New Zealand Law Journal

Incorporating "Butterworth's Fortnightly Notes."

"Wickedness, enormous, panoplied, embattled, seemingly triumphant, casts its shadow over Europe and Asia. Laws, customs, and traditions are broken up. Justice is cast from her seat. The rights of the weak are trampled down. The grand freedoms of which the President of the United States has spoken so movingly are spurned and chained. The whole stature of man, his genius, his initiative, and his nobility, is ground down under systems of mechanical barbarism and of organized and scheduled terror."

—Rt. Hon. Winston Churchill.

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SOLDIERS', SAILORS', AND AIRMEN'S WILLS: REVOCATION.

BEFORE the Wills Act, 1837, the special testamentary privileges in relation to their personal estate which were enjoyed by soldiers and sailors on active service consisted in their being dispensed from the formalities of execution required from all other testators. They did not enjoy any testamentary capacity not possessed by other persons.

By s. 9 of the Wills Act, 1837, the formalities of execution required in a valid will are set out: "no will shall be valid unless it shall be in writing, and executed" in the manner provided by the section.

Section 11 is a modification of s. 9 in favour of soldiers and sailors: it is as follows:

> Provided always, that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act.

Referring to s. 11, Sir Francis Jeune, P., said in *In the Goods of Hiscock*, [1901] P. 78, 80:

> I am inclined to the view that the reason and principle underlying those words are the same as prevailed under the Roman law, namely, that a soldier in the circumstances mentioned, or a sailor who is actually at sea, is, possibly, not altogether, but certainly to a great extent *inops consilii*, and therefore not in a position to make his will in the form required of persons in ordinary circumstances.

By s. 2 of the Wills Act, the word "will" where used in the statute, "shall extend to a codicil."

Section 20 of the statute is as follows:

> No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

In war-time, the law relating to the wills of soldiers is of particular interest, and we propose here to consider the question of the revocation of such wills.

As we have seen, s. 11 of the Wills Act provides that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the passing of the Wills Act, 1837.

The term "soldier" in s. 11 includes officers: *Drummond* v. *Parrish*, (1843) 3 Curt. 522, 163 E.R. 812; surgeons: *In re Donaldson*, (1802) 2 Curt. 386, 163 E.R. 448; and nurses: *In re Stanley*, [1916] P. 192; and the term "mariner or seaman" includes every person in His Majesty's Navy, as well the admiral or commander-in-chief as a common seaman: *In re Hayes*, (1839) 2 Curt. 588, 163 E.R. 431; *In re Saunders*, (1865) L.R. 1 P. & D. 16; *Earl of Euston* v. *Lord Henry Seymour*, (1802) 2 Curt. 339, 163 E.R. 432; *In re Rae*, (1891) 27 L.R. Ir. 116; and it also includes persons serving in the merchant service, and is not confined to the male sex: *In re Milligan*, (1849) 2 Rob. 108, 163 E.R. 1258; *Morrell* v. *Morrell*, (1827) 1 Hagg. Ecc. 51, 162 E.R. 503; *In re Parker*, (1859) 2 Sw. & T. 375, 164 E.R. 1041; *In re Hall*, (1915) 2 I.R. 362; and *In re the Will of Helgeson*, (1890) 9 N.Z.L.R. 167.

It is sufficient here to say that a will of a soldier, sailor, or (now) airman, may be made by writing or word of mouth: *In the Estate of Yates (deceased)*, [1919] P. 93; *In re Beaumont*, [1916] N.Z.L.R. 1002; *In re Desmond*, [1921] N.Z.L.R. 300; *In re Mackie, Public Trustee* v. *Brown*, [1922] N.Z.L.R. 651; and see *In re Caro*, [1917] G.L.R. 239; *In re Cogan*, (1915) 34 N.Z.L.R. 520. It is unnecessary to prove that he knew that he was making a will; it is sufficient if he intended to give expression to his wishes as to the disposition of his property in the event of his death: *In re Stable, Dalrymple* v. *Campbell*, [1919] P. 7; *Re Beech, Beech* v. *Public Trustee*, [1923] P. 46, 56; and see *In re Boyd*, (1915) 17 G.L.R. 648; *In re Milling*, [1916] N.Z.L.R. 1174; *In re Beaumont*, [1916] N.Z.L.R. 1002; *In re Scott*, [1920] G.L.R. 143; and

Plimmer v. *Public Trustee*, [1931] G.L.R. 478. If such a will be in writing, it may be written in pencil, have one witness, or no witness at all: *In the Goods of Farquhar*, (1846) 4 N.C. 651, 652; *In the Goods of Saunders*, (1865) L.R. 1 P. & D. 16; and *In re Rule*, [1916] N.Z.L.R. 254. Moreover, formalities are not required to revoke such a will: *In re Gossage*, *Wood* v. *Gossage*, [1921] P. 194.

In *In re Macdonald*, (1915) 34 N.Z.L.R. 1109, where probate was sought of the will of a soldier attested by two witnesses though there was no attestation clause, Chapman, J., expressly left open the question whether he could grant probate of a will under s. 11, where it purported to be an ordinarily attested will unless it were found that proof in the ordinary way could not be placed before the Court. He did not treat the will as a "soldier's will"; he considered it as a s. 9 will with defective attestion clause, although it had been made by a soldier on actual military service, and propounded (as His Honour said) as if it were a soldier's will.

In New Zealand, where, of course, the Wills Act, 1837, is in force, a modification was effected by the Soldiers Wills Emergency Regulations, 1939 (Serial No. 1939/276), which, by Reg. 2, apply with respect to wills made at any time after September 2, 1939, whether or not they were made before or after December 20, 1939 (the date of the coming into force of the regulations) and whether or not the testators had then died or died thereafter.*

Regulation 3 provides that, notwithstanding anything contained in s. 7 of the Wills Act, 1837—which provides that no will made by any person under the age of twenty-one years shall be valid—or in s. 171 of the Native Land Act, 1931:

> No will made by any member of any of His Majesty's Naval, Military or Air Forces during any war in which His Majesty the King may at any time be engaged shall be deemed to be invalid by reason of the testator's being under the age of twenty-one years at the time of the making of the will.

The application of this regulation appears to be limited to wills executed with the formalities required by s. 9 of the Wills Act, as s. 23 (1) of the War Legislation and Statute Law Amendment Act, 1918 (*infra*) had already declared that s. 11 of the Wills Act authorized dispositions by a minor. It does not apply to merchant seamen.

It will be remembered that s. 11 of the Wills Act authorizes dispositions of personal estate only. This section, which is, of course, in force in New Zealand, was extended, by s. 34 (1) of the War Legislation Amendment Act, 1916, in respect of soldiers' wills, to authorize dispositions of real estate. Section 34 (1) is as follows:—

> Every will made by a soldier being in actual military service within the meaning of section eleven of the Imperial Act entitled "An Act for the Amendment of the Laws with respect to Wills" (7 William IV, and 1 Victoria, Chapter 26) shall, if sufficient by virtue of that section to dispose of personal estate, be sufficient to dispose of real estate also.

Mariners and seamen being at sea were declared to have the right, while minors, to make dispositions of personal estate by informal wills under s. 11 of the Wills Act, by s. 23 of the War Legislation and Statute Law Amendment Act, 1918, which also gave s. 34 of the War Legislation Amendment Act, 1916, retrospective effect as from the commencement of the then continuing war with Germany. Section 23 is as follows:

> (1) In order to remove doubts as to the construction of the Imperial Act entitled "An Act for the Amendment of the Laws with respect to Wills" (7 William IV and 1 Victoria, Chapter 26) it is hereby declared and enacted that section eleven of the Act authorizes and always has authorized any soldier being in actual military service, or any mariner or seaman being at sea, to dispose of his personal estate as he might have done before the passing of that Act, though under the age of twenty-one years.
>
> (2) Section thirty-four of the War Legislation Amendment Act, 1916 (relating to wills made by soldiers in respect of their real estate), shall be read and construed accordingly to extend and apply, and at all times since the commencement of the present war with Germany to have extended and applied to such wills, although made by soldiers under the age of twenty-one years.

(*cf.*, s. 1 of the Wills (Soldiers and Sailors) Act, 1918 (7 & 8 Geo. 5, c. 58).)

Now, by virtue of Reg. 5 of the Soldiers' Wills Emergency Regulations, 1939, the expression "soldier" in the above-quoted sections of the 1916 and 1918 statutes, is deemed to have included since September 2, 1939, a member of any of His Majesty's Air Forces (*cf.*, Wills (Soldiers and Sailors) Act, 1918 (7 & 8 Geo. 5, c. 38), s. 5 (2)).

Regulation 6 gives meaning to the words "in actual military service" in s. 11 of the Wills Act. The regulation says:

> Without limiting the application of section eleven of the Wills Act, 1837 (Imperial) it is hereby declared that every soldier—
>
> (*a*) Who is a member of any of His Majesty's Forces raised in New Zealand; or
>
> (*b*) Who has become a soldier in New Zealand (whether before or after the commencement of these regulations),—
>
> shall be deemed to be and to have been, at all times while outside New Zealand during any war in which His Majesty may now or at any time hereafter be engaged, a soldier in actual military service within the meaning of that section.

Regulation 6 applies only to soldiers. It has a more limited effect than had the now spent s. 34 (4) of the War Legislation Amendment Act, 1916, which provided, in relation to the last War, that:

> Every member of an Expeditionary Force under the Expeditionary Forces Act, 1915, shall be deemed at all times, whether he is in New Zealand or abroad, a soldier in active military service within the meaning of section eleven of the Wills Act, 1837.

Regulation 6 does not, however, say that a soldier cannot be "in actual military service" while in New Zealand and it is still open in an appropriate case to establish by proper evidence that at the time a soldier in New Zealand made a disposition he was in actual military service: see in this regard *In the Goods of Hiscock*, [1901] P. 78; *In re Cogan*, (1915) 34 N.Z.L.R. 960; *In re Caro*, [1917] G.L.R. 239; *In re Bowden*, [1916] N.Z.L.R. 835; *In re Macdonald*, (1915) 34 N.Z.L.R. 1108; *In re Beaumont*, [1916] N.Z.L.R. 1102; and *In re Moore*, [1920] N.Z.L.R. 129. (The last-mentioned case was wrongly decided because s. 34 (4) of the War Legislation Amendment Act, 1916, was overlooked by the Chief Justice, but the decision is of value.) A soldier who is carrying out peace-time

* Regulation 4 provides that, notwithstanding anything to the contrary in s. 34 of the War Legislation Act, 1916, nothing in s. 11 of the Wills Act, 1837, is to apply with respect to any Native within the meaning of the Native Land Act, 1931. Consequently, all references to soldiers' wills in this article excludes wills by Native soldiers, whose wills are now governed by s. 9 of the Wills Act, 1837, with the exception that such a will made by a Maori Soldier under twenty-one is valid.

duties in this country, and is under orders to proceed abroad, is not in actual military service within s. 11 of the Wills Act, 1837, although he is under military control: *In the Goods of Gibson*, [1941] 2 All E.R. 91.

Furthermore, s. 11 of the Wills Act is deemed to extend at all times since September 2, 1939, to any member of His Majesty's Naval or Marine Forces not only when he is at sea, but also when he is so circumstanced that if he were a soldier he would be in actual military service within the meaning of that section: Reg. 7. This, it would appear, includes members while prisoners of war on land. Moreover, every will made after September 2, 1939, by a mariner or seamen which, by virtue of s. 11, is sufficient to dispose of personal estate shall be sufficient to dispose of real estate also: Reg. 8 (*cf.*, s. 2 of the Wills (Soldiers and Sailors) Act, 1918 (7 & 8 Geo. 5, c. 58)).

Consequently, validity is given to wills informally made by members of His Majesty's Naval, Military, Air or Marine Forces, or by mariners or seamen, since September 2, 1939, all of which are referred to in this article as "soldiers' wills" or "s. 11, wills" and any will is not invalid by reason of the testator's being under the age of twenty-one years at the time of his making such will, which may validly dispose of real as well as personal estate.

Before the Wills Act, 1837, a soldier's will was not revoked by a subsequent marriage but the effect of s. 18 of that statute is that every will shall be revoked by a subsequent marriage of the testator, and this general provision applies to wills validated by s. 11 of the Wills Act: *In re Wardrop*, [1917] P. 54. It would now apply to the wills of seamen and members of the Air Forces validated by the several extensions of s. 11 to which reference has been made.

The question now arises whether or not a will that is executed according to the formalities required by s. 9 of the Wills Act, 1837, may be revoked by an informal will that is validated by s. 11 of that statute, as extended by s. 34 of the War Legislation Amendment, 1916, and s. 23 of the War Legislation and Statute Law Amendment Act, 1918, and since September 2, 1939, by the Soldiers' Wills Emergency Regulations, 1939.

Section 20 of the Wills Act, 1837, has not been touched upon by any of the war legislation. It will be remembered that this section, *supra*, provides that a will may be revoked "by another will or codicil *executed in manner hereinbefore required;* or by some writing declaring an intention to revoke the same, and *executed in the manner in which a will is hereinbefore required to be executed.*

Some light is thrown on the question of the decision of the Court of Appeal in England in *In re Gossage, Wood* v. *Gossage*, [1921] P. 194, where it was held that s. 20 of the Wills Act does not apply to soldiers' wills—*i.e.*, wills rendered valid by s. 11 of the Wills Act, 1837.

The facts in *Gossage's* case may be summarized as follows: The testator, a non-commissioned officer in the Royal Engineers and on active service, on October 24, 1915, when, under orders to proceed with his unit to South Africa, made his will in accordance with the requirements of the Wills Act, 1837, whereby, after certain legacies, he gave the whole of the residue of his personal estate to the plaintiff, to whom he was then engaged to be married, and appointed her his sole executrix. Before starting he handed to her a sealed envelope, which he stated contained his will, and directed her not to open it unless anything happened to him. Subsequently, in consequence of certain statements made to him by the plaintiff as to her conduct during his absence, he wrote to her on April 9, 1917, from South Africa directing her to hand over the will to his sister Kate, which she accordingly did. On January 9, 1918, he wrote to his sister Kate from Cape Town in these terms:

> I was pleased to see that you got everything in order from Nance [the plaintiff] although, of course, I had no doubt that you would, for although after what has happened I am sure I could trust her as regards other things. As regards the will if you haven't already done so, I want you to burn it for I have already cancelled it.

Kate accordingly burnt the will as requested. In November, 1918, the testator died in hospital in South Africa, and amongst his belongings there was found a copy of his original will.

The report of the case must be read very carefully in order to understand what the Court decided. Lord Sterndale, M.R., at the commencement of his judgment said that "the testator was a non-commissioned officer and on active service at the time with which we have to deal." On October 24, 1915, he made a will, which His Lordship says, "we are told," was in strict accordance with the Wills Act, 1837. The statement of facts of the case shows that the copy of the will found among the deceased's effects was attested by only one of the two witnesses to the will. It is not clear from the report that the will was executed as required by s. 9 of the Wills Act, 1837, but their Lordships held that it was a valid will under s. 11, and thought it might also have been executed with the formalities required by s. 9. The matter is dealt with by reference to the will as "a soldier's will"; that is to say, the term "soldier's will" is used by their Lordships to include either a formally executed will (a s. 9 will) or an informally executed will (a s. 11 will), when either form of will has been executed by "a soldier in actual military service."

It was argued that "there was no valid revocation of the will, because by s. 20 a soldier's will could not be revoked although it could be made without the formalities required, that is, by another will or codicil or by a document executed with the same formalities as are required in the case of a will which is not a soldier's will." But their Lordships would not accept that proposition. Lord Sterndale, M.R., at p. 201, said:

> The word "revocation" postulates the existence of a previous will, and I think the words of the section must mean "executed in the manner hereinbefore required for the execution of the will it is intended to revoke."
>
> If you read ss. 9 and 11 together, no formalities are prescribed for the execution of a soldier's will, but soldiers are allowed to dispose of their personal estate as they might have done before the Act, that is to say, as they might have done before the Statute of Frauds. If that is the correct view, it seems to me that the letter of January 9, 1918, is a sufficient writing declaring an intention to revoke the will and executed in the manner required by the Act with regard to that particular will. In the case of a civilian's will certain formalities are required, in that of a soldier's will no formalities at all are necessary; and, therefore, upon the interpretation of the Act no formalities are required to revoke a soldier's will.

His Lordship came to the conclusion that there was a valid revocation of the will in question.

Warrington, L.J. (as he then was), said:

> The words in s. 20, "in the manner in which a will is hereinbefore required to be executed," must be read with

reference to the particular will with which you are dealing. If the will is that of an ordinary person, you look at s. 9; if that of a soldier, you look at s. 11 to see what the requirements are, and you find that they are those which were in existence at the passing of the Act. If, therefore, the document expressing an intention to revoke a previous will satisfies the requirements necessary before the passing of the Act, then it satisfies the requirements of the Act itself.

Younger, L.J. (as Lord Blanesburgh then was), after saying that legislation, the Wills (Soldiers and Sailors) Act, 1918, s. 1, had been passed declaring that s. 11 had always authorized the disposition of personal estate by a soldier under twenty-one years of age, remarked that the result followed that s. 7, which enacts that "no will made by any person under the age of twenty-one years shall be valid," general as are its terms, has, on the construction so declared, no application to a soldier's will. His Lordship proceeded:

Similarly, in my judgment, s. 20 has no relation to such a will. Its language is no more general than the language of s. 9, and if it were held, so far as its prescribed formalities are concerned, to extend to dispositions of soldiers and sailors referred to in s. 11 it would, in my judgment, go far to deprive those testators of the privileges reserved to them in the matter of formalities by that section. For the power which a soldier has to revoke his soldier's disposition follows as I think, from the power reserved to him by the statute to make one. It is, in my judgment, true to say that the power of revocation is merely another aspect of the power of disposition, and that power which he had before the statute remained unaffected by this statute.

In saying that, His Lordship said he differed in no way from the views expressed by Lord Sterndale, M.R., and Warrington, L.J., on the footing that s. 20 should be read as having some reference to s. 11. He merely desired to show that the same conclusion could be reached if s. 20 had no such reference.

It is clear that *Gossage's* case decided only one question—*viz.*, that a soldier's will (be it executed as a s. 9 will or a s. 11 will, so long as it was made when the testator was "a soldier in actual military service") may be revoked without any of the formalities as to execution required by s. 20 of the Wills Act.

Nothing has been said here as to the revocation by implication of a s. 9 will by a s. 11 will, though *In re Gossage* itself might be considered from that angle. The doctrine of revocation by a subsequent inconsistent will should apply: as to this, see *24 Halsbury's Laws of England*, 2nd Ed. p. 80, para. 112. Subject to the application of this doctrine, the *dicta* in *Gossage's* case imply that there may be four classes of revocation or attempted revocation, without more, that is to say, without any disposition.

(*a*) The revocation of a soldier's will, which was not executed with the formalities required by s. 9, by a subsequent similar will.

Here, no formalities are required for the revocation of such a will: *In re Mackie, Public Trustee* v. *Mackie*, [1922] N.Z.L.R. 652, following *Gossage's* case.

(*b*) The revocation of a will executed in strict accordance with the formalities required by s. 9 of the Wills Act, when the testator was on active service, by a will subsequently executed informally while the soldier was on active service.

Here, the second will revokes the first, because *Gossage's* case shows that "a soldier's will" may be either a s. 9 will or a s. 11 will, and its revocation is governed, in either case, by s. 11 of the Wills Act, s. 20 of which has no application.

(*c*) The revocation of a will made by a civilian (who afterwards becomes "a soldier in actual military service"), which was duly executed in accordance with the formalities required by s. 9, by an informal will which was not so executed in accordance with these formalities when he had become a soldier in actual military service.

Here, the s. 9 will may not be validly revoked as the word "revocation" postulates the existence of a previous will, and (to quote Lord Sterndale) that revocation "must be executed in the manner required for the execution of the will which it is intended to revoke." If this dictum is correct the revocation of the s. 9 will, to comply with s. 20 of the Wills Act, must be executed in accordance with s. 9.

(*d*) The revocation of a soldier's will, informally executed, by a subsequent s. 9 will made after the testator had ceased to be a soldier on active military service.

Here the revocation, if executed in accordance with s. 9 of the Wills Act, may be a valid revocation of the soldier's will, because, though no formalities are required in respect of such a revocation, this revocation complies with all the formalities expressly contemplated by the Wills Act: *omne majus continet in se minus*. But the matter is open to doubt, and *Gossage's* case is silent on the point, and there seems no authority touching it. The common-sense way in which to resolve the doubt seems to be the avoidance of the absurd result that would follow if a s. 9 will, made after a testator had ceased to be a soldier in actual military service, could not revoke a s. 11 will made while he was a soldier. It appears, therefore, that if the s. 11 will is, on any showing, a "testamentary disposition," if it is not a "will" (*i.e.*, a s. 9 will), it would be validly revoked by the usual will-clause revoking "all wills and testamentary dispositions." But this reasonable result cannot be gathered from *Gossage's* case.

In *In re Mackie, Public Trustee* v. *Brown, supra*, a steward on *S.S. Aparima*, a troop transport, in a document informally executed at Capetown on March 23, 1917, stated he desired "all money" to be paid to a Mrs. Robarts, and declared he had handed to her his two-named Post Office Savings-bank books. This was held by the Supreme Court of South Africa to be a valid testamentary disposition. On September 5, 1917, when the testator was in Auckland, he handed to Mrs. Brown the two Post Office Savings-bank books, mentioned in the earlier document, and told her that if anything happened to the ship or to him from aircraft or submarines, all was to go to Mrs. Brown's daughter, Miss A. Brown; and, later in the same day, in a letter written on the ship to Mrs. Brown, he confirmed the disposition. Stringer, J., after holding that the document signed at Capetown was a valid testamentary disposition of all the deceased's personal property (as included in the expression "all money"), held that the disposition in Auckland was effectual as a *donatio mortis causa* of the moneys in the Savings Banks to Mrs. Brown as trustee for her daughter. His Honour, at p. 656, proceeded:

I think it right, however, to state that, if the gift of the moneys in question had been ineffectual as a *donatio mortis causa*, I think that either the verbal declaration or the letter of September 5 would have been a valid testamentary disposition of the moneys in question. It was quite rightly admitted that the deceased was a "seaman at sea" within the meaning of s. 11 of the Wills Act, 1837, and therefore capable of disposing of his personal property not only by a

writing unattested by witnesses, but by word of mouth That the language used, either in the letter or in the verbal statement, was sufficient for the purpose is shown by the decision in *In re Beaumont*, [1916] N.Z.L.R. 1002. Either of these dispositions of the specific moneys dealt with would have operated as a revocation *pro tanto* of the testamentary document of March 23, 1917, it now being settled that no more formalities are required for the revocation of a soldier's or seaman's will than for the making of one: *Wood* v. *Gossage* (37 T.L.R. 302).

The personal property of the deceased, other than the moneys in the two Post Office Savings-banks, therefore passes under the testamentary document of March 23, 1917.

Another anomaly is that Reg. 3 of the Soldiers' Wills Emergency Regulations, 1939, allows a member of His Majesty's Naval, Military, or Air Forces, who is a minor, to execute a will even though he is not in actual military service, provided that the will is executed with the formalities prescribed by s. 9 of the Wills Act. This privilege should be extended to members of the mercantile marine, and, as so many of these gallant men are prisoners of war, Reg. 7 should be extended to apply to them, so that any merchant seaman may make informally a valid will while he is a prisoner of war.

Another question, the answer to which is in doubt, is whether s. 34 of the War Legislation Amendment Act, 1916, and Reg. 8 of the Soldiers' Wills Emergency Regulations, 1939, extend to the making valid in New Zealand of a disposition of immovable property in New Zealand by a soldier who is not domiciled in New Zealand, notwithstanding that such a disposition would not be valid by the law of such soldier's domicil, as, for instance, of a Dominion in which there has been no extension of s. 11 of the Wills Act, 1837, to make valid a disposition of realty by a s. 11 will; or in which that Act is not in force though similar legislation may be.

The doubts expressed on the matter of a revocation of a s. 9 will by a s. 11 will, the *dicta* in *Gossage's* case notwithstanding, and the other doubts to which we have drawn attention, might well be resolved by supplementary Soldiers' Wills Emergency Regulations; and we recommend the matter to the consideration of the Hon. the Minister of Justice. It is well to be prepared for all possible emergencies; and it is possible that the law as it now appears, if not placed beyond doubt, may cause considerable difficulty in relation to wills made during the present war.

SUMMARY OF RECENT JUDGMENTS.

JUDICIAL COMMITTEE.
1940.
Nov. 11, 14, 15, 18, 19, 22.
1941.
April 3.
Viscount Simon, L.C.
Lord Thankerton.
Lord Wright.
Lord Porter.

TE HEUHEU TUKINO
v.
AOTEA DISTRICT MAORI LAND BOARD.

Natives and Native Land—Treaty of Waitangi—Cession of Rights by Native Owners—Compromise by Legislature of Difficulties arising out of Transactions between Native Owners and other Parties—Statutory Direction to Maori Land Board to pay in Discharge of Claims of a Company against Native Owners Sum approved by the Native Minister—Payment so authorized made by Statute a Charge upon the Lands of such Natives—Whether such Statutory Provision invalid by Treaty of Waitangi or New Zealand Constitution—New Zealand Constitution Act, 1852 (15 & 16 Vict., c. 72), ss. 72, 73—New Zealand Constitution Amendment Act, 1857 (20 & 21 Vict., c. 53), s. 2—New Zealand Provincial Government Act, 1862 (25 & 26 Vict., c. 48), s. 8—Colonial Laws Validity Act, 1865 (28 & 29 Vict., c. 63)—Statute Law Revision Act, 1892 (55 & 56 Vict., c. 19), s. 1 and Schedule—Native Land Act, 1873, s. 4—Native Purposes Act, 1935, s. 14.

It is not open to the Courts to go behind what has been enacted by the Legislature, and to inquire how the enactment came to be made, whether it arose out of incorrect information or, indeed, on actual deception by some one on whom reliance was placed by it. The Court must accept the enactment as the law, unless and until the Legislature itself alters the enactment on being pursuaded of its error.

Labrador Co. v. *The Queen*, [1893] A.C. 104, applied.

Any rights purporting to be conferred by such a treaty of cession as the Treaty of Waitangi cannot be enforced in the Courts, except in so far as they have been incorporated in the municipal law.

Vajesingji Joravarsingji v. *Secretary of State for India*, [1924] L.R. 51 Ind. App. 357.

The New Zealand Provincial Government Act, 1862 (25 & 26 Vict., c. 48), having empowered the New Zealand Legislature to repeal s. 73 of the New Zealand Constitution Act, 1852 (15 & 16 Vict., c. 72), and providing that no enactment of the General Assembly should be invalid because of repugnancy to s. 73, and the provisions of the Colonial Laws Validity Act, 1865 (28 & 29 Vict., c. 63), operating to the same effect, s. 14 of the Native Purposes Act, 1935, is not *ultra vires* the New Zealand Legislature.

Judgment of the Court of Appeal, [1939] N.Z.L.R. 107, dismissing an appeal from the judgment of *Smith*, J., [1939] N.Z.L.R. 112, affirmed.

Counsel: *M. H. Hampson* (of the New Zealand Bar), *Hon. H. L. Parker*, and *James Christie*, for the appellants; *A. T. Denning*, K.C., and *J. Pennycuick*, for the respondents.

Solicitors: *Coward, Chance, and Co.*, London, for the appellants; *Biddle, Thorne, and Co.*, London, for the respondents.

Case Annotation: Labrador Co. v. *The Queen*, E. and E. Digest, Vol. 42, p. 611, para. 118; *Vajesingji Joravarsingji* v. *Secretary of State for India, ibid.*, Supp. Vol. 17, para. 265a.

SUPREME COURT.
Wellington.
1941.
July 4, 14.
Johnston, J.

NATIONAL INSURANCE COMPANY OF NEW ZEALAND, LIMITED v. WILSON.

Insurance—Accident—Employer's Indemnity Policy—Construction—Liability under Policy in respect of Common Law only excluded to £2,000 (inclusive of costs)—Whether Insurance Company entitled to Deduct its Costs of defending Action claiming Damages for Negligence at Common Law.

A policy of insurance of the type known as "Employers' Indemnity Policy," contained the following proviso:

> Provided always that the liability of the company under this policy for compensation in respect of each or any claim made otherwise than under the Workers' Compensation Act, 1922, and the Workers' Compensation Amendment Acts, 1926, and 1936, is limited to the sum of one thousand pounds in respect of any one cause of action which amount shall be inclusive of all costs and expenses incurred.

and also a clause agreeing in consideration of an extra premium that the liability under the policy in respect of common law only was extended to £2,000" (inclusive of costs) in the case of an individual worker."

O'Leary, K.C., and *Buxton*, for the plaintiff; *Leicester* and *Mitchell*, for the defendant.

Held, That the costs insured against were the costs that the employee was entitled to recover from the insured, and that the company was not entitled to deduct from its maximum liability its own solicitor and client costs incurred in the defence of an action against the insured, a worker, claiming damages for negligence at common law.

Semble, While s. 9 of the Law Reform Act, 1936, imposes on an insurer an obligation to keep intact the amount of its liability to the insured, whatever it may be, so that the injured man is protected, it does not fix the amount of the insurer's liability to the insured, to find which one must go to the contract of indemnity.

Solicitors: *Bell, Gully, Mackenzie, and Evans*, Wellington, for the plaintiff; *Leicester, Rainey, and McCarthy*, Wellington, for the defendant.

SUPREME COURT. New Plymouth. 1941. May 29; July 7. *Myers*, C.J.

TARANAKI HOSPITAL BOARD v. BROWN AND ANOTHER.

Magistrates' Court—Equitable Jurisdiction—"Equity and Good Conscience"—Action claiming Sum not exceeding £50 and involving Rectification of Agreement—Whether Magistrate has Jurisdiction to hear or to decide on Ground of Equity and Good Conscience—Magistrates' Courts Act, 1928, ss. 27, 100—Judicature Act, 1908, s. 99.

The Magistrates' Court has no jurisdiction to hear an action that necessarily involves rectification of an agreement.

Rewiri v. *Eivers*, [1917] N.Z.L.R. 479, explained.

Grant v. *Pirani*, (1899) 18 N.Z.L.R. 209; *Peterson* v. *Hunt and Gigg*, [1923] N.Z.L.R. 429, [1922] G.L.R. 522; *Cash* v. *Chaffer*, (1897) 15 N.Z.L.R. 416; *McKerrow* v. *Tattle*, (1905) 25 N.Z.L.R. 881; 8 G.L.R. 222, and *Dempsey* v. *Piper*, [1921] N.Z.L.R. 753, G.L.R. 346, applied.

Blay v. *Pollard and Morris*, [1930] 1 K.B. 628, referred to.

If the claim does not exceed £50, a Magistrate cannot give himself jurisdiction by hearing the action and deciding on the ground of equity and good conscience.

Tait v. *McCallum*, (1894) 13 N.Z.L.R. (S.C.) 232, applied.

Counsel: *Macallan*, for the plaintiff; *Ewart*, for the defendant Brown.

Solicitors: *Govett, Quilliam, Hutchen, and Macallan*, New Plymouth, for the plaintiff; *G. L. Ewart*, New Plymouth, for the defendant Brown.

Case Annotation: Blay v. *Pollard and Morris*, Supp. Vol. 35, para. 203a.

SUPREME COURT. Wanganui. 1941. July 11. *Blair*, J.

In re **A LEASE: AOTEA DISTRICT MAORI LAND BOARD TO COCKBURN.**

Landlord and Tenant—Lease—Option for Renewal—Lessee's failure to give required Notice in time—Relief against refusal of Lessor to grant Renewal—Condition on which Granted—Property Law Amendment Act, 1928, s. 2.

A lease granted by a trustee contained the following clause:—

> And it is hereby mutually agreed and declared by and between the Board and the lessee that if at any time during the term hereby granted the lessee shall be desirous of having a lease of the said land for a further term of twenty-one years from the expiration of the term hereby granted and of such desire shall give to the Board or leave at the office of the Board not less than three calendar months previous notice in writing and shall have observed and performed all the covenants and conditions on the lessee's part therein contained and implied then and in such case the Board shall and will grant unto the lessee a further lease of the said premises accordingly for a further term of twenty-one years at a rent, &c.

The lessee, who, owing to inadvertence, did not give the appropriate notice until almost seven months after the lease had expired, applied under s. 2 of the Property Law Amendment Act, 1928, for relief in respect of the option for renewal contained in the lease.

Palmer, in support; *Wilson*, to oppose.

Held, That, assuming that this option for renewal was enforceable against a trustee, the statutory essentials to give the Court jurisdiction to grant relief had been fulfilled but such relief, being a concession for the lessee's benefit, was granted conditionally upon the lessee paying the whole of the lessor's taxed costs as between solicitor and client, and without prejudice to the Board raising the question of the enforceability of the option given.

Solicitors: *Christensen, Stanford, and Palmer*, Marton, in support of the motion; *Izard and Wilson*, Wanganui, for the Aotea District Maori Land Board.

SUPREME COURT. Auckland. 1941. July 2, 8. *Ostler*, J.

McCONNELL v. COMMISSIONER OF STAMP DUTIES.

Statute of Frauds—Contract—Performance—Interest in Land—Memorandum—Whether Executor entitled at Law to Transfer Land pursuant to a Contract not enforceable by reason of Non-compliance with s. 4 of Statute—Whether Executor Agent of Deceased Testator to execute Memorandum of such Contract to satisfy statute—Statute of Frauds, 1677 (29 Car. 2, c. 3), s. 4.

An executor of the will of a deceased person is not entitled at law to execute a transfer of land pursuant to a contract not enforceable by the transferee against the testator by reason of non-compliance with s. 4 of the Statute of Frauds.

Nor is such an executor by virtue merely of his office the agent of the testator lawfully authorized by him to sign a memorandum of a contract made by the latter during his life so as to satisfy the requirements of the said section.

In re Rownson, Field v. *White*, (1885) 29 Ch.D. 358, applied.

The case is reported on these two points only.

Counsel: *Sexton*, for the appellant; *Meredith* and *Smith*, for the respondent.

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

Case Annotation: In re Rownson, Field v. *White*, E. and E. Digest, Vol. 23, p. 366, para. 4343.

COMPENSATION COURT. Auckland. 1941. July 10, 14. *O'Regan*, J.

KING v. JAMES HARDIE AND COMPANY PROPRIETARY, LIMITED.

Workers' Compensation—Accident Arising out of and in the Course of the Employment—Septic Dermatitis—Gradual Process of Contraction—Whether due to Injury by Accident—Workers' Compensation Act, 1922, s. 3.

Where a worker contracted septic dermatitis in both hands due to a gradual process, the initial and principal factor being irritation of the skin, the result of minute particles of cement, heat, and sweat, followed by infection,

Elwarth, for the plaintiff; *Hore*, for the defendant.

Held, That he had failed to prove that the condition of dermatitis was due to injury by accident.

Evans v. *Dodd*, (1912) 5 B.W.C.C. 305, and *Oakes* v. *Holliday*, [1927] N.Z.L.R. 263, G.L.R. 158, applied.

Burrell v. *Selvage*, (1921) 14 B.W.C.C. 158, and *Brinton's Ltd.* v. *Turvey*, [1905] A.C. 230, 7 W.C.C. 1, distinguished.

Ystradowen Colliery Co. v. *Griffiths*, [1909] 2 K.B. 533, 2 B.W.C.C. 357; *Brown* v. *Kemp*, (1913) 6 B.W.C.C. 725; and *Saddington* v. *Inslip Iron Co., Ltd.*, (1917) 10 B.W.C.C. 624, mentioned.

Solicitors: *Schramm and Elwarth*, Auckland, for the plaintiff; *Buddle, Richmond, and Buddle*, Auckland, for the defendant.

Case Annotation: Evans v. *Dodd*, E. and E. Digest, Vol. 34, p. 273, para. 2313; *Burrell* v. *Selvage, ibid.*, p. 272, para. 2309; *Brinton's Ltd.* v. *Turvey, ibid.*, p. 464, para. 3799; *Ystradowen Colliery Co., Ltd.* v. *Griffiths, ibid.*, p. 342, para. 2760; *Brown* v. *Kemp, ibid.*, p. 274, para. 2321; *Saddington* v. *Inslip Iron Co., Ltd., ibid.*, p. 272, para. 2307.

PROBATE AND ADMINISTRATION.

Deaths on War Service.

Since the article relative to the Registration of Deaths Emergency Regulations, 1941 (Serial No. 1941/115) *ante*, p. 145, was published, His Honour Mr. Justice Blair has granted probate of the will of a sergeant in the Royal Air Force, where the affidavits filed, and the circumstances of the testator's death, seemed to His Honour to eliminate any possibility of his having got into enemy hands as a prisoner, and there was, in His Honour's opinion sufficient evidence of death: *In re Fuller.*

In regard to the application for probate of the will of another member of the Royal Air Force, whose death had been officially presumed, His Honour required affidavits indicating cessation of correspondence. If such affidavits were produced, as were called for in *In re Edmondston*, [1918] N.Z.L.R. 608, the learned Judge said probate would be granted: *In re Lilburn.*

The War Deaths Emergency Regulations, 1941, were passed after His Honour's memorandum in respect of the above-named applications for probate. His Honour Mr. Justice Blair, then wrote an addendum, which, as it is so helpful to the profession, is published in full. His Honour said:

> Since the above matters were disposed of by me my attention has been called to new Regulations called the Registration of Deaths Emergency Regulations, 1941 (Serial No. 1941/115).
>
> The effect of these Regulations is to provide for the keeping by the Registrar-General of two separate War Deaths Registers, the latter of which is called the Provisional War Deaths Register.
>
> Any name appearing on the War Deaths Register so appears by reason of the fact that the Registrar is satisfied that he has died abroad while on war service. Regulation 14 (1) of the regulations makes a certificate from the Registrar as to the contents of such Register *prima facie* evidence of the facts stated in it.
>
> Regulation 14 (2) makes somewhat similar provision as to entries in the Provisional War Deaths Register, but such entries are made *prima facie* evidence only of the fact that a soldier is missing and is believed to have been killed and of any other facts expressly stated.
>
> No difficulty will arise regarding proof of death in the case of soldiers whose names appear on the War Deaths Register. Had the new regulation then been operative the names of both Sergeant Fuller and Flying Officer Lilburn would not have appeared on the War Deaths Register but would have appeared upon the Provisional Register as missing believed killed, and a copy certificate would not carry proof any further than that so far as death is concerned. But any such certificate would afford *prima facie* evidence of all facts stated relating to what any enquiries had established and any such facts would assist the Court in considering the question whether, notwithstanding an indefinite certificate, the facts proved either from the certificate, or *aliunde*, or both combined, are sufficient to satisfy the conscience of the Court upon the matter of proof of death.
>
> It will be seen that from my treatment of *Fuller's* case the circumstances of his disappearance were, even without evidence of cessation of communications, such as to justify a finding that death was proved. In *Lilburn's* case following *Edmondston's* case, [[1918] N.Z.L.R. 608] I called for evidence regarding cessation of communications and intimated that when it was produced I would grant probate.

His Honour said, in the course of his memorandum, *In re Fuller, In re Lilburn*, that in respect of proof of death he had deemed it proper to confer with five of his brother Judges present at the Court of Appeal.

THE LEASE AND LEND ACT.

A Review of its Provisions.

This Act of Congress is to us the most important enactment of any other country that has been passed in recent years, but though its general terms have been made known, copies of the Act itself have not been available.

The first point to notice is that it is an Act to promote the defence of the United States. The object to be secured is the safety of the States themselves. It is not, therefore, directed primarily to give assistance to this country nor is it necessarily limited to the giving of such assistance, as there are other countries who come within the scope of the statute. It is because the forces ranged against us are a menace to the security of the United States that such assistance is afforded.

The Act enables the President while the Act remains in force to supply to any other country any defence article or defence information, as defined, that he may determine.

Section 2 contains the definitions. A "defence article" means (*a*) any weapon, munition, aircraft, vessel or boat, (*b*) any machinery, tool, material or supply necessary for the making, maintaining, repairing and operating any such weapon, &c., (*c*) any component material part or equipment of any such weapon, &c., and (*d*) any agricultural, industrial or other commodity or article for defence. It is therefore obvious that Congress intends the term to be construed in the most liberal sense so that no such objection as that an article is not included unless it is of direct and immediate use in actual fighting can deprive the Act of its intended effect.

Section 3 is the section giving authority to the President. He may from time to time, when he deems it in the interests of national defence of the United States, authorize the Secretary of War or of the Navy or the head of any other Government Department (1) to manufacture or procure to the extent that funds are made available or contracts authorized any defence article for the government of any country whose defence the President deems vital to the defence of the United States; (2) "to sell, transfer title to, exchange, lease, lend, or otherwise dispose of" any defence article to any such government, but defence articles not manu-

factured or procured under subs. (1) can only be disposed of after consultation with the Chief of Staff of the Army or the Chief of Naval Operations, or both. There is a limit on value of articles so disposed of fixed at $1,300,000,000 but it is not clear whether the limit includes or excludes the value of articles made under the provisions of subs. (1). On the narrowest construction, it is a princely sum.

The section then proceeds by subs. (6) to authorize the President to make such terms and conditions as he deems satisfactory. The subsection is in extremely wide terms as it includes any direct or indirect benefit satisfactory to the President. It is at least conceivable that the object of defeating Germany and consequently removing the menace to the United States would be such a benefit without any consideration in money or money's worth. The subsection also provides that the Act shall cease to operate after June 30, 1943, or earlier if the two Houses by concurrent resolution so decide, but in either case the powers conferred by the Act can be exercised up to July 1, 1946, in order to carry out any contract made with a foreign government before July 1, 1943. Further, the powers given by the Act are declared not to authorize (*a*) convoying vessels by the United States Navy or (*b*) the entry of any United States vessel into a combat area in violation of s. 3 of the United States Neutrality Act, 1939.

Section 4 contains a very reasonable provision that a foreign government which is assisted in this way will not without the consent of the President in any way part with any such defence article or defence information, or permit the use of either by anyone who is not an officer, employee or agent in its service.

The remaining provisions are machinery to enable the Act to be carried out and to secure that proper information is available to Congress, and protects the patent rights of all United States citizens.

Section 8 is an important section which enables the United States to purchase or otherwise acquire arms, ammunition or implements of war produced in any country assisted under s. 3 whenever the President deems it to be necessary in the interests of the defence of the United States. This appears to be available in case of need to maintain the production of munitions in any Allied country. Section 10 saves the laws relating to the use of the land and naval forces of the United States of America, except so far as relates to the purposes set out in the Act.

Section 11 is one which is unfamiliar to us who are accustomed to the legislative omnipotence of Parliament. The United States of America has a written Constitution and all legislation must be authorized by that Constitution or be void as *ultra vires*. Accordingly, the section provides that if any provision of the Act or any application of it in particular circumstances shall be held to be invalid, such a decision shall not affect the other provisions of the Act or any other application of the provision.

The Act is short and its intention is clear. The United States merit our sincere thanks for the timely and invaluable assistance afforded under the statute.

TRANSACTIONS BETWEEN RELATIVES.

Agreement for Sale and Purchase of Land.

By E. C. Adams, LL.M.

Explanatory Note.

Transactions between relatives are carefully examined by the Stamp Duties Department, lest any element of inadequacy of consideration should be disclosed thereby. The definition of "gift" in s. 38 (1) of the Death Duties Act, 1921, is "any disposition of property otherwise than by will, without *fully* adequate consideration in money or money's worth." The value of land for the purposes of the statute, is ascertained by the Valuer-General and both the taxpayer and the Crown have the right to apply for a special Government valuation as at the date of the gift: s. 70.

Clauses 1 and 2 of this agreement are worthy of special notice. The draftsman of this precedent having in mind, the decision in *Taylor* v. *Commissioner of Stamp Duties*, [1924] N.Z.L.R. 499, has framed the agreement so as to avoid the dire effect of s. 49, which provides that in the case of a constructive gift, the value of any *future* benefit reserved by the constructive donor—*e.g.*, unpaid purchase money under an agreement for sale and purchase—shall not be deducted from the value of the gift in assessing the gift for duty: as to s. 49 see *Adam's Law of Death and Gift Duties in New Zealand*, p. 116 *et seq.* *Ad valorem* stamp duty, at the rate of 11s. for every £50 of the consideration, is payable on the agreement.

The Crown has no chance of getting gift duty in a case such as this, unless there has been as *part of the same transaction* a transfer or sale of other property—*e.g.*, farming stock and implements on the land—for an inadequate consideration between the same parties *or*, unless the Crown can establish that at the date of the agreement, there was an arrangement or understanding between the parties that the unpaid purchase money or a portion of it was not intended to be paid.

Any subsequent forgiveness of the unpaid purchase money by the vendor, would be an independent gift transaction, and not liable to gift duty, unless the amount of such forgiveness together with all other gifts made by the vendor within one year previously or subsequently, exceeded £500: see the latter portion of the judgment of Johnston, J., in *Card* v. *Commissioner of Stamp Duties*, [1940] N.Z.L.R. 644. But, in order to be effective, any such forgiveness of the unpaid purchase money would have to be by deed: *In re Gray, Gray* v. *Commissioner of Stamp Duties*, [1939] N.Z.L.R. 23. If the vendor died within three years after any such effective forgiveness, the amount of the forgiveness would come into his notional estate for death duty: s. 5 (1) (*c*). The amount of the unpaid purchase money together with interest then owing, would come into his estate under s. 5 (1) (*a*), and would be treated as personalty.

Some such provision as cl. 8 seems desirable when the title is under the Land Transfer Act, and limited as to parcels; otherwise the purchaser might insist on the vendor paying the cost of a new survey: see, however, *Schischka* v. *Peddle*, [1927] N.Z.L.R. 132.

To get the full benefit of a contract by *deed*, the witnesses should add their occupation or calling and address: *Rod* v. *Ryan*, [1932] M.C.R. 149.

AGREEMENT FOR SALE AND PURCHASE OF LAND BETWEEN RELATIVES.

AGREEMENT made this day of 1941 BETWEEN A.B. of (hereinafter called "the vendor") of the one part and C.D. of (hereinafter called "the purchaser") of the other part WITNESSETH that it is mutually agreed by and between the parties hereto that the vendor will sell to the purchaser and the purchaser will purchase from the vendor that piece or parcel of land described in the Schedule hereto at the price and upon the terms and conditions following:—

1. The price for the said land unless varied under the provisions of paragraph 2 hereof shall be the sum of pounds. (The minimum consideration to be the amount of the existing Government valuation *plus* the value of improvements, if any, effected since the date of the Government valuation.)

2. If upon the presentation of this agreement for assessment of stamp duty the Commissioner of Stamp Duties or an Assistant Commissioner of Stamp Duties shall require a new Government valuation of the said land to be obtained and the new Government capital valuation of the said land shall be found to exceed the price as fixed by paragraph 1 hereof then the amount of such new Government capital valuation shall be the price of the said land instead of the sum stated in the said paragraph 1 and this agreement shall in all respects be read and construed as if the new Government capital valuation had been stated as the price of the said land in paragraph 1 hereof.

3. The said price shall be paid by the purchaser to the vendor in manner following that is to say:—

The sum of pounds has been paid prior to the execution hereof (the receipt whereof is hereby acknowledged) and the balance shall be paid on the day of 1948 PROVIDED ALWAYS that the purchaser shall have the right at any time and from time to time to pay off the whole or any part (not being less than fifty pounds (£50)) of such balance at any quarterly day for payment of interest on one calendar month's previous notice in writing given by him to the vendor.

4. The purchaser shall pay interest on such part of the purchase money as shall for the time being remain unpaid (hereinafter referred to as "the unpaid purchase money") as from the at the rate of six pounds (£6) reducible as hereinafter mentioned to five pounds (£5) per centum per annum payable quarterly on the day of the months of the first of such payments to be made on the day of 1941 but in case the purchaser shall on any of the days hereby appointed for payment of interest or within one calendar month thereafter respectively pay to the vendor interest on the unpaid purchase money at the rate of five pounds (£5) per centum per annum then the vendor will accept such payment in lieu of and in full satisfaction for the interest at the rate of six pounds (£6) per centum per annum hereinbefore reserved in respect of every period for which interest shall be so paid within the time aforesaid but for no other period.

5. The purchaser shall be entitled to possession of the said land as from the day of 1941 and shall as from the said date pay all rates taxes assessments and other outgoings of whatsoever nature payable in respect thereof outgoings referable to periods current at that date being fairly apportioned according to the unexpired currency of such periods respectively.

6. Pending final completion of his purchase hereunder the purchaser shall keep all buildings fences gates drains and other improvements now or hereafter to be erected or made on or bounding the said land in good order condition and repair and will insure and keep insured in the name of the vendor or his appointee all buildings now or hereafter to be erected upon the said land in the full insurable value thereof and forthwith on its issue deliver to the vendor or his appointee the policy for every such insurance and seven days at least before each successive premium on every such insurance shall become due deliver to the vendor or his appointee the receipt for the payment of such premium.

7. The vendor shall be at liberty at all reasonable times by himself or his agent to enter upon and inspect the said land and the improvements thereon and in case the purchaser shall make default in the observance or performance of any of his obligations hereunder the vendor may without notice to or further consent from the purchaser and without prejudice to his other rights and remedies at any time or from time to time pay all such moneys and do or procure to be done all such acts and things as they may in their discretion deem necessary or expedient for the full or (at their option) partial observance or performance of such obligations or for remedying either fully or (at their option) partially the consequence of any such default and recover from the purchaser all moneys paid and costs and expenses incurred in or about the exercise of this power together with interest thereon at the higher rate aforesaid from the date or respective dates of paying or incurring the same until actual reimbursement thereof.

8. The title to the said piece or parcel of land is under the Land Transfer Act limited as to parcels under the Land Transfer (Compulsory Registration of Titles) Act, 1924, and will be accepted by the purchaser without requisition or objection.

9. The purchaser on payment at the times hereinbefore respectively appointed for payment thereof of all unpaid purchase money interest and other moneys payable by him hereunder shall be entitled to a transfer or other sufficient assurance of the fee-simple of the said land free from encumbrances such transfer or other assurance to be prepared by and at the expense of the purchaser.

10. In case the purchaser shall make default in payment of any purchase money interest or other moneys payable by him hereunder for the space of one calendar month after any of the days hereby appointed for payment thereof respectively or in the observance or performance of any of his obligations hereunder then and in any such case the vendor may without any notice to or demand upon the purchaser at his option either:

(*a*) Enforce specific performance of this agreement or

(*b*) Enforce payment of the unpaid purchase money which upon such default shall become immediately due payable and recoverable notwithstanding the due date thereof may not have arrived and all interest and other moneys payable hereunder or

(*c*) Rescind this contract in which case all moneys paid hereunder to the vendors shall be forfeited to them as liquidated damages or

(*d*) Resell the said land together or in lots by public auction or private contract in such manner and subject to such conditions in every respect as the vendor shall think fit (with full power to buy in or withdraw from sale at any auction and to vary modify or rescind any contract for sale and resell without being responsible for any consequent loss) and recover from the purchaser as liquidated damages any deficiency arising on such resale together with all costs preliminary and incidental to such resale and any prior abortive attempt or attempts to resell. And no purchaser on any sale purporting to be made in pursuance of this power shall be concerned to enquire as to whether any moneys remain owing under this agreement or as to whether any such default as aforesaid has been made or otherwise as to the necessity regularity or propriety of such sale or be affected by notice that no moneys remain owing hereunder or that no such default as aforesaid has been made or that the sale is otherwise unnecessary irregular or improper and the receipt of the vendor shall sufficiently discharge the purchaser on any such sale as aforesaid from all obligations to see to the application of the purchase money on such resale.

PROVIDED HOWEVER and it is hereby declared that the purchaser shall not have any right to control the vendor as to which of the said alternative courses shall be adopted.

11. Time shall be of the essence of this contract in every respect.

12. The term "the vendor" shall be deemed to extend to and include the heirs executors administrators and assigns of the vendor and the term "the purchaser" shall be deemed to and include the heirs executors administrators and assigns of the purchaser. IN WITNESS whereof the parties have hereunto subscribed their names the day and year hereinbefore written.

THE SCHEDULE ABOVE REFERRED TO.

(Set out here the official description of the land.)

SIGNED by the said A.B. in the presence of:—

Witness .
Occupation .
Address .

SIGNED by the said C.D. in the presence of:—

Witness .
Occupation .
Address .

LONDON LETTER.

Somewhere in England,
July 7, 1941.

My dear EnZ-ers,

The Honours List.—The Birthday Honours List recognized the Supreme Court Bench in the person of the Master of the Rolls, who receives a barony, and the County Court Bench and the Bar in Judge Proctor and Mr. Norman Birkett, K.C., who receive knighthoods. It has been customary in recent times for the Master of the Rolls to be honoured in this way, and it emphasizes the progress which in the course of centuries the office has made from a subordinate ministerial rank to a judicial position of great prestige and responsibility. Sir Wilfrid Greene has more than maintained on the Bench the great reputation as a lawyer which he won at the Bar, and the conferment on him of a peerage is an appropriate recognition of the judicial and other public services which he has rendered. Judge Proctor was appointed to the County Court Bench in 1928, and as Judge of the Liverpool County Court bears in a special degree the responsibility now imposed on Courts which, though nominally inferior, do work often indistinguishable from that of the High Court. And Mr. Norman Birkett, in addition to the foremost position which he has attained as a leader at the Bar, has undertaken a heavy and responsible task in advising on detention orders under Regulation 18B. The work he did was good, and he is not responsible for the unpardonable way in which the powers contained in that Regulation have at times been exercised. If we have not always approved of the results we know that the legal work in Parliament has been very heavy, and Mr. A. E. Ellis, Parliamentary Counsel, has been created a Knight Commander of the Bath. The work of local authorities, when added to A.R.P. responsibilities, has been unprecedented and from the recognition which the Honours List gives to this we can now select only two names among many—Mr. R. H. Adcock, Town Clerk of Manchester, and Major P. E. Longmore, who is Clerk to the Hertfordshire County Council, and bears a name famous in his county. Both of these are now Commanders of the British Empire.

Chief Justice of the United States.—No Court in the world is more powerful than the Supreme Court of the United States. It can, and sometimes does, set aside Congress; and it is, of course, inevitable that such a Court should exist when the Legislature of a country works under what Lord Chancellor Birkenhead called a "controlled" constitution. We have an example of the same thing in the Judicial Committee of the Privy Council which exercises a similar jurisdiction in the case of Acts of the Dominion Parliaments. Though this power is limited to some extent by provisions in the Australian Constitution and by legislation as to criminal appeals from Canada (see *British Coal Corporation* v. *The King*, [1935] A.C. 500), it is still wide. Attention is drawn to the matter by the appointment of a new Chief Justice of the Supreme Court of the United States. The President's choice has fallen on a Republican, Justice Harlow Stone, though the President is himself, I need hardly say, a Democrat. The "spoils system" has unfortunately been strongly established in the Great Republic. Now the President

has made a noteworthy " gesture," if we may use that term by appointing a Judge whose qualifications are unquestionable, but who is not of his party colour. In the recent past some people said, rightly or wrongly, that the President thought that the Supreme Court was a partisan Court, and that its decisions on the " New Deal " were actuated by party feelings. If that charge ever had substance, it is now refuted.

International Justice.—The question of an International Criminal Court before which disturbers of the peace like Hitler and his associates could be indicted, has been mooted, but no more than mooted, and the present, when all the criminals, except Hess, are still at large, is no time to discuss it. After the last war, such persons in Germany as it was thought suitable to bring to justice were tried in their own country by the High Court at Leipzig. It was before the days when German justice had submitted itself to the servile doctrine that the law expressed the will of the Führer ; and the Court acted with praiseworthy impartiality. But whether or no some High Court yet to be set up will pass judgment on the crimes which are being committed in Europe to-day, or whether they will be left to the verdict of history, or to the events which will follow the awful judgment of the highest tribunal of all—" Vengeance is mine, I will repay "—the crimes go on increasing. In the United Kingdom over 6,000 persons were killed in air-raids in April, half being women and children. These have been killed by unlawful means in Germany's war of aggression—that is, they have been murdered. In Europe Hitler is enforcing his domination by means equally brutal, and in Poland and Jugo-Slavia mass murder in the form of summary execution marks the founding of the " New Order."

Frustration.—It does not appear that the case of *Joseph Constantine Steamship Line, Ltd.* v. *Imperial Smelting Corporation* ; " *The Kingswood*," [1941] 2 All E.R. 165, has added a great deal to what was known of the doctrine of frustration. Indeed, the point to be decided was short, namely, when frustration of a contract is *prima facie* established, must the party putting forward that plea prove affirmatively that the frustration was not due to his negligence or default, or must the party denying frustration bring home negligence or default to the other side ? Atkinson, J., in a long and careful judgment ([1940] 2 All E.R. 46), held that the other side must prove the negligence of the party setting up the plea. The Court of Appeal reversed him in summary fashion ([1940] 3 All E.R. 211), and have now themselves been set right by the House of Lords. The defence of frustration may be rebutted by proof of fault, but the onus of proving fault will rest on the plaintiff. Lord Russell of Killowen put the reasons shortly enough by saying in effect that no one would put on a litigant the burden of proving a negative unless the authorities compelled it ; and in this case they did not. The majority of their Lordships considered that the doctrine of frustration was best based upon the inference of an implied term in the contract, and academic lawyers will find most meat in Lord Porter's analysis. One point their Lordships refused to elucidate. It is clear that self-induced frustration is not a good plea ; but what is meant by " default," and whether it means more than negligence, were problems propounded but not answered. Both the Lord Chancellor and Viscount Maugham flirted with the idea of a prima donna who sat in a draught when her clothes were wet and so lost her voice ; but they were reticent as to whether she would have to have sat there wilfully or merely negligently in order to invalidate her plea of frustration of a contract to sing.

Poor Persons Work.—The Law Society's Report on Poor Persons Procedure during 1940 is, on the whole, satisfactory, and those who at sacrifice to themselves continue to take this work upon them have in that knowledge their only reward. The problem of legal help for the poor is one of the most urgent which will have to be tackled after the war, but the task at the moment is to keep it going at all. Some local committees had less work to do during the year, but, owing to movements of population and kindred causes, some had a great deal more. Whether the work increased or decreased, there were fewer solicitors, fewer clerks and fewer counsel to deal with it. This position grows more serious as time goes on, and must be faced. It is impossible to read in the report of the Birmingham committee, that applications for divorce cannot be put in hand for two years, without realizing that something will have to be done. The primary cause is the reduction in the number of solicitors and counsel, and the depletion of solicitors' staffs. Many who would help cannot do so. We know that the claims of the fighting services come first, but in meeting them it must be remembered that the social fabric of this country depends on due administration of justice, which cannot continue without its trained servants. The Attorney-General has stated that he is in touch with the Bar Council on the subject, and it is to be hoped something emerges. The present arrangements for postponement or deferment of national service for solicitors and their clerks must be administered more leniently.

Lists and the Long Vacation.—The lists for the Trinity Term, which began on Tuesday, show that litigation is rapidly shrinking as the war goes on. That, of course, does not imply a corresponding slackening of business in Chambers and non-litigous work, as overworked masters and short-staffed solicitors know to their cost. There are seventy-six appeals (as against one hundred and four a year ago), four from the Chancery Division, thirty-nine from the King's Bench Division, two from the Probate, Divorce and Admiralty Division, and twenty-six from the County Courts. The Chancery list has fallen from one hundred and thirty-eight to thirty-four, and the King's Bench Division list is one hundred and sixty-seven, against six hundred and twenty. The Divisional Court has one hundred and five, which is an increase of thirty-six. It is announced that there will be no long vacation this summer. That does not mean that all the Courts will be open all the time, but that perhaps, one in each division, will be available. There is nothing in the state of the lists to require the suspension of the long vacation, and the ordinary vacation arrangements would have been ample to avoid any inconvenience to litigants. The decision has probably been taken in order to bring the Courts into line with other branches of the civil service and to forestall uninformed public criticism at what is apparently an unduly long holiday in war-time. What the public do not realize, however, is that the keeping open of Courts involves the attendance of a large number of officials whose time could be more usefully spent in other directions if they had complete freedom over a stated period.

Yours as ever,
APTERYX.

FIFTY-THREE YEARS A LAW CLERK.

In One Office.

The account of Mr. H. F. Tilley's service (*ante*, p. 139) has elicited the information that Mr. Thomas Abbott Joynt, the senior clerk in the office of Messrs. Joynt, Andrews, Cottrell, and Dawson, can better Mr. Tilley's record.

Mr. T. A. Joynt is the eldest son of the late Mr. Thomas Ingham Joynt, well known legal practitioner in Christchurch, who started practice in the early sixties and founded the present firm. When Mr. T. A. Joynt left school, he went into his father's office, his service in which was broken for a few years in the country, for health reasons; after which he rejoined his father's office, in 1888. Mr. T. I. Joynt took Mr. H. D. Andrews into partnership in 1895, and they continued in partnership until the former's death in 1907, after which Mr. Andrews carried on the practice under the same firm name, Joynt and Andrews, until 1925, when Mr. A. C. Cottrell was admitted into partnership and the firm became Joynt, Andrews, and Cottrell. In 1938, Mr. H. M. S. Dawson was admitted into the partnership and the firm became and now is Joynt, Andrews, Cottrell, and Dawson.

Throughout all these years and changes of partnership, Mr. T. A. Joynt remained with, and still remains with, the firm as the senior member of its staff, and he is well known and respected in legal circles in Christchurch.

From the foregoing, it appears that Mr. Joynt has had fifty-three years' service with the same firm, in forty-six years of which he has been associated with Mr. Andrews, in addition to at least seven years previously in his father's office, from which the present firm is derived.

RECENT ENGLISH CASES.

DIVORCE.

Desertion—Agreement before Marriage as to Matrimonial Home—Husband's Attempt to Change Matrimonial Home without Justification.

Where a husband has agreed before marriage that the wife shall continue her own business and for that purpose to make the matrimonial home at the place where that business is being carried on, it is unreasonable for him to go back on that agreement without good cause, and refusal to live at that place may amount to desertion.

KING *v.* KING, **[1941] 2 All E.R. 103. P.D.A.**

As to desertion: see HALSBURY, Hailsham edn., vol. 10, pp. 654–658, pars. 963–967; and for cases: see DIGEST, vol. 27, pp. 307–316, Nos. 2840–2939.

Restitution of Conjugal Rights—Jurisdiction—"Matrimonial Home"—Cessation of Cohabitation—Residence Within Jurisdiction.

The phrase "matrimonial home" extends, for the purposes of jurisdiction, to the husband's residence in such circumstances that any husband in such circumstances would set up a joint home if not estranged from his wife.

MILLIGAN *v.* MILLIGAN, **[1941] 2 All E.R. 62. P.D.A.**

As to jurisdiction in matrimonial proceedings: see HALSBURY, Hailsham edn., vol. 10, pp. 691, 692, par. 1027; and for cases: see DIGEST, vol. 27, pp. 263, 264, Nos. 2317–2325.

EXECUTION.

Garnishee Order—Banking Account—Debt Owing by Company—Account in name of Liquidator—Whether Account Attachable.

A creditor of a company in liquidation cannot obtain a garnishee order over funds in a bank in the name of the liquidator of the company.

LANCASTER MOTOR CO. (LONDON), LTD. *v.* BREMITH LTD., **[1941] 2 All E.R. 11. C.A.**

As to what debts may be attached: see HALSBURY, Hailsham edn., vol. 14, pp. 107–112, pars. 171–176; and for cases: see DIGEST, vol. 3, pp. 176, 177, Nos. 316–321.

PRACTICE.

Practice—Medical Report—Case Tried upon Agreed Medical Report—When Order for Case to be so Tried is Proper.

Cases where the medical report is such that the Court or cross-examining counsel may properly ask questions to disclose to the lay mind the full meaning and effect of such report should not be ordered to be tried upon an agreed medical report.

PROCTOR *v.* PEEBLES (PAPERMAKERS), LTD., **[1941] 2 All E.R. 80. C.A.**

As to orders on summons for directions: see HALSBURY, Hailsham edn., vol. 26, pp. 51, 52, par. 83; and for cases: see DIGEST, Practice, Nos. 1800–1816.

REVENUE.

National Defence Contribution—"Controlling Interest" in Company—Indirect Control—Finance Act, 1937 (c. 54), Sched. IV, pars. 4, 7 (b), 11.

A "controlling interest" of a company, within the Finance Act, 1937, Sched. IV, pars. 4, 7 (b), 11, includes an indirect controlling interest.

INLAND REVENUE COMMISSIONERS *v.* F. A. CLARK & SON, LTD. BRITISH AMERICAN TOBACCO CO., LTD. *v.* INLAND REVENUE COMMISSIONERS, **[1941] 2 All E.R. 86. K.B.D.**

As to control of company: see HALSBURY, Hailsham edn., vol. 17, pp. 89–92, par. 187, p. 290, par. 576; and for cases: see DIGEST, vol. 28, pp. 25–30, Nos. 136–154.

WILLS.

Soldier's Will—Actual Military Service—Officer Living in Own House near Barracks—Death in Air-raid—Wills Act, 1837 (c. 26), s. 11.

A soldier who is carrying out peace-time duties in his country, and is under orders to proceed abroad, is not in actual military service within s. 11 of the Wills Act, 1837, although he is under military control.

IN THE GOODS OF GIBSON, **[1941] 2 All E.R. 91. P.D.A.**

As to actual military service: see HALSBURY, Hailsham edn., vol. 14, p. 198, par. 325; and for cases: see DIGEST, vol. 39, pp. 333–335, Nos. 193–219.

WORKMEN'S COMPENSATION.

Redemption—Payment continued for Six Months—Amount of Payment varied within Six Months—Whether Redemption Available—Workmen's Compensation Act, 1925 (c. 84), s. 13.

Before a weekly payment can be redeemed under s. 13 of the Workmen's Compensation Act, 1925, it must have been continued for six months.

DAVIS *v.* CAMBRIAN WAGGON WORKS, LTD., **[1941] 1 All E.R. 460. C.A.**

As to redemption of weekly payments: see HALSBURY, vol. 34, pp. 955–958, pars. 1307–1311; and for cases: see DIGEST, vol. 34, pp. 460–463, Nos. 3769–3798.

RULES AND REGULATIONS.

Primary Industries Emergency Regulations, 1939. Phosphatic Fertilizer Control Notice, 1941. Amendment No. 1. No. 1941/120.

Control of Prices Emergency Regulations, 1939. Price Order No. 42. No. 1941/121.

Social Security Act, 1938. Social Security (X-ray Diagnostic Services) Regulations, 1941. No. 1941/122.

Emergency Regulations Act, 1939. Control of Prices Emergency Regulations, 1939. Amendment No. 1. No. 1941/123.

Fisheries Act, 1908. Sea Fisheries Regulations, 1939. Amendment. No. 12. No. 1941/124.