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" The responsibility of the Bar to the public is much less simple than the responsibility of the other professions. A duty to advance justice in human affairs is a more complicated duty, and one far more difficult to fulfilment than is a duty to preserve human life and health, or to promote human safety, comfort, and material wealth through the application of the teachings of physical science.

—PROFESSOR SIDNEY P. SIMPSON, Harvard Law School.

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Alien Enemies: Their Common-Law Rights and Disabilities.

TWO important questions arose on the outbreak of war with Germany in 1914. These were: (1) whether an alien enemy could sue in the British Courts; and (2) whether an alien enemy could be sued and defend himself in the British Courts. Old principles had to be applied to problems which had arisen in wholly unusual conditions.

When coming to a consideration of the rights of aliens in war-time, it must first be ascertained whether they are alien friends or alien enemies.* Alien friends are treated with regard to civil rights as if they were British subjects; and they are entitled to all the rights of a British citizen, including the rights to sue and defend in the King's Courts. Next, it is necessary to keep clearly in mind the meaning of the term " alien enemy " when used in reference to civil rights and liabilities. Its natural meaning implies nationality and indicates a subject of a State that is at war with His Majesty; this would not in any circumstances include a subject of a neutral State or a British subject. That, however, is not the sense in which the term is used in reference to civil rights. In 1914, before the Courts could determine the civil rights and liabilities of " alien enemies " they had to consider who were, and who were not " alien enemies." This question would have given rise to no legal difficulty in the Middle Ages, because when one sovereign prince then declared war, all the subjects owing him allegiance were at once at war with all the subjects of his enemy, and each national was bound to assist the cause of its sovereign by plundering and crippling the enemy wherever he was found. Later, this conception became grounded upon public policy which prohibits the doing of acts that will or may be to the advantage of the enemy State by increasing its capacity for prolonging warfare by adding to its credit money or goods, or to other resources available to individuals in the enemy State.

With the progress of commerce and the development of international relations, the stringency of the earlier view was modified, and the place where the individual resided or carried on business became the important consideration. Thus, an Englishman may be an alien enemy if he continues voluntarily to reside or carry on business in Germany. A German may not be an alien enemy, if, with the permission of the King, he continues to reside and carry on business in England. So also, a German with a residence or place of business, having a certain degree of permanence, in a neutral country is not an alien enemy in the view of the English Courts. This view, as taken by the Courts, may be summarized in the words of Professor Dicey, quoted with approval by the Court of Appeal in 1915:

> " Under the term ' alien enemy ' are included not only the subjects of any State at war with us, but also any British subject or the subjects of any neutral State voluntarily residing in a hostile country."

Ever since *The Hoop*, (1799) 1 C. Rob. 196, 165 E.R. 146, the established law, as pronounced in the judgment of Sir William Scott (as Lord Stowell then was), was that one of the consequences of war is the absolute, interdiction of all commercial intercourse or correspondence by a British subject with the inhabitants of the hostile country, except by permission of the Sovereign.

During the Napoleonic wars, it was the law of almost every country that the character of an alien enemy carried with it a disability to sue or to sustain a *persona standi in judicio*. This, as Lord Kenyon said in *Potts v. Bell*, (1800) 2 Term. Rep. 548, 561, 101 E.R. 1540, 1547, might be taken for granted as a principle of our common law, and the question might be taken as finally at rest. During the Crimean War this branch of the law was again considered; and Willes, J., in delivering the judgment of the Court of Queen's Bench in *Esposito v. Bowden*, (1857) 7 E. & B. 763, 119 E.R. 1430, said:

> " It is now fully established that the presumed object of war being as much to cripple his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country and that such intercourse, except with the licence of the Crown is illegal."

It followed that it was illegal for a subject in time of war, without license, to bring from an enemy's port, even in a ship, after commencing hostilities, goods purchased in the enemy's country although not appearing to have been purchased from the enemy; in fact, that trading with inhabitants of an enemy's country was trading with the enemy. Consequently, as trading with a British subject or a subject of a neutral State carrying on business in an hostile territory is as much assistance to the enemy as if it were with a subject of enemy nationality carrying on business in the enemy State, they are equally treated as alien enemies for the purpose of the enforcement of civil rights.

It is now-a-days clear law that the test for this purpose of ascertaining if an individual is or is not an " alien enemy " is not his nationality, but the place of the carrying-on of his business during war-time. When considering the enforcement of civil rights a person

* For the definition of " alien " and "alien enemy " for the special purposes of War Regulations, see the Alien Control Emergency Regulations, 1939, (Serial No. 1939/132), Cl. 1 (" alien "); the Enemy Trading Emergency Regulations, 1939 (Serial No. 1939/139), Cl. 2 (" alien enemy "); and the Enemy Property Emergency Regulations, 1939, (Serial No. 1939/153), Cl. 2 (1) (" alien enemy ").

may be treated as the subject of an enemy State, notwithstanding that he is, in fact, a subject of the British Crown or of a neutral State. Thus, an Englishman carrying on business in an enemy's country is treated as an alien enemy in considering the validity or invalidity of his commercial contracts: *McConnell v. Hector*, (1802) 3 Bos. & P. 113, 127 E.R. 61. Conversely, a person may be treated as a subject of the Crown, notwithstanding that he is, in fact, the subject of an enemy State, as when the subject of a State at war with Great Britain is carrying on business in the King's realms or in a foreign neutral country; he is not treated as an alien enemy, as the validity of his contracts does not depend on his nationality or even on what is his real domicil, but on the place or places in which he carries on his business or businesses: *Wells v. Williams*, (1697) 1 Ld. Raym. 282, 125 E.R. 18. These principles were quoted with approval by Lord Lindley in *Janson v. Driefontein Consolidated Mines, Ltd.*, [1902] A.C. 484, 505, when he said: "When considering questions arising with an alien enemy, it is not his nationality but his place of business that is important." In *Porter v. Fruedenberg*, [1915] 1 K.B. 857, 868, the Full Court of Appeal, (Lord Reading, C.J., Lord Cozens Hardy, M.R., and Buckley, Kennedy, Swinfen Eady, Phillimore, and Pickford, L.JJ., restated the common law in the early months of the War of 1914. In a unanimous judgment read by Lord Reading, L.C.J., it was said:

> "Lord Lindley's statement [in *Janson's* case] was not intended to be, and is not, exhaustive. His Lordship, for the purposes of the appeal then before the House of Lords, was considering the character of a trading corporation, and did not purport to deal with persons residing but not carrying on business in the enemy territory. Such a person is equally treated as an alien enemy provided he is voluntarily resident there, having elected to live under the protection of the enemy State. For the purpose of determining civil rights, a British subject or the subject of a neutral State, who is voluntarily resident or who is carrying on business in hostile territory, is to be regarded and treated as an alien enemy and is in the same position as a subject of hostile nationality resident in hostile territory."

In *In re Mary Duchess of Sutherland, Bechoff, David, and Co. v. Bubna*, (1915) 31 T.L.R. 248, Warrington, J., held that an action could be maintained in England by an enemy alien who was neither residing nor carrying on business in an enemy country, but was residing in an allied or a neutral country, and was carrying on his business in that allied country. This case went to the Court of Appeal, (1915) T.L.R. 394, which did not express any disagreement with the learned Judge's statement of the law.

It follows from the foregoing that at common law the question whether a man is to be treated as an enemy alien in respect of his civil rights and liabilities depends on whether or not he carries on business in a British country or not, and does not depend on his nationality or his domicil. If he carries on business in the King's realms it is not illegal to have business dealings with him, even in war-time, in respect of the business which he carries on in the British country: *W. L. Ingle, Ltd. v. Mannheim Continental Insurance Co.*, [1915] 1 K.B. 227.

Alien enemies cannot maintain a real or personal action until both nations are at peace, and they have no civil rights or privileges unless they are in the King's realms under the King's protection and by permission of the Crown: *1 Blackstone's Commentaries*, 21st Ed., c. 10, p. 372. Towards the end of the eighteenth century it was held in *Brandon v. Nesbitt*, (1794) 6 Term Rep. 23, 101 E.R. 415, that no action can be maintained by or in favour of an alien enemy; and Lord Kenyon, C.J., in delivering the judgment in the Court of the King's Bench said, at pp. 28, 418, that "the Court had not found a single case in which an action had been supported in favour of an alien enemy"; and, he added:

> "For, though it was held in *Ricord v. Bettingham*, (1765) 3 Burr. 137, 97 E.R. 1071, that the action by an enemy on a ransom bill might be maintained, the action was not brought until peace was restored, which gets rid of the objection."

The legal position was clearly stated by Lord Alvanley, C.J., in *McConnell v. Hector* (*supra.*), pp. 114, 62, when he said:

> "Every natural-born subject of England has a right to the King's protection so long as he entitles himself to it by his conduct, but if he lives in an enemy's country he forfeits that right. Although these persons may not have done that which would amount to treason, yet there is an hostile adherence and I do not wish to hear it argued that a person who lives and carries on trade under the protection and for the benefit of a hostile State, and who is so far a merchant settled in that State that his goods would be liable to confiscation in a Court of prize, is yet to be considered as entitled to sue as an English subject in an English Court of justice. The question is, whether a man who resides under the allegiance and protection of an hostile State for all commercial purposes is not to be considered to all civil purposes as much an alien enemy as if he were born there? If we were to hold that he was not, we must contradict all the modern authorities on this subject. That an Englishman from whom France derives all the benefit which can be derived from a natural-born subject of France should be entitled to more right than a native Frenchman would be a monstrous proposition. While the Englishman resides in the hostile country, he is a subject of that country, and it has been held that he is entitled to all the privileges of a neutral country while resident in a neutral country."

In *Boulton v. Dobree*, (1808) 2 Camp, 163, and *Alciator v. Smith*, (1812) 3 Camp. 245, during the Napoleonic wars, it was firmly established that an alien enemy, unless in the King's realm by permission of the Crown, could not sue in the King's Courts. The principle was again affirmed in a case arising out of the Crimean War, *Alcinous v. Nigreu*, (1854) 4 E. & B. 217, 119 E.R. 84, where Lord Campbell, C.J., held that the Court must take judicial notice that our Sovereign was at war with the Empire of Russia, and he was of the opinion that a Russian subject, who was in England without the permission, express or implied, of the Sovereign, could not sue there.

For the purpose of determining whether a person who is *prima facie* an "alien enemy" may sue in the King's Courts, the fact whether or not he is under the King's special protection or not must be proved; and the burden of proof is upon him. If an alien enemy comes to the King's realm and resides there under a safe conduct, or by the King's license or permission, and under his protection, he stands in the same position as to the right of maintaining actions in our Courts as an alien friend, a right of suing being an incidental right to protection—that is, he is no longer under the disability attaching to an alien enemy: *Porter* v. *Freudenberg* (*supra.*)

An example of an alien enemy residing in England with the King's permission is shown by the case of *Princess Thurn and Taxis v. Moffitt*, [1915] 1 Ch. 58, where Sargant, J., held that the subject of an enemy State residing in England, who had registered as an alien and as an enemy subject under the Aliens Restriction Act, 1914, though the subject of an enemy State, was entitled to sue in the King's Courts. This decision was approved by the full Court of Appeal

in *Porter v. Freudenberg* (*supra*), for the reason that such an alien was residing in England by tacit permission of the Crown: by registration he had informed the Executive of his presence in that country, and, as he had been allowed thereafter to remain there, he was *sub protectione domini regis*.

Internment does not make a person an enemy, if enemy character in a trading sense was never attached to him. Early in the War of 1914, it was decided that an enemy alien, who becomes interned as a civilian prisoner of war, is entitled to maintain any action otherwise competent to him. An alien enemy resident in a British country, who in the opinion of the Executive Government is a person hostile to the welfare of the country and is on that account interned, may properly be described as being a prisoner of war, although not a combatant or a spy. Thus, *qua* prisoner of war, he is unable to apply for a writ of *habeas corpus*: *The King v. Superintendent of Vine Street Police Station, Ex parte Liebmann*, [1916] 1 K.B. 268; but that is not to say that an interned alien is for the purpose of enforcing civil rights to be treated as a prisoner of war in the same way as if he had been captured in a German ship of war, or at some point on the Western Front.

Having explained the meaning of "alien enemy" for civil purposes, and having decided that such alien enemy's right to sue or proceed either by himself or by any person on his behalf in the King's Courts is suspended during the progress of hostilities and until after peace is restored, the full Court of Appeal in *Porter v. Freudenberg* (*supra*) next considered whether he is liable to be sued in the King's Courts during the war. Their Lordships, at p. 880, said:

> "To allow an alien enemy to sue or proceed during war in the civil Courts of the King would be, as we have seen, to give to the enemy the advantage of enforcing his rights by the assistance of the King with whom he is at war. But to allow the alien enemy to be sued or proceeded against during war is to permit subjects of the King or alien friends to enforce their rights with the assistance of the King against the enemy. *Prima facie* there seems no possible reason why our law should decree an immunity during hostilities to the alien enemy against the payment of just debts or demands due to British or neutral subjects."

The rule of law suspending the alien enemy's right of action is based upon public policy, but no considerations of public policy are apparent which would justify preventing the enforcement by a British or neutral subject of a right against the enemy. As was said by Bailhache, J., in *Robinson and Co. v. Continental Insurance Co. of Mannheim*, [1915] 1 K.B. 155, 159:

> "To hold that a subject's right of suit is suspended against an alien enemy is to injure a British subject, and to favour an alien enemy and to defeat the object and reason of the suspensory rule."

In the judgment of the Court of Appeal, the effect would be to convert that which during war is a disability, imposed upon the alien enemy because of his hostile character, into a relief to him during war from the discharge of his liabilities to British subjects.

If an enemy alien resident in a neutral country can maintain an action in our Courts, it would appear *a fortiori*, that, if resident, and even more if interned here, he can equally maintain it, since it is the plaintiff's place of business, during war, and not his nationality, that is important. It is when he is resident in hostile territory that payment of money to him is, in the view of the Court, to the advantage of the enemy. Where an enemy alien is interned, and is thereby effectively prevented from leaving the King's realm, there is no reason of State or public policy why the principle first referred to should not be given full effect: *Schaffenius v. Goldberg*, [1916] 1 K.B. 184, 292. In this case, the Court of Appeal found no warrant for the contention that internment is equivalent to a revocation of the license to remain, which is implied in registration under the Aliens Restriction Regulations, as was stated *obiter* by Low, J., to be the case in *The King v. Superintendent of Vine Street Police Station, Ex parte Liebmann* (*supra*). As Younger, J. (as he then was), said in the *Schaffenius* case, at p. 195, in the Court of first instance:

> "If there be any possibility of danger to the State in allowing an alien enemy to sue, it is surely least to be apprehended when the alien is safely interned. It would be strange that the alien might sue when possessed of all the opportunity for doing mischief which either residence in a neutral country or a certain amount of freedom in this country afforded, but was to be deprived of the privilege when kept here in strict confinement."

And Lord Cozens Hardy, M.R., concluded his judgment at p. 302, by saying:

> "It seems to me to be in accordance with general principles, and only in accordance with general principles, that the restraint which is imposed upon the personal movements of an interned German does not deprive him of civil rights in respect of a lawful contract entered into by him before the internment."

Once the conclusion is reached that the alien enemy can be sued, it follows that he can appear and be heard in his defence and may take all such steps as may be deemed necessary for the proper presentment of his defence. If he is brought at the suit of a party before a Court of justice, he must have the right of submitting his answer to the Court. To deny him that right would be to deny him justice, and would be quite contrary to the basic principles guiding the King's Courts in the administration of justice.

When an alien enemy is sued, if judgment proceed against him, the appellate Courts are as much open to him as to any other defendant. As the Court of Appeal said in *Porter's* case (*supra*):

> "It is true that he is the person who may be said in one sense to initiate the proceedings in the appellate Court by giving the notice of appeal, which is the first necessary step to bring the case before that Court; but he is entitled to have his case decided according to law, and if the Judge in one of the King's Courts has erroneously adjudicated upon it, he is entitled to have recourse to another and an appellate Court to have the error rectified. Once he is cited to appear, he is entitled to the same opportunities of challenging the correctness of the decision of the Judge of first instance or other tribunal as any other defendant."

The decision in *McVeigh v. United States*, (1870) 11 Wallace 259, in the Supreme Court of the United States is to the same effect: the defendant, who was an alien enemy, and the appellant, brought writ of error in respect of the judgment of the District and Circuit Courts, and he succeeded in reversing the judgments of those Courts.

We must now consider whether the same conclusion is reached in reference to appeals by an alien enemy plaintiff—that is, a person who before the outbreak of war was a plaintiff in a suit, and then, by virtue of his residence or place of business, became an alien enemy. As we have seen, he could not proceed with his action during the war. If judgment had been pronounced against him before the war in an action in which he was plaintiff, can he present an appeal to the appellate Courts of the King? Again, in *Porter's* case, the Court of Appeal said that he could not during

war-time: The Court could not see any distinction in principle between the case of an alien enemy seeking the assistance of the King to enforce a civil right in a Court of first instance, and an alien enemy seeking to enforce such right by recourse to the appellate Courts. As the judgment said:

> "He is in either case seeking to enforce his right by invoking the assistance of the King in his Courts. He is the "actor" throughout. He is not brought to the Courts at the suit of another, it is he who invokes their assistance; and it matters not for this purpose that a judgment has been pronounced against him before the war. When once hostilities have commenced he cannot, so long as they continue, be heard in any suit or proceeding in which he is the person first setting the Courts in motion. If he had given notice of appeal before the war, the hearing of his appeal must be suspended until after the restoration of peace."

Where an enemy alien residing and carrying on business in a hostile State, cannot be heard in the King's Courts during the war, his case cannot be adjourned until after the war; because, inasmuch as there is no existing right, no adjournment can be entertained: *Re Wilson, ex parte Marum*, (1915) 113 L.T. 1116.

Summary of Recent Judgments.

COURT OF APPEAL.
Wellington.
1939.
June 15, 16, 18; July 29.
Myers, C.J.
Blair, J.
Johnston, J.
Northcroft, J.

STRAWBRIDGE v. MASON.

Motor-vehicles—Road Collisions—Obligation on Driver to keep Vehicle "as close as practicable to his left of the roadway"—Question of Fact for Jury—"Negligence materially contributing"—Direction to Jury—Effect of Driver's Sun-blindness—Traffic Regulations, 1936 (Serial No. 86/1936), Reg. 14 (1).

The words of Reg. 14 (1) of the Traffic Regulations, 1936, which requires that—

> "Every driver of a motor-vehicle shall keep the vehicle as close as is practicable to his left of the roadway,"

raise a question of fact which must be left to the jury; except in a case so clear on its facts as to exclude any rational inference other than an inference against the plaintiff in which event the case might have to be withdrawn from the jury.

Birt v. Robinson (No. 3), [1937] N.Z.L.R. 898, G.L.R. 553, and **Ex parte Jenkins**, (1871) 10 N.S.W. S.C.R. (L.) 138, referred to.

Cooke, K.C., and **Trimmer**, for the plaintiff; **North** and **L. A. Johnston**, for the defendant.

So held by the Court of Appeal (*Myers*, C.J., and *Johnston* and *Northcroft*, JJ.), dismissing a motion for nonsuit, and, in the alternative, for judgment for the defendant *non obstante veredicto*.

Per *Blair*, J., who dissented from the result arrived at by the other members of the Court, That by reason of Reg. 14 (1) of the Traffic Regulations, 1936, there is a general duty on motorists to occupy the proper place on the road even if the road be free of other traffic: what is practicable in keeping close to the left of the roadway, depends on the circumstances and is opposed in meaning to "impracticable." Where there is a smooth traffic track 3 ft. wide within 2 ft. of the edge of the road and nothing to prevent a motor-cyclist travelling within, say, 6 ins. of the near side of the smooth traffic track that was the motor-cyclist's proper place on the road.

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

COURT OF ARBITRATION.
Christchurch.
1939.
July 24; August 10.
Callan, J.

PATERSON v. DIEDRICHS.

Workers' Compensation—Average Weekly Earnings—Compensation for Permanent Incapacity when Worker under Twenty-one—Weekly Earnings estimated in Occupation on which employed at time of Accident.

On a claim made under s. 9 of the Workers' Compensation Act, 1922, only the occupation in which the worker was employed at the date of the accident is to be considered.

Baker v. Masters, [1927] G.L.R. 597, applied.
Wood v. Wood, [1921] N.Z.L.R. 979, G.L.R. 430; **Vickers, Sons, and Maxim, Ltd. v. Evans**, [1910] A.C. 444, 3 B.W.C.C. 403; and **Miller v. Taylor and Son**, (1931) 100 L.J. K.B. 641, 24 B.W.C.C. 257, distinguished.

Counsel: Archer, for the plaintiff; **Thomas**, for the defendant.

Solicitors: Archer and Barrer, Christchurch, for the plaintiff; **C. S. Thomas**, Christchurch, for the defendant.

SUPREME COURT.
Auckland.
1939.
September 1, 5.
Ostler, J.

Re **MILLER (A BANKRUPT)**, *Ex parte* **PUBLIC TRUSTEE.**

Mortgagors and Tenants Relief—Mortgage—Guarantor—Order of Adjustment Commission—Mortgagors released from Liability and Land vested in Mortgagee freed from Mortgage—Whether Guarantor of Moneys payable under Mortgage thereby relieved from Liability—Mortgagors and Lessees Rehabilitation Act, 1936, s. 53.

Section 53 of the Mortgagors and Lessees Rehabilitation Act, 1936, has no application, where, by agreement or by virtue of an order of an Adjustment Commission, a mortgage has ceased to exist and the land charged with the mortgage has become vested in the mortgagee in fee-simple free from any charge.

In such a case, a guarantor who has guaranteed to the mortgagee the payment of moneys payable under the mortgage is released from his liability.

Counsel: Ryan, for the Public Trustee; **Meredith**, for the Official Assignee.

Solicitors: Public Trust Office Solicitor, Auckland, for the Public Trust; **Meredith, Meredith, and Kerr**, Auckland, for the Official Assignee.

SUPREME COURT.
Dunedin.
1939.
June 1, 2; September 11.
Blair, J.

FORREST v. KAITANGATA COAL COMPANY, LIMITED.

Negligence—Damages—Negligence of Employers causing Death of Worker—Claim by Administrator for Benefit of Deceased's Estate—Pain and Suffering—Shortened Expectation of Life—Effect on Claim of s. 17 of the Statutes Amendment Act, 1937—Workers' Compensation Act, 1922, s. 55—Statutes Amendment Act, 1937, s. 17.

Section 55 of the Workers' Compensation Act, 1922, was not repealed by s. 17 of the Statutes Amendment Act, 1937. Therefore, at common law, damages for pain and suffering and for curtailment of the expectation of life of a deceased worker, who was killed as the result of an accident during his employment and after the passing of the Statutes Amendment Act, 1936, may be claimed by his personal representative.

Rose v. Ford, [1937] A.C. 826, [1937] 3 All E.R. 359, discussed.

Counsel: Adams and **Wood**, for the plaintiff; **Mowat**, for the defendant.

Solicitors: Adams Bros., Dunedin, for the plaintiff; **Gallaway and Mowat**, Dunedin, for the defendant.

COURT OF ARBITRATION.
Greymouth.
1939.
August 18, 31.
Callan, J.

NEAME v. THE KING.

Workers' Compensation—Accident Arising out of and in the Course of Employment—Worker engaged in clearing Slips on Road, leaving for Home and mounting Horse at first suitable Place beyond Slip—Whether Accident arose when Worker in course of leaving Employer's Premises or subsequently—Workers' Compensation Act, 1922, s. 3 (1).

The suppliant, his father, and his uncle were employed by a Public Works roadman in clearing slips on a road. The suppliant's father hired the use of his horse and dray to the Department. In the performance of the work the three men were subject to the orders and control of the roadman. In going to and coming from the work the suppliant rode the horse and the other three travelled in a truck. The roadman told the suppliant when to leave as his journey took longer than that of the others.

Having been told that he could go, and being unable to mount the horse from the road level, the suppliant took the horse in against the bank of the first suitable place beyond the slip where he could mount. In endeavouring to do so, he fell and was injured.

W. D. Taylor, for the suppliant; **F. A. Kitchingham,** for the respondent.

Held, 1. That upon the evidence the spot where the suppliant endeavoured to mount was within that portion of the highway which constituted for the time being the employer's premises; that the accident occurred in the course of his leaving his employer's premises and in the course of his employment.

Dictum of *Romer*, J., in **Sparey v. Bath Rural District Council,** (1931) 146 L.T. 285, 24 B.W.C.C. 414, applied.

Solicitors: Joyce and Taylor, Greymouth, for the suppliant; **Guinness and Kitchingham,** Greymouth, for the respondent.

Case Annotation: *Sparey v. Bath Rural District Council*, E. and E. Digest, Supp. Vol. 34, para. 2355a.

COURT OF ARBITRATION.
Greymouth.
1939.
August 18, 31.
Callan, J.

WATSON v. THE KING.

Workers' Compensation—Accident Arising out of and in the Course of Employment—Linesman using his own Tools and told to fetch them to the Place where he was working—Injured after having collected Tools and while taking them to his Work—Workers' Compensation Act, 1922, s. 3 (1).

An electrical linesman, using his own tools, who went to and from his work on his own motor-cycle and was paid for travelling time, was told by his superior officer on a Friday to bring his tools with him on the following Monday morning for work requiring the use of them at the place where he was working. On the Monday morning he collected the tools at the place where he had left them, and on the way therefrom on his motor-cycle by the normal route to his work was injured in a motor accident.

W. D. Taylor, for suppliant; **F. A. Kitchingham,** for the respondent.

Held, That the accident did not arise out of and in the course of his employment.

Smith v. Frith, (1915) 17 G.L.R. 285; **Clausen v. Couchman Cycle Co., Ltd.,** [1935] N.Z.L.R. 368, G.L.R. 408; **Molloy v. South Wales Anthracite Colliery Co.,** (1910) 4 B.W.C.C. 65; **Evans v. Postmaster-General,** (1924) 132 L.T. 137, 17 B.W.C.C. 151; **Stokes v. Fox,** (1932) 25 B.W.C.C. 371; and **Allen v. Siddons,** (1932) 25 B.W.C.C. 350, distinguished.

Solicitors: Joyce and Taylor, Greymouth, for the suppliant; **Guinness and Kitchingham,** Greymouth, for the respondent.

English Law Reaches Wellington.

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

II.
Pearson v. Baker.

On April 11, 1840, Colonel Wakefield reported to the Committee of Colonists established under the arrangement with the Chiefs, that he had formed a Constabulary Force consisting of a Magistrate and two district constables each having two petty constables subject to his control. The Committee resolved: That the Magistrate and constables appointed by the President of the Committee shall respectively possess and exercise in this Colony all the powers which in England belong to the office of a Justice of the Peace and constables so far as the same are applicable to this Colony.

Three days later the "Police Office" reports contained the following entry: "Captain Pearson of the brig *Integrity* was arrested to-day under a warrant issued for illegal conduct towards his charterer, Mr. Wade of Hobart Town, and brought before the District Magistrate Major Baker. The prisoner refused to recognize the Court and was accordingly committed. The ensuing day Captain Pearson made his escape, and an escape warrant has in consequence been issued against him."

The following account of the affair which appeared in the *Sydney Herald* of May 11, 1840, will indicate how the minds of a Sydney jury were likely to have been prejudiced against the defendant had the civil claim for damages come before a Sydney jury, which at that time was the only forum available for the trial of the civil action which Pearson instituted:

> "The Proclamations issued by the Governor and Captain Hobson in January last clearly established the fact that British law prevails in New Zealand, and a number of gentlemen resident there have been appointed Magistrates of New South Wales and its dependencies, New Zealand being one of them, and a Police Office at the Bay of Islands has been opened, and notice given that the Magistrates sit twice a week.
>
> "The New Zealand Company's people, however, appear to be of a different opinion, and have very properly as regards themselves agreed to be under the control of a gentleman whom they call a Magistrate. This gentleman, a Major Baker, not content with attending to the disputes of those who had agreed to submit to his adjudication, issued a warrant for the apprehension of a Sydney trader, Captain Pearson, for a matter over which even if he had been a Magistrate he would have had no jurisdiction, it being a dispute with the charterer of the ship, which a civil Court alone could decide upon. For several hours Captain Pearson was kept in handcuffs and sent on board the *Tory*, where he was detained until he made his escape. He protested against the jurisdiction of Major Baker, but without avail, and his appeal to have the matter referred to the Bay of Islands was disregarded.
>
> "If any of these self-appointed authorities attempt to arrest any other person not connected with the Company, we advise the parties to do what the law would justify them—use arms in their own defence. As Captain Pearson intends to commence an action against Major Baker so soon as he returns to Sydney, we shall soon see who has jurisdition over New Zealand; whether Queen Victoria and the Judges of her Court or Colonel Wakefield and his mud-headed associates."

Thus it came about that the aggrieved Captain sued the Magisterial Major to recover compensation for assault and battery and false imprisonment; the damages being laid at £1,000.

The New Zealand Company's officers rallied round the defendant, and engaged Sydney counsel, who proceeded to establish lines of defence, the first preliminary point being an application to have the special bail bond returned and common bail admitted. This after argument was refused. Then Counsel moved for time to plead, supporting the motion with an affidavit that the defendant had been before the Police Bench in New Zealand for the same acts and had been convicted and fined £5 and costs. This application was dismissed with costs. As a last step a Commission was applied for to examine witnesses in England, a request which was granted; and, in consequence, the trial was postponed for twelve months.

By this time the month of September had arrived, but it should be mentioned at this stage that Pearson after effecting his escape made at once for the Bay of Islands and reported to Captain Hobson the state of affairs existing at the Port Nicholson settlement. There is no doubt that Pearson's report spurred Hobson into action. He published his Proclamations of Sovereignty without delay, and sent Willoughby Shortland, his Secretary, to the southern settlement for the purpose of proclaiming them and to suppress the "high treason" of the settlers. Shortland, a Justice of the Peace, in due course dealt with the matter on the spot, and both Baker and Pearson were fined £5 each for their respective assaults. These proceedings would scarcely have served as a defence to Pearson's civil action.

So the civil claim dragged on. Inquiries made both in Sydney and in London failed to disclose any further results in connection with the Commission to take evidence in England, and the subsequent history of the case suggests that this was only a device to gain time for attempts at a settlement.

The "local" Press at Port Nicholson (the *New Zealand Gazette*, not to be confounded with the Government Gazette) was edited by Samuel Revans, who was also Secretary to the Committee of the Colonists. The other side of the story was presented by him in the issue of the newspaper of April 25, 1840.

> "It is probable," he wrote, "the authorities at Sydney may think us daring and presumptuous, for using the only legal means of self-protection in our power. Should they, they would possibly like to catch us tripping; but we feel assured they understand the question of sovereignty sufficiently well to hesitate before they meddle in the matter. They would find it no slight difficulty to subject us to their tribunals; and with our right of appeal from their decision, not only to the Courts of England but to the Powers of Europe—of which we should of course avail ourselves to the fullest—would be careful of the course pursued. We have not a doubt that even the English Courts would sustain the legality of our proceedings and position."

It is not necessary to enter into the merits of these contentions, which were editorial rather than legal. The fact of the matter was that an action in the Supreme Court at Sydney was pending against the Company's so-called Magistrate.

The sequel is to be gathered from a despatch written by Colonel Wakefield to his London Directors on November 5, 1841:

> "It will be in the recollection of the Court that on the foundation of the Colony, the members of the Provisional Committee of the Colonists were brought into contact with a Captain Pearson, the master of a merchant vessel in this harbour. The Magistrate named by this Committee or Council, who acted in the matter, went afterwards on a visit to Sydney, where he was arrested at the suit of Pearson in an action for false imprisonment. By advice of the Crown lawyers, who were employed by Major Baker, the authority from the chiefs under whom the Council acted, was not pleaded in bar of the action, and upon the arrival of Dr. Evans and Mr. Hanson at Sydney the proceedings had been carried too far to allow of a plea being put in. Under these circumstances a compromise was come to by which Major Baker was to pay Pearson £100 in lieu of damages and the costs of the action. There is little doubt that if the case had gone to a jury, without the plea of the Native authority being held valid, the full extent of damages laid at £1,000 would have been given in consequence of the prejudice excited in the public mind at Sydney by the Press and Sir George Gipps remarks in Council on the case whilst before the Courts. As Major Baker was borne harmless by the Council and had officiated without pay in a most disagreeable capacity, the members considered themselves bound to relieve him of all expense, but have requested me to state the case to the Court of Directors and to represent that as the proceedings arose out of the appointment of the Committee by the Company and were intended to uphold the authority of the Company and forward the interest of the settlement under its auspices, they trust that the Court will think proper to authorize me to indemnify them. Messrs. Willis, Sandeman, and Co., of Sydney, have liquidated the claim, and have forwarded me bill of costs amounting with damages to £369 9s. 1d. I shall be glad to be instructed in the subject by the first opportunity as the parties liable are about to borrow the money off the bank, which will involve interest on it until receiving your answer."

The Court of Directors approved of the settlement and no more was heard of the matter. *Pearson v. Baker* had all the features of a leading case in Constitutional Law, but the plea of the Native authority (as Colonel Wakefield described the legal defence) was not worth the risk of an adverse verdict by a Sydney jury of £1,000.

However, had a settlement not been effected, it is probable that an application for a change of venue would have been made.

Wordy Warfare.—If war should come, the Inns of Court Regiment will show, as it did before, that the man of law may be a man of action, too. But meanwhile argument is sweet, and the lawyer's ruling passion persists, if not in the cannon's mouth, at any rate in the tented field. We are reminded of the days long since when Dr. H. P. Bigger, the Canadian historian, was a lieutenant commanding No. 4 Platoon of the Inns of Court Reserve Corps (2nd County of London Volunteers). It was, we think, the Doctor's only connection with the law. That platoon had thirteen actual or embryo silks in its ranks. Among them were Lords Russell of Killowen, Roche and Romer, Lords Justices Clauson, Finlay and Luxmore, Roland Burrows, K.C., Martelli Gover, K.C., and Reginald Smith, the publisher K.C. On one occasion Bigger sent out a section under two sergeants (Chancery silks). They did not return, and on going to seek them he found that a dispute had arisen as to the exact terms and interpretation of the order given. Each K.C. had taken to himself a junior, and they were arguing the matter formally before a court consisting of the other members of the section (all being barristers). The argument was abruptly cut short and no judgment was given. "What have I done," was the lieutenant's comment, "that I should be put in command of a lot of lawyers?" *Inter arma silent leges*, but not the lawyer, it seems.—APTERYX.

The Death Duties Act, 1921.

Succession Devolving on a Daughter-in-law: Contingent Successions.

By E. C. Adams, LL.M.

Some very nice and difficult questions of succession duty were solved by His Honour the Chief Justice in the recent case, *Neill v. Commissioner of Stamp Duties*, [1939] N.Z.L.R. 236.

As every New Zealand lawyer knows, estate duty depends on the value of the estate or the amount of the final balance, whereas succession duty depends both upon the amount of each particular succession and the relationship of each successor to the deceased: *In re Holmes, Beetham v. Holmes*, (1912) 32 N.Z.L.R. 577. Usually it is *blood* relationship which counts. With certain exceptions—*e.g.*, husbands, wives, step-children, and widows of a son or adopted son—consanguinity is the test, usually, the closer the blood-relationship to deceased, the lower the succession duty: *Andrew v. Commissioner of Stamp Duties*, [1922] N.Z.L.R. 172: *Donnelly v. Commissioner of Stamp Duties*, (1913) 33 N.Z.L.R. 79. Thus a stranger in blood, on successions exceeding £500 to £20,000, pays succession duty at the rate of 10 per cent.; whereas children, grandchildren, adopted children—*i.e.*, legally adopted under a New Zealand statute—step-children (but not step-grandchildren, *Andrew's* case (*supra*), and the widows of legitimate sons or of adopted sons—*i.e.*, legally adopted as aforesaid—pay no succession duty, unless the succession exceeds £1,000, and then from £1,000 to £5,000 it is only at the rate of 1 per cent.

In s. 2 of the Death Duties Act, 1921, there is the following definition:—

> "'Child' includes a step-child, and also includes the widow of a son or adopted son."

The difficulty in practice has been, at what particular date should the status of widowhood of a son's wife exist, for a daughter-in-law to be eligible for the lower rates payable by children. This difficulty has now been solved by the learned Chief Justice in *Neill's* case.

It was always clear that the status of *widowhood* of deceased's child or legally adopted child must exist at some time on or after deceased's death. Thus, if before testator's death the marriage of deceased's son and deceased's daughter-in-law had been dissolved, it was always abundantly clear that the beneficiary could not be treated as deceased's child for succession-duty purposes, although, if the bequest or devise was to the particular daughter-in-law as *persona designata*, the dissolution of the marriage would not cause a lapse of the testamentary gift: *Public Trustee v. Mantell*, [1923] N.Z.L.R. 346. If the marriage was dissolved after deceased's death, but before the successor had fully enjoyed the succession, the position was not so clear. Again, what was the position if the daughter-in-law's husband (deceased's son) were alive at deceased's death, but died before the successor had fully enjoyed the succession? In instances coming within the two last immediately preceding sentences could the value of the succession be split up—duty to be paid at the highest rates for the value of the succession during the husband's life, and at the lowest rates as a child, for the value of the succession during the period the status of widowhood prevailed? This "splitting up" theory, although complicated, had the merit of partial humanitarianism; it was definitely rejected by the Court, to the relief of all of us who desire a certain amount of simplicity in death-duty matters. On the other hand, there was much to be said for the view that, unless the status of widowhood existed at date of testator's death, the daughter-in-law had to be assessed as a stranger; and that, if such a status existed at date of death, it was immaterial whether or not that status continued during the beneficiary's enjoyment of the succession. That view had the merit of simplicity, and was in accordance with the cardinal principle of death-duty law, that an estate must be assessed in accordance with the facts as they exist at date of deceased's death, and not as at date of assessment, or at any other date subsequent to death: *In re Estate of William Valentine Jackson, (deceased)*, (1901) 19 N.Z.L.R. 566 affirmed by Privy Council *sub. nom. Jackson v. Commissioner of Stamps*, (1903) N.Z.P.C.C. 592; and *In re Jamieson*, [1925] V.L.R. 17. That has been held to be the correct view, subject always, however, to the provisions of s. 21 dealing with the valuation of *contingent* interests for succession duty. If the succession to the daughter-in-law is subject to a *contingency*, then the manner in which that contingency determines ultimately affects the amount of succession duty payable. Sections 21 (1), 21 (3), 21 (4), and 21 (6) are as follows:—

> "21. (1) For the purposes of succession duty every contingency affecting the succession shall be deemed to have determined in the manner in which, in the opinion of the Commissioner, it probably will determine, and the succession shall be valued and succession duty assessed and paid accordingly.
>
> "(3) If in the actual event at any time thereafter the contingency determines in a manner different from that so assumed as the basis of assessment, succession duty shall thereupon be reassessed by the Commissioner on the basis of the actual event, and as of the date of the death of the deceased.
>
> "(4) If on that reassessment it appears that too much has been paid by way of succession duty, a refund of the excess, together with compound interest thereon computed with annual rests at the rate of four per centum per annum from the date of payment of the duty, shall be made to the person who would have been entitled to recover the excess of duty had it been paid in error.
>
> "(6) Subject to the provisions of this Part of this Act, the value of any succession shall be deemed and taken to be the present value thereof at the death of the deceased:
>
> "Provided that the value of any succession acquired by way of gift and liable to succession duty under paragraph (*i*) of section sixteen of this Act shall be deemed and taken to be the present value thereof at the date of that gift."

Section 21 (6) was sometimes cited in support of the theory that all that mattered was the status of the daughter-in-law at date of testator's death. It is a most important provision, and is perhaps best illustrated by a leading Australian case, *Weldon (Commissioner of Taxes for Victoria) v. Union Trustee Company of Australia, Ltd.*, (1925) 36 C.L.R. 165, reported in the lower Court as *In re Jamieson* (*supra*). In that case the annuitant died twelve weeks after the death of the deceased, and the Revenue officials claimed that the value of the annuity for death duty purposes should be based solely on the fact that the annuitant survived deceased for only twelve weeks. But the actual decision of the Court was that in

estimating the value of the annuity such estimate should not be based on the fact that the annuitant survived deceased twelve weeks only, but the value should be ascertained by means of an estimate based upon the facts and probabilities in existence at the time of deceased's death which would ordinarily affect that value as in the case of the valuation of life interests. Now, *Weldon's* case or *Jamieson's* case had nothing to do with contingent interests, but its *ratio decidendi* is also present in *Neill's* case, as will be shown later. Section 21 (6) is put into its proper focus by Sir Michael Myers, C.J., at pp. 243, 244.

> "First of all, it is to be observed that the subsection commences with the words 'Subject to the provisions of this Part of this Act,' and consequently the subsection must be read with the various provisions of s. 17, including subs. 4. Secondly, the subsection has reference only to the matter of valuation for the purposes of duty. It is a matter of convenience to the Revenue that all valuations should be made as at the date of the testator's death in order to enable the duty to be promptly collected. But I cannot see that s. 21 (6) determines in any way the capacity in which a successor takes. That this is so is shown, I think, by reference to subs. 1 and 3 of s. 21."

The *capacity* in which a successor takes was not in issue in *Weldon's* case or *Jamieson's* case, but it was in *Neill's* case.

> "That is to say, the original assessment is based upon hypothesis, the reassessment upon facts as they actually eventuate. Where, then, a succession is contingent, it must be valued as at the date of testator's death in accordance with s. 21 (1), subject to a reassessment on the basis of the actual event, *still, however, according to the present value at testator's death.*"

The words which I have put in italics bring us back to the all important principle of *Weldon's* case or *Jamieson's* case.

As the learned Chief Justice points out, s. 21 (1) applies to *every* contingency, but unfortunately for those who have to administer the Act or advice clients on its application, nowhere is a *contingency* defined. It is not the purpose of this article to explain what is and what is not a contingency for death-duty purposes, but it may be pointed out that two successions in *Neill's* case were held to be contingent, and a third was not. A simple example of a contingency would be, a bequest to deceased's son for life, with remainder to the son's wife, *if she survived* deceased's son: *In re Legh's Re-settlement Trusts*: *Public Trustee v. Legh*, [1937] 3 All E.R. 823, per the Master of the Rolls.

Thus *Neill's* case shows that it is not necessarily at the date of deceased's death that the status of widowhood of a deceased's son is to be determined. It is to be determined when the interest first becomes a *vested* one. In the case of a contingency, it is not necessary that the wife of a child, in order to be regarded as a child of deceased for succession-duty purposes, should be actually the son's widow at the date of testator's death; it is sufficient if she is the son's widow when the contingent interest first becomes a *vested* one. Thus, in the example I have just cited (a gift to deceased's son for life, with remainder to the son's wife, *if she survives* deceased's son), there is no doubt that, if the daughter-in-law in the first instance is to be assessed for succession duty on the hypothesis that she will survive the son, it must be at the lowest rates, as a child. If the gift were to her as a *persona designata*, she would be reassessed at the highest rates as a stranger, in the event of her surviving deceased's son but being divorced in the meantime, for the crucial date is when her interest first becomes vested, which is on the son's death. But, if she survives deceased's son and obtains a vested interest, the *value* of her succession will not vary; that value will be the value of the property *less* the value of the son's life interest; her succession has to be valued as at date of deceased's death, and not according to the actual duration of the life of deceased's son.

It is thus apparent that not only for the purpose of avoiding being caught by the rule against perpetuities should every lawyer know the difference between a vested and a contingent interest; the difference is often important in Revenue matters, and it was this difference which caused judgment to go against the Crown in respect of two out of the three successions in issue in *Neill's* case. The great care which such writers as the late Professor Garrow took to convince students of the difference was well worth while, although as law students we probably thought it all a terrible bore.

Dominion Legal Conference.

Postponed Indefinitely.

At last week's meeting of the Council of the New Zealand Law Society it was unanimously decided to postpone the Dominion Legal Conference, which was to be held at Easter, 1940.

If there should be a cessation of hostilities in time for arrangements to be made for the Conference, the Council will consider whether the Conference should be held on the dates originally fixed, or not.

University Law Examinations.

Position of Students Called Up for Service.

The Registrar of the University has now been definitely advised by the Navy, Army, and Air Departments that, wherever suitable arrangements can be made, students who are in training at the various centres under the Defence Department will be granted special leave for the purpose of taking examinations for which they have entered. Where an ordinary examination hall cannot readily be reached by the candidates, the University will endeavour to make special arrangements. Students who have been called up are strongly advised to take advantage of this possibility, as even though their studies have been prejudicially affected, their examination work will then be recorded. It is hoped that a clause in the Statutes Amendment Bill, now being considered, will provide that the Senate may make certain concessions to students engaged in War service.

All students who are called up should therefore regard it as urgent that they at once report their cases, if they have not already done so, both to the University of New Zealand, and to the University College to which they may be attached.

Practice Precedents.

Trusts and Trustees: Petition to Purchase and Mortgage Realty.

Section 81 of the Statutes Amendment Act, 1936, is as follows:—

"(1) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the Court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument (if any) or by law, the Court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions (if any) as the Court may think fit, and may direct in what manner any money authorized to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.

"(2) The Court may from time to time rescind or vary any order made under this section, and may make any new or further order.

"(3) An application to the Court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust.

"(4) This section does not apply to trustees of a settlement for the purposes of the Settled Land Act, 1908."

Section 80 enacts that this section is to be read together with and deemed part of the Trustee Act, 1908.

Where it is not clear on whom any petition should be served an *ex parte* motion should be filed for directions as to service. If the order directs service in a *representative* capacity it is the practice to seal the order.

The petition must be supported by motion: Rule 414A.

The following precedent is by way of petition, and this must be verified by formal affidavit: see R. 415 of the Code of Civil Procedure. As to procedure where the allegations are contested, see *In re Mercantile Finance and Agency Co., Ltd.*, (1894) 13 N.Z.L.R. 472.

PETITION.

IN THE SUPREME COURT OF NEW ZEALAND.

.....District.

.....Registry.

IN THE MATTER of the Trustee Act 1908 and its amendments

AND

IN THE MATTER of s. 81 of the Statutes Amendment Act 1936

AND

IN THE MATTER of a deed of trust dated the day of 19 made between A. B. of widow of the one part and The Trust Company Limited of the other part.

To The Right Honourable Sir Chief Justice of New Zealand.

THE HUMBLE PETITION of The Trust Company Limited SHEWETH:

1. That by deed of trust dated the day of 19 A. B. of widow of the one part and your petitioner of the other part the said A. B. assigned to your petitioner £ (inscribed stock). The said deed of trust is in the words following:—

"This Deed made the day of one thousand BETWEEN A. B. &c. of the one part (hereinafter called the widow) and The Trust Company Limited of the other part (hereinafter called the trustee): WHEREAS E. B. &c. (hereinafter called the daughter) is the infant daughter of the widow: AND WHEREAS the widow is desirous of creating a trust of certain stocks as hereinafter appearing and for that purpose of assigning such stocks to the trustee: AND WHEREAS for that purpose the widow has lately purchased in the name of the trustee the stocks mentioned in the schedule hereto: AND WHEREAS it was agreed prior to the date of such purchase that the trustee should execute the declaration of trust hereinafter contained. NOW THEREFORE THESE PRESENTS WITNESS and it is agreed by and between the parties hereto as follows:—

"1. The widow hereby assigns to the trustee and the trustee for its part hereby acknowledges and declares that it holds the stocks mentioned in the schedule hereto (which stocks and any investments from time to time substituted thereto shall hereinafter be called 'the trust fund') and all dividends and interest accrued or to accrue upon trust.

"(*a*) To pay the income of the trust fund unto the widow until the daughter shall attain the age of twenty-one (21) years and thereafter as to both capital and income upon trust for the widow absolutely.

"(*b*) Provided however that should the daughter die before reaching the age of twenty-one (21) years then the trustee shall hold the trust fund as to both capital and income upon trust for the widow absolutely.

"2. (*a*) The trustee shall have power during the minority of the daughter from time to time to apply the whole or such part as the trustee shall think fit of the capital of the trust fund for or towards the maintenance or education of the daughter with power to pay the same to the widow for the purpose aforesaid without seeing to the application thereof.

"(*b*) For such purpose the trustee shall have power to sell all or part of the investments for the time being comprising the trust fund or (with the written consent of the widow) to raise money on the security of the same.

"3. The trustee shall have power (but only with the written consent of the widow) from time to time to vary the investments comprising the trust fund and for that purpose to sell the same and to reinvest the proceeds in any investments for the same and to reinvest the proceeds in any investments for the time being authorized by law for the investment of trust funds.

"THE SCHEDULE HEREINBEFORE REFERRED TO.

"£ New Zealand Government Inscribed Stock bearing interest at per cent. due on the 19 .

"Inscription Number:

"IN WITNESS WHEREOF these present have been executed the day and year first hereinbefore written.

"Signed by the said A. B. in the presence of—

"THE COMMON SEAL of The Trust Company Limited was hereunto affixed at a meeting of the Board of Directors in the presence of—

2. That the said A. B. is the widow of &c. who died at on or about the day of 19 aged years.

3. That the said A. B. is now aged years and that the only child of the marriage is C. B. aged .

4. That the stock referred to in the said deed of trust was purchased out of the proceeds of an insurance policy on the life of the said and that after the purchase of such Government stock and the payment of all debts costs and charges the net amount received by the said A. B. out of the estate of the said was £ .

5. That the said A. B. was the sole beneficiary under the will of the said and that she entered into the said deed of trust voluntarily and for the purpose of protecting the interests of her daughter the said C. B.

6. That since the year 19 the said A. B. has by her own exertions supported herself and her said daughter and that no advancement has been required by her in terms of clause 2 of the said deed of trust.

7. That the said A. B. has since the year 19 resided in an at No. but that on account of the increased cost of living and the rent payable for flats she is now finding it more difficult to meet the costs of living while at the same time catering for the proper maintenance and education of the said C. B. The flat at present occupied by the said A. B. is dark and sunless and subject to damp in winter has no garden and is unsuitable for the health of the said C. B. who is a delicate child.

8. That the said A. B. is employed by the : at a salary of £ per annum such salary rising at the rate of

£ per year to £ per annum. The said A. B. in her spare time undertakes private hand-sewing and earns an average of per week at this occupation. The total income of the said A. B. is at present therefore approximately the sum of £ per annum.

9. That the said A. B. has obtained an option to purchase as agent a section in Street for the sum of £ . This option has been filed under affidavit in this Honourable Court.

10. That application has been made to the of New Zealand for an advance of the full cost of erection on the said section of a four-roomed dwellinghouse constructed of and estimated to cost £ . That tenders have not yet been finalized but that the of New Zealand has given written intimation that it is prepared to advance £ for the purpose above mentioned and stating that if tenders exceed £ the will favourably consider an increase in the said advance. Such letter has been filed under affidavit in this Honourable Court.

11. That it is desired that this Honourable Court confer upon your petitioner power to purchase and take title to the section of land the subject of the option above mentioned and to grant to the of New Zealand a first mortgage thereon securing a sum sufficient to defray the cost of erection of the dwelling-house above mentioned on the usual year basis the proceeds of such mortgage to be used in the erection of such dwellinghouse upon the said section of land.

12. That the said of has given written intimation that it is prepared to accept a mortgage containing a clause exempting your petitioner from any liability under the mortgage and to accept in lieu of the covenant of your petitioner the covenant of the said A. B. Such letter has been filed under affidavit in this Honourable Court.

13. That if the above-mentioned arrangements were completed the outgoings in respect of the premises would be as follows :—

The payments for insurance and upkeep will be very small on account of the fact that the suggested materials for the premises (*viz.* with roof) eliminate ordinary painting and require only a coat of and on account of the further fact that the fire risk is minimized.

14. That the rent at present paid by the said A. B. in respect of the flat which she is occupying is £ per annum plus liability for upkeep and replacements amounting to approximately £ per annum.

15. That it is proposed that the proposed premises be leased to the said A. B. for the amount of the outgoings from time to time upon the said property which outgoings would at present amount to £ per annum.

16. That your petitioner is of opinion that it is in the interests of both beneficiaries under the said deed of trust and in particular of C. B. that the proposed purchase and mortgage should be completed on the following grounds :—

(*a*) That on account of the fact that the annual outgoings in respect of the rent payable by the said A. B. will be reduced by approximately £ the said A. B. will have available the sum of approximately £ per annum for the better maintenance and education of the said C. B.

(*b*) That on account of the fact that the payments to be made by the said A. B. in respect of the said premises include principal repayment to the equity in the said property will be considerably increased by the time when the said property will be transferable to the infant beneficiary the said C. B. on her reaching the age of twenty-one years.

(*c*) The environment of the proposed premises will be greatly to the benefit of the said C. B. compared with the environment of the flat at present occupied by the said A. B. being in a healthy and sunny locality providing for a garden and for privacy.

17. That the conveyancing costs and disbursements involved in the above transaction amount to approximately £ which would leave in the hands of the said property and subject to the costs of and incidental to this application the sum of approximately £ .

WHEREFORE YOUR PETITIONER HUMBLY PRAYS that this Honourable Court may make an order as follows :—

(*a*) That The Trust Company Limited be authorized to purchase all that piece or parcel of land comprising Lot on Deposited Plan No. : Registry at a price not exceeding £ to be held by your petitioner on the same trusts as are set out in the said deed of trust.

(*b*) That your petitioner be authorized to execute in favour of the a mortgage over the said piece or parcel of land to secure repayment of such sum as shall be necessary to erect upon the said piece or parcel of land a roomed dwellinghouse constructed of material with a roof in terms of plans and specifications already submitted to the on the ordinary terms as to interest and repayment of principal on a year table mortgage such mortgage to exempt your petitioner from any personal covenant but to include a covenant by the said A. B. to observe and perform all the covenants on the mortgagor's part therein contained and implied.

(*c*) That the proceeds of the said mortgage be used in the erection upon the said piece or parcel of land of a roomed dwellinghouse constructed of with a roof in terms of the plans and specifications already submitted to.

(*d*) That the costs and disbursements of all parties of and incidental to this application be taxed by the Registrar and paid out of the capital moneys held by your petitioner under the said deed of trust.

(*e*) That leave be reserved to all parties to apply.

(*f*) FOR SUCH FURTHER OR OTHER ORDER as to this Honourable Court may seem fit.

And your petitioner will every humbly pray, &c.

Dated this day of 19 .

I O. K. of : : make oath and say as follows :—

1. That I am of The Trust Company Limited the petitioner named in the foregoing petition.

2. That so much of the foregoing petition as relates to my own acts and deeds is true.

3. That so much thereof as relates to the acts and deeds of any other person I believe to be true.

4. That such facts (not being acts or deeds of myself or of any other person) as are set out therein without qualification are true.

5. That such facts as are set out therein as being matters of belief are true to the best of my knowledge information and belief.

Sworn at by the said O. K. this day of 19 before me— }

A Solicitor of the Supreme Court of New Zealand.

AFFIDAVIT IN SUPPORT OF PETITION.

(*Same heading.*)

I X. Y. of solicitor make oath and say as follows :—

1. That I am a member of the firm of solicitors .

2. That attached hereto marked "A" is an agreement whereby A. B. is granted an option as agent to purchase from E. F. a property situate at comprising Lot on Deposited Plan No. .

3. That attached hereto marked "C" is a letter received by my firm from G. H. &c. notifying the fact that the said G. H. is prepared to advance the sum of pounds (£) to A. B.

4. That attached hereto marked "D" is a letter from G. H. agreeing to accept a mortgage from The Trust Company Limited such mortgage containing no covenant by the said Trust Company Limited to repay the amount of the loan but containing a covenant to that effect by A. B.

5. The said mortgage is for a period of thirty years repayable by instalments of interest and principal of £ payable half-yearly interest being calculated at the rate of .

Sworn, &c.

MOTION FOR DIRECTIONS AS TO SERVICE.

(*Same heading.*)

Mr. of Counsel for The Trust Company Limited the petitioner herein TO MOVE in Chambers at the Supreme Court House before the Right Honourable Sir Chief Justice of New Zealand on day the day of 19 at 10 o'clock in the forenoon or so soon thereafter as Counsel can be heard FOR AN ORDER giving directions as to service of the said petition UPON THE GROUNDS that it is necessary to serve the said petition and it is not clear upon whom the said petition should be served.

Dated at this day of 19 .

Certified correct pursuant to rules of Court.

Counsel moving.

MEMORANDUM FOR HIS HONOUR.—His Honour is respectfully referred to s. 81 of the Statutes Amendment Act, 1936. The petition referred to prays for an order that the petitioner be granted leave to expend pounds (£), part of the moneys subject to the above-mentioned deed of trust, in the purchase of an unencumbered freehold section at and a mortgage to , in order that a dwellinghouse may be built thereon for the purpose of a home for the beneficiaries under the said deed of trust. There is no power given to the trustee by the deed of trust or by the Trustee Act, 1908, and its amendments, to do this, and it is therefore necessary to invoke s. 81 of the Statutes Amendment Act, 1936.

The only persons affected by the petition filed herein, apart from your petitioner who is the trustee under the said deed, are A. B. of , widow, the settler under the said deed of trust, as to the income of the trust pending the majority of her infant daughter C. B. (now aged years) and the said C. B. who is entitled to both capital and income on reaching the age of twenty-one years. In the event of the said C. B. dying before reaching the age of twenty-one years, the capital and income of the trust revert to the settler, A. B.

It is therefore respectfully suggested that service be effected on—

(1) Limited, the trustee under the said deed of trust, as representing C. B.; and

(2) A. B. personally.

Counsel moving.

ORDER FOR DIRECTIONS.

(*Same heading.*)

Before the Honourable Mr. Justice .

the day of 19 .

UPON READING the petition filed herein and the affidavit filed herein and the notice of motion for directions as to service of the said petition and the memorandum by Counsel filed herein and upon hearing Mr. of Counsel for the petitioner The Trust Company Limited IT IS ORDERED that the said petition be served on—

(1) The Trust Company Limited the trustee under the said deed of trust as representing C. B. &c.

(2) A. B. personally.

By the Court,

Registrar.

MOTION IN SUPPORT OF PETITION TO PURCHASE AND MORTGAGE REALTY.

(*Same heading.*)

TAKE NOTICE that Counsel for The Trust Company Limited the petitioner herein will move this Honourable Court at on day the day of 19 at the hour of 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 filed herein.

1. That The Trust Company Limited be authorized to purchase all that piece or parcel of land comprising Lot on Deposited Plan No. : Registry at a price not exceeding £ to be held by your petitioner on the same trusts as are set out in the said deed of trust.

2. That your petitioner be authorized to execute in favour of the a mortgage over the said piece or parcel of land to secure repayment of such sum as shall be necessary to erect upon the said piece or parcel of land a roomed dwelling constructed of material with a tiled roof in terms of plans and specifications already submitted to the as to interest and repayment of principal on a year table mortgage such mortage to exempt your petitioner from any personal covenant but to include a covenant by the said A. B. to observe and perform all the covenants on the mortgagor's part therein contained and implied.

3. That the proceeds of the said mortgage be used in the erection upon the said piece or parcel of land of a roomed dwellinghouse constructed of with a tiled roof in terms of the plans and specifications already submited to the .

4. That the costs and disbursements of all parties of and incidental to this application be taxed by the Registrar and paid out of the capital moneys held by your petitioner under the said deed of trust.

5. That leave be reserved to all parties to apply.

6. For such further or other order as to this Honourable Court may seem fit.

Dated at this day of 19 .

Counsel for petitioner.

This notice of motion is filed by &c.

To the Registrar and to The Trust Company Limited and its solicitor and to A. B. and her solicitor.

ORDER.

(*Same heading.*)

Before the Honourable Mr. Justice

the day of 19 .

UPON HEARING Mr. of Counsel for the petitioner and for C. B. and Mr. of Counsel for A. B. AND UPON READING the petition for leave to purchase and mortgage realty under s. 81 of the Statutes Amendment Act, 1936 filed herein and the affidavit of verifying the said petition AND UPON READING the affidavit of filed in support of the said petition AND UPON READING the order giving directions as to service of the petition filed herein IT IS ORDERED—

(*a*) That The Trust Company Limited be authorized to purchase out of the capital moneys held by it under the said deed of trust all the piece or parcel of land comprising Lot on Deposited Plan No. : Registry at a price not exceeding £ to be held by The Trust Company Limited on the same trusts as are set out in the said deed of trust.

(*b*) That The Trust Company Limited be authorized to execute in favour of a mortgage over the said piece or parcel of land to secure repayment of such sum as shall be necessary to erect upon the said piece or parcel of land a roomed dwelling constructed of material with a tiled roof in terms of plans and specifications already submitted to of ordinary terms as to interest and repayment of principal on a thirty years table mortgage such mortgage to exempt The Trust Company Limited from any personal covenant but to include a covenant by the said A. B. to observe and perform all the covenants on the mortgagor's part therein contained and implied.

(*c*) That the proceeds of the said mortgage be used in the erection upon the said piece or parcel of land of a roomed dwellinghouse constructed of with a tiled roof in terms of the plans and specifications already submitted to of .

(*d*) That the costs and disbursements of amounting to £ and the costs and disbursements of C. B. amounting to £ be paid out of the capital moneys held by The Trust Company Limited under the said deed of trust.

(*e*) That leave be reserved to all parties to apply.

By the Court.

Registrar.

Practice Notes.

SUPREME COURT EMERGENCY RULES, 1939.

Affidavit by Executor or Administrator.

The following clauses have been settled by their Honours the Judges as requisite for affidavits throughout New Zealand under the Supreme Court Emergency Rules, 1939 (Serial No. 1939/156).

1. That I was born at in (New Zealand) and am a British subject by birth and that I am not and never have been an alien enemy within the meaning of the Enemy Property Emergency Regulations, 1939.

2. That I am informed by (son or etc.) of the said A. B. deceased and verily believe that the said A. B. deceased was born at in (New Zealand) and was never an alien enemy within the meaning of the said Regulations.

3. That according to my knowledge information and belief based upon the result of my inquiries and particularly upon the information referred to in the last preceding paragraph hereof the said A. B. deceased was not at the time of his death an alien enemy within the meaning of the said Regulations.

NOTE :—If an Executor or Administrator is unable to depose as to the facts in clauses 2 and 3 above, such proof must be furnished by some person acquainted with the facts.

Magistrates' Court Decisions.

Recent Cases.

MAGISTRATES' COURT.

Practice—Costs—Local Authorities Dismissal of Informations for Alleged Breaches of Borough By-laws—Whether Costs may be awarded against Local Body Officers in Prosecutions under By-laws or a General Statute—Suggested General Practice.—LEWIS (HAMILTON BOROUGH INSPECTOR) *v.* FOSTER, **M.C.D. 223** (Paterson, S.M.).

Practice—Plaint—Recovery of Possession—Arrears of Rent—Mesne Profits—Whether Judgment may be entered for Rent in arrears in Proceedings for Recovery of Possession—Distinction in Procedure—Magistrates' Courts Act, 1928, ss. 180, 181—Magistrates' Courts Amendment Act, 1930, s. 2.—BLUETT *v.* ROGERS, **M.C.D. 214** (Coleman, S.M.).

MOTOR-VEHICLES.

Parking Regulations — By - law — City By - law restricting Motor-car Parking in certain Street for more than One Hour—No Parking-sign erected in Locality—Effect of Regulations—Traffic Sign Regulations, 1937 (Serial No. 159/1937), Reg. 3 (4).—HAZELDON *v.* RANSTEAD, **M.C.D. 232** (Stout, S.M.).

Parking Regulations—" No Parking " painted on Roadway—No Traffic Sign according to prescribed Design erected—Motor-car parked in Part of the said Roadway—Whether an Offence—Traffic Regulations, 1936, Reg. 4 (7) (*e*) (Serial No. 86/1936); Traffic Sign Regulations, 1937 (Serial No. 159/1937). Reg. 3 (4).—POLICE *v.* CHISNALL, **M.C.D. 222** (Lawry, S.M.).

NEGLIGENCE.

Animals—Cow wandering on Highway at Night—Collision with Motor-vehicle using Highway—Whether Duty on Cow's Owner to Fence or prevent Cow from Straying on Road by Day or by Night—Whether Negligence in permitting Cow to wander with other Cattle so as to be a Nuisance and Obstruction to Traffic—Breach of Statutory Duty—Owner Fined for permitting Cow to wander on Road—Conditions giving Right of Action for such Breach—Police Offences Act, 1927, s. 4 (1)—Public Works Act, 1928, s. 176 (*o*).—CHANNINGS *v.* HALSEY-MAHONEY, **M.C.D. 227** (Goulding, S.M.).

Bailment—Customary Hire-purchase Agreement—" Actual contract for sale and purchase " of Motor-car—Construction—Action against Wrongdoer for Damages to Car driven by Conditional Purchaser—Whether Vendor of Car can Maintain such Action against Third Party—Chattels Transfer Act, 1924, s. 57 (2).—FARMERS' CO-OPERATIVE ORGANIZATION SOCIETY *v.* MCKAY, **M.C.D. 217** (Woodward, S.M.).

Recent English Cases.

AGENCY.

Professional Agent—Duty to use Care and Skill—Valuation of Property—Valuer instructed by Promoters of Company to be Formed—Duty to Company—Principle in *M'Alister* (or *Donoghue*) *v. Stevenson.*

Negligence—Valuation of Property—Valuer instructed by Promoters of Company to be Formed—Duty to Company—Principle in *M'Alister* (or *Donoghue*) *v. Stevenson.*

The doctrine in Donoghue *v.* Stevenson *is confined to negligence which results in danger to life, limb or health.*

OLD GATE ESTATES, LTD. *v.* TOPLIS AND HARDING AND RUSSELL, [**1939**] **3 All E.R. 209. K.B.D.**

As to the principle in *M'Alister* (or *Donoghue*) *v. Stevenson*: see HALSBURY, Hailsham edn., vol. 23, pp. 632–634, par. 887; and for cases: see DIGEST, Supp., Negligence, Nos. 361*a*–364*l*.

Remuneration of Agent—Commission—Contract to let Premises—Prospective Tenant—Communication by him to Second Prospective Tenant—*Causa Causans*—Chain of Causation—*Novus Actus Interveniens.*

For an agent to earn his commission he must be the effective cause of the transaction going through.

COLES *v.* ENOCH, [**1939**] **3 All E.R. 327. C.A.**

As to effective cause in commission cases: see HALSBURY, Hailsham edn., vol. 1, pp. 259–261, par. 434; and for cases: see DIGEST, vol. 1, pp. 488–493, Nos. 1664–1692.

EXECUTORS AND ADMINISTRATORS.

Residuary Estate—Determination of Residue—Valuation—Date for Valuing Estate for Purposes of Final Distribution.

Where the estate has to be valued for the purpose of adjusting the rights of the parties on a final distribution, the date for such valuation should be the death of the testator unless a contrary intention appears in the will.

Re GUNTHER'S WILL TRUSTS; ALEXANDER AND ANOTHER *v.* GUNTHER AND OTHERS, [**1939**] **3 All E.R. 291. Ch.D.**

As to residuary estate: see HALSBURY, Hailsham edn., vol. 14, pp. 366–368, pars. 685–68; and for cases: see DIGEST, vol. 23, pp. 459–464, Nos. 5328–5357.

Rules and Regulations.

Fisheries Act, 1908. Fresh-water Fisheries (Southland) Regulations, 1937, Amendment No. 2. August 30. 1939. No. 1939/157.

Fisheries Act, 1908. Trout-fishing (Auckland) Regulations, 1937, Amendment No. 2. August 30, 1939. No. 1939/158.

Fisheries Act, 1908. Trout-fishing (Lakes District) Regulations, 1939. August 30, 1939. No. 1939/159.

Fisheries Act, 1908. Trout-fishing (Ashburton) Regulations, 1937, Amendment No. 2. August 30, 1939. No. 1939/160.

Stock Act, 1908. Stock Importation Amending Regulations, 1939 (No. 2.) September 6, 1939. No. 1939/161.

Dairy Industry Act, 1908. Dairy (Milk-supply) Regulations, 1939. September 13, 1939. No. 1939/162.

Motor-spirits (Regulation of Prices) Act, 1933. Motor-Spirits Prices (Nelson–Blenheim) Regulations, 1938, Amendment No. 1. September 6, 1939. No. 1939/163.

Education Act, 1914. War Bursary Regulations, 1939. September 20, 1939. Serial No. 1939/171.

Education Act, 1914. Handicraft Teachers Certificate Examination Regulations, 1939. September 20, 1939. Serial No. 1939/172.

Orchard and Garden Diseases Act, 1928. Grape-vine Diseases Regulations, 1939. September 20, 1939. No. 1939/173.

Poultry Act, 1924. Chilled Eggs (Marketing) Regulations, 1935, Amendment No. 2. September 20, 1939. No. 1939/174.

Health Act, 1920. Drainage and Plumbing Regulations Extension Order, 1939, No. 2. September 20, 1939. No. 1939/175.

War Regulations.

Under the Emergency Regulations Act, 1939.

Primary Industries Emergency Regulations, 1939. September 15, 1939. (*1939 New Zealand Gazette*, p. 2517—Serial No. 1939/164.)

Wool Emergency Regulations, 1939. September 15, 1939. (*1939 New Zealand Gazette*, p. 2521—Serial No. 1939/165.)

Industrial Emergency Council Regulations, 1939. September 15, 1939. (*1939 New Zealand Gazette*, p. 2523—Serial No. 1939/166.)

Wool Emergency Regulations, 1939, Amendment No. 1. September 20, 1939. (*1939 New Zealand Gazette*, p. 2525—Serial No. 1939/169.)

Oil Fuel Emergency Regulations, 1939, Amendment No. 1. September 21, 1939. (*1939 New Zealand Gazette*, p. 2527—Serial No. 1939/170.)