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"This is the day of the young men; but the Greeks before Troy thought it worth while to keep the aged Nestor in a tent, well behind the front line, from which he provided them with sage advice."

—MR. RANDLE F. W. HOLME, President of the Law Society (England), in a recent Presidential address.

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THE RULE IN RUSSELL v. RUSSELL: SOME RECENT DECISIONS.

II—IN DIVORCE JURISDICTION.

IN less than a year after the decision in *The King* v. *Seaton*, [1933] N.Z.L.R. 548, discussed in our last issue, the rule in *Russell* v. *Russell* was again under consideration by the Court of Appeal in *G.* v. *G.*, [1934] N.Z.L.R. 246. This was an exceptional nullity suit by a wife on the ground of her husband's alleged impotence. The respondent husband admitted non-consummation, and, at the hearing of the petition, the wife gave evidence that a child had been born to her during the period of her cohabitation with her husband before the commencement of the nullity proceedings. She named the father, and he gave evidence of relations with her at the relevant times.

The learned Judge, though personally disagreeing with the decision of the majority in *Seaton's* case, found himself bound by that judgment that the rule against the admissibility of evidence tending to bastardize children is not confined to legitimacy cases, but is a general rule of evidence applicable to the whole of our legal system. Consequently, he rejected the evidence which tended to show that the child was illegitimate, and held there was insufficient evidence upon which to found a decree of nullity. The petitioner appealed, and it was strenuously argued on her behalf in the Court of Appeal that the rule in *Russell* v. *Russell*, while it applied in legitimacy suits and divorce proceedings based on the wife's adultery, in bastardy cases in the summary jurisdiction, and in criminal proceedings where the legitimacy of a child is vitally in issue, it did not apply in any nullity suits, owing to the fact that a valid marriage need not be proved or assumed; and that the presumption of legitimacy is destroyed if the husband is proved to be impotent.

The Court of Appeal (Sir Michael Myers, C.J., Herdman, MacGregor, Blair and Kennedy, JJ.) held that the rule in *Russell* v. *Russell* was applicable. The learned Chief Justice pointed out that the presumption was that the respondent was the father of the child, and in order to succeed in her suit, the appellant had to show that the child was illegitimate. That, as he understood the judgment in *Russell* v. *Russell*, was precisely what it was not open to the spouses to do. Here there was a child, and the evidence of the spouses was given with the express object of proving non-intercourse, and therefore of showing that the child was not the child of the husband. To use Lord Finlay's words, the rule "came into play" at once. The other members of the Court agreed that the judgment of the majority of the House of Lords in *Russell* v. *Russell* had laid it down that neither a husband nor a wife is permitted to give evidence of non-intercourse after marriage to bastardize a child born in wedlock. This, said MacGregor, J.—quoting Lord Mansfield in *Goodright* v. *Moss*, (1877) 2 Cowp. 591, 594, 98 E.R. 1257, 1258—has been the law of England since 1777. Personally, His Honour added, he was glad to think that it appeared also to be the law of New Zealand in 1934.

In the recent case, *Ettenfield* v. *Ettenfield*, [1940] 1 All E.R. 293, the Court of Appeal in England (Slesser, MacKinnon, and Goddard, L.JJ.) held that the rule in *Russell* v. *Russell* is absolute, and that it applies, not only when the spouses are living together, but also when they are living apart, either under an order of the Court or by their volition.

In the judgment of the Court, delivered by Goddard, L.J., he said it was perhaps not surprising that the ingenuity of practitioners endeavoured to find distinctions, or ways by which the rigour of the rule could be mitigated.

In 1926, in *Mart* v. *Mart*, [1926] P. 24, Bateson, J., decided—following *Hetherington* v. *Hetherington*, (1887) 12 P.D. 112—that where parties are living apart under a deed of separation, the presumption of access is rebutted, as it is where the parties are separated by a decree of the Court, and he held that the evidence of the spouses as to access or non-access, excluded by the rule in *Russell* v. *Russell*, could in those circumstances be received. This decision, uniformly followed in the Divorce Division, was approved in the King's Bench Division in *Stafford* v. *Kidd*, [1937] 1 K.B. 395, [1936] 3 All E.R. 1023, and its correctness had been challenged only in *Re Bromage, Public Trustee* v. *Cuthbert*, [1935] Ch. 605, where Luxmoore, J., declined to follow *Mart* v. *Mart*, as he considered it in conflict with the decisions of the House of Lords in *Morris* v. *Davies*, (1837) 5 Cl. & F. 163, 5 E.R. 365, and *The Aylesford Peerage*, (1885) 11 App. Cas. 1.

In *Ettenfield* v. *Ettenfield* the facts found were that the husband left his wife about August 6, 1935. There was no deed or written agreement, but the parties, in the following month, orally agreed to live apart, the husband making a weekly payment to his wife. While so living apart, the wife gave birth to a child on May 26, 1937. There was no evidence against the wife, apart from the husband's evidence that he had not had intercourse with his wife since the separation. This evidence was accepted by the trial Judge, who followed the decision of the Divisional Court in *Stafford* v. *Kidd* (*supra*), by which he considered himself bound, as in spite of the rule in *Russell* v. *Russell*, the husband might give such evidence, as the parties were living apart under an informal agreement, and granted a decree to the husband. The wife appealed.

The Court of Appeal overruled *Mart* v. *Mart* (*supra*) and *Stafford* v. *Kidd* (*supra*). They held:

> The rule as laid down by the House of Lords in *Russell* v *Russell* is in the widest possible terms. *It applies to all cases of whatever nature, where the paternity of a child is in question.* As the Earl of Birkenhead put it, at p. 698, "The rule as laid down is not limited to any special class of case. It is absolutely general in the comprehensiveness of its expression. It has no geographical qualification." . . . Apart, however, from the fact that the House of Lords said in *Russell* v. *Russell* that the rule is absolutely general in its comprehensiveness, thereby admitting of no exception, when one examines the cases which are supposed to support the view of an exception, it will be found that they are not authority for any such proposition.

After a review of all the authorities, their Lordships summarized, at p. 301, the result of their examination, thus:

> The rule that evidence tending to bastardize or legitimize a child conceived and born during wedlock cannot be given by either spouse is absolute, and applies, not only when the parties are living together, but also when they are separated either by a decree of a Court of competent jurisdiction or by their own volition.
>
> Where the only evidence of adultery in support of a husband's petition is the birth of a child to the wife, if the parties have been separated by the decree or order of a competent Court, the husband need prove no more than the date of the decree or order, and the date of birth of the child. If it must have been conceived after the date of the decree or order, there is a *presumptio juris* that it is a bastard. The wife may rebut this presumption if she can, but she must do it by evidence other than her own.
>
> Where the only evidence is as mentioned in the last paragraph, and the parties have voluntarily separated, whether by deed, writing under hand, oral agreement, or agreement implied from conduct, the husband cannot give evidence of non-access, but he can prove that fact by any means open to him other than his own evidence. The presumption is that the child is legitimate. If the husband leads evidence to rebut that presumption, the wife can call, but cannot herself give, evidence in support of the child's legitimacy.

In allowing the appeal, their Lordships said they were well aware that, in deciding against the reception in the cases of divorce of the class of evidence which had been accepted since *Mart* v. *Mart* (*supra*), further—and, in some cases, insuperable—difficulties might be put in the way of petitioners; but rules of law, especially those which admit of no exception, sometimes have that result. If the evidence given in the case before them were received, it was obvious that a serious inroad would be made on a rule that the highest Court in the Kingdom had declared to be without exception. If the rule worked hardship it was for the Legislature, and not for the Courts, to mitigate its effect.

SUMMARY OF RECENT JUDGMENTS.

SUPREME COURT. Auckland. 1940. June 27; August 22. *Blair, J.*

RAYNEON (NEW ZEALAND) LIMITED v. FRASER.

Contract—Illegality—Legal at Time of making—Subsequently made Illegal by Regulations under Statute—Contract to Construct and Maintain Dentist's Neon Sign and to lease to Dentist—Whether Rent could be recovered after Regulations came into force—Dentists Act, 1936, s. 36—Dentists' Advertising Regulations, 1938 (Serial No. 1938/113), Reg. 8.

The appellant agreed to erect a neon sign consisting of the respondent's surname followed by "Dentist" and to lease it to the respondent for sixty calendar months at a monthly rent and to maintain and service it, the respondent to do the electric wiring and provide the electric current.

By the Dentists Act, 1936, and the advertising regulations made thereunder, which came into force on January 1, 1939, this form of advertisement became illegal.

Tong, for the appellant; *R. Marshall-White*, for the respondent.

Held, That, upon that date, further performance on the part of both parties became illegal, and that a claim for seven months' rental of the sign subsequent thereto could not be sustained.

Leiston Gas Co. v *Leiston-cum-Sizewell Urban Council*, [1916] 2 K.B. 428, distinguished.

Solicitors: *T. C. Webster*, Auckland, for the appellant; *Marshall-White, and White*, Auckland, for the respondent.

Case Annotation: Leiston Gas Co. v. *Leiston-cum-Sizewell Urban Council*, E. and E. Digest, Vol. 12, p. 503, para. 3251.

SUPREME COURT. Nelson. 1940. July 17; September 4. *Blair, J.*

In re **BALDWIN (A BANKRUPT), AND THE TASMAN FRUIT-PACKERS, LIMITED,** *Ex parte* **OFFICIAL ASSIGNEE**

Industrial and Provident Societies—Bankruptcy—Set-off—Bankrupt Member's Interest in Society becoming payable to his Assignee—Whether Debt to be deducted from Member's Share in ascertaining such Interest—Bankruptcy Act, 1908, s. 104.

The main purpose of the Tasman Fruit-packers, Ltd., a society registered under the Industrial and Provident Societies Act, 1908, whose members were orchardists, was to pack and dispose of its members' fruit in their behalf. It made advances to members against their fruit, taking no security therefor. Rule 12 of the society provided that

> "If any member in the society becomes bankrupt his interest in the Society shall be paid to the assignee of his property."

When B., a member, became bankrupt, he owed the society £142 for advances, and the society had in hand B.'s fruit, which

realized £45, leaving a balance of £97 against B.'s capital interest of three hundred £1 shares in the society.

On motion for directions by the Official Assignee of B.'s property,

C. R. Fell, for the Official Assignee; *Cheek*, for the Society.

Held, That no question of set-off arose, but that, in order to ascertain the value of B.'s interest in the society, B. must be credited with the value of his shares and debited as against such credit with the amount of his indebtedness to the society.

Solicitors: *Fell and Harley*, Nelson, for the Official Assignee; *Glasgow, Rout, and Cheek*, Nelson, for the Society.

SUPREME COURT. Wellington. 1940. August 22; September 11. *Myers*, C.J.

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

Will — Construction — Res Judicata — *Estoppel — On second Originating Summons for Determination of Question arising under Will Matter alleged to be* Res Judicata *and Parties estopped by Final Order on previous Originating Summons— Reference to Record and Argument on latter to Interpret Order— Whether previous Order a Decree* inter partes *on same Subject.*

A testator by his will, after directing payment of the income arising from the investment of the realization of his property to his wife for life or widowhood for the maintenance of herself and his children, directed that upon the youngest child attaining the age of twenty-one years, the whole of the money in the hands of his trustees, with the capital sum and the accumulated income, if any, should be divided among his children in equal shares, and that should any of his children die leaving issue, such issue should take their parent's share in equal shares as and when they attained the age of twenty-one years. He left three children, all of whom had attained the age of twenty-one years before the testator's death, and a widow who died without having remarried. One of the children died intestate and unmarried before the widow.

While all the children and the widow were alive, a final order was made (on an originating summons to determine one question—*viz.*, whether the shares of the three children in the testator's estate were indefeasibly vested in them), that those shares "are not indefeasibly vested in them and the said shares do not become indefeasibly vested in them until the death or remarriage of the widow . . . "

On an originating summons, after A.'s death, to determine whether A.'s share was divested by reason of his death during the lifetime of the testator's widow without leaving issue surviving him, it was argued by counsel for the other two children, that, although on the true construction of the will, A.'s share was not divested by reason of his death during the widow's lifetime without leaving issue surviving, though his interest would have been divested had he left children surviving him, the matter was *res judicata*, and that the final order estopped all parties from contending that the interest was not so divested.

Byrne, for the plaintiff; *J. S. Hanna*, for the first defendant *H. R. Cooper*, for the second defendants.

Held, 1. That it was permissible not only to examine the record but also to refer to the argument on the previous originating summons for the purpose of interpreting or explaining the order; that, on doing so, it was plain that the whole contest was between the interest of the testator's three children and those of their unborn children, and the only event that was discussed as preventing absolute vesting, was that of a child dying during the widow's lifetime, and leaving issue.

2. That the previous order was not "a decree *inter partes* on the same subject," the question now raised was not *res judicata*, and there was no estoppel.

Henderson v. *Henderson*, (1843) 3 Hare. 100, 17 E.R. 313, and *Green* v. *Weatherill*, [1929] 2 Ch. 213, applied.

Bader Bee v. *Habib Merican Noordin*, [1909] A.C. 615, distinguished.

3. That A.'s share was not divested by reason of his death during the lifetime of the widow without leaving issue him surviving.

Peareth v. *Marriott*, (1882) 22 Ch.D. 182, applied.

Ward v. *Brown*, [1916] 2 A.C. 121, and *Public Trustee* v. *Batkin*, [1928] N.Z.L.R. 558, G.L.R. 315, considered.

Solicitors: *The Solicitor*, Public Trust Office, Wellington, for the Public Trustee; *Cooper, Rapley, and Rutherfurd*, Palmerston North, for the second defendants.

Case Annotation: *Henderson* v. *Henderson*, E. and E. Digest, Vol. 16, p. 138, para. 366; *Green* v. *Weatherill*, *ibid.*, Supp. Vol. 21, No. 529a; *Peareth* v. *Marriott*, *ibid.*, Vol. 21, p. 157, para. 199; *Ward* v. *Brown*, *ibid.*, Vol. 44, p. 1082, para. 9333.

SUPREME COURT Napier. 1940. August 8, 26. *Ostler*, J.

BARLING AND OTHERS v. COMMISSIONER OF TAXES.

Public Revenue — Income-tax — Will — Construction — Whether Children's Interests Vested or Contingent—Income of Share of Estate to which Children contingently entitled held upon Trustee's Discretion to accumulate, pay to Children, or apply for their Maintenance or Education or Preferment—Portion applied for Maintenance and Education—Portion Accumulated—How Assessable—Land and Income Tax Act, 1923, ss. 35, 102 (a), (b).

A testator, who left him surviving his widow ~~and two~~ children, a boy and a girl, by his will directed his trustees to stand possessed of his residuary estate upon trust and to pay one equal half part thereof to his wife absolutely and to hold the remaining half part

"upon trust to divide the same into as many shares as there shall be children of mine surviving who shall attain the age of twenty-one years so that each of such children who shall be sons or a son shall receive twice as much as each of such children who shall be daughters or a daughter and upon each such child attaining the age of twenty-one years I direct my said trustees to pay such child the sum of £500 out of the share of such child thereunder and thereafter until such child shall attain the age of twenty-six years to pay to such child the net income arising from the balance of the share of such child hereunder and upon the attainment of the age of twenty-six years by each such child, to pay such balance to such child Failing any such child or children as aforesaid I direct my said trustees to pay the whole thereof to my said wife . . . I direct my said trustees to invest the presumptive share of any child of mine hereunder who shall be under the age of twenty-one years upon such investments as are authorized by law in New Zealand for the investment of trust funds and at their discretion (exercisable from time to time) to accumulate the income to arise from any such investments for the benefit of such child or to pay the same to such child or for the maintenance education or preferment in life of such child."

On a case stated on appeal from an assessment of income-tax under the provisions of s. 35 of the Land and Income Tax Act, 1923,

Scannell, for the appellants; *Willis*, for the respondent.

Held, 1. That the share in the capital given to each child was not a vested but merely a contingent interest.

Phipps v. *Akers*, (1842) 9 Cl. & Fin. 583, 134 E.R. 453; *Whitter* v. *Bremridge*, (1866) L.R. 2 Eq. 736, and *In re Heath*, *Public Trustee* v. *Heath*, [1936] Ch. 259, distinguished.

2. That there was no vested gift of interest to the children, but a contingent gift with three discretions vested in the trustees—*viz.*, (*i*) to accumulate the income to arise from investment of a presumptive share until the child entitled to such share attained the age of twenty-one years; or (*ii*) to pay the income to such child; or (*iii*) to pay the income for the maintenance, education, or preferment in life of such child.

3. That that portion of the income applied by the trustees for the maintenance and education of the children was "income held by the trustees in trust for the maintenance and education of the children" within the meaning of the second part of para. (*b*) (2) of s. 102 of the said Act.

Scott v. *Commissioner of Taxes*, [1939] N.Z.L.R. 246, G.L.R. 182, followed.

4. That that portion of the income which was accumulated by the trustees was assessable under the first part of the said s. 102 (2) (*b*) with no special exemptions.

Solicitors: *Crown Law Office*, Wellington, for the respondent; *Carlisle, McLean, Scannell, and Wood*, Napier, for the appellant.

Case Annotation: Phipps v. *Akers*, E. and E. Digest, Vol. 44, p. 463, para. 2832; *Whitter* v. *Bremridge*, *ibid.*, p. 1103, para. 9530; *In re Heath*, *Public Trustee* v. *Heath*, *ibid.*, Supp. Vol. 44, No. 9535a.

SUBSTITUTION.

The Effect of a Codicil.

By R. C. CONNELL, LL.M.

Seldom does an afterthought create a new difficulty. When a beneficiary, intended by a testator to take under a class gift in his will, passes away between the date of the will and a confirming codicil, the executors inquire from the family solicitor whether a substitutionary gift will take effect, thus raising the question as from what date a will speaks.

A century ago—before the coming into operation of the Wills Act, 1837,—the date from which a will with its codicils spoke was of major importance. Then future property could not be dealt with by will, and frequent disputes arose with the beneficiaries under the will on one side, and the heir or the next-of-kin on the other.

Section 24 of the Wills Act, 1837, has, to a large degree, rendered obsolete decisions on the effect of a codicil in bringing a will down to the date of the codicil as regards property. The principle, however, is still of importance in practice for in *In re Reeves, Reeves* v. *Pawson*, [1928] Ch. 351, Russell, J., (as he then was) held that a codicil containing the words: "in all other respects I confirm my said will" brought down the date of the will to the date of the codicil. So a bequest of "all my interest in my present lease of No. 1 Chesterfield Street," operated in the same way as it would have done if the words in the will had been contained in the codicil of later date, though the lease had expired and a renewal acquired between the date of the will and the codicil.

The consequences of a codicil in reference to the description of a testator's property are clear and are reasonably to be presumed as the testator's intention.

The consequences of a codicil on the beneficiaries described in the will has infrequently been the subject of litigation. It may probably now be too late for beneficiaries to challenge the principle expressed in general terms and repeatedly affirmed by the Courts—no exception being made in regard to persons in contradistinction to property—that the general rule is that a will is brought down to the date of the codicil: *In re Laybourn, Public Trustee* v. *Pettigrew*, [1934] N.Z.L.R. 711, 714; *In re Smith, Prada* v. *Vandroy*, [1916] 1 Ch. 523, 530; *In re Fraser, Lowther* v. *Fraser*, [1904] 1 Ch. 726; and *Doe d. York* v. *Walker*, (1844) 12 M. & W. 591, 152 E.R. 1334.

It has been held that by executing a codicil a testator must be considered as repeating every word of his will at that time: *Capron* v. *Capron*, (1874)L.R. 17 Eq. 288; *Re Hunter*, (1912) 1 D.L.R. 456; *Re Anderson, Canadian Permanent Trust Co.* v. *Mc Adam*, [1928] 4 D.L.R. 51. This rule is to be treated as a presumption of the testator's intention: *Goodtitle d. Woodhouse* v. *Meredith*, (1813) 2 M. & S. 5; 105 E.R. 284; *Monypenny* v. *Bristow*, (1832) 2 Russ. & M. 117; 39 E.R. 339; *Lady Langdale* v. *Briggs*, (1855) 25 L.J. Ch. 100, 65 E.R. 645; but it is subject to the two following exceptions: (1) A codicil cannot revive a legacy which has been revoked, adeemed, or satisfied—*Powys* v. *Mansfield*, (1837) 3 My. & Cr. 359, 376; 40 E.R. 964; *Hopwood* v. *Hopwood*, (1859) 7 H.L.Cas. 728, 11 E.R. 290, and *In re Warren, Warren* v. *Warren*, [1932] 1 Ch. 42; and (2) any contrary intention to be implied from the language used by the testator will be given effect to—*In re Park, Bott* v. *Chester*, [1910] 2 Ch. 322; *Adams* v. *Gourlay*, (1912) 4 D.L.R. 73; and *Fuller* v. *Hooper*, (1751) 2 Ves. Sen. 242; 28 E.R. 156.

Let us now consider the authorities for and against the contention that the beneficiaries to take under the will are those to whom the description is applicable at the date of the will and not at the date of the codicil.

The matter is left open in *28 Halsbury's Laws of England*, 580, 581,* where the learned author says:

> The effect of a confirmation of the will, by a subsequent codicil is for many purposes subject to any contrary intention being shown and without prejudice to the original effect of the will and intermediate codicils, to bring the dispositions of the will down to the date of the codicil and to effect the same disposition of the testator's estate as if the testator had at that date made a new will containing the same dispositions as the original will but with the alterations introduced by the various codicils. . . . but such confirmation, it seems, need not affect the conditions of a gift or the donee where the description may apply to different persons at different times.

In *Pattison* v. *Pattison*, (1832) 1 My. & K. 12, 14; 39 E.R. 585, an unreported case exactly in point is mentioned at p. 586: Mr. Pemberton *arguendo*:

> As to the argument founded on the supposed effect of the codicil, it is true that a codicil operates as a republication of a will for certain purposes, but it cannot have the effect of setting up a specific legacy, which would otherwise fail. A codicil confirming a will can never have the effect of altering the construction of such will. That it can have no such operation was strikingly shown in the case of a testator, who, having six children at the time of making his will, directed his property to be equally divided among his six children. One of the children died; the testator afterwards had another child, and made a codicil confirming his will; but it was held that the codicil could not be construed as applying to a different class of legatees, namely, the six children who were living at the testator's death, though there could be little doubt that such was the testator's intention. If ever there was a case in which the Court would have struggled to construe a codicil as a republication of the will, so that the will might be taken to speak from the date of the codicil, that was the case; but the law upon this point is too firmly settled to admit of relaxation, whatever, under peculiar circumstances, may be the inclination of the Court to relax it.

This case was decided in 1832.

In *Stilwell* v. *Mellersh*, (1851) 20 L.J. Ch. 356, 361, Lord Cranworth, V.C., stated:

> In my opinion then, when it is said a codicil republishing a will, or confirming a will, makes the will speak from the time of republication, that does not mean that you are to read the will in any way different from the mode in which it would have been read if the testator had died the moment after he had executed it. What absurdities otherwise would arise. Suppose I by my will say I give £500 to the present treasurer of Lincoln's Inn, and this day twelve months I republish my will, does that alter the party who is to take the legacy? . . . Now, the cases in which this question has often arisen and with which we are familiar are these: where a party says by his will "I give all my lands," what does that mean? All the lands that I have power to give. When, a year afterwards, I republish that will, having intermediately purchased lands, it will apply to the after-purchased lands. It is to be read just as if I had put in those words, "all the estates which I had power to give." Therefore, it seems to me that the distinction is manifest between an express date or an express name fixed upon. . . . But you cannot alter the meaning of the will, which you will be doing, if, by republishing the will, you are to treat the testator as having meant something by his will different from that which he has there expressed . . . I

* *Cf.* Second Edition, Vol. 34, pp. 98–101.

was turning in my mind whether I could recollect any cases in which there was this sort of devise, "I give to all my present children," then an after-born child, and a codicil republishing the will: Certainly, according to my impression, that would not give to the after-born child.

In *In re Whorwood, Ogle* v. *Lord Sherborne*, (1887) 34 Ch.D. 446, a silver cup was bequeathed to Lord Sherborne and his heirs and the original Lord Sherborne having died between the date of the will and a confirming codicil, it was held by the Court of Appeal that the gift lapsed. *Mountcashell* v. *Smyth*, (1895) 1 I.R. 346; *In re Moore (deceased), Long* v. *Moore*, [1907] 1 I.R. 315, and *Doe d. Biddulph* v. *Hole*, (1850) 15 Q.B. 848, 117 E.R. 678, are also examples of wills speaking as from their own date, though confirmed by codicils.

In *In re Park, Bott* v. *Chester*, [1910] 2 Ch. 322, a testator had provided for a gift over in case of his son's marriage with consent and death without children. The son's marriage took place in the testator's lifetime and before a codicil confirming the will. It was held that the testamentary dispositions could not be held to refer to a subsequent marriage. At p. 327 Parker, J., states:

> but the suggestion is that, the codicil having been made after the marriage, and confirming the will, I must treat the will as having for all purposes been made at the date of the codicil, and that therefore the condition can only refer, not to the first marriage, but to a subsequent marriage, . . . It is perfectly clear, on the cases quoted by counsel for the parties entitled on an intestacy, that for many purposes the republication of a will may affect the *property* [the italics are the author's] to which a devise or bequest in the will applies; but I do not think any of the authorities quoted go to this length, that for all purposes in construing it I must treat the will as having been made at the date of the codicil. A doctrine of that sort would lead to extraordinary results. For example, taking the instance put in *Stilwell* v. *Mellersh*, (1851) 20 L.J., Ch. 356, there might be a legacy to the person who now holds the position of treasurer of Lincoln's Inn. If you read the will at a subsequent date, the legatee might have been entirely altered. I do not think the doctrine of republication has ever been carried to that extent. As a matter of fact, in the present case, if you consider the doctrine of republication as affecting the beneficial interests at all, the result seems to be that it might have cut out a class of children of the son who are provided for under the will, and who are intended to benefit; and that, instead of actually confirming the will by a codicil which is expressed to confirm it, the testator would in effect, if that doctrine be applied, be revoking the bequest which had been made in the will to persons who were intended to benefit by it. So far from confirming his will, he would be revoking it. In my opinion it is impossible to carry the doctrine of the cases quoted as to the effect of republication to that extent.

In *1 Williams on Executors*, 12th Ed. 124, the above views are not entirely adopted:

> But though a codicil confirms a will and for certain purposes brings down the will to the date of the codicil, it certainly does not make the will necessarily operate as if it had been originally made at the date of the codicil.
>
> One important consequence of a republished will being considered as a new will of the date of the republication is that the operation of the will is by republication extended to subjects which have arisen between its date and republication. Thus if a testator gives to Sarah his wife a piece of plate, or other thing, and has no such wife at the time, but afterwards marries one of that name, and then republishes the will, this is a good bequest. And it has been considered that a bequest may extend to any person to whom the description is applicable at the period of republication, though not originally intended: *Perkins* v. *Micklethwaite*, (1714) 1 P. Wms. 275; 24 E.R. 386; *In re Hardyman, Teesdale* v. *McClintock*, [1925] Ch. 287.

In *Hardyman's* case, a testatrix left a will bequeathing a legacy in trust for her cousin "his children and his wife" and the cousin's wife having died in the meantime, the testatrix confirmed her will by a codicil. The son subsequently remarried and it was held by Romer, J., that the second wife was entitled to take under the codicil and will. The case is explained in *Theobald on Wills*, 9th Ed. 239–240, as follows:

> On the other hand there may be indications of intention in the will that the testator means by wife or husband any wife or husband . . .

In *Perkins* v. *Micklethwaite* (*supra*), decided in 1714, the testator by a codicil gave £500 to his son Joseph and confirmed his will. The testator had another son named Joseph at the date of the will who died between the date of the will and the codicil—Joseph the younger being born later and before the date of the codicil. It was held that the making of the codicil amounted to substitution in the will of the second Joseph in place of the first.

In *Re Donald, Moore* v. *Somerset*, (1909) 53 Sol. Jo. 673, Warrington, J., states *obiter*:

> But supposing that is wrong, what is the effect of the confirmation? You must treat the will as if it had been written out on that day; it must have such effect, though, perhaps, it is not correct to say that it must be so construed. . . . It is said that *Re Champion*, [1893] 1 Ch. 101, refers only to the subject-matter of the gifts and not to the objects. But I fail to see the distinction. There is no authority for it, except Mr. Pemberton's argument in *Pattison* v. *Pattison* (*supra*) and the unknown case to which he refers; but in that unknown case to alter the objects of the gift would have been to alter the construction of the will, and it is quite plain that that is the distinction which Mr. Pemberton was making.

It is to be noted that apparently this decision was not a considered one and is not cited in *In re Park* (*supra*).

From the above cases, however, it is clear that a good case can still be argued in favour of the view that once persons are fixed by a will, the classes will not be altered by a codicil, except so far as a contrary intention is to be gathered from the codicil.

On the authority of *In re Whorwood* (*supra*), evidence of the testator's intentions will not be admissible. A testator is presumed to know the state of his own family: *In re Gorringe, Gorringe* v. *Gorringe*, [1906] 2 Ch. 341, 351; *In re Nicolson*, (1913) 33 N.Z.L.R. 203, 210; *In re Syms (deceased), Guardian, Trust, and Executors Co. of New Zealand, Ltd.* v. *Sparling*, [1932] N.Z.L.R. 332; and *In re Metcalfe, Metcalfe* v. *Earle*, [1909] 1 Ch. 424.* Capriciousness will not be attributed to a testator, nor a whimsical or harsh result to his dispositions where the words of his will can be read otherwise: *28 Halsbury's Laws of England*, 669, and accordingly it appears that in the case of a class gift to children of a testator, one of the children having died between the date of the will and the codicil, that the substitutionary gift will take effect.

Boring in Court.—A great sessions lawyer, Caldecote, but one who had the reputation of being an intolerable bore, was arguing a question as to the rateability of certain lime quarries. In the course of what seemed an interminable argument, he contended that lime quarries "like lead and copper mines, were not rateable, because the limestone in them could be reached only by deep boring, which was a matter of science."

Lord Ellenborough: "You will hardly succeed in convincing us, Mr. Caldecote, that every species of boring is a matter of science."

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* *Re Ryan*, 16 O.W.N. 331, and *Re Jeffery*, 27 O.W.N. 158, may be relevant, but the reports are not available.

LONDON LETTER.

By Air Mail.

Somewhere in England,
August 18, 1940.

My dear EnZ-ers,

Britain stands confident—and ready. Should by force of numbers the unexpected happen and the defence in the air be broken, the land is impregnable. But the first line of defence is in the air, and this week all our thoughts have been for the airmen. The poet's vision a hundred years old is now realized with "the nations' airy navies grappling in the central blue," and the weight of the struggle falls on the flower of young manhood which makes the Royal Air Force. In Mr. Herbert Asquith's lines—

> "*Man's desperate folly was not theirs,*
> *But theirs the sacrifice.*"

It is inevitable to turn to the "Airman's Letter to his Mother," which will rank high in the literature of the war. The sacrifice of others who have given their lives "has resulted in the British Empire, where there is a measure of peace, justice and freedom for all." Now daily this is being repeated, and there are aircraft which with their pilots "do not return"—

> *Qui ante diem periit,*
> *Sed miles, sed pro patria.*

No Long Vacation.—The Supreme Court, for the first time in its history, will sit during August and September. So the Council of Judges, with the concurrence of the Lord Chancellor, has unanimously decided. It is a striking manifestation of the changed times.

The Courts will sit not merely to dispose of urgent business, but in order that all parties who so desire may have their cases tried when they are ready. Several members of the judiciary and many of those who practice in the Courts have planned to do active war work during those months, but it will be possible to secure that a sufficient rota of Judges shall be available in the Court of Appeal and in each division of the High Court. Where circumstances arising from the war justify postponements of trials or extensions of time, applications for this purpose can be made.

Requisitions on Occupied Territory.—Now that so many countries are in enemy occupation the question of the liability of the enemy to pay for requisitioned goods and services becomes of importance. War, it has been said, must support war, but attempts have been made to substitute for pillage by a conquering army the modern doctrine that private property on land is immune from seizure, though this has not yet been accepted in maritime law. The matter is dealt with in Art. 52 of the Hague Convention of 1907 on the Laws and Customs of War on Land, and it is provided that requisitions in kind and services may be claimed from municipalities or from inhabitants, but only to the extent of the needs of the army of occupation, and they must be proportionate to the resources of the country. Moreover, they must be of such a nature as not to impose on the conquered people the obligation to take part in warlike operations against their country. Payment should be made at once; otherwise, receipts must be given and payment made as soon as possible. Apart from these specific provisions the rights of a conquering army do not appear to be well defined, and it has been the practice of Germany to interpret these rights in her own favour, and assert them strictly. In the war of 1914-18 the Germans exceeded their former severity in their treatment of persons and property in occupied territories, and committed serious violations of the Hague Regulations. It is probable that the same course is being adopted now. Considering the barbarous nature of their war on civilians, it is not likely that more respect is paid to property than considerations of policy require. It will be one of the tasks of statesmen when the war has been brought to an end to re-establish International Law, and secure such indemnity as may be possible.

Habeas Corpus.—With all the internment of British subjects and aliens which is going on, it is not unnatural that there should be an attempt to question by *habeas corpus* the enforcement of the Defence Regulations. Such an attempt is being made in *Ex parte Lees* (*Times*, August 13), though since it has been adjourned for the Home Secretary to be represented, I, of course, make no comment upon it. There were, however, well-known cases in the last war which show how carefully personal liberty is guarded by the Courts. In *Re Halliday*, [1917] A.C. 260, indeed, Lord Shaw's contention that the Defence Regulations must give way to Magna Carta was overruled by the other Law Lords. But in *O'Brien* v. *Home Secretary*, (1923) 67 Sol. Jo. 553, an order for deportation to Ireland was set aside on the ground that its justification had been removed by the Irish Free State Constitution Act, 1922, and Scrutton, L.J., in his judgment, quoted the words of Lord Herschell in *Cox* v. *Hakes*, (1890) 15 App. Cas., 506, 527: "The law of this country has been very jealous of any infringement of personal liberty."

Servants or Serfs.—It is good in times like these to read the judgments of the House of Lords in *Nokes* v. *Doncaster Collieries*, [1940] 3 All E.R. 549. The problem before the House was whether an order made under s. 154 of the Companies Act, 1929, to transfer one company's property to another, could operate to transfer contracts of personal service, so that an employee of the first company might find himself, willy nilly and without being consulted, the servant of another master. The question was not an easy one, because by subs. (4) the expression "property" includes property, rights and powers of every description, and the Court of first instance, a Divisional Court, and the Court of Appeal, had held that these words were wide enough to include a contract of service. With this view Lord Romer agreed. But the majority of the Law Lords happily found it possible to take a wider view. It is a commonplace that apart from the proposed operation of this section a contract of personal service cannot be transferred without the employee's consent. As Lord Atkin put it: "Ingrained in the personal status of a citizen under our laws is the right to choose for himself whom he will serve, and this right of choice constitutes the main difference between a servant and a serf. . . . It is said that one company does not differ from another, and why should not a benevolent

Judge of the Chancery Division transfer the services of a workman to another admirable employer just as good and perhaps better. The answer is twofold. The first is that, however excellent the new master may be, it has hitherto been the servant who has had the choosing of him, and not the Judge. The second is that it is a complete mistake to suppose that people . . . do not attach importance to the identity of the particular company with which they deal." This was well said, and their Lordships were able to give effect to it by holding, in Viscount Simon's words, that s. 154 did not contemplate the transfer of rights which in their nature were incapable of being transferred. To meet present necessities a certain temporary control of labour has been voluntarily accepted, but that makes a restatement of the main principle all the more timely.

The Cat That Switched.—The most marvellous excuses are put up for breaches of the law. A lady " appearing for her husband " (a legal impossibility) in answer to a summons for a contravention of the Lighting Restrictions Order, blamed the cat for switching on the electric light. " He is quite a knowing animal and will do practically anything." Practically anything does not apparently include perusal of the relevant Order or, no doubt, pussy would have switched off when he had sufficiently dazzled the mouse he was after.

The evening paper which gave us this gem says the Magistrate " ordered the defendant to pay one shilling a week for the next two months, and said he would then review the position." There must be some misunderstanding here. There is no power to inflict a fine of indeterminate amount, though it might be a useful development of the law to permit the kind of proceeding attributed to the Bench in this case.

The American Jury.—Nowhere in the world are the technicalities of legal procedure more abused than in the United States. Hours—and in " big " cases even days and weeks—are consumed in challenges to the jury ; exceptions to evidence are taken on every possible and impossible occasion, and side issues are argued *ad nauseam*. The *Chicago Bar Record* for March has a couple of pages by a sensible woman juror, who tells us that during the murder trial in which she was empanelled, " at intervals during the day, which were as frequent as every fifteen minutes, we were retired to the jury room so that the lawyers could argue motions and exceptions. As a matter of fact we spent more time out of the court-room than in. The jurors resented this practice, because it not only resulted in considerable delay, but made us extremely curious as to what was happening out of our presence. We could not help but feel that the repeated vehement objections of one of the attorneys were motivated by his desire to ' cover-up '." So do legal tacticians overreach. She goes on to say that the jury members were bored by long and dramatic orations and appreciated the matter-of-fact presentation of his case by one attorney. " John Barrymore tactics don't go over with women jurors." It is refreshing to learn that " whenever in the discussion any matter going beyond the actual evidence in the case was brought out some member of the jury would call the attention of the others to the fact that we were to try the defendant only on the evidence in the case and according to law."

Indian Divorce Jurisdiction.—Englishmen resident in India remain domiciled in England, for they always have the *animus revertendi* which prevents the acquisition of another domicil. And since jurisdiction in divorce depends on domicil (*Le Mesurier* v. *Le Mesurier*, [1895] A.C. 517), there was formerly no power for an Indian Court to decree a divorce under the Indian Divorce Act, 1869, where husband and wife, though resident in India, were domiciled here. In that case the notion of a " matrimonial domicil," not so strict in permanence as domicil proper, was rejected. This limitation, however, on the matrimonial jurisdiction of the Indian Courts was not established till the decision of Sir Henry Duke, P. (Lord Merrivale), in *Keyes* v. *Keyes*, [1921] P. 204. The matter was considered of so much importance that counsel for the Secretary of State for India were heard, though they were admitted only as *amici curiae*, and since many decrees had been made on the assumption that the Indian Courts had jurisdiction, the Indian and Colonial Divorce Jurisdiction Act, 1926, was passed in order to validate these decrees, and confer the jurisdiction on appropriate Indian Courts in the future. Since then the Matrominal Causes Act, 1937, has been passed—the Herbert Act—extending the grounds of divorce, and though the Indian and Colonial Divorce Jurisdiction Act, 1926, purports to give to the Indian Courts jurisdiction to grant decrees for the dissolution of marriage, and to make incidental orders, " according to the law for the time being in force in England," it appears that doubts have arisen whether the jurisdiction is exercisable in accordance with the law of divorce as altered by the Herbert Act. The Indian and Colonial Divorce Jurisdiction Bill is intended to remove such doubts, and to make that Act fully effective under the present divorce law.

Causing Despondency.—" I say to myself : this is where I keep calm and steady. I do not crack silly jokes." This we are advised to do when we hear explosions, a bit of counsel that is warranted to produce explosions of mirth in a race which is accustomed to take danger and trouble with a cheerful heart and a quip. Did not our soldiers, in 1914, charge the enemy with the laughing cry " This way to the early doors " ? And was it not the inimitable Bairnsfather who depicted Old Bill, not as engaged in efforts to keep calm, but as counselling his mate to find a better 'ole if he could ?

Anyway, His Majesty's Judges seem prepared to run the risk of making a joke, even on such a sacred subject as the income-tax. In a case before the Court of Appeal, counsel referred to the rate of income-tax as " a fluctuating one."

Lord Justice Scott : " Would you like the Court to suspend judgment until to-morrow ? " (It was the day before the budget speech).

Lord Justice Luxmoore : " Or perhaps we had better wait until it is stabilized at twenty shillings in the pound."

This was, of course, a joke, and as such aroused laughter in Court. But the solemn fellow who apostrophises himself in air raids would have run off to the silent column, had this not, in the happy phrase of the Prime Minister (who, fortunately, has a sense of humour) passed into innocuous desuetude.

The proper antidote to despondency is cheerfulness, with an occasional dash of hilarity.

Yours as ever,

APTERYX.

NEW ZEALAND LAW SOCIETY.

Council Meeting.

(*Concluded from p. 226*).

Soldiers out of New Zealand: Affiliation Orders.—The following correspondence was received from the Judge-Advocate-General:—

I enclose for your information copies of a letter addressed by me to the Right Honourable the Chief Justice dated April 19, 1940, and his reply thereto date May 3, 1940.

The arrangement made by Army Headquarters will hold good for proceedings in any Court of justice.

On the 19th inst. the Honourable Mr. Justice Ostler made an order under s. 47 of the Judicature Act, 1908, appointing as Commissioners of Oaths 37 officers at present serving or about to serve in the New Zealand Expeditionary Force overseas.

Yours very truly,
Claude H. Weston,
Colonel.

Enclosure—

The Rt. Hon. the Chief Justice,
Wellington.

Dear Sir:

Service on Legal Proceedings upon Soldiers on Active Service.

Army Headquarters will undertake the service of legal proceedings upon soldiers in the New Zealand Expeditionary Force on active service in accordance with the directions for service contained in any order made by the Court.

Correspondence concerning such proceedings should be addressed by legal practitioners to the Judge-Advocate-General, Army Headquarters, Wellington.

Means of identifying the soldier in question must be indicated, and, when necessary, supplied with the documents. It is intended that service will be effected when possible by someone, preferably a solicitor of the Supreme Court of New Zealand, deputed to do so by the Judge-Advocate attached to New Zealand Divisional Headquarters and actually at Divisional Headquarters in the Judge-Advocate's Office.

Naturally under war conditions no undertaking can be given as to the time within or conditions under which service can be effected.

Probably, when service is effected, the soldier concerned will discuss the matter of the proceedings with the Judge-Advocate or his qualified assistants (and the Judge-Advocate will be asked to encourage him to do so) and an opportunity may thus present itself to advise him of the nature of the proceedings and of the decisions he may have to make and how to carry them out, but in many cases the soldier may prefer to consult someone in his own unit. The Judge-Advocate will receive any communication from the soldier concerning the proceedings that the latter may wish to make and transmit it to New Zealand. The soldier may, however, wish to communicate with New Zealand direct.

It will facilitate matters if the Supreme Court Rules can be modified to allow affidavits by soldiers on active service to be made before anyone in the New Zealand Expeditionary Force of the rank (including Temporary Rank) of Major-General, Brigadier, Colonel or Lieutenant-Colonel. Such modifications would no doubt provide that statements in an affidavit that the Deponent is a soldier on active service with the New Zealand Expeditionary Force, and that the person taking the affidavit is of the stated rank shall be deemed to be true until the contrary is proved.

It is hardly a matter for Army Headquarters to discuss whether it is quite fair to a soldier on active service to be called upon to make decisions and to take action in his domestic or business affairs at a time when all his thoughts and energy are devoted to an occupation probably more exacting and absorbing physically and mentally than any other. That is a question, it is respectfully assumed, for the Court to decide. The co-operation of Army Headquarters is consequently limited to service of proceedings as it is thought better in the interests of the soldier that it should be effected by responsible persons and under conditions affording him the maximum protection and assistance. Any variation of this suggested procedure that may occur to His Honour the Chief Justice will be welcomed by Army Headquarters.

From the Chief Justice to the Judge-Advocate-General.

I refer to your letter of April 19 and the various conferences that I have had with you upon this subject-matter. I have also, as you are aware, consulted the other Judges upon the matter.

I have to-day made an order in one case, and I enclose for your information a minute of the order which I have already read to you and which I understand you agree meets the position satisfactorily, for the present at all events.

I would suggest that when you are sending documents abroad for service you might ask your officers to send you a report of the place and manner of service and of any special circumstances that may exist in the particular case. Such report would operate as an additional safeguard of the interests of the soldier party to the proceedings inasmuch as it would enable any special circumstances to be brought by you before the Court for consideration.

You will, I understand, consider the question of applying for the appointment of solicitors of the Supreme Court serving abroad holding commissioned rank as Commissioners under s. 47 of the Judicature Act, 1908.

Reciprocal Admission of Barristers: New Zealand and New South Wales.—Professor McGechan, of Victoria University College, wrote as follows:—

Would you bring before the next meeting of the Executive of the Society consideration of the question whether reciprocal arrangements for admission as between the New South Wales and New Zealand Bars could not be brought about.

I was in practice for nine years at the New South Wales Bar and am anxious to be admitted to the New Zealand Bar. There are difficulties in the way of my doing so in the ordinary way. Both for the social advantages, so far as I myself am concerned, and for the advantages which will accrue to the Faculty of Law, I think it as well that I should be a member of the New Zealand Bar.

I have little doubt that the proposal will be well received by New South Wales if it is along the lines of reciprocity as now existing between England and New Zealand.

Thanking you for your assistance to me already in the matter.

It was decided to approve the principle of reciprocal admission of barristers, and to approach the necessary authorities with a request for the requisite arrangements to be made.

New Zealand Clerical Workers' Award.—Mr. J. F. B. Stevenson reported:

The New Zealand Clerical Workers' Dispute came before the Court of Arbitration to-day. Mr. Perry appeared on behalf of the Legal Employees' Union throughout New Zealand and I appeared on behalf of the New Zealand Law Society and applied for total exemption from the award for legal employers and legal employees. After some discussion, the representatives of the New Zealand Clerical Workers' Union stated that their Union would consent to an exemption being inserted in the award to the following effect:—

> "Nothing in this award shall apply to workers who are eligible for membership of any legal employees' or law practitioners' employees' industrial union of workers, nor to the employers of such workers, insofar as the conditions of employment of such workers are concerned."

This exemption is similar to the exemption in the current Clerical Workers' Award which is to be superceded by the new award. I requested that the words "insofar as the conditions of employment of such workers are concerned" should be struck out so as to leave the exemption without

any qualification. The Court appeared inclined to do this, but suggested that if the words were struck out, the Court might insert in lieu thereof the following words—"whilst engaged in the legal profession"—so that the exemption would then read—

> "Nothing in this award shall apply to workers who are eligible for membership of any legal employees' or law practitioners' employees industrial union of workers, nor to the employers of such workers, whilst engaged in the legal profession."

Mr. Monteith, the Workers' Assessor on the Court, argued that unless some such words were inserted, the exemption would apply to legal employers whilst engaged in any industry. I stated that I did not agree with this view. Eventually His Honour said that the Court would grant legal employers and legal employees' exemption and that the Court could settle a clause which it felt would be acceptable to the legal profession, and would insert the same in the award.

I will report further to you in due course.

Wages Protection and Contractors' Liens Act, 1939, s. 32: Retaining One-fourth of Moneys Payable.—The following letter was received from the Under-Secretary of Justice:—

> I am directed by the Hon. the Attorney-General, to acknowledge the receipt of your letter of March 11, embodying the text of a letter from a local solicitor, drawing attention to the variation in the language of s. 32 of the 1939 Act with s. 59 of the 1908 Act.
>
> The Minister desires me to thank you for calling his attention to the matter. In view of the fact that s. 59 has already been the subject of convenient judicial interpretation an amendment more closely following its language will be considered.

Application for Probate: Swearing as to Amount of Estate.—The following letter was received from the Rules Committee:—

> I refer to your letters to me of October 7, 1938, and October 13, 1938, suggesting deletion of para. (5) (setting out value of estate) in the affidavit to lead grant of probate, Form No. 34 in the First Schedule to the Code, and to my letter in reply of May 17, 1939, informing you that the matter had been considered by the Rules Committee, and would be further considered.
>
> I have now to say that the matter has been further considered and it has been decided that no action be taken to recommend an alteration in the existing form.
>
> I am to say that the Rules Committee is nevertheless obliged to the Hamilton District Law Society, and to your Society for bringing the matter forward.
>
> I permit myself to say that various views were directed to be obtained, and that the matter was then very fully discussed by the Committee and considered from the points of view of the Judge hearing an application, the executor, the solicitor acting for the executor, the beneficiaries, the public, the officers of the Court and the Government Departments concerned.
>
> As regards the point taken about publicity, which is adverted to in the Hamilton Society's reference of the matter, I may say that the Committee is informed that in some registries it is the practice to go so far only as to give the names of executors and administrators to press representatives, and then not for publication, but so as to enable the press to obtain directly from the executor or administrator (if he is prepared to give it) information sought to be published.
>
> The Committee is informed that in other registries it has been, if it is not now, the practice to allow press representatives to search records periodically so as to enable lists to be published giving the names of deceased persons, probate of whose wills or administration of whose estate is granted, together with the sworn value of the estate. If your Society is aware of any registry in which this practice still obtains, perhaps direct representations on the matter might be made to the Registrar there.

It was pointed out that the right of persons to search a document filed in the Supreme Court had recently been questioned. The Wanganui Society were of opinion that solicitors should have the right to search without question.

It was stated that it would be unwise to take any action, as there had been no difficulty in the past, and the matter was accordingly dropped.

Enlisted Soldier: Agreement with Solicitor Conducting his Practice.—*Agreement*: The secretary drew attention to the terms of the agreement prepared by the English Law Society for use between an enlisted soldier and another solicitor willing to carry on his practice.

Wearing Uniform in Court: The secretary also drew attention to the following ruling of the English Bar Council, set out on p. 23 of the *Law Journal* (London), January 13, 1940:—

> For general guidance the Council passed the following resolution: Except in cases where the barrister is serving with the armed forces of the Crown, and is required to wear his uniform while so serving during the war, a barrister should not appear in Court in uniform and should wear robes in the usual way.

Scale of Fees: Stock and Implements: Sale of Farms as Going Concern.—The following report was received from the Conveyancing Committee:—

> Again expressing a personal opinion we think the suggested scale is not unreasonable. The opinions of members of the profession practising in farming districts naturally carry weight with us.

It was unanimously decided to adopt the Hamilton scale.

Mortgagors' and Lessees' Rehabilitation Act, 1936: Notice to Guarantor: Incidence of Costs.—The Conveyancing Committee reported as follows:—

> It is clear that as a result of the provisions of s. 54 of the above Act, failure to give the notice thereby required would entail a loss to the mortgagee of his rights against the guarantor and to protect such rights, the notice must be given.
>
> From the decided cases it seems that at common law it would be open to a mortgagee to add the costs of such a notice to the amount of his mortgage, and upon exercise of his power of sale or upon redemption, such costs would have to be paid by the mortgagor. Apart from authority, it may have been arguable that the mortgagee's rights against a surety, even if the latter's covenant with the mortgagee made him a principal debtor, would be regarded as a security collateral to the charge over the land, and that therefore any costs incurred in protecting the guarantee would not necessarily fall upon the land itself. This point, however, was taken in the case of *National Provincial Bank of England* v. *Games*, (1885) 31 Ch.D. 582 (C.A.). There Mr. George Games gave the bank an equitable charge on certain lands, and Miss Games gave a promissory note as security for part of the balance. Correspondence took place between the bank and her as to this note, although nothing was eventually recovered from her. Pearson, J., held that the costs of this correspondence could be added to the amount of mortgage on foreclosure and a Court of Appeal consisting of Collins, Bowen and Fry, L.JJ., upheld him. This decision was followed by Joyce, J., in *Sachs* v. *Ashby and Co.*, (1903) 88 L.T. 383.
>
> Clause 6 of the covenants, conditions and powers set out in the Fourth Schedule to the Land Transfer Act, 1915, and implied in all mortgages by virtue of s. 103 of the Act, except insofar as is otherwise expressed therein, apparently adds to the common law rights of the mortgagee. It is not quite clear that giving the notice required by s. 54 of the Mortgagors' and Lessees' Rehabilitation Act, 1936, can be said to fall within the expression "lawfully exercising or enforcing any power, right or remedy in the mortgage contained or implied in favour of the mortgagee." In *Bowen* v. *Redmond*, [1936] G.L.R. 218, Ostler, J., gave an interpretation to these words, that included in their ambit costs and expenses properly incurred by the mortgagee in protecting his security in addition to the costs and expenses of exercising his power of sale, which interpretation is, of course, a liberal one.
>
> In the case under consideration however, there is an express covenant by the mortgagors to pay all costs and expenses reasonably incurred by the mortgagee "in enforcing or

attempting to enforce or to secure the observance or performance of any covenant therein contained or implied." This express covenant would seem to hit the bird in the eye. The notice under s. 54 is given to secure the observance of the covenant by the principal debtors the mortgagor and her husband, to pay the moneys intended to be secured thereby. Without the notice being given, the covenant itself would go and there could be no observance of something not in existence.

The fact that the Mortgagors' and Lessees' Rehabilitation Act, 1936, was passed after the mortgage was executed does not in our opinion affect the matter. The Act concerned existing mortgages and the step taken by the mortgagee was necessitated by statute. The statute forced the giving of the notice upon the mortgagee to secure the observance of the covenant in an existing mortgage.

With reference to the argument for the mortgagor stated in cl. C of the letter to the Wanganui Society, it appears to us that the retention of the guarantee is also for the benefit of the mortgagor, so that the suggestion that the Act may be placing a burden upon him does not seem to us to be sound.

The report was unanimously adopted.

LEGAL LITERATURE.

Debts and Mortgages Emergency Legislation, being the Debtors Emergency Regulations, 1940, and the Mortgages Extension Emergency Regulations, 1940 (Annotated). By J. P. Kavanagh, with a foreword by the Hon. H. G. R. Mason, Attorney-General. Pp. xvi + 151. Wellington: Butterworth & Co. (Aus.), Ltd.

This is a very comprehensive survey of the Emergency Regulations with which it deals. The Table of Cases, running into twelve pages, and a no less extensive Table of Statutes, give an indication of the range of these regulations over the field of law. Apart from common-law and other decisions, many of the cases hark back to the war-time legislation of 1914–1918, and take in decisions on the corresponding statutes of the depression era. Some are directly abrogated by the new regulations, others are directly in point in relation to their construction and effect. The warning is, however, sounded in one of the notes that many of the cases cited are inserted for illustrative purposes only, as a guide to the manner in which the Courts have applied similarly-worded sections in earlier, though different, legislation. Nevertheless, practitioners will be grateful for the time saved them in research by the wide selection of New Zealand, English, and overseas judgments of importance to the understanding and application of the several regulations, some of the local cases being of such recent vintage as to interpret actual regulations in the text.

Briefly, though most comprehensively, each complete Regulation is followed by an annotation of all the sections in previous legislation which it resembles, and a reference to where cases thereon are assembled. This alone is a time-saving device of great utility that will prove its worth. The cross-referencing of regulation with regulation is another advantage.

Each clause in the regulations receives separate treatment; and a feature of this detailed study of the most difficult of these clauses shows the lucidity with which the author has simplified them for the busy practitioner.

The text is sprinkled with a number of welcome practice hints, but the learned author deserves the thanks of practitioners for the collection of forms which comprise an appendix. These may well become the standard forms for use in the appropriate Courts, as separate Supreme Court forms and Magistrates' Courts forms are provided for working each set of Regulations. Forms of notices, and a useful affidavit that leave is unnecessary complete a full set.

Use of a general index proves that it serves its purpose satisfactorily, and rounds off a competent bit of work.

As the learned Attorney-General ends his simple appreciative Foreword, "I believe the book will be found to lighten the work of all those who are in any capacity concerned in the administration of the Regulations."

FINANCE EMERGENCY REGULATIONS, 1940.

"Security": Ordinary Mortgages Excluded.

In a recent article, *ante*, p. 157, the view was expressed that great inconvenience would arise if the definition of "security" included an ordinary mortgage of land or chattels; and it was hoped that the Minister of Finance would relieve some anxiety on the matter by clarifying the position in a supplementary regulation. Several practitioners wrote to the JOURNAL giving reasons why, in their opinion, such an amendment was unnecessary.

However, there was a doubt, as the correspondence between the New Zealand Law Society and the Minister of Finance, *ante*, p. 184, disclosed; and the Minister, though considering the Regulations were clear that mortgages given by private individuals and partnerships were not affected, promised an amendment, if it were necessary, to make the point clear beyond any doubt.

As amended by cl. 4 of the Finance Emergency Regulations, 1940, Amendment No. 1 (Serial No. 1940/250), cl. 12 (5) of the Finance Emergency Regulations, 1940 (No. 2) (Serial No. 1940/118), now reads as follows:—

> References to securities and to the issue of securities respectively include references to any mortgage or charge, whether legal or equitable, *if* created by a company or other corporation or by an incorporated body (other than a partnership), *but not otherwise*.

The words in italics have been inserted by cl. 4 of the recent amendment (Serial No. 1940/250), made on September 25. The regulation, as amended, now puts the matter beyond doubt, as it confines the term "security" to any mortgage given by a company or other corporation or by an incorporated body, and excludes an ordinary mortgage of land or chattels.

PRACTICE NOTES.

Amendment of Pleadings.

By W. J. Sim, K.C.

In *Norton* v. *Williams*, [1939] G.L.R. 434, the scope of R. 144 with regard to the amendment of pleadings and particularly the addition of a cause of action came under review by Mr. Justice Ostler, and that learned Judge had some critical remarks to make on the subject. *Inter alia*, it was observed :

> I have often thought that it (*i.e.*, the prohibition against pleading an additional cause of action) was unnecessarily technical and not in the best interests of justice. The Courts exist for the purpose of trying the real controversies existing between parties. The striking out of an additional cause of action in the amended statement of claim does not prevent the plaintiff from having that cause of action tried ; it merely makes it more expensive for her to do so.

The action was one in which a right of way over certain lands was claimed by the plaintiff. In the original statement of claim, the basis of the claim was that a prescriptive title had been acquired by virtue of upwards of twenty years' uninterrupted user, or that it was a way of necessity. An amended statement of claim had been filed before trial, in which the plaintiff abandoned the claim to the way of necessity, but in addition to the claim to the prescriptive title, alleged an express oral agreement which granted her a right of way in perpetuity. The form of proceedings before His Honour was a summons to strike out ten paragraphs and the first prayer of the amended statement of claim, and the application was granted by His Honour, but with obvious reluctance. The judgment ends with a statement that the learned Judge would be happy to see the matter come before the Court of Appeal, which would be in a position to adjudicate on the matter unembarrassed by authority, as was the position in the Supreme Court.

The striking out of such a cause of action does not prevent the issue of a new writ, and the subsequent hearing of the action itself showed the inconvenience, if not injustice, that can arise through the Courts being hampered in hearing the controversy in all its parts. The hearing took place before Mr. Justice Callan—reported [1939] N.Z.L.R. 1051—when in accordance with the previous order, such parts of the statement of claim as related to the alleged oral agreement were disregarded by the Court. The actual decision resulted for the defendant, upon the principle that a right of way by virtue of twenty years' uninterrupted enjoyment thereof rests ultimately upon the presumption of a lost grant, and where the true root of title has been shown by the claimant, there is no room for the application of the law of prescription. It was here that the procedure (which it is submitted is defective) was shown to stand in the way of justice being done. The plaintiff could not rely upon the alleged oral agreement as a basis for her claim, but being given in the course of evidence, it furnished the reason for the destruction of her own case based upon a prescriptive title or presumed lost grant.

> It is not the law [said the learned Judge] that twenty years' uninterrupted enjoyment of an easement gives an indefeasible right thereto. One must consider the circumstances. If the circumstances permit the presumption that the enjoyment originated in a grant which has since been lost or destroyed, that presumption will readily be made. But where such a presumption is impossible, a claim which imports the making of such a presumption fails. . . . The presumption of a lost grant is in this case impossible. The plaintiff, who still owns the farm, which she alleges to be the dominant tenement, is the first person who ever owned or occupied it. . . . and, upon the evidence, there is no room for any presumption that the use which she has enjoyed and upon which she rests her claim has any basis other than the arrangements verbally made, of which she speaks in her evidence. . . . She made no suggestion whatever that her use of the alleged right of way had any basis other than the parol arrangements and acts of part performance which she detailed in her evidence.

It would be hard to imagine a clearer case where a plaintiff, who might be entitled to succeed, could lose her action by the strength of her case, but cramped by the form of the proceedings. One might respectfully add to Mr. Justice Ostler's observations that the time has passed for such a situation to arise under our Code.

The present position rests upon judicial interpretation of the Rules, and not upon anything explicit in the Rules themselves. Rule 144 provides as follows :—

> 144. Either party may at any time before trial file an amended statement of claim or of defence and serve a copy thereof on the opposite party.

There are also two further empowering Rules, namely R. 270 and R. 271 :—

> 270. The Court shall have power, either before, at, or after the trial of any action, to amend all defects and errors in the proceedings in the action, whether there is anything in writing to amend by or not and whether the defect or error is that of the party applying to amend or not.
>
> 271. All such amendments shall be made with or without costs and on such terms as the Judge presiding at the trial thinks fit, and all amendments shall be made that may be necessary for the purpose of determining the real controversy between the parties in the action.

The equivalent English procedure is O. XXVIII, rr. 1, 2, 12 and 13. Order XXVIII, r. 2, corresponding to New Zealand R. 144, empowers the plaintiff to amend his statement of claim without leave, whether indorsed on the writ or not, once at any time before the expiration of the time limited for reply and before replying, or where no defence is delivered at any time before the expiration of four weeks from the appearance of the defendant who shall have last appeared. There are no express limits to the amendments that can be so made, but O. XXVIII, r. 4 gives power to disallow an amendment or any part of it, *if the justice of the case requires it.* The whole procedure is conditioned by the necessity to do justice. Amendments disallowed have been the addition of a cause of action which has accrued since the date of the issue of the writ : *Tottenham Local Board* v. *Lea Conservancy*, (1886) 2 T.L.R. 410 ; *Estelby* v. *Federated European Bank, Ltd.*, [1932] 1 K.B. 254 ; or the setting up of causes of action which since the writ was issued have become barred by the Statute of Limitations : *Weldon* v. *Neal*, (1887) 19 Q.B.D. 394. At p. 395 of the latter case Lord Esher, M.R., affirmed that an amendment will not be allowed which will prejudice the rights of the opposite party as existing at the date when it is proposed to make it.

There are no words in R. 144 itself or in any other Rule which purport to prohibit the plaintiff from pleading an additional cause of action in an amended statement of claim. The Rule has been evolved entirely from judicial decisions under "Judge-made law." It is now proposed to examine the authorities under which the limited New Zealand practice has evolved.

(*To be continued.*)

DEVIL'S OWN GOLF TOURNAMENT

Another Successful Gathering.

The annual Devil's Own Golf Tournament was held as usual during the Dominion Day week-end, at Palmerston North. Although war conditions affected the attendance and prizes were not awarded, apart from the trophies held from year to year, over fifty practitioners took part. As usual, they came from all parts of the North Island, and one from the South Island. The hospitality of the members of the profession in Palmerston North proved unabated and the cumulative effect of friendships made in earlier years added to the general enjoyment. A substantial donation was made to the Patriotic Funds from the entry fees, which were wholly devoted to that purpose.

By resolution of the Council of the New Zealand Law Society, and with the donors' consent, the LAW JOURNAL Cup was open for competition, and will be held for the coming year by Messrs. S. A. Wiren and L. C. Hemery.

The following are the detailed results, the names of winners and runners-up being given in that order:—

Devil's Own Cup: M. H. Oram; S. Till.

Mortgagors Rehabilitation: G. Phillips; P. B. Cooke.

Paupers' Appeal Stakes: R. McKenzie; J. Card.

Guarantee Fund Handicap (Medal): H. F. Bollard (69); J. Bennett (73).

Cy-près Handicap (Medal): W. F. Stilwell (74); I. Mackie (74).

Best Qualifying Aggregate: I. Mackie (150).

Certorian Bogey: P. B. Cooke (square); A. M. Ongley; A. M. Goulding (1 down).

Public Trust Bogey: A. M. Ongley (1 up); P. B. Cooke.

Distress Foursomes: H. F. Bollard, J. Hill (2 up).

Law Journal Cup: S. A. Wiren and L. C. Hemery (2 up).

Teams Match: M. H. Oram; F. Yortt; M. Bergin, and E. J. Hallett (320).

RULES AND REGULATIONS.

Fisheries Act, 1908. Trout-fishing (Waimate) Regulations, 1937. Amendment No. 2. September 26, 1940. No. 1940/244.

Fisheries Act, 1908. Trout-fishing (Otago) Regulations, 1937. Amendment No. 4. September 26, 1940. No. 1940/145.

Forests Act, 1921-22. Forest (Fire-prevention) Regulations, 1940. September 26, 1940. No. 1940/246.

Health Act, 1920. Drainage and Plumbing Regulations Extension Order, 1940, No. 2. September 26, 1940. No. 1940/247.

Patriotic Purposes Emergency Regulations, 1939. Varying notice of exemption of certain Patriotic Purpose from the Patriotic Purposes Emergency Regulations, 1939. September 26, 1940. No. 1940/248.

Emergency Regulations Act, 1939. Marine Insurance (War Risks) Emergency Regulations, 1940. September 26, 1940. No. 1940/249.

Emergency Regulations Act, 1939. Finance Emergency Regulations, 1940. Amendment No. 1. September 26, 1940. No. 1940/250.

RECENT ENGLISH CASES.

Noter-up Service

FOR

Halsbury's "Laws of England"

AND

The English and Empire Digest.

BANKRUPTCY.

Order of Discharge—Effect of Order—Release of Debts—Rent—Future Rent Due after Date of Proof—Disclaimer—Bankruptcy Act, 1914 (c. 59), s. 54—Bankruptcy Rules, 1915, r. 276.

If a bankrupt does not disclose his interest in a lease, and it vests in his receiver, the bankrupt is liable for rent not accrued due at the time of his discharge, because such rent was not a debt provable in his bankruptcy.

METROPOLIS ESTATES CO., LTD. *v.* WILDE, **[1940] 3 All E.R. 522. C.A.**

As to what debts are discharged: see HALSBURY, Hailsham edn., vol. 2, pp. 352–354, pars. 476, 477; and for cases: see DIGEST, vol. 4, pp. 580–587, Nos. 5325–5372.

COMPANIES.

Winding Up—Dissolution—Transfer of Property, Rights and Liabilities to Another Company—Contract of Personal Service—Companies Act, 1929 (c. 23), s. 154.

Master and Servant—Written Contract of Personal Service—Dissolution of Employer Company and Transfer of Property, Rights and Liabilities to Another Company—Whether Contract of Service Between Employee and Transferee Company—Companies Act, 1929 (c. 23), s. 154.

An order made under the Companies Act, 1929, s. 154, does not automatically transfer contracts of personal service.

NOKES *v.* DONCASTER AMALGAMATED COLLIERIES, LTD., **[1940] 3 All E.R. 549. H.L.**

As to assignability of contracts: see HALSBURY, Hailsham edn., vol. 7, pp. 308–310, par. 431; and for cases: see DIGEST, vol. 12, pp. 592, 593, Nos. 4930–4933.

DIVORCE.

Desertion — Continuance of Desertion — Non-Cohabitation Clause—Clause Inserted through Inadvertence.

If in a justices' order a non-cohabitation clause is left by a clerical error and no such order was in fact made and neither party regarded it, such a clause does not prevent the continuance of the desertion.

COOPER *v.* COOPER (KING'S PROCTOR SHOWING CAUSE), **[1940] 3 All E.R. 579. P.D.A.D.**

As to non-cohabitation clause in Magistrates' order: see HALSBURY, Hailsham edn., vol. 10, p. 659, par. 969; and for cases: see DIGEST, vol. 27, pp. 319–321, Nos. 2978–2999.

MASTER AND SERVANT.

Remuneration — Wages — Right to Wages While absent Through Illness.

Where there is no express agreement between master and servant as to wages during sickness, whether such a term is to be applied is a matter of fact in each case.

O'GRADY *v.* M. SAPER, LTD., **[1940] 3 All E.R. 527.**

As to wages during illness: see HALSBURY, Hailsham edn., vol. 22, p. 134, par. 222; and for cases: see DIGEST, vol. 34, p. 86, Nos. 631–640.