certain circumstances. This of course was to protect the infant who at that time had not arrived at the age of discretion. To-day it frequently happens that a young man has learned a trade, say carpentering, and by the time he is twenty-one years of age he may have saved quite a respectable sum. In one case which came to our notice, a boy left £300 apart from a life insurance, the whole of this being from his own savings. His mother and father were divorced and he had lived with his mother. By our law the father takes all.

A case might occur where the father is mentally afflicted and the mother would be in need of money.

According to our law the father's committee would receive this money and presumably would apply it to the father's upkeep.

It is realized that it is necessary to protect infants, but it should be possible for a will to be made in the presence of a Magistrate and the law should be altered so as to make this will valid. It would be better to have a will witnessed by a Magistrate, as even a corporation sole might be diffident about advising a girl or boy under twenty-one years of age in reference to testamentary dispositions.

Yours faithfully,
HART, DANIELL, AND HART.
Masterton,
May 30, 1939.

Rules and Regulations.

Board of Trade Act, 1919. Board of Trade (Price-investigation) Regulations, 1939. June 2, 1939. No. 1939/62.

Health Act, 1920. Camping-ground Regulations Extension Order, 1939, No. 3. June 2, 1939. No. 1939/63.

Poultry-runs Registration Act, 1933. Poultry Board Regulations, 1939. June 2, 1939. No. 1939/64.

Stock Act, 1908. Stock Importation Amending Regulations, 1939. June 2, 1939. No. 1939/65.

New Books and Publications.

Lewis's Workers' Compensation in South Australia. Second and enlarged edition, 1939. (Butterworth and Co. (Aus.) Ltd., Sydney.) Price 15/-.

Pilcher, Uther, and Baldock's Supplement to the Australian Companies Act. (Butterworth and Co. (Aus.) Ltd., Sydney.) Price 12/6d.

Income Tax Handbook. By J. A. L. Gunn, F.C.A. (Butterworth and Co. (Aus.) Ltd., Sydney.) Price 25/-.

Soderman and O'Connell's Modern Criminal Investigation. (G. Bell & Sons Ltd., London.) Price 20/-.