New Zealand Law Journal

Incorporating "Butterworth's Fortnightly Notes."

"We are going to guard our health and strength: for these are assets in the fight. But we shall be careless of all else—thinking only of arms for the men, arms for victory, arms for liberty. After all, these young fighting men are our sons. We bred them; there must be something of their spirit in us. . . ."

—THE RT. HON. HERBERT MORRISON, M.P., Minister of Supply.

VOL. XVII. TUESDAY, AUGUST 19, 1941 No. 15

EX PARTE MOTIONS: UBERRIMA FIDES.

RULE 413A of the Code of Civil Procedure provides as follows:

> Every notice of motion for probate or letters of administration, and every other notice of motion intended to be moved *ex parte*, shall have indorsed at the foot or end thereof a certificate signed by the solicitor engaged in the proceedings, or by counsel, in the following form: "Certified pursuant to the rules of Court to be correct."

This rule, and the two rules immediately following, RR. 413B and 413C, place a serious responsibility on the plaintiff's solicitor or counsel. "It cannot be too strongly expressed," said His Honour Mr. Justice Blair in *W.* v. *Public Trustee*, [1935] N.Z.L.R. s. 22, s. 24, "that it is the duty of the solicitor certifying to an *ex parte* application to make the fullest disclosure to the Court of all matters relevant to such an application." In *Pilkington* v. *McArthur Trust, Ltd.*, [1938] N.Z.L.R. 131, Mr. Justice Fair stressed the fact that any deviation from the certifying counsel's duty to observe the most scrupulous care and good faith in presenting *ex parte* matters to the Court for its consideration, will disentitle the plaintiff from retaining an order made upon an incomplete statement of the facts and the issues of law. This case is important in that it shows an incomplete memorandum as to the issues of law involved may be a ground for disentitling the plaintiff from retaining such an order. In a recent case, *Korman* v. *Korman* (not reported), the same learned Judge emphasized the fact that the like principles apply to all *ex parte* applications in matters that are really to be considered as matters *uberrimae fidei*.

In *Republic of Peru* v. *Dreyfus Bros. and Co.*, (1886) 55 L.T. 802, 803, Kay, J., stated these principles to be applied to all notices of motion moved *ex parte*:

> The rule of the Court is that, where an *ex parte* application is made, the person who makes it must observe what is termed *uberrima fides* . . . I have always maintained, and I think it most important to maintain most strictly, the rule that in *ex parte* applications to the Court the utmost good faith must be observed. If there is an important misstatement, speaking for myself, I have never hesitated, and never shall hesitate until the rule is altered, to impress upon all persons who are suitors in this Court the importance of dealing in good faith with the Court when *ex parte* applications are made.

In the matter before His Lordship, the affidavit, in support of an application for service of a writ of summons upon the defendants who were resident out of the jurisdiction, contained a misstatement of fact. His Lordship said he regretted that the mistake had been made, and he was willing to accept it as a slip; but, whether so or not, it seemed to him that the duty of the Court was to enforce the rule very strictly.

In *Reynolds* v. *Coleman*, (1887) 36 Ch.D. 453, 461, Cotton, L.J., observed that he fully adhered to the rule that persons applying for *ex parte* orders ought fully and fairly to state the facts upon which their application depends. Again, in *Plaskitt* v. *Eddis*, (1898) 79 L.T. 136, 138, North, J., rejected a motion because, *inter alia*, while the statements made in the affidavit were not incorrect, they did not go far enough, and the Court should have had more information. While it was clear that the parties making the affidavit knew more than they told, His Lordship acquitted them entirely of any intention to deceive or mislead the Court; but, as a matter of fact, he did not think sufficient information had been disclosed.

The earliest Reports show that the rule has been strictly applied in New Zealand. In *Smith* v. *Palmer*, (1874) 1 N.Z. Jur. 195, an application was made to dissolve an interim injunction on the grounds of improper concealment and misstatement of facts, omission to set out material documents, and failure to set out the grounds on which it was believed that the defendant justified his acts. Gresson, J., said, in dissolving the injunction, that it had been admitted by plaintiff's counsel that the Court deals with great strictness and severity with persons who apply for *ex parte* injunctions, and that the plaintiff applying *ex parte* comes under a contract with the Court that he will state the whole case fully and fairly; and if he fail to do so, and the Court finds, when the other person applies to dissolve the injunction, that any material

fact has been suppressed or not properly brought forward, it will dissolve the injunction without deciding on the merits.

In applying *ex parte* for an interim injunction, it is not for the solicitor preparing the papers to decide whether a defence founded on the facts is a good defence or not; his duty is fully to disclose to the Court the defence to his action if he knows it, and the facts on which it is based, so that the Court can judge whether they are material or not. As Mr. Justice Ostler said, in *Escott* v. *Thomas*, [1934] N.Z.L.R. s. 175, s. 176, applying the rule as stated in the *Republic of Peru* case (*supra*), if, on a motion to dissolve an *ex parte* interim injunction it appears that the plaintiff has misstated his case, either by misrepresentation, or by the suppression of material facts, so that an injunction has been obtained which might have been refused if all the facts had been stated, that in itself is a sufficient ground for dissolving the injunction.

The rule has often been applied to motions under R. 48 of the Code of Civil Procedure, an application *ex parte* to serve a writ of summons out of New Zealand, and this usually arises on a motion to set aside an order for such service, as, to cite one of the most recent instances, *Pilkington* v. *Mc Arthur Trust, Ltd.* (*supra*), where the order was rescinded because it was obtained upon an incomplete and misleading presentation of the facts, due to the plaintiff's legal advisers having been unable to ascertain in detail all the facts bearing upon the matter, and without an indication to the Court that issues of law were involved that required special consideration. Here, the learned Judge, said that it was not suggested that facts were deliberately or intentionally misrepresented; but the facts had not been placed before the Court, when the order was made, as fully and fairly as they should have been. The certifying counsel had failed to comply with the established practice under which certifying counsel directs the attention of the Court to any questions requiring special consideration, and submits authorities to be considered. As His Honour Mr. Justice Fair, at p. 137, said:

> The practice is well known and is, in general, carefully complied with. A failure by counsel in an important case such as this to give an indication that the facts involved raised questions of law that required special consideration is not, in my view, sufficiently justified by the explanation given at the hearing of the motion. [The Court was asked to consider additional facts to which its attention, when the order was made, had not been directed.] In these circumstances, the principles adopted and the practice followed where a certificate by counsel is not required apply with added force, and oblige me to make the order asked for by counsel for the [defendant] company.

His Honour added that he respectfully agreed with those rulings which are based on the principle that the Court should take the greatest possible care that the issues bearing upon *ex parte* applications on matters of importance should be fully and properly placed before it. If they were not, the omission must be regarded as a grave one, and should ordinarily be followed by a revocation of the rights conferred by an order so obtained.

Similarly, in *Korman* v. *Korman* (*supra*) an order authorizing the issue of a writ for service in Melbourne, was set aside for the reason that the information which had been given to the Court was incomplete and misleading, in that it did not place before the Court the whole of the information necessary to enable it to exercise its discretion on the grounds set out in the motion. Here, the necessary information had not been given by the plaintiff himself to his solicitor. The learned Judge said he had to consider what the plaintiff himself had not disclosed, for instance, that there was a radical conflict as to the very basis of the plaintiff's claim—*i.e.*, as to the very existence of the partnership, for the alleged breach of which a writ had been issued. The result of this was that there was not brought to the notice of the learned Judge who had made the order that the main cause and basis of the action, and the breach alleged, arose in Victoria. It was held, following the cases already referred to, that once the Court is satisfied that the party has not dealt with the Court in good faith, the order should be revoked; and that in itself was sufficient to dispose of the application to set aside the order giving leave to serve the writ out of New Zealand.

It is no excuse for the party making the application to say he was not aware of the importance of any facts which he omitted to bring forward: *Dalgleish* v. *Jarvie*, (1850) 2 Mac. & G. 231, 238, 42 E.R. 89, 92. In the course of the argument in this case, Lord Langdale observed that even though there might be facts upon which the order might be made, if the applicant had not acted with *uberrima fides* and put every material fact before the Court, the order would not be made; and the applicant must come again on a fresh motion as the omission of the statement of material facts constitutes a reason why the order so obtained should be dissolved. In the same case, Rolfe, B., said that an *ex parte* application is very much governed by the same principles which govern insurances, matters which are said to require the utmost degree of good faith, *uberrima fides*. He went on:

> In cases of insurance a party is required not only to state all matters within his knowledge, which he believes to be material to the question of the insurance, but all which in point of fact are so. If he conceals anything that he knows to be material it is a fraud; but, besides that, if he conceals anything that may influence the rate of premium which the underwriter may require, although he does not know that it would have that effect, such concealment entirely vitiates the policy. So here, if the party applying for a special injunction, abstains from stating facts which the Court thinks are most material to enable it to form its judgment, he disentitles himself to that relief which he asks the Court to grant.

To similar effect are the observations of James, V.C., in *Harbottle* v. *Pooley*, (1869) 20 L.T. 437, and those in *Boyce* v. *Gill*, (1891) 64 L.T. 825, where Kekewich, J., said that it was of the utmost importance that there should be a full disclosure of the facts, and that the Court should be able to rely on the affidavits as on the statement of counsel.

The Court is justified in discharging an order, made where full and fair disclosure has not been made of all the facts which should be considered by the Court in dealing with the application for such order even though, as Farwell, L.J., said in *The Hagen*, [1908] P. 189, 201, the party might afterwards be in the position to make another application. As Lord Cozens-Hardy, M.R., said, in referring to the general principle in *The King* v. *Kensington Income Tax Commissioners, Ex parte Polignac*, [1917] 1 K.B. 486, 505, unless *uberrima fides* can be established on an *ex parte* application, if there is anything like deception practised on the Court, the Court ought not to go into the merits of the case, but simply say, "We will not listen to your application because of what you have done."

SUMMARY OF RECENT JUDGMENTS.

SUPREME COURT.
Wellington.
1941.
July 14.
Blair, J.

In re **FULLER**: *In re* **LILBURN.**

Probate and Administration—Deaths on War Service—Proof of Death—Death Officially Presumed—Certificate—War Deaths Register—Provisional War Deaths Register—Further Evidence required—Registration of Deaths Emergency Regulations, 1941 (Serial No. 1941/115), Reg. 14.

No difficulty as to proof of death arises in applications for probate or administration where the Registrar-General issues a certificate of an entry in the War Deaths Register under Reg. 14 (1) of the Registration of Deaths Emergency Regulations, 1941 (Serial No. 1941/115).

A certificate under Reg. 14 (2) of the entry in the Provisional War Deaths Register affords *prima facie* evidence of all facts stated relating to what any inquiries 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.

So decided by Blair, J., with the concurrence of five of his brother Judges.

In re Edmondston, [1918] N.Z.L.R. 608, G.L.R. 317, followed.

Solicitors: *G. M. Spence*, Blenheim, for the executor of Fuller; *Treadwell, Gordon, Treadwell, and Haggitt*, Wanganui, for the executor of Lilburn.

COURT OF APPEAL.
Wellington.
1941.
June 25, 26.
Blair, J.
Kennedy, J.
Northcroft, J.

HOOPER (WIFE) v. HOOPER (HUSBAND).

Divorce and Matrimonial Causes—Separation (as a Ground for Divorce)—Order—Separation and Maintenance Order made in Wife's Favour on Ground that Husband "has failed or intends to fail to provide her with Adequate Maintenance—No Marital Misconduct or failure to Maintain before Wife's committal to Mental Hospital—Wife a Mental Patient on probation to Aunt's Care when Order made—Husband's Refusal to take her back—Quantum of Maintenance left to be settled by Magistrate—Whether "wrongful act or conduct" of Husband—Destitute Persons Act, 1910, s. 17 (1) (a)—Mental Defectives Act, 1911, s. 80—Divorce and Matrimonial Causes Act, 1928, s. 10 (j).

An order for separation and maintenance was granted on February 1, 1937, by the Magistrates' Court to a wife on her complaint that her husband "had wilfully and without reasonable cause failed and intends to fail to provide her with adequate maintenance." In August, 1940, the husband petitioned for a divorce on the ground that such order had continued in full force and effect for more than three years. The wife opposed the grant of a decree *nisi* on the ground that the separation order was due to the husband's wrongful act or conduct.

The evidence showed that the parties had been married in September, 1932, and had lived together at the husband's home until October, 1934, there being no complaint of the husband's conduct or failure to maintain up to that time. She was then committed to a mental hospital, where, with the exception of occasional periods of leave, she remained until December 3, 1936, when she was released on leave to the care of her aunt under s. 80 of the Mental Defectives Act, 1911. While still on probation, she visited her husband on December 27, 1936, and he refused to take her back, as she had asked, and, as to maintenance, he temporized and said this would have to be settled by a Magistrate as he would not agree to her request for £1 5s. a week. On January 12, 1937, the wife laid her complaint for separation and maintenance, and on February 1, 1937, an order was made in her favour for separation and maintenance at the rate of 17s. 6d. a week. She obtained her discharge from the Mental Hospital a month later.

On appeal from the judgment of *Johnston*, J., granting a decree *nisi* to the husband on the grounds that the husband's conduct while living with his wife was not attacked, and there was no ground for suggesting that any marital misconduct, or misconduct at any time, was the real cause of the separation,

Sievwright, for the appellant; *J. J. McGrath* and *D. McGrath*, for the respondent.

Held, per totam Curiam, dismissing the appeal, That the wife had failed to establish that the separation was due to the husband's wrongful act or conduct.

For the reasons, Per *Blair*, J., and *Northcroft*, J., concurring, That it would have been improper for the husband to agree to resume cohabitation on December 27, 1936, as his wife was then an undischarged mental patient.

Per *Kennedy* and *Northcroft*, JJ. 1. That there was insufficient evidence to establish that the husband, whose conduct in the past had been without blame, had failed to maintain his wife while she was released on leave under s. 80 of the Mental Defectives Act, 1911.

2. That, in the circumstances while the wife was still undischarged and she was or should have been in the custody of a person who had assumed full responsibility for her, the husband's replies or conduct did not fairly considered, amount to an intimation of an intention to fail to maintain.

Ansley v. *Ansley*, [1931] N.Z.L.R. 1010, G.L.R. 501, and *Keast* v. *Keast*, [1934] N.Z.L.R. 316, G.L.R. 292, referred to.

Solicitors: *A. B. Sievwright*, Wellington, for the appellant; *J. J. and Dennis McGrath*, Wellington, for the respondent.

FULL COURT.
Wellington.
1941.
June 23, 24;
July 10.
Myers, C.J.
Blair, J.
Kennedy, J.
Callan, J.
Northcroft, J.

PHILLIPS v. GRAHAM.

Justices—Practice—Increase of Penalty to enable General Appeal—Penalty not to be increased when a Magistrate is functus officio*—Justices of the Peace Act, 1927, ss. 72, 73, 74, 315.*

Except upon a rehearing, a Court of summary jurisdiction may not increase the fine or imprisonment imposed (*a*) after the final rising of the Court on the day on which the case has been dealt with by the oral pronouncement in Court of the penalty, or (*b*) even upon the day on which the case has been so dealt with, after a minute or memorandum of the conviction, following such oral pronouncement in Court, has been made in the Criminal Record Book and has been signed by the presiding justices.

But a Court of summary jurisdiction may, on the defendant's application, before the presiding justices are *functi officio* of the information, increase the penalty to permit of a general appeal, if in the circumstances they think it just to do so.

Salaman v. *Chesson*, [1926] N.Z.L.R. 626, G.L.R. 205, and *R.* v. *Manchester Justices, Ex parte Lever*, (1937) 106 L.J.K.B. 519, applied.

Jones v. *Williams*, (1877) 46 L.J.M.C. 270; *Bagg* v. *Colquhoun*, [1904] 1 K.B. 554; *R.* v. *Marsham, Ex parte Pethick Lawrence*, (1912) 81 L.J.K.B. 957; *Lang* v. *Reid*, [1916] N.Z.L.R. 1186, [1917] G.L.R. 10; and *Pellatt* v. *Barling* (*No. 2*), [1933] N.Z.L.R. s. 23, G.L.R. 161, referred to.

O'Shea, for the appellant; *Weston*, K.C., and *Birks*, for the respondent.

So held by the Court of Appeal (*Myers*, C.J., *Blair*, *Kennedy*, and *Callan*, JJ., *Northcroft*, J., dissenting).

Per *Northcroft*, J. (dissenting, but agreeing with the rest of the Court that the presiding Justice in the circumstances of the case had no jurisdiction to increase the fine), 1. That there is no jurisdiction at any time to increase a fine merely to give the defendant the right of appeal, and that the *obiter dicta* of *Edwards*, J., and *Blair*, J., in *Lang* v. *Reid*, [1916] N.Z.L.R,

1186, [1917] G.L.R. 10, and *Pellatt* v. *Barling* (*No. 2*), [1933] N.Z.L.R. s. 23, G.L.R. 161, respectively to the contrary effect should be disregarded.

Rutherfurd v. *Waite*, [1923] G.L.R. 34, distinguished from *Lang* v. *Reid*, [1916] N.Z.L.R. 1186, [1917] G.L.R. 10.

Thompson v. *Grey*, (1904) 24 N.Z.L.R. 457, 7 G.L.R. 136, and *Reg.* v. *Justices of Galway*, (1879) 14 Cox C.C. 386, 6 L.R. Ir. 1, referred to.

2. That, if the practice indicated in *Lang* v. *Reid*, [1916] N.Z.L.R. 1186, [1917] G.L.R. 10, of giving a right of general appeal by the device of increasing the fine is to be followed, it should be only in special circumstances in accordance with the principles laid down in *Lang* v. *Reid* and *Rutherfurd* v. *Waite*, [1923] G.L.R. 34; and that there were no such special circumstances in the present case.

Solicitors: *J. O'Shea*, Wellington, for the appellant; *Luke, Cunningham, and Clere*, Wellington, for the respondent.

Case Annotation: *R.* v. *Manchester Justices, Ex parte Lever*, E. and E. Digest, Supp. Vol. 14, para. 3555a; *Jones* v. *Williams*, *ibid.*, Vol. 33, p. 357, para. 669; *Bagg* v. *Colquhoun*, *ibid.*, p. 346, para. 560; *R.* v. *Marsham, Ex parte Pethick Lawrence*, *ibid.*, Vol. 14, p. 348, para. 3652; *Reg.* v. *Justices of Galway*, *ibid.*, Vol. 22, p. 390, note 3997i.

SUPREME COURT. Auckland. 1940. August 27. *Fair*, J.

In re **AUCKLAND GRAMMAR SCHOOL BOARD.**

In re **AUCKLAND CITY CORPORATION.**

Public Works Acts—Compensation—Land taken vested in Person without a power of Sale—"Doubt" as to his right to receive Compensation—Whether he has "partial or qualified interest" in the Land—"Partial interest"—"Qualified interest"—Public Works Act, 1928, ss. 91, 92.

In the phrase, "If any doubt or dispute arises as to the right or title of any person to receive any compensation," &c., in s. 91 of the Public Works Act, 1928 (which directs that when the title is doubtful, compensation or purchase-money is to be paid into the Public Trust Office), the words "right . . . to receive any compensation" include the right to give a receipt that would be binding on the recipient in future and would be a valid discharge.

Where land is vested in a person (including a corporation) who has no power to sell it (or whose power to sell it is doubtful), and who, therefore, cannot give a valid receipt for the purchase money to a purchaser of the land, as compensation moneys paid in respect of land taken under the statute are treated as being in the same position as the land, and there is a doubt as to the right of such person to receive the compensation, it should be paid into the Public Trust Office under s. 91.

In re Johnsonville Town Board, (1907) 27 N.Z.L.R. 36, 9 G.L.R. 636, applied.

In s. 92 of the statute which prescribes how compensation is to be dealt with "in respect of lands or any interest therein taken from any person having a partial or qualified interest only in such lands, and not entitled to sell or convey the same," the words "partial" and "qualified" have different meanings. "Qualified" means an interest less in quality and degree than an absolute estate in fee simple, or less than an absolute owner would have in a more limited estate in the land. The interest of the person before referred to is, therefore, a "qualified interest," and s. 92 applies in respect of compensation for the land taken from him.

Semble, "Partial interest" implies that some other person has an interest in the land taken.

In the case of the two petitions to the Court under s. 92, the Court held, on the facts, that there was a "doubt" under s. 91; that each claimant had a "qualified interest" in the land taken; and that s. 92 applied. Orders were made that the compensation should be paid to each petitioner in such a way as to preserve the trust on which it had held the land taken in as nearly the same form as if the endowment had continued in land.

Counsel: *Richmond*, for the Auckland Grammar School Board; *Stanton*, for the Auckland City Corporation; *V. R. S. Meredith*, for the Attorney-General.

Solicitors: *Buddle, Richmond, and Buddle*, Auckland, for the Auckland Grammar School Board; *J. Stanton*, Auckland, for the Auckland City Corporation; *Crown Solicitor*, Auckland, for the Crown.

OFFENDERS' PROBATION.

Its Purpose and Effect.

The following appears in this year's report of the Chief Probation Officer (Mr. B. L. Dallard), and is of importance to practitioners engaged in appearances in the criminal Courts:

"Examination of the reports submitted by the district officers reveals that in the main probationers have reacted reasonably satisfactorily, the number who have relapsed being only slightly over 11 per cent. of the total dealt with.

"It has long been recognized that indiscriminate recourse to imprisonment, which carries with it a severance of domestic ties and more often than not punishes the offender's dependants more severely than himself, is not in the best interests of the public. Probation, which aims at the rehabilitation of the offender without the stigma of imprisonment and enables the breadwinner to support his dependants whilst working out his own salvation, offers a constructive alternative in many cases. Unfortunately, the impression is fairly common that probation is "letting the offender off" or "creating a license for crime." Nothing is further from the truth. A probationary license frequently contains conditions limiting the hours of the offender's absence from his home, and prohibiting his association with undesirable persons, while the necessity to make restitution to the persons who suffered by reason of his offence obliges him to remain in regular employment. His movements are considerably restricted, his liberties curtailed, and his general conduct must conform to a more ordered and disciplined mode of living. For some offences probation is quite inappropriate. For example, many sex offenders are a public menace, and in their case segregation becomes essential. Similarly, offences showing deliberation or careful planning do not merit the more generous impulses of the law.

"Docile observance of the conditions of probation in the same manner as studied good conduct in prison does not necessarily connote reclamation or rehabilitation. This is evidenced rather by a change of mental attitude involving a recognition of a social obligation and the development of a sense of responsibility. The acquisition of a more regular habit of employment, an earnest endeavour to make reparation to those wronged, and the desire to establish one's self-esteem by the adoption of a more decent standard of living, are the pointers which indicate the real progress of a probationer; and it is in respect of these factors that the reports can be regarded as satisfactory."

NATIVE CUSTOM.

As Relating Only to the Ownership of Land.

By C. E. MacCormick, sometime Chief Judge, Native Land Court.

It has been suggested to me that a not too lengthy article on this subject would be of some interest and value.

For many years there were various judicial decisions, in some cases the learned Judges not being all of one mind, on the question how far Native custom should override the law of New Zealand. The last case was *Willoughby* v. *Waihopi*, (1910) 32 N.Z.L.R. 1295, a decision of the Full Court, Mr. Justice Edwards dissenting from the other Judges. This decision was given prior to the coming into force of the Native Land Act, 1909. Part of the difficulties arose from the differing meanings given to Native land in some of the statutes.

Since the passing of the 1909 Act followed by the Native Land Act, 1931, which consolidated the Act of 1909 and its many amendments, the position is quite clear. The jurisdiction and powers of the Native Land Court are precisely defined. Though a Court of Record, it has been judicially decided that it is purely the creation of statute, that it can exercise only the powers given it by the statute and has no inherent right to decide anything which it is not so empowered to do.

Ancient Native custom has had to be modified to some extent to meet more modern conditions. The Native Land Court has been given the task of so doing in the main, but certain modifications have been made by legislation.

In *Willoughby* v. *Waihopi*, Mr. Justice Edwards, dissenting from the other members of the Court, said that to be recognized a Native custom must have existed prior to the time when the Colony became a British Dependency, and continued: "What is really for the most part meant by those who refer to Native custom is the uncertain varying and unrecorded practice of the Native Land Court in the administration of the statutes under which that Court derives its authority."

Mr. Justice Chapman, however, in the same case said:

> A body of custom has been recognized and created in that Court (Native Land Court) which represents the sense of justice of its Judges in dealing with a people in the course of transition from a state of tribal communism to a state in which property may be held in severalty or in the state approaching severalty represented by tenancy in common.

There is support for this more sympathetic view of the learned Judge. A number of years previously a Native Land Court Judge (I think Judge Edger) stated that it must be borne in mind that Native custom was no fixed thing and must be modified to meet differing circumstances. This was felt at the time to be a somewhat startling statement, but it subsequently came under the notice of the Judicial Committee of the Privy Council who expressed the view that it might well be correct and in effect that circumstances might render necessary some variance from the recognized ancient custom.

It is clear that ancient custom could not be applied in its entirety to conditions which obtained after the coming of British Sovereignty with its implications. The position is lucidly stated in Mr. Justice Chapman's dictum.

Formerly tribal lands were held in common by all members of the tribe who held the ownership. Private or personal ownership did not exist though in many instances the right to use a particular portion of land might be accorded to a particular individual or family. The highly unsatisfactory methods of early purchase of Native land need no describing. They are well known, and caused more than one war. Eventually, the Native Land Court was constituted to enable things to be placed on a better basis.

Under the existing law, the Native Land Court is given exclusive jurisdiction to investigate the title to customary land as defined in section 2 of the Native Land Act, 1931, as land which, being vested in the Crown, is held by Natives under the customs and usages of the Maori people, and to determine the relative interests of the owners. Such titles and interests are to be determined according to the ancient custom and usage of the Maori people so far as the same can be ascertained. The Court's order is to be called a Freehold Order which vests the land in the persons named therein in the same manner as if the order were a Crown Grant and the land thereupon ceases to be customary land and becomes Native freehold land as defined in the same section 2. The owners are to be tenants in common if more than one. The land in any such order becomes subject to the Land Transfer Act, 1915 (ss. 118 to 123 of the Native Land Act, 1931).

No person shall be capable of making any alienation of customary land or any interest therein whether by will or otherwise (s. 117).

Only the Crown can bring action for possession, trespass or other injury in respect of customary land (s. 116).

Sources of right (*Take*) under which Natives lay claim to customary land are:

1. Ancestral right by descent. (*Take Tupuna.*)
2. Conquest. (*Raupatu.*)
3. Gift. (*Tuku.*)
4. Strong hand. (*Ringakaha.*)

There may be some claims under special rights but in most cases inquiry would show that the claim really arises from one of the main sources I have given.

There are several forms of gift. *Ringakaha* is in my experience not an actual *take* of itself, but has been brought forward to strengthen one of the other grounds, as showing ability to hold the land against attack.

Claims are made and rights awarded under both the male and female lines of descent of the claimant where it is proved that both lines are entitled.

While the occupation of the land is not of itself a right yet no other *take* is admitted as a right unless it is coupled with occupation which is regarded as a most important factor in deciding the extent to which claimants are entitled (relative interests). It is usual,

however, to find included in the Court's order persons admitted by the true owners through *aroha* (regard or affection) or for monetary assistance in the claim. The latter is certainly not Native custom. The relative interests of persons so admitted without right (*take kore*) are usually small.

At a large conference of Native chiefs and other persons accepted as having knowledge of Native custom held many years ago, it was decided that not even *mana rangatira* (chiefly authority) without occupation would give right to land. Where that has been accepted by the Courts it has in many cases meant a hardship to great chiefs who in ancient times were kept supplied by their people with tribute of food and other requirements. But on the other hand, Natives in some districts have themselves seen their chiefs properly provided with land, irrespective of occupation.

As practically all Native land in New Zealand has been the subject of freehold orders or other titles by which the land has ceased to be customary land, the principles of investigation of title would be of little more than academic value but for the fact that the titles of a number of large and important blocks have been reopened and further inquiry directed by the Legislature.

By subsection (2) of s. 27 of the Native Land Act, 1931, the Court is given in respect of any land owned or held by Natives or by Natives and Europeans jointly, the same powers and jurisdiction as are conferred upon the Court in respect of Native freehold land.

In most cases where a block of customary land has been converted into Native freehold land, a partition follows. The Native Land Court has exclusive jurisdiction to effect this, the procedure to be followed being given in Part VI of the Native Land Act, 1931. Where a partition cannot be arrived at by agreement among the owners, the settled practice of the Court is to partition according to the value of the relative interests of the different parties and not according to area. No other method is equitable. There is no Native custom applicable. Partition was unknown to Natives.

Succession.

Part VIII of the Native Land Act, 1931, defines the powers and procedure of the Native Land Court in regard to succession both as to cases where the deceased Native has left a will and where there is an intestacy. The Native Land Court is given exclusive jurisdiction to grant probate of the will or letters of administration of the estate of a deceased Native (s. 181). It has been decided by the Supreme Court that there can be no Native custom applicable to a will, as no such thing as a written will was known to the Natives before New Zealand became a British Dependency. The Native Appellate Court has laid it down that on an application for probate, the same considerations apply to the will of a Native as to that of a European. The general power of disposition by will is limited as to European beneficiaries by s. 173. The ordinary effect of a gift of Native freehold land has been modified by legislation. This will be further referred to later.

Upon an intestacy, the succession to the estate of a deceased Native, so far as it consists of beneficial freehold interests in Native land, shall, subject to the Act, be determined in accordance with Native custom. All other property, whether real or personal, shall be succeeded to in the same manner as if deceased had been a European (s. 176). Power to make personalty orders is given by s. 184.

But there is an important proviso to s. 176. For purposes of Native succession, no child is treated as illegitimate. Any child proved to be the offspring of a male Native who has died intestate, is according to Native custom as laid down by the Native Land Court, entitled to succeed to the interests in Native land of the deceased. This applies in all cases, even when the sexual intercourse of which the child is the result, has been of the most casual nature, or an isolated occurrence. This principle is universally recognized and accepted by the Natives themselves and could not be successfully challenged.

The proviso to s. 176, declares that for the purpose of Native succession on intestacy, a child of deceased shall be deemed to be legitimate if it be capable of succeeding to interests of deceased according to Native custom. Thus such a child is entitled to succeed to personal estate of the deceased, as well as to both Native freehold lands and European lands, if any. This provision arises from the position that a high proportion, probably a majority of Native children are illegitimate according to European law, though not by Maori ideas. But for this proviso such children would be excluded from succession to all property except Native freehold land.

On the death intestate of any Native, the wife or husband of the deceased shall not be entitled as such to any share or interest in any *real or personal* estate of deceased (s. 177). But there is provision for maintenance.

The cardinal point in Native custom relating to intestate succession to land, is that succession must follow the *take* to the land, that is to say, the order must be in favour not necessarily of the actual next-of-kin, but of the next-of-kin connected with the deceased in the line of descent from the ancestor or person to whom the land was originally awarded. I have never known that to be disputed. There is no limit to the right of representation. It enures to any number of generations from the deceased. Thus great grandchildren of deceased if their parent and grandparent in the line of descent were dead, would take between them an interest equal to the share of a surviving grand-uncle or grand-aunt, child of the deceased. But the representation in many cases goes much further than this. It also is universally accepted.

There is a recognized custom in relation to gifts of land comprising among other gifts, inclusions in the title of persons without right as before mentioned.

A gift of land is not regarded as an absolute gift. It enures only during the life or lives of the donee and his direct issue. Upon failure of direct issue the land given returns to the original donor or his representatives. Modern conditions have imported a serious flaw, because there is no legal obstacle to alienation either by deed or will. But the custom prevails for what it is worth. The judgment of the Supreme Court previously mentioned, (*In re Hokimate Davies (deceased)*, [1925] N.Z.L.R. 18) which decided that no Native custom could apply to a written will, necessarily further decided that a gift by will was an absolute one and, therefore, on the death of the beneficiary intestate, the proper successors would be the persons entitled under the law of New Zealand to succeed him. This decision, however, was repugnant to Native sentiment and legislation was passed (s. 4 of the Native Land Amendment and Native Land Claims Adjustment Act, 1927) declaring that on the complete or partial intestacy of a Native, the persons entitled to succeed to his estate

so far as it consisted of beneficial freehold interests in Native land derived by, through, or under the will of any other Native, should be determined in accordance with Native custom as it applies to gifts of land from one Native to another, and for that purpose the devise of such land should be deemed to be a gift thereof.

Section 4 of the Native Land Amendment and Native Land Claims Adjustment Act, 1927, was re-enacted by the consolidating Act of 1931 (s. 176 (3)).

ADOPTION OF CHILDREN BY NATIVES.

Such an adoption according to Native custom prevailed for many years, but about forty years ago, it was found that the custom lent itself to abuse. Certain precautionary steps were taken but these were found insufficient and finally by s. 161 of the Native Land Act, 1909, it was provided that after the commencement of that Act no Native should be capable of adopting a child in accordance with Native custom. Section 162 gave jurisdiction to the Native Land Court to make an order for the adoption of a child by a Native. These provisions were re-enacted by ss. 202 and 203 of the Native Land Act, 1931.

An interesting case heard by the Full Court in which customs relating to adoption and succession were discussed is *In re Parcihe Whakatomo (deceased)*, [1933] N.Z.L.R. s. 123.

SEPARATION AGREEMENTS.

Circumstances Affecting their Duration or Enforceability.

By I. D. CAMPBELL.

"There is no caste in contracts." With this aphorism Lord Atkin has reminded us that separation agreements, whether by deed or simple contract, form no peculiar category of their own, but are governed by the same broad principles of law which regulate the entire sphere of contract. In separation agreements no less than in mortgages and partnership agreements we may have terms express or implied. The principles of construction and interpretation of separation agreements are the same basic principles applicable to all contracts and derive their force equally from the actual or presumed intentions of the parties. To use the words of Lord Atkin again, "agreements for separation are formed, construed and dissolved and to be enforced on precisely the same principles as any respectable commercial agreement": *Hyman* v. *Hyman*, [1929] A.C. 601, 625.

If the agreement contains provision by way of trust, it is equally true to say that its operation will depend on the ordinary rules of equity applicable to any other trust. Indeed, though the contractual elements in the agreement have ceased to operate it by no means follows that the trusts in the agreement have thereby come to an end. The determination of the trust, by revocation or otherwise, is governed by the rules to which every trust is subject. There is no special dispensation for trusts in separation deeds.

The duration of a separation agreement is, then, in no way divorced from general principles. In *16 Halsbury's Laws of England*, 2nd Ed. 723, it is said:

> The extent to which the provisions of a separation deed are to be regarded as permanent and how far they are to be construed as limited to the period during which separation continues depends on the intention of the parties to be ascertained from the terms of the deed as a whole and the circumstances of the particular case.

In *Hole* v. *Hole*, [1936] N.Z.L.R. 1010, Blair, J., said: "I agree that the principle of construction above stated is the correct one." But as that case and every other case on separation agreements plainly shows, such a proposition, sound though it is, provides little assistance with practical problems. It is one of those broad academic generalizations which can usually be cited by both plaintiff and defendant with equal vigour. It is undoubtedly true that the circumstances of each particular case govern the decision, but precedent is not so barren that it can afford no further help in dealing with such agreements. In hardly any other sphere of every-day conveyancing do draftsmen follow so closely the customary diction of settled forms. There is no reason why we should be left to a course of intuitive guess work, since the same words, in the absence of a special context or different surrounding circumstances, will be construed in the same way, and although circumstances may be infinitely various, still there are several common situations which constantly recur. There is nothing foolproof in insistence on the importance of the intention of the parties. Indeed the poverty of this approach is clear from the cases. In *In re Gilling, Proctor* v. *Watkins*, (1905) 75 L.J. Ch. 335, the earlier decision in *Charlesworth* v. *Holt*, (1873) L.R. 9 Ex. 38, was regarded as exceptional and merely a decision on the wording of the particular separation deed. In *Lodder* v. *Lodder*, [1923] N.Z.L.R. 785, Salmond, J., thought it was *In re Gilling, Proctor* v. *Watkins* that was exceptional, and that that case turned on the special wording of the deed. The decision in *Negus* v. *Forster*, (1882) 46 L.T. 675, is difficult to reconcile with that in *Nicol* v. *Nicol*, (1886) 31 Ch.D. 524, but the former decision is blandly passed off as "depending on the construction of the particular instrument." It is submitted that this approach is needlessly chaotic. Repeated decisions on points of fact do not make rules of law, but they may indicate definite rules of construction, and if such rules can be ascertained, then the more clearly they are recognized, and the greater their precision, the better.

During the last twelve years there has been a rapid development in the case law on this subject. Building on decisions which have themselves been given, for the most part, within the last fifty years the Courts have defined the scope and operation of separation agreements with such thoroughness that even the points of doubt have, in the main, been clearly marked out. This series of articles offers a sketch of some of the chief questions settled, or argued, on the terms that are to be implied in an agreement for separation, and on the construction of express words as to its duration.

This review is suggested by the decision of the Court of Appeal in *Adams* v. *Adams*, [1941] 1 All E.R. 334, holding that a decree of nullity has no effect on a separation deed and that the covenant contained in it to pay weekly sums by way of maintenance was still enforceable. It may be convenient to discuss, in turn, the various types of event which have led to an attempt to restrict the operation of a separation agreement by reference to alleged implied terms, or by a direct appeal to the doctrine of frustration, or on the grounds of fraud or mistake.

Reference will be made to recent decisions in regard to maintenance orders for purposes of comparison.

1. DIVORCE.

In *Charlesworth* v. *Holt*, (1873) L.R. 9 Exch. 38, a deed of separation provided for payments during the joint lives of the spouses. The husband having subsequently obtained a divorce on the ground of the wife's adultery, defended an action brought by her seeking to recover maintenance under the deed. It was held that the divorce afforded no defence to the action, there being no express words in the deed limiting the defendant's obligation to the period during which the marriage tie subsisted. Similarly in *Goslin* v. *Clark*, (1862) 12 C.B. (N.S.) 681, a deed providing for maintenance during the joint lives of the parties had been held to remain operative notwithstanding their divorce, although the decision there appeared to be based on the special circumstances of the case.

These decisions did not pass uncriticized. *Charlesworth* v. *Holt* was considered unsatisfactory by the Court of Queen's Bench in *Grant* v. *Budd*, (1874) 30 L.T. 319, though the Court felt bound to follow it. There were many who regarded it as in substance defeating the intention of the parties, or rather, ascribing to them an intention which they did not possess to provide for a situation very different from that expressly recognized in the agreement. The rapid development of the doctrine of frustration during the present century (especially in the Coronation cases and war-time charter-party litigation) encouraged the view that *Charlesworth* v. *Holt* and *Goslin* v. *Clark* might be overruled on the basis of recognizing an implied term limiting the obligation to the period during which the parties were still man and wife. A strong argument along these lines was submitted by counsel when the same point came eventually before the Court of Appeal in *May* v. *May*, [1929] 2 K.B. 387. The facts on this occasion were very similar to those in *Charlesworth* v. *Holt*, except that it was the husband who had committed adultery and against whom the decree had been made. Such a situation had been foreseen in the judgments in *Charlesworth* v. *Holt*, when it had been suggested that the husband's own misconduct should not enable him to free himself from his covenants. Without stressing that aspect (indeed, the argument seems ill founded, as it is the voluntary act of the wife in petitioning that leads to the decree) the Court of Appeal felt that *Charlesworth* v. *Holt* had stood too long to be upset, and the plea of "implied term" or frustration was definitely, though not without some measure of reluctance, rejected.

Charlesworth v. *Holt*, with the endorsement of *May* v. *May*, is recognized as binding in New Zealand. For example in *Lodder* v. *Lodder*, [1923] N.Z.L.R. 785, Salmond, J., on a point not affected by the subsequent appeal, held that a covenant in a separation deed enured beyond the date of the divorce, expressly following *Goslin* v. *Clark* and *Charlesworth* v. *Holt*. They have been recognized as binding in several later decisions, including *Garratt* v. *Garratt*, [1940] N.Z.L.R. 732.

Owing to differences in conveyancing practice in England and New Zealand, these decisions are, however, not necessarily applicable to a number of separation agreements drawn in New Zealand. All the English decisions so far referred to related to separation deeds in which a period for the duration of the deed was expressed. It may be for the life of the wife or for the joint lives of husband and wife. But a separation deed may contain no indication in express terms of the period for which it is to remain in force. The husband's covenant to pay maintenance may do no more than define the amount, place and mode of payment, and date from which payments are to commence. In this case the *ratio* of *Charlesworth* v. *Holt*—that the express covenant in the deed is to provide for the wife for life and that no term is to be implied cutting down the full operation of that covenant—is plainly inapplicable. If the covenant in such a case is to apply even after the parties have been divorced, it can only be because the Court can find affirmative indications of that intention. The intractable terms of a solemn covenant in no way impede the effort to construe the contract as enduring exactly so long as the parties intended it to endure. The distinction has been taken by Macfarlan, J., in *Watts* v. *Watts*, [1933] V.L.R. 52. By a deed of separation, after a recital that the parties had agreed to live separate and apart from each other "for the future," the husband covenanted with the wife to pay her a weekly sum for the maintenance of herself and her child. The covenant did not specify the period for which it was to operate. The Court held that the deed should be interpreted as being limited to the period during which the parties lived apart under it and as ceasing to operate on the dissolution of the marriage between the parties. The point was discussed in *Garratt* v. *Garratt*, [1940] N.Z.L.R. 732, but as the deed in that case was construed as making provision for the joint lives of the parties the question did not have to be decided. But Myers, C.J., in referring to *Watts* v. *Watts*, observed that the English authorities did not apply to deeds where no term is expressed, and indicated that the question was still open for argument in New Zealand. Indeed, His Honour mentioned a further reason why *Watts* v. *Watts* might be followed in this country—namely, that an agreement to separate could not, in England, be concluded (as it usually is in New Zealand) with the anticipation of a later divorce founded on the very agreement to separate. In these circumstances it may undoubtedly be the fact that the parties in most cases intend their agreement to be effective only until a divorce, if any, is decreed. If a divorce is later granted on the grounds of separation under the agreement, and no term for its duration has been expressed, circumstances may readily permit the inference that the agreement was intended to terminate on the decree. In *Hole* v. *Hole*, [1936] N.Z.L.R. 1010, the deed might have been so construed, but the decision in *Watts* v. *Watts* was not cited, and on appeal, [1937] N.Z.L.R. 275, the case was decided on another ground. The question is accordingly still at large.

Before leaving this topic a possible source of confusion may be mentioned. The basis of *Watts* v. *Watts* is that the parties foresee the possibility of divorce and presumably intend to provide only for the period that they remain man and wife. On the other hand in cases such as *Adams* v. *Adams*, [1941] 1 All E.R. 334, it has been held that a mere common expectation that the marriage status may be determined falls far short of an agreement between the parties amounting to a condition. In *May* v. *May*, [1929] 2 K.B. 386, Scrutton, L.J., said that the question was not whether the parties might, but whether they must, have made their bargain on the footing that they remained husband and wife. The reasoning on which *Watts* v. *Watts* is based is entirely distinct from any such question of frustration. It is not a matter of qualifying the otherwise absolute covenants of a deed, but merely of determining their original content. A distinction of a similar type is familiar in the sphere of property, when an interest subject to forfeiture on a certain condition is contrasted with an interest the duration of which is determined by reference to an uncertain event.

Husband and wife may legitimately enter into a separation agreement in the knowledge that separation pursuant to the agreement will in fullness of time afford grounds for divorce. But it should be borne in mind that this is not the same as entering into such an agreement for the express purpose of giving grounds for divorce. For reasons which will probably commend themselves to few lawyers nowadays, an agreement of the second type has been held to be collusive: *Belbin* v. *Belbin*, [1930] G.L.R. 172. But collusion in this case is only a discretionary bar and it seems unlikely that a decree will ever be refused solely on that ground.

Although a separation deed may remain operative after the parties are divorced, this does not affect the right to apply for an order for alimony or for permanent maintenance under statutory provisions. It is immaterial whether or not the deed contains a covenant not to sue for an order. In *Hyman* v. *Hyman*, [1929] A.C. 601, the House of Lords, affirming the Court of Appeal, held that a wife who covenants by a deed of separation not to take proceedings against her husband for alimony or maintenance beyond the provision made for her by the deed and who thereafter obtains a decree for divorce on the ground of her husband's adultery is not precluded by her covenant from petitioning the Court for permanent maintenance. Public policy requires that the parties may not contract themselves out of the statutory provisions in this way. This decision established beyond question what had already been decided by the Court of Appeal in *Bishop* v. *Bishop*, [1897] P. 138, in which it was held that on granting a divorce on the ground of misconduct by the husband subsequent to the date of a separation deed the Court could disregard the provisions of the deed and grant increased maintenance.

In New South Wales and Victoria it had been held that alimony *pendente lite* could not be ordered if the deed contained a covenant not to sue. See, for example, *Brooker* v. *Brooker*, [1910] V.L.R. 488. But the Full Court in New South Wales has now overruled the earlier decisions to that effect in that State: *Seymour* v. *Seymour and Delaney*, (1936) 36 S.R. (N.S.W.) 667. It was there held by Jordan, C.J., Stephen, J., and Maugham, A.J., that the Court has jurisdiction to hear and determine an application for alimony *pendente lite* notwithstanding a prior separation deed with a covenant not to sue, but that the nature of the provision made by the separation deed and the fact of the existence of the covenant are matters to be taken into consideration.

The separation deed may itself be varied under the statutory powers as to varying ante-nuptial and post-nuptial settlements: Divorce and Matrimonial Causes Act, 1928, s. 37. A separation agreement containing provision for maintenance payments is a "post-nuptial settlement" for this purpose: *Worsley* v. *Worsley, and Wignall*, (1869) L.R. 1 P. & D. 648, and see *Soler* v. *Soler*, (1898) 17 N.Z.L.R. 49.

In *Prinsep* v. *Prinsep*, [1929] P. 225, Hill, J., said that if a settlement was made after the marriage upon the husband in the character of husband or upon the wife in the character of wife or upon both in the character of husband and wife it was a post-nuptial settlement within the meaning of the Act. "The particular form of it does not matter. It may be a settlement in the strictest sense of the term; it may be a covenant by one spouse to pay another, or by a third person to a spouse. What does matter is that it should provide for the financial benefit of one or other or both of the spouses and with reference to their married state." In *Melvill* v. *Melvill and Woodward*, [1930] P. 99, the Court of Appeal reviewed the authorities and approved dicta that a wide and liberal interpretation must be given to the statutory provision.

Orders for maintenance at rates other than those specified in the agreement were made in *Lisle* v. *Lisle*, [1923] N.Z.L.R. 410, and *Hole* v. *Hole*, [1936] N.Z.L.R. 1010, but refused in *McDowell* v. *McDowell*, [1941] G.L.R. 205. Where the husband is liable under an order as well as under his agreement, payments under the one are sometimes declared by the order itself to be *pro tanto* discharge of liability under the other. See *Reid* v. *Reid*, [1926] P. 1, followed in *Hole* v. *Hole* (*supra*). But in the absence of express provision it would appear that payments under a maintenance order are cumulative with payments under the deed. The order should therefore be in terms similar to those in *Reid* v. *Reid*, or should be for the difference between the amount specified in the deed and the amount which the Court thinks should be awarded. (See W. N. Harrison, Separation Deeds and Maintenance Orders, 8 A.L.J., 359.) But as this course is not always adopted it has been suggested that separation deeds should contain a clause terminating the liability to make payments under the deed if a maintenance order should be made, or making the payments under the deed reducible by the amount of any order.

Orders for weekly or monthly payments for the life of the wife, as distinct from the joint lives of husband and wife, are outside the jurisdiction of the Court except when made by consent, but such consent orders are valid: *Hole* v. *Hole*, [1941] N.Z.L.R. 418, and may be varied: *F.* (*now M.*) v. *F.*, [1941] N.Z.L.R. 279.

Even where the Court considers that the amount stipulated in the agreement is reasonable, the wife may be entitled to the additional benefit of an order of Court for payment at the same rate: *Buzza* v. *Buzza*, [1930] N.Z.L.R. 737. And as the woman loses her status as wife by the decree of divorce and thereby loses a possible claim under the Family Protection Act if her husband should predecease her,

security for performance of the Court order may also be required under s. 33 (1): *Sarten* v. *Sarten*, [1935] G.L.R. 414.

The effect of divorce on a summary maintenance order was for a long time a matter of debate. See *Burke* v. *Burke*, [1934] N.Z.L.R. 978, where the conflicting authorities were referred to. The matter is now settled by the Domestic Proceedings Act, 1939, s. 9, which provides that a maintenance order under Part III of the Destitute Persons Act, 1910, is not affected by dissolution of the marriage between the parties.

(Though outside the scope of this article, reference may be made in passing to the Social Security Act, 1938, s. 94 (3), which terminated liability under summary orders for the maintenance of inmates in mental institutions, this responsibility being assumed by the State.)

(*To be concluded.*)

LONDON LETTER.

Somewhere in England,
July 14, 1941.

My dear EnZ-ers,

King Leopold Vindicated.—Admiral of the Fleet, Sir Roger Keyes, in his libel action against the *Daily Mirror* for its attack on King Leopold of the Belgians, was tendered a sincere apology in Court for the criticism which he had received from that newspaper. Apologies, however, did not rest there. It was apparent from the facts stated by Sir Patrick Hastings, K.C., on behalf of Sir Roger Keyes that a very grave injustice had been done to the King of the Belgians, who, like Sir Roger Keyes, had acted throughout in accordance with the highest traditions of honour and justice. The defendants accordingly wished to take advantage of the opportunity to tender also to King Leopold, who was not now in a position to defend himself, their most sincere and respectful apology for the injustice which they had unwittingly done him. It had been proved that King Leopold, when his country was invaded, had placed himself and his army under the French High Command, and the movements of his army conformed with the orders of that Command.

Leave to Proceed.—Readers are aware of the decision of Farwell, J., in *National Provincial Bank, Ltd. and Liddiard*, [1941] 1 All E.R. 97, that where a person charges his property as security for another person's debt, for the payment of which the mortgagor is not liable, the latter is not entitled to claim the protection afforded by s. 1 (4) of the Courts (Emergency Powers) Act, His Lordship in the result dismissing the application by the mortgagee for realization on the ground that no leave was required. We have always felt a difficulty in accepting the conclusion arrived at, as it seemed to ignore the definite provision of s. 1 (2) (*a*) that the remedies therein mentioned (unless the case came within the proviso to the subsection) were not exercisable unless the leave of the Court had been obtained. It is therefore with some satisfaction that I am able to record a decision given by Morton, J., on May 2, in *Re Midland Bank, Ltd. and Franklin*, where, on corresponding facts, the learned Judge held it was procedurally wrong to dismiss the summons, the proper course to take being to make an order giving leave. A full report of the case is now available, [1941] 2 All E.R. 135.

Is a Kitchen a Factory?—You know more about labour legislation than we do; and we hear that some of yours is weird and wonderful to behold. You may like to hear that the Court of Appeal have upheld the decision of the Court below that a kitchen is not a factory: *Wood* v. *L.C.C.*, *Times*, May 14. If it is a factory, all sorts of things are required of those who employ workpeople in it; amongst others, the requirement that machinery which is possibly dangerous to those who work there should be securely fenced. A workwoman in a mental home kept by the defendants was injured while working at an electric mincing machine (or something of that kind). She sued for breach of statutory duty in that the machine was not fenced as such machines, if they are in factories, must be. The Judge below found that the kitchen was a factory within the definition contained in s. 151 of the Factories Act, 1937; but he found that the unfortunate servant was so careless in her attention to her work that she was the author of her own injury. The servant appealed on the negligence finding, but without success. The Court of Appeal therefore need not have said anything on the factory point. The Lords Justices, however, did think it right, and, no doubt it *was* right, to declare that a kitchen was not within the definition of factory in the 1937 Act, even if it be largely used for trade or gain. Lord Justice MacKinnon's opinion on the matter seems, if I may say so, to be unanswerable. To go no further, a kitchen, if a factory, would be so limited in hours of work as to make it of little value. But the language of the section is very wide.

Non-combatants.—The War Office issued a useful little statement a few days ago about non-combatant corps. We do not think that many people confuse the Pioneer Corps with the conscientious objectors. These last are gathered together by the Army Council into what is called the "Non-combatant Corps." The pioneers were well known in the last war. They did endless good work in and behind the lines, and many of our readers who were at the front had occasion to be grateful to them. But they could, and sometimes did, fight. The Non-combatant Corps are not armed, and the Army Council decided early in the war that the only use which could be made of them was to turn them into a labour corps. They are attached to the Pioneers for administrative purposes only, such, we suppose, as pay, rations and discipline. If a conscientious objector finds that, after all, his conscience has misled him, he can be moved out by due formalities into the Pioneers or into a fighting unit. But the Objectors' Corps, and the Pioneers, though united for administration, are essentially separate. In case anybody should confuse them, the Army Council have done well to make the distinction clear.

Nuisance and Negligence.—Claims for nuisance and claims for negligence are often closely intertwined. The connection has never been closer than in the case of *Dollman* v. *Hillman, Ltd.*, in which the Court of Appeal recently upheld a judgment of Mr. Justice Asquith, though they did not accept his reasons for it.

A piece of slippery fat somehow came to be on the pavement outside a butcher's shop. The plaintiff fell on it and claimed from the butchers in nuisance and negligence. Mr. Justice Asquith thought that the defendants should have been aware of the presence of the fat in time and should have warned the plaintiff of the danger. One of their servants was, indeed, looking at her as she approached. The learned Judge therefore, as we read the report, held the defendants liable for omitting to remedy a nuisance. With this the Court of Appeal did not agree. They found that the butchers caused the nuisance either directly, by employing careless choppers of their meat, or indirectly by allowing their customers to carry out on their shoes fragments of fat. They also found that the facts established below would support a finding of negligence. We were not aware till now that butchers were expected to examine their customers' feet as they leave their shops: but we live to learn. Probably the whole thing is due to the scarcity of packing paper, which compels butchers to hand over parcels of meat not so firmly wrapped up as they were before the war.

"**Free of Tax.**"—In the Golden Age, when income-tax was a mere shilling in the pound, the construction of testamentary directions as to the payment of income-tax were a matter of almost academic interest, or at the best a protection for the trustees. To-day a direction to pay even a moderate sum free of tax involves a heavy burden on the estate, a burden frequently much heavier than the testator had realized at the time he made his will. In a recent case (*Re Frazer*, May 2) Farwell, J., held that, notwithstanding a direction by the testator in his will to pay his widow an annual sum "free of all taxes (including income-tax)," yet Kenya income-tax was not thereby included. That tax became payable by reason of the widow's going to live in Kenya on her re-marriage, and the Judge said that it was not a burden on the estate which had been contemplated by the testator, who was an Englishman ordinarily domiciled in England, and what the testator meant by "free of all taxes (including income-tax)" was all taxes properly payable in this country. Although he stated that the case before him was not covered by *Re Norbury*, [1939] Ch. 528, [1939] 2 All E.R. 625, he adopted the reasons given by Bennett, J., in that case when the latter said: "Nor, I suppose, would many of them contemplate some additional burden being imposed upon their estates by a change of residence on the part of a person to whom a legacy had been given."

Clothes and the Man.—And the woman, too, for does not the Statute Book tell us that "the masculine includes the feminine," and so for man and woman alike clothes are rationed as from the first of this month. By what mysterious tailor's measure the Board of Trade has fixed the ration I do not pretend to know. To that authority, in these days, when the principles of free trade are "gone with the wind," the laws of supply and demand mean nothing. Sixty-six coupons fix the supply for a year and beyond that limit demand will be met with what Carlyle called "the Everlasting No"; a forgotten sage, perhaps, but a hundred years ago he faced this problem of "nothing to wear" in his "Philosophy of Clothes," published under the title of *Sartor Resartus*. As to the Judge on circuit, for instance, he wrote: "Has not your Red hanging individual a horsehair wig, squirrel skins and a plush gown; whereby all mortals know that he is a *Judge*?—Society, which the more I think of it astonishes me the more, is founded upon Cloth." And if the Board of Trade has made a mistake, and the sixty-six coupons do not hold out, I have it on this high authority that the foundation will be gone and society will be dissolved. But even the Board of Trade is not inexorable. It knows that the Judge must have his awe-inspiring raiment, the barrister his gown, and even the solicitor, I believe, sometimes "dresses for Court." All these, properly considered are "workmen's overalls" and are coupon-free.

What is a Motor-vehicle?—That valuable periodical, *The Journal of Criminal Law*, recorded in a recent number two interesting decisions of the Court of Justiciary (*Macdonald* v. *Carmichael*; *Orr* v. *Carmichael*, pp. 59, 61). They will probably be reported more fully in due course; but the records are quite long enough to explain the facts and decisions. The question was in both cases whether a machine called a "Diesel Dumper" was a motor-vehicle within the Road Traffic Act and the Finance Acts. This creature, for we do not know what else to call it, has four wheels, rubber tyres, and an engine by which it can be propelled along roads. It lacks certain other characteristics of the motor-vehicle as generally understood. It is used only in connection with work of road construction and the work done by a mechanical excavator, which it relieves of excavated soil. [Possibly a "bulldozer's mate": ED.] On rare occasions it carries earth from an excavating point to an embankment which is being made. But it is altogether unsuitable for the work of ordinary road transport. On all the facts the Court of Justiciary came to the conclusion that this useful creature was not a mechanically-propelled vehicle "intended or adapted for use on roads." These are the vital words in the opening definition in the Road Traffic Act, 1930. The decision depends a good deal, we think, on the meaning which should be given to the words "use *on* roads." The point is arguable, and, of course, Scots' decisions, though always respected here, are not binding. As to the taxation case, it was clear. It is to just such vehicles that immunity is given by s. 10 of the Finance Act, 1936.

Yours as ever,
APTERYX.

ROLL OF HONOUR.

Private J. A. Jamieson, Te Puke.

Mr. J. A. Jamieson, who was the resident partner at Te Puke of the firm of Messrs. Cooney and Jamieson, was killed in action in Greece at the age of forty-two years.

When he enlisted in January, 1940, Private Jamieson was Deputy-Mayor of Te Puke, where he had been elected as Councillor for two terms, on each occasion being at the head of the poll.

Private Jamieson was associated with most sporting activities in the town; and, when younger, he was prominent as a Rugby representative, as well as in athletic circles. He represented his school at Rugby and in track events. After leaving school, he entered the Native Department at Rotorua, where he remained until he entered the legal profession.

RECENT ENGLISH CASES.

Noter-up Service
FOR
Halsbury's "Laws of England"
AND
The English and Empire Digest.

CONTRACT.

Impossibility of Performance—Frustration—Charterparty—Unexplained Accident to Ship—Onus of Proof that Accident not due to Negligence—Bursting of Auxiliary Boiler.

There is no ground for the proposition that the party relying on frustration must establish affirmatively that the cause was not brought into operation by his default; the opposite view would mean that a litigant had to prove a negative, and there is nothing in the authorities to demand it.

JOSEPH CONSTANTINE STEAMSHIP LINE, LTD. *v.* IMPERIAL SMELTING CORPORATION, LTD.; "THE KINGSWOOD," **[1941] 2 All E.R. 165. H.L.**

As to frustration: see HALSBURY, Hailsham edn., vol. 7, pp. 212–217, par. 296; and for cases: see DIGEST, vol. 12, pp. 379–383, Nos. 3131–3158.

CRIMINAL LAW.

Criminal Law—Arrest Without Warrant—Under Statutory Provisions—Indecent Exposure—Power to Arrest Offender—Offence not Committed—Reasonable Cause for Suspicion—Vagrancy Act, 1824 (c. 83), ss. 4, 6.

Where complaint was made to the police of indecent exposure, and a description given by telephone, was followed by the arrest of the man indicated, and it was later found that there had not been any exposure, it was held that, although the police officers did not see the alleged offence, the doctrine of instant or itinerant arrest would obviate the point that the constable had not power, either at common law or by statute, to arrest; and consequently, the initial arrest and the subsequent detention were lawful.

STEVENSON *v.* AUBROOK AND OTHERS, **[1941] 2 All E.R. 476. K.B.D.**

As to power of arrest without warrant: see HALSBURY, Hailsham edn., vol. 9, pp. 89–95, par. 119; and for cases: see DIGEST, vol. 14, pp. 183–186, Nos. 1617–1660.

DAMAGES.

Damages—Breach of Contract—Failure to Deliver Goods—Goods Already Advertised—Loss of Co-operation of Advertisers.

If pecuniary loss can be proved, the mere fact that it was brought about by the loss of reputation caused by a breach of contract did not prevent its being recovered; but this loss must have been within the contemplation of the defaulting party at the time when the contract was made.

FOAMINOL LABORATORIES LTD. *v.* BRITISH ARTID PLASTICS LTD., **[1941] 2 All E.R. 393. K.B.D.**

As to damages in contract: see HALSBURY, Hailsham edn., vol. 10, p. 121, par. 151; and for cases: see DIGEST, vol. 17, pp. 130–135, Nos. 380–412.

DIVORCE.

Incurable Unsoundness of Mind—Period of Cure and Treatment—Detention under Order followed by treatment as Voluntary Patient—Mental Treatment Act, 1930 (c. 23), s. 5—Matrimonial Causes Act, 1937 (c. 57), s. 3.

Where a wife was detained under a direction by the Board of Control in a mental hospital under the provisions of the Mental Treatment Act, 1930, and, immediately following such detention, she was admitted to another mental hospital as a voluntary patient, where she remained for the statutory period, the statutory conditions were fulfilled, and the husband was entitled to a decree.

BENSON *v.* BENSON (BY HER GUARDIAN), **[1941] 2 All E.R. 335. P.D.A.**

As to divorce on ground of insanity: see HALSBURY, Supp., Divorce, par. 981; and for cases: see DIGEST, Supp., Husband and Wife, Nos. 3015a–3015e.

EMERGENCY LEGISLATION.

Order for Specific Performance—Failure of Purchaser to Obey Order—Application by Vendors to Forfeit Deposit—Courts (Emergency Powers) Act, 1939 (c. 67), s. 1 (2) (*a*) (iv).

The Courts (Emergency Powers) Act, 1939, has no application to proceedings by vendors, successful in proceedings for specific performance in which the defendant failed to comply with the judgment, for an order for the rescission of the contract and forfeiture of the deposit as the proceedings were not a claim by the vendors to exercise a remedy for the payment or recovery of money, but a claim to exercise a right to retain money, which, on the terms of the contract, was their money; and there was no dispensing power in the Court in equity to refuse the order, to which the vendors were entitled ex debito justitiae.

JOHN BARKER AND CO., LTD. *v.* LITTMAN, **[1941] 2 All E.R. 537. C.A.**

As to the Courts (Emergency Powers) Act, 1939, s. 1 (2): see HALSBURY'S COMPLETE STATUTES OF ENGLAND, vol. 32, pp. 947, 948; and BUTTERWORTH'S EMERGENCY LEGISLATION, Statutes Volume, p. 207.

GAMING.

Unlawful Games—Poker—Gaming-house Conducted by Company—Sale of Shares—Contract Founded on Illegality—Gaming Act, 1845 (c. 109), s. 2—Gaming Houses Act, 1854 (c. 38), s. 4.

If the Court comes to the conclusion that the true nature of a transaction sued upon was that the parties were intending to carry on some illegal undertaking, then it is the duty of the Court to take the point and not to be the means of enforcing the transaction.

When such a transaction is the purchase of shares in a company conducting a gaming establishment, and the games played were unlawful within the definition in Jenks *v.* Turpin ((1884) 13 Q.B.D. 505), *the transaction was not a mere bargain to buy shares, but it was an incident in the carrying on of an unlawful business.*

GOODCHILD *v.* WELLBORNE, **[1941] 2 All E.R. 449. K.B.D.**

As to unlawful games: see HALSBURY, Hailsham edn., vol. 15, pp. 501, 502, pars. 904, 905; and for cases: see DIGEST vol. 25, pp. 423–425, Nos. 260–270.

TRUSTS.

Rule in *Re Chesterfield's Trusts* — Applicable only to Personalty.

The rule in Re Chesterfield's Trusts ((1883) 24 Ch.D. 643) *does not apply to realty; and no apportionment between the executors of tenants for life, on their death, and the persons in whom the reversionary interests in the real estate became vested, could be made.*

Re WOODHOUSE: PUBLIC TRUSTEE *v.* WOODHOUSE, **[1941] 2 All E.R. 265. Ch.D.**

As to rights in reversionary and wasting property: see HALSBURY, Hailsham edn., vol. 33, pp. 117–121, pars. 207, 208; and for cases: see DIGEST, vol. 20, pp. 368–370, Nos. 1062–1074.

RULES AND REGULATIONS.

Poultry Act, 1924. Poultry Regulations, 1941. No. 1941/125.
Emergency Regulations Act, 1939. Motor-drivers Emergency Regulations, 1941. No. 1941/126.
Emergency Regulations Act, 1939. Naval Dockyard Emergency Regulations, 1940. Amendment No. 1. No. 1941/127.
Agriculture (Emergency Powers) Act, 1934, and the Emergency Regulations Act, 1939. Butter-box and Cheese-crate Pool Regulations, 1941. No. 1941/128.
Industrial Efficiency Act, 1936. Industry Licensing (Waxed-paper Manufacture) Revocation Notice, 1941. No. 1941/129.
Emergency Regulations Act, 1939. Defence Emergency Regulations, 1941. No. 1941/130.
Social Security Act, 1938. Social Security (Pharmaceutical Supplies) Regulations, 1941. Amendment No. 1. No. 1941/131.
Industrial Efficiency Act, 1936. Industrial Efficiency (Electric Range) Regulations, 1941. No. 1941/132.
Motor-spirits (Regulation of Prices) Act, 1933. Motor-spirits Prices (Hawke's Bay–Wairarapa) Regulations, 1937. Amendment No. 4. No. 1941/133.
Marketing Act, 1936, and the Agriculture (Emergency Powers) Act, 1934. Bobby Calf Marketing Regulations, 1939. Amendment No. 1. No. 1941/134.
Post and Telegraph Act, 1928. Postal Amending Regulations, 1941. No. 1941/135.
Stone-quarries Act, 1910. Stone-quarries Amending Regulations, 1941. No. 1941/136.
Marketing Act, 1936. Bobby Calf Marketing Regulations, 1939. Amendment No. 2. No. 1941/137.
Post and Telegraph Act, 1928. Postal Amending Regulations, 1941, No. 2. No. 1941/138.