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"I bid you all be strong and of good courage. Go forward into this coming year with a good heart. Lift up your hearts with thankfulness for deliverance from dangers in the past. Lift up your hearts in the confident hope that strength will be given us to overcome whatever perils may lie ahead till victory is won."

—H.M. THE KING, Christmas Day Broadcast, 1941.

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MAINTENANCE ORDERS: RECIPROCAL ENFORCEMENT.

THE jurisdiction of every Court to enforce obedience to its orders is necessarily limited to the territory of the State, Dominion, or dependency in which it is established: *Extra territorium jus dicenti impune non paretur.* As Lord Herschell, L.C., said in *British South Africa Co.* v. *Campanhia de Mocambique,* [1893] A.C. 602, 624: "No nation can execute its judgments, whether against persons or movables or real property, in the country of another." And Lord Cranworth, L.C., in *Hope* v. *Hope,* (1854) 4 De G. M. & G. 328, 345, 346, 43 E.R. 534, 541, said that, while the Court of a country may retain jurisdiction over a defendant who is overseas, the fact of his being abroad would result in the circumstances that the jurisdiction of the Court could not be exercised over him because no order the Court might make could be enforced: there is not a want of jurisdiction, but a want of the power to enforce it. In such a case, anybody might, by merely withdrawing himself from the jurisdiction, escape all liability. From these dicta, it is clear that, in respect of persons removing themselves from the jurisdiction, the original jurisdiction is retained, but its decrees can be enforced only within the territory over which that jurisdiction operates.

Although the laws of a State *proprio vigore* have no force beyond its territorial limits, they may be allowed, by the courtesy of another State, to operate in the latter's territory, when neither that State nor its citizens will suffer inconvenience from the application of the foreign law. That is the principle known as International Comity. Again, an association of States, such as the British Commonwealth, may agree *inter se,* for the enforcement in one of them of the decrees of the Courts of another of them. This is the principle of Reciprocity; and it is this principle that is applied and given effect in regard to persons liable for the maintenance of wives and children by virtue of the Maintenance Orders (Facilities for Enforcement) Act, 1920 (10 & 11 Geo., 5, c. 33) (*9 Halsbury's Complete Statutes of England, 409*), the avowed purpose of which is "to facilitate the enforcement in England and Ireland of maintenance orders made in other parts of His Majesty's Dominions and Protectorates and *vice versa.*"

Where His Majesty is satisfied that reciprocal provisions have been made by the Legislature of any part of His Majesty's dominions outside the United Kingdom for the enforcement within that part of maintenance orders made by Courts in England and Ireland, His Majesty may by Order in Council extend the statute to that part, and thereupon that part becomes a part of His Majesty's dominions to which the statute extends. Reciprocal legislation having been enacted in the respective parts of the Empire, the Act has been extended to them severally: for details of such extensions, see *9 Halsbury's Complete Statutes of England, 413.*

In New Zealand, the reciprocal legislation is found in the Maintenance Orders (Facilities for Enforcement) Act, 1921, which is in terms similar to the parent statute (*supra*), except that the former attaches no conditions as to reciprocity.*

The purpose of the local statute is declared to be "to facilitate the enforcement of local and foreign maintenance orders."

Consequently, notwithstanding the recognized limitation imposed by the absence of the defendant upon the enforcement of maintenance orders made within the jurisdiction of another part of the British dominions, such enforcement may be effected by the assistance of the Magistrates' Court here, if the defendant resides here; and maintenance orders made here, can be enforced in other jurisdictions in like manner. So far as defendants resident in New Zealand are concerned, this may be effected in two ways: (*a*) by the registration here of maintenance orders made elsewhere, or

* For the Dominions, and dependencies in which reciprocity with New Zealand is in current force, see *Butterworth's Annotations to the Public Acts of New Zealand,* Supplement No. 12, p. 247.

(*b*) by the confirmation here of a provisional order made in another jurisdiction.

I. Registered Orders.

Section 3 of the Maintenance Orders (Facilities for Enforcement) Act, 1921, deals with the enforcement of orders made in the United Kingdom and elsewhere in His Majesty's dominions, and it is designed to reduce the chances of a husband or other defendant from evading, by his coming to New Zealand, payments under a maintenance order which was made against him while he was in the country from which he has come. Section 3 is as follows:—

> Where a maintenance order has, whether before or after the passing of this Act, been made against any person by any Court in the United Kingdom or elsewhere in His Majesty's dominions a certified copy of the order may be registered in New Zealand in the prescribed manner, and shall from the date of such registration be of the same force and effect, and all proceedings may be taken thereon in the same manner, as if it had been a maintenance order originally made by a Magistrate acting under the authority of the principal Act.

It is of importance to see whether an overseas order, when registered here by virtue of this section, may be cancelled, varied, or appealed against.

The question arose in *Cook (on behalf of Bolton Moss)* v. *Bolton Moss*, (1938) 33 M.C.R. 79, whether an order, made in New South Wales, and registered in New Zealand, could be varied.. Upon such registration, as the learned Magistrate said, the order, after registration, became, by virtue of s. 3 of the statute, of the same force and effect as if it had been a maintenance order originally made by a Magistrate under the Destitute Persons Act, 1910; but he rejected the suggestion that, once an order is registered in New Zealand, the Court here has sole jurisdiction in respect of it—to enforce, cancel, or vary it—until it is transferred back to the Court of origin. He said:

> The preamble to the Act shows that its purpose is "to facilitate the enforcement of local and foreign maintenance orders." Nor does s. 3 mean more than that. The words "and from the date of such registration be of the same force and effect, and all proceedings may be taken thereon in the same manner as if it had been a maintenance order originally made by a Magistrate under the authority of the principal Act—*i.e.*, the Destitute Persons Act, 1910—do not mean that a new maintenance order comes into existence, with incidents different from those attaching to the order made by the Court of origin . . . In my opinion, the effect of registration merely enables a maintenance order to be enforced in New Zealand, and for that purpose the same proceedings may be taken as if the order had been made in New Zealand in the first place . . . An overseas maintenance order made under the Destitute Persons Act, so as to enable proceedings to be taken for its enforcement, and for no other purpose.

From this it follows that the legal control of the order remains in the Court of origin, and proceedings in New Zealand cannot be taken to vary or discharge the order; but all means available here may be used, to enforce any payment thereunder, whether or not they are available for enforcement in the Court of origin.

In the course of this judgment, the learned Magistrate observed the significance of s. 9 (3) of the Destitute Persons Amendment Act, 1926, which enacts that:

> It shall be the duty of the Maintenance Officer to take all such proceedings as may be necessary . . . for the recovery of moneys payable under . . . any maintenance order registered . . . in New Zealand in terms of the Maintenance Orders (Facilities for Enforcement) Act, 1921, or otherwise for the enforcement of any such order.

This special reference, he said, would not have been necessary if the overseas order became a maintenance order under the Destitute Persons Act, 1910. And, since that judgment was delivered, an additional subsection, subs. 2B (*b*) (since added, before subs. (3), by s. 18 of the Domestic Proceedings Act, 1939) gives authority to the Maintenance Officer to appear for the complainant in proceedings for the cancellation, variation, or suspension of any order made under the Destitute Persons Act, 1910, for the payment of money in respect of the maintenance of any person; but it makes no reference to orders registered under the reciprocal statute of 1921, which are dealt with only in the next succeeding subsection, above-quoted.

The learned Magistrate's construction of s. 3 is confirmed by the interpretation put on similar words in s. 8 of the Destitute Persons Amendment Act, 1926, by Smith, J., in *Wilson* v. *Morris*, [1929] N.Z.L.R. 901, in which the cancellation or variation of an analagous form of order registered in the Magistrates' Court was under consideration. The words of s. 8 (now repealed†) were in reference to an order made by the Supreme Court in its divorce jurisdiction for the payment of any maintenance; and provided for the registration of a copy of such order in the Magistrates' Court,

> And thereupon and so long as such order continues in force the order may be enforced, and all proceedings may be taken thereon, in the same manner as if it were, and at all times since the making thereof had been a maintenance order made by a Magistrate acting under the authority of the principal Act.

The similarity of language in this section to that used in s. 3 of the Maintenance Orders (Facilities for Enforcement) Act, 1921, is noteworthy. In construing s. 8, Smith, J., at p. 903, said:

> The words relied on by counsel for the plaintiff as constituting an authority to the Magistrate to cancel or vary the order are "and all proceedings may be taken thereon" . . . The word "thereon" shows that the proceedings (whatever they may be) are to be taken on the registered order. They are proceedings "on" the order, and not against it. The proceedings therefore will include all proceedings up to fine and imprisonment for wrongful default in payment. The object of s. 8 is clearly, in my opinion, to provide a summary remedy for the enforcement of the order.

Applying His Honour's reasoning to orders registered under s. 3 of the Maintenance Orders (Facilities for Enforcement) Act, 1921, the provisions of Part VI of the principal Act (the Destitute Persons Act, 1910), providing for the enforcement of orders, is the only part of that statute applicable to foreign orders which have been registered here. From His Honour's interpretation of the almost identically-worded section, it follows that there is only one Court for the variation, modification, or suspension of a foreign maintenance order, and that is the Court of origin, the jurisdiction of which to vary or cancel its own order is not ousted. From a purely practical point of view, this must be so. If there were two jurisdictions, differing decisions (as to amount of maintenance, or the term during which it has to be paid) might be given in the Court of origin and the Court of registration, and obvious confusion and uncertainty would result.

Arrears of maintenance arising between the making of the order by the foreign Court and the date of its registration here must be proved by affirmative evidence, and the onus of proof of non-compliance is on the complainant: *Ex parte Cormack, Re McMaster*, (1930) 47 N.S.W.W.N. 148. There, Stephen, J., made absolute

† By s. 2 of the Destitute Persons Amendment Act, 1930, which was in turn repealed by s. 17 of the Domestic Proceedings Act, 1939, which confers on the Magistrates Court jurisdiction to treat such a registered order "as if it were an order of a Magistrate" under the Destitute Persons Act, 1910.

a rule *nisi* for prohibition against a Magistrate who ordered that the defendant be imprisoned until the arrears of maintenance had been paid. His Honour held that the sworn complaint was not a deposition within the meaning of the Maintance Orders (Facilities for Enforcement) Act, 1923 (N.S.W.), corresponding with s. 7 of our statute, and could not be accepted as evidence of non-compliance with the order before its registration in New South Wales.

There is a further question whether the registration of a foreign order may be cancelled—not the order itself, but the local registration of it. Section 3 of the local statute says "a certified copy of the order may be registered in New Zealand in the prescribed manner."‡

Regulation 1 of the regulations made under the statute (*1923 New Zealand Gazette*, 2416), provides that registration of a certified copy of a foreign order is to be effected by the entry of the particulars thereof in the Criminal Record Book, and such entry is to be signed by the Magistrate. By the amending regulations (*1928 New Zealand Gazette*, 2868), the Magistrate must sign the prescribed minute, the text of which is given in Reg. 1 of such amending regulations. The Magistrate may not refuse to sign the minute; he has no option but to register the foreign order; and the defendant has no opportunity of opposing registration. The Magistrate's function, therefore, appears to be purely ministerial. So far as registration is concerned, he is *functus officio*, when he has signed the minute. No jurisdiction seems to be conferred upon him, so that he cannot undo by an unauthorized judicial act the effect of his exercise of an authorized ministerial function. The only remedy that seems open to the defendant is to have the original order dealt with in the Court of origin.

War conditions have provided an exception to the general rule that a maintenance order registered in New Zealand under the Maintenance Orders (Facilities for Enforcement) Act, 1921, may not be varied or cancelled. This exception applies for the period during which the person liable for payment under such maintenance order is rendering or has rendered continuous whole-time service as a member of any Military Force embodied under the Defence Act, 1909, other than a permanent force embodied under Part II of that statute. Provision to this effect is made by the Maintenance Orders (Military Forces) Emergency Regulations, 1940 (Serial No. 1940/298). In such a case, the Magistrate has power to make an order cancelling or varying the "maintenance order," which is defined as including, *inter alia*, "a maintenance order as defined in the Maintenance Orders (Facilities for Enforcement) Act, 1921."

In our next article we shall consider the confirmation in New Zealand of provisional orders made elsewhere, and their variation or cancellation; and whether an appeal lies against such confirmation.

‡ *Cf.* Section 1 of the English statute says that a foreign order made by any Court in any part of His Majesty's dominions outside the United Kingdom to which the statute extends, shall be sent to the prescribed officer of a Court in England or Ireland for registration; "and on receipt thereof the order shall be registered in the prescribed manner."

SUMMARY OF RECENT JUDGMENTS.

SUPREME COURT. Wellington. 1941. September 30; December 2, 10. *Smith*, J.

LARCOMB v. LARCOMB AND KING.

Divorce and Matrimonial Causes—Practice—Variation of post-nuptial Settlement—Guilty Wife—Husband's Petition to inquire into Settlement filed before Decree Absolute—Courts Jurisdiction to allow Petition to remain on File—Benefits under the Social Security Act, 1936—Divorce and Matrimonial Cause Act, 1928, s. 37.

A petition under s. 37 of the Divorce and Matrimonial Causes Act, 1928, to inquire into and revise an ante-nuptial or post-nuptial settlement, although filed before the making of a decree absolute, may in certain events hereinafter specified be permitted to remain on the file for the purpose of becoming an effective document after the decree absolute is made. Such events are that the party opposing the petition has not asked that the petition should be removed from the file, but has asked only for further time for pleading or that as in the present case, the respondent allowed the petition to remain on the file, and after the making of the decree absolute had filed an appearance and an answer and a summons for security for costs and subsequently a further affidavit as to her health and had permitted an adjournment of the hearing to enable a medical examination of herself to be made and an affidavit to be filed in reply.

Clarke v. *Clarke and Lindsay*, [1911] P. 186, and *Constantinidi* v. *Constantinidi and Lance*, [1904] P. 306, applied.
Gilbert v. *Gilbert and Boucher*, [1928] P. 1, distinguished.
Hole v. *Hole*, [1941] N.Z.L.R. 418, G.L.R. 161, and *Bosworthick* v. *Bosworthick*, [1927] P. 64, referred to.

Observations on the effect of benefits under the Social Security Act, 1936.

Counsel: *Cresswell*, for the petitioner; *Sievwright*, for the respondent.

Solicitors: *O'Donnell, Cresswell, and Cudby*, Wellington, for the petitioner; *A. B. Sievwright*, Wellington, for the respondent.

Case Annotation: Clarke v. *Clarke and Lindsay*, E. and E. Digest, Vol. 27, p. 532, para. 5766; *Constantinidi* v. *Constantinidi and Lance*, *ibid.*, p. 531, para. 5752; *Bosworthick* v. *Bosworthick*, *ibid.*, p. 306, para. 2836; *Gilbert* v. *Gilbert and Boucher*, *ibid.*, Supp. Vol. 27, para. 55831.

FULL COURT. Wellington. 1941. Dec. 8, 15. *Smith*, J. *Kennedy*, J. *Callan*, J.

SYKES v. ATKIN.

Rent Restriction—"Dwellinghouse"—Magistrate's Decision that Tenement constitutes Premises not within definition—Whether Appealable—Fair Rents Act, 1936, s. 20.

The decision of a Magistrate that a tenement is not within the definition of "dwellinghouse" in s. 2 of the Fair Rents Act, 1936 (as amended), and is therefore excluded from the operation of the statute, is a preliminary question which goes to the jurisdiction; and the review of such decision by the Supreme Court is in no way prevented by s. 20.

Bethune v. *Bydder*, [1938] N.Z.L.R. 1, [1937] G.L.R. 665, followed.
Aitken v. *Smedley*, [1921] N.Z.L.R. 236, G.L.R. 92, and *Saraty* v. *Morice*, [1923] N.Z.L.R. 728, G.L.R. 263, referred to.

Counsel: *C. H. Taylor*, for the appellant; *Cleary*, for the respondent.

Solicitors: *Meredith, Meredith, and Kerr*, Auckland, for the appellant; *Barnett and Cleary*, Wellington, for the respondent.

SUPREME COURT. Auckland. 1941. November 28. *Fair*, J.

ARCHER v. PETERSEN.

Criminal Law—Police Offences—Possession of Liquor in Dance-hall—"Dwellinghouse"—Statutes Amendment Act, 1939, s. 59 (5).

The word "dwellinghouse" in the phrase "nothing in this section shall apply in relation to any liquor in any licensed premises or in any dwellinghouse" in s. 59 (5) of the Statutes Amendment Act, 1939, must be construed as "dwellinghouse not used for purposes other than that of a dwellinghouse in the ordinary and normal way of living."

Heydon's Case, (1584) 3 Co. Rep. 7a; 76 E.R. 637, applied.

Counsel: *Johnstone*, K.C., and *Geisen*, for the appellant; *G. S. Meredith*, for the respondent.

Solicitors: *Leary and Geisen*, Auckland, for the appellant; *Crown Solicitor*, Auckland, and *Meredith, Meredith, and Kerr*, Auckland, for the respondent.

Case Annotation: Heydon's Case, E. and E. Digest, Vol. 42, p. 614, para. 143.

SUPREME COURT. Auckland. 1941. Sept. 25, 26, 27; November 7, 20; December 15. *Blair*, J.

THOMPSON AND OTHERS v. AUCKLAND METROPOLITAN MILK COUNCIL AND OTHERS.

War Emergency Legislation—Price Stabilization and Control Regulations—Whether they impliedly repeal the Auckland Metropolitan Milk Act, 1933—Auckland Metropolitan Milk Act, 1933, s. 45 (1) (e)—Auckland Metropolitan Milk Amendment Act, 1935—Public Safety Conservation Act, 1932, ss. 2, 3, 5—Price Stabilization Emergency Regulations, 1939 (Serial No. 1939/122), Regs. 3, 5, 11—Emergency Regulations Act, 1939, ss. 3, 5—Control of Prices Emergency Regulations, 1939 (Serial No. 1939/275), Reg. 13.

The Price Stabilization Regulations, 1939 (Serial No. 1939/122), even though subsequently validated by the Emergency Regulations Act, 1939, being by virtue of the statute which authorizes their existence—*viz.*, the Public Safety Conversation Act, 1932, necessarily of a temporary character, and for use only during a state of emergency as contemplated by that Act, cannot be read as impliedly repealing a special statute dealing with a special position and providing a special code such as the Auckland Metropolitan Milk Act, 1933, is.

Barker v. *Edger*, [1898] A.C. 748, applied.

Clause 2 of Reg. 13 of the Control of Prices Emergency Regulations, 1939 (Serial No. 1939/275) made under the Emergency Regulations Act, 1939, which says that:

> Nothing in these regulations shall be construed to deprive any person or authority of any powers or functions that he or it may have under or pursuant to any Act in respect of any of the matters referred to in the last preceding subclause,

may well be intended to restore to the Milk Council of the Auckland Metropolitan Milk Board incorporated under the Auckland Metropolitan Milk Act, 1933, and its amendment the special powers given to it by that Act and thus remove the inconveniences, difficulties, and dangers which arise when two different bodies claim to be entitled independently to function in relation to the same subject.

There is nothing in the said Acts, or regulations that makes the resolution of the said Council fixing the price to be paid to dairy farmers for milk supplied by them to milk vendors bad for want of the assent of the Minister of Industries and Commerce or of the Price Tribunal. No offence is committed because the Milk Council, or the appellant tribunal established by the Auckland Metropolitan Milk Act, 1933, and its amendment on appeal from the Council, fixes a price above the September 1, 1939, price.

Counsel: *Gould*, for the plaintiffs; *J. B. Johnston*, for the defendant, the Auckland Metropolitan Milk Council.

Solicitors: *Morpeth, Gould, Wilson, and Dyson*, Auckland, for the plaintiffs; *Stewart, Johnston, Hough, and Campbell*, Auckland, for the defendants.

Case Annotation: Barker v. *Edger*, E. and E. Digest, Vol. 42, p. 768, para. 1952.

COMPENSATION COURT. Dunedin. November 26. Invercargill. November 27. December 10. *O'Regan*, J.

HOGAN v. EARLY AND MOOR INCORPORATED.

Workers' Compensation—Accident Arising Out of and in the Course of Employment—Lightning Flash—"Locality risk" owing to Elevation and Isolation—Application of s. 62 of the Statutes Amendment Act, 1938, discussed—Workers' Compensation Act, 1922, s. 3—Statutes Amendment Act, 1938, s. 62.

The plaintiff was employed in a factory about twenty feet high, standing on an eminence about fifty feet above the ocean level and about one hundred yards from the sea. He was standing on a trolly about two feet above the floor and handling the entrails, or "runners," immersed in the first of a series of large concrete vats. About one hundred yards distant from the factory, the top of which whereon there was an elevated concrete tank, was about seventy-five to eighty feet above sea level. From this tank a metal pipe sunk in the earth about two feet extended to the factory in order to convey the requisite water to each of the said vats. While the plaintiff was so employed he was struck by lightning in the face, and his eyesight was seriously and permanently impaired. The expert evidence was that it was probable that the current struck the tank on the water-tower, travelled by the water-pipe and leaped from the tap, in front of which plaintiff stood, to the water in its earthward course.

W. J. Meade and *L. F. Moller*, for the plaintiff; *J. C. Robertson* and *H. J. Macalister*, for the defendant.

Held, That the plaintiff was injured as the result of a "locality risk," the building in which he worked and the water-tower both being elevated and isolated and that his work enhanced the risk of injury, and therefore that the accident had arisen out of his employment.

Andrew v. *Failsworth Industrial Society, Ltd.*, [1904] 2 K.B. 32, 6 W.C.C. 11, followed.

Kelly v. *Kerry County Council*, (1908) 42 Ir.L.T. 23, 1 B.W.C.C. 194, distinguished.

Plumb v. *Cobden Flour Mills Co., Ltd.*, [1914] A.C. 62, 7 B.W.C.C. 1, referred to.

Section 62 (4) (as to an additional amount payable to a worker) applies only when liability has been admitted and weekly compensation paid for some time and then discontinued, and not to a case where liability is disputed and where legal opinion as to liability may differ.

Solicitors: *Stout, Lillicrap, and Hewat*, Invercargill, for the plaintiff; *Macalister Bros.*, for the defendant.

Case Annotation: Andrew v. *Failsworth Industrial Society*, E. and E. Digest, Vol. 34, p. 318, para. 2605; *Kelly* v. *Kerry County Council, ibid.*, para. 2605i; *Plumb* v. *Cobden Flour Mills Co., Ltd., ibid.*, p. 288, para. 2415.

SUPREME COURT. Auckland. 1941. November 18. *Fair*, J.

LOUISSON v. COMMISSIONER OF TAXES.

Public Revenue—Income-tax—Employee enlisting for Service with Expeditionary Force—Company making up Difference between Pay as Employee and his Military Pay paid by Company up to March 31, 1940—Whether such Difference should be included in Employee's Assessable Income—Land and Income Tax Act, 1923, s. 79 (1) (b), (h)—Land and Income Tax Amendment Act, 1939, s. 4.

The appellant, a director and a salaried officer of the F. Co., on October 1, 1939, entered a military camp pursuant to an engagement in His Majesty's special military forces and later proceeded overseas with the Second New Zealand Expeditionary Force. On October 1, the directors of the F. Co. passed the following resolution:

> Resolved that in the case of members of the staff enlisting for service with the New Zealand Expeditionary Force, the difference between their pay as employees and their military

pay would be paid by the company up to March 31, 1940. The position to be further reviewed after that date.

In consequence thereof £453 was paid to the appellant by the F. Co., to make up the difference between that which would have been his remuneration as an employee of the company from October 1, 1939, to March 31, 1940, and the pay allowance earned by him as a member of the New Zealand Military Forces during that period.

The appellant, in returning his income for the income year ended March 31, 1940, included in his assessable income £1,028 being salary paid to him during such year as an employee of the company. This included the said sum of £453, but he contended that £453 less £104 which the company claimed as a deduction from its assessable income for the said year, pursuant to the provisions of s. 4 of the Land and Income Tax Amendment Act, 1939—*viz.*, £349 should not be included in his assessable income.

The respondent, however, assessed the appellant's assessable income at the whole amount of £1,028.

On appeal from such assessment,

Richmond, for the appellant; *G. S. Meredith*, for the respondent.

Held, for the reasons set out in the judgment, 1. That, assuming, without deciding that the appellant was, by virtue of Reg. 10 (*b*) of the Occupational Re-establishment Emergency Regulations, 1940 (Serial No. 1940/291), still in the employ of the company but not entitled to his salary by virtue of his contract with the company, which was terminated by his enlistment on October 1, the said payment of £453 was not paid " in respect of or in relation to the employment or service of the taxpayer " within s. 79 (1) (*b*) of the Land and Income Tax Act, 1923.

Seymour v. *Reed*, [1927] A.C. 554, and *Beynon* v. *Thorpe*, (1928) 97 L.J.K.B. 705; 14 T.C. 1, applied.

Marshall v. *Glanvill*, [1917] 2 K.B. 87, referred to.

2. That it was not " income derived from any other source whatsoever " within s. 79 (1) (*h*) of the said Act.

3. That, therefore, the respondent should have included in the appellant's assessable income only the sum of £679.

Seymour v. *Reed*, [1927] A.C. 554, and *Tillard* v. *Commissioner of Taxes*, [1938] N.Z.L.R. 795; G.L.R. 523, applied.

Solicitors: *Buddle, Richmond, and Buddle*, Auckland, for the appellant; *Meredith, Meredith, and Kerr*, Auckland, for the respondent.

RENEWALS OF CHATTEL SECURITIES.

Date for Registration.

Subsections (1) and (2) of s. 14 of the Chattels Transfer Act, 1924, provide:

> (1) The registration of an instrument, whether executed before or after the coming into operation of this Act, shall, during the subsistence of such instrument, be renewed in manner hereinafter mentioned once in every five years, commencing from the day of registration.
>
> (2) If not so renewed, the registration shall cease to be of any effect at the expiration of any period of five years during which a renewal has not been made as hereby required.

In a recent issue of the JOURNAL, (1941) 17 N.Z.L.J. 215, it was stated, in answer to a question in the " Practical Points " feature, that the effect of these subsections is that renewal must be made within five years commencing from the date of filing the previous renewal, *not* within a period ending with the date in the five-year period that corresponds with the date of the original registration. The question asked was as follows:

> A chattel security is registered, and it is desired to renew the registration thereof under s. 14 of the Chattels Transfer Act, 1924, for a further period of five years. The instrument is filed, say, on March 1, 1935, the first renewal being made on December 1, 1939. A second renewal is desired, and the question is whether the time within which the renewal has to be filed is on or before March 1, 1945, or December 1, 1944: whether the five-yearly periods run from the original date of registration—in this case March 1, 1935—and end on the corresponding date in each fifth year thereafter, or whether the second renewal must be made within the five years commencing from the date of filing of the previous renewal, in this case December 1, 1939.

The answer stated:

> Renewal must be made within five years commencing from the date of filing the previous renewal. This answer follows a decision of Callan, J., in an unreported case at Hamilton.

Since this appeared there has been considerable discussion among members of the profession as to the correctness of the answer; and, though it is not intended that questions asked in the " Practical Points " feature should be the subject of correspondence, the importance of the subject-matter and the number of inquiries in this instance justifies a summary of the unreported decision upon which the answer was based.

A bill of sale was registered on November 18, 1927, and an affidavit of renewal was registered on October 31, 1932. On November 15, 1937, a further affidavit of renewal was presented for registration; but the Registrar refused to accept it, as he said the affidavit should have been sworn and tendered for filing before October 31, 1937, the date before the expiry of five years from the filing of the last affidavit of renewal.

The grantee thereupon filed a motion for a review of the decision of the Registrar, asking for an order declaring that the Registrar's decision was erroneous, and directing the Registrar to accept the affidavit of renewal tendered to him on November 15, 1937, *nunc pro tunc*. Alternatively, the motion asked for an order extending the time for filing the affidavit of renewal. The motion came before Mr. Justice Callan on December 8, 1937. In a minute on the papers, His Honour supported the decision of the Registrar, but, under s. 13 of the Chattels Transfer Act, 1924, he extended the time for registration to December 15, 1927, the order to be in the usual form as in *In re J. J. Byers*, (1905) 24 N.Z.L.R. 903, 905.

Owing to its form, the determination of the learned Judge was not brought to the notice of the profession in the Law Reports. Under s. 14 of the Chattels Transfer Act, 1924, it is clear that the first renewal of registration of an instrument must be effected by the filing of an affidavit of renewal within the period of five years commencing from the date of the registration of the instrument. The learned Judge's determination shows that any subsequent renewal must be filed within five years from the day of the registration of the then previous renewal.

DEFECTIVE INDICTMENTS.

The Course to be Adopted.

By I. D. CAMPBELL.

The authors of the Criminal Code Act of 1893, from which the Crimes Act of 1908 is derived, strove hard to provide machinery which would give the most ample powers to cure defects of procedure in the course of a trial. At the same time they were at considerable pains to ensure that no process of amendment should be permitted to be used so as to deprive the accused of a fair trial, with every opportunity to state his defence. In this latter purpose they undoubtedly succeeded, but less success has attended their efforts to prevent abortive proceedings through procedural blunders. It may be useful to consider the courses that may be adopted (1) where a count in an indictment does not charge a crime, and (2) where the count charges a crime, but is not supported by the facts or evidence disclosed by the depositions.

1. Where a count for an indictable offence is so defective that as it stands it does not charge a crime.

If the accused has been committed for trial on a plea of "not guilty," he may move the Supreme Court before trial to quash the count: Crimes Act, 1908, s. 399 (1); or may move during trial to quash the count: s. 399 (2); or, if a verdict of "guilty" has been returned, may move, at any time before sentence, in arrest of judgment: s. 428 (2).

But it has been held by the Court of Appeal, (Sir Michael Myers, C.J., and Blair and Johnston, JJ., Kennedy and Fair, JJ., dissenting) that the defective count cannot be amended under s. 392 so as to allege a crime: *R.* v. *White*, [1938] N.Z.L.R. 610. In this case the count in question did not include any reference to the previous convictions which made the offence indictable, and the majority of the Court held that the powers of amendment under s. 392 did not enable the Court to amend the count, since the indictment found by the grand jury alleged no crime and was therefore a nullity. Apart from the strong arguments appearing in the two dissenting judgments it may be observed that this construction of s. 392 appears to render meaningless certain parts of two other sections of the Act. By s. 399 it is provided:

> (1) No objection to an indictment shall be taken by way of demurrer, but, if an indictment does not state in substance a crime, or states a crime not triable by the Court before which the accused is arraigned, the accused may move to quash it, or in arrest of judgment, as herein provided.
>
> (2) If such motion is made before the accused pleads, the Court shall in its discretion either quash the indictment *or amend it.*
>
> (3) If the defect in the indictment appears to the Court during the trial, *and the Court does not think fit to amend it,* it may in its discretion quash the indictment or leave the objection to be taken in arrest of judgment.

The effect of the decision in *White's* case appears to be to take away the power of amendment which is expressly recognized, if not actually conferred, by this section.

Again in s. 428 (2) it is provided:

> The accused may, at any time before sentence, move in arrest of judgment on the ground that the indictment does not (*after any amendment has been made therein that the Court is willing and has power to make*) state any crime.

If the decision in *White's* case is sound, the words in parenthesis were completely superfluous, for an indictment not stating a crime is, according to that decision, incapable of amendment in any circumstances.

Where the accused has been committed for sentence on a plea of "guilty," he may, before sentence, move in arrest of judgment under the provisions of s. 428 (2) just quoted. It has also been held, in *R.* v. *Rodley*, [1936] N.Z.L.R. 1021, following *R.* v. *Reyland*, [1919] N.Z.L.R. 252, that the Supreme Court may in such a case set aside the plea of "guilty" and quash the conviction. In *Reyland's* case, Hosking, J., after conferring with other Judges, decided that a plea of "guilty" could be set aside (*a*) if it has been the result of improper practice on the part of those concerned in the prosecution, or (*b*) if the proceedings at the hearing were prejudicially defective or irregular.

2. Where a count for an indictable offence alleges a crime that is not founded on the facts or evidence disclosed by the depositions:

If the accused has been committed for trial on a plea of "not guilty," he may move, before trial, to quash the count: s. 407 (5). He may likewise move to quash the count during the trial (but in this case the Court shall not do so unless satisfied that injustice has been done or is likely to be done if the count remains in the indictment): s. 407 (6).

In two cases, however, the Court has proceeded, not under these provisions, but under s. 37. By that section power is given (as the case may require) to direct that no bill of indictment be preferred, or that the accused be not arraigned, or that he be discharged at any stage of the trial without verdict. The section was relied on in *R.* v. *Homiston*, (1909) 28 N.Z.L.R. 1021, and in *R.* v. *Cleary*, [1940] G.L.R. 437, to deal with the situation where the count in the indictment was not supported by the depositions. But s. 37 in terms applies only where the Court "considers that the offence charged deserves no more than nominal punishment, and that it is unnecessary that a conviction should be obtained." If the depositions disclose no offence, how can it be said that even nominal punishment is called for? The section was clearly directed to meet a different situation entirely. Moreover, if a motion under s. 407 (5) is successful and the count is quashed, the accused might again be charged with the offence if further evidence were obtained. But a discharge under s. 37 is, by virtue of subs. (3), to have all the effects of an acquittal. It is submitted that the procedure under s. 37 for this reason is inappropriate where the depositions disclose, not a trivial offence, but merely an offence not supported by the evidence so far adduced. In neither of the cases cited was s. 407 mentioned, and it may be that its provisions were overlooked.

It is, of course, possible that the Court on each occasion regarded s. 407 as inapplicable, and that *sub silentio* it so decided. The provisions of s. 407 (1) enable a bill of indictment to be preferred for the charge on which the accused was committed or in respect of which the prosecutor has been bound over to prosecute,

or for any charge founded on the facts or evidence disclosed by the depositions. It may be that subs. (5) and (6) relate only to counts added by the Crown Prosecutor in this way. But subs. (5), for example, provides :

> The accused may, at any time before he is given in charge to the petty jury, apply to the Court to quash *any count in the indictment*, on the ground that it is not founded on such facts or evidence . . .

It is difficult to see any reason why these provisions should not be given a construction as wide as their apparent intention, and as supplying the appropriate procedure in cases similar to those cited.

It would appear that s. 392 would enable the Court to effect an amendment if it appears that the evidence at the trial discloses an indictable offence akin to that charged, even though the depositions do not support the original indictment.

If the accused is committed for trial on a plea of " guilty," the plea cannot be withdrawn : Justices of the Peace Act, 1927, s. 181 ; and the exceptions recognized in *R.* v. *Reyland* (*supra*) do not extend to the case where the depositions do not, in the opinion of the Judge before whom the accused comes for sentence, support the charge. But although the plea cannot be withdrawn nor the conviction quashed, the sentence may be made nominal : *R.* v. *Reyland* (*supra*) and *R.* v. *Scott*, [1939] G.L.R. 151.

An exception is established in the case of mental defectives, and a plea of " guilty " may be withdrawn by direction of the Court and a plea of " not guilty " entered in any case where there is evidence that the accused was insane at the time of the alleged offence : Mental Defectives Act, 1911, s. 33. (It would seem that a motion could then be made under s. 407 if necessary, although this combination of circumstances would be somewhat phenomenal.)

Apart from the courses mentioned as being open to the accused, there are methods open to the prosecution —*e.g.*, offering no evidence—which it is not the purpose of this article to discuss.

DAMAGES AWARDED TO INFANT PLAINTIFFS.

The Public Trust Office Amendment Act, 1913.

By J. D. Willis, LL.M.

Every practitioner is familiar with the provisions of s. 13 of the Public Trust Office Amendment Act, 1913, providing that in any cause or matter " in any Court " in which money or damages is or are claimed by or on behalf of an infant or a person of unsound mind, no moneys or damages received or awarded in such cause or matter . . . shall be paid to the next friend of the (infant) plaintiff or to the infant's solicitor but shall, unless the " appropriate Court " otherwise orders, be paid to the Public Trustee to be held and applied by him for the benefit of the person entitled thereto, but subject to any special or general directions of the " appropriate Court." The section is enacted for the protection of infants and persons of unsound mind, and no restriction is placed on the Court's discretion nor is there any indication that any preference should be shown to the Public Trustee. Thus in *Walters* v. *Ryan*, [1933] N.Z.L.R. 821, the Guardian, Trust, and Executors Co. of New Zealand, Ltd., was appointed by the Court to be trustee of a fund as requested by the plaintiff's guardian *ad litem*.

" Court " is defined in s. 2 as meaning " the Supreme Court," though this definition applies only if it is not inconsistent with the context, and considerable doubt has from time to time been expressed as to whether a Magistrate has any jurisdiction to make any order pursuant to the Act, though Magistrates do act under it. It is suggested here that the doubt entertained in certain quarters is a reasonable one and that on a strict reading of s. 13 it may well be that only the Supreme Court has the necessary authority, whatever may have been the intention of the Legislature or of the draftsman in the first instance.

Section 13 would not appear to apply where a minor brings an action pursuant to s. 47 of the Magistrates' Courts Act, 1928.

There is no reason whatever why a Magistrate, when proceedings have been commenced in the lower Court, should not acquire jurisdiction under the Act. In deciding who should be appointed trustee of the fund, " The dominant consideration is the interests of the infant, and the discretion given to the Court, must in my opinion, be exercised with that as the sole and guiding principle. This calls for a consideration of two matters : first, security ; and secondly, facilities for administration " : per Reed, J., in *Walters* v. *Ryan* (*supra*). These are matters which, in order to save time and expense, could well and should be, in cases originating in the Magistrates' Court, left to the determination of a Magistrate. The question is, however, does he actually at the moment possess such jurisdiction ?

Until recently there was no reported case on the subject, but a learned Magistrate in Auckland has now held that the Magistrates' Court has jurisdiction to make an order under s. 13 when once proceedings have been properly commenced in that Court : see *Nicholls* v. *Nelson* (not yet reported). Dealing with the question of jurisdiction, he says, towards the conclusion of his judgment :

> I understand that doubts have been expressed as to the jurisdiction of the Magistrates' Court to make any order at all under s. 13 because the word " Court " has been defined by s. 2 to mean " the Supreme Court." The definition applies however only where it is not inconsistent with the context. In my opinion, the words " any Court " and " appropriate Court " in s. 13, refer to the Court before which the cause or matter is lawfully brought. That is to say, once proceedings have been properly commenced in the Magistrates' Court, that Court acquires jurisdiction under s. 13 in respect of any moneys which may become payable to the infant plaintiff either under a compromise of the action or a judgment in the action.

One may suggest with respect, however, that, " Court " being defined as it is in s. 2 of the statute,

the words " any Court " and " the appropriate Court " in subs. (1) and (2) respectively of s. 13 may well mean the Supreme Court only, this interpretation certainly not being " inconsistent with the context." Whatever may be the true meaning of the section, it can at any rate be said that it has not been happily drafted and that its correct construction is a little difficult.

Owing to the fact that the matter is one of considerable practical importance in that the Act has to be continually invoked, it is obvious that the position should be clarified by suitable amending legislation and that Magistrates be definitely given power to make necessary orders in cases having their origin in the Magistrates' Court.

[Our contributor's doubts as to the jurisdiction of a Magistrate to approved proposed compromises of infant's claims were evidently in the mind of the New Zealand Law Revision Committee, which, as appears in (1938) 14 NEW ZEALAND LAW JOURNAL, 239, recommended an amendment to empower a Magistrate to approve the compromise of such a claim, where the amount claimed is within the jurisdiction of the Magistrates' Court. On the other hand, the learned Magistrate's judgment in *Nicholls* v. *Nelson* (*supra*) provides a convenient manner of settlement which will be welcomed by the profession.—ED.]

AGREEMENT FOR THE SALE AND PURCHASE OF LAND.

Mutual Rescission and Release.

By E. C. ADAMS, LL.M.

EXPLANATORY NOTE.

In *Goodall's Conveyancing in New Zealand*, 73, there is a precedent for rescission of agreement for sale and purchase, endorsed on the agreement itself. The following precedent appears more suitable where the rescission is subject to conditions to be performed by the purchaser.

The stamp duty on the form of rescission given in *Goodall*, 73, and in the following precedent, is 15s., as a deed not otherwise charged, under s. 168 of the Stamp Duties Act, 1923. The Department does not at present consider that they are liable to *ad valorem* conveyance duty. On the other hand, if the purchaser had taken title and the vendor a mortgage for the unpaid purchase money, the transfer back from the purchaser to the vendor, in consideration of the release of the mortgage debt, would be liable to *ad valorem* conveyance duty, either on the amount of the present Government valuation *plus* value of improvements effected since the date of such valuation, *or* on the amount of the indebtedness owing under the mortgage, whichever is the greater: *Montefiore* v. *Minister of Stamp Duties*, [1922] N.Z.L.R. 1017; *Goodall's Conveyancing in New Zealand*, 450.

The original agreement for sale and purchase would have been liable to *ad valorem* conveyance duty. If the rescission or surrender is executed not more than one year after the original agreement, and, if application for a refund is made within one year from the date of the original agreement, a refund of the *ad valorem* duty paid will be made: s. 93 of the Stamp Duties Act, 1923. For a form of declaration in support of an application for a refund, see *Goodall*, 178.

PRECEDENT.

THIS DEED made this day of One thousand nine hundred and forty-one BETWEEN A.B. of (hereinafter with his heirs executors administrators and assigns referred to as " the vendor ") of the one part AND C.D. of (hereinafter with his heirs executors administrators and assigns referred to as " the purchaser ") of the other part WHEREAS by agreement for sale and purchase bearing date the day of and made between the parties hereto the vendor agreed to sell and the purchaser agreed to purchase the lands described in the schedule hereto at or for the price or sum of pounds AND WHEREAS the purchaser is financially unable to carry out his obligations under the said agreement and has requested the vendor to release him of the same which the vendor has agreed to do subject to the purchaser entering into and executing these presents NOW THIS DEED WITNESSETH that in pursuance of and in consideration of the premises they the vendor and the purchaser do hereby mutually undertake and agree the one with the other of them as follows:—

1. THE hereinbefore mentioned agreement of the day of is as from the date of these presents rescinded and annulled.

2. THE parties hereto do hereby release each other of them from the performance of the said agreement and from all obligations on the part of each of them respectively contained or implied therein and from and against all actions suits claims damages and demands which either of them has or may have against the other in respect thereof and from all costs losses damages and expenses already incurred or to be hereafter incurred in relation to the same SAVE ONLY that the purchaser shall and will forthwith:—

(*a*) Pay all legal costs and expenses including stamp duty incurred or which may be incurred by the vendor in connection with these presents.

(*b*) Pay all interest payable on the balance of purchase money owing under the said agreement up to the date of these presents.

(*c*) Pay all rates and other outgoings (if any) payable in respect of the said lands up to the date of these presents.

IN WITNESS whereof these presents have been executed the day and year first hereinbefore written.

THE SCHEDULE HEREINBEFORE REFERRED TO.

ALL THAT [*set out here official description of land*].

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

E. F.
Law Clerk, Wellington.

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

E. F.
Law Clerk, Wellington.

NEW ZEALAND LAW SOCIETY.

Council Meeting.

A meeting of the Council of the New Zealand Law Society was held in the Supreme Court Library, Wellington, on December 5, 1941.

The following Societies were represented: Auckland by Messrs. W. H. Cocker, J. B. Johnston, A. H. Johnstone, K.C., and S. R. Mason; Canterbury: Messrs. A. W. Brown and R. L. Ronaldson; Gisborne: Mr. L. C. Parker; Hamilton: Mr. A. L. Tompkins; Hawke's Bay: Mr. H. B. Lusk; Nelson: Mr. C. R. Fell; Otago: Mr. W. F. Forrester; Southland: Mr. N. L. Watson; Taranaki: Mr. J. H. Sheat; Wanganui: Mr. A. A. Barton; Westland: Mr. A. R. Elcock; and Wellington: Messrs. H. F. O'Leary, K.C., D. G. B. Morison and G. G. G. Watson.

Mr. A. T. Young, Treasurer, was also present.

The President, Mr. H. F. O'Leary, K.C., occupied the Chair.

The President welcomed Mr. R. L. Ronaldson, who was attending the meeting of the Council for the first time.

Members of the Profession in England.—In reply to the letter sent by the President of the New Zealand Society the Secretary, General Council of the Bar, England, had replied as follows:—

> The Chairman, Sir Herbert Cunliffe, K.C., read your kind letter of 30th June to the Council at a meeting on the 29th instant.
>
> All members of the Council desire to thank you warmly for your good wishes and for the generous offer to care for children of legal practitioners.
>
> For some time now the difficulties surrounding the evacuation of children from England have been too great for anything to be done in it and there are at present no applicants to respond to your very kind offer.
>
> Again with the Council's thanks, and reciprocating your kind wishes.

In response to the inquiry as to whether the New Zealand Society could assist in replacing solicitors' libraries which had been destroyed by enemy action, the Secretary of the Law Society, London, had replied as follows:—

> With reference to my letter of the 5th instant, the Council have now had an opportunity of considering the position with regard to the supply of law books in somewhat more detail.
>
> The Council feel that it would be unwise on every ground, including principally consideration of the amount of shipping space which would be required, for any law books to be sent to this country now. At the end of the war, however, there will undoubtedly be a shortage of law books, and any books which your Society would be so kind as to send then would be received with gratitude by members of the profession in this country.
>
> The Council venture to suggest that the most useful step which your Society could take at present would be to assemble statistics as to the books which would be available. Those most likely to be required would be sets of the United Kingdom Statutes, the English *Law Reports*, and works such as the *English and Empire Digest*, *Halsbury's Laws of England*, and the *Encyclopaedia of Forms and Precedents*. The Council fully appreciate that these books are expensive ones and that in all probability there may not be a very large number in New Zealand over and above the requirements of solicitors there. The difficulty with regard to other text books is, of course, that the law changes so rapidly nowadays that books tend to become out of date and it is really only the statutes, reports and the larger works, which are kept up to date by annual supplements, which are of much permanent value. Experience has shown that when a solicitor has lost his library his most urgent need is for books of precedents, such as the *Encyclopaedia*, *Prideaux's Precedents in Conveyancing*, and *Key and Elphinstone's Conveyancing Precedents*. I expect, however, that you do not use the two latter works very much in New Zealand.
>
> May I add personally that if at any time you feel that there is anything which the Council or I could do for any member of the profession from New Zealand who is in this country please do not hesitate to let me know.

It was decided to circularize the District Societies and to assemble the necessary statistics as to what books would be available.

The President drew attention to the fact that the letter sent from the New Zealand Society had been published in the September *Gazette* of the English Law Society, and it was evident that the expressions of sympathy from the Dominions had been appreciated by the members of the profession in England.

Costs: Drawing from Trust Account:—The Auckland Society had met with a number of instances where there had been an apparent shortage in the money in a solicitor's trust banking account. In these cases the solicitor has claimed to be entitled to deduct for costs part of the moneys standing to the credit of clients.

In many cases, however, bills of costs have not been rendered and auditors have been unable to verify the correctness of this, and the Society suggested that the following regulation might be made, possibly as part of the Solicitors' Audit Regulations:

> No money held by a solicitor on behalf of any person shall be applied for or towards payment of the costs of the solicitor or be credited to the solicitor as undrawn costs in determining for the purpose of audit the amount held by him on behalf of clients unless a bill of costs or other note of charges in respect thereof has been either delivered to such person or his authorized agent or sent by post to him or such agent at his last known address provided that this rule shall not apply to commission properly chargeable on the collection of moneys or to moneys applied in payment of costs in pursuance of an authority in writing in that behalf signed by the client and specifying the sum to be so applied and the particular purpose to which it is to be applied.

The Audit Committee were of opinion that the expense and time entailed to inspect the "costs" of legal practitioners were far too great to warrant an alteration of the existing regulations. For this reason, the Wellington and Otago Society opposed the introduction of the new regulation.

It was pointed out that the Auckland Society were of opinion that if practicable, the suggested provision was very desirable. Recent cases brought before the Disciplinary Committee made it clear that such a regulation would put a check upon certain practices which have ultimately landed the practitioners in serious difficulty. The regulations would not involve the checking of all bills of costs. It was resolved that the Standing Committee confer with the Joint Audit Committee in the matter.

Standard Form of Audit Certificate.—A standard form of audit certificate submitted by the New Zealand Society was approved by the Joint Audit Committee.

The certificate was approved with the addition of the words "covering period from.....to....." after (*a*) and also after (*b*) in the declaration.

The Accountants Society was agreeable to sharing the cost of printing the certificates but was unable to undertake the task of distribution.

It was, therefore, decided that the cost of printing should be shared by the New Zealand Society and the Accountants Society and that the certificates should be distributed in due course by the District Law Societies.

(To be continued.)

SOME EXPERIENCES OF AN OLD LEGAL ACCOUNTANT.

Wellington Practitioners in the 'Eighties.

By A. F. WIREN.

It was in November, 1879, that I started life in Wellington as a solicitor's clerk, as office boy to the late Mr. F. M. Ollivier. His chambers were opposite Barrett's Hotel, and next to the old Bank of New Zealand. The bank itself, with several other smaller buildings, has long since been demolished to make room for the present bank.

Mr. Ollivier enjoyed a good practice and employed several clerks, Elliott Barton was head of the common law department, and with him were Fletcher Johnston, son of the Judge then stationed at Christchurch, and A. W. Leckie, a son of Colonel W. Leckie. On the conveyancing side, there were James Speed (no relation of the tobacconist of the same name), E. W. Kane,[1] and E. H. Dean. The accountant was Andrew Wylie, and Frank Brogan was the engrossing clerk assisted by John Wylie, a younger brother of the accountant.

Other legal firms of the period were Izard and Bell, Mr. Izard being the father of C. H. Izard, and Mr. Bell, then known as H. D. Bell.[2] They had the Crown work and were both Court men. Ernest Bell at this time held a position in the Parliamentary Buildings. Frank Wills was then managing clerk, and on their staff were, amongst others, Alexander Gray,[3] Alex. Campbell (a young conveyancer of ability), E. Heathcote Williams, L. B. Linklater, and H. Wright. Their office was in Willis Street, near where the Grand Hotel stands.

Brandon and Son occupied the office pulled down a few years ago to make room for the building which the successors of the firm now occupy. Mr. Brandon, senior,[4] has now been dead for many years, and his son Alfred de Bathe Brandon, who was practising in 1879, became head of the firm, carrying on for several years. W. H. Quick had been a partner in Brandon's, but started for himself; Edward Shaw, an ex-Resident Magistrate, and then—some time later—T. W. Hislop[5] joined Brandons. W. T. L. Travers, with his son Henry, occupied the building still standing opposite the General Post Office in Featherston Street. George Read was with Mr. Travers many years before he joined the Public Trust Office.

Buckley, Stafford, and Fitzherbert had offices on Lambton Quay, which Skerrett and Wylie later took over. Robert Orr, for so many years managing clerk to Mr. Travers, was at this time in Buckley's office. Later on, William Barton, of Featherston, was a junior partner in Buckley's office. About the middle eighties Charles Treadwell came down from Wanganui and joined the firm, followed a little later by W. H. Field. The latter is still practising in Wellington. Ernest Widdop, an excellent vocalist, was in this office, and a promising career was early cut short by a drowning accident in Evans Bay.

A well-known name of the time was that of Gordon Allan, an English barrister who had chambers in Lambton Quay, on the present T. and G. site. It was said in some quarters that Mr. Allan was the original of Dickens's Sidney Carton in the *Tale of Two Cities*. I cannot say whether there was anything in the claim or not. I remember Mr. Allan wore an eye-glass, dressed well, and was a great partaker of snuff—a habit one never sees indulged in now. On his death, his library was sold; amongst the books being works of Cicero, Pliny, Plutarch, Livy, and a copy of the *Letters of Junius*, said to be an original edition of 1772, which brought 44s.

Buller, Lewis, and Gully occupied a small building in Hunter Street close to where now stands the National Mutual Life Office. I remember that Mr. Lewis used to insist on his office boy saturating the floors with carbolic acid and one could smell the place yards away. John Anderson was their head clerk. He went over with Mr. Gully when he joined Izard and Bell.

Martin Chapman and William Fitzgerald had their offices just below Lyon and Blair's (now Whitcombe and Tombs, Ltd., Booksellers, of Lambton Quay). They were not then in partnership, but joined up shortly after this period. They later shifted to Brandon Street in one of the two buildings pulled down to erect the office now occupied by Chapman, Tripp, Watson, and Co. In the other of these buildings was the firm of Moorhouse, Edwards, and Cutten. Mr. Edwards some years afterwards was appointed a Judge of the Supreme Court. Charles Pownall, afterwards of Masterton, and David Hutchen, afterwards of New Plymouth, were junior clerks in this firm. There were other well-known practitioners in Wellington, of course, and others came later on, such as T. F. Martin, E. G. Jellicoe, C. B. Morison, and Charles Bunny. The latter's death was most tragic, as, after several day's exacting work defending a man on a charge of murder, Mr. Bunny had to take to his bed, and eventually died, I believe, of typhoid fever. He must have had the fever on him all the time, and should have been in his bed instead of in Court on such a serious case. Edmund Bunny, his brother, carried on the practice, and must, before his recent death, have been able to claim to have continued practising longer in Wellington than any other in the profession now.

The Supreme Court was on Lambton Quay where the bank of New South Wales stands. It had a small grass plot in front with two wings, one on each side of the building. When the present Supreme Court was built, the Lambton Quay site was later on auctioned and knocked down to Mr. Buller[6] at the then record price per foot—I think it was £175—reached in Wellington. Buller and Gully then shifted from Hunter Street and occupied the wing of the old Supreme Court nearest Lyon and Blair's. The Judges stationed in Wellington were Sir James Prendergast, Chief Justice, and Mr. Justice C. W. Richmond. The Registrar was Mr. A. S. Allan, with Mr. H. C. Wilmer, followed by

[1] Later, Clerk of Parliaments (C.M.G.).
[2] Later, the Rt. Hon. Sir Francis Bell, P.C., G.C.M.G., K.C., M.L.C.
[3] Later, Sir Alexander Gray, K.C.
[4] Hon. A. de B. Brandon, M.L.C.
[5] Later, the Hon. T. W. Hislop, M.L.C.
[6] Later, Sir Walter Buller, K.C.M.G.

Henry Hall, as Deputy. Arthur Cooper, a later Registrar, was a Judge's Associate, and incidentally a representative footballer. The Sheriff was Mr. Ebenezer Baker.

The Magistrates' Court was then in the old Provincial Buildings which were demolished to erect the Government Life Insurance Offices. The early Magistrates were, in order, Crawford, Mansford, and Wardell. W. P. James (Willie) was Clerk of the Court, and Henry Gordon the Bailiff. Mr. Foster, an old military man, was one of the Magistrates' Court staff. Mr. James, some years later, was made a Magistrate and stationed at Masterton. The Deeds Registration, Land Transfer, Stamp, and Survey Offices were also in this building.

(To be continued.)

PRACTICAL POINTS.

This service is available free to all paid annual subscribers, but the number of questions accepted for reply from subscribers during each subscription year must necessarily be limited, such limit being entirely within the Publishers' discretion. Questions should be as brief as the circumstances will allow; the reply will be in similar form. The questions should be typewritten, and sent in duplicate, the name and address of the subscriber being stated, and a stamped addressed envelope enclosed for reply. They should be addressed to: "NEW ZEALAND LAW JOURNAL" (Practical Points), P.O. Box 472, Wellington.

1. Husband and Wife.—*Husband on Active Service—Wife in New Zealand—Agreement for Separation proposed—Whether Valid.*

QUESTION: A soldier while on final leave married in New Zealand and is now overseas with the Forces in Egypt, his wife still being in New Zealand. Following subsequent correspondence between them, both parties have expressed the desire to enter into an agreement for separation. Can a valid and effectual agreement for separation be entered into by them at this juncture or does the fact of the husband being on active service overseas prevent this?

ANSWER: It is assumed that the question to answer is: "Can a valid and effective agreement for separation for the purposes of a divorce in three years' time be entered into by the parties in question?" There seems to be nothing to render such an agreement invalid or ineffectual, so long as it is an express agreement, executed by the parties and attested; see *McLean* v. *McLean*, [1935] N.Z.L.R. 687; *Chapman* v. *Chapman*, [1926] N.Z.L.R. 295, 296, 300. The question of domicil does not arise here.

2. Divorce.—*Service—Co-respondent overseas with New Zealand Military Forces—Service of Petition and Citation.*

QUESTION: It is proposed to file a divorce petition, citing as co-respondent a person who is now overseas with the New Zealand Military Forces. Would the order fixing time for filing the answer and for service of the petition and the citation on the co-respondent be on similar lines to that laid down for service of a *respondent* in the New Zealand military forces overseas?

ANSWER: Yes. Orders have recently been made in such cases in terms of and on the same conditions as laid down in *A.* v. *A.*, [1940] N.Z.L.R. 394, which settled the practice for serving divorce proceedings on respondents who are overseas with the New Zealand military forces.

3. Rating.—*Filing of certificate of Judgment in Supreme Court—Whether leave of appropriate Court under the Debtors Emergency Regulations, 1940, required.*

QUESTION: Judgment having been obtained by a local body against the owner of certain land in respect of rates owing thereon, such owner being entitled to the protection of the Debtors Emergency Regulations, 1940, it is desired to file a certificate of judgment in the Supreme Court pursuant to s. 79 of the Rating Act, 1925. Before filing the certificate, is it necessary to apply to the Court under the said regulations for leave to file, and, if necessary, power to sell; or is the leave of the Court under the said regulations necessary only if after filing the certificate—the six months' notice required under s. 79 of the Rating Act, 1925, having expired and the judgment still remaining unpaid it is then desired to sell the property?

ANSWER: Leave of the Court is necessary "to commence, continue, or complete" the exercise of any power of sale or leasing conferred by the Rating Act, 1925: Debtors Emergency Regulations, 1940, Reg. 4 (2) (*e*). The answer to the question accordingly depends on whether the filing of the certificate is a *commencing* of the exercise of a power of sale conferred by the Rating Act, 1925. The special statutory remedy given by s. 79 of that statute provides for certain prior steps to be taken before an *actual* sale can take place—*viz.*, (*a*) filing a certificate of judgment; (*b*) giving of six months' notice; and (*c*) failure to comply with notice by payment of judgment and costs, &c.

The actual sale cannot take place until these necessary steps have been taken, and each one might well be deemed a commencing of the exercise of the power of sale. It appears, therefore, that the leave of the Court under the regulations is necessary before the certificate may be filed.

4. Income Tax.—*Income from overseas—Within exemptions of Country of Origin—Whether "chargeable with income-tax."*

QUESTION: Our client derives income from Australia, but it is within the personal exemption allowed there, and so he does not pay tax on it there. Is this income "chargeable with income-tax in that country" within the meaning of those words in s. 89 (1) of the Land and Income Tax Act, 1921, and so exempt from income-tax here?

ANSWER: The point is a new one, and has not been decided in New Zealand, but there is a High Court decision on the corresponding Australian section, which was in the same words as s. 89. If it had been intended to exempt only income which is actually charged with income-tax so that some amount of tax became due and payable, it would have been very easy to say so. It may be that in a particular year no charge is actually made because the income is insufficient in amount to reach the taxing limit or because losses exceed receipts. But if the income is of such a nature that it is liable to be taxed, then it is income which is chargeable with income-tax though not actually so charged. The result of this view, as expressed by Latham, C.J., in *Texas Company (Australasia), Ltd.* v. *Federal Commissioner of Taxation*, (1940) 5 A.T.D. 298, 329, is, in his words, that if income is exempt from tax in a country outside Australia, then it is taxed in Australia. If, on the other hand, it is not so exempt from tax, but, if sufficient in amount, is taxed, then the income is not subject to tax in Australia. Where the income is liable to tax in New Zealand, it is exempt in Australia, and should therefore not be brought into account. In the case cited, where losses were incurred in trading in New Zealand, and no income-tax was in fact charged on the New Zealand income, the High Court of Australia held that the losses connected with it could not be brought into account in the assessment of its Australian income. Starke, J., said that the Commissioner must be satisfied that the income is chargeable; that is, that the income is of such a nature that it is liable to and may be brought to charge under the Australian law, whether it is actually charged or not. If it be so chargeable, then it is exempt from income-tax in Australia. Dixon, J., said that the section exempts gross receipts or what would otherwise form an item or items of assessable income. The word "chargeable," he said, is a wide one; and he thought it included the case of New Zealand or foreign assessable income which is liable to taxation only after deductions of outgoings and other allowances, and includes that case whether the deductions exceed the assessable income so that no New Zealand or foreign tax is in fact payable.

If "Australia" is substituted for "New Zealand" in the references in the above case, it would appear that the income referred to in the question is not liable to tax in New Zealand by virtue of s. 89 of the Land and Income Tax Act, 1923.

OBITUARY.

Mr. Frank George, Christchurch.

Mr. Frank George, who died suddenly at Christchurch, last month, at the age of seventy years, was one of the diminishing band of law clerks who served an apprenticeship in the days before the advent of mechanical devices had begun to destroy the Dickensian atmosphere of legal offices. Secretly he never ceased to regret the passing of the old-time engrossing clerks who, with infinite care, copied their leases in triplicate far into the night. To him the most labyrinthine deed search was an intellectual contest to be joined with relish. He grew up before the machine age had standardized mankind and an old-world charm and dignity of manner gave him a rare and refreshing distinction of personality. To the day of his death his clothes remained those of the law clerk of the nineties—an old-fashioned navy blue suit, hard white winged collar, bowler hat, and boots. Someone once remarked on seeing him riding in a taxi that it was absurd—a figure like that should ride only in a hansom cab.

Though tenacious of his loyalties, he had an almost youthful sense of fun and no one could hear that merry laugh without catching its infectious gaiety. The respect and affection which he enjoyed in legal circles was marked by the large number of the profession who attended his funeral service. It is as yet hard to believe that never again will that spare figure in navy blue suit and bowler hat be seen striding swiftly along Hereford Street.

The late Mr. George spent many years of his life in active and useful service to the community. He was a member of the Riccarton Borough Council from 1913 to 1921 and from 1935 to the time of his death, serving during the last four years as deputy-Mayor of the borough. He was a member of the Christchurch Domains Board for the last fifteen years, and for thirteen years held office as chairman of the Parks and Gardens Committee. He was a member of the Canterbury Provincial Patriotic Council, and he also served in the Home Guard.

Mr. George was identified in turn with the firms of Messrs. Garrick, Cowlishaw, and Fisher; Messrs. Johnston, Mills, and Joyce; and Messrs. Charles S. Thomas and Bowie, joining the last-mentioned firm in 1920.

RULES AND REGULATIONS.

Emergency Regulations Act, 1939. Shipping Requisitioning Emergency Regulations, 1939. Amendment No. 4. No. 1941/227.

Control of Prices Emergency Regulations, 1939. Price Order No. 64 (Chocolate and Confectionery). No. 1941/228.

Patents, Designs, and Trademarks Act, 1921-22. Trade-marks Regulations, 1941. No. 1941/229.

Health Act, 1920, and the Social Hygiene Act, 1917. Venereal Diseases Regulations, 1941. No. 1941/229.

Emergency Regulations Act, 1939. Teachers (Conscientious Objectors and Defaulters) Regulations, 1941. No. 1941/231.

Emergency Regulations Act, 1939. Stamp Duties Emergency Regulations, 1939. Amendment No. 3. No. 1941/232.

Health Act, 1920. Drainage and Plumbing Extension Notice, 1941, No. 3. No. 1941/233.

Emergency Regulations Act, 1939. Emergency Reserve Corps Regulations, 1941. Amendment No. 1. No. 1941/234.

Industrial Efficiency Act, 1936. Industry Licensing (Agar-manufacture) Notice, 1941. No. 1941/235.

Supply Control Emergency Regulations, 1939, and the Timber Emergency Regulations, 1939. Removal and Erection of Sawmills Notice, 1941. No. 1941/236.

Emergency Regulations Act, 1939. Workers' Compensation Emergency Regulations, 1941. No. 1941/237.

Labour Legislation Emergency Regulations, 1940. Shops Labour Legislation Suspension Order, 1941. No. 1941/238.

Labour Legislation Emergency Regulations, 1940. Factory Industries Labour Legislation Suspension Order, 1941. No. 1941/239.

Labour Legislation Emergency Regulations, 1940. Holidays Labour Legislation Modification Order, 1941. No. 1941/240.

Labour Legislation Emergency Regulations, 1940. Overtime and Holidays Labour Legislation Suspension Order, 1941. No. 1941/241.

Labour Legislation Emergency Regulations, 1940. Agricultural Workers Labour Legislation Modification Order, 1941. No. 1941/242.

Control of Prices Emergency Regulations, 1939. Price Order No. 65 (Whakatane Board Products). No. 1941/243.

Emergency Regulations Act, 1939. Accommodation Emergency Regulations, 1941. No. 1941/244.

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Primary Industries Emergency Regulations, 1939. Fat-stock *Disposal Order*, 1941. No. 1941/247.

Orchard and Garden Diseases Act, 1928. New-Zealand-grown Fruit Regulations, 1940. Amendment No. 2. No. 1941/250.

Emergency Regulations Act, 1939. Contraband Emergency Regulations, 1941. No. 1941/251.

Prize Act, 1939 (Imp.). Order in Council for restricting the commerce of Germany and Italy. No. 1941/252.

Prize Act, 1939 (Imp.). Order in Council for restricting commerce of Japan. No. 1941/253.

Law Practitioners Act, 1931. Law Practitioners (New South Wales Barristers) Order, 1941. No. 1941/254.

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Emergency Regulations Act, 1939. Dogs Emergency Regulations, 1941. No. 1941/256.

Air Navigation Act, 1941. Air Navigation Regulations, 1933. Amendment No. 10. No. 1941/257.

Emergency Regulations Act, 1939. Shipping Safety Emergency Regulations, 1940. Amendment No. 1. No. 1941/258.

Control of Prices Emergency Regulations, 1939. Price Order No. 67 (Potatoes). No. 1941/259.

Health Act, 1920. Health (Food) Amending Regulations, 1941. No. 1941/260.

Emergency Regulations Act, 1939. Naval Defence Emergency Regulations, 1941. No. 1941/261.

Transport Regulation Emergency Regulations, 1940. Transport Legislation Suspension Order, 1941 (No. 3). No. 1941/262.