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"With all its shortcomings, the democratic state is the highest political achievement of civilization. Liberty, the aim and the fruit of democracy, is, as Emerson stated, 'an accurate index, in men and nations, of general progress'."

—GEORGE R. FARNUM, of the Boston Bar, formerly Assistant Attorney-General of the United States.

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APPEALS FROM JUSTICES: INCREASING THE FINE.

IT has become a common practice to ask the presiding Magistrate or Justices to increase a fine in order to enable a general appeal from his or their determination to be brought. Section 315 of the Justices of the Peace Act, 1927, provides that the party convicted may appeal to the Supreme Court where "the fine or sum of money ordered to be paid exceeds five pounds exclusive of costs." It is usual to apply to have a fine increased to £5 1s. to bring the section into operation when the penalty imposed is less than the prescribed amount, if it is desired to appeal to the Supreme Court against the decision of the Court of summary jurisdiction.

In the recent case, *Phillips* v. *Graham* (to be reported) the Full Court laid down definitively the practice to be observed in relation to this increasing of fines, and the judgment especially limits the time within which such an increase can effectively be made. The precise direction given by the Court to tribunals exercising summary jurisdiction, as to increasing a fine to allow of an appeal, is of permanent value to all engaged in practice in the lower Courts. (This appears at the conclusion of this article.)

The question arose as a preliminary objection to the hearing of a general appeal against the decision of a Stipendiary Magistrate. The appellant had been charged with operating a motor-lorry in such mechanical condition as to cause damage to property contrary to Reg. 4 (2) of the Traffic Regulations, 1936. The hearing of the information took place on October 1, 1940, on which day the Magistrate fined the defendant £2 and ordered him to pay Court costs. On October 4, the defendant's solicitor, accompanied by the Sub-Inspector of Police who had conducted the prosecution, appeared before the convicting Magistrate and asked that the penalty imposed be increased to an amount that would enable a general appeal to be lodged. Accordingly, the learned Magistrate increased the amount of the fine to £5 1s., in addition to the Court costs ordered to be paid.

It was submitted for the Crown, as a preliminary objection, at the commencement of the hearing of the appeal in the Supreme Court, that the learned Magistrate, being *functus officio* on October 4, had no jurisdiction to increase the penalty to allow of a general appeal. In view of the importance of the question in the administration of justice in the lower Courts, His Honour Mr. Justice Johnston ordered the appeal to be re-heard before a Full Court. We may say here that no question as to rehearing arose, as the learned Magistrate did not rehear the case, but merely agreed to increase the penalty, if he had power to do so; and there was no question of any omission or mistake on his part in drawing up his minute.

The Full Court (Sir Michael Myers, C.J., and Blair, Kennedy, Callan, and Northcroft, JJ.) dealt with the Crown's objection at the recent Court of Appeal sittings. The main submission for the Crown was that once the Stipendiary Magistrate had entered the conviction and penalty in the Criminal Record Book, he was *functus officio*, except for certain matters not relevant here: this was his final judgment, and it could not be altered by him even with the consent of the parties. The Court was unanimous that the presiding Magistrate, in the circumstances of this case, had no jurisdiction to increase the fine. While agreeing that this was so, Mr. Justice Northcroft dissented from his brother Judges as to the jurisdiction of a Court of summary jurisdiction to increase a fine merely to give the defendant the right of appeal; the majority considered that there was such jurisdiction, but that it could be exercised only within definitely prescribed limits as to time and place.

The judgment of the majority, Sir Michael Myers, C.J., and Blair, Kennedy, and Callan, JJ., was delivered by Mr. Justice Kennedy. After referring to ss. 61, 69, 72, 73, 74, and 91 of the Justices of the Peace Act, 1927, their Honours said that the Magistrate, having heard and determined the case by conviction and having adjudged the payment of a

fine and costs, and having, as required by s. 74, signed a minute or memorandum thereof in the Criminal Record Book, had no jurisdiction remaining in respect of the information to make a substituted adjudication of penalty and costs on October 4. The judgment proceeded:

> He had prior to that date done all, in respect of the information, which he might do in the way of hearing, trying, determining, and adjudicating. A different adjudication could properly have been made on October 4 only on a rehearing if the Magistrate, in the exercise of his discretion, had granted a rehearing pursuant to the power conferred by s. 122.

Their Honours then referred to the opposing submission that the Magistrate's determination was not final until the conviction was drawn up; and that, until such date, he might alter or vary his determination or adjudication. But, their Honours said, if this were so, there could logically be no limit to the Magistrate's power, except that possibly a dismissal might not be altered; but a conviction might be reversed, and a dismissal substituted, on any subsequent day however remote, so long only as the conviction had not been drawn up. They continued:

> It is not necessary in all cases to draw up the conviction. Indeed, it is now to be drawn up only when necessary. Moreover, the provision that a minute or memorandum of the conviction in the Criminal Record Book shall be signed by the Justices, constitutes that minute or memorandum matter of record. The Criminal Record Book, or any extract therefrom, certified to be a true extract by the Clerk of the Court keeping the same, is sufficient evidence in all Courts to prove such conviction, that is, to prove such conviction although it is not drawn up. If then the conviction may be sufficiently proved before the conviction is formally drawn up, the drawing up of the conviction is merely an administrative act following an actual operative conviction, and not merely a potential conviction. As Sim, J., is reported to have said in *Salaman* v. *Chesson*, [1926] G.L.R. 205, "The operative conviction is the Magistrate's pronouncement in Court."

After referring to *The King* v. *Manchester Justices, Ex parte Lever*, (1937) 106 L.J. K.B. 519, 521, 522; *Jones* v. *Williams*, (1877) 46 L.J. M.C. 270, 271; *Bagg* v. *Colquhoun*, [1904] 1 K.B. 544, and *The King* v. *Marsham, Ex parte Pethick Lawrence*, (1912) 81 L.J. K.B. 957, 958, the judgment proceeded:

> Whatever be the time at which the Magistrate has lost his power to deal further with the information, it is, upon any view, clear that, when the application was made on October 4, the Magistrate was *functus officio* of the determination and adjudication, and had no jurisdiction to increase the penalty.

Their Honours then referred to two New Zealand cases, which had been the subject of much discussion in the argument before them: *Lang* v. *Reid*, [1916] N.Z.L.R. 1186, and *Pellatt* v. *Barling* (*No. 2*), [1933] N.Z.L.R. s. 23. Of these, they said:

> In *Lang* v. *Reid*, Edwards, J., expressed the opinion that, in proper cases, Justices on application could increase the penalty to permit of a general appeal. In *Pellatt* v. *Barling* (*No. 2*), Mr. Justice Blair expressed the opinion that in the particular case this should have been done. It is obvious that their minds were not directed to the point now discussed, and they are not to be taken as having expressed the view that Justices, who have determined and adjudicated upon the information and signed the minute in the Criminal Record Book, have the power and the duty on a subsequent day without rehearing the case to increase the penalty to permit of a general appeal. The appellant had no right, it was argued, *ex debito justitiae* to have the penalty so increased.

Their Honours added that their judgment should not be taken as casting any doubt upon the propriety of the conduct of Justices, who on the defendant's application, before they 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.

The minority judgment of Mr. Justice Northcroft, is, if we may say so with respect, more in touch with reality. His Honour did not challenge the reasons given in the majority judgment; and he agreed with the result that the Magistrate in the case had not jurisdiction to increase the fine as and when he did. At the same time, His Honour thought this result should be reached by another route. In his view, there is no jurisdiction in the Magistrate or Justices to increase the fine at any time.

Mr. Justice Northcroft, in the course of his judgment, said that, with respect to the learned Judges who had discussed the matter and had indicated a contrary opinion, he was unable to assume that the conferring of a general right of appeal is a consideration proper to be taken into account when fixing a penalty under the authority of the Justices of the Peace Act, 1927. He said:

> Section 315 of that Act gives a general right of appeal only where the punishment is a fine of more than £5 or imprisonment for more than one month. If, upon a review of all the circumstances, other than this matter of appeal, the Justice considers a fine of £5 or less is appropriate, then I think he is not entitled to increase the penalty merely to let in a right of appeal. To do so is to forsake the subject of punishment and to go to a matter of procedure. This process, as it seems to me, involves first a fixing of the appropriate penalty, and then the consideration of an application for leave to appeal. With respect, I think this is an assumption of power which the Legislature has refrained from conferring, and one which is not validated because it purports to be done as a fixing of penalty. If, as here, the Magistrate thought £2 an appropriate fine, then he did not in truth alter his decision upon that subject when he increased it to £5 1s. He did no more than grant leave to pursue a general appeal in circumstances in which the Legislature had said there should be no such appeal.

His Honour went on to consider the references made to this topic by Cooper, J., in *Thompson* v. *Grey*, (1904) 24 N.Z.L.R. 457, 469, mentioning *The Queen* v. *Galway Justices*, (1879) 14 Cox C.C. 386. His Honour was unable to adopt the opinions approving the present practice in New Zealand found in the *obiter dicta* of Edwards, J., in *Lang* v. *Reid*, [1916] N.Z.L.R. 1186, 1193, which had been adopted and quoted with approval by Blair, J., in *Pellatt* v. *Barling* (*supra*). Unlike those cases, in the present case the authority of a Justice to increase a penalty so as to let in a right of appeal was directly in issue. His Honour commented, as follows:

> As I understand it, both Edwards, J., and Blair, J., have asserted a power in the Justice to grant a right to appeal where special circumstances justify it. This power is not to be found in the language of the statute, and I do not think it is legitimate to read s. 315 as if, to the limitation of appeal, there were added such words as: "or when the Justice thinks there are special circumstances which make it just that there should be a general appeal." The reasons given by Edwards, J., for the conferring of such a power upon Justices, or upon this Court [the Supreme Court] would be cogent in Parliament on a question of amendment to the statute; but I cannot accept their validity in this Court upon the application or construction of the statute.

The learned Judge then pointed to the distinction in s. 67 of the Judicature Act, 1908, where statutory authority is given for leave to be given to appeal to the Court of Appeal; and he quoted the judgment

of Salmond, J., in *Rutherfurd* v. *Waite*, [1923] G.L.R. 34, 35, where that learned Judge discussed more fully, but to the same effect as did Edwards, J., in *Lang* v. *Reid* (*supra*), the circumstances which justify the granting of leave to appeal pursuant to the Judicature Act. The distinction between the two cases last cited lies in the fact that the one statute did, whereas the other statute did not, confer a power to grant such leave to appeal.

Before concluding his judgment, Mr. Justice Northcroft drew attention to the practice which the case suggested as having possibly grown up upon the authority of *Lang* v. *Reid* (*supra*). If special circumstances would justify the giving of a right of general appeal by the device of increasing the fine, as Edwards, J., had indicated, then, in the case before the Court His Honour could find no special circumstances to justify a general appeal. If the practice indicated in *Lang* v. *Reid* were to be followed, then, His Honour observed, it should not degenerate into an automatic granting of the right of appeal always to be conferred at the election of the person convicted. Before increasing the punishment, the Justice should be satisfied that good cause had been shown, in accordance with the principles laid down in *Lang* v. *Reid* and *Rutherfurd* v. *Waite* (*supra*).

As the result of the majority view, the objection was sustained, and no appeal lay.

Before concluding their majority judgment, their Honours set out the principles to guide Courts of summary jurisdiction, when asked to increase a penalty to let in a general appeal. They said:

> Except upon a rehearing, a Magistrate or Justices 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 has, following such oral pronouncement in Court, been made in the Criminal Record Book, and has been signed by the Magistrate or Justices.

SUMMARY OF RECENT JUDGMENTS.

SUPREME COURT. Hamilton. 1941. May 27; July 26. *Johnston*, J.

ROTORUA AND BAY OF PLENTY HUNT CLUB (INCORPORATED) v. BAKER.

Land Transfer—Power of Attorney—Powers to Lease and Sell—Lease Registered containing Option to Purchase—Whether Option ultra vires *Power of Attorney—Indefeasibility of Title—Whether Registration made Option enforceable if Grant thereof* ultra vires*—Land Transfer Act, 1915, s. 94.*

A power of attorney from the defendant, deposited with the District Land Registrar, gave the attorney full powers to lease land for as long a term as he thought fit and to sell it on such terms as he thought fit. A lease of the principal's land to the plaintiff, which throughout acted in good faith, containing an option to the lessee to purchase the land leased, was executed by the attorney and duly registered against the defendant's title. The option was exercised by the plaintiff, but the defendant refused to complete or to accept the purchase-money duly tendered.

In an action for specific performance,

Roe, for the plaintiff; *King*, for the defendant.

Held, 1. That the option granted was a valid exercise of the powers given, and was enforceable if exercised.

Meek v. *Bennie*, [1940] N.Z.L.R. 1, G.L.R. 5, applied.

Fels v. *Knowles*, (1907) 26 N.Z.L.R. 604, 8 G.L.R. 627, and *Horne* v. *Horne*, (1906) 26 N.Z.L.R. 208, 9 G.L.R. 245, referred to.

2. That registration of the lease made the option enforceable at the suit of the plaintiff, even if the grant thereof had been *ultra vires* the power of attorney.

Fels v. *Knowles*, (1907) 26 N.Z.L.R. 604, 8 G.L.R. 627, and *Horne* v. *Horne*, (1906) 26 N.Z.L.R. 1208, 9 G.L.R. 245, applied.

Gibbs v. *Messer*, [1891] A.C. 248, and *Boyd* v. *Mayor, &c., of Wellington*, [1924] N.Z.L.R. 604, 8 G.L.R. 627, distinguished.

Solicitors: *Urquhart and Roe*, Rotorua, for the plaintiff; *C. A. Arthur*, Te Aroha, for the defendant.

Case Annotation: Gibbs v. *Messer*, E. and E. Digest, Vol. 38, p. 752, note bbb.

SUPREME COURT. Auckland. 1941. June 17, 24. *Fair*, J.

AUCKLAND CITY CORPORATION v. THE KING.

Public Works Acts—Compensation—Whether Land taken a "Public reserve" or held in trust for "a particular purpose"—Whether Compensation paid to Claimant should have been paid to the Public Trustee—Trust on which Claimant held Compensation—Public Works Act, 1928, ss. 91, 92—Public Reserves, Domains, and National Parks Act, 1928, ss. 2, 14—Municipal Corporations Act, 1933, s. 156 (1).

Certain land was vested in the plaintiff under a grant from the Crown as an endowment for the improvement and benefit of the City of Auckland. The land, known as the Auckland City Market-site, later became subject to the provisions of the Auckland City Endowments and Reserves Act, 1875, and to the Auckland City Empowering Act, 1913. Section 2 of the latter Act provided as follows:—

> "Notwithstanding anything contained in the Crown grant for the market-site, or in the Auckland City Endowments and Reserves Act, 1875 . . . the Council shall henceforth hold the market-site as and for an endowment for the benefit of the inhabitants of the City of Auckland, and not for any special purpose, and the Council shall have with respect to the market-site all such powers of leasing and disposition as it has with respect to its general or ordinary endowments; and, in addition, shall have the special powers herein set out."

Portion of the land having been taken under the Public Works Act, 1928, for the erection of a post-office, compensation, agreed upon at £9,000, was paid to the plaintiff. The land had on it at the time when it was so taken a substantial building, which had been let from time to time by the Corporation, and was at such time let to tenants at substantial rentals.

On an originating summons taken out to determine questions raised by the Controller and Auditor-General of the Dominion,

Stanton, for the plaintiff; *Meredith* and *Smith*, for the defendant.

Held, 1. That the land was not a "public reserve" within the meaning of the definition thereof in the Public Reserves, Domains, and National Parks Act, 1928, for the following reasons:

(*a*) The word "benefit" in the definition of "public purpose" in the said Act means benefit springing from the direct or indirect use or enjoyment by the inhabitants of the land itself (such indirect use including scenic reserves not open to the public, acclimatization reserves or sanctuaries, and possibly cemeteries) and was not used in the widest sense. The land had not been granted for the use, benefit, or enjoyment of the inhabitants of the City of Auckland.

(*b*) The land did not fall within the specific definitions of "public reserve" in the said s. 2, as it did not fall within Class I of the Second Schedule to the Public Reserves and Domains Act, 1908, the Auckland City Empowering Act, 1913, s. 2 expressly negativing a site of a market as the purpose of the reserve and there was no other class of reserve named in the said Class I in which it fell.

(*c*) The Act read as a whole does not extend to land held in trust as an endowment of this kind.

2. That the said land was vested in the plaintiff in trust for a particular purpose within the meaning of s. 156 (2) of the Municipal Corporations Act, 1933—*viz.*, as an endowment without power of sale—for the benefit of the citizens, the preservation of the capital, and the provision of an assured income from it to the plaintiff, irrespective of the plaintiff's income from other sources.

Edwards v. *Hall*, (1856) 25 L.J.Ch. (N.S.) 82; *In re Robinson, Wright* v. *Tugwell*, [1892] 1 Ch. 95; and *Re Clergy Orphan Corporation*, (1894) 64 L.J.Ch. 66; L.R. 3 Ch. 145, referred to.

3. That the compensation, falling within the provisions of s. 92 of the Public Works Act, 1928, should have been paid to the Public Trustee and an application made to the Court under that section.

4. That the plaintiff should be in the same position as if the compensation had been so paid. Pending any such application, it was the plaintiff's duty to preserve the capital sum as paid and to invest it so as to provide income for the general purpose of the Corporation.

Re King (*deceased*), (1893) N.S.W.L.R. Eq. 363, distinguished.

Solicitors: *J. Stanton*, Auckland, for the plaintiff; *Crown Law Office*, Auckland, for the defendant.

Case Annotation: Edwards v. *Hall*, E. and E. Digest, Vol. 23, p. 485, para. 5530; *In re Robinson, Wright* v. *Tugwell, ibid.*, Vol. 8, p. 322, para. 1041; *In re Clergy Orphan Corporation, ibid.*, p. 357, para. 1549.

SUPREME COURT. Wellington. 1941. June 16; July 28. *Johnston*, J.

In re **NEW ZEALAND TIMES COMPANY, LIMITED.**

Company Law—Winding-up—Liquidator's Remuneration—When Payable—When Statute of Limitations begins to run in respect of Claim to such Remuneration—Statute of Limitations.

The right of the liquidator of a company to payment of his remuneration does not arise as each transaction in the liquidation which gives a right to remuneration is completed; but only when the winding-up is complete and his work is done.

The Statute of Limitations, therefore, does not begin to run in respect of his claim to remuneration until the winding-up is complete.

In re Willis C. Raymond, Ltd. (in Liquidation), [1928] N.Z.L.R. 115, G.L.R. 101; *Davies* v. *Thomas*, (1900) 2 Ch. 462; and *In re Kensington Station Act*, (1875) L.R. 20 Eq. 197, applied.

Watt v. *Assets Co., Ltd.*, [1905] A.C. 317, and *Douglass* v. *Lloyds Bank, Ltd.*, (1929) 34 Com. Cas. 263, referred to.

Counsel: *Sim*, K.C., and *Murch*, in support; *S. A. Wiren*, to oppose.

Solicitors: *Luke, Cunningham, and Clere*, Wellington, for the liquidators; *S. A. Wiren*, Wellington, for the Guardian, Trust, and Executors Co. of New Zealand, Ltd.

Case Annotation: Watt v. *Assets Co., Ltd.*, E. and E. Digest, Vol. 10, p. 912, para. 6238; *Douglass* v. *Lloyds Bank, Ltd., ibid.*, Supp. Vol. 3, para. 403a; *Davies* v. *Thomas, ibid.*, Vol. 32, p. 284, para. 614; *Re Kensington Station Act, ibid.*, Vol. 10, p. 1112, para. 7825.

RECEIVERS.

The Debtors and Mortgagors Emergency Regulations, 1940.

By H. E. ANDERSON.

Two cases in England, referring to the appointment of a receiver for debenture-holders and rights of the receiver after the appointment to sell the assets of the company, have recently been decided and call for comment in view of the interesting position always to be found when a receiver is appointed by a debenture-holder under a debenture declaring that the receiver is the agent of the company. A receiver in such a position is agent of the company only by virtue of the deed. Really he is a bailiff for the debenture-holder put in possession for the sole purpose of collaring the company's goods, selling them and paying the proceeds to the debenture-holder in liquidation of the debenture-holder's charge.

Most receivers would object to being called a bailiff, but when the position is looked at squarely, one can only see in the word "receiver" a term which is supposed to connote a gentleman, who, although a gentleman, is going to impound and sell the goods of the company: that is exactly what a bailiff does; but he is not usually referred to as a "gentleman." "Receiver" is a word used in reference to a mortgagee's and debenture-holder's agent, whereas a bailiff is a man who is usually referred to in reference to a landlord's agent, or a person who deals with the inferior Courts of Record, and is a very unpopular person. This is but a digression in an endeavour to draw forth more clearly the peculiar position of a "receiver," who by virtue of a deed becomes the agent of the person whose goods he proposes to take into his possession to sell.

In *Re S. Brown and Sons* (*General Warehousemen*) *Ltd.*, [1940] 3 All E.R. 638, the facts were that the company executed a debenture providing for the appointment of a receiver after the principal money became payable, with power to take possession of and sell the assets, and the deed declared that the receiver so appointed should be as far as the law allows the agent of the company. A summons was taken out under the Courts (Emergency Powers) Act, 1939 (Eng.) for an order giving leave to appoint a receiver, the order was made, and then the company went into voluntary liquidation. The result was that the agency between the receiver on the one hand and the company on the other was terminated according to the principle laid down in *Gosling* v. *Gaskell*, [1897] A.C. 575. The receiver then desired to sell, and the question arose as to whether he should obtain leave under the Courts (Emergency Powers) Act, 1939. The Court held that the answer depended upon the meaning of s. 1 (2) of the Act which provided that, subject to the provisions of the section, a person shall not be entitled except with leave of the appropriate Court *to proceed to exercise*

any remedy which is available to him by way of the realization of any security.

Bennett, J., in giving his decision, held that, if the company had not gone into liquidation and if the receiver still remained the agent of the company, it might have been difficult to say that the receiver, acting as the company's agent and seeking to exercise the powers in the debenture was proceeding to exercise any remedy available to the debenture-holders within the meaning of the section. The effect of the company's going into voluntary liquidation however, was that the receiver would, in realizing the assets, be acting as agent for the debenture-holders by whom he was appointed, and his act in realizing would not be his act but the act of the debenture-holders. His Lordship held that in such circumstances he must get the leave of the Court to sell. This left in doubt the question whether, when a receiver was appointed and the company had not gone into liquidation, the receiver had then to obtain the Court's consent to sell; but this case was soon followed by another case, which settled the matter.

In *Re Globe Clothing Club, Ltd., Wood's Application*, (1940) 57 T.L.R. 115, the debenture-holder appointed, with the approval of the Court, a receiver, who, by the deed, was agent of the company for all purposes. The deed gave the debenture-holder power to sell the assets and he applied to the Court for leave to sell if leave were necessary. The company was not in liquidation and was not represented at the hearing. The Court then had to decide whether after the appointment of a receiver with the consent of the Court, the receiver, by virtue of the debenture-deed, being the agent for the company, in selling the property comprised in the debenture was proceeding *to exercise any remedy* which was available to him by way of the realization of the security under s. 1 (2) (*a*) (iv) quoted above.

The learned Judge, Morton, J., came to the conclusion that the receiver, as agent for the company, was merely selling as such; that the company itself was not exercising a remedy available to it by way of the realization of a security; and that the only person under the circumstances who could come within the meaning of the Act was the debenture-holder, the debenture-holder was not before the Court and even if he was under the conditions of the debenture once a receiver was appointed then so far as the law allows, he was the agent of the company for all purposes and the security might be realized without any further order of the Court.

It is quite clear that the debenture deed in these cases makes the receiver the agent of the company. It is equally clear that the product of the realization (if any) of the assets and the income from the business of the company go, not to the person who is normally the agent's principal, but to the debenture-holder, although the agent's principal does get the benefit of having his liability extinguished; but this benefit may ruin his business. It is truly a curious position, and Morton, J., himself expressed some doubts on the matter, and said:

> It has been my practice, if I have thought the case one in which leave should be given, to give the leave for the appointment of a receiver, but, if I felt doubt as to whether or not the receiver ought to be allowed to realize the property without further application to the Court, to insert a restriction that a receiver would have to come back to the Court before selling, this the Court has power so to do under s. 1 (4) of the Act.

And in one case in which leave was given, he had directed that the following words be added:

> But so that the receiver is not to be at liberty to realize the security created by or subject to the said debenture without the leave of the Judge in person, for which purpose the applicants are to be at liberty to apply.

It is submitted that any objection on the part of the company to realization must be made at the time application is made for the appointment of the receiver. If it is not then made, it would appear that the receiver would be at liberty as agent for the company to proceed to sell without further application.

Now what is the position under the New Zealand emergency legislation, which differs considerably in phraseology from the English Act?

Under the Debtors Emergency Regulations, 1940 (Serial No. 1940/162) it is necessary, subject to the provisions of the regulations to apply to the Court for leave to appoint a receiver of any property: Reg. 4 (2) (*h*). Under the Mortgages Extension Emergency Regulations, 1940 (Serial No. 1940/163), a debenture given over property, as defined, would come under the definition of "mortgage" and debenture-holder under the definition of "mortgagees," and Reg. 6 limits the rights of mortgagees and provides that, except with the leave of the Court, it shall not be lawful for any mortgagee or any other person *to do any of the acts* referred to in the regulations; and one of the acts that a mortgagee or any other person is not entitled to do without the consent of the Court, is to commence, continue, or complete the exercise of any power of sale conferred by any mortgage.

The words of the English Act are: "Proceed to exercise *any remedy* which is available to a person by way of the realization of any security," and in *Wood's Application* (*supra*) it was held that a receiver, as agent of the company was not exercising *any remedy* by way of realization.

Does the same reasoning apply under our regulations, where the words are "Except with the leave of the Court granted under these regulations, it shall not be lawful for any mortgagee or any other person to do *any of the acts*," &c., of which selling a mortgaged property is one. Following *Wood's* case, a receiver who is appointed by a debenture-holder as the agent of the company, the company not being in liquidation, does not do the act of exercising a power of sale, the act that is done is the act of selling the property of the company, as the agent for the company; and, consequently, it would appear unnecessary to proceed for leave of the Court to sell. Does the agent for the company however come within the scope of the words "or any other person"? At first sight, it might be thought so; but the regulations do not prevent any owner from selling his own property to pay off the mortgagee, and the receiver is by the execution of the debenture deed and the contract, the agent of the company, and he acts in selling for the company, which is his principal, and he sells its property and pays the debenture-holder. The company is still interested in the moneys realized, only it has mortgaged them to the debenture-holder; it has prevented itself from using the funds for any other purpose than the discharge of its debts, but it does get its debt discharged if the sale is successful.

On the other hand, it is difficult to dissociate the receiver from the debenture-holder, because in actual

fact the receiver's job is to get the debenture-holder paid off; and, whether the sale of the goods or property of the company is an advantageous sale or not, the proceeds are for the advantage of the company in that its debt liability is reduced; but it may be a catastrophe for a sale to take place and the regulations are for the protection of mortgagors. The receiver as the agent for the company, does the actual physical act of selling the goods and property of the company and might come within the wide term "or any other person" as used in the regulation. It is submitted, however, that *Wood's* case governs the position, despite the wording of the regulation; and any further application to the Court, after leave to appoint a receiver has been given, is unnecessary.

The statement of Bennett, J., that, as a result of the liquidation, the receivers had ceased to be the agents of the company and were acting in co-operation with the debenture-holders by whom they were appointed, and that if the receivers desired to realize the property they would be *acting as agents of the debenture-holders and their act in realizing would be not their act, but the act of the debenture-holders*, was commented upon by Morton, J., who said:

> It may be that in *Re Brown and Son* (*General Warehousemen*), *Ltd.*, there were some special facts which led Bennett, J., to the conclusion that the receivers had become the agents of the debenture-holders, but if by that passage the Judge is intimating that in his view the mere fact of the liquidation not only terminates the agency of the receiver quoad the company but also constitutes the receiver the agent of the debenture-holder, that is a matter which I should desire to consider very carefully before expressing my assent to it. At the moment I feel doubt as to whether it is borne out by *Gosling* v. *Gaskill*.

It is submitted that *Gosling* v. *Gaskill*, [1897] A.C. 575, does not warrant such a statement as Bennett, J., made, and Morton, J., stated he would require to consider the matter carefully before assenting to it.

In *Gosling* v. *Gaskell*, Gosling and another were trustees for certain second debenture-holders, and the deeds charged the whole of the assets of the company present and future, with the exception of the uncalled capital. The trustees, under the deeds, were empowered in certain circumstances to enter into possession of and realize the subjects mortgaged. It was made an express condition of the exercise of their powers that "any person so appointed should be the agent of the company who alone should be liable for his acts and defaults." The trustees appointed a receiver; and the company facilitated the taking-over of the business by the receiver; and the company was subsequently, by order of the Court, wound up. Neither the liquidator or the first debenture-holder interfered with the receiver's management of the company's business, which went on after the liquidation in precisely the same manner as it had done before, except that an alteration was made in the method of signing the cheques. The receivers, in carrying on the business of the company, ordered goods subsequently to the date of liquidation; and the trustees under the debenture were sued for the amount owing for the goods. The plaintiff in the action for the price of the goods, obtained judgment against the trustees before the Lord Chief Justice, which decision was subsequently confirmed by the majority of the Court of Appeal; and from this decision the trustees appealed to the House of Lords who reversed the decision of both Courts and decided that a receiver, appointed by debenture-holders under a deed which declared that he was the agent of the company, ceased to be the agent of the company upon a winding-up order being made; but that he did not thereby become or receive any implied authority from the trustees to act as their agent. Having this decision in mind no doubt caused the remarks made by Morton, J., in *Wood's* case; and it may have been that Bennett, J., had some knowledge from the facts as they came out before him in *Brown and Son's* case indicating either a definite appointment of the receiver, as agent for the debenture-holders after liquidation, or sufficient facts drawn from the actions of the parties to warrant an implication to that effect. In any case, it seems clear that, on the appointment of a receiver under the circumstances mentioned, such receiver is never the agent of the debenture-holders, either before or after liquidation. In practice, of course, it not infrequently happens that upon liquidation the trustees for the debenture-holders execute a fresh appointment making the receiver the debenture-holder's agent. The receiver's authority to incur debts on behalf of the company ceases upon liquidation, and, upon his agency ceasing, and if he does so incur debts, then apparently he will be personally liable for those debts even though the company gets the benefit therefrom.

FIFTY-EIGHT YEARS A LAW CLERK.

With Same Firm and in Same Premises.

The account of Mr. T. A. Joynt's long service (*ante*, p. 168) has drawn attention to the even longer continuous service of the late Mr. Albert Ernest Grindrod, who was with the firm of Messrs. Hesketh and Richmond, now Messrs. Hesketh, Richmond, Adams, and Cocker, Auckland, for fifty-eight years and three quarters. He joined the staff of the firm on March 13, 1880, as office boy on his arrival from England. He rose to the position of head accountant and continued with the firm until his death on December 21, 1938. During the whole of that time he was associated with Mr. Samuel Hesketh, who died on January 8, 1939. More remarkable still, he served the whole of this time in the same building at No. 2 Wyndham Street, Auckland. This is a record of continuous and faithful service which it will be almost impossible to beat.

ROAD TRAFFIC AND WAR EMERGENCY REGULATIONS.

IV. Recent Regulations.

By R. T. Dixon.

1. Motor-vehicles Impressment Emergency Regulations, 1941.

The 1939 regulations relating to impressment of motor-vehicles have already been briefly described (*ante*, p. 126). This article consists principally of a review of the Motor-vehicles Impressment Emergency Regulations, 1941 (Serial No. 1941/145) which replace the Impressment Regulations, 1939 (Serial No. 1939/140), but which considerably extend the scope of the latter so that present regulations might quite possibly affect every person in this country who owns or has legal interest in a motor-vehicle.

In addition to providing for a system of compulsory acquisition of motor-vehicles, chiefly for the Armed Services, the 1941 regulations enable motor-vehicles to be made available, on a compulsory hiring basis, for Emergency Precautions Organizations, and similar bodies. The date of their enactment was August 27.

The most useful method of reviewing the regulations will probably be to deal with the regulations *seriatim*, and to mention in their appropriate place any cases which might be useful for interpretation of the regulations.

Reg. 1: Preliminary.—This contains the definitions of which the wide scope of the interpretation of "encumbrancer" is noteworthy. The definition of "owner" follows closely the corresponding definitions in the Motor-vehicles Act, 1924, and the Transport Licensing Act, 1931. By cl. (5) the present powers of Emergency Precautions Committees are made subject to the provisions of the regulations.

Reg. 2: Functions and Powers of the Minister.—This sets out the scope of the regulations which as mentioned earlier includes the supply of motor-vehicles for the Emergency Precautions Organizations.

Regs. 3 and 4.—These provide for the appointment of the Motor-vehicle Controller, District Controllers, Committees, and their powers to administer the regulations under the Minister. (The Commissioner of Transport has been appointed Motor-vehicle Controller.)

Impressment for the Armed Services, &c.

Reg. 5: Impressment Officers.—The Registrar of Motor-vehicles and his Deputy-Registrars are appointed to be Impressment Officers.

Reg. 6: Method of Impressment and Supply of Motor-vehicles.—The Motor-vehicle Controllers will prepare lists of motor-vehicles required by the Armed Forces, Emergency Precautions Organizations, &c., and compile lists of the vehicles available to meet those requirements.

Reg. 7: Inspection of Motor-vehicles and Equipment.—It is obligatory for the person having possession of a motor-vehicle to make it available for inspection for the purposes of the regulations and to supply all required information.

Regs. 8–19.—These provide the method of impressment (Reg. 8); the particulars to be supplied by owner (Reg. 9); delivery pursuant to warrant of impressment (Reg. 10); rejection and repossession (Reg. 11); encumbrancers (Reg. 12); valuation (Reg. 13); payment for impressed vehicles and equipment (Reg. 14); arbitration (Reg. 15); running-costs, repairing, and services (Reg. 16); travelling allowances and expenses (Reg. 17); possessory liens (Reg. 18); and notice of intention to impress (Reg. 19).

These regulations prescribe the machinery of impressment, and are similar to those previously contained in the Motor-vehicles Impressment Emergency Regulations, 1939 (Serial No. 1939/140) as amended by Amendment No. 1 (Serial No. 1941/47).

The following points deserve special notice:

Regulation 10, cl. (4) contains a new provision enabling the Police to seize an impressed vehicle, by force if necessary.

Regulations 13–15, relating to valuation of, and payment for, the vehicles and equipment, are of importance; and in view of the arbitration provisions (Reg. 15) may be the fount of legal argument.

In cl. (2) of Reg. 13 it is stated that value, and not compensation for loss, is to be the test; and this probably is directed at negativing the effect of the Full Court decision in *Royal Motor-bus Co., Ltd.* v. *Auckland City Council*, [1927] N.Z.L.R. 423. In this case it was decided that an arbitration under the respective compensation provisions may take into account the value of a motor-vehicle as a unit in a fleet of vehicles, and this seems to involve considerations of difficulty in servicing and replacement. This case, and also *Melbourne Tramway and Omnibus Co.* v. *Tramway Board*, [1919] A.C. 667, which it followed, would be of assistance to counsel who may have to deal with these regulations.

Clause (3) of Reg. 19 is noteworthy, in that it requires the owner for six months after receipt of the notice to keep the motor-vehicle in good repair. There is right of appeal against this requirement to the Registrar of Motor-vehicles, and in respect of all obligations under the notice, to the District (Transport) Licensing Authority: see Reg. 23.

Clause (5) of Reg. 19 carries consequential obligations that in the event of the sale or other disposition of a motor-vehicle affected by the notice of intention to impress, the Registrar of Motor-vehicles is to be advised of appropriate particulars; and the persons having an interest in the new disposition are to be advised of the existence of the notice.

Compulsory Loan or Hire (Principally for E.P.S. &c.).

Reg. 20: Notice of Intention to Use.—The distinction from the notice of intention to impress should be noted. The notice of intention to use is

issued by a District Controller, and not by an Impressment Officer. The vehicle is not permanently acquired, but is to be made available as and when required: cl. (2).

The additional obligations of the owner are to advise the District Controller if the vehicle becomes unfit for use, and of appropriate changes of address or ownership. He is also required to make known the existence of the notice to any person who acquires disposition of the motor-vehicle.

It will henceforth be a wise precaution for any person interested in the purchase or transfer of a motor-vehicle to check up with the appropriate Impressment Officer and District Controller on the possible existence of one or other of the notices described.

Reg. 21: Delivery Pursuant to Notice of Intention to Use.—This provides the formal requirements for delivery of the vehicle upon a demand which may come from any person acting under the authority of the District Controller (Reg. 20 (2)); and which may be given by telephone as well as in other ways (Reg. 25 (4)). This gives a wide field for malice; but it is difficult to see how a system to be operated under the conditions, perhaps of enemy action, could otherwise be effective. The owner is entitled to a receipt for the vehicle and accessories: cl. (3).

Reg. 22: Payment for Use.—It will be noted that the owner is entitled to "compensation." It appears that this word has been used advisedly, and may be intended to cover not only a hiring charge, but also any damages caused to the vehicle as a result of the hiring: see, in this connection, *Dixon* v. *Calcraft*, [1892] 1 Q.B. 458.

The owner may appeal to the District (Transport) Licensing Authority against the amount offered for payment; but the appeal must be lodged within seven days from cessation of the hiring. In general, when the vehicle is provided for use on behalf of a local authority, the latter is liable for the payment; but, otherwise, the Controller is liable.

Reg. 23: Appeals.—Appeals may be lodged against any warrant of impressment, any notice of intention to impress and any notice of intention to use. The appeal must be lodged at the office of that District (Transport) Licensing Authority who is to determine the appeal. There is no specified form for the appeal, but it must be lodged within seven clear days from date of service of the warrant or notice. In computing the seven clear days, the date of service need not be counted: *In re Amalgamated Distributors, Ltd.*, [1931] N.Z.L.R. 648.

Pending the determination of an appeal duly lodged, the action on the notice or warrant is suspended except in the case of an "emergency" as defined in Reg. 2 of the Emergency Precautions Regulations, 1940 (Serial No. 1940/187).

Regs. 24–26.—These deal with the authentication of documents (Reg. 24); notices (Reg. 25); and offences (Reg. 26).

2. Motor-drivers Emergency Regulations, 1941 (Serial No. 1941/126).

This extends indefinitely the abrogation of Reg. 4 (1) of the Motor-drivers Regulations, 1940 (Serial No. 1940/73), so far as the latter requires fresh tests for a motorist who allows three months to lapse before renewing his driver's license.

3. Transport Legislation Suspension Order, 1941 (Serial No. 1941/140).

This deals with the farm-tractor and trailer used by the owner for carting fertilizer to his farm. If less than thirteen miles of road are used for the whole journey to and from the farm, the tractor and trailer may be used with E plates, which carry exemption from license fees and heavy-traffic fees, and enable the owner to obtain a rebate of 10d. per gallon of tax on the motor-spirit used in the tractor.

SEPARATION AGREEMENTS.

Circumstances Affecting their Duration or Enforceability.

By I. D. CAMPBELL.

(*Continued from p. 178.*)

2. JUDICIAL SEPARATION.

As long ago as 1824 it was held by four Judges of the King's Bench in *Jee* v. *Thurlow*, (1824) 2 B. & C. 547, that a decree of judicial separation does not put an end to the covenants of a separation deed. It is sometimes said that this requires some qualification. As a general rule it is well settled that the provisions of a separation deed remain unaffected by such a decree. But, it is asserted, it is necessary to consider the ground on which the decree is based. If it be founded on such conduct as would, for reasons discussed later, disentitle one party to the benefit of the deed, it may be that the decree will determine the deed. But strictly the decree itself will never do so. It may, however, involve an adjudication of fact which will bring into operation the clauses of the deed itself—*e.g.*, a *dum casta* clause—or the rule that a party who by his conduct has repudiated the deed may be precluded from relying on the deed. That the decree itself has no effect on the deed is implicit in the whole of the judgments in *Gandy* v. *Gandy*, (1882) 7 P.D. 168, and *Judkins* v. *Judkins*, [1897] P. 138.

But while the survival of the deed in the case of divorce does not affect the right of the wife to apply for alimony or maintenance, it has been held that a covenant by the wife not to sue for more than the agreed allowance is binding on her notwithstanding any subsequent decree of judicial separation: *Gandy* v. *Gandy* (*supra*). The decision of the Court of Appeal expressly rests on the more limited powers which the Court is said to possess in this case as to varying settlements between the parties. The explanation of this distinction is purely historical. Divorce *a mensa et thoro*, the predecessor of judicial separation, was

granted by the Ecclesiastical Courts long before 1857, and it is alleged that the powers of those Courts to regulate the proprietary arrangements between the parties were more limited than those given to the Court for Matrimonial Causes in cases of divorce and nullity. Our own Divorce and Matrimonial Causes Act, 1928, briefly provides in s. 33 (4) that where any decree for restitution of conjugal rights or judicial separation is made on the application of the wife, the Court may make such order for alimony as it thinks fit. The provisions of s. 37 as to varying ante-nuptial and post-nuptial settlements apply only in divorce and nullity.

In *Judkins* v. *Judkins*, [1897] P. 138, the Court of Appeal, affirming the decision of Gorell Barnes, J., held that on making a decree for judicial separation the Court could disregard a prior separation deed to the extent of awarding increased maintenance "if there has been such an alteration of circumstances as renders it unjust that the wife should be barred by the deed." By implication the Court recognized a limitation on its powers in this case which does not exist in the case of subsequent divorce of the parties.

In *Hyman* v. *Hyman*, [1929] A.C. 601, it was strongly urged by counsel that the Court of Appeal in *Gandy's* case had erred in thinking the Court's powers were less extensive in cases of judicial separation. But the House of Lords, while conceding the force of the argument, did not find it necessary to decide the issue. The majority simply held that judicial separation could perhaps be distinguished in this respect from divorce—as had been held in *Gandy's* case—but that if it were not distinguishable, that decision was overruled. Lord Shaw went further, and in an eloquent onslaught on *Gandy's* case declared that it had no merits and was wrongly decided. At the risk of becoming what he terms a "legal resurrectionist" one may point out that he nowhere disposed of the argument as to the limited extent of the powers of the Court in cases of judicial separation. His attack was mainly on other parts of the decision, as will be mentioned later. On the other hand, the principle on which the House reached its decision in *Hyman* v. *Hyman* is amply wide enough to include judicial separation. By statute—though the statute merely continues in force powers which were already in existence—the Court is to make such orders for alimony as it thinks just. How is this power to be excluded from the principle of public policy which forbids the parties from contracting out in the case of divorce? The policy in either case is the same, and the distinction is lacking in the least semblance of a rational basis. If the Court can review the woman's financial position when she obtains a decree *nisi* in divorce, who would suggest that any different considerations of public policy apply where she has merely obtained a decree of judicial separation? The reservations of their Lordships in *Hyman's* case will not save this part of *Gandy's* case from eventually being completely and finally interred: see the discussion of these cases by Jordan, C.J., in *Seymour* v. *Seymour and Delaney*, (1936) 36 N.S.W. S.R. 667.

3. Nullity.

No term is implied in a separation agreement that the marriage is not voidable. (As to cases where the marriage is void, see *infra*, Section 7.) Nor is it possible to escape the burdens of a separation deed on the ground that a decree of nullity, by annulling the marriage *ab initio*, has frustrated the agreement or removed its essential substratum. Such were the arguments put forward in *Fowke* v. *Fowke*, [1938] Ch. 774. The separation deed provided for payments to be made to the wife "during her life and so long as she should continue to lead a chaste life." A decree of nullity having been made on the ground of the wife's incapacity to consummate the marriage, Farwell, J., held that the previous deed of separation remained unaffected by the decree. A formidable argument based on the disturbing phraseology of a nullity decree was unavailing, and the principles so plainly indicated in *Dodworth* v. *Dale*, [1936] 2 K.B. 503, as to the effects of a voidable marriage were given their due application. This year the question was taken to the Court of Appeal in *Adams* v. *Adams*, [1941] 1 All E.R. 334, and *Fowke* v. *Fowke* was approved. A decree of nullity based on incapacity has no effect on a separation deed and a covenant to pay weekly sums during the joint lives of the parties was held to be still enforceable. Each of the parties may be aware of the possibility of nullity proceedings being taken by the other, but a mere common expectation falls far short of an agreement amounting to a condition of the contract. The decree of nullity is not such a subsequent event as will support the plea of frustration. Both parties doubtless assume the existence of a valid marriage but until the decree there is a valid marriage, and completed acts attributable to the marriage relationship (such as the separation agreement) cannot be undone after or as a result of the decree.

The statement in *10 Halsbury's Laws of England*, 2nd Ed., 803, that in a technical sense marriage settlements cease to exist on a nullity decree being made, can no longer be regarded as correct.

It will be noticed that in both *Fowke* v. *Fowke* and *Adams* v. *Adams* the maintenance covenant was for an express term. What is the position if no term is expressed? Is it possible that *Watts* v. *Watts*, [1933] V.L.R. 52, may have its counterpart in regard to nullity as well as divorce? If *Watts* v. *Watts* was well decided and is eventually followed in New Zealand, a similar decision may be reached in regard to nullity. If the parties can properly be said to be providing for the period during which they remain man and wife, a decree of nullity may operate not by way of an implied term frustrating the agreement, but as fixing the extent or duration of the obligations which the parties originally assumed.

4. Subsequent Adultery.

A clash that went much deeper than issues of law arose when the Courts were asked to decide whether the adultery of one party to a separation deed releases the other party from its covenants.

In *Jee* v. *Thurlow*, (1824) 2 B. & C. 547, Abbott, C.J., said:

> It has been decided that a plea stating the commission of adultery by the wife is not sufficient, upon this ground, that if the husband when executing such a deed as this, thinks proper to enter into an unqualified covenant, he must be bound by it. Had he wished to make the non-commission of adultery a condition of paying the annuity to his wife, he should have covenanted to pay it *quamdiu casta vixerit.*

The case to which the Chief Justice referred was probably *Seagrave* v. *Seagrave*, (1807) 13 Ves. 439, where the wife was given leave to bring an action in the name of her trustee, her adultery being held not to preclude her from enforcing the husband's bond.

Sir James Hannen was faced with this problem of subsequent adultery in *Morrall* v. *Morrall*, (1881) 6 P.D. 68. His view was that in every separation agreement a condition was to be implied that neither party should commit adultery. That offence produced a situation not in the contemplation of the parties when the agreement was entered into, and freed the other from all obligations under the deed. The Court of Appeal in *Gandy* v. *Gandy*, (1882) 7 P.D. 168, had to consider the same question, and reached the opposite conclusion. In *Fearon* v. *Earl of Aylesford*, (1884) 14 Q.B.D. 792, the same tribunal again asserted its views on the matter. Brett, M.R., and Cotton, L.J., gave vigorous expression to sentiments which, though unacceptable in some quarters, must be acknowledged as expressing an unusually charitable outlook on faltering humanity. The Master of the Rolls said:

> If this point were now for the first time to be decided I myself should absolutely refuse to say that owing to the mere fact of a woman falling into this grave offence under any circumstances of neglect by her husband, or after any effluxion of time, public policy requires that—whatever may have been the temptation under which the woman has succumbed—the husband shall not be obliged to pay her the annuity, which he has undertaken to pay to her without any such condition being expressed.

This was endorsed by Cotton, L.J.:

> I am at a loss to see how public policy requires that when a woman commits adultery she shall at once be made destitute and be entirely stripped of all those means which her husband provided for her when they separated so as to prevent her from falling into a state of indigence and want.

In keeping with these decisions are *Hart* v. *Hart*, (1881) 18 Ch.D. 670, which decided that a *dum casta* clause did not come within the term "usual covenants" in a separation deed agreed to as part of the terms of compromise of a divorce suit, and *Sweet* v. *Sweet*, [1895] 1 Q.B. 12, in which *Fearon* v. *Earl of Aylesford* was expressly followed.

Lord Shaw, in his attack on *Gandy* v. *Gandy* in the course of his judgment in *Hyman* v. *Hyman*, strongly inveighed against the policy which these decisions express. "The contract," he said, "either contemplated, or it did not, adulterous conduct subsequent to its date. If it did not, such conduct not in contemplation and not provided for opens legitimately and effectively the attack upon the continuance of the contract as mutually binding. If, however, it did contemplate such misconduct, and this whether expressly or by implication, then in my opinion, it was a contract immoral in its nature, opposed to the fundamental sanctity of marriage and contrary to the law of England." The latter part of this dictum is well established. A deed entered into for the purpose of facilitating adultery is void. But the opinion that adultery which was not in contemplation at the date of the deed will make it voidable is not now supportable. The attempt to resuscitate the views of Lord Hannen came too late: they had already been nailed too often. In this same case Lord Atkin, for example, when referring to the submission put forward in *Gandy* v. *Gandy* in favour of an implied condition that neither party should commit adultery, gave it as his opinion that this had been rightly rejected by the Court of Appeal. It is clear that the existence of any such condition has been authoritatively and conclusively denied.

5. Conduct of One Party such as to Deprive Him of the Benefit of the Deed: Discharge by Breach.

"The conduct of one of the parties may have been such as to make it inequitable that the other should continue bound. The law on this point seems now to have come into conformity with the general law of contract, and not to present any special features in the case of separation deeds other than those involved in the circumstances in which the parties find themselves."

This statement from *Lush's Law of Husband and Wife*, 4th Ed. 451, is supported by references to *Morrall* v. *Morrall*, (1881) 6 P.D. 98, and *Gandy* v. *Gandy*, (1882) 7 P.D. 168; but it seems doubtful whether the principle has any application apart from cases in which one party has broken the express covenants of the deed. Adultery, as was decided in *Gandy* v. *Gandy*, can no longer be regarded as bringing the offender within the scope of this proposition unless chastity is made an express condition. Certainly the equitable principle to which appeal was made in these two cases was wide enough to be applied generally where the conduct of one party was destructive of the basis of the agreement, and in *Gandy* v. *Gandy*, in 1882 it was recognized that it might still be available in cases other than adultery. (Cotton, L.J., thought that incestuous adultery might be such a case.) But it seems doubtful whether it now has any practical application outside the express terms of the deed. In the second case of *Gandy* v. *Gandy* in the Court of Appeal—(1885) 30 Ch.D. 57—the husband to whom custody of the children had been given when the parties were judicially separated had failed to support them, and the wife was held to be thereby freed from her covenants under the deed. But in this case the husband had expressly undertaken by the separation deed that he would support them. The decision therefore is no clear authority on the principle now being discussed, as the covenants may have been regarded as dependant, the performance by the husband of the covenants on his part being a condition of his right to compel his wife to perform her obligations.

In *Fearon* v. *Earl of Aylesford*, (1884) 14 Q.B.D. 792, Cotton, L.J., observed: "There may be circumstances of such a character as will prevent the guilty wife from insisting upon the deed, and which will enable the husband in a Court of equity to set up an equitable defence." Likewise in *Tress* v. *Tress*, (1887) 12 P.D. 128, although no specific misconduct was alleged, the Court observed that "the respondent might have been guilty of some act which, even according to the decision of the Court of Appeal [in *Gandy* v. *Gandy* in 1882] would relieve the petitioner from the covenant." But a situation in which this will be held to apply has apparently yet to arise.

It is true that reliance was placed on this principle in *Atkinson* v. *Atkinson*, (1892) 10 N.Z.L.R. 385. By a deed of separation the husband covenanted to pay alimony and the wife covenanted not to sue for alimony. The wife applied for judicial separation and for an order for increased alimony. The husband prior to the date of the deed had committed adultery which had been concealed from his wife, and again subsequent to the deed there had been further acts of adultery. It was held that the Court could order increased payments to be made to the wife. *Gandy* v. *Gandy* was distinguished on the ground of "the exception in *Gandy* v. *Gandy* itself," where a party has so acted as to disentitle him to rely on the deed. But subsequent adultery alone does not release the other party from the deed, and it became significant only by reason of the husband's prior concealed

adultery. It was a clear case of a deed liable to rescission on the ground that it was procured by fraud or that it was tainted with illegality: (see 8 and 9, *infra*.)

Breach of the express covenants of the deed may release the other party from his covenants, or, to express it in another way, may debar a party from relying on a deed the terms of which he has himself broken. In the first place the terms of the instrument itself may make the obligation of each party to perform his covenants dependent on the other party's willingness to perform the covenants on that side. Secondly, even though the covenants be not made mutually dependent, one party by his conduct may have repudiated the whole agreement, so as to be debarred from afterwards endeavouring to enforce it.

When are the covenants mutual, dependent, reciprocal covenants, and when are they independent? On that question Brett, M.R., expressed himself forcibly in *Fearon* v. *Aylesford*, (1884) 14 Q.B.D. 792, 800: "It has been held again and again, in the Courts of law and in the Courts of equity, that these covenants are not so far reciprocal that the observance of the one is a condition subsequent on the breach of which the other fails." But although there is no presumption that the covenants are reciprocal, the express terms of the deed may—and usually will—make the covenants mutual and dependent, and the Courts tend to favour a construction which will so regard them. For instance, in *Balcombe* v. *Balcombe*, [1908] P. 176, it was said that the deed in that case was for all practical purposes a deed in which each party at the time of entering into the deed relied on the covenants on the other side. That is true of almost every separation agreement, and little evidence will apparently suffice to satisfy the Courts that the covenants are dependent.

When the covenants are not mutually dependent a breach of covenant will not debar a party from relying on the deed unless the breach is of such a kind as to justify the other party in regarding the agreement as at an end. It is not every breach of covenant in a separation deed which will prevent the party committing it from setting up the deed or will release the other party from his or her covenants. To have this effect it must be some "material and substantial breach": per Jessel, M.R., in *Besant* v. *Wood*, (1879) 12 Ch.D. 605, 628. And the breach must be deliberate: *Kunski* v. *Kunski*, (1898) 68 L.J. P. 18.

If these conditions are satisfied the agreement will cease to be binding on the other party. In *Kennedy* v. *Kennedy*, [1907] P. 49, Sir Gorell Barnes said: "The Court should not allow its hands to be tied by the covenant not to sue in a case such as the present, where the obligation to pay has been repudiated." In *Roe* v. *Roe*, [1916] P. 163, Shearman, J., referred to this case and to *Tress* v. *Tress*, (1887) 12 P.D. 128, in these words: "In my view the decisions in *Tress* v. *Tress* and *Kennedy* v. *Kennedy* and a number of other cases lay down the proposition that if, as a matter of fact, both parties have treated the deed as a nullity, then either of them is at liberty to disregard it and to insist upon the original status and rights." See also *Looker* v. *Looker*, [1918] P. 132, where a deed which had been repudiated was disregarded.

The essence of the matter is that the breaches of covenant shall be sufficient to indicate a clear repudiation of the agreement. For example, in *Balcombe* v. *Balcombe* (*supra*), the husband not only ceased to make payments under it and to carry out his part of the agreement, but tore up the copy he had and departed for America. Where the only breach is failure to pay, it must be accompanied by some indication of refusal to regard the deed as binding. Mere delay in making a payment is no repudiation of the deed: *Kunski* v. *Kunski* (*supra*); *Chard* v. *Chard*, [1939] N.Z.L.R. 380.

Lush's Law of Husband and Wife, 4th Ed. 455, says that it seems probable that the institution of proceedings for restitution of conjugal rights in contravention of a covenant would be held to be such a substantial breach of covenant as to amount to a repudiation of the contract and preclude the party who instituted them from afterwards setting up the deed. But the position is one of some difficulty. If the restitution proceedings are opposed and the agreement is pleaded as a defence the respondent is regarding the agreement as fully operative subsequent to the date of the petition. How then can he or she be heard afterwards to say that by filing the petition the petitioner has put an end to the agreement? If the petition were unopposed, the argument that the agreement had been repudiated might be sustainable, but it would not seem possible to plead repudiation when the agreement was relied on as a defence in those very proceedings. In the familiar phrase of Honyman, J., in *Smith* v. *Baker*, (1873) L.R. 8 C.P. 350, a man cannot at the same time blow hot and cold. That was one basis of the decision of the Court of Appeal in *Gandy* v. *Gandy*, (1885) 30 Ch.D. 57. It was held that the husband was not at liberty to retain the benefit of a decision given on the footing that his liability under the covenant continued and at the same time insist that his liability under it had determined. As Bowen, L.J., remarked, it would be playing fast and loose with justice if the Court allowed that. If one party to the deed relies on it, he cannot (it is submitted) afterwards allege that it was repudiated by conduct of which he had knowledge at the time when he himself sought to enforce its provisions.

If there is no express covenant not to sue for restitution of conjugal rights, is a suit for restitution nevertheless a breach of an *implied* covenant not to do so? In Queensland in a case on an ordinary separation deed it was held that an agreement not to sue for restitution of conjugal rights was necessarily implied: *Leslie* v. *Leslie*, [1912] Q.S.R. 172. It has been argued by J. G. Norris (3 A.L.J. 403) that this is the position in English law. On the other hand, W. K. S. MacKenzie (7 A.L.J. 4) maintains that this is an unwarranted extension of the law, and that an agreement to live separate can be completely effective without a covenant not to sue for restitution of conjugal rights, inasmuch as no process can now prevent a party continuing to live in a state of separation. See also *Sawyers* v. *Sawyers*, 28 N.S.W. W.N. 63.

Bankruptcy, whether voluntary or not, has an effect similar to that of repudiation of the deed. In *McQuiban* v. *McQuiban*, [1913] P. 208, it was held that as no action could be maintained, after the husband's bankruptcy, on his covenant to pay, the deed could not be set up as a defence to a petition for restitution.

Bankruptcy does not affect a summary maintenance order, which continues in full force and effect: Destitute Persons Act, 1910, s. 35.

(*To be continued.*)

LONDON LETTER.

Somewhere in England,
July 28, 1941.

My dear EnZ-ers,

The Freedom of the Seas.—The broadcast talk of President Roosevelt on Tuesday last week carries, perhaps, a little further his speech of Saturday, March 15, in which he pledged ever-increasing aid to Great Britain until real victory is won—"unqualified, all-out immediate aid." The gist of the present speech lies in the declaration that means must be found to safeguard the transport of munitions and other supplies. "The delivery of needed supplies to Great Britian is imperative. This can be done. It must be done. It will be done." And in doing it America is following her traditional policy of "the Freedom of the Seas." Fundamentally this means the freedom of American commerce from interference on the sea by belligerent nations. It brought her into war with England in 1812. It might have ranged her against this country in 1917 had not the lawless submarine warfare tipped the scale against Germany. This time also it is the warfare of Germany against commerce which makes the President raise the standard of the Freedom of the Seas, though he recognizes that the latest engines of war—the improved submarine, the heavily armed naval cruiser, and the bombing aeroplane—makes its protection more difficult. President Roosevelt does not underrate his task of rendering help, but he declares the will to perform it.

Dark Streets.—Everybody gets home by daylight now, but in December they do not do so. It seems to be now the law that if you come out of a well-lit room into a dark street you must pause for a moment till your eyesight has adjusted itself to the darkness. If you fail to do so and fall against some obstacle which the highway authority has put up in the street you are the author of your own wrong. However careless the highway authority, you can get no damages from them. This is the upshot of *Jelly* v. *Ilford Council*, decided by Mr. Justice Cassels last February and now upheld by the Court of Appeal, which approves his ruling as to people who come out of light rooms into dark streets at night time. At the same time, we have always thought that the learned Judge went too far when he said that the public in war-time and at night must "take the roads as they find them." If that were the law, the highway authority could not be liable even if they left an open trench in the road. I cannot think that even to-day that is the law, and can find plenty of cases, such as *Whyler* v. *Bingham R.D.C.*, [1901] 1 K.B. 45, in support.

Farm or Garden.—We cannot suppress unholy feelings of joy when a taxpayer, defeated in his battle with the tax collector all the way up to the House of Lords, gains a final victory over him in the highest Court. Such an event occurred just before Whitsuntide, *Banford* v. *Osborne* (*Times*, May 28). The vital question was whether the growing of vegetables on land which formed part of an ordinary mixed farm justified a decision that that part was occupied as a garden for the sale of the produce within Rule 8 of Schedule B. If yes, the profits arising from them have to be estimated according to Schedule D. All the Courts below were for the heavier assessment under Schedule D; but in the highest Court five of the first lawyers in England came to the opposite conclusion. The Lord Chancellor observed that you can, of course, split a holding into parts provided that the distinction between them is clearly made out. But there must be evidence to support the splitting and establish in fact a separate horticultural holding. Such a dissection the facts did not support. It is, of course, not possible to say how much of his land a farmer may use for growing flowers or vegetables before it ceases to be a farm and becomes a market garden.

The Courts (Emergency Powers) Act.—Just before the Easter holidays the Court of Appeal decided an interesting point on the Courts (Emergency Powers) Act, *Bowmaker* v. *Tabor*, [1941] 2 All E.R. 72. A hire-purchaser, the respondent, was in arrear with payments for a motor-car. In March, 1940, he agreed that the hire-vendor should take it back from him upon terms which seem to be generous. Afterwards the respondent must have taken legal advice and found out that such a step could not, as the law stands, be taken without leave from the "appropriate Court." The learned County Court Judge supported this view (1941) L.J.N.C.C.R. 55. There is a nice distinction between the case of a hirer who returns, without the leave of the Court, an article which he has taken on hire and the case of a hirer who assents to the owner exercising a legal right to recover his property. In the first case no leave of the Court under the Emergency Act is needed. In the second it is so. The Court of Appeal considered the agreement between the parties with care, and condemned it as an attempt not to contract out of the Act, but to waive its provisions. The distinction is fine, but clear. The case follows *Soho, &c.* v. *Pollard*, [1940] Ch. 645.

Yours as ever,
APTERYX.

RULES AND REGULATIONS.

Control of Prices Emergency Regulations, 1939. Price Order No. 46 (creamery butter and whey butter). No. 1941/139.

Transport Legislation Emergency Regulations, 1940. Transport Legislation Suspension Order, 1941. No. 1941/140.

War Legislation Act, 1917, and the Finance Act (No. 4), 1940. War Bursaries Regulations, 1941. No. 1941/141.

Health Act, 1920. Hairdressers (Health) Regulations Extension Order, 1941. No. 3. No. 1941/142.

Emergency Regulations Act, 1939. Medical Practitioners Emergency Regulations, 1941. No. 1941/143.

Medical Supplies Emergency Regulations, 1939. Medical Supplies Notice, 1941. No. 1941/144.

Emergency Regulations, 1939. Motor-vehicles Impressment Emergency Regulations, 1941. No. 1941/145.

Cinematograph Films Act, 1928, and the Statutes Amendment Act, 1936. Cinematograph Operators Licensing Regulations, 1938. Amendment No. 2. No. 1941/146.

Emergency Regulations Act, 1939. Savings Bank Emergency Regulations, 1941. No. 1941/147.

Emergency Regulations Act, 1939. National Service Emergency Regulations. Amendment No. 5. No. 1941/148.